

CHAPTER 2

LEGISLATIVE, EXECUTIVE, AND JUDICIAL ROLES AND POLICIES

2-1. Legislative Branch.

a. Role. The basic legislation which governs the conduct of the Corps civil works program consists of numerous separate enactments of the Congress. The work of preparing and considering such legislation is done largely in the Senate Committee on Environment and Public Works and the House Committee on Transportation and Infrastructure. The tendency has been for Congress to gradually increase Federal responsibility in response to needs of the times. Some water resources project purposes were originally established through specific legislation. Others were established as a result of repetitive congressional authorization of projects containing resource purposes incidental to the "primary" project purposes. Legislation pertinent to the water resources program of the Corps of Engineers is listed in Appendix B. While the public laws governing water resources are the basic source of formal, explicit policy, the Congressional intent which may be deduced from the documented history of these legislative statements is also an important policy source. Sources which express the sense of Congress include House and Senate Committee reports and resolutions and the Congressional Record of discussions during consideration of the proposed legislation.

b. Authorizing Legislation. House Committee on Transportation and Infrastructure and Senate Committee on Environment and Public Works resolutions and specific legislation provide basic authorization for feasibility studies by the Corps. Generally, water resource developments recommended to the Congress in response to study authorities may not be implemented without being specifically adopted in law. The majority of the Corps water resources projects or programs fall into that category. However, Section 201 of the 1965 Flood Control Act, as amended, delegated to the Secretary of the Army the right to administratively authorize water resources developments for which the estimated Federal cost is less than \$15 million. Approval by the Public Works Committees is required prior to project implementation. Additionally, subject to specific limits on the allowable Federal expenditures, Congress has delegated continuing authority to the Secretary of the Army acting through the Chief of Engineers for study, adoption and construction of small projects for navigation, flood control, beach erosion control, shore protection, and ecosystem restoration as summarized in Table 2-1. Criteria for design, evaluation, cost sharing and other local cooperation (with the added requirement that local interests bear all project costs in excess of the Federal limit, except for Section 111 projects) are the same for these projects as for projects specifically authorized by Congress.

c. Legislative Landmarks. The Corps civil works responsibility began with an Act of Congress in 1824 for the improvement of rivers and harbors for navigation. This led to legislation in 1879 creating the Mississippi River Commission and establishment of the Board of Engineers for Rivers and Harbors (BERH) in 1902 (Note: The BERH ceased to exist in 1993 in accordance with Section 223 of WRDA 1992). Legislative expansion of the Corps functional responsibility has included:

Table 2-1 Continuing Authority Projects

<u>Authority</u>	<u>Type of Project for Which Used</u>	<u>Statutory Limit of Federal Costs Per Project (2)</u>
Section 14 1946 FC Act(1)	Streambank and Shoreline Protection for Public Facilities	\$1,000,000
Section 103 1962 R&H Act(1)	Small Beach Erosion Control Projects	2,000,000(3)
Section 107 1960 R&H Act(1)	Small Navigation Projects	4,000,000(4)
Section 111 1968 R&H Act(1)	Mitigation of Shore Damage Due to Federal Navigation Projects	2,000,000(3)(5)
Section 204 1992 WRDA	Projects for Protection, Restoration, and Creation of Aquatic and Ecologically Related Habitats, including Wetlands (Ecosystem Restoration Projects in Connection with Dredging)	None
Section 205 1948 FC Act(1)	Small Flood Control Projects	5,000,000
Section 206 1996 WRDA	Aquatic Ecosystem Restoration Projects	5,000,000
Section 208 1954 FC Act(1)	Snagging and Clearing for Flood Control	500,000
Section 1135 1986 WRDA(1)	Project Modifications for Improvement of the Environment (Ecosystem Restoration)	5,000,000

(1) As subsequently amended.

(2) Implementation, includes all Federal expenditures, including preauthorization study costs.

(3) Includes actual costs for subsequent periodic nourishment, if part of the adopted project, as well as for initial implementation.

(4) Also, the Federal share of total costs (initial implementation costs plus the capitalized value of future maintenance costs) may not exceed 2.25 times the initial Federal costs or \$4.5 million, whichever is greater.

(5) A project involving Federal costs in excess of \$2 million will be transmitted to Congress for specific authorization.

- 1987; (a) Regulatory activities over waters, 1899, 1972, 1977 and
- (b) Hydroelectric power in dams, 1912 and 1917;
- (c) Flood control, 1917, 1927, 1936, 1974;
- (d) Recreation navigation, 1932;
- (e) Recreation, 1944, 1962, and 1965;
- (f) Irrigation (limited), 1944;
- (g) Water supply, 1944, 1958, and 1965;
- 1996; (h) Shore and beach erosion protection, 1946, 1956, 1962, 1974,
- (i) Hurricane protection, 1955, 1958;
- (j) Fish and wildlife conservation, 1958, 1965, and 1974;
- (k) Water quality, 1961, 1972, 1974;
- (l) Environmental concern and emphasis, 1970;
- (m) Wastewater management, 1972;
- (n) Wetlands development, 1976 and 1992;
- (o) Groundwater damages, 1986;
- (p) Environmental Protection, 1990;
- (q) Ecosystem Restoration, 1986 and 1996

The Water Resources Development Act (WRDA) of 1986 is the legislative landmark of major current significance. In it, the Congress has comprehensively reestablished and redefined, by purpose, the Federal interest in water resources development and has--in recognition of the limitations on Federal financial resources in an era of persistent budgetary deficits--instituted requirements for proportionately greater non-Federal cost sharing in Corps projects.

d. Other Significant Legislation. During the 1970s there was a qualitative change in public policy toward resource planning and development, spurred by the recognition that this Nation's natural resources are both interrelated and finite. Considerations other than economic efficiency evolved. Among others, this legislation includes:

(1) The Clean Water Act of 1977 (Public Law 95-217). This Act amends Public Law 92-500 and continues the massive research and action program designed to clean up U.S. waters. The Environmental Protection Agency (EPA) has primary responsibility for implementing this program. However, under Section 404 of the amended Act, the Corps of Engineers retains primary responsibility for permits to

discharge dredged or fill material into waters of the United States. The Act also defines the conditions which must be met by Federal projects before they may make discharges into the Nation's waters.

(2) Water Resources Development Act of 1976 (Public Law 94-587). Section 150 authorizes the Chief of Engineers to establish wetland areas with dredged material from water resources projects. Although Section 150 authority has not been implemented, Section 204 of WRDA 1992 is currently the primary authority for implementation of projects for the use of dredged material to protect, restore, or create aquatic and related habitats.

(3) Water Resources Development Act of 1974 (Public Law 93-251). Section 73 states a general policy that, during planning, Federal agencies will give consideration to nonstructural measures to reduce or prevent flood damage and that the Federal Government may participate in the costs.

(4) River and Harbor and Flood Control Act of 1970 (Public Law 91-611).

(a) Section 122 directed the Secretary of the Army, acting through the Chief of Engineers, to promulgate guidelines for consideration of significant economic, social and environmental effects of proposed water resources developments, so that final project decisions are made in the best overall public interest.

(b) Section 209 expressed the intent of Congress that the objectives of enhancing regional economic development, quality of the total environment, well-being of people, and national economic development are to be included in the formulation and evaluation of Federally financed water resource projects.

(5) National Environmental Policy Act (NEPA) of 1969 (Public Law 91-190). NEPA declared it a national policy to encourage productive and enjoyable harmony between man and his environment, and for other purposes. Specifically, it declared a "continuing policy of the Federal Government ... to use all practicable means and measures ... to foster and promote the general welfare, to create conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." Section 102 authorized and directed that, to the fullest extent possible, the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies of the Act.

2-2. Executive Branch. The Executive Branch of the Government is responsible for implementing the policies and programs established by law. This branch of Government includes the Executive Office of the President and the various Federal departments and agencies. The Department of the Army and the Corps of Engineers are charged by Congress with the major Federal program of water resources development. This has been the outgrowth of legislative and administrative activity over many years. The term "civil works program" is usually applied to these non-military Corps activities. The Executive Office of the President, acting directly or through support offices, specifies policy, principles, methods, standards and procedures on water and related land resources programs to be used by Federal agencies in implementing their lawful activities. Executive

policies are generally issued through the Office of Management and Budget (OMB). Pertinent Executive Orders (E.O.) are listed in Appendix C. In addition, international commissions, and interagency councils and agreements have been developed to aid in the accomplishment of executive policy.

a. Department of the Army. The Secretary of the Army oversees direction of the Corps of Engineers and its civil works program. Civil works laws authorize action in the following ways: action by the Secretary; action under the direction of the Secretary and supervision of the Chief of Engineers ; and by the Secretary, acting through the Chief of Engineers. The Chief regularly submits reports to the Secretary for transmittal, along with the Secretary's comments and recommendations, to OMB for its advice on the relation of the report recommendations to the programs of the President. The Office of the Assistant Secretary of the Army for Civil Works (OASA(CW)) works closely with the Headquarters, U.S. Army Corps of Engineers (HQUSACE) on central or critical management areas, including general programming of the Corps civil works budget; substantive policy issues; quality assurance of the policy compliance process; priorities for "new starts"; new or evolving functional areas of responsibilities for the Corps; and legislative drafting services requested by members of Congress. The OASA(CW) reviews and transmits the proposed Corps civil works budget to OMB as a basis for the President's budget recommendations to Congress.

b. Office of Management and Budget (OMB). The current structure of OMB was established by Executive Order 11541, July 1970, in the Executive Office of the President. OMB coordinates Executive Branch reports on proposed legislation and reviews proposed projects to determine their relationship to the program of the President. It reviews proposed Executive Orders and assists in the preparation of the President's annual budget and in the formulation of the fiscal program of the government, and also supervises and controls the administration of the budget. Administration positions relating to fiscal and budgetary matters are generally issued as OMB memoranda, circulars and bulletins. Pertinent OMB circulars are listed in Appendix D.

c. Water Resources Council (WRC). The WRC was created as an independent agency by the Water Resources Planning Act, Public Law 89-80, 22 July 1965, to be composed of member Federal agencies involved in natural resources development. The purpose of the Act was to encourage the conservation, development, and utilization of water and related land resources on a comprehensive and coordinated basis by the Federal Government, states, localities, and private enterprise. The Council members are the Secretaries of Agriculture; Army; Commerce; Energy; Housing and Urban Development; Interior; and Transportation; and the Administrator of the Environmental Protection Agency. The principal functions of the Council were specified under three titles of the Act:

(1) Title I - Water Resources Council.

(a) Prepare and maintain a national water assessment;

(b) Coordinate water and related land resources planning policies and programs with and among the Federal participants;

(c) Establish principles, standards and procedures for Federal participants in the preparation of plans and formulation and evaluation of Federal water and related land projects. (*)

(2) Title II - River Basin Commissions. (**)

(a) Establish and assist river basin commissions, interagency committees and coordinating groups;

(b) Coordinate and review river basin and regional plans and programs prepared by Federal - state interests;

(3) Title III - Financial Assistance to the States. Administer Federal financial grants to states for water and related land resource planning.

Section 103 of the Act (*) directs WRC to promulgate, with the approval of the President, principles, standards and procedures for water and related land resources planning for use by member agencies. This is the only function currently being performed by WRC. (WRC is no longer supported by permanent staff.) The six River Basin Commissions (**) established pursuant to Title II were subsequently terminated in accordance with Executive Order 12319, 17 February 1981.

d. Council on Environmental Quality (CEQ). The CEQ was established by Section 202 of the National Environmental Policy Act (NEPA) of 1969. The Office of Environmental Quality (OEQ), which was established by Public Law 91-224, 3 April 1970, provides staff for the CEQ. The CEQ advises and assists the President in providing leadership in protecting and enhancing the quality of the Nation's environment. It develops and evaluates Federal policies and activities on environmental quality. One of CEQ's primary functions in relation to water resources is the preparation of regulations concerning the development of environmental impact statements developed by the Corps and other agencies. CEQ regulations on implementation of the procedural provision of NEPA are printed in 40 CFR 1500-1508.

e. International Relations.

(1) Canada. The International Joint Commission (IJC) was established under the Boundary Water Treaty of 1909. It is empowered to establish local international boards to assure adherence to the rules and regulations pertaining to the utilization and safeguard of United States and Canada boundary waters. IJC boards fall into two broad categories: boards of control, which are more or less permanent; and engineering or advisory boards, which are usually dissolved after completing their investigation. Members on an IJC board are in no sense representatives of their employers. Their board service is of a professional capacity under the direction of the IJC; their agency is not committed by their actions or those of the board. Initiation and approval of IJC reference actions by the U.S. Section of the Commission is through the U.S. Department of State. Funding of this activity is under the "International Waters Studies" account or under an on-going study or project account.

(2) Mexico. The International Boundary and Water Commission (IBWC), United States and Mexico, was established pursuant to the Rio Grande, Colorado and Tijuana Treaty of 1944 and deals with the

utilization of the waters of the three rivers basins. Activities of the U.S. Section of the IBWC are funded under the Department of State. The Corps, upon request of the U.S. Section, provides advisory and technical services to the IBWC.

(3) Management of Activities. Corps members serving on boards of these International Commissions and their subordinate groups are governed by USACE Supplement 1 to AR 15-1. Members submit an annual fiscal year report on board activities per ER 25-2-1 for the Secretary of the Army's Annual Report on Civil Works Activities.

(4) Native American Tribal Governments. The United States Constitution specifically addresses Indian sovereignty by classing Indian treaties among the "supreme Law of the land," and establishes Indian affairs as a unique focus of Federal concern. Principles outlined in the Constitution and treaties, as well as those established by Federal laws, regulations and Executive Orders, continue to guide our national policy toward Indian Nations. On 29 April 1994, the United States reaffirmed its "unique legal relationship with Native American tribal governments." In recognition of the special considerations due to tribal interests, the President directed Federal agencies to operate within a government-to-government relationship with federally recognized Indian tribes; consult, to the greatest extent practicable and permitted by law, with Indian tribal governments; assess the impact of agency activities on tribal trust resources and assure that tribal interests are considered before activities are undertaken; and remove procedural impediments to working directly with tribal governments on activities that affect trust property or governmental rights of the tribes. The U.S. Army Corps of Engineers has lasting and positive relations with many Indian tribal governments (e.g., since 1990, Indian tribes have been local partners in the development and construction of over 200 Corps water resources development projects, and Indian tribes annually apply for hundreds of permits under the Corps Clean Water Act permitting responsibilities. To ensure that all Corps commands adhere to principles of respect for Indian tribal governments and honor our Nation's trust responsibility, the "U.S. Army Corps of Engineers Tribal Policy Principles" is to be used on an interim basis until more detailed statements are developed. These Principles have been developed with the OASA(CW) and are consistent with the President's goals and objectives.

f. Interagency Agreements. These agreements represent a coordination device agreed upon by two or more Federal agencies to analyze or solve common problems in a consistent manner so as to optimize the results of the joint effort. Interagency agreements, adopted as common interagency policy, carry the authority of the respective agency heads. Such agreements to which the Corps may be a party are executed, on behalf of the Department of the Army, by ASA(CW). The scope and degree of formality of this limited form of Executive policy varies widely. Pertinent interagency agreements are listed in Appendix E of this EP.

2-3. Administrative Policy.

a. Historic Policy. Administrative policy has developed gradually but continuously over the years to implement laws and to encompass the growth of economic and social need and changing technology. Basic principles of formulation and evaluation were

outlined in the report to the Interagency Committee on Water Resources entitled, "Proposed Practices for Economic Analysis of River Basin Projects," originally issued in May 1950 and revised in May 1958 (generally referred to as the "Green Book"). In May 1962, the President approved use of the principles and standards contained in Senate Document 97, 87th Congress. In September 1973, the President approved (and WRC published in the Federal Register) WRC's "Principles and Standards for Planning Water and Related Land Resources" (P&S). The P&S set forth two co-equal national objectives, national economic development (NED) and environmental quality (EQ); required, in investigations of the member agencies, formulation of alternative NED and EQ plans; and called for a display of the potential impacts of plans in a system of four accounts--an account for each of the two national objectives, an account for regional development and an account for social well-being. WRC later revised the P&S for clarity and conciseness; to emphasize water conservation; and to require, in investigations of member agencies, formulation of a primarily nonstructural plan as one of the alternatives displayed. Separately, WRC also promulgated procedures for NED evaluation and for EQ evaluation. The WRC revised P&S, and the evaluation procedures were published, 14 December 1979 and 29 September 1980, as final administrative rules for the uniform observance of Federal agencies engaged in level C planning. They were repealed 10 March 1983.

b. Current Policy. On 11 September 1981, a proposal to repeal the then standing administrative rules (P&S) was published by WRC in the Federal Register. On 17 September 1981, the President ordered that agency reports, proposals or plans be consistent with WRC's existing P&S "or other such planning guidelines for water and related land resources planning as shall hereafter be issued." (E.O. 12322) On 22 March 1982 WRC extended the period for comment on the proposed repeal of the existing rules and published for public comment proposed new Principles and Guidelines -- full title: "Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies." Thereafter, on 3 February 1983, the President approved new principles superseding those incorporated in P&S. On 10 March 1983 all of the elements of P&S were repealed (48 FR 10250) and notice of adoption and availability of the new Principles and Guidelines (P&G) issued (48 FR 10259) in the Federal Register. The effective date of change is 8 July 1983. These WRC P&G are applicable to Corps implementation studies for civil works water project plans (and to similar plans of the Bureau of Reclamation, Tennessee Valley Authority, and the Natural Resources Conservation Service). They have standing as Administrative Guidelines, not (as did the P&S) Administrative Rules. The new principles differ from the previous P&S most notably in that they prescribe a single Federal objective, national economic development (NED), and do not specifically characterize other plans that must be in the array of alternatives considered. They do retain provision for display of potential impacts in four accounts: NED, EQ, regional economic development (RED) and other social effects (OSE). The new guidelines are organized in three chapters: Chapter I - Standards integrates the new principles into guidelines for carrying out the planning process; Chapter II - National Economic Development (NED) Benefit Evaluation Procedures; and Chapter III - Environmental Quality (EQ) Evaluation Procedures which sets forth one alternative environmental evaluation system that may be used.

2-4. Judicial Branch. Federal courts clarify and define the

responsibilities and limitations placed on the Corps civil works activities by Federal statutes and the Constitution. Judicial decisions have affected civil works policies in several major areas: basic authority to construct or operate projects; administrative practices and required factors of consideration in project construction and operation (including environmental factors); and the scope and application of regulatory authorities.

a. The Courts. The Federal courts include the Supreme Court of the United States, the Court of Appeals, and the District Courts in the eleven Federal Judicial Circuits. Questions of law decided in one District or Circuit often foreclose similar questions in another District or Circuit. However, cases regarding the conduct of specific projects or activities are considered binding only with the District or Circuit in which the case was decided. The Court of Claims is also a Court of original jurisdiction. Conflicting decisions among the circuits are resolved by appeal to the Supreme Court.

b. Relation to Congressional Authority. Congressionally approved Corps projects must have been authorized in exercise of one of the powers granted to Congress by the Constitution. Such authorizations are generally based on the congressional powers to regulate interstate and foreign commerce, or to tax and spend for the general welfare. Major Supreme Court decisions have established that those general powers include not only the power to promote navigation, but also to provide for flood damage reduction, hydropower production, watershed development, and similar activities of broad water resources management. Furthermore, the powers can be applied by Congress not only to the main portions of a river or other body of water, but to its watershed and non-navigable portions as well. Also involved is the resolution of interstate water problems. States often assert conflicting claims to the waters made available by a major interbasin project. The Supreme Court has ruled that Congress may adopt a comprehensive statutory plan for apportionment of the waters involved when authorizing a project. Similarly, the court itself may adjudicate such interstate disputes. Interstate cooperation is approved by Congress in the form of an interstate compact. (Paragraph 4-3)

c. Interpretation of Legislative Policy. Policies in new or controversial fields often require judicial interpretation. In recent years judicial effect on policy has been most pronounced in matters of administrative procedures, particularly those involving public participation in decision-making and related environmental questions. The provisions of the NEPA have been applied by the courts virtually to the whole scope of the planning, construction, and operation of water resources projects, resulting in numerous changes in agencies' basic procedures. Due to this increased judicial scrutiny which occurred in the early 1970s, individuals and groups affected by present or proposed projects will have a continued opportunity to use the courts to test the propriety and application of administrative procedures.

d. Legislation and Corps Regulatory Activity. Corps regulatory authorities have been interpreted by the courts to require detailed attention to systematic decision-making and protection of the interests of the public at large as well as the particular interests of the persons or entities subjected to Federal regulation. The policies governing the administrative procedures in Corps regulatory

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programs have accordingly become increasingly detailed.