

# United States Senate

WASHINGTON, DC 20510

November 17, 2009

The Honorable Jo-Ellen Darcy  
Assistant Secretary of the Army (Civil Works)  
108 Army Pentagon  
Room 3E446  
Washington, D.C. 20310-0108

Dear Assistant Secretary Darcy:

The Water Resources Development Act of 2007 (WRDA 2007), which became law on November 8, 2007, contains a suite of programmatic reforms to the U.S. Army Corps of Engineers' planning practices. Three of the most significant of these programmatic reforms, independent peer review, safety assurance review, and mitigation reforms, became effective upon enactment. We are extremely concerned that almost two years later, little progress has been made to implement these critical reforms.

To assist us in assessing the Corps' progress on implementing these key WRDA 2007 reforms please provide the information requested below no later than December 14, 2009.

**Independent Review:** Section 2034 of WRDA 2007 (codified at 33 U.S.C. 2343) requires independent peer review of civil works projects costing more than \$45 million and other controversial projects. Section 2034 provides detailed criteria and guidance for such reviews and to ensure the independence of review panels. Section 2034 also reaches back to cover certain project studies initiated in the two years prior to enactment for which the "array of alternatives to be considered has not been identified."

1. Identify each civil works study initiated on or after November 8, 2007 with an estimated total cost of more than \$45 million including mitigation. Separately identify each civil works study initiated between Nov. 8, 2005 and Nov. 7, 2007 with an estimated total cost of more than \$45 million and which did not have an identified array of alternatives as of Nov. 8, 2007.
2. Identify all civil works studies for which independent peer review, as required by section 2034 of WRDA 2007, has already been initiated. For each such project: (a) identify the entity responsible for conducting the independent review; (b) provide a list of the reviewers and their credentials; (c) describe whether the reviewers have taken any public testimony or otherwise obtained public input; (d) provide any final independent review panel reports and state whether and how the report has been made available to the public; (e) describe any changes made to the project in response to the independent panel findings; and (f) identify the amount of money spent to date on carrying out the independent peer review.
3. Identify all civil works studies for which independent peer review, as required by section 2034 of WRDA 2007, will be initiated within the next year, and the expected date of initiation.

**Safety Assurance Review:** Section 2035 of WRDA 2007 (codified at 33 U.S.C. 2344) requires safety assurance reviews of design and construction for hurricane and storm damage reduction projects if the Chief of Engineers determines that such a review is necessary to ensure public health, safety, and welfare.

4. Identify all projects for which the Chief of Engineers has determined that a safety assurance review is appropriate. Also identify all projects for which a safety assurance review has been initiated and for each such project: (a) identify the reviewers and their credentials; (b) provide copies of any written reports and state how and whether those reports have been made available to the public; and (c) describe any changes made to the project in response to the safety assurance panel's findings. Also provide a copy of the implementation guidance for section 2035 of WRDA 2007. If implementation guidance has not been issued, explain why and provide the expected date of issuance.

**Mitigation:** Section 2036 of WRDA 2007 (codified at 33 U.S.C. 2283(d)) establishes new mitigation requirements for all civil works feasibility studies, re-evaluation reports, and environmental reviews ongoing as of November 8, 2007 and initiated after that date. Section 2036 provides detailed guidance regarding the necessary elements of mitigation plans, mitigation monitoring, mitigation success, and consultation. Section 2036(b) (codified at 33 U.S.C. § 2283a) requires the Corps to submit a yearly status report on civil works mitigation, concurrently with the President's budget submission to Congress.

5. Identify each draft and each final of the following types of reports issued for a civil works project from Nov. 7, 2007 until the date of your response: (a) environmental impact statement or supplemental environmental impact statement; (b) environmental assessment; (c) feasibility report; and (d) reevaluation report. For each such report, also provide the citation for any Federal Register notice related to the report and the website address where the full report can be accessed.

6. For each draft and each final report identified in response to #5 above, provide a copy of the mitigation plan included with the report, or the Secretary's determination that the "project will have negligible impact on fish and wildlife" as required by 33 U.S.C. § 2283(d)(1). For each mitigation plan that utilizes a mitigation bank, provide copies of documents evidencing the existence of available credits within the selected bank to offset the civil works project impacts.

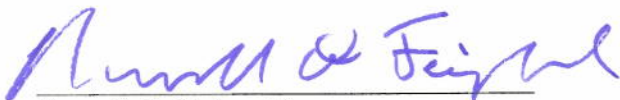
7. For each draft and each final report identified in response to #5 above, provide the dates and summaries of any consultations undertaken to determine mitigation success as required by 33 U.S.C. § 2283(d)(4).

8. Provide copies of, and the website address for, each mitigation status report submitted to Congress as required by 33 U.S.C. §2283a. On March 11, 2008, former Assistant Secretary of the Army J.P. Woodley advised the Senate Environment and Public Works Committee that the Corps was developing a database and protocols for data collection in order to be able to submit detailed mitigation status reports. Please provide information on the status of this database and protocol development and the expected date of completion.

9. Please answer the following questions concerning the implementing guidance for Section 2036(a) issued on August 31, 2009. How is the directive to implement mitigation "to the extent incrementally justified" consistent with the new requirements of WRDA 2007 and 33 U.S.C. § 2284 (benefits of activities to restore the environment are deemed to be equal to the costs of those activities)? How does the directive 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" satisfy the new and detailed WRDA 2007 monitoring requirements? Why did the Corps elect to establish the consultation process Division by Division, as opposed to establishing a single consultation process for the entire Civil Works Program, and what is the status of development of the consultation process in each Division?

Thank you for your attention to this important matter.

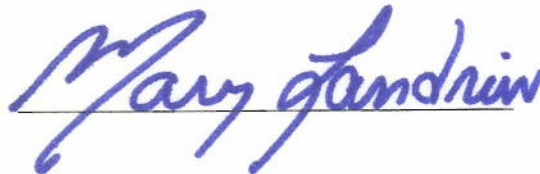
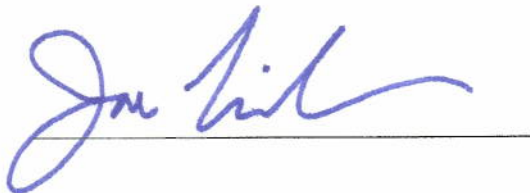
Sincerely,



Russell D. Feingold  
U.S. Senator



John McCain  
U.S. Senator



cc: The Honorable Nancy Sutley, Chairwoman of Council on Environmental Quality  
The Honorable Sam D. Hamilton, Director of the U.S. Fish and Wildlife Service  
The Honorable Barbara Boxer, Chairman, Senate Environment and Public Works  
Committee