



# FRIENDS OF THE RIVER

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VIA CERTIFIED MAIL—RETURN RECEIPT REQUESTED

April 19, 2011

John McHugh, Secretary  
Department of the Army  
1400 Defense, Pentagon  
Washington, DC 20301-1400

Secretary Gary Locke  
U.S. Department of Commerce  
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Room 5516  
Washington DC 20230

Lt. Gen. Robert L. Van Antwerp, Jr.  
Commanding General  
U.S. Army Corps of Engineers  
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Col. William J. Leady, District Engineer  
U.S. Army Corps of Engineers  
Sacramento District  
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Ken Salazar, Secretary of the Interior  
1849 C Street, NW  
Washington, DC 20240

**RE: 60 DAY NOTICE OF INTENT TO SUE over violations of the Endangered Species Act, Sections 7 and 9, relating to the Guidelines for Landscape Planting and Vegetation Management ETL 1110- 2- 571 (April 2009) and other related actions and failures to act**

Dear Federal Officers and U.S. Army Corps of Engineers:

This letter is a sixty-day notice on behalf of Friends of the River (Friends) and Defenders of Wildlife (Defenders) to sue the U.S. Army Corps of Engineers (Corps) over violations of Sections 7 and 9 of the Endangered Species Act (ESA), including 16 U.S.C. 1531, 1536, and 1538, for failure to consult with fish and wildlife agencies. Consultation was required regarding actions and failures to act related to the: Draft Final White Paper-Treatment of Vegetation within Local Flood-Damage-Reduction Systems (20 April 2007)(Prepared by CECW-CE); Guidelines for Landscape Planting and Vegetation Management Engineering Technical Letter No. 1110-2-571 (ETL); the Notice of Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls, 75 Fed. Reg. 6364-68 (February 9, 2010); the Draft Environmental Assessment (EA)/ Finding of No Significant Impact (FONSI)(February 10, 2010 (Docket No.

COE 2010-0007), and any other actions by the Corps causing or intended to cause levee operators to remove vegetation from on or near levees.

Friends and Defenders hereby join in and incorporate by reference the 60 day notice letter dated August 2, 2010, addressed to Lt. Gen. Robert L. Van Antwerp, Jr., from the Center for Biological Diversity. (A copy of that letter is attached as **Exhibit 1**). This letter is provided pursuant to the 60 day notice citizen suit provision in the ESA (16 U.S.C. 1540(g) to the extent such notice is deemed necessary by a court.

The Corps adopted the new vegetation removal policy in or about April of 2007 upon issuing the Final Draft White Paper. That accomplished a stunning policy reversal and threat to the present physical environment which includes mature trees on and near the levees. Previously, the Corps itself had required or encouraged the planting of trees on or near many levees for the purposes of species habitat preservation and environmental enhancement.

The ETL issued in April 2009 requires a vegetation-free zone along levees plus 15 feet on each side. Though the ETL provides a burdensome variance procedure, it operates to coerce levee operators to remove vegetation including trees. The Corps is also enforcing the new vegetation removal policy through interaction with levee operators including the Section 408 approval process. Levee operators in California are operating under the ETL designing levee projects to comply with it and expending significant sums to do so. The ETL and vegetation removal policy are a federal action requiring compliance with law including the ESA and the National Environmental Policy Act (NEPA).

The Draft EA/FONSI of February 2010 on the vegetation removal policy met with extensive objections from public agencies and NGO's on environmental and ESA grounds. Friends, in its letter to Douglas Wade of the Corps pointed out that the Corps is responsible for its programmatic actions and that the FONSI was inappropriate. The U.S. Fish & Wildlife Service pointed out that in California's Central Valley, the woody vegetation on the levees is vital habitat and protection for a number of endangered species whose survival as well as recovery is dependent on riparian habitat. The Service also pointed out that only about 5% of historic riparian habitat remains in the Central Valley, and that much of that remnant is on the levees. (Letter to Corps, April 22, 2010 Attach. 1 at 4)

The California Department of Water Resources (DWR) identified for the Corps a number of the endangered or threatened species that could be affected by removal of the levee vegetation including: salmonids including winter-run and spring-run Chinook and Central Valley steelhead, delta smelt, late fall-run Chinook salmon, southern distance population of the North American green sturgeon, long-fin smelt, Valley elderberry longhorn beetle, giant garter snake, riparian brush rabbit, Swainson's hawk, and burrowing owl. (Letter to Corps, April 15, 2010, attachment at p. 12). DWR also explained that there appear to be 1600 miles of levees in California that are non-compliant with the ETL. **DWR estimated the cost of ETL compliance to be \$7.5 billion.** (*Id.* at 11). DWR pointed out that most of the studies that have been done have concluded either

that vegetation is compatible with the flood control function of levees or that vegetation actually improves public safety by reducing the potential for levee erosion. (*Id.* at 7-10)

The California State Water Resources Control Board pointed out that riparian vegetation reduces sedimentation that is harmful to anadromous fish. The Board also explained that shade reduces water temperatures which is critical for salmonids and other aquatic species. The Board, to no avail, urged the Corps to prepare an Environmental Impact Statement (EIS) for the rule. (Letter to Corps, April 23, 2010).

The ETL itself 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).

The Corps, however, failed to consult with the wildlife agencies regarding the ETL and this policy change. The ESA in Section 7(a)(2) requires all federal agencies to insure that their actions are “not likely to” destroy or adversely modify habitat of endangered or threatened species determined to be critical. 16 U.S.C. 1536(a)(2). Agencies must consult with the wildlife agencies whenever their actions “may affect” a listed species. 16 U.S.C. 1536(a)(2); 50 C.F.R. 402.14. The Corps, therefore, has been, is, and remains in violation of the ESA’s consultation requirement by not having engaged in the required consultation before adopting the new vegetation removal policy and issuing the ETL.

The Corps has also unlawfully circumvented the requirements of ESA section 7(d), 16 U.S.C. 1536(d). By failing to engage in the required consultation, the Corps has evaded the section 7(d) requirement to maintain the status quo pending completion of interagency consultation. The Corps must initiate consultation with the Fish & Wildlife Service and the National Marine Fisheries Service, and then maintain the physical status quo—preservation of the existing riparian forests on and near the levees-- until the ESA process has been completed. The vegetation—critical habitat—simply cannot be removed unless and until a determination is made that the action will not result in jeopardy to the several affected species or destruction or adverse modification to their critical habitat.

The Corps is also in violation of ESA section 9, 16 U.S.C. 1538; 50 C.F.R. 17.31. Because of the failure to comply with the ESA consultation requirement, no “take” of a listed species is authorized. The definition of “take” includes harass, harm, and kill, as well as attempts to engage in any such conduct. 16 U.S.C. 1532(19). Adverse modification of the critical habitat would in the process harass, harm, and/or kill listed species, and thus constitute an unlawful “take” of such species.

The unlawful conduct of the Corps is astonishing in its vast scope. There is a complete failure to comply with the consultation requirement on a statewide, let alone regional or national

level. The ETL carries out a nationwide and statewide policy. This is a complete end run on both the ESA and NEPA by attempting to defer both ESA consultation and NEPA compliance and shift the burden of compliance to the different levee operators with respect to all ESA and NEPA issues. A single site-specific project might be determined to not in itself cause significant harm, such as, “only few trees here.” What the Corps has done, however, is to adopt vegetation removal as a guideline, standard, rule, regulation, and policy nation-wide as well as affecting 1600 miles of levees in California alone. It is unlawful under both the ESA and NEPA to avoid consideration of the cumulative impacts of removing the vegetation from all the levees. Such a restricted analysis would impermissibly subject both the ESA and NEPA decision-making processes to “the tyranny of small decisions.” See *Kern v. Bureau of Land Management*, 284 F.3d 1062, 1078 (9<sup>th</sup> Cir. 2002); *Pacific Coast Fed’n of Fishermen’s Ass’n v. National Marine Fisheries Service*, 265 F.3d 1038 (9<sup>th</sup> Cir. 2001). That unlawful tyranny of small decisions is going on right now. As just one example, the City of West Sacramento is going through the EIS process as to its levees. It is not appropriate or practical for any one levee operator to attempt to address the cumulative impacts of vegetation removal on 1600 miles of levees in the State, given that most of those 1600 miles would be under the jurisdiction of other levee operators. It is the Corps that has mandated the vegetation removal, and thus it is the Corps that must carry out the ESA consultation process and prepare a programmatic EIS.

Finally, no notice is required as to filing a NEPA action. As a matter of courtesy, however, the Corps is hereby advised that the action to be filed will include claims under NEPA as well as under the ESA. The Corps has violated NEPA by failing to prepare an EIS, or even a final EA, on the ETL and vegetation removal policy.

## CONCLUSION

We encourage the Corps to promptly withdraw the ETL and cease all vegetation removal demands in California pending completion of the ESA consultation process. The Corps should also prepare an EIS on the vegetation removal program under NEPA, including consideration of cumulative impacts under both the ESA and NEPA.

We note that the Corps has received at least three prior 60 day notices in this matter including the August 2, 2010 letter from the Center for Biological Diversity. Given the Corps’ nonresponsiveness to date, be assured Friends and Defenders will be filing a citizen suit ESA enforcement action against the Corps which will also include NEPA claims. We will seek relief including declaratory and injunctive relief as well as legal fees and costs in the action. Should the Corps instead decide to remedy these violations, please let us know immediately.

Sincerely,

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Friends of the River

/s/ Jason C. Rylander  
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