

March 31, 2010

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

RE: Corps of Engineers Transparency and On-Line Data Access

Dear Assistant Secretary Darcy:

We are writing to urge the U.S. Army Corps of Engineers to provide the public with accurate and complete data concerning two programs that regulate waters of the United States, namely, the Clean Water Act §404 and Rivers and Harbors Act §10 programs. Providing data on the area and aquatic resource types impacted, the area and aquatic resource types of mitigation required, and the locations of each, is essential to a broad array of interests in the scientific, regulated, mitigation banking, environmental, and legal communities, in addition to the Corps' local, state, and federal partner agencies.

The scientific community needs this information in order to undertake independent assessments of the ecological effectiveness of compensatory mitigation; the difficulty in obtaining such information has hampered these assessments for decades¹ and continues to stifle such efforts.² Permit applicants and state and local governments could use such information to plan needed economic development projects consistent with resource protection. Mitigation bankers have argued that data on permitting activity is critical to support their ability to undertake demand side market research and correctly site mitigation banks in watersheds in need of mitigation options.³ Environmental and conservation organizations and the legal community have argued for public access to data on impacts and mitigation as a mechanism to improve transparency and accountability in a program with a history of compliance problems.⁴ Finally, the Corps' resource agency partners need this information in order to administer complementary aquatic resource regulatory programs efficiently and effectively and to fulfill their respective statutory and regulatory responsibilities.⁵

Similarly, the scientific community, environmental and conservation organizations, and the Corps' state and federal resource agency partners need accurate and complete information on Clean Water Act jurisdictional determinations in order to track the individual and cumulative adverse impacts associated with the loss of Clean Water Act protections for the nation's wetlands, lakes, streams and other waters following the *SWANCC* and *Rapanos* Supreme Court decisions.⁶

Despite commitments by the Corps' Regulatory Program to provide these data to the public, despite significant expenditures of public funds to develop a new tracking system, and despite the deployment of the system across all Corps districts in 2007, transparency has declined over the past 7 years. The last year that data on impacts and mitigation were made available to the public was 2003. In terms of posting jurisdictional and non-jurisdictional determinations, the Corps has never achieved full and consistent posting of such determinations. Since 2007, some districts have not posted all such determinations and others have fallen far behind in their postings such that timely assessments regarding waters protected and not protected cannot be made by the public.

In 2001, the National Research Council (NRC), in its report *Compensating for Wetland Losses Under the Clean Water Act*, recommended that "The wetland area and functions lost and regained over time should be tracked in a national database."⁷ In response to NRC's recommendations, the Corps, EPA and other federal agencies issued the National Wetlands Mitigation Action Plan in 2002. Among the interagency group's recommendations were the following:

- Building upon the analysis of existing mitigation data base systems, the Corps, EPA, USDA, DOI, and NOAA will establish a shared mitigation database by 2005.
- Utilizing the shared database, the Corps, in conjunction with EPA, USDA, DOI, and NOAA, will provide an annual public report card on compensatory mitigation to complement reporting of other wetlands programs by 2005.⁸

The Corps began development of its new data management system – ORM, later G-ORM, and finally ORM2 – in 2002 and by October 2004, the agency reported that it had been put to work in the Jacksonville District.⁹ The progress and promise of readily available impact and mitigation data through ORM was an important element in the 2006-2008 mitigation rulemaking.¹⁰ By May 2007, ORM2 had been deployed in all 38 of the Corps' district offices.¹¹

As part of the appropriations process, the Corps submits an annual report to Congress. In the report, the Corps' Regulatory Program has continued to report its plans to develop and make publicly available improved data. In its 2005 and 2006 reports, the Corps' Regulatory Program discussed committing funds to improving their data system to track permitting information. In its 2007, 2008, 2009, and 2010 fiscal year reports, identical language was included stating that the new spatial database would "track workload statistics and program performance and *significant information on mitigation* including habitat type and success information, critical for insuring the 'no net loss' of wetlands goal. The database will also have spatial data on all permits, which *will* be made available to the public and our state and local partners."¹² Similar, although not identical, language was included in the fiscal year 2011 report. That report stated that ORM2 would track "*information on mitigation*," rather than "*significant information*," and that spatial data on permits "*can* be made available to the public," rather than "*will*" be made available to the public."¹³ In addition, the 2011 report stated that "The Corps continues to collaborate with Federal agencies to share information and data."

In 2007, Congress passed the Water Resource Development Act (WRDA) of 2007. WRDA is the biennial legislation that is the main vehicle for funding the Corps to study, plan, and carry out water resource development and restoration projects. The law directs the Corps to make both Civil Works and Regulatory Program data available to the public and to do so in a geospatial manner: “The Secretary [of the Army] shall carry out a program to provide public access to water resources and related water quality data in the custody of the Corps of Engineers.”¹⁴ The law states that the Corps must provide data generated in “water resources project development and regulation under section 404 of the Federal Water Pollution Control Act”¹⁵ ... and appropriately employ geographic information system technology and linkages to water resource models and analytical techniques.”¹⁶

As previously noted, in 2007 the Corps completed installation of its new Regulatory Program database, ORM2, in all 38 Corps districts. On March 11, 2008, the Assistant Secretary of the Army testified before Congress that funding provided for the Regulatory Program had increased significantly since 2001 and that the additional funding provided would be directed to implementation of the data sharing requirements stipulated in WRDA 2007 for the Regulatory Program.¹⁷ We do not know the reasons for delays in implementation of data sharing commitments. We do recognize that, particularly since the SWANCC and Rapanos decisions, Corps personnel have carried extra duties that may have delayed full implementation of data management systems.

Finally, in December 2009, the Office of Management and Budget released its “Open Government Directive” to heads of executive departments and agencies.¹⁸ The directive includes several timelines and encourages agencies to “create and institutionalize a culture of open government.” The memorandum states that “each agency shall take prompt steps to expand access to information by making it available online in open formats.” The memo stresses the importance of information being provided in a timely manner and states that “agencies should proactively use modern technology to disseminate useful information, rather than waiting for specific requests under FOIA.”

Since 2001, independent investigators, including the National Research Council, have urged the Corps’ Regulatory Program to provide timely information on permitting and mitigation to the public and its partner agencies. In 2007, Congress mandated such data sharing. In recent months, the White House has made a commitment to greater transparency and the provision of data on-line. The Corps itself has reported its intent to do so to Congress and made such commitments to the public and its sister water resource agencies. Despite the employment of new technologies to gather and report this information, the public has yet to see the results of these investments.

At a minimum, the Corps should make the following Regulatory Program data available to the public via the internet on a timely basis starting with data from 2007:

- For each jurisdictional determination: An identification number, the Corps' final determination (i.e., jurisdictional or non-jurisdictional), the program authority (e.g., CWA section 404, RHA section 10), location (at a minimum, a latitude and longitude, nearest water body and Traditionally Navigable Water, watershed or Hydrologic Unit Code (HUC)), and all other relevant information as required by Corps procedure.¹⁹
- For each authorized activity: Permit number, authorization type (e.g., standard permit, letter of permission, authorization under a nationwide or regional general permit), and location of permitted activity (at a minimum, a latitude and longitude, and watershed or HUC).
- Impact: If an authorization involves an impact to the aquatic environment, information regarding the location (at a minimum, a latitude and longitude, and watershed or HUC), amount, type (e.g., fill, shading, dredging, etc), and status (i.e., temporary or permanent) of the impact.
- Compensatory mitigation: If the impact requires compensatory mitigation, information regarding the location of the compensation site (at a minimum, a latitude and longitude, and watershed or HUC), amount of compensation required (acres and/or linear feet), and compensation mechanism used (i.e., mitigation bank, in-lieu fee mitigation or permittee-responsible mitigation).
 - If permittee-responsible mitigation is used, information regarding the method of compensation used (i.e., amounts of restoration, enhancement, establishment, or preservation required).
 - If a mitigation bank or in-lieu fee program is utilized, the amount of credits required and the name of the mitigation bank or in-lieu fee program utilized.
- Monitoring & oversight:
 - If a monitoring report is required for a compensatory mitigation site, provide the date the report was required to be submitted and the date that it was actually received.
 - If a compliance inspection is performed on a compensatory mitigation site or an impact site, the date of the inspection, the results, and any recommended follow-up actions.
- Records: The location (i.e., URL) where the public can access the final decision documents, including final mitigation plans, for each authorization both individual and general.

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Thank you for your attention to this important matter.

Sincerely,
Becky Abel
Executive Director
Wisconsin Wetlands Association

Kathy Andria
President
American Bottom Conservancy

Glynnis Collins
Executive Director
Prairie Rivers Network

Andrew Fahlund
Senior Vice President for Conservation
American Rivers

Royal C. Gardner
Professor of Law and Director
Institute for Biodiversity Law and Policy
Stetson University College of Law*

Jan Goldman-Carter
Wetlands and Water Resources Counsel
National Wildlife Federation

Ed Hopkins
Director, Environmental Quality Program
Sierra Club

Renee Hoyos
Executive Director
Tennessee Clean Water Network

Margaret Janes
Senior Policy Analyst
Appalachian Center for the Economy and the
Environment

George W. Kelly
President
National Mitigation Banking Association

Scott Kovarovics
Conservation Director
Izaak Walton League of America

Florence M. LaRiviere
Chairperson (Palo Alto, CA)
The Citizens Committee to Complete the Refuge
(from the San Francisco Bay area)

Eugenia Marks
Senior Director of Policy
Audubon Society of Rhode Island

Brian Moore
Legislative Director
National Audubon Society

Steve Moyer
Vice President for Government Affairs
Trout Unlimited

Michael Riska
Executive Director
Delaware Nature Society

Jeff Ruch
Executive Director
Public Employees for Environmental
Responsibility

Cyn Sarthou
Executive Director
Gulf Restoration Network

James Tripp
General Counsel
Environmental Defense Fund

Joy B. Zedler, Ph.D.
Aldo Leopold Chair in Restoration Ecology
Botany Department and Arboretum
University of Wisconsin-Madison

*Affiliation for identification purposes only

Cc:

The Honorable Barbara Boxer, Chairman, Senate Environment and Public Works Committee
The Honorable James Oberstar, Chairman, House Transportation and Infrastructure Committee
The Honorable Daniel K. Inouye, Chairman, Senate Appropriations Committee
The Honorable David Obey, Chairman, House Appropriations Committee
The Honorable Nancy Sutley, Chairman, Council on Environmental Quality
The Honorable Peter Orszag, Director, Office of Management and Budget
The Honorable Peter Silva, Assistant Administrator for Water, USEPA
The Honorable Rowan Gould, Acting Director, USFWS
The Honorable Jane Lubchenco, Administrator, NOAA

Endnotes:

¹ NATIONAL RESEARCH COUNCIL'S NATIONAL RESEARCH COMMITTEE ON MITIGATING WETLAND LOSSES, COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT 3 (National Academy Press) (2001); Todd BenDor, Joel Sholtes & Martin W. Doyle, *Landscape characteristics of a stream and wetland mitigation banking program*, 19(8) ECOLOGICAL APPLICATIONS 2078-92 (2009); R.F. Ambrose & S.F. Lee, *An Evaluation of Compensatory Mitigation Projects Permitted Under Clean Water Act Section 401 by the Los Angeles Regional Quality Control Board, 1991-2002* (2004); R.F. Ambrose, J.C. Callaway & S.F. Lee, *An Evaluation of Compensatory Mitigation Projects Permitted Under Clean Water Act Section 401 by the California State Water Quality Control Board, 1991-2002* (2006) (final report); J.J. Mack & M. Micacchion, *An Ecological Assessment of Ohio Mitigation Banks: Vegetation, Amphibians, Hydrology, and Soils*, Ohio EPA Technical Report WET/2006-1, OHIO ENVIRONMENTAL PROTECTION AGENCY, DIV. OF SURFACE WATER, WETLAND ECOLOGY GROUP (2006); K.C. Reiss, E. Hernandez & M.T. Brown, *An Evaluation of the Effectiveness of Mitigation Banking in Florida: Ecological Success and Compliance with Permit Conditions*, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION #WM881 (EPA Grant #CD 96409404-0) (2007); M.S. Fennessy, M.A. Gray & R.D. Lopez, *An Ecological Assessment of Wetlands Using Reference Sites*, 1-2 FINAL REPORT TO U.S. ENVIRONMENTAL PROTECTION AGENCY: WETLANDS UNIT, DIVISION OF SURFACE WATER (Grant CD995761-01) (1998); J.T. Robb, *Indiana Wetland Compensatory Mitigation: Inventory*, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT (EPA Grant # CD985482-010-0) (2000) (final report); P. Minkin & R. Ladd, *Success of Corps-Required Mitigation in New England*, USACE NEW ENGLAND DISTRICT (2003); Michigan Department of Environmental Quality: Land and Water Management Division, *Michigan Wetland Mitigation and Permit Compliance Study* (2001); Missouri Department of Natural Resources, *Assessment of 404 Wetland Mitigation Sites in Missouri*, FINAL REPORT TO THE ENVIRONMENTAL PROTECTION AGENCY (2007), available at <http://www.dnr.mo.gov/ENV/WRC/wmsa-full-report.pdf>.

² The Environmental Law Institute has convened a Science Advisory Panel to design a study that will yield a national evaluation of the ecological performance of all three forms of mitigation – mitigation banking, in-lieu fee mitigation, and permittee responsible mitigation. The study design will be vetted by a review panel comprised of representative from state, tribal, and local wetland agencies, mitigation providers, and environmental interests. The study is designed to not only produce a snapshot of compensatory mitigation, but to establish a protocol for the ongoing assessment of mitigation sites.

³ David Urban, *Corps Transparency-The Issue of Data Availability*, 31-6 NATIONAL WETLANDS NEWSLETTER 26-27 (2009).

⁴ Letter from National Wildlife Federation et al., to U.S. Army Corps of Engineers & Environmental Protection Agency (June 30, 2006); Government Accountability Office, *Wetlands Protection: Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure That Compensatory Mitigation Is Occurring* 30 (GAO-05-898) (2005).

⁵ Department of the Army, U.S. Environmental Protection Agency, U.S. Department of Commerce, Department of Interior, U.S. Department of Agriculture, U.S. Department of Transportation, *National Mitigation Action Plan* (December 24, 2002), *available at* <http://www.mitigationactionplan.gov/map.html>.

⁶ *See e.g.*, Letter from Natural Resource Defense Council et al., to Environmental Protection Agency Water Docket (EPA-HQ-OW-2007-0282 Clean Water Act Jurisdiction) (January 21, 2008).

⁷ NATIONAL RESEARCH COUNCIL, *COMPENSATING FOR WETLAND LOSSES UNDER THE CLEAN WATER ACT* 3 (National Academy Press) (2001).

⁸ *Supra* note 5.

⁹ David Olson, *The OMBIL Regulatory Module and GIS: An Overview*, 3 AQUATIC RESOURCES NEWS: A REGULATORY NEWSLETTER 2-4 (Headquarters, U.S. Army Corps of Engineers, Regulatory Branch) (2004), *available at* <http://www.mitigationactionplan.gov/Corps%20Newsletter%20ORM.pdf>.

¹⁰ *See e.g.*, Final Mitigation Rule, 73 Fed. Reg. 19594, 19601 (April 10, 2008).

¹¹ U.S. ARMY CORPS OF ENGINEERS, REPORT TO CONGRESS, FISCAL YEAR 2008 CIVIL WORKS BUDGET FOR THE U.S. ARMY CORPS OF ENGINEERS 732 (Feb. 5, 2007), *available at* <http://www.usace.army.mil/CECW/PID/Documents/Forms/AllItems.aspx?RootFolder=%2fCECW%2fPID%2fDocuments%2fj%5fsheets&FolderCTID=&View=%7b8BA8F7B1%2dC1EF%2d40FC%2dA877%2dE09CF8D5B9F1%7d>.

¹² *See* U.S. ARMY CORPS OF ENGINEERS, FISCAL YEARS 2007, 2009, AND 2010 REPORTS TO CONGRESS, (emphasis added), *available at* <http://www.usace.army.mil/CECW/PID/Documents/Forms/AllItems.aspx?RootFolder=%2fCECW%2fPID%2fDocuments%2fj%5fsheets&FolderCTID=&View=%7b8BA8F7B1%2dC1EF%2d40FC%2dA877%2dE09CF8D5B9F1%7d>.

¹³ U.S. ARMY CORPS OF ENGINEERS, FISCAL YEAR 2011 CIVIL WORKS BUDGET FOR THE U.S. ARMY CORPS OF ENGINEERS 1487-1489 (Feb. 1, 2010) (emphasis added), *available at* <http://www.usace.army.mil/CECW/PID/Documents/Forms/AllItems.aspx?RootFolder=%2fCECW%2fPID%2fDocuments%2fj%5fsheets&FolderCTID=&View=%7b8BA8F7B1%2dC1EF%2d40FC%2dA877%2dE09CF8D5B9F1%7d>.

¹⁴ Water Resources Development Act (WRDA) of 2007, Pub. L. No. 110-114, Stat. 1041 (amending 33 U.S.C. §2017).

¹⁵ 33 U.S.C. §2017(b)(1) (2007).

¹⁶ *Id.* at §2017(b)(2).

¹⁷ *Complete Statement on Fiscal Year 2009 and Implementation of the Water Resources Development Act (WRDA) 2007 Before the Senate Committee on Environment and Public Works* 110th Cong. (2008) (statement made by John Paul Woodley Jr. (Assistant Secretary Of The Army (Civil Works), Department of the Army)), *available at* http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=4dcdea79-a117-4de1-bb91-672ec93d8781.

¹⁸ Peter R. Orszag, Memorandum to Heads of Executive Departments and Agencies: Open Government Directive, OFFICE OF MANAGEMENT AND BUDGET (Dec. 8, 2010), *available at* http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf.

¹⁹ Corps regulatory guidance requires the posting of detailed and timely documentation of jurisdictional determinations. *See e.g.*, Rapanos Clean Water Act Jurisdiction Guidance 11-12, fn. 38, and attached revised jurisdictional determination form (June 5, 2007); Regulatory Guidance Letter (RGL) 07-01 (June 5, 2007); RGL 08-02 (June 26, 2008); http://www.usace.army.mil/CECW/Pages/cwa_guide.aspx.