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105TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPORT 105–75

FLOOD PREVENTION AND FAMILY PROTECTION ACT OF 1997

APRIL 24, 1997.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. YOUNG of Alaska, from the Committee on Resources, submitted the following

REPORT

together with

DISSENTING VIEWS

[To accompany H.R. 478]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 478) to amend the Endangered Species Act of 1973 to improve the ability of individuals and local, State, and Federal agencies to comply with that Act in building, operating, maintaining, or repairing flood control projects, facilities, or structures, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Flood Prevention and Family Protection Act of 1997".

SEC. 2. PURPOSE.

The purpose of this Act is to reduce the regulatory burden on individuals and local, State, and Federal agencies in complying with the Endangered Species Act of 1973 in reconstructing, operating, maintaining, or repairing flood control projects, facilities, or structures to address imminent threats to public health or safety or catastrophic natural events or to comply with Federal, State, or local public health or safety requirements.

39–006

SEC. 3. AMENDMENTS TO ENDANGERED SPECIES ACT OF 1973.

(a) ACTIONS EXEMPT FROM CONSULTATION AND CONFERENCING.—Section 7(a) of the Endangered Species Act of 1973 (16 U.S.C. 1536(a)) is amended by adding at the end the following new paragraph:

"(5) Consultation and conferencing under paragraphs (2) and (4) is not required for any agency action that—

"(A) consists of reconstructing, operating, maintaining, or repairing a Federal or non-Federal flood control project, facility, or structure—

"(i) to address a critical, imminent threat to public health or safety;

"(ii) to address a catastrophic natural event; or

"(iii) to comply with Federal, State, or local public health or safety requirements; or

"(B) consists of maintenance, rehabilitation, repair, or replacement of a Federal or non-Federal flood control project, facility, or structure, including operation of a project or a facility in accordance with a previously issued Federal license, permit, or other authorization.".

(b) PERMITTING TAKINGS.—Section 9(a) of such Act (16 U.S.C. 1538(a)) is amended by adding at the end the following new paragraph:

"(3) For purposes of this subsection, an activity of a Federal or non-Federal person is not a taking of a species if the activity—

"(A) consists of reconstructing, operating, maintaining, or repairing a Federal or non-Federal flood control project, facility, or structure—

"(i) to address a critical, imminent threat to public health or safety;

"(ii) to address a catastrophic natural event; or

"(iii) to comply with Federal, State, or local public health or safety requirements; or

"(B) consists of maintenance, rehabilitation, repair, or replacement of a Federal or non-Federal flood control project, facility, or structure, including operation of a project or a facility in accordance with a previously issued Federal license, permit, or other authorization.".

Amend the title so as to read:

A bill to amend the Endangered Species Act of 1973 to reduce the regulatory burden on individuals and local, State, and Federal agencies in complying with that Act in reconstructing, operating, maintaining, or repairing flood control projects, facilities, or structures.

PURPOSE OF THE BILL

The purpose of H.R. 478, "The Flood Prevention and Family Protection Act of 1997", is to reduce the regulatory burden on individuals and local, State, and Federal agencies in complying with the Endangered Species Act in reconstructing, operating, maintaining, or repairing flood control projects, facilities, or structures.

BACKGROUND AND NEED FOR LEGISLATION

The Endangered Species Act of 1973 (P.L. 93–295) as amended (ESA, 16 U.S.C. 1531–1543), is one of our Nation's most powerful, yet most controversial environmental laws. This law, first passed primarily in response to a concern that some species, like the bald eagle, were possibly in danger of extinction, now imposes rigid and comprehensive regulations on Federal agencies and private citizens alike to protect species in the United States and to some extent foreign countries as well.

Under the ESA, the Secretaries of the Interior and Commerce, with operational authority delegated to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, respectively, are responsible for implementing the provisions of the law. The Fish and Wildlife Service implements the ESA with respect to wildlife and most freshwater species of fish and the National Marine

Fisheries Service implements the ESA with respect to most species of salt water fish and marine animals.

FEDERAL AGENCY CONSULTATIONS

Section 7 of the ESA requires all Federal agencies to further its purposes through consultations with the Secretaries of Interior or Commerce, depending on the species affected, as a result of the Federal agency's actions. Every Federal agency must insure that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of a threatened or endangered species or result in destruction of or adverse modification of designated critical habitat. Consultation is the process in which the Federal agency engages after a determination is made by that Federal agency that their planned action "may affect" a listed species or its critical habitat. After its initiation, consultation is concluded by the issuance of a biological opinion which must include the Secretary's judgment as to whether the planned action will jeopardize the species. If a "jeopardy" opinion is reached, then the Secretary must suggest reasonable and prudent alternatives to the action.

The biological opinion is also the document which provides the "incidental take statement". Incidental take refers to a "taking" of a species (or its habitat) and results from an otherwise lawful activity. The "take" of a species includes not only the actual harm or harassment to a member of the species but harm to its habitat as well. Further, the "taking" of a species or its habitat cannot be the purpose of the activity, but must be merely incidental to it. If, in the opinion of the Secretary, "take" will occur, the Secretary prescribes "reasonable and prudent measures" (mitigation) and sets forth the terms and conditions that the Federal agency must meet or comply with to proceed with the project.

The biological opinion is not advisory in nature, but is a mandate to the other Federal agency. The Federal action agency is technically free to disregard the biological opinion and proceed with its proposed action, but it does so at its own peril (and that of its employees), for "any person" who knowingly "takes" an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment." *Bennett* v. *Spear,* Supreme Court No. 95–813, decided on March 19, 1997.

EXEMPTIONS FROM FEDERAL CONSULTATION

ESA Subsection 7(p) provides that in any area declared by the President of the United States as a major disaster area under the Disaster Relief Act of 1974, the President is authorized to act in the place of the exemption Committee and grant the exemption that the Committee could otherwise grant. Section 7 allows for exemptions to be granted by a Cabinet level exemption Committee; however, because the process is so cumbersome, it has had little utility in the 24 year history of the ESA. This exemption is limited to the "repair or replacement of a public facility substantially as it existed prior to the disaster under Sections 405 and 406 of the Disaster Relief Act of 1974 and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures

of Section 7 to be followed." Under this authority, the President can act to exempt public safety projects from ESA after a major disaster to allow public projects to be rebuilt, but can't act beforehand to allow repairs and preventive maintenance of projects to prevent a disaster without full compliance with ESA.

PROHIBITED TAKINGS

Section 9 of the ESA sets forth those actions which are prohibited or unlawful. The central and most frequently violated prohibition is the act of "take" or the "taking" of a species. "Take" is defined to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect a species or attempt to engage in any of these activities. Regulations issued by the Secretary also define "take" to include significant adverse modification or destruction of a species' habitat. Section 9 take prohibitions only directly apply to fish and wildlife which are listed as endangered. The ESA authorizes the Secretary to extend by regulation the "take" prohibition to "threatened" wildlife. The Secretary is also given great flexibility to make less restrictive regulations governing protections for threatened species. The Secretary has generally extended the take prohibition to threatened species, so that the distinction between protections for endangered species and threatened species has been blurred. There are some significant differences in the prohibitions for endangered plants. There is no prohibition on the "take" of a listed plant on one's own private property. However, regulatory authority to protect plants may be gained by the government if a private landowner needs a government permit to conduct certain activities, as when a Clean Water Act 404 permit is needed or an ESA Section 10 permit is needed because of the presence of endangered wildlife. Again, the Secretary may extend to threatened plants by regulation the prohibitions applicable to endangered plants.

AN EXCEPTION TO THE TAKE PROHIBITION—THE INCIDENTAL TAKE PERMIT

Under ESA Section 10, the Secretary can issue a permit to allow the incidental taking of species in order to allow an action or project to proceed. Generally, there are two exceptions—hardship exemptions (which are very rare) and permits. The permits issued under Section 10 are usually associated with nonfederal landowners and are issued only after an applicant submits an approved conservation plan (known as a habitat conservation plan). Past examples of conservation plans show that developing a plan that eventually is approved is no easy undertaking. The creation and development of these conservation plans is very costly and may take years to complete. There are a number of criteria the applicant must meet to get the Secretary's approval. For example, the applicant must state what the probable impact to the species will be, what mitigation measures the applicant is taking to minimize the impacts to the species, and what alternatives to the action the applicant has developed and considered. Finally, the applicant must follow other terms and conditions the Secretary may require. Even though all of the criteria may be met, the approval of a conservation plan still remains at the total discretion of the Secretary.

An added complication overlaying some ESA decisions is the permit required by Section 404 of the Clean Water Act. Section 404 generally regulates the discharge of dredged or fill material into navigable waters of the United States, including wetlands. Current interpretation of "navigable" waters can mean any just about any wet land or in many cases dry land near water bodies. If permits under Section 404 are required to proceed with an activity, then this constitutes a Federal agency action, and triggers the Section 7 consultation requirements of the ESA.

MITIGATION

Mitigation for impacts caused by activities on various environments is now regularly required to obtain a permit from a Federal agency. Mitigation can be accomplished in many ways, but frequently takes the form of setting aside land or restricting activities. Mitigation measures can also be in the form of replanting trees or other vegetation that provides habitat for the species impacted. Land involved in mitigation is often transferred to either a public or private entity for long-term maintenance. The entity may be a State or local agency or a private conservation group. The costs of mitigation vary but, depending on the type of mitigation required, may be substantial. If the permit applicant is required to acquire land to conduct mitigation, costs will depend on the value of the land and the costs of the required planting or habitat restoration. Mitigation is routinely required for building, repairing, reconstructing, and maintaining flood control facilities, such as levees. It is often the most controversial and difficult part of the process and can lead to substantially increased costs for the project.

Applicants for permits are required to conduct various types of mitigation to obtain permits under Section 404 of the Clean Water Act (for wetlands mitigation) or their ESA Section 10 or Section 7 permits. Mitigation must be approved and a funding source assured before the project can proceed.

PROBLEMS ASSOCIATED WITH ESA COMPLIANCE BY FLOOD CONTROL OFFICIALS

According to the Corps of Engineers, the primary purpose of levees is to provide flood control to protect the lands located behind such levees from being inundated. Most levees are owned, maintained, and operated by a local or State government. In addition to levees, the maintenance of river channels plays an important role in flood control. Channels must be maintained to a certain depth to provide an expected level of carrying capacity for flood waters. Levees and channels require continued maintenance to retain their capacity and structural integrity. According to the Corps of Engineers' maintenance manual, levees are to be routinely mowed and vegetation removed to protect the integrity of the levee system. When levees are not maintained in conformance with guidelines, excessive vegetation may impede levee integrity, inspection, and flood fighting activities.

The Corps also requires that river channels be clear of debris, weeds, and wild growth. According to the Corps, "Generally speaking, the regulations establish that projects must be maintained to pass the flood flows for which they were authorized and con-

structed. Vegetation, sediment, and any other obstructions which preclude the projects from operating as intended must be removed, with the work done in compliance with laws and regulations. This often requires obtaining permits and complying with the provisions of the Clean Water Act, National Environmental Policy Act, and the Endangered Species Act. Additionally, silt and vegetation obstruct the passage of flood flows causing higher river stages. Additionally, they deflect erosive forces toward the levees. This all results in an increased risk of flooding."

H.R. 478

H.R. 478 would exempt certain flood control related activities from the consultation requirements of ESA Section 7 and would also provide an exemption from the prohibitions relating to a "take" of a species found in ESA Section 9. The activities covered by the bill include reconstructing, operating, maintaining, or repairing a flood control project, facility or structure to address a critical, imminent threat to public health or safety; to address a catastrophic natural event; or to comply with Federal, State, or local public health or safety requirements. The exemption would apply to activities that consist of maintenance, rehabilitation, repair, or replacement of a flood control project or facility in accordance with a previously issued Federal license, permit, or other authorization.

Similar language was contained in H.R. 2275, "the Endangered Species Conservation and Management Act of 1995", which was ordered favorably reported by the Committee on Resources by a vote of 27–17 on October 12, 1995 (H. Rept. 104–778, Part I).

COMMITTEE ACTION

H.R. 478 was introduced on January 21, 1997, by Congressman Wally Herger (R–CA) and Congressman Richard Pombo (R–CA) The bill was referred to the Committee on Resources. On April 10, 1997, the Committee held a hearing on H.R. 478, where various individuals testified regarding their efforts to repair and maintain flood control facilities, while attempting to comply with the Endangered Species Act and commented on H. R. 478.

According to testimony received by the Committee on Resources, problems arise when the levees are not maintained and vegetation is allowed or required to grow on levees or in flood control channels. That vegetation becomes "habitat" for wildlife that is protected under both State and Federal law and brings with it all the procedural and substantive mandates of the ESA.

The Committee heard testimony about a number of problems experienced by officials of local flood control agencies with primary responsibility and liability for maintaining the integrity and stability of flood control protection systems. These officials testified of past delays, cost increases, and work stoppages as a result of the presence of endangered or threatened species at or near various flood control facilities. Officials routinely expressed concerns over the long delays and uncertainties associated with mitigation requirements.

One example studied by the Committee is the Sacramento River Flood Control Project (authorized in 1987), consisting of approxi-

mately 1,000 miles of levees that protect lands in the Sacramento Valley and the Sacramento-San Joaquin Delta. After the devastating 1986 flood season, there were numerous levees and other flood-related structures that needed repairs and maintenance. As of 1997 only a small portion of the work has been completed. The cost of the project was expected to be $105,630,000. Of that amount environmental mitigation will cost $7,286,000. Of that amount the construction of the mitigation projects is expected to be $4,450,000. Officials testified that the ESA was one of the complicating and delaying factors associated with the failure to proceed expeditiously with those repairs. During the 1997 California floods, several levees that were scheduled for repair failed resulting in flooding, loss of life, and damage to property.

The Environmental Impact Statement for the project states that if no action were taken to repair the levees it is "likely to result in levee embankment problems and potential levee failure that could cause extensive flooding, significant economic damages, and *could include loss of life.* * * * Persons residing in areas protected by the levee would be at risk. Public safety impacts would depend on the location and magnitude of flooding, time of day, warning time, ability to evacuate, and effective implementation of an evacuation plan. Sudden levee failure would pose severe public health and safety risks." (EIS, May, 1992, page FEIS 9 [emphasis added]) Unfortunately, action was not taken within the expected time frame and loss of life occurred.

The most frequently cited species which impacted levee repairs in the central valley of California is the threatened Valley elderberry longhorn beetle. This beetle makes its habitat in the branches of the elderberry tree. Although the Fish and Wildlife Service found no jeopardy to a listed species or its critical habitat in much of the levee repair work to be done in the Sacramento area, it still required substantial mitigation for the removal of elderberry trees from levees, without requiring that actual beetles be found living in the trees. In one case, the Service found that the project would impact 37 elderberry trees with 1,538 stems and therefore, could constitute an ESA Section 9 take and issued an incidental take statement to the Corps of Engineers requiring mitigation for the 37 trees. Mitigation was ordered to be conducted at a ratio of 5:1 for each impacted stem of the plant, which meant that for the 37 trees affected, the Corps was required to plant 7,690 elderberry plants on 56.5 acres of mitigation land. There was a long list of conditions to be met in establishing and maintaining the mitigation site. The habitat was to be set aside in perpetuity and would be managed by either a State or private conservation group. A survival rate of 80 percent after 10 years was required. While the levee reconstruction at this particular site had not yet been completed, the mitigation for the site has been carried out.

In another example, the Committee found that levee reconstruction work was postponed for several months because of the presence of the threatened giant garter snake, listed as threatened under the ESA. Work was scheduled to commence in October 1996, but was halted out of concern that the snake was hibernating in the area and would be injured during construction since during hibernation, the snake burrows into the ground.

On April 16, 1997, the Full Resources Committee met to consider H.R. 478. An amendment to clarify that the exemption was not applicable to new construction of flood control facilities or to routine operation of flood control facilities was offered by Congressman Pombo, and adopted by voice vote. The bill as amended was then ordered favorably reported to the House of Representatives, in the presence of a quorum by a roll call vote of 23–9, as follows:

Committee on Resources
U.S. House of Representatives
105th Congress

Full Committee

Date 4-16-97

Roll No. 1

Bill No. H.R. 478 Short Title Flood Prevention and Family Protection Act of 1997.

Amendment or matter voted on: Final Passage

Member	Yea	Nay	Pres.	Member	Yea	Nay	Pres.
Mr. Young (Chairman)	X			*Mr. Miller*		X	
Mr. Tauzin	X			*Mr. Markey*			
Mr. Hansen				*Mr. Rahall*		X	
Mr. Saxton				*Mr. Vento*			
Mr. Gallegly				*Mr. Kildee*		X	
Mr. Duncan				*Mr. DeFazio*		X	
Mr. Hefley	X			*Mr. Faleomavaega*			
Mr. Doolittle	X			*Mr. Abercrombie*		X	
Mr. Gilchrest				*Mr. Ortiz*			
Mr. Calvert				*Mr. Pickett*	X		
Mr. Pombo	X			*Mr. Pallone*		X	
Mrs. Cubin	X			*Mr. Dooley*	X		
Mrs. Chenoweth	X			*Mr. Romero-Barcelo*			
Mrs. Linda Smith	X			*Mr. Hinchey*			
Mr. Radanovich	X			*Mr. Underwood*			
Mr. Jones	X			*Mr. Farr*			
Mr. Thornberry				*Mr. Kennedy*			
Mr. Shadegg	X			*Mr. Adam Smith*		X	
Mr. Ensign				*Mr. Delahunt*		X	
Mr. Bob Smith	X			*Mr. John*	X		
Mr. Cannon	X			*Dr. Green*		X	
Mr. Brady	X			*Mr. Lampson*			
Mr. Peterson	X			*Mr. Kind*	X		
Mr. Hill	X						
Mr. Schaffer	X						
Mr. Gibbons	X						
Mr. Crapo	X			**TOTAL**	23	9	

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section sets forth the title of the bill as the "Flood Prevention and Family Protection Act of 1997".

Section 2. Purpose

This section provides that the purpose of the bill is to reduce the regulatory burden on individuals and local, State, and Federal agencies in complying with the Endangered Species Act in reconstructing, operating, maintaining, or repairing flood control projects to address public health or safety threats.

Section 3. Amendments to the Endangered Species Act of 1973

This section amends Section 7(a) of the Endangered Species Act to exempt from the consultation and conferencing requirement, action that consist of reconstructing, operating, maintaining, or repairing a flood control project, facility or structure to address a critical, imminent threat to public health or safety or to address a catastrophic natural event, or to comply with Federal, State, or local public health or safety requirements. It further provides that consultation and conferencing are not required for maintenance, rehabilitation, repair, or replacement of a flood control project facility, or structure if done pursuant to a previously issued Federal license, permit, or other authorization.

The second subsection grants the same exemption from the provisions of ESA Section 9 relating to the "take" prohibition.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

With respect to the requirements of clause 2(l)(3) of rule XI of the Rules of the House of Representatives, and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact H.R. 478.

COST OF THE LEGISLATION

Clause 7(a) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out H.R. 478. However, clause 7(d) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974.

COMPLIANCE WITH HOUSE RULE XI

1. With respect to the requirement of clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives and section 308(a) of

the Congressional Budget Act of 1974, H.R. 478 does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

2. With respect to the requirement of clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform and Oversight on the subject of H.R. 478.

3. With respect to the requirement of clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 478 from the Director of the Congressional Budget Office.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 21, 1997.

Hon. DON YOUNG,
Chairman, Committee on Resources,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 478, the Flood Prevention and Family Protection Act of 1997.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Deborah Reis.

Sincerely,

JAMES L. BLUM
(For June E. O'Neill, Director).

Enclosure.

H.R. 478—Flood Prevention and Family Protection Act of 1997

CBO estimates that enacting H.R. 478 would have no significant effect on the federal budget. Because the bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply.

H.R. 478 would exempt certain flood control projects and related activities from the consultation requirements and other provisions of the Endangered Species Act (ESA). Under these requirements, federal agencies and others must consult with either the U.S. Fish and Wildlife Service or the National Oceanic and Atmospheric Administration, as appropriate, before taking any actions that may affect protected species. The amendments to the ESA that would be made by subsection 3(a) of the bill would enable federal and other public agencies to expedite preventative measures in response to an imminent threat of flooding. Subsection 3(b) would further exempt such measures from the act's provisions on the taking of a species. The ESA defines "take" as any action "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Under the ESA, agencies are often required to mitigate the effects of their actions. Enacting subsection 3(b) of H.R. 478 could allow affected agencies to save discretionary funds that would otherwise be used for mitigation purposes such

as habitat acquisition or restoration, but any such effects would not be significant.

H.R. 478 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 and would impose no costs on state, local, or tribal governments. State and local agencies are responsible for maintaining and operating some flood control facilities. Enacting this bill would allow those agencies to avoid some expenditures currently required under the ESA.

The CBO staff contact for this estimate is Deborah Reis. This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104–4

H.R. 478 contains no unfunded mandates.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

ENDANGERED SPECIES ACT OF 1973

* * * * * * *

INTERAGENCY COOPERATION

SEC. 7. (a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS.—(1) * * *

* * * * * * *

(5) Consultation and conferencing under paragraphs (2) and (4) is not required for any agency action that—

(A) consists of reconstructing, operating, maintaining, or repairing a Federal or non-Federal flood control project, facility, or structure—

(i) to address a critical, imminent threat to public health or safety;

(ii) to address a catastrophic natural event; or

(iii) to comply with Federal, State, or local public health or safety requirements; or

(B) consists of maintenance, rehabilitation, repair, or replacement of a Federal or non-Federal flood control project, facility, or structure, including operation of a project or a facility in accordance with a previously issued Federal license, permit, or other authorization.

* * * * * * *

PROHIBITED ACTS

SEC. 9. (a) GENERAL.—(1) * * *

* * * * * * *

(3) For purposes of this subsection, an activity of a Federal or non-Federal person is not a taking of a species if the activity—

(A) consists of reconstructing, operating, maintaining, or repairing a Federal or non-Federal flood control project, facility, or structure—

(i) to address a critical, imminent threat to public health or safety;

(ii) to address a catastrophic natural event; or

(iii) to comply with Federal, State, or local public health or safety requirements; or

(B) consists of maintenance, rehabilitation, repair, or replacement of a Federal or non-Federal flood control project, facility, or structure, including operation of a project or a facility in accordance with a previously issued Federal license, permit, or other authorization.

* * * * * * *

DISSENTING VIEWS

The California floods of 1997 were a great tragedy, and it would be irresponsible for Congress not to consider how to reduce the likelihood of such a tragedy in the future. We should not use this tragedy, however, as an excuse to undercut the Endangered Species Act (ESA) which, rhetoric aside, was not the cause of the floods.

ESA plays a role in the permitting and planning for flood control projects, as do numerous laws. However, both the Department of Interior and the Corps of Engineers have clearly stated that the floods in California were the result of a winter storm unprecedented in recent history. Reservoirs and levees were simply overwhelmed. Both agencies were emphatic that there were no cases where it could be demonstrated that the implementation of the ESA caused any flood structure to fail, or where the presence of any listed species prevented the proper operation and maintenance of flood control facilities.

The same was true after the Midwest floods of 1993, when the Floodplain Management Task Force chartered an Interagency Floodplain Management Task Force to do an extensive, independent review of the major causes and consequences of that disaster. In general, the Task Force concluded that the floods were the result of an unprecedented hydro-meteorological event that caused excessive rainfall and runoff. Habitat and wetlands loss was found to be a contributing factor to the magnitude of the runoff, which ultimately exceeded the capacity of many levees. The Task Force also found that these types of floods will continue to occur and that activities in the floodplain continue to remain at risk unless the current system of flood plain management in the United States is fundamentally altered. Nowhere in the report did the Task Force identify the ESA as the cause of levee failures or recommend that environmental protections should be diminished as a way to improve flood protection and protect people and property from future risk.

During the debate on H.R. 478, the majority argued that the ESA was responsible for delays in repairs and maintenance that contributed to levee failure and resultant flood damage. The majority has been unable to furnish credible examples of this interference to justify a sweeping attack on the ESA. The real problem is the mistaken belief that we can prevent flood plains from flooding strictly through the use of structural means such as dams and levees. Moreover, this reliance on structural means actually exacerbates the damage of big floods. If we truly want to reduce the damage and human suffering associated with floods, we must look for new ways to manage them including the restoration of channel complexity, the adoption of watershed management, wetlands protection, and setback levees. A more detailed explanation of the

need for this new approach was clearly outlined in the testimony of Dr. Jeffrey Mount.

The passage of this legislation, however, will provide no guarantee of increased safety. Instead, its broad, blanket exemptions to the ESA would apply in both emergency and non-emergency situations nationwide, and would have impacts far beyond the stated goal of protecting human life and property.

For example, the bill exempts all "Federal or non-Federal flood control facilities, structures, or projects" from consideration under the ESA. According to the Corps of Engineers this could mean dams, pumps, levees, dikes, channels, drainage systems, dredging projects, reservoirs, and even beach erosion control. The real potential for flooding does not even have to be an issue.

Moreover, in the case of non-Federal projects, the determination of whether any project is considered a "flood control project, facility, or structure" for the purposes of exemption from the ESA would be left to local municipalities and water districts. The potential for a broad interpretation for considering water projects as flood control facilities, in order to be exempt from the ESA requirements, is very real.

While so-called "routine operations" were deleted from the bill in Committee, this broad category of facilities will still be exempt from ESA requirements not only for "maintenance, rehabilitation, repair, or replacement, but also for operation of any project of a facility in accordance with a previously issued Federal license, permit, or other authorization". This could include the operation of any facility operating under a Section 404 permit, a FERC license, or a broad range of other permits issued by the Federal government. At a minimum, this would include the general operations of FERC licensed dams, including spills, temperature controls and draw downs—all needed for salmon recovery.

Further, the exemption for such operations, as well for "maintenance, repair, replacement, or rehabilitation" of any facility would apply at any time, not just when a threat to public safety was evident. These terms are so broad it could include dredging a channel, inlet, or river; maintenance or repair of fish screens at dams or pumps; shutting down dams for general repairs; and the rehabilitation of the entire Mississippi River and Tributaries project or the Sacramento River Flood Control System (a five year, ongoing project).

In addition, this legislation could have severe unintended consequences. Although the requirements of the ESA for consultation and mitigation would no longer apply to this broad category of flood control projects, all other interests, including fishermen, real estate developers, cattlemen, and foresters would still be subject to the full requirements of the Act. As such, they will be required to shoulder additional protection for species listed under the ESA to compensate for the impacts of flood control that will no longer have to be mitigated. This is unfair and could create severe economic impacts.

For example, in California, the commercial salmon fishermen have just been told that they are going to face the most restrictive season in their history because of the decline of endangered winter run chinook, Snake River chinook, and coho. If the National Ma-

rine Fisheries Service no longer had authority to regulate the dams, pumps and other water projects that impact these fish, both the commercial and sport fishing industries, worth billions of dollars to the state, will face even further restrictions and possibly be shut down altogether.

In the Pacific Northwest, any general maintenance, repairs or operations of flood control structures like hydroelectric dams that operate under a FERC license may no longer be subject to ESA requirements such as fish screens, flows, or temperature controls. The recovery of salmon could be over, and a $500 million fishery and tens of thousands of jobs will be lost.

In Florida, inlets and beach berms are dredged to facilitate the drainage of agricultural lands, and is considered by the Corps to be flood control. This dredging has a direct, negative impact on sea turtles. If shrimpers who have to pull TEDs to protect these turtles are restricted now, when NMFS and the FWS have no ability to regulate these other activities impacting the turtles, they are going to be forced to restrict even further the only impacts they can regulate—fishing activities. The same is likely to be true in California, Oregon, and Washington, where coastal coho are about to be listed under the ESA. If the impacts of flood control on coho cannot be regulated, it is likely that NMFS will be forced to place greater restrictions on logging, mining, and agriculture, all of which also impact the species.

In short, despite intentions to try and "narrow" this bill, its scope is still excessively broad and its implications for other interests are unknown. This is why piecemeal amendments to the ESA do not work. There is no evidence to date demonstrating that the ESA was in any way responsible for the floods in California, the Midwest, or elsewhere. If we really want to avoid these types of flood disasters in the future, we should look to the real causes of the floods themselves and stop using the ESA as a scapegoat. If we do not, we are only destined to see these tragedies repeated time and again in the future.

GEORGE MILLER.
SAM FARR.
NEIL ABERCROMBIE.
BRUCE F. VENTO.
BILL DELAHUNT.

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