



January 6th, 2017

Corps of Engineers
Regulatory Branch
Post Office Box 3755
Seattle, Washington 98124-3755

ATTN: Pamela Sanguinetti
Pamela.Sanguinetti@usace.army.mil

RE: Comments on NWP 48 Draft Regional Conditions

Dear Ms. Sanguinetti,

Sound Action is a Washington State environmental organization with a current focus on protecting Salish Sea nearshore habitats and protected species by providing oversight to the critical regulatory actions and taking legal action as necessary to ensure the appropriate application of environmental laws.

We appreciate the opportunity to provide comments on the Seattle District's draft regional general conditions for nationwide permit 48 (NWP 48) for commercial shellfish aquaculture. However, we feel it is important to note that due to clear gaps in appropriate notifications from the Seattle district, the regional environmental community and countless members of the public were not afforded opportunity to comment on the proposed reissuance of NWP 48 itself.

On June 1, 2016 Corps Headquarters released a proposal to reissue 50 Nationwide Permits with an accompanying comment period. However, the Seattle District did not send out any notice on this until June 20, 2016. Further, the notice the Seattle District Corps published was titled "Special Public Notice for Regional conditions." As a result of this action, the comment period for the Proposed Rulemaking and Reissuance of the NWPs was not clear, particularly as the notice section for aquaculture did not include any regional conditions to comment on – which would result in an interested party not providing comment of any kind on a notice title that appeared to be limited to inviting comments on regional conditions. Further, the notice itself boldly displayed a comment period deadline of August 19 when the comment period for the proposed NWP reissuance was actually August 1, 2016.

In addition to this lack of clarity regarding comment opportunity and timing, we also learned that many of our environmental partners were not included on the Seattle District Corps notification list – even though they had previously submitted aquaculture related comments and should have been parties of record.

Confusion was also created due to concurrent actions by the Seattle District related to the active development of a Regional General Permit for aquaculture in the marine waters of Washington State.

Given that substantive NWP modifications had been put forward, and the lack of appropriate notice to the environmental community and the general public, we contacted the Seattle District with a request for a brief local area extension to the comment period on the NWP reissuance and modifications but short of acknowledging the message, there was no further communication from the Corps – resulting in an unfortunate failure to ensure meaningful public process to this decision-making.

We would like to respectfully outline that subsequent actions and notifications by the Seattle District related to aquaculture have been equally troubling.

On September 20, 2016 a Special Public Notice was sent out detailing the Special Project Information Form (SPIF) to be used for Programmatic Endangered Species Act (ESA) and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation (MSA) for Shellfish Activities in Washington State Inland Marine Waters. As you are aware, a SPIF is a commonly used tool and in the Programmatic Biological Assessment (PBA) for Shellfish Activities in Washington State Inland Marine this SPIF was specifically outlined as being necessary “in order to ensure project applicant compliance with the ESA.” Subsequent to the SPIF release multiple meetings were held and additional guidance documents for use were presented. Then with no explanation, the Corps sent a notice on December 19, 2016 directing that a SPIF would no longer be required. Not only is this unexplained turnaround puzzling at best, it creates questions about how ESA compliance will be ensured.

Similar confusion also surrounds the Corps actions related to the proposed Regional Conditions for NWP 48. On November 23, 2016 the Seattle District Corps sent out a public notice outlining the proposed regional conditions for NWP 48. This notice was specific and crystal clear in outlining that draft conditions 10 and 14, which had previously contained a note stating that the conditions do not apply to NWP 48 activities, had been revised and were now applicable to all NWP 48 via a proposed regional condition.

Subsequent to this, a second notice was sent on November 30, 2016 rescinding the regional conditions outlined in the prior notice – and like the SPIF change, there was no explanation provided. While we have provided comment below supporting the need for these draft conditions to be included, both this disjointed process and the sudden removal of the conditions even before the comment period had ended raises significant questions and concerns about industry influence.

In addition to concerns regarding process, we would like to provide comment on the following areas related to regional conditions which should be added to RGP 48.

- Regional general conditions 10 and 14 required
- Fallow area restrictions required
- Incorporation of amended PBA /BIOP conservation measures required

REGIONAL GENERAL CONDITIONS 10 AND 14 SHOULD APPLY TO NWP 48

As highlighted above, the Corps purposefully included proposed Regional General Conditions 10 and 14 in the initial Special Notice regarding proposed regional general and specific conditions for NWP 48 in their initial November 23, 2016 draft document.

It has been clearly documented that shellfish aquaculture presents significant risk of impact to submerged aquatic vegetation (SAV) and forage fish spawning habitat. Additionally, the importance of both of these unique habitats to both the preservation and recovery of the Salish Sea, listed species and Treaty Rights is abundantly clear. Federal agencies have specifically outlined both the value of the habitat and the clear impact from aquaculture and the need to protect these habitats for ESA compliance in included in the PBA and BIOPS related to shellfish aquaculture. In the interest of brevity we are not bringing forward the multitudes of supporting commentary and science found in these documents and instead are incorporating these documents and the related citations by reference ¹²³

During the comment period for NWP reissuance, the Corps received multiple letters outlining support for why these conditions must be applicable to aquaculture. Notably, input from the EPA outlined the importance of applying these conditions to NWP 48. In their letter, the EPA reported that an expert and multi-agency work group convened by the Corps had determined these conditions to be a necessary component specific to NWP 48 – and that the EPA was surprised to learn that Seattle District did not incorporate the workgroup determinations and exempted NWP 48 from these conditions.

¹ NMFS Endangered Species Act Section 7 Formal Biological Programmatic Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for Shellfish Aquaculture Activities in Washington State (COE Reference Number NWS-2014-12) September 2, 2016

²USFW Programmatic Consultation for Shellfish Activities in Washington State Inland Marine Waters August 26, 2016.

³ USACE Regulatory Program Programmatic Biological Assessment Shellfish Activities in Washington State Inland Marine Waters October 2015.

Most significantly, the EPA reported “this change, along with the proposed national changes to NWP 48 opens the door to the potential for significant cumulative adverse effects to eelgrass beds and forage fish from aquaculture activities. We are very concerned that the cumulative effects from NWP48 as proposed will be incompatible with conservation of these resources, unless the content of any specific regional conditions for NWP48 are far more prescriptive.”⁴

Similar concern was voiced by the US Fish and Wildlife Service in their comment letter which reads “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 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.”⁵

Consideration of the NWP 48 exemption for RGC 14 was met with equal concern from both agencies. In addition, Washington State Treaty Tribes have also expressed strong concern and provided the Corps with supporting documentation related to the application of these important conditions to NWP 48.

The Corps suggestion that General Condition (GC) 23 – Mitigation and GC 32 – Pre-Construction Notification will address these components is false. There is nothing in GC 32 which would require the survey of SAV or require an applicant to provide information on the location and range of forage fish spawning sites within one mile of the project site as required by RGC 10. Similarly, none of the requirements related RCG 14 are found in GC 23.

Section Summary: Include RGC 10 and RGC 14 as Regional Conditions for NWP 48.

CONTINUING FALLOW AREA RESTRICTIONS ARE REQUIRED

As documented in the shellfish PBA and BIOP, there are a currently more than 14,000 acres of aquatic land identified as “fallow.” These documents also outline that these fallow areas have either never been used for cultivation or after decades of non-use are now considered to be recovered and in a fully natural state. The PBA and the BIOP also highlight that these fallow areas are often coexisting with SAV and forage fish spawning areas – and that the introduction or reintroduction of shellfish aquaculture in these areas creates more than a minimal impact which should be prevented.

⁴ EPA Region 10 comment letter August 19, 2016

⁵ USFW comment letter August 18,2016

We recognize shellfish aquaculture may sometimes have areas that are intentionally left fallow for a short to moderate period of time and that some accommodation may be appropriate for legitimate fallow areas. However, the Corps determination that any area which may have been used for aquaculture within the past 100 years – or that was just potentially planned to have been used – may be considered “continuing fallow” and exempted from habitat and species protecting provisions is deeply troubling and stands in direct contradiction to the mandates of the ESA and the Magnuson–Stevens Fishery Conservation and Management Act.

Not only is there no support for this industry introduced position regarding what constitutes a fallow area, we can think of no other regulated area where the Corps has so willfully given a free pass to industry upon their request, and see no tangible pathway where current actions by the Corps in this area conform with law.

Using this same approach, someone who inherited waterfront property their grandparents had purchased 90 years ago and planned to build a dock but didn’t –or that built a dock that has been gone for decades –would be allowed to build a new dock without any application of current regulations supported by the best available science related to the protection of SAV, forage fish spawning and other nearshore ecosystem functions.

Fortunately, the above outlined dock scenario is not how the Corps approaches regulated areas other than aquaculture and has generally taken the approach that the laws and regulations existing at the time of the proposed rebuild of a structure that has not been in serviceable condition within a modest time period - or of a renewed proposal - must be applied.

Section Summary: Create a regional condition to establish a modest and limited time frame when determining and regulating fallow areas.

INCORPORATION OF PBA AND BIOP CONSERVATION MEASURES – WITH AMENDMENTS

Forage Fish Protections

Both the PBA and the BIOP/ incidental take statements have created a series of conservation measures and/or conditions. **We urge the Corps to create a regional condition which references and incorporates these measures – along with the corrective provisions outlined below.**

Both the PBA and BIOP outline forage fish spawning protections, however, there are several significant gaps that should be corrected and addressed via regional condition provision.

- Generally these documents limit surf smelt protections to the area above +7 MLLW and +5 MLLW for sand lance. Although those tidal elevations may have a higher abundance of activity, spawning for both species has been found to occur at lower elevations.

- A 2014 study report found surf smelt spawning at elevations as low as +3.7 MLLW with approximately 38% of documented spawning sites at elevations below +7 MLLW.⁶
- Similarly, work that is conducted within a moderate distance below spawning may still have impact on spawning due to increased sedimentation moving in to spawning elevations or changes to suitable substrates due to aquaculture and a buffer between spawning and work areas should be established.
- The outlined PBA and/or BIOP conditions also fail to protect potential forage fish spawning habitats that are likely to be occupied, but that have never been evaluated. Currently, only a small portion of the nearly 2500 miles of Salish Sea shoreline have been surveyed – with most of those surveys being one off evaluations that may not have been aligned with the appropriate time of day or year to capture spawning activity.
- Further while the PBA and BIOP direct a pre-work survey for new projects in areas of potential spawning, the only restriction after eggs are found –which effectively turns the potential habitat into documented – is to wait until after eggs are no longer present at which time the project would be allowed to fully and forever move into the spawning habitat.
- The PBA and BIOP are both clear in documenting impact to herring spawning from aquaculture impacts, however, they fail to include appropriate Herring spawning protections. The only condition related to Herring spawning allows work of any kind in herring spawning areas and during herring spawning times so long as the applicant has surveyed for eggs and/or determined the eggs have all hatched. While this provision may protect the recently spawned eggs, it does nothing to ensure the long term protection of the habitat and substrates utilized for spawning.

Section Summary: Create a regional condition prohibiting work in or use of the areas above approximately 0 MLLW in areas with documented as forage fish spawning habitat or that are potential spawning areas with suitable substrate with this condition applicable to new, expanded or areas considered to be continuing fallow. Similarly, work should be prohibited in or adjacent to herring spawning habitat – with any work for existing operations that may be in or near herring spawning area restricted to occur only outside the spawning season.

⁶ Tidal elevation of surf smelt spawn habitat study for San Juan County, Washington Tina Whitman, Friends of the San Juans Dan Penttila, Salish Sea Biological Phillip Dionne, Kirk Krueger, Kenneth Pierce Jr. and Timothy Quinn, WDFW April 2014

SAV Protections

While the PBA and BIOP do direct some measure of protection for eelgrass and laminariales, they are silent on the protection of additional macroalgae species documented to be highly utilized for herring spawning. For example, in certain parts of the Puget Sound Basin the intertidal and shallow subtidal marine algal turf, often comprising dozens of species of red, green and brown algae, is used by spawning herring. Similarly, in deeper water, and in areas where native eelgrass beds do not predominate, the mud-bottom-dwelling *Gracilaria* is a dominant substrate plant. This information is included in Seattle District Army Corp publication, yet ignored in the PBA and BIOP.⁷

Additionally, while the BIOP appears to potentially restrict activities in fallow areas with eelgrass to only oyster long lines spaced laterally at 10 feet intervals it is silent on areas with kelp or other macroalgae. Further, while the limited studies which have included evaluation of long line activity found some indication that impacts may be less than other aquaculture practices, they did not find the impact fully avoided or even reduced to the point of being minimal with evaluations finding cultured areas –including longline areas –had lower eelgrass density and cover than uncultured meadow areas⁸. Even industry documents outline the known impacts and diminished eelgrass volume from this activity type – with shading introduced from the bags themselves as well as from vegetation that may grow on the lines.⁹

Section Summary: Create a regional condition requiring buffers for all vegetation types – including macroalgae – and for all aquaculture practices and activity areas.

In closing we would like to reiterate our thanks for having this opportunity to provide input to the proposed NWP 4 and related regional conditions. It is our hope that the Corps will take a hard look at agency actions and make the needed changes to ensure that aquaculture practices in the marine waters of Washington State follow a model of habitat and species protection and include the mandated application of critical environmental laws.

Sincerely,



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⁷ Penttila, D.. Marine Forage Fishes in Puget Sound. Puget Sound Nearshore Partnership Report No. 2007-03. Published by Seattle District, U.W. Army Corps of Engineers, Seattle, Washington 2007

⁸ Dumbauld, B., J. Ruesink, H. Macrellis, F. Oyarzun, and S. Hacker. Interactions between oyster aquaculture and seagrass (*Zostera marina*) in estuaries along the West coast of North America. Estuarine Research Federation Meeting, Seattle, Washington. September 2003.

⁹ Confluence Environmental Company Coast Seafood's Shellfish Aquaculture Humboldt Bay Permit Renewal and Expansion Project REVISED EELGRASS IMPACTS ANALYSIS 2016