

TITLE 33 - NAVIGATION AND NAVIGABLE WATERS
CHAPTER 36 - WATER RESOURCES DEVELOPMENT
SUBCHAPTER V - GENERAL PROVISIONS

§ 2343. Independent peer review

(a) Project studies subject to independent peer review

(1) In general

Project studies shall be subject to a peer review by an independent panel of experts as determined under this section.

(2) Scope

The peer review may include a review of the economic and environmental assumptions and projections, project evaluation data, economic analyses, environmental analyses, engineering analyses, formulation of alternative plans, methods for integrating risk and uncertainty, models used in evaluation of economic or environmental impacts of proposed projects, and any biological opinions of the project study.

(3) Project studies subject to peer review

(A) Mandatory

A project study shall be subject to peer review under paragraph (1) if—

- (i)** the project has an estimated total cost of more than \$45,000,000, including mitigation costs, and is not determined by the Chief of Engineers to be exempt from peer review under paragraph (6);
- (ii)** the Governor of an affected State requests a peer review by an independent panel of experts; or
- (iii)** the Chief of Engineers determines that the project study is controversial considering the factors set forth in paragraph (4).

(B) Discretionary

(i) Agency request

A project study shall be considered by the Chief of Engineers for peer review under this section if the head of a Federal or State agency charged with reviewing the project study determines that the project is likely to have a significant adverse impact on environmental, cultural, or other resources under the jurisdiction of the agency after implementation of proposed mitigation plans and requests a peer review by an independent panel of experts.

(ii) Deadline for decision

A decision of the Chief of Engineers under this subparagraph whether to conduct a peer review shall be made within 21 days of the date of receipt of the request by the head of the Federal or State agency under clause (i).

(iii) Reasons for not conducting peer review

If the Chief of Engineers decides not to conduct a peer review following a request under clause (i), the Chief shall make publicly available, including on the Internet, the reasons for not conducting the peer review.

(iv) Appeal to Chairman of Council on Environmental Quality

A decision by the Chief of Engineers not to conduct a peer review following a request under clause (i) shall be subject to appeal by a person referred to in clause (i) to the Chairman of the Council on Environmental Quality if such appeal is made within the 30-day period following the date of the decision being made available under clause (iii).

A decision of the Chairman on an appeal under this clause shall be made within 30 days of the date of the appeal.

(4) Factors to consider

In determining whether a project study is controversial under paragraph (3)(A)(iii), the Chief of Engineers shall consider if—

- (A) there is a significant public dispute as to the size, nature, or effects of the project; or
- (B) there is a significant public dispute as to the economic or environmental costs or benefits of the project.

(5) Project studies excluded from peer review

The Chief of Engineers may exclude a project study from peer review under paragraph (1)—

(A) if the project study does not include an environmental impact statement and is a project study subject to peer review under paragraph (3)(A)(i) that the Chief of Engineers determines—

- (i) is not controversial;
- (ii) has no more than negligible adverse impacts on scarce or unique cultural, historic, or tribal resources;
- (iii) has no substantial adverse impacts on fish and wildlife species and their habitat prior to the implementation of mitigation measures; and
- (iv) has, before implementation of mitigation measures, no more than a negligible adverse impact on a species listed as endangered or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) or the critical habitat of such species designated under such Act;

(B) if the project study—

- (i) involves only the rehabilitation or replacement of existing hydropower turbines, lock structures, or flood control gates within the same footprint and for the same purpose as an existing water resources project;
- (ii) is for an activity for which there is ample experience within the Corps of Engineers and industry to treat the activity as being routine; and
- (iii) has minimal life safety risk; or

(C) if the project study does not include an environmental impact statement and is a project study pursued under section 701s of this title, section 701g of this title, section 701r of this title, section 577 (a) of this title, section 426g of this title, section 426i of this title, section 603a of this title, section 2309a of this title, or section 2330 of this title.

(6) Determination of total cost

For purposes of determining the estimated total cost of a project under paragraph (3)(A), the total cost shall be based upon the reasonable estimates of the Chief of Engineers at the completion of the reconnaissance study for the project. If the reasonable estimate of total costs is subsequently determined to be in excess of the amount in paragraph (3)(A), the Chief of Engineers shall make a determination whether a project study is required to be reviewed under this section.

(b) Timing of peer review

(1) In general

The Chief of Engineers shall determine the timing of a peer review of a project study under subsection (a). In all cases, the peer review shall occur during the period beginning on the date of the signing of the feasibility cost-sharing agreement for the study and ending on the date established under subsection (e)(1)(A) for the peer review and shall be accomplished concurrent with the conducting of the project study.

(2) Factors to consider

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscpri.html>).

In any case in which the Chief of Engineers has not initiated a peer review of a project study, the Chief of Engineers shall consider, at a minimum, whether to initiate a peer review at the time that—

- (A) the without-project conditions are identified;
- (B) the array of alternatives to be considered are identified; and
- (C) the preferred alternative is identified.

(3) Limitation on multiple peer review

Nothing in this subsection shall be construed to require the Chief of Engineers to conduct multiple peer reviews for a project study.

(c) Establishment of panels

(1) In general

For each project study subject to peer review under subsection (a), as soon as practicable after the Chief of Engineers determines that a project study will be subject to peer review, the Chief of Engineers shall contract with the National Academy of Sciences or a similar independent scientific and technical advisory organization or an eligible organization to establish a panel of experts to conduct a peer review for the project study.

(2) Membership

A panel of experts established for a project study under this section shall be composed of independent experts who represent a balance of areas of expertise suitable for the review being conducted.

(3) Limitation on appointments

The National Academy of Sciences or any other organization the Chief of Engineers contracts with under paragraph (1) to establish a panel of experts shall apply the National Academy of Science's policy for selecting committee members to ensure that members selected for the panel of experts have no conflict with the project being reviewed.

(4) Congressional notification

Upon identification of a project study for peer review under this section, but prior to initiation of the review, the Chief of Engineers shall notify the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives of the review.

(d) Duties of panels

A panel of experts established for a peer review for a project study under this section shall—

- (1) conduct the peer review for the project study;
- (2) assess the adequacy and acceptability of the economic, engineering, and environmental methods, models, and analyses used by the Chief of Engineers;
- (3) receive from the Chief of Engineers the public written and oral comments provided to the Chief of Engineers;
- (4) provide timely written and oral comments to the Chief of Engineers throughout the development of the project study, as requested; and
- (5) submit to the Chief of Engineers a final report containing the panel's economic, engineering, and environmental analysis of the project study, including the panel's assessment of the adequacy and acceptability of the economic, engineering, and environmental methods, models, and analyses used by the Chief of Engineers, to accompany the publication of the report of the Chief of Engineers for the project.

(e) Duration of project study peer reviews

(1) Deadline

A panel of experts established under this section shall—

(A) complete its peer review under this section for a project study and submit a report to the Chief of Engineers under subsection (d)(5) not more than 60 days after the last day of the public comment period for the draft project study, or, if the Chief of Engineers determines that a longer period of time is necessary, such period of time determined necessary by the Chief of Engineers; and

(B) terminate on the date of initiation of the State and agency review required by section 701–1 of this title.

(2) Failure to meet deadline

If a panel of experts does not complete its peer review of a project study under this section and submit a report to the Chief of Engineers under subsection (d)(5) on or before the deadline established by paragraph (1) for the peer review, the Chief of Engineers shall complete the project study without delay.

(f) Recommendations of panel

(1) Consideration by the Chief of Engineers

After receiving a report on a project study from a panel of experts under this section and before entering a final record of decision for the project, the Chief of Engineers shall consider any recommendations contained in the report and prepare a written response for any recommendations adopted or not adopted.

(2) Public availability and transmittal to Congress

After receiving a report on a project study from a panel of experts under this section, the Chief of Engineers shall—

(A) make a copy of the report and any written response of the Chief of Engineers on recommendations contained in the report available to the public by electronic means, including the Internet; and

(B) transmit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a copy of the report, together with any such written response, on the date of a final report of the Chief of Engineers or other final decision document for the project study.

(g) Costs

(1) In general

The costs of a panel of experts established for a peer review under this section—

(A) shall be a Federal expense; and

(B) shall not exceed \$500,000.

(2) Waiver

The Chief of Engineers may waive the \$500,000 limitation contained in paragraph (1)(B) in cases that the Chief of Engineers determines appropriate.

(h) Applicability

This section shall apply to—

(1) project studies initiated during the 2-year period preceding November 8, 2007, and for which the array of alternatives to be considered has not been identified; and

(2) project studies initiated during the period beginning on November 8, 2007, and ending 7 years after November 8, 2007.

(i) Reports

(1) Initial report

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscprint.html>).

Not later than 3 years after November 8, 2007, the Chief of Engineers shall submit to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a report on the implementation of this section.

(2) Additional report

Not later than 6 years after November 8, 2007, the Chief of Engineers shall update the report under paragraph (1) taking into account any further information on implementation of this section and submit such updated report to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives.

(j) Nonapplicability of FACA

The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to a peer review panel established under this section.

(k) Savings clause

Nothing in this section shall be construed to affect any authority of the Chief of Engineers to cause or conduct a peer review of a water resources project existing on November 8, 2007.

(l) Definitions

In this section, the following definitions apply:

(1) Project study

The term “project study” means—

- (A) a feasibility study or reevaluation study for a water resources project, including the environmental impact statement prepared for the study; and
- (B) any other study associated with a modification of a water resources project that includes an environmental impact statement, including the environmental impact statement prepared for the study.

(2) Affected State

The term “affected State”, as used with respect to a water resources project, means a State all or a portion of which is within the drainage basin in which the project is or would be located and would be economically or environmentally affected as a consequence of the project.

(3) Eligible organization

The term “eligible organization” means an organization that—

- (A) is described in section 501 (c)(3), and exempt from Federal tax under section 501 (a), of title 26;
- (B) is independent;
- (C) is free from conflicts of interest;
- (D) does not carry out or advocate for or against Federal water resources projects; and
- (E) has experience in establishing and administering peer review panels.

(4) Total cost

The term “total cost”, as used with respect to a water resources project, means the cost of construction (including planning and designing) of the project. In the case of a project for hurricane and storm damage reduction or flood damage reduction that includes periodic nourishment over the life of the project, the term includes the total cost of the nourishment.

(Pub. L. 110–114, title II, § 2034, Nov. 8, 2007, 121 Stat. 1086.)

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see <http://www.law.cornell.edu/uscode/uscpri.html>).

References in Text

The Endangered Species Act of 1973, referred to in subsec. (a)(5)(A)(iv), is Pub. L. 93–205, Dec. 28, 1973, 87 Stat. 884, which is classified principally to chapter 35 (§ 1531 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1531 of Title 16 and Tables.

The Federal Advisory Committee Act, referred to in subsec. (j), is Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 770, which is set out in the Appendix to Title 5, Government Organization and Employees.

Codification

Section was enacted as part of the Water Resources Development Act of 2007, and not as part of the Water Resources Development Act of 1986 which comprises this chapter.