



State of California -The Natural Resources Agency
DEPARTMENT OF FISH AND GAME
1416 9th Street
Sacramento, CA 95814
<http://www.dfg.ca.gov>

EDMUND G. BROWN JR, Governor
CHARLTON H. BONHAM, Director



VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

February 7, 2012

John McHugh, Secretary
U.S. Department of the Army
1400 Defense, Pentagon
Washington, DC 20301

Maj. Gen. Meredith W.B. Temple
Acting Commanding General and
Acting Chief of Engineers
U.S. Army Corps of Engineers
441 G Street, N.W.
Washington, DC 20314

Col. Michael Wehr, Commander
U.S. Army Corps of Engineers
South Pacific Division
1455 Market Street
San Francisco, CA 94103

Kenneth Salazar, Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

John Bryson, Secretary
U.S. Department of Commerce
1401 Constitution Ave., N.W.
Washington, DC 20230

Re: Sixty-day notice of intent to sue over violations of Sections 7 and 9 of the Endangered Species Act, relating to the U.S. Army Corps of Engineers' Guidelines for Landscape Planting and Vegetation Management (April 2009) and other related actions

Dear Secretaries and Officers of the U.S. Army Corps of Engineers:

On behalf of the California Department of Fish and Game ("DFG"), and pursuant to Section 11 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540, I am providing you this 60-day notice of an intent to sue the U.S. Army Corps of Engineers ("Corps") for violating Sections 7 and 9 of the ESA, 16 U.S.C. §§ 1536, 1538. Specifically, the adverse modification to riparian habitat that will occur under the Corps' levee vegetation removal policies would result in take as defined by the ESA. Furthermore, the Corps failed to engage in consultation pursuant to Section 7 prior to issuing each of the following documents, which shall collectively be referred to as the "Corps' Levee Vegetation Removal Policies:"

- Draft Final White Paper: Treatment of Vegetation within Local Flood Damage Reduction Systems (April 2007) ("White Paper");
- Guidelines for Landscape Planting and Vegetation Management, Engineering Technical Letter No. 1110-2-571 (April 2009) ("ETL");

Conserving California's Wildlife Since 1870

- Notice of Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls, Policy Guidance Letter 75 Fed. Reg. 6364-68 (February 2010) ("PGL");
- Draft Environmental Assessment / Finding of No Significant Impact included with the PGL (February 2010) ("Draft EA/FONSI"); and
- Policy for Development and Implementation of System-Wide Improvement Frameworks (November 2011) ("SWIF").

I. Background on the Corps' Levee Vegetation Removal Policies

In April 2007, the Corps issued the White Paper wherein the Corps proposed its current levee vegetation removal policy. In the White Paper, the Corps recognized the benefits of levee vegetation but proposed the removal of wild growth and trees such that only trees less than two inches in diameter could be retained. The Corps also acknowledged that its levee vegetation removal policy is relatively new and as such there are levees that do not meet the standard.

In August 2007, the Corps instituted the California Levee Roundtable to address vegetation and other issues affecting levees in California's Central Valley. DFG and various other stakeholders including the United States Fish and Wildlife Service ("USFWS"), National Marine Fisheries Service ("NMFS"), California Department of Water Resources ("DWR"), and the Central Valley Flood Protection Board participated in the Roundtable. As a result of the Roundtable, the stakeholders produced California's Central Valley Flood System Improvement Framework ("Framework") in February 2009. The Framework called for a measured approach to vegetation management so that potential damage to levees from wholesale vegetation removal could be avoided. The Framework also recognized that all levee risk factors need to be considered together, along with good science.

Despite the Framework, the Corps issued the ETL in April 2009, thereby undermining the Roundtable's work. The ETL requires that virtually all trees and shrubs be removed from federal levees in the United States. Levees are to have a vegetation-free corridor at least eight feet tall, with a minimum width extending fifteen feet on each side of the levee. With this requirement to remove vegetation, the ETL acknowledges the potential adverse impacts on special status species: "[i]n regions with endangered or threatened species, and/or critical habitat, vegetation removal of any kind may require clearance through the U.S. Fish and Wildlife Service or the National Marine Fisheries Service under the Endangered Species Act." (ETL, p. 5-1.) Since issuing the ETL, the Corps has required levee sponsors to comply with the ETL's vegetation standards as evidenced by several levee inspection reports issued by the Corps for levees in Contra Costa County.

Almost one year later, in February 2010, the Corps indicated by publishing notification in the Federal Register it would accept public comment on the PGL. The Corps detailed the process by which a levee sponsor could obtain a variance from the ETL and stated that all previously-granted variances were revoked unless they comply with the PGL. In short, the PGL requires the variance requestor to comply with all applicable environmental laws and to submit a voluminous amount of detailed information in support of the variance request. In the February notice the Corps also opened the Draft EA/FONSI to public comment. Although the EA/FONSI and PGL remain in draft form, the PGL has been applied to at least two levee projects in California: the Natomas Levee Improvement Program, and the Corps' repairs to the Sacramento River Flood Control Project under the Public Law 84-99 Rehabilitation Assistance Program.

On April 15, 2010, DFG and DWR submitted to the Corps extensive comments on the ETL and PGL. Some of the issues raised in the comments include: over the past few decades the Corps has supported and even required vegetation on levees to prevent erosion, removing the remaining 5% of riparian habitat in the Central Valley under the ETL would have devastating environmental impacts, levee vegetation provides crucial habitat for fish and wildlife including threatened and endangered species, and the PGL's variance process is too burdensome and expensive for levee sponsors to comply with.

On November 29, 2011, the Corps issued the SWIF, which establishes a process for levee sponsors to comply with the ETL without fear of losing eligibility for federal assistance in post-flood levee rehabilitation and other federal levee maintenance funding. The SWIF recognizes that bringing levees into compliance with the ETL can take several years and coordination between multiple entities, "especially . . . when resources protected under the Endangered Species Act . . . could be impacted by any changes to the levee system." (SWIF, p. 2.) The SWIF involves a multi-step Corps approval process whereby the levee sponsor submits to the Corps for its approval a letter of intent outlining the levee deficiencies and the sponsor's plan to rectify. If the Corps approves the letter of intent, the levee sponsor then develops a plan, subject to Corps approval, to correct levee deficiencies. The SWIF does not excuse compliance with the ETL but merely extends the time period under which compliance, or a variance under the PGL, must be achieved.

II. The Corps' Violations of the ESA

Section 7 of the ESA requires all federal agencies to consult with the Secretary of the Interior or the Secretary of Commerce, as applicable (both Secretaries shall collectively be referred to as the "Secretary"), to insure that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." (16 U.S.C. § 1536(a)(2).) The federal agency is to request of the Secretary any information

whether any species which is listed or proposed to be listed under the ESA may be present in the area of the proposed federal action. If the Secretary so advises, the federal agency is to prepare a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by the proposed federal action. (16 U.S.C. § 1536(c)(1).) If after preparing the biological assessment the federal agency determines that the federal action may affect listed species or critical habitat, the federal agency is to engage in formal consultation. (50 C.F.R. § 402.14(a).)

The Corps has made no attempt to comply with the ESA when issuing any of the above described documents (i.e., the White Paper, ETL, PGL, Draft EA/FONSI, and SWIF). At no time has the Corps engaged in the consultation process under Section 7 of the ESA. The Corps never requested information from the Secretary in relation to any of the Corps' Levee Vegetation Removal Policies. Both USFWS and NMFS commented on the Draft EA/FONSI that federally listed threatened and endangered species whose survival, as well as recovery, is directly or indirectly dependent on California's remaining five percent of riparian habitat. (http://www.water.ca.gov/floodsafe/leveeveg/levee_documents/COE-2010-0007-0052.1.pdf (last visited February 1, 2012); http://www.water.ca.gov/floodsafe/leveeveg/levee_documents/COE-2010-0007-0026.1.pdf (last visited February 1, 2012).) Despite these comments, the Corps did not prepare a biological assessment, nor did it engage in any consultation with USFWS or NMFS. By not preparing a biological assessment or consulting with USFWS or NMFS, the Corps failed to determine if formal consultation under the ESA is required.

The Corps is also in violation of Section 9 of the ESA, 16 U.S.C. § 1538. Section 9 prohibits, in part, the take of any species listed as endangered under the ESA. (16 U.S.C. § 1538(a)(1)(B).) Implementation of the Corps' Levee Vegetation Removal Policies will result in the harassment, harm, or killing of listed species, including by significant modification of listed species habitat. By failing to comply with Section 7, the Corps is also in violation of Section 9.

DFG's participation in the Roundtable has been unsuccessful in persuading the Corps to modify its levee vegetation removal policies to account for historic levee vegetation practices in California or to preserve the important riparian habitat for species listed under the ESA. As a result, DFG intends to file a suit under the ESA against the Corps. And as a courtesy, DFG is also notifying the Corps that any complaint concerning the Corps' ESA violations may also state causes of action related to the Corps' violations of the National Environmental Policy Act, Administrative Procedure Act, and any other applicable laws or regulations.

Please do not hesitate to contact me with any questions concerning this letter.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Gibson', written in a cursive style.

Thomas Gibson,
General Counsel
California Department of Fish and Game

cc: Charlton H. Bonham, Director
Sandra Morey, Deputy Director, Ecosystem Conservation Division