



## DEPARTMENT OF DEFENSE

### Department of the Army, Corps of Engineers

#### Notice of Virtual Public and Tribal Meetings Regarding the Modernization of Army Civil Works Policy Priorities; Establishment of a Public Docket; Request for Input

**AGENCY:** Department of the Army, U.S. Army Corps of Engineers, DoD.

**ACTION:** Notice; announcement of virtual public and Tribal meeting dates and solicitation of input.

**SUMMARY:** The Department of the Army, Civil Works, to include the U.S. Army Corps of Engineers (Corps) (together, “Army”), are publishing this notice to announce an effort to modernize the Civil Works program of the Corps through a number of related policy initiatives. This effort includes a series of public and Tribal virtual meetings, as well as a public docket, to gather oral and written input that will be used to inform future decision-making related to: Native American/Tribal Nation issues; potential rulemaking actions regarding the Corps’ Regulatory Program’s implementing regulations for the National Historic Preservation Act as well as Civil Works implementation of the Principles, Requirements, and Guidelines; and, environmental justice, including definitions of certain terms used in policy making.

**DATES:** Written recommendations must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The Army will hold a virtual overview of the policy initiatives on June 22, 2022. The Army will hold public virtual meetings on the following dates: July 11, 2022, July 14, 2022, July 18, 2022, July 20, 2022, and July 26, 2022. In addition, the Army will hold Tribal virtual meetings on the following dates: July 7, 2022, July 12, 2022, July 19, 2022, July 21, 2022, and July 27, 2022. Please refer to the **SUPPLEMENTARY INFORMATION** section below for additional information on these virtual meetings.

**ADDRESSES:** You may send written feedback, identified by Docket ID No. COE-2022-0006, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov/> (our preferred method).

Follow the online instructions for submitting written feedback.

- Email: [usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil](mailto:usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil). Include Docket ID No. COE-2022-0006 in the subject line of the message.
- Mail: Stacey M. Jensen, Office of the Assistant Secretary of the Army (Civil Works), 108 Army Pentagon, Washington, DC 20310-0108.
- Hand Delivery/Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

*Instructions:* All submissions received must include Docket ID No. COE-2022-0006. Please group comments into the specific topic areas identified below in the headers of the Supplementary Information section, as applicable. Written feedback received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. Out of an abundance of caution for the health of members of the public and staff and to reduce the risk of transmitting COVID-19, the Army cannot currently accept hand delivery of comments. The Army encourages the public to submit written feedback via <https://www.regulations.gov/> or email, as there may be a delay in processing mail and faxes.

**FOR FURTHER INFORMATION CONTACT:** Stacey Jensen, in writing at the Office of the Assistant Secretary of the Army (Civil Works), 108 Army Pentagon, Washington, DC 20310-0108; by telephone at 703-697-4671; and by e-mail at [usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil](mailto:usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil); or, Joseph Redican, in writing at Headquarters USACE, 441 G Street NW, Washington, DC 20314-1000; by telephone at 202-761-4523; and by e-mail at [joseph.h.redican@usace.army.mil](mailto:joseph.h.redican@usace.army.mil).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

The Department of the Army, Office of the Assistant Secretary of the Army for Civil Works, is seeking to modernize and advance the U.S. Army Corps of Engineers (Corps) Civil Works program through policy actions consistent with Administration priorities and statutory authorities. A primary focus for the modernization effort is to identify ways to better serve the needs of Tribal Nations<sup>1</sup> and other disadvantaged and underserved communities. The priority policy actions include: 1) Tribal issues, to include updating the Corps' Tribal consultation policy and implementation of the Tribal Partnership Program; 2) Rulemaking actions, to include revisions to the Regulatory Program's implementation of Section 106 of the National Historic Preservation Act found at 33 CFR 325, Appendix C, as well as a rulemaking action for implementation of the Principles, Requirements, and Guidelines; and 3) Environmental justice, to include identifying ways to further advance the Corps' Civil Works commitment to environmental justice, including compliance with relevant provisions of the Water Resources Development Act (WRDA) of 2020. Each of these priority policy actions is described in more detail below, including how they align with the advancement of the Administration's priorities. The policy priority actions have overlapping content and work together to provide a comprehensive modernization strategy for the Civil Works program.

Before deciding on specific future actions regarding the priority policy initiatives, the Army wants to gather public and Tribal input to help shape future decision-making related to these priority policy initiatives. Details for virtual meetings to receive input from all stakeholders and Tribes are below in the Public Meetings and Outreach section. The Army encourages comments on all aspects of these priority policy initiatives, to include consideration of what a modernized Corps Civil Works program entails.

For example, one action the Army has already initiated under this modernization effort is a review of Nationwide Permit (NWP) 12 for Oil or Natural Gas Pipeline Activities (87 FR

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<sup>1</sup> Tribal Nations and Tribes as used in this Federal Register notice refers to "Indian tribe" as defined in Executive Order 13175 (<https://www.govinfo.gov/content/pkg/FR-2000-11-09/pdf/00-29003.pdf>, accessed May 5, 2022), and Native Hawaiian Organizations where applicable.

17281). The review of NWP 12 is being undertaken to gather input on potential changes to the NWP which may be warranted in light of concerns raised and the Administration's policies under EO 13990 (*Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, Executive Order 13990, 86 FR 7037). Previous uses of NWP 12 have raised concerns identified in Executive Order 13990, such as environmental justice, climate change impacts, drinking water impacts, and notice to impacted communities. These concerns were raised in the context of the Corps' implementation of its own authorities under Section 404 of the Clean Water Act (33 U.S.C. 1344) as well as in the context of other authorities that the Corps must comply with when issuing the NWPs, such as the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*). The Army sought input on those aspects as well as any others related to NWP 12 through a series of virtual meetings and written docket via a separate Federal Register notice (87 FR 17281; Docket ID No. COE-2022-0003-0001).

## **II. Tribal**

### **A. Tribal Consultation Policy**

On January 26, 2021, President Biden issued the Presidential Memorandum, *Tribal Consultation and Strengthening Nation-to-Nation Relationships* (86 FR 7491). In the Memorandum, he called on each federal agency to engage in regular, meaningful, and robust consultation and to implement the policies directed in Executive Order 13175 of November 6, 2000, *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249). In addition, President Biden issued Executive Order 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis* (86 FR 7037), directing agencies to consider environmental and social justice in their mission areas.

The Corps issued its current Tribal Consultation Policy in November 2012, which provides details regarding Tribal consultation specific to the Corps' authorities and responsibilities.<sup>2</sup> The Army recognizes the important intent of the Presidential Memorandum (86 FR 7491) and

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<sup>2</sup> <https://usace.contentdm.oclc.org/utls/getfile/collection/p16021coll11/id/4241> (accessed April 1, 2022).

Executive Order 13175 (65 FR 67249), and as such, is committed to ensuring the Corps' Policy is reviewed and updated to promote early, regular, meaningful, and robust consultation consistent with its missions and authorities. As such, the Army is undertaking a review and update of the Corps' Tribal Consultation Policy.

The Army has completed an initial review of the Corps' existing Tribal Consultation Policy and has preliminarily identified several areas which may be included in an update. For example, consistent with the Consolidated Appropriations Act of 2004, as amended, the Army intends to update the Tribal Consultation Policy to provide that the Corps will consult with Alaska Native Corporations on the same basis as Indian Tribes under Executive Order 13175.<sup>3</sup> In addition, the Army intends to address provisions on culturally-sensitive information consistent with DoD Instruction 4710.02, dated September 24, 2018.<sup>4</sup>

The Army also intends to address the areas below in an update to the Corps' Tribal Consultation Policy and solicits public and Tribal input on how the areas below should be incorporated into the Policy.

In March 2019, the Government Accountability Office (GAO) issued a Report, "Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects",<sup>5</sup> which included a recommendation to document in the agency's Tribal Consultation Policy how agencies will communicate with Tribes regarding how tribal input from consultation was considered in agency decisions on infrastructure projects. The Army intends to address this GAO recommendation by updating the Corps' Tribal Consultation Policy to include a requirement to provide a written response to Tribes on how Tribal input was considered in the decision-making process.

One other area the Army seeks to include in an update to the Corps' Tribal Consultation Policy is to better address how Tribal consultation should be specifically incorporated into the

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<sup>3</sup> Consolidated Appropriations Act, 2004, Pub. L. 108–199, Div. II. Sec. 161, 118 Stat. 3, 452 (2004) as amended by Consolidated Appropriations Act, 2005, Pub. L. 108–447, Div. H., Title V. Sec. 518, 118 Stat. 2809, 3267 (2004).

<sup>4</sup> <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/471002p.pdf?ver=2018-11-28-143903-320> (accessed April 1, 2022).

<sup>5</sup> GAO-19-22, <https://www.gao.gov/assets/700/698104.pdf> (accessed April 1, 2022).

processes associated with the Corps' Regulatory Program. Currently, the Corps' Regulatory Program relies on regulations primarily from 1986 (33 CFR 320-330; 51 FR 41206) and 1990 (33 CFR 325, Appendix C at 55 FR 27003), which provide very limited references to Tribal consultation. In addition, there is no consolidated comprehensive guidance specific to the Regulatory Program for Tribal consultation. These multiple references can lead to inconsistency and lack of clarity for the Corps' staff, Tribes, and the regulated public as to how Tribal consultation is conducted in the Corps' Regulatory Program. In addition, Tribes have indicated that the lack of regulations or specific policy suggests that the Corps' Regulatory Program is not committed to consulting with Tribes. Therefore, the Army wants to ensure it is clear that the Corps' Tribal Consultation Policy applies to the Regulatory Program. The Army is also considering how to address topics specific to the Regulatory Program in the Corps' updated Tribal Consultation Policy.

For example, the Army intends to address Tribal consultation requirements for approved jurisdictional determinations issued by the Corps' Regulatory Program in the update to the Corps' Tribal Consultation Policy. An approved jurisdictional determination means the Corps has documented the presence or absence of waters of the United States on a parcel of land or a written statement and map identifying the limits of waters of the United States on a parcel of land (see 33 CFR 331.2). Some Tribes have questioned previous issuances of approved jurisdictional determinations, which are final agency actions under the Administrative Procedure Act, without pre-decisional government-to-government consultation. Tribes may be impacted by an approved jurisdictional determination in terms of which waters may or may not be jurisdictional under the Clean Water Act and as a result any permit requirements that may be required. In addition, Tribes may have information, including Indigenous Traditional Ecological Knowledge (ITEK), that may assist in making such a determination but is unknown to the Corps and may only be provided in consultation with Tribes. The Biden-Harris Administration recently issued a memorandum providing that ITEK can and should inform Federal Government decision

making where appropriate.<sup>6</sup> The Army solicits input on conducting Tribal consultations on approved jurisdictional determinations as a policy matter.

In addition to the above, the Army welcomes feedback related to other key issues, such as identification of ways in which existing policy has or has not worked, and specific procedures that should/could be identified to ensure that consultation is regular, meaningful, and robust. The Army recognizes the vast experience of Tribal Nations in engagements with the Corps, including perspectives on how consultation has occurred in the past and how it could occur in the future, and as such wants to ensure tribal voices are heard during the process to update to the Corps' Tribal Consultation Policy. In addition to the written input and listening sessions, Tribal Nations may also request an initiation of government-to-government consultation on the policy review and update. The virtual listening sessions for input are described in the Public Meetings and Outreach section below. Written comments on this priority policy initiative are also strongly encouraged and instructions are found in the Addresses section above.

## **B. Tribal Partnership Program**

Section 203 of the WRDA of 2000, as amended (33 U.S.C. 2269), authorizes the Secretary of Army, in cooperation with Indian Tribes and the heads of other federal agencies, to carry out water-related planning activities, and activities related to the study, design, and construction of water resources development projects with federally-recognized Tribes that are located primarily within Indian Country or in proximity to Alaska Native Villages. The Army has been implementing this authority as the Tribal Partnership Program (TPP). The TPP includes projects for flood damage reduction, aquatic environmental restoration and protection, and preservation of cultural and natural resources; watershed assessments; and other projects determined appropriate.

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<sup>6</sup> Presidential Memorandum on Indigenous Traditional Ecological Knowledge and Federal Decision Making, November 15, 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/11/111521-OSTP-CEQ-ITEK-Memo.pdf> (accessed on April 1, 2022).

Feasibility studies, including water-related planning activities are cost shared at 50 percent federal and 50 percent non-federal expense. The Tribal partner may request a study to be scoped at the outset to either result in a report recommending a project plan for design and construction, or in a more limited report describing an array of alternatives that are determined to be technically feasible and economically and environmentally justified. Watershed assessments are cost shared at 75 percent federal and 25 percent non-federal expense. Design and construction of projects or separable elements are cost shared in accordance with the percentages in Sections 101 of the WRDA of 1986, as amended (33 U.S.C. 2211), for navigation projects, and in Section 103 of the WRDA of 1986 (33 U.S.C. 2213) for other types of projects. For projects or separable elements where the federal share is not greater than \$18.5 million, Congress authorized the Corps to perform design and construction as funding allows (33 U.S.C. 2269 (b)(4)(A)), without further Congressional authorization. Congress must provide separate authorization and appropriations for activities where the federal share is greater than \$18.5 million.

A cost share waiver under Section 1156 of WRDA 1986, as amended (33 U.S.C. 2310), applies to federally recognized Tribes for TPP. Section 135 of the WRDA of 2020 amended this provision to include an annual inflation adjustment (Division AA of Pub. L. 116-260). Tribes are also subject to the ability to pay, as determined by the Secretary, which applies to design and construction agreements as well as to studies, watershed assessments, and planning activities conducted under the TPP. Implementation Guidance for Section 1031(a) of Water Resources, Reform Development Act of 2014 (Pub. L. 113-121) and Section 1121 of WRDA 2016 (Pub. L. 114-322), outlines the procedures for applying the ability-to-pay factor.<sup>7</sup>

The Army has directed development of updated comprehensive implementation guidance for the TPP. The guidance will cover the TPP statute, Section 203 of Pub. L. 106-541, as amended by Section 2011 of Pub. L. 110-114, Section 1031(a) of Pub. L. 113-121, Section 1121 of Pub. L. 114-322, Section 1157(i) of Pub. L. 115-270, and Section 303 of Division AA of Pub. L. 116-

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<sup>7</sup> <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll5/id/1300> (accessed April 13, 2022)



260 and any subsequent legislation enacted before its issuance. The Army seeks input on any specific topics, challenges, or best practices to include or address in the comprehensive TPP implementation guidance. For example, the Army seeks input as to whether additional clarity is needed regarding the application of the cost share waiver and/or ability to pay provisions, and if so, recommendations for such clarifications. Input is requested on ways in which the Corps can improve communication and increase awareness with Tribes regarding TPP, as well as identification of any limitations or barriers for Tribes to participate in TPP. The virtual listening sessions for input are described in the Public Meetings and Outreach section below. Written comments on this priority policy initiative are also strongly encouraged and instructions are found in the Addresses section above.

### **III. Potential Rulemaking Actions**

#### **A. Corps' Regulatory Program Procedures for the Protection of Historic Properties at 33 CFR 325, Appendix C**

Section 106 of the National Historic Preservation Act (NHPA) (Pub. L. 89-665 and amendments thereto; 54 U.S.C. 306108) requires “the head of any Federal department . . . having authority to license any undertaking, . . . prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property.” The Advisory Council on Historic Preservation (ACHP) oversees agencies' compliance and issues regulations governing Section 106 of the NHPA (36 CFR 800), which define how Federal agencies meet their statutory responsibilities under NHPA. The Army's Civil Works programs, other than the Regulatory Program, use the regulations promulgated by ACHP for federal agency compliance with Section 106 of the NHPA.

The Corps' regulations governing Section 106 of the NHPA procedures specific to its Regulatory Program were promulgated in 1990 (55 FR 27003; 33 CFR 325, Appendix C). Since then, there have been amendments to the NHPA. For example, the 1992 amendments to the NHPA recognized and expanded the role of Indian Tribes and Native Hawaiian

organizations (NHOs) in the national preservation program. In response to these changes, the ACHP revised the Section 106 implementing regulations to clarify the role of Tribes and NHOs in the Section 106 process (65 FR 77698). ACHP made further amendments to the implementing regulations in 2004 (69 FR 40544). In response to the NHPA amendments and regulations promulgated by ACHP to govern federal agency implementation of Section 106, the Corps' Regulatory Program issued interim guidance in 2005<sup>8</sup> and 2007.<sup>9</sup> The Corps' Regulatory Program issued an Advanced Notice of Proposed Rulemaking (ANPRM) in 2004 (69 FR 57662) to gather input on an update to its implementing regulations, but the Corps has never finalized an update.

The Army acknowledges there has been longstanding disagreement between the Corps and ACHP regarding differences between the Corps' Regulatory Program Appendix C and the regulations promulgated by ACHP governing the Section 106 process. For example, the scope of the undertaking subject to review and the Corps' use of "permit area" versus ACHP's use of "area of potential effect". In addition, under the regulations promulgated by ACHP the resolution of adverse effects can be accomplished via a Memorandum of Agreement or, for certain complex projects or programs, a Programmatic Agreement, while the Corps' regulations allow for resolution through a Memorandum of Agreement or permit conditioning. There are also timeline differences between the sets of regulations.

The Corps' Regulatory Program's reliance on Appendix C and multiple guidance documents can result in inconsistency and confusion among the regulated public, State and Tribal Historic Preservation Offices, Tribes, and others. In addition, the longstanding disagreement between Regulatory and ACHP regarding differences between the Corps' implementing regulations and those promulgated by ACHP concerning the Regulatory scope for permit area has resulted in lengthy and challenging consultations. Tribes have also stated that the lack of updated and

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<sup>8</sup> <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll11/id/2478> (accessed April 3, 2022).

<sup>9</sup> <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll11/id/4042> (accessed April 3, 2022).

consistent implementing regulations reflecting the current NHPA language for the Corps' Regulatory Program indicates that the Corps is not meeting their statutory and Tribal trust responsibilities.

As a result, the Army has made clear that rulemaking on Appendix C is a priority policy initiative which will serve to modernize the Regulatory Program.<sup>10</sup> The Army is soliciting input on the best approach to modernize Appendix C, including consideration for options provided in the ANPRM from 2004 (69 FR 57662). Due to the passage of time since the ANPRM, comments submitted in response to the ANPRM should be resubmitted for consideration related to this current initiative. The Army wants to best ensure compliance with the regulation promulgated by ACHP to govern federal agency implementation of Section 106 at 36 CFR 800, as well as to best reflect the policy priorities of the Administration. In particular, the Army seeks input on whether the Corps should rely on the NHPA regulations at 36 CFR 800 promulgated by ACHP and rescind Appendix C, and if so, whether any clarifying guidance is needed on the scope of the area of potential effects for the Corps' Regulatory Program, and whether development of a Program Alternative (36 CFR 800.14) would allow for clear and consistent implementation procedures, as well as improved Tribal consultation. The virtual listening sessions for input are described in the Public Meetings and Outreach section below. Written comments on this priority policy initiative are also strongly encouraged and instructions are found in the Addresses section above.

## **B. Principles, Requirements, and Guidelines (PR&G)**

### **1. Background**

Section 2031 of the WRDA of 2007 (Pub. L. 110-114) directed the Secretary of the Army, in consultation with the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Housing and Urban Development, the Secretary of Transportation,

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<sup>10</sup> See Fall 2021 Unified Agenda at RIN-0710-AB46; <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=0710-AB46> (accessed April 3, 2022).

the Administrator of the Environmental Protection Agency, the Secretary of Energy, the Secretary of Homeland Security, the National Academy of Sciences, and the Council on Environmental Quality, to revise the March 10, 1983, Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies<sup>11</sup> (P&G) for Corps use and to address the following considerations: advancements in economic and analytic techniques; public safety; low-income communities; nonstructural solutions; and integrated, adaptive, and watershed approaches.

Since 1983, the P&G has guided the evaluation and formulation of water resources projects proposed by the Corps and three other Federal water resources agencies. The 1983 P&G required the agencies to undertake a broad analysis of all significant effects of a proposed Federal water resources project and its alternatives. The P&G also directed these agencies to recommend the alternative with the greatest net economic benefit consistent with protecting the Nation's environment, unless the agency head grants an exception to this rule. The Corps uses the P&G primarily in its commercial navigation and its flood and storm damage reduction studies.

During the Obama Administration, the Council of Environmental Quality (CEQ) led an interagency effort to modernize the P&G. That process began in 2009 and concluded in 2013 and 2014, when the Water Resources Council issued the Principles, Requirements and Guidelines (PR&G).<sup>12</sup> The PR&G emphasizes that water resources projects should maximize economic development, avoid the unwise use of floodplains, and protect and restore natural ecosystems. The PR&G is designed to support water infrastructure projects with the greatest public benefits (economic, environmental and social benefits).

During the development of the PR&G, which involved an interagency process, CEQ provided an opportunity for input from the public and stakeholders, including several workshops

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<sup>11</sup> [https://planning.erdc.dren.mil/toolbox/library/Guidance/Principles\\_Guidelines.pdf](https://planning.erdc.dren.mil/toolbox/library/Guidance/Principles_Guidelines.pdf) (accessed May 4, 2022).

<sup>12</sup> <https://obamawhitehouse.archives.gov/administration/eop/ceq/initiatives/PandG> (accessed April 4, 2022).

on topics such as climate change, ecosystem services, and Tribal engagement. In addition, input from a review by the National Academy of Sciences was incorporated into the final product.

CEQ also directed and coordinated the development of Agency Specific Procedures (ASPs) by each affected water resources agency in 2014. Those ASPs were completed by all water resources agencies and approved by CEQ, with the exception of the Corps. For several years, beginning in 2015, the Congress included direction in the Joint Explanatory Statement for the annual Corps appropriation that prohibited the Corps from developing the ASPs to implement the PR&G. However, Congress has since then directed the Secretary to issue ASPs in Section 110 of WRDA 2020 (Division AA of Pub. L. 116-260).

An Army memorandum dated January 5, 2021, provided interim direction to the Corps project planning process.<sup>13</sup> The memorandum directed the Corps to give equal consideration in its project studies to all of the benefits of a proposed project and its alternatives, and equal consideration of economic, environmental and social categories.

## **2. Overview of PR&G**

The PR&G includes a number of notable features, which govern its implementation. These include: 1) the concept of public benefits, with a focus on striving to maximize public benefits (economic, social and environmental) relative to costs, with no hierarchy among the interrelated economic, social, and environmental goals when evaluating alternatives for investments; 2) elevating the Locally Preferred Plan (LPP), where an LPP exists it should be included in the final array, promoting transparency from the initial stages and reducing conflict in cases where a local sponsor has a “plan” to solve a problem; 3) elevating the nonstructural plan, where a nonstructural plan exists, it must be included in the final array regardless of whether an agency can implement it; 4) facilitating choices for the recommended project(s), where the public benefits approach involves tradeoffs among plans and outputs (economic, social, environmental)

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[https://planning.erd.c.dren.mil/toolbox/library/MemosandLetters/ComprehensiveDocumentationofBenefitsinDecisionDocument\\_5January2021.pdf](https://planning.erd.c.dren.mil/toolbox/library/MemosandLetters/ComprehensiveDocumentationofBenefitsinDecisionDocument_5January2021.pdf) (accessed April 4, 2022).

resulting in the decision maker likely having more projects that may be worthy of an investment, that there may be more than one “best” way to solve some of the nation’s increasingly complex water resources challenges, and that professional judgment in determining which project(s) is best will be facilitated by appropriate consideration of tradeoff of monetized and non-monetized effects, resulting in an elevation of the role of qualitative data and the need for professional judgment in making recommendations; 5) facilitating collaboration, where a broad application across a wider array of federal water programs is expected to facilitate collaboration in terms of data sharing, model development and agency-to-agency consultations; 6) elevating ecosystem, sustainable economic development, floodplain, environmental justice, public safety and watershed considerations in terms of alternatives that are developed and considered, increasing transparency; 7) level of analysis, where the PR&G identifies the kinds of activities to analyze and provides for varying levels of detail, as well as a means to certify equivalent processes as meeting the intent of PR&G, and the full analysis is provided for major investments whereas scaled analyses are provided for smaller investments, where the process is streamlined and procedures reflect the scope and complexity of the problem being assessed; and, 8) fiscal resources, recognizing limited fiscal resources more directly, potentially resulting in smaller projects that may not maximize the return on investment like that of an National Economic Development plan, but solving a water resources problem at a smaller or different scale.

In general, the PR&G also includes a focus on some of the policy priorities discussed in this *Federal Register* notice, as PR&G discusses climate resiliency and environmental justice in the public benefits context and they are both also included in the Guiding Principles for implementing PR&G.<sup>14</sup>

### **3. Path Forward Regarding PR&G Implementation**

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<sup>14</sup> [https://obamawhitehouse.archives.gov/sites/default/files/docs/prg\\_interagency\\_guidelines\\_12\\_2014.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/prg_interagency_guidelines_12_2014.pdf) (last accessed May 4, 2022).

The Army plans to undertake a rulemaking that will propose how specifically the Army would implement the PR&G.<sup>15</sup> The Army seeks input on the appropriate content of this PR&G rulemaking to ensure consistency with the intent and purpose of PR&G. The Army expects the rulemaking to cover a range of basic project planning issues. The Army does not seek to codify the contents of the January 2021 memorandum in the PR&G rulemaking effort. However, the Army invites comments on which aspects of this memorandum may be beneficial to carry forward in the forthcoming PR&G rulemaking effort.

The virtual listening sessions for input are described in the Public Meetings and Outreach section below. Written comments on this priority policy initiative are also strongly encouraged and instructions are found in the Addresses section above.

### **III. Environmental Justice**

#### **A. Interim Guidance Overview**

On March 15, 2022, the Assistant Secretary of the Army for Civil Works issued a memorandum to the Corps providing interim guidance on environmental justice titled, *Implementation of Environmental Justice and the Justice40 Initiative* (Interim Guidance).<sup>16</sup> The memorandum outlines the environmental justice policy for the Army and outlines three key areas of focus: 1) improving outreach and access to Army Civil Works information and resources; 2) improving access to Army Civil Works technical service programs (e.g., Planning Assistance to States and Floodplain Management Services programs) and maximizing the reach of Civil Works projects to benefit the disadvantaged communities, in particular as it relates to climate resiliency; and 3) ensuring any updates to Army Civil Works policies and guidance will not result in a disproportionate impact on disadvantaged communities.

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<sup>15</sup> See the Fall 2021 Unified Agenda, RIN 0710-AB418 at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=0710-AB41> (accessed April 4, 2022).

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[https://www.army.mil/article/254935/assistant\\_secretary\\_of\\_the\\_army\\_for\\_civil\\_works\\_issues\\_environmental\\_justice\\_guidance\\_to\\_the\\_army\\_corps\\_of\\_engineers](https://www.army.mil/article/254935/assistant_secretary_of_the_army_for_civil_works_issues_environmental_justice_guidance_to_the_army_corps_of_engineers) (accessed April 3, 2022).

The Interim Guidance focuses on priority action areas for environmental justice, including the Justice40 Initiative, in Civil Works. The priority action areas for Civil Works include the Tribal Partnership Program, Planning Assistance to States program, and Floodplain Management Services program, as well as more broadly to study, design, construction, and operation phases of projects primarily for flood risk management, coastal storm risk management, and aquatic ecosystem restoration. It also includes the Continuing Authorities Program and Environmental Infrastructure, where applicable under the relevant authorities. The memorandum also provides the initial strategy for the Corps to implement the Justice40 Initiative as envisioned by the Administration,<sup>17</sup> pending further Administration guidance. The Interim Guidance covers areas such as significant but incidental benefits and strategic outreach. The Interim Guidance details how the Corps should consider environmental justice until such time as final guidance is issued and provides a strategy for implementation to achieve the broader goals of the Administration regarding environmental justice.

The Army seeks input on whether there are additional measures that the Army should include related to environmental justice, as well as specific to the Justice40 Initiative. In particular, the Army seeks input as to whether there are areas to be updated in the Interim Guidance for consideration in a final environmental justice guidance. In addition, we seek input as to whether there are specific considerations regarding the Planning Assistance to States program, the Floodplain Management Services program, and the Continuing Authorities Program which could better achieve environmental justice and equity. Input is requested on ways to improve how these Corps programs advance environmental justice and equity, and on any current barriers to achieving these objectives. Input also is requested on recommendations for how the Army can best ensure that the assistance that it provides under these programs will directly benefit and advance environmental justice and equity.

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<sup>17</sup> See M-21-28, <https://www.whitehouse.gov/wp-content/uploads/2021/07/M-21-28.pdf> (accessed April 4, 2022).



One area not addressed in the Interim Guidance is the Corps' Regulatory Program. The Army intends to issue guidance specific to the Regulatory Program but seeks input on how best to incorporate consideration of environmental justice in the Regulatory Program. The Army requests recommendations as to how to accomplish such incorporation. The virtual listening sessions for input are described in the Public Meetings and Outreach section below. Written comments on this priority policy initiative are also strongly encouraged and instructions are found in the Addresses section above.

## **B. Outreach and Tools**

To achieve the goals outlined in the Interim Guidance, there will be an evolution as to how the Army engages and builds relationships with communities. This Federal Register notice provides the national-level engagement effort for environmental justice outreach for the Army. The virtual sessions on environmental justice will highlight the services and programs that the Corps provides and then provide an opportunity for stakeholder input on how the Army can best leverage its capabilities and authorities, as well as leveraging those of other partners and federal agencies, to meet the needs of disadvantaged and underserved communities. Following this national-level engagement, the Army will have a more targeted focus of outreach at the local level. The Army will engage Tribal, state, and local governments, and local communities to discuss these matters and to raise public awareness of the available programs and their benefits. The Army must strive to align its missions and authorities with the disadvantaged and underserved community's vision of the future to address the community's needs and enable community resilience to the maximum extent practicable. The Army seeks input on what forms of outreach are best to engage disadvantaged and underserved communities for Army programs.

As required by Executive Order 14008 on Tackling the Climate Crisis at Home and Abroad,<sup>18</sup> CEQ recently released a beta version of the Climate and Economic Justice Screening

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<sup>18</sup> <https://www.govinfo.gov/content/pkg/FR-2021-02-01/pdf/2021-02177.pdf> (accessed May 5, 2022).

Tool<sup>19</sup> to provide a consistent government-wide identification of disadvantaged communities that are marginalized, underserved, and overburdened by pollution. The Army will use this Tool for purposes of implementing the Interim Guidance, focusing on the climate change and the critical clean water and waste infrastructure (e.g., as implemented through the Corps' Environmental Infrastructure program) categories and their associated definitions. However, there are additional tools, such as the Environmental Protection Agency's EJScreen tool,<sup>20</sup> which are available for use to provide further support and description of these communities for purposes such as the National Environmental Compliance Act compliance and outreach to disadvantaged and underserved communities for our technical services programs. The Army seeks input on recommendations regarding the assessment of benefits directed towards those communities specific to the Civil Works program.

### **C. Water Resources Development Act**

Section 160 of the WRDA of 2020 (Pub. L. 116-260) (Act) directs the Secretary of the Army to issue guidance defining the term “economically disadvantaged community” for the purposes of that Act and the amendments made by that Act, and provides that to the maximum extent practicable, the Secretary shall utilize the criteria under section 301(a)(1) and (2) of the Public Works and Economic Development Act of 1965 (42 U.S.C. 3161) to the extent that such criteria are applicable in relation to the development of a water resources development project.

The Biden-Harris Administration released Interim Implementation Guidance for the Justice40 Initiative on July 20, 2021<sup>21</sup>, which included an interim definition of “disadvantaged community”:

Community – Agencies should define community as “either a group of individuals living in geographic proximity to one another, or a geographically dispersed set of individuals (such as

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<sup>19</sup> <https://screeningtool.geoplatform.gov/en> (accessed April 1, 2022). CEQ notes on the webpage that the beta version is “an early, in-progress version of the tool with limited datasets that will be regularly updated.” The Army is not soliciting input on the CEJST as that effort is being led by CEQ in a separate action.

<sup>20</sup> <https://www.epa.gov/ejscreen> (last accessed May 5, 2022).

<sup>21</sup> <https://www.whitehouse.gov/wp-content/uploads/2021/07/M-21-28.pdf>

migrant workers or Native Americans), where either type of group experiences common conditions.”

Disadvantaged – Agencies should consider appropriate data, indices, and screening tools to determine whether a specific community is disadvantaged based on a combination of variables that may include, but are not limited to, the following:

- o Low income, high and/or persistent poverty
- o High unemployment and underemployment
- o Racial and ethnic residential segregation, particularly where the segregation stems from discrimination by government entities
- o Linguistic isolation
- o High housing cost burden and substandard housing
- o Distressed neighborhoods
- o High transportation cost burden and/or low transportation access
- o Disproportionate environmental stressor burden and high cumulative impacts
- o Limited water and sanitation access and affordability
- o Disproportionate impacts from climate change
- o High energy cost burden and low energy access
- o Jobs lost through the energy transition
- o Access to healthcare.

The Army has drafted a proposed definition of “economically disadvantaged community,” consistent with the WRDA provision, to include: For purposes of the Army Civil Works program implementation of WRDA 2020 an economically disadvantaged community is defined as meeting one or more of the following:

(1) Low per capita income - The area has a per capita income of 80 percent or less of the national average; (2) Unemployment rate above national average - The area has an unemployment rate that is, for the most recent 24-month period for which data are available, at

least 1 percent greater than the national average unemployment rate; (3) Indian country as defined in 18 U.S.C. 1151; (4) U.S. Territories.<sup>22</sup>

The Army seeks input and recommendations on the proposed definition of economically disadvantaged community. The Army also seeks input on readily available data sources for the proposed definition. The virtual listening sessions for input are described in the Public Meetings and Outreach section below. Written comments on this priority policy initiative are also strongly encouraged and instructions are found in the Addresses section above.

#### **IV. Public Meetings and Outreach**

The Army will hold a series of virtual public meetings intended to solicit input to inform their review of potential future actions regarding the policy priority initiatives related to Tribal issues, potential rulemaking actions to include Appendix C and PR&G, and environmental justice. The Army will hold 11 virtual meetings in total, including one virtual meeting to provide an overview for the public and Tribes of all of the policy priority initiatives to help inform their comments, followed by a series of 10 virtual meetings to gather comments. There will be one virtual meeting on the Tribal issues open to all stakeholders, one virtual meeting on each of the rulemaking actions open to all stakeholders, and two virtual meetings on the environmental justice policy priority initiative open to all stakeholders. In addition, there will be two virtual meetings on the Tribal issues with leaders of Tribal Nations or their designated staff, one virtual meeting each on the potential rulemaking actions for the Regulatory Program's Appendix C as well as PR&G specific with leaders of Tribal Nations or their designated staff, and one virtual meeting for the environmental justice policy priority initiative with leaders of Tribal Nations or their designated staff. Registration information for the virtual public and Tribal meetings is below. Separate notification to Tribal leaders is also being provided initiating Tribal consultation where applicable, with additional outreach to Tribal staff occurring at the local District level. In

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<sup>22</sup> This can also be found at: [https://www.usace.army.mil/Missions/Civil-Works/Project-Planning/Legislative-Links/wrda\\_2020/](https://www.usace.army.mil/Missions/Civil-Works/Project-Planning/Legislative-Links/wrda_2020/) (accessed May 4, 2022) with other information regarding WRDA 2020 implementation.

addition, more community-level engagement will occur at the local District level on these policy priority initiatives to encourage participation and input on this notice.

Registration is required for all meetings. Spots are limited and those unable to attend are encouraged to provide written comments to the docket which will be given equal consideration. Additional meetings may be added if needed based on number of registrations. Attendees will be asked to provide their name and e-mail address to register.

Registration links are provided below and instructions with additional background information can also be found at the following website: <https://www.army.mil/asacw>. Persons or organizations wishing to provide verbal input during the virtual meetings will be selected on a first-come, first-served basis. Due to the expected number of participants, individuals will be asked to limit their spoken presentation to three minutes. Once the speaking slots are filled, participants may be placed on a standby list to speak or continue to register to listen to the input. Supporting materials and written feedback from those who do not have an opportunity to speak can be submitted to the docket as described above. The schedule for the virtual meetings is as follows:

- Overview virtual meeting:

June 22, 2022, 1 p.m. to 3 p.m. Eastern.

Registration link:

<https://www.zoomgov.com/meeting/register/vJltdeGvqDoqHLDhqGkGCo2XDqvJPTrrQ1E>

- Public virtual meeting on Tribal issues:

July 11, 2022, 1 p.m. to 3 p.m. Eastern.

Registration link:

<https://www.zoomgov.com/meeting/register/vJltdu2hqDMqHahppbA2q3HVKm31LbxqMqU>

- Public virtual meeting on Appendix C:

July 14, 2022, 2 p.m. to 4 p.m. Eastern.

Registration link:

<https://www.zoomgov.com/meeting/register/vJlscOqtqT4jHopjlJy1l5JnRlnt5OOxkie>

- Public virtual meeting on PR&G:

July 18, 2022, 1 p.m. to 3 p.m. Eastern.

Registration link:

<https://www.zoomgov.com/meeting/register/vJltdu6upjguG5LbfOXUWkUAEz7m3-NZ5V0>

- Public virtual meetings on Environmental Justice:

July 20, 2022, 1 p.m. to 3 p.m. Eastern.

Registration link:

<https://www.zoomgov.com/meeting/register/vJlsceqgpjgpH0DUKHEotfCGnZWEs10jtlI>

July 26, 2022, 2 p.m. to 4 p.m. Eastern.

Registration link:

<https://www.zoomgov.com/meeting/register/vJlsfuiuzqzwoG4F4fnSJmInSQZY4vZwEVGE>

- Tribal virtual meetings on Tribal Issues:

July 7, 2022, 1 p.m. to 3 p.m. Eastern.

Registration link:

<https://www.zoomgov.com/meeting/register/vJlscO-upzIsGQaR8o8fvQb23U8CBjScxBA>

July 12, 2022, 2 p.m. to 4 p.m. Eastern.

Registration link:

<https://www.zoomgov.com/meeting/register/vJltce-vqjwvG8Kjy6JX2ohci3WsBGSVLis>

- Tribal virtual meeting on Appendix C:

July 19, 2022, 2 p.m. to 4 p.m. Eastern.

Registration link:

<https://www.zoomgov.com/meeting/register/vJItdemoqjkuE29OGflxqlvB9cJrAGyoX1g>

- Tribal virtual meeting on PR&G:

July 21, 2022, 1 p.m. to 3 p.m. Eastern.

Registration link:

[https://www.zoomgov.com/meeting/register/vJItd-6rqzMpHO\\_oqn8OTcV30Fe7Af5hW9E](https://www.zoomgov.com/meeting/register/vJItd-6rqzMpHO_oqn8OTcV30Fe7Af5hW9E)

- Tribal virtual meeting on Environmental Justice:

July 27, 2022, 1 p.m. to 3 p.m. Eastern.

Registration link:

<https://www.zoomgov.com/meeting/register/vJIsdeutpjspEp7MCdx6i2KfGISuML0S83o>

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