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# CALIFORNIA CENTRAL VALLEY FLOOD CONTROL ASSOCIATION

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By email – Douglas.J.Wade@usace.army.mil

U.S. Army Corps of Engineers  
Attn: CECW-CE  
Douglas Wade  
441 G Street, N.W.  
Washington, D.C. 20314-1000

Dear Mr. Wade:

The California Central Valley Flood Control Association represents approximately 70 local agencies tasked with the management and operation of flood control facilities in California's Central Valley. Most of the agencies are local sponsors, partnering with California's Central Valley Flood Protection Board as the non-Federal sponsors for the Sacramento and San Joaquin River Flood Control Projects.

We appreciate the opportunity to comment upon the proposed "Process for Requesting a Variance From Vegetation Standards for Levees and Floodwalls," published in the February 9, 2010 Federal Register (hereinafter "Process"). We applaud the U.S. Army Corps of Engineers (Corps) for attempting to develop a consistent and thoughtful way of approaching variances for approval of vegetation on levees. However, we believe there are some fundamental flaws in the draft Process as currently proposed.

We have attempted to organize our comments below by topic for ease of reading. We welcome the opportunity to have a dialogue with you on these comments and are available to discuss any of them at your convenience.

## **Standards for Approval**

The draft Process sets an unduly restrictive standard for approval. The draft Process sets the standard of approval as "the only feasible means" to preserve, protect, and enhance natural resources." While the statutory basis for the Process requires a coherent and coordinated policy to address regional variations, it does not use language suggesting that variations from the coherent and coordinated policy must meet a standard of "the only feasible means." Indeed, depending upon how the term feasible were to be defined (it is not defined in the Process, leading to further confusion), it is possible that no variance request would ever meet this standard. The process must instead acknowledge that our nation's laws require a balancing of interests between public safety and environmental protection. This comment should not be interpreted as suggesting that environmental interests can or should trump public safety

concerns; rather, we are saying that where public safety standards can accommodate environmental considerations, they should do so. Such an accommodation standard could be phrased as “least impactful,” or “most practicable,” or “in a manner which does not compromise public safety.” But the standard you have laid out (the only feasible means) is far more draconian, and unnecessarily draconian. In a later section of the Process you note that “the variance should not include areas for which there are reasonable alternatives.” This phrase (reasonable alternatives) sets a much better standard by examining the “reasonableness” of the action, as opposed to the much higher standard of “only feasible means.”

We also note inconsistencies about the standards to be applied: the basis of approval by the District safety officer (“acceptance or non-acceptance”), the basis of approval by the District and Division (“accept or reject”), and the basis of approval by Headquarters (“concur or non-concur”). Is there a basis for this different use of language? If not, we suggest that the same language be used to avoid confusion.

We also question an approval process which requires four separate reviews and approvals (District safety officer, District commander, Division commander, and Headquarters). Such a process extends the time and costs of consideration without necessarily providing a benefit from four levels of review. We recommend that two levels be trimmed out, perhaps just including the District safety officer and the Headquarters review.

### **Scale of Variance Requests**

While it is reasonable for the Corps to request sufficient data to evaluate the request, the Corps must be prepared to process requests that arise from different regional conditions – indeed, this is the purpose for the variance process. As such, the Process needs to acknowledge that in California’s Central Valley many of the rivers on which Federal flood control systems exist have fish populations protected under the Endangered Species Act. These populations demand adequate riparian riverine habitat, which may result in variance applications which will cover many miles of levee. If the Process requires data to be submitted on a scale where all “plant location and species” are identified in plan view, the Process will generate excess work for both the applicant and the reviewers (again, four levels of reviewers). It would therefore be appropriate for the Process to allow different levels of data submission depending upon the circumstances.

### **The “Typical” Cross-Section**

It is reasonable for the Corps to aim for the management of levee systems that do not have vegetation on the upper-third of the riverside slope, on the crown, on the entire land-side slope, or within 15 feet of the land-side toe (subject to pre-existing right-of-way). But if your Process does not acknowledge exceptions to that rule for good cause, you are ignoring the history of the various systems that protect our Nation. For example, some vegetation on or around California levees was “grandfathered” into the system when the Federal levees were constructed. Some of this vegetation is guaranteed to the grantor of the land when the original real property grants were obtained for the Federal project. Some of this guaranteed vegetation, which the Corps agreed to in deeds, is located on the land-side slope or within the 15 feet. The Corps cannot adopt a new variance policy which simply ignores these property rights which the Corps previously agreed to.

A related issue is that the Process does not provide any explanation about the phrase “subject to pre-existing right-of-way.” This phrase should be clearly defined. We believe that this phrase means that where the project was constructed with less than the 15 feet of right of way, the Process will not apply and no variance is required beyond the actual right of way. There are significant portions of the Sacramento River Flood Control Project where there is no right of way, or only 10 feet of right of way. A clarification of the Corps’ intent in this area is necessary, assuming that the Corps intends to honor the real property rights in play.

### **Relationship to 208.10/408**

The Draft Process says that if implementation of a variance will modify a federally authorized levee, a Section 208.10/408 review will be necessary. This sentence must be explained. We presume that for any existing vegetation which would be permitted (or re-permitted in the case of an existing variance), no such review will be required because the implementation is not a physical modification of anything. Where new vegetation would be planted, but the levee prism would not be adjusted, we assume that you are simply seeking to assure no negative hydraulic impacts from the planting, presumably associated with a higher roughness co-efficient. If you intended something else with this statement, we request clarification.

### **Relationship to NEPA, ESA, CEQA, Etc**

Because the draft Process has the effect of canceling existing variances, with the requirement that the previously covered vegetation would now have to be removed if not re-approved (by four levels of reviewers), the draft Process is not simply an administrative action; rather, it is an action that has the potential to significantly impact the human environment. Therefore, the Corps’ draft EA is not adequate, and the Corps has failed to comply with NEPA. It is clear under this circumstance, especially with the National coverage of the draft Process, that an EIS will be required.

On a related issue, keeping the existing vegetation in place is not a “government action” which requires compliance with NEPA and ESA. Rather it is the existing condition or baseline. If the Corps seeks to adopt a policy which requires local communities to seek waivers for that existing vegetation, it is the Corps’ actions (not that of the local communities) which trigger (if triggered at all) the provisions of NEPA and ESA. Therefore, if any NEPA or ESA coverage is required, the burden of such coverage should be on the Corps and not on local communities.

We also note that the proposed deadline of September 30, 2010 for reapplying for existing vegetation is not possible. In California, all government actions are subject to the California Environmental Quality Act (the State equivalent to NEPA). It is possible that prior to applying for a new variance for existing vegetation that local and State agencies will be required to comply with CEQA, which may require the production of an Environmental Impact Report (the State equivalent of an EIS). This is impossible in the time that you propose providing.

### **Special Issues for California’s Central Valley**

In California, a discussion of how to manage vegetation on levees has been underway 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

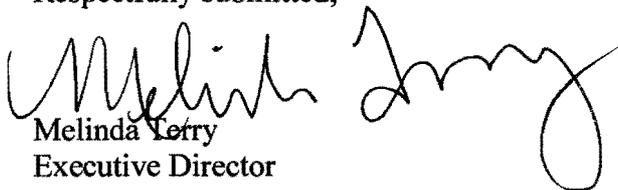
intent of the work, which is to establish a regional guidance on the subject. Paragraph 4 cites WRDA and includes the idea that the Corps is to address regional variations in levee management and resource needs. The Guidance Letter interprets that purpose as requiring a single uniform policy. However 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 Process. At a minimum, the Process should consider any regional policy that emerges or currently directs vegetation management. A better approach would be for the Process to only apply where regional policies do not exist. Paragraph 9.a. should be amended to defer to regional policies.

### **The Beneficial Effects of Vegetation**

The draft Process does not consider the structural benefits of vegetation. Vegetation has the ability to defend against various types of erosion and surface failure. In addition to their obvious ecological and species benefits, recent slope stabilization studies indicate 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 Process should consider and request information related to anticipate structural benefits of vegetation. Accordingly, the proposed Process should be amended to recognize the ecological and structural benefits of vegetation.

We appreciate the ability to provide these comments. If you have any questions, please contact me at the number above or contact the Association's attorney, Scott Shapiro at (916) 444-1000.

Respectfully submitted,

  
Melinda Terry  
Executive Director

Cc: Association Members  
Association Engineer, Joe Countryman  
Association Counsel, Scott Shapiro