

< I N S E R T L O G O S >

April *, 2024

Ms. Stacey M. Jensen
Acting Director for Policy and Legislation
Office of the Assistant Secretary of the Army (Civil Works)
108 Army Pentagon, Room 3E474
Washington, DC 20310-0108

Re: Agency Proposed Rule for Specific Procedures for PR&Gs for Water & Related Resources, Docket ID: COE-2023-0005

Dear Acting Director Jensen:

The members of the Family Farm Alliance (Alliance), Oregon Water Resources Congress (OWRC), **<insert other organizations>**, we appreciate the opportunity to provide comments and share concerns and suggestions to the U.S. Army Corps of Engineers (Army Corps) regarding the proposed rule establishing Agency Specific Procedures (ASPs) for the Army Corps' implementation of the Principles, Requirements, and Guidelines for water resources investments. The Army Corps has indicated this proposed rule is in response to authorizing language included in the Water Resources Development Act (WRDA) of 2020.

We represent farmers, ranchers and municipal, industrial, and agricultural water delivery and power customers from 17 Western states. Many of the members we represent work with the Army Corps on a daily basis.

We are dismayed that, rather than taking a fresh approach that properly balances how public benefits derived from water resources projects are measured, the Army Corps admits it “opted to use the 2015 Department of the Interior’s (DOI’s) ASPs as a basis for development of the Army Corps’ ASPs.”¹ As a result, the Army Corps, using what we viewed eight years ago as a flawed model, has carried forward many of the same, concerning proposals we have previously commented on relative to the DOI ASPs. Plus, its 40-page sweeping ASP proposal introduces other new, serious concerns.

With regard to the scope of activities that would be subject to the ASPs, the proposed rule states that “the proposed ASPs would apply to plans, projects, or programs that are initiated after any final rule may take effect. The Corps would also apply the ASPs to plans, projects, or programs that have not yet issued a Draft Environmental Impact Statement or similar level of documentation on or before any final rule effective date.”² The proposed rule excludes projects, programs, or

¹ Section B., *Overview of Proposed Rule*, 89 Fed.Reg. 12068 (February 15, 2024)

² Section A, *Background*, 89 Fed.Reg. 12067 (February 15, 2024). While this implies that any final rule for the Army

plans that meet the threshold criteria for exclusion or that fall below certain monetary thresholds under \$10 million. However, all others above that would be subject to the PR&G standard or scaled analyses based upon “professional judgment” of the Army Corps.³

The proposal further states “watershed conditions would be assessed in the evaluation,” and “[s]uch information may include but is not limited to: current trends in aquatic habitat loss or conversion; cumulative impacts in the watershed; current and future projected water resources utilization trends; species and other natural resources conservation; and chronic problems such as flooding, among others as appropriate.”⁴ We are concerned that the ASPs could significantly delay water resource plans, projects or programs now awaiting permit approval and/or potentially halt others. These concerns are driven by new requirements that such projects’ interactions with other projects and programs in a region or watershed be assessed using a “non-structural alternative” or “non-structural approaches.”⁵

As a fundamental principle, we are concerned that the proposed ASPs and PR&Gs stray beyond the legislative intent of Congress stated in the 2007 WRDA. This could significantly impede water management and development activities in the Western United States by adding significant bureaucratic layers onto already complex federal environmental and engineering decision making processes.

This letter describes our concerns with the Army Corps’ continued focus on imposing the Administration’s aggressive environmental justice and climate change agenda, using “nonstructural” and other subjective management strategies that could slow or halt future federal water infrastructure investments and potentially result in significant alteration of operations of existing Army Corps hydropower dams. Each of these concerns is detailed further below.

1. The Draft PR&Gs Go Far Beyond the Intent of the 2007 WRDA

The 2007 WRDA (P.L. 110-114) provided that revisions to the P&Gs “shall not affect the validity of any completed study of a water resources project.” The draft ASP applies the P&Gs (now PR&Gs) to activities that are much broader than “water resource projects.” Pursuant to the Obama Administration’s 2014 Interagency Guidelines,” PR&Gs specifically apply to operational modifications, modernization of existing facilities, dam safety modifications, culvert replacements,

Corps’ rules would not apply retrospectively to projects, it could result in delays or re-evaluation of plans, projects or programs that did not have a final EIS.

³ Section 234.5(a)-(c), *Level of analysis*, 89 Fed. Reg. 12099-12100 (Feb. 15, 2024).

⁴ Section 234.6(c)(6), *Watershed approach*, 89 Fed. Reg. 12081 (Feb. 15, 2024).

⁵ Section 234.2(k), *Nonstructural alternative*, and Section 234.2(l), *Nonstructural approaches*. 89 Fed. Reg. 12069-70 (Feb. 15, 2024).

water conveyance and fish ladder modifications.⁶ The 2014 Agency Guidelines directed all federal agencies engaged in water resources projects, programs, activities, or related actions to develop agency-specific procedures to implement the PR&Gs. Agencies were required to document the missions, programs, and investments to which the PR&Gs will apply.

We remain concerned about the impact the ASP will have on existing projects and programs. Clearly, the proposed ASPs and PR&Gs intend to apply to a much broader suite of federal activities than a traditional “water resources project”, as provided for in the 2007 WRDA.

2. The Proposed PR&G Could Hamstring Water Management Activities in the West

The Army Corps’ February 16, 2024 press statement states “Through these procedures, we will continue our efforts to modernize Civil Works programs by maximizing public benefits and ensuring recommended projects achieve their water management objectives and better reflect community needs and priorities.”⁷

From the beginning of the PR&G development process, we feared that new principles, requirements, and guidelines could bring water project development to a halt. Those fears remain. The process proposed by the draft ASP is daunting and uncertain, and the costs and delays it would impose could preclude many planning and development efforts from even getting started. We do not want water infrastructure programs to become mired in additional bureaucratic processes on top of the already complicated process mandated for critical projects. Those projects, especially those that enhance water supplies, are already very time-intensive and any delay for additional planning and studies will only add to the timeframe and costs for providing water supply relief.

Unfortunately, our initial concerns are now heightened with the vast overreach reflected in the proposed PR&Gs. In essence, the proposed rule would overlay a whole new “value set,” not just on new projects, but also on every Civil Works action that has a nexus with water resources. Our organization represents water and power managers who operate on a daily basis in partnership with the federal government. Placing a subjective “value” on environmental impacts of a project will likely increase the overall cost of a project beyond the perceived benefits in the new PR&G benefit-cost analysis. While the PR&Gs acknowledge integration with water resources projects requiring a NEPA analysis, they only include permissive “should” or “may” integrate with NEPA or other required federal or state environmental reviews⁸. Thus, the Army Corps would use its discretion to require yet another new layer of bureaucratic red tape.

We emphatically believe that this new, broadened application of the PR&Gs could potentially hamstring water resource development, and even daily water operations to a point that cripples day-to-day water and power deliveries. We also believe that the proposed ASP could impart real

⁶ Section 234.5(c) *Scope and magnitude of analysis required*, 89 Fed. Reg. 12076 (Feb. 15, 2024)

⁷ <https://www.usace.army.mil/Media/News-Releases/News-Release-Article-View/Article/3680078/army-corps-of-engineers-publishes-proposed-rule-for-agency-specific-procedures/> (accessed April 1, 2024).

⁸ Section 234.6, *The planning process*, 89 Fed. Reg. 12100 (Feb. 15, 2024).

disruption to programs that have a long track record of success, such as Army Corps and Bureau of Reclamation dam safety programs, and operation and maintenance programs. Grazing, logging, and other land management activities on Army Corps lands might require a scaled or standard analysis, depending upon overall scope of individual proposals and the degree of impact on water resources. We fear that this will provide yet another avenue for opponents of grazing and logging, or any other use of publicly owned lands, to try to halt these important activities.

3. The Draft ASP Will Bring More Subjectivity to Project Analyses and Decisions

There are other concerning provisions included in the PR&Gs that we fear will increase the level of subjectivity in the federal decision-making process: 1) environmental justice; 2) ecosystem services; and 3) the lack of clarity on the proposed ASP's treatment of economic analyses.; (4) bias toward nonstructural alternatives/approaches. Our concerns are further elaborated below.

a. Environmental Justice Considerations Will Cloud the Decision-Making Process

The proposed PR&Gs place an inordinate amount of emphasis on environmental justice considerations. Concerningly, the proposed language appears to prioritize environmental justice programs over other critical existing water resources programs. It appears the Army Corps is more concerned with implementing and funding hundreds of millions of dollars of the Biden Administration's Council on Environmental Quality's (CEQ's) "Justice40 Initiative"⁹ and the "Climate and Economic Justice Screening Tool" than encouraging priorities of Western water interests and economic development in national water resources planning.

For example, the Army Corps' 2022 Memorandum for the Implementation of Environmental Justice and the Justice40 Initiative states "the USACE will use investments in climate and critical clean water and waste infrastructure to measure benefits," including through Planning Assistance to States, Floodplain Management Services, as well as general construction investments, and for project in the study and planning phases, requiring comprehensive evaluation of the total benefits of each plan, including a "focus on putting the disadvantaged communities at the front and center of studies," starting at the earliest phase in the process.¹⁰

Though the Army Corps has already adopted guidance regarding environmental justice¹¹, the Army Corps in the PR&Gs states environmental justice is a "focus," and that "environmental justice should be accounted for in all areas being assessed under the PR&G, the economic, environmental and social."

⁹ See <https://www.whitehouse.gov/environmentaljustice/justice40/>,

¹⁰https://www.army.mil/article/254935/assistant_secretary_of_the_army_for_civil_works_issues_environmental_justice_guidance_to_the_army_corps_of_engineers (accessed April 1, 2024).

¹¹ See https://www.army.mil/article/254935/assistant_secretary_of_the_army_for_civil_works_issues_environmental_justice_guidance_to_the_army_corps_of_engineers, last accessed on April 1, 2024.

Further, the agency would identify communities with environmental justice concerns using CEQ’s “Climate and Economic Justice Screening Tool, the EPA’s EJScreen Tool, Indigenous Knowledge, state or local data or tools and community or resident-driven information,” and that “the ASPs require that burdens on Tribal Nations and communities with environmental justice concerns that are not avoidable are to be mitigated.”¹²

The PR&Gs further state “the Corps would ensure social (including health) environmental justice factors are evaluated during the planning process, include consideration of such factors throughout the lifecycle of a water resources investment, and that consideration should be given to impacts that could affect Tribal Nations and communities with environmental justice concerns differently than other communities.”¹³ They state the Army Corps’ “investments in water resources shall encourage “sustainable economic development”, accomplished through the “sustainable use and management of water resources ensuring overall water resources resilience and “shall include information on socio-economic conditions under current and projected conditions.”¹⁴

It is difficult to see how “sustainable economic development” will not be treated in a highly subjective manner, as farmers in California who are seeing 40% unemployment in their communities after Central Valley Project surface water was curtailed, and irrigators deriving water and hydroelectricity from the four lower Snake River dams and their reservoirs who were shut out of federal mediation discussions with certain tribes would not be viewed in the same manner as “communities with environmental justice concerns” that the Army Corps would subjectively identify.

Regardless, the Army Corps and other federal agencies could be put in the uncomfortable future position of weighing out which segments of various populations are going to be most impacted by water planning decisions. Is it the farmworkers who lose their jobs in the absence of once-reliable surface water? Or is it tribal members whose fishing rights are being impacted by water management? It would be very helpful for the Army Corps to develop a set of examples of how environmental justice considerations would be addressed in light of multiple minority, tribal or low-income populations that reside in Western watersheds that directly and indirectly benefit from water resource and multiple-purpose development projects.

b. Ecosystem Services Analysis are Subjective; Examples Would Help

The PR&Gs acknowledge that measuring ecosystem health is “challenging”¹⁵ and the Army Corps

¹² Section 234.6(c)(1) and footnote 13, 89 Fed.Reg. 12077 (Feb. 15, 2024).

¹³ Id. The Army Corps includes in a broad list of potential issues that could be evaluated: “exposure to climate-related risks and opportunities for climate resilience, factors that subject a community to poorer health or environmental conditions, subsistence hunting and gathering, Tribal resources of cultural and religious significance, cultural resources, access to greenspace or other natural areas, community values, factors that contribute to poorer physical or mental health conditions, income level, education level, and crime.”

¹⁴ Section 234.6(c)(5) *Sustainable economic development*. 89 Fed.Reg. 12101 (Feb. 15, 2024).

¹⁵ Section 234.6(c)(3) *Health and resilient ecosystems*, 89 Fed.Reg. 12080 (Feb. 15, 2024).

proposes to consider adopting any finalized OMB guidance on “ecosystem services.”¹⁶ Ecosystem goods and services are those things provided by nature that are of use to humans. The draft ASP emphasizes that a complete PR&G analysis “identifies, at a minimum, impacted services and the projected trend of each service flow. This framework is well suited for analyzing many values associated with the natural resource, as it starts from the assumption that all relevant ecosystem services should be evaluated.”

The ASP further states that such analyses “call for monetization where possible, of all ecosystem services that have economic, social, or environmental impacts that will affect decision making. Qualitative information used when it is not practicable to provide quantified or monetized information would be given similar consideration in evaluation.”¹⁷ However, it does not explain how “not practicable” would be determined. We have seen cases where the best available information is not being considered. Again, this emphasis brings with it the potential of injecting a high level of subjectivity into the analysis process. We agree that it could help in the scoring of developing new, environmentally sound water storage projects (especially if one of the purposes of such a project would be to provide downstream fishery habitat and management benefits). It might also force some conservation interests who have long escaped scrutiny for their qualitative “more water flows equal more fish” arguments in the past to actually perform the rigorous analysis really needed to justify those claims.

However, some of the other factors proposed for assessment could muddy this process. For example, consideration of “changes in social interaction and community; quality of life; safety, mental and physical health, family and individual well-being; improvements in attitudes, beliefs and values (includes culture and religion); and more” would require a high level of subjectivity, as individual planners and reviewers may have very different ideas of what these factors mean to local project proponents.

The same concern extends to the challenge of measuring changes in services based on changes in ecosystem structure or function. We completely agree with the proposed ASP statement that “there is an inherent degree of uncertainty” with projecting future conditions in quantifying the impact of an action on ecosystem services.¹⁸ The vague nature of ecosystem services analysis, especially when the beneficiaries of ecosystem services are not always obvious, are deeply concerning to us. Finally, the PR&Gs require an analysis of water resource projects in terms of changes to ecosystem services over time. The proposed analysis would need to describe when benefits are likely to be realized, and when costs are likely to be incurred. This could be very difficult, especially based on the current challenge the federal fisheries agencies have in trying to count imperiled fish, let alone predicting when they might either go extinct or fully recover.

¹⁶ Request for Comments on Proposed Guidance for Assessing Changes in Environmental and Ecosystem Services in Benefit-Cost Analysis. <https://www.govinfo.gov/content/pkg/FR-2023-08-02/pdf/2023-16272.pdf>, last accessed on April 1, 2024.

¹⁷ Section 234.7(b), *Economic, environmental, and social effects*, 89 Fed. Reg. 12087 (Feb. 15, 2024)

¹⁸ Section 234.6(g), *Inventory Existing Resources and Forecast Future Conditions*, 89 Fed. Reg. 12085 (Feb. 15, 2024)

Again, it would be very helpful to have illustrated examples of how an ecosystem services assessment would be developed, such as a water project operations plan that purports to re-direct agricultural water supplies or re-schedule water for power production towards the perceived needs of fish or sediment resources (e.g. Aspinall/ Black Canyon water rights; current Glen Canyon Dam Long Term Experimental and Management Plan EIS process; or the Lower Snake River Dams MOU).

c. Economic Analyses is Vague; Tighten Up and Enhance with Examples

The PR&Gs correctly acknowledge that “risk and uncertainty are inherent in economic analyses,” no matter the technique or methodology employed. However, a few detailed examples that demonstrate how the Army Corps would conduct such analyses would be helpful and appropriate. There are other potential costs for decision makers to consider, when considering broader economic implications from Western irrigated agriculture. These could be termed externality benefits or, if foregone, the “silent opportunity costs” inherent to changes to Western irrigated agriculture indirectly tied to the consumer spending economy. Food security impacts should include an understanding of the direct and indirect linkages to the economy derived from a low-cost food supply, making available large blocks of disposable income to the consumer spending economy, as well as the availability of high-quality food sources provided by Western irrigated agriculture. These types of policy considerations, along with the existence of non-market values for water and hydropower (e.g., the recent University of Oklahoma study conducted on Glen Canyon Dam¹) should be at the forefront of future decision making for water resources.

We foresee some procedural snags if reviewers will be required to consider “non-use” or “existence value” benefits, which are subjective and difficult to monetize or quantify. We question asking respondents what value they would place on an environmental change (such as the loss of a wetland) or preserving the resource in its current state. Again, this approach will inject a whole new level of subjectivity and time-consuming complexity into the decision-making process.

d. The Proposed ASP Is Biased Towards Non-Structural /Demand Management Measures

The proposed ASP impose vague requirements to use “nonstructural measures” and “nonstructural approaches” defined as “methods and practices employed to alter the use of existing infrastructure through human activities as opposed to altering physical interaction of water and land.

The Army Corps defines “Nonstructural approaches” to include “things like policy modifications or floodproofing of existing infrastructure.”¹⁹ The guidelines further mandate “consideration of natural systems, ecosystem process and nature-based approaches throughout alternatives development where they are feasible and consistent with the study purpose,” and inclusion of “a full nonstructural alternative and a full nature-based solutions alternative. . .in the final array of

¹⁹ Section 234.2(l) *Nonstructural approaches*, 89 Fed.Reg. 12070 (Feb. 15, 2024).

alternatives,”²⁰ which requires six types of alternatives, including also an “environmentally preferred alternative, an alternative that maximizes net public benefits, and a locally-preferred alternative”.²¹

The guidelines also include a confusing measure that “nonstructural measures and nature-based solutions should be considered as components of the other alternatives in the final array, essentially providing an integrated or “hybrid” of gray (hard) infrastructure with these other measures,” and also requires “inclusion of any needed mitigation for unavoidable adverse effects in the alternative and analysis.”²²

The document clearly appears to create a bias for selecting non-structural approaches, thus limiting, in practice, a full consideration of all alternatives. This narrow bias, intentional or not, could lead to ineffective decision making and serious ramifications that will become more important in these times of economic stress, where water needs for agriculture, industry and energy will assume greater importance to our country. Such a bias could very well lead to incomplete and flawed analyses of projects in Western watersheds and the preclusion of possible solutions that are realistic and cost-effective.

Of particular concern to our members is that modifying public or regulatory policy is somehow now considered to be a “nonstructural approach.” Within the context of a decision-making process, emphasizing policy discussion could inject a very subjective flavor into the overall procedure. While some of our members might welcome the opportunity to advocate for a treatise on the need to modernize the Endangered Species Act in a proposed operational plan, the result would not promote unbiased and streamlined decision-making. Also, there is no mention in the proposed ASP of the many limitations in agency authorities that can preclude the federal government from accomplishing these changes in policy.

4. Additional Questions, Issues Requiring Further Explanation and Specificity

In the course of our review, several additional questions arose regarding the overall new approach proposed in the ASP. These questions are presented below, as well as issues that we believe should be further vetted, and specific suggested edits:

A. Table 1 notes that “the Corps may choose to analyze the effects of a federal investment at a higher level of detail than called for by Table 1. For example, if the Corps considers an investment to be high risk, it could undertake a scaled analysis for that investment which might otherwise be excluded from the PR&G analysis.” This does not provide very much certainty, especially for larger and controversial projects with operations plans that are regularly the focus of litigation. What does “higher level of detail” mean? What are examples of situations where the Corps would choose to

²⁰ Section 234.7(h) *Nonstructural and nature-based alternatives*, 89 Fed. Reg. 12089 (Feb. 15, 2024).

²¹ Section 234.8 *Final Array of Alternatives*, 89 Fed. Reg. 12090 (Feb. 15, 2024).

²² *Id.*

analyze at a higher level of detail? Will new modeling have to be developed? How will any proposed changes under the PR&Gs impact water or power contracts, state water laws and water rights?

B. The 2007 WRDA authorization for revising the P&Gs directs the government to produce "an explanation of the intent of each revision, how each revision is consistent with this section and the probable impact of each revision on water resources projects carried out by the Secretary". This is an important issue to our members. Has this explanation been provided, and if not, when will it be?

C. Are there any minimum professional qualifications required to undertake these analyses? In many states, the types of analyses and studies described in the proposed ASP are required to be developed by professional engineers and/or planners. As written, the draft ASP appears to promote a process that any federal employee, regardless of professional credentials, could oversee or complete.

D. Section 234.7(e) of the ASP recommends that adaptive management should be clearly identified and evaluated as part of the alternatives to help reduce or manage within uncertainties. Will the same approach be employed when considering impacts to the human environment, including Western communities dependent upon natural resources-based economies?

5. **Conclusion**

Despite the Army Corps' efforts to provide a framework to govern how the Corps evaluates proposed water resources projects and programs, we remain concerned about the broad expansion of activities encompassed by the proposed ASP and PR&Gs and the likely subjective and burdensome regulatory process that is proposed to be added to an already complex process for water infrastructure. In the end, we fear this will increase delays and costs and become a litigation magnet for critics of Western water and hydropower projects going forward. Western water users do not want to see a federal planning and permitting program that becomes mired in a process that ultimately delays or even halts implementation of critical projects. Those projects - especially those that enhance limited water and power supplies - already are very time-intensive and any additional delay for planning and studies will only add to the time frame for providing relief.

Our members and others in the regulated community see increased Federal top-down regulations and controls being proposed and put in place, while proven, collaborative partnership-driven approaches to find lasting solutions to vexing water problems appear to have been put on the back burner.

The increased control exerted by federal agencies through a variety of means has increasingly led to gridlock in the management of water supplies in the West. We fear that the Army Corps proposed ASP, if implemented, will lead to more of the same. We cannot support it as drafted

and respectively request the Army Corps to go back to the drawing board to address our multiple concerns.

Thank you for this opportunity to comment on this draft document. If you have any questions about this letter, please do not hesitate to contact Dan Keppen at (541)- 892-6244 or dan@familyfarmalliance.org.

Sincerely,

Dan Keppen
Executive Director
Family Farm Alliance

April Snell
Executive Director
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Other signatories....