



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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April 17, 2012

Mr. James C. Dalton, Chief,
Engineering and Construction, Directorate of Civil Works
U.S. Army Corps of Engineers
441 G Street NW
Washington DC 20314 - 1000

Attn: CECW-CE Tammy Conforti
(tammy.conforti@usace.army.mil)
441 G Street NW
Washington DC 20314-1000

Re: Comment letter regarding Docket Number COE – 2010-007: “Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls; Additional Filings” [Policy Guidance Letter (PGL) under authority of 33 U.S.C. 701n]

Dear Mr. Dalton and Ms. Conforti:

Thank you for the opportunity to respond to the February 17, 2012 Federal Register publication of the draft document titled *‘Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls; Additional Filings’*, docket number COE-2010-0007, hereinafter referred to as the draft Project Guidance Letter (PGL).

There was an excellent levee vegetation management workshop in Washington State on April 4, 2012 attended by United States Army Corps of Engineers (USACE) leadership, the Department of Ecology (Ecology) and many other leaders and staff from relevant federal, state, local and tribal entities. Attendees agreed that three key goals need to be addressed by the final PGL to accomplish our collective natural resource management responsibilities and optimum use of public funds. These goals are:

- Protect public safety and infrastructure investments
- Support riparian vegetation to achieve fish recovery and watershed health goals
- Ensure cost effective levee operations and oversight by responsible jurisdictions

While the draft PGL is a significant improvement over the first draft PGL released in 2010, there are still additional areas that need to be incorporated in the final PGL to address the above goals. From Ecology’s perspective these areas are:



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- The process to obtain a variance to Public Law 84-99: Rehabilitation and Inspection Program (PJ 84-99) continues to seem cumbersome and costly. We expect this to result in levee sponsors choosing to follow the national standards more often in lieu of pursuing PL 84-99 vegetative management variances. Consequently, regional natural resource management goals will remain unattainable if less than optimum vegetation regimes continue to pre-dominate riparian zones throughout Pacific Northwest levee systems, especially in basins where we are trying to restore fish stocks and improve watershed health.
- The draft PGL does not provide for adequate water quality protection for fish biologic needs, especially water temperature and dissolved oxygen.
- Final decision-making will not occur where local geographic and natural resource systems' knowledge and expertise resides.
- There is no appeal process when a final decision is made at the national level to deny a levee sponsor's variance request.

Ecology maintains that a single, national level levee maintenance standard and a rigid variance request process is not workable to address our region's multi-faceted environmental management needs. The proposed draft PGL will significantly diminish the ability of the state and our local and tribal partners to:

- Achieve objectives for recovery of Endangered Species Act listed species or other stressed fish stocks
- Attain and sustain state water quality standards under the Clean Water Act (CWA)
- Carry out Ecology's missions under flood plain and shoreland management authorities and the state water code

In addition, we feel it is very important to authorize greater USACE approval responsibilities for the new System Wide Improvement Framework (SWIF) program S and levee vegetation variance requests at district or divisional office levels. Ecology strongly supports a regionally focused approach to levee vegetation management policies and practices, while still affirming the significant values that structurally sound levees provide for citizen safety and infrastructure protection.

Lastly, flexibility is critical. Over the past several years, we have developed strong relationships between local, state, tribal and federal partners in our region related to salmon recovery and healthy river corridors. Specific instances of how the new SWIF program, PL 84-99 and the draft PGL relate to our work are discussed below.

Clean Water Act and Salmon Recovery

Ecology is the Environmental Protection Agency's solely delegated Washington State agency to implement the federal CWA. The CWA requires each state to have its own water quality standards designed to protect, restore, and preserve beneficial uses of water. The draft PGL is inconsistent with the achievement of the CWA's water quality standards and beneficial uses. The repercussions of not having vegetation to shade large swaths of the water surface in salmon migration zones in our region

are documented in Ecology's *Green River Temperature Total Maximum Daily Load [TMDL] Water Quality Improvement Report (June 2011 Publication No. 11-10-046)*.

The TMDL study modeling and data analysis determined that portions of the Green River (in King County) exhibit unhealthy and sometimes lethal temperatures for salmonids including Puget Sound Chinook, Bull Trout, Coho, Chum, Pink, Sockeye, Kokanee, Steelhead/Rainbow Trout and Cutthroat Trout. We believe vegetation can be provided to shade those swaths while maintaining public safety and that is has already been demonstrated in the Pacific Northwest on a number of our levees. These species all need cold water for optimum health during various life stages. Portions of the Green River do not meet Washington State water quality numeric standards for temperature and dissolved oxygen. The TMDL found that until the "... *levee maintenance policy can be changed to allow the growth of a full riparian corridor, or levees set back to allow for planting, or until another mitigation approach can be successfully employed, temperatures will not meet state standards in the Lower Green River*".

While data collection and modeling show that this unfortunate scenario is playing out in the Green River basin, by extension, temperature impairments in other Puget Sound basins including the Nooksack, Skagit, Snohomish, Cedar, and Puyallup Rivers are also probably hampered by lack of levee vegetation.

We request the final, nationwide PGL or a regional variant of one incorporates tools, flexibly, and practices to better address local water quality management standards.

National Flood Insurance Program and the state Flood Control Act

The Federal Emergency Management Agency (FEMA) contracts with Ecology to implement state-level flood hazard preparedness, mitigation and damage reduction programs through the National Flood Insurance Program (NFIP). Our role and commitment here relates to flood hazard reduction, mitigation and ensuring that communities meet NFIP requirements so that landowners remain eligible to purchase market rate flood insurance policies. Predating the NFIP is the Washington State Flood Control Act, which has long emphasized flood hazard mitigation and flood damage reduction programs.

As you are aware, the FEMA minimum standards for the NFIP have been found to jeopardize ESA-listed salmon and other species in the Puget Sound region. The National Marine Fisheries Service's September 2008 Biological Opinion (BiOp) titled '*Implementation of the National Flood Insurance Program in the State of Washington: Phase One Document – Puget Sound Region*' includes Reasonable and Prudent Alternative (RPA) #5 which specifically focused on the need to improve vegetation along armored sections of rivers. The RPA recognizes that vegetation along armored rivers is one vital piece of sustaining salmon and other species in our region.

Specifically, at RPA #5 sub-element A, "*The FEMA shall not recognize levees that are certified by the COE utilizing COE vegetation standards unless it is demonstrated that the standard will not adversely affect species or their habitat*". Local, state and federal policies explicitly support action to achieve recovery of listed salmon species. At sub-element B, the BiOp states, "*The FEMA shall revise their procedure memoranda to reflect that levee owners that opt for an increased levee vegetation standard that removes them from the PL 84-99 program shall not be disqualified from emergency funding for*

repairs from flood damage if the levee is otherwise certified by a professional engineer". Respectfully, with federal staffing levels and budgetary realities in mind, it's clear these remain as significant pieces of unfinished business between the USACE and FEMA and other relevant federal and state partners. A revised PGL presents a significant opportunity to address RPA # 5.

Further, when it comes to improving vegetation along armored rivers, we believe most communities do not have the financial and human resource capacities to prepare documents to satisfy the Corps' proposed variance request requirements. We are very concerned regarding the affect of the burdensome and complicated 'one-size-fits-all' approaches outlined in the draft PGL, combined with uncertain outcomes of variance requests. A significant driver is the need to remain eligible for PL 84-99 financial resources for ongoing levee system maintenance and repair needs. It is highly probable that USACE's proposed approach will result in local acquiescence to the national standards if the draft PGL is adopted. In essence, there would be no practical vegetation management variance process available to these local governments.

Shoreland Management Act

The Washington State Shoreline Management Act is intended to protect shoreline natural resources, including "*...the land and its vegetation and wildlife, and the water of the state and their aquatic life...*" against adverse effects. All allowed uses are required to mitigate adverse environmental impacts to the maximum extent feasible and preserve the natural character and aesthetics of the shoreline.

Ecology's guidelines in Washington [State] Administrative Code 173-26 require that local shoreline regulations be designed to achieve "*no net loss of ecological function.*" The inability to improve vegetation along armored shorelines directly conflicts with this important, promulgated state guideline.

Water Code

The Washington State Water Resources Act of 1971 (RCW 90.54) has provisions that authorize Ecology to set minimum instream flow volumes to protect in-channel aquatic resources and habitats, recreational opportunities and aesthetics, as well as providing the regulatory framework for out-of-stream water use allocation decisions and enforcement of illegal surface water uses.

This code's connection to the draft PGL is via the establishment of regulated flow levels and how doing so can help achieve and sustain water quality goals and standards. For example, when a TMDL is needed for a given water body such as the Green River's current conditions, that analysis and work is often dependent on sustaining pre-determined minimum (or greater) instream flows are to address water quality goals.

The draft PGL approach for vegetative variances indirectly runs counter to our statewide instream flow setting/water quality management objectives. As noted earlier for our other responsibilities, a non-regional solution to levee safety and vegetation management programs can be expected to push levee sponsors to least cost and path of least resistance solutions, which in turn can undermine our linked instream flow setting responsibilities and water quality goals.

Technical comments on draft PGL:

- No Variance non-Approval Appeal Process: The final PGL needs an appeal process for cases when a levee sponsor's variance request may be acceptable at USACE district or divisional levels but isn't finally approved at the HQ level. We could assume that close partnerships between levee sponsors and USACE staff at all levels will occur as vegetation variance requests are being developed, so that the final application requests approvals at USACE HQ would be essentially pro-forma with a positive outcomes for sponsors and the environment.

However, in the majority of circumstances where significant departures from legally established land use standards are requested by applicants at local, regional, state and national governmental levels, it's typical that appeals processes are included at the time any act, rule or guidance is officially promulgated. We request the final PGL include a well-outlined and understood, fair appeal process which would provide levee sponsors with clear expectations of what a vegetation variance request process may entail from start to assumed finish.

- Overthrown Tree-Pit Dimensions: The assumed, average overturned tree pit/mound dimensions are based solely on data from eastern United States hardwood/broad-leafed trees found in natural forested conditions. The draft PGL states: "*These dimensions, which are consistent with USACE observation and experience, were derived from field data presented in the following paper: "Catastrophic Windthrow in the southern Appalachians: characteristics or pits and mounds and initial vegetation responses"*."

We agree that a sound analysis of the potential for levee structural damage from overturned trees is a critical element of any levee safety and integrity program. However, none of the trees cited in the reference paper draft PGL reference paper (*Forest Ecology and Management* 26:51-60) are species that either thrive or would be contemplated for planting on USACE Seattle NW district levees.

We request the final PGL include suitable documented references, if available, to recognize regional realities in overturned tree species pit/mound dimensions. Otherwise, levee sponsors requesting vegetation variances can be expected to use anecdotal and experiential references to justify the allowance of large trees which will run counter to the draft PGL's review references and the chart on page 9647, introducing yet another layer of disconnections and uncertainty in the variance approval process.

Thank you again for the opportunity to comment on this important issue. We remain committed to working with USACE representatives at all levels to reach mutually agreeable and beneficial solutions and look forward to the eventual release of final, workable and more practical levee vegetation maintenance Project Guidance Letter. Please contact me should you have any questions or need more information at (425) 649-7010 or jeannie.summerhays@ecy.wa.gov.

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Sincerely,

A handwritten signature in cursive script that reads "Jeannie Summerhays". The signature is written in black ink and is positioned below the word "Sincerely,".

Jeannie Summerhays, Regional Director
Northwest Regional Office
Department of Ecology

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
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