



## **MUCKLESHOOT INDIAN TRIBE**

### **Fisheries Division**

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April 17, 2012

U.S. Army Corps of Engineers  
Attn: CECW-CE, Tammy Conforti  
C441 G Street NW  
Washington, DC 20314-1000

RE: Process for Requesting a Variance From Vegetation Standards for Levees and Floodwalls,  
Additional Filings - Docket Number 2010-0007 Federal Register Notice - February 17, 2012

Dear Ms. Conforti,

Thank you for the opportunity to respond to the revised draft variance process and Policy Guidance Letter (PGL) for levee vegetation management in the US Army Corps of Engineers' Levee Safety Program. This letter follows our comments on the draft vegetation variance policy issued in 2010, and our 60-day letter dated February 23, 2011 notifying the Corps and National Marine Fisheries Service of our view that the vegetation policies, and failure to consult with the federal fishery services regarding the policies' impact on listed species and designated critical habitat, violate the Endangered Species Act.

The Muckleshoot Indian Tribe holds federally-reserved treaty fishing rights in the Green, White, and Cedar-Lake Washington river basins in Puget Sound. We recognize the Corps' and local levee sponsors' responsibilities for public safety and flood damage risk reduction. However, the Corps levee vegetation policy adversely affects over 45 miles of critical habitat for Chinook and habitat for other anadromous fish in these rivers.

We recognize that some improvements were made in the revised draft PGL and appreciate the efforts of Corps headquarters, Seattle District, and Northwest Division Corps leadership and staff over the last year to address the levee vegetation problem. These improvements include the acknowledgement of the obligation to address treaty rights, ESA, and environmental compliance; the temporary extension of any current regional variance; an option for some vegetated levees to remain eligible for PL 84-99 levee repair funds during the course of a System Wide Improvement Framework (SWIF) plan; and the option for the Corps to submit its own variances in certain circumstances. Despite such improvements, however, it is still uncertain whether the PGL will lead to variances with the flexibility to meet natural resource objectives consistent with the Corps' obligations under the ESA, and its trust responsibility to effectuate tribal treaty rights. The Corps policies must be flexible enough to approve variances with sufficient woody vegetation to maintain well-functioning instream and riparian habitat for fish and wildlife.

Over the past year, the Tribe has participated in the Seattle District multi-agency Green/Cedar River Levee Vegetation Working Group to try to develop levee vegetation solutions that accommodate public safety and natural resource protection. The Green River is an important migration, spawning, and rearing habitat for two ESA threatened species (Puget Sound Chinook and steelhead) and for other salmon that provide subsistence, ceremonial and commercial fisheries for tribal members. The Tribe negotiated a difficult Green River water settlement agreement with the City of Tacoma in 1995, where the Tribe's priority was to establish critical instream flow protection and limit the effects of municipal water withdrawals on salmon. We are concerned that the benefits achieved in this agreement are compromised by actions such as those generated by the Corps' vegetation policy. Since 2005, about 600 trees and countless willows were removed along the Green River levees to comply with the current Seattle District variance (i.e., 4 in. tree diameter maximum). The Green River Temperature TMDL Report<sup>1</sup> completed in 2011 demonstrated that the lower river exceeds state water quality standards for temperature by up to 5.6 °C (7-DADMax) and at times exceeds the lethal threshold for salmon (22 °C, 7-DADMax). Riparian shade deficiency was identified as the key contributor to the temperature impairment. The TMDL modeling indicated that even when all riparian areas along the river, except the levees, are vegetated with full site potential shade, lethal temperatures will still occur in the lower 10 km of the Green River. The TMDL report noted that *"Until the Corps of Engineers 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."*

As part of the Green/Cedar River Working Group effort, a "vegetation matrix" tool was developed for use in a variance request submittal. The matrix specifies tentative maximum vegetation sizes (e.g., 6 -12 in. tree diameter) and spacing according to location on a levee prism and a levee's structural integrity attributes. Because water temperature is a priority concern in the lower Green River, the TMDL temperature model was used to test the temperature effects of the matrix vegetation scenarios relative to existing and natural system potential shade in the Green River. Unfortunately, the matrix vegetation either perpetuated current warm temperatures, or in the scenario with the tallest vegetation, resulted in a small decrease (1.2 °C). A scenario using the national vegetation management standard (i.e., grass on levees) raised the current maximum river temperatures to over 24 °C 7-DADMax. These results suggest that the vegetation matrix limits do not produce enough shade, and that the national standard is not a viable option for Green River levees unless they are set back to allow vegetation between the levee and riverbank. More sustainable measures are needed that include sufficient vegetation on bank levees and setting back levees where possible. Whether the SWIF and variance process will facilitate these outcomes is not certain at this time.

In the NEPA draft environmental assessment for the revised draft PGL, the Corps asserts that revising the variance process does not itself affect the environment or ESA listed species. Instead it is claimed that it is the decision on each variance request that will do so, and that the

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<sup>1</sup> Green River Temperature Maximum Daily Load Water Quality Improvement Report. June 2011. C. Coffin and S. Lee, authors. Washington State Department of Ecology, Publication No. 11-10-046

Ms. Tammy Conforti  
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environmental effects of each variance decision will be properly evaluated before a final decision is made. The Corps suggests that this approach will allow for the most accurate understanding of impacts and the greatest range of options to address them. The problem with this approach is that the Corps has never fulfilled its obligation to assess the significant environmental impacts and consult with the federal services on its mandatory maintenance standards that require the removal of all meaningful vegetation. Having failed to fulfill its obligations under NEPA and the ESA with respect to the impacts of the mandatory vegetation management standards in the ETL 1110-2-71, the PGL attempts to shift the burden of ESA and NEPA compliance to local sponsors in connection with evaluation of the impacts of mitigation measures for adverse effects of implementing those standards.

Rather than evaluating the impacts of efforts to mitigate the Corps vegetation management standards on a piecemeal levee segment by segment basis in individual variance requests, we recommend that the Corps develop regionally appropriate vegetation management standards that address its ESA obligations and trust obligation to Indian tribes. Such an approach is consistent with the Congressional direction of Section 202(g) of the Water Resources Development Act of 1996 to address regional variances and needs on a comprehensive basis, rather than the piecemeal basis that will result from adoption of the PGL. Moreover, development of regionally appropriate standards would be the likely outcome if the Corps were to fulfill its obligation to consult with the federal services under the ESA on its nationwide standards.

In addition to the above concerns with the general approach, following are specific comments on the draft PGL and Enclosures.

We are concerned that the submittal requirement 5 a. (1) Enclosure 3 that "*no significant roots greater than 0.5 inches diameter will enter the levee prism*" may prohibit desirable tree species or tree heights on most levees and planting benches in the Green River. We recommend that the Corps use alternative language that allows sponsors the opportunity to address situations where such a rigid restriction harms natural resources and where larger roots likely pose little risk. Also, we note that the performance history of a levee during past flood events is included only as a submittal checklist item (7) in Enclosure 1. It seems that the performance history of a vegetated or bioengineered levee should be given greater weight in a variance request than is reflected in the draft PGL.

Again, thank you for the opportunity to comment on the revised draft process for requesting a variance from the national levee and floodwall vegetation maintenance standard.

Sincerely,

A handwritten signature in black ink that reads "Isabel Tinoco" with a stylized flourish at the end.

Isabel Tinoco  
Director

Ms Tammy Conforti

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Cc: Will Stelle, Regional Director, NOAA Fisheries Northwest Region  
Ken Berg, Manager, Washington Fish and Wildlife Office, US Fish and Wildlife Service  
Mark Isaacson, King County Water and Land Resources Division  
Philip Anderson, Director, Washington Department of Fish and Wildlife  
Ted Sturdevant, Director, Washington Department of Ecology  
James Weber, Northwest Indian Fisheries Commission  
Laurie Mann, TMDL Lead, US Environmental Protection, Agency Region 10