

Committee on Resources

Witness Testimony

**DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
(CIVIL WORKS)**

**WRITTEN STATEMENT OF MICHAEL L. DAVIS
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**ON FLOOD PROTECTION ACTIVITIES AND
IMPLEMENTATION OF THE ENDANGERED SPECIES ACT**

BEFORE THE

**COMMITTEE ON RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES
THURSDAY, APRIL 10, 1997, 12 NOON
1324 LONGWORTH HOB
WASHINGTON, D.C.**

Mr. Chairman and Members of the Committee: Thank you for the opportunity to testify on the impact of the Endangered Species Act (ESA) on the ability of federal, state, and local governments to provide flood protection. I am Michael L. Davis, Deputy Assistant Secretary of the Army for Civil Works. With me today from the Army Corps of Engineers Sacramento District are Ms. Susan L. Ramos, Chief of the Environmental Branch; Mr. Michael F. Nolan, Chief, Civil Branch Programs and Project Management; and Mr. Thomas S. Coe, Regulatory Branch. They are here at the request of the Committee to answer specific questions on the flood control projects within the Sacramento District.

INTRODUCTION

While my statement today focuses on activities in the California Central Valley and its recent devastating floods, the basic tools used by the Army Corps of Engineers apply across the Nation. Further, we believe that the recent California experience is illustrative of the solid working relationships between federal, state, and local agencies and local flood control project sponsors in other flood prone areas.

Let me say up-front that we believe that implementation of the ESA is not inconsistent with the need to build, maintain, and operate flood control infrastructure. We know today that it is not only vital to protect human safety and property -- it is also important to protect our natural resources. Using existing tools and regulatory provisions of the ESA and the Clean Water Act (CWA) we are able to maintain the important balance between flood protection and natural resource protection.

CALIFORNIA CENTRAL VALLEY ISSUES

Before I discuss our views on the impact of ESA and other environmental programs on our flood protection efforts, I would like to review some basic information on the Central Valley flood protection infrastructure. First, it is important to note that the Corps is responsible for only some of the 6,000 miles of levees in the Central Valley. Approximately 1700 miles of levees are considered federal, or "project", levees. These are levees built by the Corps and locally operated and maintained, as well as those locally-constructed levees

incorporated by Act of Congress as "federal" levees, which are also locally operated and maintained. In addition, there are approximately 400 miles of "active" non-federal levees. These are locally constructed, locally maintained levees that, under the Corps Rehabilitation and Inspection Program of PL 84-99, have been inspected by the Corps and found to meet engineering and maintenance standards set by the Corps for non-federal levees. The Corps can repair only federal levees and active non-federal levees under PL 84-99 authority.

The remaining 3900 miles of levees in the Central Valley are classified as "inactive" by the Corps. This means that these locally constructed levees either do not meet minimal engineering and maintenance standards, or do not have a local sponsor, or have not been inspected by the Corps. (Every non-federal levee, regardless of its condition, must be inspected by the Corps and granted an active status before it can become eligible for rehabilitation assistance. The inspection must occur prior to any damage caused by a flood event.) The Corps cannot repair inactive levees under PL 84-99 authority.

Corps activities apply mainly to the 1700 miles of federal "project" levees and the 400 miles of "active" non-federal levees in the Central Valley. Maintenance and repair of the 3900 miles of private levees may require a Department of the Army (DA) permit under Section 404 of the Clean Water Act and/or under Section 10 of the Rivers and Harbors Act of 1899. However, it is important to understand that most levee maintenance, repair and rehabilitation of currently serviceable structures, including levees in "non navigable" waters are exempted from regulation under the terms of CWA Section 404 (f)(1). For levee maintenance and repairs in navigable waters, a DA Section 10 permit is required. To accelerate the permitting process in these waters, a nationwide general permit has been issued by the Corps for such work. The nationwide general permit allows levees to be maintained to PL 84-99 standards with little or no review by the Corps. As a condition of the general permit the proposed work must comply with the ESA. If the work may affect threatened or endangered species, some form of informal or formal consultation with the U.S. Fish and Wildlife Service (USFWS) is required.

To provide additional regulatory relief, the Sacramento District issued a regional general permit (RGP) in early January, 1997, for emergency flood repair. The permit is for activities not otherwise covered by existing exemptions or nationwide general permits. The use of the RGP in conjunction with existing nationwide general permits and exemptions allowed the District to give very rapid authorization for emergency flood related work. Since January, the District has evaluated and authorized over 30 separate activities under the general permit with turn around times ranging from two hours to two days.

The Corps of Engineers complies with the Endangered Species Act in all of its activities, including emergency actions and regulatory activities under the Clean Water Act. Under normal circumstances, the Corps requests from the USFWS, or the National Marine Fisheries Service (NMFS) where applicable, a list of threatened or endangered species that may be in the study or project area. If a species may be present in the area, the Corps completes a biological assessment (where that would be appropriate) to see if the species would be adversely affected. If there would be an adverse effect, the Corps requests informal or formal consultation with the Service to develop means to avoid such effects. In the case of emergency actions, the Corps contacts the Service early in the emergency to begin dialogue on ways to avoid adversely affecting any threatened or endangered species.

The Corps enjoys a solid working relationship with federal and state resource agencies. We work together to ensure that flood control projects go forward in a timely manner with minimal adverse effects on the environment. Where the adverse effects need to be addressed, we work together to establish the appropriate mitigation.

A good example of this effective working relationship is the emergency flood fighting work that was done following the New Year's storm in northern and central California. As soon as our local Sacramento District became involved with fighting levee breaks, our environmental resource representatives coordinated with USFWS, NMFS, and the State of California Department of Fish and Game to obtain guidance on

conducting consultations on endangered species concerns. All three agencies stated that an initial consultation was not necessary to initiate emergency levee repairs during flood fight conditions. Instead, concerns or requirements for endangered species mitigation would be addressed once the flood fighting ended. The Corps representatives kept the agencies informed of construction activities during this period. Emergency work went forward without any delays for environmental consultation. Any formal consultation is being done later because the need for immediate repairs was realized by all.

And now that the Corps is in the rehabilitation phase of levee reconstruction in California, the USFWS is working with our Sacramento District in close coordination on environmental issues, so that we may expedite the site evaluation process and, ultimately, the final levee rehabilitation. The USFWS and State Fish and Game representatives accompany the Corps teams as they conduct site visits. A determination is made on-site of any ESA, National Environmental Policy Act, or California Environmental Quality Act concerns or habitat mitigation requirements. After the Corps and the USFWS have determined what mitigation measures can be reasonably and practicably implemented to protect endangered and threatened species and other environmental values, those measures are implemented as the rehabilitation and reconstruction work proceed, or as soon thereafter as is practicable.

The Corps is also involved in long-term and joint efforts with our resource agency counterparts to offer more effective flood protection in a manner that will complement efforts to improve protection of the environment. As established by a February 18, 1997, memorandum from the Office of Management and Budget and the President's Council on Environmental Quality, the Corps is the lead federal agency of an Interagency Task Force that will seek nonstructural alternatives for flood protection when it make sense to do so. This task force, which is represented by many agencies, will look to restore California's flood protection in a way that will minimize risk to life and property, while protecting important environmental and natural resource values. In creating the Task Force the Administration recognized the need and value associated with combining flood protection solutions and environmental considerations so that both objectives can be met simultaneously. Only through a partnership between the Corps, other agencies, and state and local communities will long-term sustainable solutions be developed and implemented.

The Interagency Task Force is working with federal, state and local agencies to identify potential nonstructural alternatives to the repair of damaged flood control facilities for the purpose of reducing future flood damages. We recognize that nonstructural alternatives are not a "silver bullet" solution and that such approaches require extensive coordination and agreement from landowners. I am pleased to say that the field staff from both the Corps and the resource agencies are working closely with others to build the consensus that is imperative in implementing such a solution, and that some potential nonstructural measures have been identified.

The Corps is involved in other long-term interagency efforts such as the CALFED Bay-Delta Program, where the State of California and federal interests have formed a partnership to protect both the people and the natural environment of the California delta region. Relationships such as CALFED illustrate the importance the Corps places on getting the views and expertise of a diverse group when developing flood protection and environmental projects. The Corps will coordinate closely with CALFED to develop long term flood control practices that are consistent with the CALFED Bay-Delta long term program. For example, the California Department of Water Resources is being funded by Category III of CALFED to be the Corps non-federal sponsor for Prospect Island. The implementation of Prospect Island will restore 1300 acres of freshwater tidal marsh, riparian, and shallow open water habitat in the Delta.

It is our strong belief that both human needs and our natural environment can both be given appropriate consideration and that decisions regarding flood protection and development issues should reflect both sets of considerations. The Corps recognizes that environmental laws such as the ESA and CWA section 404 are essential to ensure the protection of our nation's resources. While it is true that, at times, construction schedules and practices have been modified to address environmental requirements, but this has not

interfered with our ability to provide protection from floods. We continue to work with other agencies to reduce delays where possible.

H.R. 478

Chairman Young's letter of invitation asked for comments on H.R. 478, 105th Congress. The Department of the Army strongly opposes H.R. 478. The Department does not believe that H.R. 478 is necessary to allow us to deal with flood protection or flood emergencies. H.R. 478 would exempt from ESA Section 7 consultation and from ESA Section 9 "takings" provisions a great variety of activities related to flood control structures and response actions. Some of those activities do not deal with emergencies, so generally there is time to ensure reasonable and sensible compliance with the mandates of the ESA for those activities. Thus, we do not believe that exemptions such as H.R. 478 would enact are necessary for those non-emergency activities. Other activities addressed by H.R. 478 are related to emergency flood response. As previously explained, we already have and use emergency procedures to deal with ESA and other environmental requirements during flood emergency response actions. Our approach allows work to go forward as needed while taking into consideration substantial environmental impacts. H.R. 478 would not allow for this type of evaluation, and is not needed to address emergency situations.

CONCLUSION

The recent floods in the Northwest, central California, and the Ohio Valley have caused substantial damage to property, have cost taxpayers billions of dollars, and most importantly, have cost human lives. No agency is more sensitive to this devastation than the Corps of Engineers. Our dedicated field staff witness firsthand the destruction and the fears of landowners. It is time that we seriously reexamine our flood plains and our floodplain policies. We must ask if our current approach is sustainable -- in terms of effective flood protection, the fiscal investment, and the impact on our natural resources. Our short-term objective must be to help communities recover from the devastation. Our long-term objective must, in our opinion, be one that includes a serious look at all options -- not just an automatic return to structural solutions that may no longer be appropriate or effective. If we carefully evaluate all our options, we can demonstrate that we do not have to choose between flood protection and environmental protection.

Mr. Chairman, that concludes my testimony. Ms. Ramos, Mr. Nolan and I are prepared to answer any questions you may have.

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