

**CENTRAL VALLEY FLOOD PROTECTION BOARD**

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April 16, 2012

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

Subject: Comments on the Policy Guidance Letter (PGL) – Variance from Vegetation Standards for Levees and Floodwalls Docket Number COE–2010–0007, Federal Register / Vol. 77, No. 33 / Friday, February 17, 2012

Dear Ms. Conforti:

The Central Valley Flood Protection Board (Board) is responsible for managing flooding along the Sacramento and San Joaquin Rivers and their tributaries in cooperation with the U.S. Army Corps of Engineers (USACE). The Board also maintains the integrity of the existing federal flood control system through its regulatory authority by approving projects, issuing permits, and conducting enforcement. The jurisdiction of the Board includes 1,600 miles of levees in California's Central Valley, including the floodways of all tributaries and distributaries of the Sacramento River and the San Joaquin River.

Our Board and staff reviewed the proposed *Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls; Additional Filings (2012 Proposal)*, and find it in conflict with State and Federal law. We submitted specific comments to the previous version of this policy guidance on April 21, 2010. Rather than a specific response, we received a generic response to four general categories of public comments in December 2011, nearly 18 months later. We respectfully request an individual response to the six (6) previous comments that we made.

The 2012 Proposal is particularly disappointing given the extensive time invested by State, Federal, and local agency staff, as well as other interested organizations and individuals, to resolve the problems with the initial proposal in 2010. As required by California legislation, the California Department of Water Resources (DWR) published the Draft Central Valley Flood Protection Plan (CVFPP) in December 2011. Pursuant to the same legislation, our Board is scheduled to adopt this plan by July 1, 2012 and also mandated to consider the many public comments we are receiving over the next three months in public hearings, public workshops, during regular Board meetings, via our website, from public outreach meetings that are currently being held, and from individuals and organizations who are sending comment letters directly to the Board staff. This is a critical timeline, and the Board is attempting an ambitious and necessary effort to provide a framework to improve the Central Valley flood management system. DWR made concessions in its vegetation policies described in the CVFPP, despite the concerns of many stakeholders, with the intent of developing a more collaborative solution to vegetation management issues with the USACE. This effort was apparently made in vain, as the USACE has ignored the attempts by the State to develop solutions and, in so doing, has forced the State and this Board to question the future of what is currently a joint State/Federal effort to manage Central Valley rivers.

The comments below supplement those made in 2010.

1. PGL Paragraph 10a states *"The levee sponsor will have one year ... to submit a vegetation variance request or develop a system-wide improvement framework (SWIF)."* The SWIF Policy fails to contribute to an improved flood control solution because it only addresses PL 84-99 levee repair funding eligibility, rather than proposing comprehensive river system management policy. The temporary eligibility for PL 84-99 repair funding offered by the SWIF Policy does not address these broader problems. Another shortcoming is that the SWIF approach is not an independent pathway to a variance from the USACE engineering technical letter (ETL). The SWIF Policy itself indicates only that it "may complement the vegetation variance request process" and that it "may be useful in development of a vegetation variance request."
2. PGL Reference K – Memorandum, HQ USACE (CECW-HS), Policy for Development and Implementation of System-Wide Improvement Frameworks (SWIFs), November 29, 2011, was released without a formal public comment period. We were not provided an adequate opportunity to comment on the SWIF policy, and request that the SWIF policy be published in the Federal Register so our office can add our comments to the federal record.
3. The Board is very concerned that the draft variance policy was developed by the USACE without addressing the concerns expressed by State or local stakeholders. This action was a departure from the USACE active support and participation in the California Roundtable. Considering the magnitude of the implications that this policy guidance potentially has for California's flood control system, we encourage the USACE to work collaboratively with the California Roundtable and its stakeholders to address the concerns of State and local flood management agencies about this proposed policy guidance.
4. This policy is not consistent with the USACE "vegetation variance letter" dated August 3, 1949, which revised the Standard O&M Agreement to include the following text: "Brush and small trees may be retained on the waterward slope where desirable for the prevention of erosion and wave wash. Where practicable, measures shall be taken to retard bank erosion by the planting of willows or other suitable growth on areas riverward of the levees."
5. We are also concerned that the efforts needed to obtain a vegetation variance for the "legacy levees" under the proposed policy would divert funding and attention away from other critical threats to California's flood system, such as channel capacity, seepage, erosion, structural instability, and seismic loading, that must be addressed together with vegetation management to reduce the risk of flooding. This point has been made repeatedly over the past two years in correspondence to USACE and to the Assistant Secretary of the Army (ASA) for Civil Works from numerous State and local agencies and elected officials, and from members of Congress.
6. The proposed policy guidance states in Section 9 (c), *"Regional variances or variances that cover all levees within a geographical area will not be issued."* The Board's regulatory jurisdiction is for the entire Central Valley of California, including all tributaries and distributaries of the Sacramento and San Joaquin Rivers and the Tulare and Buena Vista basins. We regulate the State-Federal flood control levees in this region by enforcing the California Water Code and the California Code of Regulations. Because our regulatory authority governs a defined region, the vegetation policy variance must cover the same region to be equitable and enforceable. Vegetation variance requests for small sections of

the project levees would result in significant costs and time necessary to prepare and review such requests. Therefore, we strongly recommend that the policy guidance should allow vegetation variances on a regional basis, similar to the Framework approach which applies to California's Central Valley, rather than individual levee systems or portions thereof.

7. Section 9 (d) of the Variance Process states that "*Typically the upper third of the waterside slope, the crown, the landside slope, and within 15 feet of the landside toe (subject to preexisting real estate interest) of the levee needs to remain vegetation free, as defined in ETL 1110-2-571.*" The California Roundtable framework allows vegetation on the waterside levee slope provided that tree limbs are trimmed to 5 feet above grade for visibility and access. Our position is that water side vegetation be retained for habitat and erosion control purposes. The removal of this vegetation goes against public policy and is contrary to law, and will have significant impacts on several endangered or threatened wildlife species including the Delta Smelt, Long-Fin Smelt, Chinook Salmon, Central Valley Steelhead, Valley Elderberry Longhorn Beetle, Giant Garter Snake, Swainson's Hawk, Burrowing Owl, California Tiger Salamander, and Red-Legged Frog. The implementation of this policy would eliminate the last remaining riparian forest in California, and destroy the habitat for several endangered or threatened species. To protect this resource the California Department of Fish and Game and the organization "Friends of the River" have filed suit against this policy for failure to comply with the National Environmental Policy Act (NEPA).
8. PGL Section VII Obligations of the Levee Sponsor, states "*The levee sponsor agrees to maintain the levee system in accordance with the attached approved vegetation variance and assume the responsibility for implementing and bearing the costs of any measures that are required for compliance with the ESA or any mitigation requirements that result from environmental compliance processes such as NEPA or required permits.*" This condition places the entire financial burden on the State of California as sponsor and does not provide any funding from the Federal government to implement this action. It is unreasonable for the USACE to dictate the terms of any policy without sharing the costs or responsibility to implement it. In addition, we believe the policy is inconsistent with Federal and State laws, including but not limited to the Endangered Species Act, National Environmental Policy Act, and the Administrative Procedure Act. The Board incorporates, by reference, the April 15, 2010 comments of the California Department of Water Resources and Department of Fish and Game, which describe the legal deficiencies of the PGL and ETL 1110-2-571, particularly regarding the lack of adequate environmental documentation and the failure to follow necessary procedures.

Thank you for consideration of these comments. We sincerely hope the USACE will withdraw the 2012 Policy Guidance Letter Proposal, engage the Board and DWR on the Central Valley Flood Protection Plan, and work collaboratively to address vegetation management issues in a manner that will continue to provide for public safety while also protecting natural resources dependent on the Central Valley river management system. There is too much at risk to do anything except work together to meet this challenge.

If you have any questions regarding this subject, please contact Jay Punia, the Board's Executive Officer, at (916) 574-0609, or via email at [jpunia@water.ca.gov](mailto:jpunia@water.ca.gov).

Sincerely,



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Central Valley Flood Protection Board

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