

The Honorable John C. Coughenour
The Honorable David. W. Christel

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COALITION TO PROTECT PUGET SOUND)
HABITAT, *et al.*,)

Plaintiffs,)

v.)

UNITED STATES ARMY CORPS OF)
ENGINEERS, *et al.*,)

Defendants.)

Case No. 2:21-cv-1685-JCC-DWC

UNOPPOSED MOTION FOR
VOLUNTARY REMAND

DATE ON MOTION CALENDAR:
June 28, 2023

Defendants United States Army Corps of Engineers, et al. (collectively the “Corps”) file this unopposed motion for (1) a voluntary remand without vacatur of the decision by the Corps’ Northwestern Division Engineer that imposed conditions on, without suspending or revoking, the use of the 2021 Nationwide Permit 48 (“NWP 48”) in Washington State because the Corps intends to propose revoking the applicability of the 2021 NWP 48 in Washington State, and (2) the associated dismissal without prejudice of Plaintiffs’ related claims (Claims 1-4 and 6).

The Court has previously dismissed Plaintiffs’ other claim in this case (Claim 5 – Letters of Permission). Plaintiffs have advised the Corps that they intend to move to further amend their

1 complaint to add a new claim or claims regarding Letters of Permission in Washington State for
2 mariculture operations within 14 days after the Court grants this motion. Since Plaintiffs plan to
3 move to amend, the Corps requests that the Court not enter final judgment at this time.

4 Plaintiffs Coalition to Protect Puget Sound Habitat, *et al.*, have reviewed this motion and
5 have authorized the Corps to represent that they do not oppose the Court granting it.

6 In support of this motion, the Corps states as follows:

7 1. As filed, Plaintiffs' Second Amended Complaint contained six claims for relief,
8 five of which – Claims 1-4 and 6 – raise challenges regarding the Corps' 2021 NWP 48 as it
9 applies in Washington State. ECF No. 22. This nationwide permit authorizes commercial
10 shellfish mariculture facilities, such as oyster and clam farms, to (1) place structures or perform
11 work in navigable waters of the United States under Section 10 of the Rivers and Harbors Act,
12 and/or (2) discharge dredged or fill material into waters of the United States under Section 404 of
13 the Clean Water Act ("CWA"). *See* 86 Fed. Reg. 2,744 (Jan. 13, 2021). In a decision dated
14 February 13, 2021, which was subsequently amended on June 17, 2021, the Division Engineer
15 for the Corps' Northwestern Division exercised his discretionary authority pursuant to 33 C.F.R.
16 § 330.4(e) to impose certain regional conditions for the use of NWP 48 in Washington State.¹

17 2. Plaintiffs' Second Amended Complaint also included Claim 5, which challenged
18 the use of a type of individual permit, called a Letter of Permission, *see* 33 C.F.R. § 325.5(b), for
19 mariculture operations in Washington State. ECF No. 22. On February 13, 2023, the Court
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22 ¹ Nw. Div., U.S. Army Corps of Eng'rs, Supplemental Document for Nationwide Permit 48 (rev.
23 June 17, 2021),
24 [https://www.nws.usace.army.mil/Portals/27/docs/regulatory2/2020NWPs/2021NWPs/SuppDocs/
20210617-2021NWP-SD-NWP-48-Cor.pdf](https://www.nws.usace.army.mil/Portals/27/docs/regulatory2/2020NWPs/2021NWPs/SuppDocs/20210617-2021NWP-SD-NWP-48-Cor.pdf).

1 dismissed that claim for lack of jurisdiction, but provided that Plaintiffs may seek leave to amend
2 their Complaint regarding such Letters of Permission. ECF No. 44 at 3.

3 3. Plaintiffs have represented to the Corps and the Court that they intend to seek
4 such leave to amend in the near future, *see* ECF No. 45. Plaintiffs have agreed to file that motion
5 within 14 days of the date the Court grants this motion. As set out further below in Paragraph 7,
6 this motion for a voluntary remand would not prevent Plaintiffs from seeking and the Court from
7 adjudicating such a motion to amend regarding Letters of Permission.

8 4. If the Court grants this motion for voluntary remand, the Corps intends to issue a
9 public notice proposing the revocation of the applicability of the 2021 NWP 48 in Washington
10 State pursuant to 33 C.F.R. § 330.5(c). *See* Declaration of Brigadier General Geoffrey Van Epps
11 ¶¶ 9-10 (“Van Epps Decl.”) (attached as Exhibit 1). The Corps also intends to propose, in its
12 public notice, that existing authorizations under NWP 48 in Washington State be subject to a
13 grace period of twelve months from the date on which the Corps takes final action revoking the
14 2021 NWP in Washington State – to allow operators who have commenced work under the
15 nationwide permit to apply for an individual permit and for the Corps’ consideration of that
16 request – after which twelve month period those authorizations under the 2021 NWP 48 would
17 be expired. *Id.* ¶ 10. The Corps further intends, effective immediately upon publication of its
18 proposed action, to suspend the issuance of new authorizations for the use of the 2021 NWP 48
19 in Washington State, until such time as the Corps takes final action on its proposal to revoke the
20 use of 2021 NWP 48 in Washington. *Id.*

21 5. The Corps’ public notice will request public comments on its proposed action,
22 and the Corps will review and consider any comments received during the comment period
23 before taking final action on that proposed action. The Corps expects to issue notice of its
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1 proposal within 14 calendar days of the date that the Court grants this request for voluntary
2 remand. *Id.* ¶ 10. The Corps also expects that once its notice of proposed action is published, it
3 will complete the public comment process and take final action within five months of its
4 proposal. *Id.* ¶ 11.

5 6. If the Court grants this motion for voluntary remand, Claims 1-4 and 6, which
6 challenge the use of the 2021 NWP 48 in Washington, would be dismissed by the Court without
7 prejudice. Plaintiffs would retain the right to refile some or all of these claims based upon their
8 review of the final action the Corps takes on remand. Plaintiffs have represented to the Corps
9 that they do not expect that they would refile those claims, if the Corps' final action is consistent
10 with the proposal described above. Accordingly, granting this motion for voluntary remand will
11 likely conserve the resources of the Parties and serve judicial economy.

12 7. In these circumstances, the Corps believes it is appropriate for the Court to
13 remand the 2021 NWP 48 agency action without vacatur, as the Corps undertakes appropriate
14 proceedings to consider its next steps.

15 8. As noted above, Plaintiffs have advised that they intend to file, within the 14-day
16 period after the date of the Court grants this motion for voluntary remand, a motion that seeks
17 leave to file an amended complaint to add a claim or claims regarding Letters of Permission for
18 mariculture operations in Washington State. The Corps does not intend for the instant motion to
19 prevent Plaintiffs from filing that motion for leave to amend. Thus, the Corps requests that the
20 Court not enter final judgment at this time. The Corps reserves its right to oppose such a motion
21 for leave to file an amended complaint and, if Plaintiffs are granted leave to file such claims, to
22 defend against such claims on any basis, including lack of subject matter jurisdiction.

23 WHEREFORE, the Corps requests that the Court:
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1 (a) Remand to the Corps, without vacatur, the decision by the Corps' Northwestern
2 Division that imposed conditions on, without suspending or revoking, the use of the 2021 NWP
3 48 in Washington State;

4 (b) Dismiss Claims 1-4 and 6 without prejudice;

5 (c) Give the Plaintiffs leave within the 14-day period after the Court grants this motion to
6 file a motion that seeks leave to file an amended complaint to add a claim or claims pertaining to
7 Letters of Permission.

8 Respectfully submitted,

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