



To protect and restore California Rivers by influencing public policy and inspiring citizen action.

## FRIENDS OF THE RIVER

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April 12, 2012

Via Email and U.S. Mail

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

Re: Comments on Docket Number COE-2010-0007

Dear Ms. Conforti:

### INTRODUCTION

These comments are submitted on behalf of Friends of the River (Friends) on the “Policy Guidance Letter” (PGL), entitled *Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls* published in the Federal Register on February 17, 2012, at 77 Fed. Reg. 9637, and on the draft environmental assessment (EA) on the PGL. The EA is referenced at 77 Fed. Reg. 9637. The PGL sets forth a procedure for requesting a variance from the “mandatory vegetation-management standards contained in Engineer Technical Letter (ETL) 1110-2-571, *Guidelines for Landscape Planting and Vegetation Management at Levees, Floodwalls, Embankment Dams, and Appurtenant Structures.*” The ETL, in essence, prohibits vegetation other than grass on or near levees unless a variance is obtained.

The entire Corps process in mandating a new vegetation standard in the ETL and variance process in the PGL is a flagrant violation of the National Environmental Policy Act (NEPA) 42 U.S.C. § 4321 *et seq.* That is so because the ETL prohibition of vegetation was issued in April, 2009, without any compliance with NEPA whatsoever. No EA or environmental impact statement (EIS) was ever prepared analyzing the environmental effects of the ETL under

NEPA. The belated preparation of an EA on the PGL appears to be in reality an admission that the Corps had to comply with NEPA before it issued the ETL. The reason for this is that the ETL is of primary importance, with the importance of the PGL being of a secondary nature.

Programmatic decisions influence and pre-determine the future. Thus NEPA compliance must be undertaken for such decisions. *Laub v. U.S. Dep't of the Interior*, 342 F.3d 1080, 1088-1091 (9<sup>th</sup> Cir. 2003). The only reason to even have the PGL is to establish a variance process from the vegetation prohibition contained in the ETL. Consequently, the Corps must prepare an EIS on the ETL as well as on the PGL. Otherwise, the vegetation prohibition has been adopted and implemented without any environmental analysis under NEPA whatsoever.

The PGL states that “[D]eviation from the national standards as defined in ETL 1110-2-571 is permitted only through a vegetation variance approved by the HQUSACE LSO via the process described herein.” 77 Fed. Reg. 9640. The PGL also states that “[N]ew federally authorized cost-shared levee projects shall be designed to meet the current vegetation management standards.” 77 Fed. Reg. 9639. Also, the PGL states that “the vegetation variance process is not a mechanism to validate conditions that have developed...” and that “past USACE inspection reports that did not identify noncompliant vegetation as a deficiency do not constitute an existing vegetation variance or approved deviation.” 77 Fed. Reg. 9639.

The Corps has ignored NEPA ever since it commenced the process of setting out new policy guidance for a vegetative-free zone for all levees back when it issued the *Final Draft White Paper: Treatment of Vegetation within Local Flood-Damage-Reduction Systems (White Paper)* on April 20, 2007. Among the letters to the Corps objecting to the policy and calling for compliance with environmental laws was the Three Rivers Levee Improvement Authority (Marysville, California) letter of May 18, 2007. That letter to the Corps included citations to NEPA cases and regulations including detailed explanation of why the impacts of a new vegetation standard would be significant, requiring preparation of an EIS.

The Corps has likewise ignored the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, by not preparing a Biological Assessment and consulting with the U.S. Fish and Wildlife Service and U.S. National Marine Fisheries Service on the ETL and PGL even though removal of levee vegetation means in many places destruction of critical habitat essential for endangered

and threatened species.

The EA is a clear violation of NEPA and the ESA. The ETL prohibits woody vegetation unless a variance is obtained. The PGL allows deviation from the ETL only through a vegetation variance. 77 Fed. Reg. 9840 (§ 10). The EA actually states:

Revisions to the process for requesting a variance apply nationally. However, changing the process for applying for a variance does not itself affect the environment or any species that are listed as threatened or endangered under the Endangered Species Act (ESA). It is the decisions on specific variance requests that may effect [sic] the environment or listed species. The environmental effects of each decision on a variance application will be properly evaluated before a final decision is rendered.

(EA, p. 2).

As the Central Valley Flood Control Association (letter, April 19, 2010) said two years ago in commenting on an almost identical earlier version of the EA,

[K]eeping the existing vegetation in place is not a ‘government action’ which requires compliance with NEPA and ESA. Rather it is the existing condition or baseline.

Because the draft Process has the effect of canceling existing variances, with the requirement that the previously covered vegetation would now have to be removed if not re-approved (by four levels of reviewers), the draft Process is not simply administrative action; rather it is an action that has the potential to significantly impact the human environment. Therefore, the Corps' draft EA is not adequate, and the Corps has failed to comply with NEPA. It is clear under this circumstance, especially with the National coverage of the draft Process, that an EIS will be required.

The Corps is continuing to persist in this avoidance of its NEPA and ESA responsibilities and is attempting to unlawfully piecemeal them and delegate them away to other public agencies that unlike the Corps did not create the ETL and its prohibition of vegetation.

Friends objects to issuance of a final EA and FONSI (finding of no significant impact) and PGL and requests the Corps to set aside the ETL until it has prepared an EIS on the ETL and PGL and has prepared a Biological Assessment and consulted with the Fish and Wildlife Service and National Marine Fisheries Service on the ETL and PGL under the ESA.

Detailed comments are set out below.

## THE CORPS IS VIOLATING NEPA AND THE ESA

### *NEPA Principles*

NEPA “is a procedural statute intended to secure environmentally informed decision-making by federal agencies.” *California ex. rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1011 (9<sup>th</sup> Cir. 2009). NEPA “provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions.” *Id.* “The Act requires that an environmental impact statement be prepared for all ‘major Federal actions significantly affecting the quality of the human environment.’ 42 U.S.C. § 4332(c). The threshold that triggers a requirement for environmental analysis under the National Environmental Policy Act is relatively low: ‘It is enough for the plaintiff to raise substantial questions whether a project may have a significant effect on the environment.’” *Id. Accord, Calif. Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1097 (9<sup>th</sup> Cir. 2011) (rejecting agency’s unsupported conclusion that its action would not have some environmental impact).

### *Statement of Project Purpose is Misleading*

The statement of project purpose is a misrepresentation. Both the EA (p. 1) and the Federal Register notice, 77 Fed. Reg. 9637, claim that the mandatory vegetation prohibition contained in the ETL was adopted pursuant to Section 202 (g) of the Water Resource Development Act (WRDA) of 1996. P.L. 104-303, 110 Stat. 3658 (October 12, 1996). The claim is false. WRDA in section 202(g)(1) directed the Secretary of the Army 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 such other factors as the Secretary considers appropriate." Section 202(g)(3) required that the revised policy guidelines “shall address regional variations in levee management and resource needs.” What the Corps has done instead is adopt a "one-size-fits-all" national prohibition of vegetation in the ETL. The Corps has not done what it was directed to do by Congress, but falsely claims it has done what WRDA directed it to do.

### ***Corps' National No Vegetation Standard Contrary to Corps' Own Research***

The national “one-size-fits-all” standard makes no sense for several reasons. Or as Congressman John Garamendi said about it recently, it is like making every soldier in the Army wear the same size boot. Put differently, the national one-size-fits-all prohibition of levee vegetation in the ETL is contrary to the findings of research, including the Corps’ own research that woody vegetation is either generally good for levee performance or must be analyzed on a case-by-case basis.

Most of the studies that have been done have concluded either that vegetation is compatible with the flood control function of levees or that vegetation actually improves public safety by reducing the potential for levee erosion. California Departments of Water Resources and Fish and Game Comments, April 15, 2010, Attachment at 7-10. Such studies include the Corps’ own study in the Sacramento Valley, *The Effects of Vegetation on the Structural Integrity of Sandy Levees* (1991) concluding in general that trees improve rather than degrade levee safety; and the Corps’ findings in a literature review performed by its Engineer Research and Development Center in 2007 “that no documented evidence exists to prove trees negatively influence levee integrity: however, research is very limited that specifically addresses woody vegetation on levees.”

On about July 26, 2011 the Corps posted on the internet its new *Literature Review-Vegetation on Levees*, prepared by its Engineer Research and Development Center. The authors of the report reviewed more than 200 documents including 61 that addressed some aspect of woody vegetation on levees. (Summary, p. ii.). The Review found among other things that “[C]lear-cutting on natural slopes and stream banks generally leads to an increase in slope failures.” (Summary, p. 10). The Review concluded that “[B]oth benefits and risks of converting wooded levees to grass-covered levees, including the engineering feasibility and economic costs of such conversion, have yet to be fully investigated.” (Summary p. 16). Recommendations included that: “Levees should be addressed in terms of ecosystem habitat diversity (as separate environmental communities), and specific guidance should be established for those ecosystems.” (Summary p. 16).

On about September 8, 2011 the Corps posted on the internet its *Initial Research into the Effects of Woody Vegetation on Levees* prepared by its Engineer Research and Development Center. The work included site visits, field studies, laboratory testing and modeling and simulation of engineering, geological and environmental conditions relative to internal erosion and slope stability. Analyses were conducted for eight locations around the United States including Sacramento, ranging from Portland, Oregon to Boca Raton, Florida. Research findings included that “[T]rees near the toe increased the factor of safety because of the reinforcing effects of the roots and the increased counterweight effect of the tree to slope movement.” (Vol. IV, Summary p.v, 25). “Results indicated that a tree can increase or decrease the factor of safety with respect to slope stability depending on the location of the tree on the levee.” (Summary, p. 29). The Research conclusions included “[B]ecause of the extreme variability in geology, tree species, climate, and soils, the impact of trees on levees must be analyzed on a case-by-case basis.” (Summary, p. 29)(emphasis added).

Despite the conclusions of the Research the Corps has issued the PGL declaring the ETL prohibition of vegetation to be “mandatory.” It is arbitrary action for a public agency to keep the ETL vegetation prohibition as the starting point for all levee vegetation decisions in the face of the Corps’ own research conclusion that “the impact of trees on levees must be analyzed on a case-by-case basis.” (emphasis added).

Finally, the absurdity of the Corps’ no-vegetation standard is illustrated by the bad joke on the taxpayers and the delay in accomplishing mitigation by the picture of the Corps having to seek a variance from itself. As a result of storms in December 2005 and January 2006, several Federal levees in the Sacramento-San Joaquin Delta area were damaged and the Sacramento District carried out a rehabilitation effort including placement of quarry stone and riprap at erosion sites. Because of the ETL, the Sacramento District had to seek a variance to carry out willow plantings on 14,000 linear feet on the waterside of the affected levees. The variance was not obtained from Corps Headquarters until October 2011. The contract to carry out the work is not scheduled to be issued until the fall of 2012. *Project Fact Sheet*, PL 84-99 2005-2006 Rehabilitation Effort-Mitigation, USACE, Sacramento District. The no-vegetation standard needs to be dropped so that agencies such as the Sacramento District do not have to seek a

variance from a one-size-fit-all vegetation prohibition that is contrary to the research conclusions reached by the Corps' own experts.

***The Expert Public Agencies have Called on the Corps to Comply with NEPA and the ESA***

The length of these comments is caused by the sheer number and magnitude of NEPA and ESA violations carried out by the Corps through the ETL and PGL. To avoid even greater length, four comment letters by expert federal and California State agencies during the comment period that ended April 26, 2010 on the original draft EA and PGL and three more recent letters are specifically called to your attention and incorporated here by reference for the factual and legal information they provide. These comments show the Corps' ongoing violations of NEPA as well as failure to consult with the Fish and Wildlife Service and National Marine Fisheries Service on the impacts on endangered species of removal of all that woody vegetation/habitat nationwide and throughout California in violation of the ESA. The comment letters called to your attention and incorporated by this reference include the following:

*April 15, 2010 letter* from the California Departments of Water Resources (DWR) and Fish and Game (DFG) and its 59 page attachment which contains a wealth of invaluable factual and legal information. The California agencies concluded that: "we believe there is a legal necessity for the Corps to initiate the preparation of an ...EIS under...NEPA, and consultation under the... ESA..., to explore the full effects, including cumulative impacts, of the ETL and the VVP [Vegetation Variance Process] on the natural and human environment, including socioeconomic consequences." (letter, p. 2). The California agencies urged "the Corps to cease implementation of this new policy and procedures..." ( p.1).

*April 22, 2010 letter* from the National Marine Fisheries Service, Silver Spring, Maryland, which concluded among other things that each NEPA criteria requiring preparation of an EIS "is met under the current proposal. The environmental effects of the proposal are regionally controversial, bear directly on listed species and their habitats, establish new procedural precedents, and involve a degree of uncertainty with respect to risk." (Letter, p. 3).

*April 22, 2010 letter* from the Fish and Wildlife Service, Sacramento, California and its attachment including the comment that "[I]t is unclear why this Policy Guidance Letter is not a "Major Federal action" which requires an Environmental Impact Statement for such actions. A

"Major Federal action" includes actions with effects that may be major and which are potentially subject to federal control or responsibility." (Letter, attach. p. 5).

*April 20, 2010 letter* from the Fish and Wildlife Service, Portland, Oregon, which recommended that "the Corps consult under section 7 of the ESA on the mandatory vegetation management standards for levees contained in Engineering Technical Letter 1110-2-571.... We are not aware of any ESA consultations on these mandatory standards, which contain the variance process that is the subject of the proposed revisions.

We further recommend the Corps prepare an ...EIS to address the potential impacts on the human environment associated with the proposed process. Potential adverse effects to listed and non-listed species, including migratory birds and bald eagles, and critical habitat of ESA-listed species need to be fully considered and addressed in an EIS." (Letter, p. 2).

*August 18, 2011 letter* from the National Marine Fisheries Service, Seattle, Washington, stating "formal ESA reviews and authorizations remain notably absent." "The current program in the Pacific NW meets the 'may affect' standard for programs that are federal, authorized or carried out by a federal agency, and as such is subject to [ESA] section 7(a)(2) consultation." (Letter, p. 4).

*February 7, 2012 letter* and *March 2, 2012 letter* from the California Department of Fish and Game, giving a 60 day notice of intent to sue under the ESA. The Department advises the Corps that the "Corps' Levee Vegetation Removal Polices" including the *White Paper*, ETL, new PGL, and new EA, constitute violations of both section 7 and section 9 of the ESA due to the failure of the Corps to prepare a Biological Assessment and consult with the Federal fish and wildlife agencies before acting to prohibit vegetation.

The Corps is ignoring its own experts by maintaining its no vegetation standard and is ignoring the expert federal and State agencies by not performing NEPA analysis and ESA consultations on its standard.

### **The Corps Changed the Regulatory Status Quo and Caused Change to the Environmental Status Quo by Adopting and Implementing the No-Vegetation Standard**

There are trees and shrubs on the levees in California now as well as in other parts of the Nation that provide essential habitat for endangered and threatened species. Much of the 5% of

historic riparian habitat that still remains in the California's Central Valley exists on the levees. This residual vegetation on the levees is also essential to the scenic beauty and the aesthetic and recreational enjoyment of the rivers in the Central Valley. For decades, the Corps had allowed and encouraged planting and maintenance of trees and shrubs on Central Valley levees because there is almost no other river bank habitat left.

NEPA procedures apply to federal actions that alter the environmental status quo. *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 784 (9th Cir. 2006). The Corps' adoption of its no vegetation standard changed the regulatory status quo and causes change to the environmental status quo.

The Corps itself declared when it adopted its *White Paper* in 2007 that the policy was "relatively new" (p. 2), as it had previously allowed vegetation to grow on the levees. The Corps further stated that the growth had "become an ecological benefit," and that "clearing vegetation could be considered an adverse modification to critical habitat and possible effects on listed species." (p. 17). Consequently, an EIS is required on the PGL and ETL.

***The Corps' Adoption and Implementation of Its No-Vegetation Standard Violates NEPA Because it is a Discretionary Major Federal Action Undertaken in the Absence of NEPA Compliance***

The NEPA regulations define "major federal action." The term "includes actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. "Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedure; and legislative proposals (1506.8, 1508.17)." *Id.* at § 1508.18(a). Categories of federal actions include "formal documents establishing an agency's policies which will result in or substantially alter agency programs." *Id.* at § 1508.18(b)(1).

The Corps' adoption of its no-vegetation standard was federal agency action because the Corps is a federal agency. An action is a federal agency action if it "guides" the use of resources. *Delta Smelt Consol. Cases*, 686 F. Supp. 2d 1013, 1039 (E.D. Cal. 2010). It was a major action because it applies to the entire nation including thousands of miles of levees. It

was discretionary because it was not mandated by statute.

Although the Corps claims that “changing the process for applying for a variance does not itself affect the environment or any species that are listed as threatened or endangered under the ...ESA.” (EA p. 2), that is plainly false here. This case is not the first time that a federal agency has wrongly claimed under NEPA that something it did was only procedural. The Forest Service claimed in *California ex rel Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999 (9<sup>th</sup> Cir. 2009) that a rule that it adopted “is merely procedural in nature and scope and, as such, has no direct, indirect, or cumulative effect on the environment.” 575 F.3d at 1008, 1013, 1014. The court upheld the district court which had “reasoned that the replacement of the Roadless Rule’s uniform substantive protections with a less protective and more varied land management regime would qualify as ‘substantive’ action and would meet the relatively low threshold to trigger some level of environmental analysis under the National Environmental Policy Act.” 575 F.3d at 1013.

The ultimate effect of the procedural change addressed in *Lockyer* was to increase the likelihood of environmental change. 575 F.3d 999. Here, the Corps’ vegetation removal standard likewise increases the likelihood of environmental change. It is now more likely that vegetation will be removed from levees, altering the environmental status quo. Part of the change is to prohibit levee vegetation. The other part of the change is to require the obtaining of a new difficult-to-get variance for any woody vegetation at all to survive and cancelling existing variances which had allowed vegetation on levees in many areas for decades. The Corps’ new standard treats vegetation as intrinsically harmful and raises the bar for obtaining any variances. Implementation of non-trivial revisions of procedures or standards for project operations is major federal action requiring compliance with NEPA. *Consol. Salmonid Cases*, 688 F. Supp. 2d 1013, at 1025, 1026, 1032. An EIS is mandatory here.

***Failure to Include Adequate Project Description, Discussion of Environmental Impacts, Environmental Information, and Reasonable Alternatives in the EA***

There was no project description provided under NEPA for the ETL whatsoever. Likewise, there is no legally sufficient project description provided in the conclusory 2 ½ page EA for the PGL. Thousands of miles of levees are subject to the ETL and PGL throughout the Nation and California. No information is provided in the form of maps or written data of the

miles or locations of affected levees. No information is provided as to the trees and other vegetation subject to the ETL and PGL in terms of location or quantities or species or aesthetic or habitat significance. No information is provided as to impacts of removing levee vegetation on fish and wildlife species including endangered and threatened species, or on historic or cultural resources. There is a complete failure to provide an adequate project description as required by NEPA regulations including 40 C.F.R. 1501.2(b) and 1500.1. *See Sierra Club v. Babbitt*, 69 F.Supp.2d 1202, 1217, 1218 (E.D. Cal. 1999). The regulations require that environmental effects and the project be described in sufficient detail to allow comparison of environmental impacts to economic and technical analyses, and also to ensure that public officials and the public are environmentally informed before decisions are made that affect the environment.

The Federal Register notice in February 2012 states that the Corps "reviewed and considered 561 comments from 110 separate organizations and individuals" on the draft EA and PGL issued in 2010. 77 Fed. Reg. 9637. Despite that, the Corps' response to those comments (referenced at 77 Fed. Reg. 9637) is only eight pages long. After all those comments were made, the new draft EA comes very close to being word for word identical to the draft EA issued back in 2010 and that was the subject of all of those comments. The Corps is continuing to ignore the calls by the expert agencies including the California Departments of Fish and Game and Water Resources, the Fish and Wildlife Service, and the National Marine Fisheries Service for the preparation of an EIS and for ESA consultation. This unreasonable ignoring of NEPA's requirements for meaningful consideration of and responses to comments and for environmental analysis and disclosure was amplified by the Corps' repeating the falsehood in its responses to comments that: "The ETL released on 10 April 2009, did not change the substantive standards for vegetation management that have been in effect since 1993." To the contrary, the EA states that "USACE subsequently [after 2006] launched a major effort to review and revise policies and procedures associated with levees." (EA p. 1). The whole purpose of the *White Paper* and the ETL is to bring about the removal of woody vegetation from levees. To claim that the Corps has not changed its substantive standards is misrepresentation to the public—the opposite of the environmental full disclosure required by NEPA.

The EA and Federal Register notice descend to the level of concealment as opposed to

rise to the environmental full disclosure required by NEPA. These documents fail to disclose even the Corps' own recent *Literature Review* or *Initial Research* (both discussed above at pp. 5-6). Consequently the reader of the EA and Federal Register notice would not know that the Corps' own experts have concluded after researching the issue that "the impact of trees on levees must be analyzed on a case-by-case basis." Nor would the reader know that the Corps' own *Literature Review* team reviewed over 200 articles and other documents, and concluded that: "Clear-cutting on natural slopes and stream banks generally leads to an increase in slope failures." The list of references attached to the EA identifies only three items, one being the ETL itself, and none being any research or other informative document. Instead of providing the NEPA-required full-disclosure, the Corps is concealing its own research from the public in a transparent effort to minimize public comment and rid levees of woody vegetation without confronting the contrary conclusions reached by its own experts and opposition from an informed public.

Again, the EA is only 2 ½ pages long. The "NEPA analysis" consists of one conclusory sentence: "The environmental review process undertaken for this rule has led me to conclude that the publication of the Policy Guidance Letter will not have a significant effect on the quality of the human environment, and therefore an Environmental Impact Statement is not required by § 102(2)(C) of NEPA or its implementing regulations." (EA p. 3).

The EA mentions only two "alternatives" in three sentences. (EA p. 3). These alternatives are the "no action and revise the variance process." The most obvious alternative concealed from the public by the EA is the obvious one and what should be the selected alternative given the Corps' own research. Again, the Corps' *Initial Research into the Effects of Woody Vegetation on Levees* (September 8, 2011) concluded that: "Because of the extreme variability in geology, tree species, climate, and soils, the impact of trees on levees must be analyzed on a case-by-case basis." It is astonishing that the Corps has not only not adopted that conclusion, the Corps has not even included case-by-case analysis as an alternative. Other obvious alternatives include setting aside the ETL returning to prior Corps guidance, and an alternative establishing a standard that woody vegetation will be incorporated into new levees and retained on existing levees because of its environmental value and value as habitat, unless determined to pose a threat

to a particular levee in a particular situation.

When an EA is prepared, it cannot be conclusory. Deficient EA's do not establish compliance with NEPA. *Save the Yaak Comm. v. Block*, 840 F.2d 714 (9th Cir. 1988); *Earth Island Institute v. Morse*, 2009 WL 2423478, \*7, 8 (E.D. Cal. August 5, 2009) (scientific accuracy and integrity required in an EA). Additionally, when an agency chooses to make a decision nationwide, it must assess the site-specific environmental impacts of its decision. As the Ninth Circuit has held,

We concede that conducting a detailed site-specific analysis of the RARE II [nationwide roadless area review] decision will be no simple task and will be laden with empirical uncertainty. The scope of the undertaking here, however, was the Forest Service's choice and not the courts'. NEPA contains no exemptions for projects of national scope. Having decided to allocate simultaneously millions of acres of land to non-wilderness use, the Forest Service may not rely upon forecasting difficulties or the task's magnitude to excuse the absence of a reasonably thorough site-specific analysis of the decision's environmental consequences.

*California v. Block*, 690 F.2d 753, 765 (9th Cir. 1982). There, the agency at least did something it called an EIS, though the courts held it deficient. Here, the Corps has done nothing that purports to comply with NEPA's requirement to assess on-the-ground environmental consequences of its no-vegetation standard carried out by the ETL and PGL.

***Even without Consideration of the ETL the PGL by itself requires Preparation of an EIS and ESA Consultation***

The PGL was published in the Federal Register on February 17, 2012. 77 Fed. Reg. 9637-9650. An EIS under NEPA and consultation under the ESA is clearly required because the ETL establishes a prohibition of all vegetation other than grass on all portions of levees throughout the United States as well as out to 15 feet from the waterside and landside toes of the levees. The ETL is the "elephant in the room" so to speak. But even in the absence of the ETL the PGL in and of itself is arbitrary and unreasonable and requires preparation of an EIS and ESA consultation. Some reasons for this follow.

The PGL constitutes a formal publication in the Federal Register declaring that the standards in the ETL are "mandatory". 77 Fed. Reg. 9637. The PGL applies to all Corps districts

and field operating activities, as well as to levees within the Corps Levee Safety Program. 77 Fed. Reg. 9637. That includes levees operated or maintained by the Corps, federally authorized and locally operated levees, and locally constructed and operated levees associated with the Corps Rehabilitation and Inspection Program (RIP) (also known as the Pub. L. 84-99 program). (Id.). Consequently, the PGL formally reiterates the “mandatory” prohibition of levee vegetation other than grass and applies it throughout the United States. The standards thus apply to many thousands of miles of levees. This action by itself requires an EIS.

The PGL does not remedy any of the informational deficiencies of the EA. The PGL references 11 documents (77 Fed. Reg. 9637-9638), but no document is an environmental analysis or disclosure document. Consequently, like the EA, the PGL does not even disclose the Corps' own recent *Literature Review* or *Initial Research* (both discussed above at pp. 5-6). The reader of the PGL would have no clue that the Corps' crusade against levee vegetation is at odds with the findings of the research by the Corps' own experts. This concealment of critical information from the NEPA process violates NEPA's environmental full disclosure requirement.

The PGL specifies that "New federally authorized cost-shared levee projects shall be designed to meet the current vegetation management standards." 77 Fed. 9639 (§ 9b). That language including the mandatory word "shall" admits of no variance or exception. Consequently, the PGL prohibits for all time throughout the entire United States vegetation on new levee projects. This far-reaching, long-lasting mandatory land-use prohibition of vegetation is sufficient by itself to require EIS preparation and ESA consultation.

The PGL specifies that: "Deviation from the national standards as defined in ETL 1110-2-571 is permitted only through a vegetation variance approved by the HQUSACE LSO via the process described herein." 77 Fed. Reg. 9640 (§ 10). What this means is that in all cases in which a Corps district or levee sponsor does not apply for a variance, any and all existing vegetation other than grass will be removed, and new vegetation will not be established. This provision applies throughout the United States, and for all time. A sponsor may not apply for a variance because of a variety of possible reasons. The district or sponsor may simply not value vegetation enough to apply for a variance. The variance requirement is a “blank check” allowing sponsors to remove vegetation. Given the hostility of the Corps toward vegetation, and the vagueness of

the criteria for gaining a variance, the sponsor may conclude that going through the expensive variance process would be futile. The sponsor would be left with the task of far-reaching environmental analysis since the Corps—the agency that prohibits vegetation—has performed no environmental analysis on the PGL (or ETL). The sponsor may not have the funds to apply for a variance. The application for a variance will require extensive information being extremely burdensome and costly to levee sponsors, given what the PGL requires for variance applications, including drawings, soil profiles and numerous and extensive other items. Fed. Reg. 9642-9645. Also, the PGL specifies that if the levee *prism* is not smaller than the existing levee cross section, "it is unlikely the variance involving woody vegetation will be approved without compensating structural modifications." 77 Fed. Reg. 9642. Structural modifications to the levee would also be costly and burdensome to the levee sponsor.

This process turns the purpose of variances upside down. Normally in land-use regulation, variances are required to have more intensive development which removes vegetation or otherwise diminishes the existing environmental baseline. Keeping the existing vegetation is the existing condition or the environmental baseline. A variance should only be required to modify the existing condition, not to preserve it. This provision in the PGL means that the default rule is that existing vegetation must be removed and new vegetation will not be allowed. This also is a far-reaching, long-lasting mandatory land-use prohibition of vegetation that is sufficient by itself to require EIS preparation and ESA consultation.

The PGL states that:

USACE is responsible for assuring compliance with all applicable environmental requirements before a decision can be made on a vegetation variance request. As a condition of the levee sponsor choosing to participate in Public Law 84-99, the levee sponsor is responsible for providing all background studies, data, and other information required by USACE to complete the environmental compliance processes under the... NEPA, ESA,...

77 Fed. Reg. 9640 (¶ 11).

The PGL turns both NEPA and the ESA upside down. Under the PGL the sponsor must perform analysis under the environmental laws to simply preserve the existing environmental baseline--the existing vegetation. On the other hand, if the sponsor removes the vegetation, the PGL does not require compliance with NEPA or the ESA. This is the opposite of what the environmental

laws require. These laws require environmental analysis to remove the woody vegetation that provides scenic beauty and aesthetic values for human enjoyment, and habitat, shade, and protection for fish and wildlife. Again, the Corps turns all of this upside down by requiring environmental analysis for preservation instead of for destruction.

The requirement that vegetation be removed unless a variance is obtained also turns scientific research on the issue upside down. As already pointed out, the Corps' own new *Literature Review* found that "Clear-cutting on natural slopes and stream banks generally leads to an increase in slope failures." The Corps' own new *Initial Research* concluded that: "because of the extreme variability in geology, tree species, climate, and soils, the impact of trees on levees must be analyzed on a case-by-case basis." (Both publications discussed above, pp. 5-6). Given those findings and conclusions by the Corps' own experts, it is arbitrary and unreasonable to put the "burden" on sponsors seeking to preserve levee vegetation rather than on the Corps itself which seeks to require removal of the levee vegetation. A sensible approach would be to require a variance to remove vegetation, not to retain it. Another sensible approach would be to do as the Corps' experts recommend; analyze the impact of trees on levees on a case-by-case basis rather than starting out by making removal of vegetation the standard and the default position. The PGL is arbitrary and unreasonable because the mandate that vegetation must be removed unless a variance is sought and obtained is directly contrary to the findings and conclusions recently reached by the Corps' own experts.

### ***The Corps Violated Its Own Regulations by Failing to Prepare an EIS***

The NEPA regulations require an agency to determine under its procedures supplementing the NEPA regulations whether the proposal is one which normally requires an EIS. 40 C.F.R. § 1501.4 (a)(1). As required, the Corps has adopted its own regulations pursuant to NEPA. The Corps' own regulations provide that "actions normally requiring an EIS" include "Proposed major changes in the operation and/or maintenance of completed projects." 33 C.F.R. § 230.6(c). Requiring the removal of all existing vegetation is a major change in the operation and maintenance of the levees. The Corps has violated its own regulation by not preparing an EIS on the ETL and PGL.

## **THE CORPS MUST PREPARE AN EIS ON THE PGL AND ETL**

There are numerous NEPA rules compelling a finding of significance here and showing that an EIS is required on the PGL and that the EIS must analyze the impacts of the PGL and the ETL. If a federal action “significantly affects the quality of the human environment,” the agency must prepare an EIS. 42 U.S.C. § 4332(c); *Anderson v. Evans*, 371 F.3d 475, 487 (9th Cir. 2004) (agency prepared an EA, court held an EIS was required).

The *Anderson v. Evans* decision pointed out that the NEPA regulations define the term “significantly” for purposes of NEPA. 371 F.3d at 487. The court started with section 1508.27 which provides that “significantly” “requires consideration of both context and intensity.” As noted in *Anderson v. Evans*, the context of the action includes “society as a whole (human, national), the affected region, the affected interests, and the locality.” 371 F.3d at 487; 40 C.F.R. § 1508.27(a). Here, all of the context is affected, but none of it is analyzed. The no-vegetation standard applies to thousands of miles of levees throughout the Nation including habitat essential to endangered and threatened species.

The consideration of “intensity” required by section 1508.27 refers to the severity of impact. 40 C.F.R. § 1508.27(b); *Anderson v. Evans*, 371 F.3d at 487. “Critically for this case, to prevail on the claim that the federal agencies were required to prepare an EIS, the plaintiffs need not demonstrate that significant effects will occur. A showing that there are ‘substantial questions whether a project may have a significant effect on the environment is sufficient.’” *Anderson v. Evans*, 371 F.3d at 488.

### ***The Corps’ No-Vegetation Standard is Environmentally Significant Because of the Presence of Impacts That May be Both Beneficial and Adverse***

Under section 1508.27(b), the first “significance factor” is: “Impacts that may be both beneficial and adverse.” 40 C.F.R. § 1508.27(b)(1). That factor is triggered because there are undeniable adverse environmental effects from removing levee vegetation. Even the Corps admits that “clearing vegetation could be considered an adverse modification to critical habitat and possible effects on listed species.” (*White Paper*, p. 17, 18). An EIS is required to analyze the trade-off between adverse and beneficial-if any-impacts of the no-vegetation standard.

***The Corps' Standard is Environmentally Significant Because it may Affect Public Safety***

The second listed “significance factor” is “the degree to which the proposed action affects public health or safety.” 40 C.F.R. § 1508.27(b)(2). The Corps’ own research and literature review establish that woody vegetation often improves levee performance and that, in any event, vegetation decisions must be made on a case-by-case basis. An EIS is required to substitute science for speculation on this issue in which the Corps is requiring the removal of stabilizing vegetation from levees.

***The Corps' No-Vegetation Standard Is Environmentally Significant Because Ecologically Critical Areas and Endangered Species Habitat Are Affected***

Three related significance factors are present. One significance factor is the “unique characteristics of the geographic area such as proximity to ... ecologically critical areas.” 40 C.F.R. § 1508.27(b)(3). The hundreds of miles of levees affected in the Central Valley are ecologically critical areas because the surviving vegetation on and near the levees is critical habitat for endangered species. A second significance factor is “[T]he degree to which the action may adversely affect... or may cause loss or destruction of significant scientific, cultural, or historical resources.” 40 C.F.R. § 1508.27(b)(8). The Central Valley is down to the last 5% of historic riparian habitat, much of which is found on and near the levees. The Corps’ standard requires the destruction of what are significant surviving scientific, cultural, and historical resources.

A third significance factor is “[T]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.” 40 C.F.R. § 1508.27(b)(9). As just one example of impacts to listed species, the National Marine Fisheries Service issued a Biological Opinion to the Federal Emergency Management Agency in September of 2008, describing the serious adverse effects to ESA-listed salmonids in Puget Sound, Washington, resulting from the removal of levee vegetation. According to the expert federal and state agencies, the Corps’ action may at minimum affect critical habitat for endangered species. Even the Corps admits “clearing vegetation could be considered an adverse modification to critical habitat and possible effects on

listed species.” (*White Paper*, p. 17). It is clear that an EIS is required here under NEPA regulations.

***The Corps Standard Is Environmentally Significant Because the Effects Are Controversial***

This significance factor is “[T]he degree to which the effects on the quality of the human environment are likely to be highly controversial.” 40 C.F.R. § 1508.27(b)(4). The agencies with expertise, including the Fish and Wildlife Service, National Marine Fisheries Service, and California Departments of Fish and Game and Water Resources, all maintain that the no-vegetation standard will have significant adverse environmental effects on habitat for endangered and threatened species. There is, at minimum, a substantial dispute about the nature and effect of the Corps’ no vegetation standard.

***The Corps’ Standard Is Significant Because It Involves Unique and Unknown Risks***

There is also the significance factor of “[T]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.” 40 C.F.R. § 1508.27(b)(5). Because the Corps has performed no analysis under NEPA or consultation under the ESA, no one has a clue as to how many endangered and threatened species will be injured or wiped out by removing all that habitat throughout the Nation and California. The Corps’ action does involve unique risks and also involves unknown risks due to the Corps having performed no NEPA or ESA analysis whatsoever.

***The Corps’ Action Is Significant Because of the Precedent it Establishes***

This significance factor is “[T]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.” 40 C.F.R. § 1508.27(b)(6). The very purpose of the *White Paper*, ETL and PGL is to establish a precedent for future actions and the standard represents a decision in principle about a future consideration. The Corps itself declares that “the PGL establishes a process that may require decisions to be made on applications for vegetation variances that could have an adverse effect on the environment.” (EA at p. 3). The Corps’ standard has established a precedent for removing and prohibiting vegetation. The Corps has made a “decision in

principle” that woody vegetation is prohibited on existing levees and will not be allowed on new levees. Moreover, the prohibition of vegetation on “[N]ew federally authorized cost-shared levee projects” is absolute under the PGL. 77 Fed. Reg. 9639.

Unless the district or sponsor seeks and obtains a variance, existing vegetation will be removed and new vegetation is prohibited. The standard and the default position now is that woody vegetation is prohibited on thousands of miles of levees. This is a precedent that applies nation wide, is formally declared to be “mandatory”, and applies to the future forever unless subsequently changed. This profound regulatory change plainly requires an EIS.

***The Corps’ Action is Significant Because of its Cumulative Impacts***

Then there is the cumulative impact significance factor. That is “[W]hether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” 40 C.F.R. § 1508.27(b)(7).

The Corps itself found in a project-specific EIS for the Natomas (Sacramento) levee project significant and unavoidable adverse impacts including “loss of landside and waterside woodlands and shaded riverine aquatic habitats” and “disruption to and loss of existing wildlife corridors.” (Corps/SAFCA Final EIS/EIR, NLIP, Phase 4b Landside Improvement Project, October 22, 2010). The SAFCA Natomas levee project involves a mere 42 miles of levees, yet that one project has significant adverse environmental impacts. But what the Corps has done is to adopt a programmatic standard applicable to all of America and all of California. The Corps’ action does have “cumulatively significant impacts.”

It is unlawful to avoid consideration of the cumulative impacts of removing vegetation from all the levees. Doing so subjects the NEPA decision-making process to “the tyranny of small decisions.” See *Kern v. Bureau of Land Mgmt*, 24 F.3d 1062, 1078 (9th Cir. 2002); *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Nat’l Marine Fisheries Serv.*, 265 F.3d 1038 (9th Cir. 2001). That is exactly what the Corps has done with the ETL and PGL.

***The Corps’ Action Is Significant Because it Threatens Violation of the ESA***

Finally, there is the significance factor of “[W]hether the action threatens a violation of

Federal, State, or local law requirements imposed for the protection of the environment.” 40 C.F.R. § 1508.27(b)(10). The Corps’ action does plainly threaten violation of the ESA by causing the destruction of habitat essential to endangered and threatened species.

In conclusion, the Corps’ action does significantly affect the quality of the human environment. All ten of the “significance factors” are triggered by the no-vegetation standard carried out by the ETL and the PGL. An EIS is required. The Corps’ PGL, draft EA, and FONSI are flagrant violations of everything that NEPA and the ESA stand for.

### **CONCLUSION**

To comply with NEPA the Corps must prepare an EIS, not just an EA, on the PGL. Moreover, the EIS must address the ETL which sets the no vegetation standard, not just the PGL which sets forth the variance process from the standard set by the ETL. To comply with the ESA, the Corps must prepare a Biological Assessment and consult with the Fish and Wildlife Service and the National Marine Fisheries Service on the ETL and PGL.

Sincerely,

/s/ Ronald Stork

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/s/ E. Robert Wright

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