

2017 Nationwide Permit (NWP) 48 Reissuance Process
Meeting with Tribal Representatives at Northwest Indian Fisheries Commission
Northwest Indian Fisheries Commission
6730 Martin Way East, Olympia, WA 98516
27 September 2016; 0930-1200
Meeting Notes

Participants:

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NWIFC:

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1) Introductions

Jim Weber, Northwest Indian Fisheries Commission, facilitated the meeting on behalf of the Tribes. Introductions were made around the room and on the video conference lines. Tribal participants from Burlington, Point No Point, and Mt. Vernon called into the video conference line. U. S. Army Corps of Engineers (Corps) representatives Muffy Walker, Pamela Sanguinetti, and Matthew Bennett gave a short presentation on the current developments in the Corps' aquaculture permitting program. Topics of the presentation focused primarily on the Corps' decision to use Nationwide Permit 48 instead of a Regional General Permit, the major differences between the 2012 NWP 48 conditions and the draft and proposed 2017 NWP 48 conditions, and the remaining milestones and timelines in the NWP 48 reissuance process. The Corps solicited feedback from tribes on the current reissuance process, and requested input from tribal representatives on the formation of regional conditions to ensure activities permitted by NWP 48 in Washington State are minimally impactful.

2) Open forum session with Q & A

Jim Weber, NWIFC: Why did the Corps decide to go with the NWP instead of the RGP? What was the Corps' rationale?

Muffy Walker, Corps: The Corps is using the NWP primarily for efficiency. We have lots of actions to process, and the NWP tool is more time efficient than the RGP. We can change over to an RGP in the future after observing how the NWP works, if we choose.

Alan Chapman, Lummi: How is the Corps going to verify aquaculture land use in the previous 100 years?

Pamela Sanguinetti, Corps: We're working on a method for determining that.

Alan: Is it going to be set in stone? Will it be based off of some other permit like from the Department of Health?

Muffy: We don't know yet.

Pam: The 100 year language is a national condition. We need to work on how to fit it into the context of Washington's aquaculture industry.

Stan Walsh, Skagit River System Cooperative: Is the Seattle district of the Corps bound to abide by the 100 year rule?

Muffy: Yes, it's a national condition. We can make it more restrictive, but not less.

Stan: So we could have a different timeline in Washington?

Muffy: We can require specific documents to make a determination of shellfish use on land within the last 100 years. We probably can't require a different number of years. It might be possible, but is very unlikely.

Jeff Dickison, Squaxin Island: How is the Corps going to deal with new projects in relation to tribes? Tribes meet the test for having used the land more than 100 years ago. Will the Corps ever consider tribal aquaculture operations to be 'new'?

Pam: That's a legal question. Treaty areas can be project areas.

Muffy: We're not sure at this point.

Jim: This is an **Environmental Justice** issue. It sounds like the policy will cover Euro-Americans, but not Native people.

Randy Lumper, Skakomish: Question about changes. Have the PCN requirements changed with the 2017 NWP 48 so that notifications aren't required for many activities?

Pam: The Corps still requires a PCN for actions that affect ESA, EFH and 106.

Matthew Bennett, Corps: Regional conditions will be developed to minimize direct and cumulative impacts. The Corps is currently drafting regional conditions for public notice. The Corps would appreciate if the tribes provide comments on regional conditions by October 25th in order to help the Corps develop meaningful regional conditions.

Tim Hyatt, Skagit River System Cooperative: The NMFS Biological Opinion lists prudent conservation measures relating to aquaculture. Specifically, terms and conditions #4 which talks about long lines needing 10 foot spacing in fallow areas where eelgrass is present.

Pam: If an applicant uses the programmatic consultation for their ESA consultation, then they're covered as long as they meet the conditions. Fallow areas are locations within an aquaculture project area that are rotated out of cultivation as part of a normal farming process. After about five years of an area being fallow, the eelgrass that is present there, if it has returned, is considered as the normal eelgrass condition.

Tim: Is that a condition written into the NWP 48? Or is the Corps relying on the grower to implement that condition on their own?

Pam: The grower makes an affirmative statement when they fill out their application. But that is part of the ESA process, not the NWP 48 itself.

Muffy: Applicants that use the programmatic consultation for ESA coverage will fill out a Specific Project Information Form (SPIF), which requires them to make affirmative statements about how they operate their shellfish farm. That's our administrative record that they agree with the conditions.

Tim: Will the Corps verify that growers are meeting those conditions in the field?

Pam: That's compliance.

Muffy: We take the applicant's word. We can check if we have concerns, but otherwise we rely on the applicant.

Pam: It comes back to the notification. The notification can be helpful quality control for areas and applications.

Jim: If someone walks in and says that their family has been doing aquaculture for 90 years in an area, what type of documentation is the Corps going to require to verify that claim?

Muffy: We're working on that. Any ideas that the tribes have about that would be helpful and appreciated.

Jim: You've mentioned that up to 78% of forage fish spawning areas in North Puget Sound currently have aquaculture overlapping them. Has the Corps determined that aquaculture entering into that acreage will be no more than minimally impactful?

Pam: Yes, Corps HQ is proposing that.

Jim: What is their basis for allowing aquaculture into all that (forage fish spawning) area with no more than minimal impacts?

Pam: HQ has listed their rationale in the Federal Register. They have determined that they can coexist. It's our responsibility to interpret what that looks like in the Seattle district.

Jim: New aquaculture operations have 16 foot buffers?

Pam: Yes, as per our programmatic ESA consultation.

Jim: What are the Corps' conditions for protecting eelgrass?

Pam: We're not there yet. The 2012 NWP 48 only covered impacts up to 0.5 acres of eelgrass. After that the permit gets elevated to an individual permit.

Muffy: 16 feet is from the previous ESA consultation. The new ESA consultation also has a 16 foot buffer included, but that's only for the programmatic ESA consultation. It's not a regional condition for NWP 48.

Jim: Is all of the information for the North Puget Sound in the Biological Opinions?

Pam: Yes, there's a lot of information there beyond what we're able to present today.

Jim: In the Federal Register notice, were there studies listed for impact determinations?

Pam: Yes. The studies were from the State of Washington.

Jim: Is that the Corps entire basis for their minimal impact determination.

Pam: Yes.

Stan: So applications don't need to meet the conditions of the programmatic ESA consultation? Shouldn't regional conditions require applicants to meet the conditions set out in the Biological Opinions?

Muffy: ESA is a separate process from the application. Applicants don't need to meet the programmatic ESA conditions.

Stan: But shouldn't those applicants be held to the same conditions that applicants using the programmatic ESA consultation are?

Pam: You're correct. If an applicant goes outside of the programmatic ESA consultation, they will have to go into individual consultation. The Services will evaluate the application and make a determination of effects.

Alan: Will the Corps issue NWP 48 without ESA coverage?

Muffy: No. The applicant must have either programmatic or individual ESA coverage.

Margaret Homerding, Nisqually Indian Tribe: You've mentioned that large percentages of eelgrass beds have aquaculture located in them. Are there studies on the cumulative impact effects on eelgrass by aquaculture?

Pam: Yes, our ESA programmatic process discusses that. Those impacts drive our regional conditions. We try to identify where impacts are and craft our conditions to minimize the impacts.

Randy: Questions the science. The Biological Opinions don't model food web dynamics or trophic interactions very well, especially at the microorganism scale. For the nets, how are incidents of entanglement being reported?

Pam: Nets are a big issue. We rely on self-reporting for incidents of entanglement. We're working on figuring out how to minimize loss.

Jim: Can existing growers expand their footprint in any way without submitting a PCN?

Pam: Not in the 2012 NWP 48; we have language that addresses that.

Randy: Expanding from an existing area of cultivation into a new area, the new area automatically becomes an existing area of cultivation. That seems like a loophole.

Pam: I see your point.

Jim: Does the 2017 NWP 48 always need a PCN?

Pam: Yes, because of the ESA requirements.

Muffy: We review applications on all aspects: cultural, historic, tribal, ESA, etc. once we have a PCN. It doesn't matter what triggered the PCN.

Randy: Would an aquaculture activity ever not require an ESA PCN?

Pam: No.

Stan: We understand that the SPIF is coming shortly. Are we able to see it?

Muffy: It will be available Friday, and you will be able to get it off of our website.

Pam: The Corps is holding a workshop in October where we'll be walking through the SPIF with interested parties.

Mark Mobbs, Quinault Indian Nation: A question about compliance and enforcement. Washington State Department of Natural Resources (DNR) performs field and office review of the projects that they permit to ensure information provided in permit applications is accurate. How can the Corps be sure that information provided in permit applications is accurate if you don't field truth it? Do you check the information?

Pam: Yes, we go out and field truth information and inspect projects if we have questions or concerns about the accuracy of information.

Muffy: We inspect 10% of the NWP's that we issue. We field truth where we can. Much of our verification takes place from the office.

Andrew Shuckhart, Corps: In our new NWP PCN requirements we're requiring photos of sites in order to get a better idea of site conditions.

Mark: Does the Corps have eelgrass polygons? Lots of times surveys for a project will stop at the property line.

Pam: Yes we have polygons for eelgrass, and yes they can stop at property lines.

Margaret: What is the Corps' level of compliance identified during inspections?

Pam: It's quite high. A majority of projects inspected were 100% compliant; several others only had minor compliance issues.

Jim: You mentioned that it would be very difficult to change the 100 year language to 20 years?

Muffy: Yes, very difficult.

Jim: Who is the constituency for the 100 year language? Who is that helping?

Pam: It's possible that shellfish growers included in the Bush Act and Callow Act or that have been prevented from growing in recent times due to water quality issues could benefit from the 100 year language.

Muffy: We don't know the origin of the 100 year language or why it was included.

Jim: There was shellfish litigation in the past. Will the Corps think whether permitting will have a negative effect on the litigation decision?

Muffy: We take our tribal trust responsibility very seriously. We rely on you (tribes) to tell us how you think your treaty rights may be impacted by actions we permit. Your input is very valuable to us.

Jeff: In the U.S. v. WA litigation, there is extensive documentation of tideland utilization by growers. That info is in the court documents. The Corps could use those documents instead of the Bush & Callow Act lands. Bush and Callow Acts were a land grab, and not data of actual aquaculture activity.

Pam: You're saying that a better measure of determining whether a shellfish farm is new or existing is to use the court documents instead of the Bush & Callow Act?

Jeff: Yes. These data are more specific to tribal treaty rights.

Jim: We'll discuss internally about how best to get the Corps the relevant information.

Jeff: We appreciate the Corps' effort in characterizing impacts to forage fish spawning habitat and eelgrass. Unfortunately, you're using Washington Department of Fish and Wildlife data, which is a small subset of the actual area.

Pam: Yes, that's true. The Corps is developing a new condition that requires the expansion of documentation with regards to forage fish spawning habitat and eelgrass locations.

Jeff: We'll be very interested in that regional condition to address forage fish habitat.

Doug Morrill, Elwha: With regards to new vs. existing farms, is the Corps giving any consideration to species at each location?

Pam: There are and will continue to be NWP conditions to address the types of species that can be grown in a waterbody. Must be either native, or have been previously cultured in the waterbody. Any shellfish species grown in an area constitutes existing aquaculture.

Mark: Would new species be disapproved?

Pam: They would be evaluated as part of the application process. If it's a new species, it would not qualify for the NWP program and would be elevated to an individual permit.

Randy: New species not previously harvested in an area – we would like to have a PCN for that.

Pam: We've had that previously.

Mark: Growers are starting to push for intertidal geoduck growing. We would want to be notified of that because of potential effects to fishing access and the potential for entanglement.

Jim: What were the top two concerns of growers at the last quarterly meeting with the Corps?

Muffy: Process was a primary concern. How does it work? The public can't see the final language to comment on, only the draft language. Growers had concerns about that, and wanted to be able to have their comments on the final language considered. The timeline is tricky though. We have to publish the conditions for 90 days in the Federal Register, which means we have to finalize the language in December for publishing.

The second major concern was how the Corps develops regional conditions, and where and how the Corps considers growers' input during our process of developing those conditions.

Jim: Are the final regional conditions signed off in Portland?

Muffy: Yes. All NWP regional conditions come through Portland. Please get your concerns for regional conditions to Pam by October 25th so we can include them in our development process.

Randy: I encourage the Corps to look at the US v. WA documents when deciding how to verify a 100 year claim for determining existing farms.