

April 17, 2012

Via email: tammy.conforti@usace.army.mil

U.S. Army Corps of Engineers
Attn: CECW-CE, Tammy Conforti
441 G Street NW
Washington, DC 20314-1000

Re: Comments on Docket #COE-2010-0007

Dear Ms. Conforti:

Thank you for this opportunity to comment on the “Policy Guidance Letter” (PGL), formally known as the “Process for Requesting a Variance From Vegetation Standards for Levees and Floodwalls,” published in the Federal Register on February 17, 2012 and an associated environmental assessment (EA) with a Finding of No Significant Impact referenced in the Federal Register notice.

American Rivers (AR) has several concerns with the PGL and believes that it creates an arduous and insufficiently flexible process for local levee managers and local U.S. Army Corps of Engineers (Corps) districts to maintain trees and other vegetation other than grass on levees where larger vegetation is consistent with public safety and protection of fish and wildlife. The essence of our comments is that where local levee managers can document that maintaining trees and other vegetation on levees is as safe or safer than cutting them down, the Corps should use its expertise and authority to enable local jurisdictions to keep the vegetation in place. Instead, the PGL places what is likely to prove in practice to be an insurmountable financial and procedural burden on local levee managers who wish to protect both public safety and fish and wildlife habitat through maintaining vegetation on levees.

AR’s comments on this matter are consistent with federal legislation directing the Corps to “undertake a comprehensive review of the current policy guidelines and vegetation management for levees. The review shall examine current policies in view of the varied interests in providing flood control, *preserving, protecting, and enhancing natural resources* ...

and other factors as the Secretary considers appropriate” (emphasis added). Section 202(g)(1) of the Water Resource Development Act (WRDA) of 1996. P.L. 104-303, 110 Stat. 3658 (October 12, 1996). Section 202(g)(3) goes on to direct the Corps to “address regional variations in levee management and resource needs.” In other words, Congress has directed the Corps to find a way to protect public safety *and* improve environmental stewardship. The PGL cements the practice of cutting down all vegetation as a default practice that will, under the arduous proposed variance policy, be very difficult for local levee managers and even willing Corps districts to avoid. The PGL may meet the safety goal set out by Congress,¹ but the proposed policy would do so at the unnecessary and likely illegal expense of meeting its equally important environmental stewardship obligations. This would be an unfortunate outcome, because a “win-win” policy that allows more flexibility to retain vegetation where it is consistent with public safety is achievable.

More specifically, the proposed variance policy appears unworkable as currently written because:

- Existing variances, while the PGL would allow them to be left in place temporarily if a local jurisdiction works to develop a System-Wide Improvement Framework (SWIF), can be insufficient. For instance, in the Puget Sound area, the existing variance allowing four inch vegetation is unnecessarily restrictive and has led to significant tree cutting even when local levee owners believed the cutting to be unnecessary. Many local levee managers have determined that trees considerably larger than four inches can be left in place to protect habitat while protecting or even improving levee performance and public safety. In order to avoid unnecessary habitat impacts, the Corps should be significantly more deferential to the professional judgment and expertise of local levee managers during the two year SWIF development process.
- The process set out by the PGL is prohibitively expensive for local levee managers. At a recent conference on levee vegetation policy on the Tacoma campus of the University of Washington, Tom Bean of the King County Flood Management District stated that a single variance for a single levee system or portion of a single system (nothing larger than that – such as a regional variance that currently covers levees around the Puget Sound basin – is allowed under the new variance proposal) would cost approximately \$1 million. Many Puget Sound levee managers have dozens of levees to manage (Pierce County and Whatcom County, for instance, have 20 and 28 PL 84-99 eligible levees, respectively), and there is no guarantee under the variance policy proposal that one variance will be sufficient even for a single levee system, which apparently may need to be segmented for the purposes of receiving a variance. Bean stated that spending \$1

¹ Whether the PGL actually meets the safety goal is questionable given the increasingly well-documented role trees can play in strengthening some older levees and that they do play in levees engineered to incorporate trees, such as on the Desimone levee on the Green River in King County, Washington. A recent report, *Initial Research into the Effects of Woody Vegetation on Levees* (Sept. 8, 2011) by the Corps’ own Engineer Research and Development Center states that trees can in some cases increase levee safety and that the impact of trees must be analyzed on a case-by-case basis (Summary, p. 29).

million per levee or levee segment would not be affordable for even for King County, a relatively wealthy county with a significant funding base for flood management. If King County is concerned with the likely cost of the proposed variance, other counties and levee managers will likely find it completely unworkable from a fiscal perspective. Moreover, spending millions of local taxpayer dollars to address a “problem” created in large part by Corps policy rather than public safety needs does not make sense from a policy perspective.

- Rather than deferring to the Corps district office, the PGL sets up a complicated approval process requiring sign-off from multiple offices and individuals until Corps Headquarters finally signs off.
- More flexible alternatives that explore the role of vegetation on levees on a case-by-case basis are not explored in the PGL or in the EA.

There are ways that these short-comings could be addressed. AR’s suggestions are as follows:

- Corps headquarters should grant Corps district offices power to approve variances based on their knowledge of their local rivers and the expertise and track record of local partners;
- In order to reduce the cost, time, and staff burdens associated with the variance process, allow regional variances (not just variances for a single levee or levee segment) at the discretion of Corps district offices. Regional – or at least multi-levee variances for particular levee managers – would seem to be more consistent with the SWIF concept, which allows for developing a framework for managing multiple levees and levee segments within a single watershed. Moreover, even the broader scope of the SWIF relative to the PGL is unnecessarily narrow; a broader regional levee management framework and variance has proven administratively feasible and effective in the Puget Sound basin (in spite of the fact that this four inch variance is itself insufficient flexible);
- Consider and accept benefits, where they are well-documented, to levee integrity from including vegetation in levee design and maintenance plans. Consider research from ERDC, local levee managers, and other experts, and encourage science-based incorporation of vegetation into new and existing levees where it can meet habitat and safety demands;
- Allow inspection of levees from the river where feasible. This would reduce or eliminate the need for clearing vegetation for inspection; and
- Allow for vegetation to remain in place on levees pending the completion of a SWIF where local levee managers believe it is consistent with public safety and can demonstrate a reasonable scientific/engineering basis for that belief;

Finally, AR urges the Corps to ensure full compliance with the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). The Corps' compliance with both of these laws in concert with past levee vegetation management decisions (such as the Engineering Technical Letter (ETL) and the effect of existing levee vegetation policies in general and in particular instances of levee maintenance and repairs) has been highly suspect, and as various lawsuits and 60-day notices of intent to sue up and down the West Coast have demonstrated, the Corps is vulnerable to legal action under both the ESA and NEPA and potentially tribal treaties as well.

- Perform a full NEPA analysis on the impacts of the PGL on the nation's rivers; the Finding of No Significant Impact (FONSI) in the EA runs counter to NEPA given the major impact of the variance policy and the underlying levee vegetation policy in the ETL on our nation's rivers, fish, wildlife, and public safety – the PGL is major federal action with significant effects on the environment, which under NEPA, its regulations, and related case law (see Friends of the River's comments on this matter for a detailed discussion of the relevant NEPA regulations and case law) requires a full-fledged environmental impact statement. Moreover, the Corps was not bound by Congress or other policies to choose the policy alternative it is choosing in the PGL – this is a discretionary action that requires evaluation of a wider scope of alternatives, some of which would almost certainly provide more flexibility for local levee managers and the Corps to protect riparian habitat without compromising public safety;
- Incorporate timely consultation with NOAA Fisheries and/or the Fish and Wildlife Service under section 7 of the Endangered Species Act (ESA) for listed species affected by the PGL both as proposed as the PGL is, over time, applied on the ground; and
- Evaluate the impacts of the PGL on tribal treaty rights.

To elaborate on the above bullet point concerning the ESA, in February 2009, AR filed a 60-day notice letter of intent to sue the Corps over its failure to consult over the impacts of its PL 84-99 levee vegetation policy on listed salmon and steelhead in Puget Sound, Washington. We are contemplating our legal options and remain very concerned that no consultation has occurred to date over the impacts of the levee vegetation policy in Puget Sound or in other areas where the policy harms ESA-listed species. In Puget Sound, we are particularly concerned that the PGL threatens to turn floodplain restoration actions intended as salmon recovery actions by NOAA Fisheries and the Puget Sound Partnership into mere mitigation actions for the effects of the Corps' levee vegetation policy. The Corps' levee vegetation policy in Puget Sound and elsewhere must be consistent with efforts to improve the overall health of river ecosystems and the species that depend on healthy rivers, and the Corps should work to ensure that its policies do not set back or cancel out local endangered species and ecosystem restoration efforts. If additional ESA recovery actions are needed as a result of Corps levee vegetation policies, the Corps must recognize this impact of its policy by working with federal and state

resource agencies to identify and fund restoration actions that allow ESA recovery plans to remain on track.

Thank you for considering our comments on the PGL and the associated environmental assessment.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garrity". The signature is stylized with a large, sweeping flourish extending to the right.

Michael Garrity
Washington State Conservation Director