



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET, NW
WASHINGTON, DC 20314-1000

CECW-P

MAY 06 2019

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Revised Implementation Guidance for Section 1126 of the Water Resources Development Act (WRDA) of 2018, Purpose and Need

1. The Assistant Secretary of the Army, Civil Works approved on 2 May 2019 Section 1126 of WRDA 2018. The attached implementation guidance is posted for internal and external use on the U.S. Army Corps of Engineers official WRDA website:
<http://www.usace.army.mil/Missions/Civil-Works/Project-Planning/Legislative-Links/>.
2. Please ensure wide dissemination of this guidance. Questions regarding this implementation guidance should be directed to the Headquarters POC, William James, National Mining Expert, Operations and Regulatory Division, at (615) 369-7508 or william.l.james@usace.army.mil.

A handwritten signature in black ink, appearing to read "J. Dalton", with a horizontal line extending to the right.

JAMES C. DALTON, P.E.
Director of Civil Works

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DEPARTMENT OF THE ARMY
ASSISTANT SECRETARY OF THE ARMY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

MAY -2 2019

MEMORANDUM FOR THE COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS

SUBJECT: Implementation Guidance for Section 1126 of the Water Resources Development Act of 2018, Purpose and Need

1. Section 1126 of the Water Resources Development Act of 2018 (WRDA 2018) requires District Engineers to develop and provide a purpose and need statement to an applicant within 90 days of the applicant submitting a complete application for a water storage project. The purpose and need statement provided by the District Engineer will include a statement that indicates whether the District Engineer concurs or non-concurs with the assessment of the purpose and need proposed by the applicant. The District Engineer will not substantially commence any Environmental Assessment (EA) or Environmental Impact Statement (EIS) with respect to an applicant's water storage project prior to providing the applicant the purpose and need statement. Section 1126 of WRDA 2018 is enclosed.
2. This guidance is applicable to all U.S. Army Corps of Engineers (Corps) Districts that implement Section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act of 1899, and/or Section 14 of the Rivers and Harbors Act of 1899 (Section 408). This guidance applies to the Corps' processing of applications for permits under these authorities for regulated activities associated with the construction of a new water storage project or modification of an existing water storage project. The District Engineer shall consider the impact to the flood risk management purpose of the reservoir when making the permit decisions.
3. The District Engineer will provide an applicant a single purpose and need statement for purposes of developing an EA or EIS regardless of the number and type of Corps permit decisions. The District Engineer will consider the purpose and need proposed by the applicant, but the District Engineer exercises independent judgment in defining the purpose and need to ensure that it is appropriate to fulfill the requirements of the review. Information on defining purpose and need is discussed in Section 9(b)(4) of Appendix B to 33 CFR Part 325, Engineer Circular (EC) 1165-2-220 (or current guidance), as well as the Council on Environmental Quality's regulations at 40 CFR 1502.13. To the extent practicable, District Engineers should follow the guidance applicable to establishing the purpose and need in the Updated Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program dated July 1, 2009, or the current replacement guidance. Preparation of an EA or EIS under the National Environmental Policy Act of

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1969 to assess the impacts of the proposed water storage project shall not substantially commence until the District Engineer provides a response to the applicant's assessment of purpose and need.

4. For the purposes of complying with Section 1126(a)(1), the 90-day time frame specified in this section begins upon the receipt of a complete permit application. Determination of a complete application shall be made in accordance with the requirements listed in 33 CFR 325.1(d) or EC 1165-2-220. As is typical for large, complex proposals such as water storage projects, Corps personnel are expected to fully utilize pre-application consultation to the maximum extent practicable. Purpose and need issues should be addressed during these discussions with the goal of developing a purpose and need statement which will be satisfactory to the applicant and the District Engineer.

6. Upon receipt of a complete application for a water storage project, the District Engineer must provide a written response to the applicant within 90 days that:

a. Indicates that the District Engineer concurs that the purpose and need statement in the permit application is appropriate.

b. In the event the District Engineer does not concur with the applicant's purpose and need statement, the District Engineer will provide an assessment to the applicant of the purpose and need statement for the project that the District Engineer has determined is appropriate for use during the evaluation of the permit application.

7. In accordance with Section 1126(b), an applicant may use the provisions of the administrative appeals process specified at 33 CFR Part 331 in relation to a final decision by the Corps on the application for a permit related to construction or modification of a water storage project under the Corps Clean Water Act Section 404 and/or Rivers and Harbors Act Section 10 permitting authorities. An applicant can challenge the validity of the purpose and need statement as part of an appeal, however Section 1126(b) does not modify Part 331 and thus only individual permit applications denied with prejudice and declined individual permits can be appealed. The appeals process may not be used immediately after the District Engineer's response to the applicant's assessment of purpose and need to directly appeal the determination of the purpose and need statement that will be used during processing of the permit application prior to a final decision on that application as provided in 33 CFR Part 331. A decision on a Section 408 application is not among the actions that can be appealed under the terms of Part 331, although the basis for an adverse Section 408 decision can be challenged through an appeal of a denial with prejudice of a Section 404 or Section 10 permit application or a declined Section 404 or Section 10 permit. An adverse Section 408 decision, without either (1) an accompanying denial with prejudice of a Section 404 or Section 10 permit application or (2) a declined Section 404 or Section 10 permit, cannot be administratively appealed but may be subject to challenge in an appropriate federal district court.

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8. This guidance shall be transmitted to the appropriate Corps Division and District Commanders and posted to the Corps' WRDA website within five business days of receipt (written or electronic) from this office. Guidance shall be transmitted and posted as is and without additional guidance attached.

9. Questions regarding this implementation guidance should be directed to Stacey Jensen, Office of the Assistant Secretary of the Army for Civil Works at Stacey.m.jensen.civ@mail.mil or 703-695-6791.



R. D. JAMES
Assistant Secretary of the Army
(Civil Works)

Enclosure

cf: MG Scott Spellmon, Deputy Commanding General, Civil and Emergency Operations
James Dalton, Director of Civil Works

Water Resources Development Act of 2018, Section 1126 – Purpose and Need

(a) PURPOSE AND NEED STATEMENTS

(1) **IN GENERAL.** Not later than 90 days after the date of receipt of a complete application for a water storage project, the District Engineer shall develop and provide to the applicant a purpose and need statement that describes

(A) whether the District Engineer concurs with the assessment of the purpose of and need for the water storage project proposed by the applicant; and

(B) in any case in which the District Engineer does not concur as described in subparagraph (A), an assessment by the District Engineer of the purpose of and need for the project.

(2) **EFFECT ON ENVIRONMENTAL IMPACT STATEMENTS.** No environmental impact statement or environmental assessment required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall substantially commence with respect to a water storage project until the date on which the District Engineer provides to the applicant a purpose and need statement as required under paragraph (1).

(b) **APPEALS REQUEST.** A non-Federal interest may use the administrative appeals process described in part 331 of title 33, Code of Federal Regulations (or any succeeding regulation), in relation to a decision of the Secretary related to an application for a water storage project.