PugetSoundPartnership
our sound, our community, our chance

STATE OF WASHINGTON

April 17, 2012

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

Re: Docket Number COE–2010–0007

Dear Ms. Conforti:

I am writing on behalf of the Puget Sound Partnership (Partnership) to provide comments regarding the US Army Corps of Engineers' (USACE) February 17, 2012 Policy Guidance Letter (PGL) addressing the "Process for Requesting a Variance From Vegetation Standards for Levees and Floodwalls" (77 Federal Register pp. 9637-9650). This matter was identified in the Federal Register as Docket Number COE–2010–0007. The Partnership appreciates the opportunity to review and provide comment on the draft policy presented in this notice.

The Partnership is pursuing three key objectives as we work with numerous parties within the Puget Sound region to reach a constructive solution to the management challenges related to levee vegetation: 1) Our levees must be safe; 2) we must improve the riparian habitats that make critical contributions to the recovery of salmon; and, 3) we must achieve these outcomes cost-effectively. We are working hard in partnership with local and regional USACE offices, levee sponsors, Treaty tribes, salmon recovery plan implementers, non-governmental organizations, and others to achieve these objectives over the hundreds of miles of levees in Puget Sound that are and/or will be affected by USACE levee vegetation policies.

This comment letter is our second formal comment related to these policies. On March 12, 2010 the Partnership provided comments on the February 9, 2010 version of the PGL. In response to that version the Partnership coordinated and co-signed a joint letter from more than twenty governments and organizations in the region. That letter called for USACE to use the best available science as the basis for the subject policies; allow flexibility for vegetation where there is no evidence that it tangibly affects public safety; and support sponsors' efforts to resolve long-standing legal concerns stemming from the conflict between USACE's levee vegetation standards and federal law including the Endangered Species Act and Clean Water Act. Although the dialog about these matters has evolved over the past two years, that comment letter remains relevant and is attached here for inclusion in the current comment process.

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In light of the context noted above and our efforts to achieve our three key objectives, I offer the following general and specific comments addressing the current version of the PGL. Comments that relate to a specific portion of the PGL text identify that portion of the PGL.

- The starting point for the discussion of the variance application process is the ETL 1110-2-571 standard. The implementation of vegetation management actions that comport with the letter of this standard on Puget Sound levees enrolled in the PL 84-99 will compromise our ability to achieve the recovery of the Puget Sound ecosystem and our listed salmon populations, and will be an obstacle to the meaningful exercise of the rights of the region's Treaty tribes. For example, a recent study of the effects on water temperature of the implementation of the ETL 1110-2-571 standard on the Green River in King County showed that such an action would result in a ten mile reach of lethal water temperatures for salmon (see attached). We continue to be greatly concerned about the implementation of a standard that will force costs and potentially legal consequences on sponsors in order for them to maintain safe levees in a way that meets critical additional objectives.

- Our perspective is that the desired levee safety outcomes reflected in the ETL 1110-2-571 standard can be realized through credible approaches that can be achieved more cost-effectively than through uniform application of the standard, especially in light of the desire and need to meet this region's significant natural resource management goals. We disagree with a policy that assures that vegetation is a risk factor in every instance. This policy perspective runs counter to the state of the science as captured in the USACE Engineering Research and Development Center report (July, 2011) conclusions. This perspective and its resultant eligibility requirements will clearly give rise to significant, and potentially overwhelming, new administrative and capital costs for sponsors and other parties affected by this policy change.

- The illustrative levee cross section and planting berm figures provided in PGL Enclosure 3 indicate rather conclusively that only overbuilt levees can have vegetation other than grass. This configuration may be achievable in some settings for levee systems that are yet to be constructed but is unlikely to be achievable for many or most existing Puget Sound levees. This, in combination with the potentially prohibitive costs for developing a variance, significantly increases the likelihood that tree removal will become the default management approach, with clear negative implications for the riparian reaches enrolled in the PL 84-99 program and for the sponsors managing levees in those reaches.

- Given that the locations of Puget Sound levees enrolled in PL 84-99 are very likely to coincide with designated critical habitat or habitat otherwise important to ESA listed salmon, most Puget Sound sponsors will be required to apply and pay for a variance or be exposed to legal risks related to inadequate environmental compliance. Please clarify the legal exposure implications under the Endangered Species Act and Clean Water Act for sponsors who choose to implement the ETL 1110-2-571standard vs. those that implement an alternative vegetation management regime that cost effectively ensures levee safety and supports riparian habitat conditions supportive of listed species. This is an important consideration for sponsors and USACE's perspective may be a factor in the assessment of the pros and cons of a developing a variance application.

- Please clarify whether the Section 6b[1] (page 9638) language "existing vegetation variance" encompasses the existing Seattle District Variance.

- The term "functionality" is used in several places in the PGL to denote a level of performance needed to justify an alternative vegetation management approach. Can USACE provide a quantifiable definition, drawn from the scientific literature, of functionality that more clearly describes the level of performance sought? If a levee sponsor can demonstrate and document that their applied management approach has already resulted in a level of performance that meets or exceeds this level of performance, can they retain eligibility without having to go through a variance process?

- Allow sponsors to incorporate their applied experience in managing with vegetation on their levees into the variance application. Element number 7 in the "Submittal Checklist" (page 9641) appears to be an opportunity for sponsors to provide this type of information. If this type of information is submitted as part of a variance application, what weight will it be given in the variance approval process?

- What elements of the variance package can sponsors address collectively with a common, shared information source, e.g., the vegetation type and profile information called for in section 4b[10] in "Submittal Requirements" (page 9644)? The Seattle District Project matrix is one example of a tool that may be useful to sponsors in the Puget Sound region as they seek variances, and there may be other examples. The PGL does not consider how such tools may be incorporated into successful variance applications.

- Can sponsors provide information that demonstrates the structural benefits of vegetation within the defined variance reach? How will USACE use such information to influence the approval of the variance application?

- The PGL (pp. 9638-9639) identifies multiple levels of approvals that will be required to obtain the necessary final approval from UASCE for a variance application. This series of approvals happens progressively farther and farther from the levee, river, and watershed that is the subject of the application, with an increasing likelihood that the person with decision authority is not familiar with the subject levee, river, and watershed. This multi-stage approval process will likely add costs to the sponsor as they negotiate the path through multiple reviews. Please delegate the substantive authority for approving variance applications to the District or Division levels, which will better control process costs and help ensure that applications are evaluated and decided on by a person with direct knowledge of the subject levee, river, and/or watershed.

- Please clarify whether the Section 9b (page 9639) language "current vegetation management standards" means ETL 1110-2-571.

- Will section 9f (page 9639) be interpreted to result in vegetation allowed under the existing Seattle District Variance being considered "inadequate levee operations and maintenance"?

- Under the timeline described in Section 10a (page 9640), when would the existing Seattle District Variance no longer be the management standard in Puget Sound, i.e. what is the date when ETL 1110-2-571 will become the standard for those sponsors not seeking a variance or those proceeding within a System-Wide Improvement Framework process? What will be the process for inspecting levees that at that date do not meet the ETL 1110-2-571 standard and will need action to remain eligible for PL 84-44 funding?

- Maintain a meaningful level of flexibility under the Seattle District Variance while sponsors consider and choose among the options defined by the PGL and the new System-Wide Improvement Framework (SWIF) policy. Shrinking this flexibility will increase sponsors' exposure to potential legal consequences from tree removal that would likely result from a narrowing application of engineer's discretion allowed under the Seattle District Variance.

Between the release of the 2010 versions of the PGL and today the Partnership has worked closely with USACE to communicate our concerns about the proposed policies and explore ways to make achieving their intent more feasible in the context of conditions in Puget Sound. I would like to extend my appreciation to USACE leadership at the Headquarters, Division, and District levels for their constructive efforts to address our concerns. We need to make additional progress on both the PGL and SWIF policies, but I feel that through our shared efforts we have moved closer to a meaningful and lasting solution.

Please feel free to contact me at (360) 464-1228 or gerry.okeefe@psp.wa.gov if you have questions about these comments.

Best regards,

Gerry O'Keefe
Executive Director

Attachments (2010 comment letter, Green River temp analysis)

cc: Senator Patty Murray
Governor Christine Gregoire
Executive Dow Constantine
Billy Frank, NWIFC
Brigadier General John McMahon, Commander, Portland Division, USACE
Colonel Bruce Estok, District Engineer, Seattle District, USACE
Robyn Thorson, USFWS
Will Stelle, NMFS
Phil Anderson, WDFW
Ted Sturdevant, Dept of Ecology