



VIA CERTIFIED MAIL; RETURN RECEIPT AND FACSIMILE

August 2, 2010

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RE: 60 Day Notice of Intent to Sue over Violations of Sections 7 and 9 of the Endangered Species Act; Actions Relating to the Guidelines for Landscape Planting and Vegetation Management ETL No. 1110-2-571 and the Notice of Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls, 75 Fed. Reg. 6364-68 (February 9, 2010)

This letter serves as a sixty-day notice on behalf of the Center for Biological Diversity (the "Center") of intent to sue the United States Army Corps of Engineers ("Corps") over violations of Sections 7 and 9 of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, 1536, 1538, for failure to consult regarding actions and inactions related to the Guidelines for

Landscape Planting and Vegetation Management Engineering Technical Letter No. 1110-2-571 (“ETL”) and the Notice of Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls, 75 Fed. Reg. 6364-68 (February 9, 2010) (herein after “Variance Policy”), that may affect and are likely to adversely affect endangered and threatened species. This letter is provided pursuant to the sixty-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. *See* 16 U.S.C. § 1540(g).

The Army Corps of Engineers (“Corps”) has violated the ESA by failing to consult with the Secretary of the Interior through the U.S. Fish and Wildlife Service (“FWS”) and the Secretary of Commerce through the National Marine Fisheries Service (“NMFS”) regarding the impacts of its actions on endangered and threatened species in violation of the ESA.

The Center, its board, members, and staff, have actively participated in efforts to protect threatened and endangered species that depend on riparian habitat and aquatic resources that will be directly affected by the Corps’ actions including, but not limited to, petitioning for listing for many of these species, seeking critical habitat designation for habitat essential to species’ recovery, and working to provide specific protections for listed and imperiled species and their habitats in the face of site-specific proposals that may affect the species and their habitats.

The purpose of the ESA is to conserve the ecosystems on which endangered and threatened species depend and to conserve and recover those species so that they no longer require the protections of the Act. 16 U.S.C. § 1531(b), ESA § 2(b); 16 U.S.C. § 1532(3), ESA §3(3) (defining “conservation” as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary”). “[T]he ESA was enacted not merely to forestall the extinction of species (i.e., promote species survival), but to allow a species to recover to the point where it may be delisted.” *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059, 1069 (9th Cir. 2004). To ensure that the statutory purpose will be carried out, the ESA imposes both substantive and procedural requirements on all federal agencies to carry out programs for the conservation of listed species and to insure that their actions are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536. *See NRDC v. Houston*, 146 F.3d 1118, 1127 (9th Cir. 1998) (action agencies have an “affirmative duty” to ensure that their actions do not jeopardize listed species and “independent obligations” to ensure that proposed actions are not likely to adversely affect listed species).

I. Background Facts

The Corps has proceeded with major changes to its policies that will significantly impact listed species without engaging in the required consultation with the FWS and NMFS as required under the ESA Section 7(a)(2). Because the Corps’ actions may affect many listed species and/or their designated critical habitat, impair conservation and recovery of listed species, and potentially jeopardize the continued existence of listed species, the Corps’ actions and inactions in this regard violate the ESA.

The 2009 ETL revisions superseded earlier guidelines including the 2007 Interim Vegetation Guidance and establish a new requirement for removal of nearly all vegetation except certain perennial grasses on all levees without a variance.¹ *See* ETL at 4-3. The ETL establishes a wide “vegetation free zone” encompassing the levee prism and a 15’ strip on each side. Some vegetation may be allowed riverward of the levees. *See* ETL 2-1 to 2-3. The ETL requires removal of all vegetation not in compliance with the ETL on existing levees. ETL at 5-1. The Corps acknowledged that the vegetation removal required under the new ETL would have significant effects. As the ETL states:

“Removal of non-compliant vegetation can create significant issues for the owner/operator, as maintenance may require environmental permits. . . . In regions with endangered or threatened species, and/or their 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 at 5-1. However, the Corps failed to consult with the wildlife agencies regarding the policy changes. Thus, it appears that the Corps is attempting to shift its burden to the local levee owners or operators by requiring those entities to take responsibility for complying with the ESA and other environmental laws in seeking a variance to keep existing vegetation in place when the Corps has failed to comply with such laws in requiring that the existing vegetation be removed.

The 2010 Variance Policy requires all existing and new variances to seek approval or re-approval through a new process and supersedes earlier variances including regional variance policies. Variance Policy, 75 Fed. Reg. at 6364. The Variance Policy provides a deadline of September 30, 2010 for all waiver applications (for both new and existing waivers) and further requires that all applications must include evidence of NEPA and ESA compliance and compliance with any other relevant environmental laws. Variance Policy, 75 Fed. Reg. at 6364, 6366. As a result, the effect of the Variance Policy is to invalidate any existing variances as of September 30, 2010, if a new completed application is not filed. Thus, the implication of the Variance Policy is that any levee owner or operator who has not applied for or received a new variance by September 30, 2010, may be required to comply with the ETL vegetation removal policy whether or not environmental review and ESA consultation has been completed. Together the ETL and Variance Policy require actions to be taken that will affect the environment by a date certain and will cause changes to the environment that may affect listed species. Therefore, the Corps should have consulted with the FWS and NMFS before adopting these new policies.

¹ Because the Corps failed to undertake NEPA review or ESA consultation, there is also insufficient documentation regarding the alleged need for the policy changes and the likely impacts. Indeed, it is our understanding that there is significant evidence that well-managed vegetation is not a risk to levees in many areas and may improve stability and/or reduce erosion in many cases and that studies and research regarding these issue are ongoing. *See* Letter to Corps from California Department of Water Resources and Department of Fish and Game, dated April 15, 2010 and attachments; Letter to Corps from California Central Valley Flood Control Association dated April 19, 2010.

Affected species may include, but are not limited to, listed salmon and steelhead and their critical habitats, giant garter snake, Valley Elderberry longhorn beetle, least Bell's vireo, and southwestern willow flycatcher. For example, in many southern California coastal streams least Bell's vireo and southwestern willow flycatcher nest within riparian vegetation that may be adversely affected by clearing vegetation on and near levees pursuant to the new ETL and Variance Policy. Listed salmon and steelhead populations may be adversely affected by the clearing activities and the new policy which would limit vegetation and shade along many segments of streams, rivers, and estuaries throughout the state. Listed frogs and toads and the giant garter snake may also be affected by any clearing activities on levees. All of these potential impacts should have been included in a comprehensive consultation before the new ETL and Variance Policy were adopted.

Given the complexity of the environmental impacts of clearing riparian vegetation on and near levees in many areas of California and the impacts of the ongoing requirement that the levees remain clear of all vegetation but a limited number of grasses, the Variance Policy deadline of September 30, 2010 which requires completed environmental compliance before an application is filed is also unreasonable. We understand that the deadline may have been extended until later in 2011 for some areas in the Central Valley and that a few owners and operators may make the deadline and receive a variance, for example the West Sacramento Levee Improvements Program which recently issued a draft EIS/EIR. We also understand that a variance was recently granted for Natomas levees, although it is unclear whether the Corps has completed consultation regarding that variance. Nonetheless, it appears that many other levee owners and operators will not be able to meet the September 30, 2010, deadline and be able to fully comply with environmental review requirements and consultation requirements or permit requirements under the ESA before that time.

The Corps does not provide sufficient time for affected levee managers to seek variances and comply with all environmental laws including, for example, both the ESA and NEPA which can often take many months if not years to complete. As a result, the Corps' ETL and Variance Policy together put owners and operators in a "catch-22" situation where they could be forced to choose between complying with the Corps' policy and complying with the ESA and other environmental laws in order to keep existing vegetation in place.

In the ETL and the Variance Policy, the Corps variously admits it is ultimately responsible for ESA compliance and also attempts to deflect the need for ESA compliance off onto levee owners and operators who manage the levees (which include many federal, regional, state, and local agencies). *See* ETL at 5-1 (noting vegetation removal may require "clearance" through FWS and NMFS); Variance Policy 75 Fed. Reg. at 6366 (to apply for variance the applicant must include evidence of NEPA compliance and ESA section 7 compliance and commitments to implement measures needed to comply with the ESA); Variance Policy 75 Fed. Reg. at 6366, ("USACE ultimately remains responsible for ensuring that ESA and other environmental compliance obligations are met.").

In sum, the changes in the ETL and the Variance Policy with the imposition of the September 30, 2010 application deadline for variances together require that specific actions be

taken. Therefore, the ETL and Variance Policy will be the proximate cause of levee clearing if no waiver is applied for or granted in the very limited time allowed by the Corps. Thus, it is clear that the Corps' adoption of the 2009 ETL and 2010 Variance Policy themselves "may affect" listed species and habitats and that the Corps was required to consult with the wildlife agencies.

The Center urges the Corps to carefully consider its duties pursuant to the ESA, correct its ongoing violations, and, in accordance with its duties initiate consultation and immediately withdraw the waiver policy and the deadline for applications from the waiver policy such that existing waivers can remain in place until and unless such time as the Corps completes full formal consultation with the Fish and Wildlife Service and the National Marine Fisheries Service pursuant to the ESA Section 7(a)(2).

II. VIOLATIONS OF THE ESA

A. Violations of Section 7(a)(2); Failure Ensure Against Jeopardy Through Consultation.

Section 7(a)(2) of the ESA requires federal agencies 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 . . . determined . . . to be critical . . ." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). To accomplish this goal, agencies must consult with the Fish and Wildlife Service and/or the National Marine Fisheries Service whenever their actions "may affect" a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Section 7 consultation is required for "any action [that] may affect listed species or critical habitat." 50 C.F.R. § 402.14. Agency "action" is defined in the ESA's implementing regulations to "mean all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States." 50 C.F.R. § 402.02. The Corps' decision in adopting the 2009 ETL and 2010 Variance Policy are Federal agency actions requiring consultation.

Moreover, section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency initiates consultation on an action under the ESA, the agency "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section." The purpose of Section 7(d) is to maintain the status quo pending the completion of interagency consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to the species or destruction or adverse modification of its critical habitat. The Corps' must initiate comprehensive consultation with the Fish and Wildlife Service and the National Marine Fisheries Service, when it does so the prohibitions of Section 7(d) will apply.

The Corps has failed to consult with the wildlife agencies although it acknowledges that the levee clearing activities may affect listed species and habitats. Under such circumstances,

until and unless FWS and/or NMFS provides a biological opinion regarding the impacts of the ETL and Variance Policy on the affected listed species and critical habitats the Corps is in violation of the substantive provisions of the ESA.

The Corps cannot escape its responsibilities for the programs it has adopted and the actions it has taken by requiring other entities to comply with the ESA for site-specific projects. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. As the Variance Policy notes “USACE ultimately remains responsible for ensuring that ESA and other environmental compliance obligations are met.” 75 Fed. Reg. at 6366. While in some cases the Corps could rely on completed ESA consultation by another federal agency or an HCP issued to another entity, in this instance, the Corps has set an extremely short deadline that will preclude many of the affected entities (the levee owners and operators) from complying with the ESA in a timely manner. The Corps had discretion to set the deadline for compliance with the new ETL and Variance Policy and the Corps’ actions in adopting the policy changes may affect listed species and habitats and, therefore, the Corps’ actions are subject to the consultation requirements. In sum, it is the Corps’ decisions that may cause impacts to listed species and habitats, and therefore, the Corps was responsible for consulting with the wildlife agencies before those decisions were made but it failed to do so.

B. Violation of Section 9; Unlawful Taking of Listed Species.

The ESA prohibits any “person” from “taking” threatened and endangered species. 16 U.S.C. § 1538; 50 C.F.R. § 17.31. The definition of “take,” found at 16 U.S.C. § 1532(19), states,

The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

The Corps is in violation of Section 9 of the ESA because it is in violation of Section 7(a)(2), and has failed to consult with FWS and NMFS regarding the impacts of the ETL and Variance Policy on listed species and critical habitats. Because the Corps has not obtained biological opinions for the ETL and Variance Policy it adopted, no take of listed species is properly authorized. Regardless, the Corps’ approval of the ETL and Variance Policy will allow taking of (in the form of harassment, harm, pursuit, wounding, or killing) of the various species in violation of ESA’s Section 9.

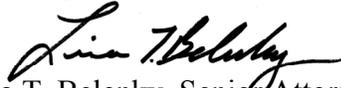
III. CONCLUSION

We urge the Corps to initiate consultation with the Fish and Wildlife Service and the National Marine Fisheries Service concerning the impacts of ETL and Variance Policy on listed species and critical habitats and, pursuant to section 7(d) of the ESA, refrain from imposing the Variance Policy deadline until such consultation is completed.

If the Corps does not act within 60 days to correct its ongoing violations of the ESA, the

Center for Biological Diversity may pursue litigation in federal court against the agency and the officials named in this letter. We will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact me.

Sincerely,



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