

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, (A.K.A. "PEER") 2001 S Street, NW – Suite 570; Washington D.C. 20009

Plaintiff,

v.

R.L. "Les" BROWNLEE, as Acting Secretary of the Army, U.S. Department of the Army; The Pentagon, Washington, D.C. 20310;

ROBERT B. FLOWERS, Lieutenant General (USA), as Commander and Chief of Engineers, HQ US Army Corps of Engineers, 441 G Street, NW; Washington D.C. 20314-1000

Defendants.

C.A. No. 03- _____

December 9, 2003 Complaint for Declaratory Relief

COMPLAINT FOR DECLARATORY RELIEF

1. Pursuant to Section 500 of the Administrative Procedures Act of 1949, Public Employees for Environmental Responsibility hereby sues in the U.S. District Court for the District of Columbia to enforce Section 515 (a) of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106-554) a.k.a. "the Data Quality Act of 2000" against the Agency captioned for its release of the Monthly Status Report, July 2003, Upper Mississippi River – Illinois Waterway System Navigation Study, Rock Island District, U.S. Army Corps of Engineers ("the Document") in contravention of the legal requirements of the Data Quality Act of 2000.

2. The Document released disseminates data produced from demonstrably inaccurate economic models that fail to ensure and maximize the quality, objectivity, utility and integrity of information (including statistical information) disseminated by the agency as mandated in the DQA. The Document was first publicly disseminated by the U.S. Army Corps of Engineers via the World Wide Web on August 7, 2003 by the Rock Island District of the U.S. Army Corps of Engineers ([View Document](#)). The primary information source for the preliminary National Economic Development benefit analysis of the six (6) alternative infrastructure investments described in the monthly status report is the product of the output of two proprietary, non-peer-reviewed, economic models operated and maintained solely by the U.S. Army Corps of Engineers. See the Monthly Status Report at pages 14-

16. These economic models and the data developed for these models have not been subjected to a peer review of any kind prior to the dissemination of information regarding their results in the monthly status report. In fact, the Army Corps of Engineers has contracted with the National Research Council for a review of these models and their potential use in the Upper Mississippi River and Illinois Waterway Navigation System Feasibility Study; however this review has not yet been completed. Disseminating information based upon these models prior to the completion of this review is a violation of the DQA.

3. The Act prohibits the Agency Defendant from disseminating data through the Document which fails to meeting standards adopted by the Congress. In addition or in the alternative, this action seeks to have the document declared in violation of the authority under which it was produced, Section 216 of the Flood Control Act of 1970 (Public Law 91-611) which states: “The Secretary of the Army, acting through the Chief of Engineers, is authorized to review the operation of projects the construction of which has been completed and which were constructed by the Corps of Engineers in the interest of navigation, flood control, water supply, and related purposes, when found advisable due to significantly changed physical or economic conditions, and to report thereon to Congress with recommendations on the advisability of modifying the structures or their operation, and for improving the quality of the environment in the overall public interest.”

JURISDICTION

4. The court has jurisdiction over this subject matter pursuant to 28 U.S.C. § 1331. The requisite federal question arises under the Administrative Procedure Act, 5 U.S.C. § 500.

5. Venue is proper in the district pursuant to 28 U.S.C. § 1391(e)(3), as this is a civil action in which the Defendants are Agencies or employees of the United States Government acting in an official capacity. The HQ for the U.S. Army Corps of Engineers is located in the District of Columbia.

PARTIES

6. Public Employees for Environmental Responsibility (PEER) is a non-profit organization in the District of Columbia chartered to hold government agencies accountable for enforcing environmental laws, maintaining scientific integrity, and upholding professional ethics in the workplace. PEER has thousands of employee and citizen members nationwide, including employees both within the U.S. Army Corps of Engineers and in other public agencies, whose work with the Upper Mississippi River – Illinois Waterway System is adversely affected by the illegal public dissemination of this information.

7. PEER also provides legal representation to current and former Army Corps of Engineers public employees who previously disclosed to the Office of Special Counsel (OSC) that the subject of the illegally disseminated Monthly Status Report, July 2003,

Upper Mississippi River and Illinois Waterway System Navigation Study, the “restructured” Upper Mississippi River – Illinois Waterway System Navigation Feasibility Study, is itself an ongoing work of intellectual dishonesty. The Department of Defense’s subsequent investigation of the disclosure to the OSC concluded that the economic evaluation of the study was originally corrupted by three (3) U.S. Army Corps of Engineers commanding officers in their attempt to alter data to justify a large and expensive civil works construction project. The study has since been “restructured” by succeeding Corps commanding officers as the result of political pressure in a manner such that the “restructured” studies still fail to ensure and maximize the quality, objectivity, utility, and integrity of information disseminated by Federal agencies.

8. Past attempts sponsored by the Department of Defense to rectify this intentional data quality failure such as seeking the National Research Council’s (NRC) evaluation of the original corrupted study and recommendations to restore credibility to the economic analysis of these potential costly civil works projects have been ignored by Corps of Engineers commanders. Ignoring these explicit NRC recommendations for restoring scientific credibility to the economic analysis of the study demeans all professional economists working in private and public service on the subject study. The unlawful public dissemination of this preliminary “restructured” information — which was circulated internationally via the World Wide Web through the Monthly Status Report, July 2003, Upper Mississippi River and Illinois Waterway System Navigation Study and was not the subject of independent review of any kind — substantially and negatively affects the ability of any reputable scientific study to address any issues concerning the economic or environmental analyses of the potential navigation system infrastructure investments which are the subject of the “restructured” Upper Mississippi River – Illinois Waterway System Navigation Feasibility Study.

9. Plaintiff PEER is thereby an “affected person” under Section (b)2(B), Data Quality Act of 2000, as defined by U.S. Office of Management and Budget (OMB), Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, and Section 3.3.4 of Attachment 1 of the Deputy Secretary of Defense’s Memorandum dated February 10, 2003, Ensuring Quality of Information Disseminated to the Public By the Department of Defense.

10. Defendant R.L. “Les” Brownlee is the Acting Secretary of the Army. As Acting Secretary, Defendant Brownlee is responsible for issuing the regulations and/or instructions which enable the Data Quality Act of 2000.

11. Defendant Robert B. Flowers is an officer commissioned by the United States Congress, and commands a sub-Agency beneath Defendant R.L. “Les” Brownlee. As such, he is responsible for promulgating the directives/instructions issued by Defendant Brownlee to enable the Data Quality Act of 2000.

STATEMENT OF FACTS

12. Through the Data Quality Act of 2000, Congress directed that the White House Office of Management and Budget to issue – by September 30, 2001 – government wide guidelines that “provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.”

13. Pursuant to this legislative mandate, the White House Office of Management and Budget promulgated “government-wide” Interim Final Guidelines for agency compliance with Data Quality Act requirements. See 66 F.R. 49718, finalized by OMB’s Final Guidelines at 67 F.R. 369 (Jan. 3, 2002).

14. These OMB guidelines establish binding procedures for “covered offices”, which include the U.S. Department of Defense and its sub-Agencies, notably the U.S. Department of the Army and its Army Corps of Engineers. These sub-Agencies are required to promulgate their own regulations and/or instructions enabling the Data Quality Act. See e.g. Deputy Secretary of Defense’s Memorandum dated February 10, 2003, Ensuring Quality of Information Disseminated to the Public By the Department of Defense. As of filing this complaint, the U.S. Department of the Army and the Army Corps of Engineers have yet to issue their regulations through the Federal Register.

15. Pursuant to the Data Quality Act of 2000, information disseminated by offices of the U.S. Government must meet particular standards, inter alia, “Objectivity” and “Utility”. 67 FR 370.

16. The U.S. Department of the Army, and its sub-Agency the Army Corps of Engineers, is a covered office under the Data Quality Act of 2000, and is also the appropriate office responsible under the Act for the Document at issue in this case.

17. The authority and responsibility for producing the models promulgated by the Monthly Status Report is the Flood Control Act of 1936, 33 U.S.C. § 701(a), and the National Environmental Policy Act, 42 U.S.C. § 4332.

18. On August 7th, 2003, the Rock Island District of the U.S. Army Corps of Engineers published the Monthly Status Report, July 2003, Upper Mississippi River – Illinois Waterway System Navigation Study on the following website: <http://www2.mvr.usace.army.mil/umr-iwwsns>. The Monthly Status report issued a document – in the form of an economic model – required by the Flood Control Act of 1936. Under the Flood Control Act, the Defendant Army Corps of Engineers may only proceed with a project if the benefits are greater than the costs met by Congressional appropriations. In this Monthly Status Report, July 2003, Upper Mississippi River – Illinois Waterway System Navigation Study, the Corps of Engineers reveals, for the first time since the original discredited study was “restructured”, the preliminary National Economic Development evaluations of six (6) potential navigation infrastructure plans under consideration as part of their ultimate recommendations for the Upper Mississippi River and Illinois Waterway Navigation System.

19. On August 20th, 2003, Public Employees for Environmental Responsibility filed a complaint under the Data Quality Act of 2000 and its enabling regulations to challenge the data issued through the Document which is the subject of this suit. Under its own regulations, the U.S. Government is required to respond to a Data Quality Act complaint within sixty (60) days of receipt. Discussions ensued with the Agency as to whether 60 days meant 60 calendar days – as is the rule with the Federal Rules of Civil Procedure – or 60 working days, a standard informally adopted now by the Agency. The 60 working day deadline passed on or after November 19th. Plaintiff’s cause of action under the Data Quality Act and through the Administrative Procedures Act accrued on November 20th.

20. The United States Congress recognized a need to improve the quality of information disseminated to the public by the Federal Government. Section 515 of the FY 2001 Treasury and General Government Appropriations Act (Pub. L. 106-554, section 515, codified at 44 U.S.C. 3516 historical and statutory note) (Dec. 21, 2002), commonly referred to as the Data Quality Act, directed OMB to establish government-wide standards in the form of guidelines designed to maximize the "quality," "objectivity," "utility," and "integrity" of information that Federal agencies disseminate to the public. The Act also required agencies to develop their own conforming data quality guidelines, based upon the OMB model.

21. Federal agencies subject to the Paperwork Reduction Act (44 U.S.C. Chapter 35) were directed by OMB to (A) issue their own guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency; (B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency; (C) report periodically to the Director of OMB: (i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency and; (ii) how such complaints were handled by the agency.

22. Office of Management and Budget DQA Guidelines § III.2 state, “As a matter of good and effective agency information resources management, agencies shall develop a process for reviewing the quality (including the objectivity, utility, and integrity) of information before it is disseminated.” and § III.4 states, “The agency’s pre-dissemination review, under paragraph III.2, shall apply to information that the agency first disseminates on or after October 1, 2002.” See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 F.R. 8452, 8452 (Feb. 22, 2002).

23. The U.S. Army Corps of Engineers has yet to publish their guidelines for implementing the Office of Management and Budget’s rules enabling the Data Quality Act as required by October 1, 2002 in OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 F.R. 8452, 8452 (Feb. 22, 2002). But on March 26, 2003, the Deputy Secretary of Defense promulgated a “policy memorandum” entitled Ensuring Quality of Information Disseminated to the Public by the Department of Defense to comply with the OMB DQA requirement.

24. The Deputy Secretary of Defense's Memorandum states, "Components should not disseminate substantive information that does not meet a basic level of quality. An additional level of quality is warranted in those situations involving influential scientific, financial, or statistical analytical results that are 'capable of being substantially reproduced'. See Memorandum at 3.1.1.2. As with the OMB DQA Guidelines, component information releases are to be marked by utility, objectivity and integrity. See Memorandum at 3.2.2.

25. Even more important to the present case, scientific material not subject to independent peer review is not presumptively objective. See Memorandum at 3.2.3. In addition, the material in question is highly influential, and therefore subject to a higher standard of quality review. See Memorandum at 3.2.3.1.

COUNT ONE – VIOLATIONS OF THE DATA QUALITY ACT OF 2000

26. By its actions, the Defendants have unlawfully issued data contrary to the requirements of the Data Quality Act of 2000 by issue the Monthly Status Report.

27. As a matter of law, the document in question is produced under the Flood Control Act of 1936 and is not a third-party product. As such, Defendants may not invoke the third-party product exemption under the Data Quality Act of 2000.

28. Plaintiffs exhausted all administrative remedies as of November 20, 2003.

29. The data, model, and economic parameters upon which the information disseminated in the Monthly Status Report, July 2003, Upper Mississippi River – Illinois Waterway System Navigation Study fails to ensure and maximize the quality, objectivity, utility and integrity of information (including statistical information) disseminated by the agency as mandated in the DQA.

30. The information contained in the Monthly Status Report, July 2003, Upper Mississippi River – Illinois Waterway System Navigation Study was first publicly disseminated by the U.S. Army Corps of Engineers via the World Wide Web on August 7, 2003 by the Rock Island District of the U.S. Army Corps of Engineers ([View Document](#)). The primary information source for the preliminary National Economic Development benefit analysis of the six (6) alternative infrastructure investments described in the monthly status report is the product of the output of two proprietary, non-peer-reviewed, economic models operated and maintained solely by the U.S. Army Corps of Engineers. See the Monthly Status Report at pages 14-16.

31. The first of these economic models is generally referred to as the Tow Cost Model, which in this study is a recent adaptation of an older Ohio River Navigation System economic model to the Upper Mississippi River and Illinois Waterway Navigation System. The second model is generally referred to as the "ESSENCE" model and was originally produced for use in the Upper Mississippi River and Illinois Waterway Navigation System Feasibility Study. See the Monthly Status Report at pages 8 and 9.

These economic models and the data developed for these models have not been subjected to a peer review of any kind prior to the dissemination of information regarding the ir results in the monthly status report.

32. In fact, the Army Corps of Engineers has contracted with the National Research Council for a review of these models and their potential use in the Upper Mississippi River and Illinois Waterway Navigation System Feasibility Study, however this review has not yet commenced. See Monthly Status Report at page 20. Disseminating information based upon these models prior to the completion of this review is a direct violation of the DQA, the OMB guidelines and the Deputy Secretary of Defense's policy memorandum.

33. By relying on newly created, non-transparent, non-reviewed, proprietary economic models that themselves use non-reviewed, proprietary economic data, arbitrarily created economic model parameters, uncorrected and biased navigation traffic future forecasts as evidenced in independent peer review comments solicited for those forecasts, the Monthly Status Report, July 2003, Upper Mississippi River – Illinois Waterway System Navigation Study is not compliant with OMB DQA Guidelines or the Deputy Secretary of Defense's policy memorandum, and, consequently, the U.S. Army Corps of Engineers has violated the DQA.

PRAYER FOR RELIEF

34. There is a high probability that the U.S. Army Corps of Engineers has released this information in order to achieve some prejudicial result in its component processes. Accordingly, the U.S. District Court for the District of Columbia must take affirmative steps to remove this disseminated information from public circulation and disavow its content until such time that a formal peer review is completed before its dissemination.

35. PEER requests the honorable Court direct that until such time that the Army Corps of Engineers complies with the provisions of the DQA and the OMB guidelines that the Army Corps of Engineers immediately disavow and withdraw from distribution the previously published Monthly Status Report, July 2003, Upper Mississippi River and Illinois Waterway System Navigation Study. PEER also requests that the Army Corps of Engineers be directed to not disseminate any further substantive information regarding the Upper Mississippi River and Illinois Waterway System Navigation Study until the conclusion of the independent review to be conducted by the National Research Council.

36. To meet PEER's prayer for relief, the Court is petitioned to:

a. Issue declarative relief that the Defendants' actions described herein are unlawful under the Data Quality Act of 2000;

b. And a specific declaration that, until the Army Corps of Engineers complies with the provisions of the DQA and the OMB Guidelines by completing an independent peer review of the information, data, analyses, and conclusions of the subject document “before it is disseminated”, that the Department of Defense immediately disavow and withdraw from distribution the published Monthly Status Report, July 2003, Upper Mississippi River and Illinois Waterway System Navigation Study. PEER also requests that the Army Corps of Engineers be directed to not disseminate any further substantive information regarding the Upper Mississippi River and Illinois Waterway System Navigation Study until the conclusion of the independent review currently being conducted by the National Research Council.

37. Cost of this action and other just relief.

Dated: December 9, 2003

Electronically Signed Upon Electronic Case Filing (ECF)w/ Court
Daniel P. Meyer, Esq.

See U.S. District Court for the District of Columbia, Electronic Case Filing System (ECF)(Rev. 4 – Jan. 2003) at 11 (electronic filing by an attorney is certification of the signature).

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