AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

THE WATER RESOURCES DEVELOPMENT ACT OF 2007: A REVIEW OF IMPLEMENTATION IN ITS THIRD YEAR

(111–92)

HEARING

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

March 3, 2010

Printed for the use of the
Committee on Transportation and Infrastructure

U.S. GOVERNMENT PRINTING OFFICE

55–276 PDF WASHINGTON : 2010

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

JAMES L. OBERSTAR, Minnesota, *Chairman*

NICK J. RAHALL, II, West Virginia, *Vice Chair*
PETER A. DEFAZIO, Oregon
JERRY F. COSTELLO, Illinois
ELEANOR HOLMES NORTON, District of Columbia
JERROLD NADLER, New York
CORRINE BROWN, Florida
BOB FILNER, California
EDDIE BERNICE JOHNSON, Texas
GENE TAYLOR, Mississippi
ELIJAH E. CUMMINGS, Maryland
LEONARD L. BOSWELL, Iowa
TIM HOLDEN, Pennsylvania
BRIAN BAIRD, Washington
RICK LARSEN, Washington
MICHAEL E. CAPUANO, Massachusetts
TIMOTHY H. BISHOP, New York
MICHAEL H. MICHAUD, Maine
RUSS CARNAHAN, Missouri
GRACE F. NAPOLITANO, California
DANIEL LIPINSKI, Illinois
MAZIE K. HIRONO, Hawaii
JASON ALTMIRE, Pennsylvania
TIMOTHY J. WALZ, Minnesota
HEATH SHULER, North Carolina
MICHAEL A. ARCURI, New York
HARRY E. MITCHELL, Arizona
CHRISTOPHER P. CARNEY, Pennsylvania
JOHN J. HALL, New York
STEVE KAGEN, Wisconsin
STEVE COHEN, Tennessee
LAURA A. RICHARDSON, California
ALBIO SIRES, New Jersey
DONNA F. EDWARDS, Maryland
SOLOMON P. ORTIZ, Texas
PHIL HARE, Illinois
JOHN A. BOCCIERI, Ohio
MARK H. SCHAUER, Michigan
BETSY MARKEY, Colorado
MICHAEL E. MCMAHON, New York
THOMAS S. P. PERRIELLO, Virginia
DINA TITUS, Nevada
HARRY TEAGUE, New Mexico
JOHN GARAMENDI, California
VACANCY

JOHN L. MICA, Florida
DON YOUNG, Alaska
THOMAS E. PETRI, Wisconsin
HOWARD COBLE, North Carolina
JOHN J. DUNCAN, JR., Tennessee
VERNON J. EHLERS, Michigan
FRANK A. LOBIONDO, New Jersey
JERRY MORAN, Kansas
GARY G. MILLER, California
HENRY E. BROWN, JR., South Carolina
TIMOTHY V. JOHNSON, Illinois
TODD RUSSELL PLATTS, Pennsylvania
SAM GRAVES, Missouri
BILL SHUSTER, Pennsylvania
JOHN BOOZMAN, Arkansas
SHELLEY MOORE CAPITO, West Virginia
JIM GERLACH, Pennsylvania
MARIO DIAZ-BALART, Florida
CHARLES W. DENT, Pennsylvania
CONNIE MACK, Florida
LYNN A WESTMORELAND, Georgia
JEAN SCHMIDT, Ohio
CANDICE S. MILLER, Michigan
MARY FALLIN, Oklahoma
VERN BUCHANAN, Florida
ROBERT E. LATTA, Ohio
BRETT GUTHRIE, Kentucky
ANH "JOSEPH" CAO, Louisiana
AARON SCHOCK, Illinois
PETE OLSON, Texas

CONTENTS

Page

Summary of Subject Matter iv

TESTIMONY

Conrad, David R., Senior Water Resources Specialist, National Wildlife Federation 63
Darcy, Hon. Jo-Ellen, Assistant Secretary of the Army for Civil Works, Department of the Army 32
Fitzgerald, Steve, Flood Committee Chair, Harris County Flood Control District, the National Association of Flood and Stormwater Management Agencies (NAFSMA) 63
Larson, Esq., Amy, President, National Waterways Conference 63
Leone, Michael A., Port Director, Maritime Administration, Massachusetts Port Authority (Massport), American Association of Port Authorities 63
Pallasch, Brian, Co-chair, Water Resources Coalition, American Society of Civil Engineers 63
Van Antwerp, Lt. Gen. Robert L., Commanding General of the U.S. Army Corps of Engineers, Department of the Army 32

PREPARED STATEMENTS SUBMITTED BY MEMBERS OF CONGRESS

Johnson, Hon. Eddie Bernice, of Texas 81
Mitchell, Hon. Harry E., of Arizona 87
Richardson, Hon. Laura, of California 88
Scalise, Hon. Steve, of Louisiana 92

PREPARED STATEMENTS SUBMITTED BY WITNESSES

Conrad, David R. 94
Darcy, Hon. Jo-Ellen 118
Fitzgerald, Steve 125
Larson, Esq., Amy 131
Leone, Michael A. 147
Pallasch, Brian 152

SUBMISSIONS FOR THE RECORD

Committee on Transportation and Infrastructure, Majority Staff, "The Water Resources Development Act of 2007 Public Law 110-114 A Report on Implementation in the Third Year," report 5
Darcy, Hon. Jo-Ellen, Assistant Secretary of the Army for Civil Works, Department of the Army: .....
Response to questions from Hon. Bishop, a Representative in Congress from the State of New York 39
Response to questions from Hon. Oberstar, a Representative in Congress from the State of Minnesota 61
Van Antwerp, Lt. Gen. Robert L., Commanding General of the U.S. Army Corps of Engineers, Department of the Army, response to questions from Hon. Oberstar, a Representative in Congress from the State of Minnesota ... 57

ADDITION TO THE RECORD

American Shore and Beach Preservation Association, written testimony 162

U.S. House of Representatives
Committee on Transportation and Infrastructure

James L. Oberstar
Chairman

David Heymsfeld, Chief of Staff
Ward W. McCarragher, Chief Counsel

Washington, DC 20515

John L. Mica
Ranking Republican Member

James W. Coon II, Republican Chief of Staff

March 2, 2010

SUMMARY OF SUBJECT MATTER

TO: Members of the Committee on Transportation and Infrastructure

FROM: Committee on Transportation and Infrastructure Staff

SUBJECT: Hearing on "The Water Resources Development Act of 2007: A Review of Implementation in its Third Year"

PURPOSE OF HEARING

The Committee on Transportation and Infrastructure will meet on Wednesday, March 3, 2010, at 12:00 p.m., in room 2167 of the Rayburn House Office Building to receive testimony on the implementation of the Water Resources Development Act of 2007 (WRDA 2007) in its third year.[1] This hearing is being conducted under the general oversight responsibilities of the Committee and under the requirements of clauses 2(n), (o), and (p) of Rule XI of the Rules of the House of Representatives.

BACKGROUND

On November 8, 2007, Congress enacted the WRDA 2007 over the veto of the President.[2] Enacting WRDA 2007 was only the 107th successful veto override in the history of the Congress.

Water resources development acts typically contain project authorizations, project modifications, and programmatic changes that affect how the Department of the Army's U.S. Corps of Engineers (Corps) plans, constructs, and operates and maintains water resources projects.[3]

---

[1] Public Law 110-114, 121 Stat. 1041.

[2] On November 6, 2007, the House of Representatives voted 361-54 to override the veto. On November 8, 2007, the Senate voted 79-14 to override the veto.

[3] Water resources projects may include projects that provide economic and environmental benefits associated with coastal and inland navigation, structural and nonstructural flood damage reduction, hurricane and storm damage reduction, environmental restoration and protection, water supply, recreation, and hydropower.

WRDA 2007 contains authorizations for over 900 projects or programs, including significant new authorities associated with the Florida Everglades, the restoration and protection of coastal Louisiana and Mississippi following the devastation of Hurricanes Katrina and Rita, and modernization of the nation's water-based transportation system.

Water resources development acts are intended to be enacted every two years. However, prior to WRDA 2007, the Water Resources Development Act of 2000 was the most recent enactment.[4]

In addition to its project and program authorizations, WRDA 2007 includes the most sweeping reforms of how the Corps develops and implements its projects and programs since the Water Resources Development Act of 1986.[5] Since November 8, 2007, the Department of the Army and the Corps have been slow to implement the programmatic reforms and projects contained in that law.[6] Where the Army and the Corps have implemented reforms, the results often have been inadequate and inconsistent with the statute and Congressional intent.

In April 2008, the Committee initiated an oversight investigation of WRDA 2007 implementation. The Committee learned that neither the office of the Assistant Secretary for Civil Works (Assistant Secretary) nor the Corps is implementing WRDA 2007 in a timely manner, and neither office possesses information sufficient to determine whether Corps district and division offices are implementing the law.

The lack of information and awareness at the Washington, D.C. level severely inhibits the ability of the Corps to achieve the results of WRDA 2007 as intended by Congress.

SIGNIFICANT PROGRAMMATIC CHANGES IN THE CORPS PROGRAM

A significant contributor to the inability of Congress to enact water resources development legislation between 2000 and 2007 was the policy dispute over the areas often referred to as "Corps reform." The central elements of this reform were: 1) strengthen the effectiveness of the Corps' mitigation program; 2) establish requirements for independent review of proposed projects that were large or controversial; and 3) revise the planning principles and guidelines that the Corps uses to develop its project recommendations.

The requirements for conducting independent reviews and strengthening the mitigation program became effective immediately upon enactment.[7] The revised principles and guidelines were to be issued no later than November 8, 2009.[8] Notwithstanding 28 months since enactment, the Corps' progress in implementing these provisions has been slow and inconsistent.

---

[4] Public Law 106-541, 114 Stat. 2572.
[5] Public Law 99-662, 100 Stat. 4082.
[6] Discussions between Committee staff and senior staff of the Corps and the Assistant Secretary of the Army for Civil Works reveal that the expected timeframe for implementation was two years, or by November 2009. The Corps and Assistant Secretary are well behind this timetable.
[7] Unless otherwise stated in the enacting legislation, all provisions of law become effective upon enactment. Some period of transition is often necessary for significant changes, but that period should be as short as possible.
[8] WRDA 2007, § 2031(b), 42 U.S.C. § 1962-3(b).

Additionally, while the major programmatic reforms of WRDA 2007 were complex, there are provisions of WRDA 2007 that should be relatively easy to implement, but do not appear to have been.

For example, section 2041, Project Administration[9], requires the Secretary to assign a unique tracking number to each water resources project. This requirement was intended to address the tendency of the Corps to refer to projects by differing names, which made documents associated with individual projects difficult to find. There is no evidence that this requirement has been implemented. Section 2041 also requires the Secretary to provide a copy of all final reports to the Library of Congress and make them available permanently on the Internet. Again, despite the relative ease of implementing this requirement, there is no evidence of its implementation.

Mitigation

Section 2036 of WRDA 2007[10] amended section 906 of the Water Resources Development Act of 1986[11] to improve and strengthen the mitigation program of the Corps. Congressional support for section 2036 grew from awareness that too often mitigation for activities of the Corps has been an afterthought with too little attention to its implementation, and very little attention to its success. In short, the Corps was not fulfilling it responsibilities under the law to mitigate for the damages caused by the construction and operation of its projects that require mitigation.

Section 906 of WRDA 1986 established requirements that Corps project studies include specific plans to mitigate when there are environmental damages associated with their construction. It also required that mitigation (including land acquisition) be undertaken *before* any construction of the project, or concurrently with construction of the project if the Secretary determines such concurrence to be appropriate.[12] Section 906 allows construction of mitigation measures to be accomplished concurrent with project construction.

The Corps in its implementation of section 906 effectively ignored Congressional direction to implement mitigation in advance of project construction.[13] There is no mention of the statutory requirement that the first emphasis of section 906 is that mitigation be undertaken *before* any construction of the project. This deficiency continues in the new guidance. Furthermore, the Corps does not sufficiently track mitigation implementation or success.[14]

Despite section 2036 and the amendments to section 906 being effective upon enactment, the implementation guidance was not issued until August 31, 2009, over 21 months after enactment, and a full year after former Assistant Secretary John Paul Woodley wrote that it would be

---

[9] 33 U.S.C. § 2346.
[10] 121 Stat. 1092.
[11] 33 U.S.C. § 2283.
[12] Section 906(a), 33 U.S.C. § 2283(a).
[13] *See*, Planning Guidance Notebook, ER 1105-2-100 (April 22, 2005), p. 2-5, "Mitigation measures determined to be appropriate should be planned for *concurrent* implementation with other major project features, where practical." (Emphasis added.)
[14] *See*, discussion in Regulatory Guidance Letter 08-03, October 10, 2008, which states, "Recent studies by the Government Accountability Office (GAO) and National Research Council (NRC) indicated that the Corps of Engineers (Corps) was not providing adequate oversight to ensure that compensatory mitigation projects were successfully replacing the aquatic resource functions lost as a result of permitted activities."

completed.[15] In addition to being tardy, the Assistant Secretary and the Corps headquarters do not have mechanisms in place to determine compliance.[16]

Section 2036 includes language that required the Corps to establish success criteria for mitigation efforts, placed responsibilities for monitoring success, and charged the Corps with consulting with State and Federal resource agencies to determine the ecological success of the mitigation. Finally, section 2036 requires the Secretary to submit (contemporaneous with the President's budget submission) a mitigation status report to the Committees[17] on the status of projects that require mitigation, the status of that mitigation, and the results of the consultation.

The report was not submitted for 2008, and was late and not fully responsive in 2009.[18] In short, the reports did not provide the information the law required. The 2010 Status Report (2010 Report), while improved, does not fulfill the statutory requirements.

The 2010 Report includes information comparing the planned mitigation to the actual efforts undertaken. However, the 2010 Report continues a deficiency of the first report in that it acknowledges that "There are different methodologies utilized by Corps districts to calculate percent of mitigation complete." [19] The Corps does not identify the specific method used for any of the projects.

Using differing methods to determine the amount of mitigation completed eliminates the ability to compare the relative progress of the Corps in meeting its mitigation requirements, and greatly diminishes the usefulness of the information. While the Corps should develop uniform methods for determining mitigation status, in the interim the Corps should at a minimum identify the method used to calculate percent of mitigation complete.

The 2010 Report also does not include or acknowledge projects that require mitigation and that are included in the President's budget request. Instead, the transmittal letter simply states that "a complete list of all the Corps' projects included in the Fiscal Year 2011 Budget can be accessed through the Corps' internet site when this information is released by the President." This reporting- by-reference demonstrates either indifference to, or a misunderstanding of, the reporting requirement of the statute. Future reports must include all of the information Congress requested in a consolidated report.

Finally, the transmittal letter and the footnotes to the report acknowledge that the consultation required by section 906(d)(4) does not occur. Assistant Secretary Darcy's letter states

---

[15] In a letter from Assistant Secretary Woodley to Chairman Oberstar dated May 1, 2008, Assistant Secreary Woodley stated, "Implementation guidance will be developed based on the gap analysis and should be completed by August."
[16] In a letter to Chairman Oberstar from Assistant Secretary Woodley dated May 1, 2008, Assistant Secretary Woodley stated, "we cannot say that any ongoing project study has been modified subject to revised § 906 and § 2036." In a letter to Chairman Oberstar from Assistant Secretary Woodley dated July 18, 2008, Assistant Secretary Woodley stated, "the Corps is a decentralized organization and the majority of the detailed information resides at the district level."
[17] Committee on Transportation and Infrastructure of the House and Committee on Environment and Public Works of the Senate.
[18] The report consisted of data that were not uniformly generated or comparable, and provided no qualitative characteristics of the mitigation.
[19] The Corps uses number of acres completed divided by number of acres required in "a number of projects", and uses "implementation (construction dollars spent) divided by what was required or scheduled" in "some cases."

that the Corps "is reviewing comments on the draft policy for the consultation process which will be finalized by June 30, 2010." The consultation process mandated by WRDA 2007 will not even *begin* until over *30 months* following the initial requirement.

Independent Review

Section 2034 of WRDA 2007[20] established independent review requirements for certain project studies.[21] Reviews are required if the project cost is expected to exceed $45 million, if the governor of an affected state requests a review, and if the Chief of Engineers determines that a project is controversial.[22] A project may also be subject to independent review if the head of a Federal or State resource agency determines that the project is likely to have a significant adverse impact on environmental, cultural, or other resources under the agency's jurisdiction.[23]

The guidance on independent review was issued on August 22, 2008, some nine months following enactment. The guidance did not accurately follow the statute, and it is currently being revised. Despite questioning from the Committee, it is apparent that the Corps has not determined the actual applicability of the independent review requirement. Instead, the Corps chose to apply independent review to projects where none is required to the detriment of the statutory requirements. Where independent reviews have been conducted, the Corps chooses to follow guidance that does not fully reflect the statutory requirements.[24] In some instances the Corps does not even follow its own guidance.[25]

Planning Principles and Guidelines

WRDA 2007 required the Secretary of the Army to revise the planning principles and guidelines as they relate to the Corps[26] no later than November 8, 2009.[27] The previous administration determined that it would not follow congressional direction and would instead develop revisions only to a portion of the principles and guidelines, the principles and standards, delaying revisions to the guidelines indefinitely. Even these more modest revisions to the principles and standards are so far behind schedule that the public review of the current draft will not even be completed until November 2010 at the earliest. That draft will only include the principles and standards, leaving the critical and more detailed guidelines to be finalized subsequently.

---

[20] 33 U.S.C. § 2343.

[21] A project study subject to review is defined as a feasibility study or reevaluation study for a water resources project, including the environmental impact statement prepared for the study; and any other study associated with a modification of a water resources project that includes an environmental impact statement, including the environmental impact statement prepared for the study.

[22] Section 2034(a)(3)(A), 33 U.S.C. § 2343(a)(3)(A).

[23] Section 2034(a)(3)(B), 33 U.S.C. § 2343(a)(3)(B).

[24] *See*, Civil Works Review Policy, Circular 1165-2-209 (January 31, 2010).

[25] For example, Corps guidance requires that district offices post independent reviews on the district website. However, notwithstanding that the review on the Mid-Chesapeake Bay Island Ecosystem Restoration Project, Chesapeake Bay, Dorchester County, Maryland is dated January 23, 2008, the review report was not available on the Baltimore District website as of February 23, 2010.

[26] The planning principles and guidelines is a reference to the document prepared by the Water Resources Council pursuant to § 103 of the Water Resources Planning Act (42 U.S.C. § 1962a-2), entitled "Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies", and dated March 10, 1983.

[27] WRDA 2007, § 2031(b), 42 U.S.C. § 1962-3(b).

The current administration did not follow Congressional direction and assigned the task of revising the principles and guidelines to the Council on Environmental Quality (CEQ). Additionally, while the statute required the Secretary to consult with a host of resource and environmental agencies[28] not typically responsible for water project planning, many of those agencies are now actively participating in the development of the revisions and the interpretation of the Congressional directives.

The agency-specific guidelines will require even more time. The President's budget proposal for fiscal year (FY) 2011 indicates that the guidelines are not even scheduled to be complete until FY 2013 – four years after the statutory due date. The Corps, now under the direction of CEQ, has not met any of its milestones for revising the principles and guidelines to date, so the likelihood of meeting the 2013 date is not good.

The administration chose to make the draft revisions to the principles and standards applicable to all water resources projects, not just those of the Corps.[29] Although the administration has authority to revise the principles and guidelines at any time through the Water Resources Council[30] expanding the applicability of the provisions has resulted in additional delays.

On December 3, 2009, CEQ released draft revisions of the principles and standards to the National Academy of Sciences and the public for review. The Academy's review is expected to be complete in November 2010. The public review period is for 90 days.

General Implementation Issues

When a new Water Resources Development Act becomes law, the Office of the Assistant Secretary and the Chief of Engineers determine what provisions require specific guidance to be properly implemented. These implementation guidances can be relatively short and simple, or lengthy and detailed, depending on the nature of the underlying statutory provision. These documents form the basis of the implementation of the law by the district and division offices.

The implementation guidances for WRDA 2007 do not appear to have been issued with a sense of priority. In developing implementation guidance, the Assistant Secretary and the Corps should have allocated resources to programmatic changes that have universal applicability and immediate effective dates. Of equal importance would be project related provisions that have immediate impact on funded activities, or immediate impact where funding is not necessary. Clearly these would include the independent review requirements and mitigation reforms. Instead, programmatic guidances were delayed while guidance documents for unfunded activities that would not be implemented and activities that required no special guidance were routinely issued.[31]

---

[28] These include the Departments of Commerce, Housing and Urban Development, Transportation, Energy, Homeland Security, and the Environmental Protection Agency.

[29] The current principles and guidelines apply to the programs of the Corps, the Bureau of Reclamation, the Soil Conservation Service, and the Tennessee Valley Authority. The revisions could apply to additional programs as well, but few other agencies develop and implement their own water resources projects.

[30] Section 103 of the Water Resources Planning Act (42 U.S.C. § 1962a-2).

[31] The guidance documents for the no action items in Title I were issued in March and July 2008, both before the documents for mitigation and independent review.

The effects of the failure to create an adequate triage for issuing guidance documents were demonstrated by Assistant Secretary Woodley stating to Chairman Oberstar that efforts on implementation were delayed for lack of resources.[32] Had resources been allocated subject to proper prioritization, more significant guidance documents could have been issued more promptly.

The failure to follow a prioritization process resulted in guidances being issued that call for no further action absent subsequent appropriation, and provisions of WRDA 2007 that require immediate implementation having no guidance documents.

WRDA 2007 includes scores of project authorizations and modifications, and significant programmatic changes in how the Corps implements the civil works program. Of the over 900 projects or programs of WRDA 2007, the Corps identified 726 individual sections in WRDA 2007 to be addressed for implementation. As of October 2009 (the last update provided to the Committee), the Corps maintains that it had issued necessary guidance on about 65% of these items. The Corps' statistics are misleading, however.

For example, of the 726 individual sections the Corps identifies, it lists 203 as included in Title I – Water Resources Projects, and claims that implementation guidance has been issued on 96 percent of the projects in that title. However, to reach that number, the Corps must include each of the 46 projects with Chief of Engineer's reports, plus each of the specifically listed small projects under the various Continuing Authorities Programs[33] and any special language for any of the Continuing Authorities Program projects.

Additionally, of the 203 items identified for Title I, 180 of the guidances either direct no further action without specific funding or allow for implementation in accordance with normal budgeting and policy considerations with no special instructions. Therefore, only 23 of the 203 items in Title I required any real "guidance" to be implemented, and 13, or 57 percent of these guidance documents have been issued.

Representatives from the Corps most recently provided information on WRDA 2007 implementation in February 2010. In multiple cases, the Corps' calculations for the percentage of guidances issued for each title did not match data otherwise available to the Committee. For example, in Title IV, the Corps claims an 80 percent completion rate for the provisions. However, of the 24 guidances required, the Corps has completed four, totaling a 16 percent completion of the guidances required in the title. This number derives from totaling up the number of required guidances for the title, available on the Corps' website, and adding up the number of guidances issued by the Corps, and calculating the percentages. This kind of discrepancy seems to indicate that the Corps is relying on an entirely different data set or process that is not publicly available. The methodology and process by which the Corps reached these calculations raises questions on the

---

[32] For example, in a letter to Chairman Oberstar from Assistant Secretary Woodley dated October 20, 2008, Assistant Secretary Woodley stated, "The Army will require significant resources to complete the revision of procedures and we likely do not have sufficient funding within the General Expense Account to carry out such work."

[33] The Continuing Authorities Program is the collective term for the general authority given to the Secretary of the Army in various statutes to carry out small projects without specific Congressional authorization. For each type of project in the Continuing Authorities Program, the Federal investment is limited and there are annual programmatic limits. Project purposes include flood damage reduction, navigation, beneficial use of dredged material, aquatic ecosystem restoration, project modifications to improve the environment, aquatic plant control, and emergency streambank repair.

consistency of data analysis. The Corps' calculations matched the Committee's totals for only three of the nine titles.

In calculating the implementation rate for WRDA 2007, the Corps would be better served by calculating the number of necessary actions and working toward achieving that goal. While such an effort does not address the qualitative differences among legislative provisions, it allows for direct analysis.

WITNESSES

PANEL I

The Honorable Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
Department of Army

Lt. Gen. Robert L. Van Antwerp
Commanding General of the U.S. Army Corps of Engineers
Department of Army

PANEL II

Mr. Michael A. Leone
Port Director, Maritime Administration
Massachusetts Port Authority (Massport)
American Association of Port Authorities

Mr. David R. Conrad
Senior Water Resources Specialist
National Wildlife Federation

Mr. Steve Fitzgerald
Flood Committee Chair
Harris County Flood Control District
The National Association of Flood & Stormwater Management Agencies (NAFSMA)

Mr. Brian Pallasch
Co-Chair
Water Resources Coalition
American Society of Civil Engineers

Ms. Amy Larson, Esq.
President
National Waterways Conference

THE WATER RESOURCES DEVELOPMENT ACT OF 2007: A REVIEW OF IMPLEMENTATION IN ITS THIRD YEAR

Wednesday, March 3, 2010

HOUSE OF REPRESENTATIVES,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
WASHINGTON, DC.

The Committee met, pursuant to call, at 12:28 p.m., in Room 2167, Rayburn House Office Building, Hon. James Oberstar [Chairman of the Committee] presiding.

Mr. OBERSTAR. The Committee on Transportation and Infrastructure will come to order for the second time today. We meet today to review implementation of the Water Resources Development Act of 2007.

I will parenthetically note for the record that this is a milestone in the Committee's oversight role. Since I was elected Chairman, it is the 50th oversight hearing conducted by the Committee since January of 2007.

My predecessor's, for whom I was administrative assistant, portrait hangs in the corner of the Committee room. John Blatnik served as Chair of this Committee for 4 years. He served in the House 28 years and was the first Chairman of the Special Investigative Committee on the Federal Aid Highway Program, established at the direction of Speaker Rayburn 3 years after the interstate highway program was enacted to inquire into allegations of fraud, corruption, and abuse in the implementation of the interstate program and the Highway Trust Fund.

There were just scattered reports of abuse of the right of way acquisitions, of construction practices, of concrete not being poured that was not up to engineering standards of bridges that were built that were not 16 feet but a lower elevation. And Speaker Rayburn said, "I don't want this largest public works program in the history of the country and maybe in the history of the world to get off to a bad start."

And John Blatnik was a combat paratrooper in World War II, served behind Nazi lines in what is today Slovenia, rescuing American airmen shot down by the Nazis hiding in haystacks and barns and grottos to stay out of the reach of the Nazi forces. He was a tough guy. He was the right guy to select for that responsibility, meticulous in his work.

And the result of the work of the Subcommittee was that, among other things, no State had internal audit and review procedures for their highway programs. They had never seen as much money as was coming out of the Highway Trust Fund, and they didn't know

how to handle it and weren't prepared to handle it. As a result of those investigations, every State adopted internal budget review management procedures.

Furthermore, 36 people—contractors, State officials, and Federal highway—then Bureau of Public Roads personnel—went to Federal and State prison; and lessons were learned in the contractor community. But it was tough oversight by this Committee, meticulous, thorough review of the work that kept the Federal highway program on a straight and even path.

But we are not here to review corruption or fraud or abuse but rather the principle of oversight which is to—just as the executive is directed by the Constitution to take care that the laws are faithfully executed, so is the legislative branch directed to ensure that the executive does its job properly, that laws are implemented as intended by Congress, and also to learn lessons from implementation that may result in further legislative changes.

We enacted the Water Resources Development Act on November 8, 2007, overriding a Presidential veto. In the history of the Congress, there have been 1,174 vetoes; and only 106 had been overridden. Ours was the 107th.

I must give credit to Mr. Mica, who led the charge on the House floor; Ms. Johnson, who is Chair of the Water Resources Subcommittee. I was in the hospital having my neck operated on, installing titanium rods to overcome the adverse effects of a bicycling accident 20 years earlier that is now starting to cut off use of hands and feet.

So, without my presence on the floor, the House overrode that veto by a vote of 361 to 54. The Senate followed suit two days later, 79-14. That is a really strong affirmation of the principles of that bill.

I go into some detail because this wasn't just an afterthought of action. That bill was the culmination of 7 years of pent-up demand for projects, for authorization of funding of the needs of navigation, flood control, water resource—water protection, levees, restoring the Everglades, and a whole host of other issues.

The bill had such enormous support because Mr. Mica and I worked together right at the outset of the session to scrub all of the projects that had passed this Committee in the three previous Congresses but had never been acted on, at least in one session, never acted on by the Senate Environment and Public Works Committee and never passed by the Senate. We never got to conference on those issues. But they had passed the House.

So let us start there with the projects that we know, and let us have a new process by which every Member must sign a document that he has no personal, family, or financial interest in the project and put all of the projects on our Committee web so we have complete transparency and openness.

Among those 900 projects were new authorities for the Florida Everglades, the restoration of the coastal wetlands of Louisiana and Mississippi following Hurricanes Katrina and Rita, the modernization of the water transportation system, upgrading the five principal locks on the Mississippi and two on the Illinois River respectively from 600 to 1,200 feet.

It is intolerable that barge traffic takes 820 hours round trip from Clinton, Iowa, to New Orleans, the world's most important export facility because the locks on the Mississippi and one each on the Ohio and Illinois were built in the 1930s. The 600 foot lengths in tows—the barge tows are 1,200 feet, and our competitors in Brazil have a 2,500-mile advantage and a 3-day sailing advantage over our grain production in the upper Midwest. And the port in New Orleans can't be as efficient as it is designed to be because it takes so long for product to get there. So we included the modernization of those locks in that legislation.

We also adopted reforms for the Corps of Engineers. The old paradigm of dam it, ditch it, drain it, which the Corps had been accused of, was going to change.

We had hearings over many years to review how it would do mitigation, for example; and, in fact, we had an amendment in 1978 that my Minnesota colleague, Republican colleague from Minnesota, Al Quie, from southeastern Minnesota, and I cosponsored to require mitigation to be done concurrently with the construction. Because it was so often the case that the Corps got to the end of the process and, oh, we would love to do that mitigation, but we ran out of money. And we completed the process, so we don't have time to do this, and we just throw the dredge spoils over the levee on the other side and damn the consequences.

That has got to change, and we enacted—we had an amendment in the WRDA bill that would require mitigation to be done in advance or concurrently with the construction and the funding. Well, it hasn't been done. We reinforced that language in WRDA in 2007.

Larger, more controversial projects have been the subject of numerous court cases and review by outside groups and controversy and the focus of a three-part series by the Washington Post, the New York Times, and many other newspapers saying the Corps was not doing its job properly.

So we required, in that legislation, the Corps to submit larger, more controversial projects to outside independent review, to improve the quality of modeling and analysis, resulting in sound conclusions based on data, based on sound analysis. We directed the Corps to update how it plans and implements the projects.

The principles of 1983, developed before the Corps had an environmental mission or before the no net loss of wetlands policy was adopted, those principles had to be updated and was directed to be done in WRDA 2007 to reflect sustainable development, rather than exploitive economic development such as the Mississippi River Gulf Outlet, to avoid unwise development of or, in fact, destruction of floodplains.

But rather than swiftly and quickly embracing the reforms of WRDA 2007, the Corps has been slow to implement; and it has not followed the direct language of the statute and congressional intent.

Today, we release a report that highlights several of the Corps' shortcomings on improved mitigation, independent review, and the planning principles guidelines. These were major subjects of our discussions over a period of years. They were the point of agreement between the House and the Senate that resulted in WRDA

2007 and in this enormous vote that we had on both sides of the aisle.

[Information follows:]

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

The Water Resources Development Act of 2007
Public Law 110-114
A Report on Implementation in the Third Year

Prepared for

The Honorable James L. Oberstar
Chairman

By the Committee on Transportation and Infrastructure
Oversight and Investigations Majority Staff

For Release on Delivery
March 3, 2010
9:00 A.M.

INTRODUCTION

On November 8, 2007, Congress enacted the Water Resources Development Act of 2007[1] over the veto of the President.[2] Enacting the Water Resources Development Act of 2007 (WRDA 2007) was only the 107th successful veto override in the history of the Congress.

WRDA 2007 was the culmination of seven years of pent up demand for authorizations to address the Nation's water resources needs. Among its over 900 projects or programs are significant new authorities associated with the Florida Everglades, the restoration and protection of coastal Louisiana and Mississippi following the devastation of Hurricanes Katrina and Rita, and modernization of the nation's water-based transportation system.

In addition to its project and program authorizations, WRDA 2007 includes the most sweeping reforms of how the Department of the Army's Corps of Engineers develops and implements its projects and programs since the Water Resources Development Act of 1986.[3] Since November 8, 2007, the Department of the Army and the Corps of Engineers have been slow to implement the programmatic reforms and projects contained in that law. Where the Army and the Corps have implemented reforms, the results often have been inadequate and inconsistent with the statute and Congressional intent.

The WRDA 2007 reforms had common goals of increasing transparency and accountability while modernizing the Corps program from its old paradigm of "dam it, ditch it, and drain it."

Reforms to the Corps' mitigation program would force the Corps to identify how it would meet its mitigation requirements upfront, rather than as an afterthought. The Corps would also have to actually monitor mitigation success, or the lack thereof, and take steps to ensure success, while presenting an annual report to Congress on its efforts.

The Corps would be required to submit its larger and more controversial project proposals to outside, independent review with the goal of improved quality of modeling and analysis. Data and analysis would lead to sound conclusions, rather than conclusions driving data and analysis.

WRDA 2007 also called for the Corps to update how it plans and implements it projects. The old water resources principles of 1983 – developed before the Corps had an environmental mission or a no net loss of wetlands policy – would be updated to reflect sustainable rather than exploitive economic development, avoid the unwise use of floodplains, and recognize values to low-income communities.

However, rather than swiftly and enthusiastically embracing the reforms of WRDA 2007, the Corps has been slow in its implementation, and has often modified its implementation to fit its intended results at the expense of the language of the statute and Congressional intent.

---

[1] Public Law 110-114, 121 Stat. 1041.

[2] On November 6, 2007, the House of Representatives voted 361-54 to override the veto. On November 8, 2007, the Senate voted 79-14 to override the veto.

[3] Public Law 99-662, 100 Stat. 4082. Discussions with senior staff of the Corps of Engineers and the Assistant Secretary of the Army for Civil Works reveal that the expected timeframe for implementation was two years, or by November 2009. The Corps and Assistant Secretary are well behind this timetable.

That the Corps would seek to implement its program beyond the authority or intent Congress granted to it is not new. Recent examples include:

St. Johns Bayou and New Madrid Floodway – A court ruled that the Corps violated the Administrative Procedures Act, the Clean Water Act, and the National Environmental Policy Act in justifying constructing the project, and ordered the Corps to halt the project and restore the work already undertaken.

Yazoo Backwater Area Pumps – EPA determined that the proposed project would have an unacceptable adverse effect on fishery areas and wildlife, adversely affecting some 67,000 acres of wetlands and other waters of the United States, and denied the permit necessary to construct the project.

Buford Dam/Lake Sydney Lanier – A court ruled that the Corps had unlawfully changed the operating purposes of Buford Dam to provide water supply to Atlanta without Congressional authorization. The court gave the Corps three years to change its operation or obtain Congressional approval.

WRDA 2007's emphasis on transparency, accountability, and modernization were intended to prevent future shortcomings such as those above. Unfortunately, there are many examples of WRDA 2007 implementation where the Corps has fallen well short. Critical areas such as mitigation, independent review, revisions to the planning principles and guidelines, the application of the Davis-Bacon Act, streamlining the project formulation and delivery process, improved sediment management, and flexibility in financing projects all contain flaws that reflect either indifference to Congressional action or to the policies that action represents.

WATER RESOURCES DEVELOPMENT LEGISLATION

Water resources development acts typically contain project authorizations, project modifications, and programmatic changes that affect how the Department of the Army's Corps of Engineers plans, constructs, and operates and maintains water resources projects.[4]

Water resources development acts are intended to be enacted every two years. However, prior to WRDA 2007, the Water Resources Development Act of 2000 was the most recent enactment.[5]

In addition to its project and program authorizations, every water resources development act includes programmatic changes in how the Corps plans, constructs, and operates and maintains its projects. WRDA 2007 includes the most sweeping reforms of how the Department of the Army's Corps of Engineers develops and implements its projects and programs since the Water Resources Development Act of 1986.[6]

---

[4] Water resources projects may include projects that provide economic and environmental benefits associated with coastal and inland navigation, structural and nonstructural flood damage reduction, hurricane and storm damage reduction, environmental restoration and protection, water supply, recreation, and hydropower.

[5] Public Law 106-541, 114 Stat. 2572.

[6] Public Law 99-662, 100 Stat. 4082. Discussions with senior staff of the Corps of Engineers and the Assistant Secretary of the Army for Civil Works reveal that the expected timeframe for implementation was two years, or by November 2009. The Corps and Assistant Secretary are well behind this timetable.

COMMITTEE ACTION

In April, 2008, the Committee initiated oversight of WRDA 2007 implementation. The Committee learned that neither the office of the Assistant Secretary for Civil Works nor the Corps of Engineers is implementing WRDA 2007 in a timely manner, and neither office possesses information sufficient to determine whether district and division offices are implementing the law.

The lack of information and awareness at the Washington, D.C. level severely inhibit the ability of the Corps to achieve the results of WRDA 2007 as intended by Congress.

WRDA 2007 includes scores of project authorizations and modifications, and several programmatic changes in how the Corps implements the civil works program. Of the over 900 projects or programs of WRDA 2007, the Corps of Engineers identified 726 individual sections in WRDA 2007 to be addressed for implementation. As of October, 2009 (the last update provided to the Committee), the Corps maintains that it had issued necessary guidance on about 65% of these items. The Corps' statistics are misleading, however.

For example, of the 726 individual sections the Corps identifies, it lists 203 as included in Title I – Water Resources Projects, and claims that implementation guidance has been issued on 96% of the projects in that title. However, to reach that number, the Corps must include each of the 46 projects with Chief of Engineer's reports, plus each of the specifically listed small projects under the various Continuing Authorities Programs[7] and any special language for any of the Continuing Authorities Program projects.

Additionally, of the 203 items identified for Title I, 180 of the guidances either direct no further action without specific funding or allow for implementation in accordance with normal budgeting and policy considerations and no special instructions. Therefore, only 23 of the 203 items in Title I required any real "guidance" to be implemented, and 13, or 57% of these guidance documents have been issued.

Representatives from the Corps briefed Committee staff on WRDA 2007 implementation on February 16, 2010. In multiple cases, the Corps' calculations for the percentage of guidances issued for each title did not match data otherwise available to the Committee. That there are apparent discrepancies indicates that the Corps is relying on an entirely different data set or a process that is not publicly available. The methodology and process by which the Corps reached these calculations raises questions on the consistency of data analysis. It also raises the issues of transparency and accountability that WRDA 2007 sought to address.

In calculating the implementation rate for WRDA2007, the Corps would be better served by calculating the number of necessary actions and working toward achieving that goal. While such an effort does not address the qualitative differences among legislative provisions, it allows for direct analysis.

---

[7] The Continuing Authorities Program is the collective term for the general authority given to the Secretary of the Army in various statutes to carry out small projects without specific Congressional authorization. For each type of project in the Continuing Authorities Program, the Federal investment is limited and there are annual programmatic limits. Project purposes include flood damage reduction, navigation, beneficial use of dredged material, aquatic ecosystem restoration, project modifications to improve the environment, aquatic plant control, and emergency streambank repair.

WRDA 2007 HISTORY AND IMPLEMENTATION

A significant contributor to the inability of Congress to enact water resources development legislation between 2000 and 2007 was the policy dispute over the areas often referred to as "Corps reform." The central elements of this reform were: 1) strengthen the effectiveness of the Corps' mitigation program; 2) establish requirements for independent review of proposed projects that were large or controversial; and 3) revise the planning principles and guidelines that the Corps uses to develop its project recommendations.

The requirements for conducting independent reviews and strengthening the mitigation program became effective immediately upon enactment.[8] The revised principles and guidelines were to be issued no later than November 8, 2009.[9] Notwithstanding 28 months since enactment, the Corps' progress in implementing these provisions has been slow and inconsistent.

The guidance on implementing the reforms to the mitigation program was not issued until August 31, 2009, 21 months following enactment, even though the requirements became effective immediately. In addition to being tardy, the Assistant Secretary and the Corps have no mechanisms in place to determine compliance.[10]

WRDA 2007 also required a mitigation status report where Congress could be informed of those projects that required mitigation, whether under construction or completed, and the status of that mitigation. The report is required to be provided concurrent with the submittal of the President's budget. The report was not submitted for 2008, and was late and not fully responsive in 2009.[11]

The 2010 report was an improvement over 2009. However, the 2010 report continues the inconsistent methods of calculating percentage of mitigation completed – some projects are based upon expenditures and some are based upon acres acquired.

The initial guidance on independent review was issued on August 22, 2008. Despite questioning from the Committee, it is apparent that the Corps has not determined the actual applicability of the independent review requirement. Instead, the Corps has chosen to apply independent review to projects where none is required to the detriment of the statutory requirements. Where independent reviews have been conducted, the Corps chooses to follow

---

[8] Unless otherwise stated in the enacting legislation, all provisions of law become effective upon enactment. Some period of transition is often necessary for significant changes, but that period should be as short as possible.
[9] WRDA 2007, Section 2031(b), 42 U.S.C. 1962-3(b).
[10] In a letter to Chairman Oberstar from Assistant Secretary Woodley dated May 1, 2008, Assistant Secretary Woodley stated, "we cannot say that any ongoing project study has been modified subject to revised section 906 and section 2036." In a letter to Chairman Oberstar from Assistant Secretary Woodley dated July 18, 2008, Assistant Secretary Woodley stated, "the Corps is a decentralized organization and the majority of the detailed information resides at the district level."
[11] The report consisted of data that were not uniformly generated or comparable, and provided no qualitative characteristics of the mitigation. In short, it did not provide the information the law required.

guidance that does not fully reflect the statutory requirements.[12] In some instances the Corps does not even follow its own guidance.[13]

On revising the principles and guidelines, the previous administration determined that it would not follow congressional direction and would instead develop revisions only to the principles and standards, delaying revisions to the guidelines indefinitely. Even these more modest revisions to the principles and standards are so far behind schedule that the public review of the current draft will not even be completed until November 2010 at the earliest. That will only include the principles and standards, leaving the more detailed and critical guidelines to be finalized subsequently. Any agency-specific guidelines will require even more time. The President's budget proposal for FY 2011 indicates that the guidelines are not even scheduled to be complete until FY 2013 – four years after the statutory due date.

GENERAL IMPLEMENTATION ISSUES:

When a new Water Resources Development Act becomes law, the Office of the Assistant Secretary and the Chief of Engineers determine what provisions require specific guidance to be properly implemented. These implementation guidances can be relatively short and simple or lengthy and detailed depending on the nature of the underlying statutory provision.

The implementation guidance documents for WRDA 2007 do not appear to have been issued with a sense of priority. Significant programmatic changes with immediate and universal applicability call for immediate attention. Clearly this group would include the independent review requirements and mitigation reforms. Instead, programmatic guidances were delayed while guidance documents for unfunded activities that would not be implemented were routinely issued.[14]

In developing implementation guidance, the Assistant Secretary and the Corps should have allocated resources to programmatic changes that have universal applicability and immediate effective dates. Of equal importance would be project related provisions that have immediate impact on funded activities, or immediate impact where funding is not necessary.

The effects of the failure to create an adequate triage for issuing guidance documents were demonstrated by Assistant Secretary Woodley stating to Chairman Oberstar that efforts on implementation were delayed for lack of resources.[15] Had resources been allocated subject to proper prioritization, more significant guidance documents could have been issued more promptly.

---

[12] See, Civil Works Review Policy, Circular 1165-2-209, January 31, 2010.

[13] Corps guidance requires that district offices post independent reviews on the district website. However, notwithstanding that the review on the Mid-Chesapeake Bay Island Ecosystem Restoration Project, Chesapeake Bay, Dorchester County, Maryland is dated January 23, 2008, the review report was not available on the Baltimore District website as of February 23, 2010.

[14] The guidance documents for the no action items in Title I were issued in March and July 2008, both before the documents for mitigation and independent review.

[15] For example, in a letter to Chairman Oberstar from Assistant Secretary Woodley dated October 20, 2008, Assistant Secretary Woodley stated, "The Army will require significant resources to complete the revision of procedures and we likely do not have sufficient funding within the General Expense Account to carry out such work."

The failure to follow a prioritization process resulted in guidances being issued that call for no further action absent subsequent appropriation, and provisions of WRDA 2007 that require immediate implementation having no guidance documents.

SPECIFIC WRDA 2007 PROVISIONS

Independent Review:

Section 2034 of WRDA 2007[16] established independent review requirements for certain project studies.[17] Reviews are required if the project cost is expected to exceed $45 million, if the governor of an affected state requests a review, and if the Chief of Engineers determines that a project is controversial.[18] A project may also be subject to independent review if the head of a federal or state resource agency determines that the project is likely to have a significant adverse impact on environmental, cultural, or other resources under the agency's jurisdiction.[19]

A letter requesting information on what projects were subject to independent review was sent to Assistant Secretary of the Army John Paul Woodley on April 17, 2008, with a response requested by April 25.

Because WRDA 2007 and the independent review requirements became law on November 8, 2007, and over five months had elapsed, the Committee expected that the Corps would know what studies were subject to review. The data submitted to the Committee indicated that the Corps did not.

In response to the question of what project studies were subject to the review requirements of §2034, the Assistant Secretary provided data indicating that 263 projects were subject to §2034 reviews.[20] However, in a recent submittal to the Committee[21], the Assistant Secretary indicated that only 20 project studies with an estimated cost greater than $45 million – studies that triggered the requirements of §2034 – were currently underway.[22]

The same submission from the Assistant Secretary stated that the Corps has conducted 15 independent reviews since WRDA 2007 became law. However, in that same submission, the Assistant Secretary's data indicate that of the 20 project studies subject to §2034 because of costs greater than $45 million, six have ongoing or completed independent review. These data simply do not match, and indicate a continuing lack of awareness of the status of WRDA 2007 implementation.

---

[16] 33 U.S.C. 2343.

[17] A project study subject to review is defined as a feasibility study or reevaluation study for a water resources project, including the environmental impact statement prepared for the study; and any other study associated with a modification of a water resources project that includes an environmental impact statement, including the environmental impact statement prepared for the study.

[18] Section 2034(a)(3)(A), 33 U.S.C. 2343(a)(3)(A).

[19] Section 2034(a)(3)(B), 33 U.S.C. 2343(a)(3)(B).

[20] Information provided to Chairman Oberstar as of August 8, 2008.

[21] Letter from Assistant Secretary Darcy to Chairman Oberstar dated January 25, 2010.

[22] id.

To date, the Corps has shown a tendency to have independent review occur for draft feasibility reports.[23] However, restricting reviews to decision documents – such as draft or final feasibility reports – can perpetuate deficiencies in the planning process that the independent review process was intended to ameliorate.

Section 2034 allows for an independent review at any time in the study process. In order to avoid "gotcha" issues arising for the first time at the end of the study process, Congress included language calling for the Chief of Engineers to make a determination as to whether to conduct an independent review at three specific times during the study. These times are: 1) when the without project conditions are identified (status quo); 2) when the array of alternatives to be considered is identified (what options will the Corps explore); and 3) when the preferred alternative is identified (the likely recommended project). The implementing guidance for §2034 does not include these references. The result can be that review comes too late in the process and results in wasted time and money.

The significance of determining whether an independent review is called for earlier in the study process is demonstrated by the ongoing study to deepen Boston Harbor, Massachusetts.

The Final External Peer Review Report for Boston Harbor Navigation Improvement[24] identified significant issues with certain economic assumptions contained in the Corp's report.[25] Earlier review of underlying economic assumptions could have allowed for corrections before the report was completed, and saved many months and millions of dollars in conducting the study. Because the review came at the end of the study, the Corps and the project sponsor incurred costs and delays unnecessarily.

The revised guidance contains other significant flaws.

Section 2034 contains very narrow exceptions to its mandatory review requirement for projects costing more than $45 million.[25] One of those exceptions is for high cost expenditures specified as involving 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. The expenditures must also be for an activity for which there is ample experience within the Corps and industry to treat the activity as routine, and there must be minimal life safety risk.

This is *one* set of circumstances that allow for *one* exception. However, the Corps guidance describes two exceptions. One for the stated purposes, and one for ample experience with minimal life safety risk.[27] This is directly contrary to the conjunctive nature of the language of §2034.[28]

The guidance document also includes a blanket statement that independent external peer reviews established under the circular are exempt from the Federal Advisory Committee Act

---

[23] See, Department of the Army Circular No. 1165-2-209, which discusses review of "decision documents".
[24] Battelle Memorial Institute, June 3, 2008.
[25] Similar deficiencies were also identified internally by the Corps of Engineers Civil Works Review Board.
[26] There are no exceptions for the other mandatory reviews.
[27] Civil Works Review Policy, Circular 1165-2-209, paragraph11.d.(3)(b).
[28] §2034(a)(5)(B), 33 U.S.C. 2343(a)(5)(B).

(FACA).[29] While §2034(j)[30] does include a FACA exemption, it is limited to "a peer review panel established under this section." The guidance document is broader than §2034,[31] therefore it must be clarified that only reviews under §2034 are permitted under the FACA exemption. The other alternative is that the Corps must make an affirmative determination that §2034 applies. For projects under $45 million, that most likely would involve a determination that the project is controversial. Nothing in the guidance addresses this situation, and it is doubtful that the Corps wants to designate scores of projects as "controversial" for the sole purpose of obtaining a FACA exemption. The bona fides of such a characterization would also be questionable.

Section 2034 requires that the Committee and the Senate Committee on Environment and Public Works be notified prior to the initiation of a review under that section. Compliance with this requirement has been sporadic. The Committee has not received the required notifications even though the Assistant Secretary's submission of January 2010 states that 15 reviews have been conducted. The failure to follow the statute and notify the Committees is another indication of the lack of coordinated implementation of §2034.

Mitigation:

Section 2036 of WRDA 2007[32] amended §906 of the Water Resources Development Act of 1986[33] to improve and strengthen the mitigation program of the Corps. Congressional support for §2036 grew from awareness that too often mitigation for activities of the Corps has been an afterthought with too little attention to its implementation, and very little attention to its success. In short, the Corps was not fulfilling its responsibilities under the law to mitigate for the damages caused by the construction and operation of its projects.

Section 906 of WRDA 1986 established requirements that Corps project studies include specific plans to mitigate for the damages associated with their construction. It also required that mitigation (including land acquisition) be undertaken *before* any construction of the project, or concurrently with construction of the project if the Secretary determines such concurrence to be appropriate. Section 906 allows construction of mitigation measures to be accomplished concurrent with project construction.[34]

The Corps in its implementation of §906 effectively ignored Congressional direction to implement mitigation in advance of project construction.[35] There is no mention of the statutory requirement that the first emphasis of §906 is that mitigation be undertaken before any construction of the project. Furthermore, the Corps did not track mitigation implementation or success.[36]

---

[29] 5 U.S.C. App.
[30] 33 U.S.C. 2343(j).
[31] "This circular addresses OMB peer review requirements under the "Information Quality Act" and the Final Information Quality Bulletin for Peer Review by the Office of Management and Budget (referred to as the "OMB Peer Review Bulletin")." Circular 1165-2-209, paragraph 1.
[32] 121 Stat. 1092.
[33] 33 U.S.C. 2283.
[34] id.
[35] See, Planning Guidance Notebook, ER 1105-2-100, April 22, 2005, p. 2-5, "Mitigation measures determined to be appropriate should be planned for *concurrent* implementation with other major project features, where practical." Emphasis added.
[36] See, discussion in Regulatory Guidance Letter 08-03, October 10, 2008, which states, "Recent studies by the Government Accountability Office (GAO) and National Research Council (NRC) indicated that the U.S. Army Corps of

Section 2036 includes language that required the Corps to establish success criteria for mitigation efforts, placed responsibilities for monitoring success, and charged the Corps with consulting with State and Federal resource agencies to determine mitigation success. Finally, §2036 requires the Secretary to submit (contemporaneous with the President's budget submission) a mitigation status report to the Committees[37] on the status of projects that require mitigation, the status of that mitigation, and the results of the consultation.

Despite §2036 and the amendments to §906 being effective upon enactment, the implementation guidance was not issued until August 31, 2009, over 21 months after enactment, and a full year after Assistant Secretary Woodley wrote that it would be completed.[38]

In April, 2008, Chairman Oberstar wrote to Assistant Secretary Woodley seeking information on the implementation of §2036 – over five months from enactment. The chairman requested a list of project studies that include or will include a mitigation component, plus a second request for a list of studies containing a mitigation component completed by the district engineer or noticed for public comment since WRDA 2007 was enacted. The Assistant Secretary's response did not provide the requested information.[39] Rather than commit to providing the requested information, the letter stated, "I will provide you additional information as it becomes available and look forward to working with you on these important efforts." [40]

A follow up request was made on June 20, 2008, for a list of ongoing studies that have a mitigation component, plus the second list of studies containing a mitigation component completed by the district engineer or noticed for public comment since WRDA 2007 was enacted.

By reply dated July 18, 2008, Assistant Secretary Woodley provided a table listing ongoing studies with mitigation components based upon "information we have to date." [41]

This response raises two concerns on WRDA 2007 implementation. First, a full eight months following enactment of the mitigation reforms, the Assistant Secretary did not possess the data necessary to evaluate compliance with the statute. The second concern is that the Assistant Secretary did not update the information except in response to additional congressional inquiry.

The implementation guidance for §2036 contains several troubling components.

The guidance continues the policy that mitigation efforts are to be incrementally justified.[42] This policy is not only inconsistent with §906 of WRDA 1986 as originally written, it is contrary to the intent of the amendments to §906 contained in §2036 of WRDA 2007.

Engineers (Corps) was not providing adequate oversight to ensure that compensatory mitigation projects were successfully replacing the aquatic resource functions lost as a result of permitted activities."

[37] The Committee on Transportation and Infrastructure of the House and the Committee on Environment and Public Works of the Senate.

[38] See, letter from Assistant Secretary Woodley to Chairman Oberstar dated May 1, 2008, "Implementation guidance will be developed based on the gap analysis and should be completed by August."

[39] Letter from Assistant Secretary Woodley to Chairman Oberstar dated May 1, 2008.

[40] id.

[41] The letter acknowledged that the table would be "updated as additional information is acquired and will be provided to you."

Amended §906 requires that any proposal for authorization of a water resources project must contain a specific plan to mitigate fish and wildlife losses created by such project, or a determination that the project will have negligible adverse impact on fish and wildlife.[43] The Corps' interpretation leads to less than full mitigation. Instead, the Corps conducts mitigation "to the extent incrementally justified", [44] or sufficient such that "only negligible adverse impacts remain." [45]

Section 906 does not permit the implementation that the Corps seeks. In the implementation guidance mitigation planning statement, the Corps states that it will use the mitigation planning process to "compensate for non-negligible impacts to aquatic and terrestrial resources to the extent incrementally justified and to ensure that the recommended project will not have more than negligible adverse impacts on ecological resources." [46]

In breaking down this policy into its three parts, the Corps is correct that mitigation planning is to compensate for "non-negligible impacts". If impacts are negligible, no mitigation is required. The second part of the policy is flawed in that there is no authority in §906 to apply an incremental cost analysis that results in adverse impacts remaining unmitigated. The third part of the policy is also flawed in that the Corps misinterprets §906 to require mitigation up to the point that only non-negligible impacts remain following compensatory measures.

Section 906 does not require mitigation such that only non-negligible impacts remain. Section 906 requires that every water resources project contain either, "(A) a recommendation with a specific plan to mitigate fish and wildlife losses created by such project, or (B) a determination by the Secretary that such project will have negligible adverse impact on fish and wildlife." [47] These clauses are written in the disjunctive for a purpose – impacts are mitigated, or the impacts are negligible. The clauses were not written such that mitigation should occur until the impacts are negligible. By definition, and the Corp's implicit acknowledgement, the impacts are not negligible or the Corps would not have developed a mitigation plan.

Congressional intent is further demonstrated by the language in §906 that "Specific mitigation plans shall ensure that impacts to bottomland hardwood forests are mitigated in-kind, and other habitat types are mitigated to not less than in-kind conditions, to the extent possible." [48]

In a recent submittal to the Chairman forwarding information provided to Senators, the Assistant Secretary explains the use of incremental cost analysis as follows. "This method enables the Corps to assess whether the benefits gained by the increasingly expensive measures are a reasonable investment (e.g., is attaining the last 2 percent of needed mitigation reasonable if the unit costs increase by 350 percent?)." [49]

---

[42] Implementation Guidance for Section 2036(a), August 31, 2009, paragraph 5.a.
[43] Section 906(d)(1), 33 U.S.C. 2283(d)(1).
[44] Implementation Guidance for Section 2036(a), August 31, 2009, paragraph 4.
[45] See, Draft Feasibility Report for Sabine-Neches Waterway Channel Improvement Project, Southeast Texas and Southwest Louisiana, December 2009, VIII.C., p. VIII-2.
[46] Implementation Guidance for Section 2036(a), August 31, 2009, paragraph 5.a.
[47] Section 906(d)(1) (33 U.S.C. 2283(d)(1)).
[48] id.
[49] Attachment included in letter from Assistant Secretary Darcy dated January 25, 2010.

This explanation reveals several flaws in the Corps' approach to meeting the mitigation requirements of §906.

First, the Corps acknowledges that the additional mitigation is "needed" and describes it as such. Therefore this mitigation should be implemented to meet the requirements of §906. Yet, the Corps acknowledges that this "needed" mitigation will not be conducted because of cost considerations, not environmental considerations. If the Corps is acknowledging that certain impacts remain unmitigated because of cost, then the Corps is not complying with the requirements of §906.

Second, if mitigation is needed as the Corps describes, and the incremental costs of implementing the mitigation are significant such that the mitigation is not included in the alternative plans considered by the Corps, there is no indication that the Corps adequately considers these unmitigated costs in performing its cost/benefit analysis in the selection of the recommended plan. This flawed analysis can distort the selection of the best plan using cost/benefit analysis.

A potential error in picking the best plan would arise because the "needed" mitigation costs for each of the alternatives are not included in the costs of the alternative. Describing this error another way, the project alternatives do not reflect environmental costs that remain unmitigated. The result is that by failing to meet the requirements of §906, the Corps' ordering of alternatives by cost/benefit analysis may be incorrect, and the Corps may select the wrong plan.

If the costs were considered in the recommended plan, then the costs would be reflected in the recommended plan and therefore would be justified. The Corps' concept of mitigation costs not being incrementally justified means the Corps is both ignoring the adverse effects on the environment and failing to recognize the costs in its analysis.

Finally, even if the actions of the Corps were consistent with §906 requirements to mitigate, which is not the case, a failure to include the costs of the unmitigated impacts to the environment in the recommended plan means the benefit/cost analysis does not reflect a determination of the true costs of the project. If there are to be unmitigated impacts on the environment, then those costs should be included as a cost of the project. The response of Assistant Secretary Darcy indicates that at a minimum the Corps should acknowledge the unmitigated impacts as costs. While there are different methods to calculate these costs, the Corps could use the incremental cost of measures *not* taken as a proxy for those unmitigated costs in conducting its cost/benefit analysis. While this policy is contrary to §906, it would at least make the economic analysis more accurate.

The Corps' practice on mitigation and cost analysis seeks to have it both ways. The Corps does not include certain mitigation measures in its recommendations because of incremental cost analysis, but there is no evidence the Corps includes the costs associated with those unmitigated impacts in its evaluation of alternatives. The gap in the Corps' analysis can result in the Corps recommending the wrong plan.

Amended §906 also requires that the Secretary ensure that the mitigation plan for each water resources project comply with the mitigation standards and policies established under the regulatory

programs administered by the Secretary.[50] There is insufficient information available to evaluate implementation of this requirement.

Mitigation Status Report—

Section 2036(b) requires that the Secretary provide to the Committees[51] a report that includes at least the following information for projects that require mitigation – the status of construction, the status of the mitigation, and the results of the consultation that is required with Federal and State agencies on the ecological success of the mitigation. To ensure that all relevant projects are included, the report is to include projects that are under construction (this would require the report to reflect both budgeted projects and Congressional additions), projects that are in the President's budget request (this would add any potential new starts and projects under construction but not recently funded), and all projects that have undergone or completed construction, but have not completed the mitigation.

The report was not submitted for 2008, and was late and not fully responsive in 2009.[52] In short, the report did not provide the information the law required. The 2010 status report, while improved, does not fulfill the statutory requirements.

The 2010 mitigation status report included information comparing the planned mitigation to the actual efforts undertaken. This information in the 2010 report is in sharp contrast to the flawed information provided in 2009.[53]

For example, for the Raritan River Basin—Green Brook Sub-basin, New Jersey flood damage reduction project, instead of a statement that the mitigation is 40% complete as in the 2009 report[54], the 2010 report provides a description of the mitigation plan and accomplishments. In the 2010 report for the Raritan River—Green Brook project, the report describes the project mitigation as "130 acres of riparian habitat." It describes the mitigation accomplished to date as, "120 acres implemented as: 28.5 riparian forest/streambank; +6.2 upland forest; +35.5 wetland forest; +5.4 shrub/scrub; +5.6 emergent wetland; +39.3 grassland." This is a clear improvement in the usefulness of the information contained in the report.

While the 2010 report is improved, it still does not meet the statutory requirements and it suffers from data quality issues.

First, the status report does not include or acknowledge projects that require mitigation and that are included in the President's budget request. Instead, the transmittal letter simply states that "a complete list of all the Corps' projects included in the Fiscal Year 2011 Budget can be accessed through the Corps' internet site when this information is released by the President."

---

[50] Section 906(d)(3)(A), 33 U.S.C. 2283(d)(3)(A).

[51] Committee on Transportation and Infrastructure of the House and Committee on Environment and Public Works of the Senate.

[52] The report consisted of data that were not uniformly generated or comparable, and provided no qualitative characteristics of the mitigation.

[53] id.

[54] The 40% complete characterization also had little informative value since the report did not specify whether that 40% figure was a calculation of total expected costs or 40% of expected land acquisition.

This reporting-by-reference demonstrates either indifference to or a misunderstanding of the reporting requirement of the statute.

The status report clearly is to include projects that require mitigation and that are included in the President's budget request.[55] Referring the Committees to the Corps' internet site does not fulfill the law. If the concern is the timing of the release of information, Congress specifically chose the timing of the report to be "Concurrent with the President's submission to Congress. . ." precisely to avoid concerns about making information public before being released by the President.[56] Future reports must include all of the information Congress requested in a consolidated report.

Second, the report continues a deficiency of the first report in that it acknowledges that "There are different methodologies utilized by Corps districts to calculate percent of mitigation complete." [57] The Corps does not identify the specific method used for any of the projects.

Using differing methods to determine the amount of mitigation completed eliminates the ability to compare the relative progress of the Corps in meeting its mitigation requirements, and greatly diminishes the usefulness of the information. While the Corps should develop uniform methods for determining mitigation status, in the interim the Corps should at a minimum identify the method used to calculate percent of mitigation complete.

Third, the status report furnished by the Assistant Secretary includes a list of every project under construction, and a second list of projects with incomplete mitigation. While a list of every project under construction is useful, it is not required by §2036 and it creates confusion between the two documents. There are data gaps between the two lists. The list of projects with incomplete mitigation includes projects that are not on the list of projects under construction. In some instances the construction and mitigation are listed as complete, so there should be no incomplete mitigation. The quality of the data submission must be improved.

Finally, the transmittal letter and the footnotes to the report acknowledge that the consultation required by §906(d)(4) does not occur. Assistant Secretary Darcy's letter states that the Corps "is reviewing comments on the draft policy for the consultation process which will be finalized by June 30, 2010." The consultation process mandated by WRDA 2007 will not even *begin* until over *30 months* following the initial requirement.

Additionally, while the Assistant Secretary's transmittal letter states that the "results of the annual consultation process with appropriate Federal and State agencies will be included in the next mitigation status report", this statement supposes that the consultation can occur, evaluations of success made, data collected, and quality information collected and prepared suitable for reporting to the Committees, all within a seven month period in advance of the President's budget submission in February 2011. The Corps has not shown itself to be able to perform such tasks in such a time period.[58]

---

[55] Section 2036(b)(2)(B).
[56] Section 2036(b)(1) (emphasis added.)
[57] The corps uses number of acres completed divided by number of acres required in "a number of projects", and uses "implementation (construction dollars spent) divided by what was required or scheduled" in "some cases."
[58] The information provided to the Chairman on January 25, 2010, stated that the final comments on the draft consultation guidance were to be provided by the end of January 2010. The draft guidance is less than two pages, yet the

It is also of note that the 2010 status report does not include any information on any required consultations. Yet, in providing information on consultation associated with mitigation plan development, of the 18 projects identified as having mitigation plans, all 18 have consultation listed as "TBD or ongoing." The Corps describes "TBD or ongoing" as indicating that "a mitigation plan and associated consultation are being developed but dates are not yet projected." It is possible that no consultation has occurred. However, this possibility is inconsistent with the Statement of Assistant Secretary Woodley that, "the Corps currently consults with the Federal resource agencies and States during the feasibility study phase when compensatory mitigation plans are prepared. . . ." [59] It also appears to be inconsistent with the recent submission of data on mitigation plans.

For example, there is a mitigation plan contained in the Draft Feasibility Report for Sabine - Neches Waterway Channel Improvement Project, Southeast Texas and Southwest Louisiana, December 2009. The Corps describes the consultation as "TBD or ongoing" in its recent submission. Assistant Secretary Woodley wrote that consultation occurs when plans are prepared. The Corps should develop an improved process for consultation, or an improved communication strategy for what is actually occurring. The submissions to Congress are inconsistent, raising questions on the accuracy of the information.

In another example, for the Upper Yazoo Projects, Mississippi, the planned mitigation is described as, "Purchase 16,250 acres of bottomland hardwood habitat, either cleared or agriculture land, for reforestation and management." But the mitigation accomplished to date is "11,834.94 acres of bottomland hardwood habitat that has been purchased and most, 11,862 acres, has been reforested to date. 4415 acres remain to be purchased." The number of *reforested* acres exceeds the acres *purchased*. Such discrepancies must be corrected, or at least explained.

The Inner Harbor Navigation Canal Lock Replacement Project, Louisiana is another example. In the footnotes to the 2010 status report, the report states:

> Construction of this project was underway when the project was enjoined by Federal District court in late 2006, pending the preparation of a supplemental EIS. The final supplemental EIS is expected to be released for 30-day agency review in April 2009.[60]

Clearly, a reference in a 2010 report to an action that is "expected" to occur in April 2009 reflects a lack of quality in the report. Either the action occurred and the results are known, or the action has not occurred and should be explained as to why it is still expected last year.

The 2009 status report included identical language as footnote 4. That report was provided to the Committees by a letter from Assistant Secretary Woodley dated April 27, 2009. Although "expected to be released . . . in April 2009" could have occurred in very late April 2009, quality control should have corrected the report for 2010.

Assistant Secretary states that the corps will take *five months* to issue the final guidance. If it will take five months to finalize a two page document, conducting and reporting on the actual consultations in seven months appears daunting.

[59] Letter from Assistant Secretary Woodley to Chairman Oberstar dated April 27, 2009.

[60] Status report footnote 4.

These obvious lapses in quality control of the report raise the greater concern of the accuracy of any of the data in the report. To achieve credibility, such apparent errors in the report must be corrected.

Revisions to the Planning Principles and Guidelines:

WRDA 2007 required the Secretary of the Army to revise the planning principles and guidelines[61] no later than November 8, 2009.[62]

The previous administration determined that it would not follow congressional direction and would instead develop revisions only to the principles and standards, delaying revisions to the guidelines indefinitely. The implementation guidance from Assistant Secretary Woodley stated that he "would *like* to complete this first phase of revision by November 2008." (Emphasis added.) However, even these more modest revisions to the principles and standards are so far behind schedule that the public review of the current draft will not even be completed until November 2010 at the earliest. That will include only the principles and standards, leaving the more detailed and critical guidelines to be finalized subsequently. Any agency-specific guidelines will require even more time. The President's budget proposal for FY 2011 indicates that the guidelines are not even scheduled to be complete until FY 2013 – four years after the statutory due date.

The administration chose to make the draft revisions to the principles and standards applicable to all water resources projects, not just those of the Corps.[63] Although the administration has authority to revise the principles and guidelines at any time through the Water Resources Council[64], expanding the applicability of the provisions has resulted in additional delays.

On December 3, 2009, the Council on Environmental Quality released draft revisions to the National Academy of Sciences and the public for review. The Academy's review is expected to be complete in November 2010. CEQ announced a public review period of 90 days.

Additional Topics:

Too often the tendency of Corps guidance documents for WRDA 2007 is to assert the Corps' independence from Congressional direction. The Corps often takes a tortured or narrow reading of WRDA 2007 provisions, or it simply interprets the new law based upon existing Corps policies while virtually ignoring Congressional intent. The discussion in this part highlights several, but by no means all, of these instances.

---

[61] The planning principles and guidelines is a reference to the principles and guidelines contained in the document prepared by the Water Resources Council pursuant to §103 of the Water Resources Planning Act (42 U.S.C. 1962a-2), entitled "Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies", and dated March 10, 1983.

[62] WRDA 2007, Section 2031(b), 42 U.S.C. 1962-3(b).

[63] The current Principles and Guidelines apply to the programs of the Corps of Engineers, the Bureau of Reclamation, the Soil Conservation Service, and the Tennessee Valley Authority. The revisions could apply to additional programs as well, but few other agencies develop and implement their own water resources projects.

[64] Section 103 of the Water Resources Planning Act (42 U.S.C. 1962a-2).

Section 2003 amended §221 of the Flood Control Act of 1970[65] to affect the execution of project partnership agreements (Federal—Non-Federal agreements for executing projects) to allow for credit for non-Federal work. The guidance contains two significant short-comings.

First, in Appendix C, paragraph 10 of the guidance, the guidance correctly states that the non-Federal sponsor must comply with applicable Federal labor laws covering non-Federal construction, including the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, and the Copeland Anti-Kickback Act. However, the guidance goes on to state that the "value of the construction portion of in-kind contributions *may* be excluded from total project costs by the Government, in whole or in part, as a result of the non-Federal sponsor's failure to comply with its obligations under these laws." (Emphasis added.)

The failure to comply with applicable Federal labor laws is a fatal flaw in eligibility for credit. Use of the word "may" implies that there may be instances when failure to comply would not preclude credit for work carried out by non-Federal sponsors. Any such instances would be contrary to the intent of amended §221 and U.S. Department of Labor position.

The applicability of the Davis-Bacon Act to work performed by non-Federal interests for which credit or reimbursement would be forthcoming was settled by the Department of Labor in December 2000, with following guidance by the Corps in July 2001. There is no ambiguity.

In December 2000, Assistant Secretary Joe Westphal wrote to Administrator T. Michael Kerr (Wage and Hour Division, Department of Labor) inquiring whether non-Federal sponsors were "to pay Davis-Bacon Act wages where work performed by the non-Federal sponsor will be reimbursed or credited toward the non-Federal share [of a water resources project.]" [66]

In response to the request of Assistant Secretary Westphal, Administrator Kerr stated that "the typical PCA [project cooperation agreement], as well as any contracts to perform the construction that are subsequently entered into by the non-Federal sponsor, would be covered by the Davis-Bacon Act." [67] After describing the normal circumstances surrounding construction by non-Federal sponsors, Administrator Kerr stated that such circumstances "must include the Davis-Bacon labor standards provisions." [68]

The Corps followed up this interpretation of the Department of Labor with a memorandum for major subordinate commands (the division offices.) [69] In that memorandum, MG Hans A. Van Winkle stated clearly that "all construction that flows from the project cooperation agreement that non-Federal interests perform for credit against the non-Federal share, or for reimbursement, must be covered by DBA." [70]

---

[65] 42 U.S.C. 1962d-5b.
[66] Letter from Assistant Secretary Joseph W. Westphal to Administrator T. Michael Kerr, December 21, 2000.
[67] Letter from Administrator T. Michael Kerr to Assistant Secretary Joseph W. Westphal.
[68] id.
[69] Implementation of Department of Labor Guidance on Applicability of Davis-Bacon Act to Non-Federal Work-in-Kind Performed Pursuant to Project Cooperation Agreements, July 19, 2001.
[70] id. at paragraph 3. DBA is a reference to the Davis-Bacon Act.

The applicability of the Davis-Bacon Act to work which will receive Federal credit or reimbursement is well settled. The implementation guidance for §2003 does not accurately reflect that applicability and is inaccurate.

Second, the guidance states that there will not be credit for work paid for by the non-Federal sponsor using funds provided by another Federal agency unless the other Federal agency "*verifies in writing* that expenditure of such funds for such purpose is *expressly authorized* by Federal law." [71] The requirements that the use of the funds be verified in writing and expressly authorized exceed the clear language in the statute and will operate as an impediment to achieving Congressional intent in allowing flexibility in non-Federal financing.

Congress addressed the use of other agency funds in §2007 of WRDA 2007. When Congress considered and enacted §2007, the Corps had in effect policies that prohibit the use of Federal funds by non-Federal sponsors to satisfy any part of the non-Federal cost share unless the Federal agency providing such funds verified in writing that expenditure of such funds is expressly authorized by statute.[72]

If Congress wanted the Corps to continue its existing policy, Congress did not need to act. However, Congress specifically rejected the Corps policy by enacting §2007. Congress changed the test for eligibility to "if the Federal agency that provides the funds determines that the funds are authorized to be used to carry out the study or project." [73] This is a less strenuous test than existed prior to WRDA 2007.

The guidance on non-Federal sponsors using Federal funds[74], both in the context of receiving credit and basic eligibility, is another example of Corps guidance ignoring the language in the statute and Congressional intent for the purpose of accomplishing its policies, not Congress' policies.

Section 2045 – Project Streamlining[75] was included in the statute to address the serious delays that occur in the Corps planning process. The Secretary was tasked with developing and implementing a coordinated review process for the development of water resources projects. The intent of the provision was to make reviews simultaneous rather than sequential. Now, three years into implementation, the Corps has yet to issue implementing guidance for §2045.

Sections 2022 and 2023 increased the Federal per project limits on carrying out small projects for navigation (§107 of the River and Harbor Act of 1960[76]) and protecting public property from erosion (§14 of the Flood Control Act of 1946[77]), respectively. Congress has periodically increased the level of Federal participation to reflect increasing construction costs. However, in the implementation guidance the Corps states that "the increased per-project limits only apply to §107 and §14 projects that do not have an executed PPA [project partnership agreement] as of

---

[71] Appendix C, paragraph 8. (Emphasis added.)
[72] Policy Guidance Letter No. 13: Use of Federal Funds to Meet Local Cost Sharing Requirements, January 25, 1989.
[73] 33 U.S.C. 2222
[74] Implementation Guidance for Section 2007 of the Water Resources Development Act of 2007 – Use of Other Federal Funds, March 28, 2008.
[75] 33 U.S.C. 2348
[76] 33 U.S.C. 577.
[77] 33 U.S.C. 701r.

7 November 2007. Therefore, existing PPAs executed on or before 7 November 2007 will not be amended to raise these limits."

The refusal to amend project agreements where the level of Federal participation is increased is contrary to §2008 of WRDA 2007, a section for which no implementation guidance has been issued.

Section 2008(a)[78] provides:

> Upon authorization by law of an increase in the maximum amount of Federal funds that may be allocated for a water resources project or an increase in the total cost of a water resources project authorized to be carried out by the Secretary, the Secretary *shall* enter into a revised partnership agreement for the project to take into account the change in Federal participation in the project. (Emphasis added.)

The Corps guidance for §§2022 and 2023 fails to recognize the existence of §2008, which requires a revision in the partnership agreement to reflect the increased level of Federal participation. Through either inadvertence or inattention, the Corps guidance is inconsistent with the law and Congressional intent.

Section 2037 of WRDA 2007[79] completely rewrote §204 of the Water Resources Development Act of 1992[80]. Section 204 was originally titled *Beneficial Uses of Dredged Material* and re-titled as *Regional Sediment Management.* The new §204 was intended to make greater use of dredged material by expanding the possible purposes beyond habitat creation and protection to include reducing storm damage to property and to transport and place suitable sediment. It also intended for the Secretary to develop regional sediment management plans, while fostering participation with the States.

The Corps guidance does not reflect the Congressional goal of using regional sediment plans as an opportunity to make better use of dredged material as a resource rather than a waste. Instead, the guidance continues an emphasis on projects as part of a plan, rather than emphasizing creation of a plan that necessitates projects for implementation. Improved planning was to lead to better projects that increase the overall benefits to the Nation. The guidance fails to take advantage of this opportunity.

The Corps guidance also perpetuates a serious misinterpretation of §207 of the Water Resources Development Act of 1996,[81] which amended §204. Section 207 added a new subsection to §204 to allow the Secretary to select a dredged material disposal method that is not the least cost option if the incremental costs are reasonable in relation to the environmental benefits, including benefits to the aquatic environment derived from the creation of wetlands and control of shoreline erosion.[82]

---

[78] 33 U.S.C. 2340(a).
[79] 121 Stat. 1094.
[80] 33 U.S.C. 2326.
[81] 110 Stat. 3680.
[82] Section 207 of WRDA 1996 added a new subsection (e) to section 204 of WRDA 1992. Subsection (e) was redesignated as subsection (d) and amended in WRDA 2007.

Despite the fact that §207 of WRDA 1996 added new language to existing §204 of WRDA 1992, the Corps takes the position that "the authorities established by 'Section 207' are separate and distinct from the authority established by Section 204. . . ." [83] Congress did not create authorities "separate and distinct" from §204 by including language *within* §204. It is inconceivable that the Corps considers a subsection within §204 as separate and distinct from it. It appears the Corps was seeking to grant itself new authority to recommend large scale projects without Congressional authorization.

The tortured nature of the Corps guidance is further demonstrated within the guidance itself. While maintaining the fiction that subsection (e) is not a part of §204, the guidance relies on another subsection of §204, subsection (c), to establish the appropriate level of cost-sharing. While the guidance states that cost-sharing "will be in accordance with Section 103 of the Water Resources Development Act of 1986 (33 U.S.C. 2213)," what the law states is that the cost-sharing "shall be determined in accordance with subsection (c)." It is subsection (c) of §204 that refers to how costs will be allocated and shared, including the reference to §103 of WRDA 1986.

The Corps is using part of §204 to establish the appropriate level of cost-sharing while asserting that other parts of §204 are "separate and distinct." If the Corps seeks such separate and distinct authority it should request it, and not torture the plain reading of the statute. This misinterpretation of the statute should have been corrected in the new guidance, particularly in that §204 of WRDA 1992 was rewritten in its entirety by §2037 of WRDA 2007. Section 207 of WRDA 1996 has no relevance.

Section 5001 of WRDA 2007[84] is another example where the Corps' implementation is inconsistent with legislative intent. Section 5001 directs the Secretary to assume maintenance of specified navigation channels upon a determination that the assumption would be environmentally acceptable and economically justified. The clear language of §5001 is that the Secretary make a determination of whether the *maintenance* is economically justified, not the underlying project.

However, in its implementation of §5001, the Corps asserts that the economic analysis required to determine whether the maintenance is economically justified required an alternatives analysis to determine whether the *existing project* depth was incrementally justified.[85] The district offices of the Corps interpret this language as requiring a feasibility level study of alternatives. This approach could result in the study costing significantly more than the maintenance. The Corps was tasked with determining whether the maintenance was economic, not the underlying, existing project.

The approach of the Corps in implementing §5001 will waste resources and is contrary to Congressional intent.

---

[83] Implementation Guidance for Regional Sediment Management – Section 2037 of the Water Resources Development Act of 2007, April 8, 2009.
[84] 121 Stat. 1189.
[85] Implementation Guidance for Maintenance of Navigation Channels, March 9, 2009, paragraph 3.b.

CONCLUSION

WRDA 2007 is a breakthrough statute. It ended the seven year stalemate from the prior Water Resources Development Act of 2000. WRDA 2007 also included the most sweeping reforms of how the Corps plans, constructs, and operates and maintains its projects and programs since WRDA 1986.

However, rather than swiftly and enthusiastically embracing the reforms of WRDA 2007, the Corps has been slow in its implementation, and has often modified its implementation to fit its intended results at the expense of the language of the statute and Congressional intent.

WRDA 2007's emphasis on transparency, accountability, and modernization was intended to address shortcomings that were too often apparent. Unfortunately, there are many examples of WRDA 2007 implementation where the Corps has fallen well short. Critical areas such as mitigation, independent review, revisions to the planning principles and guidelines, the application of the Davis-Bacon Act, streamlining the project formulation and delivery process, improved sediment management, and flexibility in financing projects all contain flaws that reflect either indifference to Congressional action or to the policies that action represents.

The Corps' guidance for implementing mitigation was not issued until August 31 last year, 21 months after enactment. The Corps' field offices during the interim were trying to implement the statute without clear direction. Without the direction on formulating adequate mitigation plans, consultation with State and Federal resource agencies was not happening.

Independent review, the Corps still has not supplied a definitive list of projects subject to the mandatory requirements. The reviews that have been undertaken were done without public notice, without public input. Even completed reviews are not routinely released publicly, way behind schedule.

The President's budget, I was appalled to find the revisions would be 4 years late. That is in part due to the Council on Environmental Quality, part due to the Office of Management and Budget.

The Corps has known and the Assistant Secretary prior to Ms. Darcy have known that this was the intent of Congress, this is a requirement of Congress, and it should have been leading the charge.

The Corps has, in fact, implemented its programs beyond the authority, beyond the intent of Congress. An example, St. John's Bayou New Madrid Floodway. A court ruled that the Corps violated the Administrative Procedures Act, that it violated the Clean Water Act, the National Environmental Policy Act in its justification of building the project and ordered the Corps to halt the project and restore work already undertaken.

Yazoo Backwater Area Pumps, a project I have been familiar with for many, many years, EPA ruled that the proposed project would have an unacceptable adverse effect on the fishery areas and the wildlife, adversely affecting 67,000 acres of wetland and other areas of United States and denied the permit.

The Buford Dam-Lake Sidney Lanier, the court ruled again—the court—the determination that the Corps had unlawfully changed the operating purposes of Buford Dam to supply water to Atlanta without authorization of Congress. The court gave the Corps 3 years to change its operation or get new authority from Congress.

There are other shortcomings from the emphasis of WRDA 2007 on transparency, accountability, and modernization. If the Corps is going to win the trust of the public, particularly the environmental community, and win rather than lose court cases, then it has to comply with the provisions of 2007. And that is where we are going to take this—that is why we have this review today and why we are going to review revisions to the planning principles, guidelines, application of the Davis-Bacon Act, streamlining project formulation. That is very important for people. Delivery process, sediment management, flexibility in financing projects, all of those are going to be the subject; and this is going to be the beginning of a dialogue between the legislative and executive branch to ensure that we together achieve our responsibility of serving the public, especially the water-dependent public and economy.

Mr. Boozman?

Mr. BOOZMAN. Thank you, Mr. Chairman.

Today, we are examining the progress the Army Corps of Engineers is making in implementing the provisions of the Water Re-

sources Development Act of 2007. By the Corps' count, there are 726 individual sections in WRDA 2007 to be implemented. Most of these are projects that Congress has authorized the Corps to carry out.

Some are policy provisions related to changes in how the Corps conducts its planning process. These provisions were very controversial as WRDA 2007 was being developed. We had a good debate on these issues; and, in the end, not all Members were content with the final outcome. Nevertheless, WRDA 2007 is now the law of the land; and we all support it being implemented as written.

I will say that I support the Corps' carrying out the provisions of WRDA 2007, including the required schedules; and if the administration finds that some provision law is unworkable, it is their responsibility to come to the Committee and ask for a legislative fix.

I am not going to get into the weeds on the implementation guidance decisions that the Corps is making. I know the Corps and the Assistant Secretary's Office have been working closely with the Chairman's oversight staff to see that the letter of the law is followed. I am sure the Chairman will press that point, as he has just done.

I am more interested and concerned about the direction the administration is heading as it carries out some of the policy issues of WRDA 2007. I will mention just a couple.

Section 2003 includes a generic credit provision that allows non-Federal partners to receive credit for in-kind work done on projects. It is both interesting and frustrating that an administration that takes great liberty with its interpretation of statutory language under the principles and guidelines provision chooses to interpret this credit provision very rigidly, making the provision completely unworkable.

I am currently most concerned about the implementation of section 2031 of WRDA 2007. It directed the Secretary of the Army to revise the water resources planning principles and guidelines as they relate to the Corps of Engineers. The administration has ignored congressional direction and assigned the task of revising principles and guidelines to the Council on Environmental Quality, not to the Secretary of the Army.

In addition, the administration has invited agencies not typically responsible for water project planning to actively participate in interpreting the statute.

This Committee, the Congress, and the Corps of Engineers itself has worked hard for decades to better understand the environmental impacts of water resources development and to minimize and to mitigate for them. There is a balance of contributing to the national economic development consistent with protecting the environment.

Section 2031 of WRDA 2007 established a national policy that water resources projects should encourage economic development and protect the environment by, number one, seeking to maximize sustainable economic development; seeking to avoid the unwise use of floodplains; and, thirdly, protecting and restoring the functions of the natural systems. But in December of 2009, the Council on Environmental Quality released its draft provision—draft revision, rather, to the first part of the P&G and clearly ignored the WRDA

2007 objectives. CEQ stated that the projects must protect and restore natural ecosystems while encouraging sustainable economic development.

Clearly, the administration is headed towards a new P&G that has a bias in favor of environmental projects or a no-action alternative and against economic projects. This approach is contrary to the objectives stated in section 2031 of WRDA 2007. The project should maximize sustainable economic development.

There are other aspects of the P&G revision that I find troubling, and perhaps the Chairman may want to have a hearing only on this provision and how it is being implemented.

Through WRDA 2007 and other statutes, we in Congress have heaped a lot of extra planning process on the Corps, including added layers of peer review. These things cost time and money, but our hope is that the extra process results in better projects. I hope that that is true. But I will add that no other Federal agency has to go through so much scrutiny and process to bring its public works projects to the Nation.

Mr. BOOZMAN. [Continuing.] I think the most common complaint Members of Congress hear about the Corps of Engineers is not that their planning principles have been wrong but that they are so mired in process that it takes too long to get a decision out of them, and I think all of us here on the Transportation and Infrastructure Committee and in Congress could provide many, many real-life examples of that.

I am afraid, Mr. Chairman, that the way this administration is interpreting the WRDA 2007 provision to revise the P&G together with the additional well-intentioned burdens we have put on the Corps, the future Corps of Engineers may simply be capable of delivering the water resources projects that the nation needs for economic development and environmental sustainability.

With that, I yield back.

Mr. OBERSTAR. I thank you for those comments and especially on the point of credit, in WRDA 2007 we wanted to make it easier for local interests to do work largely in the planning phase and the land acquisition and others, and have it count toward the non-Federal share. Instead, the result has been less help for communities and what we have seen in the past, prior to WRDA 2007, is one after another, the community comes to the Committee or to their individual Member of Congress for ad hoc help on making up that local share.

We didn't want this to be done by earmarks and water appropriations bills, but rather on a policy basis. So we are going to further explore the point the gentleman has raised plus the others.

Now the Chair of our Water Resources and Environment Subcommittee, Ms. Johnson.

Ms. JOHNSON OF TEXAS. Thank you very much, Mr. Chairman, and thank you for holding this hearing. I commend and welcome your ongoing efforts to return to the legislation originated in this Committee to ensure that the law is being implemented as written and intended. I am and will continue to be a strong supporter of increased investments in our Nation's infrastructure.

As I said on the House floor during the debate on the conference Committee report for the 2007 Water Resources Development Act,

we do right by this country when we invest in its infrastructure, including our critical water infrastructure. It took us many years to reach agreement, pass and overcome a veto to produce the 2007 act, and I remain proud that the agreements were reached.

We are here today to review the Corps' implementation of what came to be known in the years preceding 2007 as the Corps reform. This included strengthening the effectiveness of the Corps' mitigation program, establishing requirements for independent review of the proposed projects that were large or controversial and revisiting, revising the planning principles and guidelines that the Corps uses to develop its project recommendations. I was recently disappointed to learn that based on research conducted by our Committee staff, many of the reforms that this Committee and ultimately Congress approved have not been implemented.

I hope this hearing will shed light on why many of the mandates in the bill still await action 28 months later and after the water resources bill's enactment.

The Corps was required to implement revised principles and guidelines within 1 year of enactment. We still have not seen them.

To encourage consistency in recordkeeping, we mandated that the Corps assign a unique tracking number for each water resource project and, again, our research shows that this has not yet been implemented.

Congress also included language to help improve and strengthen the Corps' mitigation program. I was deeply disappointed to learn that the Corps ignored congressional direction to implement mitigation in advance of project construction. The Corps' guidelines document on this issue makes no mention of undertaking the mitigation before construction on a project.

There are other examples that I could cite, but I am eager to hear what our witnesses have to say in response to these lapses. I also want to hear from them on what this Committee can do to help them achieve the problematic changes of the Water Resources Development Act of 2007.

Again, our Nation's infrastructure is in critical need. I stand ready to do all I can to get us back on the right track and look forward to continuing to work with this Committee and the Corps to the end.

I thank you, Mr. Chairman, and I yield back.

Mr. OBERSTAR. Again, thank you very much for those remarks and for your splendid leadership on the water resources bill during the years we were in the minority and during the 110th Congress. You did a splendid job, and thank you for leading the charge on the floor while I was having my neck replaced.

Mr. Cao.

Mr. CAO. Thank you very much, Mr. Chairman. Mr. Chairman, I just want to reiterate your concern with respect to the Army Corps' efficiency and credibility. I believe that this is an extremely important hearing, especially for the people of Louisiana who live along the Gulf Coast region.

I just want to point the Army Corps to a number of projects that we have in the district that the Army Corps has virtually missed all of the deadlines. Specifically one is the Violet Diversion. Section 3083 required the Corps to design and construct the Violet Diver-

sion and the law requires the Corps to complete design on the project by November of 2009. This has been rolled—based on my understanding—into a larger MRTO restoration under section 7013 but has not been designed.

The second project is the IHNC lock replacement. Section 5083 required the Corps to submit supplemental EIS for project by July 1, 2008. The EIS was finally submitted but that deadline was missed.

The comprehensive study, section 7002, required the Corps to develop a comprehensive plan for coastal Louisiana by November 2008. Based on my understanding, this comprehensive study was never started. The U.S. Army Corps claims that funds were not specifically appropriated for initiating. However, a specific appropriation was not necessary.

The fourth project, or at least a number of projects, concerns four LCA additional projects. Section 7006 required four feasibility studies be submitted by December 31, 2009, and these studies were never submitted.

Section 7006(e)(3) required six feasibility studies to be submitted by December 31 of 2008. These studies were never completed, even though, based on my understanding, the district personnel are moving forward and the report was supposed to be, is supposed to be due by December 31 of 2010.

MRGO restoration plan. Section 7013 required a restoration plan for MRGO by 2008. Plans and/or reports were scheduled to be completed by 2012.

So, again, Mr. Chairman, this points to your concern directly questioning the efficiency and credibility of the Army Corps. They have a number of major projects in my district and the deadlines are either missed or some of the projects were—or at least some of the requirements were never submitted.

I am also concerned about the Corps' excessive delays in deepening and maintaining a portion of the Mississippi channel adjacent to the Napoleon Avenue Container Terminal at the Port of New Orleans. A small navigation project to deepen and maintain the berthing area near that terminal was specifically authorized by WRDA 2007. That was 2 years ago and the Corps has not even begun a routine study to examine the significant transportation and related economic benefits that the navigation project will produce that are vital to the competitiveness of the Port of New Orleans.

Mr. Chairman, the waterways are an integral part of Louisiana's way of life as well as an indispensable component of our economy. If we don't keep the Army Corps up to task with a number of these projects, it will affect our ability to recover as well as it will affect our ability to provide our people with jobs.

I thank you for holding this hearing, and I hope that we can both continue to work together to address the needs of the people along the Gulf Coast, especially for the people of New Orleans, of which I believe your wife is a native of the city.

So, thank you, and I yield back.

Mr. OBERSTAR. Yes. Thank you, Mr. Cao. Yes, indeed, we have visited those sites that you referenced, several times, in fact, over the course of the years. I am glad you raised those issues.

Mr. Bishop.

Mr. BISHOP. Mr. Chairman, I don't have a formal opening statement. I just want to thank you for holding this hearing. Given the nature of my district, the efficient and timely performance of the Corps is absolutely vital to both the environment of my district and to the economic stability of my district, and so these are important issues that need to be raised.

I thank you for having this hearing. I yield back.

Mr. OBERSTAR. Mr. Kagen.

Mr. KAGEN. Thank you for holding these hearings and thank you to the Army Corps for stepping up and improving your function in a more efficient way. I would like to align myself with the remarks from the gentleman from New Orleans. We all understand here on this Committee that nearly a third of our energy comes through that Port of New Orleans, and we want to make sure that not only they recover but that our Nation recovers as well in this economic downturn. I look forward to your comments.

I yield back.

Mr. OBERSTAR. Thank you. Now, whether Members have comments, we will begin with our first panel, the Honorable Jo-Ellen Darcy, Assistant Secretary of the Army, accompanied by the Commanding General of the U.S. Army Corps of Engineers, Lieutenant General Van Antwerp. You have done a superb job at the Corps, subject to these questions that we are going to be raising here. Thank you for your great service, long-time service of the Corps.

I would just like to make an observation. The Panama Canal, the second system, is nearing completion. We open in 2014 on the 100th year anniversary of the opening of the first Panama Canal. But the reason that the second system is being built is that the first one wasn't done according to the recommendation of the Corps of Engineers. When President Teddy Roosevelt, as Senator Hayakawa said, stole the Panama fair and square, he directed the Corps of Engineers to undertake an engineering scheme for building the Panama Canal where the French had failed. The assignment was given to a major, an engineering major, a civil engineer, a major in the Corps of Engineers, who spent a year traveling the isthmus, documenting, writing his report, 40 pages, which I have seen, and it is a fascinating report.

It went up to the Chief of Engineers and all the way up to President Roosevelt who looked at it and said, "oh, what's this going to cost?" When told, he said, "Can we make it smaller? Congress will never approve that amount of money."

That report recommended locks of 150-foot beam and 1,500-foot length. Had that original plan been built, they wouldn't be doing a second one now.

So, in many ways, there are other stories about the Corps being the forerunner of the National Park Service, taking over Yellowstone, reestablishing it, Yosemite, reestablishing it. I often remind people that when they see our Park Service rangers, that uniform is the uniform of the Corps of Engineers in the 1880s.

You have done enormously good work, but there are some things that we have to upgrade and uptick here.

Ms. Darcy, proceed.

TESTIMONY OF THE HON. JO-ELLEN DARCY, ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS, DEPARTMENT OF THE ARMY; AND LT. GEN. ROBERT L. VAN ANTWERP, COMMANDING GENERAL OF THE U.S. ARMY CORPS OF ENGINEERS, DEPARTMENT OF THE ARMY

Ms. DARCY. Thank you, Mr. Chairman, and distinguished Members of the Committee. I am honored to testify before you today on the implementation the Water Resources Development Act of 2007.

As you know, I have a deep personal interest and a keen appreciation of the importance of the Water Resources Development Act for the Army Civil Works Program. I will focus my oral statement on the implementation of the national policy provisions contained in Title II and would ask that my full statement be included in the record.

Mr. OBERSTAR. Without objection, so ordered.

Ms. DARCY. I would especially like to focus on the four specific provisions in Title II, Section 2031, which is the Principles and Guidelines; Section 2034, Independent Peer Review; Section 2035, Safety Assurance Review; and Section 2036, which is Mitigation for Fish and Wildlife and Wetlands losses.

Section 2031 of the Water Resources Development Act directed the Secretary of the Army to revise the Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies, which are referred to as the P&G. The Council on Environmental Quality took the lead in this effort to apply the revised P&G to all Federal agencies involved in water resources project development, a process that is expected to last at least another year.

On December 3 of 2009, the Council on Environmental Quality submitted to the National Academy of Sciences for peer review new proposed revisions to the Principles, as well as to Chapter 1 of the Guidelines of the 1983 P&G, which are called the Proposed National Objectives, Principles and Standards for Water and Land Related Resources Implementation Studies.

A Water Science Technology Board review will take about 11 months to complete. This draft was concurrently made available for public review for 90 days and CEQ has extended that for an additional 30 days. CEQ has also formed an interagency working group in January of this year to develop interagency procedures across the Federal agencies, and we are participating in this group.

The Administration plans to issue the Principles and Standards in final form in the spring of 2011 after consideration and resolution of comments received from the general public and from the National Academy.

The Corps implemented a comprehensive peer review process in May of 2005 with the publication of an Engineering Circular for peer review of decision documents, which established a rigorous peer-review process adopting most of the recommendations of the National Resource Council study under section 216 of WRDA 2000 and implementing the 2004 Office of Management and Budget Information Quality Bulletin for peer review.

Provisions in the Water Resource Development Act of 2007 reinforce and further define for the Corps this review process. We recently published an Engineering Circular which provides a more

comprehensive and a more robust review policy for civil works planning, design, and construction. The guidance contained in this Engineering Circular lays out a standard seamless process for review of all civil works projects from initial planning through design, construction, operation and maintenance, repair, replacement, and rehabilitation.

Mitigation planning is an integral part of the Corps' overall planning process. The Corps issued supplemental guidance for mitigation plans as well as for monitoring adaptive management in May of 2005.

With the passage of WRDA 2007 and Section 2036(a), we have strengthened the requirements for developing and reporting monitoring and adaptive management activities.

Monitoring of project mitigation features will continue until the Corps demonstrates that identified ecological success criteria have been met. Corps Division Commanders are establishing an annual consultation process with States and agencies, and we will include these consultation reports in the annual status report on mitigation required by Section 2036(b).

In addition, the Corps is establishing a database to track the mitigation performance.

I would be remiss if I did not mention the work we have accomplished under Title IX of WRDA 2007, the National Levee Safety Program. Title IX, specifically Section 9003, established the National Committee on Levee Safety and directed the Committee to develop recommendations for a national safety program. The National Committee on Levee Safety completed a draft report in January of 2009 and put forward 20 recommendations for creating a national levee safety program.

Although the Corps of Engineers chairs this Committee, the Committee's recommendations do not, and were not intended to, represent those of the administration.

The final draft report was provided to Congress by the Army in May of 2009.

Section 9004 requires that the Secretary establish and maintain a database with an inventory on the Nation's levees. The Corps will complete data collection and inventory of the approximately 2,000 levee systems, which comprise about 14,000 miles of levees, within current authorities and funds during fiscal year 2010.

Activities planned in fiscal year 2011 include the expansion of the National Levee Database to other Federal agencies and to incorporate non-Federal levee data on a nationwide basis. We are going to work with stakeholders to facilitate their use of the database for local levee safety programs, and we are going to develop a levee screening and classification process to rank and prioritize levees based upon risk.

With the allocation of $90 million from the American Recovery and Reinvestment Act for periodic inspections, the Corps will complete inspections for those levees which the Corps operates and maintains and those levees for which the Corps performed the initial design and construction and for those levees which have been incorporated by law into the Corps' program as a federally authorized levee system.

Mr. Chairman, implementation of this very important legislation has been and remains a priority for the Corps and the Army. This concludes my testimony, and I would be happy to answer any questions that you have.

Mr. OBERSTAR. I understand by prior agreement you speak for the Corps and General Van Antwerp does not have a separate statement but is available to answer questions.

Ms. DARCY. Yes.

Mr. OBERSTAR. Alright. The first issue that strikes me, through all of our review and the statement that I made at the opening, is the agency interaction with the National Academy of Sciences, Office of Management and Budget, Council on Environmental Quality, and other entities that are engaged in this. First of all, with the National Academy of Sciences, we thought this was going to be very straightforward, quick acting, but it seems not to have been. How is this process working? Take us through step by step what happens when you work with the Academy.

Ms. DARCY. Congressman, when the initial draft of the revision of the Principles and Standards was done by the Corps of Engineers, it was put out for public comment. Then the Council on Environmental Quality decided that the Principles and Guidelines, because they originally applied to other agencies, that they should be developed with other agencies as well.

So after that, the interagency working group, including the Corps of Engineers and the other agencies, worked on a draft of the Principles and Standards part of the Guidelines. We wanted to have this independently peer reviewed so we submitted it to the National Academy of Sciences on December 3. They estimated their review of this would take about 11 months.

We are going to have our first meeting with the Academy in March, and our public comment period on the Principles and Guidelines has been extended to mid-April 7. Within this timeframe, the Academy and the Corps will be hearing from the public, on their comments and feedback on how these Principles and Standards would actually work. The next step is the interagency development of the actual guidelines, which will begin while the Academy is reviewing the Principles and Standards.

Mr. OBERSTAR. What comes back to our Committee staff and back to me are indications that the Academy operates in a very slow, deliberative, almost academic fashion on a time frame that is more linked to eternity than to the day-to-day urgency needs of the Corps.

I suppose if you respond to that you will alienate somebody over at the NAS, but I need to get a sense. General Antwerp, you are out in the field, you have got a mission to do for the Army. You have got to build a causeway, a bridge or a passageway. You haven't got time to diddle around with it for months and months.

What was your experience working with the Academy?

General VAN ANTWERP. Well, first of all, I would like to say, Mr. Chairman, that part of our external review process is to get somebody that is totally independent, which the National Academy of Sciences is. Then they have a means of touching other groups. Our other element that we used for these are 501(c)3 nonprofit elements, because we want this to be totally external.

My experience with the National Academy of Sciences is that they start as we do and lay down the milestone schedule for whatever project or review they are going to do. This is a very complicated review because of all of the elements, plus it applies really to four agencies besides the Corps, the Bureau of Reclamation, the Natural Resources Conservation Service and the Tennessee Valley Authority.

Mr. OBERSTAR. So you are saying that the substance and the procedure itself, review, is complex in and of itself.

General VAN ANTWERP. Right.

Mr. OBERSTAR. Rather than the National Academy making it complex?

General VAN ANTWERP. I think that is exactly right. One of the guidelines behind external review is that it should be scalable, and it is scalable based on the complexity of the issue and also the importance of it. Both of those, you have to get those right. It is very complex plus the importance of it is hugely significant here, because it hasn't been updated since 1983.

Mr. OBERSTAR. The National Academy of Sciences, both we and our counterparts in the Senate thought this is a very good idea, bringing in an external, objective group, with an academic approach to issues, it doesn't have a stake in the outcome, that is, a financial stake in the outcome, but seeking good public policy.

But then it appears that this has become a very cumbersome process. Maybe it is just because we appear in the House any way, operate on 2-year terms, and we would like to see, we would like to see results sooner rather than later, sometime in the next lifetime. We want them sort of in our lifetime, maybe even in our tenure in the House.

Then you have OMB and CEQ. They also get their fingers in the pie here. Each has a different role, and I have a sense that the office spends more time on the M of the issues than on the B of the issues, more on management.

Just parenthetically, it is not for you to answer or respond to, but Congress never should have created an office of management over and above the existing agencies. That was done in 1974, and I know the historical precedence for it, 1973 actually, but it has caused us in the House and the Senate endless headaches and you and the agencies. They overstep their bounds. They really should be looking only at the budget implications and give you their view and their impressions.

Then CEQ has a different role. That is a more substantive role. That is one that looks at the environmental consequences of what you are proposing to do.

So tell me about your interaction with these two agencies and how long a turnaround time do you get with them?

Ms. DARCY. We have been working with CEQ on a number of issues in addition to the development of the Principles and Guidelines and other ecosystem restoration efforts that are being led by the Council on Environmental Quality. We, as an agency, are in constant communication with the Council, as well as OMB, not only in creating our budgets, but also in looking the way forward on some of the priorities within the budget, including ecosystem restoration.

What my experience has been so far—and I have been in this job 7 months - we have been collaborating with CEQ more than this agency ever has in the past. Not only because of the priorities of this Administration, but because I think the recognition of what the role the Corps of Engineers plays in every water resources development decision that is made in this country.

Mr. OBERSTAR. Well, that is a very good, very cautious, careful answer, and you have not offended anybody over there at OMB, and I understand that.

When we set forth in this legislation, mandatory independent reviews for larger projects that may have some elements of controversy surrounding them, we wanted those reviews done, but we were also concerned about timing. We didn't want that outside review to delay or make an already deliberative process cumbersome. But it seems that the reviews undertaken so far are coming at the end of the process, raising issues that should have been addressed earlier, and thereby creating a delay that we didn't want to happen, Boston Harbor deepening, an example of it.

What have you learned in these 2 years now, and what steps are you taking? You have got a fresh set of eyes since WRDA 2007 was enacted, and what have you learned from this process? What steps are you taking to move it along more expeditiously?

Ms. DARCY. Congressman, I think what we have learned is to start the review process earlier.

Mr. OBERSTAR. Yes, that is what we wanted you to do.

Ms. DARCY. And also have the process be throughout the life cycle of the project, not just at the beginning or not once an alternative is selected. Unfortunately, as you know this was not done in the case of Boston Harbor; the review process came late in the process.

I think an example we can point to as a success of the independent external peer review is the Mississippi Coastal project; we have just sent that chief's report to the Congress.

We had an external independent peer review on this project that lasted about 3-1/2 months. It did not delay the project, it did not delay the study, and it came in at about $212,000 for the external independent peer review, and I think we have a better project because of it.

I think the local sponsor would agree, too, sir.

Mr. OBERSTAR. Alright. We will leave it there for the moment.

Mr. Boozman.

Mr. BOOZMAN. Thank you, Mr. Chairman. It is good to have you, Secretary Darcy, and I think we get to have you again tomorrow, so we are looking forward to that, and I say that with, you know, in the right spirit, very much. We appreciate your all's hard work.

One of the national objectives proposed by CEQ, not Congress, is avoiding adverse impacts to natural ecosystems whenever possible. Since a no-action alternative is always possible, this could preclude the Corps of Engineers or any other Federal water resources agency from ever constructing a project with economic benefits.

How does the Corps intend to carry out this proposal?

Ms. DARCY. I think that what we are going to consider with the new P&G is a range of alternatives. I know that we will be looking at the other provisions in a more careful way, also in a more delib-

erative way. I don't think that the Principles and Guidelines as drafted and out for public comment would preclude us from going forward with what the best project alternative would be.

Mr. BOOZMAN. The 1983 principles and guidelines had a special emphasis that all effective alternatives for solving a set of water resources problems ought to get unbiased consideration evaluation in making a decision on what is recommended to Congress for authorization.

Again, can you explain the administration's position on this fundamental idea of considering all the alternatives without bias and making a recommendation?

I guess kind of the impasse we have is we appreciate the Council on Environmental Quality—and maybe we should get them to come over and testify since they are having so much influence, but I guess, you know, they are a body that is there to give, you know, give guidance, give advice. But the ultimate, the ultimate advice giver and the ultimate whatever is Congress, and what we are seeing is a difference in advice versus the intent of the law.

And so, again, can you comment on——

Ms. DARCY. On the role of CEQ, is that your question, sir?

Mr. BOOZMAN. Well, that, and then what I was alluding to on the alternatives, effective alternatives, you know, for involving water resources problems, getting unbiased consideration, evaluation, make the decision on what is recommended to Congress for authorization. So, yes, tell us what you see the role is and——

Ms. DARCY. I think that the Principles and Guidelines that have been drafted and are out for public comment will be able to provide for those alternatives to be considered.

What P&G revisions are intended to do is to be able to look at not only the net economic benefits but also the environmental benefits and to be able to look at both of those in all alternatives; in making the final decision for the project alternative selection both of those would be weighed.

I don't think any alternative is going to be off the table. I think that looking at them both through the eyes of the total national economic benefit as well as the environmental benefit is the way that we are hoping that they will be looked at in the future.

Mr. BOOZMAN. I understand. I guess our concern is that it doesn't have that effect, that, you know, the language is different with the intent of what Congress was trying to do, you know, with WRDA.

So with that, I yield back my time.

Mr. OBERSTAR. We will have additional rounds. Mr. Bishop.

Mr. BISHOP. Thank you, Mr. Chairman, and thank you very much for your testimony. I want to talk a little bit about the issue of cost share. I am very concerned about cost share, particularly in this economic environment. We have State and local governments with really no capacity or very limited capacity to contribute their share of Army Corps projects.

My understanding of the intent of language in WRDA 2007 was that local government should be able to use other Federal dollars for their cost share and my further understanding is that that is not happening, that is not being allowed.

So my question is what tools or authority does the Corps possess to assist communities with the local cost share?

For example, is there not language, existing language, dating back pre-WRDA 2007 that gives the Secretary the right to waive local cost share?

Ms. DARCY. Yes, there is.

Mr. BISHOP. So, I guess, more specifically, then my question is what are the set of circumstances that would need to be present for such a judgment to be made, and my further question is aren't they already present?

Ms. DARCY. Congressman, I would have to say that I don't know the specifics of what the particular criteria would be in order to get that waiver, under which authority. But I would be happy to get back to you.

[The information follows:]

INSERT: PAGE 17

In response to your request for information on the tools to waive the local cost share I am enclosing a copy of our existing ability to pay guidance used to make determinations to waive the local cost share.

33 CFR PART 241-FLOOD CONTROL COST-SHARING REQUIREMENTS UNDER THE ABILITY TO PAY PROVISION
1-33CFR241.txt - CFR - 4/25/2006 - Regulation - US
Title 33: Navigation and Navigable Waters

PART 241—FLOOD CONTROL COST-SHARING REQUIREMENTS UNDER THE ABILITY TO PAY PROVISION

Authority: Sec. 103(m), Pub. L. 99–662, 100 Stat. 4082 (33 U.S.C. 2201 et seq.), as amended by Sec. 201, Pub. L. 102–580, 106 Stat. 4797 (33 U.S.C. 2201 et seq.)

Source: 54 FR 40581, Oct. 2, 1989, unless otherwise noted.

§ 241.1 Purpose.
top
This rule gives general instructions on the implementation of section 103(m) of the Water Resources Development Act of 1986, Public Law 99–662, as amended by section 201 of the Water Resources Development Act of 1992, Public Law 102–588, for application to flood control projects.

[60 FR 5133, Jan. 26, 1995]

§ 241.2 Applicability.
top
This rule applies to all U.S. Army Corps of Engineers Headquarters (HQUSACE), elements and Major Subordinate Commands and District Commands of the Corps of Engineers having Civil Works Responsibilities.

[60 FR 5133, Jan. 26, 1995]

§ 241.3 References.
top
References cited in paragraphs (f) thru (i) may be obtained from USACE Pub. Depot, CEIM-SP-D, 2803, 52d Avenue, Hyattsville, MD 20781–1102. References cited in paragraphs (d) and (e) may be obtained from the National Information Services, 5285 Port Royal Road, Springfield, VA 22161. References (a), (b) and (c) may be reviewed in your local library or by writing your local Congressperson.

(a) Water Resources Development Act, 1986, Public Law 99–662, 100 Stat. 4082, 33 U.S.C. 2201 et seq.

(b) Water Resources Development Act 1992, Public Law 102–580, 106 Stat. 4797, 33 U.S.C. 2201 et seq.

(c) U.S. Water Resources Council, Economic and Environmental Principles and Guidelines for Water and

Related Land Resources Implementation Studies, March 10, 1983.

(d) Office of Personnel Management, FPM Bulletin 591–30.

(e) Office of Personnel Management, FPM 591–32.

(f) U.S. Army Corps of Engineers, Engineer Regulation 1165–2–29.

(g) U.S. Army Corps of Engineers, Engineer Regulation 1165–2–121.

(h) U.S. Army Corps of Engineers, Engineer Regulation 1165–2–131.

(i) U.S. Army Corps of Engineers, Engineer Regulation 405–1–12.

[60 FR 5133, Jan. 26, 1995]

§ 241.4 General policy.
top
(a) Procedures described herein establish an "ability to pay" test which will be applied to all flood control projects. As a result of the application of the test, some projects will be cost-shared by the non-Federal interest at a lower level than the standard non-Federal share that would be required under the provisions of section 103 of Pub. L. 99–662, 33 U.S.C. 2213. The "standard share", as used herein, refers to the non-Federal share that would apply to the project before any ability to pay consideration.

(b) Section 103(m) requires that all cost-sharing agreements for flood control covered by the terms of section 103(a) or 103(b) be subject to the ability to pay test. The test must therefore be applied not only to projects specifically authorized by Congress, but to the continuing authority projects constructed under section 14 of the 1946 Flood Control Act (33 U.S.C. 701r), section 205 of the 1948 Flood Control Act (33 U.S.C. 701s), and section 208 of the 1954 Flood Control Act (33 U.S.C. 701g), all as amended.

(c) The ability to pay test shall be conducted independently of any analysis of a project sponsor's ability to finance its ultimate share of proposed project costs. The ability to finance is addressed in a statement of financial capability which considers current borrowing constraints, alternative sources of liquidity, etc. It is therefore much more narrowly defined than the ability to pay test, which considers the underlying resource base of the community as a whole. The ability to pay test shall not be used to affect project scope, or to change budgetary priorities among projects competing for scarce Federal funds.

(d) Any reductions in the level of non-Federal cost-sharing as a result of the application of this test will be applied to construction costs only. Operations, maintenance and rehabilitation responsibilities are unaffected by the ability to pay test.

(e) When projects are eligible for credits as outlined in ER 1165–2–29, reference §241.3(e), the ability to pay test will be applied before any adjustments are made for credits. If the ability to pay test results in a lower non-Federal share, the allowable amount of credits will be limited by the lower share.

(f) The test is based on the following principles:

(1) Since the standard non-Federal cost-share is substantilly less than full costs in every case, the ability to pay test should be structured so that reductions in the level of cost-sharing will be granted in only a

limited number of cases of severe economic hardship.

(2) The test should depend not only on the economic circumstances within a project area, but also on the conditions of the state(s) in which the project area is located. Although states' policies with respect to supporting local interests on flood control projects are not uniform, the state represents a potential source of financial assistance which should be considered in the analysis.

(3) The alternative level of cost-sharing determined under the ability to pay principle should be governed in part by project benefits. If, as a result of the project, local beneficiaries receive more income, or are required to use fewer resources on flood damage repair or replacement, or on flood insurance, a portion of these resources should be available to pay for the non-Federal share, even in those cases where an analysis of current economic conditions indicates that there are relatively limited resources in the project area and its state.

(4) Since project benefits represent availability of resources in the future, but not the present, project sponsors should be permitted to defer a certain percentage of the non-Federal share whenever current economic circumstances suggest that non-Federal resources may be limited.

(g) The Non-Federal interest may, at its discretion, waive the application of the ability to pay test. In this case, the Non-Federal interest shall be considered to have the ability to pay the standard cost-share and no further economic inquiry will be required.

§ 241.5 Procedures for estimating the alternative cost-share.
top
(a) Step one, the benefits test. Determine the maximum possible reduction in the level of non-Federal cost-sharing for any project.

(1) Calculate the ratio of flood control benefits (developed using the Water Resources Council's Principles and Guidelines—ref. §241.3(b)) to flood control costs for the project based on the discount rate which the Corps is currently using to evaluate projects. Costs include operations and maintenance as well as first costs. Divide the result by four. For example, if the project's (or separable element's) benefit-cost ratio is 1.2:1, the factor for this project equals 0.3. If a project has been authorized for construction without a benefit-cost ratio calculated in accordance with the Principles and Guidelines, determination of the ratio is a prerequisite for consideration under the ability to pay provision.

(2) If the factor determined in §241.5(a)(1), when expressed as a percentage, is greater than the standard level of cost-sharing, the standard level will apply.

(3) If the factor determined in §241.5(a)(1), when expressed as a percentage, is less than the standard level of cost-sharing, projects may be eligible for either a reduction in the non-Federal share to this "benefits based floor" (BBF), or for a partial reduction to a share between the standard level and the BBF, as determined by the procedures in step two, §243.5. In no case however, will the non-Federal cost-share be less than five percent.

(b) Step two, the income test. Projects may qualify for the full amount of the reduction in cost-sharing calculated in Step one, or for some fraction of the reduction in cost-sharing, depending on a measure of the current economic resources of the project area and of the state or states in which the project is located.

(1) To assure consistency, the calculations in §241.5(b) (2) and (3) will be performed by HQUSACE and distributed to all FOA's via Engineering Circulars. The information will be updated and distributed to HQUSACE and to the field as soon as new data are available. The procedures may be verified for any single county or state using the sources cited.

(2) For each of the three latest calendar years for which information is available, determine the level of per capita personal income in the state in which the project beneficiaries are located, and compare this to the national average of per capita personal income. Source: Dept. of Commerce, Bureau of Economic Analysis, as published yearly in the April Survey of Current Business. (If the project beneficiaries are located in Alaska or Hawaii, divide the per capita personal income figure by one plus the percentage used in the Federal Government's cost of living pay differential for Federal workers who purchase local retail and who use private housing, employed in Anchorage, AK or Oahu, HI as contained in References §241.3(c) and (d).) Determine the state's per capita personal income as an index number in comparision to the national average (U.S.=100), and calculate the three year average of the state's index number.

(3) For each of the three latest calendar years for which information is available, determine the level of per capita personal income in the county where the project beneficiaries are located (the "project area"), and compare this to the national average of per capita personal income. Source: Dept. of Commerce, Bureau of Economic Analysis, as published yearly in the April Survey of Current Business. (If the project beneficiaries are located in Alaska or Hawaii, divide the county's per capita personal income figure by one plus the percentage used in the Federal Government's cost of living pay differential for Federal workers who purchase local retail and who use private housing, employed in Anchorage, AK or Oahu, HI.) Calculate the index for the county's per capita personal income to the national average (U.S.=100), and calculate the three year average of the county's index number.

(4) When the project area, as determined by the location of the project's beneficiaries, includes more than one county, calculate a composite project area index by taking a weighted average of the county index numbers, the weights being equal to the relative levels of benefits received in each county. When the project area includes more than one state, the state index for the project should be calculated using the same weighting technique.

(5) Calculate an "Eligibility Factor" for the project according to the following formula:

$$EF = a - b1 \times (\text{state factor}) - b2 \times (\text{area factor}).$$

If EF is one or more, the project is eligible for the full reduction in cost-share to the benefits based floor. If EF is zero or less, the project is not eligible for a reduction. If EF is between zero and one, the non-Federal cost-share will be reduced proportionately to an amount which is greater than the BBF but less than the standard non-Federal cost-share in accordance with the procedures described in paragraph §241.5(c) of this part. The values of a, b1 and b2 will be determined by HQUSACE. The parameter values will be based on the latest available data and set so that 20 percent of counties have an EF of 1.0 or more, while 66.7 percent have an EF of 0 or less. These values will be adjusted periodically as new information becomes available. Changes will be published in Engineering Circulars. The values will be set so that $b2=2\times b1$, giving local income twice the weight of state income.

(6) Since estimates (available from the Bureau of Economic Analysis) of per capita personal income for Puerto Rico, Guam and other U.S. territories are well below the national average, the eligibility factor for projects in these areas is administratively established to be equal to 1.

(7) For flood control projects sponsored by Native American tribes or villages, the EF shall be calculated using information on tribe or village income as a replacement factor for both the area and state factor (that is multiply the replacement income factor by both b1 and b2 and subtract each from a in the equation in §241.5(b)(5)). The replacement factor will be tribe or village income as a percentage of the national average for the equivalent definition of income (for example a Tribe's median family income as a percentage of the median family income for all U.S. families). The data should be the latest available information. It is acceptable, but not required that the data be obtained from the Bureau of the Census, American Indians, Eskimos and Aleuts on Identified Reservations and in Historic Areas of Oklahoma (Excluding Urbanized Areas), part 1, Table 10, or General Social and Economic Characteristics—United States Summary (1980), Table 252. Since both sources contain information for Native Americans living on reservations, rather than all Tribe or Village members, the sources should be used only when appropriate, or when no better information is available.

(c) Application of the Ability to Pay Formula to the Basic Cost-sharing Provisions of Section 103. If a flood control project has a BBF which is less than the standard cost-share and an EF which is greater than zero, the non-Federal cost-share will be reduced. The alternative non-Federal share will be calculated and reported to the nearest one tenth of one percent. The actual reduction is determined by applying the ability to pay formula to the basic flood control cost-sharing provisions of section 103 of Pub. L. 99–662, 33 U.S.C. 2213, as follows:

(1) When EF = 1, non-Federal cost-share = BBF

(2) For structural projects covered by section 103(a), when $0 < EF < 1$:

(i) If LERRD equals or exceeds 45 percent:

non-Federal cost-share = 50 - EF × (50 - BBF)

(ii) If LERRD exceeds 20 percent but is less than 45 percent:

non-Federal cost-share = (LERRD + 5) - ER × [(LERRD + 5) - BBF]

(iii) If LERRD is less than 20 percent:

non-Federal cost-share = 25 - EF × (25 - BBF)

(3) For non-structural projects covered by section 103(b), when $0 < EF < 1$:

non-Federal cost-share = 25 - EF × (25 - BBF)

(4) In no case however, can the non-Federal share be less than five percent, even if the calculation made in §241.5(c) (1), (2), or (3) results in a smaller number.

(5) Note: LERRD equals the costs of lands, easements, rights-of-way, relocations, and dredged material disposal areas expressed as a percentage of total project costs. The BBF and numerical terms in the equations above are also expressed as percentages.

(d) Additional consideration for high cost projects. For any project where the normal non-Federal share exceeds 35 percent, and the per capita non-Federal cost (i.e., normal non-Federal share of total

construction costs divided by the population in the sponsor's geographic jurisdiction) exceeds $300, the non-Federal share under the ability to pay provision will be either LERRD's (i.e., no cash requirement) or 35 percent, whichever is greater. If LERRD's exceed 50 percent, the non-Federal share remains at 50 percent. Projects which qualify under the benefits and income tests will receive the reduction under the high cost criteria only if the high cost criteria results in a greater reduction in the non-Federal cost share.

[54 FR 40581, Oct. 2, 1989, as amended at 60 FR 5134, Jan. 26, 1995]

§ 241.6 Deferred payments for certain qualifying projects.
top
(a) Whenever a project's Eligibility Factor exceeds zero, the project sponsor will be permitted to defer a portion of its share of flood control costs. The maximum allowable amount deferred equals the total non-Federal share less (for structural projects) five percent of total project costs and less (for all projects) any amounts for LERRD paid for or acquired by the sponsor prior to the time the PCA is signed. If for example, the non-Federal share of a structural project = 35.0 percent (after the ability to pay adjustment, if any) of which 10 percent is LERRD already paid for by the local sponsor, the maximum allowable amount to be deferred = 20 percent of project flood control costs (35 less the 5 percent cash requirements, less the 10 percent LERRD already acquired). Deferred payments at the option of the sponsor will be allowed regardless of the outcome of the benefits test described in §241.5(a) whenever the Eligibility Factor exceeds zero.

(b) When EF = 1, the project sponsor may defer as much as the maximum allowable amount as described in §241.6(a).

(c) When 0 < EF < 1, the sponsor may defer a fraction of the maximum allowable amount described in §241.6(a), where the fraction equals the Eligibility Factor expressed to three decimal places. Continuing the example described in §241.6(a), if EF = .712, total allowed deferral equals .712 × 20 percent = 14.2 percent of total project costs.

(d) The deferred payment can be made in equal installments over any period of time selected by the non-Federal sponsor, provided that all repayments are made between the end of construction and thirty years thereafter. The amount repaid shall include interest during the repayment period as well as interest for the appropriate portion of the construction period for any amounts deferred prior to the end of construction. The rate of interest shall be determined in accordance with the provisions of section 106 of Pub. L. 99–662, 33 U.S.C. 2216.

[54 FR 40581, Oct. 2, 1989, as amended at 60 FR 5134, Jan. 26, 1995]

§ 241.7 Application of test.
top
(a) A preliminary ability to pay test will be applied during the study phase of any proposed project. If the ability to pay cost-share is lower than the standard share, the revised estimated cost-share will be used for budgetary and other planning purposes.

(b) The official application of the ability to pay test will be made at the time the Project Cooperation Agreement (PCA) between the Corps of Engineers and the Non-Federal sponsor is signed. For structural flood control projects, the standard level of cost-sharing will not be known until the end of the project (since the standard level as specified in section 103(a), 33 U.S.C. 2213, includes LERRD). In this case, if the Eligibility Factor is greater than zero but less than one, the ability to pay non-Federal share will be

determined using estimated costs.

(c) The PCA for all projects subject to the ability to pay test will include a "whereas" clause indicating the results of the test. If the project is eligible for a lower non-Federal share:

(1) The revised share will be specified in the PCA (there will be no recalculation of this share once the PCA is signed).

(2) An exhibit attached to the Project Cooperation Agreement (PCA) will include the Benefits Based Floor (BBF) determined in §241.5(a): the Eligibility Factor (EF) determined in §241.5(b): If the Eligibility Factor is greater than zero but less than one, the estimated standard non-Federal share; the formula used in determining the ability to pay share as described in §241.5(c)(1) through (c)(4); and a display of the non-Federal cost share under the high cost criteria described in §241.5(d).

(d) If at the time of project completion, the standard non-Federal share based on actual costs is less than the ability to pay share specified in the PCA, the standard share will apply.

(e) For structural projects. (1) If the standard LERRD plus cash requirement exceeds the ability to pay cost-share, the Federal Government will make any necessary adjustments in expenditures in the following order: First, paying any cash requirement in excess of five percent of total project costs (if any) that would, under standard cost-sharing, have been the responsibility of the non-Federal sponsor; second, making payments for LERRD; and third, providing for reimbursement at the end of construction. Federal payments for LERRD will be made only after the non-Federal payment for LERRD reaches a percentage of total project costs equal to the ability to pay non-Federal cost-share less the five percent cash requirement. If such arrangements are necessary, the PCA should be prepared to reflect agreement on the best manner available for acquisition of those LERRD over the limiting percentage, or for reimbursing the sponsor upon completion of construction.

(2) The non-Federal sponsor will be required to provide a cash payment equal to the minimum of five percent of estimated project costs, regardless of the outcome of the ability to pay test, unless any or all of the five percent cash requirement is waived by application of the high cost criteria described in §241.5(d). The project sponsor shall make cash payments during construction at a rate such that the amount of non-Federal payments in each year, as a percentage of total non-Federal cash payments, equals the amount of Federal expenditures (including sunk pre-construction engineering and design costs as a first year Federal construction expenditure) as a percentage of total Federal expenditures. Total Federal expenditures include cash payments for construction and if necessary (due to ability to pay considerations), for LERRD, and for reimbursement to the non-Federal sponsor. Total Federal expenditures for the purpose of this calculation, do not include expenditures which allow the non-Federal sponsor to defer payment of the non-Federal share under the provisions of this rule.

(f) For non-structural projects, reductions in the non-Federal cost-share as a result of the ability to pay test will not affect the procedures for determining the non-Federal and Federal payment schedules. For non-structural projects, no specific cash payments during construction are required by law.

[54 FR 40581, Oct. 2, 1989, as amended at 60 FR 5134, Jan. 26, 1995]

Mr. BISHOP. I would appreciate that, because it is a particularly difficult issue right now. I know in my own State there are a lot of Army Corps projects that are ready to go that are not going for lack of a local cost share. And not only are the projects important to do, but these are projects that would put people to work.

So I would be very grateful if you would give this your serious attention and let us know what we can do to move this forward.

Ms. DARCY. I will.

Mr. BISHOP. The next question I wanted to go to was the issue of independent peer review and linking that, if I may, to the centers of expertise that the Corps maintains. My understanding is the Corps maintains some number of centers of expertise and that one of their roles was to provide some type of independent peer review of major Army Corps projects.

So I have a couple of questions that flow from that. One, do you feel that this process is working, are the centers of expertise providing this kind of peer review? That is my first question.

General VAN ANTWERP. Congressman, first of all, we do have six centers of expertise and four of six are functioning very well and have done a lot of what they were designed to do. A couple of them—and one is the navigation center, are still trying to get up and running but these six centers are to do exactly as you say.

One of their functions is to help in the review process. We have two types of review. We have internal review, and they can organize that process and put together the group of experts. They can also help to organize the external review, when that would go to the nonprofit organization or whatever organization chosen to complete the review. That is part of their charter.

The other part is to really help our districts, where they have insufficient expertise to bring the best technology and innovation to projects, to bring that expertise to these projects.

Mr. BISHOP. How are these centers currently funded?

General VAN ANTWERP. They are really joint funded. They are funded partially by what we call general funds and then partially by the project funds of those projects to which they are lending their expertise.

Mr. BISHOP. Would the Corps benefit and certainly would the American people benefit if we had more of them, and would a model for them be to site them on college or university campuses that have expertise in coastal zone processes or whatever their particular expertise might be that would be related to or be relevant to Corps projects?

General VAN ANTWERP. I think several questions are there. One, I think we have the number about right. Where they are located generally is where there have been projects like that or in a district that already has that expertise. We do use universities, and we do have money that we provide universities to help us, both in review and in study, which I think is an excellent idea. It gets the innovation, and it also puts us with academia in a little different light, and I think that is good.

So by and large, I think we are located well, we have about the right number. But we need to go to great in this area.

Mr. BISHOP. Thank you both. I yield back, Mr. Chairman.

Mr. OBERSTAR. Mr. Cao.

Mr. CAO. Thank you, Mr. Chairman. Mr. Chairman, before I begin my questioning, I ask for unanimous consent to enter into the record a statement by my colleague from Louisiana, Congressman Steve Scalise.

Mr. OBERSTAR. Without objection, the statement will be included in the record at the appropriate point.

Mr. CAO. Thank you very much, Mr. Chairman.

Secretary Darcy, General Van Antwerp, first of all, I want to thank you for everything that you have done. I am pretty sure that overseeing the Army Corps of Engineers is a quite demanding job, and I am very certain that you hear a lot of complaints on a day-to-day basis, and I am here to complain again and to make sure that my complaints are being heard.

As you can tell from Hurricane Katrina, all of these projects that I just mentioned, not only do they mean economic development, but these projects basically entail the survival of the people of the region. Katrina devastated 80 percent of New Orleans, misplaced over a million people nationwide to various areas of the country. And 4-1/2 years after Katrina, we are only, hopefully, 60 percent, 65 percent back.

This past weekend, I met with Director Spike Lee, who is doing a follow-up documentary to his first piece, When the Levees Broke, and he asked me a very direct question. He said you are the representative of this district. What are you doing to restore the coast and to protect the people of New Orleans?

And one of my answers was, because I belong to the T&I Committee, I have oversight of the Army Corps of Engineers, and my task is to make sure that they keep up with their duties, to make sure that they complete their project on time.

My question to you here is, what are you doing to ensure that the projects in my district are being completed on time and to ensure that the projects that are under the direction of Army Corps are being completed on time?

General VAN ANTWERP. First of all, thank you for the question. I count it as constructive criticism, and I appreciate it.

We have our eye on a target in New Orleans, and it is June 2011. It is the beginning of hurricane season 2011. The Congress has been gracious and the Administration has been gracious. This is about $15 billion worth of work. I would love to bring it to you in the detail that we have; when the study must be completed, when the detailed design has to be done in order to start the project at the right time to finish and meet those deadlines.

So we are very much conscious of the necessity of getting these projects done to meet that deadline of 2011.

Mr. CAO. I am pretty sure you are familiar with the issue we have in connection with Option 1 and Option 2 and Option 2(a) in connection with, I guess, the project.

An issue that has been raised, and the issue questions the, I guess, the forthrightness, the honesty of the Army Corps with respect to the feasibility study of Option 1 versus Option 2 and 2(a), seems to think that the cost study that the Army Corps put out in regards to Option 2 and 2(a) are way overblown.

What is your answer to that?

General VAN ANTWERP. First of all, Option 1 and 2 and 2(a) are— a lot different in that 2 and 2a really are a pump to the river option that eliminates a lot of the local pumps. It is a much more elegant solution, but a pricey solution, and here is why.

In order to really capture the cost, and the ability, if this is constructable or not, we are not sure because of the depth of the canals. You have all kinds of utilities and bank stabilization when you start to really increase the depth of those canals. So we have decided first of all thus far short of having any of that information, that we would accommodate options 2 and 2(a) by having a feature for the current pumps under Option 1 that would be adaptable to 2 and 2(a). So we don't burn that bridge, but that we do make it if ever 2 and 2(a) were studied and were feasible and funded that that would not all be thrown away.

But there is a part here that has been talked about and that is suspending any action now unless it is consistent with 2 and 2(a). First of all, it is very hard to know what is and what isn't feasible until you have done a study. That is the first start. You do a detailed feasibility study, give you the risks, give you enough of the engineering to say it could be done.

The other part is we have pumps right now that are temporary pumps that are on those canals, and by 2013 they are going to hit their design life. They were never intended to go the long distance. I am very concerned right now, heart to heart, about not doing something now, that we are going to count on the temporary pumps if you have a major event that won't be able to deliver without an incredible amount of maintenance.

We are checking the maintenance curves right now on every single pump, and they are increasing as we speak as they age towards 2013. So we have got to do something.

The others are a more longer term solution, to study it well. We think it would be about $15 million and 36 months to do an adequate feasibility study that would be actionable by the Congress and Administration to say if we wanted to do 2 and 2(a).

Mr. OBERSTAR. Would the gentleman yield?

Mr. CAO. Yes, Mr. Chairman.

Mr. OBERSTAR. If I may interrupt the General, 15 million to do the evaluation, analysis of the adequacy of the pumps and the replacement cost?

General VAN ANTWERP. No, sir. This would be for a feasibility study to look at Options 2 and 2(a), which is really the pump to the river option, vice Option 1, which is currently funded and authorized to replace those temporary pumps with a permanent solution. The one nuance there—and maybe I wasn't clear—but if we would do Option 1, we would include some adaptability features that in case you came back later and wanted to do 2 and 2(a), part of those features are existent.

Mr. OBERSTAR. Just a horseback estimate, if the gentleman would allow me to continue.

Mr. CAO. Please.

Mr. OBERSTAR. A horseback estimate, not hold you to the numbers, but what do you think the replacement cost would be for those pumps? And I ask the question, you know, just need a ballpark figure, but I think the gentleman would want to know, I

would want to know, other Members would want to know, so that we can start laying the foundation for it. Those pumps have to be replaced or the city is simply going to be inundated, and we should be planning now for some rather substantial investment.

General VAN ANTWERP. We actually are planning for that investment right now. That is under Option 1, and we are funded for that. So we have a plan to do that. The one thing we don't have yet for that part of the project is a project agreement with a local sponsor for that because we have had a debate over options 1, 2 and 2(a). The Corps' position is that we need to get that project agreement done and get to work and put those permanent pumps in.

If Congress tells us to do a feasibility study for 2 and 2(a), and it is funded, we would do that to the best of our ability and give the comparison. But those pumps are going to need to be replaced in 2013.

Mr. OBERSTAR. In the range of hundreds of millions of dollars I am sure.

General VAN ANTWERP. It is in the hundreds of millions but the funding is there. We are not coming back for a request for funds.

Mr. OBERSTAR. Thank you, Mr. Cao.

Mr. CAO. Thank you, Mr. Chairman. I would look again to question you tomorrow and I yield back my time. Thank you very much.

Mr. OBERSTAR. Now, independent peer review reports, the ones that have been completed so far, it seems we have had difficulty getting access to them, initially Committee staff was denied access. The public has the right to see these reports, our staff has a right to see them. They are not available on the Internet, we can't get them in person. We have to come and knock on the door, bag in hand. What do we have to do to get this?

General VAN ANTWERP. You have every right to have total access to those. There is a way to Google them, but when we went and made a lot of improvements to our website, we essentially took the easy Internet access down. The best way is to have that website that gets you there directly. But you can go through the policy review site and do it. I have the team working on this for you.

You are on to something that has been a challenge. We are trying to improve our website system and give more access and visibility. And what actually happened was it shut the Internet access down unless you were really, really savvy at how to get there, and I am not.

Mr. OBERSTAR. Well, I have newly become an Internet user after years of resisting. I am a paper and typewriter person.

So I learned how to use this and I said well, let me try to get this. We can't get access to this. So I tried, and I can't get in there. I use Google and all these things, so you tell us how, and make it open and transparent, whether we have a headquarters web page or something, somehow we haveto——

General VAN ANTWERP. We are going to link it, put a big spot on the headquarters web page, just come on to the Corps of Engineers homepage and it will tell you how to get there.

Mr. OBERSTAR. Good.

Now, early drafts of revisions to the planning principles and guidelines that we saw, that staff shared with me, required the

process to consider alternatives likely to have a high benefit-to-cost ratio. I said, where is this coming from?

It turns out that there was a document from OMB and to the Assistant Secretary of the Army and to the Corps that directed the Corps to evaluate only those projects that would have a 1.5 to 1 benefit-cost ratio.

My question was how—I asked Ken Kopocis, our Counsel, and Ryan Seiger, Counsel to the Water Resources Subcommittee, how do you determine that a project has a particular benefit-to-cost ratio if you don't do the study first. It is like Abraham Lincoln objecting to the proposal of the President for a toll on waterways. And he said, "How can you impose a toll on a waterway unless you build the project first so that you have product in the waterway for a while so that it can generate the money for the toll?"

This is the same thing, this is 160 years later. There was another document that I saw, that OMB proposed. This is OMB, that direct the Corps to support only, recommend only those projects that have a benefit-cost ratio of 2.5 to 1. That is a huge standard. It is a high requirement. Alright, tell us.

Ms. DARCY. That is a very aggressive benefit-to-cost ratio, 2.5 to 1.

Mr. OBERSTAR. That is very kind, you are being very judicious.

Ms. DARCY. That is something that we have been looking at trying to find those projects for setting priorities in a budget.

Mr. OBERSTAR. Do you have an example of one that meets that? Can you give me an example, 2.5 to 1?

Ms. DARCY. All of the projects in the President's budget, sir.

Mr. OBERSTAR. They do. We probably don't need to build them. If they are that good, someone else can build them.

No, seriously, this is unreasonable to set a goal before you undertake the review of the project, which review is going to lead you to that goal of determining benefit-cost ratios. Give it a try, General?

General VAN ANTWERP. I believe what Ms. Darcy is saying is that the projects that were 2.5 to 1 or greater are what is in the President's budget, but that number floats dependent on the list in priority. As you take the benefit-cost ratio and rack and stack the projects and then you look at what the affordability is, that is how it is prioritized. One year, it could be 3 to 1, or it could go to 2 to 1. In the 2011 budget, for those construction projects, we know how much they cost, we know the benefit-cost ratio. When we drew the line, it came to that.

Now, there is a couple of other categories. There are life safety projects where the the benefit-cost ratio does not govern. It is the life, health and safety, and an example of that would be one of our dams that needs critical rehabbing.

But the projects that were not life, health and safety or ecosystem restoration, they competed based on their benefit-cost ratio. Those ratios were known from a feasibility study and a chief's report.

Mr. OBERSTAR. I think my recollection of the Tennessee Tombigbee was just barely 1 to 1, maybe below that. We had to push and shove to get it over point 1. Lock and Dam 26 was about 1.2 at the beginning. It turned out to be one of the best projects

we have ever done on the Mississippi River. We need five more of them. And I wonder, I just wonder what B-C ratio you would assign to any one of those other five before you could even begin to work on it.

General VAN ANTWERP. We do a preliminary study. And then if we think we have a 1 to 1 benefit-cost ratio or better, then we could go to feasibility.

Mr. OBERSTAR. You make a horseback estimate——

General VAN ANTWERP. Right. You make that estimate, and then you go to feasibility, where you refine it. Then it comes out 2 to 1, 4 to 1, 2.5 to 1, whatever. And then that is where you now have a tool, that says, I can prioritize these. But a project that has a 1 to 1 cost-benefit ratio says it could be worth doing. Now you get into the next question, can we afford to do all of those that were 1 to 1, and the answer to that is no.

Mr. OBERSTAR. That is a different question. That is a question Congress needs to address, whether we can—or as in the case of the Panama Canal, President Roosevelt said, "I don't think Congress will ever approve that kind of money." But he is not the first one. President Franklin Roosevelt, when presented with the cost of building the atomic bomb, said, "can't we build a little one? That is a lot of money, we have a war going on." So they made Little Boy. Yeah. It was big enough.

Alright. In the planning process, where in order of significance does the B-C ratio come?

General VAN ANTWERP. I think it comes in in several places. The first one is where you do the initial cursory study, 100 percent Federal, to determine if we think we have a potential project. It is answering that question. And the benefit-cost ratio, unless there is health or safety or other things, says this makes sense to go to the next level.

The next level, the feasibility, has some cost-sharing aspects. So now you are also engaging the stakeholders, partners, local folks and saying, is this worth it for you to do? We think that there is a benefit-cost ratio that applies here.

And then you come through that process, eventually ending up with a chief's report, and it will have the benefit-cost ratio nailed down with all of the documentation of what are the benefits and what are the costs.

One of the things, of course, the new Principles and Guidelines will do, will now incorporate nonmonetary things; they will incorporate the environment and some of those things that are a little harder to estimate benefits. But they are going to have to be figured into whether this makes a valid project or not.

Mr. OBERSTAR. That is very illuminating, and that is important. But let me ask you a question also about the Mississippi River Lock and Dam 26, 1,200 feet, very efficient operation. But its efficiency and its contribution to river navigation is offset, mitigated, downrated by the other locks that aren't of that efficiency.

If you are looking at a system, then don't you have to look at all of the elements of the system and say together they achieve this greater goal and will have this greater benefit-to-cost ratio? Grain moves in international markets on as little as an eighth of a cent a bushel. If it takes 6 weeks round trip for barge tows to make that

trip to New Orleans and back to the Upper Mississippi, we are not being efficient. We are not being competitive in the international marketplace. The port of Santos in Brazil has a 2-week sailing advantage over New Orleans because they are further out in the South Atlantic.

General VAN ANTWERP. I think you are absolutely onto what we would call watershed planning, and you can't do a project in isolation. You have to look at effects of whether one lock could take X amount of traffic, but all the other ones on either side that actually govern, then that figures into the benefit-cost ratio of building that.

Another example is the Great Lakes. They are so intertwined, all the ports and harbors in the Great Lakes really make up a system, and you have to work them all together, because if you can't get into one port, then you can't take materials to another. Those are the tough decisions. But I think the Principles and Guidelines also includes this larger look that you are speaking of.

Mr. OBERSTAR. You just made the argument maybe somewhat better than I have done for the second lock at Sault Ste. Marie. When you think of the winter—Mr. Boozman doesn't have to deal with that issue. They don't have as much ice. And Mr. Cao doesn't have any ice at all except in the cocktail lounges in New Orleans. They don't want it. By the time it gets down to New Orleans, it is all melted. But if you think of a 105-foot beam lock and a 1,000-foot ore carrier, or an 1,100-foot, and a 1,200-foot chamber, and in January, the lock chamber has 4 or 5 inches of ice on either side, and the vessel has 3 or 4 or 5 inches of ice on either side, and they come through—have you been up there when that has happened, grinding and squeaking and creeking, and you have just got inches? You need a second lock.

We are going to be producing steel in the iron range, in the iron ore mining country in my district. The SR Steel Company, financed by Indian interests from India, not Native American interests, is going to be producing steel slabs. In 2 years or so, the slabs will be rolling off the production line. We have another plant right at Silver Bay, and inland from Silver Bay Mesabi, Nugget is producing 98 percent iron product; not taconite, which is 64, 65 percent iron, but a pure iron like a feed for a blast furnace, for steel—for a blast furnace, for steel, electric arc furnaces, for minimills, for foundries. That is also going to be—they are going to need dependability and continuity of intralake shipment. There is an increasing demand for Powder River Basin coal. Those coal trains come in 2-mile lengths down to the Port of Duluth-Superior. They have got to be able to move in the wintertime. So I think we have made—I have made my point.

Mr. CAO. Mr. Chairman, can you yield?

Mr. OBERSTAR. Mr. Cao.

Mr. CAO. Thank you very much, Mr. Chairman.

Mr. Chairman, I have in the room to your right is a group of students from New Orleans. They are from Cabrini High School. And all of the students returned to New Orleans after Katrina, so they fully understand the importance of the issue that we are discussing, the levees, the locks, what do we do, whatever we have to do in order to prevent the city from flooding again. So I just want to introduce to you the students from Cabrini High School.

Mr. OBERSTAR. Let me, on behalf of the Committee, welcome the students from Cabrini High School.

Mr. CAO. Yes, sir.

Mr. OBERSTAR. Welcome. I am familiar with Cabrini. My wife is from New Orleans, grew up there. She still has family living there, and we make frequent trips to New Orleans. It is good to have student groups see how the work of Congress is conducted. And your Representative, Mr. Cao, is doing a splendid job of advocating for the city.

Mr. Boozman.

Mr. BOOZMAN. Thank you, Mr. Chairman.

I guess I would like to follow up since the Chairman brought it up, the cost-share ratios and things, and hopefully we will be able to talk about this more tomorrow as we talk about the budget.

Where would a situation fall where if you had a project that you spent $80 million on, it lacked $30 million of completion? The cost-benefit is $1.50. So if you go ahead and complete it, then you are going to have revenue coming in. It costs $20 million to pull the plug, so you have spent about $100 million versus 110-. How would you do that? I mean, in a sense why would you not complete a project like that? Why would you change the rules of the game in the midstream? And that is essentially what we have being proposed today.

I guess when we see things like that, it really—as the Chairman mentioned, there has to be some common sense with these things, and it really does—it makes us lose confidence. It makes us really look harder at the rest of it to wonder if those kind of projects can go on, kind of what the rationale is behind it. So where would that fall? General?

General VAN ANTWERP. May I defer?

Ms. DARCY. Is your question regarding——

Mr. BOOZMAN. I just want to—either one. I really would like an answer to the question. How would you not continue that project? What is the rationale behind that one? Because if you figure the cost-ratio now after you get all of this stuff invested in it, and it is way up there, it is over the 250 mark at this point to go forward as compared to discontinue it, does that make sense? Because you have so much invested in it.

Ms. DARCY. In making priorities for the budget, we need to not only look at the benefit-to-cost ratio, but also the project purpose. And what it is we are actually going to fund in terms of project purposes, and whether those are in the priorities for the year's budget going forward.

Mr. BOOZMAN. So a hydroelectric green energy is not—does that come from the Council of Environmental Quality? Does that come from you?

Ms. DARCY. It comes from the Administration, sir.

Mr. BOOZMAN. I guess, again, that makes no sense to not fund and then ultimately have the thing paid for. Is there a rational answer, General? I mean, do you agree with that?

General VAN ANTWERP. What you have to do is take the cost to complete. Obviously the cost invested, the benefit-cost ratio, but as it came out in the President's budget, where it fell in the priorities was to not continue.

Mr. BOOZMAN. So cost to complete is $20 million. You have spent $80 million on it. I am sorry. The cost to complete is $30 million. You have spent 80 million. And 20 million to stop the project. I mean, you guys are sitting there arguing that, but that can't be argued in a rational way. I understand you have got to do it, but, again, that makes no sense at all.

And like I say, we can talk about it tomorrow, but those are the kind of things, Chairman, that we are running into that we really need to get some answer to, and it is a problem.

So I yield back.

Mr. OBERSTAR. The gentleman makes a very important point. To the layman's mind, it is very hard to justify a termination cost that is almost as much as it takes——

Mr. BOOZMAN. When you have got a hydroelectric, unless we are down on hydroelectricity now, and we don't know about it—the President in his State of the Union Address was very much, let us do nuclear, let us do these things. This is a clean—it is a situation where the turbines are down, way down in the water, so it runs all the time. It is a great project for so many things. It is clean. It is a very efficient use of whatever. But not only do we waste the money, if we go forward with the cost-benefit, we will actually get the thing paid for by the utilities over a period of time. So——

Mr. OBERSTAR. That raises the issue of independent review and the mitigation, or the issues of independent review and mitigation.

We have a few more minutes remaining before closing of this vote. We are going to—the next panel is going to tell us, judging by the testimony I have read, that independent peer review is not fully transparent to the public. They will say that interested parties don't even know that it is in the works. Do you agree? If so, what suggestions do you have for making the peer-review process more publicly available?

Ms. DARCY. Mr. Chairman, I think that it is our goal to have the independent peer-review process much more transparent. In experience so far, we thought we have done that, but, as the General mentioned, we have had access problems on the Internet. But I think we would be open to try to work more openly with the independent peer-review process because I think that was the intent of having the process in the first place.

Mr. OBERSTAR. It is a very, very important point in the discussions between our Committee and the Senate Committee, not just in the summer 2007 conference that we had, which, by the way, was about 45 minutes on a 7-year bill, but it was the subject of frequent discussions over that period of 7 years and one of the issues that continually held up further action on WRDA, Water Resources Development Act. So we need to take action to let interested parties know the peer-review process is under way, or it is coming, and inform the panels that they have the responsibility to seek public input.

General?

General VAN ANTWERP. I think the independent peer reviews do seek public input, but there is another piece at the end after they make their recommendations--that is, what we do with those recommendations will become public as well. So we will say, yes, we took that, it was important. We put that in, we are considering

this, we have done the cost-benefit of doing this, but I think that is the whole life cycle of this.

The one in particular about even the Principles and Guidelines, when they went to the National Academy of Sciences, the Principles and Standards, also went out for public review. What happens after the review of the National Academy of Sciences and after the public review, all should be made public. That is our opinion.

Mr. OBERSTAR. And regardless of what the judgment is from the public about the substance of the review, making it public is the critical point. And we get more flack for process than you do for the substance of it.

We are going to recess for these three votes. When we come back, I want to conclude with mitigation and cumulative effects measures. I want to have a discussion about floodplain management and revision of principles and guidelines. Those are the three issues remaining.

[Recess.]

Mr. OBERSTAR. The Committee will resume this hearing and conclude on the three items that I referenced before we left to vote on the House floor.

So we strengthen mitigation requirements in WRDA 2007. And I have already earlier described the effort that Mr. Quie, then-Congressman Al Quie, later our Governor of Minnesota, and I crafted on mitigation being done concurrently with the construction. The guidance issued to field offices allows them to rachet back on mitigation by setting up some sort of a determination or a category—I am not quite clear how it is expressed when situations where adverse impacts are deemed not significant, requiring that mitigation be justified incrementally. That approach, ignoring—making a determination on an impact that is negligible, that it is not significant or can be done incrementally is contrary to the spirit and, I would say, requirements of section 906. So do you have a compendium of definitions of these categories of impacts, adverse, significant, negligible? When do you make that determination? How do you come to that determination?

Ms. DARCY. Mr. Chairman, I expect that we have a compendium, but I cannot right now list off for you what that is. I would be happy to look into it and be able to provide that to you. Is your question how do we make the determination about which kind of mitigation is necessary?

Mr. OBERSTAR. Yes. The criticism is, we have seen over the years prior to WRDA 2007 that the Corps uses these sort of escape clauses and ignores effects that, in the judgment of some observers, are significant and, by the Corps' determination, are negligible. So we need an understanding of and a transparent process of coming to those determinations.

General VAN ANTWERP. We have a number of processes, Mr. Chairman, but I think we will definitely look into this and get the criteria back to you. But there is a lot of other agencies that have real high stakes in this, the Fish and Wildlife Service, the EPA for example. We have, among the Federal agencies, a lot of different inputs that have significant impact on it. And if there is, I think they would let us know, too.

[The information follows:]

INSERT: PAGE 28

We have looked at our implementation guidance for Section 5001. The guidance does not require a new feasibility study of the overall project. The guidance requires a study to determine if the project's benefits exceed the project's O&M costs and to demonstrate that the last increment is economically justified by evaluating lesser depth alternatives to the existing project.

Mr. OBERSTAR. And a further question: When do those other agencies come into this process? I raise the question because in the 2005 surface transportation bill, Mr. Young, then Chairman, asked me to convene a group, a working group, of all the various interests, environmental groups, the contractors, the builders, the unions and all the rest, and the Federal Highway Administration, to find a way to expedite projects.

What I found in this process is we have sequential review. The Federal Highway Administration starts; and then the State DOT; and then you have the EPA; then the State public pollution control agency; and then you have the Council of Environmental Quality; and then you have the Forest Service, the Fish and Wildlife Service; and then you have the Park Service, and one project comes in and says, you forgot about us; and then at the tail end, there is the National Trust For Historic Preservation, and they say, we weren't included. Well, they were; they just didn't pay attention.

So in the highway bill that we reported from the Subcommittee, it turned this vertical process on its side to get everybody in the room at the beginning. How long do you need, how long does this agency need for your permit, and let us squeeze that time frame down and do it in a more expeditious manner, not override it, not ignore these things, but do them concurrently rather than sequentially.

Now, is that a part of this?

General VAN ANTWERP. Mr. Chairman, that absolutely is a part of it; as we have refined our planning process, it is to do those things simultaneously and to get all the other agencies that have a stake in it involved very early. And for us that usually begins when we make a decision that a project is going to require an environmental impact statement for example. That process has to begin very early because that is the time driver. So if you can get that time down for that, you have decreased the overall time for the planning studies.

Mr. OBERSTAR. You have all the legislative authority or administrative authority to do this, to command all of the various agencies to come together at the beginning of the process?

General VAN ANTWERP. We have everything we need to do that. I think to bring them all together—and a lot of it is collaboration with them, but it is also what their mandate is and what they are to do. All of us are now working together to get a good jump-off. And actually it goes right into the initial scoping, that we are all getting together to determine what needs to be done.

Mr. OBERSTAR. Do you from time to time have an experience, as I uncovered in the course of this process on the SAFETEA legislation, an agency, for example, Fish and Wildlife Service, we would love to do this, but we don't have the budget for it? We can't afford to send one of our staffers off for 3 months or 6 months to do this work. So what I did was write into the surface transportation—we will pay out of the Highway Trust Fund that person to do this where you can't get off the hook. This has got to be done, we can't have things drag on for years. Now, it is not to rule out or to skirt the environmental issue, but deal with it in a reasonable timeframe. That is what people get exacerbated with.

Okay. Next, floodplain management. We gave the Corps, in the 1986 Act, authority to enhance responsible floodplain management, and required a non-Federal interest to, quote, prepare a floodplain management plan designed to reduce the impacts of future flood events in the project area. The plan shall be implemented by the non-Federal interest not later than 1 year after completion of construction of the project.

Going back to Assistant Secretary Woodley, we found that implementation was hit or miss, spotty. Are you, in the course of the direction given in WRDA 2007, reviewing floodplain management? Do you have some interim thoughts for us on where you stand with this now?

Ms. DARCY. Yes, Mr. Chairman. In addition, my office and FEMA have just reestablished the Floodplain Management Task Force that was originally instituted, I think, in the early 1990s, but we are sort of re-energizing that because we think it is a really important issue for us to be looking at on a number of fronts, not only for floodplain management, but also for some of the other Executive Orders that have been issued in this area, as well as of how our programs overlap and can be better managed.

Mr. OBERSTAR. General, do you have any comment?

General VAN ANTWERP. I would just make one quick additional comment that under the Principles and Guidelines, one of the aspects is really the nonstructural use of floodplains, which is also very wise. It is also in the Principles and Guidelines as one of the big factors, how do we use those floodplains, and where possible could you have a nonstructural solution as part of the flood-control measures?

Mr. OBERSTAR. ″Nonstructural″ is becoming kind of the watchword. It has been around for a long time. It certainly is a lower-cost way to deal with issues, and one nature has itself implemented over centuries.

The final question, I think, for me is the draft revisions to the planning Principles and Guidelines and standards, where does that stand right now, and how is this process moving forward, and what steps have you taken to engage the public in this procedure?

Ms. DARCY. The draft for the Principles and Guidelines was released on December 9th. It was released and transmitted to the National Academy of Sciences for review. Concurrently it was put out for public review and comment for I believe it was 60 or 90 days. But it has been extended through next month for public review and comment. And that public review and comment will be considered not only by the Academy, but then finally by the interagency group headed by CEQ that will review it before it goes final.

Mr. OBERSTAR. So you expect by April—you said by the end of April?

Ms. DARCY. I think the public comment period ends April 5th.

Mr. OBERSTAR. Okay. Mr. Boozman, do you have any other——

Ms. DARCY. Sir, it is also up on the Web site.

Mr. OBERSTAR. Okay. On the Web site that we——

Ms. DARCY. Just click on it.

Mr. OBERSTAR. Supposedly.

Mr. BOOZMAN. Just one thing real quick. I know that our witnesses have to go. And again, we appreciate you being here.

Section 5001 directs the Corps to assume maintenance of specified navigation channels upon a determination that the assumption would be in the best Federal interest. However, the Corps has interpreted this as requiring a full feasibility study of the existing project, and I know there is some wording in there that—but the reality is that as it is interpreted now, the study can cost much more than the actual assuming the maintenance.

Would you all—you can comment on that if you would like, or you can just look into that and just see—again, just make sure that we are looking hard at that and not getting ourselves in a situation where we all agree that the thing was built in such a manner that it is economically in the best interests of our country, the language is in the bill, but not to make it such where the study costs tremendously more than if we just did the maintenance in the first place.

Ms. DARCY. We will look into that.

Mr. OBERSTAR. Back to the question about the concurrency of review, and Committee staff counsel passed me a note that the Corps has not yet issued the guidance to implement that legislative language.

Ms. DARCY. For——

Mr. OBERSTAR. In section 2045 of WRDA 2007, the streamlining of the review process. Would you take a look at that?

Ms. DARCY. That guidance—you are correct. We will try to get a date for when it will be done, too.

[The information follows:]

INSERT: PAGE 31

We are currently developing implementation guidance for Section 2045 and anticipate issuing it by the end of June 2010.

Mr. OBERSTAR. Do you have anything else to say in your own defense?

Ms. DARCY. I thought we did all right.

Mr. OBERSTAR. You are very forthcoming, and I think we have a better understanding of where the Corps and where your office, Ms. Darcy, stands in implementing WRDA 2007. Very important for us as we proceed with the next water resources bill.

And just as a message to the administration, whoever they are, the President and his inner circle and other circles within the circle, they have underfunded the Corps in their proposed budget for 2011 again. This is supposed to be the administration of change, and, ″yes, we can.″ And the needs are huge.

And you were here, Ms. Darcy, for our oversight of the continuing review of the implementation of the stimulus bill. And, by the way, my report card, now we have 1 million, 91,000 total employment, direct, indirect and induced jobs. That is half of all of the jobs created by the stimulus that come from 6 percent of the funding. Because our funds go out—this is my report card. I carry it around with me. It is updated every 30 days or more often. And 6 percent of the funds created half of the jobs because we contract them. We know where they are going. We know the formulas, and we know the agencies.

And I have been holding these hearings—we have had 14 oversight hearings. And just because the Corps got this increment of stimulus funding should not justify what was a $4.5 billion—does not justify cutting the continuing budget to $1 billion. That is appalling. That is not the General's message to take back. He has got enough. You take that back.

Ms. DARCY. I will, sir.

Mr. OBERSTAR. You are the policy and appointed person. Tell them we are unhappy with that up here.

Ms. DARCY. I think they will hear you.

Mr. OBERSTAR. Thank you.

Ms. DARCY. And you did ask if I had one closing thing. In my opening statement I did make a personal comment that I had a keen interest in this, and that is because of my 16 years of working with your Committee when I was on the Senate side, and it is very important to me that the implementation of that long-sought WRDA 2007 is done and done right. Thank you, sir.

Mr. OBERSTAR. That is right. You were there. You are steeped in this subject. So take the message back and tell OMB, get on with it. Look, the European community is building a 2,000-mile canal through the heart of Europe to link the North Sea to the Black Sea. It is hundreds of millions of euros. It is part of the $1.4 trillion infrastructure investment program. They are halfway through with it. We need to do that at least on the Mississippi, Ohio, Illinois Rivers. And I have already talked about the five locks on the Mississippi that need to be the quality of Lock and Dam 26, on the Illinois, and Europe is going to have this project done before we ever get these five locks off the ground. Or in the ground is the proper term for it.

So take that message back. We are falling behind the rest of the world. This is just not tolerable. Free the Corps. Let it do what it does best. Give them the money to proceed.

Alright. Thank you. The panel is dismissed.

Mr. OBERSTAR. We have our next panel—Michael Leone, Port Director, Maritime Administration, Massport; Mr. David Conrad, Senior Water Resources Specialist from National Wildlife Federation; Mr. Steve Fitzgerald, Flood Committee Chair, Harris County Flood Control District of the National Association of Flood and Stormwater Management Agencies; Brian Pallasch, Water Resources Coalition, American Society of Civil Engineers; Amy Larson, president of the National Waterways Conference.

Alright. Mr. Leone, I started with you in the naming, and you are first listed in the agenda, so you are first up.

TESTIMONY OF MICHAEL A. LEONE, PORT DIRECTOR, MARITIME ADMINISTRATION, MASSACHUSETTS PORT AUTHORITY (MASSPORT), AMERICAN ASSOCIATION OF PORT AUTHORITIES; DAVID R. CONRAD, SENIOR WATER RESOURCES SPECIALIST, NATIONAL WILDLIFE FEDERATION; STEVE FITZGERALD, FLOOD COMMITTEE CHAIR, HARRIS COUNTY FLOOD CONTROL DISTRICT, THE NATIONAL ASSOCIATION OF FLOOD AND STORMWATER MANAGEMENT AGENCIES (NAFSMA); BRIAN PALLASCH, COCHAIR, WATER RESOURCES COALITION, AMERICAN SOCIETY OF CIVIL ENGINEERS; AND AMY LARSON, ESQ., PRESIDENT, NATIONAL WATERWAYS CONFERENCE

Mr. LEONE. Thank you, Chairman Oberstar. And thank you for the opportunity to provide testimony on the implementation of the Water Resources Development Act of 2007. I am Michael Leone, director of the Port of Boston for the Massachusetts Port Authority.

Mr. OBERSTAR. We should have pronounced it Leone.

Mr. LEONE. But I appear today as the Chairman of the Board of the American Association of Port Authorities, which represents the interests of the leading U.S. public port authorities, as well as public port authorities throughout the Western Hemisphere from Canada, Argentina, including the Caribbean.

I will direct my comments today to several of the policy provisions included in the 2007 act, specifically that set of provisions in Title II, the general provisions which deal with the Corps' project development and review. In the 2007 act, Congress directed a number of management measures aimed at improving the efficiency, reliability and responsiveness of the Corps' project development and implementation processes. Today I would like to share our observations on the impact of the changes and pursue the question of meeting the intended goals.

As a project development review, there are two areas of concern, sections 2034 dealing with independent peer review, and section 2045, project streamlining, that should be given additional consideration by the Committee. Both sections deal with review of project reports at different times in the project-development process and with varying scope. The issue that is not addressed is one of timing, when the reviews occur.

We do not believe that the Corps' current process is consistent with the intent of sections 2034 and 2045 to assure both thorough and streamlined review of project reports. We believe that the review, as quality control, needs to start at the beginning of a study,

involve the local sponsor, district and higher headquarters and/or independent entity, and be continuous throughout the phases of the study. There should be no surprises at the end of a cost-shared 4- to 6-year multimillion-dollar study effort.

In my own case, Massport has invested 10 years and several million dollars towards a feasibility study to deepen Boston Harbor, which so far as been rejected twice by the Corps' headquarter staff after a late-stage review surfaced differences of opinion within the Corps on the economic study parameters. There is no end in sight in pursuit of an approved chief's report. In the meantime, we are losing jobs and business.

There are currently many channel-deepening studies under way throughout the country that are required to handle increasingly larger vessels and for the Nation to remain competitive in global markets. Some have been stalled for many years and are not advancing because of technical or policy conflicts among reviewers, the study teams and the project sponsor. We are hopeful that when fully implemented, the revised project development and review sections of WRDA 2007 will result in improvements in the overall project-delivery process, and we ask the Committee to monitor that progress with us.

A related area of concern in section 2033(e) is that of centers of expertise. We have yet to see a viable and fully operational center of expertise for deep-draft navigation. We believe it is a critical missing link in fully implementing section 2045 and streamlining the project-delivery process and improving the quality of the planning and review process. Attrition and downsizing have had a noticeable effect on the ability of the Corps districts to perform all of the technical and economic studies necessary to formulate a project. Work is often spread among districts with mixed results.

We believe a deep-draft center of expertise with a dedicated full-time cadre of subject matter experts can pay many dividends in providing the most technically competent, efficient and cost-effective project-delivery system in a central location. The Corps' Inland Navigation Center of Expertise has been fully operational since 1981 and provides world-class products to Corps districts in the navigation industry. So we know what success looks like and would like to see that replicated for the deep-draft navigation to the benefit of all four coasts. We are working with the Corps on the center of expertise concept through our Quality Partnership Initiative and ask for the Committee's continued support as well.

Additionally, sections 2005 and 2029 of WRDA 2007 speak to the need for adequate dredge material management, beneficial use of recovered sediments, and use of multiple factors in judging the benefits to the Nation for investing in maintenance dredging. However, we believe it is time to revisit the 24-year-old Harbor Maintenance Tax and Trust Fund authorized in 1986 that is the sole source for reimbursement of Federal maintenance dredging funding. Port and harbor users are paying for the full maintenance and getting half in return. The tax revenue of about $1.4 billion annually would be adequate to maintain Federal channels if fully applied.

Congressional intent notwithstanding, there is no provision in the original authorization to dedicate that tax revenue for its in-

tended purpose. We ask the Committee to consider legislative provisions to ensure full use of the tax for maintenance dredging in the subsequent WRDA, hopefully this year.

And finally, Mr. Chairman, I would like to commend your leadership for section 3091 of the 2007 act, which finally provided a resolution and direction necessary to get the construction started at the Sault Ste. Marie for the second lock. This is a project of national significance that directly impacts the Great Lakes and St. Lawrence Seaway portions of our national freight system. Our Great Lakes Members look forward to the jobs, efficiencies and transportation cost savings the new project will bring.

Again, thank you for including the American Association of Port Authorities in these proceedings.

Mr. OBERSTAR. Thank you very much, Mr. Leone.

Mr. OBERSTAR. I do appreciate all of your comments, but especially the latter. It is nice to have that attention paid to the needs of the Great Lakes from the association, and just a quick question before out next witness. What is your current channel depth? Is it 38 feet?

Mr. LEONE. We are 40 feet.

Mr. OBERSTAR. And you want to go to 45? The Corps wants you to go to 48?

Mr. LEONE. In the initial study we felt we needed to go to 45 feet, but when the analysis was completed, the local district determined that 48 was probably the optimum depth for us. We feel that 45 would be adequate, but we are arguing on the economic parameters as to whether it is 48 or 47. So we are doing numerous studies, and as a result of this 10-year process and the multimillion dollars we have spent, we have yet to reach a resolution as to what is the correct depth and what the correct benefit-cost ratio would be.

Mr. OBERSTAR. We can pursue that further and perhaps in another venue. But it is of great interest to me with the opening of the Panama Canal, and the larger-capacity vessels coming to all of our seacoasts and to the gulf, with container transport possibly upbound on the Mississippi, ports have to be ready with the proper channel depth to accommodate this whole new post-Panamax capacity. And I don't know if the—if Maersk calls on the Port of Boston, but Sally Maersk and Regina Maersk with 6,000 and 6,600 containers respectively have now been outdistanced by the newest class of Maersk vessels with 13,000 containers at a 50-foot channel depth requirement. Those are going to call—or if you want them to call on your port or other east coast ports, you have got to have that channel updated. And you cannot do it 5 years from now, you need to start doing it now.

Mr. LEONE. Mr. Chairman, you are absolutely correct. And I think many ports along the gulf and east coast are trying to prepare. Not everyone needs to have 50 feet, but there are numerous ports that will need it. And that is why we have been preparing for many, many years, as other ports have done so.

So it is important to get the authorization necessary because we are in the process of also dredging our own berths at our own cost, buying cranes that can handle these larger vessels. So we are making the terminal infrastructure, but it is very, very important, it is

essential, to have that highway, the Federal channel, into your berth.

Mr. OBERSTAR. Thank you. Mr. Conrad, thanks for being with us, and thank you for the great work of the National Wildlife Federation for these many years when I started up here as a clerk of the Subcommittee on Rivers and Harbors.

Mr. CONRAD. Thank you very much, Mr. Chairman and Congresswoman Boozman. On behalf of the National Wildlife Federation, we deeply appreciate the interest and work of this Committee on providing oversight for the Corps program.

We have a lengthy statement for the record, which I will do my best to summarize. We have particularly focused on what we believe to be among the most critical WRDA reform areas, the peer review, mitigation of fish and wildlife and wetland losses, and revision of the principles and guidelines. But first I want to speak to the reform issues in their context.

These WRDA reform provisions were enacted in the wake of the terrible consequences of Hurricane Katrina and a series of damaging hurricanes and storms in 2004 and 2005. In addition, the Nation was growing increasingly aware of the threats of climate change and sea level rise, continued deterioration of critical fish and wildlife habitat and health of natural ecosystems, and increasingly severe instances of flooding and drought conditions.

After the findings emerged about the background and conditions of the New Orleans—this levees in New Orleans, this was, in essence, as much a manmade disaster as a natural disaster, many felt that the WRDA reforms were all the more necessary. These were also adopted against a backdrop of the General Accounting Office—or the Government Accountability Office having reported that recent Corps studies ″did not provide a reasonable basis for decisionmaking″; that they were ″fraught with errors, mistakes and miscalculations, and used invalid assumptions and outdated data.″ Those are all in quotes. GAO also testified failings were ″systemic in nature and therefore prevalent″—″and therefore prevalent throughout the Corps Civil Works portfolio.″ That confirmed a pattern of egregious pattern flaws that have been revealed by more than a decade of analysis of NAS, GAO, Army inspector general, independent reports, and such as the coastal Louisiana levees and the Upper Mississippi lock expansions.

These reforms are not just about technical planning matters and minute details of the law. We have received major wake-up calls that the impacts of activities of the Corps of Engineers have profound impacts and implications for our citizens, the environment and the Nation's future development. We cannot simply do things the same way.

Mr. Chairman, we have reviewed the guidance and extensive amount of material provided by Assistant Secretary Darcy and the Corps. On the whole we found that to date the implementation of these reform provisions in many cases is barely under way. Guidance prepared in many ways falls short, in some cases far short, of what we believe Congress and the law intended, and the objectives sought in the WRDA reforms are still mostly unimplemented.

On independent peer review, we would first applaud the Corps for at least broadly embracing the concept of peer review even be-

yond that required by WRDA. But on the ground, WRDA's independent review process—WRDA's independent review process, we find the process has been weakly implemented, is highly obscure, and has failed to involve the public, and is almost completely out of public sight. The Corps reported that in 13 of 14 ongoing completed external peer reviews, and 4 of the 5 ones that were completed among those, the reviewers had not taken any public testimony or otherwise obtained public input. Conversations with conservation activists and State officials across the country have shown a near universal lack of awareness of and lack of public involvement in these processes. Locating review plans and completed IEPR reports on district Web sites is in many cases difficult or impossible. Reviewers' names can generally not be located until after reports are completed.

We believe Corps guidance and the lack of public input will likely discourage review panels from reviewing issues outside whatever is included in the charge set by the Corps' contractor. This would defeat some of the main purposes of external review.

On mitigation of fish and wildlife and wetlands, we looked extensively at implementation of the new section 2036 provisions. We are extremely concerned that the compliance with these provisions appears to be lagging. WRDA added great specificity to the definition of mitigation plans: standards for in-kind mitigation, requirements for ongoing monitoring and consultation with Federal agencies and States, and reporting annually to Congress on progress for ecological success, and contingency plans for speeding progress where progress was not being made. Regrettably, our review found implementing guidance and mitigation plans developed by the Corps demonstrating that the Corps had made little progress in complying with even the most basic of mitigation reforms.

In one example we cited, a waterway channel improvement project, the Galveston district of the Corps concluded that resources which were not nationally or otherwise significant need not be mitigated. Such a standard, which is directly contrary to section 2036, would likely result in far less mitigation than WRDA requires.

We reviewed documentation of 32 projects the Corps said fell within parameters of the Senators' request for information, and in 17 projects for which we could locate adequate information for a judgment beyond those with negligible impacts, we found all 17 essentially out of compliance with WRDA's requirements, and in some in unusually multiple major ways. The process for monitoring ecological success is essentially unimplemented, in our opinion.

Finally on principles and guidelines, Mr. Chairman, WRDA 2007 enacted a new water policy that requires a fundamentally different approach to water resources project planning, and directs the Secretary to develop new planning principles, guidelines and procedures to modernize water planning.

We are very pleased that the White House Council on Environmental Quality has taken on a key role in facilitating the revision and updating the principles and standards. We also applaud Congress for directing attention to the need to update water resources planning, and applaud the administration for recognizing its importance across the Federal Government.

A new PNS provision proposal is now set to receive public and NAS comments, and we recognize the process will appropriately take considerable time to unfold. But the potential long-term benefits to the Nation make this a highly important exercise.

In our written statement we raise critical concerns that planning should be driven by Federal law and policy, not simply by benefit-cost-only framework. Environmental protection and restoration need to be fundamental objectives for water planning in the 21st century.

We are also concerned that economic requirements not undermine the new policy requirements to protect and restore natural ecosystem functions. And a base of science, including recognition of climate change and sea level rise, and greater emphasis on nonstructural approaches in integrated water resources planning is essential to a modernized planning process.

Mr. Chairman and Congressman Boozman, once again on behalf of the Federation, we greatly appreciate the efforts being made by the Committee to follow up progress of implementing the reforms of WRDA 2007. I would be happy to answer any questions. Thank you.

Mr. OBERSTAR. Thank you very much for a very thorough statement. And, of course, your entire document will be included in the Committee record.

Mr. OBERSTAR. And now Mr. Fitzgerald.

Mr. FITZGERALD. Thank you, Chairman, Mr. Boozman.

The National Association of Flood and Stormwater Management Agencies, or NAFSMA, we represent about 100 Members, mostly large urban agencies, and about 76 million citizens. Our Members on the front line are reducing loss of life and property damage from floods, improving the quality of the Nation's surface waters and riparian habitats, and helping guide the design and construction of low-flood-risk and affordable communities.

NAFSMA not only supported passage of WRDA 2007, but our Members have experience complying with it in previous WRDA bills as partners with the Corps of Engineers. We recognize the Corps has had a challenge developing guidance for such a large bill, but they have done a good job setting priorities. From a local perspective, most active studies and projects are not being held up waiting for new implementation guidance.

My testimony today will focus on four of the general provisions in WRDA 2007; first, independent peer review. It takes multidisciplinary teams to address the many interdependent and interrelated factors that influence analysis, evaluation and decisions. Our Members welcome any assistance provided, provided it is helpful in advancing the study, results in a better project and does not hinder progress.

In practice, some feasibility studies that were near completion have been delayed to comply with new peer-review requirements, with no substantial improvement in the recommended course of action. We believe peer review will be beneficial when it is actually utilized as stated in the bill. In all cases, the peer review shall be accomplished concurrent with conducting the project study.

The second provision, the principles and guidelines updates. As you would expect, we have been active in this effort. While

NAFSMA supports and agrees with most of the draft principles and standards issued by CEQ in December, we feel there are some areas where clarifications and emphasis is needed. First, while some believe that historically there has been a bias towards economic benefit, it is imperative that future water resources planning emphasize the balance and recognize interdependence of economic, environmental, public safety and social factors. Easier said than done.

Next, the non-Federal sponsor is an active partner with the Federal Government in terms of contributing funding, local knowledge and expertise. Active participation by the non-Federal sponsor during all phases of the planning process is critical to the success of the study and subsequent project.

And finally, NAFSMA members are concerned that the new principles and guidelines will make the planning process even longer, more expensive and more complex than it is now. Resources, funding and patience are limited. To fully appreciate how the proposed standards will change the planning process, NAFSMA recommends that the Corps and NAFSMA work through an example flood risk reduction study from initiation to completion while the National Academy of Sciences is preparing its comments.

The third provision I want to address is actually two: planning and streamlining. The current process that I mentioned has evolved into such a long and costly exercise that doesn't necessarily yield better decisions or projects. So what are we doing about it? Well, the inclusion of these two provisions in WRDA 2007 was a good first step.

Mr. FITZGERALD. A NAFSMA work group has identified four basic problem areas and is developing alternatives to address them. We understand the Corps' senior leadership and Secretary Darcy's office have made this a priority as well. It will take a sincere, considerable, and collaborative effort from local sponsors, the Corps, and Congress to make significant improvements.

Finally, the National Levee Safety Program. The National Committee on Levee Safety carried out the necessary work, prepared an excellent report, and continues to function effectively and productively. National believes that significant progress has been made on several of the Committee's 20 recommendations since your hearing on this topic last May.

For example, the Corps and FEMA have made substantial progress completing the National Levee Inventory and Database. However, additional authority is needed to include data for those levees owned and operated by non-Federal entities. Much work is still needed to improve levee safety in this Nation.

In closing, WRDA 2007 was a much-needed piece of legislation that helped our Nation move forward. It is now time to take the next step forward by pursuing the passage of WRDA 2010 to continue our critical water resource needs and protect the Nation's population, environment, and critical infrastructure.

Thank you for inviting local sponsors to make this presentation today before the Committee.

Mr. OBERSTAR. Thank you very much for your testimony, and I appreciate your participation today.

Our next is the Water Resources Coalition.

Mr. Pallasch, thank you for being here.

Mr. PALLASCH. Thank you, Mr. Chairman, Members of the Committee. I appreciate being here.

My name is Brian Pallasch, and I am the co-chair of the Water Resources Coalition and managing director of Government Relations and Infrastructure Initiatives at the American Society of Civil Engineers. I am pleased to appear before you today as we talk about the implementation of WRDA 2007.

Title II of WRDA 2007 contains many key policy requirements for the Corps to complete on independent peer review, dredge material disposal, technical assistance, access to water, data, planning, shore protection projects, and other program requirements. Title IX called on the establishment of the National Committee on Levee Safety.

First, I want to talk a little bit about principles and guidelines.

In December of 2009, as many of my colleagues have noted, the White House Council on Environmental Quality released for public comment its version of the principles and guidelines. The Water Resources Coalition believes the current proposal fails to meet the congressional intent and still needs to be reworked.

First, the proposal speaks to the need to incorporate public safety into the planning process, but it does not continue the discussion of the obvious ways to achieve the goal. Specifically, nothing in the proposal identifies the unequivocal need for resiliency in the design and construction of Federal civil engineering projects. In engineering terms, resiliency is the ability of an infrastructure system to recover its function after it is damaged by a natural disaster or a man-made attack.

Sustainability and resiliency must be an integral part of improving the Nation's infrastructure. Today's infrastructure, especially flood control systems, must be able to respond to and change with dynamic conditions. By incorporating resiliency, disasters will pose less of a threat to public health and will minimize disruptions to our economy.

Second, the proposal's discussion of the use of cost-benefit analysis and the development of water resource projects is flawed. The CEQ needs to explain in some detail how it will require cost-benefit analysis to be employed and especially how it will be possible to monetize the social or environmental benefits of projects and how these benefits can be compared to economic benefits and public safety.

Nearly 5 years after the devastation of Hurricane Katrina and 1 year after the release of the National Committee on Levee Safety's recommendations, Congress has still not acted to create a National Levee Safety Program. While the Corps of Engineers has begun work and made significant progress, there is no comprehensive and dependable catalog of the location, ownership, condition, hazard potential of all of the levees in the United States.

As of February 15, the Corps had inventoried or contracted for inspection approximately two-thirds of the more than 14,000 miles of Federal levees. Another 21 percent of the levee mileage is under contract for inventory and inspection. However, by some estimates, there are more than 100,000 miles of levees in the United States.

We still have a long way to go to complete a national inventory of levees.

Title IX of WRDA created the National Levee Safety Program Committee; and the goal of a robust nationwide levee safety program, though, remains an aspiration rather than a reality today.

The Committee on Levee Safety submitted its interim report with the Office of Management and Budget in January of 2009. We feel very strongly that Congress should adopt many of the recommendations of that Committee and enact legislation to establish a national levee safety program. We also feel strongly that this program could be modeled on the successful National Dam Safety Program and possibly merged with that program.

Additionally, Congress should also examine FEMA's certification rule for levees. Congress should direct FEMA to amend the rule to change the requirement from a certification to an NFIP evaluation. The term ″NFIP evaluation″ is preferable over the present ″certification requirement″ to make it clear that an evaluation is merely a judgment that a levee system is in conformity with the requirements of NFIP regulations.

The National Shoreline Erosion Control Development Program was established by section 227 of WRDA back in 1992. It is designed to test new technologies that will improve or reduce the cost of Federal beach restoration projects. There are currently seven testing sites being used by the Corps.

Section 2038 of WRDA 2007 contains important modifications to that program. For example, the original section 227 program did not permit the Corps to cost share these projects with local governments. In addition, where technology was demonstrated to work, section 227 did not permit the technology to be seamlessly integrated into existing Federal beach restoration projects. These weaknesses have been corrected in section 2038.

Currently, the Corps has issued no guidance on this program. This is an important program. Coastal areas of the Nation are at risk from serious storms that endanger lives and property. We cannot afford a lack of implementation guidance for section 2038 to stall this critical program.

With that, Mr. Chairman, I will end my remarks and be ready for your questions.

Mr. OBERSTAR. Thank you very much, Mr. Pallasch.

I will have some questions when we come back, but I would just observe, on the levee safety program, in light of your comments, that report and the recommendations are being crafted in legislative language to be included in the water resources bill for fiscal year 2011.

Ms. Larson, you are next.

Ms. LARSON. Thank you, Mr. Chairman, Mr. Boozman.

My name is Amy Larson. I am the President of the National Waterways Conference.

The Conference, established in 1960, includes in its membership the full spectrum of water resources stakeholders, including flood control associations, levee boards, waterways carriers and shippers, industry and regional associations, port authorities, shipyards, dredging contractors, regional water supply districts, engineering consultants, and State and local governments. Given our diversity,

our membership is keenly interested in the development of planning of all types of water resources projects.

My comments today will be focused on the principles and guidelines applicable to the planning and development of water resources projects and the proposal issued by the Council on Environmental Quality related to this effort.

Attached to my written statement is a copy of the comments the Conference submitted to CEQ in response to its proposal, and I respectfully request that they be included in the record here.

Mr. OBERSTAR. Without objection, so ordered.

Ms. LARSON. As this Committee well knows, reliable, well-maintained water resources infrastructure is fundamental to America's economic and environmental well-being and is essential to maintaining our competitive position within the global economy.

Our water resources infrastructure provides lifesaving flood control, navigation critical to national security and commerce, abundant water supplies, shore protection, water recreation, environmental restoration, and hydropower production. As a consequence, the planning and development of water resources projects are vitally important. With that in mind, we are very concerned that CEQ's proposal falls short of enacting a policy model envisioned by Congress in enacting the Water Resources Development Act of 2007.

At the outset, water resources planning ought to be governed by a well-defined set of overarching principles which set forth the national interest in water resources development, management, and protection. The principles should establish a clear, concise, and workable planning framework to guide the development of project recommendations through an unbiased, scientifically sound analysis; and they must recognize the critical role nonFederal sponsors play in project formulation and development.

Fundamentally, these revised principles should strengthen the executive branch's ability to recommend to the Congress economically and environmentally sound projects; and they must be clear enough to drive understandable processes and replicable outcomes, thus enabling the nonFederal interests to make complementary plans.

Unfortunately, the proposal issued by the Council on Environmental Quality fundamentally fails to establish a path to balanced solutions, clear and consistent guidance to planners, or replicable results that are understandable to all stakeholders. At the outset, the proposal doesn't really establish a workable set of principles at all, but instead uses the concepts of principles, guidelines, standards, and procedures interchangeably so that the proposal itself is confusing and unworkable.

WRDA 2007 contemplates planning founded upon multiple national objectives—economic, environmental, and social well-being, including a public safety objective. And, additionally, WRDA 2007 emphasizes a watershed approach to planning, recognizing the importance of collaborative planning and implementation.

We are concerned that CEQ's proposal, an apparent contradiction of the directive in WRDA 2007, does not promote coequal objectives in water resources planning but, instead, elevates environmental considerations at the expense of economic benefits. This approach

would be especially detrimental to flood control, navigation and water supply projects.

The proposal also sets forth a confusing approach to watershed planning. Although it appears to recognize the importance of watershed planning as called for in WRDA 2007, watershed plans are then explicitly excluded from the process.

It is unclear why a comprehensive planning framework would exclude watershed plans; and this is particularly troubling at a time when our Nation, both at the Federal and State level, is working towards the development of collaborative watershed planning, rather than planning on a project basis.

We are also concerned the proposal establishes an unworkable policy with regard to the use of floodplains. While directing avoidance of the unwise use of floodplains, the proposal does not provide criteria for determining what that would be. Instead, it appears to create a bias for selecting nonstructural approaches, thus limiting in practice full consideration of all alternatives.

This approach ignores the recognition in WRDA 2007 that sometimes use of the floodplains cannot be avoided, providing that in such cases planners should seek to minimize adverse impacts and vulnerabilities. CEQ's proposal appears to preclude consideration of all alternatives and instead support a nonstructural or no-action alternative. Such a policy would be devastating to many communities in or near the floodplains.

I see, Mr. Chairman, my time is up, but I would like to draw your attention to the procedural concerns that are outlined in more detail in our written comments. They are much more complex in those comments.

Mr. OBERSTAR. Go ahead.

Ms. LARSON. But, in sum, we are concerned that the process does not provide the transparency needed to establish a viable, long-term planning model for our WRDA resources.

Thank you, Chairman Oberstar, Mr. Boozman, for the opportunity to appear before you today; and I look forward to answering any questions you might have.

Mr. OBERSTAR. Thank you, Ms. Larson.

I do have some questions. We will proceed.

Earlier in the hearing we had a group from Mr. Cao's district in New Orleans, a school that we recognized; and I would like to take this opportunity to acknowledge the Eveleth-Gilbert school Close Up group who just entered the room and welcome them to the legislative process.

This is an oversight hearing on the work of the Corps of Engineers implementing Water Resources Development Act of 2007. A unique bill, not only because it covered 7 years of authorizations needed for the work of the Corps of Engineers on the inland waterways, ports and harbors and flood control areas of the country, but also because it was unique in that the Congress overrode a veto to put it into effect.

So welcome, students, to this unique hearing that the Committee is conducting.

Now, Mr. Conrad, you raised concerns about the ability of the public to participate in independent reviews. Have you participated in independent review?

Mr. CONRAD. In a specific independent review, I am just trying to think. Well, I have been involved in a lot of different processes. I am not sure that I actually have been involved in one, directly involved in one of the new IEPRs, no.

Mr. OBERSTAR. Well, what about other members of your organization? You say this whole process—I made special note of it—is highly obscured, completely out of the public eye.

Mr. CONRAD. Right.

Mr. OBERSTAR. And a universal lack of awareness, that you searched the Internet and could not find a review plan. We had some discussion of that earlier with the Chief of Engineers. Does that characterize the current situation?

Mr. CONRAD. Well, what I would say is that there are a lot of projects that are listed in one of the tables that the Corps of Engineers provided to Congress in terms of ongoing, independent peer reviews. In the last few weeks, I spoke with conservation leaders, State, and State officials, particularly, and even some news media people who regularly are involved in those projects. And many of them—most of them, with really one major exception, and that was a project at Louisiana coastal protection, were rather shocked to hear that even though they had been to many, many meetings of the Corps of Engineers in planning those projects, they had not heard about the independent peer reviews that the Corps listed were under way; and they were, well, again, rather shocked because they thought they were following things very, very closely.

That shocked me when I heard that. I began to realize this process is really just an internal process at the moment for the Corps. It is not being delivered as a process that would embrace any kind of public input.

Mr. OBERSTAR. That is business as usual, and that is not what we had in mind. We had in mind in WRDA of 2007 changing the process, making it open to the public, transparent, and accessible.

Mr. CONRAD. Right.

Mr. OBERSTAR. You heard the exchange I had with the Assistant Secretary and the General that I went on the Web, I couldn't find their information. Well, I am no expert on the Web, but I used the procedures that most everyone else would use, and you shouldn't have to be an expert on this thing.

Now, do you think what General Van Antwerp said was sufficient, that they are going to fix the Web, that they are going to make this a success? Is that enough? Don't they need to have an active outreach?

Mr. CONRAD. I think it is going to need a lot more than that.

The way the Corps—the newest Corps guidance which, by the way, I couldn't find on the Web either, the 209 guidance, which came out on January 31, the way that guidance contemplates the process, the review plan is supposed to be up front, and it would lay out when and where the review would take place.

But what the public is going to need is to know who are the reviewers, that they are going to need opportunities, I think, to be able to communicate with reviewers. Reviewers are mostly dealing with technical issues, but the public, in many cases, has technical information that is necessary and valuable to reviewers.

So I think they are going to need to create a more robust process than what we see so far.

Mr. OBERSTAR. Your testimony suggests there are gaps in the Corps' mitigation program, that adverse impacts go unaddressed, either because the Corps doesn't consider the resource significant or because they don't believe that the mitigation is justified. But those are issues that we tried—the Corps has been criticized for this attitude for many, many years; and we tried to give them a means by which to overcome those objections.

So now is there an assessment of the cumulative effect of unmitigated harm? Should there be one? How should it be done?

Mr. CONRAD. Well, as we looked at the fairly high degree of specificity that you all included in WRDA 2007 in terms of what should constitute plans, what they should be looking at—I am talking about the mitigation plans-- it is rather hard to understand how that could be any less clear that these are required with each project, that if it is nonnegligible impact, anything other than nonnegligible impact should be part of a plan, part of a plan, they should be monitored and reported back to Congress with consultations with State and Federal fish and wildlife agencies.

All of these different processes, unfortunately, they just haven't been implemented yet. Cumulative effects should definitely be part of that, I would think. I think we may have to look very closely to see what else could bring the Corps to be more responsive to that.

Mr. OBERSTAR. Well, the National Wildlife Federation has been engaged in these processes for decades, beginning when I started here on Capitol Hill; and we need to take—pay careful attention to those comments. We want to be sure that all organizations are included.

Now, let me yield to Mr. Boozman for such questions as he may have.

Mr. BOOZMAN. Thank you. Thank you very much.

Mr. Pallasch, the WRDA 2007 authorized a rewrite—or there is a rewriting of the principles and guidelines. In your opinion, how has CEQ strayed from what ASCE thought it was advocating. Does that make sense? I know that you all were supportive in the sense of going forward and looking at this. Do you have concerns now that maybe we are straying a little bit beyond what you thought would be the case?

Mr. PALLASCH. Sure, Congressman. I think one area that we have great concern, especially after our experience with Hurricane Katrina and working with the Corps of Engineers, is this concept of public safety. I think the principles and guidelines started with a single approach of looking at the economic benefits of a project. Obviously, the environmental benefits and environmental issues came into play; and that is an acceptable second leg of the stool, if we want to think of it as that.

I would, ASCE and the Coalition, the Water Resources Coalition, feels very strongly that public safety needs really to be the third leg of that stool. As we look at—when you are looking at a project, certainly when you are talking about flood control projects, levees, and things like that, public safety is paramount when we are looking at those types of activities.

We also have some concerns, as you try to monetize the environmental benefits, that there is no agreed-upon monetization of that, if you will.

I am not an economist, but certainly there is a lot of skepticism as to how we approach that issue, and I think the same is probably true to be said for public safety. So we have those concerns. Certainly we are going to be filing our comments. We got an extra 30 days, I guess, yesterday so we are pleased to have a little bit more time to comb through the document.

Mr. BOOZMAN. Can you comment on that, Ms. Larson? I guess I would like to know what you feel like CEQ is doing to ensure public involvement, making sure that organizations like yours are able to petition the Federal Government.

Mr. PALLASCH. I think at the beginning of the process the Water Resources Coalition was rather frustrated by the switching of the process, shall we say. The Corps of Engineers was in charge. You all gave them the charge of rewriting the principles and guidelines, and certainly ASCE supported that. We had some of our members who were calling for that over their lifetime of using that document.

In the middle of the game, shall we say, we a little bit changed the rules. And CEQ was put in charge, and we expanded it from being a rewrite simply for the Corps to going to all of the groups that were involved, and I think it is actually a little bit broader than just the four agencies.

Not that that maybe wasn't the right thing to do, to expand it a little bit. I think there were some time issues involved in that where there was only a 30-day comment at the beginning, and I think we would have been better served with a little bit more of an open process.

Mr. BOOZMAN. Ms. Larson.

Ms. LARSON. Thank you, Mr. Boozman.

We have substantive as well as procedural concerns with it. At the outset is the question of whether the agency with the most expertise in water resources planning is at the helm here, and we have serious concerns about that. I don't think it should be CEQ.

With respect to the substantive concerns, as I stated in my remarks, there really is no set of principles that is established; and we are concerned that if we are looking for a viable long-term planning model, this document doesn't have that for a variety of reasons, including that it is confusing and unworkable but also that it elevates environmental over economic. There is really no balance there, which would be devastating to the navigation and flood control projects. It promotes a nonstructural approach to floodplain use, sort of a biased approach there without that balance as well.

Those are the substantive concerns in a nutshell.

On the process side, I have two concerns about that as well.

First, the second phase of this process is already started. That is the development of the guidelines. I am saying guidelines. They have an interchange of words here. But that seems a bit premature. How can one develop guidelines when the principles are not established? Principles should be the foundation. You can't build a house without the foundation properly built, so they seem to be getting ahead of themselves.

The other part of this is a procedural due process concern, and it falls back on the Administrative Procedure Act. Now, I recognize this is not construed at the moment as a notice and comment type of rulemaking. But in a notice and comment type of rulemaking, an agency is required to at least respond to and address the comments. Failure to do so would be considered arbitrary and capricious and grounds for reversing that decision in the Court of Appeals.

At this point, the CEQ has not explained what the process is, how any comments will be addressed, how they will be heard. That could be, in an agency rulemaking, something as simple as saying we have heard your comments, we are not persuaded because of these reasons, but at least setting forth that explanation. We don't even have that at this point. So, really, there is no transparency. And if we are talking about long-term viable planning, this document does not set that foundation.

Mr. BOOZMAN. Very good. Thank you very much.

Mr. Fitzgerald, very quickly, because we do have votes and I think the Chairman perhaps wants to follow up, but levee safety, some of my communities were, you know, got involved in that very early on and got in the process. It does seem, when you look at the timeline, the timeline really becomes pretty unworkable by the time you do things back and forth.

I guess what I would like to look for is, you know, with your help is a little softer landing. I think our communities are committed to doing that, but it seems like what they are faced with right now is pretty significant. When you look at the timelines, when they are trying to act in good faith, it becomes a real problem.

Mr. FITZGERALD. Yes, the timeline on identifying a project or making a decision has taken a long time. I am not sure what the average time is, but some in our community are taking 10 years plus to go through the planning process. Some of it, as local sponsors, we have a responsibility to help and do our part. We recognize this. It is not all the Corps. We have responsibilities, too; and we are willing to step up to the plate where we can.

But I think this has evolved over the years. You know, when something would go wrong, we have a human tendency to add another step, you know, try to make it not happen again. I think over the last 50 years this process has evolved into something that has gotten difficult to try to make work.

The four areas that we—when we started doing a survey with our NAFSMA members, we were able to put the problems in four areas; and one of them was the process itself, it is a little bit unwieldy. The second is people. It takes people to do a study, to look at the problems, and come up with good solutions. So the people side is one of the areas we need to work on.

Another one is the written guidance itself. It has evolved over time and is very difficult to kind of work your way through it, and that needs to be somewhat cleaned up.

And the third one is, of course, the funding and budgeting. If you can have an uninterrupted funding cycle, you can get through the process more quickly. But I know sometimes the nonFederal sponsor can't come up with their finding; and that kind of slows it down sometimes, too. It is not only a Federal thing.

But I think with the principles and guidelines updates, this gives us a great opportunity to look at all these areas and build into these guidelines and procedures that each agency is going to come up with to try to make sure this doesn't get more complicated but that we can streamline and get the planning process where we all would like for it to be. So I think we are at a good crossroads in the United States to be able to do that.

Mr. BOOZMAN. Thank, Mr. Chairman.

Mr. OBERSTAR. Well, thank you for those questions, Mr. Boozman, and for the responses. That is what we are trying to get at, is a more streamlined procedure. We want to be sure that the public is engaged, there is openness in the process, transparency in what is happening but also that we move the whole procedure along. That is why I spent a great deal of time on that issue with General Van Antwerp on the matter of expediting.

We have taken from the surface transportation bill of 2005 the project-expediting language, put it into the Corps of Engineers' WRDA bill, and now we have taken that language and refined it further and put it into our next surface transportation authorization bill that has been reported from the Subcommittee.

But we need to continue working and delivering to the public the product that agencies are supposed to deliver. If it takes 3 years to do a simple mill and overlay in a highway project, the public sector is not being efficient. If it takes 14 years to do a transit project from idea to ridership, the public sector is not being efficient. In the meantime, bond issues expire, the public loses interest, projects die, and the same thing for the water program.

Maybe these two goals are mutually exclusive, public review, the public input. I don't think so. I have been engaged in this—this is my 36th year in Congress, and I just—I know that we can make things work better.

There are issues, some, perhaps, you can't resolve. Eventually, someone has to make a decision, but the process of getting there has to be more expeditious than it has been in the past.

Now, Ms. Larson, one of the concerns raised—and you have done a very great, detailed comment on the draft revisions to the principles and standards; and I like your distinction between principles, which should come first, and the standards and implementation, second. What I have heard from the waterways community is that the document does not have or it appears that the Corps does not draft this document with their navigation mission in mind. Is that your review of things and how would you propose to adjust that?

Ms. LARSON. I would agree with that. Our structure of comments was on broad-based policy rather than section by section because it is so unwieldy and these defects, I think, are throughout the document. But I think overall the navigation mission and the flood control mission, in particular, are relegated to second class in this document.

I think we need to find the appropriate balance between economic and human uses of our water resources and environmental and ecological considerations; and that includes ensuring that the navigation, flood control, and water supply projects are addressed; and it includes an unbiased look at all alternatives, structural and nonstructural. I think if we can strike that balance between eco-

nomic and environmental, we can ensure that all the water resources projects are addressed.

Mr. OBERSTAR. And in timely fashion.

Ms. LARSON. Correct.

Mr. OBERSTAR. I remember, as a parenthetical observation, Muriel Humphrey saying to Hubert at one time, "Hubert, a speech to be immortal need not be eternal." A review, to be effective, need not take forever; and that is what we are trying to get, a proper balance.

Just two more questions, we have 2 minutes remaining on a vote.

Mr. Fitzgerald, as we have proceeded on the oversight of the implementation of the requirement on the Corps to undertake responsible flood plain management and prepare, quote, a flood plain management plan designed to reduce the impacts of future flood events in the project area, et cetera, et cetera, do you have experience with implementation so far of section 402? What are your views on what the Corps is doing in pursuance of that language?

Mr. FITZGERALD. In Harris County, the Harris County Flood Control District, we are very aware of this requirement and we and other local sponsors in the United States agree with it. Once we invest with the Corps or any project, a lot of time, effort, and money into a project to reduce flood risk, we want to make sure that that level of protection does not deteriorate over the years. That is what the important part of the flood plain—or that is the reason for the flood plain management plan, is that actions aren't taken over the years to where that level of flood protection deteriorates.

We take that very seriously, and we are actively preparing those on a couple of projects during the study phase. I know the law says or the guidelines say we don't have to do it until after the construction is finished. That can take a long time to do. And while we are in the analysis and study phase, that is the time we need to be developing our flood plain management plans, and we are doing that now.

We look forward to completing a flood control project, a new one, so that we can actually implement those new flood control plans, flood plain management plans. So we do agree with it. We think it is very important.

Mr. OBERSTAR. Thank you.

Mr. Pallasch, have you—that is, you personally, but also your organization or your members, had an opportunity to participate in developing the revisions to the principles and guidelines?

Mr. PALLASCH. Early on, when the Corps of Engineers started drafting their revisions, there was a couple of days' worth of listening sessions that they held in the Water Resources Coalition. ASCE, AGC, the whole list of our groups all participated in that.

Since that time, once it was taken over by CEQ, it was more a discussion via correspondence than a listening session type of arrangement.

Mr. OBERSTAR. So when it got out of the Corps' hands, then you said it became more bureaucratic, more cumbersome?

Mr. PALLASCH. I think it may have become a little bit more of a closed process.

Mr. OBERSTAR. A closed process. Well, that is not what we want. We want it to be open.

I want to thank the witnesses for their contribution and testimony, for your written documents, which were very, very helpful. They show that each has undertaken a great deal of time to evaluate the subject matter at hand, the review of WRDA; and thank also, of course, the Corps, General Van Antwerp, and the Assistant Secretary.

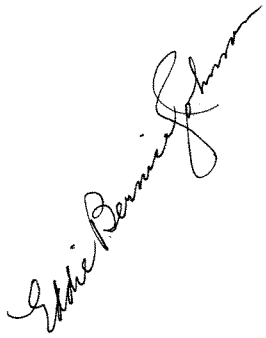
This is the beginning of an extended review process, but it will lead to—at least this stage will lead to the next Water Resources Development Act. Lessons learned will be implemented in our subsequent bill.

I also ask unanimous consent to include in the record the statement of the American Shore and Beach Preservation Association on the subject of this hearing.

Without objection, so ordered.

Mr. OBERSTAR. Since there are no other Members to pose questions, the hearing is adjourned.

[Whereupon, at 4:02 p.m., the Committee was adjourned.]



STATEMENT
CONGRESSWOMAN EDDIE BERNICE JOHNSON
COMMITTEE ON TRANSPORTATION & INFRASTRUCTURE

The Water Resources Development Act of 2007:
A Review of Implementation in its Third Year

Wednesday, March 3, 2010
12:00 p.m.
2167 Rayburn House Office Building

Mr. Chairman, thank you for holding this hearing. I commend and welcome your ongoing efforts to return to the legislation originated in this Committee to ensure that the law is being implemented as written and as intended.

I am and will continue to be a strong supporter of increased investment in our nation's infrastructure. As I said on the House floor during debate on the Conference Report for the 2007 Water Resources Development Act -- we do right by this country when we invest in its infrastructure, including our critical water infrastructure.

It took us many years to reach agreement, pass and overcome a veto to produce the 2007 Act and I remain proud of the agreements we reached.

We are here today to review the Corps' implementation of what came to be known in the years preceding 2007 as "Corps' Reform." This included strengthening the effectiveness of the Corps' mitigation program; establishing requirements for independent review of proposed projects that were large or controversial; and, revising the planning principles and guidelines that the Corps uses to develop its project recommendation.

I was recently disappointed to learn that based on research conducted by our Committee staff, many of the reforms that this Committee, and, ultimately, Congress approved, have not been implemented.

I hope that this hearing will shed light on why many of the mandates in the bill still await action 28 months after the Water Resources bill's enactment.

The Corps was required to implement revised principles and guidelines within one year of enactment – we still have not seen them.

To encourage consistency in record keeping, we mandated that the Corps assign a unique tracking number for each water resources project – again, our research shows that this has yet to be implemented.

Congress also included language to help improve and strengthen the Corps' mitigation program. I was deeply disappointed to learn that the Corps ignored Congressional direction to implement mitigation in **advance** of project construction. The Corps' guidance document on this issue makes no mention of undertaking mitigation **before** construction on a project begins.

There are other examples that I could cite, but I am eager to hear what our witnesses have to say in response to these lapses. I also want to hear from them on what this Committee can do to help them achieve the programmatic changes of the Water Resources Development Act of 2007.

Again, our nation's infrastructure is in critical need. I stand ready to do all I can to get us back on the right track and look forward to continuing to work with this Committee and the Corps to that end.

Thank you, Mr. Chairman.

Statement of Rep. Harry Mitchell
House Transportation and Infrastructure Committee
Subcommittee on Water Resources and Environment
3/3/10

--Thank you Madam Chair.

--First, let me say, I do not think we can overestimate the importance of the work that the Army Corps of Engineers does in Arizona. It is absolutely critical, and we are grateful for their efforts.

--However, as you know, this subcommittee is charged with important responsibility of oversight.

--We must ensure that legislation like the Water Resources Development Act of 2007 is being implemented appropriately.

--A number of implementation issues have arisen since that law was first enacted, and I look forward to reviewing some of them here today.

--At this time I yield back.

Congresswoman Laura Richardson
Statement at Committee on Transportation and Infrastructure Hearing on "The Water Resources Development Act of 2007: A Review of Implementation in its Third Year"
2167 Rayburn House Office Building
Wednesday March 3rd, 2010
11:00 A.M.

Laura Richardson

Mr. Chairman, I want to thank you for convening this hearing to discuss the progress that has been made in implementing the 2007 Water Resources Development Act and evaluating potential solutions for areas where implementation shortfalls exist.

As we continue our work for the current WRDA reauthorization it is important both to look back at what we have accomplished and understand where work still needs to be done.

It is unfortunate to me to see that instead of focusing the majority on lessons learned from the 2007 WRDA bill, we need to spend time discussing why several components of the bill have not been implemented at all.

I understand that simple portions of the bill to implement, such as assigning projects tracking numbers and submitting final reports to the Library of Congress, have not been completed. I hope to hear differently today, but if this is the case after more than two years, it is hard to read this situation as anything other than disregard for the intention of this committee and Congress as a whole.

One of my continuing concerns with the prioritization of Army Corp. funding is the expenditures from the Harbor Maintenance Trust Fund. The Harbor Maintenance Tax was established in 1986 as a way to generate revenue to offset the costs of the U.S. Army Corps of Engineers for dredging and maintaining America's harbors. The tax revenue goes into the Harbor Maintenance Trust Fund, which currently generates approximately $1.4 billion each year. Yet only approximately $700 million a year is spent out of the trust fund, creating a $5 plus billion dollar surplus.

The surplus revenue is being used to offset the federal deficit instead of being used as was originally intended to dredge and maintain America's harbors to keep American businesses and ports globally competitive. Vessels are

increasing in tonnage, requiring deeper drafts and making the dredging of America's harbors vital to keep America's ports globally competitive. Businesses throughout the United States are suffering as many of our nation's harbors are inadequately dredged, creating the need to use smaller and less cost effective vessels to access American markets.

This is why I have introduced, H.R. 3447, the Harbor Maintenance Trust Fund Reform Act that would alter the funding system for the Trust Fund by taking the spending power out of the hands of Congress. The bill will allow the funding to be used entirely and without delay by the U.S. Army Corps of Engineers, as intended. Local communities and port authorities will no longer be forced to set aside sparse infrastructure or operating funds on dredging, and our harbors and ports will be properly maintained, thereby keeping America globally competitive.

I have also supported a separate legislative fix that would create a budget point of order if the funds are not spent as originally intended by Congress. As we move forward with WRDA issues I urge my colleagues to find a solution that will ensure these dollars are spent as they were originally

intended to be spent and not inappropriately used to offset the deficit.

I know the utilization of the Harbor Maintenance Tax was not addressed in the 2007 WRDA bill, and I bring it up today because without a legislative fix in 2007 the problem has only gotten worse. I believe vital resource measures must be a priority of the committee as we move forward with the bill in the coming months.

I want to thank you Mr. Chairman for calling this hearing today and thank all of the witnesses for appearing before us today.

Thank you, Mr. Chairman

Steve Scalise
M.C.

Congressman Steve Scalise
Statement for the Record
Committee on Transportation and Infrastructure
Hearing on "The Water Resources Development Act of 2007: A Review of Implementation in its Third Year"
March 3, 2010

I would first like to thank the committee for its leadership in authorizing important flood protection projects in WRDA 2007. For over two million people living in South Louisiana, these projects protect their homes, businesses, churches, and schools from the damage caused by major hurricanes. The Committee should be commended for its work in decreasing the risk of major flooding, improving the long-term safety of our citizens, and preserving the crucial role South Louisiana plays in the larger U.S. economy.

While progress has been made to protect South Louisiana from hurricanes, we must go further to achieve long-term sustainability. We in South Louisiana have to face the reality of these massive hurricanes every year, but we should not have to live with the great risk of major flooding. I am hopeful that WRDA 2010 will authorize the flood protection projects that our region so desperately needs. To wait another seven years to authorize new projects would compromise the safety of South Louisiana's citizens and place the energy security of the United States at risk. Roughly 80 percent of our country's offshore domestic oil and gas supply is produced off the coast of Louisiana, and as we attempt to make America more energy independent, the value of Louisiana's energy resources will increase dramatically.

In addition, two of the largest ports in the United States are located in coastal Louisiana. The Port of New Orleans handles the fifth largest volume of cargo of any port in the United States, and the Port of South Louisiana is the largest tonnage port in the Western Hemisphere. Situated around the mouth of the Mississippi River, the busiest maritime superhighway in North America, Louisiana's energy resources and shipping infrastructure urgently need better protection- it is in our country's national interest.

In order to build the important flood protection projects we so desperately need, the Army Corps of Engineers must act with heightened urgency. The Corps continues to miss deadline after deadline while the people of South Louisiana live with the risk of catastrophic flooding due to hurricanes. In the FY06 Energy and Water Appropriations bill (P.L. 109-103) and 3rd Emergency Supplemental Appropriations bill (P.L. 109-148), Congress required the Corps of Engineers to develop a multi-approach plan (flood control, coastal restoration and hurricane protection) to provide up to Category 5 hurricane protection for

South Louisiana. The final report was to be submitted to Congress within two years of enactment (by December of 2007). Section 7014 of WRDA 07 directs the Corps to provide specific project recommendations as part of the report. This report has not yet been presented to Congress. In addition, Title VII of WRDA 07 includes 15 near term projects designed to redistribute the freshwater, nutrients and sediment resources in an effort to abate land loss. All 15 of the near term projects were authorized for construction in WRDA 07, however to date none of the projects are being constructed. Let me be clear, every deadline the Corps misses is a step backward in the recovery of our region.

Furthermore, the Corps has not progressed in its interpretation of proposals that would make South Louisiana safer. For example, the Corps has dragged its feet on implementing new plans for beneficial use of dredged sediment. This sediment could be used to rebuild our coastal wetlands- the buffer that weakens storm surge before it reaches areas where people live. Instead, over 85 percent of the Mississippi River sediment load is flushed out to sea and wasted because the Corps refuses to rethink their flawed interpretation of the statutes on the books. Also, the Corps acknowledges that options 2 and 2a to improve interior drainage in Jefferson and Orleans parishes would make our communities safer, yet they continue to endorse cheaper options that place citizens at greater risk.

Clearly, we have much work left to do to ensure the long term protection of our region throughout the entire Lake Pontchartrain basin. Projects like widening and modernizing Schneider's Canal in Slidell, Louisiana, and building a barrier structure at the eastern edge of Lake Ponchartrain, would help protect citizens living on the north shore of the Lake. Home to over 90,000 people, the Slidell area sustained catastrophic flood damage during Hurricane Katrina, but has been completely forgotten in terms of building stronger flood protection projects since the storm.

I look forward to working with the committee to include projects in WRDA 2010 that strengthen South Louisiana's flood protection system. We live in an area of great importance to the American economy and cultural identity, and it must be protected. The ultimate goal of our region is to build a flood protection system that allows us to look back at Katrina and say "never again." I would like to thank the committee for its efforts, and look forward to working with you in the future to achieve this fundamental goal.

Statement of David R. Conrad

Senior Water Resources Specialist

National Wildlife Federation

Before the

House Committee on Transportation and Infrastructure

U.S. House of Representatives

For hearings on

The Water Resources Development Act of 2007:

A Review of Implementation in its Third Year

March 3, 2010

Washington DC

Good afternoon, Chairman Oberstar, Ranking Member Mica and Members of the House Transportation and Infrastructure Committee. I am David R. Conrad and I serve as Senior Water Resources Specialist for the National Wildlife Federation, the nation's largest conservation education and advocacy organization with over 4 million members and supporters and conservation affiliate organizations in forty-seven states and territories. We deeply appreciate the interest and work of this Committee in providing oversight of the Corps of Engineers program, and particularly regarding the implementation of the policy reform provisions of the 2007 WRDA.

The Federation has a long history of interest and involvement in the management and protection of the nation's heritage of water resources and the programs of the Corps of Engineers. We were actively involved in the development of a number of the WRDA legislative reforms. We were extremely hopeful that the WRDA 2007 reforms would harbinger in a new era of more enlightened and environmentally-sensitive water resources project planning and implementation. And yet, our testimony today reflects major concern that, thus far, we have not seen the robust change in direction and outcomes that we had hoped for, and we are further concerned that even the intention of change that we firmly believed was embodied in Congress' new directives seems to be lagging in the agency and its on-going products.

In this testimony, we wish to address particularly what we have seen regarding implementation in three of what we believed to be among the most critical WRDA reform areas: **independent peer review (Section 2034), mitigation for fish and wildlife and wetlands losses (Section 2036), and revision of the Water Resources Principles and Guidelines (Section 2031) of WRDA 2007.**[1] We have reviewed the guidance and the extensive amount of other material provided by Assistant Secretary Darcy and the Corps in response questions submitted on November 19, 2009 by Senators Feingold, McCain, Carper, Lieberman, Cardin, and Landrieu. In addition, we have conferred with conservation leaders across the country on their experiences regarding many of the projects identified in the documents and the WRDA policy reforms.

On the whole, we have found that to date the implementation of these provisions is in many cases barely underway, guidance that has been prepared in many ways falls short, in some cases far short, of what we believe Congress and the law intended and the objectives sought in the WRDA reforms are still mostly unimplemented.

I. Independent Peer Review.

Mr. Chairman, the WRDA 2007, for the first time in law, established a standardized independent peer review process for costly or controversial Corps projects and a safety assurance review to examine the detailed technical designs and construction activities for certain high risk flood and storm damage protection projects. Section 2034 of WRDA 2007 required "independent peer

[1] We wish here to acknowledge the substantial contributions of Melissa Samet, NWF water resources consultant, in researching and preparing material for this report and testimony.

review" to be conducted by an independent panel of experts from outside the agency, in general, on a mandatory basis for projects costing more than $45 million, projects where a Governor of an affected state requests, and projects where the Chief of Engineers determines the project is controversial, and, on a discretionary basis, where the head of a Federal or State reviewing agency determines the project is likely to have an adverse impact on environmental, cultural or other resources under the agency's jurisdiction and the agency head requests such a review.

As part of the basis for Congress establishing these requirements, in 2006 the Government Accountability Office had reported to 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." GAO also testified that these failings were "systemic in nature and therefore prevalent throughout the Corps Civil Works portfolio." This confirmed a pattern of egregious planning flaws that had been revealed by more than a decade of National Academy of Sciences, GAO, Army Inspector General, and other independent expert reports. Since then other extensive reports such as the National Research Council reviews of safety and engineering and new plans for the Coastal Louisiana Hurricane and Storm Damage flood control systems and the economics of the Upper Mississippi and Illinois River Lock expansion proposals have continued to emphasize the critical importance of independent reviews of project planning and implementation.

Independent Peer Review Experience Since WRDA 2007

As of the January 20, 2010, responses to Senators' Questions from last November, the Corps reports there they have spent approximately $3 million on 15 Independent External Peer Review (IEPR) studies that are either now in process or (in five of the instances) where final IEPR reviews have been completed. With this small sample, there is not enough experience to make firm and final judgments on either the independence and flexibility of the process to allow panels to conduct the in-depth reviews that may improve the quality of planning or even how effective they will ultimately be. However, from the handful of independent review reports and the Corps' information, we can offer a few observations on what we see at this juncture of implementation of the statute.

First, to its credit, the Corps has taken peer review of its planning and decision documents even more broadly than WRDA 2007 required. Peer review is being woven into decisions at the District level and beyond the District level for all projects, not just those requiring independent panel reviews. In general we strongly applaud these concepts as a significant step forward, hopefully, to improve the quality of project planning.

Public Not Involved

What we have found, however, is that the process has been highly obscure and in most cases almost completely out of the public eye. We believe this weakens the value of the process and in all likelihood the public's confidence in it.

Among the most disturbing information provided by the Corps in its summary [Enclosure 3] of the first 14 IEPR efforts, is the flat admission that in 13 of the 14 on-going or completed IEPR cases and in four of the five "completed" cases, the Corps reports that the reviewers have not "taken any public testimony or otherwise obtained public input."

Section 2034 (d) of WRDA 2007 requires panels to "receive from the Chief of Engineers the public written and oral comments provided to the Chief of Engineers" as among panels' duties.[2] In the National Research Council's 2002 Section 216 report, "*Review Procedures for Water Resources Project Planning*," the panel recommended in their framework for implementing independent external reviews that the entity that would manage the review system "should facilitate communication between review panels and appropriate other federal agencies, interest groups, and the public."[3] In the Corps Guidance document EC 1105-2-410 of August 22, 2008, titled *Review of Decision Documents* and implementing the Corps' review process including Section 2034 of WRDA 2007, Appendix B includes the following:

> (12) Opportunity for Public Participation. *Whenever feasible and appropriate*, the office producing the document shall make the draft decision document available to the public for comment at the same time it is submitted for review (or during the review process) and 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 scientific or technical issues. To ensure that public participation does not unduly delay USACE activities, the PCX shall clearly specify time limits for public participation throughout the review process.[4][5] (Emphasis added).

It is clear that while Section 2034 requires the Chief of Engineers to provide the public's "written and oral comments" to the independent external review panels, the Corps' Guidance says such information will only be provided "whenever feasible and appropriate" or "whenever practical." Furthermore, since August of 2008, while the Corps has reserved the "opportunity for public comment" for oral presentations on scientific issues to panels, according to the Corps, in 13 of 14 panels this has not (at least yet) been done. In these 13 cases, the Review Management Organization has been a single contractor, Battelle Memorial Institute. We are concerned that while the Corps guidance provides for potential public hearings and opportunity for comment to

---

[2] 33 USC 2343(d)

[3] National Research Council, *Review Procedures for Water Resources Project Planning*, 2002, p. 4.

[4] The PCX is the "Planning Center of Excellence" – this has apparently been changed in new guidance issued on January 31, 2010, in EC 1165-2-209, to the "RMO" - Review Management Organization; EC 1105-2-410, 22 Aug 2008, p. B-3, and EC 1165-2-209, 31 Jan 2010, p. B-4.

[5] Nearly identical pre-WRDA 2007Corps guidance on "Independent Technical Review" was included in EC-2-408, issued May 31, 2005.

panels, public comments are already not finding their way to the panels and it there is no assurance that such input will be allowed or utilized in the future.

In addition, while reviews are listed as "ongoing" in the Corps' Enclosure 3, in nine cases, the Corps indicates a "list of reviewers and their credentials" is "not yet available." If the names and credentials of reviewers are not easily obtainable and information about when and where panels will conduct their reviews is not easily obtainable, the even if the public has relevant and important information to make available to panels, the public will be unable to avail the opportunity to share the information. We spoke with numerous conservation organization activists and state officials across the country in the past few weeks about a number of the "ongoing" reviews, and found that they were in most instances completely unaware of the review processes or who the reviewers were and what their charges were. Many of these individuals are among the most knowledgeable conservation leaders on such matters and they were greatly surprised to hear that the reviews were underway and that they had not previously heard of them.

In the one instance of which we are aware where public testimony was taken, review of the project for Louisiana Coastal Protection Restoration (LACPR), which is cited in Enclosure 3 in the January Answers to Questions, the National Research Council was the organization that fielded the expert panel. Three public sessions were held and NRC procedures which encourage public participation were followed. In this instance, while concerns were raised that this review started further into the planning process than was ideal to give the Corps feedback in their overall framing of this complex project formulation, the public gave important and very valuable testimony and perspective that substantially impacted the final IEPR report.

Charges To Reviewers May Conflict With WRDA Requirements

We are concerned that recent Guidance creates conditions where charges to IEPR panels could be in conflict with WRDA requirements. The most recent guidance in Civil Works Review Policy EC 1165-2-209 states:

> c. Charge. When preparing to initiate review of a USACE product, the "charge" to the reviewers on both the ATR teams and IEPR panels will contain the instructions regarding the objective of the review and the specific advice sought. Review should be conducted to identify, examine, and comment upon assumptions that underlie analyses (i.e. public safety, economic, engineering, environmental, real estate, and others) appropriate to the "charge," as well as to evaluate the soundness of models and analytic methods. Panels should also be able to evaluate whether the interpretations of analyses and conclusions are reasonable. To provide effective review, in terms of both usefulness and credibility of results, the charge should give reviewers the flexibility to bring important issues to the attention of decision makers. However, reviewers should be explicitly instructed in the charge 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 USACE work products. The RMO is responsible for preparing the charge.[6]

The Conference Report to WRDA 2007 addressed the charge to panels in this way:

> Sections 2034(a)(2) and 2034(d) establish the duties of the independent peer review panel and the scope of review for a project study. The managers have defined the scope of review broadly to allow the independent review panel to examine all 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. The managers expect the independent peer review panel to review those components of a project study for which the panel believes there is a reason for review. The managers do not expect the independent peer review panel to review components of the project study where the panel determines there is no controversy, disagreement, or concern. . . . The managers recognize that the recommendations of the independent review panel are advisory; however, the managers expect the Corps to give full consideration to the findings of the independent review panel.

By appearing to restrict the purview of IEPRs to only assumptions "appropriate to the 'charge' and instructing panels "not to make a recommendation on whether a particular alternative should be implemented," it appears that the guidance may unduly restrict the reach of a panel to explore those issues which it believes are relevant and important to their reviews.

Information Not Easily Accessible

WRDA Section 2034(f)(2)(A) provides that the Chief of Engineers, after receiving an IEPR report, "shall . . . make a copy of the report and any written response . . . available to the public by electronic means, including the Internet;." The Corps' recent Guidance requires the development of Review Plans, which are described as the "lynchpins" for "ensuring product credibility and accountability."[7] Home Districts are required to post these on their public websites and provide opportunity for public comment. The Review Plans are required to "anticipate and define the appropriate level of review from the very start of the effort based upon a preliminary assessment of where project risks are most likely to occur and the magnitude of what the risk might be" and also provide a range of details about any anticipated reviews that are expected, including IEPRs. They are also required to be updated as project planning proceeds.

In our internet search for the review plans associated with Enclosure 3 projects, we found some were accessible, but many were difficult or impossible to find on District Office websites. Because these plans are the portals for describing to the public the details of the review process, we believe much more should be done to make Review Plans readily accessible.

---

[6] EC 1165-2-209, Jan 31, 2010 , p.5
[7] EC 1165-2-209, Jan 31, 2010 , p. 3-4

Independent External Peer Review Budget

Finally, the Federation has some concerns that plans to greatly expand IEPR reviews in FY 2010 will need substantial funds to meet the increased costs, and it is unclear whether all such funds are fully anticipated. Enclosure 4 of the January Answers to Senators' Questions identifies 52 new Civil Works studies for which independent review is expected to be initiated by the end of FY 2010. Of the five IEPR studies that are reported to have been completed in Enclosure 3, the average cost of the studies was $228,000. The Administration's budget for FY 2011 requests $700,000, a reduction of $152,000 from the FY 2010 allocation of $852,000.

While the newest Corps Guidance EC 1165-2-209 states that "starting in FY 2010, the costs for any anticipated IEPR will be requested by study (or project) as part of the normal budget development process,"[8] it is not clear from individual budget justifications what IEPR costs are in fact anticipated. We would urge the Committee to assure that budgeting and funding will be sufficient to cover required External Peer Reviews.

II. Mitigation for Civil Works Projects

WRDA 2007 established strict mitigation standards and planning requirements for Corps civil works projects. These mitigation reforms were designed to address the following fundamental flaws in civil works mitigation.

First, the reforms were intended to ensure that mitigation was in fact proposed and implemented for all Corps projects with more than negligible impacts on fish and wildlife. While this requirement has been in place since 1986,[9] the Government Accountability Office reports that the Corps failed to implement any mitigation at all for 69 percent of projects constructed between 1986 and 2001,[10] including projects with undeniably significant impacts.[11]

---

[8] EC 1165-2-209, Jan 31, 2010, p. 17.

[9] 33 U.S.C. § 2283(d) (originally authorized by § 906 of the Water Resources Development Act of 1986, Pub.L. 99-662).

[10] 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 the Water Resources Development Act of 1986 and September 30, 2001 that received construction appropriations. *Id.*

[11] For example, the Corps did not require any mitigation for the American River Watershed Flood Plain Protection Plan, the Boston Harbor Navigation Improvements and Berth Dredging project, and the John T. Myers and Greenup Lock Improvements project even though the Environmental Protection Agency (EPA) told the Corps that each of those projects would have significant adverse environmental impacts. 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. The EPA conclusions are based on the ratings that EPA gave to the environmental impact statements for each of these plans.

Second, the reforms were intended to ensure that the Corps proposed and implemented the right kind and amount of mitigation needed to replace the same type of habitat lost to a Corps project and to restore the ecosystem functions and values of that habitat. Historically, 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 functions, and cannot meet the Corps' statutorily mandated goal of no net loss of wetland acres.[12]

Third, the reforms were intended to ensure that detailed mitigation planning was undertaken during the study process so that a realistic expectation of the ability to successfully mitigate adverse impacts and the true costs of mitigation would become an integral component of plan selection. 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 to successfully replace the lost habitat, functions, and values or to calculate the true cost of implementing that mitigation.

Fourth, the reforms were intended to ensure that the mitigation worked as promised by requiring monitoring, consultations, and contingency plans to ensure ecological success. Historically, the Corps has made little effort to evaluate whether its mitigation efforts were successful in replacing lost habitat and lost ecosystem functions and values.[13] Instead, the Corps would look to the amount of money that had been spent to determine whether or not mitigation was "complete."[14]

Congress should ensure the strictest possible compliance with the WRDA 2007 mitigation reforms to address these mitigation failings, and to help ensure that the Corps is taking all steps necessary to plan and construct the least environmentally damaging projects possible.

Regrettably, the Federation's review of the WRDA 2007 implementing guidance and the mitigation plans developed by the Corps since enactment (as provided to this Committee)

---

[12] For example, 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), the Corps proposed 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. 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.

[13] 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. U.S. Army Corps of Engineers, Vicksburg District, November 7, 2000 response to Freedom of Information Act Request No. 00-60 submitted by Earthjustice requesting information and data on the Corps' wetlands monitoring program in the Vicksburg District.

[14] In 2002, 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." United States 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.

demonstrate that the Corps has not yet complied with even the most basic of the critical mitigation mandates that were enacted almost two and a half years ago.

Standards and Planning Requirements for Civil Works Mitigation

The WRDA 2007 mitigation reforms: (1) establish minimum mitigation standards for civil works projects; (2) set forth the elements that must be included in each mitigation plan; (3) require the Corps to monitor civil works mitigation until ecological success is achieved and to consult yearly with state and federal resource agencies on the progress being made for each civil works mitigation plan; and (4) require the Corps to submit yearly status reports on its mitigation efforts.[15] These standards and requirements must be satisfied in *all* Corps studies ongoing as of, or initiated after, November 8, 2007.[16]

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

(a) 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."[17]

(b) 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 as those 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."[18] The Corps' engineering regulations also require that adverse impacts to wetlands be "fully mitigated."[19]

(c) The Corps must comply with Clean Water Act § 404, the Clean Water Act 404(b)(1) Guidelines, and the mitigation requirements applied to other governmental entities and

[15] WRDA 2007 § 2036. These provisions have been codified at 33 U.S.C. §§ 2283, 2283a, and 2317b.
[16] The Corps must satisfy these strict mitigation requirements in every feasibility study (and every project carried out under a feasibility study) that is either initiated or finalized on or after November 8, 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).
[17] 33 U.S.C. § 2283(d).
[18] 33 U.S.C. § 2283(d).
[19] 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." 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).

private parties under the Clean Water Act § 404 regulatory program.[20] To do this, the Corps must first avoid impacts, then minimize any impacts that cannot be avoided, and then implement compensatory mitigation to offset any remaining damage.[21] To comply with these requirements, civil works mitigation plans must comply with the Federal mitigation rule on *Compensatory Mitigation for Losses of Aquatic Resources*[22] in addition to the mitigation planning requirements in 33 U.S.C. § 2283(d).

Mitigation Plans: 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."[23] WRDA 2007 expanded this to require the inclusion of detailed mitigation plans in any project report in which the Corps recommends a project alternative.

WRDA 2007 also set forth the following specific elements that must be included in each mitigation plan:

(a) 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;

(b) The ecological success criteria, based on replacement of lost functions and values including hydrologic and vegetative characteristics, that will be evaluated and used to determine mitigation success;

(c) 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;

(d) 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

(e) A contingency plan for taking corrective action in cases where monitoring shows that mitigation is not achieving ecological success as defined in the plan.[24]

---

[20] 33 U.S.C. § 2283(d)(3); 40 C.F.R. § 230.2(a) (the Clean Water Act 404(b)(1) Guidelines explicitly state that they apply to the Corps' civil works program).

[21] 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" so this should also be the minimum requirement for the Corps' civil works program. 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).

[22] 73 Fed. Reg. 19594 (April 10, 2008); 33 C.F.R. Parts 325 and 332; 40 C.F.R. Part 230.

[23] 33 U.S.C. § 2283(d).

[24] 33 U.S.C. § 2282(3).

Mitigation 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.[25] The ecological success criteria, which are a required component of each mitigation plan, are to be based on replacement of lost functions and values.

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.[26]

Mitigation Reporting: WRDA 2007 requires the Corps to report to Congress each year on the status of its civil works mitigation.[27] 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. A meaningful report on the status of mitigation requires both a quantitative and a qualitative evaluation of the type, amount, and ecological success of the mitigation implemented for each project. The Federation notes that the Corps has not provided adequate quantitative or qualitative data in the two mitigation status reports it has submitted to date.

The Corps Is Not Complying With the Mitigation Mandates Established By Congress

As noted above, the Federation reviewed the materials on mitigation provided to Congress on November 19, 2009 by Assistant Secretary Darcy and the Corps. Our review of the guidance, mitigation plans, environmental analyses and other materials provided by the Corps demonstrate that the Corps has made little progress in complying with even the most basic provisions of the mitigation reforms.

The Corps has also failed to provide ready public access to critical planning documents, mitigation plans, planning guidance, and mitigation status reports that are essential if the public

[25] 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.

[26] 33 U.S.C. § 2283(d)(3).
[27] 33 U.S.C. § 2283a.

is to be able to evaluate the Corps' compliance with its mitigation requirements. Many of the documents referenced by the Corps in its response to Congress were not provided to Congress and are not available on the Corps' website. Other key mitigation documents, including mitigation status reports, are virtually impossible to locate on the Corps' website.

An accurate assessment of impacts and an accurate evaluation of the type and amount of needed mitigation are fundamental prerequisites to sound and effective mitigation planning. However, because a comprehensive analysis of the adequacy of an impacts analysis and the type and amount of mitigation requires extensive resources and project specific expertise, an evaluation of those issues is beyond the scope of this testimony, and in most cases, our comments do *not* address these issues. Our comments include a discussion of these critical issues only where we have sufficient independent knowledge to make an informed evaluation. ***The Federation wishes to stress that the absence of comments or critiques on project impacts or on the amount or type of proposed mitigation does not indicate an agreement with the Corps' analyses or determinations on these issues.***

A. The Corps is Imposing Improper Hurdles on Mitigation Planning that Could Have Profound Affects on the Adequacy of Proposed Mitigation

The Corps has created improper hurdles on mitigation planning that almost certainly will result in the Corps proposing far less mitigation than is required to replace the habitat and ecosystem functions and values lost to a civil works project. The requirements imposed by these hurdles will also mask the true impacts and costs of individual civil works projects.

(1) The Corps is Improperly Requiring Mitigation Only for Impacts to "Significant" Resources

At least some Corps districts are clearly applying an incorrect standard for mitigation planning that could have profound effects on the amount and type of mitigation proposed for Corps projects. In December 2009, the Corps' Galveston District wrote:

> "Central to mitigation planning is the determination of significance, as mitigation is required only for impacts to significant resources. Significance must be based upon the contribution of the resource to the Nation's economy, and technical, institutional and/or public recognition of the value the resource. Criteria for determining significance include, but are not limited to, scarcity or uniqueness of the resource from a national, regional, state, or local perspective."[28]

[28] Sabine-Neches Waterway Channel Improvement Project, TX, LA, U.S. Army Corps of Engineers Galveston District, draft environmental impact statement at VIII-2 (Revised 12/16/2009).

Fundamental to this approach is the conclusion that impacts to resources that are not nationally or otherwise "significant" need not be mitigated. This could result in the Corps failing to mitigate for the damage caused to innumerable resources across the country.

A requirement to mitigate only for so-called "significant" resources has absolutely no basis in law. Indeed, no variation of the word "significance" appears in the mitigation reform provisions of section 2036(a) of WRDA 2007 or in 33 U.S.C. § 2283 where that section is codified.

The mitigation requirements are quite clear, and are not tied to, driven by, or affected in any way by, the so-called "significance" of the affected resource. The Corps is required to "mitigate fish and wildlife losses created by" a civil works project; to ensure in-kind mitigation for impacts to bottomland hardwoods forests and to mitigate impacts to "other habitat types" to not less than in-kind conditions to the extent possible; and to comply with the requirements of the Clean Water Act regulatory program "to mitigate losses to flood damage reduction capabilities and fish and wildlife resulting from" water resources projects.[29]

In short, the Corps' conclusion that mitigation is needed only for impacts to significant resources is simply incorrect, and any mitigation proposal based on requiring mitigation only for significant resources is not in compliance with the law.[30]

(2) The Corps is Improperly Allowing Mitigation Only to the Extent that the Mitigation Can Be Incrementally Justified

The Corps' August 2009 implementing guidance for section 2036(a) of WRDA 2007 states the Corps "will continue to utilize the mitigation planning process described in ER 1105-2-100 in order to compensate for non-negligible impacts to aquatic and terrestrial resources to the extent incrementally justified . . . ."[31] The Corps' determination that mitigation should be allowed only "to the extent incrementally justified" does not comply with the law.

To the contrary, the civil works mitigation requirements are not tied to, or driven in any way by, an incremental cost justification. The Corps is required to "mitigate fish and wildlife losses created by" a civil works project; to ensure "in-kind" mitigation for impacts to bottomland hardwoods forests and to mitigate impacts to other habitat types "to not less than in-kind conditions" to the extent possible; and to comply with the requirements of the Clean Water Act

[29] 33 U.S.C. § 2283(d).

[30] It is not clear what might have caused the Corps to reach this conclusion. The "significance" of potential impacts is a concept related to the requirements of the National Environmental Policy Act, but has nothing to do with mitigation. Under the National Environmental Policy Act, an environmental impact statement is required for any major federal action that may significantly affect the quality of the human environment.

[31] USACE, Implementation Guidance for Section 2036 (a) of the Water Resources Development Act of 2007 (WRDA 07) - Mitigation for Fish and Wildlife and Wetlands Losses (August 2009) ("Section 2036(a) Implementation Guidance") at 2.

regulatory program "to mitigate losses to flood damage reduction capabilities and fish and wildlife resulting from" water resources projects.[32]

Moreover, as a matter of law, the benefits of such mitigation activities are deemed to be at least equal to the cost of those activities, and thus are always deemed to be justified:

> "In the evaluation of the Secretary of the benefits and costs of a water resources project, the benefits attributable to measures included in a project for the purpose of environmental quality, including improvement of the environment and fish and wildlife enhancement, shall be deemed to be at least equal to the costs of such measures."[33]

As a result, it is improper to require an incremental justification for mitigation efforts, and the Corps may not pick and choose the type and amount of mitigation based an incremental analysis of the additional costs associated with implementation.

B. The Corps is Ignoring Clear Mitigation Monitoring Requirements

The Corps' implementation guidance for section 2036(a) of WRDA 2007 states that "[m]ost mitigation measures will only require periodic inspection as part of normal operations and maintenance (O&M) to monitor to determine if ecological success is being achieved."[34] This directive is completely at odds with the critically important monitoring requirements established in WRDA 2007.

Congress made it clear that mitigation for civil works projects must be monitored until the monitoring demonstrates that the ecological success criteria established in the project's mitigation plan have been met.[35] Ecological success criteria are to measure whether the mitigation is in fact replacing the habitat and ecosystem values and functions lost to a civil works project. Ecological success criteria are to include (but are not limited to) hydrologic and vegetative characteristics.

The Corps' blanket statement that most monitoring can be carried out during periodic inspections associated with normal operations and maintenance activities is incomprehensible in light of these detailed monitoring requirements. For example, for many projects normal operations and maintenance involves little more than mowing grass on a levee or inspecting the project to ensure that it is structurally sound.

---

[32] 33 U.S.C. § 2283(d).
[33] 33 U.S.C. §2284.
[34] Section 2036(a) Implementation Guidance at 4.

[35] 33 U.S.C. § 2283(d)(3).

Legitimate monitoring will require far more than "periodic inspection as part of normal operations and maintenance." Monitoring to establish ecological success must be carried out by qualified scientists and ecologists through tests (including surveys and data gathering) and a schedule designed to allow an accurate assessment of progress towards the ecological success criteria. And, as a matter of law, monitoring must continue until the ecological success criteria have been met.

Unless legitimate monitoring takes place, the Corps, federal and state resource agencies, the local sponsor, and the public will *not* be able to assess whether the mitigation is in fact replacing the habitat destroyed or damaged by a civil works project. It will also be impossible to determine whether the mitigation contingency plans should be implemented. Legitimate monitoring is also critical to ensure that mitigation proposals are more than false promises used to undermine a full and honest assessment of the benefits and costs of civil works projects.

C. The Corps is Not Complying With its Mitigation Consultation Requirements

Despite having had almost two and a half years to develop and implement a process for carrying out its yearly mitigation consultation requirements, the Corps still has not begun this process, and has not even finalized its internal guidance (which currently contains just 5 paragraphs of text).

The historic problems with civil works mitigation (and with mitigation under the Clean Water Act § 404 regulatory program) make it imperative that the Corps comply strictly with the consultation requirements established by WRDA 2007. It is critical that the expertise of the federal, state, and tribal resource agencies be brought to bear in determining whether or not the significant adverse impacts of civil works projects are being effectively mitigated. Congress should ensure that the Corps fully implements the consultation process as quickly as possible, and certainly this year.

D. The Corps is Not Complying With its Mitigation Plan Requirements

In response to a request for the mitigation plans and environmental documentation for each project report issued in draft or final form after enactment of WRDA 2007, the Corps provided Congress with materials on 32 projects. The Federation's review of these materials demonstrates that the Corps has not yet complied with even the most basic mitigation planning requirements enacted in WRDA 2007.

The Federation again notes that we did not evaluate the adequacy of the evaluation of project impacts or of the amount or type of mitigation proposed by the Corps, and we wish to stress that

the absence of comments or critiques on these issues does not indicate an agreement with the Corps' analyses or determinations. The following portion of our testimony includes a discussion of these critical issues only where we have sufficient independent knowledge to make an informed evaluation.

Of the 32 projects identified by the Corps as falling within the parameters of the November 17, 2009 Congressional request for information, the Corps failed to provide either a mitigation plan or documentation on project impacts for 9 of the 32 projects, and that information was not readily available on line.[36] As a result, it was not possible to determine whether those projects complied with the WRDA 2007 mitigation requirements.

The documentation for six additional projects suggests that impacts to fish and wildlife and to terrestrial and aquatic habitat could be negligible, and as result, these projects did not include mitigation plans. If we assume that the environmental documentation for these projects is accurate, they would not require mitigation plans.[37]

---

[36] The Federation could not assess the adequacy of the mitigation planning for the following nine projects because the necessary information was not provided by the Corps and was not accessible on line:

(1) Powell River - Straight, Reeds, Jones & Cox Creek Sub-basins, TN. This project does not have a mitigation plan, and the final environmental assessment is not available on line. .
(2) IWW-La Grange Pool, Beardstown Navigation O&M, IL. This project does not have a mitigation plan, and the final environmental assessment was not provided and is not available on line.
(3) Alternate Offshore Borrow Area for the Cape May Inlet to Lower Township Storm Damage Reduction Project and the Lower Cape May Meadows-Cape May Point Environmental Restoration Project, NJ. This project does not have a mitigation plan, and the final environmental assessment was not provided and is not available on line.
(4) Expansion of Offshore Borrow Area for the Great Egg Inlet to Peck Beach Storm Damage Reduction Project, NJ. This project does not have a mitigation plan, and the draft environmental assessment was not provided and is not available on line.
(5) Marlinton Local Protection Project, WV. This project has some type of mitigation plan, but the mitigation plan and the final environmental impact statement were not provided and are not available on line.
(6) Lower Mud River Watershed, WV. This project has some type of mitigation plan, but the mitigation plan and the draft environmental impact statement were not provided and are not available on line.
(7) Des Moines Raccoon River Flood Damage Reduction, IA. This project has some type of mitigation plan, but the mitigation plan and the draft environmental assessment were not provided and are not available on line. This project is utilizing a mitigation bank.
(8) Howard Hanson Dam Additional Water Storage Project Final FS Report & Final EIS, WA. This project has some type of mitigation plan, but the mitigation plan and the final environmental impact statement were not provided and could not be located on line (note that the link provided by the Corps was not accurate).
(9) St. Joseph, Levees, MO. This project has some type of mitigation plan, but the mitigation plan and the final environmental assessment could not be located on line (note that the link provided by the Corps was not accurate).

[37] The Federation lacks the independent information necessary to assess whether more than negligible impacts would in fact occur from these projects: (1) Chesapeake Bay Oyster Restoration Using Alternate (Non-Oyster Shell) Substrate, MD; (2) Delaware Bay Oyster Restoration Project, DE & NJ; (3) Rehabilitation of Damaged Flood Control Works Lehigh River Weissport Flood Protection Project, PA; (4) Indian River Inlet and Bay Maintenance

Of the remaining 17 projects *all* are out of compliance with the mitigation provisions established by WRDA 2007, and most are egregiously out of compliance. Six of these projects clearly require mitigation plans as a matter of law but do not have them. The remaining 11 projects have mitigation plans that fail to include key mitigation plan requirements or fail to comply with other mitigation planning provisions. The status of the mitigation planning for these 17 projects is summarized below.

1. IWW-Starved Rock Pool, Bull's Island Navigation O&M, IL. This project has no mitigation plan even though the Corps acknowledges that mitigation is required and purchased mitigation bank credits. Where a project requires mitigation, a mitigation plan is required by law even if a mitigation bank is ultimately used to implement the mitigation.

2. Lackawanna River Local Flood Protection Project, Scranton, PA. The Corps acknowledges that the project will produce more than negligible impacts and provided a document that it claims satisfies the mitigation plan requirements. However, that document is not a mitigation plan, but instead provides a list of recommended actions that would allow the city of Scranton to come into compliance with the National Flood Insurance Program for those portions of the city that would not be protected by the project (because levees or floodwalls could not be cost-justified to protect these areas).

3. Louisiana Coastal Area, Beneficial Use of Dredged Material Program, LA. This project has no mitigation plan even though the Corps acknowledges that the project will have more than negligible impacts. Where a project has more than negligible impacts, a mitigation plan is required as a matter of law.[38]

4. South Sacramento County Streams Project, Unionhouse Creek Channel Upgrades, CA. This project has no mitigation plan even though the Corps acknowledges that mitigation is required and purchased mitigation banking credits for the project.[39] Where a project requires mitigation, a mitigation plan is required by law even if a mitigation bank is ultimately used to implement the mitigation.

5. Upper Trinity River - Central City, TX. This project has no mitigation plan even thought the Corps acknowledges that one is required and that a new project alternative was selected in a supplemental environmental impact statement issued in March 2008. While the Corps has advised Congress that a new mitigation plan is under development, the Corps has selected an alternative in direct violation of the WRDA 2007 prohibition against doing so without a detailed

---

Dredging and Beneficial Use of Dredged Material, Sussex County, DE; (5) White River Minimum Flow, AR; and (6) Water Storage Reallocation Report Greers Ferry (MAWA), AR.

[38] The Federation could not evaluate the documentation describing the impacts of this project as the link to the environmental impact statement for this project provided by the Corps was not accurate, and we could not otherwise locate the EIS on the Corps' website.

[39] Credits were purchased for the following: 7.092 vernal pool preservation credits; 5.0 credits in the Sutter Basin Conservation Bank; 31.6 Giant Garter Snake Credits also in the Sutter Basin Conservation Bank.

mitigation plan. In January 2010, the Corps awarded a $3.2 million construction contract for Phase 2 of this project.[40]

According to the final supplement No. 1 to the environmental impact statement for this project, the newly recommended alternative (the Modified Central City alternative) would impact 18.3 acres of riparian woodland, 59.0 acres of upland woodland, 0.8 acres of emergent wetland habitat, and 2.3 acres of stream habitat. Mitigation is estimated to cost $3.12 million based on a modified estimate of the cost of mitigation for the originally recommended plan. The newly recommended plan is estimated to reduce impacts from the original plan.

6. West Onslow Beach and New River Inlet (Topsail Beach) NC. This project has no mitigation plan even though the Corps acknowledges that one is required and the public and agency comment period on the draft environmental impact statement did not end until November 2008 (the draft environmental impact statement appears to have been first issued in 2006). The Corps has advised Congress that a mitigation plan is under development.

According to the draft environmental impact statement, this shore protection project may affect the following species listed as threatened and endangered under the Federal Endangered Species Act: the hawksbill sea turtle, Kemp's ridley sea turtle, leatherback sea turtle, loggerhead sea turtle, green sea turtle, piping plover, and seabeach amaranth. The project will also impact benthic species and habitat.

7. Boston Harbor Deep Draft Navigation Improvement Project, Boston, MA. There is no compensatory mitigation plan for this project despite the extensive dredging, blasting, and disposal work that will be involved, and experiences referred to in the draft environmental impact statement regarding large scale fish kills during similar types of blasting activities. The only mitigation proposed are efforts designed to avoid and minimize impacts, and even these mitigation efforts are not outlined in detailed.

According to the draft supplemental environmental impact statement for this project, it will involve deepening the main channel of Boston Harbor by 5 to 10 feet, deepening three additional channel stretches, and deepening two existing shipping berths from 3 to 5 feet. The project will require the disposal of between 6.6 and 14.8 million cubic yards of parent material, and rock blasted from the project area would total between 450,000 and 1.4 million cubic yards. Impacts from these activities certainly will include benthic habitat disturbance, impacts to fish and wildlife, and permanent loss of channel bottom.

8. Brevard County, Hurricane and Storm Damage Reduction Project Mid-Reach Segment, FL. The mitigation plan for this project is quite detailed, and includes an extensive monitoring plan. However, even this detailed plan fails to require monitoring until ecological success is

[40] U.S. Army Corps of Engineers Press Release, *Upper Trinity River Central City Project advances construction with award of $3.2-million contract*, dated January 26, 2010, available at http://www.swf.usace.army.mil/pubdata/pao/releases/fy2010/NR10-016.pdf (visited February 28, 2010).

demonstrated and contains only the vaguest reference to contingency planning. Under this plan, monitoring surveys will take place prior to, and at years 1, 2, 3, and 5 after, initial construction to determine the degree to which the mitigation reef is replicating the ecological functions of a natural near shore reef. If these surveys demonstrate significant trends that are adverse or inconsistent with the project's predicted performance, adaptive actions are to be taken. However, this contingency plan is extremely vague and states only that adaptive actions "may consist of additional monitoring, analysis, and/or modifications to the project plan, subject to coordination between the Corps of Engineers, non-federal sponsor and the relevant regulatory agencies."

According to the Draft Integrated General Reevaluation Report and Supplemental Environmental Impact Statement, this shoreline protection project will directly or indirectly bury approximately 3.0 acres of near shore rock hardbottom with 573,000 cubic yards of sand. The proposed mitigation will create 4.8 acres of artificial reef that is intended to restore about 75% of the ecological functions lost to the project.

9. Cedar Hammock / Wares Creek, FL. The mitigation plan for this project does not meet the mitigation plan requirements. Indeed, no actual mitigation plan is provided. Instead, the final environmental assessment includes only a one paragraph description of the proposed mitigation. Comments submitted by the Environmental Protection Agency state that the proposed mitigation does not satisfy the Federal mitigation requirements under Clean Water Act § 404, and that an additional 12 acres of stream bottom impacts must also be mitigated. The mitigation description fails to include: the functions and values to be achieved by the mitigation; ecological success criteria based on replacement of lost functions and values; a mitigation monitoring plan; and a contingency plan.

According to the environmental assessment, this project would affect 1.08 acres of mangroves and a mangrove-colonized sand island identified as Essential Fish Habitat. The proposed mitigation involves the local sponsor paying to restore 2.53 acres at an existing restoration project. The mitigation would be carried out on lands purchased by the State of Florida and Manatee County to protect it from development and restore it to natural conditions. Restoration is to be "primarily be accomplished by the removal of exotic vegetation, restoring a sand/shell berm to natural grade, installing culverts under an existing road to provide tidal connection and re-planting selective areas with native vegetation."

10. Chesapeake and Delaware Canal Trail Project, New Castle County, Delaware and Cecil County, MD. The mitigation plan for this project does not meet the mitigation plan requirements. For example, the plan fails to include: a description of the functions and values that will be achieved from the mitigation; ecological success criteria based on replacement of lost functions and values; the basis for determining that the lands identified for mitigation will be available; a mitigation monitoring plan (though it does identify the entity responsible for monitoring); and a contingency plan.

According to the Corps' environmental documentation, this trail construction project will impact approximately 2.2 acres of wetlands. The proposed mitigation is to restore 17 acres of wetlands located adjacent to the trail to satisfy the state's requested 10:1 mitigation ratio for the projects. The plan will take approximately 3 years to carry out and will involve a combination of spraying herbicides and burning to remove low value vegetation and allow "volunteer" higher quality plant species to colonize the sprayed mitigation area.

11. City of Topeka, Flood Risk Management Study, KS. The mitigation plan for this project does not meet the mitigation plan requirements. For example, the plan fails to include: the functions and values to be achieved by the mitigation; ecological success criteria based on replacement of lost functions and values; a detailed monitoring plan or the costs of that monitoring plan (the plan includes a very general, 1 paragraph description of monitoring); and a contingency plan.

According to the environmental documentation, this project will destroy 7.5 acres of floodplain forest. The proposed mitigation involves planting native and mast producing trees on 15 acres of disturbed flood plain land that is owned by the city of Topeka, the local project sponsor.

12. Craney Island Expansion, Norfolk Harbor and Channels, Norfolk, VA. The mitigation plan for this project does not meet the mitigation plan requirements. For example, the plan fails to include: a description of the function and values to be achieved through the mitigation; ecological success criteria based on replacement of lost functions and values; the basis for determining that the lands identified for wetlands mitigation will be available; a mitigation monitoring plan, and a contingency plan.

This project will cause a significant loss of habitat. According to the Corps' environmental documentation, this project would destroy 522 acres of marine bottoms. The proposed mitigation includes 56 acres of wetland creation, 20 acres of oyster reef restoration, and sediment remediation in a 3 mile segment of the Southern Branch, which together are to provide 487 acres of compensatory mitigation. As of October 2009, mitigation costs were estimated at $63.5 million (up from $50.2 million in the conceptual mitigation plan included in the 2006 final supplemental EIS) and mitigation will take 10 years to complete.

13. Delaware River Main Stem and Channel Deepening Project, DE, PA, and NJ. The documentation provided by the Corps for this project does not satisfy the mitigation mandates established in WRDA 2007. That documentation states only that the project will purchase NOx emission reduction credits from within non-attainment areas to mitigate for air pollution impacts from the project. The Corps cannot prepare an adequate mitigation plan for this project until it prepares a supplemental environmental impact statement that fully analyzes the many significant impacts of this project.

Some of the many potential threats from this project include the following. The dredging may resuspend toxic sediments with serious threats to fish and wildlife, including the bald eagle and

peregrine falcon. The disposal of contaminated sediments would also cause significant impacts and these impacts will remain unknowable until the Corps develops a disposal plan. Even if there were no contaminants, the dredging activities would cause major disruptions and threats to aquatic wildlife, including horseshoe crabs; oysters; migratory shorebirds; and a variety of fish species including winter flounder, finfish, and shortnose sturgeon. The dredging also threatens key food sources, shelter, spawning, and nursery habitat for fish.

14. Herbert Hoover Dike Partial Reach 1 and 2 Ditch Backfill & Culvert 14 Removal, FL. While the mitigation plan for this project is very basic, it does address many of the key mitigation plan requirements. However, even this mitigation plan does not describe the functions and values that will be achieved, does not address the cost of monitoring, and does not provide the basis for a determination that the mitigation lands are available for acquisition (or are already owned).

According to the Corps' final environmental assessment, this project will remove approximately 3.2 acres of low quality wetlands. The proposed mitigation will remove exotic vegetation from a total of approximately 9 acres on two wetland sites.

15. Mississippi Coastal Improvements Program, MS. The mitigation plan for this project does not meet the mitigation plan requirements. The plan provided to Congress consists only of a general discussion of the impacts requiring mitigation and the amount of mitigation that might be proposed. None of the mandatory mitigation plan elements are addressed in this discussion.

According to the Comprehensive Plan and Integrated Programmatic Environmental Impact Statement for this program, a number of the recommended activities will cause both direct and indirect losses of tidal and non-tidal wetlands that will require mitigation. This includes direct losses of approximately 222 acres of tidal wetlands, 483 acres of non-tidal wetlands, and 62 acres of open water bottoms. Alternative alignments of the numerous projects included in this program are being evaluated that might reduce these projected impacts. The study does recognize that mitigation planning must take place.

16. Sabine-Neches Waterway Channel Improvement Project, TX, LA. Critically, the entire approach to mitigation planning in this study is flawed. The study recommends mitigation only for "significant" resources and selected the mitigation through an incremental cost justification process. As discussed earlier in this testimony, these approaches do not comply with the law and may not form the basis of mitigation planning.

In addition, the document provided by the Corps as evidence of the required mitigation plan does not satisfy the mitigation plan requirements. For example that document fails to include: the activities that will be undertaken to implement the mitigation; a description of the functions and values that will be achieved from the mitigation; ecological success criteria based on replacement of lost functions and values; the basis for determining that the lands identified for mitigation will be available; a mitigation monitoring plan; and a contingency plan. It is likely,

however, that monitoring and contingency plans are included in another document, Appendix J, which is referred to in the document provided by the Corps. However, since Appendix J is not accessible on the Corps' website and was not provided to Congress the Federation was not able to analyze actual compliance with these mitigation plan requirements.

This project will have significant adverse environmental impacts. According to the draft environmental impact statement and feasibility report, the recommended alternative will decrease the biological productivity of 182,000 acres of marshes and forested wetlands in Louisiana. Indirect effects could lead to the loss of 691 acres of Louisiana marsh. The proposed mitigation is intended to restore 2,783 acres of emergent marsh in existing open water areas within the marsh, improve 957 acres of shallow water habitat by creating shallower, smaller ponds and channels within the restored marsh, and stabilize and nourish 4,355 acres of existing marsh located in and around the marsh restoration zone.

17. Yazoo Backwater Area, Reformulation Report, MS. The mitigation plan for this notoriously destructive project does not comply with *any* of the mitigation plan requirements and does not comply with the requirement to implement in-kind mitigation to the extent possible. This project was so destructive that it was vetoed by the Environmental Protection Agency under the Clean Water Act in August 2008.[41]

According to the final environmental impact statement for this project, the Yazoo Pumps would drain and damage 60,700 acres of wetlands. The proposed mitigation was to plant tree seedlings on 10,662 acres of frequently flooded agricultural lands, with no requirements to ensure that those lands had wetland hydrology. The final EIS stated explicitly that specific plans would not be developed until mitigation lands were purchased, and that monitoring would be limited to initial visual inspections followed by remote sensing techniques.[42] 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.

III. Revision of the Principles and Guidelines

WRDA 2007 enacted a new national water policy that requires a fundamentally different approach to water resources project planning and directs the Secretary of the Army to develop new planning principles, guidelines and procedures to modernize planning for water resources

[41] The plan information was not provided to Congress, but the Federation has this information in its records.
[42] 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. This proposal was released after enactment of WRDA 2007.

development and conservation. We are pleased that the White House Council on Environmental Quality (CEQ) has taken on a key role in facilitating the revision and updating of the Principles and Standards, working with the Secretary of the Army and the full range of agencies and departments involved with water resources development and management. In the wake of the terrible consequences of Hurricane Katrina, growing threats of climate change and sea level rise, continued deterioration of critical fish, wildlife and natural ecosystem health associated with many of our most important waters, and increasing instances of major flooding and drought conditions across the nation, we applaud Congress for directing attention to the need to update water resource planning and applaud the Administration for recognizing its importance across the federal government.

The critical process currently underway of revising, now, the Principles and Standards will undoubtedly take considerable time and effort. But the potential long-term benefits to the nation make this a highly important exercise. While a proposal is currently out for public and National Academy of Sciences review and comment, we have a number of key concerns we hope will be considered as this effort proceeds.

1. **Planning for water resources should be driven by federal law and policy, not simply benefit-cost analysis.** The draft P&S continue to retain the current failed approach to planning that is based principally on a project by project benefit-cost analysis. This approach promotes piecemeal, arbitrary planning that often fails to comply with federal law and policy. While a new requirement to value ecosystem services will be useful in some cases, it will not solve the problems inherent with relying on a cost-benefit analysis to drive project planning. The new guidelines must clearly identify the policies that will guide planning, and include clear requirements that will compel compliance with those policies. Benefit-cost analysis should play a role only after all legal and policy requirements have been complied with.

2. **Environmental protection and restoration must be a fundamental objective for water resources planning.** While the draft P&S include some good rhetoric about the value of a healthy environment and requires consideration of the value of ecosystem services, economic development remains the driver for all water planning.

3. **Restoration planning must be driven by ecological restoration objectives and not economic development objectives.** The draft P&S significantly undermine restoration planning by requiring that all restoration projects promote economic development and may require a benefit cost analysis for restoration projects. Under current guidelines, the Corps of Engineers plans ecosystem restoration projects with the sole goal of increasing the quality and/or quantity of ecosystem resources, and restoration planning does not require a cost benefit analysis.

4. **Modern approaches to water resources planning must be the fundamental drivers of water resources planning.** The draft P&S fail to address a number of requirements that are

fundamental to sound water resources planning. For example, the draft fails to adequately focus planning on increasing resiliency to climate change; fails to include a stand-alone environmental and restoration objective; fails to prioritize the use of non-structural and restoration approaches; and fails to require use of integrated water resources planning techniques that are particularly critical for water supply projects.

It is our hope that these and other issues can be addressed and improvements made as the revision effort proceeds.

IV. Conclusion

Mr. Chairman and members of the Committee, once again, on behalf of the National Wildlife Federation we greatly appreciate the efforts being made by the Committee to follow up on the progress of implementing the reforms enacted in WRDA 2007. I would be happy to respond to any questions you may have.

DEPARTMENT OF THE ARMY

COMPLETE STATEMENT

OF

THE HONORABLE MS. JO-ELLEN DARCY
ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS)

BEFORE

THE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
UNITED STATES HOUSE OF REPRESENTATIVES

ON

THE WATER RESOURCES DEVELOPMENT ACT OF 2007:
A REVIEW OF IMPLEMENTATION IN ITS THIRD YEAR

MARCH 3, 2010

Mr. Chairman and distinguished members of the Committee, I am honored to testify before you on WRDA 2007 Implementation. I am also pleased to have Lieutenant General Robert Van Antwerp, Chief of Engineers, joining me today. As you know, I have a deep personal interest in and a keen appreciation of the importance of Water Resources Development Acts to the Army's Civil Works Program.

As noted in previous testimony before Congress, the Chief of Engineers and the then Assistant Secretary of the Army (Civil Works) established a joint team to oversee the implementation of this Water Resources Development Act upon its passage on November 7, 2007. The joint team continues to work toward completing implementation guidance of the Act. The purpose of this guidance is to provide a common understanding of how the Army Corps would implement the law. Where provisions directly affect work within the Divisions and Districts, we are developing guidance in consultation with the appropriate District, Division, Headquarters Regional Integration Team, and my staff. We have given priority for implementation guidance to national policy provisions and to those project and program provisions where funds have been appropriated. We are nearing 80% completion of WRDA Implementation Guidance and are working to complete this important task.

I will focus my testimony on the national policy provisions contained in Title II, and especially on four of the most important provisions in that Title. The four provisions are Section 2031, Principles and Guidelines; Sections 2034, Independent Peer Review; Section 2035, Safety Assurance Review; and Section 2036, Mitigation for Fish and Wildlife and Wetlands Losses. Then I will briefly address several other provisions in Title II and in other Titles of WRDA 2007.

SECTION 2031, PRINCIPLES AND GUIDELINES

Section 2031 of the Water Resources Development Act of 2007 directed the Secretary of the Army to revise the Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies (P&G) after taking into account the policy and other considerations specified in the Act. The P&G is the template for water and related resources implementation studies of site-specific projects and project modifications not only for Corps Civil Works water resources projects, but all Federal water resources projects. The Council on Environmental Quality (CEQ) took the lead in this effort to apply the revised P&G to all Federal agencies involved in water resources project development, a process that is expected to last at least another year.

In September 2008, the Corps first published a draft of the Principles in the Federal Register and solicited comments from the public. We received extensive public comments from that solicitation. Then, in April 2009, the Chairman of CEQ convened an interagency working group to revise the P&G for application to the planning of the Corps as well as other agencies. In July 2009, CEQ conducted a webinar to solicit comments from the public on how to update the existing 1983 P&G. On December 3,

2009, CEQ submitted to the National Academy of Sciences (NAS) for peer review, new proposed revisions to the Principles as well as to Chapter One of the Guidelines of the 1983 P&G, called The Proposed National Objectives, Principles and Standards for Water and Related Resources Implementation Studies ("P&S"). A Water Science and Technology Board review will take about 11 months to complete. This draft was concurrently made available for public review for 90 days; CEQ has granted a 30 day extension. CEQ formed an interagency group in January 2010 to develop Interagency Procedures (Guidelines) across the Federal agencies and the Army Corps is participating in this group. At this time, the Administration plans to issue the P&S in final form in the spring of 2011 after consideration and resolution of comments received from the general public and the NAS.

The proposed P&S include a number of important changes that modernize the current approach to water resources development in this country, which include achieving co-equal goals of economic and environmental sustainability; considering monetary and non-monetary benefits; reflecting the value of water resources projects to low income communities; avoiding the unwise use of floodplains; and increasing transparency. The draft Principles and Standards have addressed Section 2031 by including considerations for:

- Best available science – including risk & uncertainty
- Public safety
- Non-structural approaches
- Regional or watershed evaluation
- Integrated Water Resources Management and Adaptive Management
- Methods for justification by public benefits

SECTIONS 2034, INDEPENDENT PEER REVIEW AND SECTION 2035, SAFETY ASSURANCE REVIEW

Our goal is to always provide the most scientifically sound, sustainable water resource solutions for the nation. The Corps review processes are essential to ensuring project safety and quality of the products that the Corps provides to the American people. Over the past few years, the Corps has recognized that its Civil Works review processes, while generally effective, needed to be strengthened. The National Research Council (NRC) report, Review Procedures for Water Resources Project Planning, (NRC 2002); the report, Decision-Making Chronology for the Lake Pontchartrain & Vicinity Hurricane Protection Project, (2008) and the Interagency Performance Evaluation Taskforce final report, Performance Evaluation of the New Orleans and Southeast Louisiana Hurricane Protection System, (2009) provide good examples of the need for and benefit of external peer review in improving Corps plans, projects and programs.

The Corps implemented a comprehensive peer review process in May 2005 with the publication of Engineering Circular 1105-2-408, Peer Review of Decision Documents,

which established a rigorous peer review process adopting most of the recommendations of the National Research Council study under Section 216 of WRDA 2000 and implementing the 2004 Office of Management and Budget (OMB) Information Quality Bulletin for Peer Review. This Corps circular called for peer review approaches that are fully integrated into the planning process for each study. Depending on the particular circumstances, reviews were to be conducted entirely within the Corps, entirely by external panels, or in various combinations. Provisions in the Water Resources Development Act of 2007 (Sections 2034 and 2035) reinforce and add further definition to the Corps review processes. Each District posts completed and ongoing independent peer review actions on its website.

In August 2008, the Corps published initial implementation guidance for Section 2034 in Engineering Circular 1105-2-410. As the policies matured, and with the inclusion of implementing guidance for Section 2035, we have published EC 1165-2-209, which provides a more comprehensive and a more robust review policy for Civil Works planning, design and construction. I personally reviewed and approved this important EC and firmly believe it serves as the cornerstone for policy compliant and technically strong Civil Works project recommendations. The guidance contained in this EC lays out a standard, seamless process for review of all Civil Works projects from initial planning through design, construction, and Operation and Maintenance, Repair, Replacement and Rehabilitation (OMRR&R). It provides the procedures for ensuring the quality and credibility of the Corps' decision, implementation, and operations and maintenance documents and work products. We have distributed the EC to Corps field offices and are making ample opportunities available to all levels of the Corps to engage in presentations and discussions to ensure a thorough understanding of these peer review processes.

SECTION 2036, MITIGATION FOR FISH AND WILDLIFE AND WETLANDS LOSSES

Mitigation planning is an integral part of the Corps overall planning process. Corps policy is to demonstrate that damages to all significant ecological resources, both terrestrial and aquatic, are avoided and minimized to the extent practicable, and that any remaining unavoidable damages will be compensated to the extent justified. The Corps issued supplemental guidance for Mitigation Plans as well as for monitoring and adaptive management in EC 1105-2-409 in May 2005. The requirements in this guidance are consistent with the requirements for Mitigation Planning reflected in Section 2036a and were restated in the Implementation Guidance for Section 2036(a).

As part of the implementation guidance for Section 2036(a) we have strengthened the requirements for developing and reporting monitoring and adaptive management activities. Recommended monitoring and adaptive management plans will be subject to Washington level policy review of the project decision documents as well as Agency Technical Review and Independent External Peer Review. Monitoring of project

mitigation features will continue until the Corps demonstrates that identified ecological success criteria have been met. The Corps will establish ecological success through annual consultation process with the appropriate Federal agencies and each State in which the applicable project is located. Division Commanders are establishing an annual consultation process with states and agencies and report to Corps Headquarters on these activities each year, and we will include these consultation reports in the annual Status Report on Mitigation required by Section 2036(b). We are taking additional steps to standardize this consultation process. In addition, the Corps is establishing a database to track mitigation performance.

The Corps prepared and submitted the annual Status Report required by Section 2036(b) to Congress concurrent with the Civil Works Budget for FY2010 and FY2011 and will continue to prepare and post this report on an annual basis. The completed status reports can be found at:

http://www.usace.army.mil/CECW/PlanningCOP/Pages/rap.aspx

Implementation guidance for Section 2036c, Wetlands Mitigation was issued in November 2008, concerning the requirement to consider use of mitigation banks in certain cases where a Corps project involves wetlands impacts.

OTHER PROVISIONS

I would like to briefly mention some of the other significant guidance that we have completed for other provisions in Title II of WRDA 2007 as well as other related ongoing activities. We have issued guidance on Funding To Process Permits (Section 2002); In-kind Credit Contributions by non-Federal sponsors and Delegation of Authority to sign Project Partnership Agreements (Section 2003); Dredged Material Disposal Facilities (Section 2005); Remote and Subsistence Harbors (Section 2006); Use of Other Federal Funds (Section 2007); Watershed and River Basin Assessments (Section 2010); The Tribal Partnership Program (Section 2011); Wildfire Firefighting (Section 2012); Technical Assistance (Section 2013); the Continuing Authorities Program (Sections 2020-2025); Support of Army Civil Works Program (Section 2028); Regional Sediment Management (Section 2037); and Federal Hopper Dredges (Section 2047). Further, implementation guidance has been issued for Studies (Title IV), the Upper Mississippi River and Illinois Waterway System (Title VIII), and the Louisiana Coastal Area (Title VII). All completed implementation guidance is posted on the Corps website:

http://www.usace.army.mil/CECW/Documents/cecwp/leg_manage/wrda2007/wrda07_imp.pdf

In addition, we have initiated the Compilation of Laws required by Section 2004; efforts to provide public access to water resources and related water quality data in the custody of the Corps through both the regulatory and planning program required by

Section 2017; incorporating information into our annual budget submittals required by Section 2027, the Fiscal Transparency Report; developing an electronic submission process of permit applications required by Section 2040; and coordinating and scheduling of Federal, State and local actions related to permitting actions (Section 2044).

TITLE IX NATIONAL LEVEE SAFETY PROGRAM

I would be remiss if I did not mention the work we have accomplished under Title IX of WRDA 2007, the National Levee Safety Program. The National Levee Safety Act of the Water Resources Development Act of 2007 (PL 110-114, Title IX, Section 9003) established the Committee on Levee Safety and directed the Committee to develop recommendations for a national levee safety program. The National Committee on Levee Safety completed its draft report in January 2009, and put forward 20 recommendations for creating a National Levee Safety Program. The final draft report was provided to Congress by the Army in May 2009. Also in May 2009, the House Subcommittee on Water Resources and the Environment held a hearing on the recommendations. Related information can be found at the following website: http://www.iwr.usace.army.mil/ncls/.

Although the Corps of Engineers chairs the Committee, the Committee's recommendations do not and were not intended to represent an Administration position.

The specific draft recommendations of the National Committee on Levee Safety for a National Levee Safety Program embrace three main concepts: (1) the need for leadership via a National Levee Safety Committee that provides for state delegated programs, national technical standards, risk communication, and coordinating environmental and safety concerns; (2) the building of strong state levee safety programs in all states that, in turn, provide oversight, regulation, and critical levee safety processes; and (3) a foundation of well-aligned federal agency programs. The Committee recently reconvened and is working to clarify three areas of the report: costs and benefits of a National Levee Safety Program; governance and strategic implementation; and stakeholder involvement. While the committee conducts these activities, the Corps is also working to implement certain components of Title IX.

Section 9004 of WRDA 2007 requires that the Secretary establish and maintain a database with an inventory of the Nation's levees. The National Levee Database and associated information collected as part of the Corps Levee Safety Program forms the basis for the initial national inventory. The Corps will complete data collection and inventory of the approximately 2,000 levee systems (or 14,000 miles of levees) within current authorities and funds during fiscal year 2010. Also this year, the Corps will engage the other Federal agencies, States, Tribes and Territories regarding their use of the database model to collect inventory information in their portfolios and submit it to the Corps – on a voluntary basis - for inclusion in the National Levee Database (NLD). Activities planned in Fiscal Year 2011, as part of the President's Budget request of $15

million for the Corps, include: the expansion of the NLD to other Federal agencies and to incorporate non-Federal levee data on a nationwide basis; work with stakeholders to facilitate their use of the NLD for local levee safety programs; and the developfoment of a levee screening and classification process to rank and prioritize levees based on risk.

The Act also requires the general condition of the levees within the current the Corps authorities to be entered into the database. The general condition determination is based on an onsite inspection of the levee, including a review of all design, construction, and other information available for the levee. As information on the inventory is completed, the companion information from ongoing routine inspections is uploaded into the database. Starting in Fiscal Year 2009, the Corps began conducting Periodic Inspections of levees which capture the broader, general condition of the levees. These inspections have been limited to those which the Corps operates and maintains; those levees for which the Corps performed the initial design and construction; and those levees which have been incorporated by law into the Corps' program as a federally authorized levee system. With the allocation of $90 million from the American Recovery and Reinvestment Act for Periodic Inspections, this work currently is scheduled for a September 2010 completion. In addition, the Corps plans to work with other Federal agencies so that data on the condition of those Federal levees can also be documented in the Database.

Mr. Chairman, implementation of this very important legislation has been and remains a priority for the Army and the Corps of Engineers. This concludes my testimony and I would be happy to answer any questions you or other members of the Committee may have. Thank you.

1333 H Street, NW
10th Floor West Tower
Washington, DC 20005
www.nafsma.org

EXECUTIVE COMMITTEE
President
Gale William Fraser, II, PE
Clark County Regional Flood Control District
Vice President
James Fiedler
Santa Clara Valley Water District
Secretary
Dusty Williams
Riverside County Flood Control & Water Conservation District
Treasurer
Tim Richards
City of Charlotte

DIRECTORS
Gary R. Clark
Illinois Department of Natural Resources
Bill DeGroot
Urban Drainage & Flood Control District Denver, CO
Jane Duarte
City of Tucson
Steve Fitzgerald
Harris County Flood Control District
Charles Hardt
City of Tulsa
James Oliver
Tarrant Regional Water District
Timothy Phillips
Flood Control District of Maricopa County
Joseph Sobanski
Metropolitan Water Reclamation District of Greater Chicago
Mike Stankiewicz
New York State Dept. of Environmental Conservation
Dusty Williams
Riverside County Flood Control & Water Conservation District
Bob Van Wyk
Fresno Metropolitan Flood Control District
Immediate Past President
Derek Guthrie
HDR, Inc.

NAFSMA COMMITTEE CHAIRMAN
Floodplain Management Committee Co-Chairs
W. Dave Canaan
Mecklenburg County Government
David Mallory
Urban Drainage and Flood Control District
Flood Management Committee Co-Chairs
Steve Fitzgerald
Harris County Flood Control District
Janet Bly
Miami Conservancy District
Stormwater Management Committee Co-Chairs
Tim Richards
City of Charlotte
Mark Pestrella
Los Angeles County Department of Public Works

NAFSMA STAFF
Executive Director
Susan Gilson

Testimony of the National Association of Flood and Stormwater Management Agencies

Presented by Steve Fitzgerald, PE
NAFSMA Director and
Flood Management Committee Chair
Chief Engineer, Harris County Flood Control District,
Houston, Texas

"The Water Resources Development Act of 2007: A Review of Implementation in its Third Year"

U.S. House of Representatives
Committee on Transportation and Infrastructure

Rep. James L. Oberstar, Chairman

March 3, 2010

The National Association of Flood and Stormwater Management Agencies (NAFSMA) is very pleased to submit this testimony regarding the implementation of the Water Resources Development Act of 2007 (WRDA 2007) on behalf of its membership.

Background on NAFSMA

NAFSMA is a 30-year old national organization based in the nation's capital that represents local, regional and state flood and stormwater management agencies, most of which are in large urban areas. Its members serve a total of more than 76 million citizens by providing flood and/or stormwater management. As a result, the association has taken an active role and has a strong interest in the implementation of WRDA 2007. For the record, NAFSMA members supported passage of this bill in the fall of 2007 because it was needed to address water resource problems in communities across the United States. At the same time, we recognize the key to successful implementation is the interpretation and subsequent implementation guidance for each provision.

NAFSMA's mission is to advocate public policy and encourage technologies in waters[illegible]d management that focus on issues relating to flood protection, stormwater and floodp[illegible]in management in order to enhance the ability of its members to protect lives, property, the environment and economic activity from the adverse impacts of storm and flood waters.

Formed in 1978, NAFSMA works closely with the U.S. Army Corps of Engineers (Corps), the Federal Emergency Management Agency (FEMA), and the U.S. Environmental Protection Agency (EPA) to carry out its mission. NAFSMA members are on the front line protecting their communities from loss of life and property, while also improving the quality of the nation's surface waters and riparian habitats. In addition, NAFSMA members are dealing directly with increased populations, strained resources, environmental and regulatory challenges, and are helping to guide design and construction of low flood risk and affordable neighborhoods.

Responsibilities of NAFSMA members are diverse and include: local sponsorship for federal and non-federal flood risk management (including levees), ecosystem restoration and other water quality projects; operation and maintenance of federal and local flood damage reduction projects; establishing and enforcing criteria for new land development; building codes; environmental stewardship; activation before, during, and after floods; flood recovery; and actively communicating risk and preparedness with constituents and the public. Our members use a variety of flood risk management "tools" in their communities such as land use and development planning, building codes and other

floodplain regulations, flood warning systems, and home residential and business buyouts (non-structural measures); and detention basins, improved channels, and levees (structural measures). In summary, our members have direct and day-to-day experience complying with provisions in WRDA 2007, as well as a specific interest in project authorizations for their communities.

NAFSMA is pleased to present the following views from a non-federal sponsor perspective on the "The Water Resources Development Act of 2007: A Review of Implementation in its Third Year".

Titles I and III –VIII: Specific Studies and Projects

While the specific studies and projects included in WRDA 2007 authorize vitally important water resources projects throughout the nation, NAFSMA does not get directly involved in individual federally-partnered projects.

Title IX: National Levee Safety Program

The National Committee on Levee Safety was established, performed the necessary work, prepared an excellent report and continues to function effectively and productively.

NAFSMA believes that significant progress has been made on several of the Committee's 20 recommendations since your hearing on this topic last May. However, there is still much work to be done, including possible legislation. One of the critical recommendations (Recommendation 2) that has seen the most substantial progress is the completion of the National Levee Inventory and Database. We believe that the Corps, FEMA, and Congress are working well together toward completing this recommendation; however, additional authority is needed to include those levees throughout the nation owned and operated by non-federal entities.

There has also been and will continue to be progress on the recommendation to develop tolerable risk guidelines (Recommendation 5) with the Corps' sponsoring of a tolerable risk workshop later this month. The Corps and FEMA have also worked to address challenges presented by the certification terminology (Recommendations 6, 7 & 8) and the Corps is working to develop approaches, skills and training for overall flood risk communication (Recommendation 9). With its recently proposed policy for requesting variances from its vegetation guidelines, the Corps is also making some progress to address Recommendation 12 of the report to develop and implement measures to more closely harmonize levee safety activities with environmental protection requirements.

Title II: General Provisions

NAFSMA has primarily focused on the general provisions in WRDA 2007 related to flood risk management. In carrying out these provisions, the Corps has had a challenging task of implementing or developing guidance for more than 47 general provisions. The Corps has worked to address the more time critical provisions first, and is continuing to produce written guidance. From the local perspective, active studies and projects are not being held up waiting for new implementation guidance.

- **Independent Peer Review (Section 2034) and Safety Assurance Review (Section 2035)**

  Most NAFSMA members concurred with these provisions as authorized in WRDA 2007. It is indeed challenging to address the multiple interdependent and interrelated factors that influence water resource analysis, evaluation, and decisions in a comprehensive manner. It takes a multidisciplinary team to move these approaches forward. NAFSMA welcomes any assistance in this area provided it is helpful in advancing the study, resulting in improvements to the project, and does not hinder progress. In practice, many feasibility studies, some that were near completion, have been delayed to comply with new requirements instituted by WRDA 2007, AND to add insult to injury, no substantial improvement in the recommended course of action resulted. IEPR will be more beneficial if actually utilized as WRDA states, "In all cases, the peer review shall … be accomplished concurrent with the conducting of the project study." In contrast, most after-the-fact reviews are not beneficial.

- **Water Resources Principles and Guidelines (Section 2031)**

  - NAFSMA appreciates the opportunity to participate in updating the Principles and Guidelines which has been the cornerstone for identifying federal flood damage reduction projects for over 25 years. Since local sponsors are active partners with the federal government for Corps of Engineers flood risk management projects, we will be working directly with the Corps in applying the updated Principles and Standards to identify future joint projects.
  - While there have been a few attempts to move this update forward and some may feel frustrated, we recognize the complexity of the issues and diversity of interests in addressing both fundamental and specific topics contained in the Principles and Guidelines. This extended time and effort was not wasted, but necessary to get where we are today which is a good start on the Principles and Standards.

- While NAFSMA supports and agrees with most of the December 3, 2009, draft Principles and Standards, we feel there are some areas where clarifications and/or changes are needed as we move forward to finalize the P&G:
  - Identifying how the new P&G will apply to ongoing studies needs clarification since its application could have a critical impact on delaying and increasing the cost of ongoing studies. NAFSMA supports the language in WRDA 2007, which indicates that the new P&G should not apply to studies already started, unless the non-Federal sponsor requests it.
  - As proposed, the new Principles and Standards seem to favor environmental protection and restoration over economic and social benefits. While we understand some believe that historically there has been a bias toward economic benefits, it is imperative that future water resources planning recognize and emphasize the need for balance and the interdependency of economic, environmental, public safety and social factors.
  - It is our belief that active participation by both the Federal and non-Federal sponsor during all phases of the planning process is critical to the success of any federal water resources study and subsequent project. In the case of Corps of Engineers flood risk management projects, the local sponsor is an active partner with the federal government in terms of contributing funding, local knowledge, and expertise.
  - While the Principles and Standards are important, it is the development and implementation of Interagency Guidelines and Agency-Specific Procedures that are most critical. These documents need to be developed in conjunction with input from non-federal sponsors. Each agency's procedures should be made available for public comment, and prior to adopting the specific procedures, the agency should confirm broad local sponsor and public support.
  - NAFSMA members are concerned that the new Principles and Guidelines will make the planning process even longer, more expensive, and more complex than it is now. Federal agencies must recognize resources, funding, and patience are limited. To fully appreciate how the proposed Principles and Standards will change the Corps of Engineers planning process, NAFSMA recommends that the Corps and NAFSMA work through an example flood risk reduction study from initiation to completion while the National Academy of Sciences is preparing its comments. This effort could help not only completion of the Principles and Standards, but also the timely development of sound and sensible

Interagency Guidelines and Agency Specific Procedures that can help streamline the process.

- **Planning (Section 2033) and Streamlining (Section 2045)**

  The current planning process is a long, complex and costly planning exercise that does not necessarily yield better flood reduction projects. As "problems" developed over the years, the solution has often been the addition of more steps instead of addressing the real problem. The result is that the quality of work and accountability has declined. We are all frustrated.

  What is being done about it? Last year, NAFSMA established a working group to address this topic. We understand this is also receiving serious attention from both the Corps of Engineers senior leadership and from Secretary Darcy's office. Also, based on two provisions in WRDA 2007, Planning and Streamlining, it is evident that Congress wants change, as well. We are convinced that it will take a sincere, considerable, and collaborated effort from local sponsors, the Corps, and Congress in coordination with OMB and CEQ to make any significant and worthwhile changes. We now have the opportunity to make many of these needed changes in the updated Principles and Guidelines, and corresponding agency specific procedures

Need for WRDA 2010?

WRDA 2007 was a much needed piece of legislation and helped us take a step forward in developing and protecting our Nation's critical water resources. We have learned much and accomplished much, but there is still much to do. It is now time to continue our work and take the next step forward by pursuing the passage of a WRDA 2010 bill to continue to meet our critical water resources needs, produce jobs and protect the nation's population, environment and critical infrastructure.

Closing

In closing, NAFSMA commends the Committee for focusing on these critical issues and very much appreciates this opportunity to testify. Please contact me or our Executive Director Susan Gilson if we can provide any further assistance on these issues.

Statement of

Amy W. Larson, Esq.
President
National Waterways Conference, Inc.
4650 Washington Boulevard
Suite 608
Arlington, Virginia 22201
(703) 243-4090

Before
The Committee on Transportation and Infrastructure
U.S. House of Representatives

On the

Water Resources Development Act of 2007:
A Review of Implementation in its Third Year

March 3, 2010

Good morning Chairman Oberstar, Ranking Member Mica, and Members of the Committee. My name is Amy Larson and I am the President of the National Waterways Conference. Thank you for the opportunity to appear before you today as the Committee hears about the important work involving our nation's water resources infrastructure.

The National Waterways Conference, established in 1960, is dedicated to a greater understanding of the widespread public benefits of our nation's water resources infrastructure. Our mission is to effect common sense policies and programs, recognizing the public value of our Nation's water resources and their contribution to public safety, a competitive economy, national security, environmental quality and energy conservation. Conference membership is comprised of the full spectrum of water resources stakeholders, including flood control associations, levee boards, waterways shippers and carriers, industry and regional associations, port authorities, shipyards, dredging contractors, regional water districts, engineering consultants, and state and local governments.

Given the Conference's diversity, our membership is keenly interested in the planning and development of water resources infrastructure projects of all types. My comments today will be primarily focused on the Principles and Guidelines applicable to water resources projects.

I. Background

Section 2031 of the Water Resources Development Act of 2007 (WRDA 2007), Publ. L. 110-114. 121 STAT. 1041, directed the Secretary of the Army to revise the 1983 Principles and Standards applicable to planning studies of water resource projects. In furtherance of that directive, the Secretary issued a "Request for suggestions and notice of public meeting," on May 8, 2008. 73 Fed. Reg. 26086. That notice sought suggestions for revising the Principles and afforded the opportunity to appear at a public hearing. Thereafter, the Secretary issued proposed Principles and again sought public comment. 73 Fed. Reg. 52960 (September 12, 2008), with comments due by October 22, 2008. Subsequently, CEQ took over the proceeding, with a goal of expanding application of the Principles to water resources development programs and activities government-wide. CEQ issued its "Proposed National Objectives, Principles and Standards for Water and Related Resources Implementation Studies" (Proposal)

in December, with comments from the public due by March 5, 2010. Attached to my statement is a copy of the comments NWC submitted to CEQ in response to its Proposal. I respectfully request that they be included in the record here.

II. General Overview

Reliable, well-maintained water resources infrastructure is fundamental to America's economic and environmental well-being, and is essential to maintaining our competitive position within the global economy. Our water resources infrastructure provides life-saving flood control, navigation critical to national security and commerce, abundant water supplies, shore protection, water recreation, environmental restoration, and hydropower production. Moreover, waterways transportation is the safest, most energy-efficient and environmentally sound mode of transportation and inland waterways have excess capacity that highways and rail lines do not enjoy, thus providing an opportunity for cost-effective congestion mitigation.

As a consequence, the planning and development of water resources projects is vitally important. The Congress recognized this when it passed the Water Resources Development Act in 2007, and in enacting prior WRDA bills. With that in mind, we are very concerned that CEQ's Proposal falls short of enacting a policy model envisioned by the Congress in WRDA 2007.

A. Principles

At the outset, water resources planning ought to be governed by a well-defined set of over-arching principles which set forth the national interest in water resources development, management and protection. These Principles should establish a clear, concise, and workable planning framework to guide the development of project recommendations through unbiased, scientifically sound analysis and must recognize the now-critical role non-Federal sponsors play in project formulation and implementation. Fundamentally, revised Principles should strengthen the Executive Branch's ability to recommend to the Congress economically and environmentally sound projects and must be clear enough to have predictable and replicable outcomes thus enabling non-Federal projects interests to make complementary plans. We further suggest that such Principles should:

- o Utilize cost-benefit analysis and other such recognized ***and proven*** analytical tools as a basis to compare options,
- o Provide for the unbiased consideration of all alternatives, and not exclude or penalize classes of alternatives from consideration and recommendation,
- o Require that decisions are made based on an assessment of net beneficial effects, and
- o Establish a peer review process that is appropriate to the potential impacts of the project and seamlessly integrated into the planning process.

Unfortunately, the Proposal issued by CEQ fundamentally fails to establish a path to balanced solutions, clear and consistent guidance to planners, and replicable results that are understandable to all stakeholders. Rather, the Proposal doesn't establish a workable set of Principles at all, but instead uses the concepts of "principles," "guidelines," "procedures," and "standards" interchangeably so that the Proposal is confusing and unworkable.

B. Planning Objectives

Section 2031 of WRDA 2007 states that:

> 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. Section 2031 further provides that any revisions to the principles and guidelines address not only economic principles, but also public safety, the value of projects to low income communities, the interaction of a project with other water resources projects or programs within a region or watershed, the use of contemporary water resources, and

evaluation methods that ensure water resources projects are justified by public benefits. Thus, WRDA 2007 contemplates water resources planning founded upon multiple national objectives: economic, environmental, and social well-being, including a public safety objective. Additionally, WRDA 2007 emphasizes a watershed approach to planning, recognizing the importance of collaborative planning and implementation.

We are concerned that the Proposal, in apparent contradiction of the directive in WRDA 2007, does not promote co-equal objectives in water resources planning, but instead elevates environmental considerations at the expense of economic benefits. This approach would be especially detrimental to flood control, navigation and water supply projects. It is also rather perplexing, and appears contradictory with other Administration initiatives. For example, the Department of Transportation is actively promoting its Marine Highways program. Waterways transportation is the safest, most energy-efficient and environmentally sound mode of transportation, and increased transportation along the waterways would help relieve some of the congestion along our highways. However, at a time when the cost-effectiveness of utilizing the nation's inland, coastal and Great Lakes waterways couldn't be more pertinent, navigation projects to help further this initiative would be negatively impacted under the Proposal. Similarly, the nation's growing population will continue to need protection from flooding and additional water supplies, both of which will necessarily entail structural solutions in addition to the non-structural ones the Proposal seems to mandate. We believe that a balanced planning model, recognizing the widespread public benefits of our nation's water resources infrastructure, would give due regard to the economic and human uses of water resources, along with environmental and ecological considerations.

The Proposal also sets forth a confusing approach to watershed planning. Although the Proposal appears to recognize the importance of watershed planning, as called for in WRDA 2007, watershed plans are then explicitly excluded from the process. It is unclear why a comprehensive planning framework would exclude watershed plans. This is particularly troubling and confusing at a time when our nation - both at the federal and state levels - is working toward the development of collaborative, watershed planning, rather than planning on a project basis.

C. Use of the Flood Plains

We are concerned that the Proposal establishes an unworkable policy with regard to use of the floodplains. While directing avoidance of the "unwise use" of the flood plains, the Proposal does not provide criteria for determining what this would be. Instead, the Proposal appears to create a bias for selecting non-structural approaches thus limiting, in practice, a full consideration of all alternatives. This approach ignores the recognition in WRDA 2007 that sometimes use of the floodplains cannot be avoided, providing that in such cases, planners should seek to minimize adverse impacts and vulnerabilities.

Moving people and infrastructure out of the floodplains is not necessarily a viable option. While we appreciate that due consideration should be given to the risks and impacts inherent in the use of our floodplains, we believe that the best approach to floodplain management will continue on a course that puts the principle of balancing economics and other factors at the center of floodplain decisions. Floodplain decisions (including permitting and licensing decisions) should be governed by consideration of the net beneficial effects of all feasible or practicable alternatives. CEQ's Proposal appears to preclude consideration of all alternatives and instead support a non-structural or no-action alternative. Such a policy would be devastating to many communities in or near a flood plain.

Additionally, Title IX of WRDA 2007, the Levee Safety Act, recognizing the complexity of flood risk management in leveed areas, calls for the establishment of a primarily non-federal Levee Safety Committee to develop recommendations and a strategic implementation plan for a national levee safety program. As the work of this Committee progresses, it becomes increasingly evident that an integrated approach is needed to effectively manage our nation's flood risk. One of the principal concepts identified as key to successfully managing the risks associated with levees is improved communications among federal agencies, together with a better vertical integration to achieve strong and balanced partnership at all levels of government.

This concept should be applied not just to leveed areas, and not just to flood risk, but to all water resources management decisions. The opportunity to achieve this ideal and

shift water resources management toward one of shared responsibility by the federal and non-federal interests is through the development of these new Principles and Standards. Regrettably, the Proposal does not recognize the significant and growing role of state and local governments. Rather than being a step forward, the Proposal is a step back from effectively managing our nation's water resources.

D. There are numerous other concerns that the Proposal does not establish a viable, long-term planning model for water resources projects as envisioned by Congress in enacting WRDA 2007. The Proposal requires quantifying monetary and non-monetary benefits and costs whenever possible, yet provides no standard or basis for doing so. This requirement would certainly lead to uncertainty and confusion in the planning process.

The Proposal uses conflicting and contradictory criteria concerning mitigation obligations. These conflicting standards will lead to uncertainty and confusion in the planning process.

The role of non-Federal sponsors and cost-sharing, introduced widely through passage of WRDA 86, must also be incorporated into the decision-making process. When a local community is faced with a decision to expend scarce financial resources for a feasibility study, there must be a transparent and predictable process for the non-federal sponsor as well as the federal planner. The Proposal is silent on this crucial element of the process.

E. Procedure

Besides the substantive concerns about the content of the proposed principles laid out above, we also have some concerns and questions about the process CEQ is utilizing to develop the Principles.

CEQ is purportedly in the first step of the process -- that is, the development of the Principles to guide water resources planning. Thereafter, according to CEQ, an interagency group will develop Procedures, followed by implementation "guidance" by individual agencies. As mentioned above, the initial Proposal uses the concepts of "principles," "guidelines," "procedures," and "standards" interchangeably, resulting in a very confusing and unworkable proposal. We are further concerned that the second phase of the process - the development

of procedures - is already underway. We would expect that the procedures would be properly based on the principles that are ultimately developed. It could be seen as rather premature to develop the second step of the process when the first step is only in the early phase. The public comment period closes this Friday, and the National Academy of Science has until November to complete its review. One cannot build a house until the foundation is properly laid.

This also raises additional questions. The Administrative Procedure Act requires an agency to consider all comments it receives in a notice and comment proceeding. Failure to do so would be considered "arbitrary and capricious" on the part of the agency. We certainly appreciate the opportunity to comment on the development of such an important federal policy in this instance. And we recognize that this process has not been characterized as, and may not be construed as, a notice-and-comment type rulemaking. Nonetheless, the process CEQ is employing here has not been fully explained to the public. Significantly, it is unclear how, or whether, the comments will be addressed by CEQ. Questions to CEQ on this issue were not answered. This is a cause for concern because an open and transparent process is essential to the development of a long-term, viable and balanced approach to water resources management.

IV. Conclusion

In sum, I hope that I have sufficiently conveyed to you the concerns of the members of the National Waterways Conference that the CEQ Proposal fails to establish a clear, concise, and workable framework to guide the development of water resources projects. It is incoherent and inconsistent - and thus not implementable in a practical sense. It substantially fails to comply with the explicit directions in Section 2031 of WRDA 07 as well as the large body of previous law and policy related to water resources. It is written so as to not require or even encourage use of proven analytical tools to distinguish among alternatives. It limits in a preemptive manner certain categories of alternatives, and (even while encouraging "collaboration") seems to assume that water resources planning recommendations are the exclusive prerogative of the Executive Branch of the Federal government thus not recognizing the keystone role played by non-Federal sponsors.

Chairman Oberstar, Ranking Member Mica, and Members of the Committee, thank you for the opportunity to appear before this Committee. I'd be happy to answer any questions that you might have.

Respectfully submitted,

Amy W. Larson
President
National Waterways Conference, Inc.
4650 Washington Blvd., Suite 608
Arlington, VA 22201
703-243-4090
amy@waterways.org

Before the
Council on Environmental Quality

Draft Principles and Standards Sections of the "Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies";
Initiation of Revision and Request for Comments

Proposed National Objectives, Principles and Standards for Water and Related Resources Implementation Studies

Comments of the
NATIONAL WATERWAYS CONFERENCE, Inc.

The National Waterways Conference, Inc. (NWC or Conference) submits these comments in response to the Notice and Request for Comments published in the Federal Register on December 9, 2009. 74 Fed. Reg. 65102.

The National Waterways Conference, established in 1960, is dedicated to a greater understanding of the widespread public benefits of our nation's water resources infrastructure. Our mission is to effect common sense policies and programs, recognizing the public value of our Nation's water resources and their contribution to public safety, a competitive economy, national security, environmental quality and energy conservation. Conference membership is comprised of the full spectrum of water resources stakeholders, including flood control associations, levee boards, waterways shippers and carriers, industry and regional associations, port authorities, shipyards, dredging contractors, regional water supply districts, engineering consultants, and state and local governments.

I. Background

Section 2031 of the Water Resources Development Act of 2007 (WRDA 2007), Publ. L. 110-114. 121 STAT. 1041, directed the Secretary of the Army to revise the 1983 Principles and Standards applicable to planning studies of water resource projects.[1]

[1] In furtherance of that directive, the Secretary issued a "Request for suggestions and notice of public meeting," on May 8, 2008. 73 Fed. Reg. 26086. That notice sought suggestions for revising the Principles and afforded the opportunity to appear at a public hearing. Subsequently, the

Subsequently, CEQ took over the proceeding, with a goal of expanding application of the Principles to water resources development programs and activities government-wide.

II. General Overview

CEQ's proposed revisions to the Principles and Guidelines governing the development of water resources projects (Proposal) would significantly alter our nation's water resources planning. Recognizing the critical role of our water resources infrastructure to a robust economy and environmental well-being, it is imperative that the resulting Principles establish a clear, concise, and workable framework to guide the development of these critical projects.

As drafted, the Proposal fundamentally fails to achieve this critical end and must be extensively revised to offer a path to balanced solutions, clear and consistent guidance to planners, and replicable results that are understandable to all stakeholders.

- Water resources planning ought to be governed by a well-defined set of over-arching principles which set forth the national interest in water resources planning decisions. Thereafter, individual agencies would develop the procedures, guidelines and standards for implementing projects. Unfortunately, CEQ's Proposal uses the concepts of "principles," "guidelines," "procedures," and "standards" interchangeably so that the Proposal is confusing and unworkable.

- A concise set of Principles should:

  - Utilize cost-benefit analysis and other such recognized ***and proven*** analytical tools as a basis to compare options,
  - Provide for the unbiased consideration of all alternatives, and not exclude or penalize classes of alternatives from consideration and recommendation,
  - Require that decisions are made based on an assessment of net beneficial effects, and
  - Establish a peer review process that is appropriate to the potential impacts of the project and seamlessly

---

Secretary issued proposed Principles and again sought public comment. 73 Fed. Reg. 52960 (September 12, 2008), with comments due by October 22, 2008.

integrated into the planning process.

- The National Objectives must be clarified in order to provide for efficient water resources planning.

  - o Although it's stated in the Proposal that the National Objective is to maximize economic, environmental and social benefits, the "modernizing" changes proposed clearly (and inappropriately) elevate environmental goals over economic and social ones. This approach would be especially detrimental to flood control, navigation and water supply projects.
  - o The Proposal also contemplates forcing multiple objectives in every water resources planning study. Requiring that every study include the multiple objectives of economic, environmental, and social benefits would lead to including features in projects where they have lesser returns than in other projects, programs or plans. Such a requirement is impractical, does not reflect the reality of project development, and would result in a waste of scarce resources.

- Collaborative planning, on a watershed basis, rather than project-by-project, should be encouraged. The Proposal fails to recognize that reality.

- The reality of cost-sharing introduced in WRDA 86 must be incorporated into the decision-making process. Non-federal sponsors, as well as federal planners, have a clear and important role in the decision process and must have a complete understanding of the process as they decide whether to expend financial resources for feasibility studies. Failure to recognize this reality results in a process which lacks transparency and predictability - critical defects in the Proposal.

- Vague, ambiguous, and confusing mandates and directives must be clarified or deleted.

III. Detailed Comments

A. Planning Principles

Principles governing water resources planning provide the

important framework for reviewing and analyzing potential projects. Such Principles should be clear and concise, and provide to agencies and the public the clarity needed for a cogent decision-making process. Thereafter, standards should be developed to implement the over-arching principles.

CEQ's proposal falls short of achieving this goal. First, the proposed laundry list of Principles (Proposal, pages 1-2) is overly broad, contradictory and unwieldy. Moreover, that list fails to make a distinction between principles and the implementing standards. For example, items such as "D. Utilize watershed and ecosystem based approaches," and "L. Ensure the planning process is fully transparent" would be more appropriate, provided they are clarified through further elaboration, in the implementing standards. In addition, items "E. Utilize best available science, practices, analytical techniques, procedures and tolls," and "F. Apply a level of detail commensurate with the potential decisions," are unduly vague so as to be confusing and impractical. The result would be a confusing system that would totally impede effective implementation by the agencies.

We strongly recommend that, in order to formulate a viable, long-term planning model, CEQ narrowly tailor its list of proposed Principles to include a concise set of principles useful and necessary for sound decision-making, that the agencies are able to effectively make operational. Such a list should be premised on the notion of net beneficial effects, whereby decision-makers would utilize cost-benefit analyses and other such analytical tools to compare various plans. The principles should ensure consideration of all alternatives, and those alternatives should be quantified. In addition, peer review is an important element of successful planning. It can add to the knowledge available to planners and is best integrated into the planning process on an ongoing basis, occurring seamlessly at key milestones throughout plan formulation, so as not to add additional time and expense to an already time consuming planning process.

B. Planning Objectives

Section 2031 of WRDA 2007 states that:

> 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. Section 2031 further provides that any revisions to the principles and guidelines address not only economic principles, but also public safety, the value of projects to low income communities, the interaction of a project with other water resources projects or programs within a region or watershed, the use of contemporary water resources, and evaluation methods that ensure water resources projects are justified by public benefits. Thus, WRDA 2007 contemplates water resources planning founded upon multiple national objectives: economic, environmental, and social well-being, including a public safety objective. Additionally, WRDA 2007 emphasizes a watershed approach to planning, recognizing the importance of collaborative planning and implementation.

CEQ's Proposal does not promote co-equal objectives in water resources planning, but instead elevates environmental considerations at the expense of economic benefits. This framework, in apparent contradiction of the directive in WRDA 2007, is reflected throughout the entire Proposal, starting on page one, the statement of National Objectives: [the primary objective is to] "protect and restore natural ecosystems and the environment while *encouraging* sustainable economic development." Similarly, the Objectives are to: avoid adverse impacts "whenever possible" and avoid "unwise use" of the floodplains. These directives are not predicated on an analysis of the net beneficial effects. Rather, they are vague and ambiguous terms, providing no basis for measurable criteria.

In order to develop a long-term planning model, we recommend that CEQ modify its Proposal to reflect a balanced approach to water resources planning. Recognizing the widespread public benefits of our nation's water resources infrastructure, a balanced approach would give due regard to the economic and human uses of water resources, along with environmental and economic considerations.

Similarly the Proposal fails to implement in a meaningful manner a watershed approach to Federal water resources planning as called for in WRDA 2007. Although the Proposal recognizes the importance of watershed planning (Chapter 2, 2.D.), watershed plans are then explicitly excluded from the process. (Chapter 2, 1.B.). It is unclear why a comprehensive planning framework would exclude watershed plans. This is particularly troubling at a time when our nation - both at the federal and state levels - is working toward the development of collaborative, watershed planning, rather than planning on a project basis.

C. Use of the Flood Plains

The Proposal directs the avoidance of the "unwise use" of the flood plains, flood-prone areas and other ecologically valuable areas. However, the Proposal does not set forth criteria for determining what would constitute "unwise use." Even more alarming, the Proposal appears to create a bias for selecting non-structural approaches thus limiting, in practice, a full consideration of all alternatives. (K. Recommend a Plan, page 23).

We appreciate that due consideration should be given to the risks and impacts inherent in the use of our floodplains; we also believe that the best approach to floodplain management will continue on a course that puts the principle of balancing economics and other factors at the center of floodplain decisions. Floodplain decisions (including permitting and licensing decisions) should be governed by consideration of the net beneficial effects of all feasible or practicable alternatives. This fundamentally rational approach is consistent with longstanding national policy of balancing economic and environmental values in decision making, and framing solutions guided by the standard of benefit-cost analysis.

D. Quantifying Monetary and Non-monetary Benefits and Costs

The Proposal requires that the costs and benefits of alternatives be quantified whenever possible. Similarly the Proposal would require monetizing non-market goods and services. These requirements are quite problematic. Initially, there is no agreed-upon basis or standard for assessing monetary benefits for environmental sustainability. Similarly, the assignment of criteria to various categories has not been articulated. Such a requirement will lead to further uncertainty in the planning process.

E. Mitigation

In the statement of Proposed National Objectives, the Proposal requires avoiding adverse impacts whenever possible and "fully mitigating" unavoidable impacts. Elsewhere the Proposal discusses mitigation when "practicable."

These conflicting standards will lead to uncertainty and confusion in the planning process. Moreover, such a distinction is unnecessary. The guidance to avoid, minimize and mitigate in NEPA should be sufficient to address any concerns in the planning process.

IV. Conclusion

As drafted, the Proposal fails to establish a clear, concise, and workable framework to guide the development of water resources projects. It is incoherent and inconsistent - and thus not implementable in a practical sense. It substantially fails to comply with the explicit directions in Section 2031 of WRDA 07 as well as the large body of previous law and policy related to water resources. It is written so as to not require or even encourage use of proven analytical tools to distinguish among alternatives. It limits in a preemptive manner certain categories of alternatives, and (even while encouraging "collaboration") seems to assume that water resources planning ***decisions*** are the exclusive prerogative of the Federal government thus not recognizing the keystone role played by non-Federal sponsors. Because of these critical and extensive failings, we recommend that this effort be put aside and restarted from the beginning.

Respectfully submitted,

Amy W. Larson

Amy W. Larson, Esq.
President
National Waterways Conference, Inc.
4650 Washington Blvd., Suite 608
Arlington, VA 22201
703-243-4090
info@waterways.org

Alliance of the Ports of Canada, the Caribbean, Latin America and the United States

AMERICAN ASSOCIATION OF PORT AUTHORITIES
1010 Duke Street • Alexandria, VA 22314
Phone: (703) 684-5700 • Fax: (703) 684-6321

Testimony of Michael Leone

Chairman of the Board of the
American Association of Port Authorities

Before the
United States House of Representatives
Transportation and Infrastructure Committee
Hearing: *"The Water Resources Development Act of 2007: A Review and Implementation in its Third Year"*

March 3, 2010 – 11:00 a.m.
Room 2167, Rayburn House Office Building

Chairman Oberstar, Ranking Member Mr. Mica and Members, I thank you for the opportunity to provide testimony to the Transportation and Infrastructure Committee on implementation of the Water Resources Development Act (WRDA) of 2007.

I am Michael Leone, Port Director of the Port of Boston, Massachusetts Port Authority. However, I appear today as Chairman of the Board of the American Association of Port Authorities which represents the interests of the leading U.S. public port authorities as well as public port authorities throughout the western hemisphere from Canada to Argentina including the Caribbean.

Since the WRDA bills are of critical importance to the health of the port industry, we appreciate the Committee's leadership and vigilance in providing oversight of the bill's implementation. In addition to authorizing the water infrastructure projects necessary for the nation to progress, the bill included many policy provisions and directives to the Corps of Engineers which directly impact project sponsors and those other parties with direct financial interest. I will direct my

comments today to several of the policy provisions included in the 2007 bill; specifically that set of provisions in Title II – General Provisions, which deal with Corps project development and review.

In the 2007 WRDA, the Congress directed a number of management measures aimed at improving the efficiency, reliability and responsiveness of the Corps project development and implementation processes. Today I would like to share our observations on the impact of the changes and pursue the question of meeting the intended goals.

Project Development and Review:
Two areas addressed by Sections 2034 — Independent Peer Review and 2045 — Project Streamlining should be given additional consideration by the Committee. Both sections deal with review of project reports at different times in the project development process and with varying scope. The issue that is not addressed is one of timing. As financial partners with the federal government in the project, public port authorities fully support a coordinated and concurrent review process whether conducted by the Corps or an independent entity.

Both parties need to have their financial and other best interests protected and assure that recommendations will result in sustainable environmental, economic and social benefits. We do not believe that the Corps' current review process is consistent with the intent of Sections 2034 and 2045 to assure both thorough and streamlined review of project reports. We believe that the review, as quality control, needs to start at the beginning of a study, involve the sponsor, district and higher headquarters and/or an independent entity and be continuous throughout the phases of study. There should be no surprises at the end of a cost-shared four- to six-year, multi-million dollar study effort. In my own case, Massport has invested many years and several million dollars towards a feasibility report to deepen Boston Harbor which so far has been rejected twice by the Corps HQ after review surfaced differences of opinion within the Corps on economic study parameters. There is no end in sight in pursuit of a Chief's report. In the meantime, we're losing business and jobs to Canadian ports.

We currently have many channel deepening studies underway throughout the country that are required to handle increasingly larger vessels and for the nation to remain competitive in global markets. Some have been stalled for many years and are not advancing because of technical or policy conflicts among reviewers, the study teams and the project sponsor. We are hopeful that when fully implemented, the revised project development and review sections of WRDA 2007 will result in improvements in the overall project delivery process. We ask the Committee to monitor that progress with us.

A related area of concern is that of centers of expertise. We are aware that this committee in WRDA 2007 and in previous bills has supported the concept and implementation of those centers. However, we have yet to see a viable and fully operational center of expertise for deep-draft navigation. We believe this is a critical missing link in fully implementing Section 2045 and streamlining the project delivery process and improving the quality of the planning and review processes. Attrition and downsizing have had a noticeable effect on the ability of Corps districts to perform all of the technical and economic studies necessary to formulate a project. Work is often spread among districts with mixed results.

We believe a deep-draft center of expertise with a dedicated full-time cadre of subject matter experts can pay many dividends in providing the most technically competent, efficient and cost effective project delivery system in a central location. The Corps Inland Navigation Center of Expertise has been fully operational since 1981 and provides world-class products to Corps districts and the navigation industry. So, we know what success looks like and would like to see that replicated for deep-draft navigation to the benefit of all four coasts. We are working with the Corps on the Center of Expertise concept through our Quality Partnership Initiative and ask for the committee's continued support as well.

Harbor Maintenance Tax:

Mr. Chairman, this committee has long recognized the importance of our nation's port system as an integral part of the transportation network and freight system. It has been very supportive of an adequate dredging program for all the nation's commercial ports, large and small. Sections 2005 and 2029 of WRDA 2007 speak to the need for adequate dredged material management, beneficial use of recovered sediments and use of multiple factors in judging the benefits to the

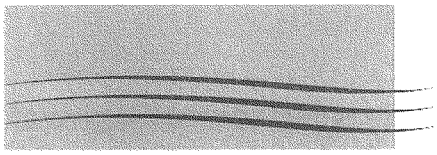
nation for investing in maintenance dredging. However, we believe it is time to revisit the now 24-year-old Harbor Maintenance Tax and Trust Fund authorized in the 1986 WRDA that is the sole source for reimbursement of federal maintenance dredging funding. Port and harbor users are paying for full maintenance and getting half in return. The tax revenue of about $1.4 billion annually would be adequate to maintain federal channels if fully applied.

Congressional intent notwithstanding, there is no provision in the original authorization to dedicate that tax revenue for its intended purpose. We ask the Committee to consider legislative provisions to insure full use of the tax for maintenance dredging in a subsequent WRDA, hopefully this year.

And finally, Mr. Chairman, I'd like to commend your leadership for Section 3091 of the 2007 WRDA which finally provided the resolution and direction necessary to get the construction started at Sault Saint Marie for the second lock. This is a project of national significance that directly impacts the Great Lakes and Saint Lawrence Seaway portions of the freight system. Our Great Lakes members look forward to the jobs, efficiencies and transportation cost savings the new project will bring.

Again, thank you for including the American Association of Port Authorities in these proceedings.

dbs02202010



WATER RESOURCES COALITION

TESTIMONY OF

THE WATER RESOURCES COALITION

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

U.S. HOUSE OF REPRESENTATIVES

ON

THE WATER RESOURCES DEVELOPMENT ACT OF 2007:

A REVIEW OF IMPLEMENTATION IN ITS THIRD YEAR

MARCH 3, 2010

ASCE
101 Constitution Ave., NW
Ste. 375 East
Washington, DC 20001
202-789-7850 (ASCE)

AGC
2300 Wilson Boulevard
Suite 400
Arlington, VA 22201
703-837-5435 (AGC)

TESTIMONY OF
THE WATER RESOURCES COALITION
BEFORE THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES
ON
THE WATER RESOURCES DEVELOPMENT ACT OF 2007:
A REVIEW OF IMPLEMENTATION IN ITS THIRD YEAR
MARCH 3, 2010

Mr. Chairman and Members of the Committee:

Good morning. My name is Brian Pallasch. I am co-chair of the Water Resources Coalition (WRC), and I am pleased to appear before you today as the committee examines the administration's implementation of the Water Resources Development Act of 2007.

We hope that this will be the first of many vigorous oversight hearings on the Corps of Engineers and its programs, which are critical to national defense, economic security, and environmental health.

WRC was established in 2007 to promote the development, implementation and funding of a comprehensive national water resources policy. It represents state and local governments, conservation, engineering and construction industries, ports, waterways and transportation services. WRC works to ensure that a comprehensive, national water resources policy is developed and funded to provide a sustainable, productive economy; healthy aquatic ecology, and public health and safety.

I. GENERAL OBSERVATIONS ON WRDA 2007

The U.S. Army Corps of Engineers (USACE) has made progress implementing WRDA 2007, but the process has been slow in places. The agency also put up procedural roadblocks to a fully transparent process.

In January 2009, shortly before the present administration took office, the Corps of Engineers disabled virtually its entire site on the Internet. The Corps removed many Internet pages dedicated to the development of WRDA implementation. This made it extremely difficult for interested parties to assess the actual progress toward completion of the law's many requirements. Lately, however, some of the data have reappeared on the Corps site.

Most importantly, title II of WRDA 2007 contained key policy requirements for the Corps to complete on independent peer review, dredged material disposal, technical assistance, access to water data, planning, shore protection projects, and other program requirements.

The Act contained 47 sections with 57 new policy tasks for the Corps. In its latest implementation guidance posted on the Internet,[1] the Corps reports that it has completed issuing guidance for 27 specific policy requirements in the Act—47 percent of the required workload.

II. ECONOMIC AND ENVIRONMENTAL PRINCIPLES AND GUIDELINES FOR WATER AND RELATED LAND RESOURCES IMPLEMENTATION STUDIES

In July 2009, the White House Council on Environmental Quality (CEQ) released for public comment its version of a document to revise and expand the scope of the "Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies," issued in 1983. The document is commonly known as the "Principles and Guidelines" or "P&G."

The proposal was required by section 2031 of WRDA 2007. Congress directed that it be carried out by the Secretary of the Army, but the CEQ announced in 2009 that it was overseeing the revisions. The CEQ notice stated that the administration "is considering developing uniform planning standards for the development of water resources that would apply governmentwide, including agencies other than the traditional water resources development agencies covered under the current Principles and Guidelines."

The 2009 proposal calls for the development of water resources projects to be based on the best available science, greater consideration of non-monetary benefits to select a project, improved transparency, and consideration of non-structural approaches that can solve the flooding problem without adversely impacting floodplain functions. The proposal would also expand the scope of the Principles and Guidelines to cover all federal agencies that undertake water resource projects.

The proposed revision recommends 13 "planning principles" for all federal agencies to observe when designing and constructing projects that could affect U.S. water resources. Among them are requirements to protect and restore natural ecosystems and the environment while encouraging sustainable economic development; to "account for ecosystem services"; to "account for the benefits and costs in appropriate monetary and non-monetary terms"; and to "incorporate public safety."

The WRC believes the current proposal needs to be reworked.

---

[1] The Corps report can be found at http://www.usace.army.mil/CECW/Documents/cecwp/leg_manage/wrda2007/wrda07_imp.pdf.

A. The proposal speaks to the need to "incorporate public safety" into the planning process, but it does not contain any discussion of obvious ways to achieve the goal. Specifically, nothing in the proposal identifies the unequivocal need for resiliency in the design and construction of federal civil engineering projects.

In engineering terms, resiliency is the ability of an infrastructure system to recover its function after it is damaged by a natural disaster or a terrorist attack.

Sustainability and resiliency must be an integral part of improving the nation's infrastructure. Today's infrastructure—especially flood control systems—must be able to respond to, and change with, dynamic conditions.

Infrastructure systems are designed to protect and improve the natural environment and carry on even after natural or man-made disasters. Resilience, implemented through a risk-management approach, can be built into infrastructure systems by taking a comprehensive approach at identifying potential hazards; assessing the likelihood of occurrence; identifying methods of recovery; recognizing system interdependencies and critical connections; and encouraging ongoing training and research for engineers and owners of infrastructure.

By taking these steps, disasters will pose less of a threat to public health and will minimize disruptions to our economy. The federal government has a clear duty to provide infrastructure systems that will last for future generations, and the guidelines need to reflect the paramount importance of infrastructure resiliency.

Although the proposal correctly identifies structural and non-structural methods (including political and legal policies designed to shift human behavior in favor of greater safety measures), the revision does not recognize an inherent weakness in nonstructural approaches to ecosystem engineering, namely the ability of people to accept far greater risks for themselves and their property than government generally condones. This needs to be discussed more fully in the guidelines.

B. The proposal's discussion of the use of cost-benefit analyses (CBA) in the development of water-resources projects is flawed. The CEQ needs to explain in some detail how it will require CBA to be employed, especially how it will be possible to monetize the social or environmental benefits of projects and how these benefits can be compared to economic benefits and public safety.

Similarly, we are concerned with the effort to monetize new welfare "benefits" to society. This appears to be a somewhat a risky undertaking when it comes to deciding on the value of economic development versus environmental benefits.

CBA seeks to instruct current decisionmaking processes. It is ill suited to informing contemporary policymakers about intergenerational issues—the *prospective* ecological

needs of a society, that is, the plants, animals, and ecosystems that future generations may value.

As with all economic approaches to environmental problems, the use of CBA generally is most appropriate in those cases where economic efficiency, not environmental protection, is the ultimate policy goal. Thus cost-benefit analyses may continue to take the government down the present path of emphasizing the economic welfare to the nation of water resources projects while leaving environmental amenities vulnerable due to the inability to monetize their welfare benefits adequately during the project-planning stage. We are equally concerned that the emphasis on CBA will be used by the Office of Management and Budget to set budget policies. For example, OMB has set a minimum cost-benefit ratio to be eligible to be considered for inclusion in the President's budget recommendations for the Corps of Engineers. That is an inappropriate use of the CBA and should not be allowed under the P&G.

Additionally, the WRC believes the proposal that was issued for comment in December of 2009 fails to meet the intent of congressional directives. The administration should substantially revised the USACE effort to update the P&G to ensure that the document reflects national priorities, encourages economic development, and protects the environment by maximizing sustainable economic development and seeking to avoid the unwise use of floodplains and flood-prone areas.

III. LEVEE SAFETY

Nearly five years after the devastation of Hurricane Katrina, and one year after the release of the National Committee on Levee Safety's Recommendations Congress has still not acted to create a National Levee Safety Program for federal or state levees. While the U.S. Army Corps of Engineers has begun work, there is no comprehensive, dependable catalog of the location, ownership, condition, hazard potential of levees in the United States. Flooding from Hurricane Katrina, which devastated the city of New Orleans in August 2005, demonstrated the need for consistent, up-to-date standards for levees based upon reliable engineering data on their location, function, and condition. Title IX of WRDA 2007 created the "National Levee Safety Program," but a robust, nationwide levee safety program remains an aspiration rather than a reality today.

In title IX, Congress established a "Committee on Levee Safety," which was to report to Congress by May 8, 2008, on the necessary elements of a levee safety program. The Committee submitted its "interim" report with the Office of Management and Budget (OMB) in January 2009.

The Committee made a number of important recommendations, including measures to create a hazard potential classification system as a first step in identifying and prioritizing hazard in levee-protected areas; to develop national levee safety standards that ensure the best engineering practices are available and implemented throughout the nation at all levels of government; to develop risk guidelines in order to reduce identified risks; and address growing concern over liability for damages resulting from levee

failures through measures aimed at reducing the potential liability of engineering firms and government agencies that perform engineering services for levee systems (e.g. inspections, evaluations, design, construction administration, certification, or flood control).

Regardless of the status of the Committee's report, Congress should enact legislation to establish a national levee safety program that is modeled on the successful National Dam Safety Program and that adopts many of the recommendations of the Committee on Levee Safety. In a related area, Congress should examine the Federal Emergency Management Agency "certification" rule for levees, which requires the endorsement of a Professional Engineer, requires a judgment that a levee meets a minimum level of flood protection under the National Flood Insurance Program (NFIP). In turn, FEMA must verify that all levees recognized as providing protection from the base flood meet the requirements outlined in 44 C.F.R. 65.10 (b). Congress should direct FEMA to amend the rule to change the requirement from certification to "NFIP evaluation." The term NFIP evaluation is preferred over the present "certification" requirement to make it clear that an evaluation is merely a judgment that the levee system is in conformity with the requirements of NFIP regulations.

IV. WATERSHEDS AND FLOODPLAINS

The WRC supports basin-wide water resources management. The nation must plan and regulate water on a watershed basis to ensure the integration of programs and goals across political boundaries. WRC believes that effective watershed management is facilitated when the government, the public and the private sector work collaboratively on this issue. Federal legislation defining the goals and standards for watershed managers should permit flexibility and accommodate regional needs.

Furthermore, the diverse nature of these problems suggests that top-down management and standard setting is an inappropriate way to deal with them. Using the watershed approach, all levels of government, the public and private industry are encouraged to participate in the decision-making and implementation process. In this way, management actions which reflect local and regional viewpoints are inherently incorporated in watershed policy.

Additionally, WRC supports the protection of natural floodplains and the concept of building disaster-resistant communities consistent with sustainable development while holding paramount the public's safety, health, and welfare. We urge governments at all levels to adopt proactive floodplain management policies, particularly in vulnerable coastal lowlands and river bottoms, and supports creative partnering between federal, state and local governments to adopt floodplain management policies and to fund the design and implementation of floodplain management policies and flood mitigation projects in a timely manner.

We believe the development or significant redevelopment of communities below sea level or in high-risk, flood-prone areas is inherently unsustainable and puts the public at unnecessary risk for loss of life and property.

Potential floodplain management tools include education and public information, land-use management, such as zoning, early warning systems and possible reservoir pre-releases, flood-proofing and elevating buildings, acquisition and relocation options, preservation of natural floodplains and open space, and emergency preparedness. Potential structural flood mitigation tools include levees, flood control dams, urban detention and retention basins, channelization, flood walls and sea walls. The multiple-use of flood prone areas and flood mitigation facilities should be pursued, including river restoration, wetland restoration, aquifer recharge, improvements in habitat, ecosystems, and water quality, recreation and open space use, and incorporation of floodplains into comprehensive watershed management programs.

Development and associated infrastructure in flood-prone areas has increased rapidly as people are attracted to historically fertile floodplains and coastal areas. Even though the benefits of preserving the natural floodplains as flood storage areas and wildlife habitat have been recognized, the floodplains continue to be developed and new inhabitants are subjected to periodic flooding and related devastation, as shown by Hurricanes Katrina and Rita. People living and working in flood prone areas often have developed a false sense of security. Once a flood occurs, residents and businesses often expect government to reduce or eliminate the risk of flooding through large capital projects. These populations need the protection of an efficient floodplain management program implemented before the flood occurs. By recognizing the likelihood of future flooding and the beneficial aspects of the natural floodplain, areas can be protected and communities can become disaster resistant.

V. WATER RESOURCE PRIORITIES REPORT

Given the persistence of serious floods over the past few years and the prospect of an increase of the risks associated with flooding, the failure to implement Section 2032 is unacceptable. However, this inaction is due to the failure of Congress to appropriate funds the Corps needs and has requested . This section asks for a report on the vulnerability of the United States to flooding, an assessment the extent to which Federal programs either are reducing risk or may be adding to risk, and proposals to change Federal programs so they reduce risks to human life and property in different regions of the country.

The need for risk assessment – which the title of this section inadequately reflects – is obvious. Section 2032 of WRDA 2007 provides the Corps with the direction and authority to look at risk assessment and risk reduction in the broadest and yet most practical approach imaginable. The implementation of this provision is long overdue.

VI. SEDIMENT MANAGEMENT

Section 2037 of WRDA 2007 made a major step in the right direction by providing the Corps of Engineers with a regional sediment management authority to accomplish the objectives of coordinating projects and their impacts. However, it is severely limited in that it only applies (a) where there is a federal navigation project, and (b) where there is

sufficient sand available from the dredging of that project to meet the regional water resource planning and management needs. This restriction hamstrings non-federal interests and the Corps in making sure the multiple purposes of reducing coastal hazards, using adaptive management for existing projects, coordinating new and existing water resource projects to save significant taxpayer costs, and assuring that the impacts of planned or existing projects have a beneficial, rather than a harmful, impact on environmental resources. The restriction contained in Section 2037 also limits affected stakeholders from having input into the planning and management of federal water resource projects.

The Corps issued guidance on the program in April 2008.

VII. NATIONAL SHORELINE EROSION CONTROL DEVELOPMENT PROGRAM

This program was established by Section 227 of WRDA 1992. It is designed to test new technologies that will improve or reduce the cost of federal beach restoration projects. There are testing sites in Cape May Point, NJ; Ventura, CA; Miami-Dade County, FL; Hawaii; Jefferson County, TX; two in Great Lakes states; and two more in California.

Section 2038 of WRDA 2007 contains important modifications to the program. For example, the original "Section 227" program did not permit the Corps to cost-share these projects with local governments. In addition, where the technology was demonstrated to work, Section 227 did not permit the technology to be seamlessly integrated into an existing Federal beach restoration projects. These weaknesses have been corrected in Section 2038.

Section 2038 moves this program under the Section 103 Continuing Authorities Program for small shoreline protection projects. The more pressing issue is the lack of implementation guidance for Section 2038. The old Section 227 program apparently remains in force until the guidance is adopted by the Corps. This leaves both the Corps' Coastal Hydraulics Laboratory, which administers the program, and local project sponsors and firms that wish to bid in the competitive process for designs of new technology in limbo.

The changes made in Section 2038 were designed to make this program more attractive to Federal taxpayers and local sponsors Apparently the Corps of Engineers feels this is a low-priority issue and has, therefore, issued no guidance. However, this is an important program. Coastal areas of the nation are at risk from serious storms that endanger lives and property. Europe, Australia, New Zealand and other nations have done far more that the United States to test new beach restoration technologies to fulfill their coastal stewardship responsibilities. They have done far more than the U.S. to test new technologies that will reduce the cost and improve the effectiveness of beach restoration projects. We cannot afford the lack of implementation guidance for Section 2038 to stall this critical program.

VIII. PEER REVIEW

Peer review is a documented, critical review of a specific agency scientific or technical work product. The review is conducted by qualified individuals (or organizations) who are independent of those who performed the work, and who are collectively equivalent in technical expertise to those who performed the original work.

Peer review is conducted to ensure that activities are technically supportable, competently performed, properly documented, and consistent with established quality criteria. It involves an in-depth assessment of the assumptions, calculations, extrapolations, alternate interpretations, methodology, acceptance criteria, and conclusions pertaining to the specific major scientific or technical work product and of the documentation that supports them. Peer review may provide an evaluation of a subject where quantitative methods of analysis or measures of success are unavailable or undefined such as research and development.

In 2006, the Civil Works Directorate of the U.S. Army Corps of Engineers (USACE) requested the American Society of Civil Engineers (ASCE) and ASCE's External Review Panel (ERP) to conduct a formal analysis of the Corps' peer review practices for engineering documents prepared in the feasibility study phase of water resources projects authorized by Congress. The ERP was formed to provide an independent review of the Corps' Interagency Performance Evaluation Task Force charged with assessing the Southeast Louisiana Hurricane Protection System (HPS) during and following Hurricane Katrina.

ASCE concluded that the USACE review practices did not protect the public health, safety, and welfare against the catastrophic failure of water resources projects designed and constructed by the Corps because the Corps reviews 1) were discretionary; 2) were not triggered by sound engineering principles; 3) did not have a mechanism to gauge their fidelity; and 4) contained vague processes for selecting reviewers. ASCE recommended that the Corps modify the circulars and establish peer review policies in accord with those recommendations.

In section 2034 of WRDA 2007, Congress directed the Corps of Engineers to conduct independent peer reviews of a limited number of water resources and other engineering projects. The mandatory reviews are to be carried out at projects that cost a minimum of $45 million, whenever a governor of a state requests an independent peer review, or whenever the Secretary determines that a project is controversial over the scope of the project and other considerations, including projects expected to have "minimal life safety risk."

In January 2010, USACE issued an "engineering circular" entitled Civil Works Review Policy pursuant to section 2034 of WRDA 2007. The document replaces the 2005 policy that was criticized by ASCE. Although the new policy is faithful to the letter of section 2034 and an improvement over the earlier version, it contains the unjustified exemptions added by Congress and follows a process like that identified in our previous discussion of the P&G that could potentially undermine the integrity of the review process and thus result in projects that threaten public safety.

Section 2034 allows too many USACE projects to escape rigorous independent peer review by outside experts intended to protect public safety. Section 2034 should be amended to eliminate the exceptions to outside peer review. The law should require an independent peer review for *every* project—regardless of its cost or controversial nature— where performance is critical to the public health, safety and welfare; where reliability of performance under emergency conditions is critical; when using innovative materials, techniques, or design methods; where redundancy in the design is lacking; or that has unique construction sequencing or a short design construction schedule.

IX. CENTERS OF PLANNING EXPERTISE

In 2003, the Corps established via an internal directive six Centers of Planning Expertise that were intended to provide specialized talent to enhance and supplement the capabilities of districts. Since 2006, coastal communities have made extensive use of the National Planning Center for Coastal & Storm Damage based in the North Atlantic Division.

Just as the other Centers, what we refer to as the Coastal PCX operates as a virtual center with a "staff" composed of a few top experts in that Division who can call on the expertise of other specialists in Divisions, Districts, and other offices and centers of the Corps throughout the nation. This is critical given the fact that not every Corps district located along the coast can have the staff time or the expertise to conduct feasibility studies in a manner that meets the standards required by WRDA 2007 and internal Corps directives that preceded that legislation.

As important as these Centers are, they operate without a budget. The Coastal PCX uses Division funds as well as small amounts from the feasibility studies for which their help is called just to meet travel expenses. The lack of funding also means that the PCX is unable in most cases to use District experts because District personnel are paid out of the studies being conducted by that District.

Frankly, the Coastal PCX has operated without the level of support WRC would like to see from the Corps leadership. Therefore, we were pleased when Section 2033(e) of WRDA 2007 provided legislative authorization for the Centers of Expertise. Unfortunately, the only "implementation guidance" for this provision was a March 12, 2009, letter from the Assistant Secretary of the Army for Civil Works to the Deputy Commanding General for Civil and Emergency Operations requesting an "update briefing on how each of the Centers is currently operating and an assessment of their capabilities, needed improvements, and further funding requirements."

This lack of effort is symptomatic of the difficulty Corps leadership has in understanding the need for these Centers of Expertise. For at least the Coastal PCX, it is a need that goes far beyond their role in the prescribed internal review process. Feasibility studies for beach projects take a minimum of 10 years before internal, let alone, external reviews. The Coastal PCX has been involved in studies ranging to Massachusetts to North Carolina and onto Louisiana, Texas and California. Without their active assistance, the

time and cost of repairing mistakes in these studies that could have been avoided is daunting to local sponsors at best and a deal-killer at worst.

Unfortunately, not only is Corps Headquarters not fully aware of the role of the Coastal PCX, but Corps Districts are extremely reluctant to ask for their assistance. In more than once case, Districts have resisted the request of local study sponsors to have the Coastal PCX meet with them to discuss the progress of the study and issues that may be raised during the review process. The process for explaining to the Divisions and Districts the role of these Centers, the reward they will get when they ask for assistance and the means by which they and/or the local sponsors can make that request should be the meat of the Section 2033(e) implementation guidance, not a letter from the ASA (CW) asking for an update on the Centers.

Thank you, Mr. Chairman. This concludes our testimony. I would be happy to answer any questions that you may have.

Statement of
The American Shore & Beach Preservation Association
Submitted to the
Committee on Transportation and Infrastructure
U.S. House of Representatives
On the
Water Resources Development Act of 2007:
A Review of Implementation in its Third Year
March 3, 2010

Chairman Oberstar and Ranking Member Mica, on behalf of the American Shore & Beach Preservation Association, we thank you for inviting our comments on issues regarding the implementation of WRDA 2007. ASBPA is a part of the Water Resources Coalition, which is also testifying today. ASBPA's testimony is meant to highlight some of the provisions of WRDA 2007 which have a significant impact on the coast, which is where a majority of Americans live and whose effective stewardship is so critical to our nation's future.

It is hard to believe that over two years have passed since the enactment of this historic legislation. As this Committee knows, water resources are vital to a robust national economy, the protection of Americans from storms, floods and other disasters, and the enhancement of our precious environmental resources. Therefore, we are extremely grateful that the Committee is taking this opportunity to provide oversight on this issue, and hope that you will find time to continue to use public forums such as this to determine how the decisions of Congress are being carried out. We also would be seriously remiss if we did not publicly express our gratitude to both of you and to all the members of this committee and its professional staff of the committee for being so supportive of the Federal coastal restoration program over the past 25 or more years.

While we and our water resources allies have concerns about the pace of the Corps' issuance of implementation guidance, ASBPA is also aware of two factors to be considered. First, Corps Headquarters has a very limited complement of staff. While some on this Committee might disagree with our view, our day-to-day dealings with Corps Headquarters staff have made it clear that the individuals whose responsibility it is to interpret policy, issue regulations, and/or improve the ability of the Corps to communicate internally and externally are assigned to two or three simultaneous areas of responsibility. This is a direct result of the lack of support for funding the Corps' General Expense account.

Second, in some cases, Congress has not provided the Corps with the funding to implement WRDA 2007 policy directives.

Section 2038: National Shoreline Erosion Control Development Program
Section 227 of WRDA 1992 created a program to test new technologies that will improve the performance of Federal beach restoration projects and reduce their cost. Section 2038 contains important modifications to that program. For example, the original "Section 227" program did not permit the Corps to cost-share these projects with local governments. In addition, where the tested technology has worked, Section 227 did not permit the technology to be seamlessly integrated into an existing Federal beach restoration project. These and other weaknesses have been corrected in Section 2038. The changes were designed to make this program more attractive to local sponsors and less costly to U.S. taxpayers. However, they exist only in legislative language approved by Congress and signed by the President. They do not exist in actuality. We cannot afford to let the lack of Section 2038 implementation guidance stall this critical program.

Section 2033(e): Centers of Planning Expertise
The Corps established via an internal directive in 2003 six Centers of Planning Expertise that were intended to provide specialized talent, expertise in the various aspects of their mission, and to enhance and supplement the capabilities of districts. They are also very involved in the internal and external review process for proposed projects.

Since 2006, ASBPA and its members have made extensive use of the National Planning Center for Coastal & Storm Damage based in the North Atlantic Division. As with the other Centers, what we refer to as the Coastal PCX operates as a virtual center with a "staff" composed of a few top experts in that Division who can call on the expertise of other specialists in Divisions, Districts, and other offices and centers of the Corps throughout the nation. Coastal restoration studies take at least 10 years to complete. Errors that can be caught and improvements that can be made prior to review can be avoided and corrected with the assistance of the PCX. Without the active intervention of the Coastal PCX, the time and taxpayer cost of repairing mistakes and resolving difficult issues related to those studies would have been daunting to local sponsors at best and a deal-killer at worst.

Unfortunately, the only "implementation guidance" for this provision was a March 12, 2009, letter from the Assistant Secretary of the Army for Civil Works to the Deputy Commanding General for Civil and Emergency Operations requesting an "update briefing on how each of the Centers is currently operating and an assessment of their capabilities, needed improvements, and further funding requirements."

This embarrassing effort is symptomatic of the failure to appreciate how critical the Centers of Expertise are to the Corps' civil works program. Implementation guidance should be crafted to help make Districts and local sponsors aware of the Centers and how to use them. This will require a level of effort that is more than a letter from the ASA(CW) asking for an update on the Centers.

Section 2032: Water Resource Priorities Report
Given the persistence of serious floods over the past few years and the prospect of increased risks associated with flooding, ASBPA has been concerned about the Corps' failure to implement the required Water Resource Priorities Report. Section 2032 mandates a report on the vulnerability of the United States to flooding, an assessment the extent to which Federal programs either are reducing risk or may be adding to risk, and proposals to change Federal programs so they reduce risks to human life and property in different regions of the country.

The need for risk assessment – which the title of this section does not adequately describe – is obvious. Section 2032 provides the Corps of Engineers with the direction and authority to examine risk assessment and risk reduction in the broadest and yet most practical approach imaginable. Unfortunately, the Corps has requested but not received funding from Congress to do the report.

Section 2031: Principles and Guidelines
ASBPA has filed extensive comments on the draft P&G revision released nearly a month ago by the Council on Environmental Quality. Not only do we conclude that the draft is seriously flawed and must undergo a major overhaul, but we also believe the CEQ-led effort is not consistent with the intent of Congress as contained in Section 2031 of WRDA 2007. That section requires that all water resources projects should reflect national priorities, encourage economic development, and protect the environment. As such, Section 2031 recommends a more equitable treatment of benefits than is proposed in the CEQ Draft.

Thank you once again for this opportunity to submit our views to the Committee. We will be happy to respond to your questions and comments.

Founded in 1926, the ASBPA promotes the integration of science, policies and actions that maintain, protect and enhance the coasts of America. For more information on ASBPA, go to www.asbpa.org, facebook or www.twitter.com/asbpa. For information about this statement, contact president@asbpa.org or beaches@asbpa.org.

○