



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

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Chairman*

*By the Committee on Transportation and Infrastructure
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INTRODUCTION

On November 8, 2007, Congress enacted the Water Resources Development Act of 2007¹ 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 its 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 Programs⁷ 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 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.

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 2007¹⁶ 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 Committee²¹, 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 Improvement²⁴ 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.²⁶ 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, paragraph 11.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 2007³² amended §906 of the Water Resources Development Act of 1986³³ 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 Committees³⁷ 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 Committees⁵¹ 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 report⁵⁴, 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 guidelines⁶¹ 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 Council⁶⁴, 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 1970⁶⁵ 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 funds⁷⁴, 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 Streamlining⁷⁵ 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 1960⁷⁶) and protecting public property from erosion (§14 of the Flood Control Act of 1946⁷⁷), 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 2007⁷⁹ completely rewrote §204 of the Water Resources Development Act of 1992⁸⁰. 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 2007⁸⁴ 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.