Santa Clara Valley Water District

5750 ALMADEN EXPWY
SAN JOSE, CA 95118-3686
TELEPHONE (408) 265-2600
FACSIMILE (408) 266-0271
www.valleywater.org
AN EQUAL OPPORTUNITY EMPLOYER

April 17, 2012

U.S. Army Corps of Engineers
Attention: CECW-CE, Ms. Tammy Conforti
441 G Street, Northwest
Washington, D.C. 20314-1000

Subject: Santa Clara Valley Water District Comments on the U.S. Army Corps of Engineers Vegetation Standards for Levees and Floodwalls Policy, Docket No. COE-2010-0007

Dear Ms. Conforti:

On behalf of the Santa Clara Valley Water District (District) in Santa Clara County, California, I am writing to provide comments on the U.S. Army Corps of Engineers (Corps) Vegetation Standards for Levees and Floodwalls Policy as requested in the February 17, 2012, Federal Register, Docket No. COE-2010-0007.

First, we thank you for the opportunity to offer comments and for your continued efforts to address the concerns of numerous stakeholders regarding the Corps Vegetation Policy.

The District is the primary water resource management agency for Santa Clara County in California—the heart of Silicon Valley. The District's mission includes: providing flood protection and environmental stewardship for the county's more than 800 miles of creeks and streams, and ensuring a clean, healthy, and reliable water supply for the approximately two million residents of Santa Clara County. In that role, the District owns, operates, and maintains many miles of levees either built by the Corps or are levees that qualify for PL 84-99 funding in the event of an emergency.

On October 5, 2011, the District Board of Directors voted to support a policy principle which in part stated, ". . . *it is in the District's interest to encourage the Corps to revise this policy in order to (1) prevent required removal of valuable riparian vegetation, and (2) prevent the consequences associated with the Corps "failing" levees that retain this valuable vegetation.*" The full policy principle is included as Attachment 1 to this letter.

In its April 2012 "Transforming Civil Works Brochure," the Corps pledged, among other things, to:

- *. . . build a justifiable and sustainable Civil Works Budget to strengthen the economy, protect the environment, and ensure the quality of life for America's communities and citizens.*
- *Engage stakeholders—the Federal family of resource agencies, State and local governments, interstate agencies, Tribes, and non-government, and private sector partners—to achieve desired economic, environmental, and quality of life outcomes.*
- *Encourage integrated water resources management.*
- *Modernize the portfolio of USACE Water Resources Infrastructure to increase its value to the Nation.*

- *Develop a robust infrastructure strategy to support economic prosperity, global competitiveness, security, and environmental sustainability of water resources.*

- *Conduct a systemic evaluation of the value and interdependence of the full portfolio of USACE water resources infrastructure within a watershed context.*

- *Make risk-informed decisions.*

- *Leverage resources to build water infrastructure.*

While those are laudable transformation targets that the District also shares, the vegetation policy appears to be leading the Corps in a path that is diametrically opposed to those modernization targets.

The District is in solidarity with other California public agencies, environmental organizations, and elected officials in restating that the current Corps *Vegetation Standards for Levees and Floodwalls* policy will not resolve fundamental issues that adversely affect public safety and cause harm to the environment. These issues were extensively documented in the April 15, 2010, letter to the Corps from the California Department of Water Resources (DWR) and California Department of Fish and Game. The District would like to request a delay in finalizing the policy pending consideration and satisfactory resolution of many of the important issues set forth in the DWR letter. Specifically, the issues of concern are as follows:

- The extremely high costs of levee construction and mitigation resulting from this policy will divert limited resources from the remediation of critical risk factors, with little or no improvement in public safety.

- When many flood protection systems were turned over to the local sponsors to operate and maintain, vegetation was already an integral component of the levees and channels. In certain instances in Santa Clara County, the Corps incorporated trees into the levee design. The trees were specifically included within the design of the project to mitigate for impacts to protected species. Therefore, the removal of the trees on existing projects most likely will cause conflicts with the Endangered Species Act for which there may be no feasible alternative mitigation actions.

- The Corps should make a clear distinction between existing levee systems and new federal project improvements. We accept the concept that new levees should be constructed and maintained in full compliance with Corps vegetation policies, but a regionally adaptable approach that recognizes the integration of vegetation is imperative for existing levees.

- The District is located in a geographical area where watersheds are small and flood waters last only hours, instead of days or months as characteristic of the eastern or mid-western parts of our country. This intrinsic flood behavior in itself greatly reduces the flood risk caused by levee failure due to seepage or toppled trees. The fact that the California DWR does not have any record linking levee failure to vegetation issues speaks volumes of the importance of this regional variance. We strongly urge the Corps to develop a levee policy that considers this type of regional variance and is truly science based.

- The recently released variance process is so stringent, burdensome, and expensive that variances are unlikely to be sought or issued except under specialized, local circumstances. The layers of approval required in the new process without specific timeframes could stretch approvals of variances out to years for approval.

- The District participated in the preparation of and fully supports the detailed comment letter sent by the California State Association of Counties (CSAC). A copy is included as Attachment 2.

In light of the fundamental concerns we and many others have with this policy, we request that the Corps delay the implementation of this policy until all parties' concerns can be addressed in a fashion that supports the Corps' goal of transformation and modernization efforts. As a path forward, the Corps is requested to consider the following options:

1. Recognize and acknowledge the millions of trees that are integral parts of thousands of miles of levees that provide vital food and cover for wildlife in California;

2. Build in a self-certification flexibility by allowing levee owners to retain trees where they are needed for habitat and levee integrity based on hydrologic and geotechnical findings.

Please do not hesitate to contact me at (408) 265-2607, extension 2084, or by e-mail at ncamacho@valleywater.org.

Sincerely,

Norma J. Camacho
Chief Operating Officer—Watersheds

Attachments
sw:fd
0417a-l.docx

ATTACHMENT 1

Santa Clara Valley Water District
2012 Legislative Proposals and Priorities

U.S. Army Corps of Engineers (Corps) Levee Vegetation Policy

SUMMARY OF LEGISLATIVE NEEDS

The Corps currently requires all vegetation other than grasses to be removed from levees and within a 15-foot buffer zone on either side of Corps-inspected levees, which often provide high quality riparian habitat. If the District doesn't remove the vegetation, the Corps could "fail" the levee and remove it from its rehabilitation and inspection program, which would then alert FEMA and others that the levee is unacceptable, and eliminate the possibility of Corps funding for flood-related work. Consequently, it is in the District's interest to encourage the Corps to revise this policy in order to (1) prevent required removal of valuable riparian vegetation, and (2) prevent the consequences associated with the Corps "failing" levees that retain this valuable vegetation.

DISTRICT'S APPROACH TO ADDRESS LEGISLATIVE NEEDS

The District intends to seek federal legislation or appropriate Corps policy changes, in concert with partner organizations and associations, to achieve the desired legislative needs.

Attachment 2

California State Association of Counties

1100 K Street
Suite 101
Sacramento
California
95814

Telephone
916.327-7500

Facsimile
916.441.5507

April 16, 2012

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

RE: Docket number, COE–2010–0007
Corps' Policy Guidance Letter (PGL) – "Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls"

Dear Ms. Conforti:

The California State Association of Counties (CSAC) appreciates the opportunity to offer comments on the Army Corps of Engineers' (Corps) Policy Guidance Letter (PGL) – "Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls" published in the Federal Register dated February 17, 2012.

CSAC represents all 58 counties in California before the State Legislature, administrative agencies and the federal government. The following comments and recommendations are based upon the technical input provided by our member counties, including local flood and stormwater management agencies, most of which have direct experience with the Corps' inspections and vegetation requirements for levees and floodwalls.

Background (FR Pg. 9638): The Draft Policy Guidance Letter (PGL) cites requirements of Section 202(g) of the Water Resources Development Act (WRDA) 1996 and Engineering Regulation (ER) 500-1-1 regarding the need to seek variances to allow vegetation on levees to remain. However, this PGL fails to consider several important points.

- WRDA 1996 *directed* the U.S. Army Corps of Engineers (Corps) to review its vegetation management guidelines to "address regional variations in levee management and resource needs." However, PGL Paragraph 9.c. specifically prohibits regional variances. Local agencies in California are currently managing flood protection systems full of vegetation. These facilities are safe and provide the designed level of flood protection. These same local agencies view vegetation as the least likely cause of a levee failure and would direct their limited resources towards the most likely cause of levee failure. It is this type of regional variation in levee management and resource needs that the PGL does not address.
- Woody vegetation was incorporated into the original design of many Corps-designed and built levee projects. Some of this vegetation installed by the Corps was mitigation for project impacts and is required by regulatory permits to be maintained and not removed.
- The Corps has in the past revised Operations and Maintenance Manuals for levee systems to allow woody vegetation on levee slopes (e.g., the manual for the Sacramento and San Joaquin Rivers in 1955).
- The Corps' current initiative to limit, if not eliminate, woody levee vegetation was prompted by inquiries to and criticism of the Corps on the damages to levees resulting from the 2005 Hurricanes Katrina and Rita. However, the Corps' own post-disaster 2006 Interagency Performance Task Force Final Report *does not* cite woody vegetation as being a factor in the failures of the levees in the hurricanes' region.
- The Corps cites no documentation that links actual levee failures to the presence of woody vegetation.

In short, it appears that the Corps seeks to subject levee owners nationwide to requirements that are inconsistent with Federal legislation, the Corps' own past authorizations, in several cases the Corps' own levee designs, and the Corps' own documentation and analysis, without any actual demonstrated need for these inconsistent requirements.

Eligibility Requirements (FR Pg. 9638): This PGL, unlike the 2010 PGL, does recognize the need for local sponsors to comply with other laws regarding the protection of environmental and cultural/historical resources, and does allow the Corps to request variances for levees in which vegetation was part of the Corps' original design. However, the policy needs to clarify that compliance with existing law includes meeting Federal and State permit and mitigation requirements. Also, rather than having local sponsors be dependent on the Corps to take the initiative to seek variances to accommodate their own designs, the policy needs to be revised to grant automatic variances for otherwise well-maintained Corps-designed levees that originally incorporated woody vegetation.

The eligibility requirements are extremely limited, effectively prohibiting the vast instances of benign vegetation on levees. PGL Paragraphs 6.a.1-3 limits variances to when they are the only means to comply with environmental laws, Tribal Nations treaties, or to address unique environmental considerations. This eligibility criterion completely rules out the possibility a variance for levee vegetation that is not a threat to public safety.

Process (FR Pg. 9638-39): The variance process described in this PGL involves several layers of Corps offices, with the requirement that Washington, DC Headquarters make the final approval of a variance request. With time limitations being imposed on only one of these layers (Agency Technical Review [ATR], 90 days), it is apparent that the variance process can take several years. This poses problems for local sponsors with imposed deadlines to obtain their variances before they either lose their eligibility to remain in the Corps' Public Law (PL) 84-99 program, or must remove the vegetation (and likely violate other laws) to maintain their PL 84-99 eligibility.

The following also needs to be considered in regards to the process described in this PGL:

- The process involves numerous layers of Corps offices in every variance decision. The PGL identifies seven Corps signatories for variance approval.
- The Corps faces the prospect of receiving a large number of variance requests from local sponsors nationwide.
- This PGL is requiring an extensive amount of information and engineering analysis in the variance request applications.

It is apparent that the Corps will need to employ a large number of personnel to process the variance applications. It is the local sponsors' understanding from their interaction and discussion with Corps personnel, that the Corps does not have sufficient personnel to handle its current workload, let alone the increase this PGL is proposing. Therefore, it is apparent that the Corps will have to:

- Hire additional personnel/acquire additional resources;
- Re-allocate personnel/resources from other Corps endeavors (e.g., operation and maintenance, regulatory [which the Corps also seeks to expand with its expanded definition of jurisdictional waters], Civil Works); or
- Prolong the variance process to the point that local sponsors' PL 84-99 eligibility will likely be put into jeopardy.

The Corps' policy needs to be revised to allow the Corps' Division Commanders to make the variance decisions. The policy also needs to be revised to either:

- Impose deadlines on the Corps to make the variance decision before the deadline for local sponsor compliance; or
- Extend the deadline for local sponsors who have variance applications under the Corps' review.

Vegetation Variance Request Submittal Requirements (FR Pg. 9639, and 9641-48): The policy in this PGL is requiring local sponsors and, for certain levees, the Corps' District Commands, to submit their variance request applications to the Corps within two years of the date of the finalization of the PGL. However, this PGL requires an extensive amount of information and engineering analysis (seven pages were needed in the Federal Register to just specify the requirements). As an example, the PGL specifies 2 Dimensional/3Dimensional analysis, sediment transport analysis, adapted bridge scour analysis, hydraulic analysis of full range of flows and combination of flows (FR Pg 9644). The costs associated with preparing such a detailed application and doing the requisite engineering analyses are significant, and will likely require local sponsors/District Commands to take considerable time to go through their own budget processes to obtain the needed funding-- if the local sponsors/District Commands even have sufficient financial means to undertake the work. It should be noted that public agencies in California, including flood protection districts, cannot raise their fees or assessments without voter approval. The current recession's impact on employment and personal income in California makes such approvals difficult, if not impossible, to obtain. It is therefore very likely that many local sponsors/District Commands will not be able to complete their applications, or even begin to undertake the work, within this PGL's specified timeframe.

This PGL, without any demonstrated actual need (i.e., citation of documentation of actual levee failures due to woody vegetation), is requiring local sponsors to undertake a considerable amount of work at great expense, in competition with other public needs (e.g., critically needed flood protection maintenance and upgrades, water quality compliance, etc.) and likely in conflict with other Federal and State laws. Otherwise, local sponsors risk losing eligibility to remain in the PL84-99 program, a program to which their taxpayers are already contributing and is vital for flood damage prevention/minimization and disaster recovery.

The PGL states that variances are unlikely where the analytical prism is equal to or larger than the existing levee. It appears the PGL is only intended for a very specific and narrow case where vegetation exists on a planting berm under a previous variance/deviation. Given these requirements, approximately half of the project levees in the Central Valley will not qualify for a variance. The intent of Public Law 84-99 was to provide federal assistance and investment in the nations existing flood protection system. The Corps' PGL is effectively reducing the number of agencies that will be eligible for federal investment in our nation's flood protection system. This seems counter to the intent of Congress in enacting Public Law 84 - 99.

Special Considerations (FR Pgs. 9639-9640): This PGL, unlike the 2010 PGL, clarifies that:

- Federally cost-shared levees shall from now on be designed with no woody vegetation on or within 15 feet of the toes of the levees.
- The Corps will not issue variances on a regional scale. Variances will have to be issued on the basis of individual levees/levee systems.
- The Corps will take regional conditions into consideration when evaluating variance requests.

- The Corps will require that most of the levee and areas adjacent to the toe, except for the lower third of the levee's waterside slope, remain free of woody vegetation unless the local sponsor can prove that it is absolutely necessary to keep the vegetation to comply with other laws, treaties, and Executive Orders.
- The Corps' lack of identification in its past levee inspection reports of vegetation as a deficiency does not constitute an existing variance or approved deviation from the Corps' new vegetation policy.
- The variance process may be implemented as part of a system-wide improvement framework (SWIF).

Although the Corps has provided clarification and some flexibility in letting some woody vegetation remain on existing levees, the policy in this PGL still imposes significant burdens on local sponsors, and threatens much existing landscaping on properties adjacent to levees, impacting not only local sponsors but likely a significant number of property owners who are not responsible for maintenance of the levees. The Corps proposes to impose these impacts without any demonstrated actual need (i.e., citation of documentation of actual levee failures due to woody vegetation) for the action.

Timeframes for Existing Vegetation Variances or Other Vegetation Deviations (FR Pg. 9640): The policy in this PGL is requiring local sponsors to submit their variance request applications to the Corps within two years of the date of the finalization of the PGL. As stated above, the time needed for local sponsors, and for certain levees the Corps' District Commands, to budget for the considerable costs and to undertake the considerable amount of work to complete the variance applications may exceed the 2-year timeframe, thus jeopardizing the local sponsors' PL 84-99 eligibility.

- Paragraph 10. Timeframes do not address variance requests under eligibility Paragraphs 6.a.1-3.
- 10.a. applies to requests under Paragraph 6.b.1 levees with existing variances or deviations;
- 10.b applies to levee sponsors with existing variances or deviations;
- 10.c. applies to eligibility under paragraph 6.c.2 and/or 6.c.3, federally authorized levees where vegetation was previously a part of the design and/or where existing Operations Manual allows vegetation within the vegetation free zone. There is no discussion or acknowledgement of variances for locally built, owned and maintained levees where vegetation was not previously allowed by variance, deviation or cited in an O&M manual.

Environmental Compliance (FR Pg. 9640): This PGL clarifies that the Corps places the entire responsibility on the local sponsors to comply with all environmental laws, because the local sponsors: "[choose] to participate in Public Law 84-99." The Corps' position fails to recognize that many of these environmental laws were enacted long after local sponsors began their participation in the PL 84-99 program. PL 84-99 was enacted in 1955. The National Environmental Protection Act (NEPA) was enacted in 1969. The Endangered Species Act (ESA) was enacted in 1973. The CWA was enacted in 1972, and the attendant Corps 404 permit regulations were promulgated in 1986. In California, the California Environmental Quality Act (CEQA) was enacted in 1970, and habitat regulation by State agencies started in the mid-1970s. Regulation of noise and proximity under the 1918 Migratory Bird Treaty Act occurred after 2000. As a result, many local sponsors became burdened with requirements that were not in place at the time they entered into Operation and Maintenance agreements with the Corps. By now jeopardizing local sponsors' PL 84-99 eligibility with this new requirement without

attendant regulatory relief or documentation showing actual cases of levee failure due to woody vegetation, the Corps appears to be engaging in an arbitrary and capricious action.

Therefore, the Corps should suspend its proposed levee vegetation policy until there is documentation of significant numbers of regional levee failures due to woody vegetation. If the Corps is to pursue the policy stated in this PGL, then local sponsors who cannot obtain variances need to be exempted from federal compensatory mitigation requirements when complying with the Corps' levee vegetation requirements. Also, the Corps needs to be the entity to meet federal and state compensatory mitigation requirements when ordering a local sponsor to remove from a Corps-constructed levee vegetation that was not previously identified as an issue in Corps inspection reports prior to 2007, the year the Corps initiated its efforts to promulgate the proposed levee vegetation policy.

Submittal Process for New Vegetation Related Science and Technology (FR Pgs. 9640-9641): This PGL added a process for local sponsors to submit new science or technology related to vegetation for Corps consideration. The process requires that the new science/technology be peer reviewed prior to submittal to the Corps. However, such peer review may take one to two years by itself, which would render brand new science/technology unavailable for use by local sponsors needing to meet the Corps' two-year deadline for their variance application submittals. The Corps needs to extend this deadline to accommodate peer review of new science/technology.

In addition, the Corps website (https://ten.usace.army.mil) cited in the PGL where scientific information is posted is inaccessible.

Enclosure 4 – Scenarios and Timelines for Attaining Compliance with USACE Standards: The flow chart cites only two paths, Scenario A where a levee receives an "unacceptable" inspection rating and Scenario B, where the levee is active and complies with standards with current vegetation variance or other deviation. Scenario A does not have the possibility of a vegetation variance (where none existed before); only a SWIF and compliance with standards is offered. Scenario B acknowledges a variance, but only for levees that are already active in PL 84-99 and with a current Vegetation variance or other vegetation deviation. It is unclear whether the Corps allows a vegetation variance for levees that don't already have a variance or deviation. Enclosure 5 only identifies scenarios for pre-existing variances/deviations.

The SWIF and PGL are supposed to be integral processes; however, the two documents appear disjointed. As a prime example, the approval authority for two the processes are with separate entities within Corps Headquarters. The SWIF is approved by the DCO/HS and PGL variances are approved by the Levee Safety Officer. In addition, the PGL approval timeline is not specified in the SWIF process. The SWIF/PGL combination also does not resolve the question of benign vegetation on levees. The "scorched earth" approach simply proposes an approach that dictates: comply with a narrow inflexible policy or be rated unacceptable and designated inactive under the PL 84-99 program.

Conclusion and Recommendations: A better approach would be to recognize that vegetation is not always detrimental to levee safety, especially in the western parts of the United States. In parts of California, flood channels are dry for the better part of the year due to the dry climatic conditions. These channels experience sporadic storm flows for only 20 to 30 days out of the entire year, often at very low levels. With such infrequent and short flows, the typical fear of seepage is not a threat and vegetation is not a major concern. In certain conditions, vegetation is not desirable and flood protection agencies want to manage and reduce vegetation.

However, a blanket prohibition of vegetation is not based on regional conditions and certainly not sound policy.

A regional variance or exemption should be tailored to the level of risk. The following criteria should be used to identify levees that have minimal risk and should be eligible for a regional vegetation variance or exemption:

- Levees that experience high flows less than 30 days per year (short residence time)
- Levees that serve only to provide freeboard
- Levees that have concrete lining or revetment
- Levees with subcritical flow
- Levees already accepted in the PL84-99 program
- Levees with historical vegetation approved/required by the Corps, with no history of performance concerns and which have been maintained in substantial conformance with Corps approved O&M Manuals

Recently, the Corps national policy development has shifted towards a risk-based approach; however, the PGL is a surprising reversion to narrow and restrictive standards-based policy making. The PGL ignores the regional diversity of California counties' flood protection systems and squanders the opportunity to address safety with reasonable and flexible policy.

In light of the fundamental flaws of the proposed PGL, we respectfully request the following:

1. Delay the implementation of the Corps policy on levee vegetation management;
2. Seek modification to the policy that:
    a. considers regional variations across the nation as directed by Congress in the 1996 WRDA Section 202(g);
    b. includes variance and exemption provisions where appropriate;
    c. conforms to other federal and state laws and allows for risk-based and science-based management decisions;
    d. includes local government in a transparent and collaborative process; and
    e. delegates limited authority to approve variances and exemptions to Corps Division commanders.

Thank you for the opportunity to comment. We look forward to viewing your response to our comments and to a revised process in the near future.

Sincerely,

Mike McGowan

Supervisor Mike McGowan
CSAC President

cc: The Honorable Jerry Brown, Governor, State of California
Mark Cowin, Director, California Department of Water Resources
Charlton Bonham, Director, California Department of Fish and Game