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November 12, 2020

Ms. Michelle Walker
U.S. Army Corps of Engineers, Seattle District
Regulatory Branch
4735 E. Marginal Way South
Seattle, Washington 98124

Re: Comments on 2020 NWP Regional Conditions

Dear Ms. Walker:

Thank you for the opportunity to offer public comment on regional issues concerning the U.S. Army Corps of Engineers (ACOE) published proposal of September 15, 2020 to reissue 52 existing nationwide permits (NWPs) and issue five new NWPs (85 FR 57298). The proposed revisions to the ACOE's NWP program are a matter of public interest for the protection of aquatic resources, and the Pew Charitable Trusts provides the ACOE's Seattle District with the following comments on regional issues specific to the proposed reissuance of NWP 48 for Commercial Shellfish Mariculture Activities.

In this letter, we highlight the following issues and offer recommendations regarding the proposed reissuance of NWP 48, with comments specific to:

- regional implications of proposed NWP 48 modifications, specific to Washington;
- inadequacy of draft revisions to the national decision document (COE-2020-0002) for proposed NWP 48 intended to respond to the October 10, 2019 court order holding NWP 48 unlawful in the State of Washington¹; and
- recommendations for additional regional conditions necessary to ensure no more than minimal adverse environmental effects in Washington.

We recommend that the Seattle District restrict implementation of new NWPs, including NWP 48, until they have adequately addressed the issues raised in this letter and have adopted district-specific regional conditions to ensure the ACOE's ability to reach the minimal adverse effects threshold for Washington.

The Pew Charitable Trusts works to advance the protection and restoration of ecologically important coastal habitat, including submerged aquatic vegetation such as eelgrass, which

¹ [Ruling](#) issued by the United States District Court, Western District of Washington (Case No. C16-0950RSL and C17-1209RSL)

features prominently in our comments. Native eelgrass beds are a type of special aquatic site under Section 404 of the Clean Water Act (33 U.S.C. 1344) and may be affected by activities requiring permits under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403), as recognized in the ACOE's proposal (85 FR 57298). Owing to its ecological importance, seagrass, including eelgrass, is designated as Habitat Areas of Particular Concern (HAPC) for Pacific Coast groundfish and marine and estuarine submerged aquatic vegetation, including eelgrass, as HAPC for Pacific Coast salmon (pursuant to essential fish habitat guidelines at 50 CFR 600.815(a)(8)). Additionally, in Washington State, native eelgrass, *Z. marina*, has been designated a species of special concern by the Washington Department of Fish and Wildlife (WAC 220-110-250) and as critical habitat by the Washington Department of Ecology's Shoreline Management Act (RCW 90.58).

Regional Implications of Proposed NWP 48 Modifications

We raise two regional implications of proposed NWP 48 modifications specific to Washington State, regarding: (1) the need to reinitiate ESA Section 7(a)(2) consultation; and (2) an uncertain finding of minimal individual and cumulative adverse environmental effects.

Need to Reinitiate Programmatic ESA Section 7(a)(2) Consultation

We question whether the ACOE's proposed modifications to NWP 48 meet the requirements of the Services programmatic biological opinion (PBO) pursuant to section 7(a)(2) of the Endangered Species Act (ESA) for shellfish aquaculture activities in Washington State (NMFS 2016, Re: NMFS Consultation No. WCR-2014-1502). The ACOE's proposed modifications to NWP 48 create discrepancies that would cause effects to listed species and critical habitat not considered in the PBO, which triggers a requirement to reinitiate formal consultation as established by 50 CFR 402.16. Specifically, the ACOE proposal removes the definition of "new commercial shellfish aquaculture operation" that it previously adopted as well as removing a relevant limit (½-acre limit for impacts to submerged aquatic vegetation in project areas that have not been used for commercial shellfish aquaculture activities during the past 100 years).

Absent identifying "new commercial shellfish aquaculture operation" as a separate management category, it is unclear how the Seattle District will know when to condition applications pursuant to NWP 48 with conservation measures identified in the Service's PBO specific to "new" activities. As established in the PBO, these conservation measures² must be adhered to in order

² Conservation Measures #3: For 'new' activities only, gravel or shell material shall not be applied to enhance substrate for shellfish activities where native eelgrass (*Zostera marina*) or kelp (rooted/attached brown algae in the order *Laminariales*) is present.

Conservation Measure #6: For 'new' activities only, shellfish activities (e.g., racks, stakes, tubes, nets, bags, long-lines, on-bottom cultivation) shall not occur within 16 horizontal feet of native eelgrass (*Zostera marina*) or kelp (rooted/attached brown algae in the order *Laminariales*). If eelgrass is present in the vicinity of an area new to shellfish activities, the eelgrass shall be delineated and a map or sketch prepared and submitted to the Corps. Surveys to determine presence and location of eelgrass shall be done during times of peak above-ground biomass: June 1 – September 30. The following information must be included to scale: parcel boundaries, eelgrass locations and on-site dimensions, shellfish activity locations and dimensions.

for an activity to be authorized by the ACOE. Absent the Seattle District's ability to ensure adherence to these conservation measures effectively, additional suppression of eelgrass not previously considered in the Services PBO would surely occur and effects to eelgrass is the primary mechanism for effects to Puget Sound Chinook salmon and its critical habitat (NMFS 2016). As inferred by the PBO analysis, increased suppression of eelgrass can reasonably be expected to further decrease cover available to juvenile Puget Sound Chinook within its critical habitat, increasing predation and negatively affecting the survival of Puget Sound Chinook (NMFS 2016). Such additional effects to listed species and their critical habitat were not considered in the Services PBO, which is a trigger for reinitiation.

Uncertain Finding of Minimal Individual and Cumulative Adverse Environmental Effects

Further, the ACOE proposed removal of pre-construction notification (PCN) thresholds and requirements for NWP 48 has the potential to affect PCN practices for aquaculture activities in Washington State, as established in the Service's PBO and per the current General Condition 18, under which a PCN is required when there is a potential to affect threatened or endangered species and/or critical habitat. In the case of Washington State, the potential to affect threatened or endangered species is triggered in all cases, owing to the number of such species that occur throughout State waters (NMFS 2016). Absent definitive requirements of PCNs for all NWP 48 applicants, there is uncertainty regarding the ACOE's ability to add ESA-specific special conditions through its PCN verifications, which is the ACOE's stated mechanism for ensuring adherence with the PBO's required measures and conditions (85 FR 57298). Without assurance that the ACOE has effective processes in place to add these special conditions through verification of each application subject to NWP 48, key measures and conditions required by the Services PBO are in fact not assured to occur, which are necessary to minimize effects to listed species and critical habitat and ensure that jeopardy to the species or destruction or adverse modification of critical habitat is avoided. Absent this assurance, the ACOE's ability to ensure that NWP 48 will result in minimal individual and cumulative adverse environmental effects is uncertain, specifically within the State of Washington.

These regional implications of the proposed NWP 48 modifications call into question both the continuing ESA coverage provided by the Service's PBO and the ACOE's ability to ensure a finding of no more than minimal individual and cumulative adverse environmental effects, specifically within Washington State. ***For these reasons, we recommend that the ACOE apply additional regional conditions to ensure no more than minimal individual and cumulative adverse effects on Washington State's aquatic environment, as further discussed below.***

Inadequacy of Draft Revisions to Address District Court Decision

Following review of the ACOE national decision document (COE-2020-0002) for proposed NWP 48, we find inadequate the cumulative effects analysis that intended to support a more rigorous finding of no more than minimal individual and cumulative adverse environmental effects, responsive to the October 10, 2019 court order holding NWP 48 unlawful in the State of

Washington. The analysis continued to put forward conclusory statements regarding the ‘minimal adverse effects’ finding that were not quantified; in many cases not substantiated by the literature; and in some cases, provided misleading interpretation of the literature on the whole. Further, the analysis did not give consideration to the ongoing effects of past actions when conducting the cumulative impacts analysis, which is relevant in particular to impacts on eelgrass. Because we expect we are not alone in expressing these sentiments and to keep our comments more focused on specific recommendations for the Seattle District, we will not go into detail on these points, but raise the issues as important to resolve fully before a final rule is made. ***To this end, we recommend further enhancing the draft decision document’s analysis to address the issues raised above and offer that the Service’s PBO may be useful when it comes to rigorous effects analysis, including cumulative effects and quantified impacts, including the evaluation of impacts to eelgrass and other dependent aquatic resources (NMFS 2016).***

Recommended Additional Regional Conditions

With these recommendations, we take under consideration the ACOE statement in its proposed rule that regional conditions are an effective tool to ensure NWP authorize activities that result in no more than minimal individual and cumulative adverse effects on the aquatic environment (85 FR 57298). Further, we take under consideration the ACOE stated belief that, “...ESA section 7 consultations, EFH consultations under the Magnuson-Stevens Fishery Conservation and Management Act, and regional conditions imposed by division engineers to restrict or prohibit the use of NWP 48 are appropriate avenues to address impacts to submerged aquatic vegetation that may be caused by activities authorized by NWP 48” (85 FR 57298). With these sentiments in mind and given our preceding comments, we strongly recommend that the Seattle District issue additional regional conditions to ensure NWPs cause no more than minimal individual and cumulative adverse effects on Washington State’s aquatic environment and to address local resource concerns.

Specifically, we recommend the Seattle District use its discretionary authority to issue district-specific regional conditions that apply to either all NWPs for the State of Washington including NWP 48, or specific to NWP 48 for the State of Washington, to both help meet a ‘minimal adverse impacts’ finding and to address local resource concerns, in this case eelgrass concerns³. A regional condition for aquatic resources of special concern would ensure the District Engineer receives ample, pertinent information specific to eelgrass when determining whether an applicant’s proposed activities are more than minimal. ***To this end, we highlight applicable***

³ As an example of local concerns for eelgrass, we reference three separate court cases and ongoing litigation brought against the ACOE regarding NWP 48 in the State of Washington that center around adverse impacts to eelgrass and insufficient analysis of individual and cumulative effects (United States District Court, Western District of Washington Case No. C16-0950RSL, C17-1209RSL, and C18-0598RSL).

regional conditions issued by the Portland District⁴ and the San Francisco District⁵ as model language that we recommend the Seattle District use to issue a comparable district-specific regional condition for aquatic resources of special concern in the State of Washington.

Additionally, we recommend that the Seattle District issue another district-specific regional condition for the State of Washington necessary to facilitate compliance with the “Endangered Species” general condition, to appropriately enhance protection of listed species or critical habitat under the Endangered Species Act. A regional condition that facilitates ESA compliance is recognized as an example category of ACOE regional condition in its proposed rule (85 FR 57298) and would go a long way to helping ensure no more than minimal individual and cumulative adverse effects on the aquatic environment. ***Specifically, we recommend an ESA compliance regional condition should make explicit the required conservation measures, reasonable and prudent measures and terms and conditions of the Services PBO⁶, as well as clarify that PCNs are a requirement for all NWP 48 applicants in the State of Washington, given that there is potential to affect threatened or endangered species and/or critical habitat throughout Washington State waters.***

In summary, our recommended additional regional conditions are in line with the ACOE current statements regarding intended purposes of regional conditions and help ensure a ‘minimal adverse effects’ finding. Without such additional conditions we believe the ACOE proposed rule

⁴ Portland District of Oregon, Regional Condition 2 (that applies to all NWPs for the State of Oregon). “Aquatic Resources of Special Concern: Pre-construction notification to the District Engineer is required for all activities proposed in waters of the U.S. within an aquatic resource of special concern. Aquatic resources of special concern are resources that are difficult to replace, unique, and/or have high ecological function. For the purpose of this regional condition, aquatic resources of special concern are native eelgrass (*Zostera marina*) beds, mature forested wetlands, bogs, fens, vernal pools, alkali wetlands, wetlands in dunal systems along the Oregon coast, estuarine wetlands, Willamette Valley wet prairie wetlands, marine gardens, marine reserves, kelp beds, and rocky substrate in tidal waters. In addition to the content requirements of NWP General Condition (GC) 32, the preconstruction notification must include a statement explaining why the effects of the proposed activity are no more than minimal. Written approval from the District Engineer must be obtained prior to commencing work. Note: If the District Engineer determines that the adverse effects of the proposed activity are more than minimal, then the District Engineer will notify the applicant that either: (a) the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) the activity is authorized under the NWP subject to submission of a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level; or (c) the activity is authorized under the NWP with specific modifications or conditions.”

https://www.nwp.usace.army.mil/Portals/24/docs/regulatory/nationwide/NWP_Regional_Permit_Condition_01DEC17.pdf

⁵ San Francisco District of California, General Regional Condition 3 (that applies to all NWPs in the San Francisco District): “Notification to the Corps (in accordance with General Condition No. 31), including a compensatory mitigation plan, habitat assessment, and extent of proposed-project impacts to Eelgrass Beds are required for any activity permitted by NWP if it will take place within or adjacent to Eelgrass Beds.”

https://www.spn.usace.army.mil/Portals/68/docs/regulatory/Nationwide/Reg_Cond.pdf

⁶ As per Section 1.3.1 Conservation Measures (pp. 11-15) of [NMFS 2016](#), subsequent [minor modifications](#) to PBO conservation measures, and as per the [Revised Incidental Take Statement](#) of NMFS PBO.

fails to ensure no more than minimal individual and cumulative adverse effects on Washington State's aquatic environment.

Conclusion

We thank the ACOE and its Seattle District for their ongoing efforts to involve the public in the development of NWPs and other permitting programs, and sincerely hope that our comments provide insights that help the ACOE meet its obligations to protect aquatic resources in Washington State. We look forward to continuing to participate in ACOE and other federal and state agency efforts to protect ecologically important coastal habitat and conserve marine life, here in Washington State, and across the Nation.

Sincerely,

A handwritten signature in blue ink, appearing to read "Steve Marx".

Steve Marx
Officer, The Pew Charitable Trusts
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