



CENTER for BIOLOGICAL DIVERSITY



**VIA ELECTRONIC MAIL**

April 16, 2012

United States Army corps of Engineers  
Attn: CECW-CE, Tammy Conforti  
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Washington, DC 20314-1000  
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Re: COE-2010-0007: Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls; Additional Filings

Dear Mr. Wade,

The Center for Biological Diversity (“Center”) and Defenders of Wildlife (“Defenders”) provide the following comments in opposition to the Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls; Additional Filings. Both the Center and Defenders provided comments in April 2010 on the earlier proposal Docket Number COE-2010-0007: Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls.

The Center is a non-profit organization with over 200,000 members and online activists. The Center is dedicated to protecting imperiled species and their habitats through science, public policy, and the law.

Defenders of Wildlife (“Defenders”) is a national non-profit organization with a field office in Sacramento, California. Defenders is dedicated to the protection of all native wild animals and plants in their natural communities.

Unfortunately, the variance process remains fundamentally flawed. It is cumbersome, uncertain, and unworkable and we do not think it will address any of the problems associated with implementation of the ETL in California or elsewhere.

The Corps appears to have made very few changes in response to comments submitted on the variance policy in 2010. Other than minor changes in wording, we were unable to determine that any substantive changes had occurred. While there are some small improvements, such as levees with existing variances having longer to begin the process of seeking a variance than under the 2010 variance process (one year to submit letter of intent and an additional year to submit a new variance request (77 FR 9640)) and existing variances not automatically being cancelled if a letter of intent is submitted in 1 year and new request a year after (*Id.*), nonetheless, implementation of the ETL and variance policy will cause significant harm to

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environmental resources, including listed species and habitats, that have not been analyzed by the Corps as required by law.

Most importantly, because the proposed policy is unlikely to achieve its stated goal of protecting levees and floodwalls and is likely to have a devastating impact on riparian vegetation, riparian species and aquatic species including many imperiled species, the Center and Defenders again urge the Army Corps of Engineers (“Corps”) to revise the proposed policy and prepare additional environmental review in the form of an Environmental Impact Statement before considering adoption of the policy as well as completing consultation with the wildlife agencies as required by the Endangered Species Act (“ESA”), 16 U.S.C. §1536(a)(2).

### **Public Safety as a Recognized Necessity**

The Center and Defenders fully recognize the need to protect and maintain public safety. However, the notion that these proposed rules will enhance public safety is predicated on the idea that the protection of the natural values of vegetation on levees directly conflicts with public safety. There is not adequate research on the relationship of vegetation and levee stability to support a vegetation management change of this scale. In fact, Corps’ regulations 33 CFR, Part 208 recognize that vegetation can improve public safety by reducing the potential for levee erosion - “Where practicable, measures shall be taken to retard bank erosion by planting of willows or other suitable growth on areas riverward of the levees.” Additionally, the Corps’ Technical Report REMR-EI-5 (Corps, Effects of Vegetation, 1991), “The Effects of Vegetation on the Structural Integrity of Sandy Levees,” report concluded that “even low root concentrations as measured along selected transects in the sandy levee sufficed to make the slope more secure under ‘worst case’ scenario conditions.”

In the wake of an event such as levee failures during Hurricane Katrina, 2005, we recognize that evaluation, response, and change is often needed to prevent future such tragedies. However, in the July 31, 2006 report, “New Orleans Levee Systems Hurricane Katrina” the Independent Levee Investigation Team did not support a finding of poor performance of levees due to the presence of woody vegetation.

Tree growth, especially on the lower portions of the levees in the native banks or waterside slopes, often has beneficial effects (Shields, Gray 1992; Corps, Effects of Vegetation, 1991), including the stabilization of levee materials, the reduction of erosive forces and the slowing of higher flows, which in turn encourages the deposition of sediments. These factors do not undermine, but rather enhance public safety. The proposed vegetation policy will likely result in devastating environmental impacts by removing vast areas of vegetation deemed critical for the support of fish and wildlife. Additionally, the removal of said vegetation will eliminate the vegetation’s potential public safety enhancement values.

### **Environmental Impacts and Environmental Law**

The removal of significant amounts of vegetation from levees would result in the loss of critical riparian corridor habitat upon which many of our listed endangered, threatened, and sensitive species depend. For example, the policy could lead to the loss of significant riparian

habitat occupied by the Southwestern willow flycatcher and least Bell's vireo in streams in southern California. Such effects could result in cumulative losses to the most vulnerable species and reverse fragile gains made in protecting these species. Moreover, some of the vegetation that may be affected by the policy was planted as mitigation for earlier projects and its loss would create a need to find or create additional similar habitat elsewhere. Additionally, preserving riparian habitats not only benefits the species that use that vegetation type but also is an important component for protecting food web dynamics and providing necessary shading for aquatic species. These foreseeable and potentially cumulatively significant environmental impacts must be considered before the proposed vegetation policy may be approved. Given the potential scope of impact, an Environmental Impact Statement in accordance with the National Environmental Policy Act (NEPA) must be prepared and ESA consultation initiated.

While the policy allows one year for levees with existing variances to notify the Corps of their intent to seek new variances and states that the Corps will continue to inspect levees under the existing variances for levees that do provide notice, the Corps still requires levee sponsors/operators are responsible to comply with NEPA and ESA requirements to re-apply for existing variances within the 2 year period and in many cases the documentation alone will take more than the allowed time. Additionally, under Corps requirements, among other things, the variance requester must disclose the extent of the root systems of species at maturity proposed to be found on or near the levee. Yet the Corps has been hoping to launch a research program to understand the species and conditions of root systems near and within levees because the Corps has established that such information is essentially, as of now, unavailable. Therefore, the establishment of the proposed variance process will in essence create a de facto policy which will largely eliminate vegetation variances and lead to wholesale riparian clear-cutting, much of which will include the destruction of mitigation habitats.

The statement in the Draft EA and FONSI (at 2) claims that "changing the process for applying for a variance does not itself affect the environment. It is the decisions on specific variance requests that may affect the environment or listed species". This claim is misleading. Although the revised policy now recognizes that there are significant ESA concerns regarding the vegetation on levees and provides somewhat more time for levees with existing variances to apply for new variances, the policy change itself heavily favors removal of existing vegetation and denying variances on levees that require new approvals for repair etc. As a result, the ETL and proposed variance policy may have a profound impact on the environment. It is well settled that in such circumstances an agency cannot rely on a FONSI. *See, e.g., Ocean Advocates v. United States Army Corps of Eng'rs*, 361 F.3d 1108, 1124 (9th Cir. 2004) (An agency can only issue a FONSI in lieu of an EIS if it puts forth "a convincing statement of reasons that explain why the project will impact the environment no more than insignificantly." (citations omitted)); *Klamath-Siskiyou Wildlands Center. v. BLM*, 387 F.3d 989, 995 (9th Cir. 2004) (an agency cannot issue a FONSI where it relies on an EA that is "silent as to the degree that each factor will be impacted and how the project will reduce or eliminate the identified impacts.")

In the landmark study "SOS: California's Native Fish in Crisis,"<sup>1</sup> habitat degradation/destruction is identified as one of the most significant factors threatening our native fish across the state. Of the 32 native salmonids in the state, 1 is already extinct, 13 are listed

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<sup>1</sup> Available at [www.caltrout.org/SoS-Californias-Native-Fish-Crisis.pdf](http://www.caltrout.org/SoS-Californias-Native-Fish-Crisis.pdf)

under endangered species laws, and 20 overall may be extinct within this century if protection and restoration efforts are not made a priority. Given the loss of the majority of our riverside and streamside habitats, the preservation of the remaining riparian corridors is essential for our fisheries survival.

Environmental impacts of this scale and magnitude cannot be deemed as having a “Finding of No Significant Impact.” This is a clear violation of the intent and letter of environmental protection law.

### **The Policy and Procedures Ignore the Best Available Science**

The Corps’ policy has no firm basis in science. Even the Corps’ own recent review of the scientific literature shows that in many cases vegetation strengthens levees and may only weaken levees in certain narrow circumstances. The Corps’ default policy against vegetation on levees is therefore arbitrary and capricious. Further, when this arbitrary policy is coupled with the flawed process for variances that is biased in favor of denial of variances, the policy and procedure will most likely result in needlessly stripping essential riparian vegetation from the levees and weaker, less safe levee structures.

### **Effective Policy Decisions**

The Corps has stated that their proposed policy has been “peer reviewed,” but the Corps’ actions seem to fail to recognize that the peer review resulted in significant concerns about the proposed actions and found a significant lack of supporting research. [See “Revised Final Independent Peer Review for U.S. Army Corps of Engineers Vegetation Policy for Local Flood Damage Reduction Systems” (Battelle Peer Review, 2008)] Moreover, the recent literature review by the Corps itself found that significant additional research is needed on this subject. Corps, Water Resources Infrastructure, Literature Review –Vegetation on Levees, ERDC SR-10-2, 2010.

For many years the Corps has participated in the California Levees Roundtable (CLR) working in an informed stakeholder process to examine and address issues which include those associated with the proposed vegetation variance process. Apparently understanding the need for more information and research, the Corps’ Engineer Research and Development Center (ERDC) was engaged in collaborative research efforts with the CLR California Levee Vegetation Research Program (CLVRP) to specifically examine these issues. Despite this seemingly reasonable approach, the Corps proposed policy changes without the benefit of these research results, and outside of the purview of these existing collaborative relationships.

Given the complexity of the problem, the variable nature of situations across the country to which this policy would be applied, and the widely accepted understanding that levee vegetation enhances rather than threatens public safety, it is poor policy making to move forward with the proposed process. Additionally, with extensive research underway, and a broad spectrum of qualified, interested stakeholders (CLR members are but a few of these) engaged in examination of the issues at hand, a return to a collaborative approach should be made.

## **Lack of Regional Variances**

The Corps's 2012 proposal does not allow regional variances, only local ones. The previous variance process under ER-500-1-1 and EP-500-1-1 (2001) allowed for variances at the regional scale. Indeed, much of California's Central Valley is currently covered by regional variances. The regional approach works well in California where many of our flood control issues are similar on a regional scale. The effect of this shift in policy is to require multiple variances where a single variance previously sufficed. We are very concerned about the piecemealing that will result from this approach especially when California, through its Central Valley Flood Protection Plan, is trying to apply a more wholistic approach to flood planning and permitting. We think the proposed local variance process is highly duplicative without yielding a commensurate benefit to public safety or flood control and we recommend that the regional variance process be retained.

## **Bias toward Denial of Variances and Lack of Appeal**

The proposed variance process is cumbersome and redundant in its requiring five levels of internal Corps review. The process is set up so that lower-level decisions favoring a variance are automatically reviewed higher in the chain of command while a denial of a variance at any level appears to instantly terminate the review. This creates a bias toward denial and significantly decreases the likelihood of a variance being approved. More troublesome is the apparent lack of an appeals process allowing applicants denied a variance the opportunity to have that decision reviewed. It is patently unfair that that applicants can be denied without any recourse and that positive determinations are reviewed over and over again for no apparent purpose.

## **No Timeline for Review**

The Corps' proposed variance process lacks any definitive timeline for review. With five layers of internal review, having a timeline by which a decision can be expected is imperative for applicants. Without such timelines, the process becomes confusing and uncertain which adds costs to an already expensive process. We recommend adding a prompt schedule for review to provide a modicum of certainty to variance applicants.

## **Summary**

The revised PGL does not effectively address public safety enhancement needs because vegetation has not been found to cause levee failure, and in fact in some cases it is believed that it enhances public safety. The proposed policy violates environmental law by: failing to provide an EIS as required under NEPA to consider the direct, indirect, and cumulative effects created by this policy change; and failing to ensure against jeopardy and destruction or adverse modification of critical habitat through consultation with the wildlife agencies; and by issuing timetables for permitting new and re-permitting exiting variances that will foster rushed environmental review. The Corps should not issue a policy that will push levee managers to remove vegetation from levees without any scientific basis, and the Corps should not adopt a policy that requires wholesale clearcutting of countless riparian corridors, including mitigation vegetation without adequate environmental review. Because the Corps has ignored the findings of peer review

research findings, abandoned the effective stakeholder processes that were developed, and dismissed its own determinations regarding vegetation on levees and the need for more research and further understanding of the issues and circumstances at hand in order to effectively address the policy needs, the Corps' approach to this issue is wholly without merit.

The Center and Defenders respectfully request that the Corps withdraw the ETL and redraft the ETL and variance policy.

Please do not hesitate to contact us if you have any questions regarding these comments.

Sincerely,



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