Regulatory references regarding project purpose statements under CWA Section 404

1995 Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program

8. Project Purpose.
Defining the project purpose is critical to the evaluation of any project and in evaluating project compliance with the Section 404(b)(1) Guidelines (Guidelines). As stated in HQUSACE's guidance resulting from the Section 404(q) elevation of the Twisted Oaks Joint Venture and Old Cutler Bay permits, defining the purpose of a project involves two determinations, the basic project purpose, and the overall project purpose. The Twisted Oaks project proposed impounding a stream, by constructing a dam, to create a recreational amenity for a residential development proposed on adjacent uplands. HQUSACE agreed that, from a basic project purpose perspective, the dam was water dependent, but that the housing was not. Since the project included two elements, a project purpose excluding either was inappropriate. Therefore, it was concluded that the overall project purpose was a residential development with a water-related amenity. In Old Cutler Bay, the overall project purpose was properly determined to be "to construct a viable, upscale residential community with an associated regulation golf course in the south Dade County area." This overall project purpose recognizes that an essential part of the upscale residential project was to include a full size (regulation) golf course, and identified a reasonable geographic area for the alternatives analysis.

The basic purpose of the project must be known to determine if a given project is "water dependent." For example, the purpose of a residential development is to provide housing for people. Houses do not have to be located in a special aquatic site to fulfill the basic purpose of the project, i.e., providing shelter. Therefore, a residential development is not water dependent. If a project is not water dependent, alternatives, which do not involve impacts to special aquatic sites are presumed to be available to the applicant (40 CFR 320.10(a)(3)). Examples of water dependent projects include, but are not limited to, dams, marinas, mooring facilities, and docks.

The basic purpose of these projects is to provide access to the water. Although the basic purpose of a project may be water dependent, a vigorous evaluation of alternatives under National Environmental Policy Act (NEPA) and the Guidelines will often be necessary due to expected impacts to the aquatic environment (e.g., a marina that involves substantial impacts to or the loss of marsh or seagrass bed).

The overall project purpose is more specific to the applicant's project than the basic project purpose. The overall project purpose is used for evaluating practicable alternatives under the Section 404(b)(1) Guidelines. The overall project purpose must be specific enough to define the

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applicant's needs, but not so restrictive as to preclude all discussion of alternatives. Defining the overall project purpose is the responsibility of the Corps, however, the applicant's needs must be considered in the context of the desired geographic area of the development, and the type of project being proposed. [emphasis added] Defining the overall purpose of a project is critical in its evaluation, and should be carefully considered. For example, a proposed road through wetlands or across a stream to provide access to an upland residential development would have an overall project purpose of "to construct road access to an upland development site." Based on this overall project purpose, the Corps would evaluate other potential access alternatives. However, the Corps would not consider alternatives in any way for the residential community or otherwise "regulate" the upland housing.

2009 Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program

12. Project Purpose

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 project 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.

Basic Project Purpose and Water Dependency

The district is responsible for defining the basic project 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*** [emphasis added] in order to fulfill its basic purpose. For example, the basic project 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 to the applicant, unless it is clearly demonstrated that such alternatives are not available (see 40 CFR 230.10(a)(3)). An activity that is not water dependent may still be authorized, as long as the 404(b)(1) Guidelines presumption against such discharges is successfully rebutted, the discharge meets the other criteria of the 404(b)(1) Guidelines, the activity is not contrary to the public interest, and it satisfies all other statutory and regulatory requirements.

Overall Project Purpose and Alternatives Analysis

The overall project purpose is used to evaluate less environmentally damaging practicable alternatives. The 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

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light of overall project purposes (40 CFR 230.10(a)(2)). This evaluation applies to all waters of the United States, not just special aquatic sites. Defining the overall project purpose is the district's responsibility. However, the applicant's needs and the type of project being proposed should be considered. The overall project purpose should be specific enough to define the applicant's needs, but not so restrictive as to constrain the range of alternatives that must be considered under the 404(b)(1) Guidelines. [emphasis added]

Purpose and Need
Defining purpose and need is discussed in Section 9(b)(4) of Appendix B to 33 CFR part 325, as well as the Council on Environmental Quality's regulations at 40 CFR 1502.13. The district should use a reasonably and objectively formulated and stated project purpose, after taking into account the "purpose and need" provided by the applicant. The district should not allow the applicant to improperly limit the project's "purpose and need", because a reasonably defined purpose and need is needed to conduct the alternatives analysis.

Appendix B to 33 CFR Part 325—NEPA Implementation Procedures for the Regulatory Program
Authority: 33 U.S.C. 401 et seq. ; 33 U.S.C. 1344; 33 U.S.C. 1413.
Source: 51 FR 41236, Nov. 13, 1986, unless otherwise noted.

(4) ***Purpose and Need***. See 40 CFR 1502.13. If the scope of analysis for the NEPA document (see paragraph 7b) covers only the proposed specific activity requiring a Department of the Army permit, then the underlying purpose and need for that specific activity should be stated. (For example, "The purpose and need for the pipe is to obtain cooling water from the river for the electric generating plant.") If the scope of analysis covers a more extensive project, only part of which may require a DA permit, then the underlying purpose and need for the entire project should be stated. (For example, "The purpose and need for the electric generating plant is to provide increased supplies of electricity to the (named) geographic area.") Normally, the applicant should be encouraged to provide a statement of his proposed activity's purpose and need from his perspective (for example, "to construct an electric generating plant"). However, whenever the NEPA document's scope of analysis renders it appropriate, the Corps also should consider and express that activity's underlying purpose and need from a public interest perspective (to use that same example, "to meet the public's need for electric energy"). Also, while generally focusing on the applicant's statement, the Corps, will in all cases, exercise independent judgment in defining the purpose and need for the project from both the applicant's and the public's perspective.

CWA Section 404(b)(1) Guidelines 40 CFR 230

404(b)(1) Guidelines Preamble Federal Register Vol 45, No 249 Wednesday December 24, 1980 Water Dependency Section, page 85338

" 'Non-water dependent' discharges are those associated with activities which do not require access or proximity to or siting within the special aquatic site to fulfill their basic purpose. An example is a fill to

create a restaurant site, since restaurants do not need to be in wetlands to fulfill their basic purpose of feeding people. In the case of such activities, it is reasonable to assume there will generally be a practicable site available upland or in a less vulnerable part of the aquatic ecosystem. The mere fact that an alternative may cost somewhat more does not necessarily mean it is not practicable.....Because the applicant may rebut the presumption through a clear showing in a given case, no unreasonable hardship should be worked. At the same time, the presumption should have the effect of forcing a hard look at the feasibility of using environmentall preferable sites."

404(b)(1) Guidelines 40 CFR § 230.10(a)(3)

"Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) 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."

§ 230.3 Definitions.

(q-1) *Special aquatic sites* means those sites identified in subpart E. They are geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region. (See §230.10(a)(3))

Subpart E—Potential Impacts on Special Aquatic Sites

§ 230.40 Sanctuaries and refuges
§ 230.41 Wetlands
§ 230.43 Vegetated shallows
§ 230.44 Coral reefs
§ 230.45 Riffle and pool complexes

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