



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

CECW-P

JUN 29 2016

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Implementation Guidance for Section 1044 of the Water Resources Reform and Development Act of 2014 – Independent Peer Review

1. Section 1044 of the Water Resources Reform and Development Act (WRRDA) 2014 amends Section 2034 of the Water Resources Development Act (WRDA) of 2007 (33 U.S.C. 2343) by increasing to \$200 million the estimated total project cost for project studies to be subject to mandatory Independent External Peer Review (IEPR); adding requirements for congressional and public notifications if an IEPR is not to be conducted; adding notification requirements and timelines for when a decision to conduct IEPR has been made; adding requirements for notice and public availability of the Final IEPR Report and Agency Response; and extending the period of applicability of Section 2034, as amended, to include project studies initiated prior to November 8, 2019. A copy of Section 2034 of WRDA 2007 as amended by Section 1044 of WRRDA 2014 is enclosed.

2. The requirements in this guidance are applicable to any project study initiated after June 10, 2014, the date of enactment of WRRDA 2014. Engineer Circular (EC) 1165-2-214 "Civil Works Review" outlines the process and requirements for implementing all Civil Works review procedures, including IEPR. (This EC can be found at <http://planning.usace.army.mil/toolbox/library/Ecs/EC1165-2-214.pdf> and at [http://planning.usace.army.mil/toolbox/library/pb/PB2016\\_02.pdf](http://planning.usace.army.mil/toolbox/library/pb/PB2016_02.pdf).) Ultimately, changes to IEPR implementation requirements outlined in this section will be addressed in an update to this EC. In the interim, the following guidance applies:

a. Increased project cost trigger. Type I IEPR is mandatory for project studies where the estimated total cost of the project, including mitigation, exceeds \$200 million; all other associated conditions specified in EC 1165-2-214 related to determining whether or not IEPR will be conducted remain unchanged.

b. Applicability. Section 2034 of WRDA 2007, as amended, applies to project studies initiated prior to November 8, 2019.

c. IEPR Decision and Congressional Notification/Public Availability.

(1) Decision to Conduct Type I IEPR. Upon MSC approval of any Review Plan that includes performing Type I IEPR, the MSC commander will immediately transmit the approved review plan and the MSC Commander approval memorandum to the responsible Regional Integration Team (RIT). The responsible RIT will prepare and transmit a letter, signed by the HQ Chief Planning and Policy, to the Committee on Environment and Public Works of the Senate (EPW) and the Committee on Transportation and Infrastructure of the House of Representatives (T&I) with a copy to the ASA-CW. The letter will notify Congress

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of the intent to conduct Type I IEPR and will be transmitted within 7 days of Review Plan approval. The decision to conduct IEPR will be made available to the public by the district posting the Review Plan on the USACE public website within 7 days of MSC approval of the Review Plan. The Review Plan shall include documentation of the Type I EPR decision.

(2) Decision to Exclude from Type I IEPR. Upon the Chief of Engineers' approval of an exclusion from conducting Type I IEPR for a study, the responsible RIT will prepare and transmit a letter, signed by HQ Chief of Planning and Policy, to the Senate EPW and House T&I Committees with a copy to the ASA-CW. The letter will notify Congress of the Chief of Engineers' decision not to conduct Type I IEPR and will be transmitted within 7 days of approval of the Type I IEPR exclusion. The decision not to conduct IEPR will be made available to the public by the district posting the Review Plan on the USACE public website within 7 days of approval of the Type I IEPR exclusion. The Review Plan shall include documentation of the Type I IEPR exclusion decision.

(3) Changes in Decision to Conduct Type I IEPR. Information developed as part of the study process may cause the Chief of Engineers to revisit the decision whether or not Type I IEPR will be conducted. Any change in the decision to conduct or not conduct Type I IEPR on a study will require re-notification of Congress and the public following the procedures described above.

d. Public Availability of Type I IEPR Information. Information regarding the conduct of Type I IEPR will be posted on the USACE public website. Following award of a task order to conduct Type I IEPR, the responsible Review Management Organization (RMO) will provide the responsible RIT with the scheduled dates for the beginning and end of review and the name of the Outside Eligible Organization (OEO) that has the task order for the review. The beginning of review is the date the panel of experts initiates the review and the end of the review is the date the OEO submits the Type I IEPR Final Report to USACE. The information will be made available to the public by the responsible RIT posting the information on the USACE public website not later than 7 days after the task order is awarded. When the OEO completes subcontracts with the panel of experts, the responsible RMO will provide the names and qualifications of the panel of experts to the responsible RIT. The information will be made available to the public by the responsible RIT posting the names and qualifications of the panel of experts on the USACE public website not later than 7 days after the subcontracts with the panel are completed.

e. Type I IEPR Report and Agency Response Public Availability and Submission to Congress. A copy of the Final Type I IEPR report documenting the comments and recommendations of the IEPR panel and a copy of the responses to the panel comments and recommendations by the Chief of Engineers will be promptly submitted to Congress and will be made available to the public on the USACE public website.

(1) Upon acceptance of the Final IEPR Report from the OEO by the RMO, the responsible RMO will transmit the report to the responsible RIT. The responsible RIT will prepare and transmit a letter, signed by the USACE Director of Civil Works (DCW), to the Senate EPW and House T&I Committees with a copy to the ASA-CW and USACE

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Commanding General (CG) within 7 days of receipt from the RMO. The letter will submit the Final IEPR Report to the Congressional committees. In order to make the tight timeline, the letter shall be transmitted electronically and shall include a pdf of the Final IEPR Report. The responsible RIT will post the Final IEPR Report on the USACE public website within 7 days of receipt from the RMO.

(2) Upon completion of the Agency Response, the responsible RIT will prepare and transmit a letter for signature by the DCW to the Senate EPW and House T&I Committees with a copy to the ASA-CW and CG within 3 days of completion of the Agency Response. The letter will submit the Agency Response to the Congressional committees. In order to make the tight timeline, the letter shall be transmitted electronically and shall include a pdf of the Agency Response. The Agency Response will be posted to the USACE public website within 3 days of completion of the Agency Response.

f. Type I IEPR Information in the Final Decision Document. For project studies that undergo Type I IEPR, the Final IEPR Report and Agency Response shall be included in an appendix to the final decision document. For project studies that are excluded from Type I IEPR, the exclusion decision and rationale shall be included in the decision document for the project study.

Encl



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SECTION 2034 OF WRDA 2007 AS AMENDED BY SECTION 1044 OF WRRDA 2014

**SEC. 2034. INDEPENDENT PEER REVIEW.**

(a) PROJECT STUDIES SUBJECT TO INDEPENDENT PEER REVIEW.—

(1) IN GENERAL.—Project studies shall be subject to a peer review by an independent panel of experts as determined under this section.

(2) SCOPE.—The peer review may include a review of the economic and environmental assumptions and projections, project evaluation data, economic analyses, environmental analyses, engineering analyses, formulation of alternative plans, methods for integrating risk and uncertainty, models used in evaluation of economic or environmental impacts of proposed projects, and any biological opinions of the project study.

(3) PROJECT STUDIES SUBJECT TO PEER REVIEW.—

(A) MANDATORY.—A project study shall be subject to peer review under paragraph (1) if—

(i) the project has an estimated total cost of more than \$200,000,000, including mitigation costs, and is not determined by the Chief of Engineers to be exempt from peer review under paragraph (6);

(ii) the Governor of an affected State requests a peer review by an independent panel of experts; or (iii) the Chief of Engineers determines that the project study is controversial considering the factors set forth in paragraph (4).

(B) DISCRETIONARY.—

(i) AGENCY REQUEST.—A project study shall be considered by the Chief of Engineers for peer review under this section if the head of a Federal or State agency charged with reviewing the project study determines that the project is likely to have a significant adverse impact on environmental, cultural, or other resources under the jurisdiction of the agency after implementation of proposed mitigation plans and requests a peer review by an independent panel of experts.

(ii) DEADLINE FOR DECISION.—A decision of the Chief of Engineers under this subparagraph whether to conduct a peer review shall be made within 21 days of the date of receipt of the request by the head of the Federal or State agency under clause (i).

(iii) REASONS FOR NOT CONDUCTING PEER REVIEW.—

If the Chief of Engineers decides not to conduct a peer review following a request under clause (i), the Chief shall make publicly available, including on the Internet, the reasons for not conducting the peer review.

(iv) APPEAL TO CHAIRMAN OF COUNCIL ON ENVIRONMENTAL

QUALITY.—A decision by the Chief of Engineers not to conduct a peer review following a request under clause (i) shall be subject to appeal by a person referred to in clause (i) to the Chairman of the Council on Environmental Quality if such appeal is made within the 30-day period following the date of the decision being made available under clause (iii). A decision of the Chairman on an appeal under this clause shall be made within 30 days of the date of the appeal.

(4) FACTORS TO CONSIDER.—In determining whether a project study is controversial under paragraph (3)(A)(iii), the Chief of Engineers shall consider if—

(A) there is a significant public dispute as to the size, nature, or effects of the project; or  
(B) there is a significant public dispute as to the economic or environmental costs or benefits of the project.

(5) PROJECT STUDIES EXCLUDED FROM PEER REVIEW.—The Chief of Engineers may exclude a project study from peer review under paragraph (1)—

(A) if the project study does not include an environmental impact statement and is a project study subject to peer review under paragraph (3)(A)(i) that the Chief of Engineers determines—

(i) is not controversial;

(ii) has no more than negligible adverse impacts on scarce or unique cultural, historic, or tribal resources;

(iii) has no substantial adverse impacts on fish and wildlife species and their habitat prior to the implementation of mitigation measures; and

(iv) has, before implementation of mitigation measures, no more than a negligible adverse impact on a species listed as endangered or threatened species under the Endangered Species Act of 1973 (16 U.S.C.

1531 et seq.) or the critical habitat of such species designated under such Act;

(B) if the project study—

(i) involves only the rehabilitation or replacement of existing hydropower turbines, lock structures, or flood control gates within the same footprint and for the same purpose as an existing water resources project;

(ii) is for an activity for which there is ample experience within the Corps of Engineers and industry to treat the activity as being routine; and

(iii) has minimal life safety risk; or

(C) if the project study does not include an environmental impact statement and is a project study pursued under section 205 of the Flood Control Act of 1948 (33 U.S.C. 701s), section 2 of the Flood Control Act of August 28, 1937 (33 U.S.C. 701g), section 14 of the Flood Control Act of 1946 (33 U.S.C. 701r), section 107(a) of the River and Harbor Act of 1960 (33 U.S.C. 577(a)), section 3 of the Act entitled “An Act authorizing Federal participation in the cost of protecting the shores of publicly owned property”, approved August 13, 1946 (33 U.S.C. 426g), section 111 of the River and Harbor Act of 1968 (33 U.S.C. 426i), section 3 of the Act entitled “An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes”, approved March 2, 1945 (33 U.S.C. 603a), section 1135 of the Water Resources Development Act of 1986 (33 U.S.C. 2309a), or section 206 of the Water Resources Development Act of 1996 (33 U.S.C. 2330).

(6) DETERMINATION OF TOTAL COST.—For purposes of determining the estimated total cost of a project under paragraph (3)(A), the total cost shall be based upon the reasonable estimates of the Chief of Engineers at the completion of the reconnaissance study for the project. If the reasonable estimate of total costs is subsequently determined to be in excess of the amount in paragraph (3)(A), the Chief of Engineers shall make a determination whether a project study is required to be reviewed under this section.

(b) TIMING OF PEER REVIEW.—

(1) IN GENERAL.—The Chief of Engineers shall determine the timing of a peer review of a project study under subsection (a). In all cases, the peer review shall occur during the period beginning on the date of the signing of the feasibility cost sharing agreement for the study and ending on the date established under subsection (e)(1)(A) for the peer review and shall be accomplished concurrent with the conducting of the project study.

(2) FACTORS TO CONSIDER.—In any case in which the Chief of Engineers has not initiated a peer review of a project study, the Chief of Engineers shall consider, at a minimum, whether to initiate a peer review at the time that—

(A) the without-project conditions are identified;

(B) the array of alternatives to be considered are identified; and

(C) the preferred alternative is identified.

(3) REASON FOR TIMING.—If the Chief of Engineers does not initiate a peer review for a project study at a time described in paragraph (2), the Chief shall—

(A) not later than 7 days after the date on which the Chief of Engineers determines not to initiate a peer review—

(i) notify the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives of that decision; and

(ii) make publicly available, including on the Internet, the reasons for not conducting the review; and

(B) include the reasons for not conducting the review in the decision document for the project study.

(4) LIMITATION ON MULTIPLE PEER REVIEW.—Nothing in this subsection shall be construed to require the Chief of Engineers to conduct multiple peer reviews for a project study.

(c) ESTABLISHMENT OF PANELS.—

(1) IN GENERAL.—For each project study subject to peer review under subsection (a), as soon as practicable after the Chief of Engineers determines that a project study will be subject to peer review, the Chief of Engineers shall contract with the National Academy of Sciences or a similar independent scientific and technical advisory organization or an eligible organization to establish a panel of experts to conduct a peer review for the project study.

(2) MEMBERSHIP.—A panel of experts established for a project study under this section shall be composed of independent experts who represent a balance of areas of expertise suitable for the review being conducted.

(3) LIMITATION ON APPOINTMENTS.—The National Academy of Sciences or any other organization the Chief of Engineers contracts with under paragraph (1) to establish a panel of experts shall apply the National Academy of Science's policy for selecting committee members to ensure that members selected for the panel of experts have no conflict with the project being reviewed.

(4) CONGRESSIONAL AND PUBLIC NOTIFICATION.—Following the identification of a project study for peer review under this section, but prior to initiation of the review by the panel of experts, the Chief of Engineers shall, not later than 7 days after the date on which the Chief of Engineers determines to conduct a review—

(A) notify the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives of the review conducted under this section; and

(B) make publicly available, including on the Internet, information on—

(i) the dates scheduled for beginning and ending the review;

(ii) the entity that has the contract for the review; and

(iii) the names and qualifications of the panel of experts.

(d) DUTIES OF PANELS.—A panel of experts established for a peer review for a project study under this section shall—

(1) conduct the peer review for the project study;

(2) assess the adequacy and acceptability of the economic, engineering, and environmental methods, models, and analyses used by the Chief of Engineers;

(3) receive from the Chief of Engineers the public written and oral comments provided to the Chief of Engineers;

(4) provide timely written and oral comments to the Chief of Engineers throughout the development of the project study, as requested; and

(5) submit to the Chief of Engineers a final report containing the panel's economic, engineering, and environmental analysis of the project study, including the panel's assessment of the adequacy and acceptability of the economic, engineering, and environmental methods, models, and analyses used by the Chief of Engineers, to accompany the publication of the report of the Chief of Engineers for the project.

(e) DURATION OF PROJECT STUDY PEER REVIEWS.—

(1) DEADLINE.—A panel of experts established under this section shall—

(A) complete its peer review under this section for a project study and submit a report to the Chief of Engineers under subsection (d)(5) not more than 60 days after the last day of the public comment period for the draft project study, or, if the Chief of Engineers determines that a longer period of time is necessary, such period of time determined necessary by the Chief of Engineers; and

(B) terminate on the date of initiation of the State and agency review required by the first section of the Flood Control Act of December 22, 1944 (58 Stat. 887).

(2) FAILURE TO MEET DEADLINE.—If a panel of experts does not complete its peer review of a project study under this section and submit a report to the Chief of Engineers under subsection (d)(5) on or before the deadline established by paragraph (1) for the peer review, the Chief of Engineers shall complete the project study without delay.

(f) RECOMMENDATIONS OF PANEL.—

(1) CONSIDERATION BY THE CHIEF OF ENGINEERS.—After receiving a report on a project study from a panel of experts under this section and before entering a final record of decision for the project, the Chief of Engineers shall consider any recommendations contained in the report and prepare a written response for any recommendations adopted or not adopted.

(2) PUBLIC AVAILABILITY AND SUBMISSION TO CONGRESS. —After receiving a report on a project study from a panel of experts under this section, the Chief of Engineers shall make available to the public, including on the Internet, and submit to the

Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives—

(A) a copy of the report not later than 7 days after the date on which the report is delivered to the Chief of Engineers; and

(B) a copy of any written response of the Chief of Engineers on recommendations contained in the report not later than 3 days after the date on which the response is delivered to the Chief of Engineers.

(3) INCLUSION IN PROJECT STUDY. —A report on a project study from a panel of experts under this section and the written response of the Chief of Engineers shall be included in the final decision document for the project study.

(g) COSTS.—

(1) IN GENERAL.—The costs of a panel of experts established for a peer review under this section—

(A) shall be a Federal expense; and

(B) shall not exceed \$500,000.

(2) WAIVER.—The Chief of Engineers may waive the \$500,000 limitation contained in paragraph (1)(B) in cases that the Chief of Engineers determines appropriate.

(h) APPLICABILITY.—This section shall apply to—

(1) project studies initiated during the 2-year period preceding the date of enactment of this Act and for which the array of alternatives to be considered has not been identified; and

(2) project studies initiated during the period beginning on such date of enactment and ending 12 years after such date of enactment.

(i) REPORTS.—

(1) INITIAL REPORT.—Not later than 3 years after the date of enactment of this section, the Chief of Engineers shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on the implementation of this section.

(2) ADDITIONAL REPORT.—Not later than 6 years after the date of enactment of this section, the Chief of Engineers shall update the report under paragraph (1) taking into account any further information on implementation of this section and submit such updated report to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives.

(j) NONAPPLICABILITY OF FACAA.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to a peer review panel established under this section.

(k) SAVINGS CLAUSE.—Nothing in this section shall be construed to affect any authority of the Chief of Engineers to cause or conduct a peer review of a water resources project existing on the date of enactment of this section.

(l) DEFINITIONS.—In this section, the following definitions apply:

(1) PROJECT STUDY.—The term “project study” means—

(A) a feasibility study or reevaluation study for a water resources project, including the environmental impact statement prepared for the study; and

(B) any other study associated with a modification of a water resources project that includes an environmental impact statement, including the environmental impact statement prepared for the study.

(2) **AFFECTED STATE.**—The term “affected State”, as used with respect to a water resources project, means a State all or a portion of which is within the drainage basin in which the project is or would be located and would be economically or environmentally affected as a consequence of the project.

(3) **ELIGIBLE ORGANIZATION.**—The term “eligible organization” means an organization that—

(A) is described in section 501(c)(3), and exempt from Federal tax under section 501(a), of the Internal Revenue Code of 1986;

(B) is independent;

(C) is free from conflicts of interest;

(D) does not carry out or advocate for or against Federal water resources projects; and

(E) has experience in establishing and administering peer review panels.

(4) **TOTAL COST.**—The term “total cost”, as used with respect to a water resources project, means the cost of construction (including planning and designing) of the project. In the case of a project for hurricane and storm damage reduction or flood damage reduction that includes periodic nourishment over the life of the project, the term includes the total cost of the nourishment.