

Comments on docket number COE–2010–0007 – Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls

1. The proposed action goes beyond describing an administrative process, as implied by the title, and includes actions that may adversely affect the environment, and therefore the FONSI is inadequate.

Paragraph 1, Purpose; states the policy guidance letter revises the procedures for obtaining a variance. But paragraph 10 states that all existing variances may no longer be valid. Rescinding existing agreements is an action beyond a mere procedural change and requires environmental review. Even though the word “may” is used to provide for the possibility of retaining existing agreements, the fact that the potential exists for this action to result in the loss of a waiver and subsequent removal of vegetation requires a NEPA analysis and may require ESA consultation as well. The FONSI that has been prepared is inadequate in light of this feature of the policy. The policy should either be amended to remove the requirement to submit applications for existing waivers or a NEPA review undertaken and ESA consultation completed if the NEPA review indicates impacts to listed species.

2. The applicability of the variance is so restrictive, that no variance is likely to be issued. This hinders the ability to achieve the stated purpose.

Paragraph 6.a.(1) states that the requested project design must be the “only feasible means” to obtain the objectives of preserving, protecting, and enhancing natural resources and/or protecting the rights of Native Americans. Vegetative systems are dynamic, complex, living systems. There are a myriad of combinations of plants and the physical environment that may prove capable of achieving desired design criteria. To limit the variance to only a single option, i.e. the only feasible means, likely results in no variances being issued, since another plausible alternative will likely be available in every case. Functionally this removes the ability to use vegetation as a management tool that could result in improved environmental condition, better protection of public safety and property, and preservation of cultural resources. The policy should be amended to allow any alternative that meets design criteria.

3. Certain data requirements which currently cannot be provided (technical information is not available) create a default outcome of a denial of the variance.

Paragraph 7.c.(5) requires, in part, that the factual submittals include the typical extent of the root systems of species at maturity to be allowed on the levee. The

Corps has recently conducted an exhaustive and comprehensive literature review and found a paucity of information on this subject. Only a scant handful of papers were found. As a result, a research program is underway to better characterize the nature of plant rooting in levees. To require this information as a condition of completeness of the application means that no one will be able to fully satisfy the application requirements. This creates a default rejection of the variance. The policy should change the requirement for root zone information to an optional submittal.

4. Environmental compliance is misplaced with regards to existing waivers.

Paragraph 1 requires all existing variances to seek re-approval through the process in this Guidance Letter. Paragraph 10 invalidates all existing variances, agreements, or other deviations from existing rules unless a new application for variance is submitted by September 30, 2010 following the process established by this guidance letter. Paragraph 11 requires that the applicant is required to provide all NEPA and ESA compliance. However, the act of invalidating an existing waiver, variance, agreement, or other deviation is accomplished by this rule, which is a Corps action, not an applicant action. Therefore compliance with NEPA and ESA for any invalidation should be undertaken by the Corps not the applicant. The applicant is acting only in a ministerial role, responding to the direction imposed by this letter, and is not the lead entity. The applicant also does not have control over the determination of whether to retain or void an existing variance or other form of waiver, and therefore cannot represent the actions that might be taken to avoid or impose environmental harm. Given the bias in the policy toward disapproving a variance, the requirement for all existing waivers to be resubmitted likely results in significant environmental impacts. The Corps should conduct environmental compliance for invalidating existing waivers.

5. Preventing participation in PL84-99 programs as a result of either rejecting reapplication for an existing waiver or failure to submit an application for reconsideration of an existing waiver is inappropriate.

Levees maintained pursuant to existing waivers comply with program responsibilities. Withdrawing PL 84-99 support for these areas because of a policy change is inappropriate. If an existing waiver is now considered too great a risk to retain, the Corps should provide assistance to the local maintaining agency and time to respond to the new maintenance requirements. Simply voiding a waiver puts a local agency in jeopardy without a means to respond.

6. The Guidance Letter conflicts with regional policy under development.

In California, a discussion of how to manage vegetation on levees has been under way between the Corps and local levee managers for a number of years. Currently there is a regional roundtable that has taken on the role of developing technical information to inform decisions about where to allow or remove vegetation and what forms of vegetation are acceptable. The Guidance Letter policy makes no provision for the outcome of this work and contradicts the intent of the work, which is to establish a regional guidance on the subject as opposed to the system or project specific focus. Paragraph 4 cites WRDA and includes the idea that the Corps is to address regional variations in levee management and resource needs. The Guidance Letter interprets that purpose as requiring a single uniform policy. However WRDA, by its very wording, recognized variation in needs and therefore provides for regional differences. The focus on individual levees, Paragraph 1, and levee systems, Paragraph 5, mistakenly focuses attention on narrow physical features of levees. The current regional roundtable approach being conducted in California is consistent with WRDA and better addresses regional needs than the policy proposed in the Guidance Letter. At a minimum, the Guidance Letter should consider any regional policy that emerges or currently directs vegetation management. A better approach would be for the Guidance Letter process to only apply where regional policies do not exist. Paragraph 9.a. should be amended to defer to regional policies.

7. The Guidance Letter does not acknowledge any beneficial effects of vegetation in regards to safety, structural integrity, and functionality of levees or environmental enhancements.

Paragraph 7.c.(4) requires description of measures designed to prevent or mitigate vegetation impacts. Nowhere are the structural benefits of vegetation considered. Vegetation has the ability to defend against various types of erosion and surface failure. Slope stabilization studies imply that vegetation can also provide structural integrity to the core of the levee, and help stabilize the earthen material exposed to adverse conditions. Particularly in geologically active areas, vegetative root networks can contribute to mitigating hazards from cracks in levees associated with ground movement. The policy should consider and request information related to anticipate structural benefits of vegetation. The policy also does not consider the value of what is being protected by the levee in comparison to the value of the ecological features the levee provides. In some cases vegetation provides habitat for endangered species, while the lands protected by the levee have the ability to recover from flood exposure, or are of limited value. In these cases, the value of protecting the endangered species by preserving vegetation on levees may exceed the potential loss from a levee failure, and in such a case the vegetation should be preserved. The policy should be amended to

consider such situations. Paragraph 9.e. should be amended to provide for alternative vegetation benefits.

8. The policy does not adequately consider the timing, staging, and risks of vegetation removal.

In situations where vegetation, particularly woody vegetation, has established on levees, the process of removing that vegetation can pose additional risks to the levee. In cases where a vegetation variance is denied, the wholesale removal of vegetation at one time can create potential for sloughing, piping, scour, or ground settling that pose greater hazards than leaving the vegetation in place. This is primarily due to the decomposition of a large amount of soil biomass in a short time interval and the commensurate loss of chemical and physical bonding between root and soil. The Guidance Letter offers only provisions for allowing or denying the variance, but does not allow for staged removal of undesirable vegetation. The Guidance Letter creates an intractable situation where a denial of the variance may be required, but issuing a denial may lead to a greater risk of levee failure. The policy should be changed to provide for conditional variances which stage management actions to provide for optimizing risk reduction for both public safety (including risk to property loss) and the environment.

9. The policy does not consider the climate implications of removing vegetation.

Retaining or increasing vegetation has the potential to contribute to carbon sequestration and offset adverse climate impacts produced by other flood system management actions. Conversely, removing vegetation would likely be done with mechanized equipment that emits carbon and would deplete the system of sequestration potential. The balance of climate impacts verses local flood risk management should be considered in the imposition of this policy and in the granting or denial of any variance application. The Guidance Letter should be amended to provide that climate impacts be considered in issuing or denying variances.

These comments are provided by Stefan Lorenzato, 1101 Kent Drive, Davis CA. as a concerned citizen and do not reflect the position of any agency, business, or non-profit organization.