# Chapter 6

## The Corps and the Law
## Key Laws Applicable to Corps Projects



The Corps must comply with numerous laws, regulations, and policies when planning and implementing water projects and making permit decisions. Ensuring strict compliance with these laws and policies can have a profound affect on the Corps' activities. This chapter summarizes environmental and other laws applicable to Corps projectsand provides background on the legal process. Laws applicable only to Corps planning, such as requirements enacted through the

Water Resources Development Acts, are discussed in Chapter 2. Activists should use this Chapter as a guide only and should seek the advice of an attorney for specific legal advice and recommendations.

## I. The Legal Process

A vast body of laws, regulations, and policies govern the way the Corps plans and implements water projects and makes permit decisions. In analyzing the ability of these laws to influence Corps decisions, it is useful to understand some basic legal principles.

### A. Laws, Regulations, and Executive Orders

The Corps, like all federal agencies, must comply with the U.S. Constitution, federal statutes, common law, regulations, judicial case law interpreting those laws and regulations, Executive orders, and internal guidance. Understanding the legal hierarchy of these laws and regulations can be useful for deciding where to focus efforts to improve Corps planning.

**U.S. Constitution:** The U.S. Constitution is at the top of the legal hierarchy that guides the U.S. legal system. All laws must comply with the requirements of the U.S. Constitution.

**Common Law:** Common law evolves primarily from judicial decisions and is based on custom and precedent. Common law must be complied with unless it has been superseded by a statute. Environmental law evolved largely from the common law of "nuisance."

**Federal Statutes:** Federal statutes are passed by Congress and are typically codified in the United States Code (U.S.C. or U.S.C.A. for U.S. Code Annotated).[1] Statutes can create procedural and substantive requirements that must be complied with. Procedural laws require that certain processes be followed, but do not mandate a particular decision. For example, the National Environmental Policy Act is a procedural law designed to ensure that the environmental consequences of federal actions are fully evaluated before the Corps decides whether or how to proceed with a project. Substantive laws require or prohibit certain activities. Substantive environmental laws include the Endangered Species Act and the Clean Water Act. Substantive laws also typically contain procedural requirements.

**Regulations:** Regulations implement provisions of federal statutes. Regulations are created by executive agencies and are found in the Code of Federal Regulations (C.F.R.). Regulations cannot conflict with or exceed the scope of the statutory language they are intended to interpret. The public must have an opportunity to comment on proposed and final regulations pursuant to the Administrative Procedure Act.

**Case Law:** Case law is created by the courts and interprets or defines the Constitution, statutes, regulations, and common law. Case law has its own hierarchy that is based on the organization of the court system. Decisions issued by the U.S. Supreme Court must be followed nationwide. Circuit Court of Appeals decisions must be followed in all the states and territories located within the Circuit and often will be relied on by courts in other Circuits.[2] District Court decisions are applicable within the geographic scope of the District Court and often will be relied on by other District Courts within the same Circuit. Cases from one Circuit or District will often be relied on by other Circuit and District courts as well. The U.S. Supreme Court can overrule a Circuit Court decision, and a Circuit Court can overrule a decision of a District Court within the Circuit Court's geographic boundaries. The term "well-established case law" typically refers to decisions by the U.S. Supreme Court or to decisions that are consistent among a number of federal Circuit Courts.

**Executive Orders:** Executive orders are orders issued by the President to federal agencies. They generally give federal agencies specific directions for implementing laws and policies established by Congress. Executive orders provide important directions for implementing laws and policies in accordance with Administration priorities, and in some cases create additional procedural requirements for certain agency actions. Executive orders are legally binding[3] but individuals typically cannot sue to enforce the terms of an Executive order unless the order explicitly states that it is enforceable (to be enforceable in the absences of an express statement, the order must have been issued under a Congressional mandate or Congressional delegation of authority). Recent Executive orders are found in Title 3 of the Code of Federal Regulations and most are easily searchable online.

**Internal Agency Guidance:** Internal guidance interprets laws and regulations. Internal guidance can be established through a number of mechanisms, including through what the Corps calls "engineering regulations," internal policy documents, and memoranda of agreements (MOAs) entered into with other agencies. Interpretative internal guidance is not subject to the notice and comment requirements of the Administrative Procedure Act, and the public typically is not provided with an opportunity to comment on internal guidance. Internal guidance can sometimes create mandatory duties on the agency.

## B. Filing a Legal Challenge in Court

Decisions of federal agencies can be challenged under the Administrative Procedure Act (APA) or under citizen suit provisions found in a number of environmental statutes. A federal agency being sued under a federal statute can be sued in the District Court for the District of Columbia, in a District Court in the state where the decision being challenged was made, or in a District in the state where the decision being challenged will have an impact.

The APA provides an opportunity for citizens to seek judicial review of agency decisions. 5 U.S.C. § 551 *et seq.* The APA states that any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action" is entitled to seek judicial review of that action. An agency's failure to act is also considered "agency action" for purposes of the APA. 5 U.S.C. § 702. However, courts will only review final agency action. Preliminary, procedural, or intermediate agency actions or rulings cannot be reviewed by a court. 5 U.S.C. § 704.

Under the APA, a court will review an agency decision to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Under this standard, the court cannot overturn an agency decision simply because the court disagrees with it. Instead, the court must find that the agency failed to consider "relevant factors," failed to articulate a rational connection between the facts and the decision, or made a clear error in judgment.[4] The court must give a great deal of deference to the agency's decision, and it will allow the agency to rely on the expertise of its own employees as long as the agency can draw a rational connection between the conclusions drawn and the facts upon which those conclusions are based.

In most cases, a court reviewing an agency action under the APA will not dictate what the agency's final decision should be. Instead, the court will review the agency's decision to determine whether it complies with the law. If it does not, the court will set aside the agency's decision and order the agency to try again. For example, if a court finds that an environmental impact statement (EIS) prepared by the Corps does not comply with the requirements of the National Environmental Policy Act, the court will order the Corps to prepare a new EIS. The court may order the Corps to consider or address specific issues in the final document, but it will not dictate the contents of the final EIS.

A number of major environmental statutes expressly allow citizens to file suit for certain violations of the statute. These "citizen suit" provisions are in addition to the judicial review provided by the APA. A citizen suit provision often creates a different standard for review than the standard created by the APA. Typically, a citizen suit provision will establish specific legal standing requirements (*see below*), and will require that the individual (or organization) intending to file suit provide advance notice to the agency. The advance notice requirement is intended to give the agency an opportunity to voluntarily comply with the law. The Clean Water Act and the Endangered Species Act both have citizen suit provisions.

Under either the APA or a citizen suit provision, an individual or organization must have judicial "standing" to file suit. An organization will have standing and be able to sue in its own name if one or more of its members have standing. To have standing, the party suing (a plaintiff) must show they have an actual stake in the outcome of the controversy. To show standing, a party must demonstrate three elements: (1) "injury-in-fact," which can be established by showing that the action will harm property owned by the plaintiff or will impact the plaintiff's ability to partake in some activity, even for purely aesthetic purposes (for example, observing an animal species, kayaking in a river, or drinking clean water from a river impacted by the challenged action); (2) a causal connection, which can be established by showing that the party being sued is the cause of the injury (this is to ensure that you are suing the correct party); and (3) "redressability," which can be established by showing that the relief sought in the lawsuit will likely prevent or alleviate the injury.[5] The concept of standing, like many legal concepts, continues to evolve, and activists considering filing suit against the Corps or another agency should seek the advice of an attorney for specific legal advice and recommendations.

## II. Environmental Protection Laws

The Corps must comply with a host of environmental and other key laws when it plans and constructs projects and issues permits. The Corps must comply with all applicable statutes, regulations, judicial decisions, and Executive orders, and must comply with its own internal guidance and policies. The Corps also must comply with certain state laws, which are typically made applicable through state permitting requirements for Corps projects and permits.

Where these laws are not followed, the Corps can be forced to stop or significantly reshape projects or permits. In some instances, litigation will be necessary to force the Corps to comply with the law. In other instances, however, the Corps will improve its decision once you have clearly identified the legal violations and/or notified them that you intend to file suit. Actual and potential legal violations should be brought to the Corps' attention at every opportunity, including in comments submitted under the National Environmental Policy Act. Stand-alone letters to the Corps pointing out any such failures also can be useful to compel compliance.

A number of key environmental laws that are often implicated in Corps planning are discussed below.[6] For ease of reference, these laws have been arranged in alphabetical order. Activists should pay particular attention to the National Environmental Policy Act, the Clean Water Act, and the Fish and Wildlife Coordination Act, which are applicable to virtually all Corps projects.

### A. Clean Water Act

The Clean Water Act (CWA), which is officially titled the Federal Water Pollution Control Act, is designed to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." CWA § 101 (33 U.S.C. § 1251).[7] The CWA provisions most applicable to Corps projects and permits are discussed below. *See 33 U.S.C. § 1251 et seq. for the full text of the CWA.*

**Clean Water Act § 313 — Federal Agency Compliance with Water Pollution Control Laws:** CWA § 313 (33 U.S.C. § 1323) requires the Corps (and all federal agencies) to comply with **all** Federal, State, interstate, and local pollution control requirements when engaged in an activity that can result in the discharge of a pollutant. This provision requires the Corps to comply with both the substantive and procedural requirements of such laws. As part of this compliance, the Corps must obtain a Water Quality Certification from the State(s) in which the project will be constructed (in most instances a Water Quality Certification will also be required for operations and maintenance activities carried out by the Corps). *See below for a discussion of the CWA § 401 State Water Quality Certification requirements.*

**Clean Water Act § 401 — State Water Quality Certifications:** CWA § 401 (33 U.S.C. § 1341) authorizes states and tribes to review Corps projects and permits within their boundaries to determine whether the activity complies with state water quality standards. This review is not mandatory, and some states will elect not to conduct such a review. Upon completing the review, the state or tribe can issue or deny a Water Quality Certification. States or tribes can also impose significant conditions on the granting of a Water Quality Certification that can reduce the impacts of the activity. Denial of a Water Quality Certification will essentially veto the Corps project or permit. *See* 33 C.F.R. § 325.2(b). *See the discussion of CWA § 511 below for additional requirements applicable to state Water Quality Certifications for Corps navigation activities.*

It is important to understand that the basis for imposing conditions or denying a permit or project under § 401 must be found within the state's water quality standards and permitting requirements. State water quality standards must be adequate "to protect public health or welfare, enhance the quality of water, and serve the purposes" of the Clean Water Act. State water quality standards must be approved by the U.S. Environmental Protection Agency. 33 U.S.C. § 1313.

Water quality standards consist of two components: (1) designated uses to be "achieved and protected" for each applicable water body or segment; and (2) water quality criteria adequate to protect those designated uses. 33 U.S.C. § 1313. A state's water quality standards must also include an antidegradation policy and methods for implementing that policy. The antidegradation requirements must, among other things, be sufficient to protect existing instream water uses and maintain the level of water quality necessary to protect those existing uses. 40 C.F.R. § 131.12.

Designated uses must be based on the "use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation." The highest levels of water quality generally are required for the propagation of fish, shellfish, and wildlife, and for recreation. Water quality criteria are either quantitative (numeric) or qualitative (narrative) statements specifying maximum concentrations or levels of pollutants that may be present in a water body in order to protect and maintain a particular designated use. 33 U.S. C. § 1313.

States (and citizen's, through the CWA citizen suit provision) have the right to enforce both numeric and narrative water quality criteria through the § 401 Water Quality Certification process.

Clean Water Act § 401 can provide an important avenue for stopping or improving Corps projects. For example, the Mississippi Chapter of the Sierra Club was able to stop the Big Sunflower River dredging project by filing a legal challenge to the state's Water Quality Certification for the project. The Corps had proposed dredging 106 miles of the Big Sunflower to reduce flooding on farmland adjacent to the river. The Mississippi

## Activist Tip

A state's Water Quality Certification review is a critical step in the review process for Corps projects and permits, and activists should engage in this review. If a Corps project or permit would violate state water quality standards, a state can essentially veto the activity or impose significant conditions to reduce the water quality impacts.

Activists should become familiar with the state water quality standards and advise both the state and the Corps if the proposed activity is likely to violate those standards. Activists should give the Corps and the state as much supporting evidence as possible on any such violations and should provide the state with the full set of comments submitted on the Corps' EIS and project study or permit.

Department of Environmental Protection had issued a Water Quality Certification for this project even though it very clearly violated the state's water quality standards. In 1999, the Mississippi Supreme Court vacated the Water Quality Certification for the project and sent it back to the state for reconsideration. This put a stop to the project and forced it back to the Corps for reevaluation. As of the date of this Citizen's Guide (10 years after the Court's decision), the project remains on hold.

**Clean Water Act § 404 — Dredge and Fill Permits:** CWA § 404 (33 U.S.C. § 1344) regulates the discharge of dredged or fill material into the nation's waters. Under § 404, the Corps issues permits to private parties and other governmental agencies for construction in wetlands, streams, rivers, and other aquatic habitats. The Corps also must comply with the requirements of § 404 when planning and constructing its own civil works projects. *See Chapter 3 for a detailed discussion of the requirements of § 404.*

**Clean Water Act § 511 — Navigation Servitude, Savings Clause:** CWA § 511 (33 U.S.C. §1371) provides, among other things, that nothing in the CWA shall be construed as "affecting or impairing the authority of the Secretary of the Army. . . to maintain navigation . . . ." This "savings clause" arises from a doctrine known as navigation servitude, which "is a term used to describe the paramount interest of the United States in navigation and the navigable waters of the nation."[8] CWA § 511 applies only to activities used by the Corps to maintain navigation. Such things as dredging for flood control purposes, management of Corps flood control dams, and management of non-Corps federal dams are not covered by CWA § 511.

CWA § 511 has implications for a state's issuance of a Water Quality Certification for Corps activities designed to maintain navigation. If a state denies a Water Quality Certification for activities designed to maintain navigation, or imposes strict conditions on the activity, CWA § 511 lets the Corps override the state permit. However, case law, regulations, and legislative history make it clear that the Corps' ability to override a state permit is extremely limited. The Corps must be able to show that complying with the state permit would **completely preclude** the Corps' ability to maintain navigation.[9]

Under the Corps' own regulations, such a decision can also only be made by the Corps' Chief of Engineers. The Chief must determine whether the Corps should (1) comply with the state denial or conditions; (2) defer the proposed dredging and seek Congressional appropriations to cover the costs of any extra measures that would allow the state to issue a permit; or (3) proceed with its navigation maintenance activities despite the permit conditions or denial pursuant to Clean Water Act § 511(a) and § 404(t). The Chief's decision must be based on an evaluation of the economic need for dredging; the impact on states outside the project area if the project is not dredged; the estimated additional cost of implementing measures that would allow the state to issue a permit; the relative urgency of dredging based on threats to national security, life, or property; and any additional facts that will aid in the determination. 33 C.F.R. §§ 337.8 and 337.2.

When these regulations were implemented, the Corps noted that it had never exercised its authority to override denial of a state water quality certification, and it did not expect to do so in the future.[10]

The CWA § 511 savings clause, and the concept of navigation servitude in general, is often misinterpreted, and states are typically not aware of the Corps' regulations concerning this issue. As a result, some states incorrectly believe that they cannot deny or place strict conditions on a state permit for a Corps navigation dredging project. In such cases, educating the state about its legal options can be extremely valuable.

For example, after American Rivers presented the state of Florida with information on these legal options (and evidence of the Corps' inability to comply with permit conditions), the state of Florida denied the Corps' request for a new five-year navigation dredging permit on the Apalachicola River.[11] This 2005 denial put an end to decades of navigational dredging on the Apalachicola River that had caused enormous damage to this exceptionally significant and internationally renowned river system.

## B. Coastal Barrier Resources Act

The Coastal Barrier Resources Act (CBRA) was enacted to minimize loss of human life, wasteful spending, and damage to fish, wildlife, and other natural resources associated with the development of designated coastal areas. Only lands included in the Coastal Barrier Resources System are protected by the CBRA. The Coastal Barrier Resources System includes undeveloped islands, bays, estuaries, and near shore waters that are subject to wind, waves, and tides. *See 16 U.S.C. §§ 3501-3510 for the full text of the CBRA.*

The CBRA generally prohibits new federal expenditures or other forms of federal financial assistance in areas that are within the Coastal Barrier Resources System. However, a number of activities that are often carried out by the Corps are exempted from the Act's prohibition. Note that the CBRA does not restrict activities carried out with private or other non-federal funds.

The CBRA prohibits the federal government from participating in the following types of projects within the Coastal Barrier Resources System: construction or purchase of any structure, facility, or related infrastructure; or any structural shoreline protection project (except in certain designated areas of the Coastal Barrier Resources System, provided that the project will not encourage development).[12] Despite this prohibition, however, structural shoreline protection projects will be allowed in cases where an emergency threatens life, land, and property. 16 U.S.C. § 3504.

The CBRA allows the construction or maintenance of improvements for existing navigation channels, including dredging, within the Coastal Barrier Resources System (*i.e.*, these projects are exempted from the CBRA). The CBRA also allows some types

### Activist Tip

Activists seeking to stop or improve Corps navigation activities (e.g., dredging and water level management) should make sure that the state fully understands that it can impose strict conditions on such activities or deny a permit for any such activities that violate the state's water quality standards. Activists should also ensure — and let the state know that it will receive — strong public support for such actions.

## Activist Tip

Activists fighting a project located in or near an area included in the Coastal Barrier Resources System should determine whether that project would or could encourage development in an area within the System. If the answer is yes, evidence on the development inducing effects should be submitted to the Corps and the Secretary of the Interior.

of habitat management and enhancement efforts; emergency actions to protect life, land, or property; and nonstructural projects for shoreline stabilization that "are designed to mimic, enhance, or restore a natural stabilization system" as long as these activities will not encourage development in areas within the Coastal Barrier Resources System. However, before carrying out one of these "exempted" activities, the federal agency must consult with the Secretary of the Interior. 16 U.S.C. § 3505.

More information on the CBRA, including maps and descriptions of the areas included in the Coastal Barrier Resources System, can be found on the U.S. Fish and Wildlife Service website at *http://www.fws.gov/habitatconservation/coastal_barrier.html.*

### C. Coastal Zone Management Act

The Coastal Zone Management Act (CZMA) is designed to encourage sound management and conservation of natural resources in the nation's coastal areas (under the Act, coastal areas include the Great Lakes). The Act establishes a national policy to (1) protect the coastal zone; (2) encourage the states to develop coastal zone management programs; (3) promote cooperation between federal, state, and local agencies engaged in programs affecting the coastal zone; and (4) encourage broad public participation in the development of coastal zone management programs. 16 U.S.C. § 1452. The federal government will provide matching funds to administer approved state coastal zone management programs. *See 16 U.S.C. § 1451 et seq. for the full text of the CZMA.*

Coastal zone management programs must include, among other things, the boundaries of the coastal zone and the means by which the state will exert control over these areas; a planning process for protecting public beaches and coastal areas; a planning process for managing energy facilities; a process for assessing the effects of shoreline erosion; policies that address use and protection of wetlands and floodplains within the coastal zone; an enforceable coastal nonpoint source pollution control program; and procedures for determining whether state or local activities are consistent with the state's program. 16 U.S.C. § 1455.

A state's coastal zone management program must be approved by the Secretary of Commerce. 16 U.S.C. § 1454. Federal agencies are required to treat the provisions of an approved coastal zone management program as binding regulations, unless the federal agency is prohibited from compliance by the agency's own legal requirements. 15 C.F.R. § 930.32.

**Federal Consistency:** Each federal agency, including the Corps, must ensure that agency activities within or affecting the coastal zone are consistent "to the maximum extent practicable" with the enforceable policies of the state's coastal zone management program. 16 U.S.C. § 1456. "Consistent to the maximum extent practicable" means that the activity must be "fully consistent with the enforceable policies of management

programs unless full consistency is prohibited by existing law applicable to the Federal agency." 15 C.F.R. § 930.32.

If the Corps "asserts that full consistency with the management program is prohibited, it shall clearly describe, in writing, to the State agency the statutory provisions, legislative history, or other legal authority which limits the Federal agency's discretion to be fully consistent with the enforceable policies of the management program." 15 C.F.R. § 930.32. Lack of funding cannot be used to justify less than full compliance with a coastal zone management program (*i.e.*, lack of funding cannot be used to support a claim that the activity complies with the program "to the maximum extent practicable"). 15 C.F.R. § 930.32.

For activities requiring a Corps (or other federal) permit, the applicant must certify to the state that the "activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program." 16 U.S.C. § 1456.

The state can either concur with or object to the consistency determination. The consistency process includes opportunities to consult with, and if necessary, negotiate with the state.

**Projects and Activities Requiring Consistency Determinations:** The Corps must submit consistency determinations to the state for each Corps civil works project or activity located within the coastal zone and for each Corps civil works project or activity outside of the coastal zone that would affect coastal zone resources. An applicant seeking a Corps permit for activities within the coastal zone or for activities outside the coastal zone that would affect coastal zone resources must submit a consistency determination to the Corps and the state. 16 U.S.C. § 1456.

**Timeline for Determinations:** The Corps (or other federal agency) must submit a consistency determination at least 90 days before the Corps' final approval of the activity. The state has 60 days to review that consistency determination. 15 C.F.R. § 930.30-930.46. If the state does not respond within the 60 day period, the state is deemed to have concurred in the consistency determination, and the project may move forward.

An applicant for a Corps-issued permit (or for a permit or license issued by another federal agency) must submit a consistency determination to both the Corps and the state after the applicant has consulted with the state concerning the steps needed to ensure consistency. The state has six months to review a permit applicant's consistency determination once the state determines that all needed information has been submitted by the applicant. 15 C.F.R. § 930.50-930.66. If the state does not respond within the six month period, the state is deemed to have concurred in the consistency determination, and the project may move forward.

## Activist Tip

Activists fighting projects located in or near an area covered by a state coastal zone management program should carefully review the requirements of that program. If the project would not be consistent with the goals and requirements of that program, activists should alert the Corps and the state. Activists should also work to ensure that the state carefully reviews the Corps' consistency determination and strictly applies the requirements of its coastal zone management program to the project.

**Effect of State Objection:** If the state objects to a consistency determination for a Corps civil works project or activity, the Corps can proceed only if it provides the legal basis for a determination that the activity is consistent with the coastal zone management plan to the "maximum extent practicable." If the state objects to a consistency determination for a Corps permit, the Corps may not issue that permit. The CZMA provides an administrative appeal to the Secretary of Commerce from a consistency objection by a coastal state.

The text of the CZMA, the CZMA implementing regulations, and additional guidance are available through the NOAA website at *http://coastalmanagement.noaa.gov/czm/czm_act.html.* The CZMA regulations implementing the consistency requirements are found at 15 C.F.R. Part 930 and can be accessed at *http://coastalmanagement.noaa.gov/consistency/regulations.html.*

## D. Endangered Species Act

The federal Endangered Species Act ("ESA") is one of the most powerful environmental laws on the books. The ESA is designed to ensure that species do not become extinct and to facilitate recovery of species that are endangered or threatened. The ESA makes endangered species protection the "highest of priorities" even if this conflicts with a federal agency's primary missions. The U.S. Supreme Court has acknowledged that in enacting the ESA, Congress clearly intended "to halt and reverse the trend toward species extinction, whatever the cost." *See 16 U.S.C. § 1531 et seq. for the full text of the ESA.*

The ESA is particularly important with respect to Corps projects. For example, the Government Accountability Office recently reported that 33% of all formal ESA consultations in the western states dealt with Corps projects and permits, and that Corps projects and permits involved far more consultations than the activities of any other single federal agency. For example, the next two agencies that trailed the Corps on this list — the Forest Service and the Bureau of Land Management — each accounted for only 11% of the ESA consultations in the western states.[13]

**Substantive Requirements of the ESA:** Section 7 of the ESA requires the Corps (and every federal agency) to (1) actively pursue species conservation; (2) insure no jeopardy to a listed species; and (3) insure that areas designated under the act as "critical habitat" are not destroyed or adversely modified. The duty to insure no jeopardy requires the Corps to ensure that its actions are "not likely to jeopardize the continued existence of any endangered . . . or threatened species." This means that a federal agency cannot directly or indirectly reduce the likelihood that the species will survive and recover in the wild. The duty to protect critical habitat means that the Corps cannot directly or indirectly alter critical habitat in a manner that diminishes the habitat's value for both survival and recovery of a listed species. 16 U.S.C. § 1536.

The ESA also imposes a number of procedural requirements on the Corps (and other agencies). First, if the Corps proposes to authorize, fund, or carry out a project, the Corps must submit a written request to the U.S. Fish and Wildlife Service (FWS) and/or NOAA Fisheries for marine species for a list of species and of formally designated critical habitat that may be present in any areas potentially affected, either directly or indirectly, by the proposed action (the action area). If one or more listed species or designated critical habitat may be present in the action area, the Corps must prepare a biological assessment.

**Biological Assessments and Formal Consultation:** A biological assessment evaluates the potential affects of the action on both listed species and species proposed for listing and on designated and proposed critical habitat. It must be submitted to FWS and/or NOAA Fisheries for review, and it must be completed before the Corps can enter into any contract for construction or begin construction. Failure to complete a biological assessment is a significant procedural violation of the ESA. 16 U.S.C. § 1536(c).

If the biological assessment, the Corps, or FWS/NOAA Fisheries conclude that the action is likely to adversely affect one or more listed species and/or designated critical habitat, the Corps must enter into formal consultation with FWS/NOAA Fisheries. Refusal to enter into formal consultation is another significant breach of the ESA. 16 U.S.C. § 1536(a)(2). As surprising as it may seem, the Corps refused to enter into formal consultation at the request of FWS on at least one highly destructive project in Mississippi. The Corps continued to refuse to enter into formal consultation until a number of environmental groups formally advised the Corps that they would file suit under the ESA.

During the formal consultation process, the Corps may not make an "irreversible or irretrievable commitment of resources" with respect to the project. This prevents the agency from taking actions that will foreclose the ability to implement alternative measures that will not adversely affect the listed species or critical habitat at issue.

**Biological Opinions:** The formal consultation process results in a biological opinion that is prepared by FWS and/or NOAA Fisheries. If the biological opinion determines that the proposed action may jeopardize the continued existence of a species and/or may destroy critical habitat, the agency will issue a "jeopardy opinion." A jeopardy opinion must discuss any "reasonable and prudent alternatives" to the proposed action that will minimize or avoid the action's adverse effects. 16 U.S.C. § 1536(b).

If the biological opinion reaches a contrary conclusion, a "no jeopardy opinion" will be issued. If a no jeopardy opinion is issued, FWS/NOAA Fisheries can issue an incidental take statement authorizing the killing or harming of a specified number of members of the listed species. The Corps cannot harm, harass, or kill a listed species without an incidental take statement.

## Activist Tip

The ESA is an incredibly powerful tool for improving or stopping a destructive Corps project or permit. Activists should determine as early in the Corps planning process as possible whether there are endangered or threatened species in the project area, or whether any areas affected by the project are designated as "critical habitat" under the ESA. In addition to the protections provided to listed species, the ESA prohibits the Corps from directly or indirectly altering critical habitat in a manner that diminishes the habitat's value for both survival and recovery of a listed species.

## Activist Tip

Activists should recognize that they will also need to work closely with FWS and/or NOAA Fisheries to ensure that the agencies are properly carrying out their responsibilities under the ESA.

Once a biological opinion is released, the Corps decides whether it will proceed with the action and/or what changes it will make to its plans to comply with its ESA duties. The Corps does not have to adopt the reasonable and prudent alternatives set forth in a biological opinion, but can instead rely on its own modifications to the project. But, failure to adopt the biological opinion subjects the Corps to the risk of a court finding that it has not complied with its ESA duties.[14] The Corps cannot determine that the benefits of the project as proposed are more important than conserving endangered or threatened species.

### E. Fish and Wildlife Coordination Act

The Fish and Wildlife Coordination Act (FWCA) authorizes the U.S. Fish and Wildlife Service (FWS) to evaluate impacts to fish and wildlife from proposed federal water resources projects and private projects that require a federal permit or license. *See 16 U.S.C. § 661 et seq. for the full text of the FWCA.*

The FWCA requires the Corps to consult with FWS (and in some instances, with NOAA Fisheries), and the head of the fish and wildlife agency in the state where the project is located, before the Corps recommends a civil works project or issues a permit for a project that will control or modify waters of any stream or other body of water for any purpose, including for navigation or drainage projects. Modifications that trigger consultation include, but are not limited to, impoundments, diversions, and channel deepening. 16 U.S.C. § 662.

The purpose of the consultation is to prevent loss and damage to wildlife and wildlife resources. 16 U.S.C. § 662. Wildlife and wildlife resources are defined to include "birds, fishes, mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent." 16 U.S.C. § 666b.

As part of the consultation, FWS and the state fish and wildlife agency must (1) develop recommendations based on surveys and investigations to determine the potential impacts to wildlife resources; (2) describe the damages to wildlife attributable to the project; and (3) develop mitigation measures to prevent these damages and to improve wildlife resources. The FWS recommendations must be as specific as possible. The FWS provides this information in a document known as the Fish and Wildlife Coordination Act Report, which must be included in the Corps' project reports (and typically is included as an Appendix to the EIS). The recommendations in the Fish and Wildlife Coordination Act Report must be given "full consideration" by the Corps, but the Corps is **not** required to adopt the FWS recommendations.

### F. National Environmental Policy Act

The National Environmental Policy Act (NEPA), often referred to as the nation's basic national charter for protecting the environment, requires the Corps to prepare an environmental impact statement (EIS) for "all major Federal actions significantly

affecting the quality of the human environment." *See 42 U.S.C. § 4321 et seq. for the full text of the NEPA.*

Virtually all proposals for new Corps projects will require an EIS. In some very limited circumstances, a less comprehensive document known as an environmental assessment (EA) may be all that is necessary. By law, the Corps also cannot issue a Clean Water Act § 404 dredge and fill permit without preparing an EIS or EA, unless the activity is explicitly exempt from NEPA review. 33 C.F.R. § 325.2.

The primary purpose of an EIS is to ensure that high quality environmental information is available to public officials and citizens before decisions are made and actions are taken. The NEPA process is intended to guide an agency in its decision making process, but it does not mandate selection of a particular alternative. As a result, once an EIS or EA is properly completed, the Corps can select any alternative it chooses (subject to provisions of other applicable law), even if other alternatives would cause far less environmental harm.

The Corps must follow two separate sets of regulations in implementing NEPA. It must comply with the NEPA regulations issued by the Council on Environmental Quality (CEQ) and those issued by the Corps. The CEQ regulations are found at 40 C.F.R. Part 1500. The Corps' NEPA regulations are found at 33 C.F.R. Part 230. The CEQ regulations, NEPA case law, NEPA guidance documents, and a CEQ Citizen's Guide to NEPA can be accessed through the CEQ website at *http://www.nepa.gov.* The CEQ Citizen's Guide to NEPA can be accessed directly at *http://ceq.hss.doe.gov/nepa/Citizens_Guide_Dec07.pdf.*

**Contents of an EIS:** An EIS must provide a full and fair discussion of significant environmental impacts of a project or permit. It must provide detailed information on each of the elements that must be addressed, and all assumptions and conclusions upon which an EIS is based **must** be supported by evidence in the administrative record (the documents and information that the Corps has considered in preparing the EIS).

Most importantly, an EIS must rigorously explore and objectively evaluate all reasonable alternatives for implementing the proposed action. While an EIS need not explore every conceivable alternative, it must rigorously explore all reasonable alternatives that are consistent with the basic objective of the project and that are not remote or speculative. A viable but unexamined alternative renders an EIS inadequate.

An EIS also must address (1) the affected environment; (2) the environmental consequences, including the cumulative impacts, of the proposed action and alternatives; and (3) measures to mitigate for any significant impacts that are identified.

An EA is a shorter, far less comprehensive document than an EIS, and will be prepared when it is not clear that the more comprehensive EIS is required. An EA must provide

## Activist Tip

Activists should look very closely at water projects for which the Corps is only preparing an EA, as the Corps will sometimes try to get by with an EA when an EIS is clearly required. For example, the Corps attempted to prepare an EA for raising a flood control levee on the Mississippi River arguing that it was "only" a single portion (or separable element) of a much larger levee raising project. However, that "single" levee raising project would have destroyed some 900 acres of bottomland hardwood wetlands. An EIS was clearly required for this project, and the conservation community was eventually able to convince the Corps of this fact by filing a legal challenge.

sufficient evidence to determine whether an EIS must be prepared. If an EA concludes that the action will significantly affect the quality of the human environment, the Corps must prepare an EIS.

If an EA concludes that the proposed action will not have a significant affect on the human environment, the Corps will not prepare an EIS, but instead will issue a Finding of No Significant Impact (FONSI). The Corps can also issue a Mitigated FONSI when the proposed mitigation will reduce impacts to below significant levels. Courts have upheld the use of Mitigated FONSIs where there is sufficient evidence to show that the mitigation will in fact reduce the impacts and is likely to be implemented.

**Supplemental EIS:** The Corps' NEPA obligations do not end when an EIS is finalized. Where significant work still must be done on a project, the Corps must prepare a supplemental EIS whenever "(i) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c).

There is no time period after which the Corps must update an EIS — even a 25 year old EIS would not need to be supplemented if one of the two tests is not met. However, CEQ has made it clear that the Corps is supposed to take a "hard look" at whether these tests have been met for any EIS that is more than five years old.[15]

**The Importance of Public Comment:** The NEPA process provides a key opportunity to provide your views on a Corps project or permit. A draft EIS must be circulated for public review and comment, and public hearings on an EIS are often held. The final EIS must respond to all public comments received. The Corps is technically not required to take public comment on an EA, but often does. The Corps also typically takes public comment on the final EIS before entering the Record of Decision for the project.

The Corps must consider information submitted during the public comment period, making the public comment process particularly important where the Corps is ignoring critical information. As discussed below, submitting comments on an EIS or EA is also critically important if you are considering a legal challenge.

Comments should include as much detail as possible concerning your views on the flaws of the EIS. You should clearly identify information that is wrong or missing, other projects and activities that should be considered in a cumulative impacts analysis (with as much specificity as possible), and alternatives to the proposed project that should be considered. You should provide copies, or at least citations to, any scientific or other studies that you want the Corps to consider. If you only provide citations, you should clearly state in your written comments that you want full copies of the cited studies included in the administrative record.

Activists should also work with scientists, economists, and other experts to have them submit detailed comments during the public comment period.

In addition to considering the information provided in public comments, the Corps also should give consideration to the number of comments submitted in opposition (or in favor of) a project. As a result, it is useful to generate as many comments as possible from other concerned citizens or organizations. Email and postcard comments have been used successfully in such efforts.

**Court Review:** Courts can review a decision not to prepare an EIS or a supplemental EIS and can review the substantive adequacy of an EIS that has been completed. In most instances, a court will only consider information contained in the administrative record in analyzing the adequacy of an EIS.

To be able to file suit for failing to prepare an adequate EIS, an individual or organization, among other things, must have submitted comments during the public comment period on either the draft or final EIS. In addition, the issues ultimately raised in the litigation must have been raised during the NEPA process. Activists should not overlook the opportunity to comment on a final EIS, particularly if litigation might be necessary. This final comment period provides an opportunity to include additional information addressing inadequacies of the EIS in the administrative record.

## G. Wild and Scenic Rivers Act

The Wild and Scenic Rivers Act (WSRA) was enacted to preserve the free-flowing condition of rivers with outstanding natural and recreational values. The WSRA designates Wild and Scenic Rivers, establishes procedures for adding additional rivers to the list, and provides guidance on how those rivers should be managed. More than 12,000 miles of 252 rivers in 39 states have already been designated as Wild and Scenic.[16] *See 16 U.S.C. § 1278 et seq. for the full text of the WSRA.*

Rivers may be designated by Congress or, under certain circumstances, by the Secretary of the Interior.[17] Segments of rivers can be designated as Wild and Scenic, and designations may include tributaries. Each river is administered by either a federal or state agency.

A Wild and Scenic designation (1) protects a river's "outstandingly remarkable" values and free-flowing character; (2) protects existing uses of the river; (3) prohibits federally-licensed dams, and imposes restrictions on other federal and federally-assisted projects that would negatively impact the river's outstanding values (*see below*); (4) establishes a quarter-mile protected corridor on both sides of the river; and (5) requires the creation of a cooperative river management plan that addresses, among other things, resource protection, development of lands and facilities, and user capacities. A Wild and Scenic

### Activist Tip

Activists challenging a project, or an unconstructed separable element of a project, with an EIS that is older than 5 years should consider whether a supplemental EIS is required. A supplemental EIS should also be required for operations and maintenance activities where the supplemental EIS tests are met.

designation does not prohibit development, does not affect water rights, and does not affect existing uses. Uses compatible with the management goals of a particular river are allowed.

**The WSRA imposes important restrictions on federal activities. The WSRA prohibits the** Federal Power Commission from issuing a license for the construction of any dam, water conduit, reservoir, powerhouse, transmission line, or other project under the Federal Power Act on or directly affecting any Wild and Scenic river. 16 U.S.C. § 1278(a). The WSRA also places important restrictions on federal permitting and federal projects that are particularly applicable to the Corps:

(1) **Restrictions on Permitting:** Federal agencies are prohibited from issuing a federal permit (or other forms of federal assistance) for "the construction of any water resources project that would have a direct and adverse effect on the values" for which the river was designated, as determined by the Secretary charged with the river's administration.[18] 16 U.S.C. § 1278(a). This prohibits the Corps from issuing a permit without the consent of the agency responsible for administering the Wild and Scenic river, essentially giving the administering agency veto power over the permit.

(2) **Restrictions on Federal Projects:** Federal agencies are prohibited from recommending the authorization of, or requesting construction appropriations for, any water resources project "that would have a direct and adverse effect on the values for which such river was established, as determined by the Secretary charged with its administration" without advising the administrating Secretary in writing 60 days in advance, and without providing a specific written report to Congress on the impacts of the project on the Wild and Scenic river. 16 U.S.C. § 1278(a). This ensures that the administering Secretary has an opportunity to raise concerns with the project to Congress, and that Congress is advised of the project's impacts to the Wild and Scenic river. The administering agency does **not** have veto power over a Corps civil works project.[19]

Additional information on the WSRA, including a comprehensive list of the rivers protected by the Act, can be accessed at *http://www.rivers.gov/*.

## III. Flood Insurance and Historic Preservation Laws

The National Flood Insurance Act and the Historic Preservation Act also often can — or should — play a role in Corps project planning. Activists should be familiar with these laws and use them to improve Corps projects when appropriate.

### A. National Flood Insurance Act

The National Flood Insurance Act establishes the National Flood Insurance Program (NFIP), which provides federally subsidized flood insurance to owners of flood-prone property in participating communities. Prior to establishment of this program, affordable private flood insurance generally was not available. The NFIP is administered by the Federal Emergency Management Agency (FEMA). *See Chapter 5 for more information on FEMA and its role in Corps projects and activities. See 42 U.S.C. § 4001 et seq. for the full text of the National Flood Insurance Act and 42 U.S.C. § 1521 et seq. for the full text of the Robert T. Stafford Disaster Relief and Emergency Services Act.*

Communities participating in the NFIP must adopt certain minimum floodplain management standards. These include: restrictions on new development in designated floodways, a requirement that new structures in the 100-year flood zone be elevated to or above the 100-year flood level, and a requirement that subdivisions be designed to minimize exposure to flood hazards.

In recent years, Congress has been increasing requirements for coordination between the NFIP, disaster relief, and Corps flood damage reduction programs (although considerably more needs to be done). Communities seeking Corps flood control projects are required to participate in, and be in compliance with, the NFIP. They must also prepare floodplain management plans as a condition of project cooperation. 33 U.S.C. § 701(b) – 12.

Two FEMA programs — the NFIP and FEMA's Hazard Mitigation Grants Program (42 U.S.C § 1570c) — have provided substantial federal funds to assist with planning and implementation of primarily non-structural buyouts of floodprone properties as well as elevations and floodproofing of existing structures, as complements or alternatives to traditional Corps flood control projects. From 1994 to 2004, FEMA supported buyouts of approximately 30,000 floodprone residences and businesses, providing approximately $1 billion in federal funds. When buildings are purchased, the owner receives pre-disaster fair market value for the property, and the land is permanently dedicated to open space uses, generally under responsibility of a local government. A variety of state and other federal programs can assist with finding new housing or business relocations, particularly after disasters. Additional information on these programs can be accessed from the FEMA website at *http://www.fema.gov.*

### Activist Tip

When commenting on a Corps flood damage reduction project, activists should urge a full and comprehensive assessment of buyouts of floodprone properties, elevating and floodproofing existing structures, and ensuring strict compliance with NFIP floodplain management standards as an alternative to a structural plan. Activists should also urge the Corps to consider an alternative that combines these nonstructural approaches with restoration efforts designed to restore the natural flood protection services provided by healthy rivers and wetlands.

Activists should also submit evidence of any non-compliance with NFIP requirements for communities that would "benefit" from the Corps' proposed plan, and urge the Corps to account only for those flood damage reduction benefits that could not also be obtained through full compliance with the NFIP requirements.

## B. National Historic Preservation Act

The National Historic Preservation Act (NHPA) establishes a comprehensive program to preserve the Nation's historical and cultural foundations. Among other things, the NHPA requires federal agencies to consider the effects of their actions on historic properties and establishes an Advisory Council on Historic Preservation. *See 16 U.S.C. § 470 for the full text of the NHPA.*

Section 106 of the NHPA requires federal agencies, including the Corps, to consider the effects of their actions on historic properties. The requirements of Section 106 apply to both the Corps' civil works and permitting actions.[20] The Advisory Council on Historic Preservation established by the NHPA must be given an opportunity to comment on Federal projects and permits prior to their implementation (these reviews will be conducted in consultation with the State Historic Preservation Officer). 16 U.S.C. § 470f.

The Section 106 review encourages, but does not mandate, preservation of historic properties. Instead, a Section 106 review ensures that preservation values are factored into federal agency planning and decision-making, and allows the public to hold the federal agency publicly accountable for decisions that affect historic properties.

More information on the NHPA can be accessed from the website for the Advisory Council on Historic Preservation at *http://www.achp.gov.* A citizen's guide to the Section 106 review process is available at *http://www.achp.gov/citizensguide.pdf.* The Section 106 regulations, Protection of Historic Properties, are found at 36 C.F.R. Part 800.

## IV. Information Access and Quality Laws

The following laws are designed to help ensure that the public has access to information prepared by federal agencies, and to ensure the adequacy of that information. Corps planning laws also require the Corps to make certain information available to the public. These Corps-specific requirements are discussed in Chapter 2.

### A. Data Quality Act

Enacted in December 2000, the Data Quality Act (DQA) is a two paragraph provision buried in an appropriations bill.[21] Though largely supported by those who **oppose** environmental regulation (as the Act can be used to stall critical regulatory efforts), the Act does provide an opportunity for challenging the contents of Corps studies. *See the Treasury and Government Appropriation Act for Fiscal Year 2001, Pub. L. No. 106-554 § 515 Appendix C for the full text of the DQA.*

The DQA was enacted primarily to ensure the accuracy of information provided on government websites. However, the requirements of the DQA are not limited to website information. The DQA requires each federal agency to "issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency." OMB is directed to establish government-wide information quality standard guidelines upon which the individual agency guidelines are to be based.

Importantly, the DQA requires federal agencies "to establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines" issued pursuant to the Act. This provides a mechanism for challenging the accuracy of information contained in Corps reports and studies.

Under the DQA a party can challenge specific assumptions or statements that are inaccurate, are contrary to trends in the literature on the subject, or that fail to tell the whole story. Studies already made public by an agency can be challenged under the DQA if the agency continues to use or rely on them.

Copies of agency guidelines established under the DQA are maintained by the Center for Regulatory Effectiveness at *http://www.thecre.com/quality/index.html.* As of the date of this publication, the Corps had not developed their own guidelines. However, guidelines are in place for the Department of Defense and these should be used to challenge Corps information until the Corps promulgates its own.

While DQA challenges have been filed by conservation groups and by Public Employees for Environmental Responsibility (PEER) against the Corps, to date those challenges

have either not been responded to or have not caused an improvement in the quality of the data and models used by the Corps.

## B. Freedom of Information Act

The Freedom of Information Act (FOIA) requires the Corps (and all federal agencies) to promptly provide documents to any person upon receipt of a written request. FOIA is an extremely useful tool for obtaining government documents that otherwise might not be available for public review, particularly those setting forth the steps taken and information reviewed by an agency in reaching a particular decision. *See 5 U.S.C. § 552 et seq. for the full text of the FOIA.*

**FOIA Request:** A FOIA request for records must reasonably describe the records requested and be made in accordance with the agency's published procedures. The Corps' FOIA procedures (including the Corps' fee schedule), and other FOIA information can be accessed at *http://www.usace.army.mil/FOIA/Pages/ArticleHome.aspx.*

A FOIA request should clearly describe the subject matter and types of documents being requested. The request should also identify the format that the requester prefers the documents to be produced in (*i.e.*, hard copies, electronic copies, etc.), as the Corps must provide the documents "in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3). In addition, if applicable, the request should include a relatively detailed discussion of why a fee waiver is warranted (*see below*).

A FOIA request can ask for a broad range of document types and should fully describe the types of documents you are requesting. For example, you could request all documents pertaining to a specific project, including letters, memoranda, analyses, studies, reports, meeting summaries, agendas, maps, and any other relevant documents, whether in draft or final form, or in the form of email messages, telephone conversations, handwritten notes, and other mediums of communication.

**Documents and Exemptions:** The Corps must produce all documents requested in a FOIA request unless those documents are explicitly exempted from production or are already publicly available. It is important to recognize, however, that FOIA only provides access to **existing** documents; an agency is not required to prepare new documents to meet a FOIA request.

The following types of documents are exempted from FOIA, and thus do not have to be produced in response to a FOIA request:

(1) Records of matters "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy";

(2) Records of matters "related solely to the [agency's] internal personnel rules and practices";

(3) Records of matters specifically exempted from disclosure by statute;

(4) Privileged or confidential trade secrets and commercial or financial information;

(5) "Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency";

(6) Personnel, medical, and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) Records or information compiled for law enforcement purposes to the extent they could interfere with enforcement proceedings;

(8) Records of matters contained in or related to reports prepared by, or on behalf of, or for the use of, an agency charged with regulating financial institutions; or

(9) Geological or geophysical information and data, including maps, concerning wells.

However, any non-exempt portions of a document that falls under one of these exemptions must be produced. 5 U.S.C. § 552(b).

The exemption that is likely to create the most problems for activists seeking information on Corps projects is the exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Often referred to as Exemption 5, this is also known as the deliberative process privilege, and it is designed to protect a full and frank discussion of legal and policy issues during the decision making process.[22]

Under Exemption 5, the Corps can withhold documents if they are predecisional, are generated in the course of the adoption of agency policy, are deliberative in nature, and reflect the give and take of the consultative process. These "pre-decisional documents" can cover such things as recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect personal opinions of the writer rather than the policy of the agency.

Information that is purely factual in nature, however, cannot be withheld under Exemption 5. In addition, predecisional documents lose their protection — and must be disclosed under FOIA — if the document is subsequently adopted as an agency position,

## Activist Tip

Activists should carefully consider what to ask for in a FOIA request. In most cases a broad request seeking all documents that pertain to a particular project or issue will make the most sense, and will ensure that you get all relevant documents. There may be cases, however, where you want to request just one or two specific documents.

A tailored request is likely to be responded to more quickly and any potential fees would be significantly less. However, if you have not identified the requested document properly, the Corps would not have to produce it.

There is no limit on the number of FOIA requests that can be sent with respect to a particular project or program.

if the document is released to the public or used by the agency in dealings with the public, or if the document is disclosed to individuals or agencies not involved in the deliberative process.[23]

**Fees and Fee Waivers:** The Corps can charge fees for providing public records under FOIA. The fees must be limited to reasonable direct costs of document search, duplication and review.[24] Documents must be provided at a reduced charge or free of charge "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4). Activists seeking a fee waiver must document how they will make the information available to the public and why it is in the public interest to do so.

**Timeline for Response:** The Corps must notify the requester within 20 working days[25] of receiving a FOIA request whether it will comply with such request, the reasons for the decision, and of the right of the requester to appeal to the head of the agency any adverse determination. The Corps can toll the 20-day period if it requests additional information from the requester. In "unusual circumstances" as defined in the Act, the time limits can be extended by the Corps. 5 U.S.C. § 552(a)(6). Despite the 20-day response requirement, responses often take much longer.

**Appealing a Denial:** Any person may appeal a denial of all or part of a FOIA request to the head of the agency. Any person who has been denied access to public records may file suit in U.S. District Court to order the production of agency records improperly withheld. The District Court must review the records and come to its own conclusion as to whether the agency's action of withholding the records was lawful.

## V. Corps Planning Laws

The Corps' project planning process is guided by an extensive body of laws, regulations, and policies. These laws and policies address such issues as the contents of Corps feasibility studies, benefit-cost analysis requirements, cost-sharing requirements, independent peer review, mitigation, and compliance with the Corps' project planning principles and guidelines (which are currently being modernized). Corps projects must also comply fully with all applicable federal environmental laws and regulations, including those outlined in this chapter. *See Chapter 2 for a detailed discussion of the Corps' project planning laws, regulations, and policies.*

## VI. Executive Orders

Executive orders are issued by the President to federal agencies and generally provide specific directions for implementing laws and policies established by Congress. While Executive orders are legally binding, they are generally not enforceable, which can limit their effectiveness. The following Executive orders are among the most important that affect the Corps' work. Most Executive orders are easily searchable online.

**Floodplain Management – Executive Order 11988 (May 24, 1977):** This Executive order directs the Corps and other agencies "to reduce the risk of flood loss, to minimize the impacts of floods on human safety, health and welfare, and to restore and preserve the natural and beneficial values served by floodplains."[26] The order requires the Corps to evaluate the potential effect their actions may have in a floodplain and to "consider alternatives to avoid adverse effects and incompatible development in floodplains." It serves as a key directive to agencies to consider alternatives to avoid actions that would result in unwise floodplain development. Compliance with this order is generally conducted in coordination with NEPA compliance, but the Corps has promulgated specific regulations to implement this Executive order.

**Protection and Enhancement of Environmental Quality – Executive Order 11514 (March 5, 1970):** This Executive order specifies the duties of the President's Council on Environmental Quality (CEQ).[27] It also directs CEQ to establish regulations for the referral of interagency conflicts concerning National Environmental Policy Act reviews to CEQ. Agency referrals to CEQ can be an important mechanism for redirecting or stopping a harmful proposal. In the case of the Oregon Inlet Jetties, NOAA Fisheries referred the Corps EIS to CEQ because there was a conflict over the project's impact to fisheries. The CEQ referral process resulted in putting an end to the jetty proposal and having the Corps, FWS, NOAA Fisheries and CEQ agree to a less environmentally destructive alternative. *See Chapters 5 for more information on CEQ and the referral process.*

**Protection of Wetlands – Executive Order 11990 (May 24, 1977):** This Executive order directs the Corps and other agencies "to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands" in carrying out federal activities and programs (the order does not apply to issuance of Federal permits or licenses to private parties for activities involving wetlands on non-Federal property).[28] This order establishes the federal policy to reduce and reverse losses and degradation of the nation's wetlands. This order is generally implemented in conjunction with NEPA compliance.

**Water Resources Projects – Executive Order 12322 (September 17, 1981):** This Executive order directs the Corps to submit project proposals or plans to the Office of Management and Budget (OMB) for review before submitting the proposal to Congress.[29] OMB is to review each project proposal to determine its consistency with the President's policies and programs, the Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies (commonly referred to as the *P&G*, which are the basic rules used by the Corps to plan and evaluate projects; the P&G are currently being modernized pursuant to hard fought reforms enacted in the Water Resources Development Act of 2007) and other applicable laws, regulations, and requirements relevant to the planning process.

Although the Corps can still proceed with a project even if OMB objects, OMB's review and conclusions can provide arguments for stopping or redirecting the project. In addition, OMB is unlikely to allow the President's budget to include funds for a project it opposes. For example, in 2001, OMB found that the Corps' proposal for the Dallas Floodway Extension project failed to identify the most effective alternative for the project consistent with protecting the environment (as required by the *P&G*). As a result, the President's budget included no money for this project in FY 2003 and 2004 even though the Corps continued to push for the project. Unfortunately, Congress nevertheless appropriated significant amounts of funding for the project in both years.

## Endnotes

1. The United States Code compiles all changes to policy provisions and is the official source for the current version of the law. As a result, you should always utilize the U.S.C. reference to find the most current legal requirements. Note that the section numbers of the U.S.C. and U.S.C.A. are identical; the U.S.C.A. merely adds explanations and case law references that have interpreted the code sections.
2. There are 11 numbered Circuit Courts of Appeals that cover specific geographic regions. There is also a District of Columbia Circuit Court and a Federal Circuit Court. The 1st Circuit Court of Appeals covers Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island. The 2nd Circuit Court of Appeals covers New York, Vermont, and Connecticut. The 3rd Circuit Court of Appeals covers Pennsylvania, New Jersey, Delaware, and Virgin Islands. The 4th Circuit Court of Appeals covers Maryland, North Carolina, South Carolina, Virginia, and West Virginia. The 5th Circuit Court of Appeals covers Louisiana, Texas and Mississippi. The 6th Circuit Court of Appeals covers Michigan, Ohio, Kentucky and Tennessee. The 7th Circuit Court of Appeals covers Illinois, Indiana, and Wisconsin. The 8th Circuit Court of Appeals covers North and South Dakota, Minnesota, Nebraska, Iowa, Missouri and Arkansas. The 9th Circuit Court of Appeals covers California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii, Guam and the Northern Mariana Islands. The 10th Circuit Court of Appeals covers Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming, plus those portions of the Yellowstone National Park extending into Montana and Idaho. The 11th Circuit Court of Appeals covers Alabama, Georgia and Florida. The District of Columbia Court of Appeals has jurisdiction over the District of Columbia, the U.S. Tax Court, and appeals from decisions of many federal administrative agencies. The Federal Court of Appeals has jurisdiction over the U.S. Court of International Trade, the U.S. Claims Court, the Court of Veteran's Appeals and patent appeals.
3. The President's authority to issue legally binding orders is found in Article II of the U.S. Constitution which grants "executive Power" to the President and directs the President to "take Care that the Laws be faithfully executed."
4. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 105 (1983); *Motor Vehicles Mfrs. Assn. v. State Farm*, 463 U.S. 29, 43 (1983).
5. *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992).
6. Numerous other environmental laws can also be implicated in Corps planning.
7. Each Clean Water Act section can be cited in two different ways. One citation is to the section of the Clean Water Act as it was passed by Congress (Clean Water Act § 101 to § 607). The Clean Water Act was codified in Title 33 of the U.S. Code, so each Clean Water Act section also has a corresponding U.S. Code citation (33 U.S.C. § 1251 to 33 U.S. C. § 1387). So for example, Clean Water Act § 101 is also known as 33 U.S.C. § 1251.
8. *U.S. v. Certain Parcels of Land in the City of Valdez*, 666 F.2d 1236 (9th Cir. 1982).
9. The legislative history makes it clear that Congress believed that the Corps was more than capable of both maintaining navigation and meeting water quality standards: "This amendment . . . is neither intended nor expected to result in compromising the ability of the Corps to maintain navigation. The States that have taken administrative and judicial action to seek Corps compliance with water quality standards have a comparable interest in the movement of commerce on waterways maintained by corps dredging. The committee expects that such States will act both to insure compliance with water quality standards and continued corps dredging activities." S. Rep. No. 95-370 at 68-69 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4393. Moreover, the Corps "acknowledges that its obligation to 'maintain navigation' does not always trump the Clean Water Act. However, the Corps contends that when it is faced with what it calls an 'either-or-situation,' the Corps ability to maintain navigation is not subject to state water quality standards." *State of North Dakota v. Corps of Engineers*, 270 F.Supp.2d 1115, 1122 (D.N.D. 2003).
10. 53 Fed. Reg. 14902 (April 26, 1988).
11. The state denied the Corps' request for a wetlands resource permit and a Clean Water Act § 401 Water Quality Certification, and denied a public easement to use sovereign submerged lands for the proposed dredged material disposal sites.
12. Federal flood insurance provided through the National Flood Insurance Program is only available for structures located within the Coastal Barrier Resource System if the building was constructed (or permitted and under construction) before the area became part of the System. If such an existing insured structure is substantially improved or damaged, the CBRA prohibits renewal of the federal flood insurance policy.
13. Government Accountability Office, *Endangered Species Act: The U.S. Fish and Wildlife Service Has Incomplete Information about Effects on Listed Species from Section 7 Consultations* (May 2009) at Table 1.
14. *E.g.*, *Tribal Village of Akutan v. Hodel*, 869 F.2d, 1185, 1193 (9th Cir. 1988), *cert. denied*, 493 U.S. 873 (1989).
15. Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ's NEPA Regulations*, available at *http://www.nepa.gov* (visited June 26, 2009).
16. *http://www.rivers.gov/* (visited June 26, 2009).

17. Under the WSRA, rivers are classified as wild, scenic, or recreational. A "wild" river is a river or river section that is free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted. A "scenic river" is a river or river section that is free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads. A "recreational river" is a river or river section that is readily accessible by road or railroad, that may have some development along the shoreline, and that may have undergone some impoundment or diversion in the past. *http://www.rivers.gov/* (visited June 26, 2009).
18. This restriction does not apply to the permitting of projects in areas above or below a designated river. A federal agency can issue a permit for developments above or below a designated river segment or on any tributary to a designated river segment as long as the activity "will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on the date of designation of a river as a component of the National Wild and Scenic Rivers System." 16 U.S.C. § 1278.
19. *Oregon Natural Resources Council v. Harell*, 52 F.3d 1499 (9th Cir. 1995).
20. Most of the NHPA challenges to Corps activities have been directed at Corps permit decisions. *See, e.g., Sayler Park Village Council v. Corps of Engineers*, (S.D. Ohio, 2003); *Committee to Save Cleveland's Huletts v. Corps of Engineers*, 163 F.Supp.2d 776 (N.D. Ohio, 2001).
21. The provisions of the Data Quality Act have not been codified in the United States Code, and thus can only be found in the Public Law.
22. *Skelton v United States Postal Service*, 678 F2d 35 (5th Cir. 1982).
23. *See, e.g., NRDC v United States DOD,* 442 F Supp 2d 857 (C.D. CA 2006).
24. An agency cannot charge an advance payment fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed $250. 5 U.S.C. § 552(a)(4).
25. Saturdays, Sundays, and legal public holidays are not included in the 20 day count.
26. The full text of Executive Order 11988 is accessible at *http://www.archives.gov/federal-register/codification/executive-order/11988.html (visited June 26, 2009).*
27. *The* full text of Executive Order 11514 is accessible at *http://www.archives.gov/federal-register/codification/executive-order/11514.html* (visited June 26, 2009).
28. The full text of Executive Order 11990 is accessible at *http://www.archives.gov/federal-register/codification/executive-order/11990.html* (visited June 26, 2009).
29. The full text of Executive Order 12322 is accessible at *http://www.archives.gov/federal-register/codification/executive-order/12322.html* (visited June 26, 2009).