

An aerial photograph of a river system with several green, forested islands and marshes. The water is a deep blue, and the land is a vibrant green. The river flows from the top left towards the bottom right, with several smaller channels and bays branching off. The islands are irregularly shaped and densely packed with trees and vegetation. The overall scene is a natural, undisturbed landscape.

A Citizen's Guide to the Corps of Engineers

American Rivers
National Wildlife Federation

Acknowledgments

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Introduction

American Rivers, in partnership with the National Wildlife Federation, created this Citizen's Guide as a resource for individuals and organizations working to improve the way the U.S. Army Corps of Engineers (Corps) plans, constructs, operates, and issues permits for projects affecting the nation's rivers, coasts, and wetlands. The guide provides a detailed overview of the Corps and of the laws, policies, and strategies that can be used to stop or improve destructive projects and permits and to promote restoration and protection of our vital water resources.

I. The Corps of Engineers

The Corps is the primary federal manager of the nation's water resources. The Corps builds and maintains much of the nation's navigation and flood damage reduction infrastructure and regulates the issuance of Clean Water Act dredge and fill and other permits to the private sector. Since its formation more than 225 years ago, the Corps has significantly transformed our nation's rivers and coasts, constructing 11,000 miles of inland waterway navigation channels, 8,500 miles of levees and seawalls, and more than 600 dams. The agency also dredges hundreds of millions of cubic yards of material each year from the nation's rivers and harbors. Since 1990, when Congress added environmental protection to the Corps' mission areas, the Corps' civil works portfolio has grown to include some of the nation's largest and most controversial restoration projects.

While Corps projects have produced some positive economic benefits for the nation, they have also caused significant environmental harm. The environmental damage has been so great that Corps projects are recognized as one of the leading reasons that North America's freshwater species are disappearing five times faster than land based species and as quickly as rainforest species. Large-scale structural projects planned and constructed by the Corps have also increased flood risks for many communities, reduced water quality, impaired recreational opportunities, and damaged economies that rely on a healthy environment.

As the nation saw all too clearly when Hurricane Katrina slammed into the Gulf Coast in 2005, at its worst, flawed Corps planning can have deadly consequences. Corps projects destroyed coastal wetlands that would have buffered Katrina's storm surge, funneled and intensified that surge into New Orleans, and encouraged development in high-risk areas. With this stage set, the Corps sealed the city's fate when it used flawed designs to

build the levee and floodwall system that was supposed to protect the city — but clearly did not. Ongoing operation of Corps projects can also lead to devastating results. A U.S. District Court recently ruled that the Corps’ “gross negligence” in maintaining the Mississippi River Gulf Outlet, a Corps-built navigation channel, also played a major role in the breaching of many New Orleans area levees during Hurricane Katrina.

During the past decade, the National Academy of Sciences, the Government Accountability Office, the Army Inspector General, federal agencies, and independent experts have issued a flood of studies highlighting a pattern of stunning flaws in Corps project planning and urging substantial changes to the Corps’ planning process. Two National Academy of Sciences panels and the Department of the Army Inspector General concluded that the Corps has an institutional bias for approving large and environmentally damaging structural projects, and that its planning process lacks adequate environmental safeguards. Less environmentally damaging, less costly, nonstructural measures that would result in the same or better outcomes are routinely ignored or given short shrift. This results in projects that are unnecessarily destructive, costly, and, in many cases, simply not needed.

In 2006, the Government Accountability Office told Congress that recent Corps studies were “fraught with errors, mistakes, and miscalculations, and used invalid assumptions and outdated data.” The problems were so pervasive that the studies “did not provide a reasonable basis for decision-making.” The Government Accountability Office also told Congress that the problems at the Corps were “systemic in nature” and “prevalent throughout the Corps’ Civil Works portfolio.”

In 2007, Congress enacted important Corps Reform legislation designed to address some of these problems. These reforms, which require modernization of the Corps’ planning guidelines, impose strict mitigation requirements on Corps projects and require outside independent peer review of costly or controversial Corps projects are discussed at length in Chapter 2. Ensuring strict compliance with the Corps Reform provisions and with the environmental protection laws and policies discussed in Chapters 3 and 6 will do much to improve Corps projects and permits.

As communities and wildlife suffer the floods, droughts, storms, and increasing sea levels fueled by climate change, it is more important than ever to improve Corps projects and permitting decisions. The Corps must begin immediately to aggressively protect and restore the nation’s rivers, wetlands, and coastlines — resources that provide the first line of defense against flooding, improve water quality, recharge groundwater, provide outstanding recreational opportunities, provide vital habitat for fish and wildlife, and are essential for making our communities more resilient to the effects of climate change.

II. Using the Citizen's Guide To Help Make A Difference

Public participation in the Corps' planning process is required by law, and informed and persistent public participation is a powerful agent for change. To assist individuals and organizations in that process, this Guide provides a roadmap to the laws and policies that are supposed to guide Corps projects and permit decisions, an overview of the Corps' history and organization, the role of Congress in Corps projects, and key strategies for effective advocacy. The Guide focuses particularly on avenues and strategies that will allow individuals and organizations to improve Corps planning, projects, and permit decisions.

We have attempted to organize this Guide in a way that will allow the reader to easily identify the tools and strategies that will be most effective for influencing a decision on a particular project or permit. The Guide also provides more detailed information on each tool so that the reader can begin effectively implementing the strategies selected. Additional consultation with legal and policy experts, and with activists who have fought similar battles with the Corps, is also recommended. A good starting point for such expertise is the Corps Reform Network, a coalition of nearly 200 grassroots, regional, and national organizations dedicated to ensuring that Corps projects are environmentally and economically sound. The Corps Reform Network advocates for improvements in Corps policies and practices, provides technical and policy assistance to its member groups, and provides a forum to discuss and share information and strategies for improving Corps projects. More information on the Corps Reform Network can be found at www.corpsreform.org.

III. Chapter Summaries

Chapter 1: Inside The Corps — The Corps' History and Structure

The Corps carries out its civil works and regulatory activities through a daunting array of directorates, divisions, districts, and research and planning centers. Chapter 1 provides an overview of the Corps' development and a guide to the agency's complicated hierarchy and structure.

Chapter 2: The Civil Works Program — Project Planning and Construction

Through its civil works program, the Corps plans and constructs water resources projects nationwide. The majority of these projects are carried out under one of the Corps' primary mission areas of navigation, flood damage reduction, and environmental restoration. Chapter 2 describes the civil works program; the Corps' project planning process; and the laws, regulations, and policies specific to the civil works program, such as requirements enacted through the Water Resources Development Acts.

Chapter 3: The Regulatory Program — Clean Water Act Section 404 Permits

The Corps' regulatory program implements Clean Water Act section 404, which regulates the discharge of dredged or fill material into the nation's waters. Through this program, the Corps is supposed to ensure that construction carried out by private parties and other governmental agencies in wetlands, streams, rivers, and coastal waters complies with the requirements of the Clean Water Act. Corps civil works projects also must comply with the requirements of section 404. Chapter 3 describes this complex program and identifies opportunities for improving Clean Water Act compliance.

Chapter 4: The Corps and Congress — Project Politics and Funding

The U.S. Congress approves and funds Corps studies, projects, and programs, and establishes key Corps policies. As a result, working effectively with Members of Congress is critical for improving the way the Corps manages the nation's rivers and wetlands. Chapter 4 describes the processes used by Congress to authorize and fund Corps activities and identifies opportunities for influencing those processes.

Chapter 5: The Players — Agencies, States, and Stakeholders

Many players can have a significant influence on Corps projects and permits, including federal agencies, presidential and congressional support offices, states, tribes, local governments, the National Academy of Sciences, and a diverse range of stakeholders. Chapter 5 provides information on the roles of these various players and suggestions for engaging them as allies in your efforts to improve Corps decisions.

Chapter 6: The Corps and the Law — Key Laws Applicable to Corps Projects

The Corps must comply with numerous laws, regulations, and policies when planning and implementing water projects and making permit decisions. Ensuring strict compliance with these laws and policies can have a profound affect on the Corps' activities. Chapter 6 summarizes environmental and other laws applicable to Corps projects and provides background on the legal process. Activists should use this Chapter as a guide only and should seek the advice of an attorney for specific legal advice and recommendations.

Chapter 7: The Corps and the Media — Strategies to Spread the Word

Whether fighting a destructive Corps project or promoting Corps reform legislation, media coverage can be a powerful tool for achieving your goals. Chapter 7 discusses key steps for developing an effective media campaign and provides practical advice for working with the media and for drafting news releases and other media tools.

Chapter 1

Inside The Corps The Corps' History and Structure

- I. An Overview of the Corps**
 - A. History of the Corps
 - B. The Corps Today

- II. The Corps' Organizational Structure**
 - A. Corps Leadership
 - B. Transitioning to a Regional Focus
 - C. Headquarters, Divisions, and Districts
 - D. Research, Development, and Field Support Centers
 - E. Boards and Commissions

The U.S. Army Corps of Engineers is the principal federal agency engaged in developing and managing the nation's water resources. The Corps builds and maintains much of the nation's navigation and flood control infrastructure, and regulates the issuance of Clean Water Act dredge and fill and other permits to the private sector. These activities, which have a profound effect on the health of the nation's rivers, coasts, and wetlands, are carried out through a daunting array of directorates, divisions, districts, and research and planning centers. This chapter provides an overview of the Corps' development and a guide to the agency's complicated hierarchy and structure.

I. An Overview of the Corps

The U.S. Army Corps of Engineers (Corps) is the primary federal manager of the nation's water resources. The agency builds and maintains much of the nation's navigation and flood damage reduction infrastructure, and regulates the issuance of Clean Water Act dredge and fill and other permits to the private sector. Since its formation over 225 years ago, the Corps has significantly transformed our nation's rivers, constructing 11,000 miles of inland waterway navigation channels, 8,500 miles of levees and seawalls, and more than 500 dams. It also dredges hundreds of millions of cubic yards of material each year from the nation's rivers and harbors.

A. History of the Corps

The Corps' formation dates back to the Revolutionary War, when the position of Chief Engineer was created in the Continental Army on June 16, 1775. This first generation of the Corps worked solely on military projects, including constructing the fortifications at Bunker Hill. In 1779, Congress established a permanent Corps of Engineers governed by its own set of regulations, but this Corps and most of the Army were disbanded in 1783 when the war ended.

The Corps was reinstated, and the Army expanded, in 1794 in response to increasing hostilities with England. In 1802, the Corps assumed control of the newly established military academy at West Point, New York — the first major engineering school in the nation — which was headed by the Corps' Chief of Engineers until 1866. The Corps underwent major reorganizations in 1802 and again in 1863 from which the Corps evolved into the organization we know today.

The Corps first ventured into civil works projects in the early 1800s. Nineteenth century America called on the Corps to build coastal fortifications and improve harbors; survey roads, canals, and entire river systems; explore and map the western frontier; eliminate navigation hazards on the Mississippi, Ohio, and other rivers; construct buildings and monuments in the nation's capitol; and provide water for the District of Columbia and nearby areas. Throughout the 19th century, the Corps' civil works role expanded with the expanding power of the federal government, and today the Corps' jurisdiction covers a broad array of responsibilities.

Navigation: In 1824, the Supreme Court issued a landmark decision, *Gibbons v. Ogden*, that established the federal government's power to regulate interstate commerce, including river navigation. After the *Gibbons* decision, Congress passed the General Survey Act, granting the president the authority to order surveys of roads and canals for commercial or military purposes. A subsequent act, called the Rivers and Harbors Act of 1824, apportioned funds to improve navigation on the Ohio, Mississippi, and later the

Missouri rivers. The 1826 reauthorization of the Rivers and Harbors Act established the legislative precedent of authorizing Corps surveys and individual “river improvement” navigation projects.

Flood Damage Reduction: Catastrophic flooding in the Mississippi River Valley after the Civil War prompted Congress to pass the first federal legislation authorizing construction of flood control projects. The 1917 law endeavored to protect life and property along the Mississippi and Sacramento rivers. Eleven years later — in the wake of the Great Flood of 1927 — Congress authorized the “Mississippi River and Tributaries Project” (MR&T) a massive and virtually endless series of flood control projects that affect the entire lower Mississippi River. The MR&T program still receives hundreds of millions in annual funding today. The Flood Control Act of 1936 formally placed flood control under federal jurisdiction. It also initiated the benefit-to-cost ratio the Corps uses to determine whether flood control and navigation projects are economically justified.¹

Multipurpose Projects: The Flood Control Act of 1944 ushered in a “multipurpose approach” to Corps projects. The act empowered the Secretary of the Interior to sell the hydroelectric power produced at Corps and other federal agencies’ projects, and authorized the gigantic multipurpose civil works project for the Missouri River Basin. That project produced six huge, main stem dams on the Missouri that were intended to provide flood control, irrigation, navigation, water supply, hydropower, and recreation benefits. After World War II, Congress authorized many other major multipurpose projects like those on the Columbia, Snake, and Arkansas rivers. Postwar growth of hydroelectric “improvements” continued through the 1970s, despite periodic opposition to both the increasingly exorbitant costs of such projects, and the proliferation of administrative and legislative delays in repaying the taxpayers’ investments.

Regulatory Program: Concerns about potential navigation obstructions like the proliferation of private hydropower dams drove Congress to institute a regulatory program to protect navigable waterways in the 1890s. The Rivers and Harbors Acts of 1890 and 1899 authorized the Corps to regulate private dam construction and required that the Secretary of War and the Corps approve dam sites and plans before construction could begin. The Rivers and Harbors Act of 1899 also gave the Corps authority to regulate most kinds of navigation obstructions.

In 1972, Congress further extended the Corps’ regulatory role by giving the Corps the authority to issue dredge and fill permits in “waters of the United States,” including wetlands, through § 404 of the Clean Water Act. In that same year, Congress gave the Corps the authority to regulate the transportation and disposal of dredged material at designated ocean disposal sites, through § 103 of the Marine Protection, Research and Sanctuaries Act.

B. The Corps Today

Today, the Corps plans, constructs, and operates a multitude of projects for navigation, flood damage reduction, environmental restoration and protection, coastal storm damage prevention, emergency response, hydroelectric power, water supply, and recreation. *See Chapter 2 for more on the Corps' civil works program.*

Through its regulatory program, the Corps regulates the discharge of dredged or fill material into the nation's waters under Clean Water Act § 404. Through this program, the Corps is supposed to ensure that construction carried out by private parties and governmental agencies (including the Corps) in wetlands, streams, rivers, and coastal waters complies with Clean Water Act requirements. The Corps also regulates the construction of structures in navigable waters such as piers, boat docks, boat ramps, breakwaters, revetment, riprap, jetties, artificial islands, pilings, and aids to navigation under § 10 of the Rivers and Harbors Act. In addition, the Corps regulates the transportation and disposal of dredged material at designated ocean disposal sites under § 103 of the Marine Protection, Research and Sanctuaries Act. *See Chapter 3 for a discussion of the Corps' regulatory program.*

The Corps also is responsible for a number of military missions. The Corps provides engineering and technical services to the Army, Department of Defense, and other federal agencies. The Corps constructs military facilities for the Army and Air Force, provides design and construction management support, and conducts hazardous waste removal and disposal at former military sites. The Corps' Directorate of Military Programs also conducts environmental remediation work under the Formerly Utilized Sites Remedial Action Program (FUSRAP) and supports the Environmental Protection Agency's Superfund and brownfields missions.

II. The Corps' Organizational Structure

The Corps employs more than 35,000 employees, the vast majority of which are civilian personnel. In the United States, the agency is organized into a daunting maze of eight divisions, 38 domestic districts, and numerous planning and research centers. Through three overseas districts, the Corps also is active in more than 90 countries around the world. In 2004, the Corps added a ninth provisional division and three additional districts that work in Iraq.

Basic Organizational Structure of the Corps of Engineers

Executive Branch of the Federal Government

President of the United States



U.S. Department of Defense

Secretary of Defense



U.S. Department of the Army

Secretary of the Army

Assistant Secretary of the Army for Civil Works



U.S. Army Corps of Engineers

Chief of Engineers — Lt. General (3 Star General)



Directorate of Civil Works

Director of Civil Works — Major General



8 Domestic Divisions

Division Commander/Engineer — Brigadier General



38 Domestic Districts

District Commander/Engineer — Colonel



Private Contractors

The Corps' basic organizational structure and supervisory authorities (in italics).

Activist Tip

The Assistant Secretary of the Army for Civil Works and the Chief of Engineers do not always see eye-to-eye on projects or policies. Activists may want to work with the ASA(CW) or one of his or her deputies to educate the office about concerns with individual projects and policies. It is important to keep in mind, however, that the ASA(CW) may not be able — or willing — to stop or change a Corps project or policy. This can be particularly true when a specific project or policy has the strong support of powerful Members of Congress.

A. Corps Leadership

Like all federal agencies, the Corps is part of the Executive Branch of the federal government. The Corps is part of the Department of the Army, which is housed within the Department of Defense. Though it is part of the military, the Corps has a predominately civilian workforce. Only about 650 of the Corps' more than 35,000 employees are military personnel.

The Corps' military leaders rotate through their posts on a regular basis. As a result, the Corps' civilian employees are the source of the Corps' "institutional memory" for virtually all Corps activities. This is particularly true of activities carried out at the district level.

As with all branches of the military, the Corps ultimately reports to a civilian leader. The Corps' military leader, the Chief of Engineers, reports directly to a Senate-confirmed civilian appointee, the Assistant Secretary of the Army for Civil Works (ASA(CW)). Four Deputy Assistant Secretaries also report to the ASA(CW).²

The Chief of Engineers, a 3-star general, has two separate and distinct command and staff responsibilities: (1) providing military leadership and defining policy for the Corps' civil works activities; and (2) providing military leadership to the Army by advising on engineering matters, real estate, and other related programs. The Chief of Engineers has approximately 20 Corps offices under his direct control. These offices, located within the Corps' Headquarters in Washington, D.C., include the Directorate of Civil Works, Directorate of Military Programs, Directorate of Research and Development, Office of Congressional Affairs, Office of History, and Office of Public Affairs, to name a few.

The Director of Civil Works, with the rank of major general, directs and oversees the civil works program. The bulk of the work of the civil works program is carried out by the Corps' eight domestic divisions and the 38 districts that report to the divisions. Both the divisions and districts are organized by watershed areas. A multitude of private contractors also assist the Corps in constructing and maintaining civil works projects.

B. Transitioning to a Regional Focus — USACE 2012

In 2003, the Corps released USACE³ 2012, a reorganization plan that creates a new framework for interactions between Corps Headquarters, divisions, and districts. USACE 2012 was designed to move the Corps away from a strict hierarchical structure and towards a system of regional operations where interactions between Headquarters, divisions, and districts are more fluid. USACE 2012 also calls for districts to plan projects in conjunction with regional and national experts from outside the district.

The Corps believes that this regional management plan will make Corps services more uniform across districts and help reduce the staffing needs of individual districts. The

Corps also believes that USACE 2012 will help the Corps reduce its workforce by 10 to 20 percent at the headquarters and division levels, which will allow the agency to more easily adjust to ongoing budgetary constraints.

The Corps has until 2012 to complete the reorganization, and individual districts and divisions are implementing the reorganization on different timelines.

USACE 2012 calls for the Corps to reorganize into

- (1) **Regional Business Centers (RBC)**, which will serve as the primary business-operating unit of the Corps. Each RBC will consist of a division office, the district offices that report to the division, and a Washington-based group known as a **Regional Integration Team (RIT)** that is supposed to represent the “interests” of the region at headquarters. According to USACE 2012, the RBC structure is intended to foster “better integration” between headquarters, divisions, and districts during project development, and to involve headquarters and division staff in earlier stages in project planning.
- (2) **Communities of Practice (CoP)**, which will provide the functional support for specific Corps activities, such as planning, operations, and public affairs. Each community of practice is supposed to be integrated vertically throughout the Corps’ headquarters, division, and district levels. Historically, these support functions were provided separately at each of these levels. For example, prior to USACE 2012, the Planning and Policy Division at headquarters would be responsible for headquarters-level planning and policy activities but they would not participate in planning at the district or division levels.

As of the date of this Citizen’s Guide, it remains difficult to gather information on all of the Communities of Practice, which include at least Engineering and Construction, Planning, Operations, Environmental, Cost Engineering, Real Estate, and Program and Project Management. More detailed information is available on the following COPs:

- *Planning Community of Practice*, which among other things, formulates and coordinates civil works policy, develops and manages civil works actions relating to authorizing legislation, serves as the main point of contact with Congress (both the authorizing and appropriations committees), manages policy compliance reviews, formulates and coordinates civil works environmental policy, and develops and maintains planning protocols and procedures. More information can be found at <http://usace.army.mil/CECW/PlanningCOP/Pages/ArticleTemplate.aspx>.
- *Engineering and Construction Community of Practice*, which directs the technical aspects of engineering, construction management, environmental protection and

restoration, operations, and maintenance and repair activities; develops technical policy; develops and integrates new technologies; manages all technical aspects of military and civil infrastructure and water resources missions; and ensures that all projects are value engineered. More information can be found at http://www.usace.army.mil/CECW/Pages/cecwe_index.aspx.

- *Environmental Community of Practice*, which is to provide the public with a central point for information concerning the Corps' civil works and military environmental projects and programs, including ecosystem restoration, formerly used defense sites, environmental stewardship, support to EPA Superfund and Brownfields programs, abandoned mine lands, Formerly Utilized Sites Remedial Action Program (FUSRAP), Base Realignment and Closure 2005, and regulatory. This CoP is also suppose "to serve as the champion for integrating and implementing the Environmental Operating Principles throughout the Corps." Limited information on the Environmental Community of Practice can be found at <http://www.usace.army.mil/Environment/Pages/Welcome.aspx>.
- (3) **Planning Centers of Expertise (PCX)**, which provide expertise on specific areas of project planning. *See subsection D for a discussion of the PCX.*

C. Headquarters, Divisions, and Districts

The Corps plans and implements its civil works activities through its Washington, D.C. headquarters, eight domestic divisions, and 38 domestic districts. *See page 10 for a map of the Corps' domestic divisions and districts.*

Corps Headquarters: The Corps' headquarters are located in Washington, D.C. The Chief of Engineers and the Director of Civil Works lead national headquarters efforts to develop, disseminate, and direct a comprehensive national policy for the Corps. Headquarters is responsible for strategic planning and direction; developing and maintaining national relationships; and managing and developing the Corps' budget.

As mentioned above, the Corps' national headquarters houses some 20 offices or directorates that are under the direct control of the Chief of Engineers. These include the Directorate of Civil Works, Directorate of Military Programs, Directorate of Research and Development, Directorate of Management Resources, Office of Chief Counsel, Office of History, and Office of Public Affairs, to name a few.

Some of the key offices within the Directorate of Civil Works include the:

- **Planning Community of Practice**, which formulates and coordinates civil works policy with the Office of the Assistant Secretary of the Army for Civil Works and other federal entities, manages the Chief's Environmental Advisory Board activities, and serves as the principal civil works point of contact with Congress.

- **Civil Works Policy and Policy Compliance Division** (and its Policy Branch and Office of Water Project Review), which conducts policy compliance reviews for “decision documents” such as feasibility studies, general reevaluation reports, and environmental impact statements, and prepares Chief’s Reports for these decisions. It also helps the regional business centers (or divisions and districts where the USACE 2012 reorganization has not been completed) identify and resolve policy questions during the planning process.
- **Engineering and Construction Community of Practice**, which develops technical policy, manages technical aspects of military and civil infrastructure and water resources missions, and assures that projects are “value engineered.”
- **Operations Community of Practice**, which oversees the operation and maintenance of Corps projects, and undertakes disaster relief and recovery work. The **Regulatory Program**, which is housed within the Operations Community of Practice, oversees private and governmental compliance with certain permit requirements established under the Clean Water Act, Rivers and Harbors Act, and the Marine Protection, Research and Sanctuaries Act.
- **Civil Works Program Integration Division**, which is responsible for developing and managing the Corps’ annual budget and appropriations process.

Corps Divisions: The Corps has eight domestic divisions (also referred to as Major Subordinate Commands or MSC) that are organized by watersheds:

- North Atlantic Division — covering the northeastern states and parts of Europe;
- South Atlantic Division — covering portions of the southeastern states;
- Great Lakes and Ohio River Division — covering portions of the Great Lakes and Ohio River Valley states;
- Mississippi Valley Division — covering portions of states from Minnesota to Louisiana that border the Mississippi River;
- Northwestern Division — covering the Pacific Northwest and portions of states along the Missouri River;
- Southwestern Division — covering portions of Texas, Oklahoma, and Arkansas;
- South Pacific Division — covering California and much of the Southwest; and
- Pacific Ocean Division — covering Alaska, Hawaii, Japan, South Korea, and the Pacific Islands.

A Division Commander, typically an Army Brigadier General, commands each division with the assistance of a Deputy Division Commander, also called the Deputy Division Engineer. Only about three percent of Corps personnel currently are located in division offices. The numbers of division personnel are expected to decline once USACE 2012 is fully implemented.

Historically, Corps division offices have been responsible for daily problem solving, program development, program execution, regional relationship management, strategic



Activist Tip

District Engineers typically move on to other military posts after 2 to 3 years on the job. As a result, numerous District Engineers can come and go before planning is complete on a major Corps project. Because the District Engineer represents the first line of approval on a Corps project, activists should fully educate each new District Engineer on projects of concern.

Activists also should work to educate the Corps' civilian planners, biologists, and economists who typically will work on projects for extended periods. These civilian employees do most of the actual planning and are the "institutional memory" for district activities.

planning, inter-agency coordination, Congressional relationships, and implementing the plans and policies of the Chief of Engineers. The divisions also have had supervisory authority over district programs and operations, including review and approval of major plans and programs of the districts.

Under USACE 2012, divisions are responsible for "Program Management," "Regional Interface," "Quality Assurance," and "Command and Control." This somewhat limited role may tend to further decentralize the Corps and give greater autonomy to the districts, rather than focusing the agency on implementing a nationally focused approach to water resource planning.

Corps Districts: The districts carry out the bulk of Corps project work, and typically are the "point of entry" for activists on individual projects. Some 83 percent of Corps employees work in district offices. The District Commander (also referred to as a District Engineer), usually an Army Colonel, is responsible for overall management of the district. The District Commander typically is assisted by two military deputies, a Deputy District Commander and a Deputy District Commander for Project Management.

Districts are the principal planning and project implementation offices of the Corps. They are supposed to plan and execute projects on schedule, within budget, with project sponsor support, theoretically with general public support, and again theoretically, in compliance with all applicable laws and policies. Districts also review and issue Clean Water Act, Rivers and Harbors Act, and Marine Protection, Research and Sanctuaries Act permits.

Districts currently employ a significant complement of technical staff, and this is expected to continue after full implementation of USACE 2012. District technical staff generally include

- Engineering staff to design projects, establish construction costs, and provide technical support during construction;
- Planning, Programs, and Project Management staff to manage projects; conduct feasibility and other studies; analyze project costs, benefits, and impacts; prepare environmental impact statements; and manage project development — these staff include biologists and other environmental scientists, and economists;
- Construction staff to manage and oversee construction contracts;
- Operations staff to operate and maintain projects once they are completed, including operating navigation and flood control structures and dredging navigation channels, and to support state and local governments in emergency response efforts;
- Regulatory staff to analyze and issue Clean Water Act, Rivers and Harbors Act, and Marine Protection, Research and Sanctuaries Act permits (regulatory staff are part of Operations);
- Real estate staff to acquire, manage, and disposes of property in connection with civil works projects;

Activist Tip

It is not clear what role the Planning Centers of Expertise ultimately will play in Corps project planning. Under USACE 2012, the PCX are supposed to be involved only in reviewing and providing specific technical advice concerning projects under their jurisdiction. The PCX are not supposed to be engaged in actual project planning. However, some districts may try to transfer larger portions of their planning responsibilities to the PCX, depending on their staffing capabilities. Under either scenario, activists should work to engage PCX members to help improve planning for projects of concern.

- Contract procurement staff to prepare, analyze, and award bids to outside contractors; and
- Legal staff to help ensure that Corps projects and activities comply with all applicable federal and state laws.

D. Research, Development, and Field Support Centers

The civil works program is assisted by a number of research, development, and field support centers.

Planning Centers of Expertise (PCX): USACE 2012 creates six subject matter specific Planning Centers of Expertise that are suppose to help move the Corps towards more “collaborative planning” and a “watershed approach to water resources planning.” USACE 2012 gives the PCX responsibility for carrying out scientific review of projects planned at the district level, a responsibility that previously was performed by the district or division. In addition to coordinating technical and independent reviews, the PCX support the planning and analytical needs of Corps projects across the country. Within their areas of expertise, the PCX do such things as provide an internal source of “consulting services” for Corps planners, facilitate studies, facilitate a national focus on issues of concern, coordinate training and the dissemination of information, maintain a clearing house of studies and information, and enhance basic planning expertise.

The six PCX are the

- National Ecosystem Restoration Center;
- National Inland Navigation Center;
- National Deep Draft Navigation Center;
- National Flood Risk Management Center;
- National Coastal Storm Damage Reduction Center; and
- National Water Management and Reallocation Center.

Water Resources Support Center (WRSC): The Water Resources Support Center provides information, advice, and guidance to Corps headquarters, divisions, and districts concerning water resources. The WRSC consists of the Institute for Water Resources, the Navigation Data Center, and the Hydrologic Engineering Center.

- (1) **The Institute for Water Resources (IWR)** was formed to provide “forward-looking” analysis of water resources problems; develop new planning and decision-support methodologies, improved hydrologic engineering methods and software tools to aid the civil works program; and produce training courses for Corps personnel. The IWR is located in Alexandria, Virginia. A considerable variety of reports and data are available from the IWR, most of which are accessible from its website at <http://www.iwr.usace.army.mil/>.

Activist Tip

Corps studies often ignore or contradict the findings of well-recognized scientific and economic experts, including experts from the Corps' own Water Resources Support Centers. These outside findings can be an important tool for challenging Corps projects and can send a powerful message about inadequacies in a Corps study.

Activists should search the Corps' research and support center websites — and other scientific sites — for studies that can assist in highlighting problems with the Corps' analysis of a project of concern. Activists should provide the Corps with copies of those studies (or at least citations to those studies) and request in writing that the studies be included in the project's administrative record.

- (2) **The Navigation Data Center** (with its Waterborne Commerce Statistics Center) in New Orleans, Louisiana, collects, summarizes, and disseminates data regarding waterborne commerce, vessel characteristics, port facilities, dredging information, and information on navigation locks. For example, the Center tracks information on traffic ton-miles for individual waterways or ports, commodities shipped, and breakdowns of commercial versus non-commercial traffic. Much of this information can be useful and can be downloaded from the Navigation Data Center website at <http://www.iwr.usace.army.mil/ndc/>.
- (3) **The Hydrologic Engineering Center (HEC)**, located in Davis, California, provides training and consulting services in the area of hydrologic engineering and modeling. HEC supports Corps field offices, headquarters, and laboratories by providing technical methods and guidance, water resources models and associated utilities, training and workshops, research and development, and technical assistance. The products produced by HEC are available to the public and can be downloaded from the HEC website at <http://www.hec.usace.army.mil/>.

Waterways Experiment Station (WES): The Waterways Experiment Station is a four-laboratory complex located in Vicksburg, Mississippi that specializes in the broad fields of coastal engineering and nearshore oceanography, hydraulics, soil mechanics, concrete, engineering geology, rock mechanics, pavements, expedient construction, and environmental relationships. WES provides Corps divisions and districts with specialized consulting services and training in coastal engineering, and model studies for site-specific design problems. The four laboratories are the Coastal and Hydraulics Laboratory, Environmental Laboratory, Geotechnical and Structures Laboratory, and Information Technology Laboratory. The WES website can be accessed at <http://www.wes.army.mil/>.

Construction Engineering Research Laboratory (CERL): The Construction Engineering Research Laboratory, located in Champaign, Illinois, supports the Army's effort to design, construct, operate and maintain all types of federal infrastructure; and helps ensure environmental quality through compliance and conservation technologies. CERL conducts research, investigations, and analytical studies. The CERL website can be accessed at <http://www.cecer.army.mil/td/tips/index.cfm>.

Cold Regions Research and Engineering Laboratory (CRREL): The Cold Regions Research and Engineering Laboratory, located in Hanover, New Hampshire, serves as the Army Laboratory for science and technology in cold environments. This laboratory devises methods for living, working, and fighting in the world's cold regions, including developing ways of improving winter navigation and ice engineering. The CRREL website can be accessed at <http://www.crrel.usace.army.mil/>.

Army Geospatial Center (AGC): The Army Geospatial Center, located in Alexandria, Virginia, provides research and development in the topographic sciences, including developing mapping, terrain analysis, and image processing systems and techniques. AGC recently expanded its mission to support the Army's Battle Command Systems, and will coordinate and integrate all geospatial information requirements for the Army. Civilian programs include the National Inventory of Dams and electronic navigation charting. The AGC website can be accessed at <http://www.agc.army.mil/>.

E. Boards and Commissions

The Chief of Engineers and Director of Civil Works are advised and supported by a number of boards and commissions, including those described below.

Chief of Engineers Environmental Advisory Board (EAB): The Chief of Engineers' Environmental Advisory Board is intended to provide outside expert advice to the Chief of Engineers on environmental policy and procedural matters. EAB members are selected by the Chief of Engineers. The Board's five to ten members are supposed to represent a broad range of expertise and experience in environmental matters. EAB meetings are open to the public in accordance with the Federal Advisory Committee Act (FACA), and are announced in the Federal Register. Information on the EAB and its members can be found at <http://www.usace.army.mil/CECW/Pages/eab.aspx>.

Current membership on the EAB includes six individuals representing academia and organizations such as the Great Lakes Fishery Commissions and the Nature Conservancy. In the past, the EAB has undertaken in-depth looks at independent review, environmental operating principles, and making Corps projects more environmentally sustainable. EAB members also have been given the opportunity to look in depth at specific Corps projects, including the Upper Mississippi River lock expansion, Everglades restoration, and Yazoo Backwater Pumping Plant projects.

Coastal Engineering Research Board (CERB): The Coastal Engineering Research Board is an advisory board that provides guidance on policy and reviews plans for research and development in coastal engineering. The CERB also recommends priorities for carrying out research projects. Information on the EAB and its members can be found at <http://chl.erdc.usace.army.mil/cerb>.

Inland Waterway Users Board: The Inland Waterway Users Board is an eleven member federal advisory committee established by the Water Resources Development Act of 1986. Board members are selected by the Secretary of the Army and must represent all geographic areas and a spectrum of the primary commercial users and shippers of the nation's inland and intracoastal waterways. The Board is headed by the Director of Civil Works and is supported by staff from the Institute for Water Resources. The Board typically meets three times annually, with the meetings open to the public and required to be noticed in the Federal Register.

The Board makes recommendations to Congress and the Secretary of the Army on priorities for spending monies in the Inland Waterways Trust Fund. The Trust Fund is funded by a 20-cent tax on diesel fuel used for commercial transportation on inland waterways, and monies in the Fund are used to pay for 50 percent of construction and rehabilitation projects on the fuel-taxed portions of the inland navigation system. The Board submits its recommendations through an annual report. Information on the Inland Waterways User Board and copies of recent annual reports to Congress can be accessed at <http://www.iwub.iwr.usace.army.mil/>.

The Mississippi River Commission (MRC): The Mississippi River Commission recommends and approves plans for navigation and flood control on the Mississippi River. The MRC's jurisdiction extends from the headwaters of the Mississippi River in Minnesota to its mouth in Louisiana. Established in 1879, the statutory mission of the MRC is to “take into consideration and to mature such plan or plans and estimates as will correct, permanently locate, and deepen the channel and protect the banks of the Mississippi; improve and give safety and ease to the navigation thereof; prevent destructive floods; promote and facilitate commerce, trade, and the postal service.” The MRC and its work are funded separately from other civil works projects through the “Mississippi River and Tributaries” (MR&T) appropriations accounts.

The MRC makes annual Mississippi River “high water” and “low water” tours on a Corps of Engineers yacht to receive public testimony on the management of the River. The tours stop in many communities along the River, where the Commission holds public forums that afford an opportunity to raise critical River-related issues. Information on the MRC can be accessed at <http://www.mvd.usace.army.mil/mrc/index.php>.

Endnotes

1. The Flood Control Act of 1936 states that “the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watershed thereof, for flood control purposes if the benefits to whomsoever they may accrue are in excess of the estimated costs.” 33 U.S.C. § 701a. This provision remains in effect today. The assumptions used by the Corps in developing these benefit-cost analyses have long been criticized by the environmental and scientific communities as creating a bias for large scale structural projects and for ignoring the benefits of healthy rivers and wetlands.
2. The four Deputy Assistant Secretaries are: Principal Deputy Assistant Secretary of the Army for Civil Works; Deputy Assistant Secretary of the Army for Policy and Legislation; Deputy Assistant Secretary of the Army for Management and Budget; and Deputy Assistant Secretary of the Army for Project Planning and Review. For purposes of effectively dealing with military leadership within the Corps, the Principal Deputy ASA is the equivalent of a 3-star general and the Deputy Assistant Secretaries are treated as the equivalent of 2-star generals.
3. USACE stands for United States Army Corps of Engineers.

Chapter 2

The Civil Works Program Project Planning and Construction

- I. The Civil Works Program**
 - A. Fundamentals of the Civil Works Program
 - B. Individually Authorized Projects
 - C. Continuing Authority Program Projects
 - D. Project Planning Assistance to Others

- II. Project Planning and Construction**
 - A. Reconnaissance Studies
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 - F. Post-Authorization Changes
 - G. Deauthorization

- III. Plan Selection Criteria**
 - A. Flood Damage Reduction and Navigation Projects
 - B. Restoration Projects
 - C. Modernizing the Corps' Planning Guidelines

- IV. Peer Review**
 - A. Independent Peer Review
 - B. Safety Assurance Review
 - C. Internal Technical Review

- V. Mitigation for Civil Works Projects**
 - A. Mitigation Requirements
 - B. Mitigation Compliance

Through its civil works program, the Corps plans and constructs water resources projects nationwide. The majority of these projects are carried out under one of the Corps' primary mission areas of navigation, flood damage reduction, and environmental

restoration. This chapter describes the civil works program; the Corps' project planning process; and the laws, regulations, and policies specific to the civil works program.

I. The Civil Works Program

Through its civil works program, the Corps plans, constructs, and operates water projects in every state in the nation. The majority of the Corps' work falls under one of its three main mission areas: flood damage reduction, navigation, and environmental protection and restoration. However, Congress also has given the Corps an increasing role in projects that fall outside these primary mission areas.

The Corps has constructed 8,500 miles of levees; 11,000 miles of navigation channels; more than 600 dams; 276 navigation lock chambers; 75 federal hydropower facilities; and countless miles of seawalls, jetties, and artificial beaches. The Corps manages the nation's inland waterway system, dredges and otherwise maintains more than 920 coastal and inland harbors, and manages more than 380 lakes and reservoirs.¹ Since 1990, when Congress added environmental protection to the Corps' mission areas, the Corps' civil works portfolio has grown to include some of the nation's largest and most controversial restoration projects.²

Outside its main mission areas, the Corps manages a host of recreation lands; supplies some 24 percent of the nation's hydropower through Corps dams; helps carry out Superfund clean-ups (through the formerly utilized site remediation program, also known as FUSRAP); and constructs schools, water supply projects, and wastewater treatment plants.

While Corps projects have produced some positive economic benefits for the Nation, they have also caused significant environmental harm. The environmental damage has been so great that Corps projects are recognized as one of the leading reasons that North America's freshwater species are disappearing five times faster than land based species and as quickly as rainforest species.³ Large-scale structural projects planned and constructed by the Corps have also increased flood risks for many communities, reduced water quality, impaired recreational opportunities, and damaged economies that rely on a healthy environment.

Two National Academy of Sciences panels and the Department of the Army Inspector General have concluded that the Corps has an institutional bias for approving large and environmentally damaging structural projects, and that its planning process lacks adequate environmental safeguards.⁴ Less environmentally damaging, less costly, nonstructural measures that would result in the same or better outcomes are routinely ignored or given short shrift. This results in projects that are unnecessarily destructive, costly, and, in many cases, simply not needed.

As communities and wildlife suffer the increased storms, floods, and droughts being wrought by global warming, it is more important than ever to transform the Corps' civil works program. Healthy rivers, wetlands, and coastlines provide the first line of defense against flooding, improve water quality, recharge groundwater, provide outstanding recreational opportunities, and provide vital habitat for fish and wildlife. Protecting and restoring these vital resources must become the primary objective for the Corps' civil works program.

A. Fundamentals of the Civil Works Program

Certain fundamental criteria apply to each Corps civil works project. Each project and project study must be authorized by Congress. Each project and project study must also be funded by Congress. Almost every project must have a non-federal sponsor who pays for a portion of the project's costs. Each project must go through a detailed planning process that is guided by laws, regulations, and guidance specifically applicable to Corps projects. And each project must comply with other applicable federal and state environmental laws.

Congressional Authorization: As discussed in Chapter 4, the Corps must have explicit Congressional approval before it can begin planning or constructing projects under the civil works program.⁵ Project studies and project construction (along with changes to Corps policy) are typically authorized through the Water Resources Development Act.⁶ Occasionally, Corps projects are authorized by stand-alone legislation or as part of another bill. For example, project authorizations are sometimes added to appropriations bills. See *Chapter 4 for a discussion of the Congressional authorization process.*

Most Corps projects costing more than \$5 million must be individually authorized by Congress. Some types of less costly projects can be carried out under one of the Corps' nine programmatic authorities, also known as "continuing authorities" programs. The continuing authorities programs place restrictions on a project's cost and purpose.

Each individually authorized project actually requires two separate authorizations. Congress must first authorize the Corps to study the project (the Corps is directed to study a water resources problem and recommend a project to address the problem). Congress then must separately authorize construction of the project recommended by that Corps study.

A project that falls under one of the Corps' continuing authority programs can be both planned and constructed without obtaining individual authorization. Congress nevertheless often will authorize specific projects under a continuing authorities program to help ensure construction. See *subsection B for a discussion of the Corps' continuing authorities programs.*

Project Funding: Before the Corps can begin an authorized study, Congress must appropriate funds to carry out that study. Likewise, Congress must appropriate funds to construct a project before the Corps can begin construction. It will often take more than one appropriation cycle to obtain all the funding necessary to complete a project study or construction. Each year's work is limited to the work that can be paid for through funds appropriated during that fiscal year, or through monies still available from a previous year's appropriation.

Activist Tip

Activists will have at least four opportunities to influence Congressional action for individually authorized Corps projects. The first is when the Corps seeks Congressional authorization to study a project. The second is when the Corps seeks appropriations from Congress to pay for the study. The third is when the Corps seeks Congressional authorization to construct the project. The fourth is when the Corps seeks appropriations to pay for the construction. Many Corps projects provide additional opportunities as they will require many years worth of study and construction funding.

At each opportunity, activists can work with members of Congress or the Administration to stop, reformulate, or require a reevaluation of a destructive project.

It is important to recognize that many authorized studies and projects are unlikely to receive the necessary funding. For example, while the Corps currently has a \$61 to \$83 billion project backlog (depending on the suite of project authorizations considered),⁷ it receives only about \$2.1 billion in construction funding each year.⁸ At that rate, it could take up to 39 years to construct all the authorized, but unconstructed, Corps projects currently on the books.

Funding for Corps activities is typically appropriated through the Energy and Water Development Appropriations Act (the E&W bill).⁹ See *Chapter 4 for a detailed discussion of the budget and appropriations process*. The E&W bill includes the total dollar amounts for each function of the Corps: General Investigation, Construction, Mississippi River and Tributaries, and Operation and Maintenance. The E&W bill also typically includes a limited number of specific project earmarks (*i.e.*, the bill directs a certain amount of appropriated money to specific Corps projects).

More detailed funding directions are included in the E&W Conference Report (or another committee report referred to in the Conference Report). The E&W Conference Report includes the E&W bill language and will typically break out each of the Corps' functional accounts by state and assign a specific dollar amount to individual projects in each state. In the appropriations process, the Conference Report is actually the final version of the appropriations bill that is sent to the President to be signed into law. As a result, any provisions in the enacted E&W Conference Report carry the force of law.

Additional explanations regarding how appropriated funds are to be spent can also be included in the managers' "joint explanatory statement" that typically accompanies the E&W Conference Report, and in Senate and House Appropriation Committee reports. Spending directives contained in these documents do not carry the force of law (unless otherwise provided in the enacted Conference Report), but agencies rarely deviate from the instructions contained in a joint explanatory statement or Committee report adopted by the conferees as these instructions represent the intent of Congress.

The few monies not earmarked for specific projects are allocated by the Corps. Congress also typically provides the Corps with some flexibility to move money between projects in cases where there are project delays or where a critical priority develops.

Since the passage of earmark reforms in 2007, Members of Congress must file a disclosure for each earmark requested by the Member, making it easier to track the source of the earmark.

Cost Sharing Requirements: Virtually all Corps projects are paid for by both the federal government and a non-federal project sponsor, also known as a local sponsor.¹⁰ The amount of the federal cost share is determined by a project's purpose. The federal government typically pays 40 to 65 percent of the cost of constructing a civil works project. See Table 1 for the standard cost share requirements for individually authorized projects. See subsection C for the cost share requirements for projects carried out under the Corps' continuing authorities programs.

The non-federal sponsor must formally agree to share the costs of a project before the project can be authorized for construction by Congress. In most cases, the non-federal sponsor can pay for at least a portion of the local cost share requirement through in-kind contributions such as providing needed project lands, easements, or rights of way, or providing services and materials for planning or construction.

Congress can waive all or a portion of the local cost share requirement or allow an increase in the amount of in-kind contributions that can be counted towards that local cost share. These types of changes typically would be included in the project's authorizing language.

A non-federal sponsor must be a legally constituted public body (which includes federally recognized Indian tribes) and typically is a state or local governmental agency. A not-for-profit organization can also act as a local project sponsor if the not-for-profit has the consent of the affected local government, and has the ability to perform the terms of its agreement and to pay damages in the event of a failure to perform. 42 U.S.C. § 1962-5b(b).

In some instances, non-federal sponsors can qualify for a reduction or waiver of the standard cost share requirement for both feasibility studies and construction if the non-federal sponsor lacks the ability to pay its share of a project's costs. 33 U.S.C. § 2213 (m). The "ability to pay" determination is based on a complex calculation that accounts for per capita income in the state and per capita personal income in the project area.¹¹ The Corps was supposed to have updated its ability to pay guidelines to include new criteria by December 31, 2007 (but as of the date of this Citizen's Guide, the Corps had not done so). 33 U.S.C. § 2213 (m).

Plan Selection Criteria: The Corps' selection of a recommended plan is driven by a set of Corps specific laws, regulations, guidelines, and policies and by the requirements of federal environmental laws such as the Clean Water Act, the Endangered Species Act, and the National Environmental Policy Act. The Corps' internal guidelines and policies are designed, in large part, to apply the *Principles and Guidelines for Water and Related Resources Implementation Studies* which were adopted in 1983 (the 1983 P&G). The 1983 P&G establish project selection criteria and dictate how the Corps is to calculate project costs and benefits. The 1983 P&G are woefully out of date; among other problems,

they relegate environmental protection to a secondary concern in project planning, and promote large scale structural projects that do not protect the environment. The 1983 P&G are currently being rewritten pursuant to a hard fought reform enacted in the Water Resources Development Act (WRDA) of 2007. *See Section III for a discussion of the Corps' plan selection criteria and for the P&G related requirements of WRDA 2007.*

Environmental Operating Principles: The Corps has established environmental operating principles that are supposed to help ensure that the project planning process is integrated with natural resource laws, values, and sound environmental practices and stewardship. The Environmental Operating Principles were established to help “restructure internal Corps methods of operation and behavior” and “do not create additional rights or responsibilities legally enforceable by outside parties.”¹² The following are the Corps' Environmental Operating Principles.

- (1) “Strive to achieve Environmental Sustainability. An environment maintained in a healthy, diverse, and sustainable condition is necessary to support life.”
- (2) “Recognize the interdependence of life and the physical environment. Proactively consider environmental consequences of Corps programs and act accordingly in all appropriate circumstances.”
- (3) “Seek balance and synergy among human development activities and natural systems by designing economic and environmental solutions that support and reinforce one another.”
- (4) “Continue to accept corporate responsibility and accountability under the law for activities and decisions under our control that impact human health and welfare and the continued viability of natural systems.”
- (5) “Seek ways and means to assess and mitigate cumulative impacts to the environment; bring systems approaches to the full life cycle of our processes and work.”
- (6) “Build and share an integrated scientific, economic, and social knowledge base that supports a greater understanding of the environment and impacts of our work.”
- (7) “Respect the views of individuals and groups interested in Corps activities, listen to them actively, and learn from their perspective in the search to find innovative win-win solutions to the Nation's problems that also protect and enhance the environment.”¹³

B. Individually Authorized Projects

Each Corps project that does not fall under one of the Corps' continuing authorities programs must undergo a two step authorization process. Congress must first pass legislation authorizing the Corps to study a water resources problem and recommend a project to solve that problem (known as a study authorization). Once the study is completed and the Corps submits a project recommendation to Congress, Congress must pass legislation authorizing the Corps to construct the project (known as construction authorization). Congress also must appropriate money for both the study and construction phases. Each of these steps is discussed below.

Obtaining Study Authorization: To obtain authorization to study a water resources problem and propose a project, a member of Congress must ensure that language authorizing the study is included in the Water Resources Development Act (or in another legislative vehicle). Congress seeks to pass a Water Resources Development Act every two years, but often does not. *See Chapter 4 for a detailed discussion of the legislative process.*

Typically, a non-federal entity will approach one of their members of Congress and request a study authorization. If the member of Congress agrees, he or she will advise the appropriate legislative Committee of the request. The Senate and/or House subcommittee that is responsible for Corps activities will then request information from the Corps (in a document known as a Docket letter) about the study area, problems, and potential solutions. Congress will then decide whether to grant the study authority to the Corps. As discussed above, studies carried out under one of the Corps' continuing authorities programs do not require individual study authorization.

In some instances, the Senate Environment and Public Works Committee or the House Transportation and Infrastructure Committee may authorize a new study merely by adopting a resolution (commonly known as a survey resolution) that provides the Corps with the necessary authority to carry out a study. A survey resolution is available only in those instances where the Corps has previously investigated and reported on water resource problems in the area at issue. The survey resolution allows the Corps to take another look at the problems facing the area without the need to have a study authorization signed into law.

Obtaining Study Funding: Congress must appropriate funds to carry out an authorized study before the Corps can begin work. Through the normal federal budget and appropriations process, the President's budget may request money to begin the study process. While Congress will use the President's budget request as a guide, it also can appropriate money for a study (or for project construction) even if those monies are not included in the President's budget. *See Chapter 4 for a detailed discussion of the budget and appropriations process.*

Obtaining Construction Authorization: As discussed above, the Corps must obtain explicit construction authorization before it can begin building any project that is not being carried out under one of the Corps' continuing authorities programs. In most instances, Congress will wait to authorize construction until it receives a final feasibility report, Chief of Engineers' Report (often referred to as a Chief's Report), and signed Record of Decision on the project.

The Chief's Report signifies that the Chief of Engineers approves the project recommendation. The Corps sends the Chief's Report to the Corps' civilian leader, the Assistant Secretary of the Army for Civil Works (the ASA(CW)) for review and approval. The Corps sends an informational copy of the Chief's Report to Congress at the same time. The ASA(CW) reviews the Chief's Report to ensure consistency with law and Administration policy and sends the Chief's Report to the Office of Management and Budget for review. If the ASA(CW) approves the Chief's Report he or she will sign a formal Record of Decision (for any project that is not already authorized for construction) and will transmit that Record of Decision to Congress.

In some instances, Congress will authorize a project before it receives a Chief's Report, and will make the authority contingent on the completion of a favorable Chief's Report within a defined period of time. These "contingent authorizations" are highly problematic because they leave the project selection entirely in the hands of the Corps with little or no Congressional oversight. Contingent authorizations also put pressure on the Corps to recommend a project regardless of the potential impacts, since Congress has already said that it wants some kind of project constructed.

The Congressional Research Service reports that since the mid-1990s, Congress has also authorized a "significant number" of projects based on Chief's Reports that were not yet approved by the ASA(CW) or by the Office of Management and Budget.¹⁴ This type of approval is also highly problematic because the projects have not be subjected to a full policy and oversight review by the Corps' own civilian leaders.

Legislation authorizing construction of a Corps project should include the project name, location, project type, and estimated federal cost. Typically a construction authorization will state that the project must be carried out as described in the Corps' feasibility study or the Chief's Report for the project. In some cases, Congress will authorize a project that is different than the one recommended by the Chief's Report. For example, Congress may authorize only a portion of the project, or it may impose additional mitigation requirements. In those instances, the authorization must describe the deviation or refer to a document that describes the project Congress wants built. Authorizing language can also provide exceptions to typical Corps policies. For example, an authorization can waive all or a portion of the local cost share requirement or allow an increase in the amount of in-kind contributions that can be counted towards that local cost share.

Activist Tip

Activists fighting older Corps projects should take the time to review both the authorizing language and the underlying Chief's Report to make sure that the Corps is following the limitations established in those documents. Projects that significantly exceed their Congressional authorization cannot be constructed.

For example, the original 1941 authorization for the Yazoo Backwater Pumping Plant (a project ultimately stopped by EPA) authorized a series of drainage projects, but explicitly required the protection of wetlands below the 90 foot elevation. When the Corps revived the plan in 1982 and again in 2007, it recommended a project that would drain wetlands down to the 87 foot elevation. This would have caused significantly more wetland losses than the authorized project. If EPA had not stopped the Yazoo Pumps, the issue of Congressional authorization would have been a key component of a legal challenge.

Obtaining Construction Funding: Once authorized, Congress must appropriate construction funding before construction can begin. Like study funding, construction funding also goes through the yearly federal budget and appropriations process. Construction funds may be requested in the President's budget, but Congress is not bound by that budget and often will appropriate more or less money than requested by the President for specific projects. *See Chapter 4 for detailed information on the budget and appropriations process.*

Construction funding is utilized by the Corps to complete detailed plans and specifications for the project, award contracts, and undertake actual physical construction. It typically takes a number of years to obtain all necessary construction funding from Congress for an individual project.

Cost Share Requirements: As discussed above, the federal government typically pays 40 to 65 percent of the cost of constructing a civil works project. The amount of the federal share is determined by the project purpose (or any specific cost-sharing requirements established through legislation specific to that project). The remaining costs must be paid by a non-federal partner, also known as a local sponsor. *See Table 1 for the standard cost share requirements for individually authorized projects.*

C. Continuing Authority Program Projects

The Corps' continuing authorities programs allow the Corps to plan, design, and construct certain types of less costly water resource projects without having to obtain individual Congressional authorization. Projects carried out under continuing authorities programs (often referred to as CAP projects) typically are much smaller in scope than individually authorized projects. They also undergo a less extensive planning process.

CAP projects are limited by the purpose of the continuing authority program under which they are carried out, and they are subject to program specific cost limitations. CAP projects also must compete for both study and construction funding from a very limited pool of funds. These funding constraints have severely limited the number of CAP projects constructed.

For example, in the first 13 years (1986 to 1999) of the Corps' Section 1135 continuing authority program, only 45 projects had been completed or were under construction. Prior to 2007, the Section 1135 program had an authorized annual funding limit of only \$25 million (Congress increased that funding limit to \$40 million in the Water Resources Development Act of 2007) and often funded the program at less than that amount. In addition, Congress often earmarks funds for specific 1135 projects, leaving hundreds of projects across the country to compete for an even smaller pool of money.¹⁵ For example, in FY 2005, Congress earmarked \$4.21 million of the \$25 million appropriated to the Section 1135 program.

Standard Cost Sharing Rules for Corps Civil Works Projects

Project	Type	Non-federal Share ¹		Legal Citation
		Construction	O&M	
Commercial Navigation— Coastal Ports²	Portion of Harbors up to 20 ft.	20%	0%	33 U.S.C. 2211
	Portion of Harbors 20-45 ft.	35%	0%	33 U.S.C. 2211
	Portion of Harbors more than 45 ft.	60%	50% ³	33 U.S.C. 2211
Commercial Navigation— Inland Waterways	Inland Waterways	50% ⁴	0%	33 U.S.C. 2212
Flood Damage Reduction— Riverine	Structural Flood Control	35% ⁵	100%	33 U.S.C. 2213
	Non-Structural Flood Control	35% ⁶	100%	33 U.S.C. 2213
Flood Damage Reduction— Shoreline Protection	Beach Replenishment and Shoreline Protection	35%	50% ⁷	33 U.S.C. 2213
Hurricane and Storm Damage Reduction		35%	100%	33 U.S.C. 2213
Restoration		35%	100%	33 U.S.C. 2213
Aquatic Plant Control	Control Operations	50%	100%	33 U.S.C. 2214
Agricultural Water Supply⁸	Non-Irrigation Projects and Irrigation Projects in Eastern States	35%	100%	33 U.S.C. 2213
Hydroelectric Power		100%	100%	33 U.S.C. 2213
Municipal and Industrial Water Supply Recreation		100%	100%	33 U.S.C. 2213
	Including Recreational Navigation	50% ⁹	100%	33 U.S.C. 2213

¹ In most cases, nonfederal interests provide lands, easements, rights-of-way, relocations, and dredge disposal areas (LERRDs) and receive credit toward its share of the project for the value of LERRDs. The federal share is paid through Congressional appropriations of federal tax dollars.

² The federal government will loan up to 10% of the non-federal share for construction to be repaid over a 30-year period. LERRDs may offset some or all of this amount.

³ The 50% nonfederal contribution applies to the portion of costs to maintain the harbor deeper than 45 feet.

⁴ The Inland Waterways Trust Fund provides the nonfederal share.

⁵ Structural flood control projects require a 5% cash outlay prior to construction. The remainder of the cost-share may be provided by LERRDs.

⁶ The nonfederal cost-share of nonstructural flood control projects may be provided entirely by LERRDs. Nonstructural flood control projects authorized before 1996 require a 25% minimum total contribution.

⁷ Projects authorized and approved before December 31, 1999 are subject to different requirements. 33 U.S.C. 2213(d)(2). Also, costs assigned to benefits of periodic renourishment to protect federal lands are 100% federal, while costs assigned to periodic renourishment to protect privately owned lands shall be 100% non federal.

⁸ Generally associated with multiple-purpose projects. For irrigation projects in 17 Reclamation (western) states, the Corps funds initial project construction, which is supposed to be repaid in conformity with Reclamation law.

⁹ The non-federal share of 50% is limited to separable costs (and in some cases, joint and separable costs) allocated to the recreational component of the project.

The Corps currently has nine continuing authorities programs, which are often referred to by the section number of the Water Resources Development Act, Rivers and Harbors Act, or Flood Control Act that authorized the program. For example section 1135 of the Water Resources Development Act of 1986 authorized a continuing authorities program titled “Project Modifications for Improvement of the Environment.” This program is typically referred to as the Section 1135 program, and projects completed under it are known as Section 1135 projects.

The Corps’ continuing authorities programs are described below.

Section 1135 — Project Modifications for Improvement of the Environment: The section 1135 program gives the Corps authority to modify existing Corps projects to restore the environment and to construct new projects to restore areas degraded by a Corps project. The Section 1135 program has an authorized yearly funding ceiling of \$40 million for the entire country. The federal share of an individual project carried out under this program cannot exceed \$5 million, and the federal cost share is 75%. 33 U.S.C. § 2309a.

Section 208 — Snagging and Clearing for Flood Control: The section 208 program gives the Corps authority to plan and carry out projects to remove snags and debris in navigable streams and tributaries for flood protection purposes. The Section 208 program has an authorized yearly funding ceiling of \$7.5 million for the entire country. The federal share of an individual project cannot exceed \$500,000, and the federal cost share is 65%. 33 U.S.C. § 701g.

Section 206 — Aquatic Ecosystem Restoration: The section 206 program gives the Corps authority to plan and carry out projects to restore degraded aquatic ecosystems (including estuaries). These projects do not have to be related to an existing Corps project. The Section 206 program has an authorized yearly funding ceiling of \$50 million for the entire country. The federal share of an individual project cannot exceed \$5 million, and the federal cost share is 65%. 33 U.S.C. § 2330.

Section 205 — Flood Damage Protection: The section 205 program gives the Corps authority to plan and construct small flood damage reduction projects. Work under this authority may include construction or improvement of levees, channels, and dams, or nonstructural alternatives such as flood warning systems or relocation. The Section 205 program has an authorized yearly funding ceiling of \$55 million for the entire country. The federal share of an individual project cannot exceed \$7 million, and the federal cost share is 65%. 33 U.S.C. § 701s.

Section 204 — Beneficial Uses of Dredged Material for Ecosystem Restoration: The section 204 program gives the Corps authority to carry out projects to restore, protect, or

create aquatic habitats, including wetlands, using dredged material from an authorized federal navigation project. The Section 204 program has an authorized yearly funding ceiling of \$30 million for the entire country, of which not more than \$5 million can be used for developing sediment management plans, and not more than \$3 million can be used for projects constructed in disadvantaged communities at full federal expense. The federal share of an individual project cannot exceed \$5 million. The federal share varies by project type, as established by 33 U.S.C. § 2213. The federal cost share is 100% where a beneficial use project is located in a disadvantaged community and the project cost does not exceed \$750,000. 33 U.S.C. § 2326.

Section 111 — Mitigation of Shore Damage Caused by Federal Navigation Projects:

The section 111 program gives the Corps authority to carry out projects that prevent or mitigate erosion damage from federal navigation projects to public or private coastlines. There is no national annual funding ceiling. The federal share for an individual project cannot exceed \$5 million. Section 111 projects are cost shared in the same proportion as the cost of the navigation project causing the damage. 33 U.S.C. § 426i.

Section 107 — Small Navigation Projects:

The section 107 program gives the Corps authority to carry out projects for small river and harbor improvements including dredging channels and building anchorage areas, breakwaters, jetties, and groins. The Section 107 program has an authorized yearly funding ceiling of \$35 million for the entire country. The federal share of an individual project cannot exceed \$7 million, and the federal cost share varies depending on the project specifications. 33 U.S.C. § 577.

Section 103 — Hurricane and Storm Damage Protection:

The section 103 program gives the Corps authority to construct small shoreline and beach restoration and protection projects like jetties, groins, and other small beach protection measures. To qualify for this program, storm damage must result from storm driven waves and ocean currents, the project must protect either lands that are open to public use or that are near public facilities, and the project must be complete within itself. The Section 103 program has an authorized yearly funding ceiling of \$30 million for the entire country. The federal share for an individual project cannot exceed \$5 million, and the federal cost share varies depending on who owns the lands, the type of land, and whether the public has access to the land being protected. 33 U.S.C. § 426e.

Section 14 — Emergency Steambank Protection:

The section 14 program authorizes the Corps to carry out emergency steambank and shoreline protection projects to prevent damage to public facilities such as roads, bridges, hospitals, schools, and water/sewage treatment plants. The Section 14 program has an authorized yearly funding ceiling of \$15 million for the entire country. Federal costs are limited to \$1.5 million in a single locality during any fiscal year, and for almost all projects, the federal cost share is 65% of construction. 33 U.S.C. § 701r.

D. Project Planning Assistance to Others

The Corps is authorized to assist states, tribes, and other non-federal entities in water resource planning.

Planning Assistance to States: The Corps has the authority to assist states, tribes, and other non-federal entities in developing comprehensive plans for the development, utilization, and conservation of water and related resources. Studies under this program can address such water resources problems as supply and demand, water quality, wetlands evaluation, flood damage reduction, and dam safety. This program has an authorized yearly funding ceiling of \$10 million, and not more than \$2 million can be expended in any one state during any fiscal year. The federal cost share for assisting states in development of comprehensive plans is 50%. The non-federal share can be provided by in-kind services. 42 U.S.C. § 1962d-16.

The Corps also has the authority to provide technical assistance to states, tribes, and other non-federal entities managing water resources. Technical assistance may include development and integration of hydrologic, economic, and environmental data and analyses. This technical assistance program has an authorized yearly funding ceiling of \$5 million, with not more than \$2 million annually being utilized to enter into cooperative agreements with nonprofit organizations to assist rural and small communities. 42 U.S.C. § 1962d-16.

Planning Technical Assistance Program: The Corps has the authority to provide technical and scientific assistance to any United States company that is competing for, or has been awarded, a foreign planning, design, or construction contract. Companies seeking such assistance must cover the costs of all services provided by the Corps, and must indemnify the United States for any responsibility for damages resulting from the planning, design, construction, operation, or maintenance of the project for which the Corps provided assistance. 33 U.S.C. § 2314a.

II. Project Planning and Construction

The Corps' project planning process is guided by an extensive body of laws, regulations, and policies. Much of the planning process is designed to apply the project selection criteria established by the 1983 P&G (these woefully outdated planning guidelines are currently being updated). Corps projects must also comply fully with all applicable federal environmental laws and regulations, including the National Environmental Policy Act (NEPA).

For individually authorized Corps projects, the planning process involves five phases: (1) the reconnaissance phase; (2) the feasibility phase; (3) preconstruction, engineering, and design; (4) construction; and (5) operations and maintenance. On average, it takes about 5.6 years for the Corps to complete both the reconnaissance and feasibility studies for individually authorized projects.¹⁶ Construction can take a year to decades to complete, depending on project size, cost, and complexity. Some projects also require post-authorization changes, which requires a sixth phase of planning. Each of these phases is discussed in detail below.

Projects carried out under one of the Corps' continuing authority programs follow a similar, but typically less detailed, planning process.

A. Reconnaissance Studies

Once a study is authorized and at least some funds have been received from Congress, the Corps may begin the project study process. The first step in this process is to prepare a reconnaissance study. The reconnaissance study is used to identify potential solutions to a water resources problem in sufficient detail to let the federal government and non-federal sponsor decide whether project planning should proceed to the more detailed feasibility study phase. If the answer is yes, the Corps will prepare a feasibility study for the project and an environmental impact statement. A significant number of projects do not make it past the reconnaissance phase.¹⁷

A reconnaissance study typically can be completed in one year, and as a matter of law cannot take longer than 18 months. 33 U.S.C. § 2282. At the beginning of the reconnaissance study process, the Corps will appoint a project manager to serve as the main point of contact with the non-federal sponsor and the public. The project manager develops and implements a project management plan, and keeps track of all commitments made during the process.

The Reconnaissance Report: The Corps must produce a Reconnaissance Report, also known as a Section 905(b) Analysis (after the section of WRDA 1986 that established the reconnaissance report requirement). The Reconnaissance Report identifies the water resources problem and potential solutions to that problem. It must include “a

preliminary analysis of the Federal interest, costs, benefits, and environmental impacts” of a potential project, and “an estimate of the costs of preparing the feasibility report.” 33 U.S.C. § 2282(b). Ultimately, the report is used to determine whether there is federal and non-federal interest in pursuing a civil works project. If the report recommends further evaluation through a feasibility study, it also must identify the non-federal sponsor who will provide the local cost share for the feasibility study.

The Reconnaissance Report is prepared by the District, and must be certified (or approved) by the Division. By certifying a Reconnaissance Report, the Division is concluding that “the proposed feasibility study would likely comply with current policies, the scope and nature of the water resource problem(s) warrant Federal participation in a feasibility study, and a non-Federal entity has the appropriate interest, authority, and capabilities to fulfill non-Federal responsibilities for the feasibility, design, and construction phases.”¹⁸

Additional Reconnaissance Study Documents: If the Corps determines that there is a federal interest and the non-federal sponsor also wishes to proceed, several additional documents must be prepared:

- (1) The non-federal project sponsor must submit a Letter of Intent (LOI) to the District Commander that states that the non-federal sponsor is willing to proceed to the feasibility study phase and is able to contribute the necessary local cost share for the feasibility study. The LOI must be submitted with the Reconnaissance Report to the Division for approval.
- (2) The Corps and local sponsor must negotiate and finalize a Project Management Plan (PMP), also called a Project Study Plan (PSP), that describes how work will be conducted and how resources will be expended. It identifies work tasks, schedules for work completion, cost estimates, and guidelines. The PMP must also include a Review Plan that outlines the scope and plans for internal technical and any anticipated independent peer reviews required for the project. *See Section IV for a discussion of the technical and independent review requirements and the required contents of a Review Plan.*
- (3) The Corps and the non-federal sponsor must negotiate and sign a Feasibility Cost Sharing Arrangement (FCSA), through which the parties agree to share the costs of the feasibility study. The FCSA cannot be executed until the Reconnaissance Report is approved by the Division.

Paying for the Reconnaissance Study: The federal government pays for 100% of the reconnaissance study, with costs normally limited to \$100,000. Funding for the reconnaissance study will be listed by state under the General Investigations (GI) account in the annual Energy and Water Development Appropriations Act.

B. Feasibility Studies and Environmental Reviews

The feasibility study is a comprehensive review of a proposed project that leads to the selection of a recommended plan by the Corps (and the Administration). The feasibility study describes and evaluates alternative plans for addressing the water resources problem, evaluates the project's environmental and economic costs and benefits, and recommends a plan for implementation. The feasibility study must be accompanied by an environmental review, as required by the National Environmental Policy Act. In most cases, this will require preparation of a detailed environmental impact statement. A feasibility study typically takes up to three years to complete, but can take much longer.

Plan Selection Criteria: The Corps' project plan selection process is driven by an extensive body of laws, regulations, and policies. Much of the planning process is designed to apply the project selection criteria established by the 1983 P&G (these woefully outdated planning guidelines are currently being updated). As noted above, selected plans also must comply with federal environmental laws. *See Section III for a discussion of the Corps' plan selection criteria.*

The Feasibility Report: The Feasibility Report describes the alternatives considered by the Corps and recommends a specific plan for implementation. The contents of a feasibility report are established by law. The report must "describe, with reasonable certainty, the economic, environmental, and social benefits and detriments of the recommended plan and alternative plans considered by the Secretary and the engineering features (including hydrologic and geologic information), the public acceptability, and the purposes, scope, and scale of the recommended plan. The feasibility report shall also include the views of other Federal agencies and non-Federal agencies with regard to the recommended plan, a description of a nonstructural alternative to the recommended plan when such plan does not have significant nonstructural features, and a description of the Federal and non-Federal participation in such plan, and shall demonstrate that States, other non-Federal interests, and Federal agencies have been consulted in the development of the recommended plan."¹⁹ 33 U.S.C. § 2282.

Importantly, Corps Feasibility Reports also must contain a specific plan to mitigate fish and wildlife losses resulting from the project, or a determination that the project will have negligible adverse impacts on fish and wildlife. 33 U.S.C. § 2283. Mitigation also must be addressed in the environmental impact statement. *See Section V for a detailed discussion of the Corps' mitigation requirements.*

In addition to any needed mitigation plan, the Feasibility Report must include: (1) a benefit-cost or cost-effectiveness analysis of the project (depending on the type of project being evaluated); (2) a description of the engineering plan and supporting analyses such as existing and modified hydrology and hydraulics, geotechnical data, and the results of geologic investigations pertinent to implementation of the plan; (3) a Real Estate Plan

(REP) that identifies and estimates the value of all real estate requirements for the project; and (4) the operation, management, repair, restoration, and replacement (OMRR&R) requirements for the project.

As a rule of thumb, the Corps seeks to complete approximately 80% of the engineering design in the feasibility report — the amount that the Corps deems necessary to prepare a meaningful cost estimate. The remaining engineering, which consists of more detailed designs and specifications, is carried out during the PED phase.

The Environmental Impact Statement and Other Environmental Documentation:

The Corps must prepare an environmental impact statement (EIS) to accompany the Feasibility Report, as required by the National Environmental Policy Act (NEPA).²⁰ The EIS is typically presented with the Feasibility Report.

NEPA requires the Corps to evaluate the environmental impacts of a proposed project, consider alternatives to the proposed project that will cause less environmental harm, and consider the views of other federal agencies, states, and the public. NEPA documents are a critical component of project planning and provide an essential opportunity for public input into the Corps' planning process. *See Chapter 6 for a discussion of NEPA and other applicable federal environmental laws.*

The EIS evaluates the anticipated impacts of the recommended project and alternatives for achieving the project goals that may cause less environmental harm. Under NEPA, the Corps must fully evaluate the environmental impacts of the project, but the Corps is not required to select the least environmentally damaging project alternative. The Corps must provide an opportunity for the public, other federal agencies, and the states to review and comment on the EIS. The EIS typically includes detailed evaluations that support the conclusion in the EIS, such as an assessment of the impacts to waterfowl and wildlife, an assessment of changes to the hydrology of the area, an assessment of impacts to wetlands, and an assessment of needed mitigation for the project.

The Corps also may be required to prepare reviews and obtain approvals to proceed with the project under other applicable environmental laws such as the Clean Water Act and the Endangered Species Act. *See Chapter 6 for more information on applicable environmental laws.*

Peer Review: Studies carried out on costly or controversial Corps projects are subject to the independent peer review requirements established by WRDA 2007. 33 U.S.C. § 2343. The Corps has also set up a peer review process that is to be followed for all other Corps projects.²¹ Each of these peer reviews is to be carried out as an integral part of the study process. *See Section IV for a detailed discussion of the peer review requirements.*

Activist Tip

Because formal public comment periods are typically very short, activists should work to become familiar with a Corps project before release of a draft feasibility report and draft EIS.

The Corps is required by law to issue a notice of intent to prepare an EIS for a project and to request comments on the scope of the EIS. Activists should take advantage of those notices to begin to engage in the project planning process. For example, you can ask for permission to attend study meetings, request regular stakeholder meetings, and work to establish relationships with key staff from the Corps and other federal and state agencies. Activists should also reach out to the non-federal sponsor, especially if the sponsor is a local or state governmental entity that should be responsive to your concerns.

Public Participation In The Feasibility Phase: Public participation is an integral component of the feasibility phase of Corps planning. The public must be given the opportunity to comment on the draft feasibility study as well as on the NEPA analysis. The NEPA process includes three opportunities for public participation: at the scoping phase, upon release of the draft report, and upon release of the final report. The Corps also often holds public hearings at the NEPA scoping phase and after draft NEPA documents are released for public comment. The public also can request such hearings.

Public comment periods are typically very short — the public will often have only 45 to 60 days to file formal comments. As a result, activists should strive to obtain information and become involved in the planning process prior to the public comment period. This earlier involvement will provide important background information and advance notice of key issues that will need to be addressed in your formal comments. Typically, there is also a second 30-day public comment period on the final Feasibility Report and final EIS.

It is important to submit formal comments on draft and final feasibility studies and environmental impact statements. These comments can help redirect a Corps plan and are critical for developing the record for any potential legal challenge to the project. If you are considering suing the Corps to improve a project's NEPA analysis, you will have to file comments on the draft and/or final EIS to ensure that you have legal standing to sue. In preparing formal comments, it is important to highlight all areas of concern with the Corps' study, to propose specific alternatives that should be analyzed, and to provide as much documentation supporting your concerns/positions as possible.

Additional Feasibility Study Documents: The following additional documents are prepared during the feasibility study phase:

- (1) If necessary, an updated Project Management Plan (PMP), negotiated between the Corps and the local sponsor, must be completed during the scoping phase of the feasibility study. The PMP describes how work will be conducted and how resources will be expended. It identifies work tasks, schedules for work completion, cost estimates, guidelines, and internal and independent review requirements.
- (2) A Project Cooperation Agreement (PCA), negotiated between the Corps and the local sponsor. The PCA describes the local sponsor's agreement to financially participate in the construction, operation and maintenance of the recommended plan. The PCA may not be executed before the feasibility study phase.

Final Approval of Feasibility Documents and the Record of Decision: After the public review period for the draft Feasibility Report and draft EIS, the Corps will make any changes it deems necessary, and submit all feasibility phase documents to Corps Headquarters in Washington, D.C. for final approval. The Chief of Engineers

will approve a recommended plan in a document known as a Chief of Engineers' Report (often referred to as a Chief's Report). The Chief's Report summarizes the recommendations, key conditions imposed on the recommended project, and other pertinent information contained in the feasibility study.

The Corps sends the Chief's Report to the Assistant Secretary of the Army for Civil Works (the ASA(CW)) for review and approval, and sends a copy of the Chief's Report to Congress at the same time. The ASA(CW) reviews the Chief's Report to ensure consistency with law and Administration policy, and sends the Chief's Report to the Office of Management and Budget for review. If the ASA(CW) approves the Chief's Report he or she will sign a formal Record of Decision (for any project that is not already authorized for construction) and will transmit that Record of Decision to Congress.

In most cases, the Corps will continue to work on preconstruction, engineering, and design between the time that the final feasibility report is submitted to Congress and the project is authorized — provided the Corps gets the necessary funding to do so.

Paying for the Feasibility Study: The federal government pays 50% of the costs of a feasibility study with the remaining 50% paid for by the non-federal sponsor. The non-federal sponsor may pay its 50% by providing in-kind products or services, such as planning assistance, GIS mapping, or hydrological analyses. An important exception to this 50-50 cost share for feasibility studies is for projects dealing with inland waterway navigation. Feasibility studies for inland waterway navigation projects are paid for 100% by the federal government.

C. Preconstruction, Engineering, and Design

The next phase of planning is known as preconstruction, engineering, and design (PED). PED involves the preparation of detailed technical designs and specifications and a clear identification of the lands, easements, rights of way, relocations, and disposal areas that are needed for the project. PED typically takes about two years to complete. As a rule of thumb, the Corps expects to carry out the final 20% of its engineering design during the PED phase, with the first 80% carried out during the feasibility phase.

The Corps is allowed to proceed with PED while Congress reviews the final Feasibility Report and considers whether it should authorize construction of the project as long as the Chief of Engineers certifies to Congress that the project is not controversial.²² As a result, for many projects the PED phase will overlap with the end of the feasibility phase.

Required PED Documents: A number of documents must be prepared during PED (although many of these also can be prepared during the feasibility phase). The major documents include a Design Documentation Report (DDR), which provides the technical basis for the plans and specifications and serves as a summary of the final design; Plans

and Specifications (P&S), which are detailed construction drawings and specifications for the project; and, if necessary, an Engineering Documentation Report (EDR) to support minor changes in design and costs from those contained in the authorizing reports.

Safety Assurance Review: Certain hurricane and storm damage reduction projects and certain flood damage reduction projects must undergo a safety assurance review if the Chief of Engineers determines that a review by independent experts is necessary to assure public health, safety, and welfare. 33 U.S.C. § 2344. The Safety Assurance Review was established by WRDA 2007 in direct response to the 2005 failure of Corps-built levees and floodwalls in New Orleans following Hurricane Katrina. *See Section IV for a discussion of the Safety Assurance Review requirements.*

Paying for PED: PED is cost shared between the Corps and the non-federal sponsor in the same proportion that construction is cost shared. Typically, however, the Corps pays the PED costs upfront and the non-federal sponsor reimburses the Corps during the construction phase. *See Table 1 for the standard cost share requirements for individually authorized projects. See Section I for the cost share requirements for projects carried out under the Corps' continuing authorities programs.*

D. Construction

Once the project is authorized for construction, the Corps must seek funding to carry out the project. Once some level of construction funds are received, the Corps will typically contract out the actual construction work while retaining oversight (and in some cases, management of) the project.

Before actual construction can begin, the following must occur:

- (1) The Secretary of the Army and non-federal sponsor must approve and execute a final Project Cooperation Agreement (PCA). The PCA obligates the Corps and the non-federal sponsor to participate in implementing, operating, and maintaining the project according to requirements established by Congress and the administration.
- (2) The non-federal sponsor must also provide the necessary lands, easements, rights of ways, relocations, and disposal sites (LERRDs). The non-federal sponsor is responsible for providing and acquiring all LERRDs (excluding railroad bridges and approaches). The cost of the LERRDs can almost always be credited toward the non-federal cost-share, and the non-federal sponsor can request the Corps' assistance in acquiring LERRDs on the sponsor's behalf.
- (3) The construction contract must be advertised and awarded.

The time it takes to complete construction varies. While most projects take several years to construct, some can take decades (for example, raising the Mississippi River mainline levees). Lack of adequate federal funds can significantly slow the process — again, federal funds must be appropriated annually in the Energy and Water Development Appropriations Act.

Safety Assurance Review: As discussed below, a Safety Assurance Review must take place during the construction phase (and PED phase) for certain hurricane and storm damage reduction projects, and for certain flood damage reduction projects. 33 U.S.C. § 2344. *See Section IV for a discussion of the Safety Assurance Review requirements.*

Construction Phase Documents: Two major documents are prepared during the construction phase: (1) the construction contract(s), which is the agreement between the Corps and the contractor(s) about how the project will be built; and (2) the project operation and maintenance (O&M) manual, which contains the instructions for the non-federal sponsor to follow for operating and maintaining the project after construction is finished. Some projects require several contracts and manuals.

Paying for Construction: The construction cost share is determined by the project purpose (or any specific cost-sharing requirements established through legislation specific to that project). As noted above, the cost of LERRDs can typically be credited toward the non-federal cost-share. *See Table 1 for the standard cost share requirements for individually authorized projects. See Section I for the cost share requirements for projects carried out under the Corps' continuing authorities programs.*

E. Operations and Maintenance

Once they are constructed, most Corps projects require ongoing operations and maintenance (O&M). O&M includes operations, repair, rehabilitation, and major replacement. O&M activities range from day-to-day maintenance, such as mowing levees, to long-term or less frequent activities such as repairing cracks, conducting inspections, and carrying out major rehabilitation efforts.

O&M activities for inland waterways, harbors, and certain reservoir systems are paid for by the federal government and are typically quite substantial. These O&M activities can include such things as dredging and dredged spoil disposal, water level and flow regulation, bank stabilization, and construction of wing dikes and other in-stream navigation training structures. Development of O&M plans for these types of projects will require an environmental review (typically an EIS) pursuant to the National Environmental Policy Act (NEPA). Planning for major rehabilitation work on federal projects will also require an environmental review.

For most other projects, O&M activities are typically handed over to the non-federal sponsor, and the activities are far less extensive.

Operation and Maintenance Documents: The project O&M manual and management plan, created during the earlier planning phases will be revised as needed. As noted above, major federal O&M activities must be evaluated under NEPA, and ongoing O&M activities along with changes in such activities can trigger the requirement to prepare supplemental NEPA documents. For example, the federal O&M activities to maintain the navigation system on the Upper Mississippi River are clearly subject to NEPA.

Paying for Operations and Maintenance: The cost-share requirements for operations and maintenance activities are based on project type. *See Table 1 for the standard O&M cost share requirements for individually authorized projects.*

F. Post-Authorization Changes

The Corps has the authority to carry out post-authorization studies to determine whether a project should be modified or is no longer justified. Post-authorization studies and modifications are most likely where there has been a significant delay between the original project authorization and appropriation for construction funding.

Post-authorization change studies require an environmental review under the National Environmental Policy Act. The scope and nature of the proposed changes, the potential environmental impacts of those changes, and the existence of changed environmental conditions or new information, will determine whether the Corps must prepare a supplemental EIS or a less detailed environmental assessment.

Post-authorization studies that lead to a recommendation that a project is no longer justified appear to be extremely rare. For example, the Corps recommended construction of the Yazoo Pumping Plant project (originally authorized in 1941) in post-authorization change reports prepared in 1982 and 2007, despite the fact that the project would have drained and damaged 200,000 acres of ecologically significant wetlands in the heart of the Mississippi River flyway. The project was so destructive that EPA ultimately issued an extremely rare Clean Water Act veto, putting an end to the project once and for all.

Post-Authorization Change Studies: The Corps has the authority to carry out the following post-authorization change studies (these studies are paid for by funds appropriated to the construction account):

- (1) A General Reevaluation Report (GRR) is the most extensive of the post authorization change studies; it is essentially a new Feasibility Report. A GRR is “a reanalysis of a previously completed study, using current criteria and policies, which is required due to changed conditions and/or assumptions.”²³ A GRR can affirm the earlier plan, recommend a new or modified plan, or find that the project is no longer justified and should not be constructed. A GRR should require preparation of an EIS.

- (2) A Limited Reevaluation Report (LRR) can be used if policy changes require reevaluation of only certain aspects of an authorized project. For example, an LRR might be appropriate for a review that is limited to reassessment of just the economics of the project.²⁴
- (3) An Engineering Documentation Report (EDR) can be prepared when there are minor changes in design and costs from the authorizing reports, or technical changes that do not require project reformulation.²⁵

The type and scope of any recommended change will determine whether the change can be approved by the Corps or whether new Congressional authorization will be required. As discussed below, the Corps has discretionary authority to implement a number of changes to already authorized projects. If a post-authorization report recommends changes that fall outside that discretionary authority, the report would be sent to Congress and new Congressional authorization would be required before those changes could be implemented.

Changes in Project Scope: The Corps can approve the following changes to the scope and location of a project, provided the changes do not include addition or deletion of a project purpose (except for deletion of water quality where the benefits attributable to water quality are less than 15% of the total project benefits):

- (1) “Increase or decrease in scope no greater than 20 percent of the scope authorized by Congress. If the scope can be defined by several parameters, (for example, storage capacity, outputs, environmental impacts) and the change in any one parameter exceeds 20 percent, the change must be approved by the Commander USACE.”²⁶
- (2) “Change in the location or the design of the project to the extent that the location and magnitude of the impacts of the change are determined to be insignificant compared to the impacts assessed for the authorized project.”²⁷

The Corps’ internal guidance suggests that the Chief of Engineers also may be able to approve additional changes to a project’s scope, but notes that the “Chief of Engineers’ discretionary authority to approve changes to authorized projects must not be abused.”²⁸ Changes in scope, including reduction in scope, beyond those listed above are to “serve as an alert that the change may exceed the Chief of Engineers’ discretionary authority.”²⁹ Ultimately, the Chief, in consultation with the ASA(CW), will determine whether a proposed change can be made under discretionary authority or whether additional Congressional authorization is required.

Addition of New Project Purposes: Under certain circumstances, the Corps can add one or more of the following new project purposes to a civil works projects without new Congressional authorization — water supply, recreation, fish and wildlife enhancement (except for land acquisition), and low flow augmentation for purposes other than water quality. The Corps also has the authority to add certain provisions for future hydroelectric power, and for the conservation of threatened and endangered species.³⁰ The addition of any other project purpose will require new Congressional authorization.

Increase in Project Costs: Under certain circumstances, the maximum project cost (the amount specified in the authorizing legislation) can be increased without Congressional approval. Automatic price increases are allowed for (1) project modifications, such as engineering and design refinements, as long as the modifications do not alter the scope or functions of the project and do not add more than 20% to the total cost of the project; (2) changes in construction costs (including real property acquisition, reconstruction studies, planning, engineering, and design) that are consistent with engineering and other appropriate cost indexes; and (3) any additional studies, modifications, or actions (including mitigation and other environmental actions) that are required by changes in federal law, such as future Endangered Species Act compliance. 33 U.S.C. § 2280. All other price increases above the maximum project cost must be authorized by Congress.

G. Deauthorization

For various reasons ranging from ongoing controversy, significant environmental harm, lack of construction funding, or lack of interest in pursuing an authorized project, a project that has already been authorized for construction can be deauthorized. A deauthorized project is “off the books” and cannot be constructed. Authorized studies can also be deauthorized. Congress has established an automatic deauthorization process for both projects and studies, which is largely handled by Corps Headquarters. Congress can also deauthorize additional specific projects and studies through passage of deauthorization language in a Water Resources Development Act or other legislative vehicle.

Automatic Project Deauthorization: The automatic project deauthorization process was originally established by Congress in 1986. This process requires the Secretary to submit an annual list to Congress of authorized projects or separable elements that have received no obligations during the five full fiscal years preceeding the transmittal of the list. The Secretary also must notify each Senator and each Member of the House of Representatives in whose district a part or all of a project on the list would be located. After the last date of the fiscal year following the fiscal year that the list was submitted, the project or separable element is no longer authorized unless funds have been obligated for the planning, design, or construction of the project during that period. 33 U.S.C. § 579a.

Automatic Study Deauthorization: The automatic study deauthorization process was also originally established in 1986. This process requires the Secretary to submit an annual list to Congress of authorized studies that have not received funding for five consecutive years. Each study on that list is automatically deauthorized unless it receives funding within 90 days of the submittal of the list. 33 U.S.C. § 2264.

Project or Study Specific Deauthorizations: Congress can deauthorize projects or studies that do not qualify for automatic deauthorization by including deauthorization language in a Water Resources Development Act or other legislation. However, this is not an easy process particularly if the deauthorization is not fully supported by Members of Congress from all of the states affected by the project. Typically, members of Congress will only pursue deauthorizing legislation if a project has significant public safety implications or egregious environmental impacts.

In WRDA 2007, Congress did deauthorize the Mississippi River Gulf-Outlet (MRGO), an ecologically destructive navigation project built by the Corps in the 1960s. WRDA 2007 § 7013. Construction and operation of the MRGO led to the loss of tens of thousands of acres of Louisiana's coastal wetlands. The MRGO also played a major role in the 2005 flooding of New Orleans by funneling Hurricane Katrina's storm surge into the city. Activists had fought for decades prior to Hurricane Katrina to close the MRGO to stem the tremendous wetland losses, but it was the public safety risks exposed by Hurricane Katrina that ultimately led to the channel's deauthorization. In addition to deauthorizing the MRGO as a navigation project, Congress also authorized preparation and implementation of a plan to restore the wetlands and storm buffering capacities lost to the outlet.

III. Plan Selection Criteria

The Corps' selection of a recommended plan is driven by a set of Corps specific laws, regulations, guidelines, and policies and by the requirements of federal environmental laws such as the Clean Water Act, the Endangered Species Act, and the National Environmental Policy Act (NEPA).

The Corps' internal guidelines and policies are designed, in large part, to apply the *Principles and Guidelines for Water and Related Resources Implementation Studies* (the 1983 P&G), which establish project selection criteria and dictate how the Corps is to calculate project costs and benefits. The 1983 P&G are woefully out of date; they relegate environmental protection to a secondary concern in project planning and promote large scale structural projects that do not protect the environment. As discussed below, the 1983 P&G are currently being rewritten pursuant to a hard fought reform enacted in WRDA 2007.

All Corps projects are supposed to comply fully with all applicable federal environmental laws and regulations, and for all projects, the Corps must assess whether the recommended plan complies with federal, state, and local laws, regulations, and policies. 33 U.S.C. § 2281. These laws impose both procedural and substantive requirements that must be met for Corps projects.

For example, NEPA establishes key procedural requirements that must be followed for Corps projects. NEPA requires the Corps to evaluate the environmental impacts of a proposed project, consider alternatives to the proposed project that will cause less environmental harm, and consider the views of other federal agencies, states, and the public. NEPA documents are a critical component of project planning, and provide an essential opportunity for public input into the Corps' planning process. However, while NEPA requires the Corps to evaluate alternatives that will cause less harm to the environment, NEPA does **not** require selection of the least damaging alternative. See *Chapter 6 for a discussion of NEPA and other applicable federal environmental laws.*

Other federal environmental laws, like the Clean Water Act, impose substantive requirements on Corps projects. For example, the Clean Water Act 404(b)(1) Guidelines (which are actually mandatory regulations that must be followed), prohibit the Corps from moving forward with a civil works project (1) "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem"; (2) if the discharge would violate certain laws and standards; (3) if the discharge would cause or contribute to significant degradation of water quality; or (4) if the Corps has not taken "appropriate and practicable" steps to minimize harm to protected waters. 40 C.F.R. § 230.10. See *Chapter 3 for a detailed discussion of these Clean Water Act requirements.*

Activist Tip

The Corps has the authority to select an alternative that is not the NED Plan when there are “overriding reasons for selecting another plan based upon other Federal, state, local, and international concerns.” As a result, activists should not let the Corps hide behind NED as justification for selecting a destructive project. Instead, activists should make it clear that avoiding environmental harm is an “overriding reason” to select a non-NED Plan.

A. Flood Damage Reduction and Navigation Projects

As a matter of law, the Corps cannot recommend a flood damage reduction project unless the benefits of that project exceed the costs. 33 U.S.C. § 701a. Navigation projects are similarly held to this standard. As a result, the Corps must determine that these types of projects have a positive benefit-cost ratio. The Corps must also determine that the recommended plan is “cost-effective.” 33 U.S.C. § 2281.

The Corps currently uses the 1983 P&G to guide its determination of project costs and benefits, and its selection of project alternatives. Under the 1983 P&G, all civil works projects except those for environmental restoration must contribute to a single federal objective known as National Economic Development (NED). To determine what plan merits federal participation, the feasibility phase must identify the NED Plan. The NED Plan is the alternative that will produce the greatest net economic benefits, consistent with protecting the nation’s environment. To help determine the NED plan, the Corps will conduct a benefit-cost analysis for each alternative evaluated in detail.

The Corps can select an alternative that is not the NED Plan provided that the feasibility report fully documents the reasons for selecting the different plan and the ASA(CW) determines that there “are overriding reasons for selecting another plan based upon other Federal, State, local and international concerns.”³¹ The Corps may also recommend a locally preferred plan that does not comply with the NED Plan if requested by the non-federal sponsor and approved by the ASA(CW).³²

As noted above, all Corps flood damage reduction and navigation projects also must comply with federal environmental laws, and the Corps must assess whether the recommended plan complies with federal, state, and local laws, regulations, and policies. 33 U.S.C. § 2281.

B. Restoration Projects

Environmental restoration projects do not require calculation of a quantitative benefit-cost analysis. Instead, restoration projects must improve the quality of the environment and must be cost-effective.³³ 33 U.S.C. §§ 2330(a) and 2281. As a matter of law, project elements that are included to protect and improve environmental quality are deemed to produce benefits that are at least equal to the costs of those measures. 33 U.S.C. § 2284.

Restoration projects are not subject to the NED evaluation. Instead, under the 1983 P&G, the Corps must identify the National Ecosystem Restoration (NER) Plan. The NER Plan is the alternative that maximizes restoration benefits compared to project costs. As a result, the assessment of an environmental restoration project focuses on quantitative and qualitative restoration criteria such as increases in species diversity, potential increases in nesting sites, and acres to be restored.

The Corps can select a restoration project alternative that is not the NER Plan provided that the feasibility report fully documents the reasons for selecting the different plan and the ASA(CW) determines that there “are overriding reasons for selecting another plan based upon other Federal, State, local and international concerns.”³⁴ The Corps may also recommend a locally preferred plan that does not comply with the NER Plan if requested by the non-federal sponsor and approved by the ASA(CW).³⁵

As noted above, all Corps restoration projects must comply with federal environmental laws, and the Corps must assess whether the recommended plan complies with federal, state, and local laws, regulations, and policies. 33 U.S.C. § 2281.

C. Modernizing the Corps’ Planning Guidelines

WRDA 2007 enacted a new national water policy that requires a fundamentally different approach to water resources project planning and directed the Secretary of the Army to develop new planning guidelines to implement that policy by November 8, 2009. 42 U.S.C. § 1962 — 3. In updating its planning guidelines, the Corps is to consult with other federal agencies and the National Academy of Sciences, and solicit and consider public and expert comments. The 1983 P&G are currently being updated pursuant to this hard fought reform.

The revised P&G must implement the new national water resources planning policy established in WRDA 2007; this new policy makes environmental protection and restoration a primary objective for *all* water projects:

“It is the policy of the United States that all water resources projects should reflect national priorities, encourage economic development, and protect the environment by — (1) seeking to maximize sustainable economic development; (2) seeking to avoid the unwise use of floodplains and flood-prone areas and minimizing adverse impacts and vulnerabilities in any case in which a floodplain or flood-prone area must be used; and (3) protecting and restoring the functions of natural systems and mitigating any unavoidable damage to natural systems.” 42 U.S.C. § 1962 — 3.

The revised P&G also must (1) ensure that public safety issues are assessed and incorporated into the formulation of alternatives and the recommended plan; (2) ensure that Corps planning uses the best available economic principles; (2) ensure that Corps planning uses sound and modern analytical techniques for water resource planning, including adaptive management; (4) account for the value of projects for low-income communities; (5) account for the value of nonstructural approaches and watershed-scale planning; and (6) ensure that projects are justified through public, as opposed to private, benefits. 42 U.S.C. § 1962 — 3.

If properly implemented, these changes would create a new paradigm for water resources planning in the United States and would fundamentally transform the Corps’ planning process.

IV. Peer Review

WRDA 2007 instituted a standardized peer review process for costly or controversial Corps projects. WRDA 2007 also instituted a safety assurance review to examine the detailed technical designs and construction activities for certain high risk flood and storm damage protection projects. The Corps has also established an internal technical review process for most of its studies. These requirements are discussed in detail below.

The WRDA 2007 review requirements were established to help improve the quality of Corps studies and designs. In 2006, the Government Accountability Office (GAO) told Congress that recent Corps studies “did not provide a reasonable basis for decision-making” because they “were fraught with errors, mistakes, and miscalculations, and used invalid assumptions and outdated data.”³⁶ The GAO also testified that these failings were “systemic in nature and therefore prevalent throughout the Corps’ Civil Works portfolio.”³⁷ This confirmed a pattern of egregious planning flaws revealed by more than a decade of National Academy of Sciences, GAO, Army Inspector General, and independent expert studies.

As of the date of this Citizen’s Guide, however, the Corps still is not complying fully with the WRDA 2007 review requirements. To improve project planning, activists need to hold the Corps accountable to its independent review requirements.

A. Independent Peer Review

WRDA 2007 requires outside independent peer review of certain Corps project studies. The reviews are to be carried out by the National Academy of Sciences or “a similar independent scientific and technical advisory organization or an eligible organization” selected by the Corps. The independent review requirements are codified at 33 U.S.C. § 2343.

Project Studies Subject to Independent Peer Review: The following types of project studies are subject to the independent peer review requirements of WRDA 2007 if the study triggers are met: feasibility studies and their environmental impact statements; reevaluation studies and their environmental impact statements; and “any other study associated with a modification of a water resources project that includes an environmental impact statement” and that study’s environmental impact statement. 33 U.S.C. § 2343(a).

These types of project studies are subject to independent peer review under the following circumstances (33 U.S.C. § 2343(a)):

- (1) A project study **must** be reviewed if it costs more than \$45 million *unless* the project falls under one of the exemptions for review (see below).

- (2) A project study **must** be reviewed if the Governor of an affected State requests an independent review *unless* the project falls under one of the exemptions for review.
- (3) A project study **must** be independently reviewed if the Chief of Engineers determines that the project study is controversial *unless* the project falls under one of the exemptions for review.
- (4) A project study **may** be reviewed if the head of a federal or state agency determines that the project is likely to have a significant adverse impact *and* requests a review. The Chief of Engineers may deny a federal or state agency request for independent review, but if that happens, the agency head can appeal the Chief's denial to the Chairman of the Council on Environmental Quality.

The WRDA 2007 independent peer review requirements apply to project studies initiated between November 8, 2007 and November 8, 2014. The requirements also apply to studies initiated between November 8, 2005 and November 7, 2007 **if** those projects did not have an “array of alternatives” identified as of November 7, 2007.³⁸ 33 U.S.C. § 2343(h).

Project Studies Exempt from Independent Peer Review: The Chief of Engineers can choose to exempt any of the following types of projects from the WRDA 2007 independent review requirements (33 U.S.C. § 2343(a)(5)):

- (1) Projects subject to review under the \$45 million cost trigger can be exempted if the Corps chooses not to prepare an environmental impact statement for the project and the Chief decides that the project (a) is not controversial; (b) “has no substantial adverse impact on fish and wildlife species and their habitat”; (c) will have no more than a negligible impact on “unique” cultural resources; and (d) will have no more than negligible impacts on ESA-listed species prior to mitigation.
- (2) Projects subject to review under any trigger can be exempted if the project is being carried out under one of the Corps’ nine continuing authorities programs and the Corps determines that the project does not require an environmental impact statement (but instead requires only an environmental assessment).
- (3) Projects subject to review under any trigger can be exempted if the project “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” and the project can be treated as routine and as having minimal life safety risks. It is important to recognize that many large rehabilitation projects will not meet these criteria, and will require independent review.³⁹

Review Panel Selection: The Chief of Engineers is to “contract with the National Academy of Sciences or a similar independent scientific and technical advisory organization or an eligible organization” to conduct the independent peer review. 33 U.S.C. § 2343(c). The Corps has the discretion to select the entity that will carry out the review, but that entity must apply the National Academy of Sciences criteria to ensure that panel members do not have a conflict with the project being reviewed. *Id.* While the Corps’ internal guidance recognizes that National Academy of Sciences (NAS) reviews are frequently cited for the type of independent external peer review process that the Corps should follow, the Corps’ guidance states that “actual NAS reviews are expected to be rare.”⁴⁰

Duties of Review Panel: The panel will review the study given to it; assess the adequacy and acceptability of the economic and environmental methods, models, and analyses; provide written and oral comments to the Chief throughout the development of the project; and submit a final report with the panel’s economic, engineering, and environmental analysis of the project study and assessment of the adequacy and acceptability of the economic and environmental methods, models, and analyses used by the Chief. The panel will not have the benefit of direct public input, but instead will have a limited opportunity to review any public comments provided to the Corps upon release of the draft feasibility report and draft EIS. 33 U.S.C. § 2343(d).

Scope of Review: 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.” 33 U.S.C. § 2343(a).

The Corps’ internal peer review guidance (discussed below) limits the panel’s ability to make recommendations regarding implementation of particular plans: “review panels should be instructed to not make a recommendation on whether a particular alternative should be implemented, as the Chief of Engineers is ultimately responsible for the final decision on a planning or reoperations study. External panels may, however, offer their opinions as to whether there are sufficient analyses upon which to base a recommendation for construction, authorization, or funding.”⁴¹ This limitation appears to conflict with the WRDA 2007 requirements.

Timing of Review: The Chief is directed to consider the need for an independent review at least as early as the time the without-project conditions are identified, the array of alternatives is identified, or the preferred alternative is identified. In all cases, the review must take place between the signing of the feasibility cost sharing agreement and the date the Chief transmits a draft Chief’s Report to the affected state(s) for their review and comment, and to the Secretary of the Interior for certain projects — the panel also terminates on the date of this transmittal. The panel must submit a report to the Chief

not more than 60 days after the close of the public comment period on a draft project study, unless the Chief determines that a longer time is required. 33 U.S.C. § 2343(b) and (e).

Panel Recommendations: The Corps is not required to adopt panel recommendations. Instead, the Chief need only consider the recommendations and prepare a written response for any recommendations adopted or not adopted. 33 U.S.C. § 2343(f).

Public Availability: The Chief of Engineers is required to make a copy of the independent review panel report and the Chief's written responses available to the public by electronic means, including the Internet. The Chief is also required to transmit the review report and the Chief's responses to Congress along with the Corps' final decision document for the project study. 33 U.S.C. § 2343(f). As of the date of this Citizen's Guide, the Corps appears to be misinterpreting this requirement to mean that the public should not have access to the independent review report until the final Chief's report and/or record of decision is submitted to Congress.

Paying for Independent Peer Review: The cost of an independent review is a federal cost and may not exceed \$500,000. However, the Chief of Engineers can waive the cost limitation if he deems it appropriate. 33 U.S.C. § 2343(g).

Sunset Provision: The WRDA 2007 independent review requirements will terminate on November 8, 2014 (seven years after enactment of WRDA 2007). 33 U.S.C. § 2343(h).

B. Safety Assurance Review

WRDA 2007 requires a safety assurance review for certain hurricane and storm damage reduction projects, and for certain flood damage reduction projects to assure public health, safety, and welfare. 33 U.S.C. § 2344. This review was established in direct response to the 2005 failure of Corps-built levees and floodwalls in New Orleans following Hurricane Katrina.

Projects Subject to Safety Assurance Review: Hurricane and storm damage reduction projects and flood damage reduction projects must undergo a safety assurance review "if the Chief of Engineers determines" that such a review "is necessary to assure public health, safety, and welfare." In determining whether a safety assurance review is necessary, the Chief is to consider whether "(1) the failure of the project would pose a significant threat to human life; (2) the project involves the use of innovative materials or techniques; (3) the project design lacks redundancy; or (4) the project has a unique construction sequencing or a reduced or overlapping design construction schedule." The safety assurance review applies to any project that is in design or construction on or between November 8, 2007 and November 8, 2014. 33 U.S.C. § 2344.

Timing and Scope of Safety Assurance Review: The review is to begin at the “appropriate point in the development of the detailed engineering and design specifications” and must take place before initiation of construction activities and periodically thereafter until construction activities are completed. The review and review schedule is to be “sufficient to inform the Chief of Engineers on the adequacy, appropriateness, and acceptability of the design and construction activities for the purpose of assuring public health, safety, and welfare.” 33 U.S.C. § 2344.

Review Panel Selection: The Chief of Engineers selects the reviewers, and must apply the National Academy of Sciences criteria to ensure that reviewers do not have a conflict of interest. The Chief has flexibility in both the number and areas of expertise of the panelists, and can appoint just a single reviewer. 33 U.S.C. § 2344(c) and (e).

Public Availability: The recommendations of the reviewer(s) and the response of the Chief of Engineers must be made available to the public, including on the internet. 33 U.S.C. § 2344.

Sunset Provision: Like the WRDA 2007 independent peer review requirements, the safety assurance review requirements terminate on November 8, 2014 (seven years after enactment of WRDA 2007). 33 U.S.C. § 2344(f).

C. Internal Technical Review

The Corps has established internal technical review requirements for all Corps decision documents and their supporting analyses. Decision documents are defined as all feasibility studies, reevaluation studies, and reports associated with project modifications that require a Chief’s report, Congressional authorization, or preparation of an EIS. These include major rehabilitation reports, dredged material management plans, dam safety modification reports, design deficiency reports, studies prepared by local sponsors, and continuing authority program studies that require an EIS.⁴²

In all cases, these internal technical reviews are to be carried out by “professionals that are at arms length and not associated with development of the work that is being reviewed.”⁴³ These internal review requirements are in addition to the independent peer review and safety assurance reviews established by WRDA 2007.

District Quality Control Review: Each decision document will go through a District Quality Control (DQC) review. The DQC examines the “basic science and engineering work products” with a goal of fulfilling the project quality requirements as defined in the Project Management Plan (PMP).⁴⁴ DQC is managed by the Corps District preparing the document being reviewed and may be conducted by staff in that District as long as they are not otherwise involved in the study.

Agency Technical Review: Each decision document will also go through an Agency Technical Review (ATR). ATR is “an in-depth review, managed within USACE, and conducted by a qualified team outside of the home District that is not involved in the day-to-day production of a project/product.”⁴⁵ The goal of the ATR is to “ensure that the product is consistent with established criteria, guidance, procedures, and policy. The ATR will assess whether the analyses presented are technically correct and comply with published USACE guidance, and that the document explains the analyses and results in a reasonably clear manner for the public and decision makers.”⁴⁶

ATR teams are to be made up of senior Corps personnel and may be supplemented by outside experts as appropriate. The leader of the ATR team is to be from outside the Corps Division in which the underlying documents are being prepared. For planning feasibility level studies, the ATR will be managed by the appropriate Planning Center of Expertise (PCX). *See Chapter 1 for a discussion of the PCX.*

ATR reviews are to provide advice on defined and specific issues that should include an analysis of the underlying assumptions, analyses, and conclusions related to public safety, economic, engineering, environmental, and other issues. ATR panels should also evaluate the soundness of models and analytic methods used. ATR panels should be given the flexibility to bring important issues to the attention of decision makers, but they will be instructed not to make a recommendation on whether a particular alternative should be implemented.⁴⁷

Review Plans: The District (or other Corps office responsible for a project) will develop a Review Plan to guide the review process for projects subject to internal technical and outside independent peer review.⁴⁸ The Review Plan is to be developed in coordination with the appropriate PCX and approved by the appropriate Division. The Review Plans are prepared during the reconnaissance phase of the planning process and are a component of the Project Management Plan (PMP). A Review Plan must be developed prior to completion of the Feasibility Cost Sharing Agreement (FCSA). *See Section II for a discussion of the reconnaissance phase and the required PMP and FCSA documents.*

The Review Plans are to be detailed enough to assess the necessary level of review, the focus of such a review, the models and data proposed for the study, and the parts of the study that are likely to be challenging. Review Plans are also to include an execution plan that explains how the review will be carried out.

Public Participation in Review Plans and Reviews: Review Plans must be published on the home District’s public website, and the public must be given an opportunity to review and comment on each Review Plan. Each Division is also required to post an agenda of Review Plans on the Division website and to update that agenda at least every three months. The agenda is to describe all decision documents covered by the review requirements and link to each review-related document that has been made public.⁴⁹

The public is also supposed to be allowed to participate in the review process. “Whenever feasible and appropriate,” the draft decision document being reviewed under a Review Plan is to be made available to the public for comment at the same time it is submitted for review (or during the review process). In such cases, the District should also “sponsor a public meeting where oral presentations on scientific issues can be made to the reviewers by interested members of the public. When employing a public comment process, the PCX shall, whenever practical, provide reviewers with access to public comments that address significant scientific or technical issues.”⁵⁰

V. Mitigation for Civil Works Projects

WRDA 2007 established strict mitigation standards for Corps civil works projects. The WRDA 2007 reforms strengthened the Corps' existing mitigation requirements in an effort to dramatically improve the Corps' abysmal mitigation record.⁵¹ Unfortunately, as of the date of this Citizen's Guide, the Corps still had not complied with its new (or old) mitigation mandates. To minimize the impacts of Corps projects, and to force the Corps to plan less destructive projects in the first instance, activists need to hold the Corps accountable to its mitigation requirements.

A. Mitigation Requirements

WRDA 2007 establishes minimum standards for civil works project mitigation, defines the elements that must be included in mitigation plans, requires the Corps to monitor civil works mitigation until ecological success is achieved, and requires the Corps to consult yearly with state and federal resource agencies on the progress being made for each civil works mitigation plan.⁵² Notably, these new mitigation requirements must be met for **all** new and ongoing Corps project studies.

Applicability of New Mitigation Requirements: The Corps must now comply with its full suite of mitigation requirements for **all** new and ongoing Corps project studies. This means that the Corps must satisfy its strict mitigation requirements in every feasibility study (and every project carried out under a feasibility study) that is either initiated or finalized after November 7, 2007. In addition, the full suite of mitigation requirements must be satisfied for each authorized project for which the Corps prepares a supplemental environmental impact statement or supplemental environmental assessment and for each authorized project for which the Corps conducts a general reevaluation report or other internal reevaluation. 33 U.S.C. § 2283(d).

Minimum Mitigation Standards: Corps projects are subject to the following minimum mitigation standards.

- (1) The Corps must implement mitigation for fish and wildlife losses unless the Corps makes a specific finding that the project would cause only “negligible adverse impacts to fish and wildlife.” 33 U.S.C. § 2283(d).
- (2) The Corps must implement not less than in-kind mitigation. This means that the mitigation must restore the same or greater ecosystem and habitat values lost to the civil works project. Specifically, the Corps must implement in-kind mitigation for damage to bottomland hardwood wetlands, and it must mitigate impacts to other habitat types “to not less than in-kind conditions, to the extent possible.” 33 U.S.C. § 2283(d).

- (3) The Corps is required by statute to meet, at a minimum, the same mitigation standards that the Corps requires of other governmental entities and private parties under the Clean Water Act § 404 program. The Council on Environmental Quality reports that under the 404 program, the Corps requires “a ratio of more than two acres of mitigation for every acre of permitted impacts to wetlands.”⁵³ As a result, this should be the minimum amount of mitigation required for the civil works program as well. *See Chapter 3 for a discussion of the mitigation requirements of the 404 program.*
- (4) The Corps is required by statute and regulation to minimize the adverse impacts of its own projects on the nation’s waters to the maximum extent practicable, as required by the Clean Water Act 404(b)(1) Guidelines (which are actually mandatory regulations). To do this, the Corps must first avoid, then minimize impacts, and then implement compensatory mitigation to offset any remaining damage.⁵⁴ *See Chapter 3 for a discussion of the sequencing requirements of the 404 program.*
- (5) The Corps’ internal guidance states that adverse impacts to wetlands are to be “fully mitigated.”⁵⁵

Detailed Mitigation Plans Required: Since 1986, the Corps has been required to submit a “specific plan to mitigate fish and wildlife losses” with every project the Corps recommends to Congress, unless the Corps makes a specific finding that the project would cause only “negligible adverse impacts to fish and wildlife.” 33 U.S.C. § 2283(d). WRDA 2007 added detailed requirements for Corps mitigation plans, which now must include:

- (1) The type, amount, and characteristics of the habitat being restored, a description of the physical actions to be taken to carry out the restoration, and the functions and values that will be achieved;
- (2) The ecological success criteria, based on replacement of lost functions and values, that will be evaluated and used to determine mitigation success;
- (3) A description of the lands and interest in lands to be acquired for mitigation, and the basis for determining that those lands will be available;
- (4) A mitigation monitoring plan that includes the cost and duration of monitoring, and identifies the entities responsible for monitoring if it is practicable to do so (if the responsible entity is not identified in the monitoring plan it must be identified in the project partnership agreement that is required for all Corps projects); and

- (5) A contingency plan for taking corrective action in cases where monitoring shows that mitigation is not achieving ecological success as defined in the plan. 33 U.S.C. § 2282(3).

Mitigation Timing: Since 1986, the Corps has been required to implement all civil works mitigation prior to, or concurrently with, project construction. Purchase of mitigation lands is supposed to take place prior to any project construction, or concurrently with the purchase of interests in project lands (*i.e.*, also before any project construction). Construction associated with mitigation can be carried out concurrently with project construction. 33 U.S.C. § 2283(a).

Long Term Monitoring and Consultation: WRDA 2007 establishes detailed mitigation monitoring and consultation requirements for Corps projects. The Corps (or a delegated entity) must monitor mitigation for **each** civil works project **until** the monitoring demonstrates that the ecological success criteria established in the project's mitigation plan have been met. The Corps also must consult yearly on each project with the appropriate federal agencies and the states on the status of the mitigation efforts. The consultation must address the status of ecological success on the date of the consultation, the likelihood that the ecological success criteria will be met, the projected timeline for achieving that success, and any recommendations for improving the likelihood of success. 33 U.S.C. § 2283(d)(3).

Regulations implementing the National Environmental Policy Act also require the Corps to monitor its mitigation requirements to help ensure that any mitigation the Corps commits to carry out in a Record of Decision is fully implemented. 40 C.F.R. §§ 1505.2 and 1505.3; 33 C.F.R. § 230.15.

Mitigation Reporting: WRDA 2007 requires the Corps to report to Congress each year on the status of its civil works mitigation. 33 U.S.C. § 2283a. The mitigation status report must provide mitigation information — including the results of its yearly mitigation consultations — for all projects that are under construction, all projects that have undergone or completed construction but for which mitigation has not been completed, and all projects for which construction funding is requested for the next fiscal year. The status report is to be submitted with the President's proposed budget request for the Corps, and must be made available to the public, including on the internet.

No Net Loss of Wetlands Goal: WRDA 1990 established a statutory “interim goal of no overall net loss of the nation's remaining wetlands base, as defined by acreage and function, and a long-term goal to increase the quality and quantity of the nation's wetlands, as defined by acreage and functions” for the Corps' civil works program. 33 U.S.C. § 2317(a)(1).

Paying for Mitigation: Mitigation costs are a project cost and are allocated to the appropriate project purpose (the purpose requiring the mitigation) and cost-shared accordingly. Cost-shared mitigation costs include the costs of lands, easements, rights-of-way, and relocations needed to implement the mitigation. 33 U.S.C. § 2283(c).

Congress established an Environmental Protection and Mitigation Fund in 1986 to fund authorized fish and wildlife mitigation measures in advance of appropriation of construction funding for a project. Monies paid from the fund are to be reimbursed from the first appropriations made for construction (including planning and design) of such project. The fund has an authorized yearly funding ceiling of \$35 million. 33 U.S.C. § 2286.

B. Mitigation Compliance

The WRDA 2007 mitigation reforms were enacted to address the Corps' abysmal record on mitigation, which is discussed below. Unfortunately, as of the date of this Citizen's Guide, the Corps had not improved its mitigation planning and had not complied with the requirements established by WRDA 2007.

Historic problems with Corps mitigation planning can be found in four main areas. Activists should be aware of these historic problems to assist in properly commenting on Corps projects and Corps mitigation plans.

First, historically the Corps has failed to implement any mitigation at all for the vast majority of its projects. As noted above, since 1986 the Corps has been required to implement mitigation for all but negligible fish and wildlife losses. Despite this statutory mandate, the Government Accountability Office (GAO) reported that the Corps failed to mitigate at all for 69 percent of projects constructed between 1986 and 2001. GAO also reported that where the Corps did require mitigation, it failed to mitigate concurrently with project construction 80 percent of the time.⁵⁶

It is simply not plausible that 69 percent of Corps projects would cause only "negligible adverse impacts." For example, the Corps' own guidelines state that the environment will be harmed by "practically all flood control projects."⁵⁷ And no reasonable person could suggest that turning a free flowing river into a navigation channel through the construction and operation of locks, dams, and training structures, and through dredging and water level manipulation could cause only negligible impacts.

Projects examined by the GAO included a number with egregious violations of the Corps' requirement to mitigate for all projects with more than negligible fish and wildlife impacts. For example, the Corps did not prepare a mitigation plan for the American River Watershed Flood Plain Protection Plan, even though EPA concluded that the project was so environmentally destructive that it "must not proceed as proposed." The Corps also

did not prepare mitigation plans for the Boston Harbor Navigation Improvements and Berth Dredging project or the John T. Myers and Greenup Lock Improvements project even though EPA told the Corps that each of those projects would have “significant environmental impacts.”⁵⁸

Similarly, in 2002, the Corps’ San Francisco District refused to include mitigation for a proposed project in northern California that would have destroyed 100 acres of wetlands. According to the Corps, it would not require mitigation for the Bolinas Lagoon project because it would be too expensive to do so and mitigation could not take place close to the project site.⁵⁹ With much pushing from the environmental community, the Bolinas Lagoon project has been substantially revised.

Second, historically the Corps would often propose out-of-kind mitigation in the small percentage of projects where mitigation was proposed. The Corps would often propose mitigating impacts to wetlands, streams, and riparian habitat with fewer acres of more common terrestrial habitat. This out-of-kind mitigation by definition cannot replace lost wetland functions, and cannot meet the Corps’ statutorily mandated goal of no net loss of wetland acres.

A very recent example of this problem can be found in the Corps’ 2007 proposal for the notorious Yazoo Backwater Pumping Plant project in Mississippi (a project that was vetoed by EPA under the Clean Water Act in August 2007). That proposal, which was finalized after enactment of WRDA 2007, called for mitigating 60,700 acres of wetland damage by planting tree seedlings on 10,662 acres of frequently flooded agricultural lands, with no requirements to ensure that those lands had wetland hydrology. In actuality, the Yazoo Pumps would have drained and damaged far more than 60,700 acres of wetlands. In 2000, EPA said the project would actually drain and damage more than 200,000 acres of ecologically significant wetlands; and EPA, the Fish and Wildlife Service, and an independent hydrology assessment all demonstrated that the Corps’ study grossly underestimated the actual wetland impacts.⁶⁰

Even if it were theoretically possible to mitigate wetland losses at this scale, the Corps’ proposal certainly would not have done so. Since the Corps had not actually proposed any wetlands mitigation it could not replace the wetland functions that would be lost through the project. Even if the Corps’ proposal somehow miraculously created 10,622 acres of wetlands, even using the Corps’ assessment of wetland impacts that would still result in more than an 80 percent loss of wetlands.

Additional examples of this problem abound. For example, the Corps’ project to enlarge the existing Mississippi River Mainline Levees will destroy a minimum of 7,328 acres of wetlands, but mitigation is limited to reforesting 5,863 acres of frequently flooded agricultural lands. Potential mitigation lands have not been identified, and the Corps

will not develop mitigation plans until after acquiring mitigation lands. The Corps' plan to dredge over 100 miles of the Big Sunflower River will, among other things, damage 3,631 acres of wetlands. But, the Corps' mitigation is limited to planting tree seedlings on only 1,912 acres of frequently flooded agricultural lands.

Third, historically Corps studies have identified only the amount of mitigation that would be undertaken, while leaving all mitigation planning for a later date. Lack of a detailed mitigation plan makes it impossible to evaluate the potential for mitigation success or to calculate the true cost of implementing that mitigation.

Fourth, historically the Corps has made little effort to evaluate whether its mitigation efforts were working. For example, in November 2000, the Corps' Vicksburg District — which covers portions of Arkansas, Louisiana and Mississippi — acknowledged that it had carried out no mitigation monitoring at all for the many civil works projects in that District.⁶¹ In at least some situations, the Corps has looked only to the amount of money it has spent to determine mitigation “success.” The Corps advised GAO that “the point at which 50 percent of mitigation is completed occurs in the fiscal year in which the Corps district office’s cumulative expenditures toward the mitigation plan total at least 50 percent of the estimated cost of these activities.”⁶²

Endnotes

1. U.S. Army Corps of Engineers, Information Paper, Civil Works Program Statistics, February 17, 2005, (“Civil Works Program Statistics Fact Sheet”).
2. The Water Resources Development Act of 1990 established a new mission for the Corps: “The Secretary shall include environmental protection as one of the primary missions of the Corps of Engineers in planning, designing, constructing, operating, and maintaining water resources projects.” 33 U.S.C. § 2316(a). As of January 2004, the Corps was constructing 81 specifically authorized restoration projects. In fiscal year 2004, 19% of the Corps’ total appropriation (\$866.6 million) was going towards restoration projects. The largest of these projects include the Comprehensive Everglades Restoration Program, Columbia River Fish & Wildlife Mitigation, Upper Mississippi River Environmental Management Program, and the Missouri River Fish & Wildlife Mitigation. Civil Works Program Statistics Fact Sheet, *supra* note 1.
3. Ricciardi, Anthony and Rasmussen, Joseph B., “Extinction Rates of North American Freshwater Fauna”; *Conservation Biology*; 13 (5), October 1999, at 1220.
4. National Research Council, *New Directions in Water Resources Planning for the U.S. Army Corps of Engineers*, 1999, at 4, 21, 61-63; National Research Council, *Inland Navigation System Planning: The Upper Mississippi River-Illinois Waterway*, 2001, at 25-28; 53-54; US Army Inspector General, *Report of Investigation*, Case 00-019, 2000, at 7-8.
5. Before the Corps can proceed with an authorized study or build a project authorized for construction it also must obtain funding from Congress. See Chapter 4 for a detailed discussion of the budget and appropriations processes.
6. While most Corps projects and statutory policies are now enacted through a Water Resources Development Act (WRDA), Corps policies are codified, and kept up to date, in a document known as the United States Code. As a result, Corps policy provisions will typically have both a WRDA reference and a United States Code (U.S.C. or U.S.C.A. for U.S. Code Annotated) reference. For example, section 2034 of WRDA 2007 (Independent Peer Review) has been codified at 33 U.S.C. § 2343. The United States Code compiles all changes to policy provisions and is the official source for the current version of the law. As a result, you should always utilize the U.S.C. reference to find the most current legal requirements. Note that the section numbers of the U.S.C. and U.S.C.A. are identical, the U.S.C.A. merely adds explanations and case law references that have interpreted the code sections. While the Corps is devoted to talking about laws in terms of their WRDA section numbers, it is impossible to know whether a provision has been amended by looking only at the original WRDA language. Project authorizations typically are not codified in the United States Code. As a result, to find amendments to a project provision, you will need to search each subsequent WRDA (the Corps will typically include all such changes in its description of a project’s authorizing language).
7. Before enactment of WRDA 2007, the Corps had an existing “backlog” of more than 800 authorized projects, of which more than 500 were not consistently receiving construction appropriations. That backlog was “estimated at \$38 billion to \$60 billion depending on the suite of project authorizations considered.” Congressional Research Service, *Report to Congress; Army Corps of Engineers Water Resources Projects: Authorization and Appropriations*, Updated October 4, 2007 at 4. WRDA 2007 authorized an additional \$23 billion in Corps activities, adding more than 900 new projects and programs to the Corps’ already massive backlog.
8. Congress appropriated \$1.7 billion for Corps construction in Fiscal Year 2004, \$1.8 billion for construction in Fiscal Year 2005, \$2.4 billion for construction in Fiscal Year 2006, \$2.3 billion for construction in Fiscal Year 2007, and \$2.3 billion for construction in Fiscal Year 2008. Energy and Water Appropriations Act 2004; Energy and Water Appropriations Act 2005; Energy and Water Appropriations Act 2006; Revised Continuing Appropriations Resolution 2007 (Pub. L. 110-5); Consolidated Appropriations Act of 2008 (Pub. L. 110-161).
9. Like all legislation, the E&W Bill must go through the full legislative process, including House and Senate Committee votes, House and Senate floor votes, and a House-Senate Conference Committee to work out any differences between the House and Senate versions.
10. The local sponsor cost share requirement was established in 1986. It applies to all projects authorized after 1986 and to most projects authorized before 1986.
11. U.S. Army Corps of Engineers, ER 1165-2-121, Flood Control Cost-Sharing Requirements under the Ability-to-Pay Provision - Section 103(m) of PL 99-662 (01 Nov 1989).
12. U.S. Army Corps of Engineers, Environmental Operating Principles and Implementation Guidance.
13. *Id.*
14. Congressional Research Service, *Army Corps of Engineers Water Resources Activities: Authorization and Appropriations*, Updated February 4, 2005 at 4.
15. As of FY 2001, there were 355 Section 1135 projects competing for the limited program funds.
16. National Research Council, *New Directions in Water Resources Planning for the U.S. Army Corps of Engineers* (National Academy Press 1999) at 41.
17. In 2001, the Corps’ then Chief of Engineers General Robert B. Flowers testified that only about a third of reconnaissance studies eventually lead to feasibility studies, and that only 16 of every 100 reconnaissance studies leads to a project actually being constructed by the Corps. General Robert B. Flowers, Army Corps Chief of Engineers, “Oral Statement,” Reforms to Address the Corps of Engineers Feasibility Studies, hearing before Senate Environment and Public Works Subcommittee on

- Transportation and Infrastructure on March 15, 2001, available at http://www.senate.gov/~epw/stm1_107.htm#03-15-01 (visited June 29, 2009).
18. U.S. Army Corps of Engineers, ER 1105-2-100, Corps Planning Guidance Notebook, Appendix H, Amendment #1 (20 Nov 2007) at H-5.
 19. These requirements were established by WRDA 1986.
 20. In certain extremely rare situations, it is possible that a less detailed environmental assessment may be sufficient.
 21. U.S. Army Corps of Engineers, EC 1105-2-410, Review of Decision Documents (22 Aug 2008).
 22. The Corps can proceed to PED once the Chief of Engineers has transmitted his recommendations for a project to the Secretary for transmittal to Congress and before Congress authorizes a project for construction **as long as** the Chief of Engineers also transmits findings to Congress stating that the project is without controversy and justifies further engineering, economic, and environmental investigations. 33 U.S.C. § 2287.
 23. U.S. Army Corps of Engineers, ER 1105-2-100, Corps Planning Guidance Notebook, (22 Apr 2000) at 4-2.
 24. *Id.*
 25. *Id.*
 26. U.S. Army Corps of Engineers, ER 1105-2-100, Corps Planning Guidance Notebook, Appendix G, Amendment #1 (30 Jun 2004) at G-55 to G-56.
 27. *Id.*
 28. *Id.*
 29. *Id.*
 30. U.S. Army Corps of Engineers, ER 1105-2-100, Corps Planning Guidance Notebook, (22 Apr 2000) at 4-10.
 31. *Id.* at 2-7; 1983 P&G.
 32. U.S. Army Corps of Engineers, ER 1105-2-100, Corps Planning Guidance Notebook, (22 Apr 2000) at 2-8. “In all cases, the LPP [locally preferred plan] must have greater net benefits than smaller scale plans, and enough alternatives must be analyzed during the formulation and evaluation process to insure that net benefits do not maximize at a smaller scale than the sponsor’s preferred plan. . . . If the sponsor prefers a plan more costly than the NED plan, the NER Plan or the combined NED/NER Plan, and the increased scope of the plan is not sufficient to warrant full Federal participation, ASA(CW) may grant an exception as long as the sponsor pays the difference in cost between those plans and the locally preferred plan. The LPP, in this case, must have outputs similar in kind, and equal to or greater than the outputs of the Federal plan. It may also have other outputs. The incremental benefits and costs of the locally preferred plan, beyond the Federal plan, must be analyzed and documented in feasibility reports . . .” *Id.*
 33. The Secretary is authorized to carry out a restoration project if the Secretary determines that the project “(i) will improve the environment and is in the public interest; or (ii) will improve the elements and features of an estuary” and determines that the project “is cost-effective.” Restoration projects “may include removal of a dam.” 33 U.S.C. § 2330(a).
 34. U.S. Army Corps of Engineers, ER 1105-2-100, Corps Planning Guidance Notebook, (22 Apr 2000) at 2-7; 1983 P&G.
 35. U.S. Army Corps of Engineers, ER 1105-2-100, Corps Planning Guidance Notebook, (22 Apr 2000) at 2-8. *See also*, note 32, *supra*.
 36. Government Accountability Office, (GAO-06-529T), *Corps of Engineers, Observations on Planning and Project Management Processes for the Civil Works Program*, March 2006.
 37. *Id.*
 38. Because the array of alternatives is typically selected early in the planning process, most studies initiated during this period likely will not be subject to the WRDA 2007 independent review requirements. It also may be difficult to establish whether or not an “array of alternatives” had already been identified for projects initiated during this period.
 39. It is important to recognize that some rehabilitation projects will not be exempt because they are technically complex and fall outside the other exemption parameters. Major rehabilitation projects can cost tens of millions to hundreds of millions of dollars, will require a benefit cost analysis, and can extend the life of an existing project for another 50 years.
 40. U.S. Army Corps of Engineers, EC 1105-2-410, Review of Decision Documents (22 Aug 2008).
 41. *Id.*
 42. *Id.*
 43. *Id.*
 44. *Id.*
 45. *Id.*
 46. *Id.*
 47. *Id.*
 48. The required contents of Review Plans are set forth in Appendix B to EC 1105-2-410, Review of Decision Documents (22 Aug 2008).
 49. U.S. Army Corps of Engineers, EC 1105-2-410, Review of Decision Documents (22 Aug 2008).
 50. *Id.*, Appendix B.
 51. These earlier mitigation requirements were established by the Clean Water Act 404(b)(1) Guidelines and by WRDA 1986 and WRDA 1990.
 52. WRDA 2007 § 2036. These provisions have been codified at 33 U.S.C. §§ 2283, 2283a, and 2317b.
 53. Council on Environmental Quality, *Conserving America’s Wetlands 2006: Two Years of Progress in Meeting the President’s Goals*, Appendix B at 22 (April 2006).
 54. The Clean Water Act 404(b)(1) Guidelines explicitly state that they apply to the Corps’ civil works program. 40 C.F.R. § 230.2(a).
 55. U.S. Army Corps of Engineers, ER 1105-2-100 (22 Apr 2000), Appendix C at 6-17. Each District Commander is to “ensure that

- adverse impacts to wetland resources are fully mitigated.”
56. General Accounting Office, *U.S. Army Corps of Engineers Scientific Panel's Assessment of Fish and Wildlife Mitigation Guidance*, GAO-02-574, May 2002 at 4. The Corps provided the mitigation planning information for 150 projects that it says were authorized between 1986 and September 30, 2001 that received construction appropriations. *Id.*
 57. U.S. Army Corps of Engineers, ER 1105-2-100, Corps Planning Guidance Notebook, (April 22, 2000) at E-89.
 58. The list of projects without mitigation plans identified in the May 2002 GAO study *U.S. Army Corps of Engineers Scientific Panel's Assessment of Fish and Wildlife Mitigation Guidance* (GAO-02-574) was provided to American Rivers by the U.S. Army Corps of Engineers. EPA gave the Corps' environmental impact statement for the American River Watershed Flood Plain Protection Plan a rating of EU2. EPA gave the Boston Harbor Navigation Improvements and Berth Dredging Project and the John T. Myers and Greenup Lock Improvements environmental impact statements an EU2 rating. The criteria for these ratings, which include the quotes referenced in the text, are described at <http://www.epa.gov/compliance/nepa/comments/ratings.html> (visited March 20, 2008).
 59. Specifically, the Corps concluded that it would not mitigate for the loss of 100 acres of jurisdictional wetlands because: (1) on-site mitigation is not physically possible; (2) there are no acceptable potential mitigation sites close to the project site and off-site mitigation would be inconsistent with County policies; (3) mitigation would be so expensive that it would prevent the Corps from proceeding with the project; and (4) loss of salt marsh habitat cannot be mitigated because no mitigation is planned. Draft Environmental Impact Statement, Bolinas Lagoon Ecosystem Restoration Project, San Francisco District (July 2002) at 4-15 to 4-16.
 60. U.S. Army Corps of Engineers, Final Yazoo Backwater Area Reformulation Report and Final Supplement No. 1 to the 1982 Yazoo Area Pump Project Final Environmental Impact Statement (2007), Appendix 1 Mitigation. The mitigation also might include some use of water control structures to establish winter waterfowl habitat on a small percentage of the mitigation acres. The Corps also said that specific plans would not be developed until mitigation lands are purchased, and monitoring will be limited to initial visual inspections followed by remote sensing techniques.
 61. U.S. Army Corps of Engineers, Vicksburg District, November 7, 2000 response to Freedom of Information Act Request No. 00-60 submitted by Melissa Samet, Earthjustice requesting information and data on the Corps' wetlands monitoring program in the Vicksburg District. While the Vicksburg District recently started a mitigation monitoring program, the data being collected is not sufficient to determine whether functional replacement is actually occurring.
 62. General Accounting Office, *U.S. Army Corps of Engineers Scientific Panel's Assessment of Fish and Wildlife Mitigation Guidance*, GAO-02-574, May 2002 at 4 n.2.

Chapter 3

The Regulatory Program Clean Water Act Section 404 Permits

- I. The Corps' Regulatory Program**
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The Corps' regulatory program implements Clean Water Act section 404, which regulates the discharge of dredged or fill material into the nation's waters. Through this program, the Corps is supposed to ensure that construction carried out by private parties and other governmental agencies in wetlands, streams, rivers, and coastal waters complies with the requirements of the Clean Water Act. Corps civil works projects also must comply with the requirements of section 404. This chapter describes this complex program and identifies opportunities for improving Clean Water Act compliance.

I. The Corps' Regulatory Program

The Corps' regulatory program implements § 404 of the Clean Water Act. Section 404 regulates the discharge of dredged or fill material into the nation's waters and establishes requirements that must be met before the Corps can issue permits to private parties and governmental agencies for construction in wetlands, streams, rivers, and other aquatic habitats. The Corps shares responsibility for managing the § 404 program with the U.S. Environmental Protection Agency (EPA).

A. Overview of Clean Water Act Section 404

Section 404 of the Clean Water Act prohibits the discharge of dredged or fill material into waters protected by the Act without a valid permit. Waters protected by the Clean Water Act include wetlands, rivers, streams, lakes, ponds, and coastal waters (collectively, "protected waters"). *See the "Waters Protected By The Clean Water Act" box for a discussion of key issues concerning protected waters.*

Section 404 applies to activities carried out by private parties and governmental agencies, including the Corps. Activities requiring § 404 permits include the filling of protected waters to allow construction of housing developments, residential subdivisions, retail establishments, hotels, marinas, and roads. *More detailed information on the types of activities covered by § 404 can be found at 33 C.F.R. §§ 323.2 and 323.3.* Corps civil works projects also must comply with the substantive and analytical requirements of § 404, although the Corps will not issue itself an actual permit. 40 C.F.R. § 230.2; 33 C.F.R. § 336.1.

The Corps must comply with two sets of Clean Water Act regulations before it can issue a § 404 permit or approve a Corps civil works project — the EPA 404(b)(1) Guidelines and the Corps' own § 404 regulations. In most cases, a § 404 permit also cannot be issued until the proposed activity has been reviewed under the National Environmental Policy Act (NEPA). *See Section III below for a detailed discussion of the Clean Water Act regulations and Chapter 6 for a discussion of the National Environmental Policy Act.*

Other Types of Corps Permits

The Corps issues two additional types of permits that are not addressed in this Chapter. Ocean discharge permits authorize the transportation and disposal of dredged material at designated ocean disposal sites. 33 U.S.C. § 1413. Rivers and Harbors Act § 10 permits authorize the construction of structures in navigable waters such as piers, boat docks, boat ramps, breakwaters, revetment, riprap, jetties, artificial islands, pilings, and aids to navigation. 33 U.S.C. § 403. Ocean dumping and § 10 permitted activities also may require a § 404 permit. If more than one permit is required, the requirements of each permit type must be satisfied. The regulations applicable to § 10 permits are found at 33 C.F.R. Part 322. The regulations applicable to ocean dumping permits are found at 33 C.F.R. Part 324.

Decisions under the regulatory program are also supposed to comply with the “sequencing” and mitigation policies established by EPA and the Corps. The sequencing policy requires applicants to first avoid impacts. Impacts that cannot be avoided are to be minimized. Finally impacts that cannot be avoided or minimized must be mitigated. *See Section IV below for more on mitigation.*

The overall regulatory program is also supposed to comply with the longstanding — but unmet — national goal of “no-net-loss” of the nation’s remaining wetland acres and functions. This goal was established in 1989 by the George H.W. Bush administration. The no-net-loss goal is statutorily mandated for the Corps’ civil works program. 33 U.S.C. § 2317(a)(1).

B. Management of the Regulatory Program

The Corps and EPA are both responsible for implementing the § 404 program, and they share many responsibilities including enforcement and developing regulatory policy and guidance. The Corps is responsible for the day-to-day management of the program,

Dredging Requires A Permit Unless It Causes Only Incidental Fallback

In addition to requiring a permit for discharging dredged material into protected waters, § 404 requires a permit for the actual dredging, digging up, or clearing of any wetland or other protected water. A permit will be required even if the soil dredged from the protected water will be disposed of on dry land. This is because these types of activities are presumed, as a matter of law, to result in the discharge of dredged material into protected waters. This legal “presumption” can be rebutted, however, if the applicant can show that the dredging, digging, or clearing will cause only “incidental fallback” of the dredged material into the protected water.

Incidental fallback (an issue that was heavily litigated by development interests) is defined as the redeposit of small volumes of dredged material that is incidental to excavation activities. 33 C.F.R. § 323. A project will produce more than incidental fallback if more than a small amount of dredged material will wind up in an area that is not right next to the area being dredged. Mechanized activities will likely result in more than incidental fallback.

Understanding incidental fallback and the incidental fallback presumption is important because if an activity will produce only incidental fallback, a § 404 permit will **not** be required. However, if an activity produces more than incidental fallback, a § 404 permit **will** be required.

The Corps is increasingly using incidental fallback to exempt activities from permit requirements. For example, the Corps has claimed that a gravel mining operation in the Kansas River does not require a § 404 permit because the mining is producing only incidental fallback. However, the Corps has no project specific or other information to show that this is the case. In the absence of this project specific information, the incidental fallback presumption prohibits the gravel mining without a § 404 permit.

If the Corps refuses to require a permit based on incidental fallback, activists should send a Freedom of Information Act request for the evidence that proves that the specific project will cause no more than incidental fallback. Activists can also gather data independently to show that the activity will in fact redeposit far more than small amounts of material into the river or wetland.

Waters Protected by the Clean Water Act

A pair of recent decisions by the U.S. Supreme Court — *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* and *Rapanos v. United States* — have exposed the nation's small streams and wetlands to uncontrolled discharges of pollutants and fill.¹ The risk to the nation's waters has been compounded by ambiguous and complicated federal agency guidance issued by the Corps and EPA to implement these decisions.

The nation's small and intermittent streams — approximately 60% of the nation's stream miles — and some 20 million acres of wetlands are now at risk of losing all Clean Water Act protections. The risks are even greater in some arid regions of the country, where 75% to 90% of stream miles do not flow all year round. The implications are enormous as these waters provide vital wildlife habitat, store flood waters, filter pollutants, and return water to aquifers.²

A water that is not covered by the Clean Water Act is not protected by the requirements of § 404 or by any other of the Clean Water Act's many provisions. As a result, such waters can be filled or polluted without any federal limitations or permits.³

In its 2001 *SWANCC* decision, the U.S. Supreme Court narrowly ruled that a so-called "isolated" Illinois water body was not covered by the Clean Water Act simply because it was used by migratory birds. In January 2003, the EPA and Corps issued a directive that went far beyond this very narrow Supreme Court ruling. EPA and the Corps directed field staff to stop applying Clean Water Act protections to virtually all so-called "isolated" waters unless they had received prior permission to do so from agency headquarters in Washington, DC⁴ This directive effectively removed Clean Water Act protections for non-navigable "isolated" water bodies, including critically important prairie pothole wetlands, playa lakes, and vernal pools.

In its 2006 *Rapanos* decision, the Supreme Court revisited the issue of which waters are covered by the Clean Water Act. However, instead of clarifying the scope of Clean Water Act coverage, the Court added to the confusion by issuing a split decision. Justice Kennedy, who provided the swing vote, would require the agencies to show a physical, biological, or chemical linkage — a "significant nexus" — between a smaller tributary and a traditionally navigable stream before the smaller tributary could be protected under the Clean Water Act.⁵ Because of the complicated nature of the split decision, Justice Kennedy's opinion has become the controlling decision.

In June 2007, EPA and the Corps issued guidance on *Rapanos*, which like the *SWANCC* guidance, goes well beyond the Supreme Court's decision. The agencies' guidance puts intermittent and ephemeral streams, and many adjacent wetlands, in danger of losing Clean Water Act protections, even though the Court's decision did not require such a result. The guidance also ignores parts of the *Rapanos* decision that would allow the government to protect water bodies when they collectively are important to water quality. The *Rapanos* guidance instead requires the Corps to determine whether an individual stream segment has a "significant nexus" to the nearest traditionally navigable water (even if that traditionally navigable water is far downstream) through a burdensome case-by-case determination process.

The impacts of the Supreme Court cases and agency guidance have been dramatic. Waters across the country have lost all protection under the Clean Water Act with significant implications for clean water, fish and wildlife habitat, flood protection, and water supply.⁶

While the Obama Administration could improve the situation by withdrawing the *SWANCC* and *Rapanos* guidance, only Congress can fix the problem entirely. The Clean Water Restoration Act would restore the historic scope of Clean Water Act protections to the nation's waters.⁷

You can find out about decisions not to extend Clean Water Act protections to waters in your area by visiting your Corps District's website; the Districts are required to post these decisions online.

while EPA sets standards and is ultimately responsible for ensuring that permits and the permitting program comply with the requirements of the Clean Water Act.

EPA Responsibilities: The Corps must comply with the EPA standards, and EPA is ultimately responsible for ensuring that the permitting program, permits, and Corps projects comply with the requirements of the Clean Water Act. To this end, EPA has two key roles in connection with individual Corps permit decisions. First, EPA reviews and formally comments on individual permit applications and general permits. These comments can compel the Corps to significantly modify or deny a permit. EPAs review to ensure compliance with § 404 takes place at the same time EPA reviews a permit or project for compliance with NEPA.

Second, EPA can stop the Corps from issuing a permit and can stop a Corps civil works project if EPA finds that the project “will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.” CWA § 404(c), 33 U.S.C. § 1344(c). However, these Clean Water Act “vetoes” are extremely rare, and there is no way to force EPA to issue one. This is because the veto authority is discretionary with the agency, which means that an individual or organization cannot sue EPA to compel a veto. Significant groundwork must be laid with EPA before it will consider a veto, which is ultimately a very political decision. Only 12 vetoes have ever been issued by EPA.⁸ *See Section III below for more on the veto process.*

EPA also (1) sets the standards used to determine which waters are subject to § 404; (2) sets the standards used to evaluate permit applications and projects — these standards are contained in the 404(b)(1) Guidelines and other policy documents; (3) identifies activities that are exempt from permitting requirements; (5) oversees state and tribal actions; and (6) shares enforcement responsibilities with the Corps.

Corps Responsibilities: The Corps develops regulatory and policy guidance in collaboration with EPA, shares enforcement responsibility with EPA, and promulgates general permits. The Corps’ regulations cannot conflict with EPA’s regulations, and the Corps must comply with both sets of regulations when issuing a § 404 permit.

The Corps also is responsible for the day-to-day management of the § 404 program, where it (1) determines whether particular waters are protected under § 404 by making jurisdictional determinations; (2) determines whether particular activities are covered by the permitting requirements; (3) evaluates applications under general permits; (4) evaluates individual permit applications, works with applicants to eliminate, reduce and mitigate adverse impacts to protected waters, and issues (either with or without conditions) and denies individual permits; and (5) ensures that any conditions imposed by the state are included in Corps permits. Most of the authority for administering the

regulatory program has been delegated to the Corps districts. *The types of permits issued by the Corps, the permit review process, and mitigation for permitted impacts are discussed in Sections II, III, and IV below.*

The Corps has established a one-sided administrative appeals process for permit decisions. This appeals process is available only to permit applicants, owners of the property at issue, or lease, easement, or option holders on the property at issue. The applicant or one of these other parties can file an appeal if an individual permit is denied, if the applicant does not agree with the conditions of the permit, or if the applicant does not agree with a jurisdictional determination (a determination that a wetland or water body is subject to the regulatory requirements of § 404). The appeal results in the decision being reviewed by the next higher level within the Corps, which typically means that the division engineer will review the decision of a district engineer. 33 C.F.R. Part 331.

An administrative appeal cannot be filed by individuals or organizations that oppose issuance of a Corps permit, or that oppose a decision that no permit is required because the water body is not jurisdictional. Instead, any such challenges must be filed in federal court.

State Assumption and Participation: The Clean Water Act also allows states to “assume” or take over all or part of the § 404 program for all but large navigable water bodies in their states. Programs in these states must comply with the same framework as the federal § 404 program, including providing public notice and an opportunity for the public to comment on permit applications. EPA must receive copies of all permit applications, and retains the ability to file objections and veto permits. To date, only New Jersey and Michigan have assumed the § 404 program. However, a number of states have developed state “programmatically general permits” that cover the permitting of activities with wetland impacts of three acres or less. Wetland protection statutes for a number of states can be found at the Association of State Wetland Managers’ website at www.aswm.org/swp/states.htm.

It is important to know that states and tribes can play a key role in § 404 decisions even if they have not assumed all or part of the § 404 program. Through the Water Quality Certification process established by § 401 of the Clean Water Act, states and tribes can prohibit or put significant conditions on § 404 permits and Corps civil works projects. *See Section III below and Chapters 5 and 6 for a more detailed description of the roles of the states and the requirements of Clean Water Act § 401.*

C. Environmental Impacts of the Regulatory Program

Strict compliance with the laws, regulations, and polices that govern the § 404 program would provide strong protections for the nation's rivers, streams, and wetlands. Regrettably, however, these regulations have not been strictly applied. Instead, the Corps has focused on expediting permit approvals and has fundamentally ignored the § 404 requirements for its own civil works projects. The environmental consequences have been disastrous.

The U.S. Fish and Wildlife Service (FWS) reports that between 1986 and 1997 the United States lost at least 644,000 acres of wetlands.⁹ A close analysis of this report reveals an annual loss of 130,480 acres of wetland and estuarine habitat during that ten-year period (the report concludes that 58,500 acres of wetlands and open water habitats were lost each year over that period, but when ponds and lakes — which do not provide the same functions as wetlands — are removed from the report's statistical analysis, the much higher and more accurate wetlands impact number is revealed). Annual wetland losses are actually even far greater, because small ephemeral wetlands (those that dry out during part of the year) were not surveyed by the study. Ephemeral wetlands are frequently targeted for development and agriculture because they are common throughout the country and easily converted.¹⁰

While not all of these losses are attributable to mismanagement of the § 404 program, the losses from § 404 permitted activities are enormous. For example, according to the Corps, in just the year 2000 the nationwide permit program authorized 19,407 acres of wetland impacts and damage to 5,651,597 linear feet of streams. This is a dramatic increase from the reported wetland impacts permitted under the § 404 program just two years earlier. In 1998, the Corps reported 7,202 acres of wetland impacts from the nationwide permit program and 26,200 acres of wetland impacts from all types of permits.¹¹ These numbers almost certainly understate the total losses attributable to the § 404 permitting program because the Corps does not have a systematic method for tracking impacts and there has been no tracking at all of many losses allowed under general permits.

The significant losses attributable to the permitting program are perhaps not surprising since the Corps rarely denies a request for a § 404 permit. For example, between 2001 and 2003, the Corps denied fewer than 1% of the permits requested. The Corps contends that it does not need to deny more permits because it ensures that the impacts of permitted activities are minimized to the maximum extent practicable. However, this contention is difficult to reconcile with the known losses to wetlands, streams, and other aquatic habitats since the § 404 program has been in place.

The losses from the Corps' civil works program — which also must comply with the requirements of § 404 — have not been tracked, but are undeniably significant. Just a handful of Corps projects currently under construction or in the planning stages would destroy tens of thousands of acres of wetlands.¹²

EPA also is to blame for the failings of the program, as it has not aggressively used its authority to limit impacts. For example, EPA has used its veto authority under the Clean Water Act only 12 times, protecting a total of 74,780 acres of wetlands (according to the veto documents). Prior to the 2008 veto of the Yazoo Backwater Pumping Plant project, the total number of wetlands protected through the EPA veto process was just 7,780 acres. Only two of the 12 vetoes were for Corps civil works projects (Bayou aux Carpes and Yazoo Backwater Pumping Plant).¹³

Activist Tip

Careful scrutiny of projects “approved” under nationwide or other general permits can lead to important environmental victories.

In Ohio, a group of citizens became suspicious when a tree nursery began digging a deep channel in a high quality coastal marsh on Lake Erie. Though the project had been approved under Nationwide Permit 27, which authorizes wetland and stream restoration projects, the deep channel was obviously designed to deliver water to the nursery and not to improve conditions in the marsh. When the citizens complained to the Corps’ Buffalo District, the general permit was revoked and the nursery was ordered to either restore the site or seek an after-the-fact individual permit.

While the district was prepared to grant an after-the-fact permit, the citizens, now organized as “Friends of Sheldon Marsh,” continued to fight state certification of the project. Eventually, after public hearings, letters, and additional site visits, the Ohio Environmental Protection Agency denied certification for the project. The Corps was then forced to order complete restoration of the marsh.

II. Types of Section 404 Permits

Two basic types of § 404 permits authorize the disposal of dredged or fill material into protected waters: general permits and individual permits. The Corps will also issue “after-the-fact” permits in some instances including, unfortunately, where landowners or developers chose to proceed without a permit even when they knew that doing so violated the law.

A. General Permits

General permits are an expedited form of permitting for activities that are supposed to have no more than “minimal adverse impacts” both individually and cumulatively. General permits also are to be promulgated only for activities that are similar in nature and that are similar in their impact on water quality and the aquatic environment. A general permit can be issued for only five years. To reissue a general permit, the Corps must go through the entire permit evaluation process and a formal administrative rulemaking process.

CWA § 404(e), 33 U.S.C. § 1344(e).

General permits are developed and promulgated by the Corps. General permits developed for the entire country are known as Nationwide Permits. General permits developed for specific regions or states are known as Regional Permits. Regional conditions can also be placed on Nationwide Permits to make sure they properly reflect a region’s ecology.

The Corps must provide an opportunity for public notice and comment before proposing, issuing, modifying, extending, or revoking a general permit. It is important to note that this public notice and comment requirement applies only to issuance of the general permit (such as a Nationwide Permit for bank stabilization) and not to each instance where the Nationwide Permit is used.

Like all other permits, general permits must comply with the EPA 404(b)(1) Guidelines and the Corps’ own § 404 regulations. They also are supposed to be evaluated under NEPA. Like all permits, general permits also are subject to state and tribal Clean Water Act § 401 Water Quality Certifications and to determinations that the general permit complies with any applicable approved Coastal Zone Management Plan. States and tribes may prohibit or condition the use of any general permit in their state or tribal lands if the general permit does not comply with state or tribal water quality standards. States and tribes also may require a Water Quality Certification for a specific activity that falls under a Nationwide Permit. *See Chapter 6 for a discussion of Clean Water Act § 401.*

If a particular project meets the conditions of an existing general permit (e.g., in terms of type of activity and size of impact), that activity may be approved under the general permit. The Corps typically issues general permits on an expedited basis with little or no project specific review, and no public notice or comment. The Corps can require an

Activist Tip

To understand all of the requirements of a Nationwide Permit, you must look at three components:

- (1) The text of the Nationwide Permit applicable to the activity at issue;
- (2) The General Conditions applicable to all Nationwide Permits (these are located at the end of the Nationwide Permits); and
- (3) Any Regional General Conditions for the Nationwide Permit applicable to the activity at issue.

individual permit for an activity that would otherwise appear to meet the general permit conditions if that activity would result in more than minimal impacts.

Because activities covered under general permits undergo little or no review, it is important that general permits are adequately protective from the start. The public can help improve general permits by submitting comments when the general permits are being developed — the public will have the opportunity to comment on general permits every five years when they are reauthorized. The public can also request that states or tribes further condition the use of general permits or revoke their use in the state or on tribal lands.

Nationwide Permits: Last issued on March 19, 2007, there are currently 50 Nationwide Permits. All of these Nationwide Permits expire on March 19, 2012. Some of the many types of activities covered under the 2007 Nationwide Permits include bank stabilization, minor dredging, maintenance and dredging of existing basins, and maintenance of existing flood control projects. The most frequently used general permits are Nationwide Permits 29 (Residential Developments) and 39 (Commercial and Institutional Developments), which authorize residential, industrial, or institutional development activities with no more than one-half acre of impact or no more than 300 linear feet of impacts to a stream bed, though the district engineer can waive the limits for impacts to intermittent and ephemeral streams.

Eighteen of the 2007 Nationwide Permits (including permits 29 and 39) require the applicant to notify the Corps in advance of construction, regardless of the acreage impacted. The Corps then has 45 days to decide if the project meets the Nationwide Permit conditions. Twenty-two of the Nationwide Permits do not require any pre-construction notification to the Corps.

The full text of each Nationwide Permit and the General Conditions applicable to all Nationwide Permits can be found at www.usace.army.mil/cecw/pages/nw_permits.aspx. Regional General Conditions on Nationwide Permits and Regional Permits must be obtained from the Corps district in which the activity will take place.

B. Individual Permits

An individual permit must be obtained for activities that do not qualify for a general permit. For example, an individual permit is required for activities that have larger impacts than those allowed under a general permit, for activities not covered by a general permit, and for waters or geographic areas not covered by a general permit. *See Section III below for a more detailed discussion of the process and standards used for evaluating individual permits.*

Activist Tip

The Corps often is not aware of development activities that affect wetlands. Activists can monitor development activities in their communities, determine if a developer has the proper permit, and report activities that are being conducted without a permit to the Corps and appropriate state regulatory agencies so the Corps and the state can evaluate the developer's work under the permitting process.

Before issuing an individual permit, the Corps must (1) issue a public notice and provide an opportunity for public, federal agency, and state comment on the permit application; (2) conduct a two-tiered Clean Water Act evaluation; (3) apply the avoid and minimize requirements more rigorously than it would for a general permit; (4) conduct the project-specific environmental review required by NEPA; and (5) include any conditions required by state or tribal review of the permit.

C. After-the-Fact Permits

Many development activities occur without the knowledge of the Corps and without required § 404 permits. A developer is not necessarily fined when caught, but must proceed with the process of applying for an “after-the-fact” permit. The developer is required to pay for restoration if the permit is denied. If an after-the-fact permit is granted, the developer is allowed to continue with the activity but must follow all conditions set forth in the permit and mitigate the impacts.

In granting an after-the-fact permit, the Corps must follow the same process and apply the same regulations and policies used for granting individual permits. No after-the-fact permit can be processed if (1) the district engineer determines legal action is appropriate; (2) enforcement litigation has already been initiated by the Corps or other entity, such as concerned citizens; or (3) a required federal, state, or local authorization/certification has already been denied. 33 C.F.R. § 326.3(e).

Applicants who are denied an after-the-fact permit, or who disagree with the conditions of an after-the-fact permit, can appeal the decision to the next higher level within the Corps under the same administrative appeals process discussed above. 33 C.F.R. § 331.11.

D. Activities Exempt From Permitting

The Clean Water Act exempts a number of activities from the § 404 permit requirements. However, even exempted activities will require a § 404 permit under certain circumstances. CWA § 404(f), 33 U.S.C. § 1344(f).

The following activities are designated as exempt and do not require a § 404 permit unless one of the triggers discussed below are met (exempted activities are described in detail at 33 C.F.R. § 323.4):

- Normal farming, silviculture (forestry) or ranching practices that are part of an established, ongoing operation. (Practices that are not considered normal, such as deep ripping¹⁴ are not exempt and require a permit. Activities conducted for new operations also require a permit. For example, a landowner would need a permit to construct a fish farming pond on land that had not previously been used for fish farming¹⁵);
- Maintenance of structures, such as dikes, dams, levees, breakwaters, causeways, or

- bridge abutments (maintenance does not include modifications to the character, scope or size of the original fill design);
- Construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance (but not construction) of drainage ditches;
 - Construction of temporary sedimentation basins on a construction site that does not involve the placement of fill material in protected waters;
 - Any activity that has already been approved by a state nonpoint source pollution discharge program that meets specified requirements under § 208(b)(4) of the Clean Water Act; and
 - Construction or maintenance of farm or forest roads, or temporary roads for moving mining equipment, as long as such roads comply with best management practices and detailed requirements set forth in the regulations.

These exempted activities will nevertheless require a § 404 permit if the discharge contains a toxic pollutant or if the purpose of the activity is to convert protected waters into a new use where the flow or circulation of water may be impaired or the reach of such waters reduced. The water's flow or circulation is presumed to be impaired if the discharge will cause "significant discernable alterations" to flow circulation. Exempted activities will also require a § 404 permit if they are incidental to the construction of structures designed to drain or otherwise significantly modify wetlands and other protected waters. 33 C.F.R. § 323.4.

III. The Section 404 Permit Review Process

This section provides an overview of the nine step permit review process, followed by a more detailed discussion of Step 5 of that process — the review that determines whether the permit satisfies the requirements of the Clean Water Act.

A. Nine Step Permit Review Process

The following is an outline of the nine steps involved in reviewing, evaluating, and issuing individual § 404 permits. While these steps are discussed sequentially, they often overlap and may require several iterations before being satisfied.

Step 1 — Initial Determinations: Upon receipt of a permit application, the Corps must determine if the water in question is protected under the Clean Water Act, whether the proposed activity requires a permit, and if so, whether an individual permit is required. In addition, the Corps must determine whether the permit application is complete and if it is not, the Corps must request additional information from the applicant. The Corps encourages pre-application conferences to address many of these issues. Since the Supreme Court's decisions in *SWANNC* and *Rapanos*, and the issuance of agency guidance implementing those cases, the process of determining whether a water body is covered by the Clean Water Act has become significantly more complicated and time consuming. See “*Waters Protected by the Clean Water Act*” in Section I above.

Step 2 — Public Notice: Once the Corps determines that the permit is complete, it must issue a public notice within 15 days that describes the permit application, the proposed activity and its location, and the potential environmental impacts. The items that must be included in a public notice are set forth at 33 C.F.R. § 325.3. The notice must invite the public to submit comments within a specified period of time. The notice does not have to be published in the Federal Register. Instead, the notice must be posted in certain public locations and sent to interested parties. Most Corps districts now post their permit notices online. However, it is still advisable to notify the appropriate Corps district (preferably in writing) that you want to be included on the district's public notice mailing list to make sure that you receive all notices.

Generally, a public notice must “include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comments.” 33 C.F.R. § 325.3(a). The courts have interpreted this to mean that the Corps is required to disclose to the public any pivotal data underlying its proposed action before the close of the notice and comment period.¹⁶ The typical Corps public notice, however, provides only minimal and/or boilerplate information, and does not provide the information needed to generate meaningful public comment. Additional information can usually be obtained by contacting the Corps project manager for the permit or the state water quality certification project manager for the permit. It is strongly recommended that you attempt to obtain additional information before submitting your comments.

Activist Tip

Activists should make the most of opportunities to comment on § 404 permits.

Public comment serves three key purposes. First, it can advise the Corps of the depth of opposition to a particular activity. Second, it can provide detailed project information for the administrative record that might otherwise be ignored. Third, it can give individuals and organizations “standing” to file a legal challenge to the permit if that becomes necessary.

Comments on a § 404 permit should include details on why the permit should be denied and specific information on how the proposed activity could be modified to reduce harm to the environment. Activists should provide as much detail as possible on less damaging locations for the project — including locations not currently owned by the applicant, opportunities for avoiding and minimizing impacts of the project, and necessary mitigation.

Step 3 — Comment Period: Interested federal and state agencies, organizations, and individuals may submit written comments on the permit application during the identified comment period, which is typically 15 to 45 days. Any person or organization can request that the Corps hold a public hearing and/or provide a longer comment period. The Corps often will agree to provide additional time to submit comments. You should confirm any individual extensions of time to submit comments in a letter or at least an email to the person granting the extension and retain a copy of the written confirmation for your records. If you do not submit written comments, the Corps will assume that you have no interest in the outcome of the permitting decision. In most instances, if you or your organization does not submit written comments on a permit you will not have legal “standing” (*i.e.*, the legal right to file a lawsuit) to challenge that permit in court.

Federal agencies including EPA, FWS, NOAA Fisheries, and the Federal Emergency Management Agency (FEMA) are invited to comment on permit applications. These agencies also can have a significant influence over Corps permits and projects through other legal avenues such as ensuring compliance with the Endangered Species Act. Activists should strive to develop good working relationships with agency staff and provide them with as much background material, guidance, and support as possible. *See Chapter 5, and Section I above, for more on the roles of federal agencies.*

The Corps reviews the public and agency comments to help determine whether the permit should be denied, issued, or issued with conditions, and to help determine whether an Environmental Impact Statement (EIS) or just an Environmental Assessment (EA) must be prepared. Since one of the purposes of an EA is to determine whether an EIS is necessary, a decision by the Corps to prepare an EA is not the final word on whether an EIS will ultimately need to be prepared.

Step 4 — Public Hearing: The Corps may hold a public hearing on the permit application if one is requested and if the Corps determines that there is sufficient public interest in a hearing. Citizens cannot force the Corps to hold a hearing because, as a matter of law, that decision is within the sole discretion of the Corps. Hearings on permit applications are somewhat rare, but you should request a hearing if the permit is of particular concern to a noticeable community of interest. As part of its review, a state also may hold a public hearing, and sometimes will hold a joint hearing with the Corps. Prior to requesting a public hearing, you should carefully consider whether you would be able to get a sufficient number of people to attend because a small turnout of people expressing concerns about the permit could undermine your efforts.

Step 5 — Clean Water Act Evaluation: The Corps conducts a two-tiered regulatory analysis to determine whether the proposed activity or Corps project complies with the Clean Water Act and its implementing regulations. Tier one involves determining whether a permit application or civil works project complies with EPA’s Clean Water Act § 404(b)(1) Guidelines, and tier two requires the Corps to evaluate the activity under its

Activist Tip

A state's Water Quality Certification review is a critical step in the permitting process, and participating in this review can be one of the most important efforts an activist can take to stop or modify a Corps permit. Through this review, the state or tribe can stop the Corps from issuing a permit or impose significant conditions to reduce the impacts of the activity.

Activists should be sure to give the state all the information on a proposed permit that they have given to the Corps.

own regulations to determine whether the permit or project is in the public interest. See *Subsection B for more on the Clean Water Act evaluation process.*

The Corps is also supposed to evaluate the permit to ensure that it meets the “sequencing” and mitigation policies established by the Corps and EPA. Under sequencing, a party seeking a § 404 permit — and the Corps before approving a civil works project — must take three key steps in a specific order. First, the applicant (or the Corps for civil works projects) must demonstrate that steps have been taken to avoid impacts to protected waters and especially to wetlands or other special aquatic sites where practicable. Second, for those impacts that cannot be avoided, the applicant or the Corps must demonstrate that steps have been taken to minimize impacts to the greatest extent practicable. Finally, the applicant or the Corps must propose compensatory mitigation for harm to waters that cannot be avoided or minimized.

In determining the appropriate amount, and other details, of mitigation, the Corps is supposed to comply with the requirements established by 33 C.F.R. § 320.4(r) and 33 C.F.R. Part 332. Compensatory mitigation generally consists of efforts to restore or replace at least an equivalent amount of aquatic habitat that replaces the lost wetland or other aquatic functions, in most cases of the same type. Unfortunately, compensatory mitigation has not been very successful in replacing lost habitat. See *Section IV below for more on mitigation.*

Step 6 — NEPA Evaluation: The Corps or the applicant must prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) for the proposed activity before the Corps makes a decision on a permit, unless the proposed activity falls within a categorical exclusion that exempts it from NEPA review. 33 C.F.R. § 325.2. The Corps is responsible for ensuring preparation of adequate NEPA documentation even if the EA or EIS is prepared by the applicant or a consultant. As a result, the Corps (and not the applicant) would be sued in a lawsuit challenging an EA or EIS. The NEPA process also provides a second important opportunity for public comment. Unlike the public notice in Step 2, public notice of intent to prepare an EIS must be published in the Federal Register. See *Chapter 6 for a discussion of the requirements of the National Environmental Policy Act.*

Step 7 — State and Tribal Review: States and tribes have a key role in approving, conditioning, or prohibiting Corps permits and projects. The Corps cannot issue a § 404 permit and cannot construct a civil works project until the state or tribal regulatory agency issues, denies, or waives a Water Quality Certification for the activity. 40 C.F.R. § 325.2. If a Water Quality Certification is issued, all conditions placed on that certification (e.g., additional mitigation, partial approval of the project, etc.) must become part of any final Corps permit. If a Water Quality Certification is issued, the Corps can still deny the § 404 permit, but if a Water Quality Certification is denied, the Corps cannot issue the § 404 permit.

The Water Quality Certification process is set forth in § 401 of the Clean Water Act, which authorizes states and tribes to review Corps permits and certain Corps projects within their boundaries to determine whether the activity complies with state water quality standards. This review is not mandatory and some states will elect not to conduct one. Upon completing a review for compliance with state water quality standards, the state or tribe can issue or deny certification. The state Water Quality Certification process also has public notice and comment requirements, and states can also hold hearings. *See Chapter 6 for a more detailed discussion of the Clean Water Act § 401 Water Quality Certification requirements.*

Coastal states with approved Coastal Zone Management Plans can also review Corps permits and project decisions to determine compliance with the Coastal Zone Management Plan. The impact of a state's finding that the project or permit is not consistent with the Coastal Zone Management Plan depends on the type of project and the applicant. These rules are set forth at 33 C.F.R. § 325.2(b)(2). In addition, the Corps must consult with states to determine whether any historic or archeological sites will be impacted by the permitted activity, pursuant to the National Historic Preservation Act. 16 U.S.C. § 470(f); 36 C.F.R. § 800.2(c)(1). *See Chapter 6 for a more detailed discussion of the Coastal Zone Management Act and the National Historic Preservation Act.*

Step 8 — Permit Decision: The Corps' permit decision should be based on the public and agency comments received, the Clean Water Act evaluation, the NEPA evaluation, and any state or tribal review and requirements. Once it reaches a decision, the Corps must issue a Statement of Finding, or where an EIS was prepared a Record of Decision, explaining its decision on the permit application including any permit conditions. These final decision documents, along with the final NEPA documentation (be it an EA or an EIS), must be made available to the public.

The Corps can reevaluate an issued permit if it finds that the decision to grant the permit was based on false, incomplete, or inaccurate information, or if significant new information comes to light that was not considered in reaching the original decision.

Step 9 — EPA Veto: As discussed in Section I above, EPA can veto a § 404 permit or a Corps project if the activity would have unacceptable impacts, but such vetoes are extremely rare. Clean Water Act § 404(c) authorizes EPA to restrict, prohibit, deny, or withdraw the use of an area as a disposal site for dredged or fill material if the discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." EPA can issue a veto either before or after the Corps issues a permit or decides to move ahead with a civil works project. The Corps may not issue a permit if the EPA regional administrator has notified the district engineer and the applicant in writing that she/he intends to prohibit, deny, restrict, or withdraw the use of the area as a disposal site under Clean Water Act § 404(c). CWA § 404(c), 33 U.S.C. § 1344(c); 33 C.F.R. § 323.6(b).

Activist Tip

Activists can do much to ensure that the protective regulations implementing § 404 are strictly applied. Your active participation in the permitting process can prevent the Corps from succumbing to pressure from the private sector (and Congress) to make quick decisions that favor development over environmental protection.

It is important to build the record for strict compliance by submitting detailed comments and by helping others, including federal and state agencies and independent experts, to do the same.

In making its veto determination, EPA will consider the effects of both the permitted activity (for example, filling wetlands to build a dam) and the resulting impacts of the project (for example, the impacts of the reservoir created by the dam). Public notice, and public comment and hearings are required before a veto can be issued. Regulations governing the veto process are found at 40 C.F.R. Part 231. The regulations and additional information on Clean Water Act 404(c), including 404(c) actions taken by EPA to date, can be accessed at <http://www.epa.gov/owow/wetlands/404c/>.

B. Two-Tiered Clean Water Act Evaluation

As noted in Step 5 above, before issuing a § 404 permit or approving a civil works project, the Corps must evaluate the activity to make sure it complies with the Clean Water Act and its implementing regulations. The Corps does this through a two-tiered analysis that is at the heart of the permit evaluation process.

The Corps must first determine if the activity complies with the EPA 404(b)(1) Guidelines. These Guidelines establish detailed environmental standards that must be met before a permit can be issued or a Corps project can be approved. If the proposed activity violates the Guidelines, the Corps must deny the permit (or not move forward with its own civil works project). If the proposed activity complies with the 404(b)(1) Guidelines, the Corps must undertake a second analysis.

Under its second analysis, the Corps must determine if the proposed activity is in the public interest, as defined by the Corps' own § 404 regulations. If the proposed activity would be contrary to the public interest, the Corps **must deny** the permit (or not move forward with its own civil works project), even if the proposed activity meets the requirements of the 404(b)(1) Guidelines.

Tier One — EPA § 404(b)(1) Guideline Evaluation: Determining whether a permit application or civil works project complies with EPA's Clean Water Act § 404(b)(1) Guidelines is the first step in the Corps' two-tiered Clean Water Act evaluation. Compliance with the 404(b)(1) Guidelines is mandatory, despite the "guideline" label, and the Corps must deny a permit if the proposed activity does not comply with the 404(b)(1) Guidelines.

The 404(b)(1) Guidelines state that "dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystem of concern." 40 C.F.R. § 230.1(c). The 404(b)(1) Guidelines go on to provide guidance on evaluating the impacts of a proposed activity. The 404(b)(1) Guidelines are found at 40 C.F.R. Part 230 and can be accessed at <http://www.epa.gov/owow/wetlands/40cfr/>.

Activist Tip

Activists should identify practicable alternatives for a proposed activity in written comments on a Corps permit or project. If a practicable alternative is available, the Corps legally may not issue the permit or approve a civil works project. You will make it much harder for the Corps to ignore this requirement if you provide specific details on possible alternative plans and locations.

The 404(b)(1) Guidelines explicitly require the Corps to deny a § 404 permit in four situations (*see the “Key Definitions” box for more on the terms bolded below*):

- (1) A permit must be denied if there is a practicable alternative that will cause less harm.** A § 404 permit must be denied “if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem.” 40 C.F.R. § 230.10(a). “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.” This includes locating the project in an area not currently owned by the applicant. An area that is not presently owned by the applicant may be a practicable alternative if it “could be reasonably obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity.” 40 C.F.R. § 230.10(a)(2).

If an activity is not **water dependent**, the 404(b)(1) Guidelines create a legal presumption that practicable alternatives to the proposed activity are available that do not involve a **special aquatic site**. Special aquatic sites include wetlands, mud flats, and riffle and pool complexes that are deemed to be so ecologically valuable that their degradation or destruction may represent an irreversible loss of valuable aquatic resources. 40 C.F.R. § 230.1(d). Unless the applicant clearly demonstrates that a practicable alternative does not exist, the Corps is supposed to deny a permit that impacts a special aquatic site. This is supposed to place a very strong burden on the applicant to show that there are no practicable alternatives to the proposed activity.

An activity is **water dependent** if it requires access or proximity to a special aquatic site in order to fulfill the activity’s basic purpose. 40 C.F.R. § 230.10(a)(3). For example, a housing project is by definition not water dependent, because you can build homes without being near or in the water. A marina, on the other hand, likely will be water dependent. Applicants often attempt to describe a project in such a way that it will be deemed to be water dependent (so that the applicant will have a lighter burden to meet in obtaining a permit). For example, an applicant may claim that the purpose of a project is to build a water front hotel or an upscale housing development with an attached marina. Whether either of these projects is truly water dependent would rest on identifying the appropriate project purpose for the purposes of § 404. Water dependency is a critical but complicated issue. If faced with a questionable case you should seek guidance from someone with expertise in this area.

There is a second legal presumption related to the practicable alternatives analysis. It is presumed that the NEPA documents that must be prepared before a permit can be issued will satisfy the practicable alternatives analysis and demonstrate that no practicable alternatives exist. 40 C.F.R. § 230.10(a)(4). Like all legal presumptions,

however, this one can be rebutted — and in many cases it will need to be rebutted because NEPA documents often will not satisfy the practicable alternatives analysis. Comments on NEPA documents and permit applications should provide as much detail as possible on why the NEPA analysis does not satisfy the practicable alternatives (or other) requirements of the 404(b)(1) Guidelines.

- (2) A permit must be denied if the discharge would violate certain laws and standards.** A § 404 permit must be denied if the proposed discharge would (a) cause or contribute to violations of any state water quality standard; (b) violate any applicable toxic effluent standard or prohibition under Clean Water Act § 307; (c) jeopardize the existence of endangered or threatened species listed under the Endangered Species Act, or result in a likelihood of the destruction or adverse modification of formally designated critical habitat; or (d) violate any requirement imposed by the Secretary of Commerce to protect any marine sanctuary under the Marine Protection, Research and Sanctuaries Act. 40 C.F.R. § 230.10(b).
- (3) A permit must be denied if the discharge would cause or contribute to significant degradation of water quality.** A § 404 permit must be denied if the discharge would cause or contribute, either individually or cumulatively, to significant degradation of protected waters. Significant degradation will be measured by significant adverse effects on (a) human health or welfare, including municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites; (b) life stages of aquatic life and other water-dependent wildlife; (c) aquatic ecosystem diversity, productivity, and stability, such as loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water or reduce wave energy; and (d) recreational, aesthetic, and economic values. 40 C.F.R. § 230.10(c).
- (4) A permit must be denied unless the applicant has taken steps to minimize harm to protected waters.** A § 404 permit must be denied if the permit applicant has not taken “appropriate and practicable” steps to minimize potential adverse impacts on the aquatic ecosystem. 40 C.F.R. § 230.10(d). Potential adverse impacts may be minimized by (a) the selection of the discharge location; (b) treating or limiting the material to be discharged; (c) controlling the material after it has been discharged and the method of dispersion; (d) utilizing technology to reduce impacts; and/or (e) avoiding interference with animals and their habitat. More detail on actions that can be taken to minimize adverse environmental impacts can be found at 40 C.F.R. §§ 230.70 to 230.77.

Tier Two — The Corps’ Public Interest Review Evaluation: If the Corps determines that a permit can be granted or a project can be approved under the EPA 404(b)(1) Guidelines, the Corps must conduct the second tier of its Clean Water Act review. Under this second tier, the Corps must evaluate the activity under its own regulations to

Key Definitions

Aquatic environment and aquatic ecosystem mean “waters of the United States, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals.” 40 C.F.R. § 230.3(c).

Practicable alternative means an alternative that is “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” This includes locating the project in an area not currently owned by the applicant if it “could be reasonably obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity.” 40 C.F.R. § 230.10(a)(2).

Special aquatic sites mean wetlands, mud flats, vegetated shallows, riffle and pool complexes, coral reefs, sanctuaries, and refuges. These are “geographic areas, large or small, possessing 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.” 40 C.F.R. § 230.3(q-1), and § 230.40 to § 230.45.

Water dependent means the activity requires access or proximity to or siting within a special aquatic site in order to fulfill its basic purpose. 40 C.F.R. § 230.10(a)(3).

Wetlands mean “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances, do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.” 40 C.F.R. § 230.3(t).

determine whether the permit or project is in the public interest. The Corps must deny a permit if granting the permit would not be in the public interest as defined by the Corps' regulations. 33 C.F.R. §§ 320.4 and 323.6.

Under its public interest review, the Corps must evaluate the “probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest.” 33 C.F.R. § 320.4(a). The benefits that reasonably may be expected to accrue from the project must be weighed against its reasonably foreseeable detriments. The Corps' § 404 regulations are found at 33 C.F.R. Parts 320 to 331, and additional policy guidance can be found at www.usace.army.mil/CECW/Pages/reg_materials.aspx.

The Corps' public interest review decision should reflect the national concern for both protecting and utilizing important resources, including protecting wetlands — a value explicitly recognized by the Corps' own regulations, which state that “wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public interest.”¹⁷ 33 C.F.R. § 320.4(b).

The Corps' public interest evaluation also must consider all factors that may be relevant, and the cumulative effects of those factors, including

- Environmental factors such as conservation, wetlands, fish and wildlife values, water quality, floodplain management, water conservation, energy conservation, environmental benefits, and mitigation;
- Cultural and economic factors such as historic, cultural, aesthetics, scenic and recreational values, general environmental concerns, water supply, development, navigation, and economics;
- The relevant extent of the public and private need for the proposed work;
- The practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed work, where there is a conflict as to the resource use; and
- The extent and permanence of the beneficial and/or detrimental effects the proposed work is likely to have on the public and private uses to which the area is suited. 33 C.F.R. § 320.4(a).

Similarly, in recognition of the significant natural values and functions of floodplains, the Corps is supposed to avoid authorizing floodplain development whenever practicable alternatives exist outside the floodplain. 33 C.F.R. § 320.4(l).

Activist Tip

Activists should use the poor record on mitigation to make three key points in written comments on Corps permits (and projects):

- (1) The Corps should deny a permit that would result in unacceptable impacts to protected waters because there is a strong likelihood that mitigation would not offset those impacts. If appropriate, comments should explain why mitigation is not likely to offset the impacts and urge the Corps to deny the permit.
- (2) The Corps should make every effort possible to ensure that impacts to wetlands and other aquatic habitats are avoided in the first instance, because mitigation is likely to fail. Comments should stress the need to avoid impacts to protected waters and provide details on opportunities to do so.
- (3) To improve the likelihood of mitigation success, detailed mitigation requirements developed after careful planning should be included as enforceable conditions of new permits. Comments should provide as much detail as possible on needed mitigation and on elements that should be included in the mitigation plan.

IV. Mitigation for Permitted Activities

As illustrated in Section I, despite the protections provided by § 404 and the no-net-loss of wetlands goal, the nation continues to lose wetlands, streams, and other aquatic habitats at an unacceptable rate. Mitigation is an attempt to offset some of these losses.

This section discusses the current dismal state of mitigation success, the various types of mitigation that can be implemented, federal and state mitigation requirements, and key elements of an effective mitigation plan. It also highlights opportunities for activists to help improve the mitigation process and the likelihood of mitigation success.

A. Mitigation Overview

To satisfy the purposes of the Clean Water Act and the no-net-loss of wetlands goal, compensatory mitigation should replace the lost functions, values, and spatial extent of aquatic habitats damaged or destroyed by activities governed by § 404. However, compensatory mitigation has been only marginally successful and these goals are not being met.

Scientists have concluded that under the § 404 program, the “actual amount of wetland impacts offset is only about 20 percent, meaning that the section 404 permitting program has been fostering an 80 percent net loss of wetlands.”¹⁸ The Corps’ civil works mitigation record is equally dismal. In May 2002, the Government Accountability Office found that the Corps has not implemented any mitigation at all for almost 70 percent of civil works projects constructed since 1986. *See Chapter 2 for a discussion of mitigation for civil works projects.*

The failure of mitigation is due to a host of reasons including poor mitigation planning, improper implementation, lack of implementation, and lack of mitigation monitoring and follow-up. In addition, the scientific understanding of many types of wetlands is so lacking that scientists cannot even describe the steps necessary to restore them.

Importantly, the National Research Council has noted that there is “a considerable controversy over whether or not wetlands can actually be restored. The arguments are particularly important when wetland restoration is undertaken within the mitigation context, and the promise of full restoration of a degraded site allows a natural wetland to be destroyed.”¹⁹

The lack of successful mitigation for § 404 permits and Corps projects has very real ecological and economic impacts. For example, wetlands filter pollutants from water; absorb and slow the release of storm runoff; recharge aquifers; provide crucial wildlife habitat for millions of migrating waterfowl, shorebirds, and other species; and provide recreation and enjoyment to millions of Americans who visit wetland areas each year.

When wetland losses are not mitigated effectively, water quality decreases, water supplies are strained, flood damages increase, and wildlife suffers.

B. Types of Compensatory Mitigation

As discussed in Section III, compensatory mitigation (the third step of the three step sequencing policy that is to be applied to all § 404 permits) generally consists of efforts to restore or replace at least an equivalent amount of aquatic habitat that replaces the lost functions, in most cases of the same type. There are four general types of compensatory mitigation that differ in their ability to replace lost functions and values:

- (1) **Establishment (also known as Creation)** involves building new wetlands or streams in upland areas where wetlands or streams did not previously exist. This type of mitigation frequently fails to create a fully functioning wetland because the correct soils, hydrology, and historic seed bank are not present to support wetland creation. The science shows that this type of mitigation will not create a fully functioning stream.
- (2) **Restoration** involves recreating a wetland or stream that has been drained or otherwise damaged. This is the preferred mitigation method because it has the greatest likelihood of being ecologically successful. Restoration provides the best chance of replacing both lost functions and wetland acres or stream miles.
- (3) **Enhancement** involves improving the functioning of an existing wetland or stream. Enhancement does not replace lost wetland acreage or stream miles, and it is often difficult to quantify any improvements in function. This type of mitigation should be used only in addition to restoration.
- (4) **Preservation** involves protecting an existing high-quality wetland or stream through purchase or other means. This form of mitigation cannot compensate for either lost functions or lost acreage of wetlands or miles of streams destroyed by development. It should only be used in addition to restoration.

These various types of compensatory mitigation can be implemented through project specific efforts, mitigation banks, and in-lieu-fee arrangements.

Project specific mitigation is mitigation carried out to compensate for wetland and other impacts resulting from a specific permitted activity or Corps project. The mitigation will be implemented after the permit is issued or the Corps project is approved. For § 404 permits, the permittee is ultimately responsible for the implementation and success of the mitigation. *See Chapter 2 for a discussion of mitigation for civil works projects.*

Mitigation banks are large-scale wetland mitigation projects that attempt to create, restore, or enhance wetlands so that the bank can sell mitigation credits to others who are developing in wetlands. Mitigation banks are supposed to create wetlands (and wetland functional values) that did not exist at the time the property was acquired. Many are based in part on preservation or enhancement of existing wetlands so any argument that they replace wetlands is weak at best. Credits are supposed to be based on the amount of wetlands or wetland functions restored or created. However, credits are often sold before monitoring shows that the mitigation credits function as promised and/or before restoration or enhancement has taken place — the Corps even allows new banks to sell credits as soon as they obtain a deed to the mitigation bank lands, which can occur long before implementation of any mitigation. In addition, mitigation banks are often a long distance from the project and are based on preservation and enhancement. As a result, mitigation banks are often not the best mitigation option.

In-lieu-fee mitigation involves payment of a fee into a pooled mitigation fund managed by a for-profit business, conservation group, land trust, or government agency. This type of mitigation should be used only in very rare instances. Frequently, this type of mitigation includes few reporting requirements and no monitoring. It also may be years before the funds are used to restore wetlands. Frequently, the funds are simply used to buy existing wetlands that do not sufficiently compensate for functions and acreage of wetlands lost to development.

C. Federal and State Mitigation Requirements

This Subsection discusses federal and state mitigation requirements that are intended to offset the harm caused by § 404 permitted activities and Corps projects. To improve mitigation success, it is vital to ensure the strictest possible compliance with these requirements, even as it is clear that they must be strengthened if we are to have any hope of achieving the no-net-loss of wetlands goal.²⁰

While many of the requirements discussed below specifically address wetlands, it is also very important to remember that damage to rivers, streams, and other waters must be mitigated.

Federal Mitigation Requirements: Compensatory mitigation for Corps permits is governed by a relatively new set of regulations found at 33 C.F.R. Part 332, Compensatory Mitigation for Losses of Aquatic Resources. These regulations were promulgated in 2008, and can be accessed at http://www.usace.army.mil/CECW/Pages/reg_materials.aspx. Additional information, including training materials for implementing these regulations is available on EPA's website at <http://www.epa.gov/wetlandsmitigation/#regs>.

The draft compensatory mitigation regulations were strongly opposed by many in the environmental and scientific community because they were not based in sound science

(especially with respect to their applicability to stream mitigation), they gave the Corps too much discretion in deciding when and how much mitigation is required, and they created preferences for the use of mitigation banks and in-lieu-fee mitigation without any evidence that those forms of mitigation are ecologically superior. While some improvements were made in response to these objections, the final rule remains flawed. Nevertheless, there are provisions in the Compensatory Mitigation rule that you should be aware of, and provisions that should be strictly implemented.

Amount of Mitigation: The district engineer has the discretion to determine whether compensatory mitigation is required. Where compensatory mitigation is required, the amount of compensatory mitigation must be sufficient to replace lost aquatic resource functions, to the extent practicable. “In cases where appropriate functional or condition assessment methods or other suitable metrics are available, these methods should be used where practicable to determine how much compensatory mitigation is required. If a functional or condition assessment or other suitable metric is not used, a minimum one-to-one acreage or linear foot compensation ratio must be used. . . . The district engineer must require a mitigation ratio greater than one-to-one where necessary to account for the method of compensatory mitigation (e.g., preservation), the likelihood of success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and/or the distance between the affected aquatic resource and the compensation site.” 33 C.F.R. § 332.3(f).

The district engineer must also require, “to the extent appropriate and practicable, additional compensatory mitigation to offset temporal losses of aquatic functions that will result from the permitted activity.” 33 C.F.R. § 332.3(m).

A district engineer can require the establishment of riparian areas and/or buffers around wetland or stream mitigation sites when the buffer is necessary to ensure the long-term viability of those resources. However, when that happens, the Corps also must grant compensatory mitigation credits for that buffer, even though the buffer cannot compensate for the wetland acreage or stream miles lost to development, and does not replace the lost functional values. 33 C.F.R. § 332.2(i).

Mitigation Preferences: The Compensatory Mitigation regulations establish a flexible preference for the use of restoration over establishment, enhancement, and preservation; restoration “should generally be the first option considered because the likelihood of success is greater and the impacts to potentially ecologically important uplands are reduced compared to establishment, and the potential gains in terms of aquatic resource functions are greater, compared to enhancement and preservation.” 33 C.F.R. § 332.3(a).

The regulations also establish a hierarchy of preferred methods for implementing mitigation. The applicant is supposed to choose the highest method on the list that is appropriate for the impacts being allowed under the permit:

- (1) Use of credits from a mitigation bank (when the impacts will take place within the service area of an approved mitigation bank, and the bank has the appropriate number and resource type of credits available);
- (2) Use of credits from an in-lieu-fee program (when impacts are located within the service area of an approved in-lieu-fee program, and the sponsor has the appropriate number and resource type of credits available);
- (3) Permittee-responsible compensatory mitigation developed using a loosely defined watershed approach;²¹
- (4) On-site/in-kind permittee responsible mitigation; and
- (5) Off-site/out-of-kind permittee responsible mitigation.

The creation of a preference for the use of mitigation banks is a fundamental shift in the mitigation program. Unfortunately, that shift is not based on scientific evidence showing that mitigation banks produce more successful mitigation. To the contrary, the Corps and EPA have acknowledged that this shift was “based on administrative criteria, not ecological criteria.”²² Prior to enactment of these regulations, there was a preference for in-kind and on-site mitigation.

Mitigation Timing: Compensatory mitigation must be carried out in advance of or concurrent with the activity causing the authorized impacts, “to the maximum extent practicable.” 33 C.F.R. § 332.3(m).

Mitigation Plans: The Compensatory Mitigation regulations require that all compensatory mitigation projects have a mitigation plan. If the mitigation will be carried out by the permittee, the mitigation plan must address each of the 12 elements discussed below, and the plan must be approved by the district engineer prior to approval of the final permit. That plan also must be incorporated into the permit by reference, and through special permit conditions (*see below*).

Mitigation plans for permittees using mitigation banks or in-lieu-fee programs need only include the baseline information (*see below*), the methodology used to establish the amount of credits (*see below*), and the name of the specific mitigation bank or in-lieu-fee program to be used. Mitigation banks and in-lieu-fee programs must prepare

a mitigation plan for each separate compensatory mitigation project site. 33 C.F.R. § 334.2(c).

Note that the mitigation plans do **not** have to be provided with the public notice for the permit.

Compensatory mitigation plans must address the following (the following descriptions are either adapted from or directly quoted from 33 C.F.R. § 332.4(c); activists should consult the regulations for a comprehensive list of plan requirements):

- (1) **Objectives.** A description of the resource type(s) and amount(s) of mitigation that will be provided, the method of compensation (*i.e.*, restoration, establishment, enhancement, and/or preservation), and the manner in which the functions of the compensatory mitigation will address the needs of the region.
- (2) **Site selection.** A description of the factors considered during the site selection process.
- (3) **Site protection instrument.** A description of the legal arrangements and instrument, including site ownership, that will be used to ensure the long-term protection of the compensatory mitigation project site.
- (4) **Baseline information.** A description of the ecological characteristics of the proposed compensatory mitigation project site and the impact site, including plant communities, hydrology, soil conditions, other appropriate site characteristics, and a map or geographic coordinates for the mitigation sites. If a mitigation bank or in-lieu-fee program is going to be used, the mitigation plan only needs to provide baseline information about the impact site, not the mitigation bank or in-lieu-fee project site.
- (5) **Determination of credits.** A description of the number of credits to be provided and a brief explanation of the rationale for this determination.
- (6) **Mitigation work plan.** Detailed written specifications and work descriptions for the compensatory mitigation project, including, but not limited to, the geographic boundaries of the project; construction methods, timing, and sequence; source(s) of water, including connections to existing waters and uplands; methods for establishing the desired plant community; plans to control invasive plant species; the proposed grading plan, including elevations and slopes of the substrate; soil management; and erosion control measures. Additional details such as channel form, design discharge, etc., may be required for stream mitigation projects.
- (7) **Maintenance plan.** A description and schedule of maintenance requirements to ensure the continued viability of the resource once initial construction is completed.
- (8) **Performance standards.** Ecologically-based standards that will be used to determine whether the compensatory mitigation project is achieving its objectives. Ecological performance standards are also discussed in 33 C.F.R. § 332.5.

Activist Tip

The Corps typically does not provide a draft mitigation plan for the public to review during the permit and NEPA public comment periods. Activists should formally request copies of mitigation plans prior to submitting comments, but it is important to submit detailed comments on needed mitigation even if a plan is not provided.

Comments submitted on both the permit and NEPA documents should provide detailed information on what should be included in a sound mitigation plan — referring to, and using, the compensatory mitigation regulations as a guide. In addition to improving the chance of mitigation success, pointing out necessary components of a sound mitigation plan can make the mitigation more “real,” which should help drive avoidance of impacts in the first place.

- (9) **Monitoring requirements.** A description of the parameters that will be monitored to determine if the compensatory mitigation project is on track to meet performance standards and if adaptive management is needed; and a monitoring and reporting schedule.
- (10) **Long-term management plan.** A description of how the compensatory mitigation project will be managed after performance standards have been achieved to ensure long-term sustainability. This includes a description of long-term financing mechanisms and the party responsible for long-term management.
- (11) **Adaptive management plan.** A management strategy to address unforeseen changes in site conditions or other components of the compensatory mitigation project, including the party or parties responsible for implementing adaptive management measures.
- (12) **Financial assurances.** A description of financial assurances that will be provided and how they are sufficient to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with its performance standards.

Mitigation Monitoring: Mitigation monitoring must be carried out for a “period that is sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than five years. A longer monitoring period must be required for aquatic resources with slow development rates (e.g., forested wetlands, bogs). Following project implementation, the district engineer may reduce or waive the remaining monitoring requirements upon a determination that the compensatory mitigation project has achieved its performance standards. Conversely the district engineer may extend the original monitoring period upon a determination that performance standards have not been met or the compensatory mitigation project is not on track to meet them. The district engineer may also revise monitoring requirements when remediation and/or adaptive management is required.” 33 C.F.R. § 332.6.

Permit Conditions: An individual permit that utilizes permittee-responsible mitigation, must include special conditions that: (a) “identify the party responsible for providing the compensatory mitigation;” (b) “incorporate, by reference, the final mitigation plan approved by the district engineer;” (c) “state the objectives, performance standards, and monitoring required for the compensatory mitigation project, unless they are provided in the approved final mitigation plan; and (d) “describe any required financial assurances or long-term management provisions for the compensatory mitigation project, unless they are specified in the approved final mitigation plan.” 33 C.F.R. § 332.3(k).

State Mitigation Requirements: As discussed above, the Corps has not set a minimum requirement for the number of acres required to replace wetlands that have been damaged or destroyed by a § 404 permitted activity or Corps project. A number of states, however, do require, or at least recommend, a specific amount of mitigation. States can require use of their mitigation ratios through the § 401 Water Quality Certification process or where they have assumed management of the § 404 process.

Required or recommended mitigation ratios are typically tied to the type of mitigation used (creation, restoration, enhancement, or preservation) and the type of wetlands damaged by the permitted activity or project.

States with specific mitigation requirements typically require more than one acre of mitigation for each wetland acre harmed, with specific ratios tied to the type of mitigation used (creation, restoration, enhancement, or preservation) and the type of wetlands damaged by the permitted activity or project. The following are some examples of state mitigation requirements:

- **California** requires greater than one-to-one mitigation, and has a goal “to ensure no overall net loss and a long-term net gain in the quantity, quality, and permanence of wetland acreage and values in California in a manner that fosters creativity, stewardship, and respect for private property.”²³ The California Coastal Commission, for example, always requires a mitigation ratio greater than 1:1 and will often require ratios of 4:1 or larger.²⁴
- **Illinois** requires mitigation ratios of from 1:1 for minimal impacts to 5.5:1 where wetlands are completely destroyed, and has a goal of “no overall net loss of the State’s existing wetland acres or their functional value due to State supported activities.”²⁵
- **Indiana** requires mitigation ratios of from 1.5:1 to 4:1 depending on the quality of the wetlands impacted and the distance of the mitigation site from the impacted site — restoration or creation of similar wetlands near the impacted area requires at least 1.5:1; impacts to wetlands dominated by grasses, wildflowers and other herbaceous plants require 1.5:1 to 2:1; impacts to wetlands dominated by shrubs and saplings require 2:1 to 3:1; and impacts to wetlands dominated by trees require 3:1 to 4:1. These ratios can be increased by the regulatory agencies.²⁶
- **Maine** requires mitigation ratios of from 1:1 to 2:1 for restoration, enhancement, or creation depending on the quality of the wetlands impacted, and a mitigation ratio of 8:1 where preservation is utilized to compensate for impacts to any type of wetland. The state has a goal of achieving no-net-loss of wetland functions and values.²⁷
- **Maryland** requires mitigation ratios of from 1:1 to 4.5:1 for non-tidal wetlands, and from 1:1 to 6:1 for tidal wetlands, depending on the type of wetland impacted and the type of mitigation utilized. The state has a goal of preserving tidal wetlands and preventing their loss and despoliation and strives for a net resource gain in tidal

wetlands acreage and function. For non-tidal wetlands, Maryland has a goal of no-net-loss of wetland acreage and function.²⁸

- **Michigan** requires mitigation that will ensure no-net-loss of wetlands. The following ratios are required when wetland mitigation is of a similar ecological type as the impacted wetland — restoration or creation of 5:1 for impacts to wetland types that are rare or imperiled on a statewide basis; restoration or creation of 2:1 for impacts to forested wetland types, coastal wetlands that are not rare or imperiled, and wetlands that border upon inland lakes; restoration or creation of 1.5:1 for impacts on all other wetland types; and mitigation through preservation of existing wetlands requires a ratio of 10:1. These ratios can be increased if the replacement wetland is of a different ecological type than the impacted wetland.²⁹
- **Minnesota** requires a minimum replacement ratio of 2:1. For wetlands on agricultural land or in counties where 80 percent or more of pre-settlement wetlands exist, the minimum replacement is 1:1.³⁰
- **Missouri** recommends mitigation ratios of from 1:1 to 4:1 depending on the type of wetland impacted — 1:1 to 1.5:1 for farmed wetlands; 1:1 to 3:1 for emergent wetlands; 1.5:1 to 3:1 for shrub-scrub wetlands; and 2:1 to 4:1 for wooded wetlands. These ratios can be increased, and the state's guidelines stress the importance of completely avoiding impacts in the first instance.³¹
- **New Hampshire** requires mitigation ratios of at least 1.5:1 to 15:1 depending on the type of wetland impact and the type of mitigation implemented — 2:1 for bog restoration, 3:1 for tidal wetland creation and 2:1 for tidal wetland restoration; 1.5:1 for creation or restoration of forested wetlands; and 1.5:1 for creation and 1:1 for restoration for all other wetland types. In some instances New Hampshire will allow mitigation through preservation of uplands that buffer a jurisdictional wetland area that meets or exceeds the functional assessment of the wetland to be impacted by the project at ratios of from 3:1 to 15:1.³²
- **New Jersey** requires mitigation at a ratio of 2:1 — two acres of freshwater wetlands or state open waters must be restored for each acre disturbed by a project.³³
- **New York** recommends mitigation at a ratio of at least 1:1 and recognizes that it often will be necessary to implement higher mitigation ratios to fully compensate for lost wetland acreage and functions.³⁴
- **Ohio** requires mitigation ratios of from 1.5:1 to 3:1 depending on the type of wetland impacted and the type of mitigation utilized.³⁵
- **Oregon** requires minimum ratios based on the type of compensatory mitigation proposed — restoration 1:1; creation 1.5:1; enhancement 3:1; enhancement of cropped wetlands 2:1.³⁶
- **Pennsylvania** requires wetlands mitigation “at a minimum area, function, and value ratio of 1:1.”³⁷

- **Rhode Island's** Coastal Resource Management Council requires wetland mitigation for all alterations to coastal wetlands at a ratio of 2:1.³⁸
- **South Carolina** requires mitigation for wetland impacts within the state's coastal zone at a ratio of 2:1 wetlands created to wetlands altered for private projects, and 1:1 for wetlands created to wetlands altered for projects deemed to be in the public interest. Enhancement must be coupled with some creation and must clearly be an ecological improvement over the existing system.³⁹
- **Tennessee** requires that mitigation achieve no-net-loss of water resource values. Mitigation ratios for wetland impacts are based on the type of mitigation carried out — no less than 2:1 for restoration activities; no less than 4:1 for creation and enhancement; and no less than 10:1 for preservation. Applicants also may propose best professional judgment ratios based on the resource value and functions of the affected wetland, resource value of the mitigation, and the likelihood of success of the mitigation.⁴⁰
- **Vermont** requires that there be “no-net-loss of the protected functions or acreage of significant wetlands” and strongly promotes complete avoidance over mitigation.⁴¹
- **Virginia** requires minimum ratios for compensation of wetland impacts of 2:1 for forested wetland impacts; 1.5:1 for scrub-shrub wetland impacts; 1:1 for emergent wetland impacts; and 1:1 for stream impacts. Project-specific ratios are determined for other open water impacts.⁴²
- **Washington** recommends mitigation ratios of from 1.5:1 to 24:1 depending on the type of mitigation utilized.⁴³
- **West Virginia** requires mitigation ratios of from 1:1 to 3:1 depending on the type of wetland impacted and the timing of the mitigation implementation — 1:1 for open water wetlands, 2:1 for emergent wetlands; and 3:1 for scrub-shrub and forested wetlands. If in-kind compensatory mitigation is completed 12 months prior to the wetland disturbance, mitigation shall be 1:1 for any wetland type impacted. Mitigation carried out through acquisition of existing wetlands requires considerably higher mitigation ratios — 5:1 for open body wetlands; 10:1 for wet meadow wetlands, and 15:1 for scrub-shrub and forested wetlands.⁴⁴
- **Wisconsin** requires a standard compensation ratio of 1.5:1, but a ratio of 1:1 might be allowed in some instances where an established mitigation bank is used.⁴⁵

Endnotes

1. Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001); Rapanos v. United States, 126 S. Ct. 2208 (2006).
2. As of the date of this Citizen's Guide, small and intermittent streams contributed to the drinking water supplies for 110 million Americans. In addition, more than 40% of facilities (14,800) with Clean Water Act NPDES permits currently discharge into small or intermittent streams, and in arid regions of the country this percentage can be much higher. For example, approximately 50 percent of NPDES permitted wastewater discharges in Texas flow directly into intermittent streams. Some wastewater plants that discharge into intermittent waters already are petitioning EPA to allow discharges without any permit requirements at all.
3. A water that is covered by the Clean Water Act is often called a jurisdictional water. A water that is not covered by the Clean Water Act is often called a non-jurisdictional water.
4. The agencies received highly critical comments on this policy and on a related rulemaking effort from a large majority of state agencies, water and wildlife experts, sportsmen, floodplain managers, public health officials, conservation organizations and several EPA regional offices. In 2006, the House of Representatives – in a strong, bipartisan fashion – voted to halt this misguided policy.
5. Four other justices took the radical view that the law protects “only those relatively permanent, standing or continuously flowing bodies of water” and only those wetlands with a “continuous surface connection” to protected waters.
6. Examples of these losses are documented in *Courting Disaster: How the Supreme Court Has Broken the Clean Water Act and Why Congress Must Fix It*, a publication of Earthjustice, Environment America, Clean Water Action, National Wildlife Federation, Natural Resources Defense Council, Sierra Club, and Southern Environmental Law Center (April 2009) available at <http://www.earthjustice.org/library/reports/courting-disaster-final-april-2009.pdf> (visited June 29, 2009); and *Reckless Abandon: How the Bush Administration is Exposing America's Waters to Harm*, a publication of Earthjustice, National Wildlife Federation, Natural Resources Defense Council, and Sierra Club (August 2004) available at http://www.earthjustice.org/library/reports/CWA_Jurisdiction_8-12-04.pdf (visited June 29, 2009).
7. The Clean Water Restoration Act (S.787 in the 111th Congress) has strong support from states, scientist, sportsmen, floodplain managers, and conservation organizations. In June 2009, an amended version of S.787 was reported out of the Senate Environment and Public Works Committee. Members of Congress leading efforts to restore the historic scope of Clean Water Act protections include Senator Russ Feingold (D-WI), Senator Barbara Boxer (D-CA), and Representative James Oberstar (D-MN).
8. EPA 404(c) vetoes: North Miami Landfill, FL (1981); M.A. Norden, Mobile, AL (1984); Bayou aux Carpes, LA (1985); Maybank, Jehossee Island, SC (1985); Attleboro Mall/Sweedens Swamp, MA (1986); Lake Alma Impoundment, GA (1988); Henry Rem Estate, East Everglades, FL (1988); Russo Development Corp., NJ (1988); Ware Creek Water Supply, VA (1989); Big River Water Supply, RI (1990); Two Forks Water Supply, CO (1990); Yazoo Backwater Pumping Plant, MS (2008). <http://www.epa.gov/owow/wetlands/404c/> (visited June 29, 2009).
9. Dahl, T.E. 2000. Status and trends of wetlands in the conterminous United States 1986 to 1997. U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. 82 pp., at <http://wetlands.fws.gov/>.
10. National Wildlife Federation, *Nowhere Near No-Net-Loss*, April 22, 2004.
11. U.S. Army Corps of Engineers, Draft Programmatic Environmental Impact Statement for the Nationwide Permit Program (July 2001) at 5-20 and Appendix F.
12. The following are some examples. According to the Corps, construction of the New Madrid Levee and Pumping Plant in Missouri will destroy 75,000 acres of seasonally flooded wetlands. According to the Corps, its ongoing enlargement of the Mississippi River Mainline Levees will destroy a minimum of 7,328 acres of wetlands. According to the Corps, its plan to dredge over 100 miles of the Big Sunflower River in Mississippi will, among other things, damage 3,631 acres of wetlands.
13. For a list of vetoed projects, see endnote 8 above.
14. “Deep ripping” is a process where bulldozers drag rippers, consisting of 4-foot to 7-foot metal prongs, through the earth. This practice breaks up the soil, and disgorge rock, sand, and biological material behind the ripper. Deep ripping alters the movement of surface and subsurface water and limits or destroys the ability of wetlands to retain water.
15. *Conant v. United States*, 786 F.2d 1008 (11th Cir. 1986).
16. *National Wildlife Federation v. Marsh*, 568 F. Supp. 985, 994-95 (D.D.C. 1983).
17. The Corps' regulations provide specific examples of many wetland functions that are important to the public interest. These include significant biological functions, including food chain production, general habitat, nesting, spawning and rearing areas; drainage, sedimentation and flushing functions; shielding of other areas from wave action; storage areas for storm and flood waters; ground water discharge areas; and water purification functions. 33 C.F.R. § 320.4(b)(2). The Corps' regulations further recognize that the cumulative effects of piecemeal wetland losses can result in a major impairment of wetland resources. 33 C.F.R. § 320.4(b)(3).
18. R. Eugene Turner, et al., “Count It by Acre or Function—Mitigation Adds Up to Net Loss of Wetlands”, National Wetlands Newsletter, November-December 2001. A 1996 study published

- in *Ecological Applications* concludes that the: “sober reality [is] that under present mitigation policies and practices ‘losses are likely to be uncompensated for and that what we call mitigation has a high chance of failure.’” Margaret S. Race and Mark S. Fonseca, *Fixing Compensatory Mitigation: What Will It Take?*, in *Ecological Applications* 6(1):94-101 at 97 (Ecological Society of America, eds., 1996).
19. National Research Council, *Restoration of Aquatic Ecosystems: Science, Technology, and Public Policy* (National Academy Press 1992) at 310-311.
 20. In 2001, the National Research Council concluded that “[t]he goal of no-net-loss of wetlands is not being met for wetland functions by the mitigation program, despite progress in the last 20 years.” National Research Council, *Compensating for Wetland Losses Under the Clean Water Act*, June 2001, at 2.
 21. The term “watershed approach” is defined in the regulations as “an analytical process for making compensatory mitigation decisions that support the sustainability or improvement of aquatic resources in a watershed. It involves consideration of watershed needs, and how locations and types of compensatory mitigation projects address those needs. A landscape perspective is used to identify the types and locations of compensatory mitigation projects that will benefit the watershed and offset losses of aquatic resource functions and services caused by activities authorized by DA permits. The watershed approach may involve consideration of landscape scale, historic and potential aquatic resource conditions, past and projected aquatic resource impacts in the watershed, and terrestrial connections between aquatic resources when determining compensatory mitigation requirements for DA permits.” 33 C.F.R. § 332.2.
 22. U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, *Compensatory Mitigation for Losses of Aquatic Resources*, Final Rule, 73 Fed. Reg. 19594, 19605 (Apr. 10, 2008).
 23. California Wetlands Conservation Policy (established by Executive Order W-59-93).
 24. California Coastal Commission, *Procedural Guidance For The Review Of Wetland Projects In California’s Coastal Zone*, Chapter 2.
 25. <http://dnr.state.il.us/wetlands/ch6e.htm>, The Illinois Interagency Wetland Policy Act Of 1989; 17 Illinois Administrative Rules Section 1090.50 Wetland Review Process.
 26. <http://www.cbbel-in.com/cbbelwetland/mitigation.htm>.
 27. <http://www.maine.gov/sos/cec/rules/06/096/096c310.doc>.
 28. Code of Maryland Regulations, Title 26, §§ 26.23.04.03 and 26.24.05.01 accessible from http://www.mde.state.md.us/Programs/WaterPrograms/Wetlands_Waterways/regulations/regulations.asp.
 29. http://www.michigan.gov/deq/0,1607,7-135-3313_3687-86447--,00.html.
 30. Minnesota Regulation 8420.0546 at <http://www.bwsr.state.mn.us/wetlands/publications/MNRegulations.pdf>.
 31. http://www.dnr.mo.gov/env/wpp/401/mitigation_guidelines.pdf.
 32. http://www.des.state.nh.us/Rulemaking/adopted2005/Wt_200-800.pdf.
 33. New Jersey Administrative Code 7:7A-15.8.
 34. <http://www.dec.state.ny.us/website/dfwmr/habitat/wetlmit.pdf>.
 35. Ohio Administrative Code 3745-1-54(F)(1).
 36. <http://www.oregonstatelands.us/fact6.pdf>.
 37. <http://www.cicacenter.org/swift2.cfm?st=PA>.
 38. <http://www.cicacenter.org/swift2.cfm?st=RI>.
 39. http://www.scdhec.net/ocrm/PUBS/New_CARegs_03.doc, South Carolina Office Of Ocean And Coastal Resource Management Rules And Regulations For Permitting In The Critical Areas Of The Coastal Zone.
 40. http://tennessee.gov/environment/wpc/publications/2005RuleAmend1200_04_07.pdf.
 41. <http://www.state.vt.us/wtrboard/wet/wetrule2002.pdf>, Vermont Wetland Rules.
 42. <http://www.deq.state.va.us/wetlands/mitigate.html>.
 43. <http://www.ecy.wa.gov/pubs/0406013a.pdf>.
 44. West Virginia Code of State Rules, Title 47, Series 5A (47 CSR 5A) accessible at <http://www.wvsos.com/csr/verify.asp?TitleSeries=47-05A>.
 45. http://www.dnr.state.wi.us/org/es/science/publications/wetland_mitig.pdf.

Chapter 4

The Corps and Congress Project Politics and Funding

I. Authorizing Corps Activities

- A. Overview of the Water Resources Development Act
- B. Influencing a Water Resources Development Act

II. Funding Corps Activities

- A. The Budget Process
- B. The Appropriations Process

III. Understanding the Legislative Process

- A. The Congressional Committee System
- B. House and Senate Floor Proceedings

The U.S. Congress approves and funds Corps studies, projects, and programs, and establishes key Corps policies. As a result, working effectively with Members of Congress is critical for improving the way the Corps manages the nation's rivers and wetlands. This chapter describes the processes used by Congress to authorize and fund Corps activities and identifies opportunities for influencing those processes.

Activist Tip

Congress controls the construction of new Corps projects, establishes the laws and policies that guide the Corps, and funds the Corps' activities. To influence these processes, activists should strive to build strong working relationships with their Members of Congress and Congressional staff.

I. Authorizing Corps Activities

The main legislative vehicle for authorizing and modifying Corps studies, projects, and programs is the Water Resources Development Act (WRDA, pronounced “were-da”).¹ WRDA is also the legislative vehicle used to create or modify policies for the Corps' civil works program, such as planning procedures, cost-sharing, and mitigation requirements for Corps projects. Congress typically attempts to pass a WRDA every two years — during even numbered years to coincide with elections — but it is not required to do so.

Understanding the authorizing process is very important, because in most instances the Corps may not study or build a project unless it receives explicit Congressional authorization to do so. Typically, each project will require two separate authorizations. Congress will first authorize the Corps to study a problem and recommend a project to address the problem. Congress then must authorize construction of the project recommended by the Corps' study. Only projects or studies that fall under one of the Corps' “continuing authority” programs can proceed without specific Congressional authorization, although Congress often will authorize specific projects under those programs to ensure construction. *See Chapter 2 for additional information on obtaining study and project authorizations.*

A. Overview of the Water Resources Development Act

Either the administration or Congress can initiate a WRDA.

The administration can initiate a WRDA by sending a proposal to Congress. The administration's proposal will be developed by the Corps, the Office of the Assistant Secretary of the Army for Civil Works (the civilian head of the Corps), and the Office of Management and Budget. Once sent to Congress, the administration's proposal will be considered by the Senate and House Committees with jurisdiction over WRDA and the Corps' civil works program.

The Committees with jurisdiction over WRDA and the Corps' civil works program are the Senate Environment and Public Works (EPW) Committee and its Transportation and Infrastructure Subcommittee, and the House Transportation and Infrastructure (T&I) Committee and its Water Resources and Environment Subcommittee. These Congressional Committees can — and often do — develop WRDAs on their own. *See Section III below for more on the Committee system.*

The House T&I Committee and/or its Subcommittee typically hold one or two hearings in March or April of even numbered years to evaluate projects and policies that various Members of Congress and constituencies would like included in WRDA. The Senate EPW Committee usually follows with a similar process four to six weeks later. In both chambers, the Subcommittee staff will solicit project requests from Members of Congress and develop a WRDA bill. Committee staff typically pay particular attention to project requests from Members of Congress in leadership positions who can help steer a WRDA bill through their respective chambers.

The Subcommittee and Committee chairs and their staff typically attempt to develop WRDA in a cooperative and bipartisan fashion to ensure rapid Committee and floor action. Committee and floor consideration of a WRDA usually take place in July and September, respectively, so that final passage will occur just before elections. The public generally has little time to review the bills in advance of Committee action — actual bills or bill proposals often surface only a few days before a Committee meets to “mark up” the bill. In addition, many of the most controversial proposals are added in rewrites of the bills, called “manager’s amendments,” that are finalized by Committee staff just before WRDA reaches the House or Senate floor. As a result, the public and media are often left in the dark about important proposed changes or additions.

As with all bills, any differences between a House and Senate passed WRDA must be resolved before a bill can be sent to the President for signature. This is done through a conference Committee consisting of Members of both the House and Senate. It is extremely difficult to influence the conference process, and the public typically has very limited input into this process.

Tracking Policies and Projects in Water Resources Development Acts

The project and policy provisions included in a particular Water Resources Development Act may be amended, superseded, or replaced by provisions in later bills.

Most Corps-wide policies established by the various WRDAs have been codified in Title 33 of the U.S. Code, where they are updated as any changes are made. As a result, you should refer to the Code for the Corps’ current policy requirements. The U.S. Code can be accessed at <http://www.gpoaccess.gov/uscode/index.html> or <http://www.findlaw.com/cascode/uscodes/>.

Project authorizations and modifications are not compiled in this way, and there is no publicly accessible compilation of projects and subsequent modifications. As a result, to be sure you have all provisions pertaining to a specific project you will need to look through all WRDAs enacted since the project was first authorized. Fortunately electronic versions of the WRDAs and the “find” function make this task fairly easy. For projects authorized prior to 1974, you also may need to look in the Flood Control Acts for flood damage reduction projects, and in the Rivers and Harbor Acts for navigation projects.

Activist Tip

Never assume that your Members of Congress are aware of problems with a particular Corps project. All too often, they will have heard only the most glowing description of the project from project proponents. Activists should inform their Members of Congress about problems with a project as early as possible in the project planning process.

B. Influencing a Water Resources Development Act

Understanding the various pressure points and the general dynamics at play in any given Congress is essential to developing and implementing an effective strategy to authorize, stop, or modify specific Corps projects and policies through the legislative process.

A host of factors can influence whether a WRDA bill will move in any given year. For example, other legislative priorities — particularly those being handled by the Committees with jurisdiction over the Corps, like the federal Highway bill — may move WRDA to the back burner. Concerns with a large federal deficit also can make WRDA less attractive to a fiscally conservative Congressional leadership. Issues related to the applicability of Davis-Bacon (the “prevailing-wage” labor law that requires payment of the prevailing union wages for all workers on a public works project) to Corps projects, have also prevented WRDA from moving.

On the other hand, a desire to authorize a specific project can help drive efforts to pass a WRDA in any given year. For example, the Upper Mississippi and Illinois lock expansion project was the driving force in the Senate’s unsuccessful effort to pass a WRDA in 2004. The desire to authorize the Everglades Restoration project was the driver for passing WRDA 2000. Where a WRDA has not moved for a number of years, the pent-up desire for new projects (and for Members to be able to point to their ability to bring money into their states) can move a WRDA through.

Influencing Project Authorizations: The most effective way to obtain, prevent, or modify a project authorization is to work with the Members of Congress in the state where the project will be constructed. Other Members of Congress typically defer to the views of the Congressional delegation from the project state. However, it is possible to generate out-of-state Member opposition to a particularly costly and destructive project, and to generate out-of-state Member support for a project with significant restoration benefits.

It is critical to let Members of Congress know about concerns with, or support for, Corps projects located in their state. To effectively fight or support a project in or affecting multiple states, it is vital to work with activists in each of the affected states so that all appropriate Members of Congress are hearing directly from their constituents. Activists should also work to generate opposition or support for a project from scientists, economists, other conservation organizations, and non-traditional allies where possible. As many of these constituencies as possible should contact the appropriate Members of Congress (or their staff) directly. Activists should also inform the appropriate Committee staff about their concerns or support. Activists should also work to generate media coverage about the project, and make sure that any articles and editorials supporting their position are provided to key Members of Congress.

Activist Tip

There are many ways to inform Members of Congress of your positions on Corps projects and policies. Activists should use as many of these tools as possible:

- Send letters to your Representative and Senators, to the chair and ranking member of the appropriate Committees, and in some cases to all Members of the House or Senate. Always send letters by email or fax if you cannot deliver them by hand.
- Meet with Members of Congress or their staff in Washington, D.C., and meet with your Members of Congress when they are in your state during Congressional recesses.
- Urge friendly Members of Congress to send a letter that supports your position to the chair and ranking member of the appropriate Committee, and to circulate a “Dear Colleague” letter that asks other Members of Congress to sign on to the letter that supports your position.
- Work with a friendly Member of Congress to host a Congressional staff briefing to provide information about a project or proposed policy reform. For example, in October 2004, activists from Florida worked with Senator Graham’s staff to conduct a briefing on the need to deauthorize navigation dredging on the Apalachicola River.

Influencing Policy Changes: A broad-based and concerted strategy typically is required to institute legislative policy changes for the Corps. This strategy must be designed to overcome the aversion that many Members of Congress have to altering rules that foster construction of projects that bring money into their states and that are supported by powerful constituencies. Generating media coverage of key flaws — and, if they exist, scandals — with the Corps’ project planning and operations processes is essential to effectively carrying out such a strategy. For example, recent reform efforts obtained a significant boost when a Corps economist announced that the Corps had deliberately manipulated data in an attempt to justify expansion of locks on the Mississippi and Illinois Rivers — these allegations later were confirmed by the Department of the Army Inspector General and the National Academy of Sciences.

Congress’ willingness to implement policy reforms can also be tied directly to the level of interest in authorizing new Corps projects. The stronger the push for new project authorizations (which can be driven by pent up demand), the more willing Members of Congress may be to address needed policy reforms. For example, significant Corps reforms were implemented in 1986 after reform proponents forced an almost decade-long WRDA hiatus. Despite several attempts, no WRDA was enacted from 1977 to 1985. Reforms were enacted in WRDA 2007 after the environmental and taxpayer communities caused a six year pause in the passage of WRDA (from January 2001 to November 2007).

Efforts to prevent passage of a WRDA can be aided by highlighting the overall cost of the bill or a particularly costly or controversial project included in the bill. Both of these were used in 2004 to help stop attempts to pass the WRDA reported out of the Senate EPW Committee. The Congressional Budget Office determined that the EPW-reported WRDA 2004 would cost an incredible \$17.7 billion through 2019. The Senate bill also included a \$1.5 billion authorization for new and expanded locks on the Upper Mississippi and Illinois Rivers — a project that had been wrapped in controversy for years — despite the fact that the Corps had not finalized its feasibility study or issued a Chief’s Report for the project.² Reform proponents used the cost of the bill and the controversy surrounding the lock expansion project to argue that the Senate bill would add significantly to the ballooning federal deficit and that the bill would not pass easily. See Chapter 5 for more on Congressional Budget Office cost estimates. Interestingly, the WRDA ultimately passed by Congress in 2007 authorized more than \$23 billion worth of new activities.

Activist Tip

The President's Budget provides two key opportunities for influencing the amount of money that Congress ultimately will give to the Corps.

First, influencing the President's Budget can help set the tone for the Congressional appropriations debate that will follow. Though not easy, it is possible to influence the President's Budget by working with the Office of Management and Budget (OMB). OMB works with the Corps to develop its budget and has a small staff dedicated to reviewing Corps projects. You can contact OMB to discuss your concerns with, or support for, a project and recommend an appropriate funding level (e.g., zero or full funding). You also can urge OMB to include specific policy recommendations in the budget. If you want to increase funding for a Corps project, you may be able to increase the budget request by working directly with sympathetic Corps staff.

Second, you can use the President's budget to launch a media campaign to influence the Congressional appropriations process. Release of the President's budget is an excellent opportunity to issue a press release and/or work directly with reporters to obtain media coverage of projects of concern funded by the President's budget.

II. Funding Corps Activities

The Corps, like all federal agencies, is funded for only one year at a time. The Corps' funding is established each year through a two-step process. In the first step, the White House and then Congress develop a government-wide budget for all federal activities. Using the budget as a guide, Congress then develops and passes detailed legislation that appropriates money for specific activities.

Each of these processes — budget and appropriations — covers the federal fiscal year (FY). The federal government's fiscal year begins on October 1 and ends on the following September 30 in the named fiscal year. So, for example, FY 2004 runs from October 1, 2003 through September 30, 2004.

A. The Budget Process

The federal budget describes how the federal government will allocate funds to implement federal laws and run federal agencies for a given fiscal year. Budget planning starts 18 months before the fiscal year covered by a budget, and involves two separate but related steps: formulation of the President's budget and formulation of Congress' budget.

The President's Budget: The President is required by law to submit a comprehensive federal budget for the upcoming fiscal year to Congress each year, no later than the first Monday in February. The portion of the President's budget devoted to the Corps sets forth specific funding amounts for individual civil works projects and programs.

In addition to recommending funding amounts for specific projects, the President's budget also sets forth policies underlying the budget and may recommend specific legislative changes that have budget implications. *See the Box right for examples of policy provisions contained in recent Presidential budgets.*

The President's budget typically is developed over an 18-month period. The Corps starts the process by developing a proposed budget. That proposed budget is submitted to the Office of Management and Budget (OMB) almost 12 months before the beginning of the fiscal year covered by the proposed budget (typically in September or October). OMB reviews the financial needs of the agency and its programs and negotiates with the Corps over the amount of money to be included in the Corps' budget. OMB sends the budget back to the Corps in late November or December — a process known as the "passback." The Corps then revises its budget request and prepares supporting material for inclusion in the President's budget submission to Congress. The Corps' final budget is then included in the budget submitted to Congress in February.

Corps Reform Policies Articulated in Recent Presidential Budgets

In FY 2002, the President's budget recommended focusing Corps resources on its high priority mission areas of flood damage reduction, navigation, and ecosystem protection and restoration and on completing high priority projects. The budget limited new construction to just two projects, redirected construction funding "away from ongoing projects that are not economically justified, are environmentally damaging, or violate other established policies," and redirected operation and maintenance funding away from low-use inland waterway segments.

In FY 2003, the President's budget again stressed the need to reduce the backlog of ongoing construction projects by completing high priority projects as soon as possible and not starting new projects. The budget also announced that the administration would soon release a proposal for independent review of significant projects.

In FY 2004, the President's budget recommended principles for improving the Corps' program that mirrored some key reforms long sought by environmental and taxpayer advocates: (1) external review of Corps projects to ensure use of sound and modern science, economics, and analytical techniques; (2) pursuit of only those authorized projects that "meet current economic and environmental standards and that address contemporary needs;" (3) pursuit of only those projects that provide "a very high net economic or environmental return to society relative to their cost;" (4) prioritization of projects within a watershed based on the comparative net economic or environmental return; (5) deauthorization of projects outside the Corps' main mission areas, of navigation projects with extremely low commercial use, and of inactive projects; and (6) requiring local entities to pay their fair share for Corps projects.

In FY 2005, the President's budget reiterated its FY 2002 to FY 2004 recommendations and focused funding to support these principles. The budget zeroed out funding — and proposed canceling previously appropriated but unused funding — for the highly destructive Yazoo Pumps project. The budget also zeroed out funding for other wasteful and destructive projects, including the Upper Mississippi Navigation Expansion Study; the Grand Prairie Irrigation Demonstration Project in Arkansas; the Dallas Floodway Extension Project in Texas; the Delaware River Deepening Project in Delaware, New Jersey, and Pennsylvania; and the Columbia River Deepening Project in Washington and Oregon.

In FY 2006, the President's budget proposed a new initiative to apply objective, performance-based guidelines to prioritize funding to Corps projects that maximize overall net economic and environmental returns. The Budget redirected Corps funding to nationally important environmental restoration projects, including Everglades Restoration, the Upper Mississippi River Environmental Management Program, and Missouri River Fish and Wildlife Recovery. The Budget also zeroed out funding for a number of harmful projects, including outdated and environmentally destructive projects within the Mississippi River & Tributaries Program, the Grand Prairie Irrigation Demonstration Project in Arkansas, the Dallas Floodway Extension Project in Texas, and the New Madrid Levee and pumping plant in Missouri.

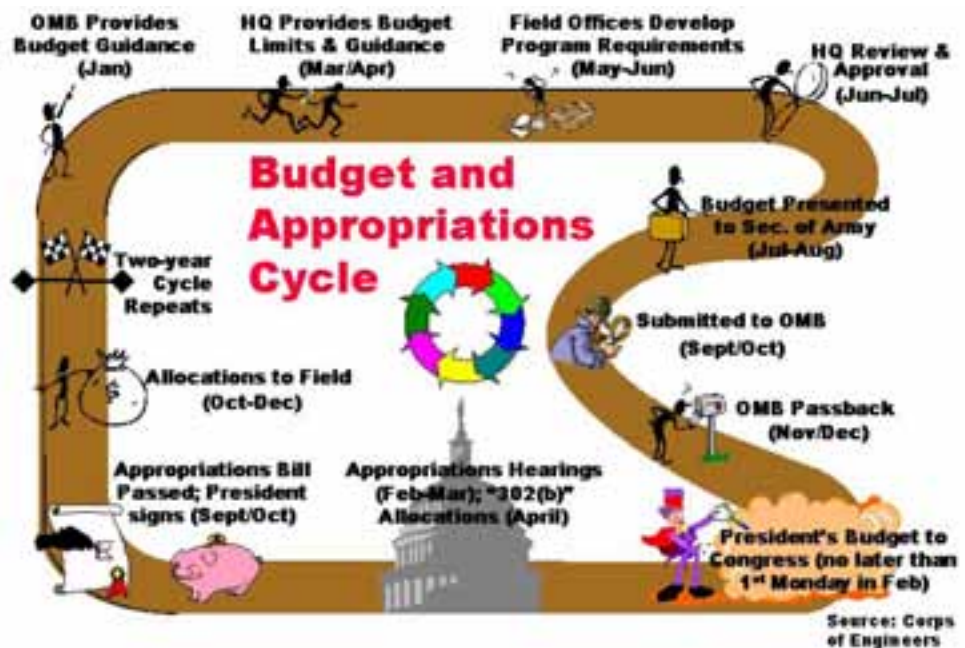
In FY 2010 (the first budget prepared by the Obama Administration), the President's budget focused funding on the Corps' primary mission areas of navigation, flood damage reduction, and ecosystem restoration. Money was also directed towards maintenance of existing critical infrastructure. The budget identified as a high priority, funding for restoration of Louisiana coastal wetlands, including effectively closing the Mississippi River Gulf Outlet. The budget also announced that the Corps would focus "on developing new strategies, along with other Federal agencies and non-Federal project partners, to better manage, protect, and restore the Nation's water and related land resources, including floodplain and flood-prone coastal areas" and would strengthen accountability and transparency in the spending of federal tax dollars. The budget also proposed phasing out the excise tax on diesel fuel that is used to fund the inland waterways trust fund, and replace it with a lock usage fee.

Congress' Budget: After receiving the President's proposed budget, Congress reviews the spending proposals and begins its own budget process. Congress is not bound by the President's budget and often deviates substantially from the President's proposal.

In preparing its budget, Congress first establishes total spending and revenue levels to be met for the upcoming fiscal year (and the following four fiscal years) to guide budget development. Both the House and Senate attempt to pass a "budget resolution" establishing these levels by April 15. Both chambers attempt to — but do not always — agree to a single budget resolution. Congress is supposed to keep spending within the limits established by the budget resolution, but ultimately can choose to exceed those limits.

The "discretionary spending" amounts contained in the budget resolution are allocated to the House and Senate Appropriations Committees, in a process known as the "302(a)" allocation. Discretionary spending is spending that requires specific, annual appropriations by Congress, and it accounts for about one-third of all federal spending.³ The House and Senate Appropriations Committees then subdivide the 302(a) allocation among the separate Appropriations Subcommittees, in a process known as the "302(b)" allocations.

All of these steps are supposed to be completed before the House and Senate consider any appropriations bills. However, the Appropriations Committees may move forward with appropriations legislation without a Congressional budget if a budget is not completed by May 15. *For more on the budget process, see the Office of Management and Budget's "A Citizen's Guide to the Federal Budget" at <http://www.gpoaccess.gov/usbudget/fy02/pdf/guide.pdf>.*



Activist Tip

Activists should not lose heart if Congress authorizes a destructive Corps project. Corps projects cannot move forward until funds are appropriated, and Congress often will not appropriate the necessary construction monies. As of 2004, more than 500 authorized Corps projects had received no construction funding.

Activists can work with Members of Congress to zero out, or cut, funding for projects of concern (and to increase funding for environmentally sound projects). Though appropriations battles can be frustrating because they often need to be repeated over many years, they can effectively stop a destructive project or at least buy more time to expose significant flaws in the Corps' original planning process.

B. The Appropriations Process

The House and Senate Appropriations Committees each have twelve Subcommittees that develop appropriations bills to fund the federal government's discretionary spending. These Subcommittees draft their appropriations bills guided by the budget resolution.

In both the House and Senate, the Appropriations Subcommittee with jurisdiction over the Corps' civil works program is the Energy and Water Development Subcommittee. The appropriations bill that establishes the Corps' funding is the Energy and Water Development Appropriations bill (E&W appropriations bill). In addition to funding the Corps, the E&W appropriations bill funds parts of both the Department of Energy and the Department of the Interior's Bureau of Reclamation.

The Corps' section or "title" of the E&W appropriations bill includes the total dollar amounts for each function of the Corps — General Investigation, Construction, Mississippi River and Tributaries, and Operation and Maintenance. The E&W bill also typically includes a limited number of specific project earmarks (i.e., the bill directs a certain amount of appropriated money to specific Corps projects). More detailed funding directions are included in the E&W Conference Report (or another committee report referred to in the Conference Report), which will typically break out each of the Corps' functional accounts by state and assign a specific dollar amount to individual projects in each state. This is in striking contrast to the lump sums for multiple projects or programs included in the appropriations bills for most other agencies.

The Energy and Water Development Subcommittees in both the House and Senate hold hearings on the Corps' budget request and invite Corps officials (generally the Chief of Engineers and Assistant Secretary of the Army for Civil Works) to describe their funding needs and answer questions. These hearings typically are held in February or March. The Corps also provides Congress with "budget justifications" for each project in the President's budget that explain how the Corps will spend the requested money.⁴ These justifications may provide important information for a project you are fighting, and they are publicly available on the Corps' website though typically are extremely difficult to find. The Subcommittees also will solicit appropriations requests from other Members of Congress. The public is also invited to submit written testimony on projects and programs that should be funded (or not funded) in the Corps' budget.

The Subcommittee will consider the bill and any amendments during what is known as a "mark-up," and ultimately will vote to "report" the bill to the full Appropriations Committee for its consideration and approval. A second mark-up can also take place at the full Appropriations Committee. During mark-ups, Members of Congress frequently add money for their favorite projects and occasionally cut funding for controversial projects.

Once the full Appropriations Committee reports out the bill,⁵ it is ready to be sent to the House or Senate floor. The House normally completes action on appropriations bills first. The Senate will then take into account the House-passed version when developing its own bill. The House normally passes its E&W appropriations bill sometime during May to July, with Senate passage a month or two later.

Like all legislation, after both chambers pass an E&W appropriations bill, any differences between the two versions must be resolved so that identical language is passed in both the House and the Senate before being sent to the President for signature. The conference Committee, which normally consists of Members of the House and Senate Appropriations Subcommittees, will finalize the bill through a Conference Report. In the appropriations process the Conference Report is actually the final version of the appropriations bill that is sent to the President to be signed into law. Any provisions enacted in the bill signed into law are legally binding.⁶

The entire appropriations process must run its course annually to keep the federal government operating. If an appropriations bill is not completed by October 1, the beginning of the fiscal year, Congress must adopt a “continuing resolution” (CR) to provide stopgap funding until the bill is passed.⁷ Congress may pass several CRs (often extending funding for only a few weeks at a time) that continue to fund the government at current levels until the new Fiscal Year’s spending is approved. Each CR will only cover those agencies for which a final appropriations bill has not yet been enacted. Sometimes, if the October 1 deadline is nearing or has already been missed, Congress will package numerous appropriations bills into one massive “omnibus” bill, instead of passing bills individually. This has happened repeatedly in recent years.

Locating an Appropriation for a Particular Corps Project or Program

To find the amount of money appropriated to a particular Corps project you will need to look under one of the three main appropriations accounts — general investigations, construction general, and operations and maintenance — and under the appropriate account state listing in the final E&W appropriations bill and Conference Report. The wetlands regulatory program, Formerly Utilized Sites Remedial Action Program (FUSRAP), and general expenses are listed separately.

The three main appropriations accounts correspond to the study, construction, and operations and maintenance phases of Corps projects. Each of these main accounts also contain separate sections for “Flood Control, Mississippi River and Tributaries, Arkansas, Illinois, Kentucky, Louisiana, Mississippi, Missouri, and Tennessee” and “miscellaneous,” which includes the Corps’ programs such as the Great Lakes Remedial Action program, Planning Assistance to the States, and the various Continuing Authority Programs. The conference report typically will further subdivide the accounts by state. Thus, to find the amounts appropriated to a particular project in Mississippi, you would need to look under both the Mississippi listings for the appropriate account and under the Mississippi listings for the Flood Control Mississippi River and Tributaries account.

Directing Substantive Actions Through Appropriations Bills: While House and Senate rules generally prohibit the authorizing and appropriations Committees from encroaching on each other's functions, the Committees do not always follow these rules. As a result, appropriations bills sometimes include provisions that impose substantive requirements. These requirements can be imposed via numerous vehicles that often are offered during mark-up or on the House or Senate floor.

A “rider” is a provision attached to an appropriations bill that imposes a substantive requirement that should properly be included only in an authorizing bill. Since Congress must pass appropriations bills each year, riders are used to pass substantive provisions that may face controversy or delay in the normal authorization process. A “limitation” restricts the expenditure of funds provided in an appropriations bill by either prohibiting their use for a specified purpose or setting a spending ceiling on a particular project or program. Provisions also can be added to specify how the Corps is to spend appropriated funds on a particular project or program. An “earmark” directs a portion of an appropriation to a specific project or activity. However, since by practice almost all Corps projects are funded in this way (on a project-by-project basis), technical earmarks are less of an issue for the Corps' appropriations.

Riders, limitations, and other directive language in an appropriations bill typically apply only to the fiscal year in which the appropriations bill is in effect, though by their terms they may extend longer. In the appropriations process, the Conference Report is actually the final version of the appropriations bill that is sent to the President to be signed into law. As a result, any such directives in the enacted E&W Conference Report carry the force of law.

Additional explanations regarding how appropriated funds are to be spent can also be included in the managers' “joint explanatory statement” that typically accompanies the E&W Conference Report, and in Senate and House Appropriation Committee reports. Spending directives contained in these documents do not carry the force of law (unless otherwise provided in the enacted Conference Report), but agencies rarely deviate from the instructions contained in a joint explanatory statement or Committee report adopted by the conferees as these instructions represent the intent of Congress.

III. Understanding the Legislative Process

To effectively influence Corps projects or policies through the legislative process, it is important to be familiar with the workings of the Congressional Committees and with the procedures used by the House and Senate for considering and passing legislation. This section provides an overview of these processes.

A. The Congressional Committee System

Congress relies heavily on the Committee system to handle the many complex issues it addresses. The Senate and House divide their work among approximately 250 Committees and Subcommittees. Each Committee is assigned issues over which they have jurisdiction, and they wield enormous power over the issues under their control. As a result, working effectively with Committee and Subcommittee staff is important for influencing legislation.

Different Committees handle Congress' policy and funding responsibilities.⁸ House and Senate legislative Committees are responsible for legislation that deals with the substantive duties and programs of the federal agencies (*e.g.*, WRDA). The appropriations Committees have jurisdiction over funding federal agencies and their programs (*e.g.*, funding provided through the E&W appropriations bill).

Congressional Committees With Jurisdiction Over the Corps

U.S. House of Representatives

- Legislative — Transportation and Infrastructure (T&I) Committee and its Water Resources and Environment Subcommittee
- Appropriations — Appropriations Committee and its Energy and Water Development Subcommittee

U.S. Senate

- Legislative — Environment and Public Works (EPW) Committee and its Transportation and Infrastructure Subcommittee
- Appropriations — Appropriations Committee and its Energy and Water Development Subcommittee

The primary functions of a Committee and its Subcommittee are to conduct hearings and investigations; take legislative action (by drafting bills and reporting legislation to the full House or Senate for possible consideration); and carry out oversight of the federal agencies under their jurisdiction. Senate Committees also fulfill the Senate's constitutional roles to consider treaties and Presidential nominees.

Committee and Subcommittee chairs and a majority of the Committee's members are from the majority party in the House or Senate. Committee and Subcommittee "ranking members" are lead members from the minority party in the House or Senate. For example, in the 108th Congress (2003-2004), the Republicans were the majority party in the House and Senate (*i.e.*, they held a majority of the 435 House seats and a majority of the 100 Senate seats). Thus, Committee chairs were Republicans and the ranking members were Democrats. In the 111th Congress (2009 -2010), the Democrats are the majority party in the House and Senate and, as a result, Committee chairs are Democrats and ranking members are Republicans. Committee and Subcommittee chairs wield an enormous amount of power. For example, they can determine whether the Committee will consider a specific issue or piece of legislation. In most cases, if a Committee refuses to address a measure it will receive no further action.

Holding Hearings and Soliciting Comments: When a Committee or Subcommittee chooses to consider a measure it will usually ask the appropriate federal agencies to submit written comments on the measure. Committees and Subcommittees also may hold hearings to gather information and views from non-Committee experts, including other members of Congress, federal agency staff, or outside experts such as those in the environmental community.⁹ Hearings can be held in Washington, D.C. or elsewhere, and can be held at any time, even if the House or Senate is adjourned or in recess. Hearings are generally open to the public, and most hearings can now be viewed via the Internet.¹⁰

A hearing agenda and witnesses are usually set by the Committee chair, but minority members of a Committee often work with the majority in selecting witnesses to represent their views since they are entitled to call witnesses of their choice on at least one day of a hearing. Witnesses must file an advance copy of their written testimony with the Committee, and their oral testimony before the Committee is generally limited to five minutes. *See the Box on the next page for a list of recent hearings addressing Corps Reform issues.*

Recent Committee Hearings Addressing Corps Reform Issues

Copies of written testimony can be accessed at the “hearings” sections of the Committee websites.

March 15, 2007 – Hearing on water resources needs and the President’s budget proposal for the Army Corps of Engineers for Fiscal Year 2008, before the Senate Transportation and Infrastructure Subcommittee of the Environment and Public Works Committee. *Pro-reform written testimony submitted by American Rivers and endorsed by Earthjustice, Environmental Defense, and National Wildlife Federation.*

March 15, 2006 – Hearing on strengthening the Nation’s water infrastructure and U.S. Army Corps of Engineers planning priorities, before the House Energy and Resources Subcommittee of the Government Reform Committee. *Pro-reform testimony given by American Rivers and Taxpayers for Common Sense.*

March 31, 2004 – Hearing on the Corps’ role in the nation’s water resource needs in the 21st century, before the Senate Transportation and Infrastructure Subcommittee of the Environment and Public Works Committee. *Pro-reform testimony given by Environmental Defense.*

March 5, 2003 – Hearing on independent peer review in agency decision making, before the House of Representatives Water Resources and Environment Subcommittee of the Transportation and Infrastructure Committee. *Pro-reform testimony given by American Rivers.*

June 18, 2002 – Hearing on the Water Resources Development Act of 2002, before the Senate Environment and Public Works Committee. *Pro-reform testimony given by Senator Russ Feingold (D-WI); National Wildlife Federation; Taxpayers for Common Sense; G. Edward Dickey, Ph.D., economist and former Deputy Assistant Secretary in the Office of the Assistant Secretary of the Army for Civil Works and former Chief of the Corps’ Planning Division; and Association of State Floodplain Managers. Additional pro-reform written testimony submitted by American Rivers, Audubon of Florida, National Audubon Society, and National Taxpayers Union.*

April 10, 2002 – Hearing on the Water Resources Development Act of 2002, before the House of Representatives Water Resources and Environment Subcommittee of the Transportation and Infrastructure Committee. *Pro-reform testimony given by American Rivers and National Wildlife Federation.*

March 7, 2002 – Hearing on the impacts of a reduced Army Corps of Engineers budget, before the House of Representatives Water Resources and Environment Subcommittee of the Transportation and Infrastructure Committee. *Pro-reform testimony given by Taxpayers for Common Sense.*

March 15, 2001 – Hearing on the media allegations that the Corps is a “rogue” agency, before the Senate Transportation and Infrastructure Subcommittee of the Environment and Public Works Committee. *Testimony given by Robert Flowers, Corps’ Chief of Engineers; no environmental or taxpayer testimony given.*

May 16, 2000 – Hearing on the Water Resources Development Act of 2000, before the Senate Transportation and Infrastructure Subcommittee of the Senate Environment and Public Works Committee. *Pro-reform testimony given by American Rivers.*

Activist Tip

Activists should seek assistance from seasoned lobbyists to develop a legislative strategy.

To effectively carry out a legislative strategy, it is important to develop strong working relationships with Committee Members and Committee staff to help ensure that your issues are properly addressed at the Committee level. It is much more difficult to pursue your legislative objectives without Committee support.

If you are successful in Committee you may need to develop a floor strategy to retain your Committee “win.” If you are unsuccessful in Committee, you will need to decide whether to continue your legislative efforts. It is at this point that understanding House and Senate floor procedures becomes important. For example, if you have been unable to prevent a project from being authorized in a WRDA reported by the House Transportation and Infrastructure Committee, you might pursue a floor amendment to strike the authorization from the bill. However, if the House decides to consider the WRDA under “suspension of the rules” no amendments can be offered and you would need to develop another strategy.

Considering Legislation: By practice, legislation is referred to a Subcommittee before the full Committee considers it — although WRDA sometimes bypasses the Subcommittee process. A Committee or Subcommittee can consider legislation already introduced, or can draft its own legislation. A Subcommittee often drafts WRDAs using Member project requests, reform proposals, and introduced reform legislation as a guide.

A Committee or Subcommittee will consider a specific bill through a process known as a “mark-up.”¹¹ During its mark-up, the Subcommittee will vote on whether to amend and/or “report” the bill to the full Committee for its consideration.¹² During a full Committee mark-up, the full Committee will vote on whether to amend and/or report the bill to the full House or Senate. Timing of consideration of a bill on the House or Senate floor is heavily influenced by the leadership in the respective chamber.

A Committee’s influence over a bill continues through the floor vote. In both the House and Senate, the chair and ranking member of the Committee that reported the bill typically manage the proceedings during the full chamber’s deliberation. Committee chairs also often offer a “manager’s amendment,” which is considered before other amendments may be offered. A manager’s amendment can range from technical corrections to major substantive changes to the bill reported out of Committee (major changes usually are negotiated with Committee staff in advance). Committee members also generally will be appointed to any conference Committee created to reconcile the differences between House and Senate versions of a bill.

B. House and Senate Floor Proceedings

The procedures used to debate and consider a bill vary considerably between the House and Senate. These differences are driven by the distinct approaches to moving legislation in the two chambers. In general, the House seeks to ensure that a majority of Members (from either one or both parties) can make decisions without unwarranted delays caused by a minority of Members. In contrast, the Senate employs a more deliberate decision-making process that provides significant protection to the concerns of individual Senators. *See the Box on the following page for some key differences between the House and Senate floor procedures.*

Key Differences Between House and Senate Deliberations

	House	Senate
Approach	Majority should rule without unwarranted delays by the minority.	Views of individual Senators must be considered even where it slows down the deliberation process.
Debate	<p>Debate time is limited. Members typically are given only five minutes to speak, and can speak for more than one hour only by unanimous consent. A simple majority vote can end debate, but special rules can be passed to control debate on a particular bill.</p> <p>Designed to prevent “filibusters” or other delaying actions on measures with majority support.</p>	<p>Debate time and time to offer amendments is unlimited, and “non-germane” amendments can be offered (amendments that are not relevant to the measure under consideration), unless there is a unanimous agreement to proceed in a different manner.</p> <p>Allows use of “filibusters” to delay or prevent votes. A filibuster ends only when the speaker chooses to stop (or is too fatigued to continue), unanimous consent is reached on the measure at issue, or a 3/5 majority votes for “cloture” which cuts off debate after 30 additional debate hours.</p>
Floor Procedures	<p>Consideration of a bill can proceed under one of a number of procedures that typically will be chosen based on the amount of controversy surrounding the bill:</p> <ol style="list-style-type: none"> (1) Unanimous consent — used when bills have almost no opposition; allows little or no floor time for debate and no significant amendments. (2) Suspension of the rules — used when bills have overwhelming but not unanimous support; debate generally is limited to 40 minutes; floor amendments are prohibited; requires a 2/3 vote to pass. (3) Corrections Calendar — allows one hour of debate and one opportunity for floor amendments; requires a 3/5 vote to pass. (4) In the House — usually allows only one hour of debate after which a majority typically votes to cut off further debate and amendments; requires a simple majority to pass. (5) Committee of the Whole — used when bills are controversial; debate typically lasts for more than one hour with time divided equally between the floor managers; floor managers make opening statements and yield portions of their time to allow other members to speak. After general debate, Members may consider and debate amendments with debate limited to five minutes per amendment. After the last amendment is offered, the Committee of the Whole reports the bill to the House. The House votes on the amendments before voting to pass or reconsider the measure. 	<p>Consideration of a bill follows standard Senate rules, unless there is unanimous consent to proceed in a different fashion (<i>i.e.</i>, not one Senator objects).</p> <p>Absent a special agreement, consideration of a bill begins with opening statements by the floor managers. The presiding officer of the Senate then must recognize, in order, any Senator who wishes to speak. If unanimous consent is obtained to limit time for debate and/or time to offer amendments, floor managers will control the debate time.</p> <p>Amendments recommended by the reporting Committee are disposed of first, and then amendments can be offered to any part of a measure in any order. Non-germane amendments also may be offered unless there is unanimous consent to consider only germane amendments. The Senate can dispose of each amendment by either voting on it directly, or voting to “table” it. A motion to table cannot be debated, and if the motion is successful, the amendment is defeated. If the motion to table fails, debate on the amendment resumes.</p> <p>There are many complexities in the Senate amendment process. For example, while amendments to the original measure (called “first-degree”), are pending, a Senator may offer “second-degree” amendments to change the first-degree amendments. Votes occur on second-degree amendments first, then on first-degree. When the Senate orders the bill to be “engrossed,” there can be no further amendments. The Senate then votes on final passage.</p>

	House	Senate
Special Rules	The House Rules Committee (controlled by the majority party) decides which “rules” will apply to consideration of a particular bill. “Open” rules allow Members to offer any germane amendments. “Closed” rules allow no amendments. “Restrictive” rules limit the number of amendments that can be proposed, and the majority often writes such rules to control debate on important legislation. Special rules can allow non-germane amendments, but such rules must be adopted by a majority of Members.	The Senate’s standing rules, precedents, and customary practices govern floor proceedings. It is customary practice to enter into unanimous consent agreements to waive standing rules to expedite business. This means that if even one Senator objects, standing rules will govern. The Senate does not have a Rules Committee.
Scheduling	Majority leadership and the Rules Committee handle scheduling. The Speaker of the House or the Majority Leader decides which bills will be considered and whether any will be considered under suspension of the rules. The Rules Committee decides when the measure will be considered and which floor procedures will be used (unless leadership has already decided to proceed under suspension of the rules).	The Senate majority leader is primarily responsible for scheduling, and will determine which bills will be considered. To be considered on the Senate floor, a bill must be (1) placed on the floor’s legislative calendar when the Committee reports it; (2) placed directly on the floor’s legislative calendar when it is introduced or received from the House (this allows Senators to bypass referral to an unsympathetic Committee); or (3) offered as an amendment to any other bill under consideration (this allows Senators to bypass the Committee and the majority leader’s scheduling preferences).
Quorum	The Constitution requires the presence of a quorum, or a majority, of Members to be present on the floor to vote and conduct other business. A quorum is presumed to be present unless demonstrated otherwise. If a Member suggests the absence of a quorum, and a majority does not respond, the House (or Senate) must adjourn, recess, or attempt to secure a quorum. Thus, a “quorum call” is usually used strategically to temporarily suspend floor activity in order to accommodate individuals, discuss procedural or policy problems, or force Members to the floor.	Same as in the House.
Voting	Votes can be counted three ways, by (1) voice vote, where Members call out “aye” or “no;” (2) recorded vote, where each Member’s vote is recorded electronically and published in the Congressional Record; or (3) division in the chamber where Members stand to be counted.	Same as in the House.

Endnotes

1. The first WRDA was passed in 1974. Before 1974, Congress authorized flood damage reduction projects through the Flood Control Acts, and navigation projects through the Rivers and Harbors Acts. Corps projects also are occasionally authorized in the Energy and Water Development Appropriations bill, which was the case in the FY 2004 bill, or in other legislation. Additionally, where a particular water resources problem in a specific area already has been investigated, a Congressional Committee can adopt a “study resolution” to provide the necessary study authority. However, any project resulting from that study would still require separate authorization in WRDA or some other bill.
2. Projects that are authorized in a WRDA bill before issuance of a final Chief’s Report are called “contingent authorizations.” Contingent authorizations can be very controversial, particularly for costly projects, because Congress is authorizing the project before the Corps has finalized its recommendations.
3. The remaining federal spending consists of “direct spending” like Medicare and Social Security entitlements that do not require annual appropriations by Congress.
4. The Corps will not provide budget justifications for funding appropriated to projects that are not included in the President’s budget.
5. It is at this stage in the appropriations process that the bill is “scored” by the Congressional Budget Office. This “score” determines the cost of the bill to help ensure that Committees adhere to the spending limits set forth in the budget resolution. *See Chapter 5 for more on scoring.*
6. Once the E&W appropriations bill becomes law, the Corps will execute the act. However, the funds provided in the final law are not automatically available to the Corps. Instead, the Office of Management and Budget (OMB) is responsible for reviewing the agency’s apportionment requests by fiscal quarter or activity, as appropriate, and for making the funds available to the Corps. A continuing controversy surrounds the administration’s ability to allocate and reallocate funds appropriated by Congress, which often is done. For example, in 2004 OMB redirected a significant amount of Corps funding to cover the costs of the war in Iraq.
7. In FY 2003, only two of the 13 appropriations bills were completed on time. Numerous continuing resolutions were then passed until an FY 2003 omnibus appropriations bill was finally passed in February of 2003.
8. House and Senate rules generally prohibit the authorizing and appropriations committees from encroaching on each other’s functions, but the Committees do not always follow these rules.
9. Hearings also are held for oversight and investigative activities, and in the case of the Senate, to review the qualifications of presidential nominees.
10. Most hearings can now be viewed via the Internet by accessing the Committee’s webpage from www.house.gov or www.senate.gov, or by visiting www.capitolhearings.org/.
11. A committee chair determines the “markup vehicle” or text the chair presents to the committee for consideration. The text can be a measure introduced as a stand alone bill in the same chamber as the Committee; one passed by the other chamber and referred to the Committee; a draft measure that has not been introduced, such as a Subcommittee-reported bill or a “chairman’s mark;” or an “amendment in the nature of a substitute” to the original bill or text called up by the Committee.
12. A bill is considered “reported” once a Subcommittee or full Committee agrees on specific legislative language and a majority votes in support of recommending a bill to the next step (either to the full Committee or to the full House or Senate). When a Committee orders a bill reported, the chairman is required by House or Senate rules to report the measure “promptly” to the floor for full consideration by the respective chamber.

Chapter 5

The Players Agencies, States, and Stakeholders

I. Federal Agencies

- A. Environmental Protection Agency
- B. U.S. Fish and Wildlife Service
- C. NOAA Fisheries
- D. Federal Emergency Management Agency
- E. U.S. Geological Survey

II. Presidential Support Offices

- A. Council on Environmental Quality
- B. Office of Management and Budget

III. Congressional Support Offices

- A. Government Accountability Office
- B. Congressional Budget Office
- C. Congressional Research Service

IV. States, Tribes, and Local Governments

V. The National Academy of Sciences

VI. Stakeholders

Many players can have a significant influence on Corps projects and permits, including federal agencies, presidential and congressional support offices, states, tribes, local governments, the National Academy of Sciences, and a diverse range of stakeholders. This chapter provides information on the roles of these various players and suggestions for engaging them as allies in your efforts to improve Corps decisions.

Activist Tip

EPA can be a tremendous ally in your efforts to stop or improve Corps projects and permits. EPA must comment on all environmental impact statements and must review projects and permits to make sure they comply with the Clean Water Act. EPA can even veto a project that has particularly egregious impacts — though this authority is only rarely used.

Activists should strive to develop strong working relationships with EPA staff and assist them in understanding, commenting on, and, where appropriate, opposing Corps projects and permits.

I. Federal Agencies

Many federal agencies play an important role in shaping Corps projects and permits. Agencies with the greatest ability to significantly improve Corps decisions include the Environmental Protection Agency, the U.S. Fish and Wildlife Service, and NOAA Fisheries.

A. Environmental Protection Agency

The Environmental Protection Agency (EPA) is charged with repairing past damage to the natural environment, establishing criteria to prevent future damage, and ensuring cleaner water, air, and land. EPA sets and enforces national environmental standards; collaborates with federal agencies, states, tribes, and local governments to create and enforce environmental laws; and conducts environmental research. EPA is headed by an Administrator appointed by the President, and has 18,000 employees throughout the country. Established in 1970, EPA has an annual budget of about \$7.5 billion.

Much of EPA's work is done through its ten regional offices, which have responsibility for implementing EPA programs in the states covered by the region. EPA headquarters sets policy, establishes guidance, specifies scientific methods and data collection requirements, and oversees the work of the regions. *See the Figure below for a map of the EPA regions (source: Environmental Protection Agency).*

EPA can influence the planning of Corps projects and the issuance of Corps permits primarily through the Clean Water Act and the National Environmental Policy Act. EPA and the Corps also work together on the Superfund program. *See Chapter 3 for more on the Clean Water Act permitting program, and Chapter 6 for more on other provisions of the Clean Water Act and the National Environmental Policy Act.*



CWA Role: EPA and the Corps jointly administer § 404 of the Clean Water Act (CWA), which prohibits the discharge of dredged or fill material into waters of the United States (including most wetlands) without a valid permit. While the Corps administers the day-to-day § 404 permitting program, EPA is ultimately responsible for ensuring that projects and permits comply with the CWA. Section 404 applies to activities carried out by private parties and governmental agencies, including Corps civil works projects.

EPA reviews Corps permits and projects to ensure that they comply with the requirements of the CWA and its implementing regulations. This CWA compliance review often takes place at the same time EPA reviews permits and projects for NEPA compliance. EPA also has the authority under CWA § 404(c) to veto a Corps permit or civil works project. However, these vetoes are very rare and to date only 12 have been issued. *See Chapter 3 for a detailed discussion of the requirements that the Corps must meet to comply with Clean Water Act § 404.*

NEPA Role: EPA is required by law to review and comment in writing on all National Environmental Policy Act (NEPA) reviews conducted by other federal agencies on (1) new federal construction projects or other federal agency action requiring NEPA review; (2) new legislation; and (3) proposed regulations.¹ EPA will review and provide substantive comments on both the quality of environmental analyses and the conclusions contained in draft and final environmental impact statements (EIS). EPA will also provide a rating for each draft EIS to help guide improvements. However, EPA does not rate final EISs. EPA comments must be made available to the public, and copies can be obtained from the EPA Office of Federal Activities in Washington, D.C. *See Chapter 6 for a discussion of the requirements of the National Environmental Policy Act.*

If EPA determines that any such action, legislation, or regulation will have an unsatisfactory effect on environmental quality, public health, or public welfare, EPA must publish that determination and refer the matter to the Council on Environmental Quality. *See Section 11 for a discussion of the referral process.*

Rating a Draft Environmental Impact Statement

EPA uses two criteria to rate a draft EIS. The first criterion addresses the environmental impact of the action and is reported as Lack of Objections (LO); Environmental Concerns (EC); Environmental Objections (EO); or Environmentally Unsatisfactory (EU). The second criterion rates the adequacy of the environmental impact statement and is reported as Adequate (1); Insufficient Information (2); or Inadequate (3). The lowest possible rating is EU3, which means that the project has unsatisfactory environmental impacts and that the information provided in the EIS is not adequate.

EPA is also responsible for notifying the public about opportunities to comment on EISs issued by all federal agencies. EPA does this through notices in the Federal Register. All federal agencies must submit their draft and final EISs to EPA, and each week EPA publishes a list of EISs received along with information on the public comment period. Typically, the Corps also will publish a Federal Register notice setting forth the availability of a draft or final EIS for public comment, and the Corps must publish a notice of intent to prepare an EIS in the Federal Register.

Superfund Role: EPA runs the nation's Superfund program, which is the main federal program for cleaning up sites contaminated with hazardous and toxic materials. Under a long-standing interagency agreement, EPA can seek clean-up assistance from the Corps. EPA will follow a three-step process to determine whether it should seek the Corps' assistance. First, EPA will determine whether a private entity is liable for the clean up and will approach that entity to perform the clean-up work. Second, if a private party clean up is not possible, EPA will determine whether the state can and will undertake the clean up. Third, if a state clean up is not possible, EPA will determine whether a federal clean up is appropriate and ask the Corps to undertake the work.

B. U.S. Fish and Wildlife Service

The mission of the U.S. Fish and Wildlife Service (FWS) is to conserve, protect, and enhance fish, wildlife, and plants, and the habitats they depend on. The FWS supervises the 94-million-acre National Wildlife Refuge System, enforces wildlife protection laws, administers the Endangered Species Act, manages migratory bird populations, restores fisheries and wildlife habitats, and assists foreign governments with conservation projects. The FWS has more than 7,500 employees in nearly 700 field units, seven regional offices, and headquarters, and an annual budget of almost \$2 billion. The FWS was established in 1939, and is located within the Department of the Interior.

The FWS can influence Corps projects and permits through the Fish and Wildlife Coordination Act, the Endangered Species Act, the National Environmental Policy Act, and the Clean Water Act.

FWCA Role: The Fish and Wildlife Coordination Act (FWCA) requires the Corps to consult with FWS regarding the fish and wildlife impacts of proposed Corps projects and permits and on measures to mitigate those impacts. FWS must prepare a report that describes those impacts and makes recommendations for mitigating the damage to fish and wildlife resources. This FWCA report must be included in any EIS prepared for a project or permit. The Corps must give "full consideration" to the FWS recommendations, but the Corps is not required to adopt those recommendations. *See Chapter 6 for a discussion of the Fish and Wildlife Coordination Act.*

Activist Tip

Like EPA, the FWS can play a critical role in shaping Corps projects and permits. Activists should strive to build strong working relationships with FWS staff to help ensure that FWS

- Fully understands the potential impacts of the proposed activity, any flaws in the Corps' environmental review, and the ramifications of the historic inability to successfully mitigate impacts.
- Prepares a comprehensive Fish and Wildlife Coordination Act report that includes strong and detailed mitigation recommendations.
- Where appropriate, formally opposes the Corps project or permit and refers the project to the Council on Environmental Quality.
- Properly evaluates the project area for the presence of threatened or endangered species, and keeps a careful watch for any new or increased sightings of listed species because such new information can force the Corps to reassess a project's impacts.

ESA Role: The Endangered Species Act (ESA) requires FWS (for land and freshwater species) and NOAA Fisheries (for marine species) to provide the Corps with a list of threatened or endangered species and ESA-designated critical habitat that may be present in any area affected by a Corps project or permit. The Corps must request this information from the appropriate agency. If listed species or critical habitat may be present in the affected areas, the Corps must prepare a biological assessment to evaluate the project's impacts on those species or habitat. FWS and/or NOAA Fisheries must review and evaluate the biological assessment and come to their own conclusion on the potential impacts.

If the biological assessment, FWS, or NOAA Fisheries conclude that the project or permitted activity is likely to adversely affect one or more listed species and/or designated critical habitat, the Corps must enter into formal consultation with FWS and/or NOAA Fisheries on the project. These "Section 7" formal consultations seek to insure that the proposed action will not jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of formally designated critical habitat. A formal consultation typically will require preparation of a biological opinion. *See Chapter 6 for a discussion of the Endangered Species Act.*

NEPA Role: FWS may review and comment on draft and final NEPA documents prepared by the Corps. Like other federal agencies, FWS can refer a project to the Council on Environmental Quality if the Corps does not adequately address FWS concerns with the Corps' environmental review of a project or permit.

CWA Role: FWS may comment on CWA § 404 permits and on § 404 evaluations of Corps project proposals.

C. NOAA Fisheries

NOAA Fisheries² is charged with rebuilding and maintaining sustainable fisheries, promoting the recovery of protected species, and protecting and maintaining the health of marine habitats. The agency is responsible for the management, conservation, and protection of marine resources within the Exclusive Economic Zone of the United States (those waters located from three to 200 miles offshore) and is particularly focused on economically important fisheries. NOAA Fisheries has six regional offices, numerous field offices, and six research centers located throughout the United States. NOAA Fisheries was established in 1970 and is located within the Department of Commerce.

As discussed in the FWS description above, NOAA Fisheries is responsible for advising and consulting with the Corps and other federal agencies regarding threatened and endangered marine species and critical habitat under the ESA. Like other federal agencies, NOAA Fisheries also can submit comments on NEPA documents prepared for Corps projects and permits.

Activist Tip

Because FEMA is responsible for responding to natural disasters, staff workloads can be extremely unpredictable. As a result, activists should get to know the appropriate FEMA staff and keep them apprised of the status of important floodplain-related permits and projects in their areas. FEMA comments typically will be prepared by the regional office assigned to the state(s) in which the proposed activity will take place.

D. Federal Emergency Management Agency

The Federal Emergency Management Agency (FEMA, pronounced “feema”) is charged with helping the United States prepare for, prevent, respond to, and recover from disasters, regardless of the cause. FEMA works with and advises industries, federal agencies, communities, and individuals on emergency management, and works closely with the Corps in responding to many natural disasters including floods, earthquakes, and volcanic eruptions. FEMA has more than 2,500 full time employees and 4,000 standby employees in offices across the country. FEMA was established in 1979 and is now located within the Department of Homeland Security.

Of particular importance to the Corps’ project and permitting activities are FEMA’s responsibilities for mapping the nation’s floodplains, managing the National Flood Insurance Program,³ developing measures to ensure safe building within the floodplain, relocating homes out of the floodplain, and ensuring proper implementation of the Floodplain Management Executive Order (11988). This Executive Order directs the Corps and other agencies to evaluate the potential affects of their actions on a floodplain and to consider alternatives to avoid actions that would result in unwise floodplain development. *See Chapter 6 for a discussion of this Executive Order.*

Implementation of these FEMA responsibilities can affect the location and design of Corps projects because the Corps is under increasing pressure to avoid flood control projects that encourage floodplain development, preserve and restore natural flood storage areas such as wetlands, and consider relocation from the floodplain as a viable option for flood damage reduction projects.

These FEMA responsibilities also can affect the Corps’ permitting decisions for activities within floodplains. FEMA is invited to comment on all CWA § 404 permit applications for activities in flood prone areas, and these comments can be an important tool for affecting the direction of Corps permit decisions. FEMA’s comments will focus on whether the proposed development or activity will be reasonably safe from flooding and whether it complies with applicable FEMA requirements, particularly requirements of the National Flood Insurance Program (which requires that communities meet certain floodplain management requirements in order to qualify for national flood insurance). FEMA will also examine whether there are alternatives to the proposed activity that could avoid adverse and incompatible development in a floodplain. 44 C.F.R. § 60.3.

E. U.S. Geological Survey

The U.S. Geological Survey (USGS) is a science agency with no regulatory or management mandate. Its role is to provide impartial scientific research and information to other federal agencies and the public. USGS concentrates its research efforts on monitoring and publicizing possible natural hazards, such as earthquakes and floods; studying the quantity, quality, and availability of natural resources; and understanding and maintaining data on the world's physical, chemical, and biological environment. USGS has 10,000 employees in nearly 400 offices in the United States and several other countries and has an annual budget of approximately \$1 billion. USGS was established in 1879 and is located within the Department of the Interior.

The Corps and many other federal agencies use USGS research, data, and expertise to help inform project and policy decisions and to resolve complex natural resource problems. USGS is extensively involved in many Corps projects. For example, USGS collects data and reports on the status and trends of the Upper Mississippi River, including on the effects of the navigation system constructed and managed by the Corps. The USGS also manages the nation's critically important network of stream gauges, which provides the basic hydrologic data that forms the foundation of our understanding of the nation's water resources.

Information particularly relevant to Corps projects can be obtained from the USGS National Wetlands Research Center, Contaminant Biology Program, Status and Trends of Biological Resources Program, Fisheries and Aquatic Resources Program, and Biological Informatics Program.

Water Resources Council

Though it has been inactive for more than 25 years, the work of the Water Resources Council continues to have an enormous impact on Corps projects. The Council was established to encourage the conservation, development, and utilization of water and related land resources. Council members included the Secretaries of Agriculture, Army, Commerce, Energy, Housing and Urban Development, Interior, Transportation and the Administrator of the Environmental Protection Agency. In late 1983, the Council's acting Chairman, Secretary of the Interior James Watt, deactivated the Council by eliminating its funding and staff, and the Council remains inactive to this day.

In 1983, before being deactivated, the Council wrote the basic rules used by the Corps to plan and evaluate water resources projects. These rules, known as the "Principles and Guidelines" (P&G), dictate how the Corps considers environmental impacts, evaluates project benefits and costs, and selects project alternatives. The P&G continue to govern the development of Corps projects despite the fact that they have never been updated.

The Water Resources Development Act (WRDA) of 2007 directs the Corps to modernize the P&G and implement a new national policy that establishes environmental protection and restoration as a primary objective for *all* water projects. In updating the P&G, the Corps must consult with other federal agencies and the National Academy of Sciences, and solicit and consider public and expert comments. The revisions are to be finalized by November 8, 2009. 42 U.S.C. § 1962–3. If the directives of WRDA 2007 are properly implemented, the revised P&G would create a new paradigm for water resources planning and fundamentally transform the Corps' planning process. See *Chapter 2 for a discussion of the P&G*.

Activist Tip

CEQ has a small staff dedicated to examining Corps projects and to ensuring that all federal agencies comply fully with the National Environmental Policy Act. Activists should consider educating CEQ about concerns with specific Corps projects early in the NEPA process.

Because CEQ is responsible for coordinating federal environmental and natural resource related activities, it is important to tell CEQ if a project is at odds with other environmental protection initiatives. For example, activists should let CEQ know if a Corps project will drain lands enrolled in the Wetlands Reserve Program run by the U.S. Department of Agriculture or if the project will result in a net loss of wetlands.

II. Presidential Support Offices

Two offices within the Executive Office of the President play a key role in review and oversight of Corps projects and policies: the Council on Environmental Quality and the Office of Management and Budget.

A. Council on Environmental Quality

The Council on Environmental Quality (CEQ) was established by the National Environmental Policy Act of 1969 (NEPA) to oversee compliance with NEPA by the federal government, to fund and conduct research into the state of the environment, and to recommend policies to the President to improve the health of the environment. CEQ has promulgated (and when necessary, updates) regulations that implement NEPA. The CEQ regulations must be followed by all federal agencies. Each agency also may promulgate its own companion NEPA implementing regulations which must be consistent with the CEQ regulations. *See Chapter 6 for a discussion of the National Environmental Policy Act.*

The CEQ NEPA regulations set forth the process that agencies must follow to comply with NEPA. They address agency planning, EIS preparation, public and agency commenting, referrals of environmentally unsatisfactory projects to CEQ, and agency decisions and implementation. The CEQ regulations are found at 40 C.F.R. Parts 1500 to 1508. The CEQ regulations, NEPA caselaw, and NEPA guidance documents can be accessed through the CEQ website at <http://www.nepa.gov>.

CEQ will take center stage in resolving controversies surrounding specific Corps projects and permits if a project or permit is formally “referred” to CEQ by another federal agency. Before formally referring a project to CEQ, the referring agency must work with the Corps to try to resolve as many differences as possible. Upon referral, CEQ will work to resolve remaining differences and is typically seen as “brokering a deal” between the agencies.

Very few projects are referred to CEQ. Only 27 projects have been officially referred to CEQ since 1974, and, of those, ten were Corps projects. The most recent referral (October 2001) was for a proposed Corps navigation project at Oregon Inlet on North Carolina’s Outer Banks. As a result of that referral, CEQ, the Corps, and the Departments of the Interior and Commerce agreed that the Corps’ proposal should not proceed — an outcome long pushed for by many in the environmental community.

In recent years, the White House has called on CEQ to encourage the resolution of interagency disagreements to forestall formal referrals. This pre-referral intervention may provide a means for addressing problems with Corps projects.

Activist Tip

Though it can take some effort, effectively engaging OMB on specific Corps projects can produce important benefits. OMB is most likely to pay close attention to Corps projects that are particularly expensive, that have questionable economic justification, or that violate a policy that is important to the Administration. OMB opposition can help stop or stall a project and/or help activists enlist support from influential decision makers and generate media attention.

Working closely with national conservation organizations, activists convinced OMB to oppose the Corps' \$319 million Grand Prairie Irrigation project in Arkansas and the \$154 million Dallas Floodway Extension project in Texas. OMB strongly objected to the Dallas Floodway project due to the high cost and urged the Corps to study lower cost alternatives. OMB objected to the Grand Prairie project due to the project's environmental impacts and because it would take the Corps into an area of work (irrigation development) that should not be a Corps responsibility.

B. Office of Management and Budget

The Office of Management and Budget (OMB) plays an important role in supervising federal agencies and in preparing the President's budget for submission to Congress. OMB oversees the development and resolution of all budget, policy, legislative, regulatory, procurement, e-gov, and management issues on behalf of the President. OMB seeks "to help improve administrative management, to develop better performance measures and coordinating mechanisms, and to reduce any unnecessary burdens on the public."

Since 1981, OMB has reviewed specific Corps project proposals pursuant to Executive Order 12322. This Executive Order requires the Corps to submit any water resources report, proposal, or plan to OMB for review before submitting it to Congress for approval, legislative action, or appropriations. OMB review is intended to ensure that Corps projects are consistent with (1) the policies and programs of the President; (2) the "Principles and Guidelines" that govern development of Corps projects; and (3) other applicable laws, regulations, and requirements relevant to the planning process. When the Corps submits its report, proposal, or plan to Congress, it also must include a statement of the advice received from OMB. *See Chapter 6 for a discussion of Executive Order 12322.*

OMB also plays a significant role in overseeing and managing the Corps' annual budget proposal and in developing Administration proposals for the Water Resources Development Act. Like all federal agencies, the Corps' budget must be reviewed and approved by OMB before being submitted to Congress. In recent years, OMB has been a strong advocate for cutting funding for wasteful Corps projects and for improving the Corps' economic and environmental accountability.

The sections within OMB that have the most influence over the Corps are the

- (1) Natural Resource Program, which oversees Corps projects and activities, plays a critical role in annual negotiations with Congress over federal fiscal policies, and provides ongoing policy and management guidance to the Corps.
- (2) Budget Review Offices, which provide strategic and technical support for budget decision-making and negotiations, as well as monitoring Congressional action on spending legislation.
- (3) Legislative Reference Division, which coordinates the review and approval of the Administration's legislative proposals and issues "Statements of Administration Policy" (also known as SAPs) that set forth the official position of the President on legislation being considered by the House or Senate.

Activist Tip

Activists can work with their Members of Congress to initiate GAO investigations into specific Corps projects or activities. Because GAO does not have the staff needed to respond to all the requests sent to it, you should keep the GAO's work prioritization scheme in mind as you work with your Member of Congress. If your Representative or Senators are not in a leadership position or on one of the Committees with jurisdiction over the Corps, you can ask them to work with leadership or a Committee member to jointly request the needed GAO study.

III. Congressional Support Offices

Three legislative branch offices provide investigative, research, and budget support for Congress: the Government Accountability Office, Congressional Research Service, and Congressional Budget Office.

A. Government Accountability Office

The Government Accountability Office (GAO, formerly the General Accounting Office) was established in 1921 to be an independent auditor of government agencies and their activities. Sometimes referred to as “Congress’ watchdog” or the “investigative arm of Congress,” the GAO provides a variety of nonpartisan services to Congress related to oversight and review of federal agency activities. The GAO conducts research and investigations, issues reports and findings, provides testimony to Congress, and conducts briefings.⁴

GAO has investigated many Corps projects, policies, and activities. In the 1980s, GAO issued reports on the Corps’ cost-benefit analyses, construction backlog, and deauthorization program. More recent GAO reports include

- *Missouri River Navigation: Data on Commodity Shipments for Four States Served by the Missouri River and Two States Served by Both the Missouri and Mississippi Rivers* (2009);
- *Army Corps of Engineers: Known Performance Issues with New Orleans Drainage Canal Pumps Have Been Addressed, but Guidance on Future Contracts Is Needed* (2007);
- *South Florida Ecosystem: Restoration Is Moving Forward but Is Facing Significant Delays, Implementation Challenges, and Rising Costs* (2007);
- *Waters and Wetlands: Corps of Engineers Needs to Ensure That Permit Decisions Made Using Funds from Nonfederal Public Entities Are Transparent and Impartial* (2007);
- *Army Corps of Engineers: Improved Monitoring and Clear Guidance Would Contribute to More Effective Use of Continuing Contracts* (2006);
- *Hurricane Katrina: Strategic Planning Needed to Guide Future Enhancements Beyond Interim Levee Repairs* (2006);
- *Corps of Engineers, Observations on Planning and Project Management Processes for the Civil Works Program* (2006);
- *Army Corps of Engineers, Improved Planning and Financial Management Should Replace Reliance on Reprogramming Actions to Manage Project Funds* (2005);
- *Improved Analysis of Costs and Benefits Needed for Sacramento Flood Protection Project* (2003);
- *Great Lakes: A Coordinated Strategic Plan and Monitoring System Are Needed to Achieve Restoration Goals* (2003);
- *Scientific Panel’s Assessment of Fish and Wildlife Mitigation Guidance* (2002);
- *Delaware River Deepening Project: Comprehensive Reanalysis Needed* (2002);
- *Oregon Inlet Jetty Project: Environmental and Economic Concerns Need to Be Resolved* (2002);
- *Assessments Needed to Determine Effectiveness of In-Lieu-Fee Mitigation* (2001);
- *Local Sponsors’ Views on Corps’ Implementation of Project Cost Sharing* (1991).

Activist Tip

CBO cost estimates can provide valuable fodder for fighting Corps projects or proposed policy changes. A high CBO cost estimate can be used to

- Convince Members of Congress to oppose the bill.
- Urge Members of Congress to offer an amendment to strike a costly project authorization or policy provision.
- Ask House or Senate leadership to deny floor time or prevent a vote on the bill.
- Call for a Presidential veto of the bill.

For example, CBO estimated that implementing the WRDA reported by the Senate Committee in 2004 (S.2773) would cost more than \$17.7 billion through 2019. This enormous cost was an effective tool for convincing key Senators to oppose the bill and supported calls to Senate leadership to deny floor time for the bill.

GAO studies can be required by law (*i.e.*, a study is mandated by language included in legislation) or can be requested by Members of Congress. GAO also can undertake investigations on its own initiative. These studies typically examine emerging issues and issues of broad institutional concern to Congress. Reports mandated by law are available to all Members of Congress and the public as soon as they are finalized. Other studies can be withheld from the public for up to 30 days (or longer in some limited circumstances) after issuance, at the direction of the Congressional requester. GAO studies can be accessed at www.gao.gov.

Because GAO's resources are limited, it prioritizes its work as follows. First, GAO will conduct studies required by law. Second, GAO will conduct studies requested by leadership (*i.e.*, the majority or minority leader of the Senate or House). Third, GAO will conduct studies requested by a majority or minority leader of a Committee with jurisdiction over the agency or issue being investigated. Fourth, GAO will carry out studies requested by a member of a Committee with jurisdiction over the agency or issue being investigated. Finally, GAO will respond to requests from members not on a Committee with jurisdiction.

B. Congressional Budget Office

The Congressional Budget Office (CBO) was established in 1975 to provide Congress with nonpartisan economic analyses and cost estimates. CBO does not make recommendations on policy, but instead acts as an economist for Congress. CBO has a professional staff of about 230 economists and public policy analysts and is advised by a panel of economic experts composed of former CBO directors and eminent economists.

CBO provides cost estimates for virtually every bill passed by a full Committee, a process known as “scoring” a bill.⁵ Once a House or Senate Committee passes a bill, it is submitted to CBO's Budget Analysis Division to determine how much it would cost to implement, or how much revenue would be received, during at least the first five years following the bill's enactment. All cost estimates and scores are available on CBO's website at www.cbo.gov/.

A CBO score for a Water Resources Development Act (WRDA) typically will estimate the cost of the bill for longer than five years (for example, CBO might estimate the cost of the bill for the first 10 to 15 years after the bill is passed). Any construction or operations costs that continue or occur after the designated time period are not included in the cost estimate.⁶ These costs are adjusted for anticipated inflation and assume that the authorized amounts will in fact be appropriated. A WRDA will almost always cost the federal government far more than indicated by the CBO score because many Corps projects will incur construction and operations costs beyond the time period covered by the CBO estimate.

C. Congressional Research Service

The Congressional Research Service (CRS) is the research branch of the Library of Congress and is charged with providing Congress with objective, nonpartisan information and analyses. CRS produces annual reports on upcoming appropriations bills and on issues and controversies that are likely to be addressed in any given legislative session, such as proposed Corps reforms. Members of Congress also can ask the CRS to conduct issue specific research, analyses, and investigations. Thus, constituents can work with their Members of Congress to obtain valuable information and research assistance on Corps issues.

CRS reports typically summarize issues surrounding complex or controversial topics, and CRS has written numerous reports on the Corps. For example, CRS has issued reports on the Corps' Everglades restoration project and on the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*⁷ (often referred to as SWANCC) regarding so-called "isolated" wetlands.

CRS materials are not automatically available to the public, but often can be obtained from Members of Congress or their staff. In addition, the National Council for Science and the Environment maintains a publicly accessible database of many CRS Reports on environmental and related topics at www.ncseonline.org/NLE/.

Activist Tip

Activists should participate in the Clean Water Act § 401 water quality certification process, particularly in states with a strong environmental protection ethic and mandate. In some instances, working at the state level may be your most effective tool for stopping or improving a Corps project or permit.

If a state develops the appropriate record — and has the political will — it can outright deny permission to proceed with a permit or most types of Corps projects. The state also can impose significant conditions on those activities. Because state courts will throw out a § 401 water quality certification that does not comply with state law, activists in states intent on rubber-stamping bad projects or permits still may want to devote resources to the § 401 review to build a strong record for a possible legal challenge.

Activist Tip

The Corps' internal policy to abandon new projects opposed by a state's Governor is a little-used, but potentially very powerful tool. Activists should consider whether it makes sense to pursue this option given the views of their Governor and the politics surrounding the proposed project.

IV. States, Tribes, and Local Governments

States and tribes have a key role in approving, conditioning, or prohibiting the issuance of Corps permits and projects. Numerous county and city governmental entities, including city councils, levee districts, drainage districts, and port authorities, also are often involved with Corps projects.

Water Quality Certification Role: Clean Water Act (CWA) § 401 authorizes states and tribes to review Corps permits and certain Corps projects within their boundaries to determine whether the activity complies with state water quality standards. 33 U.S.C. § 1341. This review is not mandatory and some states will elect not to conduct one.

State and tribal water quality standards often have strong provisions that prevent degradation of waterways and require mitigation. If a permit or project will violate these standards, the state or tribe can deny what is known as a § 401 water quality certification. If the state or tribe denies a § 401 water quality certification, the activity cannot proceed. States or tribes also can impose significant conditions on the permit or project through the § 401 water quality certification process that can reduce the impacts of the activity. 33 C.F.R. § 325.2(b). The U.S. Supreme Court has upheld the rights of states to impose conditions via the § 401 process that are not technically part of a state's water quality standards, giving states broad jurisdiction to protect the public interest. *See Chapter 6 for a discussion of Clean Water Act § 401.*

Governor Opposition Role: The Corps has an internal policy to abandon planning for a new civil works project (*i.e.*, one not yet authorized by Congress) that is opposed by the Governor of the state in which it will be located. The Corps will proceed with a feasibility study or other review of an unauthorized project over the objection of a Governor “only if the project is physically located in more than one state and provides substantial and urgently needed interstate benefits; is an indispensable element of a major river basin plan; or involves compelling circumstances related to national interest or security.” If these conditions are present and the Corps decides to proceed with the project, the feasibility report submitted to Congress must fully document the Governor's opposition. If a Governor objects to construction of a project that has already been authorized, the Corps will advise the appropriations Committees in the House and Senate, which will investigate whether or not to continue funding the project.⁸

Coastal Zone Management Act Role: Coastal states with approved coastal zone management plans can review Corps permits and project decisions to determine whether they comply with that plan. The impact of a state's finding that the project or permit is not consistent with the coastal zone management plan depends on the type of project and the applicant. The rules outlining these impacts are set forth at 33 C.F.R. § 325.2(b) (2). *See Chapter 6 for a discussion of the Coastal Zone Management Act.*

Activist Tip

Corps projects and permits typically are reviewed by those state agencies that deal with environmental protection, natural resources, fish and game, coastal and/or marine resources, natural heritage programs, and historic preservation. It is important to know your state players and to work closely with the appropriate agencies to ensure they pay close attention to Corps projects and permits that fall under their jurisdiction.

FWCA Role: The Fish and Wildlife Coordination Act (FWCA) requires the Corps to consult with the head of the fish and wildlife agency in the state where the project is located (and with FWS) regarding the fish and wildlife impacts of proposed Corps projects and permits and on measures to mitigate those impacts. State fish and wildlife agencies can play a significant role in shaping Corps projects through the FWCA. *See Chapter 6 for a discussion of the Fish and Wildlife Coordination Act.*

NEPA Role: States and tribes may review and comment on draft and final NEPA documents prepared for Corps permits and projects. *See Chapter 6 for a discussion of the National Environmental Policy Act.*

National Historic Preservation Act Role: The Corps must consult with states and tribes to determine whether any historic or archeological sites will be impacted by the permitted activity, pursuant to the National Historic Preservation Act. 16 U.S.C. § 470(f); 36 C.F.R. § 800.2(c)(1). *See Chapter 6 for a discussion of the National Historic Preservation Act.*

State, Tribal, and Local Legal Review and Permitting Role: In addition to complying with federal law, many Corps projects and permits must satisfy state legal requirements such as obtaining necessary state permits, carrying out state-mandated environmental reviews, and satisfying state environmental and species protection laws. For example, California has its own state environmental review law known as the California Environmental Quality Act (CEQA). Corps projects and permits covered by CEQA must satisfy all the requirements of CEQA in addition to meeting all of the requirements of NEPA. Activists should become familiar with applicable state laws and participate in the state and local review and permitting processes.

Local Sponsor Role: States, tribes, and local governments can serve as nonfederal sponsors for Corps projects. Nonfederal sponsors pay for a portion of the project through financial contributions or in-kind support, and as a result have a great deal of influence over the project's development. *See Chapter 2 for more on the requirements of nonfederal sponsors.*

Activist Tip

Activists can work with Members of Congress to obtain an NAS study of a controversial Corps project or policy.

Once an NAS study is in progress, activists should take advantage of opportunities to provide testimony — and generate expert testimony — to help guide the panel's findings.

Upon release of a study, activists should work to generate media coverage of the study findings, and should urge Members of Congress to follow-up on those findings.

V. The National Academy of Sciences

The National Academy of Sciences (NAS) was established in 1863 to counsel the federal government on scientific and technical issues and as an honorific body for the nation's top scientists. The National Research Council (NRC) was created in 1916 as the operating arm of the NAS.⁹ The NRC carries out scientific and engineering research for the NAS, issues reports, provides expert Congressional testimony, and conducts Congressional staff briefings. The NRC has a staff of approximately 1,200 employees. NAS does not receive annual funding as a line item in Congressional appropriations bills. Instead, funding for NAS studies is on a project-by-project basis and normally is provided by the agency for which the study is being conducted.

The NAS and NRC are recognized for the independence and credibility of their volunteer study committees. As a result, the NAS is often asked to analyze complex, high stakes projects and issues, and NAS studies often influence governmental decisions. NAS reports can be required by law or be prepared at the request of an individual Member of Congress or federal agency. The NAS will also independently identify research needs and often pursues studies on emerging issues like water privatization that do not fall under any one agency's purview.

Corps-related studies are typically conducted by the Water Science and Technology Board of the Division of Earth and Life Sciences.¹⁰ When conducting a study for the Corps, this board will create a committee of from 10 to 20 volunteer, nonpartisan experts. The committee chair plays a critical role as committee leader, advisor to the NAS study director, and principal integrator of the committee's report. The chair also serves as the chief spokesperson in representing the committee to reviewers, sponsors, and the public.

The NRC has conducted numerous studies on Corps projects and policies due to increased pressure to obtain independent, outside opinions on Corps projects and issues. For example, the NAS has issued a number of reports on the Corps' Everglades Restoration project (2003-2002) and on the scandal surrounding the Corps' proposed expansion of locks and dams on the Upper Mississippi River (2004, 2001). It has also studied restoration efforts on the Missouri River (2002) and the many problems associated with effective wetlands mitigation (2001).

The NAS has also conducted a series of studies to assess the Corps' planning and project review practices (most of which were required by WRDA 2000), including

- *Analytical Methods and Approaches for Water Resources Planning (2004)*, which addresses needed changes to the Corps' "Principles and Guidelines" and its planning guidance policies;
- *River Basins and Coastal Systems Planning Within the U.S. Army Corps of Engineers (2004)*, which addresses the challenges to water resources planning at the scale of river basins and coastal systems;
- *Adaptive Management for Water Resources Project Planning (2004)*, which addresses issues related to the effective use of adaptive management by the Corps;
- *U.S. Army Corps of Engineers Water Resources Planning: A New Opportunity for Service (2004)*, which addresses the need for modernizing the Corps' authorities, planning approaches, and guidelines to better match contemporary water resources management challenges;
- *Review Procedures for Water Resources Planning (2002)*, which addresses the need for a formalized process to independently review costly or controversial Corps projects;
- *New Directions in Water Resources Planning for the U.S. Army Corps of Engineers (1999)*, which examines the length of time and cost of Corps studies in comparison with similar studies carried out by the private sector.

VI. Stakeholders

At the national, state, and local levels, thousands of entities are involved with Corps projects and permits and water resources issues. These stakeholders range from traditional supporters of Corps projects — such as navigation and flood control boosters — to contractors, professional associations, and environmental nonprofit organizations.

These groups can play many roles as either proponents or opponents of Corps activities, including

- Serving as the nonfederal sponsor for Corps projects — the nonfederal sponsor pays for a portion of the project through financial contributions or in-kind support and as a result, has a great deal of influence over the project's development;
- Devoting resources to opposing, redirecting, or promoting Corps projects;
- Contracting to construct a civil works or permitted project or to prepare the NEPA review for such projects;
- Submitting public comments and attending public meetings and hearings on Corps projects or permits;
- Contacting Members of Congress and other decision makers to voice support or opposition to Corps decisions or policies;
- Generating media coverage, or responding to media questions, about Corps projects, permits, or policies; and
- Providing expert advice or consultation to the Corps or to groups opposing or supporting Corps projects.

Activist Tip

A critical step in working on a Corps project or permit is to identify potential allies and known or likely opponents. These organizations and their agendas will affect your advocacy efforts.

For example, activists fighting expansion of the locks on the Upper Mississippi and Illinois Rivers have had to counter the very vocal support of MARC 2000, an industry coalition whose mission is economic growth through the expansion of navigation. Activists fighting to improve the Corps' beach building operations have had to address the arguments of the American Shore and Beach Preservation Association, which actively lobbies for Corps beach projects and related policies that often align with economic development at the expense of environmental protection.

Potential allies include a host of professional associations that have supported various Corps reforms, including the Association of State Wetland Managers, Association of State Floodplain Managers, American Society of Civil Engineers, National Association of Flood and Stormwater Management Agencies, and the American Water Resources Association. These and similar organizations may be helpful in achieving both project and policy reforms.

Endnotes

1. Clean Air Act § 306, 42 U.S.C. § 7609. While the Clean Air Act establishes this requirement, EPA's review is conducted under the auspices of NEPA. In other words, Clean Air Act § 306 requires EPA to submit comments during the NEPA process and to refer the issue to CEQ if the lead agency ignores EPA's concerns.
2. NOAA Fisheries was formerly known as the National Marine Fisheries Service or NMFS.
3. The Corps also provides technical assistance to FEMA on a reimbursable basis in support of the National Flood Insurance Program. For example, the Corps might provide detailed hydrologic and hydraulic analyses to determine areas of flood hazards and the degree of flood risk. Under the National Flood Insurance Community Assistance Program, the Corps also may assist communities through activities such as surveying additional elevation reference marks, performing community assessment visits, and holding flood-proofing workshops.
4. The GAO also has an Office of Special Investigations that investigates referrals concerning specific allegations of federal fraud, waste, abuse, or misconduct.
5. CBO cost estimates typically are not prepared for draft or subcommittee-approved bills, and House or Senate passed bills are analyzed only upon request. If requested, and if resources permit, CBO also will prepare cost estimates for bills and floor amendments that individual Members have introduced or plan to introduce.
6. Project deauthorizations included in a WRDA bill typically do not affect the bill's cost estimate. This is because these projects likely would not have been built in the near future so that significant savings would not be expected by taking away the authority to build them.
7. 531 U.S. 159 (2001).
8. Corps Policy on Opposition by a Governor, EP 1165-2-1 (30 July 99), Digest of Water Resources Policies and Authorities.
9. The NAS, the NRC, the National Academy of Engineering established in 1964, and the Institute of Medicine established in 1970, are referred to collectively as the National Academies. The National Academies function as a not-for-profit organization with a membership of 2,000 honorary scholars and 300 foreign associates.
10. Other divisions include Behavioral and Social Sciences and Education; Engineering and Physical Sciences; Policy and Global Affairs; Institute of Medicine; and the Transportation Research Board. There are fifty different boards within the NAS divisions.

Chapter 6

The Corps and the Law Key Laws Applicable to Corps Projects

I. The Legal Process

- A. Laws, Regulations, and Executive Orders
- B. Filing a Legal Challenge In Court

II. Environmental Protection Laws

- A. Clean Water Act
- B. Coastal Barrier Resources Act
- C. Coastal Zone Management Act
- D. Endangered Species Act
- E. Fish and Wildlife Coordination Act
- F. National Environmental Policy Act
- G. Wild and Scenic Rivers Act

III. Flood Insurance and Historic Preservation Laws

- A. National Flood Insurance Act
- B. National Historic Preservation Act

IV. Information Access and Quality Laws

- A. Data Quality Act
- B. Freedom of Information Act

V. Corps Planning Laws

VI. Executive Orders

The Corps must comply with numerous laws, regulations, and policies when planning and implementing water projects and making permit decisions. Ensuring strict compliance with these laws and policies can have a profound affect on the Corps' activities. This chapter summarizes environmental and other laws applicable to Corps projects and provides background on the legal process. Laws applicable only to Corps planning, such as requirements enacted through the

Water Resources Development Acts, are discussed in Chapter 2. Activists should use this Chapter as a guide only and should seek the advice of an attorney for specific legal advice and recommendations.

I. The Legal Process

A vast body of laws, regulations, and policies govern the way the Corps plans and implements water projects and makes permit decisions. In analyzing the ability of these laws to influence Corps decisions, it is useful to understand some basic legal principles.

A. Laws, Regulations, and Executive Orders

The Corps, like all federal agencies, must comply with the U.S. Constitution, federal statutes, common law, regulations, judicial case law interpreting those laws and regulations, Executive orders, and internal guidance. Understanding the legal hierarchy of these laws and regulations can be useful for deciding where to focus efforts to improve Corps planning.

U.S. Constitution: The U.S. Constitution is at the top of the legal hierarchy that guides the U.S. legal system. All laws must comply with the requirements of the U.S. Constitution.

Common Law: Common law evolves primarily from judicial decisions and is based on custom and precedent. Common law must be complied with unless it has been superseded by a statute. Environmental law evolved largely from the common law of “nuisance.”

Federal Statutes: Federal statutes are passed by Congress and are typically codified in the United States Code (U.S.C. or U.S.C.A. for U.S. Code Annotated).¹ Statutes can create procedural and substantive requirements that must be complied with. Procedural laws require that certain processes be followed, but do not mandate a particular decision. For example, the National Environmental Policy Act is a procedural law designed to ensure that the environmental consequences of federal actions are fully evaluated before the Corps decides whether or how to proceed with a project. Substantive laws require or prohibit certain activities. Substantive environmental laws include the Endangered Species Act and the Clean Water Act. Substantive laws also typically contain procedural requirements.

Regulations: Regulations implement provisions of federal statutes. Regulations are created by executive agencies and are found in the Code of Federal Regulations (C.F.R.). Regulations cannot conflict with or exceed the scope of the statutory language they are intended to interpret. The public must have an opportunity to comment on proposed and final regulations pursuant to the Administrative Procedure Act.

Case Law: Case law is created by the courts and interprets or defines the Constitution, statutes, regulations, and common law. Case law has its own hierarchy that is based on the organization of the court system. Decisions issued by the U.S. Supreme Court must be followed nationwide. Circuit Court of Appeals decisions must be followed in all the states and territories located within the Circuit and often will be relied on by courts in other Circuits.² District Court decisions are applicable within the geographic scope of the District Court and often will be relied on by other District Courts within the same Circuit. Cases from one Circuit or District will often be relied on by other Circuit and District courts as well. The U.S. Supreme Court can overrule a Circuit Court decision, and a Circuit Court can overrule a decision of a District Court within the Circuit Court's geographic boundaries. The term “well-established case law” typically refers to decisions by the U.S. Supreme Court or to decisions that are consistent among a number of federal Circuit Courts.

Executive Orders: Executive orders are orders issued by the President to federal agencies. They generally give federal agencies specific directions for implementing laws and policies established by Congress. Executive orders provide important directions for implementing laws and policies in accordance with Administration priorities, and in some cases create additional procedural requirements for certain agency actions. Executive orders are legally binding³ but individuals typically cannot sue to enforce the terms of an Executive order unless the order explicitly states that it is enforceable (to be enforceable in the absence of an express statement, the order must have been issued under a Congressional mandate or Congressional delegation of authority). Recent Executive orders are found in Title 3 of the Code of Federal Regulations and most are easily searchable online.

Internal Agency Guidance: Internal guidance interprets laws and regulations. Internal guidance can be established through a number of mechanisms, including through what the Corps calls “engineering regulations,” internal policy documents, and memoranda of agreements (MOAs) entered into with other agencies. Interpretative internal guidance is not subject to the notice and comment requirements of the Administrative Procedure Act, and the public typically is not provided with an opportunity to comment on internal guidance. Internal guidance can sometimes create mandatory duties on the agency.

B. Filing a Legal Challenge in Court

Decisions of federal agencies can be challenged under the Administrative Procedure Act (APA) or under citizen suit provisions found in a number of environmental statutes. A federal agency being sued under a federal statute can be sued in the District Court for the District of Columbia, in a District Court in the state where the decision being challenged was made, or in a District in the state where the decision being challenged will have an impact.

The APA provides an opportunity for citizens to seek judicial review of agency decisions. 5 U.S.C. § 551 *et seq.* The APA states that any person “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action” is entitled to seek judicial review of that action. An agency’s failure to act is also considered “agency action” for purposes of the APA. 5 U.S.C. § 702. However, courts will only review final agency action. Preliminary, procedural, or intermediate agency actions or rulings cannot be reviewed by a court. 5 U.S.C. § 704.

Under the APA, a court will review an agency decision to determine whether it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706. Under this standard, the court cannot overturn an agency decision simply because the court disagrees with it. Instead, the court must find that the agency failed to consider “relevant factors,” failed to articulate a rational connection between the facts and the decision, or made a clear error in judgment.⁴ The court must give a great deal of deference to the agency’s decision, and it will allow the agency to rely on the expertise of its own employees as long as the agency can draw a rational connection between the conclusions drawn and the facts upon which those conclusions are based.

In most cases, a court reviewing an agency action under the APA will not dictate what the agency’s final decision should be. Instead, the court will review the agency’s decision to determine whether it complies with the law. If it does not, the court will set aside the agency’s decision and order the agency to try again. For example, if a court finds that an environmental impact statement (EIS) prepared by the Corps does not comply with the requirements of the National Environmental Policy Act, the court will order the Corps to prepare a new EIS. The court may order the Corps to consider or address specific issues in the final document, but it will not dictate the contents of the final EIS.

A number of major environmental statutes expressly allow citizens to file suit for certain violations of the statute. These “citizen suit” provisions are in addition to the judicial review provided by the APA. A citizen suit provision often creates a different standard for review than the standard created by the APA. Typically, a citizen suit provision will establish specific legal standing requirements (*see below*), and will require that the individual (or organization) intending to file suit provide advance notice to the agency. The advance notice requirement is intended to give the agency an opportunity to voluntarily comply with the law. The Clean Water Act and the Endangered Species Act both have citizen suit provisions.

Under either the APA or a citizen suit provision, an individual or organization must have judicial “standing” to file suit. An organization will have standing and be able to sue in its own name if one or more of its members have standing. To have standing, the party suing (a plaintiff) must show they have an actual stake in the outcome of the controversy. To show standing, a party must demonstrate three elements: (1) “injury-in-fact,” which can be established by showing that the action will harm property owned by the plaintiff or will impact the plaintiff’s ability to partake in some activity, even for purely aesthetic purposes (for example, observing an animal species, kayaking in a river, or drinking clean water from a river impacted by the challenged action); (2) a causal connection, which can be established by showing that the party being sued is the cause of the injury (this is to ensure that you are suing the correct party); and (3) “redressability,” which can be established by showing that the relief sought in the lawsuit will likely prevent or alleviate the injury.⁵ The concept of standing, like many legal concepts, continues to evolve, and activists considering filing suit against the Corps or another agency should seek the advice of an attorney for specific legal advice and recommendations.

II. Environmental Protection Laws

The Corps must comply with a host of environmental and other key laws when it plans and constructs projects and issues permits. The Corps must comply with all applicable statutes, regulations, judicial decisions, and Executive orders, and must comply with its own internal guidance and policies. The Corps also must comply with certain state laws, which are typically made applicable through state permitting requirements for Corps projects and permits.

Where these laws are not followed, the Corps can be forced to stop or significantly reshape projects or permits. In some instances, litigation will be necessary to force the Corps to comply with the law. In other instances, however, the Corps will improve its decision once you have clearly identified the legal violations and/or notified them that you intend to file suit. Actual and potential legal violations should be brought to the Corps' attention at every opportunity, including in comments submitted under the National Environmental Policy Act. Stand-alone letters to the Corps pointing out any such failures also can be useful to compel compliance.

A number of key environmental laws that are often implicated in Corps planning are discussed below.⁶ For ease of reference, these laws have been arranged in alphabetical order. Activists should pay particular attention to the National Environmental Policy Act, the Clean Water Act, and the Fish and Wildlife Coordination Act, which are applicable to virtually all Corps projects.

A. Clean Water Act

The Clean Water Act (CWA), which is officially titled the Federal Water Pollution Control Act, is designed to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.” CWA § 101 (33 U.S.C. § 1251).⁷ The CWA provisions most applicable to Corps projects and permits are discussed below. *See 33 U.S.C. § 1251 et seq. for the full text of the CWA.*

Clean Water Act § 313 — Federal Agency Compliance with Water Pollution Control Laws: CWA § 313 (33 U.S.C. § 1323) requires the Corps (and all federal agencies) to comply with **all** Federal, State, interstate, and local pollution control requirements when engaged in an activity that can result in the discharge of a pollutant. This provision requires the Corps to comply with both the substantive and procedural requirements of such laws. As part of this compliance, the Corps must obtain a Water Quality Certification from the State(s) in which the project will be constructed (in most instances a Water Quality Certification will also be required for operations and maintenance activities carried out by the Corps). *See below for a discussion of the CWA § 401 State Water Quality Certification requirements.*

Clean Water Act § 401 — State Water Quality Certifications: CWA § 401 (33 U.S.C. § 1341) authorizes states and tribes to review Corps projects and permits within their boundaries to determine whether the activity complies with state water quality standards. This review is not mandatory, and some states will elect not to conduct such a review. Upon completing the review, the state or tribe can issue or deny a Water Quality Certification. States or tribes can also impose significant conditions on the granting of a Water Quality Certification that can reduce the impacts of the activity. Denial of a Water Quality Certification will essentially veto the Corps project or permit. *See* 33 C.F.R. § 325.2(b). *See the discussion of CWA § 511 below for additional requirements applicable to state Water Quality Certifications for Corps navigation activities.*

It is important to understand that the basis for imposing conditions or denying a permit or project under § 401 must be found within the state's water quality standards and permitting requirements. State water quality standards must be adequate "to protect public health or welfare, enhance the quality of water, and serve the purposes" of the Clean Water Act. State water quality standards must be approved by the U.S. Environmental Protection Agency. 33 U.S.C. § 1313.

Water quality standards consist of two components: (1) designated uses to be "achieved and protected" for each applicable water body or segment; and (2) water quality criteria adequate to protect those designated uses. 33 U.S.C. § 1313. A state's water quality standards must also include an antidegradation policy and methods for implementing that policy. The antidegradation requirements must, among other things, be sufficient to protect existing instream water uses and maintain the level of water quality necessary to protect those existing uses. 40 C.F.R. § 131.12.

Designated uses must be based on the "use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation." The highest levels of water quality generally are required for the propagation of fish, shellfish, and wildlife, and for recreation. Water quality criteria are either quantitative (numeric) or qualitative (narrative) statements specifying maximum concentrations or levels of pollutants that may be present in a water body in order to protect and maintain a particular designated use. 33 U.S.C. § 1313.

States (and citizen's, through the CWA citizen suit provision) have the right to enforce both numeric and narrative water quality criteria through the § 401 Water Quality Certification process.

Clean Water Act § 401 can provide an important avenue for stopping or improving Corps projects. For example, the Mississippi Chapter of the Sierra Club was able to stop the Big Sunflower River dredging project by filing a legal challenge to the state's Water Quality Certification for the project. The Corps had proposed dredging 106 miles of the Big Sunflower to reduce flooding on farmland adjacent to the river. The Mississippi

Activist Tip

A state's Water Quality Certification review is a critical step in the review process for Corps projects and permits, and activists should engage in this review. If a Corps project or permit would violate state water quality standards, a state can essentially veto the activity or impose significant conditions to reduce the water quality impacts.

Activists should become familiar with the state water quality standards and advise both the state and the Corps if the proposed activity is likely to violate those standards. Activists should give the Corps and the state as much supporting evidence as possible on any such violations and should provide the state with the full set of comments submitted on the Corps' EIS and project study or permit.

Department of Environmental Protection had issued a Water Quality Certification for this project even though it very clearly violated the state's water quality standards. In 1999, the Mississippi Supreme Court vacated the Water Quality Certification for the project and sent it back to the state for reconsideration. This put a stop to the project and forced it back to the Corps for reevaluation. As of the date of this Citizen's Guide (10 years after the Court's decision), the project remains on hold.

Clean Water Act § 404 — Dredge and Fill Permits: CWA § 404 (33 U.S.C. § 1344) regulates the discharge of dredged or fill material into the nation's waters. Under § 404, the Corps issues permits to private parties and other governmental agencies for construction in wetlands, streams, rivers, and other aquatic habitats. The Corps also must comply with the requirements of § 404 when planning and constructing its own civil works projects. *See Chapter 3 for a detailed discussion of the requirements of § 404.*

Clean Water Act § 511 — Navigation Servitude, Savings Clause: CWA § 511 (33 U.S.C. §1371) provides, among other things, that nothing in the CWA shall be construed as "affecting or impairing the authority of the Secretary of the Army. . . to maintain navigation . . ." This "savings clause" arises from a doctrine known as navigation servitude, which "is a term used to describe the paramount interest of the United States in navigation and the navigable waters of the nation."⁸ CWA § 511 applies only to activities used by the Corps to maintain navigation. Such things as dredging for flood control purposes, management of Corps flood control dams, and management of non-Corps federal dams are not covered by CWA § 511.

CWA § 511 has implications for a state's issuance of a Water Quality Certification for Corps activities designed to maintain navigation. If a state denies a Water Quality Certification for activities designed to maintain navigation, or imposes strict conditions on the activity, CWA § 511 lets the Corps override the state permit. However, case law, regulations, and legislative history make it clear that the Corps' ability to override a state permit is extremely limited. The Corps must be able to show that complying with the state permit would **completely preclude** the Corps' ability to maintain navigation.⁹

Under the Corps' own regulations, such a decision can also only be made by the Corps' Chief of Engineers. The Chief must determine whether the Corps should (1) comply with the state denial or conditions; (2) defer the proposed dredging and seek Congressional appropriations to cover the costs of any extra measures that would allow the state to issue a permit; or (3) proceed with its navigation maintenance activities despite the permit conditions or denial pursuant to Clean Water Act § 511(a) and § 404(t). The Chief's decision must be based on an evaluation of the economic need for dredging; the impact on states outside the project area if the project is not dredged; the estimated additional cost of implementing measures that would allow the state to issue a permit; the relative urgency of dredging based on threats to national security, life, or property; and any additional facts that will aid in the determination. 33 C.F.R. §§ 337.8 and 337.2.

Activist Tip

Activists seeking to stop or improve Corps navigation activities (e.g., dredging and water level management) should make sure that the state fully understands that it can impose strict conditions on such activities or deny a permit for any such activities that violate the state's water quality standards. Activists should also ensure — and let the state know that it will receive — strong public support for such actions.

When these regulations were implemented, the Corps noted that it had never exercised its authority to override denial of a state water quality certification, and it did not expect to do so in the future.¹⁰

The CWA § 511 savings clause, and the concept of navigation servitude in general, is often misinterpreted, and states are typically not aware of the Corps' regulations concerning this issue. As a result, some states incorrectly believe that they cannot deny or place strict conditions on a state permit for a Corps navigation dredging project. In such cases, educating the state about its legal options can be extremely valuable.

For example, after American Rivers presented the state of Florida with information on these legal options (and evidence of the Corps' inability to comply with permit conditions), the state of Florida denied the Corps' request for a new five-year navigation dredging permit on the Apalachicola River.¹¹ This 2005 denial put an end to decades of navigational dredging on the Apalachicola River that had caused enormous damage to this exceptionally significant and internationally renowned river system.

B. Coastal Barrier Resources Act

The Coastal Barrier Resources Act (CBRA) was enacted to minimize loss of human life, wasteful spending, and damage to fish, wildlife, and other natural resources associated with the development of designated coastal areas. Only lands included in the Coastal Barrier Resources System are protected by the CBRA. The Coastal Barrier Resources System includes undeveloped islands, bays, estuaries, and near shore waters that are subject to wind, waves, and tides. *See 16 U.S.C. §§ 3501-3510 for the full text of the CBRA.*

The CBRA generally prohibits new federal expenditures or other forms of federal financial assistance in areas that are within the Coastal Barrier Resources System. However, a number of activities that are often carried out by the Corps are exempted from the Act's prohibition. Note that the CBRA does not restrict activities carried out with private or other non-federal funds.

The CBRA prohibits the federal government from participating in the following types of projects within the Coastal Barrier Resources System: construction or purchase of any structure, facility, or related infrastructure; or any structural shoreline protection project (except in certain designated areas of the Coastal Barrier Resources System, provided that the project will not encourage development).¹² Despite this prohibition, however, structural shoreline protection projects will be allowed in cases where an emergency threatens life, land, and property. 16 U.S.C. § 3504.

The CBRA allows the construction or maintenance of improvements for existing navigation channels, including dredging, within the Coastal Barrier Resources System (*i.e.*, these projects are exempted from the CBRA). The CBRA also allows some types

Activist Tip

Activists fighting a project located in or near an area included in the Coastal Barrier Resources System should determine whether that project would or could encourage development in an area within the System. If the answer is yes, evidence on the development inducing effects should be submitted to the Corps and the Secretary of the Interior.

of habitat management and enhancement efforts; emergency actions to protect life, land, or property; and nonstructural projects for shoreline stabilization that “are designed to mimic, enhance, or restore a natural stabilization system” as long as these activities will not encourage development in areas within the Coastal Barrier Resources System. However, before carrying out one of these “exempted” activities, the federal agency must consult with the Secretary of the Interior. 16 U.S.C. § 3505.

More information on the CBRA, including maps and descriptions of the areas included in the Coastal Barrier Resources System, can be found on the U.S. Fish and Wildlife Service website at http://www.fws.gov/habitatconservation/coastal_barrier.html.

C. Coastal Zone Management Act

The Coastal Zone Management Act (CZMA) is designed to encourage sound management and conservation of natural resources in the nation’s coastal areas (under the Act, coastal areas include the Great Lakes). The Act establishes a national policy to (1) protect the coastal zone; (2) encourage the states to develop coastal zone management programs; (3) promote cooperation between federal, state, and local agencies engaged in programs affecting the coastal zone; and (4) encourage broad public participation in the development of coastal zone management programs. 16 U.S.C. § 1452. The federal government will provide matching funds to administer approved state coastal zone management programs. *See 16 U.S.C. § 1451 et seq. for the full text of the CZMA.*

Coastal zone management programs must include, among other things, the boundaries of the coastal zone and the means by which the state will exert control over these areas; a planning process for protecting public beaches and coastal areas; a planning process for managing energy facilities; a process for assessing the effects of shoreline erosion; policies that address use and protection of wetlands and floodplains within the coastal zone; an enforceable coastal nonpoint source pollution control program; and procedures for determining whether state or local activities are consistent with the state’s program. 16 U.S.C. § 1455.

A state’s coastal zone management program must be approved by the Secretary of Commerce. 16 U.S.C. § 1454. Federal agencies are required to treat the provisions of an approved coastal zone management program as binding regulations, unless the federal agency is prohibited from compliance by the agency’s own legal requirements. 15 C.F.R. § 930.32.

Federal Consistency: Each federal agency, including the Corps, must ensure that agency activities within or affecting the coastal zone are consistent “to the maximum extent practicable” with the enforceable policies of the state’s coastal zone management program. 16 U.S.C. § 1456. “Consistent to the maximum extent practicable” means that the activity must be “fully consistent with the enforceable policies of management

programs unless full consistency is prohibited by existing law applicable to the Federal agency.” 15 C.F.R. § 930.32.

If the Corps “asserts that full consistency with the management program is prohibited, it shall clearly describe, in writing, to the State agency the statutory provisions, legislative history, or other legal authority which limits the Federal agency’s discretion to be fully consistent with the enforceable policies of the management program.” 15 C.F.R. § 930.32. Lack of funding cannot be used to justify less than full compliance with a coastal zone management program (*i.e.*, lack of funding cannot be used to support a claim that the activity complies with the program “to the maximum extent practicable”). 15 C.F.R. § 930.32.

For activities requiring a Corps (or other federal) permit, the applicant must certify to the state that the “activity complies with the enforceable policies of the state’s approved program and that such activity will be conducted in a manner consistent with the program.” 16 U.S.C. § 1456.

The state can either concur with or object to the consistency determination. The consistency process includes opportunities to consult with, and if necessary, negotiate with the state.

Projects and Activities Requiring Consistency Determinations: The Corps must submit consistency determinations to the state for each Corps civil works project or activity located within the coastal zone and for each Corps civil works project or activity outside of the coastal zone that would affect coastal zone resources. An applicant seeking a Corps permit for activities within the coastal zone or for activities outside the coastal zone that would affect coastal zone resources must submit a consistency determination to the Corps and the state. 16 U.S.C. § 1456.

Timeline for Determinations: The Corps (or other federal agency) must submit a consistency determination at least 90 days before the Corps’ final approval of the activity. The state has 60 days to review that consistency determination. 15 C.F.R. § 930.30-930.46. If the state does not respond within the 60 day period, the state is deemed to have concurred in the consistency determination, and the project may move forward.

An applicant for a Corps-issued permit (or for a permit or license issued by another federal agency) must submit a consistency determination to both the Corps and the state after the applicant has consulted with the state concerning the steps needed to ensure consistency. The state has six months to review a permit applicant’s consistency determination once the state determines that all needed information has been submitted by the applicant. 15 C.F.R. § 930.50-930.66. If the state does not respond within the six month period, the state is deemed to have concurred in the consistency determination, and the project may move forward.

Activist Tip

Activists fighting projects located in or near an area covered by a state coastal zone management program should carefully review the requirements of that program. If the project would not be consistent with the goals and requirements of that program, activists should alert the Corps and the state. Activists should also work to ensure that the state carefully reviews the Corps' consistency determination and strictly applies the requirements of its coastal zone management program to the project.

Effect of State Objection: If the state objects to a consistency determination for a Corps civil works project or activity, the Corps can proceed only if it provides the legal basis for a determination that the activity is consistent with the coastal zone management plan to the “maximum extent practicable.” If the state objects to a consistency determination for a Corps permit, the Corps may not issue that permit. The CZMA provides an administrative appeal to the Secretary of Commerce from a consistency objection by a coastal state.

The text of the CZMA, the CZMA implementing regulations, and additional guidance are available through the NOAA website at http://coastalmanagement.noaa.gov/czm/czm_act.html. The CZMA regulations implementing the consistency requirements are found at 15 C.F.R. Part 930 and can be accessed at <http://coastalmanagement.noaa.gov/consistency/regulations.html>.

D. Endangered Species Act

The federal Endangered Species Act (“ESA”) is one of the most powerful environmental laws on the books. The ESA is designed to ensure that species do not become extinct and to facilitate recovery of species that are endangered or threatened. The ESA makes endangered species protection the “highest of priorities” even if this conflicts with a federal agency’s primary missions. The U.S. Supreme Court has acknowledged that in enacting the ESA, Congress clearly intended “to halt and reverse the trend toward species extinction, whatever the cost.” *See 16 U.S.C. § 1531 et seq. for the full text of the ESA.*

The ESA is particularly important with respect to Corps projects. For example, the Government Accountability Office recently reported that 33% of all formal ESA consultations in the western states dealt with Corps projects and permits, and that Corps projects and permits involved far more consultations than the activities of any other single federal agency. For example, the next two agencies that trailed the Corps on this list — the Forest Service and the Bureau of Land Management — each accounted for only 11% of the ESA consultations in the western states.¹³

Substantive Requirements of the ESA: Section 7 of the ESA requires the Corps (and every federal agency) to (1) actively pursue species conservation; (2) insure no jeopardy to a listed species; and (3) insure that areas designated under the act as “critical habitat” are not destroyed or adversely modified. The duty to insure no jeopardy requires the Corps to ensure that its actions are “not likely to jeopardize the continued existence of any endangered . . . or threatened species.” This means that a federal agency cannot directly or indirectly reduce the likelihood that the species will survive and recover in the wild. The duty to protect critical habitat means that the Corps cannot directly or indirectly alter critical habitat in a manner that diminishes the habitat’s value for both survival and recovery of a listed species. 16 U.S.C. § 1536.

Activist Tip

The ESA is an incredibly powerful tool for improving or stopping a destructive Corps project or permit. Activists should determine as early in the Corps planning process as possible whether there are endangered or threatened species in the project area, or whether any areas affected by the project are designated as “critical habitat” under the ESA. In addition to the protections provided to listed species, the ESA prohibits the Corps from directly or indirectly altering critical habitat in a manner that diminishes the habitat’s value for both survival and recovery of a listed species.

The ESA also imposes a number of procedural requirements on the Corps (and other agencies). First, if the Corps proposes to authorize, fund, or carry out a project, the Corps must submit a written request to the U.S. Fish and Wildlife Service (FWS) and/or NOAA Fisheries for marine species for a list of species and of formally designated critical habitat that may be present in any areas potentially affected, either directly or indirectly, by the proposed action (the action area). If one or more listed species or designated critical habitat may be present in the action area, the Corps must prepare a biological assessment.

Biological Assessments and Formal Consultation: A biological assessment evaluates the potential affects of the action on both listed species and species proposed for listing and on designated and proposed critical habitat. It must be submitted to FWS and/or NOAA Fisheries for review, and it must be completed before the Corps can enter into any contract for construction or begin construction. Failure to complete a biological assessment is a significant procedural violation of the ESA. 16 U.S.C. § 1536(c).

If the biological assessment, the Corps, or FWS/NOAA Fisheries conclude that the action is likely to adversely affect one or more listed species and/or designated critical habitat, the Corps must enter into formal consultation with FWS/NOAA Fisheries. Refusal to enter into formal consultation is another significant breach of the ESA. 16 U.S.C. § 1536(a) (2). As surprising as it may seem, the Corps refused to enter into formal consultation at the request of FWS on at least one highly destructive project in Mississippi. The Corps continued to refuse to enter into formal consultation until a number of environmental groups formally advised the Corps that they would file suit under the ESA.

During the formal consultation process, the Corps may not make an “irreversible or irretrievable commitment of resources” with respect to the project. This prevents the agency from taking actions that will foreclose the ability to implement alternative measures that will not adversely affect the listed species or critical habitat at issue.

Biological Opinions: The formal consultation process results in a biological opinion that is prepared by FWS and/or NOAA Fisheries. If the biological opinion determines that the proposed action may jeopardize the continued existence of a species and/or may destroy critical habitat, the agency will issue a “jeopardy opinion.” A jeopardy opinion must discuss any “reasonable and prudent alternatives” to the proposed action that will minimize or avoid the action’s adverse effects. 16 U.S.C. § 1536(b).

If the biological opinion reaches a contrary conclusion, a “no jeopardy opinion” will be issued. If a no jeopardy opinion is issued, FWS/NOAA Fisheries can issue an incidental take statement authorizing the killing or harming of a specified number of members of the listed species. The Corps cannot harm, harass, or kill a listed species without an incidental take statement.

Activist Tip

Activists should recognize that they will also need to work closely with FWS and/or NOAA Fisheries to ensure that the agencies are properly carrying out their responsibilities under the ESA.

Once a biological opinion is released, the Corps decides whether it will proceed with the action and/or what changes it will make to its plans to comply with its ESA duties. The Corps does not have to adopt the reasonable and prudent alternatives set forth in a biological opinion, but can instead rely on its own modifications to the project. But, failure to adopt the biological opinion subjects the Corps to the risk of a court finding that it has not complied with its ESA duties.¹⁴ The Corps cannot determine that the benefits of the project as proposed are more important than conserving endangered or threatened species.

E. Fish and Wildlife Coordination Act

The Fish and Wildlife Coordination Act (FWCA) authorizes the U.S. Fish and Wildlife Service (FWS) to evaluate impacts to fish and wildlife from proposed federal water resources projects and private projects that require a federal permit or license. *See 16 U.S.C. § 661 et seq. for the full text of the FWCA.*

The FWCA requires the Corps to consult with FWS (and in some instances, with NOAA Fisheries), and the head of the fish and wildlife agency in the state where the project is located, before the Corps recommends a civil works project or issues a permit for a project that will control or modify waters of any stream or other body of water for any purpose, including for navigation or drainage projects. Modifications that trigger consultation include, but are not limited to, impoundments, diversions, and channel deepening. 16 U.S.C. § 662.

The purpose of the consultation is to prevent loss and damage to wildlife and wildlife resources. 16 U.S.C. § 662. Wildlife and wildlife resources are defined to include “birds, fishes, mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent.” 16 U.S.C. § 666b.

As part of the consultation, FWS and the state fish and wildlife agency must (1) develop recommendations based on surveys and investigations to determine the potential impacts to wildlife resources; (2) describe the damages to wildlife attributable to the project; and (3) develop mitigation measures to prevent these damages and to improve wildlife resources. The FWS recommendations must be as specific as possible. The FWS provides this information in a document known as the Fish and Wildlife Coordination Act Report, which must be included in the Corps’ project reports (and typically is included as an Appendix to the EIS). The recommendations in the Fish and Wildlife Coordination Act Report must be given “full consideration” by the Corps, but the Corps is **not** required to adopt the FWS recommendations.

F. National Environmental Policy Act

The National Environmental Policy Act (NEPA), often referred to as the nation’s basic national charter for protecting the environment, requires the Corps to prepare an environmental impact statement (EIS) for “all major Federal actions significantly

affecting the quality of the human environment.” See 42 U.S.C. § 4321 *et seq.* for the full text of the NEPA.

Virtually all proposals for new Corps projects will require an EIS. In some very limited circumstances, a less comprehensive document known as an environmental assessment (EA) may be all that is necessary. By law, the Corps also cannot issue a Clean Water Act § 404 dredge and fill permit without preparing an EIS or EA, unless the activity is explicitly exempt from NEPA review. 33 C.F.R. § 325.2.

The primary purpose of an EIS is to ensure that high quality environmental information is available to public officials and citizens before decisions are made and actions are taken. The NEPA process is intended to guide an agency in its decision making process, but it does not mandate selection of a particular alternative. As a result, once an EIS or EA is properly completed, the Corps can select any alternative it chooses (subject to provisions of other applicable law), even if other alternatives would cause far less environmental harm.

The Corps must follow two separate sets of regulations in implementing NEPA. It must comply with the NEPA regulations issued by the Council on Environmental Quality (CEQ) and those issued by the Corps. The CEQ regulations are found at 40 C.F.R. Part 1500. The Corps’ NEPA regulations are found at 33 C.F.R. Part 230. The CEQ regulations, NEPA case law, NEPA guidance documents, and a CEQ Citizen’s Guide to NEPA can be accessed through the CEQ website at <http://www.nepa.gov>. The CEQ Citizen’s Guide to NEPA can be accessed directly at http://ceq.hss.doe.gov/nepa/Citizens_Guide_Dec07.pdf.

Contents of an EIS: An EIS must provide a full and fair discussion of significant environmental impacts of a project or permit. It must provide detailed information on each of the elements that must be addressed, and all assumptions and conclusions upon which an EIS is based **must** be supported by evidence in the administrative record (the documents and information that the Corps has considered in preparing the EIS).

Most importantly, an EIS must rigorously explore and objectively evaluate all reasonable alternatives for implementing the proposed action. While an EIS need not explore every conceivable alternative, it must rigorously explore all reasonable alternatives that are consistent with the basic objective of the project and that are not remote or speculative. A viable but unexamined alternative renders an EIS inadequate.

An EIS also must address (1) the affected environment; (2) the environmental consequences, including the cumulative impacts, of the proposed action and alternatives; and (3) measures to mitigate for any significant impacts that are identified.

An EA is a shorter, far less comprehensive document than an EIS, and will be prepared when it is not clear that the more comprehensive EIS is required. An EA must provide

Activist Tip

Activists should look very closely at water projects for which the Corps is only preparing an EA, as the Corps will sometimes try to get by with an EA when an EIS is clearly required. For example, the Corps attempted to prepare an EA for raising a flood control levee on the Mississippi River arguing that it was “only” a single portion (or separable element) of a much larger levee raising project. However, that “single” levee raising project would have destroyed some 900 acres of bottomland hardwood wetlands. An EIS was clearly required for this project, and the conservation community was eventually able to convince the Corps of this fact by filing a legal challenge.

sufficient evidence to determine whether an EIS must be prepared. If an EA concludes that the action will significantly affect the quality of the human environment, the Corps must prepare an EIS.

If an EA concludes that the proposed action will not have a significant effect on the human environment, the Corps will not prepare an EIS, but instead will issue a Finding of No Significant Impact (FONSI). The Corps can also issue a Mitigated FONSI when the proposed mitigation will reduce impacts to below significant levels. Courts have upheld the use of Mitigated FONSI where there is sufficient evidence to show that the mitigation will in fact reduce the impacts and is likely to be implemented.

Supplemental EIS: The Corps’ NEPA obligations do not end when an EIS is finalized. Where significant work still must be done on a project, the Corps must prepare a supplemental EIS whenever “(i) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c).

There is no time period after which the Corps must update an EIS — even a 25 year old EIS would not need to be supplemented if one of the two tests is not met. However, CEQ has made it clear that the Corps is supposed to take a “hard look” at whether these tests have been met for any EIS that is more than five years old.¹⁵

The Importance of Public Comment: The NEPA process provides a key opportunity to provide your views on a Corps project or permit. A draft EIS must be circulated for public review and comment, and public hearings on an EIS are often held. The final EIS must respond to all public comments received. The Corps is technically not required to take public comment on an EA, but often does. The Corps also typically takes public comment on the final EIS before entering the Record of Decision for the project.

The Corps must consider information submitted during the public comment period, making the public comment process particularly important where the Corps is ignoring critical information. As discussed below, submitting comments on an EIS or EA is also critically important if you are considering a legal challenge.

Comments should include as much detail as possible concerning your views on the flaws of the EIS. You should clearly identify information that is wrong or missing, other projects and activities that should be considered in a cumulative impacts analysis (with as much specificity as possible), and alternatives to the proposed project that should be considered. You should provide copies, or at least citations to, any scientific or other studies that you want the Corps to consider. If you only provide citations, you should clearly state in your written comments that you want full copies of the cited studies included in the administrative record.

Activist Tip

Activists challenging a project, or an unconstructed separable element of a project, with an EIS that is older than 5 years should consider whether a supplemental EIS is required. A supplemental EIS should also be required for operations and maintenance activities where the supplemental EIS tests are met.

Activists should also work with scientists, economists, and other experts to have them submit detailed comments during the public comment period.

In addition to considering the information provided in public comments, the Corps also should give consideration to the number of comments submitted in opposition (or in favor of) a project. As a result, it is useful to generate as many comments as possible from other concerned citizens or organizations. Email and postcard comments have been used successfully in such efforts.

Court Review: Courts can review a decision not to prepare an EIS or a supplemental EIS and can review the substantive adequacy of an EIS that has been completed. In most instances, a court will only consider information contained in the administrative record in analyzing the adequacy of an EIS.

To be able to file suit for failing to prepare an adequate EIS, an individual or organization, among other things, must have submitted comments during the public comment period on either the draft or final EIS. In addition, the issues ultimately raised in the litigation must have been raised during the NEPA process. Activists should not overlook the opportunity to comment on a final EIS, particularly if litigation might be necessary. This final comment period provides an opportunity to include additional information addressing inadequacies of the EIS in the administrative record.

G. Wild and Scenic Rivers Act

The Wild and Scenic Rivers Act (WSRA) was enacted to preserve the free-flowing condition of rivers with outstanding natural and recreational values. The WSRA designates Wild and Scenic Rivers, establishes procedures for adding additional rivers to the list, and provides guidance on how those rivers should be managed. More than 12,000 miles of 252 rivers in 39 states have already been designated as Wild and Scenic.¹⁶ *See 16 U.S.C. § 1278 et seq. for the full text of the WSRA.*

Rivers may be designated by Congress or, under certain circumstances, by the Secretary of the Interior.¹⁷ Segments of rivers can be designated as Wild and Scenic, and designations may include tributaries. Each river is administered by either a federal or state agency.

A Wild and Scenic designation (1) protects a river's "outstandingly remarkable" values and free-flowing character; (2) protects existing uses of the river; (3) prohibits federally-licensed dams, and imposes restrictions on other federal and federally-assisted projects that would negatively impact the river's outstanding values (*see below*); (4) establishes a quarter-mile protected corridor on both sides of the river; and (5) requires the creation of a cooperative river management plan that addresses, among other things, resource protection, development of lands and facilities, and user capacities. A Wild and Scenic

designation does not prohibit development, does not affect water rights, and does not affect existing uses. Uses compatible with the management goals of a particular river are allowed.

The WSRA imposes important restrictions on federal activities. The WSRA prohibits the Federal Power Commission from issuing a license for the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project under the Federal Power Act on or directly affecting any Wild and Scenic river. 16 U.S.C. § 1278(a). The WSRA also places important restrictions on federal permitting and federal projects that are particularly applicable to the Corps:

- (1) **Restrictions on Permitting:** Federal agencies are prohibited from issuing a federal permit (or other forms of federal assistance) for “the construction of any water resources project that would have a direct and adverse effect on the values” for which the river was designated, as determined by the Secretary charged with the river’s administration.¹⁸ 16 U.S.C. § 1278(a). This prohibits the Corps from issuing a permit without the consent of the agency responsible for administering the Wild and Scenic river, essentially giving the administering agency veto power over the permit.
- (2) **Restrictions on Federal Projects:** Federal agencies are prohibited from recommending the authorization of, or requesting construction appropriations for, any water resources project “that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration” without advising the administering Secretary in writing 60 days in advance, and without providing a specific written report to Congress on the impacts of the project on the Wild and Scenic river. 16 U.S.C. § 1278(a). This ensures that the administering Secretary has an opportunity to raise concerns with the project to Congress, and that Congress is advised of the project’s impacts to the Wild and Scenic river. The administering agency does **not** have veto power over a Corps civil works project.¹⁹

Additional information on the WSRA, including a comprehensive list of the rivers protected by the Act, can be accessed at <http://www.rivers.gov/>.

Activist Tip

When commenting on a Corps flood damage reduction project, activists should urge a full and comprehensive assessment of buyouts of floodprone properties, elevating and floodproofing existing structures, and ensuring strict compliance with NFIP floodplain management standards as an alternative to a structural plan. Activists should also urge the Corps to consider an alternative that combines these nonstructural approaches with restoration efforts designed to restore the natural flood protection services provided by healthy rivers and wetlands.

Activists should also submit evidence of any non-compliance with NFIP requirements for communities that would “benefit” from the Corps’ proposed plan, and urge the Corps to account only for those flood damage reduction benefits that could not also be obtained through full compliance with the NFIP requirements.

III. Flood Insurance and Historic Preservation Laws

The National Flood Insurance Act and the Historic Preservation Act also often can — or should — play a role in Corps project planning. Activists should be familiar with these laws and use them to improve Corps projects when appropriate.

A. National Flood Insurance Act

The National Flood Insurance Act establishes the National Flood Insurance Program (NFIP), which provides federally subsidized flood insurance to owners of flood-prone property in participating communities. Prior to establishment of this program, affordable private flood insurance generally was not available. The NFIP is administered by the Federal Emergency Management Agency (FEMA). *See Chapter 5 for more information on FEMA and its role in Corps projects and activities. See 42 U.S.C. § 4001 et seq. for the full text of the National Flood Insurance Act and 42 U.S.C. § 1521 et seq. for the full text of the Robert T. Stafford Disaster Relief and Emergency Services Act.*

Communities participating in the NFIP must adopt certain minimum floodplain management standards. These include: restrictions on new development in designated floodways, a requirement that new structures in the 100-year flood zone be elevated to or above the 100-year flood level, and a requirement that subdivisions be designed to minimize exposure to flood hazards.

In recent years, Congress has been increasing requirements for coordination between the NFIP, disaster relief, and Corps flood damage reduction programs (although considerably more needs to be done). Communities seeking Corps flood control projects are required to participate in, and be in compliance with, the NFIP. They must also prepare floodplain management plans as a condition of project cooperation. 33 U.S.C. § 701(b) – 12.

Two FEMA programs — the NFIP and FEMA’s Hazard Mitigation Grants Program (42 U.S.C § 1570c) — have provided substantial federal funds to assist with planning and implementation of primarily non-structural buyouts of floodprone properties as well as elevations and floodproofing of existing structures, as complements or alternatives to traditional Corps flood control projects. From 1994 to 2004, FEMA supported buyouts of approximately 30,000 floodprone residences and businesses, providing approximately \$1 billion in federal funds. When buildings are purchased, the owner receives pre-disaster fair market value for the property, and the land is permanently dedicated to open space uses, generally under responsibility of a local government. A variety of state and other federal programs can assist with finding new housing or business relocations, particularly after disasters. Additional information on these programs can be accessed from the FEMA website at <http://www.fema.gov>.

B. National Historic Preservation Act

The National Historic Preservation Act (NHPA) establishes a comprehensive program to preserve the Nation's historical and cultural foundations. Among other things, the NHPA requires federal agencies to consider the effects of their actions on historic properties and establishes an Advisory Council on Historic Preservation. *See 16 U.S.C. § 470 for the full text of the NHPA.*

Section 106 of the NHPA requires federal agencies, including the Corps, to consider the effects of their actions on historic properties. The requirements of Section 106 apply to both the Corps' civil works and permitting actions.²⁰ The Advisory Council on Historic Preservation established by the NHPA must be given an opportunity to comment on Federal projects and permits prior to their implementation (these reviews will be conducted in consultation with the State Historic Preservation Officer). 16 U.S.C. § 470f.

The Section 106 review encourages, but does not mandate, preservation of historic properties. Instead, a Section 106 review ensures that preservation values are factored into federal agency planning and decision-making, and allows the public to hold the federal agency publicly accountable for decisions that affect historic properties.

More information on the NHPA can be accessed from the website for the Advisory Council on Historic Preservation at <http://www.achp.gov>. A citizen's guide to the Section 106 review process is available at <http://www.achp.gov/citizensguide.pdf>. The Section 106 regulations, Protection of Historic Properties, are found at 36 C.F.R. Part 800.

IV. Information Access and Quality Laws

The following laws are designed to help ensure that the public has access to information prepared by federal agencies, and to ensure the adequacy of that information. Corps planning laws also require the Corps to make certain information available to the public. These Corps-specific requirements are discussed in Chapter 2.

A. Data Quality Act

Enacted in December 2000, the Data Quality Act (DQA) is a two paragraph provision buried in an appropriations bill.²¹ Though largely supported by those who **oppose** environmental regulation (as the Act can be used to stall critical regulatory efforts), the Act does provide an opportunity for challenging the contents of Corps studies. *See the Treasury and Government Appropriation Act for Fiscal Year 2001, Pub. L. No. 106-554 § 515 Appendix C for the full text of the DQA.*

The DQA was enacted primarily to ensure the accuracy of information provided on government websites. However, the requirements of the DQA are not limited to website information. The DQA requires each federal agency to “issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency.” OMB is directed to establish government-wide information quality standard guidelines upon which the individual agency guidelines are to be based.

Importantly, the DQA requires federal agencies “to establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines” issued pursuant to the Act. This provides a mechanism for challenging the accuracy of information contained in Corps reports and studies.

Under the DQA a party can challenge specific assumptions or statements that are inaccurate, are contrary to trends in the literature on the subject, or that fail to tell the whole story. Studies already made public by an agency can be challenged under the DQA if the agency continues to use or rely on them.

Copies of agency guidelines established under the DQA are maintained by the Center for Regulatory Effectiveness at <http://www.thecre.com/quality/index.html>. As of the date of this publication, the Corps had not developed their own guidelines. However, guidelines are in place for the Department of Defense and these should be used to challenge Corps information until the Corps promulgates its own.

While DQA challenges have been filed by conservation groups and by Public Employees for Environmental Responsibility (PEER) against the Corps, to date those challenges

have either not been responded to or have not caused an improvement in the quality of the data and models used by the Corps.

B. Freedom of Information Act

The Freedom of Information Act (FOIA) requires the Corps (and all federal agencies) to promptly provide documents to any person upon receipt of a written request. FOIA is an extremely useful tool for obtaining government documents that otherwise might not be available for public review, particularly those setting forth the steps taken and information reviewed by an agency in reaching a particular decision. *See 5 U.S.C. § 552 et seq. for the full text of the FOIA.*

FOIA Request: A FOIA request for records must reasonably describe the records requested and be made in accordance with the agency’s published procedures. The Corps’ FOIA procedures (including the Corps’ fee schedule), and other FOIA information can be accessed at <http://www.usace.army.mil/FOIA/Pages/ArticleHome.aspx>.

A FOIA request should clearly describe the subject matter and types of documents being requested. The request should also identify the format that the requester prefers the documents to be produced in (*i.e.*, hard copies, electronic copies, etc.), as the Corps must provide the documents “in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.” 5 U.S.C. § 552(a)(3). In addition, if applicable, the request should include a relatively detailed discussion of why a fee waiver is warranted (*see below*).

A FOIA request can ask for a broad range of document types and should fully describe the types of documents you are requesting. For example, you could request all documents pertaining to a specific project, including letters, memoranda, analyses, studies, reports, meeting summaries, agendas, maps, and any other relevant documents, whether in draft or final form, or in the form of email messages, telephone conversations, handwritten notes, and other mediums of communication.

Documents and Exemptions: The Corps must produce all documents requested in a FOIA request unless those documents are explicitly exempted from production or are already publicly available. It is important to recognize, however, that FOIA only provides access to **existing** documents; an agency is not required to prepare new documents to meet a FOIA request.

The following types of documents are exempted from FOIA, and thus do not have to be produced in response to a FOIA request:

- (1) Records of matters “specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy”;

Activist Tip

Activists should carefully consider what to ask for in a FOIA request. In most cases a broad request seeking all documents that pertain to a particular project or issue will make the most sense, and will ensure that you get all relevant documents. There may be cases, however, where you want to request just one or two specific documents.

A tailored request is likely to be responded to more quickly and any potential fees would be significantly less. However, if you have not identified the requested document properly, the Corps would not have to produce it.

There is no limit on the number of FOIA requests that can be sent with respect to a particular project or program.

- (2) Records of matters “related solely to the [agency’s] internal personnel rules and practices”;
- (3) Records of matters specifically exempted from disclosure by statute;
- (4) Privileged or confidential trade secrets and commercial or financial information;
- (5) “Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency”;
- (6) Personnel, medical, and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) Records or information compiled for law enforcement purposes to the extent they could interfere with enforcement proceedings;
- (8) Records of matters contained in or related to reports prepared by, or on behalf of, or for the use of, an agency charged with regulating financial institutions; or
- (9) Geological or geophysical information and data, including maps, concerning wells.

However, any non-exempt portions of a document that falls under one of these exemptions must be produced. 5 U.S.C. § 552(b).

The exemption that is likely to create the most problems for activists seeking information on Corps projects is the exemption for “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” Often referred to as Exemption 5, this is also known as the deliberative process privilege, and it is designed to protect a full and frank discussion of legal and policy issues during the decision making process.²²

Under Exemption 5, the Corps can withhold documents if they are predecisional, are generated in the course of the adoption of agency policy, are deliberative in nature, and reflect the give and take of the consultative process. These “pre-decisional documents” can cover such things as recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect personal opinions of the writer rather than the policy of the agency.

Information that is purely factual in nature, however, cannot be withheld under Exemption 5. In addition, predecisional documents lose their protection — and must be disclosed under FOIA — if the document is subsequently adopted as an agency position,

if the document is released to the public or used by the agency in dealings with the public, or if the document is disclosed to individuals or agencies not involved in the deliberative process.²³

Fees and Fee Waivers: The Corps can charge fees for providing public records under FOIA. The fees must be limited to reasonable direct costs of document search, duplication and review.²⁴ Documents must be provided at a reduced charge or free of charge “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4). Activists seeking a fee waiver must document how they will make the information available to the public and why it is in the public interest to do so.

Timeline for Response: The Corps must notify the requester within 20 working days²⁵ of receiving a FOIA request whether it will comply with such request, the reasons for the decision, and of the right of the requester to appeal to the head of the agency any adverse determination. The Corps can toll the 20-day period if it requests additional information from the requester. In “unusual circumstances” as defined in the Act, the time limits can be extended by the Corps. 5 U.S.C. § 552(a)(6). Despite the 20-day response requirement, responses often take much longer.

Appealing a Denial: Any person may appeal a denial of all or part of a FOIA request to the head of the agency. Any person who has been denied access to public records may file suit in U.S. District Court to order the production of agency records improperly withheld. The District Court must review the records and come to its own conclusion as to whether the agency’s action of withholding the records was lawful.

V. Corps Planning Laws

The Corps' project planning process is guided by an extensive body of laws, regulations, and policies. These laws and policies address such issues as the contents of Corps feasibility studies, benefit-cost analysis requirements, cost-sharing requirements, independent peer review, mitigation, and compliance with the Corps' project planning principles and guidelines (which are currently being modernized). Corps projects must also comply fully with all applicable federal environmental laws and regulations, including those outlined in this chapter. *See Chapter 2 for a detailed discussion of the Corps' project planning laws, regulations, and policies.*

VI. Executive Orders

Executive orders are issued by the President to federal agencies and generally provide specific directions for implementing laws and policies established by Congress. While Executive orders are legally binding, they are generally not enforceable, which can limit their effectiveness. The following Executive orders are among the most important that affect the Corps' work. Most Executive orders are easily searchable online.

Floodplain Management – Executive Order 11988 (May 24, 1977): This Executive order directs the Corps and other agencies “to reduce the risk of flood loss, to minimize the impacts of floods on human safety, health and welfare, and to restore and preserve the natural and beneficial values served by floodplains.”²⁶ The order requires the Corps to evaluate the potential effect their actions may have in a floodplain and to “consider alternatives to avoid adverse effects and incompatible development in floodplains.” It serves as a key directive to agencies to consider alternatives to avoid actions that would result in unwise floodplain development. Compliance with this order is generally conducted in coordination with NEPA compliance, but the Corps has promulgated specific regulations to implement this Executive order.

Protection and Enhancement of Environmental Quality – Executive Order 11514 (March 5, 1970): This Executive order specifies the duties of the President's Council on Environmental Quality (CEQ).²⁷ It also directs CEQ to establish regulations for the referral of interagency conflicts concerning National Environmental Policy Act reviews to CEQ. Agency referrals to CEQ can be an important mechanism for redirecting or stopping a harmful proposal. In the case of the Oregon Inlet Jetties, NOAA Fisheries referred the Corps EIS to CEQ because there was a conflict over the project's impact to fisheries. The CEQ referral process resulted in putting an end to the jetty proposal and having the Corps, FWS, NOAA Fisheries and CEQ agree to a less environmentally destructive alternative. *See Chapters 5 for more information on CEQ and the referral process.*

Protection of Wetlands – Executive Order 11990 (May 24, 1977): This Executive order directs the Corps and other agencies “to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands” in carrying out federal activities and programs (the order does not apply to issuance of Federal permits or licenses to private parties for activities involving wetlands on non-Federal property).²⁸ This order establishes the federal policy to reduce and reverse losses and degradation of the nation's wetlands. This order is generally implemented in conjunction with NEPA compliance.

Water Resources Projects – Executive Order 12322 (September 17, 1981): This Executive order directs the Corps to submit project proposals or plans to the Office of Management and Budget (OMB) for review before submitting the proposal to Congress.²⁹ OMB is to review each project proposal to determine its consistency with the President's policies and programs, the Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies (commonly referred to as the *P&G*, which are the basic rules used by the Corps to plan and evaluate projects; the *P&G* are currently being modernized pursuant to hard fought reforms enacted in the Water Resources Development Act of 2007) and other applicable laws, regulations, and requirements relevant to the planning process.

Although the Corps can still proceed with a project even if OMB objects, OMB's review and conclusions can provide arguments for stopping or redirecting the project. In addition, OMB is unlikely to allow the President's budget to include funds for a project it opposes. For example, in 2001, OMB found that the Corps' proposal for the Dallas Floodway Extension project failed to identify the most effective alternative for the project consistent with protecting the environment (as required by the *P&G*). As a result, the President's budget included no money for this project in FY 2003 and 2004 even though the Corps continued to push for the project. Unfortunately, Congress nevertheless appropriated significant amounts of funding for the project in both years.

Endnotes

1. The United States Code compiles all changes to policy provisions and is the official source for the current version of the law. As a result, you should always utilize the U.S.C. reference to find the most current legal requirements. Note that the section numbers of the U.S.C. and U.S.C.A. are identical; the U.S.C.A. merely adds explanations and case law references that have interpreted the code sections.
2. There are 11 numbered Circuit Courts of Appeals that cover specific geographic regions. There is also a District of Columbia Circuit Court and a Federal Circuit Court. The 1st Circuit Court of Appeals covers Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island. The 2nd Circuit Court of Appeals covers New York, Vermont, and Connecticut. The 3rd Circuit Court of Appeals covers Pennsylvania, New Jersey, Delaware, and Virgin Islands. The 4th Circuit Court of Appeals covers Maryland, North Carolina, South Carolina, Virginia, and West Virginia. The 5th Circuit Court of Appeals covers Louisiana, Texas and Mississippi. The 6th Circuit Court of Appeals covers Michigan, Ohio, Kentucky and Tennessee. The 7th Circuit Court of Appeals covers Illinois, Indiana, and Wisconsin. The 8th Circuit Court of Appeals covers North and South Dakota, Minnesota, Nebraska, Iowa, Missouri and Arkansas. The 9th Circuit Court of Appeals covers California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii, Guam and the Northern Mariana Islands. The 10th Circuit Court of Appeals covers Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming, plus those portions of the Yellowstone National Park extending into Montana and Idaho. The 11th Circuit Court of Appeals covers Alabama, Georgia and Florida. The District of Columbia Court of Appeals has jurisdiction over the District of Columbia, the U.S. Tax Court, and appeals from decisions of many federal administrative agencies. The Federal Court of Appeals has jurisdiction over the U.S. Court of International Trade, the U.S. Claims Court, the Court of Veteran's Appeals and patent appeals.
3. The President's authority to issue legally binding orders is found in Article II of the U.S. Constitution which grants "executive Power" to the President and directs the President to "take Care that the Laws be faithfully executed."
4. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 105 (1983); *Motor Vehicles Mfrs. Assn. v. State Farm*, 463 U.S. 29, 43 (1983).
5. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).
6. Numerous other environmental laws can also be implicated in Corps planning.
7. Each Clean Water Act section can be cited in two different ways. One citation is to the section of the Clean Water Act as it was passed by Congress (Clean Water Act § 101 to § 607). The Clean Water Act was codified in Title 33 of the U.S. Code, so each Clean Water Act section also has a corresponding U.S. Code citation (33 U.S.C. § 1251 to 33 U.S. C. § 1387). So for example, Clean Water Act § 101 is also known as 33 U.S.C. § 1251.
8. *U.S. v. Certain Parcels of Land in the City of Valdez*, 666 F.2d 1236 (9th Cir. 1982).
9. The legislative history makes it clear that Congress believed that the Corps was more than capable of both maintaining navigation and meeting water quality standards: "This amendment . . . is neither intended nor expected to result in compromising the ability of the Corps to maintain navigation. The States that have taken administrative and judicial action to seek Corps compliance with water quality standards have a comparable interest in the movement of commerce on waterways maintained by corps dredging. The committee expects that such States will act both to insure compliance with water quality standards and continued corps dredging activities." S. Rep. No. 95-370 at 68-69 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4393. Moreover, the Corps "acknowledges that its obligation to 'maintain navigation' does not always trump the Clean Water Act. However, the Corps contends that when it is faced with what it calls an 'either-or-situation,' the Corps ability to maintain navigation is not subject to state water quality standards." *State of North Dakota v. Corps of Engineers*, 270 F.Supp.2d 1115, 1122 (D.N.D. 2003).
10. 53 Fed. Reg. 14902 (April 26, 1988).
11. The state denied the Corps' request for a wetlands resource permit and a Clean Water Act § 401 Water Quality Certification, and denied a public easement to use sovereign submerged lands for the proposed dredged material disposal sites.
12. Federal flood insurance provided through the National Flood Insurance Program is only available for structures located within the Coastal Barrier Resource System if the building was constructed (or permitted and under construction) before the area became part of the System. If such an existing insured structure is substantially improved or damaged, the CBRA prohibits renewal of the federal flood insurance policy.
13. Government Accountability Office, *Endangered Species Act: The U.S. Fish and Wildlife Service Has Incomplete Information about Effects on Listed Species from Section 7 Consultations* (May 2009) at Table 1.
14. *E.g., Tribal Village of Akutan v. Hodel*, 869 F.2d, 1185, 1193 (9th Cir. 1988), *cert. denied*, 493 U.S. 873 (1989).
15. Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations*, available at <http://www.nepa.gov> (visited June 26, 2009).
16. <http://www.rivers.gov/> (visited June 26, 2009).

17. Under the WSRA, rivers are classified as wild, scenic, or recreational. A “wild” river is a river or river section that is free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted. A “scenic river” is a river or river section that is free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads. A “recreational river” is a river or river section that is readily accessible by road or railroad, that may have some development along the shoreline, and that may have undergone some impoundment or diversion in the past. <http://www.rivers.gov/> (visited June 26, 2009).
18. This restriction does not apply to the permitting of projects in areas above or below a designated river. A federal agency can issue a permit for developments above or below a designated river segment or on any tributary to a designated river segment as long as the activity “will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on the date of designation of a river as a component of the National Wild and Scenic Rivers System.” 16 U.S.C. § 1278.
19. *Oregon Natural Resources Council v. Harell*, 52 F.3d 1499 (9th Cir. 1995).
20. Most of the NHPA challenges to Corps activities have been directed at Corps permit decisions. See, e.g., *Saylor Park Village Council v. Corps of Engineers*, (S.D. Ohio, 2003); *Committee to Save Cleveland’s Huletts v. Corps of Engineers*, 163 F.Supp.2d 776 (N.D. Ohio, 2001).
21. The provisions of the Data Quality Act have not been codified in the United States Code, and thus can only be found in the Public Law.
22. *Skelton v United States Postal Service*, 678 F.2d 35 (5th Cir. 1982).
23. See, e.g., *NRDC v United States DOD*, 442 F Supp 2d 857 (C.D. CA 2006).
24. An agency cannot charge an advance payment fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$250. 5 U.S.C. § 552(a)(4).
25. Saturdays, Sundays, and legal public holidays are not included in the 20 day count.
26. The full text of Executive Order 11988 is accessible at <http://www.archives.gov/federal-register/codification/executive-order/11988.html> (visited June 26, 2009).
27. The full text of Executive Order 11514 is accessible at <http://www.archives.gov/federal-register/codification/executive-order/11514.html> (visited June 26, 2009).
28. The full text of Executive Order 11990 is accessible at <http://www.archives.gov/federal-register/codification/executive-order/11990.html> (visited June 26, 2009).
29. The full text of Executive Order 12322 is accessible at <http://www.archives.gov/federal-register/codification/executive-order/12322.html> (visited June 26, 2009).

Chapter 7

The Corps and the Media Strategies to Spread the Word

I. Designing a Media Campaign

- A. Identifying a Target Audience
- B. Developing a Message
- C. Developing a Media Strategy

II. Working With the Media

- A. Identifying Key Media Contacts
- B. Communicating With Journalists
- C. Making an Interview Work for You

III. Media Tools

- A. Media Kits
- B. News Releases, Statements, and Advisories
- C. Editorials, Op-Eds, and Letters to the Editor
- D. News Conferences and Briefings
- E. Paid Advertising

Whether you are fighting a destructive Corps project or promoting Corps reform legislation, media coverage can be a powerful tool for achieving your goals. This chapter discusses key steps for developing an effective media campaign and provides practical advice for working with the media and for drafting news releases and other media tools.

I. Designing a Media Campaign

While your organization can gain important publicity from having a spokesperson quoted in the newspaper or interviewed on the evening news, the true power of media is its ability to affect change. An effective media campaign can educate the general public, inspire concerned citizens to act, pressure decision makers to do the right thing, and draw public attention to the importance of your issues and goals.

Before developing a media campaign, you should carefully identify your campaign objective. What do you want to achieve? Your objective may be to prevent authorization of a new Corps project, to convince Congress to pass Corps reform legislation, or to convince the Corps to select a less damaging plan for a particular project. Your objective will guide your entire media campaign.

A. Identifying a Target Audience

Once you have defined your objective, you need to identify the audience you are trying to reach. Individuals in a position to help you achieve your objective are your “primary targets.” Primary targets may be local lawmakers, Members of Congress, the President, Corps employees, or other agency personnel. You should then identify the people who can influence your primary targets. These are your “secondary targets.” Secondary targets might include constituents of an elected official, fishermen whose livelihoods will suffer as a result of a Corps project, hunters and anglers, or homeowners affected by a project.

For example, in order to prevent authorization of a new Corps project, you might need to secure support — or neutralize opposition — from several key Members of Congress. These Members of Congress are your primary targets, and their constituents are secondary targets because they can influence the target Members of Congress. Your media strategy could include efforts to educate these secondary targets about the cost and destructiveness of the project that you want stopped. The ultimate goal of this education would be to inspire these constituents to tell their elected officials (your primary targets) that the project must be stopped.

B. Developing a Message

Once you know your objective and have identified your target audience, you should develop a strong message or messages that will connect with your audiences. Your message is the thought or idea you want your target audience to remember and act upon.

A good message is clear and simple; is consistent throughout your media campaign; encourages your target audience to take action; communicates the problem and the solution in matter-of-fact language; is easy to understand by someone who is not familiar with your issue and avoids jargon, acronyms, and complicated terms.

To help develop your message, you should identify the one or two points you would want your target audience to remember after reading an article about your issue. You should then incorporate the values you share with your primary and secondary targets into those points. For example, you may share government responsibility and accountability as a value. Or perhaps you share concerns about future generations. Framing your message around themes that reflect values held by your target audience will help you connect with them.

Your campaign should have one main message that is consistent throughout your campaign and among all spokespeople. For example, if the Corps is proposing to channelize a local stream to reduce flood damages when better solutions exist, your main message might be this:

The Corps' plan is environmentally destructive and wastes taxpayer dollars. The fish that live in this stream will be directly harmed by the project, as will ducks that use the stream and its floodplain for food supply and wintering habitat. There are less expensive and less environmentally harmful ways to reduce flood damages, and these are the only types of projects that the Corps should consider.

This message states clearly and simply what you want your audience to know about this Corps project. It is matter-of-fact and does not use complicated terms or jargon that may surround the issue. It also can be adapted to resonate with various audiences by altering the style, facts, and anecdotes used to deliver your message. For example, at a Chamber of Commerce breakfast meeting you could talk about how the project will both waste tax dollars and harm local businesses that rely on hunting, fishing, and tourism revenues. At a meeting of the local hunting club you could stress how the project would destroy critical waterfowl habitat.

Because your overall message — like the one above — typically will be too wordy and cover too many issues to be quoted in the media, you will need to distill that message into an appropriate sound bite to get your message into the news.

Crafting a Sound Bite that Reflects Your Message: A sound bite distills your message into a brief and memorable statement of your position that is instantly understandable even to someone totally unfamiliar with your issue. A sound bite should also accurately capture the essential message you want to communicate. Because it is the statement most likely to get quoted, you should also make sure that your sound bite is “on message.” You should avoid inflammatory or over-the-top sound bites, which though easy to write, may not convey your message effectively.

A sound bite does not — and should not — provide context or detail. To the contrary, a good sound bite will be stripped of context and qualification. In a newspaper article or broadcast, the reporter will provide the context. In a news release, you can provide the context in paragraphs following your sound bite. In an interview, you can follow your sound bite with the context and facts that support your message.

The following techniques may help make your sound bite more colorful and improve its chances of being quoted:

- (1) **Alliteration** is one of the easiest techniques to employ. Think of the word or words that are central to your issue, and then identify words that start with the same consonant sounds that can be used to craft your sound bite. *Example:* “With this project, the Corps is choosing pork over people and foul play over waterfowl.”
- (2) Using a well-understood **analogy** is another way to craft an effective sound bite. *Example:* “This Corps proposal is like a party balloon — colorful on the outside, but full of hot air on the inside.” *Example:* “This is another stone being piled on the wall of Corps incompetence.” *Example:* “Independent review will lift the cloud of suspicion hovering over Corps studies.”
- (3) Connecting your message to a well understood example from **current popular culture or events** can be very effective in making your point. *Example:* “We’d have more confidence in this study if Arthur Andersen conducted it.” (In 2002, the financial accounting firm Arthur Anderson was frequently in the news for its fraudulent accounting practices, especially those involving Enron).
- (4) When cleverness eludes you, stick to a **simple statement** that presents your bottom line. *Example:* “The proposed ‘mitigation’ cannot compensate for the natural wetlands that will be destroyed and this essential habitat will be lost forever.”

While it is not always easy to craft a sound bite, it is well worth the time and effort because this is what is most likely to make it into print or onto the air. As a rule of thumb, it probably will take about a third of your news release preparation time to come up with one or two catchy sound bites, and you almost always will spend more time crafting a sound bite than on any other element in a news release.

C. Developing a Media Strategy

Your media strategy should identify how and when you will attempt to get your message into the media to reach your target audiences. Ideally, this strategy would take advantage of both opportunistic and strategic media to deliver your message to your target audience in as many ways, and at as many times, as possible.

Opportunistic Media: An opportunistic media plan will take advantage of news created by other parties to deliver your message. Taking advantage of opportunistic media often will require an ability to respond rapidly to news events about which you may have little or no advanced knowledge. For example, if you are fighting construction of an old-style Corps flood control project in your hometown, you could respond to a local flood by issuing a news release highlighting the need for modern, nonstructural approaches to reduce future flood damages. A plan geared towards providing a rapid response to local flood events may want to identify key flood indicators that should be tracked to provide advanced notice of a potential media opportunity. Other opportunistic news events that could support your message — like issuance of the President’s budget for the Corps — are more predictable in their timing.

An opportunistic media plan also would identify opportunities for leveraging external activities into “news” in order to generate media coverage for your efforts. For example, if you have advance notice of the date that the Corps will be issuing a report on a project you are fighting, you could contact reporters ahead of time to let them know about the report and to deliver your message about the project. You could also issue a news release on the day the Corps releases its report. These types of efforts can be very effective, particularly when you have a good idea of what the report or other information being released will say so that you can anticipate the proper response.

Strategic Media: In strategic media you create your own newsworthy events to promote media coverage of your message. For example, you could issue a news release or hold a press conference on the day you file a lawsuit or release a new study on the economics or environmental impacts of a Corps project. Distributing a media advisory to invite journalists to an activist workshop, or writing an editorial piece on upcoming legislation are also examples of strategic media. Strategic media allows you to control both your message and the timing of your media efforts.

A key element of strategic media is to make your media activity newsworthy. To determine the newsworthiness of your activity you should evaluate whether it creates a compelling “news hook” that would compel a reporter to write a story about the activity right away. There are three elements of newsworthiness that give news its “hook”:

- Timeliness — by definition, news must be something that is new;
- Proximity — stories that are closest to the reader will have the greatest affect; and
- Relevance — news that applies to a reader’s life will be most interesting to the reader.

Releasing new information, such as polling data or a new independent economic analysis of a costly Corps project, can create a news hook. However, you do not always have to generate new information to generate news. For example, you may be able to creatively repackage existing information to make it newsworthy, or you could send your message with unusual or nontraditional allies. A joint announcement by environmentalists, local farmers, and local businesses opposing the Corps' construction of an agricultural water supply project or supporting a wetland restoration project could generate media because these groups typically do not join forces in these ways.

You may be able to enhance the newsworthiness of your announcement by tying it into something else that is going on in the world of potential readers (e.g., with the government, on television, or in the environment where they live). For example, you could release a report outlining the Corps' waste of tax dollars on April 15, or release a report on destructive beach projects on the first day of summer.

Activist Tip

Activists should get to know at least the following journalists, reporters, and editors in your area:

- The environmental, outdoor, or other beat reporter at your local paper(s).
- An editorial writer and news editor at the same paper(s).
- The bureau chief or news editor at the nearest Associated Press bureau.
- The assignment editors for each local TV station that covers the news.
- The news directors for public radio stations (sometimes NPR affiliates) that service your area.
- The news directors for commercial radio all-news stations that service your area.

II. Working With the Media

To get your message into the news on a consistent basis, it is important to develop strong working relationships with reporters who are likely to cover your issues. To do this, you will need to maintain regular contact with key journalists, provide them with accurate information, refer them to other reliable sources when you cannot answer their questions, and be respectful of the constraints on their time. If journalists view you as a trusted and reliable source of information, they are more likely to turn to you and your organization for comments on a regular basis.

A. Identifying Key Media Contacts

It is important to get to know the reporters, editors, and editorial writers who cover your issues at local, regional, and for some issues national, news outlets. These are the people you will need to turn to when you want to get your message out.

There are many ways to obtain this information, but it is probably easiest to begin by identifying all of the newspapers, wire services, and television and radio stations that might cover your issue. You should include local, regional, and national media outlets. You can then talk with local, regional, and national conservation organizations to find out who covers your issues at these outlets. In the end though, it may be necessary to look on websites, read previous coverage, or cold-call news outlets to obtain the best contact information. While cold calling a news team may be daunting at first, most journalists will appreciate your effort to locate the right person rather than bombarding them or others with information that will never be used.

As you identify these individuals, you should keep a running contact list that you can turn to when you have news to report, or a story to tell. The most common way to create and maintain a list is a contact management program such as Microsoft Access or Excel. However, the most important thing is not what computer program you use for your list, but that you have a list that is organized, easily accessible to you and others in your organization, and easily updatable since media contacts often change.

The following information should help you locate the appropriate reporters and editorial writers at different types of media outlets.

Newspapers: Identify all environmental reporters that may be on staff. Keep in mind that not all papers assign the specific title “environmental reporter” to those who may cover that beat. If you are unsure of the best person to cover your story, call the city desk of the newspaper and ask for the name of the most appropriate reporter. Occasionally, you may have a message that is appropriate for another reporter’s beat, such as the outdoor reporter, health and science reporter, education reporter, metro beat reporter, state legislative reporter, or city council reporter. When the message you want to send is softer and more story-like (as opposed to being part of a hard, breaking news story) you will want to contact a feature reporter. Editorial writers are also important contacts.

Activist Tip

Many companies publish media directories that can help make your job easier. Green Media Toolshed, a non-profit provider of electronic media lists, is geared towards serving environmental organizations at an affordable price. Other companies also offer annually printed directories and sell access to their media databases. For example, Leadership Directories Inc. publishes a national news media guide known as *the News Media Yellow Book*. These resources can be very expensive, but also may be available free of charge at your local public or college library.

Wire Services: Wire services are news agencies that provide news articles and reports to their subscribers who can then use the wire service stories in their own papers or television newscasts. Subscribers typically include a full range of national, regional, and local newspapers, and radio and television stations. You will want to get to know the appropriate reporters from at least the Associated Press and Reuters news services.

The Associated Press (AP) is the most influential wire service in the country, as virtually every media outlet subscribes to AP. The AP has bureaus throughout the nation, with most having a handful of general assignment reporters. The AP reporter in the bureau that covers your area should be your first point of contact when you have news to share. By securing a story through AP, you will reach many of the newspapers in your region, state, or city.

Reuters is another popular wire service. Reuters is not as large as AP, but operates in a similar way. Once again, identify the key journalist in the bureau closest to your area, and make that person one of your first media contacts.

Television Stations: The news assignment editor is your best contact at a television station because he or she selects the stories and issues that will be reported. Television reporters typically are general assignment reporters who are given their assignments by the station's news assignment editor.

Radio Stations: The news director is your best contact at a radio station. Most radio stations do not have reporters, and the news director is often solely responsible for choosing the stories that are reported.

B. Communicating With Journalists

Working effectively with the media involves more than just having your message and facts in order. It is important to understand the pressures journalists typically work under and to communicate with them in a way that fosters their ability to get their work done on time. While some of the following tips are driven by simple common sense, others are driven by the realities of a reporter's work environment.

- (1) Be **prompt**. You should always return a call from a journalist as soon as possible. Reporters are often on a deadline, and calling back too late will mean missing your chance to get your message in their story. If you cannot answer a reporter's question, do not leave the reporter dangling — let her know and refer her to others who can help if you are able. If you can help, you might want to take a few minutes to gather your thoughts before you return the call (or, if a reporter reaches you directly, say that you need 15 minutes to collect your thoughts). Immediately send promised faxes and emails.
- (2) Be **mindful of time**. Journalists are busy people. They work under the constant pressure of tight deadlines and may be working on multiple stories at any given time. You should be sensitive to their needs and to the amount of time they have available to talk to you. If you would like more time to introduce a journalist to your issue, ask if you can meet to talk in depth about your issue. Avoid calling a newspaper or television reporter after 3:00 p.m., unless you have a breaking news story or have been asked to call during that time. This is the time when many news outlets are preparing the next day's paper or the evening broadcast. If you have to pull together information to respond to a reporter's inquiry, find out the deadline and send the requested information as quickly as possible.
- (3) Be **honest**. One of the quickest ways to ruin a relationship with a reporter is to provide incorrect information. It goes without saying that it is never appropriate to knowingly lie to a reporter. You should also never provide information that you are not sure is accurate, and you should not speculate. It is far better to tell reporters that you are not able to help them and direct them to another person or organization that might be able to help. In every communication you have with a journalist, you are building a relationship that must be based on trust.
- (4) Be **accessible**. You should do your best to be available to reporters, particularly on the day you are holding a news event or issuing a news release. Also, consider providing your cell phone or home phone number to journalists, since they often have more time after normal working hours to talk. You never want to make it hard for journalists to reach you, because they will move on to another source or may give up trying to reach you altogether. If you know you will be unavailable, identify

Activist Tip

When pitching a news story, consider using an embargo or offering the story as an exclusive.

An embargo is a “hold” until a certain specified date that you put on a news release, report, or other information that you give to one or more reporters. An embargo is the best tool for controlling the timing of media coverage while giving reporters enough time to research and write the best possible story. You should get a verbal agreement from a reporter that she will abide by the terms of the embargo before providing detailed information on your issue.

In an exclusive, you provide information to only one reporter. If you give a reporter exclusive rights to a story, you should also agree to a publication date. If the reporter has not published the story by that time, or decides to pass on the story altogether, you are then free to give exclusive rights to another reporter. You cannot give an exclusive to one reporter and embargo the same information to others.

someone else who can answer media questions and respond to inquiries. Also, be sure to have your contact information available on your website, which should also have a “press room” where you post releases, pictures, and other useful information for journalists.

- (5) Be **proactive**. You should call reporters if you have news, or if you want to get your message into a story. Do not wait around for a reporter to call you. For example, if you have a story to tell about a Corps project funded by the President’s budget, you should call reporters as soon as (or even before) the President’s budget is released. For any strategic media efforts (*i.e.*, news over which you control the timing), you should initiate communications with reporters to pitch your story.
- (6) Be **aware of competing news**. When planning strategic media, be cognizant of other competing news events and avoid releasing information when you know another large or competing event is being held in your area. Your event or activity also is likely to get more coverage if it is held early in the week. You should avoid releasing information or holding events on Fridays because it may be forgotten — or seem like “old” news — by Monday. You should also contact reporters and hold press events early in the day so reporters will have plenty of time to write their stories. Prior to your event you may want to ask if you can meet to talk at length about your issue and concerns.

The best way to initiate contact with a reporter is by phone. You can then follow-up by sending additional information or materials. Be sure to tell the reporter you are sending follow-up information so she knows to look for it. Most important, send the materials right away. If you need time to pull information together, you should let the reporter know (find out if there is a deadline) and send the information as soon as possible. If you are unable to reach the reporter on the phone, leave a short, to the point message with your name, the name of your organization, your title, and your phone number. If you want to send information immediately to make sure the reporter has access to it for a breaking story, make sure you tell the reporter that in your phone message, and then send the materials right away.

When pitching a story (or following up with information) you should follow the following widely accepted protocols for the various types of media outlets.

Newspapers: You should call newspaper reporters between about 10:30 a.m. and 3 p.m. Reporters do not appreciate interruptions in the late afternoon when they are wrapping up their research and interviews and starting to write for the morning paper. Phone calls and e-mails are the most effective way to reach reporters. Sending a fax into a newsroom without directing it to a specific contact is not an effective way to get a reporter’s attention.

Wire Services: Reporters for wire services can file stories at any time of the day, but it is still best not to call them in the late afternoon. Phone calls and e-mails are the most effective way to reach wire service reporters.

Television Stations: Television stations rarely plan their day's coverage far in advance. Television stations also rely heavily on stories coming over the AP wire. Do not call television stations between 11:00 a.m. and 1:00 p.m. (to steer clear of the noon broadcast) or after 4:30 p.m. (to steer clear of the evening news). Early morning calls are fine. Assignment editors typically decide where to send reporters and cameras at a 9:00 am morning meeting. In contrast to newspapers, faxes are still a good way to approach television news operations. Place a call to the assignment editor or "futures editor" to make sure you have the appropriate fax number. They will put the fax in a folder for the date of your event and take another look at it during that day's morning planning meeting.

Radio Stations: Radio news relies heavily on stories coming over the AP wire. Faxes are still a good way to approach radio stations because they often experience rapid turnover (making email addresses quickly obsolete) and typically are very small so that faxed press releases generally get to the right person.

C. Making an Interview Work for You

The key to making any interview or question and answer session successful is to maintain control of the discussion. Keep in mind that while you have zero control over the questions you are asked, you have 100 percent control over the answers you give. To maintain control of an interview — whether its conducted in person, live on the air, by phone, or at a news conference — you should:

- (1) Focus on no more than three key messages that you can support with facts and examples.
- (2) Refine and rehearse your messages so that you can sum them up in 30 seconds.
- (3) Prepare responses to potential questions and rehearse those responses. Make sure you are prepared to respond to questions that reflect the opposing viewpoint and to any opposing studies or research. In answering questions, never concede your opponent's message — you should never even repeat your opponent's message unless you rebut it in the same sentence. Be prepared to politely redirect all questions that you cannot answer or that address topics unrelated to your issue, back to your message.

- (4) During the interview, deliver your most important message first — put the lead in the lead — and provide facts and examples only after discussing all of your messages. When delivering your message, be brief and to the point. The more succinct your message, the more likely it is that you will be quoted.
- (5) Stay “on message” when answering questions. If a question is not related to your message, veers the conversation into a different area, or is one you cannot answer, briefly acknowledge the question then bridge the conversation back to your message. Do not dodge a question; instead redirect it to your message. Remember that in general your goal is to deliver your message; it is not to provide an answer to every question that you are asked.
- (6) Always base your message and answers on facts, and never let a reporter convince you to speculate or hypothesize on an issue. Do not try to “wing” a response if you don’t know the answer to a question, and do not base a response on facts that you cannot prove (even if you are confident of those facts). If you do not know the answer to a question, you should just say so. You should then feel free to refer the reporter to other experts.
- (7) Be conversational and do not use sarcasm or make flippant remarks. Be positive, not defensive. Do not use inflammatory or accusatory words like “outrageous,” “negligent,” or “deceitful.” Stay jargon-free and make sure you do not talk in shorthand. And while a smile or a laugh can deflect barbs, you should avoid jokes.
- (8) Speak clearly so the reporter can understand and accurately record your comments. You may want to slow down when you see a reporter taking notes or hear the clack of the keyboard during a phone interview to make sure the reporter can accurately record your statement. Feel free to ask a reporter to read back your answer if you are not sure she caught it. Unless you are doing an interview live on the air, you should also feel free to pause, and say, “I’d like to try that again” or “Scratch that, that wasn’t quite right.” Finally, give yourself time to formulate an appropriate response to a question, even if you need to pause for a few seconds before responding.
- (9) Remember that nothing is ever “off the record” unless you have specific prior agreement with the reporter to be off the record. The comments you make after the pad and pencil have been put away are often the comments that wind up in print. Do not say anything to a journalist, even casually, that you would not want to see printed in the paper or hear on the air.

Activist Tip

Because television tells stories with pictures, making footage available to reporters will increase your chance of appearing on the evening news. You can provide professional quality footage or assist reporters in obtaining original footage. For example, you can take reporters to the site of a proposed Corps project, or invite them to a media event with a strong visual element (i.e., an attractive or striking location or backdrop, a large crowd of protestors, or colorful and large pictures and graphics that support your message).

Most television stations prefer to receive footage (often referred to as “B-roll”) on a professional format known as Beta Sp. This is not the same as the consumer beta tape format. Some stations may accept footage on consumer formats like Mini-DV if the subject matter is otherwise hard to obtain. Use a tripod to increase your odds of getting footage a station might use.

III. Media Tools

There are a number of standard media tools that you can use to implement your media strategy, including news releases, advisories, and opinion pieces. This section provides broad guidelines to help you create these tools. You should also try to “brand” your written materials so that journalists will quickly recognize that they come from your organization.

A. Media Kits

A media kit is a collection of materials that provide basic information about your organization’s stance on an issue or series of issues. Its purpose is to give members of the media easy access to the tools they need to accurately report on your issue. Ideally, your media kit will be compiled in a folder or binder marked with your organization’s logo and will include

- A fact sheet or general overview of the issue;
- Recent news releases related to the issue;
- Published positive editorials about the issue;
- Visual materials such as graphs, photographs, slides, or CDs;
- Other materials that describe your organization’s mission and stance on the issue; and
- Your contact information.

B. News Releases, Statements, and Advisories

A news release (often called a press release) is the most common way to get your message to the media. It advises the media of a news event, provides your views and message about that event, and gives background information. A news statement is similar to a news release but is simpler to prepare because it provides your comments on a news event without providing the context or any background information. The purpose of both a news release and statement is to get your message into any story about the news event you are commenting on.

News advisories are used to announce news events and provide information to editorial writers. A news event advisory is an announcement that informs reporters of the time and place of a news event such as a news conference, news briefing, public workshop, or rally. An editorial advisory provides background or in-depth information to editorial writers and urges them to take an editorial stand on an issue. An editorial advisory can be written in an informal style, as if you were speaking to the person receiving it.

A **news release** should include

- Your organization's logo;
- The date of the release, and the date that any embargo will be lifted (e.g., "embargoed until 9 a.m. on February 20, 2005");
- Contact information for the person who will be available to talk to reporters;
- A headline that conveys the most important message of the story;
- A "dateline" that identifies the city and state where the story is taking place (in capital letters);
- A first paragraph or "lead" that provides the main idea of the story;
- A quote or quotes from a key executive from your organization or an expert;
- Supporting paragraphs that answer the "how" and "what" of the story and provide more details on the lead (all paragraphs should be short and concise);
- If the release is longer than one page, an indication that it continues by adding the word "more" at the bottom of the first page, and a header on the following pages that includes the release date and page number;
- If appropriate, a web address where more information is available;
- Boilerplate language at the end that describes your organization (this could be your mission statement); and
- Below the boilerplate language, include "###" to indicate the end of the release.

A **news statement** should include

- Your organization's logo;
- The date of the statement;
- A headline that conveys the most important message of the story;
- The name, title, and organization of the person making the statement (under the headline);
- A lead paragraph that provides the main point you want to make, and one or two additional paragraphs that provide further comment (open each paragraph with a quote mark and close the last sentence of the last paragraph with a quote mark);
- If appropriate, a web address where more information is available;
- Boilerplate language at the end that describes your organization (this could be your mission statement); and
- Below the boilerplate language, include "###" to indicate the end of the statement.

A **news advisory** to announce an event should include

- A title telling the recipient what the event is about;
- All necessary logistical information about the event in a "who," "what," "when," "where" format, including the time, location, and/or phone number for a teleconference;

- Sufficient background information to make your story interesting, without giving away too much information (you want reporters to come to the event to get the story); and
- Contact information.

An **editorial advisory** should include

- A direct pitch urging the recipient to take a stand;
- An indication that you have experts or staff that the writer can speak to;
- A statement of the problem, and any proposed solution;
- Factual information to drive home the importance of the story;
- A statement identifying what individuals can do to be part of the solution, if possible;
- If the project or issue affects human health, include a statement of that fact; and
- Contact information.

Style Tips for Preparing Media Tools

Newspapers are commonly written in either the Associated Press or Chicago style, and it is important that news releases, statements, and advisories conform to one of these standard styles. Any bookstore will carry guides to these styles, and you may want to purchase one as a handy desktop reference. You also should

- (1) Spell out the names of organizations and agencies the first time you refer to them. If the release contains additional references, put the organization or agency's initials in parenthesis immediately after the first reference and use those initials in subsequent references. *First Reference:* The Corps Reform Network (CRN) released a report today that... *Second Reference:* The CRN report surveys wildlife data for...
- (2) Attribute opinions, judgments, and calls to action to a person or other source. *Do:* "Senator Brown's position on this issue defies common sense," said Tim Eder, National Wildlife Federation's Water Resources Director and Corps Reform Network Coordinator. *Don't:* Senator Brown's position on this issue defies common sense. *Do:* "Floridians should call Representative Jones' office to urge her to support this bill," said Melissa Samet, American Rivers' Senior Director of Water Resources and Corps Reform Network Co-Chair. *Don't:* Floridians should call Representative Jones' office to urge her to support this bill.
- (3) Avoid writing in the passive voice which can make your writing weak and uninteresting (in the passive voice, the subject of the sentence receives the action expressed in the verb). Use the active voice to make your writing stronger and clearer. *Do:* Today, Senator Russ Feingold introduced comprehensive Corps reform legislation in the U.S. Senate. *Don't:* Today, comprehensive Corps reform legislation was introduced by Senator Russ Feingold in the U.S. Senate.
- (4) Make all quotes short and concise so they can be easily pulled from your release and used in a news story. When conveying numerical information, it is important to keep those numbers manageable. *Do:* "The next WRDA bill could cost taxpayers more than \$5.5 billion." *Don't:* "The next WRDA bill could cost taxpayers \$5,531,452,000."

Activist Tip

You should make extensive use of any editorials that support your position. Always send copies to any targeted Members of Congress and other decision makers with a letter stating (or restating) your position. Where appropriate, use the editorial to renew your call for a statement in support of your position or to request a meeting. You can also send an editorial to other papers to encourage them to editorialize in support of your position. Supporting editorials should be included in any media kit prepared for your issue.

C. Editorials, Op-Eds, and Letters to the Editor

Generating editorials, op-eds, and letters to the editor should be an important component of any media strategy. Editorials supporting your position can be extremely effective in influencing decision makers, including Members of Congress from the paper's coverage area, and the general public. Op-eds, particularly when written by respected experts or decision makers, can do the same. Letters to the editor are also an excellent way to disseminate your message since the letters to the editor section is often the most-read section of a paper.

Editorials: In addition to sending news advisories to editorial writers, you should talk to editorial writers whenever you have a specific issue that is appropriate for editorial coverage. The rules for working with reporters apply equally to working with editorial writers. In addition, you should be prepared to (1) prove why your issues are important to their audience (including by providing facts and figures, and identifying academics and policy makers who support your position); and (2) provide attractive written materials that support your issue (*e.g.*, brochures, fact sheets, graphs, pictures, or reports).

Larger newspapers often have editorial boards that share editorial responsibilities. Like individual editorial writers, these boards are prominent opinion-makers. Meetings with editorial boards follow the same protocols as meetings with editorial writers with two key differences. Editorial board meetings are more formal and occur at regularly scheduled interviews. As a result, they provide less opportunity for spontaneity and offer less opportunity to discuss breaking issues.

Op-Eds: An op-ed is an opinion piece prepared by someone other than an editor that appears on the page facing the editorial page (op-ed is short for "opposite editorial," a name derived from this standard location). Syndicated columns and guest opinion pieces also appear on this page. The key to getting an op-ed published is to make it relevant to the paper's readers, usually by localizing the information.

Policies for the submission of op-eds vary greatly from paper to paper, and you should check a paper's website or call the editorial department for guidelines on word count, exclusivity, and submission before preparing your op-ed. You should call the op-ed page editor the same day you send an op-ed to confirm that he or she received the submission. If your op-ed is not published or you do not hear from anyone after two or three days, call the newspaper back and ask if they plan to run it. If they pass on your op-ed, you are free to give it to a competing paper. You should never send the same op-ed at the same time to papers that compete for the same circulation area.

An op-ed should

- Suggest a headline (but note that the newspaper ultimately will decide the final headline);
- Include the author's name at the top;
- Be relevant to the paper's readers. You can create relevance by localizing the information or otherwise tying it to an issue of concern to the readers (*e.g.*, by tying it to an editorial or article previously published in the same paper);
- Be organized in the following order: (1) pique the reader's interest, (2) provide background, (3) explain the problem you are addressing, (4) provide a solution and discuss any challenges to reaching that solution, (5) include a call to action; and (6) close with a snappy statement that will mobilize readers;
- Be written in short, concise sentences that are limited to one thought each. An op-ed can be casual and conversational in tone (*e.g.*, start with a personal experience and be descriptive);
- If appropriate, mention your organization (*e.g.*, mention a report or study you have released);
- At the end, restate the author's name, position, and organization and provide the address for your organization's website.

Letters to the Editor: Letters to the editor respond to news stories, editorials, or opinion pieces that were previously printed in the paper. They are an easy and effective advocacy tool for sending your message on an issue addressed in the original article; reinforcing a point in the original article that drives home your message; clearing up inaccuracies or false information that may have been reported; providing information omitted from the original article; making a local issue national or a national issue local; and reaching a large audience to garner support for an issue.

Letters to the editor should be brief and should respond to only one article or opinion piece. Many newspapers have a 200-word limit on letters to the editor, and longer letters either will not be published or may be edited. Letters to the editor should be sent to the paper **as soon as possible**, ideally within one day from the date the original article was published.

A letter to the editor should

- Include the headline of the article to which you are responding and the date of publication in the re: line of your letter or in the first line or two of your letter;
- Use a strong lead sentence to attract the editor and reader's attention, and immediately state your reason for writing;
- Include supporting facts and assertions in a second or third paragraph, and mention your organization and its views on the subject;
- Use the final paragraph to sum up your letter and, if appropriate, to demonstrate the "larger picture" surrounding the issue;

- State your points in a clear, concise, and professional manner that clearly ties your campaign message to the article to which you are responding. Do not restate any incorrect information included in the original article as this will only draw more attention to the incorrect information;
- Be free of spelling and grammatical errors; and
- Include your name, title, organization, address, and daytime phone number (most newspapers will not print your letter until they have called to verify that you did, in fact, write it).

Be sure to check the paper's website or editorial page for specific guidelines for letters to the editor. Many news organizations have an online form you can use to send a letter to the editor, and almost all provide an email address, fax number, or mailing address on their website. A phone call to the newspaper will help you ascertain the most appropriate staffer to whom you should address your letter. It is often a good idea to make a follow up call to confirm receipt and stress why it is important for the newspaper to publish your letter. While many larger newspapers will not confirm receipt of a letter, smaller papers often will.

D. News Conferences and Briefings

A news conference is a live media event that is used to announce breaking news, make an important announcement, or release new information like a major detailed study or report. The purpose of the news conference is to provide your information to multiple members of the media at the same time, and answer any questions they may have. A news conference typically will start with statements by one or more spokespersons followed by a question and answer session.

A news briefing is more informal and more intimate than a news conference. While, a news conference may include dozens of members of the media, a news briefing is more select and is done with only a handful of reports — usually no more than 12. Because it involves a small group, the setting can be an office conference room or a restaurant over lunch.

Teleconferencing is a way to communicate with the media, even when distance or other factors keep you from being in the same room with them. An audio teleconference typically will use a telephone conference service that can accommodate many callers at one time. Video conferencing is also available, though it will be more expensive. Video conferencing is done through a television, and while the visual and audio quality is not the best it is the closest thing to being in the same room.

Ideally, you should give reporters a full weeks notice of any planned news conference or briefing. A week before your event, send a news advisory to the editors and reporters who are most likely to cover your event. Be sure to include a cell phone number so reporters can reach you on the day of the event, provide logistical information in “who,” “what,” “when,” “where” format, and highlight any photo opportunities. Follow up with phone calls after the advisory has been distributed. Some news conferences will, of necessity, need to be convened on shorter notice. You should give as much advance notice of these news conferences as possible by sending a media advisory and calling those members of the press most likely to cover your story.

To help generate attendance at a public event, you should send a brief summary of your event to the Calendar/Events Editor at all relevant newspapers three weeks before the event. The summary should describe your event, emphasize why people may want to attend, and include a phone number that the public can call with questions. Your event information will usually be published five to seven days beforehand. One week before the event you should also send a news advisory to reporters, as discussed above.

News Conference and News Briefing Checklist

When preparing for a news conference, news briefing, teleconference, or other public event you should

- Clear the date, time, and place with all speakers and participants;
- Make sure there are no other major events or news conferences that could conflict;
- Limit remarks to no more than five minutes per speaker, and have no more than four speakers;
- Leave ample time for questions;
- Have all speakers agree on talking points ahead of time;
- Confirm that presenters have prepared in advance, developed quotable sound bites, and rehearsed answers to anticipated questions;
- Ensure that any visuals, graphs, or charts are ready by the date of the conference;
- Have enough handouts and media kits for all attendees, and post all materials on your website;
- For conferences held inside, make sure the room can accommodate all attendees;
- For conferences held on location, make sure the location is accessible and relatively quiet;
- Test all technical equipment, and make sure backups are available;
- Schedule any needed translators;
- Have a sign-in sheet or other method for recording reporter attendance; and
- Send a media advisory to editors and reporters most like to cover your event one week before the event.

E. Paid Advertising

A well-placed advertisement in a newspaper or on the radio can augment your earned media efforts. The cost of advertising varies widely among media outlets and within markets. The cost also varies based on the type of advertisement you want to place. For example, a black and white newspaper advertisement will cost less than a color advertisement, and a 30 second radio spot will cost less than a 60 second spot. It is typically less expensive to advertise in a weekly paper than a daily paper. Radio advertisements also can be relatively inexpensive, particularly in rural areas. You should explore the costs with the newspaper or radio stations most likely to reach your target audience before doing any other work on preparing an advertisement. In determining paid advertising costs, you also will need to factor in the cost of preparing the advertisement or radio spot.



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American Rivers is the leading conservation organization fighting for healthy rivers so communities can thrive. American Rivers protects and restores America's rivers for the benefit of people, wildlife and nature. Founded in 1973, American Rivers has more than 65,000 members and supporters, with offices in Washington, DC and nationwide.



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The National Wildlife Federation is America's largest conservation organization. We work with more than 4 million members, partners and supporters in communities across the country to protect and restore wildlife habitat, confront global warming and connect with nature.
