

Section 404 (b)(1)- Purpose & Need

Regulatory Program Workshop

February 13, 2015

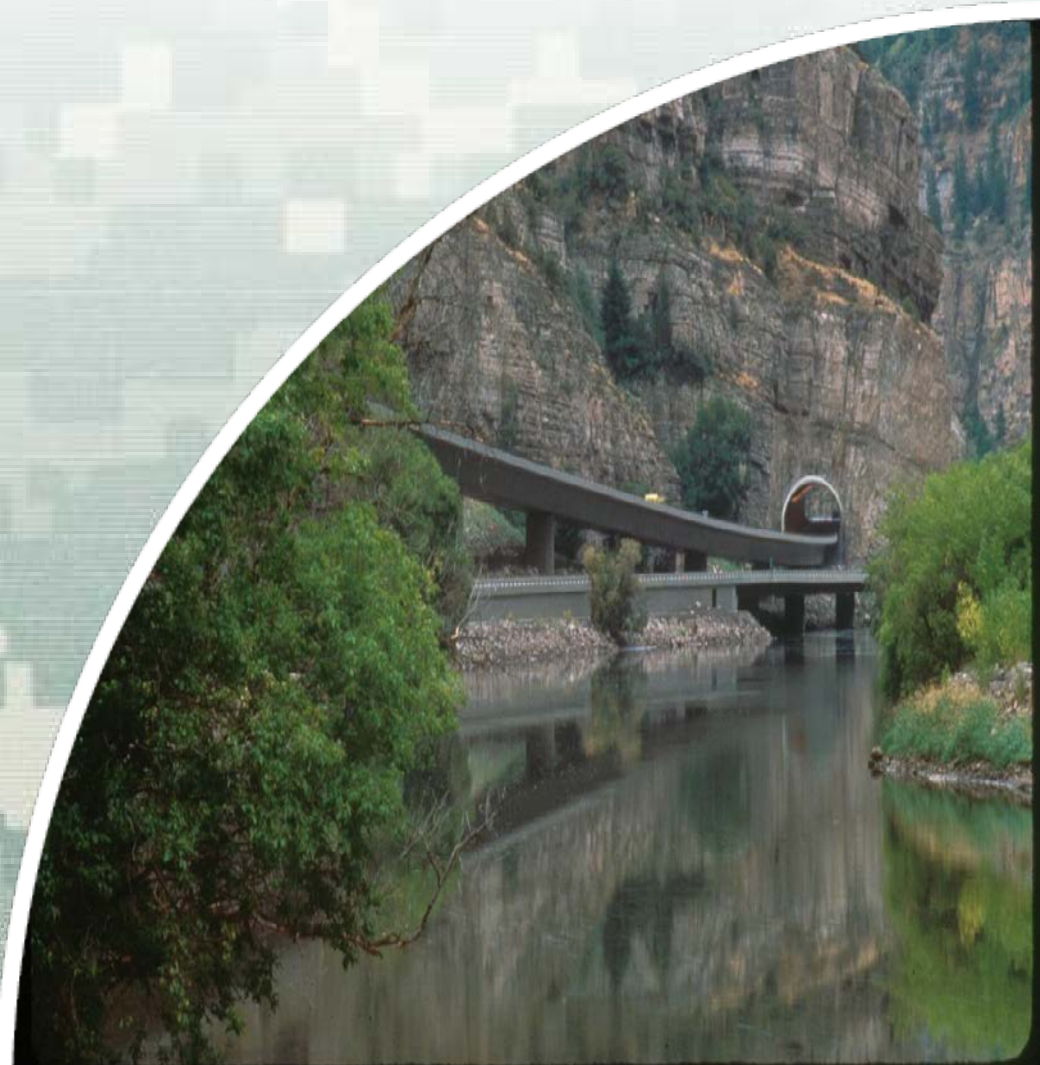
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PURPOSE AND NEED

Objectives

- Identify and define **purpose** & **need** for projects
- Understand **difference** between basic & overall purpose
- Avoid a **purpose** that's too narrow or too broad
- Know when the Corps is likely to **question** project need



PURPOSE AND NEED

Need  Purpose

What is the **problem**?

What **action** is
proposed to
solve the problem?

(separate but interrelated)



PURPOSE AND NEED

Purpose ←→ **Need**

Key to determining compliance with 404(b)(1) Guidelines

Addressed in Corps public interest review (33 CFR 320.4)

Not part of the 404(b)(1) analysis

Both are required to be addressed by NEPA



Basic Purpose vs. Overall Purpose

Basic Purpose:

1. Fundamental, essential, or irreducible purpose of proposed project
2. Used to determine if project is **water dependent**
3. Determined solely by **the Corps** (with input from applicant)
4. Considers only the physical aspects of the project
5. Does not consider viability



Basic Purpose

Examples

- Housing/Shelter
- Sufficient water supply
- Transportation efficiency



Overall Project Purpose

1. Extends basic purpose to applicant's specific project
2. Used as the basis for the **alternatives analysis**
3. Should be concisely stated
4. Defines the **geographic boundaries** to determine a reasonable range of alternatives



Overall Purpose

5. **Defines the extent of effects you are required to consider**
6. **Determined by the Corps, from the typical applicant's perspective**
7. **Subject to review/revision during permit process**
8. **Must not be too restrictive or too broad - WHY?**



Overall Project Purpose

(Too Restrictive Examples)

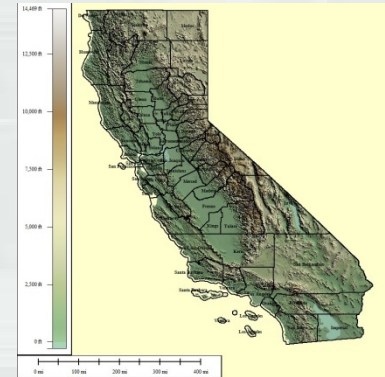
- **A 530–house subdivision**
- **An Arnold Palmer golf course**
- **A waterfront retirement community**



Overall Project Purpose

(Too Broad Examples)

- A subdivision in northern California
- A profitable commercial development



Overall Project Purpose

What about these?

- **To construct an upscale 500-slip marina for 30+ foot boats, in Stillwater Cove, including a boat travel lift, workshop, fuel and pumpout facilities, a boat store, and parking for 200 cars**
- **To build a road**
- **To construct a viable upscale residential community with a regulation-size golf course in southern Dade County**



Speculative Purpose

- **Always some degree of uncertainty and/or risk; applicant must only be able to demonstrate a reasonable probability he/she could accomplish the work.**
- **However, perfectly acceptable for applicant to apply for a permit for work that would be accomplished by others.**
- **Applicant must be specific enough about purpose to enable an adequate alternatives analysis.**



NEED

“The following general criteria will be considered in the evaluation of every application: ...The relative **extent of the public and private need** for the proposed structure or work.”

(33 CFR 320.4(a)(2))



NEED

“ When private enterprise makes application for a permit, it will generally be **assumed that appropriate economic evaluations** have been completed, the proposal is economically viable, and is needed in the marketplace. **However, the district engineer, in appropriate cases, may make an independent review of the need for the project from the perspective of the overall public interest.**”

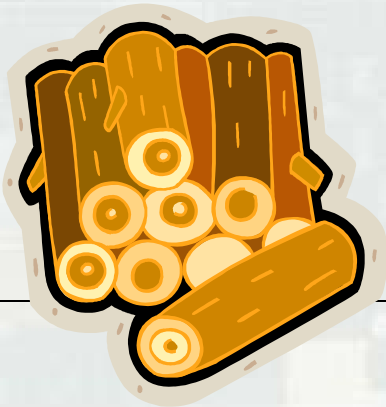
(33 CFR 320.4(q))



NEED

Friends of the Earth v. Hintz (800 F.2d 822, 1986)

- The court ruled that the Corps could properly rely on the applicant for such information in its review.
- The court also noted that it did not condone blind acceptance by the Corps of such information.



NEED

HQUACE Findings - Hartz Mountain Development Corporation (404(q) elevation)

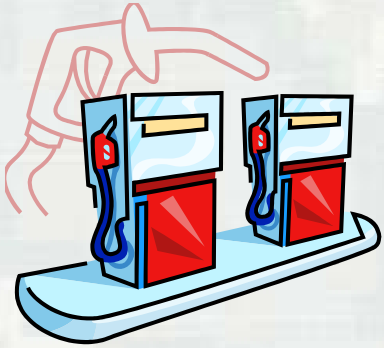
The Corps' responsibility is to control all aspects of the analysis. While the Corps should consider the applicant's views and information concerning the project purpose and existence of practicable alternatives, this must be undertaken without undue deference to the applicant's wishes.



NEED

- **Need is not a 404(b)(1) component. However, need is closely tied to project purpose.**
- **Corps may (and should) defer to state or other government's decision to spend money**
- **Corps may make independent review of public need**
- **Extent of need may affect alternatives analysis**





Examples of Need

- Construct a **gas station** (the town's fifth proposing to impact 0.75 acre of nontidal wetlands)
- Impoundment for **public water supply** to meet a projected 50-year demand impacting 150 acres of nontidal wetlands



State and Local Primacy

- 1. The primary responsibility for determining zoning and land use matters rest with state, local, and tribal governments.**
- 2. The DE will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance.**
- 3. Such issues include but are not limited to national security, navigation, national economic development, water quality, preservation of special aquatic sites, and national energy needs.**
- 4. Whether a factor has overriding importance will depend on the degree of impact in an individual case.**



Necessary Information

1. The **public notice** must include a clear description of the proposed fill and/or structures that describes the nature and magnitude of the activity in order to generate meaningful comments. 33 CFR 325.1(d)(1)
2. “If the activity would include the construction of a filled area or pile or float-supported platform, the project **description** must include the use of, and specific structures to be erected on, the fill or platform.”
33 CFR 325.1(d)(5)
3. When a project is **so speculative** that alternatives and avoidance and minimization cannot be meaningfully addressed, the application may be considered **incomplete**. 33 CFR 325.3(a)



Questions?

