



February 25, 2009

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

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Re: Endangered Species Act Violations: U.S. Army Corps of Engineers'
Implementation of Levee Rehabilitation Inspection Program in Puget Sound,
Washington.

To Whom It May Concern:

On behalf of American Rivers, I am writing to request that you take immediate action to remedy ongoing violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, by the U.S. Army Corps of Engineers ("Corps") in the Puget Sound region, Washington. The Corps implements the levee Rehabilitation and Inspection Program ("RIP"), a federal action that affects listed chinook salmon, chum salmon, and steelhead, without having ensured, through the ESA consultation process, that the program does not jeopardize these species or adversely modify their critical habitat, as required by § 7(a)(2) of the ESA. 16 U.S.C. § 1536(a)(2). As a result, the Corps is in violation of the ESA and subject to citizen suit.

While this letter constitutes prelitigation notice required by § 11(g) of the ESA, 16 U.S.C. § 1540(g), American Rivers stands ready to work with you to resolve these issues without litigation. American Rivers believes that the changes to the Corps' implementation of its levee maintenance and repair program necessary to ensure compliance with the ESA can be accomplished without compromising human safety and the protection of property. In fact, the likely result of an ESA review of the Corps' RIP standards and practices and improvements to protect listed species will be safer, more secure levees, in addition to maintenance and repair standards that promote the survival and recovery of salmon in Puget Sound.

Endangered Species Act Background

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978). A review by the U.S. Supreme Court of the ESA's language, history, and structure convinced the Court “beyond doubt” that “Congress intended endangered species to be afforded the highest of priorities.” Id. at 174. “The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.” Id. at 184 (emphasis added). To accomplish this purpose, the ESA includes both substantive and procedural provisions that are designed to protect and recover imperiled species. In order to meet these obligations, the Supreme Court declared that “endangered species [have] priority over the ‘primary missions’ of federal agencies.” Id. at 185.

Section 7 of the ESA, the heart of the ESA's protections for federal actions, imposes a strict substantive duty on federal agencies to ensure that their activities do not cause jeopardy to listed species or adverse modification to their critical habitat. 16 U.S.C. § 1536(a)(2). It further establishes an interagency consultation process to assist federal agencies in complying with this duty. An agency must initiate consultation under Section 7 whenever it takes an action that “may affect” a listed species, subject to limited exceptions. See 50 C.F.R. § 402.14(a), (b).¹

Regulations implementing § 7 broadly define the scope of agency actions subject to consultation. See 50 C.F.R. § 402.02 (“agency action” includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies”). The Ninth Circuit Court of Appeals has construed this term broadly. See Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1054-55 (9th Cir. 1994); Conner v. Burford, 868 F.2d 1441, 1453 (9th Cir. 1988). The consultation process concludes when the expert agency, in this case NMFS, issues a biological opinion on the impacts of the agency action to listed species. See generally Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985). Pending the completion of the consultation process, agency actions that may affect listed species cannot go forward. See id. at 764 (“If a project is

¹ The ESA consultation regulations were amended in the waning hours of the last administration. See 73 Fed. Reg. 76272 (Dec. 16, 2008). Those regulations are currently the subject of four separate court challenges and under review by the new administration. In any event, as described in this letter, the Corps is in violation of both the new and previous ESA consultation regulations.

allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter, of course, is impermissible.”)

The National Marine Fisheries Service (“NMFS”) first listed Puget Sound chinook as a threatened species under the ESA in March of 1999. 64 Fed. Reg. 14,308 (March 24, 1999). The ESU includes all naturally spawned chinook populations residing below impassable natural barriers in the Puget Sound region from the North Fork Nooksack River to the Elwha River, inclusive. Id. at 14,313. Puget Sound chinook require properly functioning habitat, which includes healthy functioning riparian ecosystems. The chinook listing explicitly identified increased temperatures and the loss of riparian vegetation and large woody debris as factors in the decline of the chinook. Id. at 14,311.

NMFS listed Hood Canal summer-run chum salmon at approximately the same time. The listing identifies loss of large woody debris and riparian vegetation as one of the factors affecting the chum. 64 Fed. Reg. 14508, 14512 (March 25, 1999). In 2005, NMFS affirmed that the chinook and chum remained threatened under the ESA. 70 Fed. Reg. 37160 (June 28, 2005). In that renewed listing, NMFS identified the removal of riparian shade canopy and large woody debris as the kind of activity that is likely to “harm” listed salmon through habitat modification, potentially constituting a violation of § 9 of the ESA. Id. at 37196.

NMFS further designated hundreds of river and stream miles in Puget Sound as “critical habitat” for the chinook and the chum in 2005. 70 Fed. Reg. 52630 (Sept. 2, 2005).

Puget Sound steelhead were listed as threatened species in 2007. 72 Fed. Reg. 26722 (May 11, 2007). In listing the steelhead, NMFS concluded that the primary threat to the steelhead was the present and threatened destruction of its habitat, observing that loss of riparian habitat was a key factor in the decline of this species. Id. at 26732. To date, NMFS has not designated critical habitat for the steelhead.

Numerous scientific documents and technical recovery plans have identified loss of riparian vegetation—which leads to removal of organic matter, reduced large woody debris, and increased temperatures in salmon bearing rivers—as one of the key factors in the ongoing decline of chinook and other Puget Sound aquatic species. See, e.g., NMFS, ESA § 7 Consultation on EPA's Approval of Washington State Water Quality Standards (Feb. 28, 2008)² at 104-05 (discussing importance of riparian shade to meeting state water quality standards for temperature). Moreover, the maintenance of dike and levee systems that maintain a degraded status quo of constrained rivers, inadequate channel meandering, insufficient off-channel habitat and increased river velocities is a key factor in virtually all Puget Sound rivers. Measures to address these limiting factors are a high priority in the Puget Sound chinook recovery plan.

² <https://pcts.nmfs.noaa.gov/pls/pcts-pub/sxn7.pcts_upload.download?p_file=F8044/200702301_water_quality_02-05-2008.pdf>

Overview of the Rehabilitation and Inspection Program

Pursuant to P.L. 84-99, the Corps implements the levee Rehabilitation and Inspection Program throughout the nation, including in the Puget Sound region. 33 U.S.C. § 701n; 33 C.F.R. §§ 203.12, 203.41. Under the RIP, the Corps makes available federal funding for the repair and reconstruction of Federal and non-Federal levees that are damaged by flood events or other emergencies. In order to be eligible for such funding, local jurisdictions are required to meet minimum structural and maintenance standards established by the Corps. *Id.* For non-Federal levees (i.e., those levees constructed and maintained by local jurisdictions), those maintenance standards are contained in a national “Levee Maintenance Manual.” 33 C.F.R. § 203.51. For Federal levees (i.e., those levees normally constructed by the Corps and maintained by a local sponsor pursuant to agreement), the maintenance standards are typically laid out in a levee-specific operations and maintenance manual provided to the local sponsor of the levee. *Id.* § 203.51(b)(2); § 208.10(a)(1).

The Corps conducts annual inspections of participating levees and informs jurisdictions if its levees are eligible or ineligible for RIP funding. 33 C.F.R. § 203.42-.43. If a levee is deemed ineligible, the jurisdiction is given a limited period in which to solve whatever problem prevented it from being eligible. Ineligible levees cannot receive RIP funding for repair and rehabilitation if they are damaged in a flood event. *Id.* § 203.44(b). Additionally, where levees are ineligible under the RIP, the Corps will not authorize emergency funds to be expended for flood emergency preparation, flood fighting, or rescue operations. Participation in this program by local jurisdictions and sponsors is thus technically voluntary, but because of the considerable federal financing made available for eligible levees, and because of the consequences for non-compliance with the RIP standards, there are strong financial and regulatory incentives to participate in the program.

The Levee Maintenance Manual (for non-Federal levees) and most or all levee-specific Operations and Maintenance Manuals (for Federal levees) require that any vegetation over two inches in diameter on a levee must be removed. The requirement, which applies nationally, is predicated on a decades-old belief that larger vegetation on levees undermines their integrity and increases the risk of levee failure. This belief is inconsistent with the current best available science and engineering data available in the Pacific Northwest and in other places, which shows that properly maintained native vegetation actually strengthens levees during flood events. During recent flood events in the Pacific Northwest, for example, data shows that levees with substantial native vegetation onsite—deemed ineligible for PL 84-99 funding—fared better than those meeting the Corps’ RIP standards.

The Corps’ involvement with local levees does not end with its requirement to meet these vegetation management standards. Where eligible levees are damaged during flood events, Corps funds and/or staff are made available to repair or replace damaged levees with a small, or sometimes no, local cost share. Under the Corps’ regulations, no improvements or amendments to the levees are authorized with federal funds, although nonstructural alternatives are authorized. In the past, the Corps has refused to fund some levee repairs that improve environmental and safety performance of levees, such as levee setback projects. In most cases,

levees are simply repaired or replaced in the same configuration as they existed prior to the flood damage, without taking opportunities to consider setbacks, soft armoring, or mitigation.

Implementation of the RIP is Subject to the ESA in Puget Sound

a. The RIP is a “federal action” subject to the ESA

Any action that is “authorized, funded, or carried out” by a federal agency—including the Corps—is subject to the procedural and substantive protections of § 7. 50 C.F.R. § 402.02. Because the RIP is a federal agency program that involves both strong federal incentives to remove levee vegetation as well as funding of repair and rehabilitation of damaged levees, it is subject to § 7.

The Corps has asserted in correspondence that the decision about whether to pursue federal funding through the RIP is a voluntary local decision, and hence not a federal “action” for purposes of the ESA. This is incorrect. In National Wildlife Federation v. Federal Emergency Management Agency, a district court found that FEMA’s flood insurance program constituted a federal action subject to ESA § 7 even though participation by local jurisdictions was voluntary. 345 F. Supp.2d 1151, 1174 (W.D. Wash. 2004) (“Even though the program is voluntary, it is ‘authorized’ and ‘carried out’ by a federal agency in a way that may adversely affect the Puget Sound chinook salmon.”). NMFS’s own final chinook recovery plan explicitly states that “dike and levee maintenance” constitute federal actions that are subject to ESA consultation. Final Chinook Recovery Plan at 470.

Further, while the U.S. Supreme Court has held that only actions that are “discretionary” are subject to § 7’s requirements, see Nat’l Association of Homebuilders v. Defenders of Wildlife, 127 S. Ct. 2518 (2007), there is no dispute that the Corps has discretion to offer variances from or otherwise amend its national levee maintenance standards. See ER 500-1-1, 5-22(c). Since 1995, the Puget Sound area has operated under such a variance that allows vegetation up to 4 inches in diameter. The Corps has departed from the default national standards in other geographic regions of the country as well. The Corps also has explicit regulatory discretion to implement “nonstructural alternatives” during the repair or replacement of levees. 33 C.F.R. § 203.50. Nothing in PL 84-99 or other authorizing statute prevents the Corps from adopting different levee maintenance standards that are protective of listed species while still providing for safety and integrity of levees.

b. The RIP “may affect” listed salmonids in Puget Sound

Implementation of the RIP “may affect” listed chinook salmon. The threshold for such a determination is very low. See 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (“Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement”) The chinook recovery plan specifically identifies the conflict between levee maintenance standards, which require removal of riparian vegetation, and the needs of the species.

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 diverse channel structure.

Final Chinook Recovery Plan at 81. Similarly, the 2008 Puget Sound Partnership “Action Agenda” explicitly identifies the conflict between the Corps’ RIP and the needs of healthy habitat, and calls for reconciling the two as a priority in restoring Puget Sound.

A recent biological opinion concerning the implementation of the National Flood Insurance Program (“NFIP”) by the Federal Emergency Management Agency (“FEMA”) in Puget Sound indirectly addressed the impacts of the RIP. NMFS, ESA § 7 Consultation for Ongoing National Flood Insurance Program in Puget Sound (Sept. 22, 2008). According to the FEMA BiOp, there are 115 levees in Puget Sound subject or potentially subject to the RIP. *Id.* at 13. The BiOp found that the Corps’ maintenance standards requiring removal of native vegetation from levees were an adverse indirect effect on chinook salmon and other species of the FEMA flood program because FEMA relied on those standards to determine compliance with its own levee standards. The BiOp observed that while certification of levees by the Corps was voluntary, “severe economic consequences” resulted from nonparticipation in the program.

As part of the reasonable and prudent alternative in that BiOp developed to avoid violating the ESA, NMFS directed FEMA to no longer recognize the Corps’ levee certification under most circumstances and to revise its policies so that levees that maintain adequate riparian vegetation remain eligible for FEMA benefits. The FEMA BiOp suggests this “will encourage more levee owners to follow FEMA standards instead of [Corps] standards, which will increase riparian function and the quality of salmon habitat.” FEMA BiOp at 161. Recent studies further confirm that densities of juvenile salmonids are higher adjacent levees where native vegetation is present compared to those where it is not.

Finally, the Corps’ funding for or carrying out of repair and replacement of damaged levees without mitigation or consideration of structural alternatives that are better for salmon results in maintaining a degraded status quo that continues to harm and that prevents the recovery of these species.

c. The Corps has never consulted on the impacts of the RIP

It is indisputable that the Corps has never consulted on the impacts of its vegetation management standards or implementation of the RIP as a whole. In 2003, the Corps sought “informal” consultation with NMFS on its “flood control projects maintenance inspection program” in Western Washington. It appears that the Corps’ biological assessment for this action was limited to a review of federal flood control works. NMFS declined to concur with the Corps’ “not likely to adversely affect” determination for this action, noting that removing streamside vegetation and replacing bank armoring were activities that adversely affect listed salmonids. The non-concurrence also expressed confusion over why the Corps chose to consult on “such a small

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subset of the dike and levee network under its jurisdiction.” However, it does not appear that the Corps pursued any further consultation from that point.

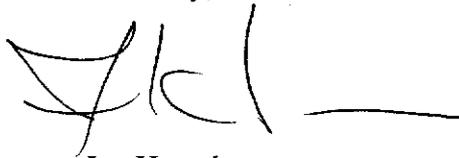
In some instances, the Corps has initiated consultation on the impacts of specific repair or replacement actions that are funded or authorized by the Corps as part of the RIP. In some instances, it authorizes and/or carries out these actions prior to initiating consultation with NMFS, even where the repair is not an emergency. In other instances, it appears that no consultation occurs at all. While the Corps has sometimes initiated consultation on such individual actions, it does not appear that any consultations have been completed.

Conclusion

In the absence of a completed consultation with NMFS on the impacts of the P.L. 84-99 program in Puget Sound, the Corps is in violation of ESA § 7. Because the removal of native vegetation on salmon-bearing rivers by local levee sponsors has not been evaluated through the § 7 process, those sponsors are at risk of violating ESA § 9 if the removal of vegetation results in harm to listed species. Violation of the ESA puts those jurisdictions at risk of citizen enforcement, court injunctions, and costs of litigation, including attorneys’ fees.

We emphasize again our willingness to work with the Corps to settle this violation without litigation, as well as our strong belief that the levees of Puget Sound will ultimately be more effective at protecting people and communities once these issues are taken into consideration. If you would like to discuss the contents of this letter, or believe that anything contained herein is in error, please feel free to contact me at (206) 343-7340 ext. 25.

Sincerely,

A handwritten signature in black ink, appearing to be 'JH', followed by a horizontal line.

Jan Hasselman

Attorney for American Rivers