

Committee on Resources

Witness Testimony

STATEMENT OF
RIVERSIDE COUNTY FLOOD CONTROL
AND WATER CONSERVATION DISTRICT
REGARDING
IMPACTS OF THE
ENDANGERED SPECIES ACT
ON FLOOD CONTROL ACTIVITIES
David P. Zappe
General Manager-Chief Engineer
Riverside County Flood Control
and Water Conservation District
IMPACTS OF THE ENDANGERED SPECIES ACT
ON FLOOD CONTROL ACTIVITIES

The Riverside County Flood Control and Water Conservation District (District) appreciates this opportunity to present the Committee with information regarding the impacts of the Endangered Species Act on flood control activities of the District, and the public it serves, and to provide recommendations for reform.

MAINTENANCE ISSUES

During the District's fifty year history, it has developed an extensive flood control system in western Riverside County including 35 dams, debris basins and detention basins, 48 miles of levees, 188 miles of open channel and 182 miles of underground storm drain. Several of these projects have been constructed in partnership with such Federal agencies as the U.S. Army Corps of Engineers (Corps), the Soil Conservation Service (now the Natural Resources Conservation Service) and the U.S. Forest Service.

Proper operation and maintenance of this flood control system is critical to protect the life and property of the residents of western Riverside County, and is essential to ensure that economic activity and transportation corridors are not disrupted during times of flooding. In the case of projects constructed with Federal partners, the District is mandated to operate and maintain those projects to standards dictated by the Federal agencies, as well as indemnifying and holding these agencies harmless from all liability and damages.

There are additional Federal mandates for flood control maintenance. In order to participate in the National Flood Insurance Program, the Federal Emergency Management Agency (FEMA) requires the "Community", in this case Riverside County and its incorporated Cities, to maintain the carrying capacity of all flood control facilities, and in some cases even semi-natural creeks and rivers. As owner of most of the regional facilities this maintenance responsibility ultimately falls on the District. Communities which fail to meet their maintenance responsibility are subject to expulsion from the National Flood Insurance Program, loss of other Federal aid, and even exposure to suits by FEMA for recovery of flood insurance and disaster payments.

For decades, the District routinely maintained its flood control system without interference, but over the past five to six years, has been hamstrung in this effort through the regulatory activities of several Federal agencies including the Corps, the Environmental Protection Agency (EPA), and the U.S. Fish and Wildlife Service (Service). These agencies have effectively been given veto power over local flood control maintenance activities by virtue of a myriad of regulations promulgated under authority of the Federal Clean Water Act (CWA) and the Federal Endangered Species Act (ESA). Although these laws have been on the books for many years, their impacts have steadily grown more burdensome as Federal agencies have issued new and more stringent regulations without the authority of new law, often as a means to negotiate settlement of environmental lawsuits of questionable merit such as the recently overturned suit which established the Tulloch Rule. In addition, the Service has recently stepped up its pace of new listings of endangered species. The result is that formerly routine maintenance activities of existing flood control facilities, many built in Federal partnership, are now subject to onerous Federal permit and mitigation requirements, along with the attendant delays, increased costs, and ongoing threat to the public health and safety.

Today, under the Federal Clean Water Act, three separate permits are required to operate and maintain the District's flood control systems. First, a National Pollutant Discharge Elimination System (NPDES) Municipal Stormwater Permit is required simply to discharge stormwaters to so called "waters of the United States". Although the District agrees reasonable regulation of stormwater discharges is necessary, the NPDES Program as currently constituted imposes a massive unfunded mandate on local government without proof of a commensurate return in water quality benefits. Secondly, a Section 404 Dredge and Fill Permit must be obtained from the Corps for any project which "discharges" fill to waters of the United States. Under Section 7 of the ESA, the Corps is required to "consult" with the Service where a permitted activity may jeopardize an endangered or threatened species or "critical" habitat, and the EPA retains veto power over any permit issued by the Corps with which they disagree. Finally, a Section 401 Water Quality Certification or Waiver must be obtained before any given 404 Permit becomes valid. Since California is an "NPDES State", this process has been delegated by EPA to the State Water Resources Control Board.

The District believes that conformance to this web of multiple Federal permits places an unreasonable burden on local government attempting to meet its obligation to protect the public through timely maintenance of flood control systems. Many examples of problems with the regulatory environment can be cited:

In January of 1993, the Old Town area of the City of Temecula was subjected to major flooding by overflow from Murrieta Creek. Flows raged through shops, stores and restaurants several feet deep, resulting in over ten million dollars of property damage. Miraculously no one was killed as a direct result, but in a number of cases citizens escaped their cars just before they were swept away. Some of the businesses never fully recovered and no longer exist. Prior to the flood, Federal officials had refused to allow mechanical clearing of vegetation and removal of accumulated sediment on the creek, partially due to alleged concerns about the endangered least Bell's vireo, and only after the damage occurred did they allow the critically needed flood control maintenance to take place. Ironically, FEMA, another Federal agency, later reimbursed the District and the City of Temecula for much of the cost of the post flood maintenance under a Federal Disaster Declaration, and also paid flood insurance and damage claims to those flooded.

During the early 1990's, the District was advised by a U.S. Fish and Wildlife representative that we could not control burrowing rodents in two large earth fill dams, Alessandro Dam in the City of Riverside, and Pigeon Pass Dam in the City of Moreno Valley. The concern expressed was that filling of rodent burrows could result in an incidental "taking" of the endangered Stephens' kangaroo rat. Obviously, failure to control

burrowing rodents in these large earth fill dams could have led to a catastrophic failure. Adoption of a habitat conservation plan for the endangered rat has finally resolved this problem, but in the interim, many citizens were subjected to unnecessary risk.

In the mid 1990's, the District was prevented for more than two years from making critical repairs to the Santa Ana River levees, a Federally constructed flood control project owned and operated by the District, because two endangered woolly-star plants were discovered in the general area of the necessary remedial work. The District is mandated to maintain these levees by the Federal government (U.S. Army Corps of Engineers), but could not do so even though a failure would have been catastrophic to the City of Riverside and adjacent communities.

The Potrero Creek Debris Basin, near San Jacinto, filled to capacity during the Winter of 1994/95. Restoration of capacity was critically needed because of a major fire in the tributary watershed. Permits to excavate the basin were sought from the Corps in July 1995, and the District agreed to provide 2 acres of offsite mitigation, and in addition proposed to set aside 40 acres of the 99-acre debris basin site as a habitat reserve. After consultation with the Service, the Corps requested a survey of the site for the endangered Stephens' Kangaroo Rat (SKR) despite existence of an April 1996 agreement implementing a Habitat Conservation Plan approved by the Service, which specifically provided that maintenance and operation activities were exempt from biological survey requirements. The Service did not accept their error on this issue for more than two weeks. Additionally, the Service demanded that the District conduct focused surveys for the Federally endangered slender-horned spine flower, and two other sensitive species, the San Bernardino kangaroo rat and the Los Angeles pocket mouse. Neither the San Bernardino kangaroo rat nor the Los Angeles pocket mouse are Federally listed as endangered or threatened, and surveys should not have been required for these species. In multiple visits to the site, Service staff found no evidence of the spine flower and the District had already proposed avoidance of the only potential area of the site where occupancy was feasible. Eventually, the Service acquiesced to the District's positions, and accepted the proposed mitigation and preservation plan, but the many months of foot dragging by the Service delayed the debris removal project until January of 1997, dangerously late in the rainy season.

Survival of an endangered or threatened species was not at stake in any of the cited cases, but inflexibility built into the ESA, coupled with indifference to public health and safety issues on the part of the Federal resource agency and regulatory staffs, prevented the District from taking appropriate corrective measures in a timely manner unnecessarily jeopardizing lives and property.

NEW PROJECTS AND GENERAL ISSUES

The District has also experienced major difficulties in permitting new flood control projects because of the ESA. This can be illustrated by following the course of attempts to permit the District's proposed San Jacinto River flood control project, near Perris, through the Federal regulatory process. Beginning in 1988, the District entered into 6 years of negotiations with the Service to address concerns they had raised for a potentially endangered plant, the San Jacinto Saltbush. These lengthy negotiations resulted in agreement by the District to add significant environmental enhancements desired by the Service to the project, thus avoiding the need to propose endangered listing of the Saltbush. These enhancements included adding a 100-foot wide riparian corridor for the entire 10 mile length of the project, and providing an additional 250-foot wide corridor of land contiguous to the channel to provide mitigation and protection for the Saltbush and several other plant species of concern to the Service. In order to provide guarantees to the Service and other resource agencies, the Flood Control District, the County of Riverside and the City of Perris executed a Memorandum of Understanding (MOU) with the Service and the California Department of Fish and

Game. The MOU provided for development of a habitat corridor plan for the San Jacinto River subject to review and approval by the Service, and a final draft plan was submitted to the Service for consideration and approval in November 1993. It should be emphasized that the MOU and corridor plan were developed voluntarily by local government, working directly with representatives of the Service, specifically to address Service concerns about the San Jacinto Saltbush and other species. In response to this extensive local initiative, the Service inexplicably proposed listing of the Saltbush and three other species as endangered, unilaterally abrogating the MOU. Even under provisions of the existing ESA, the District believes that the Service was obligated to have first considered the local plan proposed to protect the species in question; and second, by any impartial standard to have recognized that implementation of the plan proposed by local government would have obviated the need to list the Saltbush and other species of concern. Since that time, the Service has again changed its position, informally proposing a complete redesign of the project and its mitigation features. Nine years after negotiations began the District is standing by, still waiting for the Service to formalize their proposal. This chain of events speaks for itself with respect to problems with administration of the ESA.

The quality of the Administrative record supporting listing of the Saltbush and the other species, is also an issue. Under the provisions of the ESA, the determination to list a species as endangered or threatened must be based "solely on the basis of the best scientific and commercial data available". Of the total information contained in the Administrative Record for the proposed listing of the San Jacinto Saltbush and the other species involved, only about one-half was even closely related to the listing proposal. And of the remaining material only an insignificant fraction could be considered to be serious scientific data, certainly not enough information to substantiate the need to list the identified species. And most disturbing of all, a comprehensive biological assessment prepared for the District by Tierra Madre Consultants at the direct request of the Service was not even included in the record.

Another problem related to the designation of "critical habitat" proposed by the Service. Under provisions of the ESA, such designation is required to be "on the basis of the best scientific data available". But the Services' proposed boundary line for critical Saltbush habitat followed section and property lines, neither of which have any relationship to biological functions.

Finally, during negotiations for the proposed San Jacinto River project, and beginning in November 1988, the Corps requested on three separate occasions that the Service initiate a Section 7 Consultation under provisions of the ESA. Under current rules, the Service has 90 days to conclude such a consultation, and thereafter has an additional 45 days to provide a biological opinion to the requesting agency. In this case the Service unilaterally terminated the first two consultations, and failed to meet the required deadline for the third consultation. The Service finally issued a biological opinion for the proposed project in March of 1995, more than six years after the initial request.

Major reform of the ESA is necessary to ensure that in the future, Service personnel act in good faith with the public they serve, and to ensure all future listings are based on quality science, are fully justified and in the public interest.

SUMMARY AND RECOMMENDATIONS

Specific reforms to the ESA recommended by the District are as follows:

Most importantly, a categorical exemption should be added to provide for routine maintenance and emergency repair of all existing flood control facilities and appurtenant structures which protect the

public health and safety, including dams, debris basins, detention basins, open channels and highway drainage structures.

Standards should be established for the quality of the science required to justify a proposed listing, and the science and administrative record should be subject to review and approval by an independent panel of qualified scientists before a proposed listing may be published in the Federal Register.

Criteria should be established for distinguishing true species from subspecies, and only true species should qualify for listing.

The time period for public comment, and/or for requesting a public hearing, concerning the proposed listing of a species should be increased, and the time periods should be included in the Act itself rather than implementing regulations. It is recommended that the time allotted for public comment be increased to 120 days, and the time allotted to request a public hearing be 90 days. In addition, proposals to list a species should be published prominently in newspapers of broad general circulation.

Early consultation with potentially affected local government, including counties and incorporated cities, should be mandatory before a proposed listing is published in the Federal Register.

Processing and review of permit applications, habitat conservation plans, and Section 7 consultations should be subject to specific time periods for completion, and should be deemed approved if not completed within the allotted time.

The District fully understands that flood control programs and methods are currently undergoing dramatic change. Softer, non-structural solutions utilizing flood plain management principles are being implemented, rather than the concrete based structural measures used in the past. And where structures are absolutely necessary, they incorporate softer, more environmentally friendly materials and designs where feasible. But millions of citizens still rely on the existing flood control systems which have been constructed to ensure protection of their lives and property. Major reform is necessary to ease the current regulatory burden on local government, and allow maintenance of these existing systems of flood control facilities which provide the backbone of protection for the public's health and safety. Reform of the Endangered Species Act is a critical step in that process.

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