

107TH CONGRESS
1ST SESSION

S. 646

To reform the Army Corps of Engineers.

IN THE SENATE OF THE UNITED STATES

MARCH 29, 2001

Mr. FEINGOLD introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To reform the Army Corps of Engineers.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Corps of Engineers Reform Act of 2001”.

6 (b) TABLE OF CONTENTS.—The table of contents of
7 this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Findings and purposes.
- Sec. 3. Definition of Secretary.

TITLE I—PROJECT PLANNING REFORM

- Sec. 101. Principles and guidelines.
- Sec. 102. Stakeholder advisory committees.
- Sec. 103. Independent review.
- Sec. 104. Public access to information.

Sec. 105. Benefit-cost analysis.

Sec. 106. Project criteria.

TITLE II—MITIGATION

Sec. 201. Full mitigation.

Sec. 202. Concurrent mitigation.

Sec. 203. Mitigation tracking system.

1 **SEC. 2. FINDINGS AND PURPOSES.**

2 (a) FINDINGS.—Congress finds that—

3 (1) the Corps of Engineers is the primary Fed-
4 eral agency responsible for developing and managing
5 the harbors, waterways, shorelines, and water re-
6 sources of the United States;

7 (2) the scarcity of Federal resources requires
8 more efficient use of Corps of Engineers funding
9 and greater oversight of Corps of Engineers anal-
10 yses;

11 (3) demand for recreation, clean water, and
12 healthy wildlife habitat must be reflected in the
13 Corps of Engineers project planning process;

14 (4) the social and environmental impacts of
15 dams, levees, shoreline stabilization structures, and
16 other projects must be adequately considered and
17 fully mitigated; and

18 (5) affected interests must play a larger role in
19 the oversight of Corps of Engineers project develop-
20 ment.

21 (b) PURPOSES.—The purposes of this Act are—

1 (1) to ensure that the water resources invest-
2 ments of the United States are economically justified
3 and enhance the environment;

4 (2) to provide independent review of Corps of
5 Engineers feasibility studies, general reevaluation
6 studies, and environmental impact statements;

7 (3) to ensure that mitigation for Corps of Engi-
8 neers projects is successful and cost-effective;

9 (4) to enhance the involvement of affected in-
10 terests in Corps of Engineers feasibility studies, gen-
11 eral reevaluation studies, and environmental impact
12 statements;

13 (5) to revise Corps of Engineers planning prin-
14 ciples to meet the economic and environmental needs
15 of riverside and coastal communities;

16 (6) to ensure that environmental analyses are
17 considered to be co-equal to economic analyses in the
18 assessment of Corps of Engineers projects, recog-
19 nizing the need for sound science in the evaluation
20 of the impacts on the health of aquatic ecosystems;
21 and

22 (7) to ensure that the Corps of Engineers is
23 making appropriate, up-to-date calculations in con-
24 ducting cost-benefit analyses of Corps of Engineers
25 projects.

1 **SEC. 3. DEFINITION OF SECRETARY.**

2 In this Act, the term “Secretary” means the Sec-
3 retary of the Army.

4 **TITLE I—PROJECT PLANNING**
5 **REFORM**

6 **SEC. 101. PRINCIPLES AND GUIDELINES.**

7 Section 209 of the Flood Control Act of 1970 (42
8 U.S.C. 1962–2) is amended to read as follows:

9 **“SEC. 209. CONGRESSIONAL STATEMENT OF OBJECTIVES.**

10 “(a) IN GENERAL.—It is the intent of Congress that
11 economic development and environmental protection and
12 restoration be co-equal goals of water resources planning
13 and development.

14 “(b) REVISION OF PRINCIPLES AND GUIDELINES.—
15 Not later than 1 year after the date of enactment of the
16 Corps of Engineers Reform Act of 2001, the Secretary
17 shall revise the principles and guidelines of the Corps of
18 Engineers for water resources projects—

19 “(1) to provide for the consideration of ecologi-
20 cal restoration costs under Corps of Engineers eco-
21 nomic models;

22 “(2) to incorporate new techniques in risk and
23 uncertainty analysis;

24 “(3) to eliminate biases and disincentives for
25 nonstructural flood damage reduction projects;

26 “(4) to incorporate new analytical techniques;

1 “(5) to encourage, to the maximum extent prac-
2 ticable, the restoration of aquatic ecosystems; and

3 “(6) to ensure that water resources projects are
4 justified by benefits that accrue to the public at
5 large and not only to a limited number of private
6 businesses.

7 “(c) UPDATE OF GUIDANCE.—The Secretary shall
8 update the Guidance for Conducting Civil Works Planning
9 Studies (ER 1105–2–100) to comply with this section.”.

10 **SEC. 102. STAKEHOLDER ADVISORY COMMITTEES.**

11 (a) IN GENERAL.—Upon receipt of a written request
12 by any person or governmental entity, the Secretary shall
13 establish, for each water resources project that is author-
14 ized or substantially modified after the date of enactment
15 of this Act, a stakeholder advisory committee to assist the
16 Secretary in the development of feasibility studies, general
17 reevaluation studies, and environmental impact state-
18 ments for the project.

19 (b) DURATION OF REVIEWS.—A stakeholder advisory
20 committee established for a project under this section may
21 provide advice to the Secretary during planning and de-
22 sign of the project, beginning with the initiation of the
23 draft feasibility study for the project and ending with the
24 issuance of the draft environmental impact statement for
25 the project.

1 (c) MEMBERSHIP.—

2 (1) IN GENERAL.—A stakeholder advisory com-
3 mittee established for a project under this section
4 shall be composed of—

5 (A) representatives of—

6 (i) State and local agencies;

7 (ii) tribal organizations;

8 (iii) public interest groups;

9 (iv) industry, scientific, and academic
10 organizations; and

11 (v) Federal agencies; and

12 (B) other interested citizens.

13 (2) BALANCE.—The membership shall rep-
14 resent a balance of the social, economic, and envi-
15 ronmental interests in the project.

16 (d) ROLE.—A stakeholder advisory committee estab-
17 lished for a project under this section shall advise the Sec-
18 retary but shall not be required to make a formal rec-
19 ommendation.

20 (e) COSTS.—The costs of a stakeholder advisory com-
21 mittee established for a project under this section—

22 (1) shall be a Federal expense;

23 (2) shall not exceed \$250,000; and

24 (3) shall be considered to be part of the total
25 cost of the project.

1 (f) APPLICABILITY OF FEDERAL ADVISORY COM-
2 MITTEE ACT.—The Federal Advisory Committee Act (5
3 U.S.C. App.) shall apply to a stakeholder advisory com-
4 mittee established under this section.

5 **SEC. 103. INDEPENDENT REVIEW.**

6 (a) PROJECTS SUBJECT TO INDEPENDENT RE-
7 VIEW.—

8 (1) IN GENERAL.—The Secretary shall ensure
9 that feasibility studies, general reevaluation studies,
10 and environmental impact statements for each water
11 resources project described in paragraph (2) are
12 subject to review by an independent panel of experts
13 established under this section.

14 (2) PROJECTS SUBJECT TO REVIEW.—A project
15 shall be subject to review under paragraph (1) if—

16 (A) the project has an estimated total cost
17 of more than \$25,000,000, including mitigation
18 costs;

19 (B) the Governor of an affected State de-
20 scribed in paragraph (4) requests the establish-
21 ment of an independent panel of experts for the
22 project;

23 (C) the Director of the United States Fish
24 and Wildlife Service determines that the project
25 is likely to have a significant adverse impact on

1 fish or wildlife after implementation of proposed
2 mitigation plans;

3 (D) the head of a Federal agency charged
4 with reviewing the project determines that the
5 project is likely to have a significant adverse
6 impact on environmental, cultural, or other re-
7 sources under the jurisdiction of the agency
8 after implementation of proposed mitigation
9 plans; or

10 (E) the Secretary determines that the
11 project is controversial under paragraph (3).

12 (3) CONTROVERSIAL PROJECTS.—

13 (A) DETERMINATION BY THE SEC-
14 RETARY.—Upon receipt of a written request by
15 an interested party or on the initiative of the
16 Secretary, the Secretary shall determine wheth-
17 er a project is controversial for the purposes of
18 paragraph (2)(E).

19 (B) CRITERIA.—The Secretary shall deter-
20 mine that a project is controversial if the Sec-
21 retary finds that—

22 (i) there is a significant public dispute
23 as to the size, nature, or effects of the
24 project; or

1 (ii) there is a significant public dis-
2 pute as to the economic or environmental
3 costs or benefits of the project.

4 (4) AFFECTED STATE.—An affected State re-
5 ferred to in paragraph (2)(B) means a State that—

6 (A) is located at least partially within the
7 drainage basin in which the project is located;
8 and

9 (B) would be economically or environ-
10 mentally affected as a consequence of the
11 project.

12 (b) OFFICE OF INDEPENDENT REVIEW.—

13 (1) ESTABLISHMENT.—There is established in
14 the Office of the Assistant Secretary of the Army for
15 Civil Works an Office of Independent Review (re-
16 ferred to in this section as the “Office”).

17 (2) DIRECTOR.—

18 (A) APPOINTMENT.—The head of the Of-
19 fice shall be the Director of the Office of Inde-
20 pendent Review (referred to in this section as
21 the “Director”), who shall be appointed by the
22 Secretary for a term of 3 years.

23 (B) SELECTION.—

1 (i) QUALIFICATIONS.—The Secretary
2 shall select the Director from among indi-
3 viduals who are distinguished scholars.

4 (ii) CONSIDERATION OF REC-
5 OMMENDATIONS.—In making the selection,
6 the Secretary shall consider any rec-
7 ommendations made by the Inspector Gen-
8 eral of the Army.

9 (C) LIMITATION ON APPOINTMENTS.—The
10 Secretary shall not appoint an individual to
11 serve as the Director if the individual has a fi-
12 nancial or close professional association with
13 any organization or group with a strong finan-
14 cial or organizational interest in an ongoing
15 water resources project.

16 (D) TERMS.—An individual may not serve
17 for more than 1 term as the Director.

18 (3) DUTIES.—The Director shall establish a
19 panel of experts to review each project subject to re-
20 view under subsection (a).

21 (c) ESTABLISHMENT OF PANELS.—

22 (1) IN GENERAL.—As soon as practicable after
23 the Secretary selects a preferred alternative for a
24 project subject to review under subsection (a), the

1 Director shall establish a panel of experts to review
2 the project.

3 (2) MEMBERSHIP.—A panel of experts estab-
4 lished by the Director for a project shall be com-
5 posed of not fewer than 5 nor more than 9 inde-
6 pendent experts who represent a balance of areas of
7 expertise, including biology, engineering, and eco-
8 nomics.

9 (3) LIMITATION ON APPOINTMENTS.—The Di-
10 rector shall not appoint an individual to serve on a
11 panel of experts for a project if the individual has
12 a financial or close professional association with any
13 organization or group with a strong financial or or-
14 ganizational interest in the project.

15 (4) CONSULTATION.—The Director shall con-
16 sult with the National Academy of Sciences in devel-
17 oping lists of individuals to serve on panels of ex-
18 perts under this section.

19 (5) COMPENSATION.—An individual serving on
20 a panel of experts under this section shall be com-
21 pensated at a rate of pay to be determined by the
22 Secretary.

23 (6) TRAVEL EXPENSES.—An individual serving
24 on a panel of experts under this section shall receive
25 travel expenses, including per diem in lieu of subsist-

1 ence, in accordance with sections 5702 and 5703 of
2 title 5, United States Code.

3 (d) DUTIES OF PANELS.—A panel of experts estab-
4 lished for a project under this section shall—

5 (1) review each feasibility study, general re-
6 evaluation study, and environmental impact state-
7 ment prepared for the project;

8 (2) assess the adequacy of the economic models
9 used by the Secretary in reviewing the project to en-
10 sure that—

11 (A) multiple methods of economic analysis
12 have been used; and

13 (B) any regional effects on navigation sys-
14 tems have been examined;

15 (3) assess the adequacy of the environmental
16 models and analyses used by the Secretary in re-
17 viewing the project;

18 (4) receive from the public, and review, written
19 and oral comments of a technical nature concerning
20 the project; and

21 (5) submit to the Secretary a report containing
22 the panel's economic, engineering, and environ-
23 mental analysis of the project, including the panel's
24 conclusions on the feasibility studies, general re-
25 evaluation studies, and environmental impact state-

1 ments for the project, with particular emphasis on
2 matters of public controversy.

3 (e) DURATION OF PROJECT REVIEWS AND PANEL.—

4 A panel of experts shall—

5 (1) complete review of a project under this sec-
6 tion not later than 180 days after the date of estab-
7 lishment of the panel; and

8 (2) terminate upon submission of a report to
9 the Secretary under subsection (d)(5).

10 (f) RECOMMENDATIONS OF PANEL.—

11 (1) CONSIDERATION BY SECRETARY.—After re-
12 ceiving a report on a project from a panel of experts
13 under this section and before entering a final record
14 of decision for the project, the Secretary shall—

15 (A) consider any recommendations con-
16 tained in the report; and

17 (B) prepare a written explanation for any
18 recommendations that are not adopted.

19 (2) PUBLIC REVIEW; SUBMISSION TO CON-
20 GRESS.—After receiving a report on a project from
21 a panel of experts under this section, the Secretary
22 shall—

23 (A) make a copy of the report and any
24 written explanation of the Secretary on rec-
25 ommendations contained in the report available

1 for public review in accordance with section
2 104; and

3 (B) submit to Congress a copy of the re-
4 port and any such written explanation.

5 (g) COSTS.—

6 (1) IN GENERAL.—Subject to paragraph (2),
7 the costs of a panel of experts established for a
8 project under this section—

9 (A) shall be a Federal expense;

10 (B) shall not exceed \$500,000; and

11 (C) shall be considered to be part of the
12 total cost of the project.

13 (2) WAIVER.—The Secretary may waive the
14 limitation specified in paragraph (1)(B) in any case
15 in which the Secretary determines a waiver to be ap-
16 propriate.

17 (h) APPLICABILITY OF FEDERAL ADVISORY COM-
18 MITTEE ACT.—The Federal Advisory Committee Act (5
19 U.S.C. App.) shall apply to a panel of experts established
20 under this section.

21 **SEC. 104. PUBLIC ACCESS TO INFORMATION.**

22 (a) IN GENERAL.—Except as provided in subsection
23 (c), the Secretary shall ensure that information relating
24 to the analysis of a water resources project by the Corps
25 of Engineers, including all supporting data, analytical doc-

1 uments, and information that the Corps of Engineers has
2 considered in the analysis, is made available to any indi-
3 vidual upon request and to the public on the Internet.

4 (b) TYPES OF INFORMATION.—Information con-
5 cerning a project that shall be made available under sub-
6 section (a) shall include—

7 (1) any information that has been made avail-
8 able to the non-Federal interests with respect to the
9 project; and

10 (2) all data used by the Corps of Engineers in
11 the justification and analysis of the project.

12 (c) EXCEPTION FOR TRADE SECRETS.—

13 (1) IN GENERAL.—The Secretary shall not
14 make information available under subsection (a) that
15 the Secretary determines to be a trade secret of the
16 person that provided the information to the Corps of
17 Engineers.

18 (2) CRITERIA FOR TRADE SECRETS.—The Sec-
19 retary shall consider information to be a trade secret
20 only if—

21 (A) the person that provided the informa-
22 tion to the Corps of Engineers—

23 (i) has not disclosed the information
24 to any person other than—

1 (I) an officer or employee of the
2 United States or a State or local gov-
3 ernment;

4 (II) an employee of the person
5 that provided the information to the
6 Corps of Engineers; or

7 (III) a person that is bound by a
8 confidentiality agreement; and

9 (ii) has taken reasonable measures to
10 protect the confidentiality of the informa-
11 tion and intends to continue to take such
12 measures;

13 (B) the information is not required to be
14 disclosed, or otherwise made available, to the
15 public under any other Federal or State law;
16 and

17 (C) disclosure of the information is likely
18 to cause substantial harm to the competitive po-
19 sition of the person that provided the informa-
20 tion to the Corps of Engineers.

21 **SEC. 105. BENEFIT-COST ANALYSIS.**

22 Section 308(a) of the Water Resources Development
23 Act of 1990 (33 U.S.C. 2318(a)) is amended—

24 (1) in paragraph (1)(B), by striking “and” at
25 the end;

1 (2) in paragraph (2), by striking the period at
2 the end and inserting “; and”; and

3 (3) by adding at the end the following:

4 “(3) any projected benefit attributable to any
5 increase in the value of privately owned property, in-
6 crease in the quantity of privately owned property,
7 or increase in the value of privately owned services,
8 that arises from the draining, reduction, or elimi-
9 nation of wetland.”.

10 **SEC. 106. PROJECT CRITERIA.**

11 After the date of enactment of this Act, the Secretary
12 shall not submit to Congress any proposal to authorize or
13 substantially modify a water resources project unless the
14 proposal contains a certification by the Secretary that the
15 project minimizes to the maximum extent practicable ad-
16 verse impacts on—

17 (1) the natural hydrologic patterns of aquatic
18 ecosystems; and

19 (2) the value or native diversity of aquatic eco-
20 systems.

21 **TITLE II—MITIGATION**

22 **SEC. 201. FULL MITIGATION.**

23 Section 906(d) of the Water Resources Development
24 Act of 1986 (33 U.S.C. 2283(d)) is amended—

1 (1) in paragraph (1)(A), by inserting “fully”
2 before “mitigate”; and

3 (2) by adding at the end the following:

4 “(3) STANDARDS FOR MITIGATION.—

5 “(A) IN GENERAL.—To mitigate losses to
6 fish and wildlife resulting from a water re-
7 sources project, the Secretary, at a minimum,
8 shall acquire and restore 1 acre of habitat to
9 replace each acre of habitat negatively affected
10 by the project.

11 “(B) MONITORING PLAN.—The mitigation
12 plan for a water resources project under para-
13 graph (1) shall include a detailed and specific
14 plan to monitor mitigation implementation and
15 success.

16 “(4) DESIGN OF MITIGATION PROJECTS.—The
17 Secretary shall—

18 “(A) design each mitigation project to re-
19 flect contemporary understanding of the impor-
20 tance of spatial distribution of habitat and the
21 natural hydrology of aquatic ecosystems; and

22 “(B) fully mitigate the adverse hydrologic
23 impacts of water resources projects.

24 “(5) RECOMMENDATION OF PROJECTS.—The
25 Secretary shall not recommend a water resources

1 project alternative or choose a project alternative in
2 any final record of decision, environmental impact
3 statement, or environmental assessment completed
4 after the date of enactment of this paragraph unless
5 the Secretary determines that the mitigation plan
6 for the alternative has the greatest probability of
7 cost-effectively and successfully mitigating the ad-
8 verse impacts of the project on aquatic resources
9 and fish and wildlife.

10 “(6) COMPLETION OF MITIGATION BEFORE
11 CONSTRUCTION OF NEW PROJECTS.—The Secretary
12 shall complete all planned mitigation in a particular
13 watershed before constructing any new water re-
14 sources project in that watershed.”

15 **SEC. 202. CONCURRENT MITIGATION.**

16 Section 906(a)(1) of the Water Resources Develop-
17 ment Act of 1986 (33 U.S.C. 2283(a)(1)) is amended by
18 adding at the end the following: “To ensure concurrent
19 mitigation, the Secretary shall complete 50 percent of re-
20 quired mitigation before beginning project construction
21 and shall complete the remainder of required mitigation
22 as expeditiously as practicable, but not later than the last
23 day of project construction.”

1 **SEC. 203. MITIGATION TRACKING SYSTEM.**

2 (a) IN GENERAL.—Not later than 180 days after the
3 date of enactment of this Act, the Secretary shall establish
4 a recordkeeping system to track—

5 (1) the quantity and type of wetland and other
6 habitat types affected by the operation and mainte-
7 nance of each water resources project carried out by
8 the Secretary;

9 (2) the quantity and type of mitigation required
10 for operation and maintenance of each water re-
11 sources project carried out by the Secretary;

12 (3) the quantity and type of mitigation that has
13 been completed for the operation and maintenance of
14 each water resources project carried out by the Sec-
15 retary; and

16 (4) wetland losses permitted under section 404
17 of the Federal Water Pollution Control Act (33
18 U.S.C. 1344) and required mitigation for such
19 losses.

20 (b) REQUIRED INFORMATION AND ORGANIZATION.—
21 The recordkeeping system shall—

22 (1) include information on impacts and mitiga-
23 tion described in subsection (a) that occur after De-
24 cember 31, 1969; and

25 (2) be organized by watershed, project, permit
26 application, and zip code.

1 (c) AVAILABILITY OF INFORMATION.—The Secretary
2 shall make information contained in the recordkeeping
3 system available to the public on the Internet.

○