



Contra Costa County
Flood Control
& Water Conservation District

Julia R. Bueren,
ex officio Chief Engineer

R. Mitch Avalon,
Deputy Chief Engineer

March 15, 2010

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

RE: Docket Number COE-2010-0007
Process for Requesting a Variance from
Vegetation Standards for Levees and Floodwalls

Files: 4006-22, 4007-22, & 72-09-01

Dear Mr. Wade:

We have reviewed the Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls (Docket Number COE-2010-0007) published in the Federal Register on February 9, 2010. The following are our comments:

1. The Contra Costa County Flood Control and Water Conservation District (FC District) is the local entity in charge of operation and maintenance of several federally authorized flood control facilities constructed by the U.S. Army Corps of Engineers (Corps of Engineers) in Contra Costa County.

Among these facilities is the Wildcat and San Pablo Creeks Flood Control Project, authorized by the U.S. House of Representatives on June 9, 1976, and the U.S. Senate on June 15, 1976, in accordance with the recommendations of the Secretary of the Army and the Chief of Engineers in House Document 94-11. The project was authorized under section 201 of Public Law 89-298 (1965 Flood Control Act). Several of our comments on the variance policy use the Wildcat and San Pablo Creeks Flood Control Project as an example of the consequences of this new policy.

The Sacramento District of the Army Corps of Engineers prepared the Operations and Maintenance (O&M) Manual for the Wildcat and San Pablo Creeks Federal Flood Control Project, and it states that the San Francisco District has the responsibility for monitoring project operations and maintenance after construction. Construction was completed in 1987. The project levees have been inspected by the Corps of Engineers since the project was turned over to our agency in 1987. On August 3, 2009, and October 20, 2009, we received inspection reports for the Wildcat and San Pablo Creeks Federal Flood Control Projects, which included recommendations to remove the trees from the levees.

These recommendations have not been included in previous inspection reports, because the trees were authorized by the Corps of Engineers to provide shaded riparian habitat. The new policy guidance should allow an exception for the Wildcat and San Pablo Creeks vegetation and all levee vegetation previously authorized and acknowledged by the Corps of Engineers' annual inspection reports.

2. The Army Corps of Engineers has included Section 2-04 in the O&M Manual for the Wildcat and San Pablo Creeks Federal Flood Control Project, which states that mature vegetation will be maintained to provide a closed canopy over the creeks, creating shaded aquatic habitat. Exhibit G of the O&M Manual shows existing mature trees on the levees. The Corps of Engineers designed the Wildcat and San Pablo Creeks project landscaping plan with trees and other vegetation planted on the project levees and adjacent to floodwalls to mitigate for losses to fish and wildlife habitat. The new variance policy is in conflict with the Wildcat and San Pablo Creeks O&M Manual because approximately 50% of the project includes levees and floodwalls installed by the federal project, of which approximately 80% incorporates vegetation not in compliance with the Landscaping Guideline ETL 1110-2-571. The extensive planting plan is shown in the O&M Manual created by the Corps of Engineers. In Accordance with the Local Cooperation Agreement, the FC District is obligated to maintain the project in accordance with the O&M Manual. This project should therefore be exempt from any variance requirement.
3. Facilities constructed by the Corps of Engineers for local flood control protection are regulated by the Code of Federal Regulations — Title 33: Navigation and Navigable Waters 33 CFR 208.10 — Local Flood Protection Works. Section 10 (b) of Federal Regulation CFR 208.10 states, "Where practicable, measures shall be taken to retard bank erosion by planting of willows or other suitable growth on areas riverward of the levees." Landscape Guideline ETL 1110-2-571 and the Variance Policy conflict with federal regulation CFR 208.10.
4. The Local Cooperation Agreement for the Wildcat and San Pablo Creeks project was executed with the Corps of Engineers on June 20, 1986, prior to the vegetation variance policy issued in 1997. Since the project has been maintained in accordance with the Maintenance Manual, there has been no variance from the approved Corps of Engineers plan. Therefore, this project, along with all projects constructed prior to the development of this new variance and maintained in accordance with an approved O&M Manual, should be considered exempt from the variance policy and ETL 1110-2-571.
5. Section 10 of the proposed variance process entitled "Existing Variances or other Deviations" states that "Deviation from the national standards, as defined in ETL 1110-2-571, is permitted only through a vegetation variance, approved by the HQUSACE LSO, via the process described herein."

Application of this requirement to vegetation and plantings on levees that were originally mandated by the Corps of Engineers as part of the federal project, presents a new and contradictory policy that will create problems for the local sponsors due to the following:

- Removing the trees and vegetation will cause us to be in violation of our original agreement with the Corps of Engineers for the construction and maintenance of the Wildcat and San Pablo Creeks federal flood control project.
 - For the Wildcat and San Pablo Creeks project, there was extensive community involvement in the design and installation of the vegetation and commitment to the community to maintain the vegetation. If the vegetation is removed to comply with the new Corps policy, the community may strongly protest and/or may take legal action against the FC District and the Corps of Engineers.
 - The FC District does not have the resources to fund the requirements (such as the application process for a variance, engineering analysis, environmental compliance, and the actual costs to remove the trees and vegetation) triggered by the policy when there has been no variance in an authorized and approved project. If the Corps is requesting that we remove vegetation or apply for a variance for federal flood control projects previously approved with vegetation, then we request that federal funding be provided to comply with all new federal requirements, including NEPA and Section 7 Consultation.
 - This new policy will create environmental impacts and will require the nonfederal sponsor to prepare an environmental document for the removal of the vegetation. The Corps of Engineers' Regulatory Branch, the U.S. Fish and Wildlife Service, the Department of Fish and Game, and the Regional Water Quality Control Board will require mitigation for the impacts of the vegetation removal, which will be significant. This mitigation requirement will be very difficult and expensive to accomplish, with little likelihood of completely compensating for the major loss of habitat within the watershed, much less within the federal project itself.
 - Removal of the vegetation may violate the Federal Endangered Species Act.
 - If the FC District requests a variance, it is not likely to be approved, resulting in the loss of federal disaster recovery assistance.
 - These changes will require us to prepare an amendment to the O&M Manual.
6. The Wildcat and San Pablo Creeks project may not be the only federal project where the mitigation planting component, which was mandated and designed by the Corps of Engineers, is in conflict with the Corps of Engineers' Landscaping Guideline, ETL 1110-2-571. To ensure that this type of conflict will not cause the local sponsor undue burden, we request the following:

- The Corps of Engineers should not require the local sponsor to comply with the variance requirement in those cases where the approved federal project included vegetation in conflict with ETL 1110-2-571.
 - The Corps of Engineers should waive the requirement for the local sponsor to submit a request for an Agency Technical Review (ATR) by September 30, 2010, to get a variance for vegetation plantings on levees. We assume that levee vegetation originally approved by the Corps is not a variance or a deviation from standards. That should be clarified in the policy guidance. However, if the Corps decides to retroactively declare previously approved vegetation on project levees as a deviation, we request an additional five years to obtain federal funding and to prepare the supporting documents for a variance. We recommend that the deadline be revised to September 30, 2015.
7. The environmental impacts for the removal of existing trees and vegetation on flood control facilities with extensive fish and wildlife habitat will be significant.

Since the implementation of this new requirement will cause significant environmental impacts, we disagree that the Finding of No Significant Impact (FONSI) document is sufficient for this proposed action, and we request that the Corps of Engineers prepare a full Environmental Impact Statement prior to implementing the new policy guidance.

8. General Comments:

- The Corps should determine whether the landscaping plans designed by the Corps and planted as part of the federal project is consistent with its existing policy. The FC District should not be burdened with this effort due to the Corp's decision.
- The Corps should develop a list of situations where a variance will be granted and provide sample applications to help the nonfederal sponsors prepare complete applications. The Corps should also include a list of supporting documents that will be required to obtain a variance. Variances should be granted and vegetation should remain on the levees that have no risk to the public. For example, levees that provide protection against shallow flooding should be automatically exempt from the vegetation standards, and a variance should not be required.
- The new vegetation standards require that a minimum of 15-feet on both sides of a floodwall should be free of vegetation due to potential damage from falling trees and tree roots. We recommend that the Corps allow tree species with small trunk diameters and/or shallow roots to mitigate these concerns. The benefits of carefully planted trees and shrubs adjacent to floodwalls outweigh the potential risks. Vegetation along floodwalls provides aesthetic and riparian habitat benefits.

- The 30-foot clear zone for floodwalls is not available for most flood control projects in our jurisdiction. Existing right of way is limited for most projects. There may be less than 15-feet from the floodwall to the top of bank of the channel or from the floodwall to private property. Floodwalls are typically used when there is limited right of way. Our agency does not have funding to acquire property, condemn property, or relocate existing structures to expand the flood control projects to meet these new requirements. Existing federal flood control projects with limited right of way should be exempt from these requirements.
- The FC District should not be put in a situation, through no fault of its own, where it faces financial crisis due to the Corps of Engineers withdrawing support for disaster assistance under PL 84-99 or financial crisis resulting from the costs of implementing required mitigation to offset the loss of habitat values provided by federally planned landscaping installations.

Thank you for the opportunity to provide comments to the variance policy. If you have any questions, please contact Mario Consolacion at (925) 313-2283 or me at (925) 313-2203.

Sincerely,



R. Mitch Avalon
Deputy Chief Engineer
Contra Costa County Flood Control
& Water Conservation District

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c: Julia R. Bueren, Chief Engineer
Greg Connaughton, Flood Control
Tim Jensen, Flood Control
Roberta Gulart, Dept. of Conservation & Development--CDD
General Robert Van Antwerp
Chief of Engineers
USACE HQ
441 G Street, NW
Washington, DC 20314
Colonel (P) Rock Donahue
Division Commander
USACE
South Pacific Division
1455 Market Street
San Francisco, CA 94103-1398
Colonel Thomas Chapman
District Engineer
USACE
1325 J Street
Sacramento, CA 95814
LTC Laurence Farrell
District Engineer
USACE, San Francisco District
1455 Market Street
San Francisco, CA 94103