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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT SEATTLE

COALITION TO PROTECT PUGET SOUND
HABITAT, and CENTER FOR FOOD SAFETY,

Plaintiffs,

vs.

U.S. ARMY CORPS OF ENGINEERS, an
agency of the United States; LIEUTENANT
GENERAL SCOTT A. SPELLMON, in his
Official capacity as Chief of Engineers of the
U.S. Army Corps of Engineers; COLONEL
GEOFF VAN EPPS, in his Official Capacity as
the Commander of the Northwestern Division of
the U.S. Army Corps of Engineers; and
COLONEL ALEXANDER L. BULLOCK, in his
Official Capacity as Commander of the Seattle
District of the U.S. Army Corps of Engineers,

Defendants.

Case No. 2:21-cv-01685-JCC-DWC

THIRD AMENDED COMPLAINT

(Environmental and Administrative
Procedure Act Claims)

LIST OF ACRONMS & ABBREVIATIONS

1	APA	Administrative Procedure Act
2	CFS	Center for Food Safety
3	CWA	Clean Water Act
4	EIS	Environmental Impact Statement
5	ESA	Endangered Species Act
6	FONSI	Finding of No Significant Impact
7	LOP	Letter of Permission
8	NEPA	National Environmental Policy Act
9	NWP	Nationwide Permit
10	RHA	Rivers & Harbor Act
11	The Coalition	Coalition to Protect Puget Sound Habitat
12	The Corps	U.S. Army Corps of Engineers

LIST OF EXHIBITS

13	Exhibit A	Spreadsheet of LOPs Issued to Commercial Shellfish Operations in Washington from February 2021 to July 2023 (Sorted by Date Issued)
14	Exhibit B	Decision Document for 2021 NWP 48 (January 2021)
15	Exhibit C	Notice of Intent to Sue the Corps under the ESA (February 2021)
16	Exhibit D	Maps of Permits Issued to Commercial Shellfish Operations in Washington from February 2021 to July 2023 (Grouped by Permit Type and Waterbody) <ul style="list-style-type: none"> • Washington’s Coastal & Inland Waters • Grays Harbor • Puget Sound • Hood Canal • Willapa Bay
17	Exhibit E	List of Comments Submitted by Plaintiffs in Opposition to LOPs Issued to Commercial Shellfish Operations in Washington (Sorted by Date and Type)

SUMMARY

1
2 1. Washington state is home to unique and invaluable coastal ecosystems, which are
3 unfortunately being threatened by the excessive expansion of industrial commercial shellfish
4 aquaculture. This action presents as-applied and facial challenges to decisions of the United States
5 Army Corps of Engineers (“the Corps”) authorizing commercial aquaculture operations in
6 tidelands throughout Washington, including Puget Sound and Willapa Bay, through “Letters of
7 Permission” (LOPs) under the Rivers and Harbors Act. These challenges are based on the Corps’
8 failure to comply with the (1) National Environmental Policy Act (NEPA); (2) Clean Water Act
9 (CWA); (4) Rivers and Harbors Act (RHA); and/or (5) Administrative Procedure Act (APA),
10 when authorizing such expansion.

11 2. By initiating this action, Plaintiffs seek to:

- 12 a) Obtain a declaration that the Corps’ decision to allow the conversion of
13 individual CWA permits and those operations previously permitted under
14 Nationwide Permit 48 (NWP 48) to LOPs was unlawful because of those
15 activities’ potentially significant individual or cumulative impacts on
16 environmental values, and the Corps knew or should have known that those
17 activities would have encountered appreciable opposition;
- 18 b) Obtain a declaration that the Corps violated and continues to violate the
19 CWA and RHA, including its own regulations, by issuing hundreds of LOPs to
20 new and expanded commercial shellfish operations with potentially significant
21 individual or cumulative impacts on the environment, and when the Corps
22 knew or should have known that those activities would have encountered
23 appreciable opposition;
- 24 c) Obtain an order vacating, setting aside, and/or remanding the Corps’ LOPs
25 for projects previously authorized under NWP 48;
- 26 d) Obtain an order setting aside any LOPs listed on the attached Exhibit A
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1 issued unlawfully to commercial shellfish operations with potentially
2 significant environmental impacts and/or appreciable opposition until the
3 Corps complies with RHA and its implementing regulations, and the CWA,
4 environmental review under NEPA, and/or public notice and comment, and
5 compliance with any other applicable laws, such as the Endangered Species
6 Act (ESA);

7 e) Obtain an order enjoining the Corps from issuing any further LOPs to
8 former NWP 48 authorized facilities, until the Corps complies with the RHA
9 and its implementing regulations, including any applicable requirements under
10 NEPA, the ESA, the CWA, or other relevant laws.

11 JURISDICTION

12 3. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 (federal
13 question); § 1346(a)(2) (civil action against the United States); § 1361 (action to compel officer of
14 the United States to perform his or her duty); § 2201 (authorizing declaratory relief); and § 2202
15 (authorizing injunctive relief and any other “necessary and proper relief”), and 5 U.S.C. § 702
16 (judicial review of agency action under the APA). This action arises under the laws of the United
17 States, including the APA, 5 U.S.C. §§ 701–706; NEPA, 42 U.S.C. §§ 4321–4370m; RHA, 33
18 U.S.C. § 403; and CWA, 33 U.S.C. § 1244. An actual, justiciable controversy exists between
19 Plaintiff and Defendants. The requested relief is proper under 28 U.S.C. §§ 2201 (declaratory
20 relief) and § 2202 (injunctive relief), and 5 U.S.C. §§ 705 and § 706.

21 VENUE

22 4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e). A substantial part of
23 the events or omissions giving rise to the claims occurred within this District. The Seattle District
24 of the U.S. Army Corps is the responsible for substantial portions of the actions and omissions
25 giving rise to this case, and it is also located in within this District, in Seattle, King County,
26 Washington. In addition, Plaintiffs have several members who reside in this District.

PARTIES

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3 5. **Plaintiff Coalition to Protect Puget Sound Habitat** (“Coalition”) is a non-profit
4 organization incorporated under the laws of the state of Washington. The Coalition is an alliance
5 of interested citizens, environmentalists, scientists, and recreational users who reside on or near
6 Puget Sound, and study, work to protect and recreate in the waters of Puget Sound. The
7 Coalition’s mission is to protect the habitat of Puget Sound tidelands from the expansion of new
8 intensive shellfish aquaculture methods and practice. The Coalition and its members are directly
9 affected by the expansion of industrial aquaculture operations in both the coastal and nearshore
10 areas of Puget Sound, and its impact on plants, animals, and ecological function. The expansion
11 of these operations directly impairs the Coalition and its members’ personal, recreational, and
12 aesthetic enjoyment of tidelands near their homes and other parts of Puget Sound. The Coalition
13 and its members have repeatedly submitted comments raising these concerns to the Corps and/or
14 other agencies before the Corps’ issuance of the 2012 NWP 48, the 2017 NWP 48, the 2021 NWP
15 48, and the individual authorizations and/or LOPs at issue in this case. *See* Exhibit E (List of
16 Plaintiffs’ Comments). In addition, the Coalition previously brought a successful suit against the
17 Corps for improper issuance of the 2017 NWP 48, challenging some of the same conduct at issue
18 in this case, and obtained a favorable ruling on the merits and on remedy. The Coalition then
19 successfully defended those rulings on appeal at the Ninth Circuit.

20 6. The Coalition seeks to give a voice to citizens’ concerns about aquaculture and its
21 impact on the health and quality of the shoreline and waters of Puget Sound, as well as the flora
22 and fauna that depend upon these irreplaceable resources. Members of the Coalition live in and/or
23 use Puget Sound and are and will be directly and adversely affected by the rapid and massive
24 expansion of the aquaculture industry of the type at issue under NWP 48 and under the new LOPs
25 for previous NWP 48 projects. This includes members such as Laura Hendricks, Maradel Gale,
26 Lee Ruddy, and Susan Macomson, all of whom live and recreate in various parts of Puget Sound,
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1 in or near areas where the Corps has improperly authorized commercial shellfish operations
2 without full consideration of the environmental impacts and public interest factors. This type of
3 expansion can potentially undermine the protection and enhancement of the quality of the waters
4 of Puget Sound, as well as the many plant and marine species that depend upon those waters for
5 food and habitat. As such, the industrialization of aquaculture that is being allowed by the Seattle
6 District of the Corps interferes with the ability of the plaintiff's members to enjoy and recreate in
7 the waters of the Sound.

8 7. The Coalition has representational standing to bring this action. The Defendants'
9 violations of the CWA, RHA, APA and NEPA have had an adverse impact on Plaintiff's
10 members' ability to use and enjoy the waters of Puget Sound, and the Defendants' actions have
11 injured the health, recreational, environmental, aesthetic, commercial and/or other interests of
12 Plaintiff's members. These injuries are fairly traceable to the Defendants' violations and are
13 capable of redress by this Court.

14 8. The Coalition also has organizational standing to bring this action. Plaintiff has
15 long been engaged in a variety of educational and advocacy efforts to call attention to and
16 challenge the dramatic expansion of the commercial shellfish industry in Puget Sound, so as to try
17 to improve water quality and ecological function in its waters. This has included filing of a
18 Petition with the Corps in May 2015 to suspend or revoke NWP 48, which the Corps ignored. The
19 Coalition then successfully sued the Corps to overturn the previous NWP 48 and its
20 authorizations. The Defendants' failures to comply with the requirements of the law, and the prior
21 rulings of this court, have or will adversely affect Plaintiff's abilities to fulfill its mission and
22 purpose, and these injuries are fairly traceable to Defendants' violations. These injuries are also
23 capable of redress by this Court.

24 9. Plaintiff **Center for Food Safety** ("CFS") is a public interest nonprofit
25 organization whose mission is to empower people, support farmers, and protect the earth from the
26 adverse impacts of industrial food production, including the adverse environmental and wildlife
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1 impacts of industrial shellfish operations. CFS has more than one million members across the
2 country, including tens of thousands of members in Washington State. CFS has offices in
3 Portland, Oregon; San Francisco, California; and Washington, D.C. CFS is a nationally
4 recognized leader on the issue of industrial agriculture and its impacts to public health and the
5 environment. Through science-based regulatory advocacy, public engagement, and
6 groundbreaking litigation, CFS protects its members and the public from the harmful effects of
7 industrial agriculture and promotes transparency and accountability in the food system. CFS also
8 acts as a watchdog of the federal agencies tasked with regulating different aspects of food
9 production, such as the Corps, which is the only federal agency with permitting authority over
10 industrial shellfish operations. If necessary, CFS utilizes public education, public notice and
11 comment, regulatory action, and litigation to ensure that federal agencies comply with their
12 statutory mandates and other federal laws designed to prevent and reduce the harmful impacts of
13 industrial agriculture.

14 10. CFS has long had an aquaculture program, including numerous policy, scientific,
15 and legal staff, dedicated to addressing the adverse environmental and public health impacts of
16 industrial aquaculture. CFS strives to improve oversight and regulation of aquaculture operations
17 by promoting policy and cultural dialogue between regulatory agencies, policymakers, and
18 legislators and affected groups, including residents, consumers, chefs, and environmental
19 advocates, to protect public health and the environment from industrial aquaculture, including
20 specifically shellfish aquaculture, and to promote and protect more sustainable alternatives.

21 11. Specifically, regarding the previously challenged NWP 48, in 2017, CFS actively
22 engaged with the Corps on the proposed reissuance of NWP 48, including the submission of
23 several comments urging the Corps to forgo adopting NWP 48, at least in its current form, and to
24 protect the unique and essential aquatic ecosystems and shorelines in Washington. When the
25 Corps issued 2017 NWP 48, CFS brought a lawsuit in this Court challenging the Corps'
26 compliance with the CWA, NEPA, ESA, and the APA. *Coal. to Protect Puget Sound Habitat v.*
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1 *U.S. Army Corps of Eng'rs*, 417 F. Supp. 3d 1354 (W.D. Wash. 2019). This Court vacated that
2 permit and remanded to the Corps to comply with the CWA and NEPA, 466 F. Supp. 3d 1217
3 (W.D. Wash. 2020), and the Ninth Circuit affirmed. 843 F. App'x 77 (9th Cir. 2021). When the
4 Corps first announced that it planned to reissue the NWP 48 in September 2020, CFS commented
5 on the draft permit and again urged the Corps to follow CWA, NEPA, and the ESA, as well as
6 this Court's order. *See* Comments Submitted on Proposal to Reissue and Modify Nationwide
7 Permits, COE-2020-0002 (Nov. 16, 2020).

8 12. CFS has representation and organizational standing. CFS has thousands of
9 members who live, work, and recreate in areas affected by commercial shellfish aquaculture in
10 Washington, including Willapa Bay and Puget Sound. This includes members such as Patrick and
11 Kathryn Townsend, who live and recreate in the coastal areas of Puget Sound, and Thomas
12 Buchele, who regularly visits and recreates the beaches along Willapa Bay, where the Corps has
13 improperly authorized hundreds of commercial shellfish operations without full consideration of
14 the environmental impacts and public interest factors. Specifically, these members' personal,
15 economic, recreational, aesthetic, property, and other interests are harmed by the unchecked
16 expansion of industrial shellfish activities in Washington's tidelands, including the use of
17 pesticides and plastics, and the conversion of shorelines and native vegetation to commercial
18 shellfish growing beds and other aquaculture operations. In addition, CFS has long worked to
19 prevent and reduce the harmful impacts of aquaculture. Because the Corps continues to fail to
20 comply with federal law and judicial orders, CFS must divert substantial organizational resources
21 that would have otherwise been used to improve other aspects of aquaculture, such as offshore
22 and state finfish farming, to bring costly, resource-intensive regulatory and legal challenges
23 against the Corps.

24 13. Defendant **United States Army Corps of Engineers** is an agency of the U.S.
25 Department of Defense. The Corps has a District Office in Seattle, Washington. The Corps and its
26 officers are responsible for the lawful execution of the CWA, NEPA, and the APA, as they
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1 pertain to dredge and fill activities of commercial shellfish aquaculture in coastal waters.

2 14. Defendant **Lieutenant General Scott A. Spellmon** is the Commanding General
3 and Chief of Engineers of the Corps. Lieutenant General Spellmon is named as a defendant solely
4 in his official capacity. The Commanding General and Chief of Engineers is charged with
5 supervising and managing all Corps' decisions and actions, including the evaluation of Corps'
6 decisions and actions under NEPA and section 404 of the CWA. The Chief of Engineers is
7 authorized to issue NWPs and charged with reviewing NWPs and proposing modifications,
8 revocations, and reissuance, as well as preparing NEPA documents and Section 404(b)(1)
9 Guidelines compliance analyses for proposed NWPs.

10 15. Defendant **Colonel Geoff Van Epps** is the Commander and Division Engineer of
11 the Northwestern Division of the Corps, which includes the Seattle District. Colonel Van Epps is
12 named as a defendant solely in his official capacity. Division engineers are authorized to modify,
13 suspend, or revoke NWP authorizations within their divisions, and are responsible for preparing
14 supplemental documentation for modifications or revocations made as a result of their authority.
15 Division engineers are also responsible for imposing regional conditions on NWPs at their
16 discretion, and to prepare supplemental documentation for modifications or revocations made as a
17 result of their authority. The Northwestern Division is responsible for a substantial portion of the
18 actions or omissions at issue in this lawsuit, including regional effects analysis and determination
19 that NWP 48, as well as the terms and conditions, all regional conditions, and limitations, and the
20 finding that NWP 48 allegedly would (or would not) have only minimal and not significant
21 effects on the aquatic environment here.

22 16. Defendant **Colonel Alexander L. Bullock** is the Commander of the Seattle
23 District of the Corps. Colonel Bullock is named as a defendant solely in his official capacity.
24 Under Corps regulations, district commanders are responsible for compliance with NEPA for
25 actions within district boundaries, and CWA § 404 permitting. The Seattle District is responsible
26 for a substantial portion of the actions or omissions at issue in this lawsuit, including, but not
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1 limited to, the issuance of regional conditions for NWP 48 and supplemental analysis and findings
2 in support of those conditions. The Seattle District Engineer is authorized to add, modify, or
3 delete special conditions in permits, and to modify, suspend and revoke permits, such as regional
4 permits or authorizations under NWP 48.

5 **LEGAL BACKGROUND**

6 **I. ADMINISTRATIVE PROCEDURE ACT**

7 17. The APA authorizes any person who has been adversely affected by an agency
8 action to seek judicial review of the action. 5 U.S.C. § 702. The APA provides a cause of action
9 to challenge agency actions “made reviewable by statute,” or final actions “for which there is no
10 other adequate remedy in a court.” *Id.* § 704. In addition, the APA provides standards for judicial
11 review of agency action. The APA directs reviewing courts to “compel agency action [that is]
12 unlawfully withheld or unreasonably delayed.” *Id.* § 706(1). The APA also directs courts to “hold
13 unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary,
14 capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(1)(A).

15 18. The APA provides a cause of action for challenging the Corps’ actions under
16 NEPA; section 404 of the CWA, 33 U.S.C. § 1344; and section 10 of the RHA, 33 U.S.C. § 403
17 because “there is no other adequate remedy in a court” with respect to these actions. As a result,
18 Plaintiffs’ claims arising under NEPA, the CWA, and the RHA are reviewable under the APA.

19 **II. CLEAN WATER ACT**

20 19. The purpose of the CWA is “to restore and maintain the chemical, physical, and
21 biological integrity of the Nation’s waters.” 33 U.S.C. § 1251. To achieve this objective, section
22 404 of the CWA establishes a program for regulating the discharge of dredge or fill material into
23 waters of the United States, including wetlands. *Id.* § 1344. Section 404 requires a permit for
24 discharges of dredged or fill material into waters of the United States. Section 404 authorizes the
25 Secretary of the Corps, acting through the Chief of Engineers, to issue permits for the discharge
26 of dredged or fill material into waters of the United States when certain conditions are met.

1 Concurrent regulatory authority exists under section 10 of the RHA, 33 U.S.C. § 403.

2 20. Under this program, the Corps must issue individual permits for proposed
3 activities with potentially significant impacts. The Corps can issue a general permit for an entire
4 category of activities on a regional or nationwide basis “if the Secretary determines that the
5 activities in such category are similar in nature, will cause only minimal adverse environmental
6 effects when performed separately, and will have only minimal cumulative adverse effect on the
7 environment.” *Id.* § 1344(e)(1); *see also* 40 CFR § 230.7. A nationwide permit (NWP) is a
8 general permit that authorizes specific activities across the country, unless a district or division
9 commander revokes the NWP in a state or other geographic region. *See* 33 CFR § 330.1. If a
10 proposed activity falls under an existing NWP, an applicant may request authorization under the
11 existing NWP rather than applying for an individual permit. *Id.* §§ 320.1(a)(3), § 330.6(a).

12 21. Before issuing any NWPs, the Corps must conduct analyses of compliance with
13 Section 404(b)(1) Guidelines and prepare a statement of findings. *See* 40 CFR § 230.7(b). The
14 Corps must deny a permit that does not comply with those Guidelines.

15 22. Under Section 404(b)(1) Guidelines, developed in conjunction with the Secretary
16 of the Army and published in 40 CFR § 230, cumulative impacts include “the changes in an
17 aquatic ecosystem that are attributable to the collective effect of a number of individual
18 discharges of dredged or fill material.” Section 404(b)(1) Guidelines require the Corps to predict
19 cumulative effects by evaluating the number of individual discharges that already exist, and “the
20 number of individual discharge activities likely to be regulated under a General permit until its
21 expiration, including repetitions of individual discharge activities at a single location.”

22 23. Section 404(b)(1) Guidelines prohibit the Corps from issuing a permit or NWP
23 authorization if the discharge will cause or contribute to significant degradation of the waters of
24 the United States. “Significant degradation” includes significantly adverse effects on fish,
25 shellfish, wildlife, and special aquatic sites, as well as the life stages of aquatic life, and the
26 diversity, productivity, and stability of aquatic ecosystems.

1 24. Section 404(b)(1) Guidelines, specifically 40 C.F.R. § 230.12(a)(3), prohibit the
2 Corps from issuing a permit or an NWP authorization if:

- 3 a) There is a practicable alternative to the proposed discharge that would have
4 less adverse effect on the aquatic ecosystem, so long as such alternative does
5 not have other significant adverse environmental consequences; or
6 b) The proposed discharge will result in significant degradation of the aquatic
7 ecosystem; or
8 c) The proposed discharge does not include all appropriate and practicable
9 measures to minimize potential harm to the aquatic ecosystem; or
10 d) There does not exist sufficient information to make a reasonable judgment as
11 to whether the proposed discharge will comply with the Guidelines.

12 25. In addition, the Corps’ own “public interest review” rules prohibit the issuance of a
13 Section 404 permit or an NWP authorization if it would be contrary to the public interest. 33
14 C.F.R. § 320.4. In evaluating this issue, the Corps must weigh the benefits of a proposed project
15 against its reasonably foreseeable detriments, considering all relevant factors and their cumulative
16 impacts. Relevant factors include conservation, general environmental concerns, fish and wildlife
17 values, water quality, and the general needs and welfare of the people.

18 26. Under Corps regulations, a division engineer may modify, suspend, or revoke a
19 NWP authorization by geographic area, class of activity, or class of waters within their division to
20 address effects of authorized activities under Section 404(b)(1) Guidelines or any factor of the
21 public interest or that otherwise may be more than minimal. Some NWPs, including NWP 48,
22 require pre-construction notification (PCN) or application to the district engineer prior to
23 undertaking covered activities.

24 27. Upon receipt of a PCN or application, the district engineer must determine whether
25 the activity will result in more than minimal individual or cumulative adverse environmental
26 effects or may be contrary to the public interest. A district engineer must perform a case-by-case
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1 review of each PCN or application submitted under an NWP to make these determinations. In
2 doing so, the district engineer must consider the environmental setting, the resources affected, the
3 functions of affected resources, the degree to which resources perform those functions, the extent
4 of loss of aquatic resource functions, the duration of adverse effects, the importance of lost
5 aquatic resource functions, and required mitigation.

6 28. When determining appropriate mitigation, a district engineer must consider its
7 adequacy to ensure that adverse environmental effects are minimized. If a district engineer
8 reviewing a PCN or application finds that a proposed activity would have more than minimal
9 individual or cumulative adverse effects or is otherwise contrary to the public interest, the district
10 engineer must either modify the NWP authorization to reduce or eliminate such effects or instruct
11 the permittee to apply for a regional general permit (if one exists) or individual permit.

12 **III. RIVERS AND HARBORS ACT**

13 29. Under Section 10 of the RHA, 33 U.S.C. § 403, a Corps permit is required for
14 work or structures affecting navigable waters of the United States.

15 30. Under Corps regulations, specifically 33 C.F.R. § 320.2(b) and § 322, “[t]he
16 construction of any structure in or over any navigable water of the United States, the excavating
17 from or depositing of material in such waters, or the accomplishment of any other work affecting
18 the course, location, condition, or capacity of such waters is unlawful unless the work has been
19 recommended by the Chief of Engineers and authorized by the Secretary of the Army.”

20 31. In cases where the district engineer determines that the proposed work or structure
21 “would be minor, would not have significant individual or cumulative impacts on environmental
22 values, and should encounter no appreciable opposition,” the Corps may issue a letter of
23 permission (or LOP) “through an abbreviated processing procedure which includes coordination
24 with Federal and state fish and wildlife agencies, as required by the Fish and Wildlife
25 Coordination Act, and a public interest evaluation, but without the publishing of an individual
26 public notice.” 33 C.F.R. § 325.2(e).

1 **IV. NATIONAL ENVIRONMENTAL POLICY ACT**

2 32. Pursuant to 42 U.S.C. §§ 4321–4370m, NEPA is our basic national charter for
3 protection of the environment. Regulations promulgated by the Council on Environmental Quality
4 (“CEQ”) establish that NEPA’s twin aims are to (1) ensure fully informed decision-making, and
5 (2) provide for public participation in environmental analysis and decision-making.

6 33. As provided by law, the Corps has adopted regulations to implement NEPA. The
7 Corps’ NEPA regulations supplement—and do not supersede—other NEPA regulations.

8 34. Under both the 1978 CEQ Regulations and the 2020 Revisions, the Corps is
9 required to conduct a thorough analysis of cumulative impacts under NEPA. The 2020 Revisions
10 required the Corps to fully consider reasonably foreseeable effects, including those categorized as
11 “cumulative impacts” under the 1978 CEQ Regulations. The consideration of cumulative impacts
12 follows longstanding legal precedent interpreting NEPA to require agencies to consider
13 cumulative effects. Even before CEQ issued its 1978 regulations, the U.S. Supreme Court
14 interpreted NEPA to require consideration of cumulative effects “when several proposals . . . that
15 will have *cumulative* or synergistic environmental impact upon a region are pending concurrently
16 before an agency.” *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) (emphasis added).

17 35. NEPA requires that agencies and the public have access to high-quality
18 environmental information before making decisions or taking action. Accurate scientific analysis,
19 expert agency comments, and public scrutiny are essential to implementing NEPA.

20 36. NEPA imposes procedural requirements on federal agencies to make sure that they
21 take a ‘hard look’ at the environmental effects of their actions. Pursuant to 42 U.S.C. § 4332(c),
22 NEPA requires agencies to prepare an Environmental Impact Statement (“EIS”) for “major
23 Federal actions significantly affecting the quality of the human environment.” For all actions not
24 subject to a Categorical Exclusion, agencies must prepare either an EIS or an Environmental
25 Assessment (“EA”), a public document that provides sufficient evidence and analysis to
26 determine whether to prepare an EIS.

1 37. An agency may prepare an EA to determine whether an action requires an EIS. If
2 the agency concludes that an action will not significantly affect the environment in its EA, the
3 agency may issue a Finding of No Significant Impact (“FONSI”) in lieu of preparing an EIS. A
4 FONSI is a document in which the agency briefly explains the reasons why an action will not
5 have a significant effect on the environment and the reasons an EIS will not be prepared. A
6 FONSI must include the EA or a summary of it and note all related environmental documents.

7 38. Under NEPA, major federal actions may include new and continuing activities,
8 including projects and programs entirely or partly financed or approved by federal agencies; new
9 or revised agency rules, regulations, plans, policies, or procedures.

10 39. An agency must consider the impacts from a proposed action. An impact means
11 changes to the human environment from the proposed action or alternatives that are reasonably
12 foreseeable, including effects that are later in time or farther removed in distance from the
13 proposed action or alternatives. Effects include ecological, aesthetic, historic, cultural, economic,
14 social, or health effects.

15 40. In considering whether the effects of a proposed action are significant, agencies
16 shall analyze the potentially affected environment and degree of the effects of the action. When a
17 proposed action is likely to have significant effects, the agency should prepare an EIS.

18 41. Section 102(2)(E) requires agencies to “study, develop, and describe appropriate
19 alternatives to recommended courses of action in any proposal which involves unresolved
20 conflicts concerning alternative uses of available resources.” Section 102(2)(E) applies to both
21 EAs and EISs, so an EA must include “appropriate alternatives” when a proposal involves
22 unresolved conflicts concerning alternatives uses of available resources.

23 42. A FONSI must be supported, and if mitigation measures are relied upon to avoid
24 significance, they must be developed to a reasonable degree: a perfunctory description, or mere
25 listing of mitigation measures, without supporting analytical data, is insufficient to support a
26 finding of no significant impact. Particularly in situations where the agency is relying upon
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1 mitigation to support a decision to rely upon an EA and a FONSI—and therefore not to prepare an
2 EIS—the agency must carefully evaluate any proposed mitigation and engage in on-going
3 monitoring to ensure that mitigation measures are being followed. Mitigation measures used to
4 support a FONSI must be enforceable and the agency must have sufficient resources to perform or
5 ensure performance of mitigation measures.

6 43. NEPA requires that an agency incorporate its environmental analysis into its
7 decision-making process. NEPA’s purpose is not to generate paperwork or litigation, but to
8 provide for informed decision making and foster excellent action.

9 **V. ENDANGERED SPECIES ACT**

10 44. When a species is listed as threatened or endangered under the ESA,
11 section 7(a)(2) requires that all federal agencies “insure” [sic] their actions “are not likely to
12 jeopardize the continued existence of any endangered species or threatened species or result in the
13 destruction or adverse modification of [their critical habitat].”

14 45. ESA establishes an interagency consultation process to assist federal agencies in
15 complying with their substantive) duty to guard against jeopardy to listed species or destruction or
16 adverse modification of critical habitat. Under Section 7(a)(2), federal agencies must consult with
17 the appropriate expert fish and wildlife agency to determine whether their actions will jeopardize
18 any listed species’ survival or adversely modify designated critical habitat and, if so, to identify
19 ways to modify the action to avoid that result. The National Marine Fisheries Service (NMFS) is
20 the expert for most anadromous and marine species, and the Fish and Wildlife Service (FWS) is
21 the expert for many terrestrial and freshwater species.

22 46. The Services have adopted joint regulations governing the ESA Section 7(a)(2)
23 consultation process. Under the joint regulations, a federal agency must initiate Section 7(a)(2)
24 consultation with NMFS or FWS whenever it undertakes an “action” that “may affect” a listed
25 species or critical habitat. 50 C.F.R. § 402.14(a). The threshold for a “may affect” determination
26 and the required Section 7(a)(2) consultation is low.

1 47. To complete formal consultation, NMFS and/or FWS must provide the Corps with
2 a “biological opinion” explaining how the proposed action will affect the listed species or habitat.
3 In ensuring that any action is not likely to jeopardize a listed species or result in the adverse
4 modification of critical habitat, the ESA requires every agency to use only the best scientific and
5 commercial data available at every step of the process. Until consultation is complete, agencies
6 may not commence the action or make any irreversible or irretrievable commitment of resources
7 which may foreclose the formulation or implementation of any reasonable and prudent alternative
8 measures.

9 48. If either of the Services concludes that the proposed action “will jeopardize the
10 continued existence” of a listed species, the biological opinion must outline “reasonable and
11 prudent alternatives.” If the biological opinion concludes that the action is not likely to jeopardize
12 the continued existence of a listed species, and will not result in the destruction or adverse
13 modification of critical habitat, the Services must provide an incidental take statement specifying
14 the amount or extent of such incidental taking on the listed species and any “reasonable and
15 prudent measures” that they consider necessary or appropriate to minimize such impact, and also
16 setting forth the “terms and conditions” that must be complied with by the Corps to implement
17 those measures.

18 49. Section 7(a)(1) requires the Corps, in consultation with and with the assistance of
19 the Services, to utilize its authority in furtherance of the purposes of the ESA by carrying out
20 programs for the conservation of endangered and threatened species. Federal agencies have an
21 independent and substantive obligation to insure that their actions are not likely to jeopardize the
22 continued existence of endangered or threatened species or adversely modify critical habitat.
23 Indeed, a “no jeopardy” biological opinion from NMFS or FWS does not absolve the action
24 agency of its independent duty to ensure that its actions comply with the ESA.
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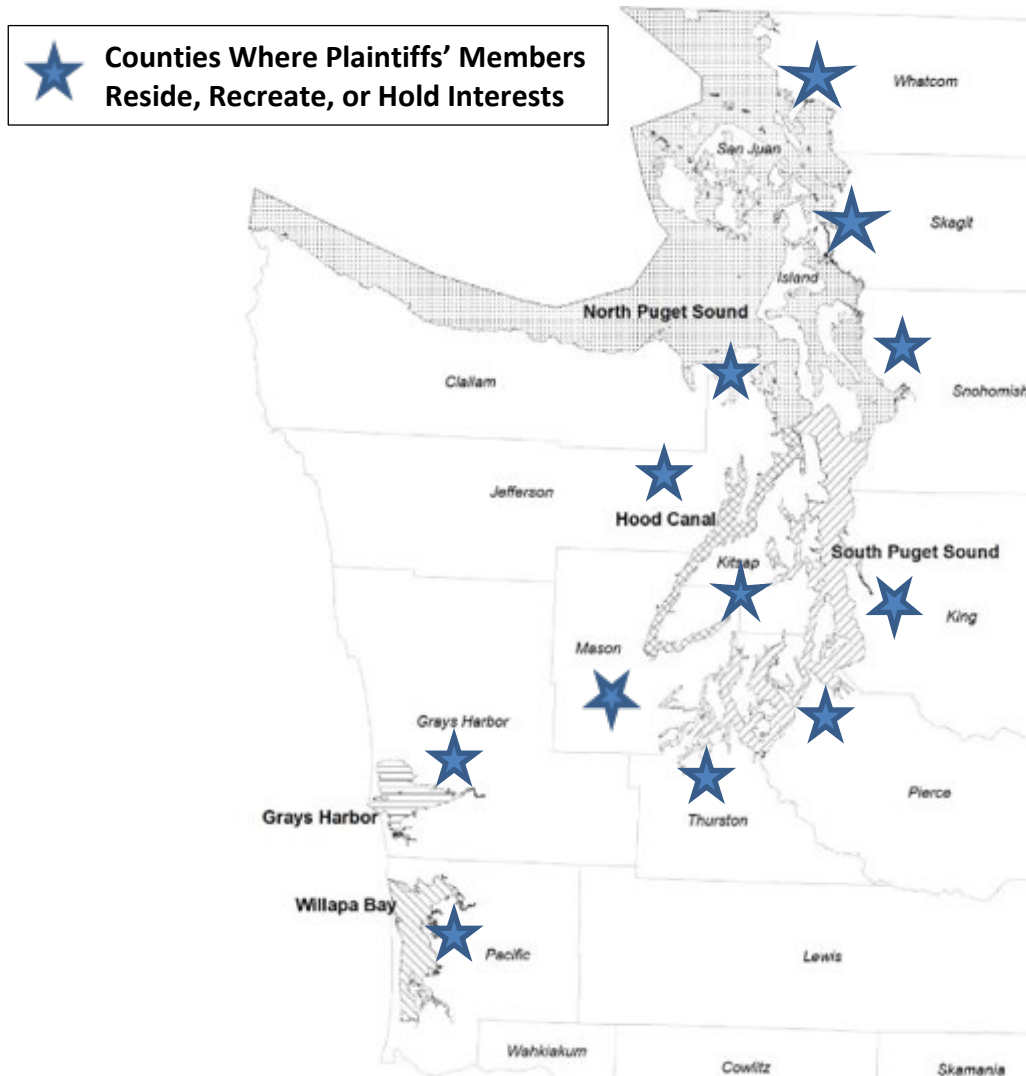
FACTUAL BACKGROUND

I. INDUSTRIAL SHELLFISH AQUACULTURE IN WASHINGTON

50. Shellfish, including oysters, clams (including geoducks), and mussels, have been harvested and grown in Washington for over 150 years, but cultivation has expanded significantly since the Corps’ initial issuance of NWP 48 in 2007, and continued maintenance of the NWP 48 program until it was voluntarily rescinded in response to the current lawsuit on October 5, 2023. Today, industrial shellfish aquaculture exists throughout Washington’s coast and intertidal areas, including Willapa Bay, Grays Harbor, Hood Canal, and Puget Sound. In 2015, commercial shellfish aquaculture occupied one-quarter of the state’s total shoreline, roughly 50,000 shoreline acres. Today, this number has increased due to the Corps’ issuance of the 2017 and 2021 NWP 48. According to the Corps’ estimates, commercial shellfish operations authorized under the 2017 NWP 48 cover 72,000 coastal acres, covering roughly one-third of Washington’s total shoreline.

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Map of Washington’s Inland Waters
U.S. Army Corps’ Programmatic Biological Assessment (2015)



51. The vast majority of this acreage (approximately 90%) is found in Willapa Bay, a large bay located in Pacific County, Washington. The 2017 NWP 48 authorized 50,000 acres of commercial shellfish aquaculture operations in Willapa Bay. In comparison, the 2012 NWP 48 authorized only 36,000 acres. Willapa Bay is a major estuary located along Washington’s Pacific Coast, covering 88,000 acres of diverse ecosystems that provides essential nearshore habitat for several aquatic species, including endangered and threatened fish, whales, and shorebirds. The

1 2017 NWP 48 also authorized over 7,500 acres of commercial shellfish operations in Grays
2 Harbor, another estuary located on Washington’s Pacific Coast, just north of Willapa Bay.

3 52. Additionally, nearly 15,000 acres of commercial shellfish operations are found in
4 Puget Sound and Hood Canal. Puget Sound is a large inland estuary connected to the Pacific
5 Ocean. It is the second-largest estuary in the United States, covering more than 2,000 miles of
6 shoreline and 8.3 million acres of watershed. It is divided into South Puget Sound, a deep basin
7 drained by many small streams with sheltered, nutrient rich waterways that are highly conducive
8 to shellfish growing. North Puget Sound includes Whidbey Basin, Admiralty Inlet, Strait of Juan
9 de Fuca, and the San Juan Archipelago. Another major waterbody associated with Puget Sound is
10 Hood Canal, a long, narrow inlet of sea located in Mason County. Together, these areas have tens
11 of thousands of acres of commercial shellfish aquaculture, overlapping with essential nearshore
12 habitats for eelgrass, salmon, whales, and other aquatic species. The number of aquaculture
13 operations is likely to increase dramatically in the future because this area is slated for much of
14 the expansion of this industry in the future.

15 53. Oyster and clam operations are concentrated in Willapa Bay and Grays Harbor.
16 Over 25% of all U.S. oyster aquaculture takes place in this area. A wider variety of
17 shellfish are cultivated in Puget Sound, including geoduck clams (produced almost exclusively for
18 export to luxury food markets in Asia and other countries). Most geoducks are grown in Puget
19 Sound/Hood Canal. Washington’s shellfish aquaculture industry is growing and expected to
20 continue to grow, meaning more tidelands will be authorized for shellfish production.

21 54. Shellfish are raised either directly on the tidal bed (“bottom culture”), or with some
22 kind of support (“off-bottom culture”), often using plastic gear like polyvinyl chloride (PVC) and
23 high-density polyethylene (HDPE). Oysters may be grown using bottom culture; long lines
24 (oysters suspended on nylon ropes strung on stakes in rows in tidal bed); rack and bag culture
25 (plastic net bags hold oysters, rack suspends off ground, including emerging “flip bag”
26 technique); or stake culture (oyster attached to stakes in tidal bed). Clams are also grown with
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1 bottom culture, often with anti-predator netting, and geoducks are grown inside PCV tubes
2 inserted into the tidal bed (at a rate of 42,000 tubes per acre), which are then covered with the
3 anti-predator netting.

4 55. The same intertidal areas and inland bays that support shellfish aquaculture are
5 also home to numerous wildlife species, including threatened and endangered species. This
6 shoreline habitat is essential for many species, including invertebrates (such as benthic
7 invertebrates that are the backbone of the food chain and larger, commercially important
8 Dungeness crab); finfish (including forage fish like herring and many varieties of salmon); and
9 birds (migratory and shorebirds). These areas serve as nurseries, feeding grounds, and have
10 important roles in cycling nutrients.

11 56. Commercial shellfish aquaculture harms the aquatic ecosystem. *Coal. to Protect*
12 *Puget Sound Habitat*, 417 F. Supp. 3d at 1359, 1362–63.

13 57. Shellfish aquaculture degrades water quality, reduces seagrass populations, and
14 destroys aquatic habitats by depositing food and shellfish waste; disrupting sediments, water flow,
15 and water turbidity; installing large-scale plastic structures and gear; and applying chemical
16 pesticides to clear growing areas of native plants and species; and continuously using mechanical
17 equipment to maintain growing areas and cultivate shellfish. Because the Corps estimated that
18 shellfish aquaculture covered one-third of Washington’s total shoreline in 2017, the potential for
19 cumulative impacts from this industry is significant. Moreover, because the Corps also predicts
20 that the number of acres authorized for commercial shellfish aquaculture will continue to increase
21 due to the expansion of the industry, the industry’s cumulative and individual impacts pose a
22 growing threat to the local environment and wildlife.

23 58. Shellfish aquaculture activities fall into the general categories of bed preparation,
24 seeding, grow out, and harvest. Bed preparation and harvest activities can temporarily increase
25 turbidity and total suspended solids. Bed preparation also involves the removal and destruction of
26 species like snails, starfish, and sand dollars. Some activities, *e.g.*, tilling, harrowing, dredge
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1 harvest and geoduck harvest, can remove submerged aquatic grass, like eelgrass. The use of
2 chemicals (*i.e.*, imazamox herbicide to kill non-native eelgrass) also affects water quality and
3 removes eelgrass. During grow out, plastic gear remains on the beach continuously. Finally,
4 shellfish aquaculture activities can cause benthic disturbance.

5 59. Despite the unfounded claims of the industry, there is no evidence that intensively
6 concentrated shellfish aquaculture in Washington has a positive impact on water quality. In fact,
7 these concentrated shellfish operations are consuming nutrients previously relied on by wild
8 species, while depositing waste on the seabed, and changing the physical dynamics of an
9 environment.

10 60. Geoduck aquaculture involves the use of a massive number of PVC tubes inserted
11 into the substrate, then covered in anti-predator netting. At a rate of 42,000 tubes per acre, the
12 shore is *covered* with plastic. This gear can and does become dislodged during storms and other
13 weather events, spreading plastics pollution into other areas of the marine environment. Once the
14 geoducks are ready for harvest, they are removed from the substrate via high-pressure water
15 hoses, which liquefy the sediments, disrupting and harming benthic organisms and spreading
16 suspended sediment in the water column.

17 61. Clam culture, including geoduck, involves acres and acres of anti-predator netting,
18 typically plastic, to exclude predators (*i.e.*, wildlife) like crabs and birds. Although evidence
19 suggests that ironically these nets are not highly effective at deterring predators, they do,
20 however, change the intertidal coastline resulting in lower species richness, accumulation of fine
21 silt and organic matter, and trapping wildlife (crabs, fish, birds). Nets pose a particular threat to
22 forage fish like herring that use the intertidal regions for spawning. The accumulation of silt and
23 reduction of eelgrass provides perfect habitat for, and correlates with an increase in, native
24 burrowing and ghost shrimp, which at high enough numbers cause the substrate to loosen and
25 clams to sink and suffocate. Anti-predator nets can also become dislodged and wash up on the
26 shore providing hazards to humans and wildlife alike. The expert wildlife agencies NMFS and
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1 FWS both recognized the harm these nets pose to wildlife from trapping, entanglement, and
2 blocking movement/migration.

3 62. Commercial shellfish aquaculture operations also impact forage fish, like Pacific
4 herring (a keystone forage fish species in the area), surf smelt, and sand lance. Forage fish are an
5 important prey resource for many species including Chinook salmon, steelhead, bull trout, and
6 marbled murrelet. Many types of shellfish aquaculture equipment result in loss of spawning
7 habitat for these crucial fish, netting can entangle fish, and harvesting can destroy forage fish
8 eggs. Active aquaculture, including fallow acreage, is co-located with herring, surf smelt, and
9 sand lance in Puget Sound and Hood Canal, and with herring in Willapa Bay/Grays Harbor. The
10 Corps estimates that in Willapa Bay, shellfish aquaculture currently overlaps with over 50% of
11 the total herring spawning area mapped by the Washington Department of Fish and Wildlife.

12 63. Shellfish aquaculture also has negative aesthetic impacts, as well as impacts to
13 public beach access and recreation. Shellfish operations, particularly those using a lot of plastic
14 gear, mar views of the beaches, inlets, and bays along Washington shorelines, to the detriment of
15 residents and visitors. These operations often involve heavy machinery, and some activities
16 involve significant noise and light pollution. Shellfish aquaculture's presence and gear prevents
17 residents and visitors from walking and other recreational activities on beaches. The harm to
18 wildlife, including endangered species, impacts residents' and visitors' ability to view these
19 species, and recreationally fish or harvest wild shellfish.

20 **A. IMPACTS TO EELGRASS**

21 64. One major impact from shellfish aquaculture is the reduction and removal of
22 eelgrass and other submerged aquatic vegetation.

23 65. Much of the intertidal area in Washington still supports eelgrass (*zostera marina*
24 and other varieties) and other submerged aquatic vegetation, although it is declining across the
25 state and in the rest of the world. Eelgrass is a highly valued and protected native habitat for many
26 species of fish, invertebrates, and birds. Eelgrass is known as an "ecosystem engineer" because it
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1 can partially create its own habitat by slowing down water flow, while its roots and rhizomes bind
2 and stabilize sediments. Eelgrass is a direct food source for many organisms and serves as
3 nurseries and juvenile habitat for various fauna, including herring, Dungeness crab, and several
4 species of juvenile salmon. Further, eelgrass provides organic material, aids in sediment/substrate
5 nutrient cycling and release, and improves water quality through oxygen production and nutrient
6 absorption. Because eelgrass absorbs carbon dioxide and produces oxygen, it provides mitigation
7 against ocean acidification (decrease in ocean pH caused by increasing atmospheric CO₂ levels).

8 66. The vegetated shallows that support eelgrass are considered “special aquatic sites”
9 under the CWA Section 404(b) Guidelines.

10 67. The Puget Sound Partnership, the state agency leading the region’s collective
11 effort to restore and protect Puget Sound, has identified eelgrass as a prime indicator of estuarine
12 ecosystem health and aimed to increase eelgrass area in Puget Sound by 20% by the year 2020.

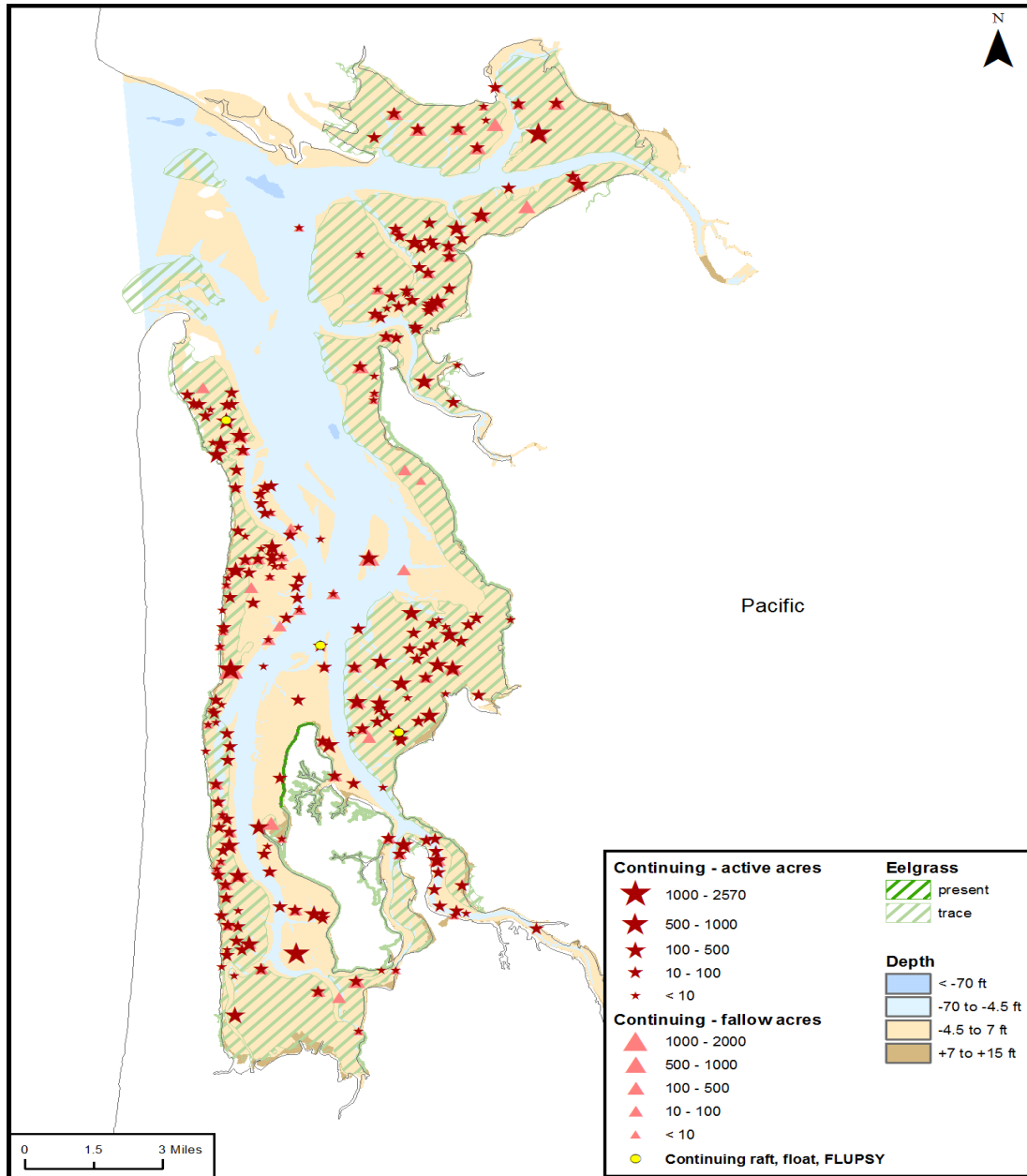
13 68. Japanese eelgrass (*zostera japonica*) was introduced to the Pacific Northwest
14 nearly a century ago and now grows along the entire Pacific coast from Humboldt, California to
15 British Columbia. Like the native *z. marina*, Japanese eelgrass provides many of the same food,
16 shelter, and habitat functions in Washington and was long protected and highly valued. Its
17 regulatory status only changed after shellfish growers lobbied the State Noxious Weed Control
18 Board to list Japanese eelgrass as a Class C noxious weed to commercial shellfish beds.

19 69. Shellfish aquaculture significantly overlaps with eelgrass. The Corps estimates that
20 66% of the active aquaculture acreage overlaps with eelgrass, not including the authorized
21 acreage currently fallow, which is even more likely to support eelgrass. Aquaculture exists in
22 about 50% of the eelgrass in Willapa Bay, as shown below.

23 70. Studies find negative correlations between shellfish aquaculture and eelgrass
24 density and extent. (Dumbauld and McCoy 2015; Wilson and Atkinson 1995). This is no surprise
25 given that industrial shellfish aquaculture often involves the intentional removal of eelgrass, either
26 through mechanical or chemical means. Many shellfish operations use heavy machinery like
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tractors on the tidal bed, outfitted with city street sweepers (to remove aquatic vegetation), plows, and pesticide injectors. In addition to intentional/actual removal of submerged aquatic vegetation, nets and other equipment used in commercial shellfish aquaculture can reduce or eliminate eelgrass and other vegetation due to shading.

Map of Continuing Acres and Eelgrass in Willapa Bay from U.S. Army Corps' Programmatic Biological Assessment (2015)



1 71. The Corps has recognized that these impacts are continuous for the permit period
2 authorizing aquaculture activities, because there is often no return to the prior substrate and
3 habitat conditions; new equipment is placed shortly after harvest of the prior crop, and equipment
4 use occurs in all regions of Washington. Corps, PBA (2015). Thus, while eelgrass may recover or
5 re-colonize areas after shellfish aquaculture has ceased (recovery estimated to take about five
6 years in Washington), the continuous nature of production makes this impossible.



13 *Figure 6: Tractor with Street Sweeper, Willapa Bay*

14 **B. PESTICIDE USE IN SHELLFISH AQUACULTURE**

15 72. Another harmful consequence of industrial shellfish operations in Washington is
16 the introduction of pesticides into the marine environment. Pesticides are biocides meant to kill
17 living things, and as such have an enormous potential to harm non-target organisms, especially
18 when used in aquatic areas where they are certain to move and disperse into the environment.

19 73. Washington is the only state that allows pesticide use on shellfish beds. Currently,
20 one herbicide is allowed in Willapa Bay/Grays Harbor, and another application for insecticide use
21 is pending.

22 74. Once the shellfish industry succeeded in having Japanese eelgrass designated a
23 noxious weed, they were able to secure a permit to remove it through chemical means. In 2014
24 the Washington Department of Ecology, the agency responsible for administering water pollution
25 discharge permitting under CWA § 402, granted commercial clam growers a permit to spray the
26 herbicide Imazamox on clam beds in Willapa Bay and Grays Harbor.

1 75. The Imazamox NPDES Permit was opposed by numerous groups and agencies,
2 including the United States Fish and Wildlife Service (FWS), based on potential impacts to native
3 eelgrass both in mixed beds and off-site and the ecological benefits of Japanese eelgrass.
4 Imazamox is an ALS-inhibiting systemic herbicide that kills all types of eelgrass. While Japanese
5 eelgrass grows at slightly higher elevations than *z. marina* eelgrass, Willapa Bay is very shallow
6 and many mixed beds of both eelgrasses exist. The Permit did not prohibit the spraying native
7 eelgrass on clam beds, nor did the permit include requirements to monitor impacts to native and
8 off-site eelgrasses. No monitoring is required if spraying does not occur up to a 10 meter property
9 line buffer. Imazamox NPDES Permit at 12. In the three years between 2014 and 2017, only one
10 grower has ever been required to monitor impacts in the 10m buffer (on 2.5% of the total acreage
11 sprayed). The Washington Department of Ecology modified the permit in 2017 to allow
12 continued spraying for the remaining two years of the permit, despite a failure to adequately
13 verify that 10m buffers are sufficient to prevent off-site impacts to eelgrass (either through the
14 Buffer Validation study or monitoring by permittees).

15 76. In addition to the ongoing use of herbicide to kill eelgrass in Willapa Bay/Grays
16 Harbor, oyster growers recently attempted to obtain a NPDES permit from the Washington
17 Department of Ecology for imidacloprid, a systemic neurotoxin, to kill burrowing and ghost
18 shrimp. As a neonicotinoid, imidacloprid is especially toxic to invertebrates, highly effective in
19 small doses, persistent in the environment, and moves easily in water. Imidacloprid was selected
20 as a replacement to the phased-out carbaryl, a likely carcinogen harmful to ESA-listed species
21 like green sturgeon and salmon.

22 77. In 2015, the Department of Ecology initially granted a NPDES permit that would
23 have allowed aerial spraying of thousands of acres of shellfish beds. Numerous conservation
24 groups, residents, and other agencies objected to the permit. NMFS objected that burrowing
25 shrimp are native to the area and play an important role in the ecosystem, including as prey for
26 species like Dungeness crab, green sturgeon, and salmon. In addition to reducing prey, NMFS
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1 stated that imidacloprid would “kill nearly all benthic organisms on the acreage directly treated.”
2 Indeed, imidacloprid product labels expressly prohibit use in water because of its high toxicity to
3 aquatic invertebrates. The permit was cancelled after major shellfish companies like Taylor
4 Shellfish pulled out, due to customer pressure, including from major restaurant chefs in Seattle
5 citing food safety concerns with serving shellfish directly sprayed with neurotoxin and refusing to
6 serve it.

7 78. In 2017, growers’ association again applied for a permit to spray imidacloprid on
8 shellfish beds, but this time the Department of Ecology found that the proposal did meet
9 Washington’s environmental sediment and water quality protection laws and denied the permit in
10 2018. The Willapa-Grays Harbor oyster growers appealed Ecology’s permit denial to the
11 Pollution Control Hearings Board, and although the growers settled their appeal, they intend to
12 find alternative chemicals and may request an imidacloprid permit in the future.

13 **C. PLASTICS USE IN SHELLFISH AQUACULTURE**

14 79. Another consequence of industrial shellfish aquaculture is the introduction of
15 plastic pollution to the intertidal waters and beaches, with grave impacts to wildlife, aesthetics,
16 recreation, and food safety.

17 80. According to the Corps, there are currently 34,441 acres of shellfish operations
18 with artificial structures. The Corps also estimates that 23,409 acres of commercial shellfish
19 operations currently use plastic gear, which is roughly half of all acres the Corps says it
20 authorized under the previous iteration of NWP 48 in 2017.

81. As noted above, plastic PVC tubes and anti-predator netting (HDPE) are heavily used in clam and geoduck culture, and other types of plastics like racks and bags and PVC stakes and polyolefin ropes are used for oyster culture. See below for photos of plastic pollution from shellfish activities taken by Plaintiffs’ members while visiting recreational sites across Washington. Shellfish plastic gear can exclude native species from their habitat, especially the anti-predator netting used to protect farmed shellfish from predators in the local environment. Anti-predator nets are harmful to wildlife that are exposed to debris or trapped in loose netting. Plastic cages and other artificial structures can also significantly change the habitat, inhibiting wildlife movement and increasing habitat fragmentation. Despite providing little benefit to shellfish producers, and posing a serious threat to wildlife, plastic structures and gear are frequently used in commercial shellfish aquaculture.



Photo of Shellfish Nets
(Jan. 24, 2022)

Photo of Loose Shellfish Nets & Lines
(Jan. 15, 2022)

82. This plastic gear degrades over time and breaks down into smaller and smaller pieces called microplastics, which act as an additional source of plastic pollution in the ocean. Microplastics adsorb toxic pollutants already present in the water, creating a poison pill for wildlife that become exposed to microplastics in the food supply. Aquatic species at the top of the food chain, such as large fish, birds, and whales, have higher exposure to microplastics due to bioaccumulation.

1 83. Microplastics from nets, which are used frequently in commercial shellfish
2 operations, as show in the examples below, have been shown to reduce shellfish reproductivity,
3 mobility, and survival, and they are often ingested by farmed shellfish grown in Washington’s
4 coastal waters for human consumption. In addition, strands of polyolefin ropes from oyster
5 longlines have been found inside shellfish grown near operations that use this type of plastic gear.
6 Hence, not only is the shellfish industry contributing to the global issue of marine plastic
7 pollution, but they are also hurting themselves by polluting the waters in which they produce
8 shellfish and threatening the health and survival of their very own product.

9 **D. HARM TO MARINE LIFE**

10 84. Large populations of industrially grown organisms require a proportional amount
11 of food. These shellfish compete with forage fish for not only habitat, but also in many cases the
12 zooplankton and phytoplankton on which they rely.

13 85. The impacts that result from that competition are obvious and reverberate
14 throughout the food chain. Less food for forage fish means a reduced environmental carrying
15 capacity for those forage fish. Fewer forage fish means a reduced carrying capacity for often-
16 endangered salmonids. Fewer salmonids mean less food for Orca whales, and other large
17 predators that rely upon the existence of healthy populations of those fish.

18 86. Industrial shellfish operations rely heavily on plastic nets and lines to anchor
19 farmed shellfish to structures in the water and to protect shellfish from predators. For example,
20 geoduck operations stick PVC tubes into sandy substrate at a rate of 42,000 tubes per acre, and
21 then cover the tubes with anti-predator nets. These PVC tubes, lines, and nets erode over time,
22 increasing plastic waste and microplastics in Washington’s coastal waters.

23 87. Plastic pollution from aquaculture operations adversely affects marine ecosystems.
24 When aquatic species (including farmed shellfish) ingest debris, they can suffer abrasions,
25 obstructions, and other serious physical injuries. Further, microplastics are a “poison pill” to
26 wildlife, impairing shellfish growth, development, mobility, reproductivity, and survival.

1 Microplastics absorb pollutants in the environment, increasing toxicity and bioaccumulation for
2 species that ingest microplastics, such as forage fish at the bottom of the food chain and shellfish
3 produced for human consumption. In addition, entanglements with hanging lines or detached gear
4 can cause death or serious injury to wildlife, including endangered whales. These injuries are
5 particularly harmful for juvenile salmon and other species that travel long distances for feeding
6 and rearing.

7 **II. CORPS' INDUSTRIAL SHELLFISH AQUACULTURE PERMITTING**

8 **A. CORPS' PERMITTING PRIOR TO 2021 NWP 48**

9 88. The Corps' shellfish aquaculture permitting history is one of varied effort and
10 urgency. Apparently recognizing the existence of impacts from discharges into jurisdictional
11 waters because of shellfish aquaculture activities, the Corps issued the first iteration of NWP 48
12 beginning around 2007. The Seattle District adopted NWP 48 beginning in 2007.

13 89. The 2007 NWP 48 only included existing operations as of 2007 (an operation "that
14 has been granted a permit, license, or lease from a state or local agency specifically authorizing
15 commercial aquaculture activities and which has undertaken such activities"). 72 Fed. Reg.
16 11,092, 11,145 (Mar. 17, 2007). Like later iterations, it authorized the installation of buoys, floats,
17 racks, trays, nets, lines, tubes, containers, and other structures necessary for commercial
18 aquaculture activity, and discharges of dredged or fill material necessary for shellfish seeding,
19 rearing, cultivating, transplanting, and harvesting activities. The Seattle District adopted this
20 NWP and consulted with NMFS regarding impacts to listed species, including as part of the
21 action several conservation measures to be attached to authorizations under nationwide permit.

22 90. In 2012, the Corps reissued NWP 48, this time extending the permit to cover new
23 shellfish aquaculture operations, although any new activity could not directly affect more than
24 1/2-acre of submerged aquatic vegetation beds (e.g., eelgrass). 77 Fed. Reg. 10,184, 10,228-
25 10,232 (Feb. 21, 2012). An activity was considered "existing" if it was within "the area in which
26 the operator is currently authorized to conduct commercial shellfish aquaculture activities, as
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1 identified through a lease or permit issued by an appropriate state or local government agency, a
2 treaty, or any other easement, lease, deed, or contract which establishes an enforceable property
3 interest for the operator.”

4 91. The Seattle District adopted the renewed 2012 NWP 48 for Washington, with ten
5 general conditions and one regional condition specifically for NWP 48: “The commercial harvest
6 of clams by means of hydraulic escalator harvester equipment is not authorized by this NWP.”
7 Seattle District, *Supplement to National Decision Document for 2012 Nationwide Permit 48 and*
8 *Regional General Conditions*, 42–45 (March 19, 2012). In its Supplemental Decision Document,
9 the Seattle District stated that it already completed a programmatic ESA consultation for existing
10 commercial shellfish aquaculture in 2009 and attached 16 special conditions to all activities
11 authorized under the 2012 NWP 48.

12 92. Although the Seattle District predicted that 2012 NWP 48 would only be used 50
13 times a year, or 250 times over its five-year life, *id.* at 31, it was actually used *over 1,000 times*
14 from 2012 to 2016. The Seattle District issued 92% of all NWP 48 authorizations in the nation, so
15 the industrialized shellfish aquaculture production challenged here is particularly centralized and
16 unique to Washington State.

17 93. Despite the significant overuse of the 2012 permit, far beyond what was
18 considered and analyzed during its adoption, the Corps never completed any supplemental
19 impacts analysis to determine whether the massive expansion of operations under the 2012 permit
20 had adverse cumulative impacts that are more than minimal (CWA) or significant impacts the
21 environment (NEPA). Instead, the overuse of this permit has allowed significant expansion of
22 commercial shellfish aquaculture, onto thousands of never-before cultivated acres, or acres that
23 had been fallow since (at least) before 2007, with no analysis of their environmental impacts.

24 94. The Corps reissued NWP 48 again in 2017. Like previous versions of the permit,
25 NWP 48 authorizes “the installation of buoys, floats, racks, trays, nets, lines, tubes, containers,
26 and other structures into navigable waters of the United States NWP [48] also authorizes
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1 discharges of dredged or fill material into waters of the United States necessary for shellfish
2 seeding, rearing, cultivating, transplanting, and harvesting activities.” Issuance and Reissuance of
3 Nationwide Permits, 82 Fed. Reg. 1,860, 1,995 (Jan. 1, 2017).

4 95. The 2017 permit included several significant changes, the biggest of which is a
5 revised definition of “new” commercial aquaculture, to “an operation in a project area where
6 commercial shellfish aquaculture activities have not been conducted during the last 100 years.”
7 *Id.* at 1,995 (emphasis added). This definition of “new” was not in the 2012 permit. Instead, a new
8 project area was one not “currently authorized,” and new operations were prohibited from directly
9 affecting more than 1/2-acre of submerged aquatic vegetation beds. The 2017 revised definition of
10 “new” means that any operation is considered “existing” rather than “new” so long as some
11 manner of commercial shellfish activity was conducted there in the last 100 years. This was a
12 significant departure from the previous definitions of existing operations: the 2007 permit
13 included as “existing” only operations were actually authorized and operating at the time the
14 permit was adopted, in 2007, and the 2012 permit defined “existing” as the “area in which the
15 operator is currently authorized to conduct commercial shellfish aquaculture activities, as
16 identified through a lease or permit issued by an appropriate state or local government agency, a
17 treaty, or any other easement, lease, deed, or contract which establishes an enforceable property
18 interest for the operator.” Being considered an “existing” operation, rather than “new,” allows a
19 commercial shellfish operation to avoid specific protections, including the prohibition on
20 affecting more than 1/2 acre of submerged aquatic vegetation (*i.e.*, eelgrass), and to avoid having
21 to submit a Pre-Construction Notice (PCN) to the Corps (including various information about the
22 proposed operation). *Id.* at 1,995-1,996. The Corps also removed the Pre-Construction Notice
23 requirement for dredge harvesting, tilling, or harrowing in eelgrass, and for changing from bottom
24 culture to floating/suspended culture. *Id.* at 1,995.

25 96. In its environmental assessment, the Corps predicted that approximately 1,625
26 activities could be authorized over a five-year period under the 2017 permit, resulting in impacts
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1 to approximately 56,250 acres of waters of the United States, including jurisdictional wetlands.
2 Corps, Decision Document NWP 48, 65 (Dec. 21, 2016) (2017 Decision Document).

3 97. Plaintiffs and others commented to the Corps that the permit approval would cause
4 cumulatively adverse impacts, especially with the new 100-year loophole definition for “new”
5 operations. Plaintiffs urged the Corps not to re-issue NWP 48 as written, to allow regional and
6 District Engineers to utilize regional general or individual permits, or if the Corps did decide to
7 move forward with NWP 48, to complete a full EIS rather than an EA and to undertake ESA
8 consultation with the Services. CFS, Comments on Proposal to Reissue and Modify Nationwide
9 Permits; Docket Number COE-2015-0017/RIN 0710-AA73 (August 1, 2016).

10 98. The Corps stated in the 2017 Decision Document that while individual
11 authorizations or verifications under NWP 48 would not require any additional NEPA, regional
12 Corps divisions and districts are required to prepare supplemental decision documents to provide
13 regional analyses of environmental effects of a NWP, including a regional cumulative effects
14 analysis. Corps Decision Doc. NWP 48 at 6.

15 99. The Corps’ 2017 Decision Document for NWP 48 did not address pesticide or
16 plastic gear use on shellfish beds: “The Corps does not have the authority to regulate discharges
17 of pesticides. Discharges of pesticides may require authorization by states or the U.S. EPA under
18 section 402 of the Clean Water Act. Division engineers can impose regional conditions to address
19 the use of plastics, if plastic materials are used for the activities regulated under the Corps’
20 authorities.” *Id.* at 9.

21 100. The Corps did not complete any ESA Section 7 consultation with the Services
22 regarding the renewal of NWP 48, instead relying on a general condition requiring all non-federal
23 permittees to submit a Pre-Construction Notice “if any listed species or designated critical habitat
24 might be affected or is in the vicinity of the activity, or if the activity is located in designated
25 critical habitat.” General Condition 18, 82 Fed. Reg. at 1,999.

26 101. Plaintiff Coalition challenged the 2012 issuance of NWP 48, and collectively,
27

1 Plaintiffs Coalition and CFS challenged the 2017 issuance of NWP 48. *See* 2:16-cv-00950-RSL;
2 2:17-cv-01209-RSL. In October 2019, the U.S. District Court for the Western District of
3 Washington held that the 2017 permit violated the CWA and NEPA because the Corps failed to
4 adequately consider the individual and cumulative impacts on the environment. *Coal. to Protect*
5 *Puget Sound Habitat*, 417 F. Supp. 3d at 1367. Specifically, the court held that the Corps’
6 minimal impacts finding was improperly based on “(1) selectively chosen statements from the
7 scientific literature, (2) the imposition of general conditions with which all activities under
8 nationwide permits must comply, and (3) the hope that regional Corps districts will impose
9 additional conditions and/or require applicants to obtain individual permits if necessary to ensure
10 that the adverse impacts will be minimal.” *Id.* at 1359. In June 2020, the district court vacated the
11 permit, and in February 2021, the Ninth Circuit affirmed the district court’s decision. *Coal. to*
12 *Protect Puget Sound Habitat*, 466 F. Supp. 3d 1217 (W.D. Wash. 2020), *aff’d*, 843 F. App’x 77
13 (9th Cir. 2021).

14 **B. 2021 NWP 48 ISSUANCE**

15 ***i. National Headquarters***

16 102. On September 15, 2020, the Corps published a proposed regulation to reissue with
17 modifications the existing NWPs and associated general conditions and definitions, along with
18 five new NWPs. 85 Fed. Reg. 57298.

19 103. On January 4, 2021, the Corps issued the Decision Document, which acts as the
20 agency’s Environmental Assessment (EA) for NWP 48 under NEPA. Exhibit B.

21 104. On January 13, 2021, the Corps reissued several NWPs authorizing certain
22 activities that require Corps permits under CWA Section 404 and/or RHA Section 10, 33 U.S.C. §
23 403, including NWP 48 for commercial shellfish aquaculture (re-titled as commercial shellfish
24 *mariculture* activities). Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2744.
25 NWP 48 went into effect on March 15, 2021.

26 105. The Corps estimated that the 2021 NWP 48 “will be used approximately 331 times
27

1 per year on a national basis, resulting in impacts to approximately 13,684 acres of waters of the
2 United States [per year],” or 68,420 acres of water over a five-year period. 2021 HQ Decision
3 Doc. at 123. The Corps further estimated that “approximately 1,805 activities could be authorized
4 over a five-year period until this NWP expires, resulting in impacts to approximately 69,420 acres
5 of waters of the United States, including jurisdictional wetlands.” *Id.* at 123–24.

6 106. The 2021 NWP 48 Decision Document contains almost no new analysis compared
7 with the prior 2017 NWP 48 and eliminates one of the only ostensible protective measures
8 contained in the prior permit, which limited authorizations based on a 100-year “lookback,”
9 allowing authorizations for only those areas which has been cultivated in some manner in the
10 previous 100 years. Decision Document at 5. The Corps also removed the prior ½-acre limit for
11 new activities. *Id.* at 5, 13.

12 107. The one major change in the 2021 Decision Document from the previous iteration
13 is the Corps’ description of its CWA authority. As described in the 2021 NWP Decision
14 Document, “the purpose of the NWP is to authorize discharges of dredged or fill material into
15 waters of the United States for commercial shellfish mariculture activities.” *Id.* at 121. The
16 Decision Document also states that “[t]he use of structures for commercial shellfish mariculture
17 activities, such as long lines, cages, racks, bags, tubes, and netting are not regulated under Section
18 404 of the Clean Water Act because they do not constitute ‘dredged material’ or ‘fill material’ or
19 result in discharges of dredged or fill material.” *Id.*

20 108. The Corps did not analyze site-specific or regional cumulative impacts before
21 issuing the 2021 NWP 48. In the 2021 NWP 48 Decision Document, the Corps expressly admits
22 to limiting its impact analysis to national-scale impacts. 2021 HQ Decision Doc. at 41, 75–76.
23 The Corps bluntly claims that information regarding site-specific impacts is not readily available.
24 *See, e.g., id.* at 36 (“The environmental impacts of authorized activities during the period the
25 NWP is in effect is dependent on the current environmental settings in which these activities will
26 occur, and quantitative data on those current environmental settings is not available.”); 41 (“Due
27

1 to the large geographic scale of the affected environment (i.e., the entire United States), . . . it is
2 only practical to describe the affected environment in general terms. In addition, it is not possible
3 to describe the environmental conditions for specific sites where the NWP's may be used to
4 authorize eligible activities.”). The 2021 NWP 48 Decision Document also uses identical
5 language to describe the “affected environment” as the 2017 Decision Document. *Compare id.* at
6 41 *with* 2017 HQ Decision Document at 25.

7 109. In addition, the Corps did not analyze quantitative data regarding potential
8 impacts. In the 2021 NWP 48 Decision Document, the Corps expressly admits to limiting its
9 impact analysis to a “qualitative analysis” of the general, national-scale impacts. 2021 HQ
10 Decision Document at 75–76 (“Given the geographic scope in which this NWP can be used to
11 authorize activities . . . and the wide variability in aquatic resource[s] . . . from site to site and from
12 region to region, the analysis of environmental consequences is a qualitative analysis.”).

13 110. The Corps relied on limited studies to make broad generalizations about the
14 potential impacts. For example, despite failing to quantify any of the impacts to benthic
15 organisms, the Corps broadly asserted that “[m]ost of the impacts to benthic organisms may be
16 temporary, as these organisms can recover after various natural and anthropogenic disturbances
17 that occur in these dynamic coastal ecosystems.” Decision Document at 121. The only cited
18 source for this broad assertion is an example focusing on “certain seagrass species in certain
19 locations have in some cases exhibited capacity to recover and reproduce after dredge harvesting
20 activities for commercial shellfish mariculture activities.” *Id.*

21 111. The Corps also limited its evaluation of cumulative impacts to certain
22 activities. For example, the Corps ignored shellfish seeding and other activities that will increase
23 because of permitted activities because these activities “by themselves are not considered to be
24 discharges of fill material regulated under section 404.” Decision Document at 122. Likewise,
25 Corps refused to analyze the foreseeable impacts of pesticide use because it does not have direct
26 permitting authority over pesticides. *Id.* at 10, 81, 96.

1 112. The Corps continued to analyze the potential impacts of permitted activities in
2 comparison to past degradation and other human activities. *See, e.g., id.* at 57 (“The affected
3 environment (i.e., the current environmental setting) has been shaped
4 by a wide variety of human activities.”); 67 (“The current environmental setting is the product of
5 the cumulative or aggregated effects of human activities that have persisted over time. . . .The
6 current environmental setting is dependent in part on the degree to which past and present human
7 activities have altered aquatic and terrestrial resources in a particular geographic area over time.
8 The Corps does not provide any site-specific information or quantitative data when comparing the
9 estimated number of authorized activities on a national basis to past degradation. *See, e.g., id. at*
10 *76–77* (“Because the activities authorized by this NWP constitute *only a small proportion* of the
11 categories of human activities that directly and indirectly affect ocean waters . . . and other
12 aquatic resources, the activities authorized by this NWP over the next 5 years are *likely to result*
13 *in only a minor incremental change* to the current environmental setting for ocean waters,
14 estuarine waters.”) (emphasis added).

15 113. In the 2021 NWP 48 issuance, the Corps declined to impose new protections for
16 seagrass, referring to the prospect as “impractical.” Decision Document at 14.

17 114. The Corps proposed three alternatives in its EA. First, a “no action” alternative;
18 second, reissuance of NWP 48 “with modifications;” and third, reissuance “without
19 modifications.” Dec Doc at 40. Despite a clear and unequivocal Order from this Court, and
20 affirmed by the Ninth Circuit Court of Appeals, the Corps decided to reissue “with
21 modifications,” but without conducting the analysis required by 42 U.S.C. § 4321 *et seq* or 40
22 C.F.R. §230.7(a) to determine whether the activities will have only minimal cumulative adverse
23 effects on the aquatic environment.

24 115. Before the Corps re-issued the 2021 NWP 48, Plaintiffs and others submitted
25 comments to the Corps to warn the agency that approving the proposed permit would cause
26 significant direct, indirect, and cumulative adverse impacts. Plaintiffs urged the Corps to conduct
27

1 a thorough analysis of all potential impacts of issuing the 2021 NWP 48.

2 116. Neither the final 2021 NWP 48 nor the Decision Document address the concerns
3 Plaintiffs raised during the public comment period. For example, the Decision Document does not
4 fully consider the adverse impacts of pesticide use or plastics on commercial shellfish operations.
5 Nor does the agency analyze the potential impacts on salmonids, Orca whales, and other
6 threatened and endangered species. Nor does the Decision Document evaluate the impacts of
7 NWP 48 in conjunction with hundreds of LOPs for similar industrial-scale aquaculture projects,
8 and/or in conjunction with multiple “standard” or individual permits for industrial aquaculture
9 projects. *See e.g.*, Exhibit D (maps of currently issued LOPs and standard permits).

10 117. The Corps did not complete any ESA Section 7 consultation with the Services
11 regarding the renewal of NWP 48, and instead relies on a general condition requiring all non-
12 federal permittees to submit pre-construction notice “if any listed species or designated critical
13 habitat might be affected or is in the vicinity of the activity, or if the activity is located in
14 designated critical habitat.” Decision Document at 85, 115.

15 ***ii. Seattle District***

16 118. On September 30, 2020, the Seattle District of the Corps issued a Special Public
17 Notice for its proposed adoption of NWP 48, and the accompanying proposed regional conditions.
18 This Special Public Notice was not published in the Federal Register, and the comment period for
19 this Special Public Notice differed significantly from the opportunities to comment during the
20 prior issuances of NWP 48.

21 119. The only proposed Regional Condition specific to NWP 48 stated that
22 “commercial harvest of clams by means of hydraulic escalator harvester equipment is not
23 authorized by NWP.” SPN of Proposed Regional Conditions at 8.

24 120. Plaintiffs and other members of the public provided comments to the Seattle
25 District describing numerous substantive issues with the proposed NWP and regional conditions,
26 urging the District to forego NWP 48, and instead use individual permits, or regional general
27

1 permits, but only following the requisite cumulative and other impact analyses pursuant to NEPA
2 and CWA. In March 2021, the Seattle District decided to ignore these comments and finalized the
3 only proposed condition specific to NWP 48. *See* SPN of Final Regional Conditions at 18.

4 121. On information and belief, the Seattle District authorized a number of operations
5 under the 2021 NWP 48 prior to its Motion for Voluntary Remand, ECF 47. Pursuant to that
6 motion, the Corps intends to revoke the NWP 48 in Washington State, giving any remaining
7 operations authorized under it a grace period of one year to obtain an individual or other permit.

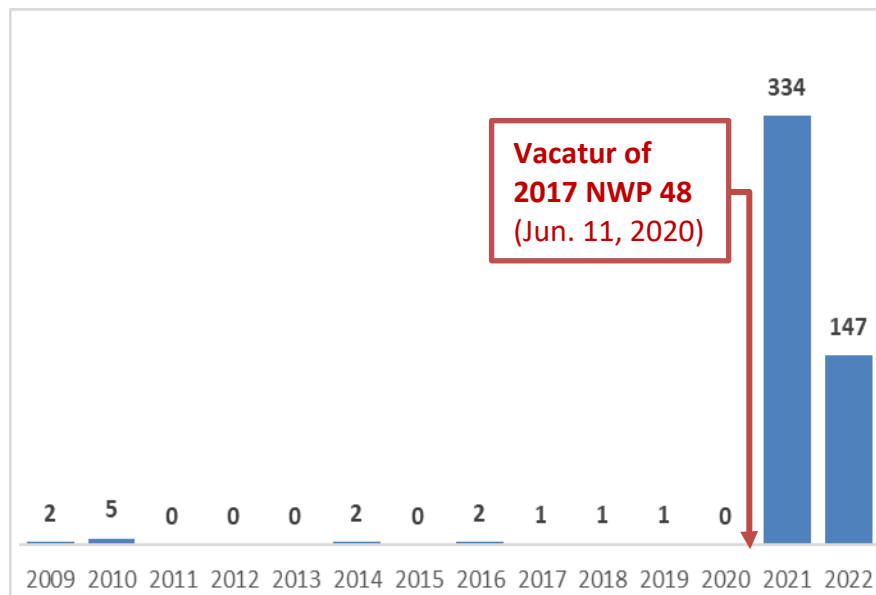
8 *Id.*

9 **C. LETTERS OF PERMISSION**

10 122. Despite an order from this Court requiring the Corps to comply with CWA and
11 NEPA requirements and fully consider the individual and cumulative impacts of its shellfish
12 permitting before issuing any further permits and vacating the 2017 NWP 48 (requiring entities
13 previously authorized under NWP 48 to seek individual permits), the Seattle District proceeded to
14 authorize most industrial shellfish aquaculture operations with LOPs, without any cumulative
15 impacts analysis, contrary to the Corps' own regulations.

16 123. Between 2009 and 2020, the Seattle District only issued 14 LOPs to commercial
17 shellfish operations in Washington's tidelands. From 2021 to February 2023, the Seattle District
18 issued 487 LOPs to commercial shellfish operations in Washington's tidelands, demonstrating the
19 Corps' significant increase in the use of LOPs, a specific type of permit authorization that only
20 applies in limited circumstances, to approve commercial shellfish operations in Washington. *See*
21 Table 1 below. The number of LOPs issued to commercial shellfish operations will likely
22 continue to increase as the Seattle District continues to grant LOPs to existing operations
23 previously authorized under NWP 48, as well as new and expanded operations in the same coastal
24 areas. *See* Exhibit A (List of Final Issued LOPs).

**Total LOPs Issued to Commercial Shellfish Operations in Washington Each Year
(2009 to 2022)**



124. On information and belief, based on permit information released to Plaintiffs under the Freedom of Information Act (FOIA), the Seattle District has granted over 400 LOPs following vacatur of 2017 NWP 48, the vast majority of which were formerly authorized under the 2012 and 2017 NWP 48 which was deemed unlawful by this Court. Following this Court's vacatur of 2017 NWP 48 in 2020, the Corps started to replace NWP 48 authorizations with standard permits. However, the Corps then started to withdraw those permits to become LOPs. As of the date of this filing, the Corps has issued LOPs to the vast majority of operations previously authorized under the 2012 or 2017 NWP 48.

125. On information and belief, the Corps HQ and/or the Seattle District Engineer made a decision to allow the use of LOPs rather than individual permits under the CWA and RHA, or the NWP 48. That decision allowed the Corps to permit the vast majority of shellfish aquaculture in Washington as LOP's, something it had never previously done. That decision, to waive or ignore jurisdiction under the CWA and to allow conversion of NWP 48 operations to LOP's included a major change in the Corps' assertion of its CWA jurisdiction over such operations.

1 126. From February 2021 to February 2023, the Corps has issued hundreds of LOPs to
2 commercial shellfish operations in Puget Sound and Hood Canal, covering thousands of acres of
3 diverse ecosystems for the highly intensive and continuous cultivation of geoduck clams, oysters,
4 mussels, and other shellfish types. During this same period, the Corps has also issued several
5 LOPs to commercial shellfish operations in Grays Harbor, Squamish Bay, and Willapa Bay,
6 covering thousands of acres of sensitive tidelands and protected aquatic habitats.

7 127. From February 2021 to February 2023, the Corps has issued hundreds of LOPs to
8 new and expanded commercial shellfish operations across Washington, covering hundreds of
9 acres of sensitive tidelands and habitats for the cultivation of geoduck clams, oysters, and other
10 shellfish types. On information and belief, the Corps' Seattle District continues to grant new
11 LOPs in addition to those specifically challenged in this lawsuit and absent relief from this court
12 the Corps will continue to grant new LOPs in the future using the same flawed reasoning it has
13 used to approve the LOPs already issued and challenged here.

14 ***i. Wildlife Impacts***

15 128. The Corps has issued—and continues to issue—hundreds of LOPs for individual
16 commercial shellfish operations with adverse effects on aquatic species and federally threatened
17 or protected species. In multiple decision documents associated with LOPs issued to commercial
18 shellfish operations, the Corps acknowledged the potential effects on local wildlife and their
19 habitats but failed to specify or quantify these effects. *See, e.g.*, Decision Document (“DD”)
20 (NWS-2007-01147-AQ) at 16 (approving 15 acres for oyster cultivation, despite acknowledging
21 that the “proposed shellfish operation may alter the habitat characteristics of tidal waters which
22 provide habitat to many species of fish and wildlife within Grays Harbor”); DD (NWS-2020-
23 00356-AQ) at 14, 18 (acknowledging that the “proposed shellfish operation may alter the
24 habitat . . . within Pickering Passage”); DD (NWS-2020-01154-AQ) at 15 (acknowledging that
25 some “species would be adversely affected” by changes); DD (NWS-2020-00592-AQ) at 17
26 (concluding that wildlife impacts “will be temporary and minimal” despite acknowledging that
27

1 the “[e]quipment used for the proposed shellfish aquaculture activities, such as project specific
2 tubes and netting, may . . . entangle birds and other types of aquatic species such as forage fish
3 and crabs”). For example, on July 2, 2021, the Corps issued an LOP to Taylor Shellfish Farms “to
4 commercially cultivate geoduck clams for human consumption” on one acre of tidelands in South
5 Puget Sound, despite recognizing that “species may be temporarily adversely affected.” Decision
6 Document (NWS-2020-943-AQ) at 4–5, 17. The Corps also recognized that “South Puget Sound
7 is occupied by Puget Sound Chinook salmon, Puget Sound steelhead, canary rockfish, and their
8 designated critical habitat (programmatic consultation).” *Id.* at 5. However, the Corps failed to
9 discuss the specific risks to wildlife, given the nature of the proposed operation, the number of
10 years in operation, and the affected area. *Id.* Nor did the Corps attempt to quantify the potential
11 effects on certain aquatic species and their habitats before summarily concluding the effects were
12 temporary and negligible. *Id.*

13 *ii. Environmental Impacts*

14 129. The Corps has issued—and continues to issue—hundreds of LOPs for commercial
15 shellfish operations with adverse effects on the environment. In multiple decision documents
16 associated with the LOPs issued to commercial shellfish operations, the Corps failed to describe
17 the potential individual and cumulative adverse effects to the local environment, such as the long-
18 term impacts on water quality, nutrient levels, vegetation density, and biodiversity. For example,
19 in issuing an LOP to a new geoduck operation in Eld Inlet, the Corps claimed that the “effects” of
20 the proposed activities would be “extremely short in duration and temporary in nature and would
21 not result in detectable individual or cumulative adverse impacts,” but failed to describe those
22 potential effects with specificity. DD (NWS-2020-00060-AQ) at 3, 13-14.

23 130. In addition to entirely ignoring some important impacts, the Corps significantly
24 understated the adverse impacts that it did acknowledge in its environmental analysis. In multiple
25 LOP decision documents, the Corps generally acknowledged the potential adverse effects of
26 aquaculture on the environment but failed to specify or quantify these effects. *See, e.g.,* DD
27

1 (NWS-2020-01154-AQ) at 13, 18 (acknowledging that “[g]eneral environmental concerns such as
2 water, air, noise and pollution may be positively or negatively affected by commercial shellfish
3 aquaculture activity”); DD (NWS-2020-00592-AQ) at 15. For example, in issuing an LOP to an
4 existing oyster operation on 100 acres of cultivation area in Willapa Bay, the Corps
5 acknowledged that “[i]mpacts including water, air, noise pollution may be positively or
6 negatively affected depending on the specific aquaculture activity proposed.” DD (NWS-2020-
7 559) at 13; *see also id.* at 15 (noting that “[s]ome species of aquatic organisms may temporarily
8 benefit from those changes, while other species may temporarily be adversely affected.” *Id.* at 15.
9 However, the Corps failed to discuss the specific risks to wildlife and the environment, given the
10 nature of the proposed operation, the number of years in operation, and the affected area. *Id.* Nor
11 did the Corps attempt to quantify the potential effects on certain aquatic resources or
12 characteristics before summarily concluding the effects were temporary and negligible. *Id.* The
13 Corps’s purported agnosticism as to whether commercial shellfish operations will have an adverse
14 effect on the environment contradicts the findings in the prior case, the findings in some of the
15 Corps own draft cumulative impact analysis, and it improperly minimizes the numerous studies,
16 comments, and other evidence in the record demonstrating that commercial shellfish operations
17 have adverse impacts on Washington’s coast.

18 *iii. Plastic Use*

19 131. The Corps issued and continues to issue LOPs for operations without full
20 consideration of the potential impacts of plastic use. In multiple LOP decision documents, the
21 Corps also generally acknowledged the environmental effects of plastic use in shellfish
22 aquaculture but failed to quantify or specify these effects. *See, e.g.,* Decision Document (“DD”)
23 (NWS-2007-01209-AQ) at 12 (approving 12 acres for geoduck clam cultivation in Puget Sound,
24 despite plastic use); DD (NWS-2007-01219-AQ) at 12; DD (NWS-2020-00899-AQ) at 17. For
25 example, in issuing an LOP to Taylor Shellfish for a geoduck operation, the Corps acknowledged
26 that “[t]here are legitimate concerns about the impacts of plastics in our environment, particularly
27

1 on the aquatic environment and within the food chain.” Decision Document (NWS-2020-943-
2 AQ) at 15. However, the Corps failed to discuss the specific risks of pesticide use to wildlife and
3 the environment, given the nature of the proposed operation and the affected area. *Id.* The Corps
4 also claimed that the potential impacts of plastic use were negligible due to proposed mitigation
5 measures, without any quantitative analysis or public notice, or describing how the proposed
6 mitigation measures would actually prevent the harms from plastic use. *See, e.g.*, DD (NWS-
7 2020-00060-AQ) at 13 (concluding that “[t]he nets used in commercial shellfish aquaculture
8 activities are minor and temporary, there are general and special conditions included to minimize
9 discarded and escaped equipment”).

10 *iv. Pesticide Use*

11 132. The Corps issued and continues to issue LOPs for operations without full
12 consideration of the potential impacts of pesticide use. In all the LOPs and associated decision
13 documents released thus far to Plaintiffs through FOIA requests, the Corps ignored the potential
14 impacts of pesticide use on proposed operations. For example, in issuing an LOP to a 35-acre
15 oyster operation in North Grays Harbor, owned by Lone Tree Oyster Company, and a 97.5-acre
16 oyster operation in North/Central Willapa Bay, owned by Petit and Sons Oyster, the Corps fails to
17 describe or analyze any of the potential individual or cumulative effects of pesticide use. *See* DD
18 (NWS-2007-1140-AQ); DD (NWS-2012-0609). Despite not prohibiting pesticide use by
19 permittees, the Corps failed to account for its impacts where permitted operations use pesticides
20 to eradicate species that they consider pests.

21 *v. Cumulative Impacts*

22 133. The Corps issued and continues to issue LOPs for operations without full
23 consideration of the cumulative impacts of those operations, in conjunction with the NWP 48
24 authorizations, and in conjunction with other individual permits for industrial shellfish
25 aquaculture operations in Puget Sound, Willapa Bay, and other important coastal areas. *See*
26 Exhibit D (Maps of Final Issued Permits in Washington). In multiple LOP decision documents,
27

1 the Corps summarily concluded that operations would not have significant cumulative impacts on
2 the environment because there were existing shellfish aquaculture operations in the area. *See, e.g.*,
3 DD (NWS-2020-01183-AQ) at 28 (concluding that operation will have no significant cumulative
4 effects because it will “perpetuate the status quo of 42 acres of shellfish cultivation occurring in
5 [the] action area”); DD (NWS-2020-00590-AQ) at 29 (operation “will perpetuate the status quo
6 of 4.09-acres of shellfish cultivation occurring in this action area”); DD (NWS-2020-01131-AQ)
7 at 6, 9, 14, 16 (approving 1.3 acres for mussel and oyster cultivation in Totten Inlet, even though
8 “[t]here [were] 81 previously authorized shellfish mariculture operations covering 155.76 acres or
9 9.1% of Totten Inlet intertidal habitat,” because operation “would occupy 0.08% of the intertidal
10 habitat within Totten Inlet”). For example, in issuing a LOP to a geoduck operation owned by
11 Taylor Shellfish, the Corps determined that “[i]mpacts from the continuation of [the proposed
12 geoduck aquaculture operation] at this location would not have a significant cumulative impact on
13 the area since the aquaculture activities are existing and ongoing.” Decision Document (NWS-
14 2020-943-AQ) at 15, 31. However, the Corps failed to specify or quantify the proposed
15 operation’s potential cumulative impacts. *Id.* Rather than analyze the potential cumulative impacts
16 against the environmental baseline, the Corps compared the proposed operation with existing
17 shellfish activities, even when those activities were never approved by the Corps. *See, e.g.*, DD
18 (NWS-2007-01219-AQ) at 3 (approving 1.67 acres for geoduck clam cultivation in Puget Sound,
19 even though “[t]he applicant had deviated from the approved plans by using plastic cups for
20 geoduck cultivation”); DD (NWS-2020-01154-AQ) at 5 (concluding that there are no cumulative
21 impacts because operation was previously verified in 2012 and 2017, even though proposed
22 operation expands the area for geoduck cultivation, which has greater impacts than oyster
23 culture). For new operations, the Corps focused on the proposed mitigation measures, rather than
24 analyzing the potential cumulative impacts, as required. *See, e.g.*, DD (NWS-2021-00124-AQ) at
25 9 (“The proposed work would not have significant or cumulative impacts on environmental
26 values because the proposed project has avoided and minimized effects to environmental values
27

1 and would not have significant individual or cumulative impacts on such values.”).

2 ***vi. Appreciable Opposition***

3 134. Plaintiffs and their members have a long history of challenging the expansion of
4 commercial shellfish operations with adverse impacts on their communities, recreational areas,
5 and personal properties. Plaintiffs and their members rely on community outreach, organizing,
6 public education, public comments, policy advocacy, and if necessary, litigation, to ensure the
7 Corps adequately evaluates the individual and cumulative effects of these operations.
8

9 135. Due to the Corps’ dramatic increase in authorizing commercial shellfish operations
10 under LOPs, Plaintiffs have been effectively shut out of decision-making process for many of the
11 commercial shellfish operations authorized near their homes, recreational areas, and communities.
12 Plaintiffs and their members have submitted multiple comments raising concerns about many of
13 the operations at issue in this case. *See* Exhibit E (Plaintiffs’ Comments in Opposition to Specific
14 LOPs). Even though the Corps did not provide a public notice and comment period before
15 authorizing the LOPs at issue, Plaintiffs and their members used the limited information available
16 to them to submit comments in opposition to proposed operations. Although these comments
17 discussed specific operations and their potential effects on specific waterbodies, the Corps
18 unlawfully concluded that there was no “appreciable opposition” for these and other similar now
19 LOP authorized operations, in violation of the RHA and its minimum criteria for LOP procedures.
20
21

22 **III. PLAINTIFFS’ INTERESTS**

23 136. Plaintiffs and their members are injured by the challenged actions because
24 Defendants negated their procedural rights, as stakeholders, consumers of shellfish, and residents
25 and visitors of the impacted areas, to meaningfully participate in important permit approval
26 processes. The Corps failed to adequately evaluate the significant adverse impacts likely to result
27 from any of the hundreds of LOPs issued to shellfish operations across the state of Washington.

1 As a result, the Corps caused procedural injury to Plaintiffs and their members.

2 137. Plaintiffs' members live, work, and recreate in intertidal and coastal areas where
3 the Corps has authorized commercial shellfish activities—and where the Corps may authorize
4 additional activities in the future—under an LOP. This includes members such as Laura Hendricks,
5 Maradel Gale, Susan Macomson, and Patrick Townsend, who live along the shoreline of Puget
6 Sound and regularly recreate in the surrounding intertidal and coastal areas, and Thomas Buchele,
7 who owns a vacation home in the Long Beach Peninsula and enjoys spending time along the coast
8 of Willapa Bay, where the Corps has improperly authorized several commercial shellfish
9 operations. These members live on or near Washington's shorelines and have substantial property
10 interests in protecting these areas from the adverse impacts of commercial shellfish operations.
11 These members also enjoy spending time and recreating along Washington's shorelines and have
12 substantial aesthetic, recreational, and personal interests in protecting these important coastal
13 habitats and ecosystems from degradation and pollution. For example, many members enjoy
14 observing wildlife, walking along the beach, visiting state parks and wildness areas, bicycling,
15 kayaking, hiking, and other recreational activities in Washington's nearshore and intertidal areas,
16 including Totten Inlet, Case Inlet, Hammersley Inlet, Hood Canal, Grays Harbor, and Willapa
17 Bay. Some members have businesses and hobbies that rely on the natural beauty, biodiversity,
18 and ecological health of Washington's coastal ecosystems. These interests are harmed by the
19 cumulative and direct adverse impacts of industrial shellfish aquaculture, including pesticide use
20 and drift, physical barriers to beach access, plastic use and pollution, impairment of aesthetics,
21 light and sound pollution, habitat destruction, and reduction in biodiversity. Many members also
22 enjoy eating fresh and locally grown shellfish, and some members go to great lengths to find
23 responsibly harvested shellfish grown without pesticides in Washington. Many members are
24 concerned about the human health impacts of consuming shellfish grown on commercial shellfish
25 operations using pesticides, and plastic equipment and other industrial methods, and some
26 members are afraid to eat *any* shellfish grown near commercial shellfish operations, including
27

1 shellfish on their own property, due to pesticide use on commercial shellfish growing beds in
2 adjacent areas.

3 138. Plaintiffs' members include people who have aesthetic, recreational, cultural,
4 scientific, and economic interests in the health of Washington's aquatic ecosystems and the
5 wildlife they support, including threatened and endangered species, like salmon. These members
6 have concrete interests in viewing aquatic wildlife, including listed species that rely on
7 Washington's intertidal areas for spawning, rearing, and feeding. These members' interests are
8 directly injured by the Corps' approval of commercial shellfish operations in Washington's
9 coastal and intertidal areas because the Corps failed to properly consider the direct and cumulative
10 effects of these operations or mitigate the risks to threatened and endangered species before
11 authorizing operations under an LOP. Plaintiffs and their members are injured by the Corps'
12 approval of LOPs that will have more than minimal adverse cumulative impacts to Washington's
13 shorelines and bays, without adequate analysis of these impacts or mitigation to avoid cumulative
14 impacts.

15 139. If the Court finds the Corps violated the RHA, CWA, and APA by issuing
16 hundreds of LOPs and vacates those already granted, the Corps would no longer be able to rely on
17 the permits to authorize shellfish operations that directly impair Plaintiffs' and their members'
18 interests in Washington's shorelines, aquatic ecosystems, wildlife, and surrounding communities.
19 Moreover, the Court could further prevent and reduce injuries to Plaintiffs and their members by
20 ordering the Corps to fully consider the potential impacts before issuing further LOPs, as required
21 by federal statutes and the agency's own regulations.

22 **FIRST CLAIM FOR RELIEF**

23 **VIOLATION OF THE RHA AND APA**

24 **ISSUANCE OF LOPS WITHOUT PROPER EVALUATION**

25 140. Plaintiffs re-allege paragraphs 1–140.

26 141. This First Claim for Relief challenges each of the LOPs identified in Exhibit A as
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1 individual final agency actions in violation of the RHA, its implementing regulations, and the
2 APA. This Claim is brought under the APA’s provisions for judicial review of final agency
3 actions, 5 U.S.C. §§ 701–706(2).

4 142. Section 10 of the RHA, 33 U.S.C. § 403, and the Corps’ implementing regulations
5 limit use of LOPs to activities where the Corps properly concludes that the proposed activities
6 “would be minor, would not have significant individual or cumulative impacts on environmental
7 values, and should encounter no appreciable opposition.” 33 C.F.R. § 325.2(e). The use of “and”
8 makes it clear that all three conditions must be met for an LOP, as opposed to a standard
9 individual permit, to be appropriate.

10 143. As of the date of this filing, the Corps has issued well over 400 LOPs to
11 commercial shellfish operations with potentially significant adverse environmental impacts on
12 Washington’s tidelands. *See* Exhibits A-D. Some of these operations cover hundreds of acres of
13 Washington’s shoreline, and many of them overlap with areas listed as essential habitats for
14 threatened or endangered species. Many of these operations are also heavily concentrated in
15 important coastal waterbodies and estuaries, such as Willapa Bay, Puget Sound, Grays Harbor,
16 and Squamish Harbor. *See* Exhibit D.

17 144. Each of the over 400 LOPs, which are final agency actions, authorize commercial
18 shellfish operations to operate for a number of years in sensitive coastal areas and habitats. Each
19 of these actions was approved without properly evaluating the environmental impacts, including
20 the risks to threatened and endangered species and the cumulative adverse effects on the
21 surrounding ecosystem, as required by the RHA, its regulations, and other applicable laws.

22 145. The total number of LOPs—and the potential threats to the environment and
23 Plaintiffs’ interests—will continue to increase as the Corps continues to improperly approve
24 commercial shellfish operations in Washington’s coastal areas.

25 146. Plaintiffs and other members of the public submitted multiple comments about the
26 potential or actual impacts and the extensive controversy surrounding commercial shellfish
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1 operations in Washington's coastal areas, before the Corps issued the challenged LOPs. Those
2 comments raised multiple concerns about specific types of operations and owners, as well as the
3 potential direct, indirect, and cumulative impacts of commercial shellfish operations on specific
4 waterbodies, species, and ecosystems that are important to Plaintiffs and their members. In light
5 of the prior litigation, and all of the comments submitted to the Corps before, during, and since
6 that litigation, the Corps was clearly on notice that there was or would be appreciable opposition
7 to these operations. Because the Corps unlawfully concluded that there was no appreciable
8 opposition for the operations at issue here, the Corps' decision to issue the challenged LOPs
9 without a public comment period violated its public notice and public interest review
10 requirements under the RHA and its implementing regulation.

11 147. In the decision documents associated with these LOPs, released to Plaintiffs
12 through FOIA requests, the Corps failed to adequately consider whether these LOPs would have
13 significant adverse impacts on the environment and wildlife. Although the Corps' decision
14 documents expressly acknowledged that plastics from shellfish operations pose a threat to the
15 environment and wildlife, the Corps failed to describe or quantify these impacts, much less
16 analyze them in their environmental assessment. The decision documents also confirmed that the
17 Corps failed to consider adverse impacts to wildlife and their habitats, despite evidence that the
18 operations were in areas with known threatened or endangered species, protected habitats, or
19 other important features. Further, the Corps ignored some known impacts, such as pesticide use,
20 entirely. Thus, because an LOP may only be issued in cases where proposed work would be
21 minor and would not have significant individual impacts on the environment, the Corps
22 improperly issued LOPs to shellfish operations without fully considering the potentially
23 significant adverse impacts of the proposed shellfish operation on the local environment.

24 148. In the decision documents associated with these LOPs, only made public through
25 FOIA requests submitted by Plaintiffs, the Corps failed to adequately consider whether these
26 LOPs would have cumulative impacts to the environment and wildlife. Although the Corps
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1 acknowledged that these operations are in sensitive areas and areas with a potentially high
2 pollution burden, the Corps failed to describe or quantify how proposed operations would
3 contribute or exacerbate existing threats. The Corps also failed to consider the full range of
4 impacts from proposed and existing commercial shellfish operations in surrounding areas and
5 connected waterbodies. Thus, because an LOP may only be issued in cases where proposed work
6 would be minor and would not have significant cumulative impacts on the environment, the Corps
7 improperly issued LOPs to shellfish operations without fully considering the potentially
8 significant cumulative impacts of the proposed operation on the local environment and wildlife.

9 149. In addition, the Corps failed to fully consider the public interest before issuing
10 LOPs, some of which cover hundreds of acres of tidelands in sensitive areas, without any public
11 notice or comment. Given Plaintiffs' interest in improving federal permitting and regulation of
12 commercial shellfish aquaculture in Washington, as well as Plaintiffs' previous litigation and
13 public comments on this matter, the Corps should have known that the agency would "encounter
14 appreciable opposition" from the Plaintiffs in this case, at the very least. Thus, because an LOP
15 may only be issued in cases where proposed work would be minor and encounter no appreciable
16 opposition, the Corps improperly issued LOPs to shellfish operations with significant adverse
17 impacts that would have certainly received opposition from Plaintiffs, and potentially other
18 residents, community groups, and environmental organizations. Rather than provide public notice
19 and opportunity for comment, as required for standard individual permits, the Corps instead
20 choose to hide from public view its shellfish aquaculture permitting activities following the
21 vacatur of NWP 48.

22 150. The Corps failed to adequately consider the cumulative impacts of these
23 operations. Instead of analyzing the cumulative effects of each proposed operation on the
24 environment and local wildlife against the environmental baseline, the Corps compared proposed
25 operations with existing degradation to conclude that there were no significant cumulative
26 impacts on the environment. The Corps also failed to consider the cumulative impact of
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1 approving multiple projects in the same area. Consequently, the Corps issued LOPs based on
2 improper cumulative impacts determinations. In issuing LOPs without conducting a proper
3 cumulative impacts analysis, each of the Corps' individual permitting decisions have violated the
4 RHA, and arbitrary, capricious, an abuse of discretion, not in accordance with law, and without
5 observance of procedures required by law, 33 U.S.C. § 403, its implementing regulations, and the
6 APA. 5 U.S.C. §§ 701–706.

7 151. The Corps has issued LOPs for commercial shellfish aquaculture operations in
8 jurisdictional waters without properly considering their impacts, including whether impacts would
9 be minor, whether there would be cumulative impacts, and whether there would likely be any
10 appreciable public opposition, in violation of the RHA, which is arbitrary, capricious, an abuse of
11 discretion, not in accordance with law, and without observance of procedures required by law, 33
12 U.S.C. § 403, its implementing regulations, and the APA. 5 U.S.C. §§ 701–706. Plaintiffs'
13 interests are and will continue to be harmed by unlawful LOPs.

14 152. The Corps' unlawful LOPs are causing injuries to the Plaintiffs, for which they
15 have no adequate remedy at law.

16 153. The Corps' unlawful LOPs are final agency actions subject to judicial review
17 under 5 U.S.C. §§ 706(2)(A) and (D), and each of these unlawful LOPs should be reversed and
18 set aside because the Corps issued these LOPs without the procedures required by law and are
19 arbitrary, capricious, an abuse of discretion, and/or contrary to law.

20 154. Pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, Plaintiffs should be
21 awarded costs, expenses, expert witness fees, and reasonable attorney fees associated with this
22 litigation.

23 **SECOND CLAIM FOR RELIEF**

24 **VIOLATION OF THE RHA AND APA**

25 **DECISION TO ISSUE LOPs TO OPERATIONS PREVIOUSLY AUTHORIZED UNDER NWP**

26 **48 WITHOUT PROPER EVALUATION**

1 155. Plaintiffs re-allege paragraphs 1–140 and 155.

2 156. This Second Claim for Relief challenges the Corps’ decision to issue LOPs to
3 operations previously authorized under the unlawful NWP 48, without completing the necessary
4 review or public notice, in violation of the RHA, its implementing regulations, and the APA.

5 157. Between 2009 and 2020, the Seattle District only issued 14 LOPs to commercial
6 shellfish operations in Washington’s tidelands. After this Court vacated the 2017 NWP 48 and
7 ordered the Corps to authorize commercial shellfish operations under individual permits in 2021,
8 the Corps at some point decided to allow or to convert the operations previously authorized under
9 the 2017 NWP 48 to LOPs. The Corps did so despite risks to the environment, wildlife, and the
10 public interest, and foreseeable opposition from Plaintiffs and other members of the public.

11 158. As of the date of this filing, the Corps has issued over 400 LOPs to commercial
12 shellfish operations. These operations all have potentially significant adverse environmental
13 impacts on Washington’s tidelands, either individually or cumulatively. All these LOP’s were
14 issued since this Court vacated the 2017 NWP 48 in 2021.

15 159. The Corps’ decision to allow or to convert NWP authorizations to LOPs violates
16 section 10 of the RHA, 33 U.S.C. § 403, and the Corps’ implementing regulations, which only
17 allows the Corps to issue LOPs when proposed activities “would be minor, would not have
18 significant individual or cumulative impacts on environmental values, and should encounter no
19 appreciable opposition.” 33 C.F.R. § 325.2(e).

20 160. The Corps continues to issue LOPs for commercial shellfish aquaculture
21 operations in jurisdictional waters without properly considering their impacts, including whether
22 impacts would be minor, whether there would be cumulative impacts, and whether there would
23 likely be any appreciable public opposition, in violation of the RHA, and which is arbitrary,
24 capricious, an abuse of discretion, not in accordance with law, and without observance of
25 procedures required by law, 33 U.S.C. § 403, its implementing regulations, and the APA. 5
26 U.S.C. §§ 701–706. Plaintiffs’ interests are and will continue to be harmed by the Corps’ decision
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1 to use LOPs to avoid the necessary public comment and environmental process for operations
2 previously authorized under the unlawful 2017 NWP 48.

3 161. The Corps' unlawful decision is causing injuries to Plaintiffs, for which they have
4 no adequate remedy at law.

5 162. The Corps' decision to allow or to convert NWP 48 authorizations to LOPs was a
6 final agency action subject to judicial review under 5 U.S.C. §§ 706(2)(A) & (D).

7 **PRAYERS FOR RELIEF**

8 WHEREFORE, the Plaintiffs respectfully request that the Court:

- 9 1. Adjudge and declare that the Corps violated the RHA and APA in issuing LOPs
10 for work in jurisdictional waters without adequately supporting its determination
11 that the proposed work would be minor and not have significant individual or
12 cumulative impacts on environmental values and would encounter no appreciable
13 opposition;
- 14 2. Adjudge and declare that the Corps violated the RHA, and APA in deciding to
15 allow or to convert LOPs to operations previously authorized under NWP 48
16 without adequate review of the risks to the environment, wildlife, and public
17 interest factors;
- 18 3. Adjudge and declare that the Corps violated the RHA, its implementing
19 regulations, and the APA in issuing each and all of the final LOPs identified in
20 Exhibit A;
- 21 4. Vacate or set aside the LOPs already issued in violation of the RHA and APA and
22 enjoin the Corps from continuing to issue LOPs for work in jurisdictional waters,
23 and/or which have more than minor impacts, significant cumulative impacts, or
24 that would encounter appreciable opposition;
- 25 5. Award the Plaintiffs their fees, costs, expenses, and disbursements, including
26 reasonable attorneys' fees, associated with this litigation under the Equal Access to
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Justice Act, 28 U.S.C. § 2412; and

6. Grant such other relief as this Court deems just and proper.

DATED: October 19, 2023

Respectfully Submitted,

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