

# Can Happy Subjects Have an Enlightened Despot? Customer Satisfaction Among Army Corps Permit Applicants

BY KIM DIANA CONNOLLY

*Justice Antonin Scalia has described the U.S. Army Corps of Engineers' permitting process as overly burdensome and inefficient. Yet empirical data gathered from Corps Customer Service Surveys do not bear out this assessment. Results from these surveys, as well as the apparent disconnect between applicant experiences and the public's negative perception of the permitting process, are described below.*

Presented only with Justice Antonin Scalia's June 2006 plurality opinion in *Rapanos v. United States*,<sup>1</sup> someone unfamiliar with the U.S. Army Corps of Engineers' permitting process<sup>2</sup> might expect a plethora of angry, unhappy permit applicants. Justice Scalia wrote in *Rapanos* that "[t]he burden of federal regulation on those who would deposit fill material in locations denominated 'waters of the United States' is not trivial. In deciding whether to grant or deny a permit, the [Corps] exercises the discretion of an enlightened despot . . . ."<sup>3</sup> Justice Scalia's explanation continues by pointing to reported high costs and delays<sup>4</sup> involved in obtaining permits under §404 of the Clean Water Act.<sup>5</sup>

Corps records demonstrate that this alleged level of permitting delays and burdens is inaccurate.<sup>6</sup> Nevertheless, Justice Scalia's negative portrayal is consistent with oft-voiced complaints about the burdens involved in the Corps permitting process. Critics of the Corps routinely portray the regulated community as extremely dissatisfied with what it perceives as an unnecessarily burdensome permitting process.<sup>7</sup> This high level of applicant discontent has been asserted for decades.<sup>8</sup>

Empirical data reveal the inaccuracy of this assertion. In fact, Customer Service Surveys filled out by permit applicants<sup>9</sup> after undertaking the process of securing a Corps permit<sup>10</sup> reveal that many are delighted with the process. Though an appreciable number of applicants do express concern about the time the permit process requires, an impressive percentage of applicants give the Corps perfect marks in their overall ranking of the permitting experience. Some applicants even go so far as to proclaim themselves "satisfied customers."

This article explores the results of the Corps' Customer Service Surveys, as well as the apparent disconnect between Justice

Scalia's (and others') perceptions and the available nationwide data on applicants' views of the permitting process. Contrary to Justice Scalia's rhetoric in *Rapanos*,<sup>11</sup> Corps permit applicants have deemed the regulatory program to be ". . . appropriate, sensible, and effective." Indeed, many declare themselves to be satisfied customers, and most are not deeply troubled by the alleged burdens of the permitting process. This apparent disconnect between data and perception may signal larger issues within the Corps permitting process and a need for some internal administrative examination and reform. But perhaps as importantly, the data may reveal a need to convey to the judiciary a more accurate picture of the Corps permitting process in order to aid courts in their review of such agency actions.<sup>12</sup>

## Corps Customer Service Survey Results

To determine what Corps Customer Service Surveys might reveal about the permitting program and related matters, nine Corps districts from around the nation<sup>13</sup> were originally selected and sent Freedom of Information Act (FOIA)<sup>14</sup> requests for copies of responses to customer service surveys. The surprising result was that, six weeks later, only two of the districts in the initial sample supplied copies of any completed surveys, and half responded that they did not survey their permit applicants.<sup>15</sup> Shortly thereafter, similar FOIA requests were sent to the rest of the 38 districts asking for survey responses for the years 2002-2005.

All 38 districts responded.<sup>16</sup> But as it turns out, not all Corps district Regulatory Programs survey their customers.<sup>17</sup> In fact, only 20 districts reported having any survey responses,<sup>18</sup> and three of those reporting survey responses had a statistically insignificant number of only one or two surveys total.<sup>19</sup>

Generally, those districts that regularly survey their permit applicants have found them to be satisfied with the process. In those districts that reported with a statistically significant number of surveys,<sup>20</sup> more than half of respondents evaluating their overall experience with the Corps regulatory program gave "high satisfaction" ratings.<sup>21</sup>

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### *General Praise for the Corps' Regulatory Program Service*

Many applicants who completed surveys had general praise for the Corps, often focusing specifically on a particular district office's work. For example, one applicant from the Albuquerque District declared that "[s]ervice was exemplary." An applicant from the Sacramento District declared Corps staff "[e]specially helpful." A Wilmington District applicant wrote, "I feel the program is well run, responses are prompt and detailed, and the contacts in the office are knowledgeable and helpful." A Charleston District applicant said "[e]xcellent response time. Helpful. Overall great experience."

Some of these comments providing general praise to the Regulatory Program were specific to certain district office activities. For example, one Kansas City District applicant wrote, "[b]y far and without question, I am extremely impressed with the technical knowledge and communication skills of the regulatory specialists in the [Kansas City] office. Our firm works with four regional Corps offices in the Midwest USA in application of 100+ [S]404 permits annually. Although we may not always agree with staff decisions, we are treated fairly and professionally by the regulatory specialists who work under the supervision of [Corps employee]." Likewise, a Little Rock District office applicant wrote "I was very impressed by this office's cooperation to resolve permitting issues even when the project manager was unavailable."

Like the Kansas City District comment from the previous paragraph, some commenters had experience in multiple districts, and provided comparative comments. For example, one applicant from the Savannah District wrote, "[w]e work in numerous districts. Savannah is by far the most professional and effective." One from the Wilmington District suggested, "[u]pdate the Wilmington District Web site. The Charleston District has an outstanding Web site—user friendly with good information."

Of course, not all comments were complimentary. One applicant from the Albuquerque District said, "[p]rogram hard to understand and jurisdictional issues are not well defined." Likewise, a Jacksonville District applicant wrote that "[t]he attitude of staff was unprofessional and adversarial. The staff threatened with absolutely no basis in fact or regulations." A Charleston District respondent even wrote, "[p]ain in the a\*\*." Such negative comments generally were few and far between, while positive comments (and numerical scores) were the norm. The surveys thus show that many Corps permit applicants are not only content, but in some cases delighted, with their overall exposure to the Regulatory Program.

### *Praise (Mostly) for Specific Corps Employees' Service*

Another significant general category of comments containing positive feedback was directed at the actions of specific Corps employees. Many times, such comments were extraordinarily

enthusiastic. For example, one Rock Island District applicant called on the Corps to "[g]ive [the particular Corps employee] a raise and more vacation." Likewise, an Albuquerque District applicant declared, "[Corps employee] did an outstanding job of investigating my situation and getting back to me in record time. He was prompt and professional! This man was one of the best professionals I have ever worked with." A Memphis District applicant wrote, "I want to commend all those involved in the Memphis Corps District, especially [Corps employee] for the prompt and processing and issuance of the individual 404 that I needed. As always, [Corps employee] communicated with me about issues needing clarification, and made special efforts to issue by a deadline I was under. This is just one example of the top-notch work performed by your District. Thank you!"

In the Rock Island District, one applicant wrote, "[i]t is a big

help to have people like [Corps employee] to explain the complexities and options clearly and accurately. Qualified people administering the program make it workable." A New Orleans District applicant wrote, "If all the permit writers were as professional, responsible and responsive as [Corps employee], you would have fewer complaints and irate applicants. He does exactly what he says he will do in a timely manner. He is clear about his objectives and does not vacillate, even when pressured. He is not afraid to be candid and direct."

A few of those submitting surveys were not as complimentary about Corps employees. One Wilmington district applicant said, "[t]hey need to speed up to a slow walk." An Alaska District applicant noted that "[r]equests for additional information were numerous and cumbersome. The instruction for what is required for a project should be clearly spelled out. This may help limit the discrepancies between what different project managers require. Travel by the project manager delayed the permit process." But such negative responses about particular employees were highly unusual. The surveys viewed as a whole show that most Corps permit applicants have particularly good experiences with individual Corps Regulatory Program personnel.

### *Comments About the Length & Complexity of the Permitting Process*

The data show an appreciable number of survey complaints in some districts that were focused on the length and/or complexity of the Corps permitting process. There are, however, significant variations among districts, and survey respondents in some districts had mainly praise for the prompt responses. Moreover, many of those providing comments about delay suggested that it was workload and not staff failings that lead to their complaints. For example, one Mobile District applicant declared that "[t]hree months or longer is way too long to have to wait for replies from [the Corps]." An applicant from the Jacksonville District "[a]ppled

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for permit approx [date]. This took a year to receive. However, after your agency began to work on the permit, it was fast and delivery was quick and professional.”

Some of those raising complaints about the delays offered suggestions for how to cure them, such as one Sacramento District applicant who said, “[s]taff seems knowledgeable and courteous, just maybe overloaded. For large projects, developers would trade higher fees (use of ‘approved’ consultants perhaps) for speedier permits.” A New Orleans District applicant wrote, “[Corps employee] was extremely helpful. My only suggestion is that the time for permit submission to approval be speeded up (if not limited by statute).”

Those who complained about timeliness, however, were often careful to note that certain Corps employees were not to blame. One comment from the Memphis District said, “[n]eed more timely approval and issuance of permit. . . . However, Corps personnel were very helpful.” Likewise, in the Rock Island District, one applicant wrote that “[t]he process is very thorough and time consuming, but the Corps personnel were very helpful and professional.” A Charleston District applicant wrote, “[i]t is clear there is a shortage of per-

want to note that staff changes/reassignments in Wilmington have resulted in much better response time . . . .” Nevertheless, it cannot be denied that the survey data show some districts are still experiencing challenges in timely processing of permit applications and related activities.

#### *Recommendations and Complaints Focused on Technological or Educational Improvement Suggestions*

Some recommendations and complaints submitted by survey respondents dealt with technological suggestions, such as an Albuquerque District applicant who recommended that “you add to your Web site (or if this is already there, make it more obvious) a general timeline of the [S]404 application process and a process flowchart, including what contacts and decisions that may be made at various points.” A Sacramento District applicant recommended that the Corps “[m]ake the Internet more user friendly—e.g., downloadable permit form.”

Other complaints recommended implementing deadlines for responses. A Jacksonville District applicant noted that the office is “[s]o overworked and understaffed to handle such a large

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sonnel to cover the state of [South Carolina]—I think the Corps does a remarkable job given the lack of congressional support for the program.” And finally, in a similar vein a Sacramento District applicant commented that “[a]s usual, the Corps needs more staff in the Regulatory Branch to improve service-time. Service overall was good and staff were courteous and helpful.”

Applicant complaints on the Corps Regulatory Program’s failure to process permits in a timely manner were not, however, universal. Contrary to the quotes in the previous paragraph, other Sacramento District applicants said, “[g]reat job on timeliness” or “[t]hanks for the speedy response!” An Albuquerque District applicant likewise wrote, “[Corps employee’s] response was immediate and thorough. He was very helpful in answering additional questions. He is always courteous.” In the Rock Island District, one applicant wrote, “[w]e appreciate the fast processing of this permit modification.” In the Savannah District, one survey respondent commented that the assigned Corps employee “provided very prompt service.” And in the Alaska District, one respondent said, “[t]hank you for a ‘speedy’ courteous service.”

Likewise, it seems that the Corps may be making progress in responding to complaints about timely processing, as evidenced by one Sacramento District respondent who wrote, “[i]n the past the Corps has not been reasonable or quick in responding. This time it went well.” A respondent in the Wilmington District wrote, “I

workload, that the process becomes management through government permitting! Staff adequately, then create reasonable, specific response times which the Corps must respond within. Not having any time accountability is not fair to the public or private sector.”

A few complaints centered on Corps employees’ familiarity with the process. For example, one Portland District applicant noted that “[i]ndividuals in the permitting process should be better aware of the Corps’ own regulations. I had to point them out!” A Sacramento District applicant likewise stated that “[i]nterpretation of regulations is arbitrary. There is no consistency between project managers.”

Thus certain survey responses support other changes, in addition to speeding up the process, that the Corps Regulatory Program should explore. Some reported improvements currently in process at Corps headquarters may address a number of these issues.

#### *Policy-Based Commentary on the Permitting Program*

Some comments by survey respondents addressed larger, policy-level issues. A significant number of these comments support the program as it is or call for it to be strengthened. For example, one Sacramento District comment suggested the Corps “[h]ire more personnel to keep up with all the demands and violations. Stop being just a ‘permitting agency’ and be a regulatory agency—don’t just issue permits to everyone—Say NO

sometimes (which the Corps rarely does) and enforce violations.” Similarly, a Savannah District applicant called on the Corps to “[s]pend more time on enforcement and compliance.” Likewise, in the Albuquerque District, an applicant suggested the Corps provide “[m]ore outreach and education about the permit program. Didn’t like the way the Corps has backed off on permits for [a particular watershed] due to losing a Supreme Court decision on a sand and gravel quarry; don’t see how they relate.” Likewise, a Charleston District applicant wrote, “. . . I am sure, as you are aware, homeowners regularly destroy upland buffers. It is my opinion (for what it is worth) that mitigation for residential sites should be required to come from an approved mitigation bank.” In a similar vein, a Rock Island District comment remarked that “[a]ll seemed reasonable to me—it’s the people that do not apply but take law into their own hands that disturb me.”

Other suggestions presented innovative training or staffing ideas. For example, a Wilmington District applicant suggested, “[t]he Corps should cont[inue] efforts to dev[elop] a certified wetland delineator program. Valuable time could be saved by allowing Corps reps. to make/sign [jurisdictional determinations] from an [official] review or a cert delineators submittal rather than requiring a site review every time.” Yet one Wilmington District applicant wrote very positively that the “Regulatory Program is completely justified. It serves the purpose to protect wetlands and all the benefits of wetlands. Wetlands must be protected.”

#### *Concluding Remarks on the Survey Comments*

Readers should not think that there were no clearly negative general comments. There were quite a few. One applicant from the Sacramento District complained about the district office, saying “[i]t’s slow, cumbersome and staffed by people who are not motivated to produce a finished product. The only agency I would rate lower is [the U.S. Fish and Wildlife Service]! [The Corps/FWS] staff need to forget personal biases and do their job.” Likewise, an applicant from the same district claimed to be “[v]ery unsatisfied with how a piece of land was taken care of. I was confused of what they were doing for approximately six months. Then was not instructed on how to secure a permit or even if I needed one. All they have done is delayed progress for me on approximately 1/2-acre of wet property.” A Wilmington District applicant wrote, “[p]lease stop taking our land.”

Despite such seemingly heartfelt complaints from a few applicants, the majority of those who completed the Corps Regulatory Program Customer Service Surveys are satisfied with the Corps. One Rock Island District applicant declared her or himself to be “totally satisfied with entire program in particular the friendly personnel.” Sacramento District applicants also joined in the chorus of praise, telling the Corps “. . . thank you. Very interesting process . . .” and “[i]t was easier than expected.” An Albuquerque District applicant likewise wrote the Corps to say “[y]our agency is a pleasure to work with.” These statements and others show a very different agency than one would expect from Justice Scalia’s remarks in *Rapanos* that opened this article.

#### **Conclusion: Is Enlightened Despotism Working?**

The Corps Regulatory Program declares that it has three equally important goals: “(1) To provide strong protection of the Nation’s aquatic environment, including wetlands; (2) To enhance the efficiency of the Corps’ administration of its regulatory program; and (3) To ensure that the Corps provides the regulated public with fair and reasonable decisions.”<sup>22</sup> As to these second and third goals, the Corps seems to be doing a decent job from the perspective of a considerable segment of the regulated public.

Admittedly, the data presented here are imperfect.<sup>23</sup> Some districts reported very few surveys, and some don’t survey at all. There is no way of knowing the background of those who responded to the surveys.<sup>24</sup> But as discussed above, the data do demonstrate a degree of disconnect between the views of some (including Justice Scalia and some vocal representatives of the regulated community) and the reality expressed directly by a significant number of applicants.<sup>25</sup>

Although technically dicta, Justice Scalia’s invective against the Corps regulatory program preceded a plurality opinion that provided no deference to the Corps in its interpretation of proper jurisdiction.<sup>26</sup> To the extent that Justice Scalia’s distrust of the Corps process may not be based on supportable data, the reliability of the administrative review process by the judicial branch may be in question. Because the two newest Justices (Chief Justice John G. Roberts and Justice Samuel Alito) signed on to the opinion authored by Justice Scalia, this matter warrants further examination.

In addition to these issues with judicial review, the data also suggest a number of changes to agency operations are needed. First, the fact that only certain districts survey customers demonstrates that Corps headquarters needs to find a way to make its districts more accountable.<sup>27</sup> The Corps should be consistent in surveying activities nationwide. Likewise, it may be a good time to update the customer survey instrument in light of the Corps’ use of new business improvement methodologies—known as Lean Six Sigma—and analysis of data received through those surveys over the years.<sup>28</sup>

Additionally, with respect to agency operations, the level of expressed dissatisfaction with delays means efforts should be amplified in certain districts to speed up permitting. Recent increases in funding to the Corps Regulatory Program likely helped,<sup>29</sup> but more or reallocated federal appropriations and an increased workforce seem to be necessary. Furthermore, other efficiency measures in the works by the Corps Regulatory Program (such as having permit applications online on most districts,<sup>30</sup> the “lead district” initiative,<sup>31</sup> new regulatory guidance letters,<sup>32</sup> and an updated automated information system<sup>33</sup>) should be brought online as soon as possible.<sup>34</sup> Finally, because they are defined among the customer base, Corps district offices should seek regular input (through the existing survey or perhaps another instrument) from non-applicant customers.

With respect to the protected resources themselves, these data likely demonstrate that too many permits are being issued too freely by the Corps. As the Corps own statistics show, significantly less than one percent of permit applications are denied.<sup>35</sup>

Finally, with regard to both agency and judicial matters, what these data do show is that the rhetoric opposing the permitting

program needs to be met with fact.<sup>36</sup> According to many of those who have experienced the process, applying for a permit from the Corps Regulatory Program is not an overly burdensome event. Thus it seems the Corps is actually more “enlightened” (or at the very least, far less onerous) than Justice Scalia portrays.<sup>37</sup> ■

#### ENDNOTES

<sup>1</sup> Rapanos v. United States, 126 S. Ct. 2208 (2006). See generally Robert Meltz & Claudia Copeland, *The Wetlands Coverage of the Clean Water Act is Revisited by the Supreme Court: Rapanos v. United States* (Congressional Research Service, Sept. 12, 2006), available at <http://www.cnire.org/NLE/CRSreports/06Oct/RL33263.pdf>. For background materials on the cases, including the original Carabell permit application and associated documentation, as well as the Rapanos enforcement documents, see Kim Diana Connolly, *US Supreme Court Rapanos and Carabell Wetlands Cases*, <http://www.law.sc.edu/wetlands/rapanos-carabell> (last visited Mar. 15, 2007).

<sup>2</sup> See generally U.S. Army Corps of Engineers, *Regulatory Permit Process*, <http://www.vtn.iwr.usace.army.mil/regulatory/regpermit.htm> (last visited Mar. 15, 2007).

<sup>3</sup> 126 S. Ct. at 2214.

<sup>4</sup> *Id.* “The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes. Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 74-76 (2002). “[O]ver \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.” *Id.* at 81. These costs cannot be avoided, because the Clean Water Act ‘impose[s] criminal liability,’ as well as steep civil fines, ‘on a broad range of ordinary industrial and commercial activities.’ Hanousek v. United States, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of certiorari). In this litigation, for example, for backfilling his own wet fields, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines. See United States v. Rapanos, 235 F.3d 256, 260 (6th Cir. 2000).”

<sup>5</sup> 33 U.S.C. §1344.

<sup>6</sup> For example, in Fiscal Year 2002, 88% of all permit actions were completed within 60 days, a serious difference from the 313 days asserted by the study cited in Justice Scalia’s plurality. U.S. Army Corps of Engineers, *Civil Works Strategic Plan, Fiscal 2004 - Fiscal Year 2009* (Mar. 2004), available at [http://www.usace.army.mil/cw/hot\\_topics/ht\\_2004/cw\\_strat.pdf](http://www.usace.army.mil/cw/hot_topics/ht_2004/cw_strat.pdf).

<sup>7</sup> See, e.g., Daniel R. Simmons & H. Sterling Burnett, National Center for Policy Analysis, *Protecting Property Rights, Preserving Federalism and Saving Wetlands*, available at <http://www.ncpa.org/pub/st/st2911#a> (“the Corps and EPA have pursued civil and criminal prosecutions for small, technical violations of the Act in order to intimidate property owners and developers into compliance, although the complexity of the regulatory process and the unsettled state of the law makes compliance difficult.”); National Association of Home Builders, *Corps Official Hears Wetlands Regulation Complaints*, <http://www.nbnnews.com/NBN/issues/2006-05-22/Environment/2.html> (last visited Mar. 15, 2007) (“Hoping for relief from what one Florida developer called ‘a shameful way to treat an American citizen,’ members came armed with detailed examples of missed deadlines, painfully slow permit approval processes and even ‘regulatory blackmail’ from local Corps officials asserting jurisdictional authority where none exists.”); see also Pacific Legal Foundation, *Another Wetlands Horror Story: PLF Asks Appeals Court To Rein In Government’s Campaign Against Cape Cod Cranberry Farmers* (May 2005), <http://www.pacificlegal.org/mvcTask=bulletinsNewsletters&nl=6&cid=459&PHPSESSID=3ed290b90bb4918dedf858197212bfff0> (last visited Mar. 15, 2007); National Federation of Independent Business, *Property Rights and Wetlands*, <http://www.nfib.com/page/propertyRightsCases.html> (last visited Mar. 15, 2007).

<sup>8</sup> See, e.g., Claudia Copeland, *Wetlands Legislation: Comparison of Two Bills* (Congressional Research Service, 1995), available at <http://www.ncseonline.org/nle/crsreports/wetlands/wet-2.cfm> (“Section 404 has increasingly become a source of conflict between those who view it as critically important to wetland protection and others who see it as excessively intruding on privately owned property and private land-use decisions.”); *The Wetland Permitting Process: Is It Working Fairly? Hearing 107-50, Hearing Before the Subcomm. on Water Res. and Env’t, 107th Cong.* (2001); see also Virginia S. Albrecht & Bernard N. Goode, *Wetland Regulation in the Real World* (Beverage & Diamond, P.C., 1994); Lisa Snell, *Wait Problems—Wetlands and Land Use Permits*, REASON (Oct. 1994), available at [http://www.findarticles.com/p/articles/mi\\_m1568/is\\_n5\\_v26/ai\\_16101037](http://www.findarticles.com/p/articles/mi_m1568/is_n5_v26/ai_16101037).

<sup>9</sup> Original survey is available at U.S. Army Corps of Engineers, *Customer Service*

*Survey—Regulatory Program*, [http://www.usace.army.mil/cw/cecwo/reg/cust\\_surv.pdf](http://www.usace.army.mil/cw/cecwo/reg/cust_surv.pdf) (last visited Mar. 8, 2007).

<sup>10</sup> For a brief overview of the permitting process, see U.S. Army Corps of Engineers Memphis District, *The Regulatory Permit Program—A Brief Guide from the Memphis District*, available at <http://www.mvm.usace.army.mil/regulatory/Permit/permit.htm> (“This brochure discusses the regulatory program of the U.S. Army Corps of Engineers: what it is, how it began, how it may affect you, and what you as a concerned American can do to help . . .”).

<sup>11</sup> Rapanos v. United States, 126 S. Ct. 2208, 2214 (2006).

<sup>12</sup> Agency actions are entitled to an appropriate level of deference from the courts. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). The disconnect demonstrated here may lead to erroneous judicial review by undermining agency expertise. The data here may indicate there has been more compliance in Corps permitting with the “mood” of Congress in enacting Section 404 of the Clean Water Act than has previously been acknowledged in judicial review of such cases generally. See *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474, 487 (1951).

<sup>13</sup> The initial surveys were sent out to the following random sample of districts in November 2005: Charleston, Galveston, Jacksonville, Huntington, New England, New Orleans, Philadelphia, Sacramento, and St. Paul.

<sup>14</sup> 5 U.S.C. §552.

<sup>15</sup> Only the Jacksonville and Sacramento Districts provided survey responses. Note that New Orleans and Huntington did not respond to the initial request.

<sup>16</sup> A full list of Corps district offices can be found at U.S. Army Corps of Engineers, *Regulatory Program—District Offices*, <http://www.usace.army.mil/cw/cecwo/reg/district.htm> (last visited Mar. 15, 2007).

<sup>17</sup> Note that during my research, Corps Headquarters staff confirmed that all Districts should be surveying their customers. Telephone Interview with Russell L. Kaiser, USACE Headquarters, (Mar. 9, 2007). It is not clear to Corps Headquarters why some districts do not engage in surveys. *Id.*

<sup>18</sup> Those Districts that do not report any Regulatory Program surveys are: Buffalo, Chicago, Detroit, Fort Worth, Galveston, Huntington, Honolulu, Los Angeles, Louisville, Nashville, New England, New York, Norfolk, Philadelphia, Pittsburgh, San Francisco, St. Paul, and Tulsa.

<sup>19</sup> The Baltimore District had only one response, and the Omaha and Vicksburg Districts had only two responses each.

<sup>20</sup> For these purposes, the three districts that had only one or two survey responses were excluded from this study.

<sup>21</sup> For additional information on the survey itself, see U.S. Army Corps of Engineers, *Customer Service Survey—Regulatory Program*, [http://www.usace.army.mil/cw/cecwo/reg/cust\\_surv.pdf](http://www.usace.army.mil/cw/cecwo/reg/cust_surv.pdf) (last visited Mar. 15, 2007). For an in-depth look at the Customer Survey and the survey responses, see Kim Diana Connolly, *Survey Says: Army Corps No Scalian Despot*, 37 ENVTL. L. REP. 10317 (May 2007).

<sup>22</sup> U.S. Army Corps of Engineers, *Regulatory Program Goals*, <http://www.usace.army.mil/cw/cecwo/reg/goals.htm> (last visited Mar. 8, 2007). Interestingly, a fourth goal appears in a 2006 PowerPoint presentation to the Regional Regulatory Office: “Take care of our Regulatory Personnel.” U.S. Army Corps of Engineers, *Corps Regulatory Program, Regional Regulatory Conference June 2006* (PowerPoint Presentation, on file with the author).

<sup>23</sup> Note that my analysis, as a non-scientist lawyer, might also be considered “imperfect” in terms of truly dissecting the data.

<sup>24</sup> Because the survey instrument allows anonymous feedback, we cannot know for example what percentage of respondents had either their permit application denied or not modified at all.

<sup>25</sup> Proper “marketing” by the Corps of their own survey results may be able to do a bit of damage control on that score.

<sup>26</sup> Quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984), the Rapanos plurality ruled specifically that “[t]he Corps’ expansive interpretation of the ‘the waters of the United States’ [was] not ‘based on a permissible construction of the statute’.” Rapanos v. United States, 126 S. Ct. 2208, 2236 (2006). Cf. “[t]he Corps’ decision in the underlying cases to treat these wetlands as encompassed within the term ‘waters of the United States’ is a quintessential example of the Executive’s reasonable interpretation of a statutory provision.” *Id.* at 2252 (J. Stevens, dissenting).

<sup>27</sup> Corps Districts have been accused of operating too independently and without sufficient headquarters-level control in the past. See, e.g., United States General Accounting Office, *WATERS AND WETLANDS: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* (Feb. 2004), available at <http://www.gao.gov/new.items/d04297.pdf>.

<sup>28</sup> See Connolly, *supra* note 21, for more information on Lean Six Sigma.

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hourly rate of legal representation and staff multiplied by the estimated number of hours that would be required for the action.

Both the stewardship endowment and easement enforcement endowment must generate sufficient funds—based on a reasonable rate of return after inflation—to support annual stewardship activities and cover the costs of an easement defense should it arise.

### *Property Analysis Record*

The Center for Natural Lands Management has developed the Property Analysis Record (PAR).<sup>5</sup> The PAR is a computerized database methodology that is extremely effective in helping land managers to calculate the costs of land management for a specific project. It helps analyze the characteristics and needs of the property from which management requirements and costs are derived. It helps pinpoint management tasks and estimates their costs as well as the necessary administrative costs to provide the full cost of managing any property. The PAR generates a concise report, which serves as a well-substantiated basis for long-term funding.

### **Conclusion**

With adequate preparation, land trusts can be uniquely qualified to take on the long-term stewardship responsibilities of wetland mitigation sites. Partnering with land trusts in the long-term stew-

ardship of compensation sites will not only assist the federal resource agencies in improving their track record with compensation projects, but may provide land trusts with unique conservation opportunities and additional sources of funding with which to pursue their land preservation missions. However, each land trust should carefully consider all of the opportunities and liabilities associated with mitigation before taking on the long-term stewardship responsibilities of a mitigation site. ■

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#### ENDNOTES

<sup>1</sup> U.S. Government Accountability Office. September 2005. Wetlands Protection: Corps of Engineer Does Not Have an Effective Oversight Approach to Ensure that Compensatory Mitigation is Occurring. Available at [www.epa.gov/owow/wetlands/pdf/GAO05898.pdf](http://www.epa.gov/owow/wetlands/pdf/GAO05898.pdf).

<sup>2</sup> National Research Council Board on Environmental Studies and Toxicology. 2006. Compensating for Wetland Losses Under the Clean Water Act. Available at <http://www.nap.edu/books/0309074320/html/>.

<sup>3</sup> Wilkinson, J. and J. Thompson. 2006. *2005 Status Report on Compensatory Mitigation in the United States*. Washington, D.C.: Environmental Law Institute.

<sup>4</sup> National Research Council Board on Environmental Studies and Toxicology. 2001. Compensating for Wetland Losses Under the Clean Water Act. Available at <http://www.nap.edu/books/0309074320/html/>.

<sup>5</sup> Center for Natural Lands Management, *PAR-Property Analysis Record*, at [http://www.cnlm.org/cms/index.php?option=com\\_content&task=view&id=21&Itemid=155](http://www.cnlm.org/cms/index.php?option=com_content&task=view&id=21&Itemid=155) (last visited Apr. 2, 2007).

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## CAN HAPPY SUBJECTS HAVE AN ENLIGHTENED DESPOT? *continued from page 12*

<sup>29</sup> Between FY 1999 and FY 2006 the Corps Regulatory Program budget increased from 106 million dollars per year to 160 million dollars per year. Energy And Water Development, 1999 Appropriations, Pub. L. No. 105-245, 112 Stat 1838, 1842 (Oct. 7, 1998); Energy And Water Development Appropriations Act of 2006, Pub. L. No. 109-103, 119 Stat 2247, 2251 (Nov. 19, 2005); *see also* U.S. Army Corps of Engineers, Corps Regulatory Program, *Regional Regulatory Conference June 2006* (PowerPoint Presentation, on file with the author).

<sup>30</sup> A number of districts are using on-line permit applications now, but increased usage is anticipated to expedite processing and save time with data entry. Telephone Interview with David Olson, U.S. Army Corps of Engineers (Mar. 15, 2007). Once the OMBIL Regulatory Module (ORM) (an automated information system to collect regulatory information and track regulatory actions including impact acreage, wetland type and acreages, and mitigation type and acreages, *see* National Wetlands Mitigation Action Plan, *Initial Deployment of ORM*, <http://www.mitigationactionplan.gov/OMBILdatabase.html> (last visited Mar. 8, 2007)), is up and running all districts will have access to on-line permit applications.

<sup>31</sup> The “lead district” approach is directed at streamlining activities in states with more than one Corps district. Appointing a “lead district” is designed to minimize conflicts and simplify applicant’s confusion on regional issues (such as programmatic general permits). Telephone Interview with David Olson, U.S. Army Corps of Engineers (Mar. 15, 2007).

<sup>32</sup> Corps regulatory guidance letters can be found on-line at U.S. Army Corps of Engineers, *Regulatory Guidance Letters*, <http://www.usace.army.mil/cw/cecwo/reg/rglsindx.htm> (last visited Mar. 15, 2007).

<sup>33</sup> *See supra* note 30.

<sup>34</sup> Russ Kaiser from Corps Headquarters reports that:

To further aid the decision-making process, several new Regulatory Guidance Letters (RGLs) are being prepared. One RGL will identify practices and documentation requirements to support jurisdictional determinations; another RGL will clarify the exemptions for irrigation and drainage ditches; yet another RGL will provide guidance on writing special conditions. Additional RGLs will be developed to support wetland delineations. Regional supplements are being prepared to supplement the 1987 Wetland Delineation manual. Finally, RGL 05-05 was developed to identify the physical indicators supporting an ordinary high water mark. Districts will be encouraged to publish requirements for jurisdictional determinations that would generally support the decision being made without a site visit.

Additionally, ORM v2.0 will provide a streamlined, step by step process that will assist in the evaluation of jurisdiction. Embedded GIS resources will support timely reviews of aerial photography, topographic mapping, and existing national wetland inventories and will provide for quick references to jurisdictional determinations already conducted. Use of GIS and geo-location tools will support data populations of standard geographical location, such as State, County, watershed and drainage basins. Users will be able to document the nearest waterway and any large scale river network automatically by establishing the location of the project site. Users will identify the size and type of each aquatic resource on site and then document the jurisdiction or lack thereof for each aquatic resource. The jurisdictional module of ORM v2.0 will be developed to include the required documentation for establishing or declining jurisdiction and will support electronic notification to the EPA and posting of the documentation on district web pages.

Email from Russell L. Kaiser, U.S. Army Corps of Engineers, “RE: Help with More Data (UNCLASSIFIED)” (Mar. 9, 2007). In a telephone interview David Olson with the Corps Regulatory Program headquarters office also pointed to the new Nationwide Permitting Program as intended to increase efficiency by making those general permits easier to understand. Telephone Interview with David Olson, U.S. Army Corps of Engineers (Mar. 15, 2007). *See also* Reissuance of Nationwide Permits; Notice, 72 Fed. Reg. 11092 (Mar. 12, 2007), *available at* [http://www.usace.army.mil/cw/cecwo/reg/nwp/nwp\\_2007\\_final.pdf](http://www.usace.army.mil/cw/cecwo/reg/nwp/nwp_2007_final.pdf) (the “Corps proposal is intended to simplify the NWP program while continuing to provide environmental protection . . .” *Id.*).

<sup>35</sup> The latest statistics available on-line are from FY 2002 and FY 2003. U.S. Army Corps of Engineers, *US Army Corps of Engineers Regulatory Program* (2003), *available at* <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/2003webcharts.pdf>. They show that in 2002, there were 128 denials of the 81,302 permits applied for (0.16%), and in 2003, there were 299 denials of the 86,177 (0.35%) permits applied for. This means that in those two years an average of 0.25% of permits applied for were denied.

<sup>36</sup> For an interesting discussion about the power of (and dangers of) rhetoric, *see* Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City Of New London, Babbitt v. Sweet Home, And Other Tales From The Supreme Court*, 75 U. CINN. L.R. 101 (2006).

<sup>37</sup> *Rapanos v. United States*, 126 S. Ct. 2208, 2214 (2006).