



## JOINT GUIDANCE

**Subject:** Joint guidance for clarifying and applying the interpretation of the terms “basic purpose” and “overall project purpose” under the Clean Water Act Section 404(b)(1) Guidelines

1. **Purpose.** This joint guidance aligns the U.S. Environmental Protection Agency’s (EPA) interpretation and the U.S. Army Corps of Engineers’ (Corps) interpretation of the regulatory terms “basic purpose” and “overall project purpose” under the Clean Water Act (CWA) Section 404(b)(1) Guidelines for purposes of government efficiency.

### 2. General Considerations.

a. **Background.** The Section 404(b)(1) Guidelines, found at 40 CFR Part 230, are statutorily mandated EPA regulations used in evaluating activities requiring a CWA Section 404 permit. The regulations state, in relevant part:

(a) Except as provided under Section 404(b)(2), **no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem**, so long as the alternative does not have other significant adverse environmental consequences.

(1) [...]

(2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of **overall project purposes**. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the **basic purpose** of the proposed activity may be considered.

(3) Where the activity associated with a discharge which is proposed for a special aquatic site [...] does not require access or proximity to or siting within the special aquatic site in question to fulfill its **basic purpose** (*i.e.*, is not “water dependent”), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to

have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.

40 CFR 230.10 (emphasis added).

This guidance provides a joint agreement by the EPA and the Corps that “basic purpose” is used to determine the water-dependency of a project and that “overall project purpose” is used to evaluate potential practicable alternatives. These terms have different meanings that are specific to their relevant purposes.

**b. Regulatory Program Benefits.** This joint guidance provides transparency to the public on how the EPA and Corps interpret the 404(b)(1) regulations for purposes of identifying the “basic purpose” and “overall project purpose.” Consistency across the federal agencies in how these terms are interpreted and applied in the Section 404 program provides greater clarity for permit applicants and EPA and Corps field staff, and is expected to provide for more efficient and timely permit processing. Corps field staff are expected to follow this guidance as part of its review of specific projects while EPA field staff are expected to follow this guidance as part of its review of Corps individual permit applications for compliance with the Section 404(b)(1) Guidelines.

### **3. Guidance.**

**a.** Defining the project purpose is critical to the evaluation of any project, and in evaluating project compliance with the Section 404(b)(1) Guidelines. Defining the basic purpose enables the Corps to determine if the activity is water dependent (see 40 CFR 230.10(a)(3)). The overall project purpose is used to identify and evaluate practicable alternatives (see 40 CFR 230.10(a)(2)). Decision documents should clearly define the basic and overall project purpose for each activity requiring a Section 404 permit.

**b. Basic Purpose and Water Dependency.** The district is responsible for defining the basic purpose. The basic purpose of the project must be known to determine if a given project is “water dependent” and requires access or proximity to, or siting within, a special aquatic site in order to fulfill that purpose. For example, the basic purpose of any residential development is to provide housing for people. Houses do not require access or proximity to a special aquatic site and they do not have to be located in a special aquatic site to fulfill their basic purpose of housing people. Therefore, a residential development is not water dependent. If a project is not water dependent, alternatives that do not involve impacts to special aquatic sites are presumed to be available and should be considered unless such alternatives are not practicable. An activity that is not water dependent may still be authorized, as long as all requirements of the Section 404(b)(1) Guidelines are met, the activity is not contrary to the public interest, and it satisfies all other statutory and regulatory requirements.

**c. Overall Project Purpose and Alternatives Analysis.** The overall project purpose is used to identify and evaluate practicable alternatives and determine the least environmentally damaging practicable alternative (LEDPA) consistent with 40 CFR 230.10(a). The Section 404(b)(1) Guidelines state that an alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes (40 CFR

230.10(a)(2)). The evaluation of alternatives should include those that are both on-site and off-site (40 CFR 230.10(a)(1)). The requirement to perform this evaluation applies to discharges into all waters of the United States, not just those impacting special aquatic sites.

Defining the overall project purpose is the district's responsibility. However, the applicant's needs, including the applicant's underlying objectives, and the type of project being proposed should be considered. The overall project purpose should be specific enough to define the applicant's needs, including the applicant's underlying objectives, but not so restrictive as to constrain the range of alternatives that must be considered under the Section 404(b)(1) Guidelines.

- i. As an example for a residential development, an applicant may propose the following overall project purpose:

To construct an upscale residential PGA professionally designed championship golf course community in East County with 355 units of luxury country club type housing for an affluent segment of the city area population.

The district must use its independent judgment in determining the overall project purpose. The overall project purpose must not be so narrowly identified so as to unduly restrict a reasonable search for potential practicable alternatives. In the above example, the overall project purpose proposed by the applicant is too restrictive for a number of reasons, including its reference to a specific number of units and a golf course of specific design. When defining the overall project purpose, the intent is to capture the project's fundamental objective(s), focusing on the "what" and "why" rather than the "how." The overall project purpose must be defined so that an applicant is not in the position to direct, or appear to direct, the outcome of the Corps' evaluation required under the Section 404(b)(1) Guidelines. Full cooperation between an applicant and the Corps is required for this process to work. A more appropriate formulation of the overall project purpose for this example would be:

To construct a viable upscale residential community with an associated regulation golf course in the East County area.

- ii. As an example for a water supply project, an applicant's proposed overall project purpose could be stated in terms of the underlying objectives:

To provide a reliable future water supply to meet the projected increase in demand for the Westlake area.

Alternatively, the overall project purpose could be incorrectly stated in terms of a specific type of solution:

To construct a new reservoir for storing 1.5 km<sup>3</sup> of water by impounding Clear Creek upstream of the City of Westlake.

The first formulation of the overall project purpose identifies the fundamental objectives that any alternative must address, while the second limits consideration only to alternatives

of a certain type (impounding a waterway to create a reservoir), size (1.5 km<sup>3</sup> of storage), and location (in Clear Creek upstream of Westlake). The first focuses more on the “why” and the second more on the “how.” An overall project purpose along the lines of the first formulation would allow for consideration of a range of alternatives or combinations of alternatives that could meet the stated objectives. This might include: construction of a new reservoir; operational changes to, or expansion of, existing reservoirs within the current water supply system; expand existing or add new gravel pit storage sites; expand existing or add new aquifer storage/recovery well sites; and implementation of conservation measures within the system to address water demand in concert with one or more identified structural alternatives. Alternatives that are determined to not be practicable or do not meet the overall project purpose could be excluded from further evaluation. Because the second formulation is too restrictive and would limit consideration of potentially practicable alternatives under the Section 404(b)(1) Guidelines, the first would be the more appropriate formulation of the overall project purpose for this example.

- iii. In another example for a water supply project, the overall project purpose could be stated as:

To provide sufficient water supply for East County in the Cottonwood River Basin for projected growth through the year 2060.

Applying this overall project purpose would allow for the consideration of a range of alternatives. Off-site alternatives could include: water conservation; recycle and reuse of wastewater; groundwater wells; purchase of water from other suppliers; increased withdrawal at existing intake site; upland constructed flow augmentation reservoir; traditional reservoir (no pump storage); construction of multiple reservoirs; river intake system with no storage reservoir; river or stream intake with one storage reservoir; and construction of several intakes with storage reservoir. On-site alternatives could include: combining water conservation with the preferred reservoir alternative; combining groundwater use with the preferred reservoir alternative; combining purchase of water with the preferred reservoir alternative; and a reduced size reservoir for the preferred alternative.

**4. Duration.** This guidance remains effective unless revised or rescinded.



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