



# Northwest Indian Fisheries Commission

6730 Martin Way E., Olympia, Washington 98516-5540  
Phone (360) 438-1180      www.nwifc.org      FAX # 753-8659

July 25, 2011

Colonel Anthony Wright  
US Army Corps of Engineers  
Seattle District  
P.O. Box 3755  
Seattle WA 98124-3755

RE: Consultation regarding the Corps' levee vegetation policy in western Washington

Dear Colonel Wright,

As you are aware, the Commission's member tribes possess rights reserved by treaty to take a fair share of the fish (and shellfish) destined to pass their usual and accustomed fishing places. Among these fish are the salmon that originate in coastal Washington and Puget Sound watersheds. Many of the rivers in these watersheds are constrained by levees intended to protect infrastructure and agricultural lands from flood events. The Corps of Engineers' P.L. 84-99 levee Rehabilitation and Inspection Program provides funds that can be used for flood emergency preparations and to repair flood damage for those levees maintained consistent with standards and guidance set by the Corps of Engineers. As a consequence of the funding conditioned by these standards and the inevitability of flooding, the Corps' levee maintenance requirements constitute an almost irresistible force on the decision-making of local levee sponsors/owners. Among these levee maintenance standards are the limits that the Corps has set for levee vegetation.

It is well established that levee vegetation is important for protecting salmon and the tribes' federally-secured treaty rights to take fish. In the Water Resources Development Act of 1996, Congress directed the Corps to undertake a thorough review of its levee vegetation management guidelines "in view of the varied interests in providing flood control, preserving, protecting, and enhancing natural resources, *protecting the rights of Native Americans pursuant to treaty and statute*, and such other factors as the Secretary considers appropriate."<sup>1</sup> The Puget Sound Chinook Recovery Plan declares that:

Riparian function depends on vegetated banks, and the removal of large trees precludes the recruitment of large woody debris, essential to a varied channel structure. Dikes and levees generally have maintenance requirements that prohibit vegetation, largely eliminating the production of food for salmon and the recruitment of large woody debris for cover and

---

<sup>1</sup> See Water Resources Development Act of 1996, Publ. L. No. 104-303, §202(g); see also NMFS, Section 7 Consultation on Implementation of the National Flood Insurance Program in the State of Washington Phase One Document – Puget Sound Region (September 22, 2008) (NMFS Tracking No. 2006-00472) at 13 n.10 (emphasis added).

diverse channel structure. Channelization and floodplain structures such as dikes reduce river sinuosity, increasing water velocity and reducing the volume of habitat. In many cases, floodplain structures eliminate the connection to side channels and wetland complexes where salmon once could rest and feed. Guidelines for salmon recovery emphasize the need to address fundamental ecosystem processes by restoring vegetation, hydrology, channel structure and essential food supplies for salmon.<sup>2</sup>

At the July 12, 2011 meeting on levee vegetation sponsored by the Corps and the Puget Sound Partnership, staff from the Partnership also emphasized that riparian degradation was a factor in the decision to list both Chinook and southern resident killer whales (orca). PSP staff noted that riparian vegetation provides the following functions: shade, streambank stabilization, sediment control, litter input, large woody debris, nutrient input, and microclimate.<sup>3</sup> Given the close proximity to rivers of most federal and nonfederal levees in western Washington, it is beyond question that management of levee vegetation has a significant effect on salmon and the treaty-reserved right to take fish.

At the July 12th meeting, the Corps provided a discussion of its treaty and trust responsibilities to Indian tribes as part of its presentation regarding a regional variance to its levee vegetation guidelines. Corps staff outlined the agency's obligation to "engage in pre-decisional consultation" with tribes; its "duty to protect resources and rights reserved by tribes; and an obligation to inform, coordinate and consult with tribes prior to making or taking actions that have the potential to affect tribal rights or interests."<sup>4</sup> We agree that the Corps has these obligations. Unfortunately, it's not clear how these consultation and resource protection commitments will be met.

Statements from Corps staff at the July 12<sup>th</sup> meeting indicated that Corps headquarters would likely publish a draft levee vegetation Program Guidance Letter (PGL) in October and a final PGL in December 2011. The commitment to engage in "pre-decisional consultation" clearly means a commitment to consult while there is time to meaningfully affect the Corps' decision process. The Corps made the decision a number of months ago to not engage in direct discussions on this issue with any tribe other than the Muckleshoot Tribe.<sup>5</sup> Since then, the Seattle District and its invitation-only workgroup have developed its matrix/tool (presented on July 12<sup>th</sup>) to help levee owner/sponsors decide the type and amount of vegetation that can be left on levees, consistent with P.L. 84-99 requirements. Again, it is not clear what the process or timeframe will be for implementing the Corps' consultation obligations with Indian tribes, but it is essential that these consultations occur.

---

<sup>2</sup> See NMFS, Puget Sound Chinook Recovery Plan (2007) at 81-82.

<sup>3</sup> See PSP, Managing Levee Vegetation to Help Reach Targets for Salmon and Puget Sound Recovery (July 12, 2011) (Powerpoint Presentation by David St. John) at frame 3.

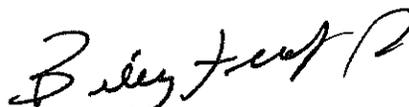
<sup>4</sup> See Corps of Engineers, Federal Treaty Trust Responsibilities (July 12, 2011) (Powerpoint Presentation by Lori Morris) at frames 4-5.

<sup>5</sup> The Muckleshoot Tribe was invited to participate in the Corps' process for developing a regional levee vegetation variance template shortly after the Tribe filed its Sixty Day Notice of Intent to Sue the Corps of Engineers for failure to consult with the National Marine Fisheries Service regarding the impacts of its levee vegetation policy on ESA-listed salmon, as required by section 7(a)(2) of the Endangered Species Act. See Letter to John McHugh, Secretary of the Army, and Gary Locke, Secretary of Commerce, from Richard Reich, Attorney for the Muckleshoot Indian Tribe (February 23, 2011).

Based on the information presented at the July 12 meeting, the Corps still has yet to confirm that it will indeed meet its treaty and trust obligations to protect resources and rights reserved by tribes. While a great deal of attention has been focused on assuring that levees be accessible and inspectable, not enough attention has been paid to whether the habitat needs of salmon are going to be met by implementation of the Seattle District's matrix/tool. For example, there has not yet been an assessment of how implementation of the matrix/tool will assure implementation of the temperature Total Maximum Daily Load (TMDL) established for the Green River, pursuant to the Clean Water Act. To serve as a template for assuring that the Corps' treaty and statutory obligations are met, the matrix/tool process being developed in the Seattle District must assure that all the habitat requirements of salmon are met and that salmon recovery is the eventual result. If a new levee vegetation variance is not adequate to meet these federal obligations, then levee setbacks or other system-wide improvement measures may need to be developed and implemented.

Accordingly, the Commission respectfully requests a meeting between appropriate representatives of the Corps and the Commission's member tribes to develop an approach to conduct meaningful consultations regarding the Corps' levee vegetation policy in western Washington. Please contact Mike Grayum, Executive Director, at (360) 438-1180 if you have any questions.

Sincerely,



Billy Frank, Jr.  
Chairman

cc: Nancy Sutley, CEQ  
Jay Jensen, CEQ  
Kimberly Teehee, White House Council of Domestic Policy  
Major General William Grisoli  
Brigadier General John McMahon  
Senator Patty Murray  
Senator Maria Cantwell  
Representative Norm Dicks  
Representative Rick Larsen  
Representative Adam Smith  
Representative Dave Reichert  
Representative Jim McDermott  
Representative Jay Inslee  
Representative Jaime Herrera Beutler  
NWIFC Commissioners