

Chapter 5

The Players: Agencies, States, and Stakeholders

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

Activist Tip

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

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

I. Federal Agencies

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

A. Environmental Protection Agency

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

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

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



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


EPA reviews Corps permits and projects to ensure that they comply with the requirements of the CWA and its implementing regulations. This CWA compliance review often takes place at the same time EPA reviews permits and projects for NEPA compliance. EPA also has the authority under CWA § 404(c) to veto a Corps permit or civil works project. However, these vetoes are very rare and to date only 11 have been issued. *See Chapter 3 for a detailed discussion of the requirements that the Corps must meet to comply with Clean Water Act § 404.*

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

If EPA determines that any such action, legislation, or regulation will have an unsatisfactory effect on environmental quality, public health, or public welfare, EPA must publish that determination and refer the matter to the Council on Environmental Quality.

Rating a Draft Environmental Impact Statement

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



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

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

B. U.S. Fish and Wildlife Service

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

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

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

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Activist Tip

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

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

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

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

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

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

C. NOAA Fisheries

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

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

Activist Tip

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

D. Federal Emergency Management Agency

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

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

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

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

E. U.S. Geological Survey

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

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

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

Water Resources Council

Though it has been inactive for more than 20 years, the work of the Water Resources Council continues to have an enormous impact on Corps projects. The Council was established to encourage the conservation, development, and utilization of water and related land resources. Council members included the Secretaries of Agriculture, Army, Commerce, Energy, Housing and Urban Development, Interior, Transportation and the Administrator of the Environmental Protection Agency. In late 1983, the Council's acting Chairman, Secretary of the Interior James Watt, deactivated the Council by eliminating its funding and staff, and the Council remains inactive to this day.

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

In recent years, numerous expert policy studies have recommended that the P&G be revised and updated to reflect contemporary water resource science, economics, environmental, and other policies, and national needs. As of the date of this publication, however, neither Congress nor the administration had provided the leadership needed to bring this about. See *Chapter 2 for a discussion of the P&G.*

Activist Tip

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

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

II. Presidential Support Offices

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

A. Council on Environmental Quality

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

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

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

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

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

Activist Tip

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

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

B. Office of Management and Budget

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

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

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

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

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

Activist Tip

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

III. Congressional Support Offices

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

A. Government Accountability Office

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

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

- *Improved Analysis of Costs and Benefits Needed for Sacramento Flood Protection Project (2003);*
- *Great Lakes: A Coordinated Strategic Plan and Monitoring System Are Needed to Achieve Restoration Goals (2003);*
- *Scientific Panel’s Assessment of Fish and Wildlife Mitigation Guidance (2002);*
- *Delaware River Deepening Project: Comprehensive Reanalysis Needed (2002);*
- *Oregon Inlet Jetty Project: Environmental and Economic Concerns Need to Be Resolved (2002);*
- *Assessments Needed to Determine Effectiveness of In-Lieu-Fee Mitigation (2001);*
- *Local Sponsors’ Views on Corps’ Implementation of Project Cost Sharing (1991).*

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

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

Activist Tip

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

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

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

B. Congressional Budget Office

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

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

A CBO score for a Water Resources Development Act (WRDA) typically will estimate the cost of the bill for longer than 5 years (for example, CBO might estimate the cost of the bill for the first 10 to 15 years after the bill is passed). Any construction or operations costs that continue or occur after the designated time period are not included in the cost estimate.⁶ These costs are adjusted for anticipated inflation and assume that the authorized amounts will in fact be appropriated. A WRDA will almost always cost the federal government far more than indicated by the CBO score because many Corps projects will incur construction and operations costs beyond the time period covered by the CBO estimate.

C. Congressional Research Service

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

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

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

Activist Tip

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

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

Activist Tip

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

IV. States, Tribes, and Local Governments

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

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

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

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

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

Activist Tip

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

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

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

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

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

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

Activist Tip

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

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

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

V. The National Academy of Sciences

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

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

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

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

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

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

Activist Tip

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

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

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

VI. Stakeholders

At the national, state, and local levels, thousands of entities are involved with Corps projects and permits, and water resources issues. These stakeholders range from traditional supporters of Corps projects – such as navigation and flood control boosters – to contractors, professional associations, and environmental nonprofit organizations. *See Appendix X for a list of selected stakeholders frequently involved in Corps projects and water resources issues.*

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

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

Endnotes

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



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