



# United States Department of the Interior



## FISH AND WILDLIFE SERVICE

Washington Fish and Wildlife Office  
510 Desmond Dr. SE, Suite 102  
Lacey, Washington 98503

APR 16 2012

Ms. Tammy Conforti  
U.S. Army Corps of Engineers  
441 G Street, NW  
Washington, DC 20314-1000

Dear Ms. Conforti:

We have reviewed the February 17, 2012, Federal Register Notice (77 FR 9637) regarding the Policy Guidance Letter (PGL) describing the *Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls*. Our comments are presented below. Please note that we provided comments previously, by letter dated April 20, 2010, on an earlier version of the PGL (75 FR 6364), and those comments (enclosed) are generally still relevant. While we recognize that some changes were made to the draft PGL in response to previous comments, those changes have not substantially addressed the concerns that we raised in our April 2010 letter. Based on our review of the February 17, 2012, Federal Register Notice, we have the following comments:

1. The PGL should adequately provide for effective regional approaches. We have been collaboratively working with the U.S. Army Corps of Engineers' (Corps) Seattle District, the National Marine Fisheries Service (NMFS), the Washington Department of Fish and Wildlife, the Muckleshoot Tribe, and King County over the last year and a half to develop approaches for managing levee vegetation that maintain levee integrity, but which also provide more benefits to salmonids listed under the Endangered Species Act than the PGL would allow. This work has included the development of a matrix tool to assist in defining the amount and extent of permissible vegetation while meeting levee safety considerations. This approach is based on local conditions, best available science, and the professional experience of the members of the workgroup. The PGL, as proposed, would significantly restrict implementation of this approach. We believe the PGL should allow for a regional approach that considers the conditions that are unique to the Pacific Northwest, and allow for variance decisions to be made by the Corps at the Division/Major Subordinate Command (MSC) level.
2. As proposed, the PGL involves an overly complicated process. Although the PGL creates the option for a vegetation variance from the requirements set forth in the Engineering Technical Letter 1110-2-571, we are concerned that the application process for such a variance will be so onerous that it would rarely be used. The current Seattle District variance process is applied district-wide, while the PGL will require separate variance requests for each affected levee, and will not allow for variance requests for levee systems that function as a unit, or which are hydrologically connected. This approach is inefficient for local sponsors, and will make variance requests expensive and time-consuming. The threshold requirement for even requesting a variance (i.e., the "request must demonstrate that a variance is the only reasonable means to" comply with applicable laws concerning the environment, or protect treaty rights, or "address a

unique environmental consideration, such as to maintain sensitive species populations and to preclude the need for future federal listing under the Endangered Species Act (Act)...”) is also problematic. Protecting treaty rights and ensuring compliance with the Act is the Corps’ responsibility. This responsibility cannot be deferred to non-Federal entities, and given that treaty rights and listed salmonids are an issue throughout the Pacific Northwest region, it seems illogical to require this process for each affected levee.

3. As proposed, the PGL provides inadequate vegetation standards for meeting the biological requirements of listed salmonids. Replacing the current regional variance process with a national vegetation standard is likely to result in the further degradation of salmonid habitat, and prevent the recovery of many listed salmonids in the Pacific Northwest because of the onerous nature of the proposed process, the restrictions on allowable vegetation compared to the existing vegetation, and the elimination of the existing variance. Currently, many salmonids in the Northwest are listed as threatened and/or endangered and the rivers they inhabit are designated as critical habitat. This includes the bull trout (*Salvelinus confluentus*), a threatened species that is under our jurisdiction. The draft recovery plan for the bull trout identifies avoidance of the negative effects associated with bank stabilization and removal of riparian vegetation from dikes and levees (USFWS 2004, pg. 248) as recovery actions.

4. The proposed PGL requires section 7 consultation under the Act, as appropriate, between the Corps and the Fish and Wildlife Service (FWS) and/or the NMFS on vegetation variance requests. Given the minimal amount of vegetation allowed on levees under the proposed PGL, the vegetation maintenance program itself is likely to result in adverse effects to listed species and critical habitat. To date, the national standard for levee vegetation maintenance under P.L. 84-99 has not been the subject of a completed consultation. The FWS recommends the Corps consider the following information relative to completing such a consultation:

- a. The headquarters offices of the FWS, NMFS and the Corps should collaboratively determine if a programmatic consultation approach on the effects of the national standard for levee vegetation maintenance on listed species and critical habitat makes sense considering the scope of effects to NMFS and FWS listed species and critical habitat nationwide.
- b. The issue of maintaining vegetation on levees is critical to providing for the conservation needs of listed salmonids and riparian dependent species on the west coast. It is also likely that some levee sponsors will choose the national standard to stay in the P.L. 84-99 program rather than propose a System Wide Improvement or PGL variance process.
- c. Section 7 consultation at the Division/MSD level on the west coast should occur as a tiered consultation to a national programmatic consultation if the latter is conducted. If it is not, “stand alone” consultation should occur at the Division/MSD level. Then local sponsors that do not choose to prepare a System Wide Improvement or PGL variance process will be able to adopt an Act-approved standard to maintain their eligibility in the P.L. 84-99 program.

5. Meeting Tribal Treaty rights. All Federal agencies have responsibilities to protect tribal trust resources. As part of this responsibility, we believe the Corps has the responsibility to address habitat loss and degradation caused by levee vegetation maintenance that continues to degrade the condition of tribal trust resources. The effects of levees and vegetation management are a significant issue for salmonid populations, given that water temperature and riparian vegetation are limiting factors on most rivers.

This concludes our comments on the proposed PGL. Thank you for the opportunity to review and provide comments on this matter. If you have any questions, please contact John Grettenberger of my staff at (360) 753-6044.

Sincerely,

A handwritten signature in black ink that reads "Ken S. Berg". The signature is written in a cursive style with a large, prominent "K" and "B".

Ken Berg, Manager  
Washington Fish and Wildlife Office

Enclosure (1)

cc:

FWS-R9, Arlington, VA (R. Sayers, J. Miller)  
FWS-R1, Portland, OR (L. Salata, T. Rabot)  
IDFWO, Boise, ID (R. Holder)  
OFWO, Portland, OR (J. Stephenson)

Literature Cited

U.S. Fish and Wildlife Service. -2004. Draft Recovery Plan for the Coastal-Puget Sound Distinct Population Segment of Bull Trout. Volume 1. Puget Sound Management Unit. Region 1. US Fish and Wildlife Service, Portland Oregon. 389 pp.