



# United States Department of the Interior

## FISH AND WILDLIFE SERVICE

Washington Fish and Wildlife Office  
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Lacey, Washington 98503



AUG 18 2016

**In Reply Refer To:**

01EWF00-2016-CPA-0072

Michelle Walker  
U.S. Army Corps of Engineers, Seattle District  
ATTN: Regulatory Branch (K. Urelus)  
Post Office Box 3755  
Seattle, Washington 98124-3755

Dear Ms. Walker:

Subject: Comments for the Proposed 2017 Nationwide Permits and Seattle District  
Regional Conditions

On June 1, 2016, the U.S. Army Corps of Engineers (Corps) published a proposal to reissue 50 existing nationwide permits (NWP) and two new NWP. On June 20, 2016, the Corps' Seattle District issued a special public notice describing the proposed regional general conditions and proposed regional specific conditions that are currently under consideration by the Seattle District and Northwestern Division. Comments for the proposed regional general conditions and proposed regional specific conditions will be accepted through August 19, 2016.

Thank you for the opportunity to provide comments for the proposed NWP regional general and regional specific conditions. We appreciated the series of informational meetings and workshops leading up to the public comment period. With our comments, the U.S. Fish and Wildlife Service (USFWS), Washington Fish and Wildlife Office (WFWO) aims to:

- Offer our support and/or recommended changes for proposed NWP regional general and specific conditions.
- Offer our support for requiring compensatory mitigation to offset all authorized losses of jurisdictional waters.
- Offer our support and recommendations for improved communication and coordination with affected Native American Indian Nations and Tribes. And,

- Offer our support for, and willingness to engage in continued inter-agency coordination directed at effective program-level and landscape-scale planning and implementation to arrest and reverse current trends toward significant cumulative loss and decline of fish, wildlife, and tribal trust resources.

### Background

Section 404(e) of the Clean Water Act (CWA) provides the statutory authority for the Secretary of the Army to issue general permits on a nationwide basis for any category of activities involving discharges of dredged or fill material into waters of the United States. NWP's are a type of general permit. They are designed to regulate with little delay certain activities in jurisdictional waters and wetlands that have no more than minimal adverse environmental impacts (33 CFR part 330.1(b)). Activities authorized by NWP's and other general permits must be similar in nature, cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment (33 U.S.C. § 1344(e)(1)). NWP's can also be issued to authorize activities pursuant to Section 10 of the Rivers and Harbors Act of 1899 (33 CFR part 322.2(f)).

The Corps and U.S. Environmental Protection Agency (EPA) administer the CWA with the overarching goal and obligation of ensuring the "restoration and maintenance of [the] chemical, physical and biological integrity of [the] Nation's waters" (33 U.S.C. § 1251). The Corps and EPA also act as agents of the federal government and in so doing must uphold the treaty-protected rights, and protect and restore the treaty-protected resources, of federally-recognized Native American Indian Nations and Tribes. In Washington State, more than twenty federally-recognized Indian Nations and Tribes co-manage treaty-protected resources, and/or exercise treaty-protected rights, along the coast, Puget Sound (or Salish Sea), and Columbia River.

The USFWS and National Marine Fisheries Service (NMFS) administer the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*)(ESA), the Fish and Wildlife Coordination Act, Magnuson-Stevens Fishery Conservation and Management Act, and other/related fish and wildlife laws and policies. The protections and procedural or administrative requirements of the ESA apply to all agencies of the federal government. All agencies of the federal government "...shall, in consultation with and with the assistance of the Secretary [of the Interior], utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of ... species listed pursuant to section 4 of [the ESA]" (ESA Section 7(a)(1)). "Each federal agency shall ... [also] insure that any action authorized, funded, or carried out ... is not likely to jeopardize the continued existence of any ... species or result in the destruction or adverse modification of [critical] habitat" (ESA Section 7(a)(2)).

According to the Corps, and in the context of the NWP program, the phrase "minimal cumulative adverse effect on the environment" refers to the collective direct and indirect adverse environmental effects caused by all the activities authorized by a particular NWP during the time period that the NWP is in effect in a specific geographic region (a period of no more than 5 years). The appropriate geographic area for assessing cumulative effects is determined by the decision-making authority.



In February 1997, the Seattle District withdrew authorization for the use of NWP's 13, 14, 23, and 26 from the Commencement Bay Study Area (CBSA), where a cumulative effects study documented extensive wetland loss (Corps 1991). During 2002, the list of withdrawn permits was expanded to also include NWP's 12, 29, 39, 40, 41, 42, and 43. The WFWO understands that these NWP's were determined by the Corps to have impacts to wetlands and other waters of the U.S. that exceed the threshold of minimal effects for the area of concern. We concur with that assessment.

During 2014, the Seattle District completed the *Cumulative Effects Analysis, Eastern Shore of Central Puget Sound, Washington* (Corps 2014). The study area extended north from the boundary of the CBSA at Brown's Point on Commencement Bay, to Tulalip Point north of the mouth of the Snohomish River and Everett, Washington. The study area includes the Duwamish and Snohomish River estuaries to the upriver extent of salt water intrusion, and landward 650 ft from mean higher high-water. The study area was divided into subsections for detailed analysis. The analysis concludes with the following multiple lines of evidence demonstrating that cumulative adverse effects are extensive and have exceeded the ability of the area of concern to accommodate additional effects and recover (Corps 2014, pp. 6-7 to 6-8):

- *Wetlands and Special Aquatic Sites:* Approximately 80 percent loss of Snohomish River and 98 percent loss of Duwamish River estuarine habitat.
- *Impervious Surface:* An increasing trend in impervious surface for all subsections over the 55-year period of analysis. The entire study area exceeds the documented 10 percent threshold of concern recommended by Booth and Jackson (1997 in Corps 2014).
- *Landscape Fragmentation:* In all subsections of the study area at landscape-scale, patch area decreased and patch density and edge density increased over the 55-year period of analysis. There remains a deeply fragmented landscape dominated by high- and medium-density development with hardening of over 72 percent of the shoreline.
- *Water and Sediment Quality:* Multiple creeks and marine shoreline areas in the study area display degraded water and sediment quality. There is restricted shellfish harvesting on all beaches on the eastern shores of Puget Sound between Everett and Tacoma. Sediment quality results include increased severity and spatial extent of sediment toxicity, and an increase in adversely affected benthic invertebrate communities.
- *Salmon and Trout:* All Puget Sound Chinook salmon (*Oncorhynchus tshawytscha*) populations are below planning ranges for recovery escapement levels. Most populations are below the spawner-recruitment levels consistent with recovery. Most populations have declined in abundance since the 2005 status review, and trends since 1995 are mostly flat. Overall, new information on abundance, productivity, spatial structure, and diversity since the 2005 review does not indicate a change in the biological risk category. This includes pre-spawn mortality identified in multiple streams and shoreline areas within the study area.



- *Marine Birds*: Studies document declining densities or other assemblage changes in marine bird populations of the Puget Sound.

When a Corps District receives a pre-construction notification (PCN), the District Engineer reviews the PCN and determines whether the proposed activity will result in more than minimal individual or cumulative adverse environmental effects (81 FR 35187; June 1, 2016). The District Engineer applies the criteria in paragraph 2 of Section D, "District Engineer's Decision." The District Engineer may add conditions to the NWP authorization, including mitigation requirements, to ensure that the verified NWP activity results in no more than minimal individual or cumulative adverse environmental effects. Mitigation requirements for NWP activities can include permit conditions to avoid or minimize adverse effects on certain species or other resources, or compensatory mitigation requirements to offset authorized losses of jurisdictional waters and wetlands so that the net adverse environmental effects are no more than minimal. Review of a PCN may also result in the Corps District asserting discretionary authority to require an individual permit for the proposed activity (81 FR 35188; June 1, 2016).

When making waiver decisions, as well as compensatory mitigation decisions, District Engineers consider the factors in paragraph 2 of Section D, "District Engineer's Decision" (77 FR 10287; February 21, 2012). The factors most relevant to compensatory mitigation decision making are: (1) The environmental setting in the vicinity of the NWP activity, (2) the functions provided by the aquatic resources that will be affected by the NWP activity, (3) the degree or magnitude to which the aquatic resources perform those functions, (4) the extent that aquatic resource functions will be lost as a result of the NWP activity (e.g., partial or complete loss), (5) the duration of the adverse effects (temporary or permanent), and (6) the importance of the aquatic resource functions to the region (e.g., watershed or ecoregion). The Corps is soliciting comment on the appropriateness and practicability of requiring compensatory mitigation (81 FR 35192; June 1, 2016).

The Corps is also soliciting comment on five aspects of waivers: (1) Making changes to the numeric limits that can be waived; (2) whether to retain the authority of District Engineers to issue activity specific waivers for certain NWP limits; (3) whether to impose a linear foot cap on waivers for certain NWP limits; (4) whether to impose a linear foot cap on losses of intermittent and ephemeral stream beds; and, (5) whether to require compensatory mitigation to offset all losses of stream bed authorized by waivers (81 FR 35192; June 1, 2016).

#### General Comments

Several of the proposed NWPs have had, and will continue to have or result in, greater than minimal cumulative adverse effects on the environment. An objective consideration of cumulative adverse effects should include or incorporate the impacts and damage resulting from past actions, and should include the additive, countervailing, and synergistic effects of the current, proposed activity or activities (CEQ 1997). Cumulative effects are the total effect of all actions (all direct and indirect effects) on a given resource, ecosystem, or human community no matter who has or is taking the actions. Each affected resource, ecosystem, and human community must be analyzed in terms of its capacity to accommodate additional effects, based on its own time and space parameters (CEQ 1997).



Available information indicates to us and provides ample evidence to conclude that several of the NWP's are used too frequently and extensively, and too often without adequate compensatory mitigation, resulting in significant cumulative adverse effects and losses of jurisdictional waters and wetlands, and corresponding significant cumulative adverse effects and losses of ecosystem processes and functions. NWP General Condition 17 ("Tribal Rights") and 23 ("Mitigation") would seem to establish the correct expectation where avoidance, minimization, and compensatory mitigation are concerned, but in practice (or as presently implemented) these general conditions do not afford adequate protection for fish, wildlife, and tribal trust resources. The Seattle District's NWP program contributes significantly to prevailing, observable and measurable trends toward declining fish and wildlife habitat function across multiple spatial scales. These trends represent impacts and damage to treaty-protected resources and rights which the agencies of the federal government are charged with protecting and upholding.

Information to describe the current, degraded environmental baseline and observable trends (for the Washington coast, Puget Sound or Salish Sea, and Columbia River) includes the following: the Northwest Indian Fisheries Commission's (NWIFC) *2016 State of Our Watersheds* (NWIFC 2016a), and sources of information cited therein; various reports and action agenda produced by and for the Puget Sound Ecosystem Monitoring Program and Puget Sound Partnership; species recovery and planning documents produced by the NMFS, USFWS, and watershed-based lead entities; and, a series of reports produced by and for the Washington State Conservation Commission (i.e., reports describing limiting factors in each of the Water Resource Inventory Areas). Two Corps publications, the *Commencement Bay Cumulative Impact Study* (Corps 1991) and *Cumulative Effects Analysis, Eastern Shore of Central Puget Sound, Washington* (Corps 2014) document multiple lines of evidence demonstrating that cumulative adverse effects are extensive and have exceeded the ability of the areas of concern to accommodate additional effects and recover.

The Corps NWP program incorporates compensatory mitigation unevenly. More should be done to ensure that every Corps permit issuance or authorization incorporates specific requirements for compensatory mitigation to fully offset impacts to jurisdictional waters and wetlands, and associated loss or degradation of ecosystem processes and functions. Available information indicates to us and provides ample evidence that the Corps' compensatory mitigation policies and procedures are applied unevenly and with uncertain and/or incomplete results. The NMFS has previously found and communicated to the Corps the following (NMFS 2014; NMFS 2016): 1) The Corps has extensive authority to address individually small, but collectively large and significant losses, but often or generally declines to do so; 2) The Corps fails to successfully track individual and cumulative impacts and effects; and, 3) Available data indicate there is a low rate of compliance with required compensatory mitigation, and only a small percentage of NWP activities or projects successfully replace or offset impacts to ecological functions. Some of these conclusions were also identified in a study and report produced by the Washington State Department of Ecology (Ecology)(Ecology 2000).

Without reliable, effective compensatory mitigation to fully offset impacts to jurisdictional waters and wetlands, the Seattle District's NWP program will continue to have greater than minimal cumulative adverse effects on the environment. Where impacts to ESA-listed species



and critical habitat are concerned, we feel strongly that the Corps can and should implement integrated 7(a)(1) and 7(a)(2) programs. Sections 7(a)(1) and 7(a)(2) of the ESA are related and interdependent. If federal agencies limit their attention to the minimum requirements under section 7(a)(2) (i.e., avoiding jeopardizing species; avoiding destruction or adverse modification of critical habitat), and neglect their responsibilities under section 7(a)(1) (i.e., conserving listed species), the eventual outcome could be a future where any proposed action is likely to jeopardize listed species and/or result in adverse modification of critical habitat. Therefore, federal agencies should develop and implement section 7(a)(1) programs in conjunction with their section 7(a)(2) consultations.

Conservation objectives can be achieved more reliably, completely, and efficiently through landscape-scale programmatic mitigation. We recommend that the Seattle District continue to identify, fund, plan, and develop new and additional compensatory mitigation options for NWP applicants, including in-lieu fee programs, conservation banks, and other similar arrangements. If planned and implemented with the involvement and participation of other interested and affected parties, including Native American Indian Nations and Tribes, Ecology, and county shoreline programs, landscape-scale programmatic mitigation holds the prospect of simplifying and streamlining effective compensatory mitigation for the impacts and losses incurred by NWP activities and projects.

Where impacts to treaty-protected resources and rights are concerned, the Seattle District has heard directly from Native American Indian Nations and Tribes about the deficiencies of the NWP program (NWIFC 2016b; R. McReynolds *pers. comm.* 2014): requirements for PCNs are inadequate; information provided to Indian Nations and Tribes in support of individual NWP authorizations is often incomplete; absent a Freedom of Information Act request, requests for additional information received from Indian Nations and Tribes are often denied by the Corps; the Corps does not adequately track the status and outcome of individual NWP activities or projects, and therefore wrongly interprets individual and cumulative impacts and effects to treaty-protected resources and rights; and, the Corps does not provide adequate monitoring or enforcement to ensure NWP activities comply with all required conditions, including required compensatory mitigation. These complaints suggest to us that the Seattle District should improve their communications with Indian Nations and Tribes to effectively advocate for tribal treaty-protected resources and rights.

#### Specific Comments – NWP Regional General Conditions

*1. Pre-Construction Notification (PCN):* Native American Indian Nations and Tribes have stated that NWP General Condition 17 (“Tribal Rights”) is inadequate (NWIFC 2016b; R. McReynolds *pers. comm.* 2014); in practice, or as presently implemented, this general condition does not provide adequate protection for tribal trust resources. They have also stated that PCNs required under NWP General Condition 18 (Endangered Species) do not substitute for adequate and complete notifications made directly to affected Indian Nations and Tribes. Native American Indian Nations and Tribes have recommended that the Seattle District’s NWP program should require PCNs for each and every NWP activity or project located within the U.S. vs. Washington (Boldt Decision) case area (i.e., throughout all of the Puget Sound or Salish Sea and most of coastal Washington)(NWIFC 2016b; R. McReynolds *pers. comm.* 2014). We believe that the



Corps must, in every case, provide to affected Indian Nations and Tribes the basic information required to effectively advocate for treaty-protected resources and rights. We offer our support for the recommendation that PCNs should be required for each and every NWP activity or project located within the U.S. vs. Washington (Boldt Decision) case area.

*2. Aquatic Resources Requiring Special Protection:* The WFWO does not support the stated exception for NWP 3 (Maintenance). Based on our experience consulting with the Seattle District and their applicants, we conclude that NWP activities and projects which are designed to maintain existing structures too often ignore or fail to consider viable alternatives, do not adequately address ongoing causes for failure, and do not include or incorporate adequate compensatory mitigation to offset impacts to ecosystem processes and functions. Existing structures below the mean higher high water mark are also vulnerable to projected sea level rise associated with climate change. Between 2012 and 2016, the Seattle District authorized more than 1,200 projects with NWP 3 (Maintenance), the most of any NWP. Too often these NWP activities and projects have resulted in a net loss, and therefore a more than minimal cumulative adverse effect and loss, of jurisdictional waters, wetlands, and associated ecosystem processes and functions. We therefore recommend that the Seattle District remove the stated exception for NWP 3 (Maintenance).

*3. New Bank Stabilization in Tidal Waters of the Salish Sea:* We offer our support for a prohibition on the use of NWPs when authorizing new bank stabilization in tidal waters of the Puget Sound and Salish Sea. We agree that available information supports the need for and warrants this prohibition. However, we recommend that the Seattle District also consider whether available information supports the same or a similar prohibition along lower portions of major Puget Sound tributaries (e.g., the lower Puyallup, Green/Duwamish, Snohomish, Stillaguamish, and lower Skagit Rivers). Unless, in every case, NWPs authorizing new bank stabilization include or incorporate adequate compensatory mitigation to offset impacts to ecosystem processes and functions, these NWP activities and projects will result in significant net losses, and a more than minimal cumulative adverse effect and loss, of jurisdictional waters, wetlands, and associated ecosystem processes and functions. We do not support waivers that would allow District Engineers to authorize NWP activities and projects resulting in net losses of habitat or habitat function.

We are aware that the Seattle District has included a "maintenance exception" in this version of NWP Regional General Condition 3. While we understand the Corps is reluctant to prohibit all use of NWPs when authorizing maintenance of existing bank stabilization, we conclude that NWP activities and projects which are designed to maintain existing structures too often ignore or fail to consider viable alternatives, do not adequately address ongoing causes for failure, and do not include or incorporate adequate compensatory mitigation to offset impacts to ecosystem processes and functions. Unless, in every case, NWPs authorizing maintenance of existing bank stabilization include or incorporate adequate compensatory mitigation to offset impacts to ecosystem processes and functions, these NWP activities and projects will result in significant net losses, and a more than minimal cumulative adverse effect and loss, of jurisdictional waters, wetlands, and associated ecosystem processes and functions.



4. *Commencement Bay*: This NWP regional general condition identifies ten NWPs that may not be used to authorize activities or projects located in the CBSA. It is our understanding that the origins of this regional general condition include the *Commencement Bay Cumulative Impact Study* (Corps 1991) and related policy analyses and decisions made during 1997 and 2002. Also, if we understand correctly, it appears today that even the Corps' Seattle District has incomplete records to explain why the list includes ten specific NWPs (NWPs 12, 13, 14, 23, 29, 39, 40, 41, 42, and 43), but does not include other or additional NWPs.

We do not support the current version of this NWP regional general condition. Instead, the WFWO recommends that NWP Regional General Condition 4 should be re-defined in both scope and intent. The Seattle District has documented multiple lines of evidence demonstrating that cumulative adverse effects are extensive and have exceeded the ability of the areas of concern to accommodate additional effects and recover (Corps 1991; Corps 2014). Information included in these reports provides compelling evidence that the Seattle District should, at a minimum, extend the prohibition on using NWPs to all of the east-central Puget Sound, from Point Defiance (west of Tacoma), to Tulalip Point (north of the mouth of the Snohomish River and Everett). It may also be appropriate to extend the prohibition on using NWPs to Lake Washington, Lake Sammamish, and the lower Columbia River (EPA 2016). We also request and recommend that the Corps re-evaluate the list of specifically excluded NWPs. The special public notice and available supporting information provide no explanation for why the list includes ten specific NWPs, but does not include other or additional NWPs.

5. *Bank Stabilization*: According to the EPA, the Seattle District and Northwestern Division have removed language from the 2012 version of this NWP regional general condition, including language which established requirements for NWP activities and projects that maintain existing bank stabilization (EPA 2016). These changes weaken rather than strengthen the protections afforded by this NWP regional general condition. We therefore offer our support for the recommendation, made by the EPA (EPA 2016), that omitted language from the 2012 version of this NWP regional general condition should be included, including the language which established requirements for NWP activities and projects that maintain existing bank stabilization. Unless, in every case, NWPs authorizing maintenance of existing bank stabilization include or incorporate adequate compensatory mitigation to offset impacts to ecosystem processes and functions, these NWP activities and projects will result in significant net losses, and a more than minimal cumulative adverse effect and loss, of jurisdictional waters, wetlands, and associated ecosystem processes and functions. We do not support waivers that would allow District Engineers to authorize NWP activities and projects resulting in net losses of habitat or habitat function.

7. *Stream Loss*: We offer our support for this new NWP regional general condition. We support a waiver that would allow District Engineers to authorize NWP activities and projects resulting in net losses if the primary purpose is to restore and improve ecological function and the project or activity meets the conditions of NWP 27 (Aquatic Habitat Restoration, Establishment, and Enhancement Activities).

8. *Mitigation*: We do not support the current version of this NWP regional general condition. Instead, the WFWO recommends that NWP Regional General Condition 8 should require



compensatory mitigation for any and all net loss of jurisdictional waters, wetlands, or associated ecosystem processes and functions. We do not support waivers that would allow District Engineers to authorize NWP activities and projects resulting in net losses of habitat or habitat function.

Conservation objectives can be achieved more reliably, completely, and efficiently through landscape-scale programmatic mitigation. We recommend to the Seattle District that they continue to identify, fund, plan, and develop new and additional compensatory mitigation options for NWP applicants, including in-lieu fee programs, conservation banks, and other similar arrangements. If planned and implemented with the involvement and participation of other interested and affected parties, including Native American Indian Nations and Tribes, Ecology, and county shoreline programs, landscape-scale programmatic mitigation holds the prospect of simplifying and streamlining effective compensatory mitigation for the impacts and losses incurred by NWP activities and projects.

*10. Submerged Aquatic Vegetation and Forage Fish:* We offer our support for this NWP regional general condition. However, NWP Regional General Condition 10 should not include a blanket exception or exemption for all NWP 48 (Commercial Shellfish Aquaculture) activities and projects. NWP 48 may allow for limited impacts to submerged aquatic vegetation and forage fish, but applicants are not relieved of the responsibility for documenting potential impacts and losses. The Seattle District must collect this information for all NWP activities and projects, including NWP 48 (Commercial Shellfish Aquaculture) activities and projects, to ensure they do not result in a more than minimal cumulative adverse effect and loss. We recommend striking the language excluding the application of this condition from NWP 48.

*14. Temporary Impacts and Site Restoration:* We offer our support for this NWP regional general condition. However, NWP Regional General Condition 14 should not include a blanket exception or exemption for all NWP 48 (Commercial Shellfish Aquaculture) activities and projects. NWP 48 may allow for limited impacts to submerged aquatic vegetation, but applicants are not relieved of the responsibility for documenting potential impacts and losses. The Seattle District must collect this information for all NWP activities and projects, including NWP 48 (Commercial Shellfish Aquaculture) activities and projects, to ensure they do not result in a more than minimal cumulative adverse effect and loss. We offer our support for including monitoring requirements for any and all NWP activities and projects that result in a potential net loss of submerged aquatic vegetation. We do not support waivers that would allow District Engineers to authorize NWP activities and projects resulting in net losses of habitat or habitat function. We recommend striking the language excluding the application of this condition from NWP 48.

#### Specific Comments – NWP Regional Specific Conditions

Several of the proposed NWPs have had, and will continue to have or result in, greater than minimal cumulative adverse effects on the environment. Available information indicates to us and provides ample evidence to conclude that several of the NWPs are used too frequently and extensively, and too often without adequate compensatory mitigation, resulting in significant cumulative adverse effects and losses of jurisdictional waters and wetlands, and corresponding significant cumulative adverse effects and losses of ecosystem processes and functions.



The Corps NWP program incorporates compensatory mitigation unevenly. More should be done to ensure that every Corps permit issuance or authorization incorporates specific requirements for compensatory mitigation to fully offset impacts to jurisdictional waters and wetlands, and associated loss or degradation of ecosystem processes and functions. We do not support waivers that would allow District Engineers to authorize NWP activities and projects resulting in net losses of habitat or habitat function.

*3. Maintenance:* While we understand the Corps is reluctant to prohibit all use of NWPs when authorizing maintenance, we conclude that NWP activities and projects which are designed to maintain existing structures too often ignore or fail to consider viable alternatives, do not adequately address ongoing causes for failure, and do not include or incorporate adequate compensatory mitigation to offset impacts to ecosystem processes and functions. Unless, in every case, NWPs authorizing maintenance of existing structures include or incorporate adequate compensatory mitigation to offset impacts to ecosystem processes and functions, these NWP activities and projects will result in significant net losses, and a more than minimal cumulative adverse effect and loss, of jurisdictional waters, wetlands, and associated ecosystem processes and functions.

*10. Mooring Buoys:* The Seattle District has heard directly from Native American Indian Nations and Tribes about the deficiencies of the NWP program (NWIFC 2016b; R. McReynolds *pers. comm.* 2014), including their significant concerns regarding NWP authorizations for mooring buoys. Indian Nations and Tribes have indicated that NWP authorizations for mooring buoys interfere with and have individual and cumulative impacts and effects to treaty-protected resources and rights (including the right to fish and collect shellfish). We offer our support for the recommendation that PCNs should be required for each and every NWP activity or project located within the U.S. vs. Washington (Boldt Decision) case area.

*13. Bank Stabilization:* We offer our support for a prohibition on use of NWPs when authorizing new bank stabilization in tidal waters of the Puget Sound and Salish Sea. We agree that available information supports the need for and warrants this prohibition. However, we recommend that the Seattle District also consider whether available information supports the same or a similar prohibition along lower portions of major Puget Sound tributaries (e.g., the lower Puyallup, Green/Duwamish, Snohomish, Stillaguamish, and lower Skagit Rivers). Unless, in every case, NWPs authorizing new bank stabilization include or incorporate adequate compensatory mitigation to offset impacts to ecosystem processes and functions, these NWP activities and projects will result in significant net losses, and a more than minimal cumulative adverse effect and loss, of jurisdictional waters, wetlands, and associated ecosystem processes and functions. We do not support waivers that would allow District Engineers to authorize NWP activities and projects resulting in net losses of habitat or habitat function.

*29. Residential Developments:* This NWP regional specific condition requires that PCNs for multi-phase projects must include information to describe all work in or potentially affecting waters of the U.S. We offer our support for this requirement. However, in order to ensure that the Corps receives adequate information to describe and understand potential effects to waters of the U.S., we recommend that the Seattle District incorporate additional language regarding site



development, pervious and impervious surfaces, and stormwater runoff control and treatment. There are increasing trends in impervious surface (Corps 2014), which often exceed the documented 10 percent threshold of concern recommended by Booth and Jackson (1997 in Corps 2014). NWP activities and projects must incorporate (or reference) State or local requirements for stormwater runoff control and treatment, otherwise they will have a more than minimal cumulative adverse effect on jurisdictional waters, wetlands, and associated ecosystem processes and functions.

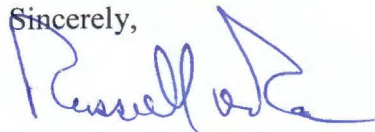
*31. Maintenance of Existing Flood Control Facilities:* Unless, in every case, NWPs authorizing maintenance of existing facilities or structures include or incorporate adequate compensatory mitigation to offset impacts to ecosystem processes and functions, these NWP activities and projects will result in significant net losses, and a more than minimal cumulative adverse effect and loss, of jurisdictional waters, wetlands, and associated ecosystem processes and functions.

*39. Commercial and Institutional Developments:* This NWP regional specific condition requires that PCNs for multi-phase projects must include information to describe all work in or potentially affecting waters of the U.S. We offer our support for this requirement. However, in order to ensure that the Corps receives adequate information to describe and understand potential effects to waters of the U.S., we recommend that the Seattle District incorporate additional language regarding site development, pervious and impervious surfaces, and stormwater runoff control and treatment.

*48. Commercial Shellfish Aquaculture Activities:* The EPA (EPA 2016) and Native American Indian Nations and Tribes (NWIFC 2016b) have recently expressed concerns regarding NWP 48. We share their stated concerns. NWP 48 uses confusing and seemingly contradictory terms and definitions; it establishes and perpetuates uneven treatment among applicants; and, fails to incorporate regional general or specific conditions that are adequately protective of submerged aquatic vegetation and marine forage fish. The Seattle District has recently indicated an interest and willingness to develop a regional general permit for shellfish activities. We offer our support for a regional general permit for shellfish activities, especially one that incorporates stronger protections for submerged aquatic vegetation and marine forage fish.

Thank you for the opportunity to provide comments for the proposed NWP regional general and specific conditions. If these comments are unclear, if the Seattle District has related questions, or would like to further discuss these matters, please contact Ryan McReynolds (ryan\_mcreynolds@fws.gov; 360-753-6047) or Curtis Tanner (curtis\_tanner@fws.gov; 360-753-4326).

Sincerely,



*for* Eric V. Rickerson, State Supervisor  
Washington Fish and Wildlife Office

cc:

Corps, Seattle, WA (K. Urelus, A. Shuckhart, M. Bennett, L. Morris)



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EPA, Seattle, WA (L. Storm, S. Meyer)  
NMFS, Seattle, WA (D. Hirsh)  
NWIFC, Lacey, WA (J. Weber)  
WFWO, Lacey, WA (R. McReynolds, M. Jensen, C. Tanner)

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