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Regulatory Division
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U.S. Army Corps of Engineers, Los Angeles District
Regulatory Division, Ventura Field Office
60 South California Street, Suite 201
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Re: Comments on 2020 NWP Regional Conditions

Dear Ms. Schowalter and Mr. Szijj:

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 (NWP) and issue five new NWP (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 San Francisco and Los Angeles Districts with the following comments on regional issues specific to the 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 that are expected to increase eelgrass suppression;
- inadequacy of draft revisions to the national decision document (COE-2020-0002) for proposed NWP 48¹ specific to individual and cumulative adverse effects; and
- recommendations for regional conditions necessary to ensure no more than minimal adverse environmental effects within California.

¹ Intended to respond to the October 10, 2019 court order and [ruling](#) issued by the United States District Court, Western District of Washington (Case No. C16-0950RSL and C17-1209RSL)

We recommend that the San Francisco and Los Angeles Districts restrict implementation of new NWP's, 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 California.

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

Specific to California, we highlight protective designations and policies for eelgrass, including the state's designation of eelgrass beds as sensitive habitat.² In accordance with California's Coastal Management Program, the Coastal Act requires that: special protections must be given to areas and species of special biological or economic significance; and biological productivity and water quality must be maintained, and where feasible, restored; among other provisions (Cal. Pub. Res. Code § 30200-30236). Further, it is NOAA Fisheries' policy to recommend no net loss of eelgrass habitat function in California according to its California Eelgrass Mitigation Policy (CEMP) (NMFS 2014). In particular, the CEMP specifies that, "eelgrass warrants a strong protection strategy because of the important biological, physical, and economic values it provides, as well as its importance to managed species under the Magnuson-Stevens Fishery Conservation and Management Act." To this end, CEMP recommends compensatory mitigation for the loss of existing eelgrass habitat function across all of California, to the extent that avoidance and minimization of effects to eelgrass have been pursued to the maximum extent practicable (NMFS 2014).

NWP 48 Modifications Expected to Increase Eelgrass Suppression

The ACOE's proposed modifications to NWP 48 allow for an increased amount of eelgrass suppression by removing 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). By striking the previous ½ acre limit for

² California Environmental Protection Agency: State Water Resources Control Board, Water Quality Control Plan, Ocean Waters of California: [California Ocean Plan \(2019\)](#)

impacts to submerged aquatic vegetation in “new” areas, the ACOE would permit expanded impacts to eelgrass, beyond a ½ acre, which would effectively increase the amount of eelgrass suppressed by “new” shellfish mariculture. Given the aforementioned national and California state policies and designations that highlight the need for special eelgrass protections, the ACOE’s willingness to permit increased impacts to submerged aquatic vegetation, including eelgrass, is unexpected particularly in light of its inadequate individual and cumulative effects analysis discussed below.

Further, the ACOE proposed removal of pre-construction notification (PCN) thresholds and requirements for NWP 48 has the potential to affect long-standing PCN practices for commercial shellfish mariculture activities in California. Absent definitive requirements of PCNs for all NWP 48 applicants, there is uncertainty regarding the ACOE’s ability to add special conditions to protect eelgrass through its PCN verifications which, pending the adoption of additional regional conditions, would be its only mechanism for adding post-issuance procedures by division or district engineers to mitigate adverse effects to eelgrass (85 FR 57298). Without assurance that the ACOE has effective processes in place to add such special conditions through verification of each application in California subject to NWP 48, the ACOE’s ability to ensure that its implementation of NWP 48 will result in no more than minimal individual and cumulative adverse environmental effects is highly uncertain.

These regional implications of the proposed NWP 48 modifications call into question both the rationale for modifications that increase eelgrass suppression and the ACOE’s ability to ensure a finding of no more than minimal individual and cumulative adverse environmental effects, specifically within California. ***For these reasons, we recommend that the ACOE reconsider including the proposed NWP 48 modifications and apply additional regional conditions to ensure no more than minimal individual and cumulative adverse effects on California’s aquatic environment, as further discussed below.***

Inadequacy of Draft Revisions for Individual and Cumulative Adverse Effects

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 a court order that held NWP 48 unlawful in Washington State where comparable eelgrass concerns exist as occur in California. In its national decision document, the ACOE’s 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 San Francisco and Los Angeles Districts, 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. Specifically, we suggest that review of a programmatic biological opinion developed by NOAA Fisheries specific to a proximate State's commercial shellfish mariculture activities is needed rigorous effects analysis, including cumulative effects and quantified impacts to eelgrass and other dependent aquatic resources (NMFS 2016).*

Recommended Additional Regional Conditions

With the following 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 statements in mind and given our preceding comments, we strongly recommend that the San Francisco and Los Angeles Districts issue regional conditions to ensure NWP cause no more than minimal individual and cumulative adverse effects on California's aquatic environment.

With respect to the Districts' proposed regional conditions for 2020 NWP and previously issued regional conditions for 2017 NWP, we commend the Los Angeles District for its proposed regional condition 5.b. relative to 2020 NWP, which implements, in part, NOAA Fisheries' CEMP recommendations and facilitates compliance with the Magnuson-Stevens Fishery Conservation and Management Act (specific to adverse effects to EFH, defined at 50 CFR 600.910(a))³. We also recognize the value of the San Francisco District's previously issued regional condition 3 relative to 2017 NWP, which also implements, in part, NOAA Fisheries'

³ Los Angeles District of California, Proposed Regional Condition 5.b. for 2020 NWP (that applies to all NWP in the Los Angeles District). "5. The permittee must submit a PCN in accordance with General Condition 32 in the following circumstances: b. All areas designated as EFH by the Pacific Fishery Management Council (PFMC). For non-federal permittees, if the NWP activity might have the potential to adversely affect EFH as designated by the PFMC, the PCN must include an EFH assessment and analysis of effects of the action on EFH, in accordance with 50 CFR 600.920(e). If the site is in estuarine or marine waters and contains eelgrass (*Zostera marina* or *Z. pacifica*) the EFH assessment shall also include an eelgrass survey according to the methods described in the most recent version of the CEMP published by the National Marine Fisheries Service. For NWP activities that require pre-construction notification, Federal permittees must provide the documentation demonstrating compliance with the Magnuson-Stevens Fishery Conservation and Management Act. Adverse effects to EFH are defined at 50 CFR 600.910(a)."

<https://www.spl.usace.army.mil/Portals/17/docs/publicnotices/Special%20Public%20Notice%20Nationwide%20Permit%20Reissuance.pdf>

CEMP recommendations.⁴ We acknowledge that the San Francisco District is not proposing to continue this condition for 2020 NWP, unfortunately. ***Building from these proposed and past-issued conditions, we recommend the San Francisco and Los Angeles Districts use their discretionary authority to issue a district-specific regional condition that applies to all NWPs for California including NWP 48 and more holistically implements NOAA Fisheries’ CEMP recommendations and implementing guidelines⁵ in order to help meet a ‘minimal adverse impacts’ finding.***

Further, we recommend the Districts’ incorporate all aquatic resources of special concern in their issued condition, inclusive of eelgrass, which would ensure the District Engineers receive ample, pertinent information when determining whether an applicant’s proposed activities are more than minimal. Such a regional condition would go a long way to helping ensure no more than minimal individual and cumulative adverse effects on California’s aquatic environment. ***To this end, we recommend that the San Francisco and Los Angeles Districts review and incorporate relevant aspects of a proximate west coast District’s condition for aquatic resources of special concern.⁶ We also recommend that such a condition clarify that PCNs are a requirement for***

⁴ San Francisco District of California, General Regional Condition 3 for 2017 NWPs (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

⁵ CEMP recommends no net loss of eelgrass habitat function in California, and compensatory mitigation for the loss of existing eelgrass habitat function following avoidance and minimization of effects to the maximum extent possible, as well as implementing guidelines for California specific to: eelgrass habitat definition, surveying eelgrass, avoiding and minimizing impacts to eelgrass, assessing impacts to eelgrass habitat, mitigation options, and special circumstances. NOAA Fisheries website for Seagrass on the West Coast provides a direct link to CEMP as well as other useful polices, tools, and data specific to California and relevant to eelgrass conservation, helpful to ensuring minimal adverse effects. <https://www.fisheries.noaa.gov/west-coast/habitat-conservation/seagrass-west-coast>

⁶ Portland District of Oregon, Regional Condition 2 for 2017 NWPs (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

all NWP activities in California that may have the potential to adversely affect aquatic resources of special concern, including eelgrass, given that NOAA Fisheries' CEMP recommendations and implementing guidelines are relevant throughout California waters.

In summary, our recommended additional regional condition is 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, the ACOE proposed rule fails to ensure no more than minimal individual and cumulative adverse effects on California's aquatic environment.

Conclusion

We thank the ACOE and its San Francisco and Los Angeles Districts 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 California. 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 California, and across the Nation.

Sincerely,



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