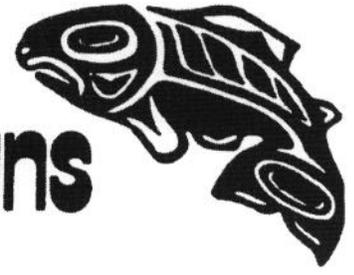




Puyallup Tribe of Indians



March 9, 2010

VIA ELECTRONIC MAIL

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

RE: Comments on the *Process for Requesting a Variance From Vegetation Standards for Levees and Floodwalls*, Docket No. COE-2010-0007.

Dear Mr. Wade:

The Puyallup Tribe is writing to provide comments on Army Corps of Engineers (Corps) proposal to revise its policy regarding variance from the national standards for managing vegetation on levees that are part of the Public Law (PL) 84-99 program. The Tribe is disappointed to see this new policy which will create such an onerous process which limits meaningful review by limiting input and participation and prolongs the process to the point of being impractical to address levee issues that occur on a seasonal or yearly basis. The impractical burdens are so great that the variance process will rarely be used. Furthermore, the proposed Policy revokes current variances and requires those variances to be re-evaluated under the new process.

One of two results will come out of this policy. Either a local jurisdiction will fail to apply for a variance and, therefore, either violate its own local agreements or Federal law in an attempt to maintain PL 84-99 funding, or the local jurisdiction will forego funding to comply with agreements and federal law thereby lessening its financial ability to protect residents and businesses from flood damage.

The Tribe respectfully requests the Corps revoke the proposed policy for the reasons stated herein. The Tribe is willing to work with the Corps in developing a policy that will result in appropriate levels of review to address Corps concerns while allowing the required flexibility

to comply with the Endangered Species Act, other federal law, court orders, treaties, and protect listed species and their habitat.

The Puyallup Tribe is located in Pierce County, Washington. As a signatory to the Treaty of Medicine Creek, the Tribe has reserved fishing rights in its usual and accustomed fishing areas which include, but are not limited to, the Puyallup River and its tributaries. The Tribal reservation is located in an urban area that includes the City of Tacoma and the City of Fife. The Tribe owns, as part of its lands, the bed and banks of the lower 7 miles of the Puyallup River before the river enters Commencement Bay in Puget Sound.

The Puyallup River and its tributaries contain essential habitat for three fish species listed under the Endangered Species Act. Like many river systems in the Pacific Northwest, the Puyallup River has challenges providing appropriate temperatures for the listed species, appropriate spawning habitat, and habitat that both provides food sources and appropriate refuge for both adults and juvenile fish. In fact, the Puyallup River is on the 303(d) list for temperature under the Clean Water Act.

The Tribe works tirelessly with local governments including Pierce County and the cities of Fife, Tacoma, Puyallup, Orting, Sumner, Bonney Lake and others to address flooding concerns and natural resource concerns. Predominantly, the Tribe works with Pierce County with regard to the levee system that protects the Tribal community and businesses and Pierce County residents and businesses. The Tribe works to not only provide effective flood control, but also to preserve and protect the natural resources upon which all residents, tribal and non-tribal, depend.

The proposed policy will hinder or, worse, prevent the use of variances from the national vegetation standards from being sought out and applied along the Puyallup River and its tributaries. Pierce County is faced with a daunting task in complying with Federal law, court orders, and State law when it undertakes levee projects to protect Pierce County residents from flooding. Pierce County must comply with the ESA by not causing a "take" of listed species. In light of the importance of vegetation for shading, refuge, and food sources, continued compliance with the national standards will result in a take of listed species under the ESA. While Pierce County could seek protection for incidental take under Section 10 of the ESA, Pierce County to date had not started that permitting process which would include development of a Habitat Conservation Plan. The new policy requires ESA compliance analysis to be provided in the application packet. Yet until a variance is approved, it will be unlikely that Pierce County, in particular, could comply with the Endangered Species Act.¹

¹ It is also not clear that a variance will provide any benefit with regard to ESA compliance if any vegetation that provides refuge, shading, or a source of food is removed as a result of the work.

Pierce County is also charged with complying with a federal court order entitled "Order Adopting Stipulations re: Vegetation Removal" in *Puyallup Tribe of Indians vs. Pierce County*, U.S. District Court, Western District of Washington at Tacoma, Case No. c79-269T. The Court Order is a stipulated settlement between the Tribe and Pierce County that dictates how and what types of vegetation can be removed on levees along certain segments of the Puyallup River and some of its tributaries. On many occasions, compliance with the order is inconsistent with compliance with the vegetation standards set forth by the Corps. The Land Claims Settlement between Pierce County, the United States, and other local jurisdictions also requires the local governments, including Pierce County, comply with the order regarding vegetation removal. The Land Claims Settlement is codified as federal law at 25 U.S.C. 1773. By limiting the availability of variances to the Corps levee vegetation management standards or making the application process so burdensome it is unlikely Pierce County can avail itself of a variance, the Corps is forcing Pierce County to choose between PL 84-99 funding and compliance with a court order and federal law. Putting Pierce County into such a position is contrary to the goal of protecting fish and fish habitat while also protecting citizens from flood damage.

Furthermore, if Pierce County chooses to comply with the PL 84-99 requirements for vegetation management or receives a variance and subsequently is funded through PL 84-99, a Section 7 consultation will be required under the Endangered Species Act to ensure that funding of the project and subsequent application of the levee vegetation management standards or variance will not jeopardize the continued existence of any listed species. 16 U.S.C. § 1536(2). The Corps attempts to abrogate its ESA compliance obligations by stating that the applicant is required to demonstrate compliance with the ESA. However, it is the Corps responsibility under Section 7 of the ESA to be sure that any project that the Corps funds does not adversely affect a listed species.

The date by which all existing variances must comply with the new policy is wholly unrealistic, particularly in Pierce County. Due to the lack of ESA compliance either by Pierce County or the Corps with regard to removal of vegetation or standards that jeopardize the future existence of endangered species, neither Pierce County nor the Corps will be able to comply with the ESA by September 30, 2010. It is impossible to expect the National Marine Fisheries Service or the U.S. Fish and Wildlife Service to complete a Section 7 consultation or for local jurisdictions to comply with Section 10 of the ESA and receive an incidental take permit within the time allowed. Therefore, the local jurisdiction will be forced to choose between complying with the ESA and being able to receive adequate funding to protect its citizens from flooding. Likewise, if funding is provided to local jurisdictions under PL 84-99 without compliance with the ESA by the Corps through a Section 7 consultation, the Corps will also be violating the ESA. Such actions will lead to costly litigation, thereby reducing the already scarce financial resources available to provide positive impacts that will allow for flood protection and protection and conservation of listed species.

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Finally, the Tribe is disappointed to learn of this significant policy change that could have dramatic impacts on listed fish species of both economic and cultural significance to the Tribe for the first time through the Federal Register. The United States, and its agencies including the Army Corps of Engineers, has a unique relationship to Tribes that has been confirmed through the Constitution, treaties, statutes, executive orders, and judicial decisions. This relationship, and the United States commitment to consult with Tribes, was reaffirmed by the current administration on November 5, 2009. 74 Fed. Reg. 57881. In addition, it is alarming that such a policy would be published for comment without consultation with the Tribe in light of the United States' trust responsibilities to the Tribe and the responsibility to protect the Tribes reserved rights in the fishery that naturally flow from that Trust responsibility. The Puyallup Tribe formally requests that government to government consultation be initiated on this issue to discuss the above matters and the overall impacts the Corps levee management standards have on the Puyallup River, its tributaries, and the listed species and critical habitat found therein.

Sincerely,



Herman Dillon, Sr.
Chair, Puyallup Tribal Council

cc: Congressman Norm Dicks
Congressman Adam Smith
Senator Patty Murray
Senator Maria Cantwell