

STRIKE HARMFUL STREAMLINING PROVISIONS IN S.601

April 8, 2013

Members of the Senate
United States Senate
Washington, D.C. 20510

Re: Strike Sections 2033 and 2032 in the Water Resources Development Act of 2013 (S.601)

Dear Senator:

The undersigned 50 professors of Administrative Law, Environmental Law, and Natural Resources Law and Policy write to express deep concerns with sections 2033 and 2032 in the proposed Water Resources Development Act of 2013 (S.601). These provisions would radically undermine protections provided by a highly rational structure of environmental laws enacted with strong bipartisan support over the past four decades. We urge you to strike sections 2033 and 2032 from the bill.

The National Environmental Policy Act, the Endangered Species Act, the Clean Water Act, the Fish and Wildlife Coordination Act, and other vitally important environmental laws represent the societal imperatives of evaluating and weighing the full set of risks, costs, and benefits, and avenues for avoiding environmental damage before taking potentially harmful actions. Full and careful compliance with this rational structure of laws is fundamental to sound decision making on federal activities.

Sections 2033 (Project Acceleration) and 2032 (Study Acceleration) would undermine the fundamental functions of these bedrock environmental laws, including the principles that decision makers and the public understand the environmental consequences of a project before deciding whether it should be constructed; determining whether less damaging alternatives are available; and modifying or stopping projects that are particularly damaging to humans, fish and wildlife, and the environment.

Environmental reviews expose the true cost of environmentally damaging and ill conceived proposals leading to better and far less damaging projects. For example, preparation of a supplemental environmental impact statement revealed that the Corps of Engineers (Corps) could complete a long term project to raise levees along the Mississippi River while saving more than 4,300 acres of wetlands that would have been destroyed under its original plan.¹ In some cases, environmental reviews have helped stop particularly destructive projects, saving taxpayers hundreds of millions of dollars. For example, the environmental review process exposed devastating environmental impacts of the Yazoo Backwater Pumping Plant Project in Mississippi, prompting the George W. Bush Administration to veto the project and saving taxpayers more than \$220 million.

When resource agency concerns are ignored and necessary studies are not done, the results can be devastating. For example, the Corps refused to listen to the concerns of the U.S. Fish and Wildlife

¹ Brief of Plaintiffs-Appellants, United States Court of Appeals for the Fifth Circuit, *Mississippi River Basin Alliance et al v. Lancaster et al.*, Case Number 99-31235, at 7 (January 26, 2000) (the supplemental EIS concluded that the traditional method of construction would destroy at least 11,654 acres of wetlands while the new alternative selected by the Corps would destroy 7,328 acres). The Corps continued to work on critical elements of this project while it prepared the supplemental environmental impact statement.

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Service and the Service's recommendations for additional environmental and hydrologic modeling before constructing the Mississippi River Gulf Outlet (MRGO) in Louisiana.² During Hurricane Katrina, the MRGO funnelled Katrina's storm surge into New Orleans, resulting in devastating flooding in St. Bernard Parish and the lower Ninth Ward. Since its construction, the MRGO has destroyed more than 27,000 acres of coastal wetlands and damaged more than 600,000 acres of coastal ecosystems surrounding the Greater New Orleans area.

As aptly stated by eight past chairs of the Council on Environmental Quality:

[C]onsideration of the impacts of proposed government actions on the quality of the human environment is essential to responsible government decision-making. Government projects and programs have effects on the environment with important consequences for every American, and those impacts should be carefully weighed by public officials before taking action. **Environmental impact analysis is thus not an impediment to responsible government action; it is a prerequisite for it.**³

Maintaining the integrity of the environmental review process for Corps projects is critical for responsible water resources planning. Corps proposals typically involve large scale structural measures with multiple and complex impacts that can radically transform entire ecosystems. Full and meaningful assessments of such projects – including independent, detailed reviews by the resource agencies – are essential for preventing the construction of poorly-designed projects that cause significant and avoidable damage to the nation's natural resources and put communities at risk. Such reviews are particularly important given the Corps' well recognized institutional bias towards construction of large scale structural projects and its long history of flawed analyses.⁴

Sections 2033 and 2032 strike at the core of the environmental review process and severely undermine the protections provided by the National Environmental Policy Act, the Endangered Species Act, the Clean Water Act, the Fish and Wildlife Coordination Act, and other vital environmental laws by:

1. **Transferring Control Over All Environmental Reviews to the Corps of Engineers:** Section 2033 makes the Corps the lead agency for the entire "environmental review process" which is sweepingly

² Team Louisiana, *The Failure of the New Orleans Levee System during Hurricane Katrina*, A Report prepared for Secretary Johnny Bradberry, Louisiana Department of Transportation and Development, Baton Rouge, Louisiana, State Project No. 704-92-0022, 20 (December 18, 2006) at Chapter 7, page 231.

³ September 19, 2005 Letter to the Honorable Cathy McMorris, Chair of the Task Force on Improving the National Environmental Policy Act from Russell E. Train (CEQ Chair 1970-1973), Russell W. Peterson (CEQ Chair 1973-1976), John Busterud (CEQ Chair 1976-1977), Charles W. Warren (CEQ Chair 1977-1979), J. Gustave Speth (CEQ Chair 1979-1981), Michael R. Deland (CEQ Chair 1989-1993), Kathleen A. McGinty (CEQ Chair 1995-1998), George T. Frampton Jr. (CEQ Chair 1998-2001), Gary Widman (CEQ General Counsel 1974-1976), Nick Yost (CEQ General Counsel 1977-1981) (emphasis added).

⁴ Department of the Army Inspector General (Case No. 00-019), Investigation of Allegations against the U.S. Army Corps of Engineers Involving Manipulation of Studies Related to the Upper Mississippi River and Illinois Waterway Navigation Systems (November 2000)(finding that the Corps deceptively and intentionally manipulated data in an attempt to justify a \$1.2 billion lock expansion project and that the Corps has an institutional bias for constructing costly, large scale structural projects). Between 1994 and 2011, at least 35 reports from the National Academy of Sciences, Government Accountability Office, Army Inspector General, National Academy of Public Administration, U.S. Commission on Ocean Policy, and independent experts revealed major flaws in Corps project planning and implementation, and urged substantial changes to the Corps' planning process.

defined to include “the process for and completion of any environmental permit, approval, review, or study required for a water resources project under any Federal law other than the National Environmental Policy Act of 1969.” *This unprecedented provision could be interpreted to give the Corps control over reviews that under current law are clearly not under its jurisdiction, including consultation under Section 7 of the Endangered Species Act, review under the Fish and Wildlife Coordination Act, and reviews under laws governing activities in coastal areas and on public lands.*⁵

2. **Promoting Cursory Reviews and Uninformed Decisions:** Section 2033 directs federal agencies to “complete any required approval on an expeditious basis using the shortest existing applicable process” and requires the Secretary to “issue guidance to allow for the use of programmatic approaches to carry out the environmental review process.” Section 2032 requires the Corps to complete a feasibility study, which as a matter of law includes a required EIS, within 3 years.⁶ *These provisions direct the Corps to utilize programmatic reviews that are not appropriate for informing project-specific decisions and could require use of emergency review procedures in non-emergency situations.*⁷ *These provisions will create significant pressure to finalize reviews even when critical information needed to assess impacts is missing.*
3. **Significantly Undermining the Ability of Resource Agencies to Do Their Jobs:** Section 2033 institutionalizes a process that will significantly undermine the ability of the resource agencies to carry out their duties, and both allows and encourages the Corps to impose an unprecedented amount of pressure on resource agencies to sign off on Corps projects despite valid objections or the need for additional information. As outlined below, this section sets arbitrary and unreasonably short deadlines for reviews; allows the Corps to elevate disagreements over technical issues all the way to the President; and directs the Corps to impose multiple and ongoing fines on resource agencies that miss arbitrary deadlines or that disagree with the Corps on issues soundly within the expertise of the resource agencies.⁸ *These provisions will have a severe chilling effect on a resource agency’s ability to meaningfully evaluate and raise important concerns and objections to federal water projects. The imposition of fines represents a substantial departure from the important deference provided by Congress to federal agencies with natural resource expertise.*
 - **Deadlines that Preclude Meaningful Review:** Section 2033 imposes a 60 day limit for the public, federal and state agencies to comment on a draft EIS. For other environmental review process documents, including any permit, approval, review or study, the limit is 30 days. Section 2033

⁵ Potentially significant additional complications are created because this provision also allows Non-Federal sponsors who are state or local governmental entities to serve as a “joint lead agency” with the Corps for purposes of preparing any environmental document under NEPA, and to “prepare any environmental review process document required in support of any action or approval by the Secretary.”

⁶ 33 U.S.C. § 2282(a)(4)(“the term ‘feasibility report’ means each feasibility report, and any associated environmental impact statement and mitigation plan, prepared by the Corps of Engineers for a water resources project”)

⁷ 33 C.F.R. §230.8 (the Corps “may proceed without the specific documentation and procedural requirements” established by its NEPA implementing regulations in “responding to emergency situations”).

⁸ While the text contains avenues to extend time periods and limit the issue resolution and referral process, these provisions would undermine informed decision-making and impartiality in environmental reviews and hamper the ability of resource agencies to do their jobs. Penalties are set at \$20,000 per week for any project requiring an EIS or environmental assessment up to a maximum of 1% of yearly funding per project and 5% of yearly funding for all projects per year. While the penalties ostensibly are intended to send needed funds to the office conducting the actual review, the transfer provision does not make clear which budgets will be fined and which will be increased.

directs the Corps to establish additional deadlines “to complete decisions regarding the project.” Section 2032 limits development of a Corps feasibility study and the required EIS to 3 years.

- Excessive Paperwork and Inspector General Investigations: Section 2033 requires the resource agencies (but never the Corps) to prepare extensive justifications each time the agency is unable to comply with one of the arbitrary deadlines imposed by the Corps, even where the resource agency has not received necessary factual information. If a resource agency lacks sufficient funding to complete the work and meet a deadline, the bill requires an Inspector General investigation into that claim.
- Multiple Reviews and Elevation: If the Corps does not believe that a resource agency should have more time – or if the Corps simply disagrees with the resource agency on a substantive or technical issue – the Corps can elevate the matter through three separate levels of review. Any delay, disagreement, or denial could be elevated by the Secretary to the head of the resource agency, then to the Council on Environmental Quality, and finally directly to the President. Such referrals can be made on multiple issues during the planning process.
- Unprecedented Financial Penalties: Section 2033 imposes penalties on *any* federal agency that does not render a decision under *any* Federal law relating to a project that requires an EIS – including Section 7 consultations under the Endangered Species Act, final Fish and Wildlife Coordination Act reports, and decisions under the Clean Water Act – within 180 days of completion of the EIS or within 180 days of completion of a permit application, whichever is later. Agencies would be fined up to \$20,000 a week for careful deliberation of important environmental issues.

Sections 2033 and 2032 will not improve decision-making or save taxpayer dollars. Instead, they will force agency staff to make uninformed decisions or worse, to rubber stamp unacceptable projects, prioritizing deadline compliance over effective review. To protect the nation’s rivers, coasts, and wetlands the resource agencies must have the ability to conduct the analyses needed to fully understand the impacts of Corps projects. They also must have the ability to raise concerns and objections free from undue pressure or influence. It is not in the nation’s interest to revert to decision making processes that shortcut lessons of science and procedural logic that have been so painfully learned over the past decades.

We urge you to strike sections 2033 and 2032 from the bill.

Sincerely,

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