

DEPARTMENT OF DEFENSE**Department of the Army, Corps of Engineers****33 CFR Part 234****[Docket ID: COE–2023–0005]****RIN 0710–AB41****Corps of Engineers Agency Specific Procedures To Implement the Principles, Requirements, and Guidelines for Federal Investments in Water Resources****AGENCY:** U.S. Army Corps of Engineers, Army, Department of Defense (DoD).**ACTION:** Final rule.

SUMMARY: This rule establishes Agency Specific Procedures (ASPs) for the U.S. Army Corps of Engineers (Corps) to implement the Principles, Requirements, and Guidelines (PR&G) for Federal water resources investments. It provides a framework to govern how the Corps would evaluate proposed water resources investments, subject to the PR&G. The rule incorporates recommendations from interested parties. The Army is issuing this rule in response to congressional direction in the Water Resources Development Act of 2020.

DATES: This rule is effective on January 17, 2025.**FOR FURTHER INFORMATION CONTACT:** Mr. Milton Boyd, Acting Director for Policy and Legislation, Office of the Assistant Secretary of the Army (Civil Works), 108 Army Pentagon, Washington, DC 20310–0108, at (202) 761–8546 or milton.w.boyd.civ@army.mil.**SUPPLEMENTARY INFORMATION:**

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A. Executive Summary

The Principles and Requirements for Federal Investments in Water Resources (P&R)¹ were established pursuant to the Water Resources Planning Act of 1965 (Pub. L. 89–8), as amended (42 U.S.C. 1962a–2), and consistent with Section 2031 of the Water Resources Development Act of 2007 (WRDA 2007) (Pub. L. 110–114, 42 U.S.C. 1962–3). In WRDA 2007, Congress instructed the

¹ See https://obamawhitehouse.archives.gov/sites/default/files/final_principles_and_requirements_march_2013.pdf. Last accessed May 21, 2024.

Secretary of the Army to revise the 1983 Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies (P&G)² for the U.S. Army Corps of Engineers (Corps). Section 110 of the Water Resources Development Act of 2020 (WRDA 2020) (Division AA of Pub. L. 116–260) directed the Army to issue its final Agency Specific Procedures (ASPs) necessary for the Corps' Civil Works program to implement the P&R and Interagency Guidelines³ (henceforth “Principles, Requirements and Guidelines,” or PR&G).

The P&R were released in March 2013 and set the overarching policy direction. The Interagency Guidelines were finalized in 2014 and provide a common framework for Federal agencies to implement the P&R. The PR&G provide a framework to guide how Federal water resources agencies develop proposed investments in water resources. The PR&G replace the 1983 P&G. Each water resources agency is to develop ASPs to implement the PR&G.

This rule establishes the Corps' ASPs to implement the PR&G. The ASPs provide a framework for the Corps to use in the planning process for projects, plans, and programs. The ASPs focus project development on maximizing net public benefits. Public benefits are documented across economic, environmental, and social categories. The evaluation of alternatives will be consistent with the principle that environmental, economic, and social impacts are interrelated. The analysis of benefits may be quantified using monetary or non-monetary metrics. Qualitative descriptions of benefits may also be developed. The environmental, economic, and social benefits and costs are to be fully considered in formulating and evaluating alternative plans and making recommendations to decision-makers.

B. Background

The Army, through the Assistant Secretary of the Army for Civil Works, is responsible for policy direction and oversight of the Army's Civil Works program, whereas the Corps has the lead in implementing the Civil Works program. This document refers both to the Army (for policy direction) and the Corps (for implementation responsibility).

Section 2031 of WRDA 2007 (Pub. L. 110–114, 42 U.S.C. 1962–3) established

² See https://planning.erdc.dren.mil/toolbox/library/Guidance/Principles_Guidelines.pdf. Last accessed May 21, 2024.

³ See https://obamawhitehouse.archives.gov/sites/default/files/docs/prg_interagency_guidelines_12_2014.pdf. Last accessed May 21, 2024.

a national water resources planning policy. The national water resources planning policy states that all water resources projects should reflect national priorities, encourage economic development, and protect the environment by: (1) seeking to maximize sustainable economic development; (2) seeking to avoid the unwise use of floodplains and flood-prone areas and minimizing adverse impacts and vulnerabilities in any case in which a floodplain or flood-prone area must be used; and, (3) protecting and restoring the functions of natural systems and mitigating any unavoidable damage to natural systems.

Section 2031 of WRDA 2007 also called for the Secretary of the Army to revise the 1983 P&G for use by the Corps in the formulation, evaluation, and implementation of water resources projects. WRDA 2007 required that these revisions to the P&G address the following: the use of best available economic principles and analytical techniques, including techniques in risk and uncertainty analysis; the assessment and incorporation of public safety in the formulation of alternatives and recommended plans; assessment methods that reflect the value of projects for low-income communities and projects that use nonstructural approaches to water resources development and management; the assessment and evaluation of the interaction of a project with other water resources projects and programs within a region or watershed; the use of contemporary water resources paradigms, including integrated water resources management and adaptive management; and evaluation methods that ensure that water resources projects are justified by public benefits.

In 2014, the Council on Environmental Quality (CEQ) completed an interagency effort to update the 1983 P&G (79 FR 77460). The PR&G were developed through this interagency process to improve Federal decisions on investments in water resources by giving more prominence to ecological, public safety, environmental justice, and related concerns.

The PR&G, which govern how Federal agencies evaluate proposed water resources projects, programs activities, and related actions, consist of the following three components: (1) the P&R, providing the overarching concepts that the Federal Government seeks to achieve through policy implementation and requirements for inputs into analysis of Federal investment alternatives; (2) Interagency Guidelines, providing more detailed guidance for affected Federal agencies,

including the Departments of the Interior, Agriculture, and Commerce, the Environmental Protection Agency, the Corps, the Federal Emergency Management Agency, and the Tennessee Valley Authority, for determining the applicability of the P&R; and (3) the ASPs, outlining agency-specific procedures for incorporating the P&R into agency missions and programs.

The P&R describe the Federal Objective as reflecting national priorities, encouraging economic development, and protecting the environment. The Federal Objective is rooted in the national water resources planning policy established in Section 2031 of WRDA 2007. Two key concepts are “Federal investment” and “public benefit.” The PR&G focus on Federal water resources investments, including projects, plans, and programs that either directly or indirectly affect water quality or water quantity, including ecosystem restoration or related land management activities. The level of a given Federal investment will be determined on a present value basis over the life of the Federal investment, and the net public benefits of an investment will be assessed and used to guide Federal decision-making. Federal water resources investments should strive to achieve water resources goals and seek to maximize net public benefits, consistent with the PR&G.

The PR&G modernize the Federal Government’s approach to water resources development. They take a more comprehensive approach to water projects that seeks to maximize public benefits relative to the cost of an investment in water resources. Under the PR&G, decision-making is intended to be more transparent and better informed through risk recognition. Recommendations will be aimed at meeting the broader Federal Objective of reflecting national priorities, encouraging economic development, and protecting the environment by seeking to maximize sustainable economic development, seeking to avoid the unwise use of floodplains, and protecting and restoring the functions of natural systems and mitigating unavoidable damage to natural systems. The ASPs will serve as the framework for how the Corps will implement the PR&G.

The Army pursued rulemaking to provide codified direction for the Corps project planning process, which will achieve the purposes of the PR&G with input from robust and meaningful Tribal and public engagement. The Corps also reviewed and considered the approved ASPs of other Federal agencies in developing this final rule.

This final rule follows the general framework laid out in the PR&G. This rule formalizes the planning framework of the Corps under the PR&G in a transparent manner.

The final ASPs will apply to plans, projects, or programs that are initiated after this final rule takes effect. The Corps will 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 the final rule effective date.

C. Response to Public Comments

Initially, the Army sought input from Tribes, Federal, and State agencies, stakeholders, and other interested parties through the issuance of the Notice of Virtual Public and Tribal Meetings Regarding the Modernization of Army Civil Works Policy Priorities; Establishment of a Public Docket; Request for Input (Modernize Civil Works) that was published on June 3, 2022 (87 FR 33756).

Subsequently, on February 15, 2024, the Assistant Secretary of the Army for Civil Works published a proposed rule to establish the “Corps of Engineers Agency Specific Procedures To Implement the Principles, Requirements, and Guidelines for Federal Investments in Water Resources” (89 FR 12066). A 60-day public comment period closed on April 15, 2024.

On February 16, 2024, the Assistant Secretary of the Army for Civil Works sent letters to Tribal Nations, Alaska Native Corporations, and Native Hawaiian Organizations and Communities requesting consultation and seeking comments on the proposed rule. Tribal Nations, Alaska Native Corporations, and Native Hawaiian Organizations could request consultation through April 26, 2024.

During the comment period, three virtual public meetings were held to accept oral comments on the proposed rule. In addition, written comments were submitted by almost 250 organizations and individuals. Comments were provided by States, agencies, local governments, utilities, business interest groups, environmental organizations, academic institutions, farmers, businesses, and private citizens. Comments ranged from fully supportive of the proposed rule to viewpoints that were skeptical or not supportive. Many groups and individuals offered support along with recommendations to change parts of the proposed rule.

Virtual public meetings were hosted by the Office of the Assistant Secretary

of the Army for Civil Works on February 26, 2024, and March 12, 2024, and a virtual Tribal meeting was held on March 19, 2024. In total, 133 people attended the virtual meetings. The Office of the Assistant Secretary of the Army for Civil Works led the meetings and presented slides and moderated the public comment sessions. Verbal comments were accepted along with comments in the chat messages. Some of the meeting participants asked questions, and clarifying responses were provided to assist the public in understanding the proposed rule. All presentation materials, transcripts, and video recordings from the virtual meetings are available on the Army’s website (https://www.army.mil/article/273436/procedures_to_evaluate_water_resource_investments).

The Army received 13,292 pages of comments during the comment period. There were public comment letter submissions with multiple cosigners, including a single letter with over 100 signing organizations. The Army also received thousands of duplicated form letters within a single submission. Not counting the duplicated comments, the Army received over 500 unique comments.

One Tribal Nation elected to conduct Government-to-Government consultation on the proposed rule that resulted in revisions to the rule regarding Tribal treaty and reserved rights and consultation requirements.

The supporting materials used to prepare this rule, and the comments and materials received on the proposed rule are available on the Federal e-rulemaking portal (<https://www.regulations.gov>) (search Docket ID: COE-2023-0005).

The Office of the Assistant Secretary of the Army for Civil Works reviewed all comments and made changes, as appropriate, to the final rule based on those comments and an internal review. Those changes are described in detail in the “Section-by-Section Discussion of the Final Rule and Revisions from the Proposed Rule” in this preamble.

Most comments received were supportive of the ASPs but included specific recommendations and/or line-by-line edits. A significant portion of entries requested additional guidance on how to appropriately value non-monetized benefits when comparing economic, environmental, and social parameters and determining the net public benefits. Several commenters were concerned that the rule incorporates too much subjectivity into the planning and decision-making process. Others encouraged earlier and more consequential involvement of

Tribes and communities from the onset of and throughout the study process. A few letters expressed concerns that the rule will not be sufficient to ensure substantial changes on its own. At least two commenters recommended that the ASPs not be codified, indicating that not every agency went through rulemaking for their respective ASPs, and cited concerns over litigation. At least one commenter supported the decision to codify the ASPs, indicating it aligned with the good government principles of consistency, predictability, transparency, and accountability.

Some commenters did not broadly support the proposed rule. A couple commenters asserted that the ASPs exceed Congressional intent and the Army's authority. The Army notes that Congress expressly directed it to develop these ASPs for the PR&G in Section 110 of WRDA 2020. The Army is executing this direction.

A few comments focused on potential Federal budgeting and financing implications of the rule. One comment expressed that economic development remains an important objective of Federal budgetary criteria. Others sought the inclusion of Federal budget considerations in the rule and other supporting information. While these are valid considerations, the budget development and approval processes are separate from the framework outlined in the rule. Federal budgets are developed and proposed by the Administration and presented to Congress for appropriations considerations and approvals. These are separate and independent actions not related to the formulation of solutions to water resources related problems for potential implementation via the Army Civil Works program.

There were a few comments on specific project concerns. The rule will apply to plans, projects, or programs that are initiated after this final rule takes effect. In general, the Corps will 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 the final rule effective date.

In general, changes to the final rule included technical and grammatical corrections. In accordance with the Office of the Federal Register "Document Drafting Handbook," footnotes have been removed from the rule. A technical correction to the rule included updating the cited authority. The authority for the rule has been corrected to 42 U.S.C. 1962-3. Throughout the rule, the abbreviation of ASPs was added when necessary. Other technical corrections made to the final

rule, not covered in Section D of this preamble, included: correction of the issuing office for the PR&G in § 234.1; removal of "and" prior to "buyouts/acquisition" in the second sentence of § 234.2(l); name correction for the Corps' Interagency and International Services program in § 234.4(d)(2)(xi); clarifying the reference in paragraph 234.4(d)(2)(xv) to "Section 234.3"; added "protect Tribal treaty rights" to list of environmental justice principles in § 234.6(c)(1)(ii); deleted duplicative text in next-to-last sentence within § 234.6(c)(6); fixing a typographical error in the numbering of § 234.6(f)(7); deleting the caveat in § 234.7(h) "where feasible and consistent with the purpose of the water resources study"; deleted the caveats in § 234.8(a) " , if one exists,"; deleted duplicative text in the sixth sentence of § 234.9(c); and a numbering correction within § 234.11(a)(2).

Based on comments received, text within the rule was updated to better describe the full consideration of economic, environmental, and social benefits in decision-making. The rule text has also been updated to add clarity and emphasis to respecting Tribal treaty rights throughout the planning process for any plan, project, or program.

A large majority of comments received were seeking further clarity on process, procedures, methodology, and tools. The Corps will review current guidance following publication of the final rule to determine the need for updates.

The Army received many comments stressing the importance of environmental protection or conservation. This input is incorporated into various sections of the rule ranging from Guiding Principles to alternatives formulation to benefits analysis and the clear presentation of evaluation results.

The proposed rule included 58 items where the Army solicited specific input from interested parties. The public provided input on 44 of the topic areas. The input received is presented in the "Section-by-Section Discussion of the Final Rule and Revisions from the Proposed Rule" section of this preamble, including how the information was used to change the rule or whether the information was not incorporated into the rule.

The items that did not receive input were: the use of the term "water resources development projects;" the inclusion of additional resilience measurement concepts; the exclusion of Corps watershed studies from the ASPs; the type of data to use in inflating the monetary applicability thresholds; whether to account for the non-Federal

share of the costs in setting the monetary thresholds; whether there are alternative forms to measure ecosystem health; comment on particular models, tools, methodologies, or other information that may be helpful in assessing ecosystem resilience; whether the description of public safety as proposed should be broadened; whether additional threats to public safety should be included for consideration beyond those related to natural events; comment on risk informed frameworks that can supplement or improve the current risk informed planning processes used by the Corps; comment on when a multi-criteria decision analysis would be appropriate for the application within PR&G analysis; and comment on the tools, methods, and processes for assessing the tradeoffs to best elicit preferences resulting in the most informed recommendations in a consistent manner.

The input request also solicited comment in general on issues or concerns related to this proposed rule. That feedback, when received, is noted in the "Section-by-Section Discussion of the Final Rule and Revisions from the Proposed Rule" section of this preamble.

D. Section-by-Section Discussion of the Final Rule and Revisions From the Proposed Rule

The final rule incorporates changes based on input received through the comment process. A summary of the comments received, responses, and changes to each section are as follows:

Section 234.1 General. This section of the rule describes the background of the PR&G as well as the authority for the development of the Corps' ASPs.

Nothing in this rule will change any other legal requirements to which the Corps is subject, including applicable WRDA provisions. There were no public comments submitted on this section. No changes were made to the final rule.

Section 234.2 Definitions. This section provides definitions for relevant terms used in the rule. The Army solicited input on additional terms that needed to be defined and on whether the definitions required additional clarity. Several commenters recommended adding various definitions to § 234.2. A letter was received seeking clarity on the terms "actionable science" and/or "best available science," and another sought to include a definition of "environmental infrastructure projects." The following paragraphs describe other comments received with respect to definitions and the Army responses.

Response: As a result of the public comment process, the only addition made to the definitions section is the addition of the term “professional judgment.”

Section 234.2(a) Acceptability. This paragraph provides a definition for the term “acceptability.” This definition is provided in the P&R. Acceptability is one of four criteria to be considered when formulating an alternative. Acceptability takes into consideration the general public’s perspectives in the determination of an alternative’s viability and appropriateness and ensures consistency with existing Federal laws, authorities, and public policies. There were no public comments concerning the definition of the term “acceptability.”

Response: No changes were made to the definition of the term “acceptability.”

Section 234.2(b) Adaptive management. This paragraph provides a definition for the term “adaptive management.” This definition is provided in the P&R and describes the process to address changes, uncertainty, and maximization of goals over time. Adaptive management should be incorporated into alternatives, where warranted, to address risk and uncertainty. One Tribal Organization proposed that the definition should reference the need to monitor ecological responses to the Corps’ operations and to institute operational flexibility to respond to changing conditions. Another comment was received suggesting that future guidance related to adaptive management include requirements for how and when those measures are to be evaluated throughout a project’s lifecycle.

Response: No changes were made to the definition of the term “adaptive management.” The Army disagrees with the comment proposing a change to the definition. The ASPs will apply to all Army Civil Works water resources investments (except in cases outlined in § 234.3(d)(1)), where analysis may include the monitoring of ecological responses to proposed Civil Works projects.

Section 234.2(c) Completeness. This paragraph provides a definition for the term “completeness.” This definition is provided in the P&R and describes when an alternative is complete enough to realize the planned effects. Completeness does not equate to a particular scope or scale to be considered complete. Completeness is one of four criteria to be considered when formulating an alternative. No comments were received concerning the definition of the term “completeness.”

Response: No changes were made to the definition of the term “completeness.”

Section 234.2(d) Effectiveness. This paragraph provides a definition for the term “effectiveness” and describes that an alternative is effective when it alleviates the specific problems and achieves the specified opportunities. One comment letter was received that recommended adding resiliency to the definition.

Response: No changes were made to the definition of the term “effectiveness.” The Army does not agree that the suggested changes would improve the definition, and is retaining the definition provided in the P&R for consistency with other Federal agencies.

Section 234.2(e) Efficiency. This paragraph provides a definition for the term “efficiency.” This definition is provided in the P&R and describes the extent to which an alternative may alleviate the specified problems and realize the specific opportunities at the least cost. Efficiency is similar to effectiveness with the additional element of cost consideration. Two commenters recommended including environmental and social efficiency in the definition. Another commenter recommended referencing economic efficiency in the definition.

Response: No changes were made to the definition of the term “efficiency.” The Army does not agree that the suggested changes would improve the definition, and is retaining the definition provided in the P&R for consistency with other Federal agencies.

Section 234.2(f) Federal investment. This paragraph provides a definition for the term “Federal investment.” The ASPs are intended to assist the Corps in designing and evaluating potential Federal investments in water resources. Federal investment, as used in the PR&G, is broad and intended to capture a wide array of activities that the Federal Government undertakes relating to water resources, including projects, programs, and plans. The definition in this rule is specific to the Corps. A few comment letters recommended expanding the definition to reference Corps mission areas and to include water supply and hydropower, among others.

Response: No changes were made to the definition of the term “Federal investment.” The final rule applies broadly, including investments in primary missions, as well as hydropower and water supply.

Section 234.2(g) Federal objective. This paragraph provides a definition for the term “Federal Objective,” which is the fundamental goal of Federal

investments in water resources. This basic definition is provided in the PR&G but originates in Section 2031 of WRDA.

Multiple comments were received about the definition of the term “Federal Objective.” Comments were received recommending the inclusion of the complete text from Section 2031 of WRDA 2007. One commenter recommended text from Engineer Regulation 1105–2–100 where the planning objectives describe the desired results of the planning process. Two commenters recommended adding the terms “resiliency” and “sustainability” and including broader public benefits to key parts of the definition. One comment recommended including “remediating past inequities” and “respecting the treaty rights of Tribal Nations” as a part of the definition of the term “Federal Objective.” One commenter recommended the rule clearly state that the Federal Objective be considered as project outcomes for all Federal water resource projects. Another comment sought to incorporate clearer standards, thresholds, and directives in the definition to provide for robust stakeholder engagement similar to current guidance in Engineer Regulations and Engineer Pamphlets.

Response: No changes were made to the definition of the term “Federal Objective.” The Army does not agree with adding the terms “resiliency” or “sustainability” or broader public benefits to the definition. The full definition of Federal Objective is detailed in law (Section 2031 of WRDA 2007) and mirrored in the PR&G. The definition in the ASPs is abbreviated but the full concepts are detailed in other parts of the rule. See §§ 234.4 and 234.6 of the rule.

The Army does not agree with adding text from Engineer Regulation 1105–2–100 as that description explains the planning objectives of the study and not necessarily the Federal Objective itself. The Army already provides guidance that the alternatives should be compared to the Federal Objective during the formulation stage of a study.

The Army does not agree with including “remediating past inequities” in the definition of the term “Federal Objective.” The P&R defines the Federal Objective based on section 2031(a) of WRDA 2007, which does not include this term.

Regarding respecting treaty rights of Tribal Nations, the Corps is committed to meeting its trust responsibility by integrating the Civil Works Tribal Consultation Policy into the implementing guidance for the PR&G. The Corps will review existing guidance and provide updated guidance, where

warranted, following completion of the final rule. This would include identification of any guidance needed to address the protection of Tribal treaty rights and trust resources and identifying opportunities for communities with environmental justice concerns. The final rule was modified with respect to the treatment of Tribal treaty rights in §§ 234.6, 234.7, and 234.9.

Section 234.2(h) Indigenous Knowledge. This paragraph provides a description of the term “Indigenous Knowledge”. The description used in the rule is consistent with the definition codified by the Department of Interior, Bureau of Land Management in 43 CFR 2361.5, and 43 CFR 6101.4 (h); and with the description in the November 30, 2022 White House memorandum, “Guidance for Federal Departments and Agencies on Indigenous Knowledge.” Indigenous Knowledge must be considered in and used to inform all aspects of the implementation of the ASPs, where relevant and applicable.

Multiple comments were received concerning the proposed rule’s definition of Indigenous Knowledge. One noted that the term should be defined by Tribal Governments through Government-to-Government consultation. Another called for incorporating a definition from the Advisory Council on Historic Preservation. The other expressed the need to recognize other types of first-hand and long-term knowledge from local communities.

Response: The final rule describes Indigenous Knowledge, and is consistent with the descriptions and definitions used in existing law and existing Federal guidance. The Corps has revised the description for clarity. While no substantive changes were made, aspects of the comments received are key to the successful implementation of the Corps’ Civil Works Tribal Consultation Policy and will be considered in the development of future Corps guidance.

Section 234.2(i) Nature-based alternatives. This paragraph provides a definition for the term “nature-based alternatives.” Two commenters recommended changes to the definition by adding text recognizing that the same land can be used for multiple purposes and benefits as well as the addition of created ecosystems. One comment letter requested further details regarding establishing clear objectives for use of nature-based solutions, monitoring requirements, and adaptive management parameters. One commenter indicated that nature-based solutions should be excluded from the definition of

nonstructural approaches. Another commenter recommended that the Corps actively partner with industry to test technologies for nature-based solutions.

Response: No changes were made to the definition of the term “nature-based alternatives.” The Army does not agree that the suggested changes would improve the definition, and is using the definition provided in the report entitled, “Opportunities to Accelerate Nature-based Solutions: A Roadmap for Climate Progress, Thriving Nature, Equity, & Prosperity”,⁴ issued by CEQ, the White House Office of Science and Technology Policy, and the White House Domestic Climate Policy Office (2022). This approach aligns with the practice of other Federal water resources agencies.

The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the rule to include any necessary details regarding the application, evaluation, and recommendation of nature-based alternatives.

Section 234.2(j) Non-Federal interest. This paragraph provides a definition for the term “non-Federal interest.” The definition is taken from 42 U.S.C. 1962d–5b(b). The Army solicited comment on whether equating the non-Federal interest with the local interest is an appropriate approach for implementation. The Army also solicited recommendations on how the ASPs can incorporate and identify the role of the non-Federal interest.

Multiple commenters recommended expansion of the definition of the term “non-Federal interest” to include responsibilities required of the non-Federal interest as well as their role in the development of a water resources development project. Several comments were received suggesting early coordination with non-Federal interests to establish a solid foundation for any study, to include problem identification, objectives, constraints, etc. One comment letter suggested the definition be expanded to acknowledge contributions of non-Federal interests in defining problems, objectives, and constraints associated with a water resources development project. One comment letter sought details on cost-sharing and ownership responsibilities associated with a completed project. One comment letter requested the acknowledgement of multiple non-Federal partners on any given study/

project. One comment letter requested early coordination to leverage contributions from a non-Federal interest in a study/project. Another suggested the Army should recognize that many projects with non-Federal and local interests are also of Federal interest because regional economic benefits have spillover and additive benefits to the national economy. Another comment letter requested clarity on the implementation authorities of the non-Federal interest and details on locally preferred plans.

Response: No changes were made to the definition of the term “non-Federal interest.” The Army does not agree that changes to the definition of the term “non-Federal interest” are required as the definition is codified in law. Existing Corps documents such as “Partnering with the U.S. Army Corps of Engineers: A Guide for Communities, Local Governments, States, Tribes, and Non-Governmental Organizations” (2019) outline the role and responsibilities of the non-Federal interest(s) in development (planning, design, construction, and maintenance) of water resources projects. Cost-share requirements for non-Federal interest(s) are established in statute, or otherwise directed by Congress.

Section 234.2(k) Nonstructural alternative. This paragraph provides a definition for the term “nonstructural alternative.” One comment letter was received stating the opinion that nonstructural measures are distinctively different from natural and nature-based measures.

Response: No changes were made to the definition of the term “nonstructural alternative.” The Army has retained the definition provided in the P&R for consistency with other Federal agencies.

Section 234.2(l) Nonstructural approaches. This paragraph provides a definition for the term “nonstructural approaches.” Nonstructural approaches are intended to apply across the Corps missions and activities that are subject to the PR&G. Since WRDA 1974, the Corps has been required to evaluate opportunities to reduce flood damages using nonstructural approaches in plan formulation. Congress has expanded the definition of nonstructural approaches and included the requirement for nonstructural approaches in specific study authorities and for the rehabilitation of existing structures.

The Army solicited comment on whether the examples in the definition are appropriate and provide context for the term “nonstructural” or whether modifications should be made to the definition. The Army also solicited comment on whether the definition best

⁴ See <https://www.whitehouse.gov/wp-content/uploads/2022/11/Nature-Based-Solutions-Roadmap.pdf>. Late accessed May 21, 2024.

enables the Corps to achieve the long-term planning goals and objectives of the PR&G, including the P&R's healthy and resilient ecosystems and floodplains Guiding Principles.

A few commenters recommended modifying the definition of the term "nonstructural approaches" to show that the approach contributes to the Federal Objective and reduces project risks or accounts for externalities. One commenter recommended removing the nature-based alternative from the list of examples so that it may be presented as its own alternative during the evaluation process. One comment letter suggested that nonstructural approaches should not be mandatory when none exist to address the water resources problem under investigation. Another commenter worried that developing nonstructural alternatives would add unnecessary cost to studies.

Response: No changes were made to the definition of the term "nonstructural approaches." The Army does not agree that the suggested changes would improve the definition, and is retaining the definition provided in the P&R for consistency with other Federal agencies. Text was added to § 234.8(f) of the rule requiring documentation of any decision to not evaluate a particular measure/alternative if none exists. The Corps already routinely develops nonstructural measures and approaches in many of its studies without adding undue costs.

Section 234.2(m) Professional judgment. In response to comments seeking clarity on use of the term, a definition was added to the rule.

Note: From this point forward, the definitions within § 234.2 will advance one position in the rule (*i.e.*, § 234.2(m) in the proposed rule will become (n)), due to the addition of the term "professional judgment."

Section 234.2(n) Public benefits. This paragraph provides a definition for the term "public benefits." Public benefits encompass economic, environmental, and social benefits, and include those that can be quantified in monetary terms, as well as those that can be quantified or described in other ways qualitatively. The PR&G provide for the maximization of public benefits relative to costs. This definition is adapted from the definition provided in the P&R.

One comment letter suggested public benefits should capture benefits for affected populations and not communities further removed from the issue at hand. One comment letter requested further details on how public benefits will be used to determine the price of storage and water supply

investigations. Another sought clarification of the meaning and role of public benefits.

The Army solicited comment on how benefits to Tribal Nations should be described, such as whether benefits to Tribal Nations should be considered a Federal trust responsibility, and whether benefits to Tribal Nation should be called out separately from the overarching "public benefits." The Army also solicited comment on how such analysis would best be conducted for projects affecting Tribal Nations, and whether the Corps should identify, characterize, and evaluate the benefits to the Tribal Nation separately, as opposed to including them in a broader assessment of the overall benefits of the proposed project and the alternatives to the U.S. Nation (including the affected Tribal Nations).

Multiple comments supported the distinction of Tribal benefits from public benefits. Two comments highlighted the challenges with adequately capturing or quantifying Tribal benefits through a cost-benefit analysis. One Tribal Nation stated that Tribal treaty and reserved rights, including treaty-protected resources and habitats, are not and should not be characterized as "benefits" (whether "Tribal" or "public"); rather, they are the supreme law of the land, which should not be evaluated in a cost-benefits analysis.

Response: No changes were made to the definition of the term "public benefits." The Army acknowledges that Tribal benefits are categorically separate from public benefits and must be identified in consultation with the Tribal Nation to which the benefits would accrue. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the rule to include additional details or procedures for presenting quantitative or qualitative public benefits and benefits to Tribal Nations. Additional clarifying text was added to the rule regarding the treatment of Tribal treaty rights in §§ 234.6, 234.7, and 234.9.

Section 234.2(o) Regulatory. This paragraph provides a definition for the term "regulatory." This definition is provided in the P&R and is a general definition of actions which are regulatory in nature promulgated by the Federal Government. "Regulatory" actions can include the promulgation of regulations as well as other activities such as permit decisions. There were no public comments concerning the use of the term "regulatory."

Response: No change was made to the definition of the term "regulatory."

Section 234.2(p) Resilience. This paragraph provides a definition for the term "resilience." This definition is provided in the P&R. The Army solicited comment on whether the resilience definition provided in Executive Order 13653 (Preparing the United States for the Impacts of Climate Change) (78 FR 66817 (Nov. 6, 2013)), the National Climate Resilience Framework, or M-24-03 (Advancing Climate Resilience through Climate Smart Infrastructure Investments and Implementation Guidance for the Disaster Resiliency Planning Act) should be included in the regulation instead of or in addition to the proposed definition. The Army also solicited comment on whether additional concepts from these documents should be included in the rule.

Some commenters felt the proposed definition of resilience was too narrow and recommended expanding the definition. Other commenters suggested that the definition was too broad, and asked that it be aligned with current Corps guidance.

Response: The Army updated the definition of resilience in the final Rule in accordance with the National Climate Resilience Framework.

Section 234.2(q) Sustainable. This paragraph provides a definition for the term "sustainable." This definition is provided in the P&R and refers to the conditions where humans and nature can coexist.

One commenter recommended expansion of the definition of sustainable to include a characterization of the effects or outcomes of potential actions to be assigned to benefits.

Response: No changes were made to the definition of the term "sustainable." The Army does not agree that the suggested changes would improve the definition, and is retaining the definition provided in the P&R for consistency with other Federal agencies.

Section 234.2(r) Tribal Nation. This paragraph provides a definition for the term "Tribal Nation." This definition is consistent with the Federal Government's definition and identification of a Tribal Nation by the Secretary of the Interior (25 U.S.C. 5130).

Environmental justice is one of the Guiding Principles of the P&R and this rule. The Army recognizes that there are other Indigenous populations, Native Hawaiian Organizations, and non-Federally recognized Tribes that may not meet the definition of the term "Tribal Nation." Many of these include communities having environmental justice concerns. Regardless of definitions and legal authorities

applicable to the Civil Works programs, the Corps would ensure full outreach and coordination occurs with all Tribal Nations, Indigenous populations, Native Hawaiian Organizations, and non-Federally recognized Tribes as relevant to a particular water resources investment as addressed in the preamble's discussion of § 234.6(d). Such outreach and coordination would be separate from Government-to-Government consultation requirements.

The Army solicited comment on whether non-Federally recognized Indigenous populations should be defined separately for the purposes of the PR&G. One public comment recommended that Indigenous populations be defined separately from Federally recognized Tribes for the purposes of the PR&G. One public comment supported full outreach with all Indigenous populations, regardless of Federal recognition, to fully assess environmental and equity concerns. One Tribal Nation supported the definition as proposed in the draft rule.

Response: In consideration of the comments received and after Nation-to-Nation consultation, the Army did not make a change to the definition of the term "Tribal Nation." The Army recognizes the complexities of Federal recognition for Indigenous communities, many of which have significant environmental justice concerns regardless of any status as Federally recognized Tribes. The Army will continue outreach and other best practices for Indigenous populations that do not have Federal recognition.

Section 234.2(s) Unwise use of floodplains. This paragraph provides a definition for the term "unwise use of floodplains." This definition is adapted from the definition provided in the P&R. The proposed definition of "unwise use of floodplains" included any action that is incompatible with or adversely impacts one or more floodplain functions that leads to a floodplain that is no longer self-sustaining. The Army solicited comment on how the Corps should evaluate the self-sustainment of a floodplain that is occupied or inhabited.

Multiple commenters recommended clarification and/or expansion of the definition. One commenter recommended alignment of the definition with Executive Order 11988. Others sought the inclusion of broader concepts such as a climate-informed science approach and a Federal Flood Risk Management Standard. Other commenters supplied recommended language to identify the category of broad impacts on attributes of the floodplain. One comment letter

requested the definition be expanded to acknowledge the importance of floodplains to fish and wildlife. Others noted that wetlands and floodplains are essential resources that provide numerous ecosystem services.

Response: The Army added the following sentence to the Rule definition: "To identify floodplain areas for the purpose of this section, the Corps will use the best-available and actionable science including a climate-informed science approach." This was done for consistency with the Federal Flood Risk Management Standard established under Executive Order 13690 (Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input) (80 FR 6425 (Feb. 4, 2015)).

Section 234.2(t) Watershed. This paragraph provides a definition for the term "watershed." This general definition for watershed is provided in the P&R. There were no public comments concerning the definition of the term "watershed."

Response: No changes were made to the definition of the term "watershed."

Section 234.3 Exceptions. This section describes a way to request an exception from the Assistant Secretary of the Army for Civil Works to the requirements or policy contained in this rule. Exception requests must be submitted in writing.

Several comments were received on this topic. One comment letter, from a Tribal Organization group representing seven Tribal Nations, recommended including criteria for the Assistant Secretary of the Army for Civil Works to grant exceptions. Several comment letters similarly requested clear parameters and criteria for seeking an exception from the Secretary for any policy exception. One comment letter requested additional details on unique circumstances that may require exceptions. Two comments were received requesting a public notification process when exceptions are obtained for an undertaking. Another recommended striking the provision allowing non-Federal sponsors to request exemptions. One comment requested an explanation of the intended use of the exception authority and a requirement for periodic reporting of the use of exceptions. A State water agency noted that stranded asset situations should be specifically identified as eligible for an exception.

Response: No changes were made to the final rule. The Corps will review existing guidance and provide updated guidance, where warranted, following

completion of the rule regarding process and procedures for exceptions.

Section 234.4 Objectives and applicability.

Section 234.4(a) Introduction. This paragraph of the final rule states the goals and objectives of the ASPs. The final rule will help ensure consistency and transparency in the Corps' implementation of the PR&G by providing a common framework codified in regulation. The rulemaking process provided an opportunity for review and comment prior to finalization. The Corps has various guidance documents for its water resources development project planning process, but the final ASPs will ensure all projects, plans, and programs subject to the PR&G are using the same Guiding Principles and considerations in developing alternatives and recommendations. After finalizing the ASPs, the Corps will review its guidance documents and rescind, modify, or develop new guidance as needed to comport with and further the objectives of the ASPs. However, the final ASPs are intended to stand on their own regarding the overall framework and provide the guideposts for the Corps when implementing the PR&G.

The Army solicited comment to identify where additional details may be warranted in the final rule and preamble, and where additional specific technical tools or methodologies may be warranted in follow-on Corps guidance documents.

A comment was received during a virtual public meeting questioning how the ASPs will integrate with the Engineer Regulation 1105-2-100, which was recently updated with Engineer Regulation 1105-2-103.

Response: No changes were made to the final rule. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the rule for any process and procedures necessary to implement the final rule.

Section 234.4(b) Objectives for Federal water resources investments. This paragraph of the rule discusses the Federal objectives for Federal water resources investments, building on the definition of the Federal Objective provided in § 234.2(g). Section 2031 of WRDA 2007 describes more specifically how to accomplish the Federal Objective. The Federal investments must reflect national priorities, encourage economic development, and protect the environment by seeking to maximize sustainable economic development; by seeking to avoid the unwise use of floodplains; and by

protecting and restoring the functions of natural systems and mitigating any unavoidable damage to natural systems. Consideration of the P&R Guiding Principles when developing Federal water resources investments will assist in achieving the Federal Objective. Section 2031 did not provide a hierarchy for how to accomplish the objective nor does this final rule.

National priorities may include general priorities (for example, health and safety) but can include more specific priorities that emerge and may evolve over time. There are often multiple national priorities at any one time, all of which should be considered and reflected in Federal water resources investments to the extent relevant. Such priorities can be found in laws or developed by the Administration and are informed by stakeholder and community engagements. The Corps will also fulfill its Tribal trust responsibilities under applicable treaties.

Response: No changes were made to the final rule. Please see this preamble's discussion of § 234.2(g) for a response to the public comments on the definition of the term "Federal Objective."

Section 234.4(c) Net public benefits. This paragraph of the rule describes the net public benefits to society, which are sought to be maximized. Per the P&R, public benefits encompass economic, environmental, and social goals. Public benefits include benefits that can be described in monetary terms and those that can be quantified or described in other ways or qualitatively.

A key aspect of the PR&G is that the environmental, economic, and social impacts are interrelated. In addition, the potential solutions to a water resources challenge or opportunity may produce varying degrees of effects relative to environmental, economic, and social goals. As a result, the Corps will describe, assess, and consider the tradeoffs among the potential solutions to inform the decision-making process.

The study should evaluate all key benefits and costs to society that are relevant to the investment decision. The extent to which the alternatives would have effects across the three categories will naturally vary across Corps studies.

The PR&G emphasizes that relevant environmental, social, and economic effects should all be considered and that both quantified and unquantified information will form the basis for evaluating and comparing potential Federal investments in water resources to the Federal Objective. The ASPs make clear that the Corps will use monetized and quantified data to the extent practicable, but that unquantified

information will be fully considered as well. This more integrated approach will allow decision-makers to view a more complete range of effects of alternative actions and will lead to more socially beneficial investments.

Some benefits may be difficult to categorize as economic, environmental, or social. Analysts should be as specific as possible when categories cannot easily be assigned and to describe the relevance when evaluating alternatives. Double-counting should be avoided. In addition, when economic, environmental, and social goals compete, the Corps will describe such instances and include the considerations in the tradeoff analysis (see § 234.10(b)).

Under the ASPs, consideration of the range of economic, environmental, and social benefits is an integral component of the planning process. Development of a comprehensive plan to address the water resources challenge or opportunity must begin in the earliest phases of the planning process and continue throughout the process.

The Army solicited comment on whether net public benefits should be described without the additional step of categorizing them into economic, environmental, and social categories, in order to display all benefits in their entirety without the risk of double-counting or having to identify a specific benefit category when there may be overlap.

The Army received a number of comments on this topic. Several commenters indicated that environmental, economic, and social impacts should be displayed separately. One commenter indicated that providing both combined and segregated data may provide a better understanding of projects as a whole and in parts but indicated that the benefit-to-cost ratio should not commingle non-economic costs in an economic efficiency analysis. Another commenter indicated that net public benefits should be described and displayed in separate national accounts for analysis, evaluation, and comparison. It suggested that tradeoffs, double-counting, overlaps, and other relationships between national accounts can be more easily identified when displayed in separate accounts. A commenter suggested that benefits should not be categorized as they felt that avoiding categorization implicitly avoids double-counting and allows the benefits to be included independent of any bias or importance ascribed to a particular category. Another felt that they should not be categorized as doing so suggests sharp distinctions between

economic, environmental, and social effects.

One comment suggested the consideration and evaluation of a range of benefits (environmental, economic, and social), especially for natural and nature-based solutions. Related comments focused on including environmental and social considerations in the comprehensive evaluation of costs and benefits.

Another commenter indicated that details on the methodology for determining net public benefits are not included in the rule and said that it is unclear how economic benefits calculated in the traditional national economic development approach will be reformulated to remove the bias toward higher property values, which it said is inherent to the calculation of avoidable damages. Multiple commenters mentioned the need for future guidance on how net benefits will be determined and displayed. One comment specifically called for clarification on how this concept will be used in pricing water supply storage.

Several commenters recommended including in the rule language from the Interagency Guidelines stating that there is no hierarchy among environmental, social, and economic benefits to ensure that economic objectives do not remain the driving force. However, one commenter suggested that life safety be given priority over all other considerations.

One commenter indicated that adherence to the P&G's national economic development objective, which avoids internal redistribution of economic benefits and costs, is inconsistent with elements of social impacts where the intent is the redistribution of benefits towards disenfranchised communities, and also said that a philosophical reconciliation needs to be explicitly addressed or a higher emphasis placed on regional economic development.

Response: No changes were made to the final rule. Net public benefits will be determined based on the economic, environmental, and social benefits and costs to society as a whole. There is no stated goal of redistribution of benefits for Corps projects but rather an emphasis on analyses and metrics that can account for communities with environmental justice concerns and Tribal lands. The use of social impacts (positive or negative) in the evaluation of potential Federal actions will allow the direct consideration of effects that are not captured by traditional economics. Any new metrics or monetization will be economically and scientifically sound.

Regional economic development effects are the changes in the distribution of economic activity that would result from implementation of an alternative plan. These economic effects amount to a transfer of resources from one part of the Nation to another (either from one region of the country to another, or within a region). They accrue in a local area or region but are offset by equivalent losses elsewhere in the country. A separate regional economic development analysis can account for the transfer effects of a proposed Federal investment where the effects of spending or jobs on the local area may be a consideration.

The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

The Army solicited comment on whether it should be acknowledged that Tribal benefits are part of the trust responsibility in implementing the PR&G.

Response: No changes were made to the final rule. In many circumstances, Indigenous Knowledge can be used to inform the benefits that may accrue as a result of any given alternative providing more transparency on the entirety of benefits provided to better inform decision-making. Some benefits are also difficult to monetize or quantify, for example, non-use values of wildlife loss (such as existence or bequest values), or some culturally valued experiences (for example, spiritual connection to nature and option to lead a subsistence way of life).

The Army solicited comment on approaches and tools that may be employed to best enable the Corps to have consistent and transparent implementation, including using any final guidance provided by the Office of Management and Budget (OMB) on ecosystem services in response to its August 2, 2023, proposal (88 FR 50912). OMB finalized its ecosystem services guidance, “Guidance for Assessing Changes in Environmental and Ecosystem Services in Benefit-Cost Analysis,” in February 2024.⁵

The Army received some comments suggesting potential tools and considerations regarding the use of ecosystem services valuations when assessing project alternative plans. One commenter indicated that the ASPs should state that the Corps must account for the value of ecosystem services lost as a project cost, and account for the value of ecosystem

services gained as a project benefit and that potential mitigation measures may not be used to offset the loss of ecosystem services. Another commenter mentioned that discounting methodologies applied to ecosystem services or natural resources incorporate the impact of potential scarcity into future cost/value of these natural services and resources.

Response: No changes were made to the final rule. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule. Ecosystem service impacts will be considered in the benefit costs analysis as appropriate. The Army disagrees that mitigation may not be used to offset the loss of ecosystem services.

The quantification of benefits relates to several evolving fields and new methods may develop over time. The PR&G and the ASPs emphasize that benefits should be monetized, when possible, quantified when they cannot be monetized, and described when neither monetization nor quantification is possible with available methodologies and data. Where qualitative descriptions and analysis are used, they should be of sufficient detail and quality to enable the decision-maker to make informed decisions.

The Army solicited comment on whether life safety benefits should be specifically identified, and if so, under which of the three benefits categories. Several commenters responded to this inquiry. One responder indicated that life safety benefits should be identified, include national security, and be considered under other social effects. Another responder indicated that they should be identified and have a greater focus while being integrated across economic, environmental, and social categories. Another responder indicated that they should be front and center to any analysis and not placed in any one category.

Response: No changes were made to the final rule. Life safety benefits will be displayed in the social benefits category. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

Section 234.4(d) Applicability. This paragraph describes the projects and programs that must use the ASPs and outlines those projects and programs that are excluded from the requirements of this rule. Essentially, the PR&G apply to all Corps projects and programs that are not identified as excluded in § 234.4(d)(2) or granted an exception under § 234.3. Even though such projects or programs would be excluded

from the full application of the ASPs and the PR&G, those projects and programs should still strive to meet the intent of the ASPs by applying similar concepts where relevant.

With respect to a project or program that qualifies for a NEPA categorical exclusion, such exclusion does not automatically trigger an exclusion for applicability of the ASPs. However, projects or programs may meet the terms of an exclusion under both NEPA and this rule.

This rule will also apply to non-Federal interests who undertake feasibility studies to support an authorization to construct a Corps water resources development project, such as under Section 203 of WRDA 1986, as amended (33 U.S.C. 2231).

The following actions are excluded from the ASPs as these actions and activities do not result in the consideration of a proposed Federal water resources investment: Corps Regulatory actions; real estate actions; technical services programs, such as Planning Assistance to States and Flood Plain Management Services; Section 408 actions; the Public Law 84–99 program; the Water Infrastructure Finance and Innovation Act Program; environmental infrastructure projects; land management plans; operation and maintenance (O&M) activities carried out in a manner consistent with an existing O&M manual or O&M plan; Interagency and International Services and Support for Others program actions; research or monitoring activities; and emergency actions.

Monitoring (e.g., water quality monitoring or fish monitoring) and research activities are excluded from the requirements of this rule. Such activities may be used to inform Federal investments in a proposed or existing water resources development project, but they are not themselves a water resources development project, program, or a related Federal investment decision. The Interagency Guidelines provide that the PR&G are not intended to include data collection, except insofar as its purpose is to inform an investment decision involving permanent site-specific actions.

The Corps’ Interagency and International Services and Support for Others program actions are excluded from the requirements of this rule. These actions are provided on a reimbursable basis and as such are assistance to other programs and not a proposed Federal investment by the Corps, as are the other activities covered under the ASPs. All the work that the Corps performs under these programs is requested by other agencies that pay the

⁵ See <https://www.whitehouse.gov/wp-content/uploads/2024/02/ESGuidance.pdf>. Last accessed May 21, 2024.

Corps the full cost of providing these services. For example, on a reimbursable basis, the Corps provides technical assistance under this program to non-DoD Federal agencies, State and local governments, Tribal Nations, private U.S. firms, international organizations, and foreign governments. The Corps provides engineering and construction services, environmental restoration and management services, research and development assistance, management of water and related land natural resources, relief and recovery work, and other management and technical services. While some of this work may be related to a water resources investment by another Federal agency, it is not related to an investment decision by the Corps and, as such, is not covered under the Corps ASPs. Although excluded from the Corps ASPs, the Corps' international programs are subject to other international environmental requirements and DoD environmental commitments.

In addition, those projects, programs, or plans that meet the threshold criteria in the Table 1 are generally for routine investments. In most cases, these investments would not have significant adverse effects on water resources. Projects or plans implemented under programmatic authorizations from Congress (e.g., Tribal Partnership Program and Continuing Authorities Program) are potentially included under the ASPs depending on the monetary thresholds for the actions. Any study, project, or plan that meets the monetary thresholds contained in Table 1 would need to be assessed to determine the appropriate level of analysis to be applied. Any study, project, or plan that falls below the \$15 million threshold would be excluded from the ASPs.

Also included in the list of exclusions are those programs, plans, or projects that fall under an exception in § 234.3.

Excluded activities within these projects or programs will follow the relevant laws, Tribal treaty and reserved rights, regulations, and general planning processes, and will still strive to meet the intent of the PR&G by applying similar concepts where relevant.

The Army solicited comment on whether modifications allowed under the Public Law 84–99 program should not be excluded from the requirements of this rule. Two responders commented on the ASPs applicability to the Public Law 84–99 program. One commenter indicated that the Corps should apply the improved planning framework in the ASPs to Public Law 84–99 to the greatest extent practicable to help communities prepare for natural disasters and ensure these projects are

designed and evaluated for the full range of comprehensive benefits, and that the process for applying these ASPs to the Public Law 84–99 program should be scaled in a manner to be consistent with the emergency response nature of this program. Another responder indicated that the Army and the Corps should consider removing or limiting the proposed exclusion of the Public Law 84–99 program regarding repair or restoration activities on flood control and shoreline management works threatened or destroyed by flooding. However, the commenter indicated that it is appropriate to retain the exclusion for inspections, preparedness activities, technical assistance, direct flood fighting assistance, rescue operations, and post-flood response.

Response: No changes were made to the final rule. Upon further consideration, modifications implemented under the Public Law 84–99 program are better addressed in the Public Law 84–99 rule (33 CFR part 203) and associated guidance and thus have been excluded from the PR&G.

The Army solicited comment on whether additional exclusions should be added, such as dredged material management plans, Tribal Partnership Program activities, Continuing Authorities Program, and major rehabilitation evaluation reports due to scope, scale, level of investment, project partner, technical nature of the product, etc.

One commenter suggested that the ASPs should be applied to operating manuals and water control plans. One comment sought the addition of renewals and replacements to the actions in § 234.4(d)(2)(x). Another suggested removing § 234.4(d)(2)(xv) or prescribing a process for these decisions. It was also suggested that § 234.4(d)(2)(xiv) be deleted or clarified with provisions. Another commenter indicated that the ASPs should apply to existing projects. Comments received from a Tribal Nation and a Tribal Organization also recommended that the PR&G should apply to existing operations of Corps' projects affecting Tribal land or water. One commenter responded and suggested that when formulating dredged material placement alternatives, the Corps should account for all benefits of beneficial use placement opportunities, including the economic value of clean dredged material for ecosystem restoration and storm damage reduction and cost savings available.

One comment recommended adding a sentence indicating that excluded projects should still strive to meet the intent of the PR&G and ASPs by

applying similar concepts where relevant.

Response: No changes were made to the final rule. The ASPs will apply to all new Army Civil Works' water resources investments that meet the threshold criteria contained in Table 1, to include feasibility studies; general reevaluation reports; major rehabilitation reports; studies performed under the continuing authorities program of the Corps; studies to support significant changes to operations including any such changes that warrant preparation of an environmental impact statement, re-allocation studies, and studies conducted under Section 216 of the Flood Control Act of 1970 (33 U.S.C. 349a); and any other project or program not otherwise excluded under § 234.4(d)(2).

The suggestion to add operating manuals and water control plans under the ASPs was not adopted for O&M activities that are carried out in a manner consistent with the existing approved O&M manual or plan that are routine in nature. However, the ASPs would apply to significant proposed changes to an existing O&M plan that may be controversial, significant changes to the existing plan to meet new goals, and other significant changes that may warrant a fresh exploration of the options.

Section 234.4(d)(2)(xiv) was modified to remove "that meet the threshold criteria for exclusion or". This was done to clarify that Table 1 determines the cost-based threshold criteria for the application of the ASPs to projects, programs or plans.

Section 234.4(d)(2)(xv) was retained to preserve the Assistant Secretary of the Army for Civil Works' ability to make exceptions on a case-by-case basis.

The ASPs provide a framework to govern how the Corps would evaluate proposed water resources investments and do not apply to existing projects where no changes are proposed. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

In addition, the Army solicited comment on whether any of the actions identified as proposed exclusions in the rule should not be excluded, in which case the ASPs would apply to them. The Army did receive input in response to whether any of the actions identified as proposed exclusions should not be excluded. This input was related to the Public Law 84–99 program and those comments are addressed earlier in this section of the preamble.

Response: The final rule clarifies the scope of the O&M exclusions. No other

changes were made to the list of exclusions in the final rule.

The Army solicited comment on whether watershed studies should be specifically included to ensure that they align with the goals of the PR&G and result in better outcomes for integrated water resources management.

A number of respondents indicated that studies should follow a watershed approach. Multiple responders indicated that the PR&G should apply to watershed studies. One responder indicated that if watershed studies include the development of specific future projects or potential future projects, they should follow the ASPs. The specific requirement for such plans might be less than the full planning approach outlined for specific projects, but these studies seek to maximize net public benefits in a manner consistent with the ASPs and the Federal Objective.

Response: No changes were made to the final rule.

The Army solicited comment on whether watershed studies should be excluded from the requirements of this rule. A responder indicated that the concept of watershed studies brings its own set of challenges, highlighted by concerns regarding the practicability of advancing individual Civil Works projects within broader watershed study areas.

Response: No changes were made to the final rule. Watershed studies do not typically result in specific Federal investment construction recommendations; in those cases, they would not be subject to the ASPs. If a watershed study does include recommendations that meet the monetary thresholds for inclusion, then the ASPs would apply. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

Section 234.5 Level of analysis. Once a decision is made that the PR&G apply under § 234.4, the next step is to determine what level of analysis should be applied.

Section 234.5(a) Standard and scaled level of analysis. There are two levels of analysis under the PR&G that are applied based on the scope and magnitude of the proposed projects, programs, or plans, and the significance of the Federal investment. The different levels of analysis allow for investment decisions to be made effectively and efficiently. Many small, routine activities are excluded from the PR&G analysis under the rule (refer to § 234.4(d)(2)) such as O&M activities that are carried out in a manner consistent with the existing approved

O&M manual or routine investments in invasive species removal. A scaled PR&G analysis would generally include fewer alternatives with a more streamlined formulation process and justification procedures than a standard analysis, while still adhering to the PR&G and resulting in a systematic decision. A scaled analysis reflects the scope and complexity of the problem being assessed. The ASPs include a table that provides the monetary threshold criteria to be used for identifying the types of projects, programs, or plans and their corresponding level of analysis.

The Army solicited comment on whether the proposed rule language regarding benefit-cost analysis in this section is adequate or whether additional content or examples are needed in the rule text. The Army also solicited comment on the types of analyses that may best be used to evaluate the full range of public benefits under both standard and scaled levels of analysis.

The Army received comments that more rigorous analysis may be warranted if significant non-monetized effects are likely to occur. The Army also received comments that the standard level of analysis is appropriate for any proposal that would require an Environmental Impact Statement under NEPA. Another comment advised in-depth analysis when the uncertainty is so high that the performance metric ceases to be informative.

Other comments were that the benefit transfer methods discussed in this section of the proposed rule were weak and that the Army should define what should be similar for projects to apply other studies' benefit functions, and to include guidance on how to scale or weight studies to better match the local context. Another comment expressed concern over the use of benefit transfer and expressed the need for more clarity regarding when it is appropriate.

One organization offered that a benefit-cost analysis tool has an inherent error that could be avoided with external review. One commenter expressed concern that the ASPs should also clarify that they do not establish a new requirement for a positive, quantified benefit-cost determination to justify the recommendation of an ecosystem restoration project.

Response: No changes were made to the final rule. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

Section 234.5(b) Determining the appropriate level of analysis. This paragraph of the rule describes the

process for determining the appropriate level of analysis under the PR&G. In addition to the considerations and descriptions provided in § 234.5(a) for the scaled and standard analysis and the criteria provided in Table 1 to be used as a general guide, the ASPs note that professional judgment and available resources are also important factors in determining the appropriate levels of analysis.

The Army solicited comment on additional considerations to be applied when determining the appropriate level of analysis under the PR&G and whether additional clarity is needed on how such determinations may be made.

One commenter indicated that mechanisms other than project cost should be considered to determine the appropriate level of analysis and indicated that planning efforts that do not exceed the monetary thresholds can inform major investment decisions that vastly exceed these thresholds, and it would be difficult to reassess climate change during the implementation phase if a quantitative climate change analysis is not included in the planning phase.

One commenter indicated that the rule fails to identify specific criteria that will be applied to determine the level of analysis, and to address this lack of clarity additional content or examples are needed in the regulatory text.

Another commenter indicated that the Corps should consult with State and local partners when determining the appropriate level of analysis. In particular, the Corps should work with State partners that have permitting and review obligations to ensure that the planning analysis, including investigations and data collection, meets both the Corps' and State review data needs. Another commenter expressed concern that the ASPs puts too much emphasis on monetary criteria and inadequate emphasis on potential environmental impacts in discussing how the Corps will determine which level of analysis to apply to a particular project. The commenter recommended including language describing factors that could justify deviating from Table 1 in the text of the final rule. The responder also recommended adding language to Table 1 to clarify that the monetary thresholds are not decisive on their own. Finally, this responder indicated that the standard level of analysis is appropriate for any project that would require an Environmental Impact Statement under NEPA. Another commenter stated that industrial-scale offshore wind projects that involve significant ocean area must trigger the full PR&G and must require in-depth,

extensive scientific analysis as part of the Corps' regulatory process to ensure no harm to the ocean ecosystem and the communities that depend on access to fisheries.

Response: No changes were made to the final rule. This rule does not apply to the Corps' Regulatory program. The Corps will consult with Federal, State, and local partners in determining the appropriate level of analysis to include State partners with permitting and review obligations. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule regarding the level of analysis to be used in planning studies.

Section 234.5(c) Scope and magnitude of analysis required. The threshold criteria provided in Table 1 are guidelines to establish an appropriate scope and magnitude for the analysis based on the Federal cost (excluding the non-Federal share) of a proposed activity, measured in terms of the present value of the Federal investment. The present value is the current dollar value, after discounting. In the proposed rule, Table 1 was taken straight from the Interagency Guidelines. The monetary thresholds were designed to be relevant to all agencies implementing the PR&G to provide a common framework and baseline. Programmatic-level analyses require the detail necessary to ensure decision-makers have sufficient information to make an informed decision, but they may be conducted differently than project-level analyses. The Corps may choose to analyze the effects of a Federal investment at a higher level of detail than called for by Table 1.

The Interagency Guidelines state that the P&R specifically apply to operational modifications, modernization of existing facilities, dam safety modifications, culvert replacements, water conveyance, and fish ladder modifications. The analysis of significant O&M investments of this kind would be subject to the thresholds in Table 1. O&M activities resulting in consequential effects on water quantity or water quality that have not been previously analyzed should be appropriately analyzed using either the project- or programmatic-level processes laid out in the rule. More significant operational changes, such as adding a new project purpose or significantly modifying project outputs, warrant analysis under the PR&G. However, routine O&M activities are excluded (see § 234.4(d)). O&M activities that are included in original project authorizations do not require a separate analysis if the activity is carried out in

a manner that is consistent with that authorization. Significantly changed O&M plans or those changed to meet new goals may require a new analysis at the standard or the scaled level.

The Army solicited comment on whether the values provided in Table 1 are the appropriate thresholds to apply for the Corps and also whether the amounts should be adjusted for inflation from the original amounts provided, which were developed in 2014. The Corps further solicited comment about what data should be used to make those adjustments going forward, such as Gross Domestic Product deflator, Consumer Price Index, or something else. The Army solicited comment on whether the Corps should account for the non-Federal share of the costs in setting these thresholds to reflect the total cost to society (Federal plus non-Federal costs) of the proposed investment. The Army also solicited comment on whether more clarity is needed for which types of projects would fall under the project vs. program vs. plan criteria.

The Interagency Guidelines state that if the Corps develops a revised proposed Table 1 specific to the Corps, the following considerations should be taken into account: (1) thresholds relevant to the specific activities of the Corps; and (2) criteria relevant to the Corps for determining the level of analysis. The Army solicited comment on whether either of those considerations warrant a revision to Table 1 for the Corps.

Comments received from a Tribal Nation and a Tribal Organization recommend threshold criteria provided in Table 1 should not limit the evaluation of proposed activities that could impact Tribal Nations. Another commenter recommended indexing the threshold values to account for economic conditions since 2014.

Response: Table 1 was modified in response to comments received. Threshold values and ranges were updated and increased to reflect total investment (Federal and non-Federal). These thresholds are not intended to preclude or minimize the Tribal trust responsibility and resulting Government-to-Government consultation requirements when determining the scope and scale of analysis where a Federal action may have Tribal implications.

Section 234.6 The planning process.

Section 234.6(a) Introduction. This paragraph describes how the planning process will incorporate the Guiding Principles from the P&R in the analysis and development of Corps Federal

investments in solving water resources problems.

Response: The Army made minor edits to this section of the Rule for clarity. In response to comments from Tribes and a Tribal Organization concerned that the Army recognizes Tribal treaty rights, the following text was added to this section of the rule: "The Corps will identify impacts to Tribal treaty and water rights at the earliest phases and throughout the plan evaluation process, screening alternatives that impact Tribal treaty and water rights."

Section 234.6(b) National Environmental Policy Act. This paragraph encourages the Corps to integrate the NEPA and the PR&G processes as much as possible to produce a single analytic document to meet both requirements. Compliance under NEPA and this rule does not eliminate the Corps' obligations under other statutory requirements (for example, Endangered Species Act compliance) or fulfillment of Tribal trust responsibilities.

The Army solicited comment on how the navigation program can use tools and resources to directly assess and, as appropriate, demonstrate project benefits for disadvantaged communities and other nearby communities, in particular.

One comment was received requesting that the Corps update its models and policies to better reflect the full economic and environmental benefits of channel expansion projects.

Response: No changes were made to the final rule. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

Section 234.6(c) Guiding principles. This section describes the Guiding Principles for the planning process that the P&R identify, which are environmental justice, avoiding the unwise use of floodplains, healthy and resilient ecosystems, public safety, sustainable economic development, and a watershed approach. The Guiding Principles are intended as overarching concepts to ensure that Federal water resources investments best serve the public.

Many comments suggested that the rule provides insufficient guidance for achieving goals aligned with the Guiding Principles. Another comment suggested including a new Guiding Principle associated with rising sea levels.

Response: No changes were made to the final rule. The Guiding Principles were identified in the P&R. The Corps will review existing guidance and

provide updated guidance, where warranted, following completion of the final rule.

Section 234.6(c)(1) Environmental justice. This section defines the term “environmental justice” and states that communities with environmental justice concerns will be “at the front and center of studies.”

The Army received multiple comments about the Guiding Principle of environmental justice. The majority of commenters support the inclusion of environmental justice as a Guiding Principle. Comments recognized the benefits to communities with environmental justice concerns of the broader evaluation framework and the decision-making criteria in the ASPs. Another organization suggested adding text from the preamble to the rule itself to highlight potential issues that should be evaluated.

Some commenters requested additional specifics about how the Corps will realize the goals of environmental justice, including how relevant communities will be identified. One commenter mentioned the need to define communities with environmental justice concerns and disadvantaged communities.

Some commenters recommended specific tools, techniques, or procedures to help realize these goals; others called for environmental justice to be prioritized throughout all aspects of the ASPs. Others advocated to strengthen the standard for project selection.

Commenters noted the need to transparently include communities in decision-making. One commenter recommended targeted outreach to ensure equitable access to participation.

Another commenter asked how communities would be compensated should they endure negative environmental impacts from Corps’ projects.

Response: The Army made minor edits to this section of the Rule for clarity. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule. In accordance with the Water Resources Development Act of 2007, Section 2036, the Corps is required to develop a mitigation plan to address environmental impacts from Corps projects. If a community is enduring long-term negative environmental impacts from a Corps project, appropriate response could be considered on a case-by-case basis in accordance with Federal law, regulation, and policy.

The opportunity for meaningful input by affected communities is a component

of the definition of the term “environmental justice.” Comments pertaining to outreach and collaboration with communities with environmental justice concerns are addressed under this preamble’s discussion of § 234.6(d).

Additional commenters expressed concerns, not about the Guiding Principle itself, but about the tone with which environmental justice is discussed in the rule. Some wished for the principle to be emphasized more strongly; others expressed concern that the rule over-emphasizes the importance of environmental justice and that such over-emphasis ultimately could impair the quality of the Corps’ decision-making, especially in cases when achieving environmental justice-related goals may appear to conflict with the objectives or feasibility of specific projects.

Response: The Army reiterates that environmental justice is an important Guiding Principle of these ASPs, identified in the P&R alongside the other Guiding Principles. The Army disagrees with the supposition that any of these principles, including environmental justice, will negatively impact the Corps’ work. On their own, the Guiding Principles do not mandate specific mission or project outcomes; rather, they act as policy guideposts to ensure that the Corps serves the public in the execution of its authorities.

One commenter asserted that the inclusion of environmental justice as a Guiding Principle exceeds Congressional intent and asked for it to be removed from the rule.

Response: The P&R identifies environmental justice as a Guiding Principle, and the consideration of impacts on local communities embodied by that principle is reflected in Section 2031(a) and (b)(3) of WRDA 2007. Congress expressly directed the Corps to develop these ASPs for the PR&G in Section 110 of WRDA 2020. The Army is executing this direction.

Some commenters, including a Tribal Organization, suggested that remedying past inequities should be a Guiding Principle or a standard decision-making factor in the planning criteria for existing and future water resources development projects. One comment from a Tribal Nation supported the inclusion of subsistence and social impact assessments, and greater transparency for evaluating benefits and impacts under environmental justice analysis of a proposed project. Through Government-to-Government consultation with another Tribal Nation, a comment was made to differentiate broader environmental justice concerns

from protected Tribal treaty or reserved rights.

Response: The Guiding Principles are defined in the P&R. The Army agrees that subsistence activities should be considered in agency decision-making under the environmental justice Guiding Principle. The rule includes this language at § 234.6(c)(1)(ii). The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

Related to environmental justice, the Army solicited comment on how the navigation program can use tools and resources to assess and, as appropriate, demonstrate project benefits for disadvantaged communities and other nearby communities.

Commenters representing Tribes recommended a social impact assessment tool, not specific to navigation, for identifying impacts on Tribes and other communities with environmental justice concerns. These comments are addressed under the discussion of § 234.9(c) in this preamble.

Response: No changes were made to the final rule.

Section 234.6(c)(2) Floodplains. This section states that Federal investments shall strive to sustain floodplains’ natural and beneficial functions to the maximum extent practicable.

The Army received comments expressing support for the inclusion of floodplains in the Guiding Principles. Some sought for the principle to be strengthened, especially with respect to long-term implications of a changing climate, or to be aligned expressly with current Corps guidance and other Federal policy documents. Other commenters wanted to see explicit language in the ASPs ensuring that projects are self-sustaining and do not result in the unwise use of a floodplain. A commenter suggested that the rule specifically address how the Corps would implement the Federal Flood Risk Management Standard established under Executive Order 13690 (Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input) (80 FR 6425 (Feb. 4, 2015)).

The Army solicited comment on how the Corps should evaluate the self-sustainability of a floodplain that is occupied or inhabited. Some commenters suggested a variety of specific assessment methodologies. They also recommended working with academic experts to identify approaches after the ASPs are finalized.

Response: The following information was added to the Rule: “To identify floodplain areas for the purpose of this section, the Corps will use the best-available and actionable science including a climate-informed science approach.” The Army reiterates that effective floodplain management and increasing resilience to flooding and storms are important Guiding Principles of these ASPs and the PR&G. For a discussion specific to the term “unwise use of floodplains,” see § 234.2(s) of this preamble. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

Section 234.6(c)(3) Healthy and resilient ecosystems. The ASPs reinforce the directive in WRDA 2007 to protect and restore ecosystem functions and to minimize and mitigate those impacts if they cannot be avoided. The rule states: “Alternatives shall protect the existing functions of ecosystems and may restore the health of damaged ecosystems to a less degraded and more natural state where feasible” Alternatives must include avoidance, minimization, and compensatory mitigation considerations for each identified alternative solution. Appropriate mitigation of adverse effects is to be an integral part of each alternative plan.

Some commenters suggested that the phrase “may restore” be changed to “shall restore,” and others suggested removing “where feasible” from the text. Commenters also recommended specific approaches for how best to follow this Guiding Principle.

The Army solicited input on whether there are alternative forms to measure ecosystem health such as specific assessment methods in particular for the Corps’ aquatic ecosystem restoration mission.

One commenter recommended quantification of multi-purpose benefits and effects of nature-based solutions.

When evaluating water resources investment alternatives, the health of the affected ecosystem should be measured in its current condition (baseline) and projected under each of the alternatives being considered. A Tribal Organization commented that the current baseline may already be degraded by an existing project or as a cumulative effect of a different Federal action and that this should be considered when establishing the baseline conditions.

When determining the environmental baseline for new water resources development investment decisions, the Corps does consider impacts by existing projects or Federal actions.

Response: No changes were made to the final rule. Regarding “may” versus “shall,” the Army notes that, while aquatic ecosystem restoration is one of the Corps’ missions, not all studies are authorized to restore damaged ecosystems. In some cases, imperative language would put the ASPs at odds with congressional authority. On the other hand, contingent language acknowledges potential opportunities. Thus, the original language has been retained. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

Section 234.6(c)(4) Public safety. The rule describes “public safety” in terms of loss of life and injury. It calls for alternatives to avoid, reduce, or mitigate significant risks to public safety.

The Army solicited comment on whether the description of the term “public safety” should be broadened and whether additional threats to public safety should be included for consideration beyond those related to natural events.

Several commenters responded. One suggested that life safety should be recognized as a benefit of national security. Another commenter indicated that public safety should include both drought and flood resilience and stressed the role of water supply in ensuring public health and safety. Some commenters suggested that improved life safety be recognized as a benefit of many navigation projects. Another commenter indicated that alternatives should consider any risk of harm or injury to persons and property and should utilize qualified design professionals to achieve these safety goals.

The Army solicited comment on whether life loss should be monetized.

Some commenters supported monetizing loss of life, with one of these commenters suggesting that the Corps consider the methodologies used to determine the value of a statistical life presented in U.S. Department of Transportation and Federal Emergency Management Agency documents.

Response: No changes were made to the final rule. The Army will consider additional factors in the discussion of public safety through future updates to planning and engineering guidance. However, the Army does not believe that changes to the rule are required to address these factors.

The Corps includes an analysis of the risk to life safety in its flood and coastal storm risk management studies and in its dam safety modification studies. The Corps generally considers this risk in assessing costs and benefits and in

formulating potential solutions. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule, to include a review of Department of Transportation and Federal Emergency Management Agency approaches.

Section 234.6(c)(5) Sustainable economic development. The term “sustainable” is defined in the rule at § 234.2(p). The sustainable economic development Guiding Principle in the P&R states, “alternative solutions for resolving water resources problems should improve the economic well-being of the Nation for present and future generations through the sustainable use and management of water resources”

Numerous commenters expressed support for the Guiding Principle of sustainable economic development. Commenters suggested that a set of quantitative and qualitative metrics and/or methodologies be developed for measuring sustainable development. Another commenter argued that the goal of sustainable development should be not just for humans and nature to coexist but to thrive. This commenter requested that the definition of sustainable development be strengthened accordingly.

Response: No changes were made to the final rule. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule. The need for metrics and methodologies will be a specific area of review. The Guiding Principle of sustainable economic development is defined in the P&R. The Army reiterates the importance of this Guiding Principle.

Section 234.6(c)(6) Watershed approach. The term “watershed” is defined in the rule at § 234.2(s). When developing alternatives, the water resources problem being addressed should be analyzed on a watershed-based level to facilitate inclusion of a complete range of solutions, after considering the breadth of impacts across the watershed.

The Army received multiple comments on the Guiding Principle of taking a watershed approach in the planning process. The majority of commenters expressed support for this principle. Some commenters offered suggestions for how best to implement this Guiding Principle. Some commenters worried that the watershed approach Guiding Principle effectively mandates a minimum scope (comprehensive, multipurpose watershed analysis) and geographic

scale for all Corps studies, increasing study costs and complexity.

The Army solicited comment on example frameworks, tools, and methods for implementing a watershed approach, such as whether the Department of Energy's Basin-Scale Opportunity Assessment methodology could be adapted for use under the ASPs.

Response: No changes were made to the final rule. The Army reiterates the importance of this Guiding Principle in the PR&G. As a Guiding Principle, the watershed approach does not mandate specific study methodologies or outcomes. The approach does not require all studies to conduct robust and detailed watershed analyses at any specific scope or scale, or require a multipurpose or comprehensive watershed analysis; rather, it acknowledges that watersheds are complex systems and that water resources management entails identifying and addressing systemically interdependent problems. A watershed approach encourages Corps planning teams to maintain awareness of watersheds as systemic units. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

Section 234.6(d) Collaboration.

Section 234.6(d)(1). This paragraph outlines an increased focus on collaboration for the Corps to improve decision-making and promote transparency. The Army recognizes that Tribal Nations, regional, State, local, and non-governmental entities, as well as communities and landowners, are interested in the water resources problems that affect them, have expertise, and share in the responsibility of managing and protecting public water resources. The Corps will seek to collaborate fully with a wide range of affected entities, stakeholders, and the public in all stages of the planning process. The Corps will initiate coordination with appropriate Federal or State agencies administering Federal laws as early in the process as practicable to fully integrate environmental considerations into the planning process, identifying early on critical information, analyses, and requirements needed for the planning decision and maximizing opportunities to avoid and minimize impacts to the human environment to the extent practicable. These engagements should account for the desired form and type of engagement from communities to ensure such engagements are culturally relevant and appropriate. Another key element of the enhanced collaboration is

transparency, ensuring that Tribal Nations and interested parties are kept informed about the Corps' process and various factors under consideration. The Army recognizes that enhanced collaboration and engagement will take time, skill, and commitment on the part of the Corps and project sponsors, as well as those who are engaging in the Corps' process.

Section 234.6(d)(1) also makes clear that enhanced collaboration does not obviate the need for Tribal consultation, where appropriate. In addition, Tribal consultation does not obviate the need for the Corps to ensure that enhanced collaboration with Tribal Nations occurs. Consultation and enhanced collaboration are not the same thing, and in certain circumstances, Tribal engagements result in a greater understanding of the Tribal Nations' needs than what may be achieved in consultation. Tribal Nations may serve as Cooperating Agencies under the NEPA process, contributing their expertise on environmental issues. Engagement beyond consultation is necessary to improve overall relationships and communication with Tribal Nations and to identify areas for participation in and access to Civil Works programs.

Multiple comments supported the intent of this section to enhance collaboration to ensure transparency, promote public participation, and have full collaboration with a wide range of affected Tribal, State, and local governments, non-governmental stakeholders, communities, and the general public. A significant number of letters were received requesting that the rule retain provisions that require the Corps to fully engage with local interests, stakeholders, and Tribal Nations. These letters also recommended that the Corps vigorously assess the impacts of climate change during project planning.

One comment received through Nation-to-Nation consultation on the rule emphasized the importance of early and robust Government-to-Government consultation, not just collaboration, with Tribal Nations, and that consultation, both at the initial stage of formulating alternatives and following more detailed analysis of alternatives, is critical to identifying Tribal treaty rights and water rights that may be impacted by a potential water resources development project. The comment also stated that details regarding the timing and notification of Tribal partners would be helpful guidance to include in the rule. Another comment from a Tribal Organization representing seven Tribal Nations expressed concern that

the Corps will not follow the extensive requirements to consult and collaborate as prescribed in the ASPs.

One commenter expressed concern over Indigenous communities being informed of any changes that could be made on potentially sacred lands.

Response: In response to comments received, the rule was revised. The Corps acknowledges the unique relationship with Tribal governments and is committed to meeting its Federal trust responsibility in accordance with the Corps' Civil Works Tribal Consultation Policy. The rule was amended in § 234.6(d)(1) to acknowledge that robust, early collaboration with Tribes is in addition to the requirement to conduct early, meaningful, and robust Government-to-Government consultation with Tribal Nations.

Section 234.6(d)(2). Although this paragraph recognizes that tools and levels of engagement will vary based on a variety of factors, the section requires use of best practices of engagement, such as the spectrum of engagement from the International Association for Public Participation and modifications from various U.S. government agencies, including the Corps. In addition, the Corps will ensure that it considers and incorporates the information that it receives from Tribal Nations and external sources into the problem definition, the forecast of future conditions, and the alternatives analysis. See § 234.6(c)(1) of the rule and the discussion of § 234.6(c)(1) in the preamble for other considerations in engaging communities with environmental justice concerns.

Another element of enhanced collaboration is in instances where a water resources problem identified in community engagement is beyond the Corps' traditional mission areas. In such instances, the Corps can collaborate with Tribal Nations, Federal, State, and local agencies, and non-governmental organizations or private entities, through either formal or informal public participation processes, such as in scoping, to identify alternative solutions to the problem, including solutions that may be outside Corps mission areas but where communities may seek further assistance elsewhere. Following the ASPs may result in alternatives that are outside (in whole or in part) of the Corps mission areas or its core capabilities, or are better suited to another Federal agency or a Tribal, State, or local government to implement.

Enhanced collaboration also helps to ensure transparency, promote Tribal and public participation, and assist in

developing community-driven solutions to water resources problems. The Corps would ensure that the collaboration includes opportunities for engaged participants to assess the effectiveness of the collaboration, identify areas of concern that could be redressed moving forward, note areas of success to continue to build on for the effort at hand, and discuss lessons learned to inform future efforts.

Multiple commenters expressed strong support for robust collaboration and enhanced transparency in the planning process, with many offering suggestions for implementation. One comment suggested incorporating more specific and explicit engagement requirements throughout the regulation, including that the Corps should bring to the table all relevant State agencies at key points in the planning process. Another comment recommended that the rule direct planners to establish a collaboration and public engagement plan prior to initiation of the formal scoping phase and to modify the plan as needed to improve collaboration throughout the planning process. Other comments suggested the Corps identify and perform outreach to a wide variety of organizations and informal groups, and that the Corps should be required to hold meetings with stakeholders at various stages of the planning process or invest in dedicated staff members for community engagement. Comments requested more details on, and made recommendations for, achieving robust collaboration throughout the planning process and developing a formal approach for community engagement in decision-making.

Response: The Army made minor edits to this section of the Rule for clarity. The Army appreciates the supportive comments on this section. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the rule. This may include additional details on public engagement tools, techniques, and the use of information from local sources.

Section 234.6(e) Investigations and data collection. This section discusses investigations and data collection, which should be ongoing and integrated early in planning process. However, additional investigations should be performed as necessary. The section outlines areas for the study team to consider and relevant data to collect in investigations. It recommends that the Corps leverage existing information and conduct new investigations and data collection, where appropriate, when existing information is not present.

Federally recognized Tribes indicated support for the inclusion of environmental considerations as discussed in the rule and noted that cultural impacts must also be considered. Additionally, one Tribal Nation commented that the rule should identify impacts on historic properties and traditional cultural properties, requesting that the planning process described in § 234.6 identify the need to comply with the National Historic Preservation Act and Native American Graves Protection and Repatriation Act in water resources planning and the operation of existing projects.

Another comment urged that local and regional technical and scientific data be included in the study when that data is available and more specific than Federal data.

Response: No changes were made to the final rule. The Army concurs that impacts on cultural resources and practices will be identified in the planning process for water resources development investment decisions. The Corps must comply with existing Federal laws and regulations, such as the National Historic Preservation Act and Native American Graves Protection and Repatriation Act, as well as treaties with Tribal Nations.

Section 234.6(f) Identify purpose, problems, needs, and opportunities. This section sets out the requirements for framing the investigation of Federal water resources investments. The section also sets expectations for early collaboration with Tribal Nations and stakeholders (also see § 234.6(d)). The Corps would begin with a clear statement of the water resources challenges, including the problems and opportunities to be addressed. The causes of the problems should be identified, as well as any planning objectives, constraints, and the relationship of the problems to the missions, statutory authorities, and other requirements of the Corps. A watershed-based or systems approach should generally be applied when defining the scope of a water resources challenge.

The scope of any study should be broad enough to cover the full range of reasonable alternatives while avoiding an unwieldy number of alternatives. The various perspectives from those participating in the process can ensure a more robust and holistic view of the current conditions and potential solutions to the key water resources challenges.

The scoping process is an iterative process. The scope would include actions to obtain stakeholder, partner, and public input; however, that input

may not be available early in the study process.

Clearly defined problems, opportunities, and constraints are key to enable the Corps to identify a potential Federal investment for consideration. In general, this step corresponds to the identification of the project's purpose and need under NEPA; however, the scoping process for a Corps study may be different than what is required under NEPA scoping. To most fully integrate the PR&G and NEPA processes at the earliest stages, the Corps should describe and request public input on the study purpose, problems, needs and opportunities in the Notice of Intent to prepare an Environmental Impact Statement.

The Corps would seek to align the study scoping for a project and NEPA scoping to the extent practicable. As implementation of NEPA and the PR&G should be fully integrated, the identification of problems, needs, and opportunities apply to both applications and can be accomplished in study scoping. Typically, more background information is available when NEPA scoping is conducted. Corps study teams may not have all the information that is identified in this section of the rule during the initial development of the project management plan. For example, finalizing the planning objectives and constraints to be used in the analysis of the Federal investment cannot be developed until other actions have been conducted, such as inventorying and forecasting, that are identified in the study scope.

The Army solicited comment on how to address specific limitations on the scoping process due to factors such as the scope of the study authority, cost-sharing requirements, non-Federal interest support, and Corps mission areas and core capabilities. The Army also solicited comment on whether there may be terms and conditions under which additional consideration may proceed that would enable the Corps to consider alternatives beyond those that the non-Federal interest supports.

Several comments were received on this topic. One commenter suggested that study goals and objectives should align with the Federal Objective. Another commenter asked for this section of the rule to spell out specifically how the Guiding Principles would guide and constrain the planning process. One comment letter suggested that the Corps explain how individual study objectives comply with the Federal Objective established in WRDA 2007. Another stated that objectives should be broadly framed to avoid the

pre-selection of recommended alternatives and to avoid locking in structural approaches. Another letter encouraged early collaboration to reach agreement on problems to be addressed in a study. One Tribal letter expressed the need to establish study problems, needs, and objectives following consultation with Tribal Nations to better understand Tribal treaty rights. Another comment suggested the rule more clearly describe how social and environmental justice will be considered in the selection of the project study area.

Response: A topographic correction was made to the numbering of this subsection. Additional edits were made to this section of the Rule for clarity. Planning objectives will be developed with input from stakeholders, including consultation with Tribes, and framed in such a manner that they do not prescribe a particular solution. The Guiding Principles are neither procedural mandates nor hard constraints; they are overarching policy polestars. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule. Future planning guidance may provide additional details regarding the development of planning objectives, problems, needs, and opportunities.

Section 234.6(g) Inventory existing resources and forecast future conditions. To determine baselines, the Corps will identify the existing conditions and the baseline levels and, to the extent practicable, identify current trends and variability in key environmental and economic indicators and conditions such as climate, population, urbanization, and land use. The current existing conditions provide the baseline for forecasting both the future “with-project conditions” and the future “without-project conditions.” The inventory and forecast provide information for understanding existing conditions and for establishing a baseline for forecasting “with-project conditions” and “without-project conditions.” The existing conditions and forecast provide a basis for comparing the effects of alternative water resources investments. These forecasts help define the problems, needs and opportunities that the study will address in the subsequent steps.

The existing and forecasted future conditions will include descriptions of the economic, environmental, and social settings within the study area. The Corps will consider future climate change and economic development and land use change scenarios. A watershed approach should also be used in

describing current and future conditions.

The Corps will use peer-reviewed (where possible and appropriate) and reasonable projections. In addition, Indigenous Knowledge and local knowledge should be included in the descriptions, following appropriate procedures for free, prior, and informed consent for use in the descriptions, consistent with memoranda and Executive Orders on the recognition and inclusion of Indigenous Knowledge. The conditions would be described as appropriate and applicable to the specific investment, with consideration for the Guiding Principles of the P&R. The level of detail provided in the inventories should be commensurate with the rest of the analysis and level of scope and scale of the proposed Federal investment.

The forecast of future conditions is comparable to the NEPA identification of future impacts associated with the proposed alternatives. Such comparisons will also be conducted with the No Action alternative. Any key assumptions made for forecasting future conditions will be disclosed.

The terms “without-project condition” and “with-project condition” refer to the conditions that the Corps estimates are most likely to occur in the future over the period of the analysis. Since the future is inherently uncertain, the Corps study should identify and describe the key known drivers of the uncertainties. The inventory of existing resources and forecast of future conditions should also include assumptions for scenarios and for extreme weather events to evaluate sensitivity of alternatives to a range of conditions, such as drought or hurricanes. The Corps will use the scenario analysis and discussions on extreme weather events to inform how alternatives may perform under future conditions with respect to climate resilience. Scenario analyses may help to evaluate other sources of uncertainty beyond those associated with extreme weather or climate conditions.

Reasonably foreseeable actions by public and private entities should be included to understand how key resources and services may change in the future, and used to better understand the most likely future condition in the absence of the proposed Federal investment. As with any projections of future conditions, there is an inherent degree of uncertainty. Characterization of uncertainty should be quantitative, when feasible, and qualitative when not, and should provide a commensurate level of detail to the analysis. Residual

risk that is not proposed to be, or cannot be, addressed or mitigated should be disclosed to aid in the decision-making process. Where the effects of climate variability and climate change are relevant to the investment decision, the study should fully describe the key sources of uncertainty and the range of its possible effects over time.

The proposed future “without-project condition” is what is expected to occur, over the period of analysis, in the absence of a proposed further investment by the Corps in a project, action, or program. The Corps typically uses a 50-year timeframe for the period of analysis (see Engineer Regulation 1105–2–103⁶ paragraph 2–4b(4)). Future land use changes would be incorporated. The future “without-project condition” is the baseline for comparison of alternatives. The proposed future “with-project condition” is what is expected to occur in the future, over the period of analysis, with a specific Corps proposed project or program in place. Climate change would need to be considered in both the future “without-project condition” and the future “with-project condition.” Projections of future conditions would account for expected environmental, social, and economic changes, including those that result from climate variability and climate change, particularly for projects with relatively long service or operational lives, as these projects may be subject to additional climate variability and change.

A summary of the process used to identify the existing and future conditions for the administrative record ensures that appropriate considerations were incorporated and provides transparency in the process. The summary includes discussion of Tribal, partner, stakeholder, and public inputs.

Identification of existing resources seeks to quantify relevant resource conditions in the study area as they currently exist. The forecasting of future conditions would do the same over the period of analysis. The period of analysis does not reflect the expected service or operational life of the investment. The Army solicited comment on what the standard period of analysis should be when the Corps implements the PR&G.

The Corps received several comments indicating that the period of analysis should not be limited to 50 years. Two commenters indicated that the period of evaluation should be extended to 100

⁶ See https://www.publications.usace.army.mil/Portals/76/ER%201105-2-103_7Nov2023.pdf. Last accessed May 21, 2024.

years. One commenter indicated that the design analysis of structures should reflect their actual use life rather than being limited to 50 years, and instead use an “adaptive adaptation” approach rather than planning for a time horizon and then rebuilding when the infrastructure is obsolete. Another commenter recommended that the final rule include new text clarifying the period of analysis regarding project lifespan and the cumulative effects of Federal projects. In particular, they noted that a shorter period of analysis may not account for sea level rise impacts. Another commenter stated that certain Corps projects have conflated existing conditions with the future “without-project conditions,” and requested that the rule specify parameters for the future “without-project conditions.” One comment was received suggesting that when forecasting future conditions, the Corps should also include scenarios for extreme weather events to determine sensitivity to a range of conditions, such as drought or hurricanes. The Corps also received a comment that the analysis consider future conditions that are plausible and result in a high risk of failure.

Response: The Army made minor edits to this section of the Rule for clarity. The Army concurs that a period of evaluation longer than 50 years may be appropriate in some instances. The Corps may issue additional guidance on how the period of analysis will be determined and used in studies. As described above, in standard Corps analyses, future “without-project conditions” include what is expected to occur, over the period of analysis, in the absence of a proposed further investment by the Corps in a project, action, or program. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

Section 234.6(h) Formulate alternatives. The paragraph establishes the framework for developing a full range of alternatives that will address the water resources problem and sets the evaluation criteria of acceptability, efficiency, effectiveness, and completeness. Investigations, data collection, and analysis should be ongoing and should leverage and incorporate information from Tribal, State, local, non-governmental, scientific, and economic literature, and other relevant sources.

A range of potential plans must be investigated with a subset retained for further analysis, including alternatives with only nonstructural elements and an environmentally preferred

alternative. Nonstructural measures and nature-based solutions are important considerations of the PR&G and should be integrated into alternatives for Federal water resources investments wherever appropriate. As with structural solutions, considerations should be made for technical feasibility, land use, cost, past performance, and longevity. In addition, the rule requires the Corps to include an environmentally preferred alternative in the final array of alternatives, which is consistent with the current Corps’ planning process as well as consistent with NEPA.

The Corps will formulate the alternative plans in a systematic manner that ensures that it has identified and considered the full range of reasonable alternatives. The studies will evaluate alternatives based on the most likely future conditions. The alternatives should seek to address the water resources challenge, problem, or need identified in § 234.6(f), achieve the planning objectives of the study and the Federal Objective, and follow the Guiding Principles. Alternatives should reflect potential solutions that are feasible. The range of alternatives provides a framework for comparing the relative effectiveness and efficiency of the alternatives in achieving economic, environmental, and social goals.

In addition, as noted in § 234.6(e), the same period of analysis should be used in alternatives analysis. The period of analysis selected can bias selection of one option or another. A shorter analysis period would benefit alternatives with fewer upfront costs and more upfront benefits, as compared to an alternative with more upfront costs but more long-term benefits and lower cost over time. Thus, the period of analysis selected must be long enough to account for costs and benefits including the principal significant long-term effects.

When an alternative is beyond the Corps missions, such an alternative may be carried forward for further analysis where it provides solutions to the identified problem, meets the identified economic, environmental and social goals, and appropriate funding is available or may be made available (including from other agencies and partners without Corps action). In such case, the alternative should specifically identify the relevant parties with requisite responsibility for any action beyond Corps missions, their authority for that action, the interrelation between that action and the recommended Corps project, action, or program and appropriate sequencing of implementation. Any recommendations for authorization should clearly and

specifically delineate the Federal water resources project being recommended for Corps authorization, and any condition precedent for construction. The rule provides that for Corps investments, the Corps would be the designated lead for completing the PR&G analysis.

The Army solicited comment on whether and when the Corps should consider alternatives beyond those that the non-Federal interest supports, such as when an alternative may be beyond Corps missions.

Several comment letters were received that supported no limitations on alternatives when identifying effective water resources solutions. Another comment letter was received which suggested that in no case should a sponsor or non-Federal interest be asked to support water resources investments that include increments that do not meet their objectives or are beyond their capabilities.

Additional comment letters were received regarding the treatment of alternative solutions, incremental analysis of separable elements and any additional costs to meet investment objectives. Specifically, comments were received indicating that the Corps should establish clear principles on how separable elements and investment increments will be considered within the budget formulation process. One recommended identification and evaluation of all investment increments and separable elements to achieve efficient and effective investment outcomes, to illuminate the value and impact of each project component.

Response: The Army made minor edits to this section of the Rule for clarity. The Corps will review existing guidance and provide updated guidance needs, where warranted, following completion of the final rule. Specifically, the Corps will review guidance regarding the development of alternatives and treatment of separable elements.

Section 234.6(h)(1). In this paragraph, the screening of alternatives in a systematic manner is discussed. An initial set of alternatives would be refined for reasons such as having excessive cost or unavoidable impacts, not sufficiently addressing the problem or opportunity, or other factors. The refinement would also consider the Federal Objective and the Guiding Principles. Alternatives that are eliminated should still be briefly discussed in publicly available documents, as well as the reasons for their elimination. The remaining alternatives are considered the reasonable range of alternatives to be

carried through the analysis and NEPA evaluation. They should be distinct enough to warrant individual consideration and entail different potential solutions to the water resources challenges. The alternatives should describe not just the economic, environmental, and social conditions and benefits, but also impacts. Alternatives should also describe any potential institutional barriers that the Corps or others would have to address or overcome to implement the alternative, including Federal, State, or local statutory or regulatory requirements, and current policies. Transparency and full consideration of economic, environmental, and social effects, both quantifiable and non-quantifiable, must be provided for each alternative. Descriptions of the social, environmental, and economic impacts of not investing, or underinvesting, in any Tribal or disadvantaged community, under the future “without-project condition” and the No Action alternative, should be included. Programmatic-level procedures would generally be expected to have fewer alternatives than project-level procedures, as they are generally of a lower level of detail with fewer options for developing them. In all cases, the alternatives analyzed under the PR&G will be included in the NEPA document. As discussed previously in § 234.6(f) of the preamble, the Corps will work to integrate the PR&G analysis with NEPA to the extent practicable.

Response: The Rule was modified to clarify that the Corps will identify and consider a full range of reasonable alternatives.

Section 234.7 Evaluation framework.

Section 234.7(a) The ASPs provide a common framework and general requirements for the Corps to use in evaluating full consideration of social, environmental, and economic benefits and costs of any separable elements and potential alternatives for Federal investment. This will include their performance with respect to the Guiding Principles, and their contributions to the Federal Objective.

Response: The Army made changes to the Rule for clarity. The Rule was updated to stress the need to fully consider all attributes when evaluating separable elements and alternatives. The Army added the word “clearly” for emphasis.

Section 234.7(b) Economic, environmental, and social effects. The Corps will identify and evaluate the economic, environmental, and social effects across alternatives. Such effects comprise the full range of relevant

public benefits potentially provided by Corps projects.

Many commenters supported evaluation of the economic, environmental, and social effects in the Corps planning process. Some commenters wanted to see stronger language emphasizing that the three categories of effects would be balanced and nonhierarchical between each other, and that the three categories would be equally considered.

Multiple commenters wished to see methodologies detailed in this paragraph. For example, one commenter requested more specifics on how the Corps would account for the social, environmental, and economic impacts of chronic underinvesting in communities, especially disadvantaged communities, during the planning process, while another wanted to know how the Corps would incorporate evaluation of ecosystem services, and yet another wished to see inclusion of cost-effectiveness and reasonable cost as key approaches for evaluating environmental effects. One organization recommended adding language clarifying that the Corps must account for the value of ecosystem services lost as a project cost, and account for the value of ecosystem services gained as a project benefit.

One commenter discussed discount rates and OMB Circulars A–4 and A–94 in the context of this section. Another commenter discussed the similarities between this Section and OMB Circulars A–4 and A–94 and suggested that this section simply reference the OMB Circulars. See preamble § 234.9(c) for the Army’s response to comments on this topic.

Another commenter proposed adding a new paragraph to § 234.7, identifying biodiversity as a priority of alternative plans.

The Army solicited comment on specific tools and methodologies that commenters wished to recommend for quantifying or monetizing economic, environmental, and social effects. Multiple such recommendations were received. Additional recommendations were received regarding qualitative and non-monetary evaluation approaches. Some commenters wished to see an explicit constraint on prioritizing any type of data (quantitative vs. qualitative, monetized vs. non-monetized) over any other. One commenter mentioned that monetization should follow sound economic principles and practices.

Response: The Army edited the rule for clarity: “Relevant monetary, quantitative, and descriptive information will be fully assessed and considered in the analysis.” It is

important to include relevant monetary, quantitative, and qualitative descriptive information in this section. The Army acknowledges the importance of biodiversity as an index of ecosystem health. The Corps already evaluates biodiversity in its studies; future guidance will describe any changes to biodiversity evaluation in the planning process, as appropriate. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule. This may include how the Corps will identify, collect, assess, and consider relevant data of all types.

Section 234.7(c) Best available actionable science and commensurate level of detail. This section of the rule specifies that to support the evaluation of alternatives, the analysis should use the best available actionable science, Indigenous Knowledge, data, techniques, procedures, models, and tools across a wide variety of pertinent subjects.

Regarding data used for planning studies, one comment letter found the terms “actionable science” and “best available science” to be confusing. One commenter recommended including in the rule a commitment to use a specific sea level rise scenario adopted by an interagency task force. Another comment letter conveyed that the Corps should ensure that data utilized in planning studies should meet multiple objectives by producing it in a transferable, accessible, multi-use format at a high enough resolution for use by others beyond the planning context. An additional letter was received commenting on the capabilities that non-Federal interests contribute to water resources investigations, and how this should allow for the use of local or region-specific analysis. One commenter suggested inclusion of “other place-based knowledge” in addition to Indigenous Knowledge. One Tribal Nation letter supported the inclusion of environmental considerations as discussed in 89 FR 10266 and said that cultural impacts must also be considered in evaluations.

Response: No changes were made to the final rule. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

Section 234.7(d) Risk and uncertainty. To improve decision-making, the ASPs require that risks and uncertainty be identified, described, considered, and quantified if feasible. This section explicitly calls for consideration of the costs and benefits of reducing risks and uncertainties.

For project planning purposes, the “risk” of an adverse outcome reflects two factors—the probability that an adverse outcome will occur; and its consequences if it were to occur. The term “uncertainty” is used to express doubt or lack of knowledge about a positive (beneficial) or negative (harmful) outcome. Risk and uncertainty may be expressed either qualitatively or quantitatively. Some elements of uncertainty are described in § 234.6(g) regarding future conditions. The risks and uncertainties need to be disclosed for transparency and in plain language and made relevant to the comparison of alternatives. When available, such risks and uncertainties should be contextualized in a format readily understandable by the public. In some instances, reducing risks and uncertainties may result in increased costs, and the advantages of doing so in informing decision-making should be weighed against those additional costs. The Corps practices risk-informed decision-making (see Planning Manual Part II: Risk-Informed Planning).⁷

The Army solicited comment on risk-informed frameworks to supplement or improve the current risk-informed planning process.

Multiple commenters stated that all risk-informed planning should conform to OMB Circular A–4 and that the Corps should make risk-informed decision-making apply to levee safety consistent with Circular A–4, and refrain from unconventional notions, such as tolerable risk, which are no more than expressions of the risk preferences of the agency or analysts within the agency. Another commenter indicated that the Corps needs to clearly and specifically articulate, in this rule and elsewhere, what the term “risk-informed decision-making” is, how it is to be applied, and under what statutory authorities.

Response: OMB Circular A–4 covers regulatory actions, which are beyond the scope of the ASPs. The Corps may follow OMB Circular A–4, where applicable. The Corps consolidated the discussion of risk and uncertainty in one place in the final rule. Therefore, the final rule no longer includes § 234.10(d); and some of the language proposed in that subsection has moved to § 234.7(d). The Corps also has revised § 234.7(d) to include language on providing an estimate in the study of the extent to which the uncertainty may change over time. The Corps will review existing guidance and provide updated

guidance, where warranted, following completion of the final rule. That review will encompass risk-informed decision-making as well as levee safety guidance and practice.

Section 234.7(e) Adaptive management. Adaptive management is defined under this rule in § 234.2(b). Adaptive management is highlighted as a tool to help reduce or manage uncertainties. The rule calls for adaptive management measures to be clearly identified and evaluated as part of the alternatives. Adaptive management should be considered throughout the process and should be employed as soon as triggers are identified which necessitate such measures. Post-construction adaptive management measures to address unforeseen conditions or impacts of the project should also be included in Corps recommendations for project authorization.

No comments were received on this section.

Response: No changes were made to the final rule.

Section 234.7(f) and (g) Climate change and water availability, water use, and resilience. These paragraphs require consideration of climate change, water availability, water use, and drought and flood resilience in all aspects of the planning process.

The Army received multiple comments supporting this requirement. Many commenters stressed the importance of both climate change and drought resilience and water supply to the health of ecosystems and communities. Some comments recommended specific methods, approaches, or data sources to meet the requirements described in the rule. One comment recommended that a framework be developed that establishes processes and procedures for using inland climate change in the evaluation, design, authorization, and construction of flood risk reduction facilities. One commenter stated that it would be difficult to reassess climate change if it was not evaluated during the planning stage. Another commenter stressed the importance of considering nonstationarity for drought resilience and water supply projects as well as flood risk management studies. One organization sought the inclusion of the consideration of multiple flood risks when conducting investigations.

One commenter asserted that there may be a contradiction between maximizing economic outputs, and protecting and conserving the environment. The commenter did not make specific recommendations to change the rule.

Response: No changes were made to the final rule. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

Section 234.7(h) Nonstructural and nature-based alternatives. This paragraph further describes requirements to develop alternatives that use nonstructural and nature-based solutions to address the water resources problem. Nonstructural approaches are defined in § 234.2(l) of the rule. The paragraph requires the consideration of natural systems, ecosystem processes, and nature-based solutions.

Nonstructural and nature-based alternatives are to be developed with the same rigor as other alternatives. A full nonstructural alternative and a full nature-based solutions alternative will also be included in the final array of alternatives, to the extent that such a solution exists. In some cases, these may be one and the same. Nature-based solutions should also be considered as components of other alternatives in the final array, providing integrated or “hybrid” alternatives with these other measures.

The Army received a comment on this section questioning the inclusion of caveat language for these types of alternatives but not including similar caveat language for structural alternatives. One comment letter was received which expressed the opinion that natural and nature-based solutions may not always be compatible as a remedy and recommended that flexibility be allowed for each situation. The Army received multiple comments suggesting that nonstructural and nature-based alternatives be prioritized, by default, over other alternatives in the formulation and consideration of alternative plans. The Army received comment that nature-based solutions may reduce overall costs and offer more benefits than static-built infrastructure.

Response: The rule text was changed to remove the caveat language. The Army disagrees with the prioritization of various alternatives because they would be inconsistent with a requisite standard of rigor in the evaluation and comparison of potential solutions to water resources problems. In addition, the PR&G note that nonstructural approaches must be given full and equal consideration in the decision-making process. Establishing a higher priority for certain alternatives would contradict the concept of equal consideration. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

⁷ See <https://planning.erdc.dren.mil/toolbox/library/Guidance/PlanningManualPartII/IWR2017R03.pdf>. Last accessed May 21, 2024.

Section 234.7(i) Tribal treaty rights. This paragraph provides that each of the alternatives considered for a water resources investment must protect Tribal treaty rights. Each treaty is unique and must be analyzed to ensure any possible impacts, as well as benefits, to treaty rights are fully understood and accounted for in the evaluation of alternatives. The Corps will ensure consistency with the “Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights”⁸ during the evaluation framework process. The Corps commits to enhancing interagency coordination and collaboration to protect Tribal treaty and reserved rights and to fully implement Federal Government treaty obligations. If Tribal treaty rights preclude selection of an alternative, the Corps will disclose such details. The Corps also commits to following the “Best-Practices for Identifying and Protecting Tribal Treaty Rights, Reserved Rights, and Other Similar Rights in Federal Regulatory Actions and Federal Decision-Making.”⁹

Several commenters supported the inclusion of evaluating Tribal treaty and reserved rights during scoping and throughout the alternatives development and evaluation process in § 234.7(i) of the rule. One public comment suggests consideration of Tribal treaty rights and other environmental justice impacts to ensure that Corps investments appropriately address the needs of historically underrepresented stakeholders and potential uncertainties that may threaten the viability of a project alternative. A Tribal Organization and a Federally recognized Tribe commented that only Congress may abrogate or interfere with Tribal treaty rights, and that the Corps may not recommend a water resources development project that violates Tribal treaty rights. Further, the Federally recognized Tribe recommends that evaluation of Tribal treaty rights starts as a threshold inquiry, not to be deferred to the evaluation phase, as any alternative that violates Tribal treaty rights is not a viable alternative and should be eliminated as soon as it is identified. One comment from a Tribal Nation acknowledges that in some cases the full extent of impacts to Tribal treaty rights

and water rights may not be known until detailed environmental analysis is completed and recommends that impacts to Tribal treaty rights continue to be evaluated at each stage of the project planning process. The comment continues, stating if the Corps determines in consultation with a Tribal Nation that an alternative does not interfere with Tribal treaty or water rights, the Corps must then take affirmative steps to protect and advance Tribal interests throughout the remainder of the planning process, as required by its trust responsibility to Tribal Nations through consultation.

Response: Section 234.7(i) was updated to remove reference to “an otherwise viable alternative” when identifying impacts to Tribal treaty and water rights. The Army agrees that unless Congress provides explicit authority, the agency does not have authority to recommend projects that interfere with Tribal treaty rights. The Army also concurs that this analysis must be done at the earliest phases and iteratively through the plan formulation and evaluation process. Additional edits in § 234.6(d) of the rule added emphasis on the requirement to conduct Nation-to-Nation consultation in addition to the robust, early collaboration with Tribal Nations, which will be paramount in the development of implementing guidance for the PR&G.

Another comment states while Tribal treaty rights should be considered in the analysis, it would be inappropriate for the Corps to determine any treaty or reserved rights that may be in dispute, that Federal agencies are not the appropriate arbitrators of these rights, and this determination is beyond the Corps’ expertise and authority.

Response: Treaties are between the Federal Government and Federally recognized Tribes. The Corps is required to consult with Tribal Nations on potential impacts on Tribal treaty rights through Nation-to-Nation consultation, as treaties are “not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted” (*United States v. Winans*, 198 U.S. 371, 381 (1905)). While the Corps does not get involved in water rights or treaty rights determinations unless it is a part of developing a water resources project, the Corps does have relevant expertise developed through implementation of its statutory authorities and in fulfilling the Federal trust responsibility.

One comment recommends that this evaluation of Tribal treaty rights follow the Department of the Army permitting context to balance the broad range of public and private interest factors and

weigh the cost and benefits of a proposed activity (33 CFR 320.4). Lastly, one comment recommended revisions to the existing Missouri River operations to comply with the treaty provisions in § 234.7(i).

Response: When planning a future water resources investment, the Corps is engaged at each stage of the process—from the initial scoping, through project formulation and evaluation, and ultimately to the recommendation of a water resources investment. In comparison to the Department of the Army permitting context, the project planning process provides multiple opportunities to identify and screen out alternatives that may adversely impact Tribal treaty rights. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the rule to include an evaluation of guidance related to the Tribal Treaty Rights Effects Determination process.

Section 234.7(j) and (k) State water law and international obligations. These paragraphs provide that the alternatives for Federal investments must ensure compliance with State water laws to the extent they do not conflict with Federal laws and regulations as well as treaty and other international obligations. If any constraints within that compliance require an otherwise viable alternative to not be carried forward, then the Corps would disclose those details.

A commenter suggested that a similar statement be added requiring compliance with Federal environmental laws. Another commented that the procedures should require deference to State and local preferences on trade-offs. A commenter noted that a set of statutes broader than “state water laws” may apply to Corps projects and recommended broadening the language to acknowledge all applicable State laws. Another commenter stated the rule must be revised to give deference to State water allocation decisions.

Response: Section 234.7(j) of the rule was modified to broaden the applicability of State laws. Compliance with applicable Federal law is a required baseline. These paragraphs acknowledge the diversity of State laws and international obligations, and explicitly establish a requirement to comply with all applicable such laws.

The Army has not included language in the rule to give deference to State water allocations. The Water Supply Act of 1958 (Title III of Pub. L. 85–500) recognizes the primary responsibilities of the States and local interests in

⁸ See <https://www.doi.gov/sites/doi.gov/files/interagency-mou-protecting-tribal-treaty-and-reserved-rights-11-15-2021.pdf>. Last accessed May 21, 2024.

⁹ See https://www.bia.gov/sites/default/files/dup/inline-files/best_practices_guide.pdf. Last accessed May 21, 2024.

developing water supplies. The Army does not allocate water but allocates the storage space within its reservoirs.

Section 234.7(l) Period of Analysis. This paragraph complements the preamble discussion of § 234.6(g) of the rule regarding the period of analysis and review of alternatives. The period of analysis selected will be documented with appropriate supporting information. The same timeframe would be used across all alternative evaluations. The Corps has typically used a 50-year timeframe for the period of analysis (see Engineer Regulation 1105–2–103 paragraph 2–4b). The Corps recognizes the importance of consistency and comparability within a given study in evaluating the alternatives. Under the final rule, the Corps would determine the period of analysis for each study to reflect a time frame that will sufficiently capture all important effects of each of the alternatives.

The Army solicited comment on whether there should be an upper limit established for the period of analysis. The Army also solicited comment on whether the Corps' current timeframe is the appropriate period of analysis for implementing the Corps' projects. Further, the Army solicited comment on whether the period of analysis should be longer given that some benefits could accrue over timescales beyond 50 years. To round out the period of analysis considerations the Army solicited comment on whether the period of analysis should vary based upon the mission area and the particular purpose and need of the proposed investment.

The Corps received three comments addressing the period of analysis. Two commenters indicated that the period of evaluation should be extended to 100 years. Another indicated that the design analysis of structures should reflect their actual use life rather than being limited to 50 years, and instead use an "adaptive adaptation" approach rather than planning for a time horizon and then rebuilding when the infrastructure is obsolete. Another commenter recommended that the final rule include new text clarifying the period of analysis, including regarding project lifespan and the cumulative effects of Federal projects. In particular, the commenter noted that a shorter period of analysis may not account for sea level rise impacts.

Response: The Army changed the name of this subsection from "Timing" to "Period of Analysis" and made additional edits for clarity. As previously discussed within the Preamble for § 234.6(g), the Army concurs that a period of evaluation

longer than 50 years may be appropriate in some instances. The Corps will review existing guidance and provide updated guidance relative to the period of analysis for investigations, where warranted, following completion of the final rule.

Section 234.8 Final array of alternatives. This paragraph outlines the final array of alternatives to address the problem that would be identified and subject to analysis and consideration. The rule requires the Corps to include six alternatives in the final array: a No Action or "without-project condition" alternative, a fully nonstructural alternative, a fully nature-based alternative, an environmentally preferred alternative, an alternative that seeks to maximize net public benefits, and a locally-preferred alternative. A single alternative might satisfy more than one category, such as a nature-based alternative that is also the net public benefits alternative. There may be cases where there are two or more alternatives in a category that will be considered as part of the final array of alternatives. All alternatives in the final array must be developed using a comparable level of rigor and detail.

The Army received public comments about locally preferred alternatives. One commenter noted that impacted communities should have meaningful and informed input regarding the identification of the locally preferred alternative. Another emphasized the need for analysis to help justify a locally preferred plan as a Federal plan, while another mentioned a need to consider the locally preferred plan in a revised definition of non-Federal interest. Another commenter requested clarity on cost allocation among project purposes and the corresponding cost sharing.

A number of letters were received regarding the treatment of alternatives. One comment identified conflicting statements regarding the requirements to include nonstructural approaches. Another commenter recommended that if any of the required alternatives is not included in the final array, the analysis will need to fully justify that decision. One comment letter suggested that the Corps consider alternatives outside of its authorities if they could maximize net public benefits. Another commenter suggested alternatives be described based on method rather than have alternatives that are based on achieving an objective. Another comment requested that any caveats associated with consideration of alternative plans be removed to force creative thinking about nonstructural and natural and nature-based solutions. One comment letter suggested consideration of natural

and nature-based solutions over all other measures; whereas another letter suggested priority for structural measures in certain applications. One comment letter went further, requesting future guidance clearly identify procedural and methodology requirements to include nonstructural and natural and nature-based solutions. A commenter suggested that the Corps has the discretion to modify the identification of the nature-based solution alternative based on project-specific considerations of local conditions. One commenter indicated that a fully nature-based alternative may limit efforts to identify an implementable nature-based alternative and that nature-based solutions could include structural and non-structural features. One comment recommended that the non-Federal interest be fully involved in determining the final array of alternatives, especially to ensure that they can fulfill any associated requirements for lands, cost-share, and maintenance activities. Another commenter recommended that § 234.8 be accompanied by standard guidance and case studies that exemplify the use of innovative and diverse tools and methods for comprehensive evaluation of economic, social, and environmental benefits. Another commenter indicated that the discussion on the final array of alternatives should be revised to reflect the fact that the final array will include the primary purpose of the analysis and the Federal Objective.

Response: Changes were made to the rule to acknowledge that if one or more of the required alternatives is not included because the Corps was not able to identify a potential solution that is feasible and would be effective, the study must document that decision. The Corps will review existing guidance and provide updated guidance, including procedural requirements and methodology considerations for determining the final array of alternatives, where warranted, following completion of the final rule. The Corps will consider the use of case studies to help illustrate examples of the types of alternatives required to be presented in the final array of alternatives.

For the locally preferred alternatives, all costs above the identified alternative that maximizes net public benefits would be a 100 percent non-Federal cost. Additional policies and procedures for recommending locally preferred alternatives will be covered in future implementing guidance.

Section 234.9 Evaluate effects of alternatives.

Section 234.9(a) and (b). These sections establish the general framework

for the analysis of the effects of the final array of alternatives. The analysis must evaluate how each alternative's benefits compare to its costs, how the alternatives perform with respect to the PR&G's Guiding Principles, how they perform against the objectives of the study, and how they perform against the prescribed formulation criteria of completeness, effectiveness, efficiency, and acceptability. In doing so, the final array of alternatives will be assessed in a manner to best inform decision-making. The objectives of the study should be related to, or stem from, the identified water resources problem or opportunity, and must be clear and focused so that they can be used to evaluate alternatives.

The Army received several comments that recommended including in the rule language from the Interagency Guidelines stating that there is no hierarchy among economic and environmental goals. The Army also received comments requesting that Tribal treaty rights evaluation be acknowledged throughout the planning process in consultation with Tribal Nations. One commenter supports aspects of this section and recommends the ASPs should include a methodology framework and plan selection criteria. Another commenter recommended that the Corps evaluate alternatives for potential impacts on the status of Federal jurisdiction for wetlands. Another comment suggested changing the text of § 234.9(b)(2) to evaluate each alternative against the study objectives and the Federal Objective. One commenter noted that the Army needs to clarify the benefits analysis process on how benefits will be compared, leading to a clear and transparent path to project selection. Another commenter provided suggestions for how best to evaluate alternatives built around nature-based solutions. Another commenter suggested that guidance be developed to ensure the Corps analyzes multiple types of inundation risk in flood risk management studies.

Response: The Army modified the rule text to require full consideration of economic, environmental, or social benefit categories and to require the analysis for the final array of alternatives to identify any impacts to Tribal treaty rights that were unknown earlier in the planning process and which prevent the selection of an alternative. The Corps will review existing guidance and provide updated guidance relative to methodologies and criteria, where warranted, following completion of the final rule. The Corps considers jurisdictional status of wetlands during the planning process.

Section 234.9(c) Consideration of benefits and costs. This paragraph establishes three categories to fully account for the costs and benefits of an alternative and its contributions to the Federal Objective: economic, environmental, and social.

The PR&G does not direct the Corps to develop ASPs that require the selection of a particular alternative investment, but rather to evaluate a range of alternatives. When evaluating an array of alternatives, the Corps will keep in mind a number of key aspects, such as economic, environmental, and social impacts, which are interrelated; not all impacts can be monetized, and impacts described qualitatively should be given full consideration; and there could be more than one alternative that reasonably and approximately meets the Federal Objective and seeks to maximize the public benefits relative to costs.

The paragraph reiterates that the costs and benefits should be quantified and monetized to the extent practicable using a scientifically valid and acceptable way. If qualitative applications are used, they must be of sufficient detail to ensure the decision-maker can make an informed decision understanding both the importance and magnitude of potential changes.

This paragraph is the heart of the PR&G and encapsulates the largest change in Corps decision-making and consideration of Federal water resources investment alternatives. Rather than primarily focusing on national economic development in the alternatives analysis, the ASPs require economic, environmental, and social benefit categories to be considered fully. Qualitative information can be used to further contextualize their social relevance, but double-counting should be avoided.

This paragraph calls for the current dollar value costs, along with non-monetized measures and descriptions of benefits, to be measured against the current dollar value benefits and non-monetized measures and description of benefits of each alternative, and compared to the No Action alternative. Future predicted cost and benefit value (monetized) estimates will be discounted to present value terms for the analysis. The evaluation of alternatives is part of the NEPA alternatives analysis, in which the No Action alternative and Action alternatives are described, evaluated, and compared.

The Army solicited comment on whether to eliminate the three categories to simply account for all costs and benefits without further

categorization which may make it easier to avoid double-counting, although noting that certain costs and benefits may not be as visible if they are not specifically called out in a category.

Several commenters indicated that the Corps should use the three categories. Some commenters mentioned the need for additional guidance, and some recommended that future guidance discuss how non-monetary outputs are weighed against monetary. Multiple commenters suggested that the Corps continue to identify the national economic development plan but should modernize it to reflect environmental and social values.

Response: No changes were made to the final rule regarding the three benefit categories. The Corps will review existing guidance and provide updated guidance relative to benefit and cost methodologies, where warranted, following completion of the final rule.

The Army solicited comment on the selection of discount rates and consideration of whether declining discount rates should follow the guidance in OMB Circulars A-4 and A-94.

The Army received multiple responses on this topic. Two commenters expressed concern about the use of higher discount rates and their impact on analyses. One of these commenters suggested that the Corps expand its consideration of relevant factors to include additional social and environmental factors, and that net present value estimates be reported at a zero-percent discount rate. They felt this can be invaluable when benchmarking new assumptions, methods, and policy approaches. Several commenters indicated that, to the extent practicable and allowable by law, the Corps and OMB should follow the guidance in OMB Circulars A-4 and A-94 related to discount rates. Another commenter suggested that the Corps define the term "minimum standards" in the final rule that can be supplemented with OMB- and Corps-specific guidance. Specifically, the commenter recommended that the Corps should follow A-4 and A-94, adopt the declining discount rate schedule outlined in Circular A-4, and should update the long-term discount rate schedule every three years. Another commenter expressed concern with OMB Circulars A-4 and A-94 and their use of risk adjusted discount rates to account for risk to discount future costs and benefits, and indicated that discounting should only be done to account for the time value of money. This commenter also expressed concern with using declining discount rates.

While not specific to discount rates, a commenter asked for the Corps' perspective on weighted benefit-to-cost ratios as discussed in OMB Circular A-94, while also providing support for including distributional effects in analyses. Support for inclusion of distributional effects was echoed by multiple respondents. Another commenter responded that discounting methodologies applied to ecosystem services or natural resources incorporate the impact of potential scarcity into the future cost and value of these natural services and resources.

Response: No changes were made to the final rule regarding discount rates. In general, the Corps will follow the principles presented in Circulars A-4 and A-94 for implementing a benefit-cost analysis. For clarification, Circular A-94 emphasizes that the preferred way to address risk is through project level certainty equivalents, which adjust uncertain expected values to account for risk. Per Circular A-94, when direct determination of individuals' certainty equivalent valuations is not feasible, the inclusion of a risk premium in the discount rate serves as a practical alternative. The discount rate used by the Corps is based on a requirement in section 80 of WRDA 1974. Where appropriate, the Corps will consider using weighted benefit-to-cost ratios as part of a sensitivity analysis to inform an investment decision.

Distributional effects are often considered but may not be appropriate for some types of investments. For example, the primary benefits associated with an aquatic ecosystem restoration project are realized by the ecosystem that is being restored including the plant and animal species that use that habitat, rather than by any specific members of the public. The Corps does not discount non-monetized outputs.

Another commenter provided several comments regarding how the Corps conducts economic analyses. In particular, the commenter expressed concern with the use of average annual values and the inclusion of interest costs of borrowing. The commenter also mentioned a spreadsheet tool that the Army uses for calculating benefit-to-cost ratios.

Response: No changes were made to the final rule regarding how the Corps performs its economic analyses. The Corps utilizes a constant dollar analysis. There is no comingling of constant or inflated values. Costs are counted in the analysis in the year they are incurred. The average annual calculations are the result of the present value being factored with the capital recovery factor.

The capital recovery factor is calculated utilizing the discount rate used in the present value calculations and the period of analysis and represents sound economic evaluation. Current technical practices utilize the best available tools and are subject to peer review requirements. The Corps does not have a singular spreadsheet tool that is used to determine benefit-to-cost ratios. While a particular study may use such a tool, the Corps uses a variety of approved models in aiding with economic analyses.

The ASPs intentionally do not dictate specific evaluation tools, methods, or processes. These tools and methods will evolve over time and the Corps is committed to using the best available tools and methods appropriate for the analysis, now and in the future. In this manner, the Corps can be nimble in changing with the evolving science, knowledge, data, and methods, rather than promulgating a prescriptive method in regulatory text that may quickly become outdated.

The Army solicited comment on tools and methodologies. While the ASPs do not prescribe the techniques to be used to quantify and monetize costs and benefits, the Corps' analysis must include information to justify the use of any technique as the most appropriate given the circumstances, how it compares to other methods that could have been used (pros vs. cons), and what are the risks and uncertainties inherent in using that particular technique. The ASPs allow for the use of new analytical techniques and methodologies as they become available and cost-effective. Costs would include the costs of O&M. One comment was provided which indicated that the final regulation should more clearly describe how O&M costs projected for the Corps and local sponsors are to be included in the benefit-cost analysis used to evaluate the range of project alternatives.

Response: No changes were made to the final rule regarding tools and methodologies. All O&M costs incurred by the Corps or others during the period of evaluation for the study are included in the analysis. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

The Army solicited comment on how such analysis would best be conducted for projects affecting Tribal Nations, and whether the Corps should identify, characterize, and evaluate the benefits to the Tribal Nation separately, as opposed to including them in a broader assessment of the overall benefits of the proposed project and the alternatives to

the U.S. Nation (including the affected Tribal Nations).

One comment supported the inclusion of subsistence and social impact assessments and greater transparency for evaluating benefits and impacts under the environmental justice analysis of a proposed project. One comment stated that the impacts of existing Corps projects and climate change on Tribal watersheds should be fully evaluated, as the costs suffered by Tribes should be identified separately from any other costs or damages incurred, including mitigation. Two comments specifically supported the use of a social impact assessment methodology to determine social costs of a proposed water resources project, with one comment asking for it to be added as a Guiding Principle of the PR&G.

Response: Changes were made to the final rule regarding the treatment of Tribal benefits. As noted in the discussion of § 234.4(c) in this preamble, several comments supported the separation of Tribal benefits from public benefits. The rule was amended to state that the consideration of benefits to Federally recognized Tribes will be done in direct consultation with the respective Tribal Nation and will supplement the public benefit analysis. While the PR&G apply to new water resources development investment decisions (except for those Federal activities noted in § 234.4(d)(2)), compliance with other Federal statutes and laws would still be required. Social impact analysis is a methodology that could be used to evaluate social costs and will be considered during the development of implementing guidance, where warranted, following the completion of the final rule.

Section 234.10 Compare alternatives.

Section 234.10(a) Comparing alternatives. This section calls for alternatives to be compared with each other and the No Action alternative. The alternatives would include a description of the adaptability and resilience of alternatives to climate change and other risks. The alternative plan (or plans) that reasonably maximizes net public benefits would be identified. The ASPs explicitly call for robust engagement to provide meaningful participation and input from Tribal Nations and stakeholders as they may have different perspectives, values, considerations, and information on potential effects to inform tradeoffs between alternatives.

The Army solicited comment on how it could compare alternatives and develop a recommendation.

One comment recommended that this section of the rule be strengthened to indicate that the considerations must include beneficiaries and any others that will be significantly impacted, and that their perspectives and preferences will be elicited on alternatives. Another commenter suggested the text in § 234.10(a) include obtaining values and input from stakeholders and the affected community. One commenter recommended additional guidance to assist planners in determining how to maximize net public benefits. One commenter supported the inclusion of environmental justice benefits and costs among the display of effects of alternatives.

Response: The Army made minor edits to this section of the Rule for clarity. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

The Army also solicited comment on when it would be appropriate to apply multi-criteria decision analysis within a PR&G analysis. One commenter responded and indicated that multi-criteria decision analysis would be appropriate to use as a decision aiding tool.

Response: No changes were made to the final rule regarding the use of multi-criteria decision analysis. Multi-criteria decision analysis is a tool that may be used for assessing the tradeoffs among alternatives and can aid in decision-making. The Corps will review existing guidance and provide updated guidance relative to comparing alternatives, where warranted, following completion of the final rule.

Another approach that could be followed is structured decision-making. In addition, in certain instances, the Corps has employed decision frameworks such as using resilience as a guiding strategy under the City Resilience Framework¹⁰ for the Coastal Texas study. The City Resilience Framework presents a broad, multi-dimensional perspective on the integrated conditions that support resilience within a community. The framework highlights four dimensions of resilience: Health and Wellbeing, Economy and Society, Infrastructure and Environment, and Leadership and Strategy. The Army solicited comment on whether the City Resilience Framework aligns with the PR&G Guiding Principles and if it could be

employed in a decision framework under the ASPs.

One commenter mentioned that the City Resilience Framework could be used for assessing tradeoffs and effects of alternatives.

Response: No changes were made to the rule. The Corps will review existing guidance and provide updated guidance relative to the PR&G decision framework, where warranted, following completion of the final rule.

The Army solicited comment on the various frameworks and methods that may be employed in the decision-making process when facing a multi-dimensional problem with complex tradeoffs between monetary and non-monetary outputs and quantitative and qualitative data, which would support objective analysis and sound decision-making.

The Army received comments that there should be a specific system of accounts to realistically evaluate and balance tradeoffs. Others recommended that the four accounts from the 1983 P&G be included in the ASPs. One commenter requested additional detail and guidance related to the evaluation and comparison of factors that cannot be monetized or quantitatively evaluated.

The Army solicited comment on whether the Corps should pursue a more straightforward approach, maximizing net public benefits as a primary metric for comparing the alternatives and evaluating the tradeoffs, and clarify the decision framework.

The Army received comments that additional direction should be provided to assist planners in determining how to maximize net public benefits.

Response: No changes were made to the final rule. The Corps will review existing guidance and provide updated guidance relative to tools, methods, and processes, where warranted, following completion of the final rule.

The Army received comments through Government-to-Government consultation regarding Tribal Nations as beneficiaries and appropriately identifying benefits to Tribes. Tradeoff analysis will not be used to identify potential mitigation of loss of treaty rights, and benefits to Tribal Nations can only be identified through direct consultation.

Response: The rule was amended in § 234.10(a)(3) to state that Tribal treaty rights are guaranteed by such treaties. As mentioned earlier, § 234.9(c) was amended to ensure that the consideration of benefits to Federally recognized Tribes is done in consultation with the respective Tribal Nation.

Section 234.10(b) Tradeoffs. Tradeoffs are anticipated and expected for the implementation of the ASPs regarding the potential alternatives. Tradeoffs are assessed from the perspective of the specific circumstances of each study, including the study area, resources, impacted populations, and study authority to inform plan selection.

The tradeoffs will be described throughout the decision-making process to ensure an informed decision. Different project elements may be justified for different types of public benefits, that should be described. Tradeoffs may be identified on the basis of both quantifiable and unquantifiable terms. In addition, each alternative's separable element's goals and objectives should be identified to provide a rationale for inclusion or exclusion from the alternative.

The Army solicited comment on whether the Corps should pursue a more straightforward approach, using maximizing the net benefits as a primary metric for use in comparing the alternatives and evaluating the tradeoffs, and to clarify the decision framework.

Multiple commenters indicated that a system of accounts to evaluate tradeoffs should be displayed to be complete and transparent. Several commenters suggested that the non-Federal interest and other stakeholders be included in the decision of the tradeoff analysis. One commenter requested that the phrase "professional judgment" be clarified. Another noted that investment decisions should be based on complete and transparent tradeoffs. One commenter mentioned that the Corps should clarify that benefit-cost analysis is an appropriate decision framework and that net benefit maximization is an appropriate decision criterion.

Response: No changes were made to the final rule. Benefit-cost analysis is the basis for plan selection, and net public benefit maximization is fundamental to the ASPs. Section 234.10(a)(3) of the rule explicitly requires consideration of the preferences of Tribal Nations and stakeholders when comparing alternatives. The phrase "professional judgment" is now defined in § 234.2(m) of the final rule. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

Section 234.10(c) Information for inclusion in the analysis. This paragraph outlines the information and tables that will promote consistency and transparency in comparisons across different studies. The information to be included in the analysis and documentation is consistent with other

¹⁰ See <https://www.rockefellerfoundation.org/report/city-resilience-framework/>. Last accessed May 21, 2024.

Federal agency approaches in their ASPs, so it can also provide consistency across the Federal Government. Information must highlight how alternatives achieve the four evaluation criteria of completeness, effectiveness, efficiency, and acceptability.

Additional tradeoff displays should show any other relevant important information. A summary table will display the economic, environmental, and social costs and benefits, and another table would indicate the extent to which the alternatives achieve the Guiding Principles.

The Corps should use the most readily available, scientifically acceptable, and best available data and information, to include Indigenous Knowledge, for assessing tradeoffs.

The Interagency Guidelines support use of a common framework that would be used across agencies enhance transparency and clarity about the decision-making process, and encourage agencies to collaborate to develop these common displays.

The Army solicited comment on the tools, methods, and processes for assessing the tradeoffs to best elicit preferences resulting in the most informed recommendations in a consistent manner, although variation is expected due to the nature and diversity of water resources and their associated challenges, which vary greatly across the Nation.

Several commenters identified the need to refine methodologies to ensure that local and regional benefits are not overshadowed by national considerations and should be acknowledged in the benefit evaluations and decisions.

Response: No changes were made to the final rule. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

Section 234.10(d) Risk and uncertainty. This section requires a description of areas of risk and uncertainty with sufficient detail so that decisions can be made with knowledge of the degree of reliability and the limits of available information, recognizing that even with the best available engineering and science, risk and uncertainty will always remain. From the vantage point of one who is deciding now whether to propose an investment in water resources to achieve results in the future, the risk and uncertainty in the outcome tend to increase over time. Therefore, the study should include an analysis of the range of expected results from the investment both in the short-term and in the less predictable future,

in order more fully to account for the effects of the risk and uncertainty.

The Army solicited comment on the Corps' approach to identifying areas of risk and uncertainty, including whether certain Corps studies should include an estimate of the return on investment under current conditions.

Commenters supported using science to describe risks and uncertainty. One commenter suggested alternative methods to conduct efficiency analysis.

Response: The Corps consolidated the discussion of risk and uncertainty in one place in the final rule. Therefore, the final rule no longer includes § 234.10(d); and some of the language proposed in that subsection has moved to § 234.7(d). The Corps also has revised § 234.7(d) to include language on providing an estimate in the study of the extent to which the uncertainty may change over time. The Corps will review existing guidance and provide updated guidance relative to methods to account for risks and uncertainties, where warranted, following completion of the final rule.

Section 234.11 Select the recommended plan.

Section 234.11(a) Recommended plan. The Corps will recommend a decision to either: (1) propose authorization of an alternative project, program or plan; (2) pursue an alternative under existing law; (3) propose implementation of a project, program or plan to be implemented by others; or (4) take no further Corps action. Federal investments should seek to achieve the Federal Objective and maximize net public benefits, as measured by the economic, environmental, and social costs and benefits to the Nation.

The PR&G help the Federal Government improve decision-making by accounting for long-term costs and benefits; developing investments to withstand or adapt to climate change; creating better, more resilient communities; and avoiding conflicts and project delays by including local input.

Multiple letters were received containing comments associated with § 234.11. One comment suggested additional explanation of how preferences from non-Federal sponsors, Tribal Nations, stakeholders, and others will be considered in the decision-making process. The same letter also suggested the rule incorporate methods for monetizing environmental and social effects. One comment expressed a need for a requirement to explain how these preferences were incorporated into the analysis and considered in the decision-making process. A letter supported consideration of tools for tradeoff

analysis for a more structured decision-making process, and supported explicitly documenting the process. Another letter requested that the rule require the rationale for plan selection to include how non-Federal sponsors and stakeholders were engaged in plan selection. One comment expanded on a recommendation to include plan selection criteria in the rule to inform non-Federal interests and the public of these requirements, and to further support Congressional authorization and appropriation steps to lead to successful cost-shared project implementation. One comment recommended an edit to § 234.11 by adding "consistent with achieving the Federal objective of protecting and restoring the nation's environment." Another commenter suggested tying the selection of a plan to the Federal Objective. One organization commented that it remains to be seen how benefits analysis would be used to select a plan and that there could be inconsistencies nationwide.

Response: Edits were made to the final rule regarding investment recommendations and consideration of monetized and non-monetized outputs in the decision-making process. The Rule was further modified to require the Corps to analyze and fully consider all social, environmental, and economic benefits and costs of each separable element of a proposed investment. Section 234.10(a)(3) of the final rule explicitly requires consideration of the preferences of Tribal Nations and stakeholders when comparing alternatives. Sections 234.6 and 234.7(i) of the final rule specify that the Corps will identify potential impacts to Tribal treaty rights at the earliest phases and throughout the plan evaluation process, screening alternatives that impact Tribal treaty and water rights. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

The Army disagrees with comments about the use of benefits analysis and potential nationwide inconsistencies. No changes were made to the rule in this regard.

Section 234.11(b) Exceptions. The rule allows for exceptions for a recommended plan that does not maximize net public benefits; however, such exceptions must be approved by the Assistant Secretary of the Army for Civil Works. This policy underscores the importance of the PR&G approach to put forth a recommended plan that seeks to maximize net public benefits.

Multiple comment letters were provided regarding this section of the rule. One questioned whether an

exception would not be required for recommended plans that do not meet the authorized study purpose. Another letter suggested the rule consider options to require additional support from cost-share partners and others. Another recommended removing language in §§ 234.3 and/or 234.11(b) potentially allowing unbounded exceptions.

Response: No changes were made to the rule. Input from non-Federal interests, Tribal Nations, stakeholders, affected populations, and other interested parties is routinely considered in the decision-making process. The Corps will review existing guidance and provide updated guidance relative to policy and procedural requirements, where warranted, following completion of the final rule. An exception from the Assistant Secretary of the Army for Civil Works will be required if recommending a plan other than the plan that maximizes net public benefits.

Additional comments received. A number of comments that are outside of the various sections of the rule or did not explicitly address questions posed by Army in the proposed rule. For example, one commenter recommended the use of a commercial ecosystem-friendly marine concrete product that can be used for marine infrastructure work. While this input is noted, specific products are beyond the scope of the ASPs.

Many of the comments received on the rule asked for additional details on the specific methods, procedures, tools, techniques, and relevant examples that the Corps would use for implementation of these ASPs. One comment requested that future guidance address requirements for how the Corps will complete studies under the ASPs within the three-year study duration and three-million-dollar Federal cost framework of Section 1001 of the Water Resources Reform and Development Act of 2014 (Pub. L. 113–121). This letter further recommended earlier vertical integration within the Corps while freeing up more time for plan formulation. One comment stressed the need for vertical integration during the initial application of these ASPs to ensure implementation challenges are addressed efficiently. A comment was received during a virtual public meeting requesting that non-Federal interests be included in training opportunities associated with the application of the ASPs. A number of comments requested that any implementation guidance be developed in a transparent manner to include an opportunity for public input.

Response: No changes were made to the final rule. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule. The Corps will review the need for updated procedures, methodologies, and other requirements, as well as public engagement, to effectively implement the rule.

A comment was received from a professional association recommending that project delivery teams be comprised of qualified staff and disciplines, including landscape architects, during all project phases. This association also indicated that landscape architecture design and planning can reduce and mitigate ecological harm, improve resilience, and adapt communities to the effects of climate change. Another organization offered its support and services in developing water resources projects and facilitating public processes. A local entity suggested adding language recognizing the non-Federal sponsor as a true member of the team. One letter noted the non-Federal sponsor should be highly valued and leveraged in the development of project authorization documents and for insights into the decision-making process. One organization suggested the inclusion of Engineering With Nature scientists to support the development and design of nature-based solutions for risk reduction.

Response: No changes were made to the rule. These comments are noted. It is current practice to build project delivery teams from appropriate qualified staff to address the particular water resources issue under investigation. This would include staff from within the Corps, non-Federal interests, partners, and other external resources.

One commenter suggested that the ASPs include a discussion on the requirements of Section 8106 of WRDA 2022.

Response: No changes were made to the rule. The Corps issued implementation guidance for Section 8106(a) and 8106(b) of WRDA 2022 in February 2024.¹¹ The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule.

One comment expressed concern that the ASPs mandate multi-purpose projects, and expressed particular concern about the impact that such a mandate would have on shoreline protection projects.

Response: No changes were made to the rule. The ASPs do not mandate multi-purpose projects. Alternatives will be formulated based on the specific study authorization and in consultation with the non-Federal sponsor and other stakeholders with no requirement for a project to be multi-purpose. While projects will evaluate social, economic, and environmental benefits, many studies will remain single purpose.

One comment focused on regulatory protections for fishing grounds.

Response: Comment is noted although it is beyond the scope of this rule. No changes were made to the rule.

One organization noted that conflicting State and Federal regulations may hinder the implementation of nature-based solutions. They recommended convening leadership of State and Federal agencies to discuss which existing laws are relevant to promoting marsh and wetland preservation and restoration in response to the impacts of sea level rise, and which laws hinder improvements to coastal resilience. They noted that determining how to accept and compromise on habitat trade-offs will be an important discussion topic and that placing dredged sediment in open water to maintain wetland footprints is needed for long-term coastal resilience. The commenters suggested that the meeting would aim to develop exemptions or revise regulations and policies to help promote the cost-effectiveness of nature-based solutions.

Response: The proposed resolution of the comment extends beyond the need and intent of this rule. No changes were made to the rule.

One comment was received regarding the feasibility of land acquisition that non-Federal interests are required to provide for project implementation.

Response: No changes were made to the rule. Real estate is the responsibility of the non-Federal interest for any Corps water resources development project. If a non-Federal interest is unable to acquire the necessary real estate, plan selection could be affected.

A responding organization offered comment on the need for the Corps to expand its capacity and to begin attracting and elevating the skills necessary to apply the ASPs from within its ranks.

Response: No changes were made to the rule. The Corps recognizes the need to develop and train staff to perform the analysis and other elements of the ASPs. These efforts will be a key factor in the success of the new framework.

One commenter indicated that the Corps should base cost estimates on realistic projections of the project's full

¹¹ See <https://www.usace.army.mil/Missions/Civil-Works/Project-Planning/Legislative-Links/WRDA-2022/>. Last accessed May 21, 2024.

life-cycle costs, likely construction start date, likely funding streams over time, and historical cost increases by project type and geographic location.

Response: No changes were made to the rule. The Corps will review existing guidance and provide updated guidance, where warranted, following completion of the final rule. The Corps considers life cycle costs, likely construction start dates, and geographic locations when developing its cost estimates.

E. Expected Benefits and Costs of the Rule

Overall, this rule provides greater flexibility to the Federal Government and non-Federal interests to consider a wider range of benefits, improve the effectiveness of Federal and local investments in Civil Works projects, and provide water resources projects that better serve communities and the public. Informed by a more detailed understanding of various risks, Federal, State, local, and Tribal governments can apply available resources to the activities that are most likely to produce public benefits. A full accounting of benefits and costs will result in projects that increase public benefits. An increased focus on collaboration throughout the planning process: ensures projects benefit from local knowledge, improves Federal decision-making, and promotes transparency and responsiveness. A focus on environmental justice ensures that the Federal Government's resources benefit disadvantaged communities, including many communities that are overburdened by pollution and marginalized by underinvestment. The Corps has eleven covered programs under the Justice40 Initiative¹² that would apply the ASPs as described in this rule. The use of an ecosystem services approach allows the planning process to better anticipate and account for the effects of a Federal investment.

As the Corps starts implementing this new approach, evaluation and decision-making methods, tools, and processes will need to be developed, resulting in increased costs in time and effort for all parties. More resources will likely be directed to the evaluation of social, environmental, and non-traditional economic benefits and costs; engagement with other governmental and non-governmental partners; and assessing and communicating risks and uncertainties to the public. The Corps Civil Works program is committed to

ensuring development of an adequate study scope and documentation; establishing a realistic schedule and budget early in the study process; and ensuring adequate leveraging of data, models, methods, and information from Tribal, State, local, and non-governmental resources to assist in development and evaluation of alternatives.

This rule will mostly affect the Investigations appropriations account of the Corps, that Congress uses to provide funding for authorized feasibility studies of potential new Civil Works projects, major rehabilitation studies, and general reevaluation and review studies. The ASPs will also affect the Continuing Authorities Program funded out of the Construction appropriations account, and Section 216 and reallocation studies funded out of the O&M appropriations account. We anticipate the costs to the Federal Government to implement the rule to remain roughly the same as under the current planning process since the ASPs change only the process to select the recommended project alternative rather than the Congressional appropriation process. The estimated value added to these projects as a result of the application of the ASPs would exceed any estimated added costs. The change to the Corps' internal process results in a shift in focus from strictly an economic evaluation to one evaluating economic, environmental, and social considerations. This would require additional tools and methods as described in the rule preamble which are existing, in development, or would evolve as science and analytical studies improve over time. The Corps uses tools and methods for the current approach, and will tools and methods to the current approach to include social and environmental considerations. This new process will require additional trainings and the development of tools and methods not currently available, which may result in some minor additional costs to the Corps. Those initial costs would be outweighed by the long-term benefits of the implementation of the ASPs and efficiencies gained by the use of new tools and methods. The costs to the public would be the same as under the current planning process. The Corps' planning process and Civil Works programs and projects that fall under the ASPs are not mandatory or obligatory requirements on the public, but rather are initiated and voluntarily entered into by the non-Federal interest and the Corps pursuant to Congressional authorization.

See the Regulatory Impact Analysis for further discussion on the benefits and costs of the rule.

F. Procedural Requirements

a. Executive Order 12866: Regulatory Planning and Review; Executive Order 13563: Improving Regulation and Regulatory Review. Executive Order 12866 (58 FR 51735 (Oct. 4, 1993)), as amended by Executive Order 14094 (88 FR 21879 (Apr. 11, 2023)), defines a "significant regulatory action" as one that is likely to result in a rule that may:

- (1) have an annual effect on the economy of \$200 million or more (adjusted every three years by the Administrator of the Office of Information and Regulatory Affairs for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or Tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in this Executive Order, as specifically authorized in a timely manner by the Administrator of the Office of Information and Regulatory Affairs in each case.

This rule has been found to be a significant regulatory action and has therefore been submitted to OMB for clearance.

This rule establishes the procedures to implement the PR&G but does not, by itself, impose costs or benefits. Potential costs and benefits would only be incurred as a result of actions taken under existing Corps programs relying on these procedures. See the Regulatory Impact Analysis for further discussion on the costs and benefits of the rule.

b. Review under the National Environmental Policy Act. As required by NEPA, the Department of the Army prepares appropriate environmental analyses for its activities affecting the quality of the human environment. The Corps has determined that this regulation would not significantly affect the quality of the human environment. The rule establishes the procedure the Corps will consider in evaluating investments in projects, programs, and plans. The Corps will conduct an action-specific NEPA analysis before

¹² See <https://www.whitehouse.gov/environmentaljustice/justice40/>. Last accessed May 21, 2024.

undertaking any activities that could potentially affect the quality of the human environment and will integrate the NEPA process with the procedure laid out in this rule. A draft Environmental Assessment was prepared and circulated to support this rule-making process. As a result of the public comment period, no significant changes were made to the final Environmental Assessment. The only edits included the removal of the proposed rule, adding a summary of the public involvement process, and adding the determination that an Environmental Impact Statement is not required for the promulgation of the regulation. The final Environmental Assessment to support this determination is available at <http://www.regulations.gov>.

c. Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4). The Unfunded Mandates Reform Act does not apply to this rule because this rule provides policy for Corps Civil Works planning processes authorized through congressional action. The Corps has also found, under Section 203 of the Act, that small governments, as defined under the Regulatory Flexibility Act analysis, will not be significantly and uniquely affected by this rulemaking. Although small governments may be non-Federal interests for a Corps project and therefore be involved in the ASPs, there are other forms of non-Federal interests and other entities engaged in the process, so small governments are not uniquely affected. The action imposes no enforceable duty on any Tribal, State, or local governments, or the private sector.

d. Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.). This rule does not impose any information collection requirements for which OMB approval under the PRA is required.

e. Executive Order 13132: Federalism. This rule will not have substantial direct effects on the States, the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

f. Regulatory Flexibility Act. The Regulatory Flexibility Act, as amended (5 U.S.C. 601 et seq.), generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and

small governmental jurisdictions. For purposes of assessing the impacts of the rule on small entities, a small entity is defined as: (1) a small business based on the Small Business Administration size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

The Army certified that this regulation does not have a significant effect on a substantial number of small entities. The regulation merely provides ASPs for the Corps' planning processes implementing the PR&G. Although small entities might benefit from such Corps water resources development projects—just as large entities and private individuals might—the agency procedures under the regulation do not place any burden on small entities.

g. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. Under Executive Order 13175, the Federal Government may not issue a regulation that has substantial, direct effects on one or more Tribal Nations, on the relationship between the Federal Government and Tribal Nations, or on the distribution of powers and responsibilities between the Federal Government and Tribal Nations. The Executive Order also states the Federal Government may not issue a regulation that imposes substantial direct compliance costs on those communities, and that is not required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance cost incurred by the Tribal Nation governments, or the Federal Government consults with those governments. If complying by consulting, Executive Order 13175 requires agencies to provide OMB, in a separately identified section of the preamble to the rule, a description of the extent of prior consultation with representatives of affected Tribal Nation governments, a summary of the nature of Tribal Nation concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13175 requires that agencies develop an effective process permitting elected officials and other representatives of Tribal Nation governments an opportunity to provide timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.

This regulation does not impose significant compliance costs on any

Tribal Nation, nor does it otherwise have substantial direct effects on any Tribal Nation. The regulation merely provides agency procedures specific to the Corps to implement the PR&G. Whether the Corps initiates a water resources development project for Federal investment depends on if it is authorized by Congress. The Army believes that the regulation itself does not directly result in a substantial, direct effect on the relationship between the Army and Tribal Nations but does recognize that implementation of the ASPs at a project, program, or plan level may result in improved engagement and collaboration and appropriate solutions to water resources problems in partnership with Tribal Nations. The Army's initiatives to comply with the Executive Order include: (1) initiating Government-to-Government consultation on the **Federal Register** notice to Modernize Civil Works (87 FR 33756 (June 3, 2022)) to permit meaningful, early, and robust engagement in development of the proposed rule; (2) conducting a virtual meeting on this effort with Tribal Nations held on July 21, 2022; (3) responding to all requests for one-on-one consultation and meeting with three Tribal Nations at a leader-to-leader level and one Tribal Nation at a staff-level.

The Army conducted Government-to-Government consultation on this rule action through a specific Dear Tribal Leaders letter sent to Tribal leaders. In addition, the virtual public meeting held on March 19, 2024, was intended to receive Tribal comments on the proposed rule. Tribal Nations were invited to submit written comments to the docket for this rule. All letters received by the Army as part of the Tribal consultation process may be found in the docket (www.regulations.gov at Docket ID COE-2023-0005). In addition, the Army engaged in Government-to-Government consultation with one Tribal Nation on this rule in accordance with the existing Tribal Consultation Policy. The Corps' provision of water resources development projects and services does not affect the distribution of power or responsibilities between the Federal Government and Tribal Nations. This rule will neither impose substantial direct compliance costs on federally recognized Tribal governments nor preempt Tribal law.

h. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks. The Army interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the agencies

have reason to believe may disproportionately affect children, per the definition of the term “covered regulatory action” in Section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

i. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. This action is not a significant energy action because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

j. National Technology Transfer and Advancement Act. This rulemaking does not involve technical standards, and as such does not trigger requirements under the National Technology Transfer and Advancement Act.

k. Executive Order 14096: Revitalizing Our Nation’s Commitment to Environmental Justice for All; Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations. The Army believes that this action does not have disproportionate and adverse human health or environmental effects on communities with environmental justice concerns.

The ASPs amplify the goals of Executive Order 14096 by incorporating environmental justice principles into the Corps’ planning processes, connected with and as part of environmental and economic goals, as opposed to solely relying on economic justification.

For this rule, consistent with the governing statute and Executive Order 14096, the Army considered whether the change in benefits due to this rule may be differentially distributed among communities with environmental justice concerns in the affected areas when compared to both baselines. This rule action establishes a process for the Corps to identify a final array of alternatives for water resources development project investments and to inform the recommended plan. The rule would not directly result or contribute to benefits to any particular community, as such projects must be congressionally authorized and appropriated. However, the consideration of social, environmental, and economic goals, out of necessity, incorporates environmental justice considerations into those alternatives and the Corps’ recommended alternative. The impacts of the changes to the Corps’ processes proposed in this rule would be beneficial to communities with

environmental justice concerns because it ensures environmental justice considerations are brought forth and considered in the Corps’ Civil Works processes.

l. Congressional Review Act (CRA). This action is subject to the CRA, and the Corps will submit a rule report to each House of the Congress and to the Comptroller General of the United States. Pursuant to the CRA (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a “major rule”, as defined by 5 U.S.C. 804(2).

List of Subjects in 33 CFR Part 234

Administrative practice and procedure, Intergovernmental relations, Technical assistance, Water resources.

Approved by:

Jaime A. Pinkham,

Acting Assistant Secretary of the Army (Civil Works).

■ Accordingly, for reasons stated in the preamble, 33 CFR part 234 is added to read as follows:

PART 234—CORPS OF ENGINEERS AGENCY SPECIFIC PROCEDURES TO IMPLEMENT THE PRINCIPLES, REQUIREMENTS AND GUIDELINES FOR FEDERAL INVESTMENTS IN WATER RESOURCES

Sec.

- 234.1 General.
- 234.2 Definitions.
- 234.3 Exceptions.
- 234.4 Objectives and applicability.
- 234.5 Level of analysis.
- 234.6 The planning process.
- 234.7 Evaluation framework.
- 234.8 Final array of alternatives.
- 234.9 Evaluate effects of alternatives.
- 234.10 Compare alternatives.
- 234.11 Select the recommended plan.

Authority: 42 U.S.C. 1962–3.

§ 234.1 General.

(a) This part prescribes the Agency Specific Procedures (ASPs) for the United States Army Corps of Engineers (Corps) to execute its Civil Works mission, in accordance with the Water Resources Principles and Guidelines defined in section 2031 of the Water Resources and Development Act (WRDA) of 2007 (Pub. L. 110–114; 42 U.S.C. 1962–3), the Principles, Requirements and Guidelines (PR&G) issued by the Council on Environmental Quality and approved by the Water Resources Council, and as called for in section 110 of WRDA 2020 (Division AA of Pub. L. 116–260).

(b) Section 2031 of the WRDA of 2007 (Pub. L. 110–114) directed the Secretary

of the Army to revise the March 10, 1983, Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies (P&G) for Corps use and to address the following considerations: advancements in economic and analytic techniques; public safety; low-income communities; nonstructural approaches; interaction with other water resources projects and programs; integrated and adaptive management; and use of public benefits to justify projects. This WRDA provision also provided that the Federal Objective is to reflect national priorities, encourage economic development, and protect the environment by seeking to maximize sustainable economic development, avoid the unwise use of floodplains, and protect and restore natural ecosystems.

(c) The PR&G was issued as an interagency effort to modernize the P&G. The PR&G is comprised of the Principles and Requirements (P&R) issued in March 2013 and the Interagency Guidelines issued in December 2014. The PR&G emphasizes that water resources projects should strive to meet the Federal Objective and maximize public benefits relative to public costs. The PR&G is designed to support water infrastructure projects with the greatest public benefits (economic, environmental, and social benefits) relative to costs.

(d) Congress directed the Secretary of the Army to issue ASPs to implement the PR&G in section 110 of WRDA 2020 (Division AA of Pub. L. 116–260).

§ 234.2 Definitions.

Acceptability. The viability and appropriateness of an alternative from the perspective of the Nation’s general public and consistency with existing Federal laws, authorities, and public policies. It does not include local or regional preferences for solutions or political expediency.

Adaptive management. A deliberate, iterative, and scientific-based process of designing, implementing, monitoring, and adjusting an action, measure, or project to address changing circumstances and outcomes, reduce uncertainty, and maximize one or more goals over time.

Completeness. The extent to which an alternative provides and accounts for all features, investments, and/or other actions necessary to realize the planned effects, including any necessary actions by others. It does not necessarily mean that alternative actions need to be large in scope or scale.

Effectiveness. The extent to which an alternative alleviates the specified

problems and achieves the specified opportunities.

Efficiency. The extent to which an alternative alleviates the specified problems and realizes the specified opportunities at the least cost.

Federal investment. Investments made by the Corps related to water resources development projects, including flood and storm risk management, ecosystem restoration, land management activities, navigation, recreation, and hydropower.

Federal Objective. The fundamental goal of Federal investments in water resources. Federal water resources investments shall reflect national priorities, encourage economic development, and protect the environment. Federal investments should strive to maximize net public benefits.

Indigenous Knowledge. Indigenous Knowledge may be described as a body of observations, oral and written knowledge, innovations, practices, and beliefs developed by Tribes and Indigenous Peoples through interaction and experience with the environment, consistent with the definitions used in 43 CFR 2361.5 and 6101.4(h) and the Guidance for Federal Departments and Agencies on Indigenous Knowledge, issued November 30, 2022. It is applied to phenomena across biological, physical, social, cultural, and spiritual systems. Indigenous Knowledge can be developed over millennia, continues to develop, and includes understanding based on evidence acquired through direct contact with the environment and long-term experiences, as well as extensive observations, lessons, and skills passed from generation to generation.

Nature-based alternatives. An alternative comprised of actions to protect, sustainably manage, or restore natural or modified ecosystems to address societal challenges, while simultaneously providing benefits for people and the environment.

Non-Federal interest. (1) a legally constituted public body (including an Indian Tribe and a Tribal Organization (as those terms are defined in 25 U.S.C. 5304)); or

(2) a nonprofit entity with the consent of the affected local government, that has full authority and capability to perform the terms of its agreement and to pay damages, if necessary, in the event of failure to perform.

Nonstructural alternative. An alternative comprised of a nonstructural approach or combination of nonstructural approaches that addresses the water resources problem.

Nonstructural approach. An approach that alters the use of existing

infrastructure or human activities to generally avoid or minimize adverse changes to existing hydrologic, geomorphic, and ecological processes. This may include measures such as certain forms of nature-based solutions; modified floodplain practices; policy modifications; vessel speed limits; traffic management and tidal navigation restrictions; the reoperation of dams and reservoirs to restore or better mimic natural hydrology and flow patterns; invasive plant removal; signage to limit public access at an aquatic ecosystem restoration site; setbacks; elevations; relocation; buyout/acquisition including the acquisition of flowage easements; dry flood proofing; and wet flood proofing. They may also include actions that are not the responsibility of the Corps such as providing flood insurance, establishing building codes for new construction, and other local floodplain management practices, installing early warning systems, and developing emergency evacuation plans.

Professional judgment. An evidence-based decision that relies on appropriate training and experience.

Public benefits. Encompasses economic, environmental, and social impacts, and includes those that can be quantified in monetary terms, as well as those that can be quantified or described qualitatively.

Regional economic development effects. The changes in the distribution of regional economic activity that would result from implementation of an alternative plan. These economic effects amount to a transfer of resources from one part of the Nation to another (either from one region of the country to another, or within a region). They accrue in a local area or region but are offset by equivalent losses elsewhere in the country.

Regulatory. Generally, those activities subject to legal restrictions promulgated by the Federal Government.

Resilience. Resilience is the ability to prepare for threats and hazards, adapt to changing conditions, and withstand and recover rapidly from adverse conditions and disruptions.

Sustainable. The creation and maintenance of conditions under which humans and nature can coexist in the present and into the future.

Tribal Nation (Federally recognized Indian Tribe or Tribal Organization). An Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 5130.

Unwise use of floodplains. Any action or change that diminishes public health and safety, or an action that is incompatible with or adversely impacts one or more floodplain functions that leads to a floodplain that is no longer self-sustaining or degrades ecosystem services.

Watershed. A land area that drains to a common waterbody.

§ 234.3 Exceptions.

Exceptions to any requirements or policy contained in this part may be requested by the Corps or the non-Federal interest or responsible Tribal, State, or local government. Exceptions must be requested in writing and will be reviewed for a decision by the Assistant Secretary of the Army for Civil Works.

§ 234.4 Objectives and applicability.

(a) *Introduction.* The goal of the Department of the Army's ASPs is to ensure that Army Civil Works consistently applies a common framework for analyzing a diverse range of water resources development projects, programs, activities, and related actions involving Federal investments. The ASPs will advance transparency and consistency of the Corps' Federal investments in water resources. The intention of the ASPs is to outline the steps to apply the PR&G to Corps water resources investments, including a determination of the applicability of the PR&G in the context of the Corps' missions and authorities, to provide a common framework for evaluation of investment alternatives, and to ensure that the Corps adequately addresses the Guiding Principles identified in the P&R.

(b) *Objectives for Federal water resources investments.* Section 2031 of WRDA 2007 (Pub. L. 110–114; 42 U.S.C. 1962–3) specifies that Federal water resources investments shall reflect national priorities, encourage economic development, and protect the environment. The Corps shall accomplish this Federal Objective of water resources planning policy by:

(1) Seeking to maximize sustainable economic development;

(2) Seeking to avoid the unwise use of floodplains and flood-prone areas and minimizing adverse impacts and vulnerabilities in any case in which a floodplain or flood-prone area must be used; and

(3) Protecting and restoring the functions of natural systems and mitigating any unavoidable damage to natural systems.

(c) *Net public benefits.* The Corps shall strive to maximize net public benefits to society. Public benefits

encompass economic, environmental, and social goals, include monetized and un-monetized effects, and allow for the consideration of both quantified and unquantified effects.

(d) *Applicability.* (1) The objectives in paragraph (b) of this section shall be embodied in all new Army Civil Works' water resources investments, which include both structural and nonstructural approaches to water resources problems. The PR&G analysis under the Corps' ASPs described in this part is generally required for feasibility studies; general re-evaluation reports; major rehabilitation reports; studies performed under the continuing authorities program of the Corps; studies to support significant changes to project operations including any such changes that warrant preparation of an environmental impact statement, re-allocation studies, and studies conducted under section 216 of the Flood Control Act of 1970 (33 U.S.C. 549a); and any other project or program not otherwise excluded under paragraph (d)(2) of this section.

(2) The PR&G is not intended to apply to all Federal actions. The following types of Federal investments are identified as excluded from the requirements of this part:

- (i) Regulatory actions, such as the issuance of permits associated with section 404 of the Clean Water Act (33 U.S.C. 1344).
- (ii) Real estate actions.
- (iii) Planning Assistance to States program.
- (iv) Flood Plain Management Services program.
- (v) Section 14 of the Rivers and Harbors Act of 1899 (33 U.S.C. 408) program.
- (vi) Public Law 84–99 program.
- (vii) Water Infrastructure Finance and Innovation Act Program.
- (viii) Environmental Infrastructure projects.

(ix) Land management plans.

(x) Operation and maintenance activities that are carried out in a manner consistent with the existing approved operation and maintenance manual or plan for an authorized project. This exclusion does not apply to significant proposed changes to an existing O&M plan including proposals that may be controversial, significant changes to the existing plan to meet new

goals, and other significant changes that may warrant a further analysis of the options for operation and maintenance.

(xi) International and Interagency Services and Support for Others actions.

(xii) Research or monitoring activities.

(xiii) Emergency actions.

(xiv) Projects, programs, or plans that fall below the thresholds identified in table 1 to § 234.5(c). These excluded actions generally occur when investments are routine and have inconsequential effects on water resources.

(xv) Additional programs, plans, or projects which the Assistant Secretary of the Army for Civil Works determines do not require analysis pursuant to § 234.3.

§ 234.5 Level of analysis.

(a) *Standard and scaled levels of analysis.* Once a determination has been made that the PR&G does apply, the level of analysis shall be determined. The level of PR&G analysis required will vary in scope and magnitude across programs and activities. There are two levels of analysis: standard and scaled. In general, the level of analysis should be commensurate with the significance of the Federal investment in terms of dollar value and the potential environmental impacts. While there is not a clear distinction between the different levels of analysis, the two types of analysis can generally be distinguished in several ways:

(1) A standard analysis seeks to evaluate all the relevant benefits and costs associated with the project or activity using original or secondary data. This type of analysis is typically used for new or significantly modified actions. The Corps would conduct a benefit-cost analysis of programs and activities that have some effect on the environment. For projects/activities that fall into the category of standard analysis, the analysis should make significantly greater efforts to quantify and monetize impacts. The extent to which effects can and should be monetized should be made on a resource-by-resource basis and should consider the estimated present value cost of the project/activity and the significance of the effects.

(2) A scaled analysis is an analysis that is more limited in scope for projects, programs, or plans that have low risk/low cost, have minimal

consequences of failure, pose minimal threats to human life or safety, or do not result in significant impacts to the environment. A scaled analysis may rely on benefits function transfer methods and readily available secondary data sources. Benefits function transfer methods are used to estimate monetary values by transferring available information about relationships from studies already completed to another location, context, or issue. Best practices would be applied when using this approach to avoid common pitfalls.

(b) *Determining the appropriate level of analysis.* In many cases, professional judgment and available resources will be important factors in determining the appropriate level of analysis. The Corps will ensure that cumulative effects of many small, routine actions would not in itself elevate those investments to a scaled or standard analysis. Many of those small, routine actions would be excluded from PR&G analysis.

(c) *Scope and magnitude of analysis required.* The threshold criteria for project, programmatic, and individual plan level analysis for Army Civil Works is shown in table 1 to this paragraph (c). These thresholds represent guidelines for the level of analysis that is likely to be most appropriate for an activity, given the level of investment in, appropriations for, or cost of that activity. In determining whether a given activity or project falls under or exceeds the financial thresholds, it is the level of the present value of Federal investment that is the relevant criterion to use. However, for a particular activity, a different level of analysis may be more appropriate, and projects/programs may depart from these guidelines where such a departure is justified. In general, a scoping effort should be undertaken to evaluate the level of effort needed to analyze the full range of potential effects. Project-level analysis should generally be used for water resources investments when the Corps has discretion in site-specific investment decisions. A programmatic-level analysis generally has a broader scale and/or scope than a project-level analysis. Programmatic-level analysis generally relates to funding programs or where a proposal for a set of similar actions analyzed under one decision document may occur.

TABLE 1 TO PARAGRAPH (C)—MONETARY THRESHOLD CRITERIA

Type of activity	Total investment (\$M)	Annual federal appropriations (\$M)	Level of analysis
Projects	>30	Standard analysis.
Proposed Corps investments in water resources, such as infrastructure, ecosystem restoration, new construction, modifications or replacements to existing facilities, and operations and maintenance.	15–30		Scaled analysis.
	<15		Excluded.
Programs	>100	Standard analysis.
		50–100	Scaled analysis.
		<50	Excluded.
Individual Plans	>50	Standard analysis.
Management plans, such as watershed, master, etc.		10–50	Scaled analysis.
		<10	Excluded.

§ 234.6 The planning process.

(a) *Introduction.* The following planning process will be used to implement the common framework summarized in the Interagency Guidelines for analyzing Federal investments in applicable water resources. The planning process will ensure that plan formulation, evaluation, and recommendations for proposed Corps investments reflect the Guiding Principles identified in the P&R: healthy and resilient ecosystems, sustainable economic development, floodplains, public safety, environmental justice, and a watershed approach. The planning process consists of a series of steps that identify or respond to problems and opportunities, as well as specific Tribal, State, and local concerns, and, in most cases, culminates in a recommended plan. The process involves an orderly and systematic approach to making determinations and decisions at each step so that the interested public and decision-makers in the planning organization can be fully aware of the following: the basic assumptions employed; the data and information analyzed; the areas of risk and uncertainty; the reasons and rationales used; and the significant implications of each alternative. The Corps will identify impacts to Tribal treaty and water rights at the earliest phases and throughout the plan evaluation process, screening alternatives that impact Tribal treaty and water rights. The planning process is iterative to adapt to new information and understanding. The result of the planning process is investment advice. The advice may be a recommended plan or plans that seek to maximize net public benefits in addressing the identified water resources problem and a description of the analysis of the benefits and costs of that and other potential plans.

(b) *National Environmental Policy Act (NEPA).* Where Federal investments in water resources require analysis under

NEPA and this part, Army Civil Works should integrate, to the extent possible, the analysis in this part into existing planning processes, and may integrate this part and NEPA analyses in a single analytical document that reflects both processes. Army Civil Works shall seek opportunities to integrate other required Federal and State environmental reviews with their combined analyses.

(c) *Guiding Principles.* The Guiding Principles provide the overarching concepts that the Corps seeks to promote through investments in water resources.

(1) *Environmental justice.* Environmental justice refers to the just treatment and meaningful involvement of all people regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment so that people:

(i) Are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and

(ii) Have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.

Environmental justice shall be considered throughout the Civil Works program and in all phases of project planning and decision-making. Army Civil Works projects and programs shall advance equity by meeting the needs of communities, such as by reducing disparate environmental burdens, protecting Tribal treaty rights, removing barriers to participation in decision-making, and increasing access to benefits provided by Civil Works programs, including for disadvantaged communities. The planning process

shall put these communities at the front and center of studies, providing robust opportunities for effective participation in the planning and decision-making processes. Any disproportionate adverse public safety, human health, or environmental burdens of project alternatives on communities with environmental justice concerns shall be avoided, minimized, or mitigated to the greatest extent reasonable. The Corps shall ensure that communities with environmental justice concerns have meaningful opportunities to identify potential alternatives, effects, and mitigation measures. The Corps shall also be transparent in fully displaying, disclosing and considering the potential effects of alternative actions on communities with environmental justice concerns.

(2) *Floodplains.* All future Federal investments in and affecting floodplains must meet some level of floodplain resilience. Alternatives affecting floodplains should aim to improve floodplain resilience if possible and also should avoid the unwise use of floodplains. To identify floodplain areas for the purpose of this section, the Corps will use the best-available and actionable science including a climate-informed science approach. If construction in the floodplain or adverse impacts to a floodplain’s natural and beneficial functions cannot be avoided, then the alternative must minimize adverse impacts to these areas and mitigate unavoidable impacts using nature-based approaches where possible. The Corps shall identify and communicate potential adverse effects on floodplain functions for the various alternatives under consideration. Where the Corps proposes to construct a project feature in a floodplain because that is the best way to achieve flood risk reduction or other public purposes, that proposed Corps project is not automatically considered an unwise use of the floodplain. The Corps shall strive to sustain the floodplain’s natural and

beneficial functions to the maximum extent practicable given the project's purpose and need.

(3) *Healthy and resilient ecosystems.* Alternatives shall protect the existing functions of ecosystems and may restore the health of damaged ecosystems to a less degraded and more natural state where feasible and in accordance with current study and cost-sharing authorities. When adverse environmental impacts cannot be completely avoided, alternatives shall strive to minimize environmental impacts. When a particular alternative will cause unavoidable damage to the environment, mitigation to offset damages shall be incorporated into that alternative and evaluated as part of that alternative. In developing alternatives, consideration shall be given to ecosystem resilience, including acknowledging the value of ecosystem services to people. When evaluating alternatives, the health of the affected ecosystem shall be measured in its current condition as the baseline and projected under the alternatives being considered, including the No Action alternative.

(4) *Public safety.* Alternative solutions shall strive to avoid, reduce, or mitigate significant risks to public safety, including both loss of life and injury, and shall include measures to manage and communicate the residual risks. The impact and reliability of alternatives on significant risks to public safety must be evaluated for both existing and future conditions, considered in decision-making, and documented.

(5) *Sustainable economic development.* The Corps' investments in water resources shall encourage sustainable economic development. This is accomplished through the sustainable use and management of water resources, ensuring overall water resources resilience. Sustainable economic development creates and maintains conditions under which humans and nature can coexist. Analysis under sustainable economic development shall present, where feasible, information about the environmental resources in the project area or the area where activities are occurring, and how the resources and their value might be expected to change over time. Physical capital information may also be included where relevant. Analysis shall also include information on socio-economic conditions under current and projected conditions. Economic, social, and environmental effects and benefits shall be incorporated into the analysis of alternatives.

(6) *Watershed approach.* When developing alternatives, the water resources problem being addressed should be analyzed on a watershed-based level to facilitate inclusion of a complete range of solutions, after considering the breadth of impacts across the watershed. A key aspect of the watershed approach is the analysis of information regarding watershed conditions and needs, allowing for consideration of upstream and downstream conditions and needs; consideration of other projects and actions in place, underway or planned by other agencies within the watershed; and the more thorough addressing of the potential impacts of a proposed action. The scale of the watershed used to develop alternatives can vary. The appropriately sized watershed for the particular need being addressed shall be a case-specific determination based on the relevant facts and circumstances. The watershed scale used to develop alternatives should encompass a geographical area large enough to ensure plans address cause and effect relationships among affected resources and activities, both upstream and downstream, and cumulative in nature, that are important to gaining public benefits or avoiding harm from the project. The watershed approach ensures that the interconnectedness of systems is evaluated to fully understand the root causes and symptoms of the water resources problem and the full range of potential public benefits. Communication starting in the scoping phase with other agencies or Tribal, territorial, State, and local government partners working in the watershed will help realize a watershed approach. In addition, other potential investments in the watershed shall also be accounted for under the watershed approach.

(d) *Collaboration.* (1) The planning process will seek to achieve full collaboration with a wide range of affected Tribes, governmental and non-governmental stakeholders, communities with environmental justice concerns, and the public in all stages of the planning process. Collaboration with Tribes, governmental and non-governmental stakeholders, communities with environmental justice concerns, and the general public throughout the planning process allows consideration of multiple perspectives and information sources, such as Indigenous Knowledge, and shall be emphasized throughout the planning process. Collaboration with Tribes, communities, and local and State governments is a critical element to help identify specific problems,

opportunities, and significant constraints within the study area, and to help establish planning goals and objectives that are consistent with the objectives of this part and are locally appropriate. Starting at the earliest phase in the planning process, Tribes and other communities with environmental justice concerns shall have an opportunity to play a key role in identifying alternatives, enhancing the positive benefits to their communities from potential Federal investment, and describing any concerns they may have with a potential project. Such early, meaningful, and robust engagement will help identify and address problems, possible solutions, and scope studies. Robust, early collaboration with Tribes does not negate the need for Tribal consultation. Robust, early collaboration with Tribes is in addition to the requirement to conduct early, meaningful, and robust Government-to-Government consultation with Tribal Nations when appropriate.

(2) To improve Federal decision-making and to promote transparency, Army Civil Works shall seek to meaningfully collaborate with other Federal and non-Federal entities. Engagement methods and scope of engagement will depend on the stage of the planning process, the issues, and the groups that will be contributing ideas and information to the planning process, and shall use best practices and techniques for engagement. Engagement strategies shall consider Corps, Tribal, and community resource constraints. Indigenous Knowledge, information from Tribal Nations, local and State governments, non-governmental organizations, and the public shall be incorporated into the problem definition and forecasting of future conditions as well as the development and analysis of alternatives. Robust engagement and transparency throughout the planning process, including during the evaluation and comparison of alternatives, will help deliver sound investment advice for water resources solutions that maximize net public benefits.

(e) *Investigations and data collection.* Investigations, data collection, and analysis should be ongoing and integrated early in the planning process. Investigations should be relevant to the planning objectives and constraints. The interdisciplinary study team should identify the most important areas to focus on in the study, such as: engineering and design; surface water and groundwater hydrology; hydraulics; geology; operations; water quality; land resources; power generation and conservation; economics; financing;

environmental, social, and cultural impacts and mitigation; opportunities for recreation; cost estimation for construction, operation, maintenance, replacement, and energy consumption; and climate change (to include greenhouse gas emissions). Investigation, data collection, and analysis should leverage and incorporate information from Tribal, State, local, non-governmental sources, and the public. Additional investigations should be performed as necessary.

(f) *Identify purpose, problems, needs, and opportunities.* To identify purpose, problems, needs, and opportunities, the Corps shall:

(1) Ensure that the planning goals and objectives are consistent with the study authority.

(2) Clearly identify the purpose of the study, the role of the Federal Government, as well as the views of the non-Federal interest (if any), cooperating agencies, Tribes, various stakeholders, and the public.

(3) Describe the problems and opportunities to which the agency is responding in a manner that will not foreclose consideration of the full range of reasonable alternatives, including options that the non-Federal sponsor may not support.

(4) Define the study area, including activities within the watershed that are relevant to the proposed project and areas where impacts should be avoided.

(5) Describe the plans for stakeholder involvement.

(6) Prepare a summary of the planning objectives and constraints to be used in the analysis of the Federal investment. This summary should include a discussion of stakeholder, partner, and public input.

(7) Include a discussion of the social and cultural context of the region and resources.

(g) *Inventory existing resources and forecast future conditions.* A summary of the specific economic, environmental, and social setting within the study area shall cover the condition and functional relationships of affected resources; their development potential and possible conflicts in producing affected ecosystem services; and the local situation with respect to investment, climate, markets, affected communities, and basic economic productivity.

(1) The phrase “forecast future conditions” generally relates to the identification of impacts associated with the alternatives, including the No Action alternative. Future conditions should be assessed and analyzed as part of the evaluation process, and the best

available data and forecast should be used to complete an analysis of these uncertain conditions.

(2) This exercise of identifying existing resources and forecasting future conditions will quantify, to the extent practicable, relevant water and related resource conditions as they currently exist within the study area, and forecast future conditions over the period of analysis. This would also include resources and conditions regarding the economic, environmental, and social aspects within the study area, as well as ecosystem services and climate-related scenarios. The existing resources and future conditions will be established using generally accepted sources that are national, State, or regional in scope, such as from peer-reviewed sources or sources which are government-produced.

(3) The “without-project condition” is the most likely condition expected to exist in the future over the period of analysis in the absence of a Federal investment by the Corps (through the proposed Corps project, action, or program that is under consideration), given current laws, policies, projects under construction, and any existing resources/conditions. It considers expected actions that may be executed by others, including potential future land use conditions, and shall consider effects of climate change using multiple scenario analyses.

(4) The “with-project condition” is the most likely condition expected to exist in the future, over the period of analysis, with a specific Corps project or program in place. It considers expected actions that may be executed by others, including potential future land use conditions, and shall consider effects of climate change using multiple scenario analyses.

(5) To ensure that the appropriate criteria and problems are incorporated into the analytical framework, a summary of the process used to define the relevant existing conditions and foreseeable future conditions shall be prepared and made available to the public and shared with stakeholders.

(h) *Formulate alternatives.* The primary goal of an alternative is to address a water resources challenge, consistent with the Federal Objective and Guiding Principles. The primary function of an alternative must be to alleviate unsatisfactory conditions or address a problem or opportunity that exists or will exist in the future without the proposed Federal investment that is under consideration. Alternatives should address the defined water resources challenge that is the subject of the analysis, and may achieve multiple

purposes. Alternative formulations should focus on solutions that are feasible and meet the planning objectives of the study, based on the most likely future conditions expected with and without implementation of an alternative. The viability of an alternative should be determined through an evaluation of its acceptability, efficiency, effectiveness, and completeness, as required in the PR&G. The period of analysis should be the same for each alternative and sufficient to encompass the lifespan and significant long-term impacts of the project. In addition, alternatives may also include actions which are beyond the missions of the Corps where others may help provide solutions to the identified problem and meet the goals of the PR&G. However, such alternatives shall identify the relevant parties with requisite responsibility for those actions beyond Corps missions (such as other Federal agencies and non-Federal partners), their authority for that action, the interrelation between that action and the recommended Corps project, action, or program and appropriate sequencing of implementation. For Corps investments, the Corps will be the designated lead for completing PR&G analysis.

(1) Alternatives are to be developed in a systematic manner that ensures that the Corps has identified and considered the full range of reasonable alternatives. A range of potential alternatives should be initially investigated reflecting a range of scales and measures, and as alternatives are refined, some would be screened out for reasons such as having excessive cost or unavoidable impacts, not sufficiently addressing the identified problem or opportunity, or other factors. The study report should include some analysis of the eliminated alternatives and reasons for their elimination. The plans that are retained for additional analysis will comprise the range of reasonable alternatives required for the NEPA analysis. Section 234.8 describes the alternatives required in the final array.

(2) Consideration of nonstructural approaches and nature-based solutions that meet the planning objectives shall be an integral part of the development and evaluation of Federal investments in water resources.

(3) Each alternative formulated for the PR&G analysis should align with the alternatives evaluated in the corresponding NEPA document.

(4) The Corps should formulate the alternatives based on an incremental analysis of their benefits and costs to society. The economic, environmental, and social effects of a water resources

development project are interrelated. In formulating alternatives to address the identified water resources problem or opportunity, the Corps shall consider each of these effects and seek to maximize net public benefits.

§ 234.7 Evaluation framework.

(a) *General.* To inform the overall decision-making process, this section describes the common framework and general requirements to be used by the Corps in evaluating and ensuring full consideration of the social, environmental, and economic benefits and costs to society of any separable elements and potential alternatives for Federal investment. This will include their performance with respect to the Guiding Principles and their contributions to the Federal Objective. Any key assumptions that affect the analysis of alternatives shall be clearly described in the study.

(b) *Economic, environmental, and social effects.* (1) The Corps' analytical framework for evaluating Federal investments should focus on the key economic, environmental, and social effects that are relevant to the investment decision. Typical NEPA analyses emphasize environmental effects and benefits, including ecosystem services, and these should also be used as a core part of water resources alternatives analysis. A benefit-cost analysis would be conducted for each alternative. Ecosystem services are an important benefit-cost category that should be included in the benefit-cost analysis.

(2) In addition, the scale of the analysis can be adjusted for a given study. While all analyses should share common elements, how these elements are achieved can depend on the identified problem or opportunity. It is important to establish a consistent analytic approach for each study. When implementing its ASPs, the Corps will consider and, where it deems appropriate, align with the latest Federal methods and guidance (for example, updated OMB Circulars and applicable interagency guidance) to ensure that the analytical framework accounts for all significant economic, environmental, and social costs and benefits, including ecosystem services. Where possible, monetization enables the incorporation of the values placed on the benefits and costs evaluated and provides a way to evaluate trade-offs in common analytical units (dollars). OMB Circulars A-4 and A-94 provide guidance on appropriate use of monetization methods. The Corps anticipates that it will not be possible to monetize all social and environmental

costs and benefits of the alternatives. In these cases, the Corps should quantify the social and environmental costs and benefits and when neither monetization nor quantification is possible, the Corps should qualitatively describe the social and environmental costs and benefits in sufficient detail to allow differentiation across alternatives. Relevant monetary, quantitative, and descriptive information will be fully assessed and considered in the analysis.

(c) *Best available actionable science and commensurate level of detail.* (1) Analysis to support the evaluation of alternatives shall use the best available actionable science, to include Indigenous Knowledge, data, analytical techniques, procedures, models, and tools in ecology, hydrology, economics, engineering, biology, and other disciplines to the extent that sufficient funding is available, and to the extent such information is relevant and appropriate to the subject investment. To the extent feasible, the effects of the alternatives should be monetized. Effects will be monetized, quantified, or described, in that order.

(2) The level of detail required to support alternatives analysis may vary but should be sufficient to inform the decision-making process efficiently and effectively. The level of detail, scope, and complexity of analyses should be commensurate with the scale, impacts, costs, scientific complexities, uncertainties, risk, and other aspects (such as public concern) inherent in potential decisions.

(d) *Risk and uncertainty.* When analyzing potential Federal water resources investments, the Corps shall identify, describe, and quantify (if feasible) areas of risk and uncertainty and consider them in decision-making. Risks and uncertainties shall be identified and described in a manner that is clear and understandable to the public and decision-makers. This includes describing the nature, likelihood, and magnitude of risks, as well as the uncertainties associated with key supporting data, projections, and evaluations of competing alternatives. Risk and uncertainty are inherent in economic analyses as well as the analysis of physical and biological factors, no matter the technique or methodology employed. The study should estimate the extent to which the outcomes from an investment may vary over time from the estimates provided in the study, both in the short-term and in the less predictable future, due to uncertainty. Knowledge of risk and uncertainty and the degree of reliability of the estimated consequences will better inform decision-making. When

there are considerable uncertainties concerning the ability of an alternative to function as desired (such as producing the desired outputs and/or the general acceptability of the alternative) the option of pursuing improved data or models should be considered. Reducing risk and uncertainty may involve increased costs or loss of benefits. The advantages and costs of reducing risk and uncertainty should be explicitly considered in formulating alternatives and the overall decision-making process.

(e) *Adaptive management.* Adaptive management measures shall be clearly identified and evaluated as part of alternatives to the extent that such measures are commensurate with the significance of the proposed activity and available resources. Adaptive management measures are particularly useful when making management choices in the face of uncertainty, such as when detailed information and tools are not readily available.

(f) *Climate change.* Conditions resulting from a changing climate shall be identified and accounted for in all stages of the planning process, and uncertainties associated with climate change will be identified and described. Analysis of climate change impacts shall reflect the best available actionable science and will leverage region-specific information from Federal, Tribal, State, local, and non-governmental partners. The Corps shall incorporate a climate-informed science approach considering impacts such as inland and coastal climate change impacts on flood and drought hazards using the most up-to-date science, policies, and tools available. The Corps shall also ensure climate resilience and adaptation are incorporated and considered throughout the planning process and across alternatives, including a discussion on how climate, drought, and ecosystem resilience may intersect for that particular action and can contribute to the economic vitality and water resources resilience of the Nation. The changing climate should inform the understanding of water resources needs and how those needs can potentially be addressed.

(g) *Water availability, water uses, and resilience.* The consideration of multiple uses, competing demands, and the potential future uses of the water resources shall be taken into account when formulating and evaluating solutions to a water resources problem or challenge. Water availability and efficient use of water shall be considered in designing the alternatives, as shall resilience, when applicable to the purpose of the study. The analysis

shall consider water availability, water uses, and resilience over a range of conditions, from too little water in drought and multiple-use scenarios, to too much water in flood scenarios.

(h) *Nonstructural and nature-based solutions.* Nonstructural measures alter the use of existing infrastructure or human activities to generally improve, avoid, or minimize adverse changes to existing hydrologic, geomorphic, and ecological processes. Nonstructural measures may be combined with fewer or smaller traditional structural project components to produce a complete alternative plan or may be used instead of a structural project. In the development of alternatives, the use of natural systems, ecosystem processes, and nature-based solutions shall be considered. Full consideration and reporting on nonstructural and nature-based alternative actions shall be an integral part of the evaluation of Federal water resources investment alternatives, and a full nonstructural in addition to a full nature-based alternative will be included in the final array of alternatives. Nonstructural and nature-based aspects should also be included in the other alternatives in the final array when appropriate.

(i) *Tribal treaty rights.* Each of the alternatives considered for a water resources investment must be consistent with the protection of Tribal treaty rights. Alternatives that impact Tribal treaty and water rights should be screened out as soon as the Corps becomes aware of such impacts, and the study will document why the alternatives have been screened.

(j) *State water law.* Alternatives for water resources investments must be consistent with applicable State laws, including water rights and decrees, to the extent that these do not conflict with Federal laws and regulations. Analyses should identify legal constraints that preclude selection of an otherwise viable alternative.

(k) *International obligations.* Alternatives for water resources investments must be consistent with meeting treaty and other international obligations. Analyses should identify international obligations that preclude selection of an otherwise viable alternative.

(l) *Period of analysis.* The period of analysis for the study shall be documented with an appropriate justification, and used to evaluate each alternative.

§ 234.8 Final array of alternatives.

(a) Except as provided in paragraphs (c) and (f) of this section, the final array of alternatives shall include, at a

minimum, the following six alternatives:

(1) A No Action alternative.

(2) A nonstructural alternative: An alternative that can effectively address the problem through the feasible use of nonstructural approaches.

(3) A nature-based solution alternative: An alternative that can effectively address the problem through the feasible use of nature-based solutions (including natural systems and ecosystem processes).

(4) An environmentally preferred alternative.

(5) An alternative that seeks to maximize net public benefits to society. In developing this alternative, the Corps shall not consider regional economic development effects.

(6) An alternative that is locally preferred. If this alternative differs from the net public benefits alternative, it will be required to have a comparable level of detail and analyzed using the same analytical framework as the net public benefits alternative.

(b) The nonstructural and nature-based alternatives do not preclude consideration of these elements in other alternatives. Nonstructural measures and nature-based solutions shall 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.

(c) The same alternative may be identified as more than one of these required alternatives.

(d) Mitigation of unavoidable adverse effects associated with each alternative must be included in the alternative and in the analyses.

(e) If an alternative requires changes in existing laws, regulations, or policies, those changes must be clearly identified and explained.

(f) If one or more of the required alternatives is not included because the Corps was not able to identify a potential solution that is feasible and consistent with the purpose of the study, the study must document that decision.

(g) The discussion of the final array of alternatives should include the primary purpose of the analysis; the geographic size of the study area; the types of impacts; the number of people potentially affected and anticipated degree of impact; environmental justice considerations; the size and location of communities potentially affected including the presence of Federally-recognized Tribes or Tribal members; and the type of data and information available from Indigenous Knowledge,

collaboration, public involvement, and previous studies.

§ 234.9 Evaluate effects of alternatives.

(a) *Analysis of alternatives.* For the final array of alternatives, the analysis should describe, evaluate, and estimate the key social, environmental, and economic effects, and assess the contributions of each alternative to the Guiding Principles. The analysis should identify any impacts to Tribal treaty rights which were unknown earlier in the planning process and which prevent the selection of an alternative.

(b) *Evaluation procedures.* In addition to assessing how alternatives perform with respect to the Guiding Principles, the evaluation procedures shall incorporate methods to evaluate:

(1) How public benefits of an alternative compare to its costs, including full consideration of all important social, environmental, and economic benefits and costs.

(2) How alternatives perform against the objectives of the study.

(3) How alternatives perform against the four formulation criteria: completeness, effectiveness, efficiency, and acceptability.

(c) *Consideration of benefits and costs.* The report should fully account for the effects to society of alternative plans and their respective contributions to the Federal Objective, relative to the No Action alternative. The analysis will evaluate the economic benefits and costs, environmental benefits and costs, and social benefits and costs of alternatives, regardless of how they are included (monetized, quantified, or described). The consideration of benefits to federally recognized Tribes will be done in direct consultation with the respective Tribal Nation and will supplement the public benefit analysis. To the extent practicable, such costs and benefits must be quantified in a scientifically valid and acceptable way, and such quantified costs shall be monetized where practicable. When monetization or quantification is not possible, costs and benefits must be described in sufficient detail to enable the decision-maker to understand the importance and magnitude of potential changes. For monetized costs and benefits, the present value cost of each alternative must be compared to the present value of the benefit to the public. For quantified but not monetized benefits and costs, the Corps would present the information on an average annual basis, and would also describe how the benefits and costs would accrue over the period of analysis. For qualitatively described benefits and costs, expectations would

be described across the period of analysis. The effects of alternative plans are displayed in terms of costs and benefits.

§ 234.10 Compare alternatives.

(a) *Comparing alternatives.*

Alternatives shall be compared to each other and to the No Action alternative and shall include a comparison of the ability of the alternatives to perform under changing conditions, including climate change. The alternative (or alternatives) that reasonably meets the Federal Objective and maximizes net public benefits shall be identified. In addition, alternatives may be evaluated separately with respect to other considerations, including distributional effects. These considerations may include:

(1) Temporal factors, since certain effects may occur at different points in time.

(2) Spatial factors, since certain costs, benefits, and transfers may accrue to different regions. Regional-scale analyses may be useful to inform regional-level economic development objectives. It is important to note that such regional analyses, while useful, are completely separate from the calculation of net public benefits described in § 234.4(c).

(3) Beneficiaries. Tribal Nations and stakeholders (including other governmental agencies and communities with environmental justice concerns) may indicate different tradeoffs among the various benefits and costs of a Federal action. Tribal reserved rights, including treaty-protected resources and habitats, are not benefits to the Tribal Nation, rather, they are guaranteed by such treaties. Robust engagement at this stage shall focus on eliciting preferences among the alternatives, their component elements, and their effects. When calculating net benefits, these distributional effects can be examined using techniques like income weighting.

(b) *Tradeoffs.* Tradeoffs among potential alternatives will be assessed and described throughout the decision-making process and in a manner that informs decision-making. Based on the available analytical information, the Corps would use its professional judgment in making its recommendations on decisions among tradeoffs. The tradeoff displays shall be understandable, transparent, and constructed in a generally consistent

fashion for all analyses. The analysis shall include a combination of both tables and explanatory materials to help inform a decision. Displays shall facilitate the evaluation and comparison of alternatives necessary to make the following determination and reflect the following:

(1) The effectiveness of alternatives in solving the water resources problem and taking advantage of the opportunities identified in the planning process.

(2) What must be given up in monetary and nonmonetary terms to enjoy the benefits of the various alternatives, relative to the baseline.

(3) The differences among alternatives.

(c) *Information for inclusion in the analysis.* To promote consistency across the Corps, the following tables and information shall be included in the analysis and documentation prepared for a decision process:

(1) *Criteria.* The analysis must explicitly address the extent to which an alternative achieves each of the following criteria: completeness, effectiveness, efficiency, and acceptability. This evaluation must be systematic and can include both quantitative and qualitative components.

(2) *Effects matrix.* A matrix summarizing the tradeoffs, relative to the baseline, effect-by-effect must be included in the integrated report.

(3) *Additional trade-off displays.* Additional text and tables should display other important trade-offs, such as trade-offs along temporal, spatial, and beneficiary dimensions.

(4) *Summary table.* A summary table displaying the economic, environmental, and social costs and benefits as measured (monetized, quantified, quantitative) for each alternative. In addition, the summary table will display the economic, environmental, and social costs and benefits which were derived qualitatively. The summary table will also separately include information on the level of risk or uncertainty for each alternative.

(5) *Achievement of objectives table.* A table indicating the extent to which the Guiding Principles have been achieved.

§ 234.11 Select the recommended plan.

(a) *Recommended plan.* (1) Plan selection will require decision-makers to assess tradeoffs and to consider the extent of both monetized and non-

monetized effects. The basis for selection of the recommended plan should be fully reported and documented in a transparent manner, including the criteria and considerations used. This section must provide a discussion about the extent to which the alternatives achieve the Federal Objective and maximize net public benefits to society. The report must include an explanation of the assumptions in the evaluation of monetized and non-monetized benefits and costs. This section will include a summary of elicited Tribal Nation and stakeholder perspectives on the alternatives and their effects.

(2) The Corps should recommend:

(i) Authorization of an alternative project, program, or plan;

(ii) Implementation of an alternative under existing law;

(iii) Implementation of a project, program or plan by others; or

(iv) No action.

(3) In its studies, the Corps shall analyze, evaluate, fully consider, and justify each separable element of the proposed investment independently of the other separable elements, based on its social, environmental, and economic benefits and costs to society.

(4) The Corps should seek to meet water resources objectives and maximize net public benefits, relative to public costs. It is possible that more than one alternative might reasonably and approximately meet these conditions. "Net public benefits" implies that the anticipated benefits will be presented relative to the costs associated with the accrual of those benefits. Net public benefits can include both quantified and non-quantified benefits. Any recommendation will clearly delineate the Federal water resources project(s) or actions being recommended, including any condition precedent for construction.

(b) *Exceptions.* A recommended plan for a Federal water resources investment that does not maximize net public benefits requires an exception from the Assistant Secretary of the Army for Civil Works. Requests for exception should describe the project or activity, the rationale for the exception, and present relevant data and analysis to support the request.

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