SUPPLEMENTAL DOCUMENT
FOR NATIONWIDE PERMIT 43
Revised 17 June 2021

This document is a supplement to the national decision document for Nationwide Permit (NWP) 43, Stormwater Management Facilities and addresses the regional modifications and conditions for this NWP in Washington State. In Washington State the Seattle District is the lead district. It is prepared for the purposes of 33 CFR 330.5(c)(1)(iii). The Northwestern Division (NWD) Division Engineer has considered the potential individual and cumulative adverse environmental effects that could result from the use of this NWP in Washington State, including the need for additional modifications of this NWP by imposing regional conditions to ensure that those individual and cumulative adverse environmental effects are no more than minimal. These regional conditions are necessary to address important regional issues relating to jurisdictional waters and wetlands. These regional issues are identified in this document. These regional conditions are being required to ensure that this NWP authorizes activities that result in no more than minimal individual and cumulative adverse environmental effects. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should have regional conditions or be excluded from NWP eligibility, as described below, to further ensure that the NWP does not authorize activities that have more than minimal individual and cumulative adverse environmental effects.

1.0 Background

In the September 15, 2020, issue of the Federal Register (85 FR 57298), the United States Army Corps of Engineers (Corps) published its proposal to reissue 52 existing NWPs and issue five new NWPs. To solicit comments on its proposed regional conditions for these NWPs, the Seattle District issued a public notice on September 30, 2020 with a comment deadline of November 15, 2020. On August 31, 2020, the Seattle District initiated early coordination with the Washington State Department of Ecology (Ecology) and the Environmental Protection Agency (EPA) regarding Section 401 Water Quality Certification (WQC). On September 11, 2020, the Seattle District submitted a WQC pre-filing request with Ecology, EPA, and Tribes with designated WQC authority. On October 14, 2020, the Seattle District submitted their WQC request to Ecology, EPA, and Tribes with designated WQC authority. On October 15, 2020, the Seattle District requested a Coastal Zone Management Act (CZMA) consistency determination from Ecology. The issuance of the NWPs was announced in the January 13, 2021 issue of the Federal Register notice (86 FR 2744). After the issuance of the final NWPs, the Seattle District considered the need for regional conditions for this NWP. The NWD's findings are discussed below.

2.0 Consideration of Public Comments

2.1 General Comments

On October 21, 2020, the Seattle District met with Ecology, EPA, U.S. Fish and Wildlife Service

(USFWS), National Marine Fisheries Service (NMFS), Washington State Department of Fish and Wildlife (WDFW), and Washington State Department of Natural Resources (WDNR) to provide information on the proposed regional conditions and the process to submit comments. On October 29, 2020, the Seattle District met with Tribes and the Northwest Indian Fisheries commission (NWIFC) to discuss the proposed regional conditions and the process to submit comments. Based on comments received from agencies, Tribes, and the pubic during this public review period, the Seattle District retain and revised the proposed regional conditions (RC) specific to NWPs and regional general conditions (RGCs) applicable to all NWPs in the Seattle District's regulatory boundaries.

Comment 1 (Retain all Pre-Construction Notifications (PCNs) removed from NWPs as regional conditions (RC)): Two commenters urged the Seattle District to continue to require PCNs for Washington State which were removed at the national program level for the re-issued NWPs in order to adequately protect treaty resources.

Response 1: A PCN is required for all projects in the Salish Sea and the Columbia River due to NWP general condition 18 – *Endangered Species*. NWP general condition 18 requires non-federal permittees to submit PCNs for any proposed activity that might affect ESA-listed species or designated critical habitat, if listed species or designated critical habitat are in the vicinity of the proposed activity, or if the proposed activity is located in critical habitat. The Salish Sea and many of the tributaries draining to the Salish Sea contain ESA-listed species and critical habitat and therefore already require submission of PCN for any NWP use. Under NWP general condition 17 – *Tribal Rights* no activity or its operation may impair reserved Tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights. To ensure compliance with this condition, the Seattle District has established coordination procedures with a number of Tribes to help ensure NWP activities comply with NWP general condition 17 – *Tribal Rights.* Any Tribe without a coordination procedure in place is invited to contact the Seattle District and Seattle District will work with the Tribe to develop one. If comments are received from a Tribe raising concerns regarding Tribal rights, the Corps encourages communication between the Tribe and the project proponent to ensure compliance with general condition 17. If a Tribe objects to a project and a resolution between the project proponent and the Tribe cannot resolve the issue, the Corps will decide on whether the proposed action would comply with NWP general condition 17.

Comment 2 (PCN in Boldt Decision Areas): Two commenters stated PCNs should be required for all projects that occur within the Boldt case area.

Response 2: While we are uncertain the specific geographic reach of the Boldt Decision, we understand it includes the Salish Sea. NWP general condition 17 – *Tribal Rights*, must be complied with for all authorizations using an NWP. Due to numerous ESA listings in the Salish Sea, many if not all projects in the Salish Sea are required to submit a PCN due to NWP general condition 18 – *Endangered Species*. NWP general condition 18 requires non-federal permittees to submit PCNs for any proposed activity that might affect ESA-listed species or designated critical habitat, if listed species or designated critical habitat are in the vicinity of the proposed

activity, or if the proposed activity is located in critical habitat. The Salish Sea and many of the tributaries draining to the Salish Sea contain listed species and critical habitat and therefore, must submit a PCN to the Corps. The Seattle District has established coordination procedures with Tribes to help ensure NWP activities comply with NWP general condition 17. Any Tribe without a coordination procedure in place is invited to contact the Seattle District and we will work with the Tribe to develop one.

Comment 3: (Required PCN information): Two commenters stated PCNs should require information regarding how long the proposed project is expected to last. The same commenters stated if the project is a repair or replacement, the project proponent should provide proof that the project had been permitted previously, along with the date and description of previous repairs or replacements. The same commenters stated project proponents should demonstrate that there is a continuing need for the repair or replacement.

Response 3: Once a structure or fill is authorized, it remains authorized unless the district engineer suspends or revokes the authorization (see 33 CFR 325.6). NWP general condition 32 – *Pre-Construction Notification* specifies the information required by the district engineer to determine if a PCN is complete. Additional information may be requested by the district engineer on a case-by-case basis to determine if a project would result in no more than minimal adverse environmental effects. RGC 1 – *Project Drawings* requires the submission of project drawings for all PCNs in the Seattle District. Structures or fill must be previously authorized, either through a Department of the Army permit, or by being grandfathered in by the age of the structure. Many applicants do not have a full site history of the project when they apply for a permit and rely on the Corps searching and researching their records to determine the status of the structure as being authorized or not. While the Corps encourages project proponents to provide the Corps with as many details as they can, this information is not always available, and will not be required as a part of a complete PCN. For project proponents using NWPs, the district engineer assumes through use of the NWP or by receipt of a PCN that the project proponent needs to perform work, and additional information regarding purpose or need is not required.

Comment 4 (PCN for all wetland loss and open water impacts): One commenter stated PCNs should be required for any wetland loss, and activities impacting lakes, streams, and marine waters.

Response 4: This would be redundant as many if not all impacts to these aquatic resources already require a PCN. Many of the NWPs involving impacts to wetlands have an NWP-specific national PCN requirement. A PCN is required for all projects in the Salish Sea and the Columbia River due to NWP general condition 18 – *Endangered Species*. NWP general condition 18 requires non-federal permittees to submit PCNs for any proposed activity that might affect ESA-listed species or designated critical habitat, if listed species or designated critical habitat are in the vicinity of the proposed activity, or if the proposed activity is located in critical habitat. The Salish Sea and many of the tributaries draining to the Salish Sea contain listed species and critical habitat and therefore, must submit a PCN to the Corps. Also, an RGC will be added to

require a PCN for all projects resulting in a stream loss.

Comment 5 (Communication with Native American Tribes (Tribes)): Three commenters stated the process for obtaining comments is inconsistent with Seattle District Tribal consultation policies and there is a need for more formal and meaningful coordination. The same commenters stated the Seattle District should improve their communications with Indian Nations and Tribes to effectively advocate for Tribal treaty-protected resources and rights. The same commenters stated NWPs do not provide adequate notification and opportunity for Tribal consultation and has not provided evidence to ensure the protection of treaty resources including an analysis of cumulative impacts. One commenter stated the Corps are not meeting their federal trust obligations. One commenter pointed out the Seattle District had recently changed the amount of information made available to Native American Tribes through informal requests, requiring the submission of Freedom of Information Act (FOIA) requests which impedes effective communication. Two commenters stated the truncated review process has limited the ability of Tribes to fully engage with the Corps. One commenter disagreed that the NWP program is consistent with EO 13175 (Consultation and Coordination with Indian Tribal Governments). Seven Tribes requested an extension for comments to ensure reserved treaty rights and resources are protected. One commenter (Makah Tribe) requested government-to-government (G2G) consultation with Corps Headquarters (HQ).

Response 5: The number of Tribes in each state and their interest in the Corps' regulatory review of projects varies greatly; therefore, HQ defers decisions on how best to coordinate with Tribes on a project-by-project basis to each district. During the NWP reissuance process, the Seattle District sent the federally recognized Tribes with interests in Washington State two letters (early coordination and G2G invitations) and held an informational meeting about the reissuance process. The Seattle District has 33 federally recognized Tribes either with reservations and/or historical lands within the District's boundaries. At this time the Seattle District has established Tribal Notification Procedures with the following 26 Tribes: Confederated Tribes of the Colville Reservation, Cowlitz Indian Tribe, Confederated Tribes of Grand Ronde, Hoh Indian Tribe, Jamestown S'Klallam Tribe, Kalispel Tribe of Indians, Lower Elwha Klallam Tribe, Lummi Nation, Makah Indian Tribe, Muckleshoot Indian Tribe, Nez Perce Tribe, Nisqually Indian Tribe, Nooksack Tribe, Port Gamble S'Klallam Tribe, Puyallup Tribe of Indians, Confederated Tribes of the Samish Indian Nation, Skagit River System Cooperative, Skokomish Tribal Nation, Snoqualmie Indian Tribe, Spokane Tribe, Squaxin Island Tribe, Stillaguamish Tribe of Indians, Suquamish Tribe, Swinomish Indian Tribal Community, Tulalip Tribes, Confederated Tribes of the Umatilla Indian Reservation, and the Upper Skagit Indian Tribe. The Seattle District also has Notification Procedures with the Skagit River System Cooperative. The Seattle District established coordination procedures with these Tribes to ensure NWP activities comply with NWP general condition 17 – *Tribal Rights.* Through these procedures, the Seattle District contacts the appropriate Tribe(s) and requests comments on proposed projects. The Seattle District will continue to reach out to the remaining Tribes to establish notification procedures. Any Tribe without a coordination procedure in place is also invited to contact the Seattle District to discuss establishing a notification procedure. If comments are received from a Tribe raising

concerns regarding Tribal rights, the Corps encourages communication between the Tribe and the project proponent to ensure compliance with NWP general condition 17. If a Tribe objects to a project and a resolution between the project proponent and the Tribe cannot resolve the issue, the Corps will make a determination on whether the proposed action would comply with NWP general condition 17. The Seattle District utilizes these procedures to streamline obtaining site specific input from the Tribes on NWPs, helping the Corps comply with Section 106 of the National Historic Preservation Act (NHPA) and fulfill its trust obligations. Without these procedures, requesting and distributing of information would take place using the FOIA procedures. The District is still reviewing its FOIA procedures specific to Tribal coordination as a result from the recent listening sessions with Tribes. The Corps uses the Department of Defense American Indian and Alaska Native Policy to guide its interactions with Tribes. The Corps also had developed additional policies, which are available at: http://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/. NWP general condition 17 must be complied with for all NWP activities. On November 13, 2020, the Seattle District received a copy of a comment letter from the Makah Tribe to HQ requesting a G2G meeting. To ensure HQ received this request, on December 4, 2020, the Seattle District Tribal Liaison forwarded the G2G request from the Makah Tribe to the HQ Tribal Liaison.

Comment 6 (Provide Additional Summary Data in Correspondence to Tribes): One commenter remarked that the Corps should provide summaries including tables and a geographic distribution of concerns when corresponding with Tribes during the NWP re-issuance to facilitate the development of comments.

Response 6: The Seattle District recognizes the challenges in coordinating with Tribes at both the policy and staff levels. Throughout the process of issuing the NWPs, letters were prepared and sent to individual Tribes to inform them of upcoming Tribal meetings, postings in the Federal Register, public notices, comment reviews, and the ability to request government-to-government meetings. The Corps relies on Tribes to provide comments and respond to inquiries to understand concerns and identify issues. Comments received in response to the public notice announcing the draft proposed regional conditions were made public and available for review on the Seattle District website. The Seattle District will continue to update and improve coordination with Tribes to insure effective and efficient communication.

Comment 7 (Avoid Impacts to Treaty-Reserved Resources): One commenter urged the Corps to avoid making in-water and land-use decisions that will impact treaty-reserved resources (cultural, fishery, and other natural resources) within adjudicated Usual and Accustomed fishing areas. Another commenter stated the NWPs result in significant impacts to the Tribes' treaty-secured salmon and shellfish resources and that the use of the NWP process needs to be significantly curtailed. Three commenters state that the NWPs obstruct the recovery of Puget Sound; the recovery and productivity of salmon; water quality improvement efforts; and adversely affect treaty protected fish, including shellfish and finfish. One commenter recommended a PCN requirement for all waters that support Tribal-reserved treaty rights (those areas located within Tribal Usual and Accustomed Areas).

Response 7: The Corps cannot avoid making permit decisions within Tribal Usual and Accustomed fishing areas as under the Clean Water Act (CWA) and Rivers and Harbors Act (RHA) as we must review and make a final decision on every application received. All permits issued will be reviewed to ensure compliance with all applicable Federal laws while considering the public interest review which includes a review of potential impacts to treaty Tribal rights. NWP general condition 17 – *Tribal Rights* and NWP general condition 20 – *Historic Properties*, provide protection of cultural resources and treaty Usual and Accustomed Areas as they relate to the NWP program. The Seattle District has established coordination procedures with Tribes to help ensure NWP activities comply with NWP general condition 17. Any Tribe without a coordination procedure in place is invited to contact the Seattle District and the Seattle District will work with the Tribe to develop one. NWP general condition 17 must be complied with in all cases. Regarding impacts to salmon and shellfish resources and the recovery of Puget Sound, NWP national and regional conditions are in place to allow for a thorough review to ensure impacts to these aquatic resources are minimized. NWP general condition 23 – *Mitigation*, requires all project to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable. RGC 5 – *Crossings of Waters of the United States*, ensures the best design for salmonid passage is utilized, RGC 2- *New Bank Stabilization in Tidal Waters of Puget Sound* prohibits use of NWPs to authorize bank stabilization activities in five specific water resource units in Puget Sound. RGC 4 – *Bank Stabilization* requires a PCN for all projects including new or maintenance bank stabilization activities allows the Seattle District the opportunity on a case-by-case basis to determine if the activity is more than minimally impacting and requires review under a Standard Permit.

Comment 8 (ESA, MSA, MMPA): One commenter (NMFS, Oregon Coast Branch) recommended additional meetings to address concerns about addressing the Endangered Species Act (ESA), Magnuson-Stevens Fishery Conservation and Management Act (MSA), and Marine Mammal Protection Act (MMPA). The same commenter stated the NWPs do not have minimal adverse effects individually or cumulatively based on [Section 7] past consultations. The same commenter and another commenter (NMFS, West Coast Region) wanted the Seattle and Portland District to identify which NWPs need ESA/Essential Fish Habitat (EFH) consultation.

Response 8: At the national level, HQ has coordinated with their counterparts at NMFS, and the USFWS to ensure the NWP program is consistent with ESA and MSA. In additional to national coordination, on October 15, 2020, the Seattle District sent a letter to NMFS, requesting comments. Also, on October 21, 2020, a meeting was held between Seattle District and resource agencies including NMFS. NWP regulations at 33 CFR 330.4(f) and NWP general condition 18, *Endangered Species*, ensures all activities authorized by NWPs comply with Section 7 of the ESA. Section 330.4(f)(2) and paragraph (c) of NWP general condition 18 requires non-federal permittees to submit PCNs ‘‘if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat.’’ Federal permittees should follow their procedures for ESA Section 7 compliance (see 33 CFR 330.4(f)(1)). The Corps evaluates non-federal project proponent’s PCNs and makes an effect determination for the proposed NWP activity in accordance with Section 7 of the Endangered

Species Act. When evaluating a PCN, the district engineer will determine whether the proposed activity ‘‘may affect’’ or will have “no effect” to listed species and designated critical habitat. The applicant shall not begin work until the Corps has provided notification the proposed activity will have “no effect” on listed species or critical habitat, or until ESA section 7 consultation has been completed. The Seattle District cannot proactively identify which categories of NWPs require ESA/EFH because each project utilizing a particular NWP could be in a different waterbody with different ESA/EFH species/habitats. As stated previously each project is looked at on a case-by-case basis to determine the level of coordination, if any, with the NMFS and USFWS (collectively referred to as the Services).

Comment 9 (ESA consultation required in floodplains): One commenter (NMFS West Coast Region) wanted the Seattle and Portland District to add an RGC to require consultation for the placement of any permanent fill within the 100-year floodplain.

Response 9: The Corps does not regulate floodplains. Based on the existing regulations, wherever the Corps has jurisdiction over waters of the United States to require a permit, if listed ESA species are critical habitat are present the Corps will consult as required for ESA compliance. Therefore, an RGC is not required.

Comment 10 (Impact thresholds in certain waterbodies): One commenter proposed a regional condition applicable to Portland and Seattle District where streams mapped as Magnuson-Stevens Act EFH; NMFS ESA Designated Critical Habitat; or Oregon Department of Fish and Wildlife or Washington Department of Fish and Wildlife priority fish habitat, loss of streambed or bank for any category of NWP shall be limited to no more than 300 linear feet, consistent with the NWP program of 2017 and there should be no use of NWPs in freshwater or estuaries that are documented as juvenile salmonid spawning, rearing, or migration habitat in Portland and Seattle District.

Response 10: National general conditions relating to stream length thresholds to ensure minimal impacts have been established. NWP general condition 2 – *Aquatic Life Movements* and NWP general condition 3 – *Spawning Areas* have restrictions to minimize impacts to these areas. Furthermore, the Seattle District will have an RGC requiring a PCN for all projects with stream loss. This will allow case-by-case analysis of stream impacts to ensure impacts to streams including areas of salmonid spawning, rearing, or migration habitat are minimized.

Comment 10 (Requirement for compensatory mitigation): One commenter stated that any loss between up to 300 linear feet, and or 1/10 of an acre of aquatic habitat (estuarine, freshwater or wetland) shall require compensatory mitigation at a minimum of a one-for-one ratio. Any loss of aquatic habitat above the upper limit shall include compensatory mitigation at a minimum of a three-for-one ratio to ensure that under-reporting of impact, and underperformance of mitigation are fully considered and addressed, and thereby achieve no net loss. Two commenters stated if not all impacts of the proposed action are avoided, then a compensatory mitigation plan should be provided. The same commenters stated mitigation for temporal impacts is important, and there is no such thing as a repair or replacement that is zero impact. The same commenters

stated a repair or replacement prolongs the impacts of the original project and must be mitigated. One commenter stated any impacts to critical habitat and EFH needs to be mitigated to replace lost area and function and a net gain in lost area and/or function.

Response 10: Per NWP general condition 23, the Corps has a requirement to ensure adverse impacts to waters of the U.S. are avoided, minimized, and compensated for (if necessary). This requirement is applied to all amounts of impacts; therefore, it is unnecessary to set a threshold for compensatory mitigation requirements. Under the Federal Compensatory Mitigation for Losses of Aquatic Resources Final Rule (33 CFR Parts 325 and 332) (2008 Federal Mitigation Rule), a host of factors including functions, limited resources in specific watershed, landscape position, and risks are considered when determining the appropriate amount of compensatory mitigation; therefore, it is inappropriate to set an all-encompassing ratio for compensatory mitigation. Instead utilizing regional standards (i.e., freshwater wetland compensatory mitigation ratios or credit-debit method) or case-by-case analysis for other aquatic resources is more appropriate. The Seattle District recognizes the importance of aquatic resources and allows fair and reasonable use of those resources under its regulatory authority. The 2008 Federal Mitigation Rule acknowledges that temporal loss of function to waters of the United States may require compensatory mitigation at the discretion of the district engineer to ensure the activities authorized by NWP result in no more than minimal individual and cumulative adverse environmental effects. Once a structure or fill is authorized, it remains authorized unless the district engineer suspends or revokes the authorization (see 33 CFR 325.6), and any compensatory mitigation requirements must be considered when the project is first constructed. Impacts to critical habitat and EFH are typically addressed through the ESA and EFH consultation process. During that process conservation measures may be required to replace lost area or functions by NMFS which is more appropriate than requiring Corps-required compensatory mitigation.

Comment 11 (Review of Corps Mitigation Program): One commenter stated the Corps' mitigation program needs to be improved and the Tribes would like to be involved.

Response 11: The Corps' mitigation program is separate from the NWP reissuance process. Comments and concerns with the national mitigation rule should be raised with HQ.

Comment 13 (RGC with waivers): One commenter does not support waivers.

Response 13: The Seattle District is not proposing any regional conditions with waivers.

Comment 14 (Maintenance Bank Stabilization Projects): Salmonid references – All references to salmon throughout the document should include all species within the family Salmonidae including resident or anadromous species and listed and non-listed species. All streams, whether perennial or intermittent, that are known to or have the potential to support salmonids during any stage of their life history should be included. We recommend that the Corps use the fish use habitat map that is maintained by Ecology (https://ecology.wa.gov/Regulations-Permits/Permits-certifications/Mineral-prospecting-and-placer-mining#map) to determine salmonid presence in a given stream. The Ecology map

identifies waters of the state that are designated as critical habitat under ESA for salmon, steelhead, or bull trout, and all fresh waters of the state with designated uses (an Ecology designation) of salmonid (salmon, trout, char, whitefish) spawning, rearing, and migration. Critical habitat maps produced by the NMFS and the USFWS (bull trout, steelhead, etc.) for the species they regulate, and, Priority Habitats and Species (PHS) maps produced by WDFW should also be used by the Corps to identify streams supporting salmonid and other listed fish. PHS maps and information may be requested from WDFW at https://wdfw.wa.gov/sites/default/files/2019-02/orderinformationform.pdf.

Response 14: The Seattle District acknowledges the science-based definition by the commenter. The Seattle District acknowledges the existence and utility of tools provided in the comment but will not require the use of the tools in an RGC. The Seattle District does utilize online tools provided by the State to help inform our decisions. The Corps uses all available science/tools and mandating the use of just one tool is not appropriate.

Comment 15 (Require PCN for federal agencies): One commenter requested a new RGC to require PCNs for federal agencies, federally funded project proponents, including state agencies with National Environmental Policy Act (NEPA) responsibilities (such as Washington Department of Transportation) because without PCN reporting requirements, the Seattle District would not be able to track project authorizations or assess cumulative impacts within a watershed or county within the District; federal permittees would be solely responsible for demonstrating compliance with a) all the NWP general conditions, including GC 17 – *Tribal Rights*, 18 – *Endangered Species Act Consultation*, 21 – *National Historic Preservations Act*, and 23 – *Compensatory Mitigation*; b) the District's Regional Conditions; and c) any 401 Certification or Coastal Zone Management Act conditions that become conditions of the NWPs; and without reporting to the Seattle District, there is no review mechanism to ensure that federal permittees provide adequate and appropriate compensatory mitigation for adverse impacts pursuant to general condition 23 – *Mitigation*. This is particularly important given that the proposed rule change to remove the 300 linear feet limit emphasizes the importance of PCNs and compensatory mitigation to offset stream impacts.

Response 15: In the 2021 proposed NWPs, HQ proposed to remove the requirement for federal agencies to submit a PCN. In the 2021 final NWPs, removal of this requirement was not implemented. Federal agencies will be required to submit PCNs; therefore, no regional conditions are required in this regard.

Comment 16 (Administration Change): One commenter stated they don't believe it is appropriate to institute these changes given that a new administration will be inaugurated in mid-January, and request that the process for making these changes be put on hold until the new administration decides its course of action.

Response 16: HQ controls the timeline for finalization of the NWPs, not the Seattle District.

2.2 General Comments on Nationwide Permit 43

Comment 1 (Impervious Surfaces and Stormwater): Two commenters stated NWP 43 should only be available for use in HUC-12 watersheds where impervious cover is less than 5%. The same commenters stated a requirement should be added to this NWP to treat stormwater discharges to reduce salmon mortality. One commenter stated a requirement should be added to this NWP to address the impacts of stormwater runoff on coho salmon populations, particularly with regard to N-(1,3-dimethylbutyl)-N'-phenyl-p-phenylenediamine).

Response 1: The Corps does not have the authority to review the impacts from all projects potentially contributing to impervious surface coverage as many developments do not impact waters of the United States. The Corps' CWA authority is limited to waters of the United States. Furthermore, impacts related to the discharge of stormwater and water quality because of impervious surfaces are outside of the Corps' direct control and responsibility. Evaluation of these impacts are administered under authority of the National Pollution Discharge Elimination System and Section 401 of the CWA, by the EPA on Federal Lands, the State of Washington on state lands, and Tribes with Section 401 authority. Also, under the ESA, the Services address impacts due to impervious surfaces.

Comment 2 (PCN requirements): One commenter stated the PCN for this NWP needs to include a long term maintenance plan to prevent water quality degradation over time due to neglect.

Response 2: NWP general condition 3 – Proper Maintenance, requires that any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable NWP general conditions, as well as any activity-specific conditions added by the district engineer to an NWP authorization. Evaluation of water quality degradation over time, and compliance with Section 401 of the CWA, is the responsibility of the EPA on Federal Lands, the State of Washington on state lands, and Tribes with Section 401 authority.

Comment 3 (Impact Thresholds): One commenter stated the 1/2 acre of non-tidal wetlands and 300 feet of stream impacts allowed are too high and should be restricted to upland locations outside of riparian areas. The same commenter stated the activities allowed by this NWP should be prohibited or mitigated in wetlands, floodplains, and channel migration zones.

Response 3: All activities authorized by NWP are required to avoid and minimize impacts to the maximum extent practicable under NWP general condition 23 – *Mitigation*. Not all activities in the channel migration zone or floodplains occur in waters of the United States or navigable waters. Those not within the waters of the United States/navigable waters are not within the Corps jurisdiction. For projects subject to PCN, the district engineer will review the activity to determine if upland construction is a practicable avoidance measure. The terms and conditions of the NWPs, such as acreage limits and mitigation measures, are imposed to ensure that the NWPs authorize only those activities that result in no more than minimal adverse effects on the aquatic environment and other public interest review factors.

Comment 4 (Stream Loss): One commenter stated the Seattle District should develop a regional condition to retain the 300 linear foot limit for stream bed loss proposed for removal from the NWP national program. The same commenter stated removing the linear foot limit would result in greater bed loss than is currently allowed for all but the largest streams and rivers. The same commenter stated that the removal of the 300 linear foot limit would lead to substantially greater loss of important habitat, and the impacts would be more than minimal.

Response 4: Changes in the national program related to removal of the 300-linear-foot limits of some NWPs are more appropriately addressed at the national program level. The Seattle District will retain a PCN requirement for stream loss to evaluate the impacts on a case by case basis. The ecological importance of streams in the region is discussion in section 2.5.2 of this document and supports having a PCN requirement for stream loss.

2.2.1 Proposed Regional Conditions for NWP 43

1. Pre-construction notification for new facilities must include a long-term maintenance plan if permits for periodic maintenance dredging will be required in waters of the United States.

No comments were received specific to this regional condition.

2.3 Proposed Regional General Conditions (RGC)

2.3.1 Proposed RGC 1, Project Drawings

This has been an NWP RGC since 2017. No revisions are proposed.

Drawings must be submitted with pre-construction notification (PCN). Drawings must provide a clear understanding of the proposed project, and how waters of the U.S. will be affected. Drawings must be originals and not reduced copies of large-scale plans. Engineering drawings are not required. Existing and proposed site conditions (manmade and landscape features) must be drawn to scale.

Comments in Response to Public Notice:

Comment 1 (Additional Requirements): One commenter recommended permit proponents include latitude/longitude site location for each permitted activity on the drawings for outside agencies to review Corps permit notifications with multiple activities.

Response 1: The requirements of NWP general condition 32 – *Pre-Construction Notification* identifies the items required to consider a PCN complete, one of the items being the location. While it does not specify that the latitude and longitude is required, this information can be easily obtained by the Corps. As a standard practice, the Seattle District lists the latitude and longitude on permit application drawings. Also, the Seattle District has a “Drawings Checklist”

to help applicant prepare application drawings. This checklist encourages applicants to list the latitude and longitude on the drawings.

This RGC will be retained with no revisions.

2.3.2 Proposed RGC 2, New Bank Stabilization in Tidal Waters of Puget Sound

This has been an NWP RGC since 2012. No revisions are proposed.

Activities involving new bank stabilization in tidal waters in Water Resource Inventory Areas (WRIAs) 8, 9, 10, 11 and 12 (within the areas identified on Figures 1a through 1e) cannot be authorized by NWP.

Comments in Response to Public Notice:

Comment 1 (General): One commenter supports continuation of this RGC. One commenter requested clarification on the term "new" to be clear that a maintenance of an existing bank stabilization is not considered within the definition of "new".

Response 1: As an existing ongoing general practice, the Seattle District does not consider maintenance of existing structures to be "new".

Comment 2 (Impacts to treaty-reserved rights, cumulative effects, and freshwater tributaries): One commenter stated no new bank stabilization should be allowed in tidal waters of Puget Sound due to impacts to treaty-reserved natural resources and rights. One commenter stated no new bank stabilization should be allowed in tidal waters of Puget Sound because cumulative impacts have been exceeded by the NWP program. The prohibition for new bank stabilization activities should be extended to freshwater tributaries of Puget Sound. One commenter stated this RGC should be extended to WRIA 7 for the same reason this condition was placed on WRIA's south of WRIA 7. Because within the Snohomish, Skykomish, and Snoqualmie rivers, 33% of riverbanks are diked, bermed, or armored and within the Snohomish Estuary, 40-66% is diked or armored. One commenter stated this RGC should be expanded to all Puget Sound waters.

Response 2: As discussed later in this document, the Seattle District has local procedures in place to ensure their obligations regarding treaty-reserved rights are met through notification procedures with Tribes in the region for all PCNs. Impacts of the NWP program are addressed through national review and determination that cumulative impacts are minimal. On a regional level, the Seattle District determined that in response to potential cumulative impacts in certain regions the listed waterbodies are prohibited from NWP use for new bank stabilization. Revocation of new bank stabilization in tidal waters of Puget Sound has been in place since the 2012 NWPs. For the 2012 NWP issuance, revocation was applied in certain WRIAs where a large percentage of the banks have been stabilized along of eastern shoreline in Puget Sound. That revocation was the result of scientific studies and data from the Puget Sound Nearshore Ecosystem Restoration Project. WRIA 7 and other WRIAs in Puget Sound were not identified as

areas where a large percentage of the banks had been stabilized; therefore, other WRIAs will not be included in this RGC. In addition, no compelling scientific information was submitted to support the addition of other tidal waters or freshwater tributaries to this list.

Comment 3 (Impact Evaluation): Two commenters requested the Corps evaluate the regional impact to local governments caused by the administrative burden of being permitted by an individual permit for road maintenance, which could include either new or maintenance of existing bank stabilization.

Response 3: If the road maintenance requires maintenance of existing bank stabilization, this RGC does not apply. For those projects where new bank stabilization is required, this condition will only apply in the tidal waters of WRIAs 8, 9, 10, 11 and 12.

This RGC will be retained with no revisions.

2.3.3 Proposed RGC 3, Commencement Bay

This has been an NWP RGC since 1994. There were proposed modifications to more clearly demonstrate that any permanent losses of wetlands and special aquatic sites in Commencement Bay would be more than minimal and as such should not be authorized under NWPs.

No permanent losses of wetlands or mudflats within the Commencement Bay Study Area may be authorized by any NWP (see Figure 2).

Comments in Response to Public Notice:

Comment 1 (Retain this RGC): One commenter recommended the Corps retain the language in the 2017 RGC due to the contaminated sediments, historic loss of special aquatic sites, and existing restoration and mitigation sites in the Commencement Bay Study Area. One commenter recommended this condition be made more expansive to all activities, and that in addition to NWP 12 (substations) ; NWP 13; NWP 14; NWP 23; NWP 29; NWP 39; NWP 40; NWP 41; NWP 42; and NWP 43, NWP C and D should also be added to the list of authorized NWPs.

Response 1: The restricted use of NWPs in the Commencement Bay Study Area is related to the historic loss of mudflats, wetlands and marsh as identified in the *Commencement Bay Cumulative Impact Study*. The *Commencement Bay Cumulative Impact Study* reviewed impacts to estuarine wetlands and marsh from an undeveloped state in 1877 to the time of the study around 1990, and determined that that 89.4% of historic mudflats, and 98.5% of historic marsh had been eliminated. This condition is not connected with any restoration goals or contaminated sediment concerns. In order to allow more flexibility to use NWPs, this condition has been modified to not restrict the use of NWPs within the study area for temporary impacts, but to restrict its use for new impacts which would result in additional losses of mudflats and wetlands.

Comment 2 (Expand RGC to additional waters): One commenter recommended expanding this RGC to include HUC-12 watersheds draining into the Salish Sea and its tributaries, Grays Harbor, and the Chehalis basin where impervious cover is 5% or greater.

Response 2: This condition is related to the historic loss of mudflats, wetlands and marsh as identified in the *Commencement Bay Cumulative Impact Study*. The *Commencement Bay Cumulative Impact Study* reviewed impacts to estuarine wetlands and marsh from an undeveloped state in 1877 to the time of the study around 1990, and determined that that 89.4% of historic mudflats, and 98.5% of historic marsh had been eliminated. The HUC-12 watershed is not covered by that study. However, we review each project to determine if individually or cumulatively the impacts are minimal as required to qualify for NWP authorization. Projects occurring in the HUC-12 would undergo that review. The current state of the HUC-12 watershed does not support a closure of the use of NWPs. In general, impacts related to the discharge of stormwater and water quality because of impervious surfaces are outside of the Corps control and responsibility. Evaluation of these impacts are addressed under authority of the National Pollution Discharge Elimination System and Section 401 of the CWA, by the EPA on federal lands and the State of Washington on state lands.

Comment 3 (Thresholds for permanent and temporary impacts): One commenter wants to add language to this RGC to ensure temporary and indirect impacts in Commencement Bay, as a result of NWPs, are avoided and minimized. Any temporary or indirect effects greater than 1/10 of an acre should require individual permit review. EPA recommends such impacts not exceed 1/10 of an acre, consistent with the NWP general condition 23 threshold requirement for mitigation.

Response 3: Avoiding and minimizing temporary and indirect impacts are already a requirement for all NWP reviews to ensure impacts are minimal. If they are not minimal, they would be processed as an individual permit. A 1/10 of an acre threshold is unnecessary because the RGC prohibits all permanent losses of wetlands or mudflats within the Commencement Bay area.

This RGC will be retained with proposed revisions.

2.3.4 Proposed RGC 4, Bank Stabilization

This has been an RGC since 2012 and a revision is proposed. The Seattle District proposed a modification to reference specific species of concern by the Seattle District in Washington State (i.e., Endangered Species Act listed species, particularly in Puget Sound) which should be included for a PCN for the Corps to fully assess impacts.

All projects including new or maintenance bank stabilization activities in waters of the U.S. where salmonid species are present or could be present, requires PCN to the U.S. Army Corps of Engineers (Corps) (see NWP general condition 32).

For new bank stabilization projects only, the following must be submitted to the Corps:

a. The cause of the erosion and the distance of any existing structures from the area(s) being stabilized.

b. The type and length of existing bank stabilization within 300 feet of the proposed project.

c. A description of current conditions and expected post-project conditions in the waterbody.

d. A statement describing how the project incorporates elements avoiding and minimizing adverse environmental effects to the aquatic environment and nearshore riparian area, including vegetation impacts in the waterbody.

In addition to a. through d., the results from any relevant geotechnical investigations can be submitted with the PCN if it describes current or expected conditions in the waterbody.

Comment 1 (Maintenance Bank Stabilization Projects): Two commenters recommended revoking all maintenance authorized by NWP in tidal waters of the Salish Sea. One commenter recommended requiring compensatory mitigation for maintenance bank stabilization projects. One commenter recommended limiting the use of NWPs to authorize maintenance to bank stabilization projects to 10% of the length of the structure. One commenter recommended maintenance to bank stabilization projects should not be authorized to repair damage caused by natural erosion or wave action. Two commenters did not support revoking the use of NWPs for maintenance bank stabilization projects within the Salish Sea.

Response 1: If a Department of the Army permit was required to construct the original structure or fill, appropriate compensatory mitigation would have been required by the district engineer when the permit was issued to offset the loss of aquatic resource functions and services resulting from the authorized work. Additional compensatory mitigation is usually unnecessary to maintain those structures or fills. The terms and conditions for NWPs, along with the regional conditions, will ensure that an NWPs authorizes only those activities with no more than minimal individual and cumulative adverse effects on the aquatic environment. The Seattle District does not believe it is necessary to further restrict or limit maintenance of bank stabilization structures to a specific length of the existing footprint. As noted in 33 CFR 320.4(g)(2), "a landowner has the general right to protect their property from erosion," which applies to natural erosion and erosion caused by wave action. RGC 4 does not restrict maintenance bank stabilization to a specific length.

Comment 2 (Bank Stabilization PCN): One commenter recommended they do not want the qualifying language of "activities in waters of the U.S. where salmonid species are present or could be present." to be included in the RGC. Stream ecology literature that headwater streams are critical for maintaining downstream habitat forming processes, including hydroperiod and flow maintenance, routing and dispersal of sediments and nutrients, as well as large woody debris. Without providing equal protection to headwater streams that do not directly host species

of salmonids, the habitats required for spawning, rearing, and refuge are not well maintained. This same commenter wanted bioengineering requirement retained.

Response 2: The Corps acknowledges headwaters streams do provide important functions and has proposed to retain the stream loss RGC with a PCN requirement (see 2.5.2 below). Regarding adding "where salmonid species are present or could be present" to this RGC, this text clarifies the application of this condition to those regionally sensitive areas where the vast majority of bank stabilization activities occur. Between the two RGCs, impacts to streams will trigger a PCN whereby projects can be appropriately reviewed on a case-specific basis.

Comment 3 (Previous Authorization): One commenter recommended the Corps require project proponents provide documentation sufficient to establish bank stabilization projects had been previously authorized prior to the Corps permitting any maintenance activity.

Response 3: Many applicants do not have a full site history of the project when they apply for a permit and rely on the Corps searching and researching their records to determine the status of the structure as being authorized or not. To qualify for an NWP authorization, it is not necessary for the project proponent to produce a copy of the prior authorization. While the Corps encourages project proponents to provide the Corps with as many details as they can, this information is not always available, and will not be required as a part of a complete PCN.

Comment 4 (Remove Existing Bank Stabilization): One commenter recommended the Seattle District work to remove more bank stabilization in the Salish Sea than the new bank stabilization projects for which it issues permits.

Response 4: The Corps' Regulatory Program is tasked with ensuring projects abide by the regulations as prescribed. While the Corps requires avoidance and minimization on every project, compensatory mitigation for lakes, streams, and marine waters is assessed on a case-by-case basis. NWPs authorize categories of activities resulting in no more than minimal individual and cumulative adverse environmental effects, including NWP 27 – *Aquatic Habitat Restoration, Establishment, and Enhancement Activities.* Project proponents proposing compensatory mitigation by means of removing existing bank armoring will be considered if compensatory mitigation is required, however the Seattle District Regulatory Program's mission is to review activities for compliance with federal law, not to implement restoration goals.

Comment 5 (Soft Shoreline Armoring): One commenter recommended the Corps incentivize using less harmful "soft" shoreline armoring approaches.

Response 5: The Seattle District encourages the use of bioengineering and "soft" shoreline armoring design methods, but understands these approaches are not appropriate for all sites due to high energy impacts from wind and waves. NWP 54 – *Living Shorelines*, has been created to permit the use of a wide variety of alternative shoreline armoring design methods.

Comment 6 (Bioengineering): One commenter requested that the bioengineering requirement in 2012 RGC 5 be retained in RGC 4.

Response 6: As noted in 33 CFR 320.4(g)(2), "a landowner has the general right to protect their property from erosion," which applies to natural erosion and erosion caused by wave action. Item d. in the existing RGC, it states "A statement describing how the project incorporates elements avoiding and minimizing adverse environmental effects to the aquatic environment and nearshore riparian area, including vegetation impacts in the waterbody." Bank stabilization using bioengineering elements would be part of avoiding and minimizing adverse environmental effects. Although the RGC is not directly prescriptive regarding bioengineering, the RGC does allow for bioengineering to be used and considered.

This RGC will be retained with proposed revisions.

2.3.5 Proposed RGC 5, Crossings of Waters of the United States

This has been an RGC since 2012. Revisions were proposed to remove the requirement for a monitoring plan.

Any project including installing, replacing, or modifying crossings of waters of the U.S., such as culverts or bridges, requires submittal of a PCN to the U.S. Army Corps of Engineers (see NWP general condition 32).

If a culvert is proposed to cross waters of the U.S. where salmonid species are present or could be present, the project must apply the stream simulation design method from the Washington Department of Fish and Wildlife located in the *Water Crossing Design Guidelines* (2013), or a design method which provides passage at all life stages at all flows where the salmonid species would naturally seek passage. If the stream simulation design method is not applied for a culvert where salmonid species are present or could be present, the project proponent must provide a rationale in the PCN sufficient to establish one of the following:

a. The existence of extraordinary site conditions.

b. How the proposed design will provide equivalent or better fish passage and fisheries habitat benefits than the stream simulation design method.

Culverts installed under emergency authorization that do not meet the above design criteria will be required to meet the above design criteria to receive an after-the-fact nationwide permit verification.

Comments in Response to Public Notice:

Comment 1 (General): One commenter supported the change. One commenter stated determination of stream simulation must have written concurrence from WDFW and any affected Tribes.

Response 1: The Corps cannot rely on the approval of plans by a State agency. As stated later

in this document, the Seattle District has local procedures which include notification of Tribes for all PCNs. This afford them the opportunity to review and comment on any culvert designs.

Comment 2 (Retain PCN requirement and monitoring plan): Two commenters requested retaining the PCN and monitoring plan requirement. Monitoring requirements drive the success of culvert repair and replacement in the State of Washington. Without monitoring requirements, one commenter stated there would be more than minimal impacts may occur.

Response 2: The Seattle District is not proposing to remove the PCN requirement. During the permit review process, the Seattle District will ensure the project will only result in minimal impacts. Monitoring requirements are not required because the Corps already has a compliance program to inspect a certain percentage of projects to ensure work is constructed according to permit requirements.

Comment 3: One commenter stated instead of WDFW's insufficient and outdated guidelines, the Washington State Department of Transportation's Hydraulics Manual should be used. The same commenter also stated a monitoring plan should still be required to ensure the effectiveness in providing passage at all life stages at all flows where salmonid species would naturally seek passage. One commenter stated the RGC should be modified to have language consistent with the Culvert Injunction including language that states if a non-stream simulation design is used the proponent must mitigate by providing the same net benefit to salmonid resources as would have been provided through a stream simulation design.

Response 3: This RGC does not preclude consideration and use of an alternative design method. Other methods can be used if the design method provides passage at all life stages at all flows where the salmonid species would naturally seek passage. The requirement for a monitoring plan to ensure passage at all life stages at all flows where the salmonid species would naturally seek passage was removed because the design would have been reviewed and determined to be in compliance with National general condition 2 for Aquatic Life Movements which requires sustained movement of aquatic species before authorization of the activity. If the Seattle District has concerns about a particular design, a special condition can be added to the NWP verification to require submittal and compliance with a monitoring and/or mitigation plan.

This RGC will be retained with proposed revisions.

2.3.6 Proposed RGC 6, Construction Boundaries

This has been an RGC since 2017. Modifications to specifically state "within waters of the U.S." to improve the clarity of the condition.

Permittees must clearly mark all construction area boundaries within waters of the U.S. before beginning work on projects that involve grading or placement of fill. Boundary markers and/or construction fencing must be maintained and clearly visible for the duration of construction. Permittees should avoid and minimize removal of native vegetation (including SAV) to the maximum extent possible.

Comment 1 (Retain this RGC): One commenter said to retain this RGC because removal introduces confusion for the permittee, neighboring residents and property owners, and regulators. Lacking clear boundaries at a construction site affects the ability to safely conduct construction activities and implement mitigation measures.

Response 1: This RGC was proposed to be modified for clarity, not removed. The RGC requirement to mark all construction area boundaries before beginning work on projects that involve grading or placement of fill was ambiguous. The intent of the RGC was to ensure aquatic resource protection. The modification of the RGC adds clarity by stating, "Permittees must clearly mark all construction area boundaries within waters of the U.S. before beginning work on projects that involve grading or placement of fill." Adding the language, "within waters of the U.S. provides clarification and provides additional aquatic resource protection.

This RGC will be retained with proposed revisions.

2.3.7 Proposed RGC 7, ESA Reporting to NMFS

This is a proposed new RGC. In 2017, all Districts were required by HQ to add this as a special condition to the permit. By adding this as an RGC removes the need to add this as a special condition to each individual NWP verification. Should HQ remove this requirement, this RGC will not be added.

For any nationwide permit that may affect threatened or endangered species:

Incidents where any individuals of fish species, marine mammals and/or sea turtles listed by National Oceanic and Atmospheric Administration Fisheries, National Marine Fisheries Service (NMFS) under the Endangered Species Act appear to be injured or killed as a result of discharges of dredged or fill material into waters of the U.S. or structures or work in navigable waters of the U.S. authorized by this Nationwide Permit verification shall be reported to NMFS, Office of Protected Resources at (301) 713-1401 and the Regulatory Office of the Seattle District of the U.S. Army Corps of Engineers at (206) 764-3495. The finder should leave the animal alone, make note of any circumstances likely causing the death or injury, note the location and number of individuals involved and, if possible, take photographs. Adult animals should not be disturbed unless circumstances arise where they are obviously injured or killed by discharge exposure or some unnatural cause. The finder may be asked to carry out instructions provided by the NMFS to collect specimens or take other measures to ensure that evidence intrinsic to the specimen is preserved.

Comments in Response to Public Notice:

Comment 1 (General): One commenter supported the RGC.

Response 1: Comment noted.

This RGC will be added as a new RGC.

2.4 Recommendations for Additional Regional Conditions

Comment 1 (Use of multiple NWPs): One commenter proposed a new RGC that states no use of multiple nationwide permits for a single project is allowed because it is inconsistent with the requirement of robust environmental review, safeguarding aquatic resources, and minimizing individual or cumulative adverse effects. Projects that achieve procedural streamlining by "stacking" multiple NWPs or making NWP "cocktail" by combining multiple NWPs are likely to be segregated into individual isolated elements which are not conducive to an accurate or holistic assessment through environmental review. Another commenter also proposed a prohibition on use of multiple NWPs.

Response 1: NWP general condition 28 specifically allows use of multiple NWPs provided certain conditions are met to ensure impacts are minimal. As there is already an existing condition, a new RGC prohibiting use of multiple NWPs is not required.

Comment 2 (Prohibition of new bank stabilization in lakes and tributaries): One commenter is concerned about the impacts existing bank armoring has had on Lake Washington and Lake Sammamish. Approximately 82% of Lake Washington's shoreline is altered by bulkheads and riprap, and there are roughly 4,157 docks, including 60 constructed since 2011, on both lakes. The commenter proposes the following RGC condition be added: Activities involving new hard armor bank stabilization in Lake Washington and Lake Sammamish cannot be authorized by NWPs. Proposed maintenance activities (including replacement of existing hard armor bank stabilization structures) in Lake Washington and Lake Sammamish should include the use of bioengineering techniques and natural materials to the maximum extent practicable. One commenter states that given the multiple ESA-listed species dependent upon remaining tidally influenced reaches of the Columbia River and its tributaries (WRIA 24 (Willapa Bay), WRIA 25 (Wahkiakum), WRIA 27 (Cowlitz), WRIA 28 (Clark), and WRIA 29 (Skamania)), they believe that the Seattle District should restrict new bank stabilization activities from being authorized under NWPs. This is similar to the Seattle District's approach in the Puget Sound.

Response 2: The Seattle District believes that RGC 4 for Bank Stabilization is sufficient to ensure that bank stabilization activities are minimally impacting. Requiring a PCN for all projects including new or maintenance bank stabilization activities allows the Seattle District the opportunity on a case-by-case basis to determine if the activity is more than minimally impacting and requires review under a Standard Permit. The ecosystem of the Lakes and the Lower Columbia River and its tributaries and the level and type of impacts are different than Puget Sound; hence, the level of protection of the resources is different.

Comment 3 (Inadvertent discoveries): One commenter proposed a new RGC that states the permittee shall immediately notify the district engineer if, at any time during the course of the work authorized, human burials, cultural items, or historic properties, as defined by the NHPA and Native American Graves Protection and Repatriation Act (NAGPRA), are discovered. The permittee shall implement the following procedures as outlined on the Inadvertent Discovery

Plan to be posted on the Portland District Regulatory Website. Failure to stop work immediately and until such time as the district engineer has coordinated with all appropriate agencies and Native American Tribes, and complied with the provisions of 33 CFR Part 325, Appendix C; the NHPA, NAGPRA, and other pertinent regulations could result in violation of state and federal laws. Violators may be subject to civil and criminal penalties.

Response 3: While this commenter referenced Portland District, the Seattle District assumed it applied to them as well. NWP general conditions 20 and 21 already have requirements to ensure proper procedures are undertaken for historic properties and discovery of previously unknown remains and artifacts. The provisions of the NHPA and NAGPRA state violations may be subject to civil and criminal penalties, as well as applicable State penalties; therefore, addition of an RGC would be duplicative of these existing laws.

Comment 4 (Kelp avoidance): One commenter recommended an RGC be added to require a pre-construction notification for all marine in-water activities where kelp species are present and adopt a standard minimum buffer as an impact avoidance measure.

Response 4: Impacts to designated critical habitat are evaluated under NWP general condition 18 – *Endangered Species* for federally listed threatened and endangered species, such as salmonids with designated critical habitat in the Salish Sea. In some instances, kelp may be important resources to ESA-listed species. Due to numerous ESA listings in the Salish Sea, many if not all projects in the Salish Sea are required to submit a PCN. Although the Corps does not list floating kelp beds as a special aquatic site, as the Corps reviews the PCN, impacts to kelp at a project location may be reviewed on a case-by-case basis to ensure projects authorized by NWP result in no more than minimal individual and cumulative adverse environmental effects, and the requirements of NWP general condition 18 are met.

Comment 5 (Use of Chemically Treated Wood): One commenter requested the Seattle District include an RGC which avoids or limits the use of chemically treated, water- or oil-based wood preservatives, and prohibit the use of treated wood on projects which have TMDL implementation.

Response 5: NWP general condition 6 – *Suitable Material* requires, "No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see section 307 of the CWA)." Treated wood may be considered a suitable material for activities, if the district engineer determines its use complies with this condition and is free from toxic pollutants in toxic amounts. NWP general condition 25 – *Water Quality*, requires each project proponent to obtain an individual water quality certification or waiver for discharges authorized by the NWP if the state or authorized Tribe has not previously certified compliance of the NWP with Section 401 of the CWA (see 33 CFR 330.4(c)). The Seattle District can add a special condition, if it is appropriate, to the verification letter requiring compliance with the *EPA Region 10 Best Management Practices for Piling Removal and Installation in Washington State* dated 18 February 2016. Ecology, the EPA, and Tribes with 401 authority are the appropriate entities to make effect determinations on issues related to water quality. Compliance with the requirements

of the ESA and the use of compensatory mitigation are described in NWP general condition 18 – *Endangered Species*, and NWP general condition 23 – *Mitigation*, respectively. The Seattle District believes these conditions are adequate to evaluate and mitigate for the adverse environmental effects of a project on a case-by-case basis.

Comment 6 (Incorporate Portland District's Regional Conditions 4, 5, and 7): One commenter recommended the Seattle District incorporate Portland District's Regional Conditions 4 (In-water Work Extensions), 5 (EFH), and 7 (Fish Screening) to ensure ESA and MSA are fully implemented.

Response 6: The Seattle District and Portland District have different regional concerns; therefore, the regional conditions for each district may be different. ESA and MSA will be fully implemented by all districts are required by the laws themselves and NWP general condition 18 – *Endangered Species*. See sections 2.0 and 7.0 of this document for more information on how these laws will be implemented as they apply to the Regulatory Program.

2.5 Comments on RGCs Proposed for Removal

2.5.1 Aquatic Resources Requiring Special Protection

This RGC from the 2017 NWPs was proposed for removal.

Activities resulting in a loss of waters of the United States in mature forested wetlands, bogs and peatlands, aspen-dominated wetlands, alkali wetlands, vernal pools, camas prairie wetlands, estuarine wetlands, wetlands in coastal lagoons, and wetlands in dunal systems along the Washington coast cannot be authorized by a NWP, except by the following NWPs:

NWP 3 – Maintenance
NWP 20 – Response Operations for Oil and Hazardous Substances
NWP 32 – Completed Enforcement Actions
NWP 38 – Cleanup of Hazardous and Toxic Waste

In order to use one of the above-referenced NWPs in any of the aquatic resources requiring special protection, prospective permittees must submit a PCN to the Corps of Engineers (see NWP general condition 32) and obtain written authorization before commencing work.

Comment 1 (Deletion of RGC for Aquatic Resources Requiring Special Protection): One commenter supported deletion of this RGC.

Response 1: Comment noted.

Comment 2 (Retain RGC for Aquatic Resources Requiring Special Protection): A commenter stated many of the habitats listed in this RGC provide flood protection and are critical to endangered species, and that removal of this condition will likely delay the recovery of listed aquatic species. One commenter stated the regional condition should be retained but modified to remove the exception for NWP 3 – *Maintenance.* One commenter stated the

removal of this RGC would result in a loss of waters of the United States to occur in mature forested wetlands, bogs and peatlands, aspen-dominated wetlands, alkali wetlands, vernal pools, camas prairie wetlands, estuarine wetlands, wetlands in coastal lagoons, and wetlands in dunal systems along the Washington coast. The same commenter recommended retaining the RGC due to the rarity, sensitivity, and difficulty in mitigating impacts of these resources, and still allowing exceptions for NWPs 3, 20, 32, and 38. Two commenters recommended the condition be retained in the re-issued Nationwide Permits. One commenter stated the Corps did not provide justification for the removal of this RGC.

Response 2: The Corps recognizes the importance of protecting species listed as threatened or endangered under the Endangered Species Act, and requires permittees comply with NWP general condition 18 – *Endangered Species*. For species not listed as threatened or endangered by federal law, permittees must also comply with NWP general condition 2 – *Aquatic Life Movements*. The Corps' Regulatory Program allows for fair and reasonable use of the nation's aquatic resources which could result in a loss of waters of the United States; however, NWPs must result in no more than minimal adverse environmental effects both cumulatively and individually. The Seattle District proposed removal of this RGC because these resources are often protected at the State and local level and the above listed NWP general conditions would make their prohibition duplicative and there could be certain circumstances when a project may have very minimal impacts to these resources which if minimized and compensated for could be authorized by a NWP. However, based on numerous concerns raised by resource agencies and Tribes, the Seattle District will retain the RGC with a modification. The prohibition will be removed but a PCN will be required should a project propose the loss of any of these aquatic resources so the Seattle District can complete a case-specific review of the project to ensure impacts to these aquatic resources are minimized, individually and cumulatively.

Comment 3 (Require a PCN for aquatic resources requiring special protection): Three commenters stated that a PCN should be required for projects affecting these aquatic resources that are rare, unique, or provide significant functions in the region.

Response 3: The Seattle District recognizes the rarity and uniqueness of these aquatic resources in the region and will have a PCN requirement for proposals to use NWPs in those waters so that the Seattle District can assess on a case-by-case basis the impacts to these specific aquatic resources.

This RGC will be retained and modified to be: A PCN is required for activities resulting in a loss of waters of the United States in wetlands in dunal systems along the Washington coast, mature forested wetlands, bogs and peatlands, aspen-dominated wetlands, alkali wetlands, vernal pools, camas prairie wetlands, estuarine wetlands, and wetlands in coastal lagoons.

2.5.2 Stream Loss

This RGC from the 2017 NWPs was proposed for removal.

A PCN is required for all activities that result in the loss of any linear feet of stream beds. No activity shall result in the loss of any linear feet of perennial stream beds or the loss of greater than 300 linear feet of intermittent and/or ephemeral stream beds. A stream may be rerouted if it is designed in a manner that maintains or restores hydrologic, ecologic, and geomorphic stream processes, provided there is not a reduction in the linear feet of stream bed. Streams include brooks, creeks, rivers, and historical waters of the United States that have been channelized into ditches. This condition does not apply to ditches constructed in uplands.

Stream loss restrictions may be waived by the district engineer on a case-by-case basis provided the activities result in net increases of aquatic resource functions and services.

Comment 1 (Retain a stream loss RGC): Thirteen commenters requested that an RGC specific to stream loss be retained. One commenter stated a PCN should be required for any activity resulting in the loss of any linear feet of streambed. The same commenter stated small, non-glacial fed streams account for the majority of Coho salmon production in their Tribe's Usual and Accustomed fishing grounds, and the compensatory mitigation requirement being limited to losses greater than 1/10 of an acre of streambed would results in a net loss of habitat, having a devastating effect on small streams amounting to a total loss of treaty-reserved resources. One commenter stated impacts to ESA species/critical habitats in streams have more than minimal cumulative impacts and adversely affect salmon important to treaty reserved rights. One commenter stated a PCN should be required for all projects that result in the loss of any acreage of streambed to provide notification to treaty Tribes, state agencies, and the general public. The same commenter stated the PCN should be required to evaluate potential impacts to ESA, MSA, NHPA, State Hydraulic Project Approvals, State-owned aquatic lands, marine sanctuaries, estuarine and freshwater reserves, wetlands and eelgrass beds, dredged material contamination, toxic clean-up sites, and to evaluate treaty-protected resources and rights. One commenter stated a PCN should be required for all perennial and intermittent stream impacts. One commenter stated numerical thresholds for NWP determinations are not appropriate, and that no loss of any perennial, intermittent, or ephemeral stream should be allowed within the NWP program in any stream that supports any life history of any salmonid species or any protected habitat and species at any time. On commenter stated the Seattle District should retain this condition and add compensatory mitigation requirements to ensure no net loss of aquatic habitats. One commenter stated compensatory mitigation should be required for streambed impacts that exceed 100 square feet to ensure there is a net ecological gain in the form or functions or area. One commenter stated the removal of this RGC is problematic, as it results in the removal of the PCN requirement for all activities that result in the loss of any linear feet of stream bed. The same commenter underscored the need for PCNs for Tribes to evaluate project impacts in their treaty reserved interest areas. The same commenter and another commenter stated an RGC for stream loss should be retained until more robust scientific rationale is provided on how stream impacts would be authorized by NWPs following removal of the 300-linear-foot limit and adoption of a 1/2 of an acre of allowable stream impact. Another commenter stated they want PCN requirements for all projects that result in the loss of any linear foot or acreage of streambed. The same commenter stated the stream loss RGC be retained and revised for consistency with

the Navigable Waters Protection Rule. One commenter stated that the removal of the 300-linear-foot limits to certain NWPs coupled with the removal of this RGC would result in a net loss of streambed to first- to fourth-order streams, particularly headwater streams originating in Washington's mountain ranges. One commenter stated a 300 foot stream loss limit should be retained. The same commenter urged the Corps to retain an RGC for stream loss, at minimum requiring a PCN to ensure the impacts result in no more than minimal environmental effects. One commenter stated the removal of a stream loss RGC was not supported as it would eliminate consideration by state agencies through PCN of special habitats under protection by the State of Washington. The same commenter stated Washington State continues to invest substantial funds and resources in recovery of stream loss, particularly in salmon-spawning and rearing streams or streams that contribute to downstream salmon habitat-forming processes. Two commenters stated no activity should result in the loss of perennial stream beds, and intermittent and ephemeral streams have influence on downstream water quality and channel conditions.

Response 1: Changes in the national program related to removal of the 300-linear-foot limits of some NWPs area more appropriately addressed at the national program level. The Seattle District recognizes the need to notify Native American Tribes to allow them to comment on and evaluate impacts to treaty-reserved resources. In response to these numerous comments from the Tribes, the Seattle District will retain a PCN requirement for stream loss to allow notification to Tribes to ensure consistency with NWP general condition 17 – *Tribal Rights*. Also, the ecological importance of streams in the region as described below support having a PCN requirement for stream loss. Streams provide necessary ecological and hydrological functions by moving water, nutrients, and sediment throughout the watershed, which is a critical requirement for salmonids (listed under the ESA in the Seattle District) and other fish and wildlife species. Streams also provide landscape level hydrologic connections; increase surface and subsurface water storage and exchange; provide ground-water recharge and discharge; moderate or improve stream temperatures; allow for sediment transport, storage, and deposition which creates instream habitat, provides for natural processes that create riverine wetlands and affords floodplain maintenance and development; aids in nutrient storage and cycling; creates wildlife habitat and migration corridors; supports riparian vegetation communities to help stabilize stream banks and provide fish and wildlife habitat.

This RGC will be retained and modified to be: A PCN is required for all activities that result in the loss of any linear feet of streams.

2.5.3 Mitigation

This RGC from the 2017 NWPs was proposed for removal.

Pre-construction notification is required for any project that will result in permanent wetland losses that exceed 1,000 square feet. In addition to the requirements of General Condition 23 (Mitigation), compensatory mitigation at a minimum one-to-one ratio will be required for all permanent wetland losses that exceed 1,000 square feet. When a PCN is required for wetland

losses less than 1,000 square feet, the Corps of Engineers may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in minimal adverse effects on the aquatic environment.

Compensatory mitigation for impacts to marine waters, lakes, and streams will be determined on a case-by-case basis. If temporary impacts to waters of the United States exceed six months, the Corps of Engineers may require compensatory mitigation for temporal effects.

Comment 1 (Retain RGC - *Mitigation*): One commenter stated that this RGC should be retained with modifications to include requiring mitigation for losses of greater than 1/10 of an acre of stream bed, and greater than 1/10 of an acre of wetland. The same commenter stated that language be added to this condition stating the Corps may require compensatory mitigation for temporal effects exceeding six months. Another commenter recommended the Corps retain the language of this RGC to ensure NWPs have minimal impacts on the environment, and do not result in cumulative impacts to listed and non-listed fish species and important habitats. Another commenter recommended retaining this RGC and modifying it to require compensatory mitigation for any net loss of jurisdictional waters where activities cause a loss of more than 1,000 square feet for all waters, not just wetlands.

Response 1: Activities authorized by NWP must meet all NWP general conditions and regional conditions including NWP general condition 23 – *Mitigation*, which requires compensatory mitigation for impacts greater than 1/10 of an acre to wetlands and loss of 3/100 of an acre of stream bed. The Corps' Regulatory Program allows for fair and reasonable use of the nation's aquatic resources and the Corps works with project proponents to be flexible, understanding not every project can be designed within rigid parameters. Temporary impacts spanning multiple years may result in a temporal loss of function to waters of the United States and may require compensatory mitigation to ensure the activities authorized by NWP result in no more than minimal individual and cumulative adverse environmental effects. In consideration of the various site specific concerns and the variety and quality of wetland functions throughout Washington State, the final decision regarding compensatory mitigation requirements for temporal impacts will be considered on a case-by-case basis after the district engineer has received a PCN for the proposed activity. No activity authorized by NWP may result in more than minimal adverse environmental effects, either individually or cumulatively. Listed and non-listed fish species and their habitats are protected by NWP general conditions, such as NWP general condition 18 – *Endangered Species*, and NWP general condition 2 – *Aquatic Life Movements.* The Seattle District has found the need to allow more flexibility to project proponents for impacts above 1,000 square feet for impacts to waters of the United States, based on the variability of quality and function present in different areas and categories of wetlands. All usage of NWPs is required to meet the requirements of NWP general condition 23 – *Mitigation*, which requires avoidance and minimization before compensating for direct impacts to waters of the United States. Where compensatory mitigation is required, project proponents must submit a PCN to the Corps to review the project. In other cases, such as for impacts to streams, there are other PCN triggers that will allow the district engineer the opportunity to

review the project to determine on a case-by-case basis if compensatory mitigation should be required to minimized adverse environmental effects individually and cumulatively.

Comment 2 (Require compensatory mitigation for impacts to ESA listed species' habitat): One commenter recommended that compensatory mitigation be required for all impacts to ESA listed species' habitat less than 1,000 square feet.

Response 2: The Corps regulates discharges of dredged or fill material into waters of the United States under Section 404 of the CWA, and structures and work in navigable waters under Section 10 of the RHA. All permits issued by the Corps are required to comply with various federal laws, including the ESA. While the district engineer may condition projects related to its federal authority, compliance with the measures and provisions of the ESA are more appropriately enforced by NMFS and/or the USFWS. All NWPs which might affect listed species and their critical habitats are required to comply with NWP general condition 18 – *Endangered Species*, which articulates the requirements of permittees and project proponents.

Comment 3 (General Mitigation comments): One commenter stated when projects occur on properties with critical areas including but not limited to wetlands and streams permittees must first attempt to avoid the impact, and if avoidance is not possible then the impact needs to be minimized to the extent possible. The same commenter stated any impact that does occur (even minimal) should be mitigated. The same commenter stated the preferred option for mitigation should be on-site and in-kind, and only if that cannot be achieved should off-site or out-of-kind options be considered. The same commenter stated impacts must be mitigated in the watershed in which they occur, otherwise there is no way to achieve no net loss, and that allowing any impact without requiring mitigation is not achieving no net loss and is not supported by science. The same commenter stated all impacts must be mitigated and mitigation ratios of one-for-one ratio are not acceptable, and for regulatory consistency and to ensure successful outcomes the Corps should use the wetland mitigation ratios recommended by Ecology in its *Wetland Mitigation in Washington State* guidance document for mitigation required on federal and non-federal lands. One commenter stated Corps' no net loss policy has not worked as promised, Corps permitting has resulted in cumulatively significant impacts, and further losses must be mitigated.

Response 3: Under NWP general condition 23 – *Mitigation*, avoidance and minimization to environmental impacts is required in all cases before compensatory mitigation be proposed. For projects where compensatory mitigation is a requirement following avoidance and minimization measures, approval from the district engineer is required in all cases to ensure the compensatory mitigation will adequately compensate for the proposed impacts. No activity authorized by NWP may result in more than minimal adverse environmental effects, either individually or cumulatively. NWP general condition 23 – *Mitigation* states, "For the NWPs, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2) and (3)). However, if an appropriate number and type of mitigation bank or in-lieu credits are not available at the time the PCN is submitted to the district engineer, the district engineer may approve the use of permittee-responsible mitigation."

The 2008 Federal Mitigation Rule allows for consideration of hard to replace resources, and the district engineer will review compensatory mitigation plans that deviate from the mitigation preference on a case-by-case basis. Off-site, out-of-kind mitigation is the least preferred method of compensatory mitigation, however NWP general condition 23 – *Mitigation* allows flexibility to review permittee-responsible mitigation plans on a case-by-case basis, where there may be a greater benefit to ecosystem functions and services that deviate from the mitigation preference. Mitigation under a watershed approach is articulated under the 2008 Federal Mitigation Rule. There is no federal statute or regulation requiring ''no net loss'' of aquatic resources. The ''no overall net loss'' goal for wetlands articulated in the 1990 United States EPA-Army Memorandum of Agreement for Mitigation for CWA Section 404 Permits states the Section 404 permit program will contribute to the national goal. The 1990 Memorandum of Agreement only applies to standard individual permits. The mitigation ratio of one-for-one for wetland and streambed losses exceeding 1/10 of an acre and 3/100 of an acre, respectively, are articulated in NWP general condition 23 – *Mitigation* is a minimum requirement for the NWP program. The Seattle District utilizes the joint guidance (Corps, EPA, and Ecology) *Wetland Mitigation in Washington State* to evaluate compensatory mitigation plans and works with project proponents on a case-by-case basis to ensure proposed plans and monitoring address site specific concerns.

Comment 4 (Add new mitigation conditions): One commenter recommended adding regional conditions which would modify NWP general condition 23 – *Mitigation* by combining clauses c. and d. on compensatory mitigation, and revising them to say that any loss between up to 300 linear feet, and or 1/10 of an acre of aquatic habitat (estuarine, freshwater or wetland) shall require compensatory mitigation at a minimum of a one-for-one ratio. The same commenter stated any loss of aquatic habitat above the upper limit shall include compensatory mitigation at a minimum of a three-for-one ratio to ensure that under-reporting of impact, and underperformance of mitigation are fully considered and addressed, and thereby, achieve no net loss.

Response 4: Language regarding linear feet of stream has been removed from the NWPs, as stream impacts are to be evaluated based on square footage of impact. Mitigation is currently required for impacts above 1/10 of an acre to wetlands and loss of 3/100 of an acre of streambed and is determined on a case-by-case basis for impacts to estuaries and freshwater areas where there is a PCN requirement. PCNs are currently required in all marine and estuarine areas of Washington State due to listed endangered species, and stream impacts will require PCNs in all cases under an RGC. Freshwater lakes are evaluated on a case-by-case basis where there is a PCN due to listed species, cultural resources, or for new bank stabilization projects or other NWP specific PCN requirements. The Seattle District utilizes the joint guidance (Corps, EPA, and Ecology) *Wetland Mitigation in Washington State* to evaluate compensatory mitigation plans and as a guide for compensatory mitigation ratios; however, to allow flexibility based on site conditions the mitigation ratios may be modified by the district engineer on a case-by-case basis.

Comment 5 (Add PCN for all impacts to achieve no net loss): One commenter recommended that this RGC be retained and modified to require PCNs for any wetland loss, and any activity

impacting lakes, streams and marine waters. The same commenter stated the Corps' no net loss policy has not worked as promised, and that failing to have a regional condition for mitigation or PCNs is not a recipe for achieving no net loss. The same commenter stated that streamlined permitting for minimal impacts should only happen if those impacts don't cumulatively amount to significant impacts.

Response 5: The Seattle District recognizes the importance of aquatic resources and allows fair and reasonable use of those resources under its regulatory authority. While PCNs may be required in some cases to ensure projects authorized by NWP result in no more than minimal adverse environmental effects, the NWP program is designed to allow projects to proceed without notification to the Corps to reduce processing time, streamline the process for project proponents, and to improve regulatory efficiency. There is no federal statute or regulation requiring ''no net loss'' of aquatic resources. The "no overall net loss" goal for wetlands articulated in the 1990 United States EPA-Army Memorandum of Agreement for Mitigation for CWA Section 404 Permits states the Section 404 permit program will contribute to the national goal. The 1990 Memorandum of Agreement only applies to standard individual permits. The NWP program allows loss of waters of the United States provided the loss is no more than minimal individually and cumulatively.

This RGC will not be retained.

2.5.4 Magnuson-Stevens Fishery Conservation and Management Act – Essential Fish Habitat

This RGC from the 2017 NWPs was proposed for removal.

EFH is defined as those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity. If EFH may be adversely affected by a proposed activity, the prospective permittee must provide a written EFH assessment with an analysis of the effects of the proposed action on EFH. The assessment must identify the type(s) of EFH (i.e., Pacific salmon, groundfish, and/or coastal-pelagic species) that may be affected. If the Corps determines the project will adversely affect EFH, consultation with NMFS will be required.

Federal agencies should follow their own procedures for complying with the requirements of the MSA. If a PCN is required for the proposed activity, federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements.

Comment 1 (No way to ensure minimal impacts): One commenter said to retain this RGC but did not provide a rationale. Two commenters said to retain this RGC because the elimination would no longer provide the opportunity to identify projects in EFH prior to the project being initiated. If projects can proceed in EFH without review, then there is no longer a way to ensure that no, or only minimal impacts occur.

Response 1: The NWP Program's compliance with EFH consultation requirements of the MSA will be achieved through EFH consultation between Corps districts and NMFS regional offices. This approach continues the EFH Conservation Recommendations provided by the NMFS Headquarters to Corps Headquarters in 1999 for the NWP program. Corps districts that have EFH designated within their geographic areas of responsibility will coordinate with NMFS regional offices, to the extent necessary, to develop NWP regional conditions that conserve EFH and are consistent with the NMFS regional EFH Conservation Recommendations. Corps districts will consult consultations in accordance with the EFH consultation regulations at 50 CFR 600.920. In most areas of Washington State, there are species covered under EFH and ESA; therefore, the NWP general condition for PCNs involving effects to ESA species/habitat would apply in situations for EFH which would afford the Seattle District the opportunity to complete EFH review.

Comment 2 (Require written EFH assessment): One commenter stated the Seattle District should modify the RGC for activities that result in the loss of streambed or wetlands as waters of the United States, requiring the Corps to determine if there is a loss to EFH. If EFH may be adversely affected by a proposed activity, the prospective permittee must provide a written EFH assessment with an analysis of the effects of the proposed action on EFH.

Response 2: EFH consultation regulations at 50 CFR 600.920, require any federal action that may adversely affect EFH, federal agencies must provide NMFS with a written assessment of the effects of that action on EFH. The level of detail in an EFH Assessment should be commensurate with the complexity and magnitude of the potential adverse effects of the action. The addition of an extra regional condition would not provide any additional protection to the resource that is not already covered within 50 CFR 600.920. In most areas of Washington State, there are species covered under EFH and ESA; therefore, the NWP general condition for PCNs involving effects to ESA species/habitat would apply in situations for EFH which would afford the Seattle District the opportunity to complete EFH review. Also, with the retention and modification of the RGC requiring a PCN for stream losses, impacts to EFH in streams will be reviewed by the Seattle District.

Comment 3 (Retain this RGC): Five commenters stated this RGC should be retained. One of those commenters stated that it should be revised to include the protection of submerged aquatic vegetation (SAV). One commenter stated no NWP activity should be permitted on forage fish potential spawning habitat, during forage fish spawning periods, or without conducting surveys to determine forage fish presence or use of habitat. Another commenter stated the removal of this RGC undermines the recovery of endangered salmon stocks and Southern Resident Orca and believes that the Corps should be explicit about the importance of protecting forage fish species within Washington State. The same commenter requested adding eulachon (*Thaleichthys pacificus*); Pacific herring (*Clupea pallasi*); Pacific sand lance (*Ammodytes hexapterus*); and surf smelt (*Hypomesus pretiosis*) spawning habitat species to an RGC. The same commenter stated inclusion of a RGC for forage fish would provide consistency in the management of these important species by state and local governments in Washington State. Two commenters stated removal of this condition is problematic and leaves forage fish and nearshore habitats without

protection.

Response 3: The Seattle District recognizes the importance of forage fish both to nearshore habitat functions, and as a part of food webs in the marine environment. NWP general condition 2 – *Aquatic Life Movements* and NWP general condition 3 – *Spawning Areas*, provide protection for impacts to forage fish. Endangered Species are already protected by federal law, and further specifically addressed by NWP general condition 18 – *Endangered Species*. The Seattle District has determined that conditions related to forage fish are more appropriately addressed on a case-by-case basis both through coordinating with applicants after receipt of a PCN and by the addition of special conditions to NWP verifications to give narrow and specific requirements for projects authorized by an NWP. Currently PCNs are required for all NWPs used in marine waters of Washington State, which allows the district engineer to address avoidance and minimization efforts for all projects which may impact forage fish and marine SAV such as eelgrass. In many cases, these conditions result in project specific requirements to perform surveys prior to performing work, and limits on when work can be performed based on forage fish spawning cycles. The Seattle District is confidant the removal of this RGC will not result in more than minimal adverse environmental effects to forage fish.

This RGC will not be retained.

2.5.5 Notification of Permit Requirements

This RGC from the 2017 NWPs was proposed for removal.

The permittee must provide a copy of the nationwide permit authorization letter, conditions, and permit drawings to all contractors and any other parties performing the authorized work prior to the commencement of any work in waters of the United States. The permittee must ensure all appropriate contractors and any other parties performing the authorized work at the project site have read and understand relevant NWP conditions as well as plans, approvals, and documents referenced in the NWP letter. A copy of these documents must be maintained onsite throughout the duration of construction.

Comment 1 (Retain this RGC): One commenter said to retain this RGC but did not provide a rationale. Another commenter said to retain this RGC because removal will create regulatory misinformation and inconsistency and create additional burden upon the permittee and regulators.

Response 1: This RGC will not be retained because we have found that it is unenforceable as written. While it is important contractors and other parties are aware of permit conditions, it is ultimately the responsibility of the permittee to ensure the parties performing the work are informed and aware of all conditions.

This RGC will not be retained.

2.5.6 Temporary Impacts and Site Restoration

This RGC from the 2017 NWPs was proposed for removal.

a. Temporary impacts to waters of the United States must not exceed six months unless the prospective permittee requests and receives a waiver by the district engineer. Temporary impacts to waters of the United States must be identified in the PCN.

b. No more than 1/2 of an acre of waters of the United States may be temporarily filled unless the prospective permittee requests and receives a waiver from the district engineer (temporary fills do not affect specified limits for loss of waters associated with specific nationwide permits).

c. Native soils removed from waters of the United States for project construction should be stockpiled and used for site restoration. Restoration of temporarily disturbed areas must include returning the area to pre-project ground surface contours. If native soil is not available from the project site for restoration, suitable clean soil of the same textural class may be used. Other soils may be used only if identified in the PCN.

d. The permittee must revegetate disturbed areas with native plant species sufficient in number, spacing, and diversity to restore affected functions. A maintenance and monitoring plan commensurate with the impacts, may be required. Revegetation must begin as soon as site conditions allow within the same growing season as the disturbance unless the schedule is approved by the Corps of Engineers. Native plants removed from waters of the United States for project construction should be stockpiled and used for revegetation when feasible. Temporary Erosion and Sediment Control measures must be removed as soon as the area has established vegetation sufficient to control erosion and sediment.

e. If the Corps determines the project will result in temporary impacts of submerged aquatic vegetation (SAV) that are more than minimal, a monitoring plan must be submitted. If recovery is not achieved by the end of the monitoring period, contingencies must be implemented, and additional monitoring will be required.

This RGC does not apply to NWP 48, *Commercial Shellfish Aquaculture Activities*. Please see specific regional conditions for NWP 48.

Comment 1 (Support Deletion): One commenter supported the deletion of RGC

Response 1: Comment noted.

Comment 2 (Retain this RGC, more than minimal impacts): One commenter stated this RGC should be retained because eliminating the 1/2 of an acre threshold, the requirement to use native soil, revegetate the site, and have a monitoring and recovery plan for SAV will lead to greater than minimal impacts

Response 2: Should these specific circumstances arise; the Seattle District will ensure the

relevant parts of the RGC would be added as special condition(s) to the NWP verification to ensure impacts are minimal. Currently PCNs are required for all NWPs used in marine waters of Washington State (where SAV is located), which allows the district engineer to address avoidance and minimization efforts for all projects which may impact SAV.

Comment 3 (Retain this RGC, inconsistent with local and State regulations and contrary to standard environmental operating principles): Two commenters stated this RGC should be retained because removal would create an inconsistency with the State of Washington's state and local regulations, policies, and/or guidance documents and removing this measure does not appear to be science or data based and does not meet and/or contradicts the seven Environmental Operating Principles, or the Corps' green ethics, which are being incorporated into all Corps business to achieve a sustainable environment.

Response 3: Inconsistencies between federal, state and local regulations and policies often exist and RGCs should not be added for the purpose to resolving those inconsistencies. The purpose of an RGC would be to ensure impacts are minimal. As stated previously, should these specific circumstances arise, the Seattle District will ensure the relevant parts of the deleted RGC would be added as special condition(s) to the NWP verification to ensure impacts are minimal.

Comment 4 (Retain this RGC and have it applied to NWP 48):

Response 4: Because this RGC will not be retained, it is not applicable to NWP 48. NWP 48 will have standard special conditions to ensure impacts are minimal.

This RGC will not be retained.

3.0 Alternatives

3.1 No Regional Conditions

Proposing no RGCs was determined to not be a viable alternative in Washington State. The national general conditions do afford a level of protection regarding these issues and the district engineer has the ability to take discretionary authority on a case-by-case basis. However, as required by the reauthorization process, the district coordinated with the resource agencies, the Tribes, and the public to take into account regional differences in aquatic resource functions and services in the State of Washington. As the Corps evaluated the comments received not all of the concerns raised were determined to require regional conditions to address the concerns. However, regional conditions were retained or added where there were concerns impacts would be more than minimal on a broad geographic basis. Therefore, without the RGCs described in this document impacts to aquatic resources, endangered species, and/or Tribal rights would not be minimized.

3.2 Alternative Regional NWP Limits or Pre-Construction Notification Thresholds

None proposed.

4.0 Section 7 of the Endangered Species Act

4.1 General Considerations

There are over 50 species in Washington State listed under the ESA as threatened or endangered. Over 20 species have designated critical habitat. With the high number of listed species and critical habitat, ensuring compliance with ESA comprises a significant percentage of the regulatory workload for the Seattle District.

Compliance with the ESA is required for all actions authorized by the Corps. For determinations of "may affect, not likely to adversely affect" (NLAA) and "may affect, likely to adversely affect" (LAA), informal and formal consultations, respectively, are required. The consultation initiation package for both informal and formal consultation includes an evaluation of impacts from the project and its associated construction techniques to the listed species and to designated critical habitat.

Restrictions or regional notification requirements have been placed on various NWPs in the Seattle District to ensure activities authorized by NWPs are minimally impacting, are consistent with the ESA, and permittees are aware of these requirements.

4.2 Local Operating Procedures for Section 7 of the Endangered Species Act

The Seattle District first determines if the proposed activity will have "no effect" on threatened or endangered species and critical habitat. The determination of "no effect" will be documented in the administrative record and if all the other NWP terms and conditions are met, the Seattle District will proceed to issue the NWP verification.

If the activity may affect a threatened or endangered species or their critical habitat, then the Seattle District will consult with the appropriate Service(s). When ESA consultation is required, the project proponent is informed of this decision. The Seattle District informs the project proponent the work may be authorized by an NWP; however, verification cannot occur until the Corps completes the evaluation and consultation required by the ESA. Modifications to the proposed project may occur during the ESA consultation in order to minimize impacts to threatened and endangered species or designated critical habitat.

There are several methods the Seattle District uses to complete consultation. The Seattle District completed various ESA Section 7 programmatic consultations with the Services. Programmatic consultations are done for a pre-identified category of activities that are similar in nature and are located in a pre-defined geographic area. If a project proponent would like coverage under an existing programmatic consultation, they must ensure their project meets the design criteria and conservation measures described in the programmatic consultation. If the Seattle District does not have a programmatic consultation for activities covered by an NWP, an individual informal or formal consultation will be conducted.

A majority of PCNs received by the Seattle District require consultation with the Services. The Seattle District has developed, and continues to develop, additional streamlining tools including additional programmatic consultations and impact reduction guidelines to minimize impacts to listed species, reduce documentation and improve consultation efficiency for individual Section 7 consultations.

5.0 Section 106 of the National Historic Preservation Act

5.1 General Considerations

The Seattle District ensures compliance with the provisions of the NHPA for all permit applications, including those for NWPs. The Seattle District reviews every permit application received, including PCN for NWPs, to evaluate impacts to historic properties.

In addition to the conditions of the NWPs, state and federal law require anyone who discovers human remains to stop work and notify authorities. For projects subject to PCN, the district engineer can add a special condition related to inadvertent discovery procedures to NWP verifications in cases where there are site specific concerns to historic properties. When notified of the discovery of previously unknown remains and artifacts, the district engineer has authority to exercise his discretionary authority and modify, suspend, or revoke the permit as discussed in 33 CFR 330.4. All projects authorized by NWP are required to meet NWP general conditions 20 and 21.

When the Seattle District consults with Tribes and the Tribal Historic Preservation Office (THPO) or State Historic Preservation Office (SHPO) under the NWP process, the project proponent is notified in writing work cannot be verified under the NWP until all Section 106 requirements have been satisfied. If the Seattle District determines the activity would have no potential to cause effects on any historic properties, the Seattle District then issues the NWP authorization without further consultation with the THPO/SHPO.

5.2 Local Operating Procedures for Section 106 of the National Historic Preservation Act

Archaeologists in the Seattle District, with the assistance of a database provided by the SHPO, determine if a historic site is present in the permit area. If the Seattle District determines a site could be present and the proposed work could adversely impact the site, an archaeological survey is required. Coordination between the Seattle District, Tribes, and the THPO/SHPO occurs when the Seattle District determines a proposal could adversely impact a historic or cultural site. The Seattle District regularly coordinates with the THPO/SHPO and Tribes to improve procedures and to address other concerns.

6.0 Government-to-Government Consultation with Tribes

6.1 Consultation Summary

On September 24, 2020, the Deputy Commanding General for Civil and Emergency Operations issued guidance for conducting government-to-government consultation with Tribes on the proposed 2021 NWPs. On September 18, 2020, the Seattle District sent letters to all Tribes with interests in Washington State, the Northwest Indian Fisheries Commission (NWIFC), and the Skagit River System Cooperative (SRSC) with "early coordination" notification of the anticipated reissuance of the NWPs. On October 15, 2020, the Seattle District sent letters to the Tribes, the NWIFC, and the SRSC inviting them to participate in government-to-government consultation regarding NWPs. No requests for government-to-government consultations were received in response to these letters. Also, on October 29, 2020, the Seattle District met with Tribes to discuss the proposed regional conditions and the process to submit comments.

6.2 Local Operating Procedures for Protecting Tribal Rights

The Seattle District has 33 federally recognized Tribes either with reservations and/or historical lands within the District's boundaries. At this time the Seattle District has established Tribal Notification Procedures with the following 26 Tribes: Confederated Tribes of the Colville Reservation, Cowlitz Indian Tribe, Confederated Tribes of Grand Ronde, Hoh Indian Tribe, Jamestown S'Klallam Tribe, Kalispel Tribe of Indians, Lower Elwha Klallam Tribe, Lummi Nation, Makah Indian Tribe, Muckleshoot Indian Tribe, Nez Perce Tribe, Nisqually Indian Tribe, Nooksack Tribe, Port Gamble S'Klallam Tribe, Puyallup Tribe of Indians, Confederated Tribes of the Samish Indian Nation, Skagit River System Cooperative, Skokomish Tribal Nation, Snoqualmie Indian Tribe, Spokane Tribe, Squaxin Island Tribe, Stillaguamish Tribe of Indians, Suquamish Tribe, Swinomish Indian Tribal Community, Tulalip Tribes, Confederated Tribes of the Umatilla Indian Reservation, and the Upper Skagit Indian Tribe. The Seattle District also has Notification Procedures with the Skagit River System Cooperative. Through these procedures, the Seattle District contacts the appropriate Tribe(s) and requests comments on permit actions the Tribe has requested coordination on based on geographic areas. The Seattle District will continue to update these agreements and to reach out to the remaining Tribes to establish notification procedures. These procedures allow for coordination with the Tribes on individual projects that may affect their Tribal rights.

7.0 Essential Fish Habitat

Federal agencies are required, under section 305(b)(2) of the MSA and its implementing regulations (50 CFR 600 Subpart K), to consult with NMFS regarding actions authorized, funded, or undertaken by the agency that may adversely affect EFH. If an action would adversely affect EFH, NMFS is required to provide the federal action agency with EFH conservation recommendations (MSA section 305(b)(4)(a)). In some cases, ESA conservation measures are adequate to avoid, minimize, or otherwise offset potential adverse effects to the EFH and specific EFH conservation recommendations are not necessary. In other cases, NMFS provides specific conservation recommendations in order to minimize the potential adverse effects to the EFH.

The Corps and the project proponent must fully consider the EFH conservation recommendations

provided by NMFS and must provide, within 30 days of receipt of the recommendations, a detailed written response to NMFS. The response includes a description of measures proposed, such as a permit special condition, to avoid, mitigate, or offset the adverse effects of the activity on EFH. In the case of a response that is not consistent with the EFH conservation recommendations, the response must explain the reasons for not following the recommendations, including the scientific justification for any disagreements over anticipated effects of the proposed action and the measures needed to avoid, minimize, mitigate or offset such effects.

8.0 Supplement to the Analyses in the National Decision Document

8.1 Public interest review factors (33 CFR 320.4(a)(1))

In addition to the discussion in the national decision document for this NWP, the Seattle District has considered the local impacts expected to result from the activities authorized by this NWP, including the reasonably foreseeable cumulative effects of those activities.

(a) Conservation: Same as discussed in the national NWP decision document.

(b) Economics: Same as discussed in the national NWP decision document.

(c) Aesthetics: Same as discussed in the national NWP decision document.

(d) General environmental concerns: Same as discussed in the national NWP decision document.

(e) Wetlands: Same as discussed in the national NWP decision document. For impacts to wetlands and all other waters of the United States, mitigation is required. Mitigation consists of actions to avoid, minimize, and compensate for impacts from the project. All permit applicants are required to avoid and minimize impacts to waters of the United States. A compensatory mitigation plan is used to compensate for the unavoidable loss of waters of the United States (wetlands, streams, rivers, etc.) and to ensure those losses minimize adverse effects to the aquatic environment. Mitigation plans must be prepared in accordance with the 2008 Federal Mitigation Rule. In the Seattle District, applicants can meet this requirement for wetland compensatory mitigation by preparing a mitigation plan in accordance with the Ecology Publication #06-06-011a, *Wetland Mitigation in Washington State – Part 1: Agency Policies and Guidance and Part 2: Developing Mitigation Plans* (Version 1), dated March 2006 (or updated revision). The Seattle District worked in conjunction with the State and the EPA to develop this document to ensure wetland mitigation plans are designed appropriately so wetland impacts are fully mitigated.

(f) Historic properties: Refer to Section 5.2 of this document for Seattle District's Local Operating Procedures for compliance with the NHPA.

(g) Fish and wildlife values: RGC for *Crossings of Waters of the United States*, will reduce the

adverse effects to fish and other aquatic species on projects involving crossings of waters of the United States in Washington State by requiring design methods to facilitate the movement of flood flows and debris, allow passage of nearly all fish and aquatic organisms and allow many natural stream processes to continue to function. Compliance with this RGC takes into account the unique life cycle stages of certain salmonids and will ensure the authorized activity has minimal adverse effects.

(h) Flood hazards: Same as discussed in the national NWP decision document.

(i) Floodplain values: Same as discussed in the national NWP decision document.

(j) Land use: Same as discussed in the national NWP decision document.

(k) Navigation: Same as discussed in the national NWP decision document.

(l) Shore erosion and accretion: Same as discussed in the national NWP decision document.

(m) Recreation: Same as discussed in the national NWP decision document.

(n) Water supply and conservation: Same as discussed in the national NWP decision document.

(o) Water quality: Same as discussed in the national NWP decision document.

(p) Energy needs: Same as discussed in the national NWP decision document.

(q) Safety: Same as discussed in the national NWP decision document.

(r) Food and fiber production: Same as discussed in the national NWP decision document.

(s) Mineral needs: Same as discussed in the national NWP decision document.

(t) Considerations of property ownership: Same as discussed in the national NWP decision document.

8.2 Section 404(b)(1) Guidelines Impact Analysis (Subparts C-F)

(a) Substrate: Same as discussed in the national NWP decision document.

(b) Suspended particulates/turbidity: Same as discussed in the national NWP decision document.

(c) Water: Same as discussed in the national NWP decision document.

(d) Current patterns and water circulation: Same as discussed in the national NWP decision document.

(e) Normal water level fluctuations: Same as discussed in the national NWP decision document.

(f) Salinity gradients: Same as discussed in the national NWP decision document.

(g) Threatened and endangered species: Refer to Section 4 of this document

(h) Fish, crustaceans, molluscs, and other aquatic organisms in the food web: Same as discussed in the national NWP decision document.

(i) Other wildlife: Same as discussed in the national NWP decision document.

(j) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(1) Sanctuaries and refuges: Same as discussed in the national NWP decision document.

(2) Wetlands: Refer to Section 8.1(e) (Wetlands) of this document.

(3) Mud flats: Same as discussed in the national NWP decision document.

(4) Vegetated shallows: Because of the abundance of ESA-listed species in tidal waters, a PCN is required for work in tidal waters per NWP general condition 18 – *Endangered Species*. Work in or affecting SAV (vegetated shallows) in marine areas will be fully assessed through the PCN process and ESA/MSA consultation and/or EFH assessments. This general condition will ensure impacts to vegetated shallows are minimized.

(5) Coral reefs: Same as discussed in the national NWP decision document.

(6) Riffle and pool complexes: While impacts to riffle and pool complexes are not specifically restricted by any regional condition, potential adverse impacts to these special aquatic sites receive additional review and are restricted for the protection of the species listed as threatened or endangered under NWP general condition 18 – *Endangered Species*. These systems are very important for all life stages of the fish protected under the ESA. These systems are especially important because they are typically located near or within spawning areas for the fish. Individual review of projects under this condition would allow the Seattle District to ensure project impacts to riffle and pool complexes are minimal and appropriately mitigated.

(k) Municipal and private water supplies: Same as discussed in the national NWP decision document.

(l) Recreational and commercial fisheries: Same as discussed in the national NWP decision document.

(m) Water-related recreation: Same as discussed in the national NWP decision document.

(n) Aesthetics: Same as discussed in the national NWP decision document.

(o) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national NWP decision document.

8.3 Regional Cumulative Effects Analysis

This section discusses the anticipated cumulative effects of the use of this NWP in Washington State during the period this NWP is in effect. The cumulative effects of this NWP are dependent upon the number of times the NWP is anticipated to be used in the region and the quantity and quality of waters of the United States anticipated to be impacted as a result of the activities authorized by this NWP (see 40 CFR 230.7(b)). The cumulative effects of this NWP are also dependent on compensatory mitigation that may be required during the period this NWP is in effect, when compensatory mitigation offsets impacts to waters of the United States authorized by this NWP.

Based on reported use of this NWP during the period of March 19, 2017, to September 15, 2020, the Seattle District estimates that this NWP will be used 2 times per year in Washington State, resulting in impacts to 0.1 of an acre of waters of the United States. The reported use includes PCNs submitted to the Seattle District, as required by the terms and conditions of the NWP as well as regional conditions imposed by the Division Engineer. The reported use also includes voluntary notifications submitted to the Seattle District where the applicants request written verification in cases when pre-construction notification is not required. The reported use does not include activities that do not require pre-construction notification and were not voluntarily reported to the Seattle District.

Based on reported use of this NWP during that time period, the Seattle District estimates that 17 percent of verifications for this NWP will require compensatory mitigation to offset the authorized impacts to waters of the United States and ensure that the authorized activities result in only minimal adverse environmental effects. The verified activities that do not require compensatory mitigation will have been determined by the Seattle district engineer to result in no more than minimal individual and cumulative adverse environmental effects without compensatory mitigation. During 2021–2026, the Seattle District expects little change to the percentage of NWP verifications for this NWP requiring compensatory mitigation, because there have been no substantial changes in the mitigation general condition or the NWP regulations for determining when compensatory mitigation is to be required for NWP activities. The demand for these types of activities could increase or decrease over the five-year duration of this NWP.

Based on these annual estimates, the Seattle District estimates that approximately 10 activities could be authorized over a five-year period until this NWP expires, resulting in impacts to 1 acre of waters of the United States. 1 acre of compensatory mitigation would be required to offset those impacts in the Seattle District. Compensatory mitigation is the restoration (re-establishment or rehabilitation), establishment, enhancement, and/or preservation of aquatic resources for the

purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved. [33 CFR 332.2]

9.0 List of Final Corps Regional Conditions

9.1 Regional General Conditions

Note that the numerals for the final RGCs may be different than the RGC numerals listed in the above discussion because of the retention of two RGCs.

RGC 1, Project Drawings

Drawings must be submitted with pre-construction notification (PCN). Drawings must provide a clear understanding of the proposed project, and how waters of the United States will be affected. Drawings must be originals and not reduced copies of large-scale plans. Engineering drawings are not required. Existing and proposed site conditions (manmade and landscape features) must be drawn to scale.

RGC 2, Aquatic Resources Requiring Special Protection

A PCN is required for activities resulting in a loss of waters of the United States in wetlands in dunal systems along the Washington coast, mature forested wetlands, bogs and peatlands, aspen-dominated wetlands, alkali wetlands, vernal pools, camas prairie wetlands, estuarine wetlands, and wetlands in coastal lagoons.

RGC 3, New Bank Stabilization in Tidal Waters of Puget Sound

Activities involving new bank stabilization in tidal waters in Water Resource Inventory Areas (WRIAs) 8, 9, 10, 11 and 12 (within the areas identified on Figures 1a through 1e) cannot be authorized by NWP.

RGC 4, Commencement Bay

No permanent losses of wetlands or mudflats within the Commencement Bay Study Area may be authorized by any NWP (see Figure 2).

RGC 5, Bank Stabilization

All projects including new or maintenance bank stabilization activities in waters of the United States where salmonid species are present or could be present, requires PCN to the U.S. Army Corps of Engineers (Corps) (see NWP general condition 32).

For new bank stabilization projects only, the following must be submitted to the Corps:

e. The cause of the erosion and the distance of any existing structures from the area(s) being stabilized.

f. The type and length of existing bank stabilization within 300 feet of the proposed project.

g. A description of current conditions and expected post-project conditions in the waterbody.

h. A statement describing how the project incorporates elements avoiding and minimizing adverse environmental effects to the aquatic environment and nearshore riparian area, including vegetation impacts in the waterbody.

In addition to a. through d., the results from any relevant geotechnical investigations can be submitted with the PCN if it describes current or expected conditions in the waterbody.

RGC 6, Crossings of Waters of the United States

Any project including installing, replacing, or modifying crossings of waters of the United States, such as culverts or bridges, requires submittal of a PCN to the U.S. Army Corps of Engineers (see NWP general condition 32).

If a culvert is proposed to cross waters of the U.S. where salmonid species are present or could be present, the project must apply the stream simulation design method from the Washington Department of Fish and Wildlife located in the *Water Crossing Design Guidelines* (2013), or a design method which provides passage at all life stages at all flows where the salmonid species would naturally seek passage. If the stream simulation design method is not applied for a culvert where salmonid species are present or could be present, the project proponent must provide a rationale in the PCN sufficient to establish one of the following:

c. The existence of extraordinary site conditions.

d. How the proposed design will provide equivalent or better fish passage and fisheries habitat benefits than the stream simulation design method.

Culverts installed under emergency authorization that do not meet the above design criteria will be required to meet the above design criteria to receive an after-the-fact nationwide permit verification.

RGC 7, Stream Loss

A PCN is required for all activities that result in the loss of any linear feet of streams.

RGC 8, Construction Boundaries

Permittees must clearly mark all construction area boundaries within waters of the United States before beginning work on projects that involve grading or placement of fill. Boundary markers and/or construction fencing must be maintained and clearly visible for the duration of construction. Permittees should avoid and minimize removal of native vegetation (including submerged aquatic vegetation) to the maximum extent possible.

RGC 9, ESA Reporting to NMFS

For any nationwide permit that may affect threatened or endangered species:

Incidents where any individuals of fish species, marine mammals and/or sea turtles listed by National Oceanic and Atmospheric Administration Fisheries, National Marine Fisheries Service (NMFS) under the Endangered Species Act appear to be injured or killed as a result of discharges of dredged or fill material into waters of the U.S. or structures or work in navigable waters of the U.S. authorized by this Nationwide Permit verification shall be reported to NMFS, Office of Protected Resources at (301) 713-1401 and the Regulatory Office of the Seattle District of the U.S. Army Corps of Engineers at (206) 764-3495. The finder should leave the animal alone, make note of any circumstances likely causing the death or injury, note the location and number of individuals involved and, if possible, take photographs. Adult animals should not be disturbed unless circumstances arise where they are obviously injured or killed by discharge exposure or some unnatural cause. The finder may be asked to carry out instructions provided by the NMFS to collect specimens or take other measures to ensure that evidence intrinsic to the specimen is preserved.

9.2 Regional Conditions for NWP 43

1. Pre-construction notification for new facilities must include a long-term maintenance plan if permits for periodic maintenance dredging will be required in waters of the United States.

10.0 Water Quality Certification and Coastal Zone Management Act consistency determinations

In Washington State, two agencies and 11 Tribes currently have 401 WQC authority. Ecology is authorized to make 401 WQC decisions in Washington State for activities on public and private lands, and all federal lands not managed by the EPA. Ecology is responsible for making all CZMA consistency determinations in Washington State.

The EPA has 401 WQC authority in Indian Country. Indian County includes reservation lands, trust lands, and Dependent Indian Communities. Dependent Indian Communities refers to a limited category of Indian lands that are neither reservation or trust lands that satisfy the following two requirements: (1) they are set aside by the federal government for the use as Indian land and, (2) they must be under federal superintendence. To date, the EPA has granted

the following Tribes 401 WQC authority over activities on their respective Tribal lands:

- Confederated Tribes of the Chehalis Reservation
- Confederated Tribes of the Colville Indian Reservation
- Kalispel Tribe of Indians
- Lummi Nation
- Makah Tribe
- Port Gamble S'Klallam Tribe
- Puyallup Tribe of Indians
- Quinault Indian Nation
- Spokane Tribe of Indians
- Swinomish Indian Tribal Community
- Tulalip Tribes

Ecology issued a WQC with conditions that was initially accepted by the Corps. However, upon a recent review, it was determined that a general condition upon which the WQC was granted for this NWP is inconsistent with EPA's new regulations implementing Section 401. General Condition 1 of Ecology's general WQC, which applies broadly to all activities potentially authorized under this NWP, is not acceptable because it undermines the finality of the general WQC and allows Ecology to act after the conclusion of the reasonable period of time. EPA's preamble to the regulations implementing Section 401 makes it clear that certifying authorities cannot unilaterally modify a certification after it is issued or include "reopener" clauses in a certification. 85 Federal Register 42210, 4227–80. General Condition 1 constitutes a reopener as it would allow Ecology to review individual actions included in the general WQC to ensure that the activities comply with water quality standards and there is no limitation on what projects would be subject to that review. The Corps views the general WQC as inconsistent with EPA's new Section 401 regulations and thus declines to rely on the general WQC for this NWP going forward and will instead require individual WQCs or waiver for activities authorized by this NWP.

WQC was denied by EPA. Ecology requires an individual CZMA consistency determination if individual WQC is required. WQC was denied by the Lummi Nation, Makah Tribe, Puyallup Tribe of Indians, Swinomish Indian Tribal Community, and the Tulalip Tribes. WQC was waived by the Confederated Tribes of the Chehalis Reservation and Colville Indian Reservation, Kalispel Tribe of Indians, Port Gamble S'Klallam Tribe, Quinault Indian Nation, and the Spokane Tribe of Indians.

11.0 Measures to Ensure No More Than Minimal Adverse Environmental Effects

The terms and conditions of the NWP, including the PCN requirements and the regional conditions listed in Section 9.0 of this document, will ensure that this NWP authorizes only activities with no more than minimal individual and cumulative adverse environmental effects. High-value waters will be protected by the restrictions in NWP general condition 22 and the PCN requirements of the NWP. Through the PCN process, the Seattle District will review certain

activities on a case-by-case basis to ensure that those activities result in no more than minimal adverse environmental effects, individually and cumulatively. Through the PCN review process, the district engineer can add special conditions to an NWP authorization to ensure that the NWP activity results in no more than minimal adverse environmental effects, individually and cumulatively. During the PCN process, the district engineer will exercise discretionary authority and require an individual permit for a proposed activity that will result in more than minimal individual and cumulative adverse environmental effects.

The Seattle District, Regulatory Branch has local procedures for projects involving excavation and dredging activities. If the projects involve excavation or dredging in open water, the Seattle District Dredged Material Management Office (DMMO) is contacted to determine if there is a potential to encounter contaminated sediments. If there is the potential, the Seattle District will coordinate with the DMMO and may require testing to ensure the appropriate dredging and disposal methods are implemented.

The Seattle District has local procedures for projects in or affecting sites designated by the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund site). If the project in within Superfund site boundaries or has the potential to impact a Superfund site, the Seattle District has a standard operating procedure outlining requirements to coordinate with EPA. This process ensures the Superfund site and any past, present, or future clean up action is not adversely impacted by the project, as well as ensuring the project results in no more than minimal individual and cumulative adverse environmental effects due to contaminated sediment release and disturbance.

Mitigation plans must be prepared in accordance with the 2008 Federal Mitigation Rule. In the Seattle District, project proponents can meet this requirement for wetland compensatory mitigation by preparing a mitigation plan in accordance with the Ecology Publication #06-06-011a, *Wetland Mitigation in Washington State – Part 1: Agency Policies and Guidance, and Part 2: Developing Mitigation Plans* (Version 1), dated March 2006 (or current revision). The Seattle District worked in conjunction with the State and the EPA to develop this document to ensure wetland impacts are fully mitigated.

Work authorized by any general permit may have special conditions added to restrict work to the authorized in-water work windows. If, at a later time, the district engineer, Division Engineer, or Chief of Engineers determines that the use of this NWP would result in more than minimal individual and cumulative adverse environmental effects, the modification, suspension, or revocation procedures at 33 CFR 330.4(e) or 33 CFR 330.5 will be used.

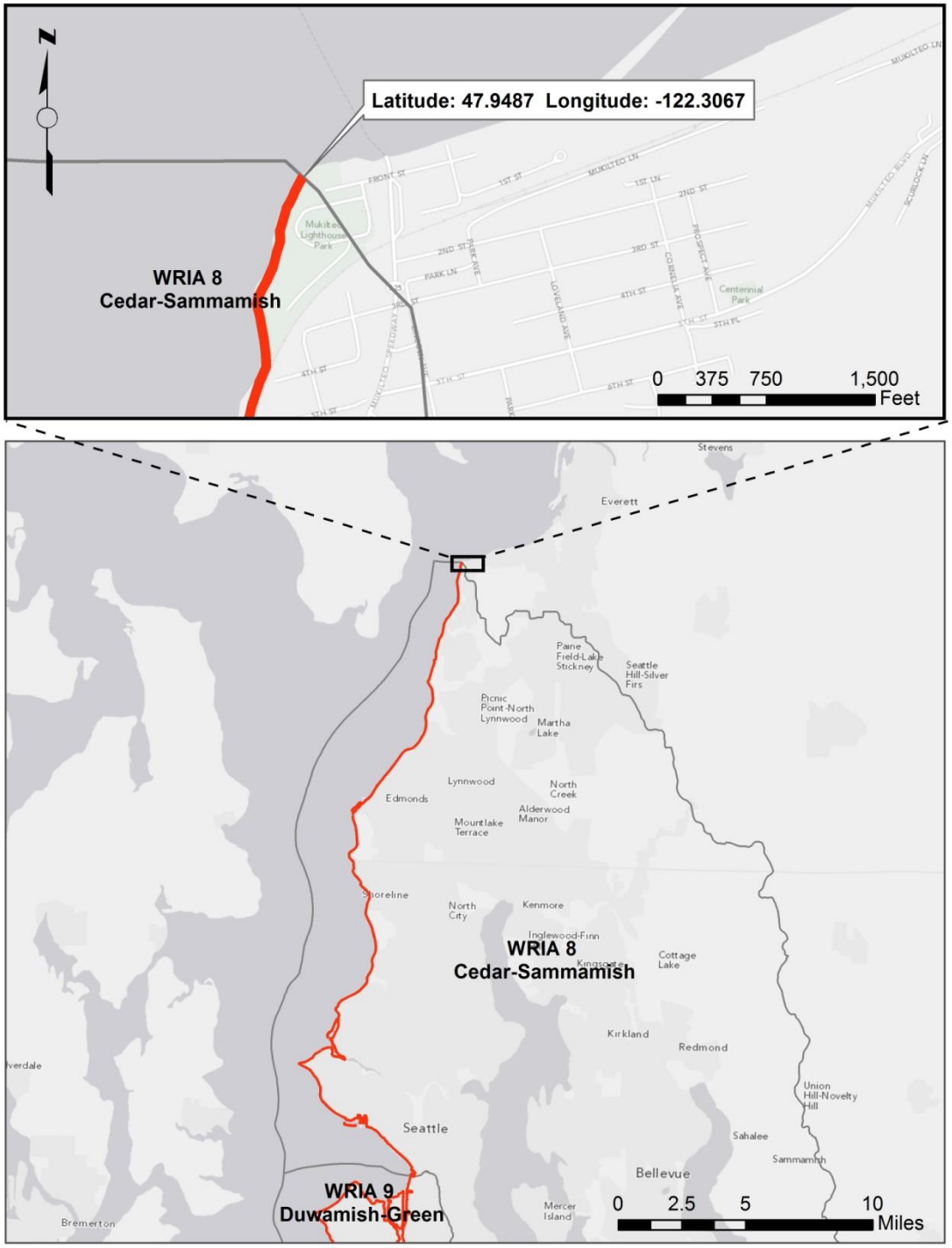
If, at a later time, there is clear, unequivocal evidence that the use of this NWP would result in more than minimal individual and cumulative adverse environmental effects, the modification, suspension, or revocation procedures at 33 CFR 330.4(e) or 33 CFR 330.5 will be used.

12.0 Final Determination

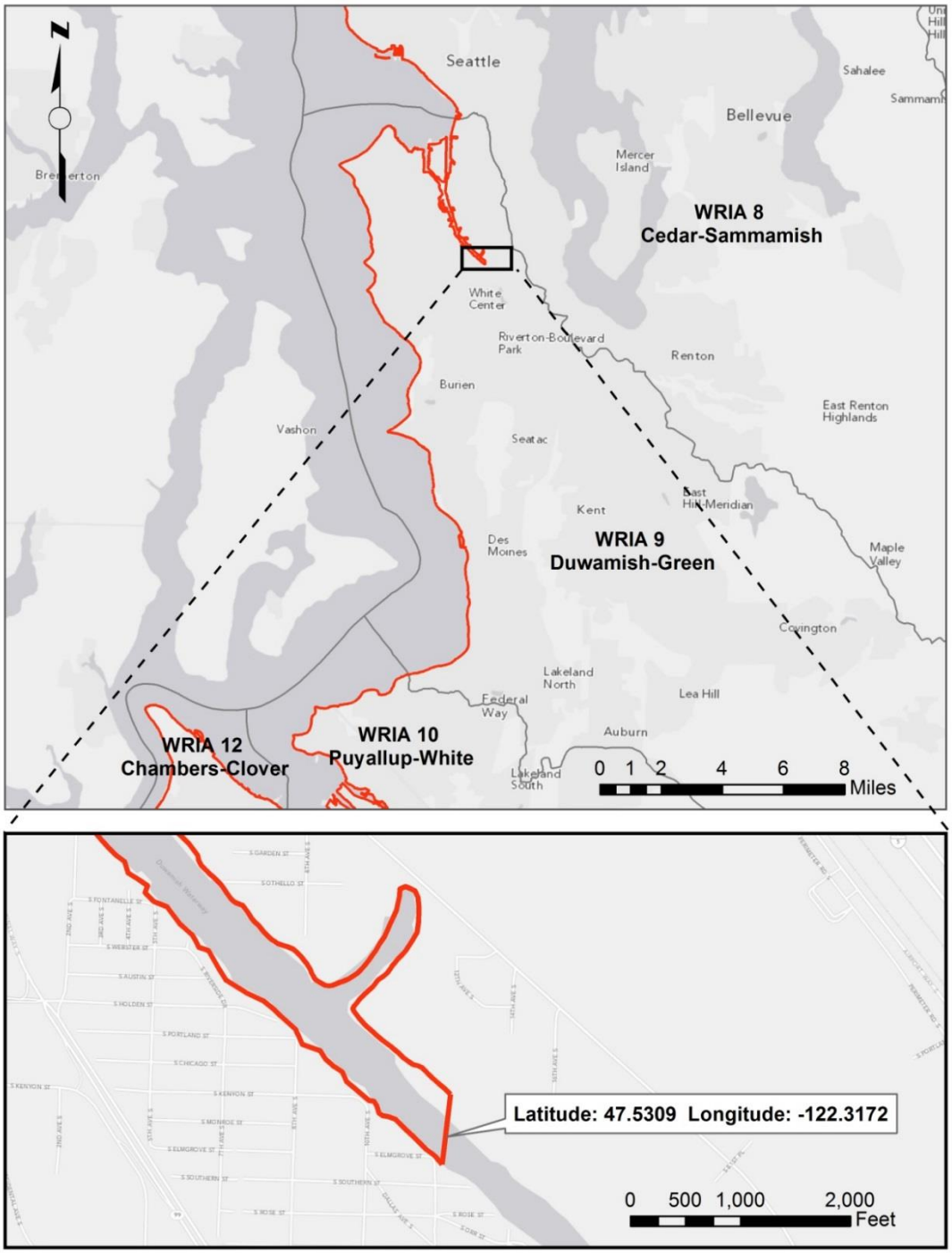
Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that this NWP, including its terms and conditions, as well as these regional conditions, will authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects.

13.0 Figures

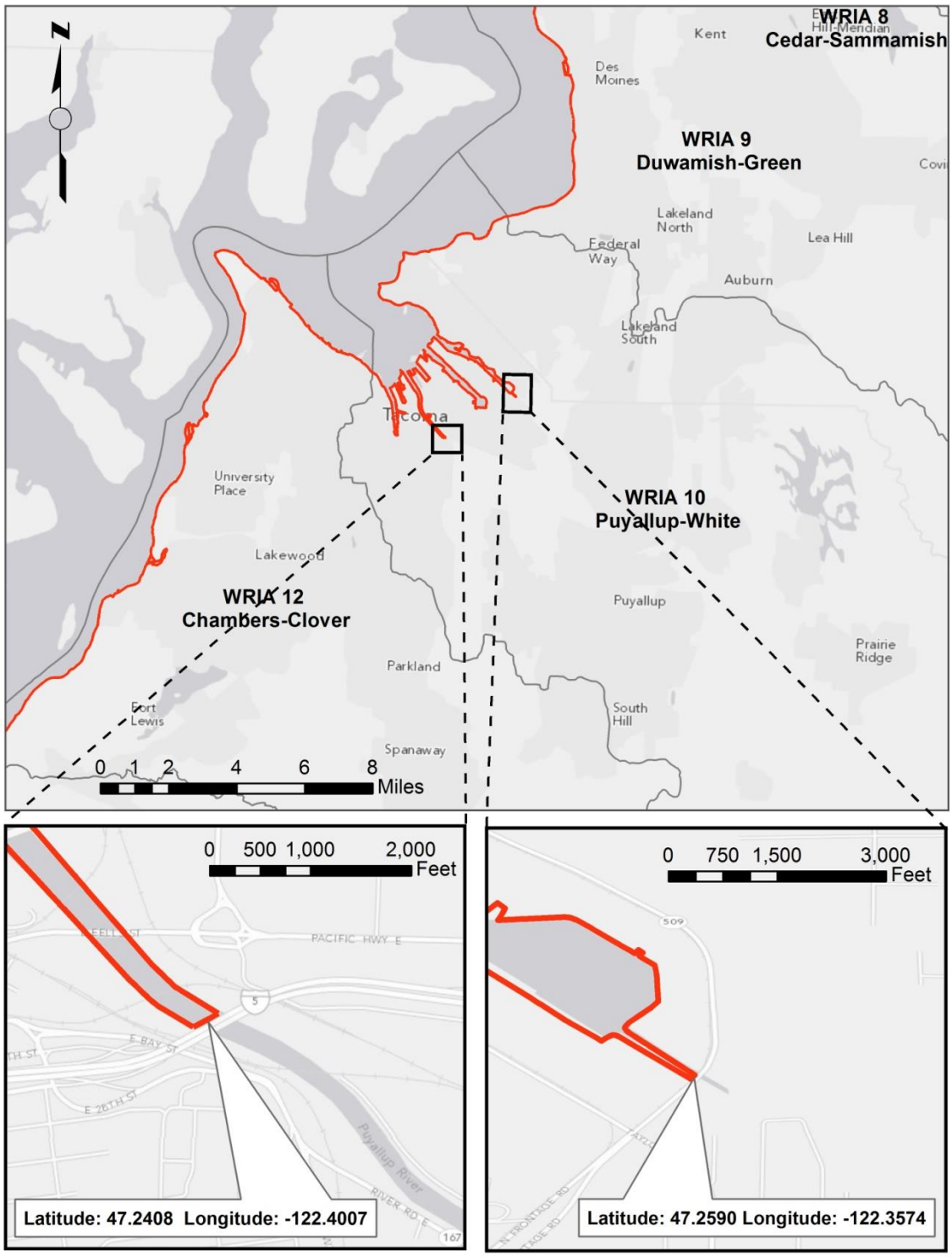
Figure 1: RGC 3 – WRIAs 8, 9, 10, 11, and 12
a. WRIA 8



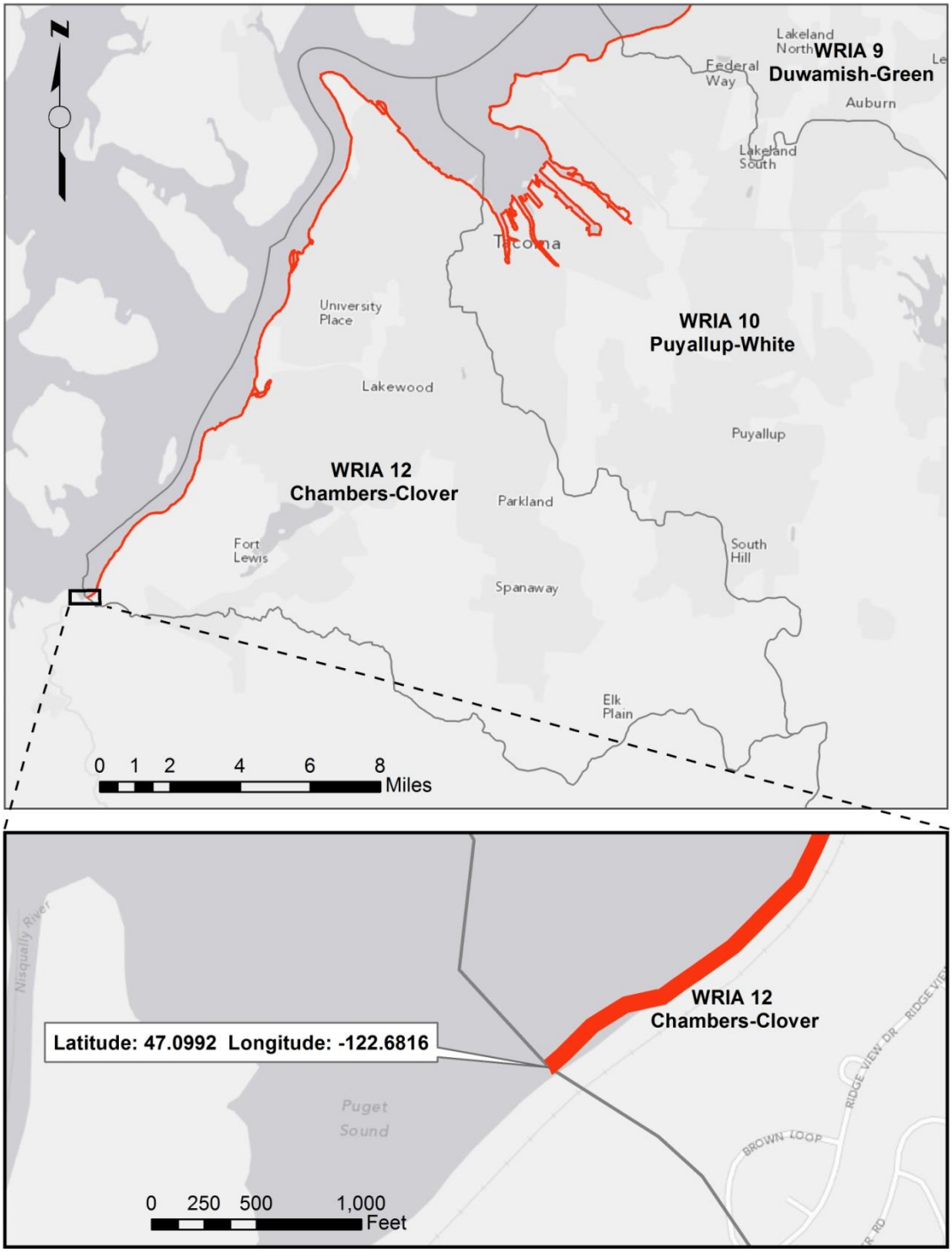
b. WRIA 9


N
Seattle
Sahalee
Bellevue
Mercer Island
WRIA 8
Cedar-Sammamish
White Center
Riverton-Boulevard Park
Renton
Burien
East Renton Highlands
Vashon
Seatac
East Hill-Meridian
Kent
Des Moines
WRIA 9
Duwamish-Green
Maple Valley
Covington
Lakeland North
Lea Hill
Federal Way
Auburn
WRIA 12
Chambers-Clover
WRIA 10
Puyallup-White
Lakeland South
0 1 2 4 6 8
Miles
Latitude: 47.5309 Longitude: -122.3172
0 500 1,000 2,000
Feet

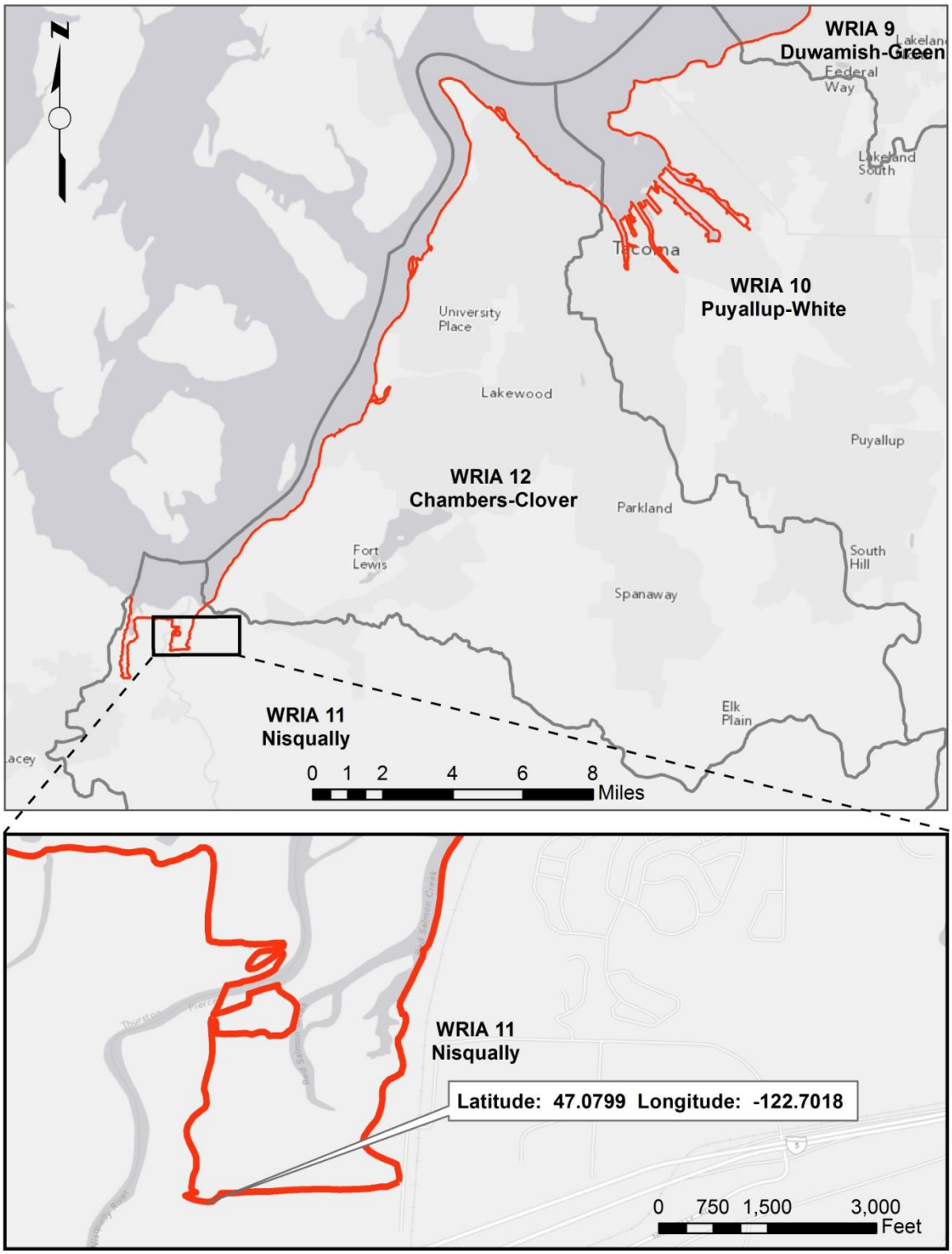
c. WRIA 10


WRIA 8
Cedar-Sammamish
Kent
Des Moines
WRIA 9
Duwamish-Green
Lakeland North
Lea Hill
Federal Way
Auburn
Lakeland South
Tacoma
University Place
WRIA 10
Puyallup-White
Lakewood
WRIA 12
Chambers-Clover
Puyallup
Prairie Ridge
Parkland
Fort Lewis
South Hill
Spanaway
0 1 2 4 6 8 Miles
0 500 1,000 2,000 Feet
PACIFIC HWY E
E BAY ST
E 26TH ST
Puyallup River
RIVER RD E
Latitude: 47.2408 Longitude: -122.4007
0 750 1,500 3,000 Feet
Latitude: 47.2590 Longitude: -122.3574

d. WRIA 12


N
Lakeland North
WRIA 9
Duwamish-Green
Federal Way
Auburn
Lakeland South
Tacoma
University Place
WRIA 10
Puyallup-White
Lakewood
Puyallup
WRIA 12
Chambers-Clover
Parkland
Fort Lewis
South Hill
Spanaway
Elk Plain
0 1 2 4 6 8
Miles
Nisqually River
WRIA 12
Chambers-Clover
Latitude: 47.0992 Longitude: -122.6816
Puget Sound
BROWN LOOP
RIDGE VIEW DR
0 250 500 1,000
Feet

e. WRIA 11


WRIA 9
Duwamish-Green
Federal Way
Lakeland South
Tacoma
WRIA 10
Puyallup-White
University Place
Lakewood
Puyallup
WRIA 12
Chambers-Clover
Parkland
Fort Lewis
South Hill
Spanaway
Elk Plain
WRIA 11
Nisqually
0 1 2 4 6 8
Miles
WRIA 11
Nisqually
Latitude: 47.0799 Longitude: -122.7018
0 750 1,500 3,000
Feet

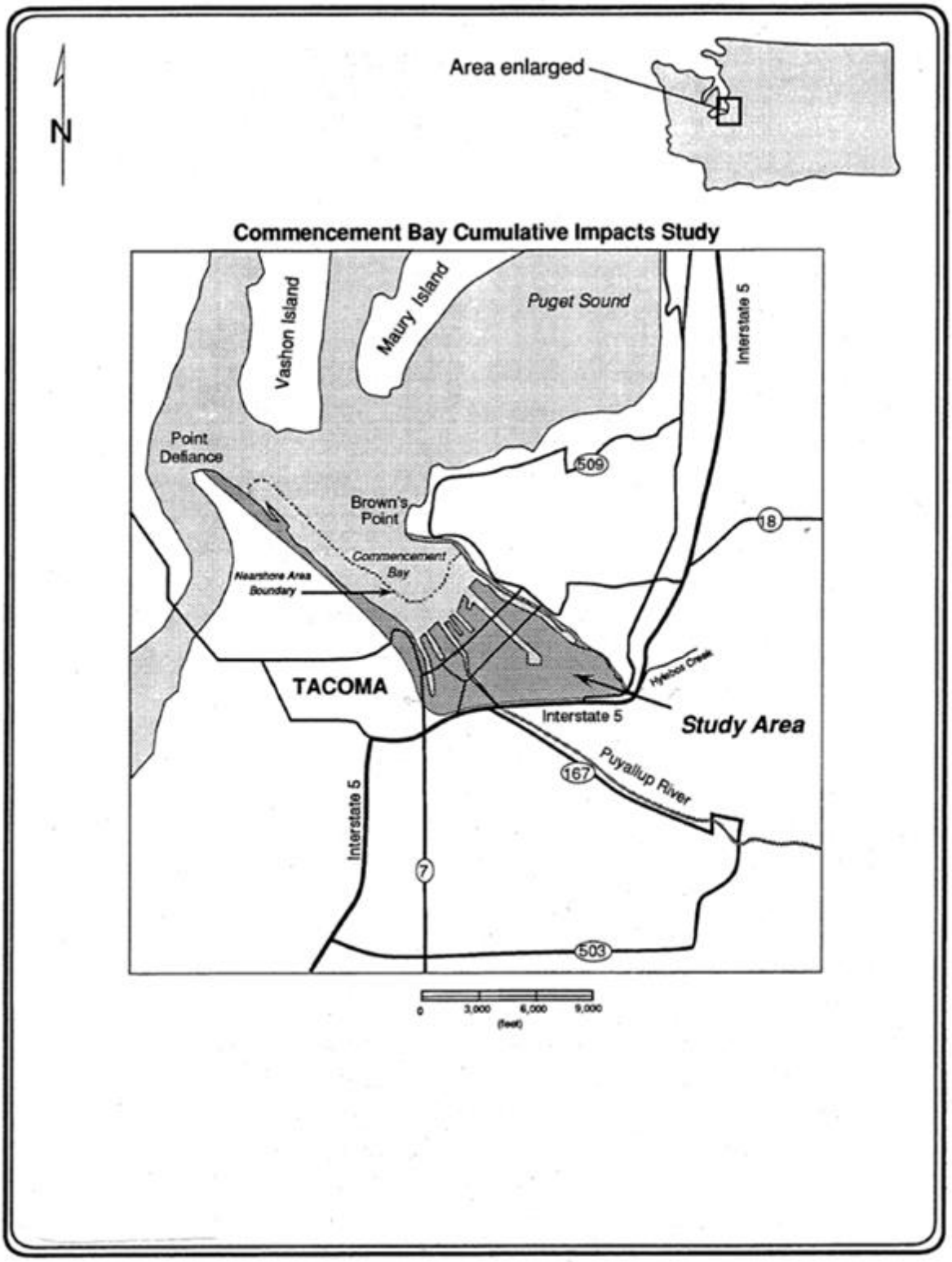



Figure 2. RGC 4 – Commencement Bay Study Area