



# United States Department of the Interior



## FISH AND WILDLIFE SERVICE

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In Reply Refer to:  
FWS/R1/AES/HC

APR 20 2010

Douglas J. Wade (CECW-CE)  
U.S. Army Corps of Engineers  
441 G Street, NW  
Washington, DC 20314-1000

Dear Mr. Wade:

This responds to your request for comments on the subject action in the February 9, 2010, Federal Register. Our response is based on our review of the Army Corps of Engineers' (Corps) Federal Register notice, draft Environmental Assessment (EA), and Finding of No Significant Impact on the subject action.

The proposed revisions involve the establishment of a national standard for obtaining a variance for vegetation management on levees and floodwalls. Although the proposed revisions leave open the option for departure from the national standard, we are concerned the application process is so onerous it would rarely be used. Replacing the current regional variance with a national levee vegetation standard is likely to result in the further degradation of salmonid habitat, thus prolonging the recovery of many listed salmonids in the Pacific Northwest. This is due to the onerous nature of the proposed process, restrictions on plantings previously permitted under an existing variance, and possible elimination of existing variances by September 30, 2010, unless they are in compliance with the new variance process. Currently, many salmonids in Washington State 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 the jurisdiction of the U.S. Fish and Wildlife Service (Service). The draft recovery plan for the bull trout (Service 2004) recommends implementation of bank stabilization projects in a manner that avoids adverse effects on riparian systems, including those caused by the removal of riparian vegetation from dikes and levees (see Service 2004, pg. 248).

In addition, there are numerous unlisted fish and wildlife species dependent on the riparian and aquatic habitats associated with our river systems, including those that may have developed on levees and floodwalls. Species such as the willow flycatcher (*Empidonax traillii*), yellow warbler (*Dendroica petechia*), and the yellow-breasted chat (*Icteria virens*) are highly dependent on or highly associated with riparian habitat. Declines in these and other riparian obligate species are at least partly attributed to habitat loss. The willow flycatcher is listed by the Service as a Bird of Conservation Concern in western Washington (Service 2008). While these species are not federally listed as threatened or endangered under the Endangered Species Act (ESA), they are protected under the Migratory Bird Treaty Act (MBTA). The proposed national vegetation variance process will likely allow for the continued and potentially increased degradation of habitats used by these species due to clearing measures that exceed those

currently deemed adequate to provide for a safe levee structure. The Corps should address potential impacts to migratory birds and the potential for unauthorized 'take,' as defined under the MBTA, that may be caused by the proposed action as a result, for example, of vegetation removal that results in the destruction of a migratory bird nest with eggs or young.

Although not restricted to riparian areas, the bald eagle (*Haliaeetus leucocephalus*) also nests within trees in riparian zones that may be located on levees or floodwalls. The bald eagle was recently delisted from the ESA, but is protected under the Bald and Golden Eagle Protection Act (BGEPA).

In addition, Executive Order (EO) 13186 obligates all Federal agencies to look for conservation opportunities for migratory birds when planning or implementing agency actions, with particular emphasis on the conservation of Birds of Conservation Concern. Executive Order 13186 also recommends taking advantage of the conservation work of partners and bird conservation initiatives (e.g., Partners in Flight) to achieve more effective bird conservation policies and programs.

We recommend the Corps coordinate with us to determine the most effective and efficient approach for complying with the requirements of the ESA, MBTA, and the BGEPA, as well as EO 13186, relative to implementing the proposed process. For example, ESA section 7 consultation at the state or Corps district level should be considered, as appropriate, so the individual and aggregated effects of the proposed action can be meaningfully evaluated in cases where the proposed action may affect listed species or critical habitat. We also recommend the Corps consult under section 7 of the ESA on the mandatory vegetation management standards for levees contained in Engineering Technical Letter 1110-2-571 *Guidelines for Landscape Planting and Vegetation Management at Levees, Floodwalls, Embankment Dams, and Appurtenant Structures* in cases where meeting those standards may affect listed species or critical habitat. We are not aware of any ESA consultations on these mandatory standards, which contain the variance process that is the subject of the proposed revisions.

We further recommend the Corps prepare an Environmental Impact Statement (EIS) to address the potential impacts on the human environment associated with the proposed process. Potential adverse effects to listed and non-listed species, including migratory birds and bald eagles, and critical habitat of ESA-listed species need to be fully considered and addressed in an EIS. Preparing an EIS would permit a larger range of alternatives to be analyzed and allow for greater public participation and disclosure in the process. The draft EA for the proposed action addresses only two alternatives, a "no action" and the proposed process for requesting a variance. Other alternatives, such as allowing local Corps districts to obtain and/or retain their regional variances, may meet the national standards and would likely provide greater environmental benefits.

We strongly recommend the levee vegetation variance implemented by the Corps' Seattle District be exempt from the proposed process or included as an alternative in the EIS. Currently, obtaining a vegetation variance in the State of Washington is achieved through a process that includes an annual inspection of Public Law 84-99 levees. Based on this inspection process and the site-specific conditions of the levee and river system, both public safety and environmental

concerns are addressed. This variance process has been effectively implemented by King County, Washington, to balance federal mandates related to funding for levee repairs and the recovery of federally listed salmonids within the leveed river systems. The proposed national variance process will likely create a strong disincentive for entities that wish to apply for a levee vegetation maintenance variance.

The proposed regulatory changes should be supported by sound science. For example, studies are currently underway in California that are designed to provide information regarding the risk of retaining vegetation on levees. These studies under the California Levee Vegetation Research Program (2010) will address issues such as the susceptibility of trees on or near levees to windthrow and the potential for water piping and seepage through levees associated with tree roots. These studies will help to determine the potential impacts from levee vegetation on the stability of the levee, and if such vegetation may be benign or beneficial to levee integrity. We recommend the proposed variance process not proceed, especially in areas with existing variances, until this information is available. Furthermore, the Service recommends the final rule (or supporting environmental compliance documentation) list the citations for the scientific literature that the Corps considered when creating the vegetation restrictions identified in the variance process (e.g., no wood on the upper third, landside slope of a levee, or 15 ft landward of the landside toe of a levee; and the need for a variance to plant vegetation on berms/benches).

Should the proposed process be adopted, we request stakeholders such as federal and state resource agencies, tribes, and the public be included in the variance review process to provide information on the necessity of a levee to provide for natural resources. Additionally, a timeline for the review process and an appeal process should be established as part of the proposal.

Additionally, the Corps has a continuing obligation under section 7(a)(1) of the ESA to use its authorities to carry out programs for the conservation of listed species and their habitats. The proposed process is not likely to encourage or advance conservation for listed salmonids and their habitat in the Pacific Northwest. Exemption of the existing variance process at the state-level would, at a minimum, allow opportunities for the recovery of these species to continue, while providing for public safety.

Thank you for the opportunity to review and provide comments on the proposed action. If you have any questions regarding this response, please contact Don Steffek at (503) 231-2198 or Larry Salata at (503) 231-2350.

Sincerely,

  
Acting

Regional Director, Region 1  
Portland, Oregon

Douglas J. Wade (CECW-CE)

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cc:

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### LITERATURE CITED

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