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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

FIRST AMENDED COMPLAINT

(Environmental and Administrative
Procedure Act Claims)

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, under the 2021
7 issuance of Nationwide Permit 48 (NWP 48) and through “Letters of Permission” (LOPs) under
8 the Rivers and Harbors Act. These challenges are based on the Corps’ failure to comply with (1)
9 the National Environmental Policy Act (NEPA); (2) the Clean Water Act (CWA); (3) the
10 Endangered Species Act (ESA); (4) the Rivers and Harbors Act (RHA); and/or (5) the
11 Administrative Procedure Act (APA), when authorizing such expansion.

12 2. Defendants violated NEPA because they (1) improperly determined that activities
13 authorized under NWP 48 would not significantly adversely affect the environment, and (2) failed
14 to rest a Finding of No Significant Impact (FONSI) on an adequate Environmental Assessment,
15 including a hard look at all direct, indirect, and cumulative impacts of shellfish aquaculture
16 permitting—or alternatively to complete an Environmental Impact Statement (EIS) with proper
17 NEPA analysis in it. Defendants violated the CWA in the issuance and administration of NWP 48
18 by authorizing activities that result in more than minimal adverse environmental impacts and
19 contribute to significant degradation of waters of the United States. Defendants violated RHA
20 Section 10 and their own regulations by (1) failing to notify the public and provide opportunity to
21 comment on LOPs, and (2) authorizing activities that result in more than minimal adverse
22 environmental impacts. Defendants violated the ESA by failing to initiate consultation on 2021
23 NWP 48 as required by Section 7. Defendants violated the APA by making arbitrary and
24 capricious decisions not in accordance with the law.

25 3. By initiating this action, Plaintiffs seek to:

26 a) Obtain a declaration that the Corps violated (again) NEPA and its
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1 implementing regulations when it improperly found when issuing NWP 48 that
2 activities in Puget Sound authorized under NWP 48 would not significantly
3 adversely affect the environment, and decided not to prepare an EIS;

4 b) Obtain a declaration that the Corps (again) violated the CWA and its
5 implementing regulations when it issued NWP 48;

6 c) Obtain a declaration that the Corps (again) violated the CWA and its
7 implementing regulations when it failed to take required actions to ensure that
8 activities authorized under NWP 48 would not have more than minimal adverse
9 impacts on the environment or significantly degrade waters of the United States;

10 d) Obtain a declaration that the Corps violated the CWA and RHA, including its
11 own regulations, when it issued hundreds of LOPs to commercial shellfish
12 activities previously authorized under NWP 48, despite those activities' potentially
13 significant individual or cumulative impacts on environmental values, and when
14 the Corps knew or should have known that those activities would have
15 encountered appreciable opposition;

16 e) Obtain a declaration that the Corps violated the ESA and its implementing
17 regulations when it issued NWP 48;

18 f) Obtain an order vacating, setting aside, and/or remanding the Corps' (1)
19 authorizations of activities under NWP 48 since the 2021 issuance of that permit;
20 and (2) the LOPs for projects previously authorized under NWP 48;

21 g) Obtain an order enjoining the Corps from issuing any further authorizations
22 under NWP 48 in Washington, and any further LOPs for projects previously
23 authorized under NWP 48, until the Corps complies with NEPA by producing a
24 new supplemental document; and/or complies with the ESA by completing
25 consultation; and/or complies with the CWA by completing adequate effects
26 analyses, to ensure that authorized activities will have minimal effects on the
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1 environment and comply with 33 U.S.C. § 1344(b)(1) and the regulations adopted
2 under that law; and/or the RHA and the regulations for issuance of LOPs.

3 **JURISDICTION**

4 4. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 (federal
5 question); § 1346(a)(2) (civil action against the United States); § 1361 (action to compel officer of
6 the United States to perform his or her duty); § 2201 (authorizing declaratory relief); and § 2202
7 (authorizing injunctive relief and any other “necessary and proper relief”), and 5 U.S.C. § 702
8 (judicial review of agency action under the APA). This action arises under the laws of the United
9 States, including the APA, 5 U.S.C. §§ 701–706; NEPA, 42 U.S.C. §§ 4321–4370m; ESA, 16
10 U.S.C. §§ 1531–44; RHA, 33 U.S.C. § 403; and CWA, 33 U.S.C. § 1244. An actual, justiciable
11 controversy exists between Plaintiff and Defendants. The requested relief is proper under 28
12 U.S.C. §§ 2201 (declaratory relief) and § 2202 (injunctive relief), and 5 U.S.C. §§ 705 and § 706.

13 **VENUE**

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

19 **PARTIES**

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

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

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

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

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

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

12 12. Specifically, regarding the challenged action, in 2017, CFS actively engaged with
13 the Corps on the proposed reissuance of NWP 48, including the submission of several comments
14 urging the Corps to forgo adopting NWP 48, at least in its current form, and to protect the unique
15 and essential aquatic ecosystems and shorelines in Washington. When the Corps issued 2017
16 NWP 48, CFS brought a lawsuit in this Court challenging the Corps' compliance with the CWA,
17 NEPA, ESA, and the APA. *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Eng'rs*,
18 417 F. Supp. 3d 1354 (W.D. Wash. 2019). This Court vacated that permit and remanded to the
19 Corps to comply with the CWA and NEPA, 466 F. Supp. 3d 1217 (W.D. Wash. 2020), and the
20 Ninth Circuit affirmed. 843 F. App'x 77 (9th Cir. 2021). When the Corps first announced that it
21 planned to reissue the NWP 48 in September 2020, CFS commented on the draft permit and again
22 urged the Corps to follow CWA, NEPA, and the ESA, as well as this Court's order. *See*
23 *Comments Submitted on Proposal to Reissue and Modify Nationwide Permits, COE-2020-0002*
24 *(Nov. 16, 2020)*.

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

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

19 15. Defendant **Lieutenant General Scott A. Spellmon** is the Commanding General
20 and Chief of Engineers of the Corps. Lieutenant General Spellmon is named as a defendant solely
21 in his official capacity. The Commanding General and Chief of Engineers is charged with
22 supervising and managing all Corps' decisions and actions, including the evaluation of Corps'
23 decisions and actions under NEPA and section 404 of the CWA. The Chief of Engineers is
24 authorized to issue NWPs and charged with reviewing NWPs and proposing modifications,
25 revocations, and reissuance, as well as preparing NEPA documents and Section 404(b)(1)
26 Guidelines compliance analyses for proposed NWPs.

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

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

LEGAL BACKGROUND

I. ADMINISTRATIVE PROCEDURE ACT

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

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

10 **II. CLEAN WATER ACT**

11 20. The purpose of the CWA is “to restore and maintain the chemical, physical, and
12 biological integrity of the Nation’s waters.” 33 U.S.C. § 1251. To achieve this objective, section
13 404 of the CWA establishes a program for regulating the discharge of dredge or fill material into
14 waters of the United States, including wetlands. *Id.* § 1344. Section 404 requires a permit for
15 discharges of dredged or fill material into waters of the United States. Section 404 authorizes the
16 Secretary of the Corps, acting through the Chief of Engineers, to issue permits for the discharge
17 of dredged or fill material into waters of the United States when certain conditions are met.
18 Concurrent regulatory authority exists under section 10 of the RHA, 33 U.S.C. § 403.

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

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

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

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

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

- 20 a) There is a practicable alternative to the proposed discharge that would have
21 less adverse effect on the aquatic ecosystem, so long as such alternative does
22 not have other significant adverse environmental consequences; or
23 b) The proposed discharge will result in significant degradation of the aquatic
24 ecosystem; or
25 c) The proposed discharge does not include all appropriate and practicable
26 measures to minimize potential harm to the aquatic ecosystem; or
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1 d) There does not exist sufficient information to make a reasonable judgment as
2 to whether the proposed discharge will comply with the Guidelines.

3 26. In addition, the Corps' own "public interest review" rules prohibit the issuance of a
4 Section 404 permit or an NWP authorization if it would be contrary to the public interest. 33
5 C.F.R. § 320.4. In evaluating this issue, the Corps must weigh the benefits of a proposed project
6 against its reasonably foreseeable detriments, considering all relevant factors and their cumulative
7 impacts. Relevant factors include conservation, general environmental concerns, fish and wildlife
8 values, water quality, and the general needs and welfare of the people.

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

15 28. Upon receipt of a PCN or application, the district engineer must determine whether
16 the activity will result in more than minimal individual or cumulative adverse environmental
17 effects or may be contrary to the public interest. A district engineer must perform a case-by-case
18 review of each PCN or application submitted under an NWP to make these determinations. In
19 doing so, the district engineer must consider the environmental setting, the resources affected, the
20 functions of affected resources, the degree to which resources perform those functions, the extent
21 of loss of aquatic resource functions, the duration of adverse effects, the importance of lost
22 aquatic resource functions, and required mitigation.

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

3 **III. RIVERS AND HARBORS ACT**

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

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

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

18 **IV. NATIONAL ENVIRONMENTAL POLICY ACT**

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

23 34. As provided by law, the Corps has adopted regulations to implement NEPA. The
24 Corps’ NEPA regulations supplement—and do not supersede—other NEPA regulations.

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

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

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

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

24 39. Under NEPA, major federal actions may include new and continuing activities,
25 including projects and programs entirely or partly financed or approved by federal agencies; new
26 or revised agency rules, regulations, plans, policies, or procedures.

1 40. An agency must consider the impacts from a proposed action. An impact means
2 changes to the human environment from the proposed action or alternatives that are reasonably
3 foreseeable, including effects that are later in time or farther removed in distance from the
4 proposed action or alternatives. Effects include ecological, aesthetic, historic, cultural, economic,
5 social, or health effects.

6 41. In considering whether the effects of a proposed action are significant, agencies
7 shall analyze the potentially affected environment and degree of the effects of the action. When a
8 proposed action is likely to have significant effects, the agency should prepare an EIS.

9 42. Section 102(2)(E) requires agencies to “study, develop, and describe appropriate
10 alternatives to recommended courses of action in any proposal which involves unresolved
11 conflicts concerning alternative uses of available resources.” Section 102(2)(E) applies to both
12 EAs and EISs, so an EA must include “appropriate alternatives” when a proposal involves
13 unresolved conflicts concerning alternatives uses of available resources.

14 43. A FONSI must be supported, and if mitigation measures are relied upon to avoid
15 significance, they must be developed to a reasonable degree: a perfunctory description, or mere
16 listing of mitigation measures, without supporting analytical data, is insufficient to support a
17 finding of no significant impact. Particularly in situations where the agency is relying upon
18 mitigation to support a decision to rely upon an EA and a FONSI—and therefore not to prepare an
19 EIS—the agency must carefully evaluate any proposed mitigation and engage in on-going
20 monitoring to ensure that mitigation measures are being followed. Mitigation measures used to
21 support a FONSI must be enforceable and the agency must have sufficient resources to perform or
22 ensure performance of mitigation measures.

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

1 **V. ENDANGERED SPECIES ACT**

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

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

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

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

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

10 50. Formal consultation must be reinitiated by the Corps or the Services if
11 discretionary federal involvement or control over the action has been retained or is authorized by
12 law, and:

- 13 a) the amount or extent of taking specified in the incidental take statement is
14 exceeded;
- 15 b) new information reveals effects of the action that may affect listed species or
16 critical habitat in a manner or to an extent not previously considered;
- 17 c) the action is modified in a manner that causes an effect to the listed species or
18 critical habitat that was not considered in the biological opinion; or
- 19 d) a new species is listed or critical habitat designated that may be affected by the
20 identified action.

21 51. Section 7(a)(1) requires the Corps, in consultation with and with the assistance of
22 the Services, to utilize its authority in furtherance of the purposes of the ESA by carrying out
23 programs for the conservation of endangered and threatened species. Federal agencies have an
24 independent and substantive obligation to insure that their actions are not likely to jeopardize the
25 continued existence of endangered or threatened species or adversely modify critical habitat.
26 Indeed, a “no jeopardy” biological opinion from NMFS or FWS does not absolve the action
27

1 agency of its independent duty to ensure that its actions comply with the ESA.

2 **FACTUAL BACKGROUND**

3 **I. INDUSTRIAL SHELLFISH AQUACULTURE IN WASHINGTON**

4 52. Shellfish, including oysters, clams (including geoducks), and mussels, have been
 5 harvested and grown in Washington for over 150 years, but cultivation has expanded significantly
 6 since the Corps’ initial issuance of NWP 48 in 2007, and continued maintenance of the NWP 48
 7 program until it was vacated in 2020. Today, industrial shellfish aquaculture exist throughout
 8 Washington’s coast and intertidal areas, including Willapa Bay, Grays Harbor, Hood Canal, and
 9 Puget Sound. In 2015, commercial shellfish aquaculture occupied one-quarter of the state’s total
 10 shoreline, roughly 50,000 shoreline acres. Today, this number has increased due to the Corps’
 11 issuance of the 2017 and 2021 NWP 48. According to the Corps’ estimates, commercial shellfish
 12 operations authorized under the 2017 NWP 48 cover 72,000 coastal acres, covering roughly one-
 13 third of Washington’s total shoreline.



25 ***Washington Inland Waters in***
 26 ***U.S. Army Corps, Programmatic Biological Assessment (2015)***

27 53. The vast majority of this acreage (approximately 90%) is found in Willapa Bay, a

1 large bay located in Pacific County, Washington. The 2017 NWP 48 authorized 50,000 acres of
2 commercial shellfish aquaculture operations in Willapa Bay. In comparison, the 2012 NWP 48
3 authorized only 36,000 acres. Willapa Bay is a major estuary located along Washington’s Pacific
4 Coast, covering 88,000 acres of diverse ecosystems that provides essential nearshore habitat for
5 several aquatic species, including endangered and threatened fish, whales, and shorebirds. The
6 2017 NWP 48 also authorized over 7,500 acres of commercial shellfish operations in Grays
7 Harbor, another estuary located on the Washington’s Pacific Coast, just north of Willapa Bay.

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

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

26 56. Shellfish are raised either directly on the tidal bed (“bottom culture”), or with some
27

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



16 *Figure 1: Oyster Bags & Geoduck Tubes, Totten Inlet, South Puget Sound (2009)*



17 *Figure 2: Geoduck Tubes, Totten Inlet, South Puget Sound (2008)*



23 *Figure 3: Oyster Long Lines, Willapa Bay*



24 *Figure 4: New Geoduck Installation, Eld Inlet, South Puget Sound (2013)*

25 57. The same intertidal areas and inland bays that support shellfish aquaculture are
 26 also home to numerous wildlife species, including threatened and endangered species. This
 27

1 shoreline habitat is essential for many species, including invertebrates (such as benthic
2 invertebrates that are the backbone of the food chain and larger, commercially important
3 Dungeness crab); finfish (including forage fish like herring and many varieties of salmon); and
4 birds (migratory and shorebirds). These areas serve as nurseries, feeding grounds, and have
5 important roles in cycling nutrients.

6 58. Commercial shellfish aquaculture harms the aquatic ecosystem. *Coal. to Protect*
7 *Puget Sound Habitat*, 417 F. Supp. 3d at 1359, 1362–63. The 2021 EA is less protective than the
8 prior iterations of NWP 48 because it removes restrictions on acreage and time.

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

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

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

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

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

25 64. Commercial shellfish aquaculture operations also impact forage fish, like Pacific
26 herring (a keystone forage fish species in the area), surf smelt, and sand lance. Forage fish are an
27

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

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

16 **A. IMPACTS TO EELGRASS**

17 66. One major impact from shellfish aquaculture is the reduction and removal of
18 eelgrass and other submerged aquatic vegetation.

19 67. Much of the intertidal area in Washington still supports eelgrass (*zostera marina*
20 and other varieties) and other submerged aquatic vegetation, although it is declining across the
21 state and in the rest of the world. Eelgrass is a highly valued and protected native habitat for many
22 species of fish, invertebrates, and birds. Eelgrass is known as an "ecosystem engineer" because it
23 can partially create its own habitat by slowing down water flow, while its roots and rhizomes bind
24 and stabilize sediments. Eelgrass is a direct food source for many organisms and serves as
25 nurseries and juvenile habitat for various fauna, including herring, Dungeness crab, and several
26 species of juvenile salmon. Further, eelgrass provides organic material, aids in sediment/substrate
27

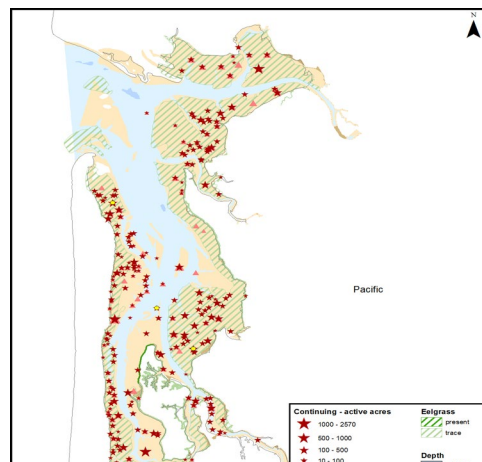
1 nutrient cycling and release, and improves water quality through oxygen production and nutrient
 2 absorption. Because eelgrass absorbs carbon dioxide and produces oxygen, it provides mitigation
 3 against ocean acidification (decrease in ocean pH caused by increasing atmospheric CO2 levels).

4 68. The vegetated shallows that support eelgrass are considered “special aquatic sites”
 5 under the CWA Section 404(b) Guidelines.

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

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

15 71. Shellfish aquaculture significantly overlaps with eelgrass. The Corps estimates that
 16 66% of the active aquaculture acreage overlaps with eelgrass, not including the authorized
 17 acreage currently fallow, which is even more likely to support eelgrass. Aquaculture exists in
 18 about 50% of the eelgrass in Willapa Bay, as shown below.



19
 20
 21
 22
 23
 24
 25
 26 **Figure 5: Willapa Bay Continuing Acres and Eelgrass from**
U.S. Army Corps, Programmatic Biological Assessment (2015)

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

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



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

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

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

1 75. Washington is the only state that allows pesticide use on shellfish beds. Currently,
2 one herbicide is allowed in Willapa Bay/Grays Harbor, and another application for insecticide use
3 is pending.

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

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

23 78. In addition to the ongoing use of herbicide to kill eelgrass in Willapa Bay/Grays
24 Harbor, oyster growers recently attempted to obtain a NPDES permit from the Washington
25 Department of Ecology for imidacloprid, a systemic neurotoxin, to kill burrowing and ghost
26 shrimp. As a neonicotinoid, imidacloprid is especially toxic to invertebrates, highly effective in
27

1 small doses, persistent in the environment, and moves easily in water. Imidacloprid was selected
2 as a replacement to the phased-out carbaryl, a likely carcinogen harmful to ESA-listed species
3 like green sturgeon and salmon.

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

15 80. In 2017, growers’ association again applied for a permit to spray imidacloprid on
16 shellfish beds, but this time the Department of Ecology found that the proposal did meet
17 Washington’s environmental sediment and water quality protection laws and denied the permit in
18 2018. The Willapa-Grays Harbor oyster growers appealed Ecology’s permit denial to the
19 Pollution Control Hearings Board, and although the growers settled their appeal, they intend to
20 find alternative chemicals and may request an imidacloprid permit in the future.

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

22 81. Another consequence of industrial shellfish aquaculture is the introduction of
23 plastic pollution to the intertidal waters and beaches, with grave impacts to wildlife, aesthetics,
24 recreation, and food safety.

25 82. According to the Corps, there are currently 34,441 acres of shellfish operations
26 with artificial structure. The Corps also estimates that 23,409 acres of commercial shellfish
27

1 operations currently use plastic gear, which is roughly half of all acres the Corps says it
2 authorized under the previous iteration of NWP 48 in 2017.

3 83. As noted above, plastic PVC tubes and anti-predator netting (HDPE) are heavily
4 used in clam and geoduck culture, and other types of plastics like racks and bags and PVC stakes
5 and polyolefin ropes are used for oyster culture. Shellfish plastic gear can exclude native species
6 from their habitat, especially the anti-predator netting used to protect farmed shellfish from
7 predators in the local environment. Anti-predator nets are harmful to wildlife that are exposed to
8 debris or trapped in loose netting. Plastic cages and other artificial structures can also significantly
9 change the habitat, inhibiting wildlife movement and increasing habitat fragmentation. Despite
10 providing little benefit to shellfish producers, and posing a serious threat to wildlife, plastic
11 structures and gear are frequently used in commercial shellfish aquaculture.

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

18 85. Microplastics from nets, which are used frequently in commercial shellfish
19 operations, as show in the examples below, have been shown to reduce shellfish reproductivity,
20 mobility, and survival, and they are often ingested by farmed shellfish grown in Washington's
21 coastal waters for human consumption. In addition, strands of polyolefin ropes from oyster
22 longlines have been found inside shellfish grown near operations that use this type of plastic gear.
23 Hence, not only is the shellfish industry contributing to the global issue of marine plastic
24 pollution, but they are also hurting themselves by polluting the waters in which they produce
25 shellfish and threatening the health and survival of their very own product.

1 **D. HARM TO MARINE LIFE**

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

5 87. The impacts that result from that competition are obvious and reverberate
6 throughout the food chain. Less food for forage fish means a reduced environmental carrying
7 capacity for those forage fish. Fewer forage fish means a reduced carrying capacity for often-
8 endangered salmonids. Fewer salmonids mean less food for Orca whales, and other large
9 predators that rely upon the existence of healthy populations of those fish.

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

15 89. Plastic pollution from aquaculture operations adversely affects marine ecosystems.
16 When aquatic species (including farmed shellfish) ingest debris, they can suffer abrasions,
17 obstructions, and other serious physical injuries. Further, microplastics are a “poison pill” to
18 wildlife, impairing shellfish growth, development, mobility, reproductivity, and survival.
19 Microplastics absorb pollutants in the environment, increasing toxicity and bioaccumulation for
20 species that ingest microplastics, such as forage fish at the bottom of the food chain and shellfish
21 produced for human consumption. In addition, entanglements with hanging lines or detached gear
22 can cause death or serious injury to wildlife, including endangered whales. These injuries are
23 particularly harmful for juvenile salmon and other species that travel long distances for feeding
24 and rearing.

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

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

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

7 91. The 2007 NWP 48 only included existing operations as of 2007 (an operation "that
8 has been granted a permit, license, or lease from a state or local agency specifically authorizing
9 commercial aquaculture activities and which has undertaken such activities"). 72 Fed. Reg.
10 11,092, 11,145 (Mar. 17, 2007). Like later iterations, it authorized the installation of buoys, floats,
11 racks, trays, nets, lines, tubes, containers, and other structures necessary for commercial
12 aquaculture activity, and discharges of dredged or fill material necessary for shellfish seeding,
13 rearing, cultivating, transplanting, and harvesting activities. The Seattle District adopted this
14 NWP and consulted with NMFS regarding impacts to listed species, including as part of the
15 action several conservation measures to be attached to authorizations under nationwide permit.

16 92. In 2012, the Corps reissued NWP 48, this time extending the permit to cover new
17 shellfish aquaculture operations, although any new activity could not directly affect more than
18 1/2-acre of submerged aquatic vegetation beds (e.g., eelgrass). 77 Fed. Reg. 10,184, 10,228-
19 10,232 (Feb. 21, 2012). An activity was considered "existing" if it was within "the area in which
20 the operator is currently authorized to conduct commercial shellfish aquaculture activities, as
21 identified through a lease or permit issued by an appropriate state or local government agency, a
22 treaty, or any other easement, lease, deed, or contract which establishes an enforceable property
23 interest for the operator."

24 93. The Seattle District adopted the renewed 2012 NWP 48 for Washington, with ten
25 general conditions and one regional condition specifically for NWP 48: "The commercial harvest
26 of clams by means of hydraulic escalator harvester equipment is not authorized by this NWP."
27

1 Seattle District, *Supplement to National Decision Document for 2012 Nationwide Permit 48 and*
2 *Regional General Conditions*, 42–45 (March 19, 2012). In its Supplemental Decision Document,
3 the Seattle District stated that it already completed a programmatic ESA consultation for existing
4 commercial shellfish aquaculture in 2009 and attached 16 special conditions to all activities
5 authorized under the 2012 NWP 48.

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

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

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

24 97. The 2017 permit included several significant changes, the biggest of which is a
25 revised definition of “new” commercial aquaculture, to “an operation in a project area where
26 commercial shellfish aquaculture activities have not been conducted during the last 100 years.”
27

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

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

23 99. Plaintiffs and others commented to the Corps that the permit approval would cause
24 cumulatively adverse impacts, especially with the new 100-year loophole definition for “new”
25 operations. Plaintiffs urged the Corps not to re-issue NWP 48 as written, to allow regional and
26 District Engineers to utilize regional general or individual permits, or if the Corps did decide to
27

1 move forward with NWP 48, to complete a full EIS rather than an EA and to undertake ESA
2 consultation with the Services. CFS, Comments on Proposal to Reissue and Modify Nationwide
3 Permits; Docket Number COE-2015-0017/RIN 0710-AA73 (August 1, 2016).

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

9 101. The Corps' 2017 Decision Document for NWP 48 did not address pesticide or
10 plastic gear use on shellfish beds: "The Corps does not have the authority to regulate discharges
11 of pesticides. Discharges of pesticides may require authorization by states or the U.S. EPA under
12 section 402 of the Clean Water Act. Division engineers can impose regional conditions to address
13 the use of plastics, if plastic materials are used for the activities regulated under the Corps'
14 authorities." *Id.* at 9.

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

20 103. Plaintiff Coalition challenged the 2012 issuance of NWP 48, and collectively,
21 Plaintiffs Coalition and CFS challenged the 2017 issuance of NWP 48. *See* 2:16-cv-00950-RSL;
22 2:17-cv-01209-RSL. In October 2019, the U.S. District Court for the Western District of
23 Washington held that the 2017 permit violated the CWA and NEPA because the Corps failed to
24 adequately consider the individual and cumulative impacts on the environment. *Coal. to Protect*
25 *Puget Sound Habitat*, 417 F. Supp. 3d at 1367. Specifically, the court held that the Corps'
26 minimal impacts finding was improperly based on "(1) selectively chosen statements from the
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1 scientific literature, (2) the imposition of general conditions with which all activities under
2 nationwide permits must comply, and (3) the hope that regional Corps districts will impose
3 additional conditions and/or require applicants to obtain individual permits if necessary to ensure
4 that the adverse impacts will be minimal.” *Id.* at 1359. In June 2020, the district court vacated the
5 permit, and in February 2021, the Ninth Circuit affirmed the district court’s decision. *Coal. to*
6 *Protect Puget Sound Habitat*, 466 F. Supp. 3d 1217 (W.D. Wash. 2020), *aff’d*, 843 F. App’x 77
7 (9th Cir. 2021).

8 **B. 2021 NWP 48 ISSUANCE**

9 ***i. National Headquarters***

10 104. On September 15, 2020, the Corps published a proposed regulation to reissue with
11 modifications the existing NWPs and associated general conditions and definitions, along with
12 five new NWPs. 85 Fed. Reg. 57298.

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

15 106. On January 13, 2021, the Corps reissued several NWPs authorizing certain
16 activities that require Corps permits under CWA Section 404 and/or RHA Section 10, 33 U.S.C. §
17 403, including NWP 48 for commercial shellfish aquaculture (re-titled as commercial shellfish
18 *mariculture* activities). Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 2744.
19 NWP 48 went into effect on March 15, 2021.

20 107. The Corps’ issuance of NWP 48 constitutes a final agency action.

21 108. The Corps estimated that the 2021 NWP 48 “will be used approximately 331 times
22 per year on a national basis, resulting in impacts to approximately 13,684 acres of waters of the
23 United States [per year],” or 68,420 acres of water over a five-year period. 2021 HQ Decision
24 Doc. at 123. The Corps further estimated that “approximately 1,805 activities could be authorized
25 over a five-year period until this NWP expires, resulting in impacts to approximately 69,420 acres
26 of waters of the United States, including jurisdictional wetlands.” *Id.* at 123–24.

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

7 110. The Corps did not analyze site-specific or regional cumulative impacts before
8 issuing the 2021 NWP 48. In the 2021 NWP 48 Decision Document, the Corps expressly admits
9 to limiting its impact analysis to national-scale impacts. 2021 HQ Decision Doc. at 41, 75–76.
10 The Corps bluntly claims that information regarding site-specific impacts is not readily available.
11 *See, e.g., id.* at 36 (“The environmental impacts of authorized activities during the period the
12 NWP is in effect is dependent on the current environmental settings in which these activities will
13 occur, and quantitative data on those current environmental settings is not available.”); 41 (“Due
14 to the large geographic scale of the affected environment (i.e., the entire United States), . . . it is
15 only practical to describe the affected environment in general terms. In addition, it is not possible
16 to describe the environmental conditions for specific sites where the NWPs may be used to
17 authorize eligible activities.”). The 2021 NWP 48 Decision Document also uses identical
18 language to describe the “affected environment” as the 2017 Decision Document. *Compare id.* at
19 41 *with* 2017 HQ Decision Document at 25.

20 111. In addition, the Corps did not analyze quantitative data regarding potential
21 impacts. In the 2021 NWP 48 Decision Document, the Corps expressly admits to limiting its
22 impact analysis to a “qualitative analysis” of the general, national-scale impacts. 2021 HQ
23 Decision Document at 75–76 (“Given the geographic scope in which this NWP can be used to
24 authorize activities . . . and the wide variability in aquatic resource[s] . . . from site to site and from
25 region to region, the analysis of environmental consequences is a qualitative analysis.”) (emphasis
26 added). The Corps bluntly claims that quantitative data regarding nationwide impacts is not
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1 available. *See, e.g., id.* at 60 (“There is little national-level information on the current ecological
2 state of the Nation’s wetlands, streams, and other aquatic resources, or the general degree to
3 which they perform various ecological functions . . .”); 75 (“The analysis of environmental
4 consequences in this environmental assessment is a qualitative analysis because of the lack of
5 quantitative data at a national scale on the various human activities and natural factors that may
6 concurrently alter the current environmental setting during the 5-year period this NWP is
7 expected to be in effect . . .”).

8 112. The Corps also fails to provide quantitative data regarding the cumulative effects
9 of NWP 48 other than the estimated number of times the permit will be used on a national basis
10 over five years. 2021 HQ Decision Doc. at 123–24. Despite recognizing that “repetitive
11 disturbances at a single site over time” and “multiple activities occurring in a geographic area
12 over time” can have cumulative effects, the Corps admits to limiting its cumulative analysis to the
13 agency’s estimates on the number of activities authorized on a nationwide scale, ignoring data on
14 the nature or location of the estimated uses. *Id.* at 36, 67–68 (“[T]he cumulative impacts of this
15 NWP are the product of how many times this NWP is used . . . across the country during the 5-
16 year period this NWP is anticipated to be in effect.”).

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

25 114. The Corps also limits its evaluation of cumulative impacts to certain activities. For
26 example, the Corps ignores shellfish seeding and other activities that will increase as a result of
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1 permitted activities because these activities “by themselves are not considered to be discharges of
2 fill material regulated under section 404.” Decision Document at 122. Likewise, Corps refuses to
3 analyze the foreseeable impacts of pesticide use because it does not have direct permitting
4 authority over pesticides. *Id.* at 10, 81, 96.

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

19 116. In the 2021 NWP 48 issuance, the Corps declined to impose new protections for
20 seagrass impacts, referring to the prospect as “impractical.” Decision Document at 14.

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

2 118. Before the Corps re-issued the 2021 NWP 48, Plaintiffs and others submitted
3 comments to the Corps to warn the agency that approving the proposed permit would cause
4 significant direct, indirect, and cumulative adverse impacts. Plaintiffs urged the Corps to conduct
5 a thorough analysis of all potential impacts of issuing the 2021 NWP 48.

6 119. Neither the final 2021 NWP 48 nor the Decision Document address the concerns
7 Plaintiffs raised during the public comment period. For example, the Decision Document does not
8 fully consider the adverse impacts of pesticide use or plastics on commercial shellfish operations.
9 Nor does the agency analyze the potential impacts on salmonids, Orca whales, and other
10 threatened and endangered species. Nor does the Decision Document evaluate the impacts of
11 NWP 48 in conjunction with hundreds of LOPs for similar industrial-scale aquaculture projects,
12 and/or in conjunction with multiple “standard” or individual permits for industrial aquaculture
13 projects. *See e.g.*, Exhibit D (maps of currently issued LOPs and standard permits).¹

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

19 ***ii. Seattle District***

20 121. On September 30, 2020, the Seattle District of the Corps issued a Special Public
21 Notice for its proposed adoption of NWP 48, and the accompanying proposed regional conditions.
22 This Special Public Notice was not published in the Federal Register, and the comment period for
23 this Special Public Notice differed significantly from the opportunities to comment during the
24

25 ¹ On information and belief, the Seattle District has authorized at least 19 operations under the
26 2021 NWP 48. However, the specific locations of these operations are not currently available to
27 Plaintiffs. Consequently, those additional NWP 48 authorizations are not yet included in the
spreadsheet provided in Exhibit A or the maps provided in Exhibit D.

1 prior issuances of NWP 48.

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

5 123. Plaintiffs and other members of the public provided comments to the Seattle
6 District describing numerous substantive issues with the proposed NWP and regional conditions,
7 urging the District to forego NWP 48, and instead use individual permits, or regional general
8 permits, but only following the requisite cumulative and other impact analyses pursuant to NEPA
9 and CWA. In March 2021, the Seattle District decided to ignore these comments and finalized the
10 only proposed condition specific to NWP 48. *See* SPN of Final Regional Conditions at 18.

11 124. On information and belief, the Seattle District has authorized a number of
12 operations under the 2021 NWP 48.

13 **C. LETTERS OF PERMISSION**

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

20 126. Most of the re-permitted operations following this Court’s vacatur of 2017 NWP
21 48 were started as individual permits (or “standard permits”) and then withdrawn to become
22 LOPs. As of the date of this filing, the Seattle District has issued 424 LOPs to shellfish operations
23 in Washington’s tidelands from February 2021 to March 2022, and this number will likely
24 continue to increase as the Seattle District continues to grant LOPs to commercial shellfish
25 operations in 2022. Exhibit A. On information and belief, based on permit information released to
26 Plaintiffs under the Freedom of Information Act (FOIA), the Seattle District has granted over 400
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1 LOPs following vacatur of 2017 NWP 48, the vast majority of which were formerly authorized
2 under the 2012 and 2017 NWP 48.

3 127. From January to August 2021, the Corps issued 123 LOPs for aquaculture
4 operations in Puget Sound and Hood Canal, covering over 522 acres of diverse ecosystems for the
5 cultivation of geoduck clams, oysters, mussels, and other shellfish types. From March to July
6 2021, the Corps issued 4 LOPs for oyster operations in Grays Harbor, covering over 570 acres of
7 Washington's tidelands. During this same period, the Corps issued 4 LOPs for oyster operations
8 in Willapa Bay, covering over 457 acres.

9 128. From May to July 2021, the Corps issued several LOPs for new aquaculture
10 operations across Washington, covering over 226 acres for the cultivation of geoduck clams,
11 oysters, and other shellfish types.

12 ***i. Wildlife Impacts***

13 129. The Corps has issued hundreds of LOPs for individual commercial shellfish
14 operations with adverse effects on aquatic species and federally threatened or protected species. In
15 multiple decision documents associated with LOPs issued to commercial shellfish operations, the
16 Corps acknowledged that the potential effects on local wildlife and their habitats but failed to
17 specify or quantify these effects. *See, e.g.*, Decision Document (“DD”) (NWS-2007-01147-AQ)
18 at 16 (approving 15 acres for oyster cultivation, despite acknowledging that the “proposed
19 shellfish operation may alter the habitat characteristics of tidal waters which provide habitat to
20 many species of fish and wildlife within Grays Harbor”); DD (NWS-2020-00356-AQ) at 14, 18
21 (acknowledging that the “proposed shellfish operation may alter the habitat . . . within Pickering
22 Passage”); DD (NWS-2020-01154-AQ) at 15 (acknowledging that some “species would be
23 adversely affected” by changes); DD (NWS-2020-00592-AQ) at 17 (concluding that wildlife
24 impacts “will be temporary and minimal” despite acknowledging that the “[e]quipment used for
25 the proposed shellfish aquaculture activities, such as project specific tubes and netting,
26 may . . . entangle birds and other types of aquatic species such as forage fish and crabs”).For
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1 example, on July 2, 2021, the Corps issued an LOP to Taylor Shellfish Farms “to commercially
2 cultivate geoduck clams for human consumption” on one acre of tidelands in South Puget Sound,
3 despite recognizing that “species may be temporarily adversely affected.” Decision Document
4 (NWS-2020-943-AQ) at 4–5, 17. The Corps also recognized that “South Puget Sound is occupied
5 by Puget Sound Chinook salmon, Puget Sound steelhead, canary rockfish, and their designated
6 critical habitat (programmatic consultation).” *Id.* at 5. However, the Corps failed to discuss the
7 specific risks to wildlife, given the nature of the proposed operation, the number of years in
8 operation, and the affected area. *Id.* Nor did the Corps attempt to quantify the potential effects on
9 certain aquatic species and their habitats before summarily concluding the effects were temporary
10 and negligible. *Id.*

11 *ii. Environmental Impacts*

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

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

16 *iii. Plastic Use*

17 132. The Corps issued LOPs for operations without full consideration of the potential
18 impacts of plastic use. In multiple LOP decision documents, the Corps also generally
19 acknowledged the environmental effects of plastic use in shellfish aquaculture but failed to
20 quantify or specify these effects. *See, e.g.,* Decision Document (“DD”) (NWS-2007-01209-AQ)
21 at 12 (approving 12 acres for geoduck clam cultivation in Puget Sound, despite plastic use); DD
22 (NWS-2007-01219-AQ) at 12; DD (NWS-2020-00899-AQ) at 17. For example, in issuing an
23 LOP to Taylor Shellfish for a geoduck operation, the Corps acknowledged that “[t]here are
24 legitimate concerns about the impacts of plastics in our environment, particularly on the aquatic
25 environment and within the food chain.” Decision Document (NWS-2020-943-AQ) at 15.
26 However, the Corps failed to discuss the specific risks of pesticide use to wildlife and the
27

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

8 *iv. Pesticide Use*

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

19 *v. Cumulative Impacts*

20 134. The Corps issued LOPs for operations without full consideration of the cumulative
21 impacts of those operations, in conjunction with the NWP 48 authorizations, and in conjunction
22 with other individual permits for industrial shellfish aquaculture operations in Puget Sound,
23 Willapa Bay, and other important coastal areas. *See* Exhibit D, Maps of Seattle District Final
24 Issued Permits from January 1, 2021, to March 31, 2022. In multiple LOP decision documents,
25 the Corps summarily concluded that operations would not have significant cumulative impacts on
26 the environment because there were existing shellfish aquaculture operations in the area. *See, e.g.*,

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

1 **D. PLAINTIFFS' INTERESTS**

2 135. Plaintiffs and their members are injured by the challenged actions because
3 Defendants negated their procedural rights, as stakeholders, consumers of shellfish, and residents
4 and visitors of the impacted areas, to meaningfully participate in important permit approval
5 processes. The Corps failed to adequately evaluate the significant adverse impacts likely to result
6 from the 2021 NWP 48 permit or any of the hundreds of LOPs issued to shellfish operations
7 across the state of Washington. Nor did the Corps ensure that its re-issuance of the NWP 48
8 complied with the CWA and NEPA, as required by this Court's Order. As a result, the Corps
9 caused procedural injury to Plaintiffs and their members. Th

10 136. Plaintiffs' members live, work, and recreate in intertidal and coastal areas where
11 the Corps has authorized commercial shellfish activities—and where the Corps may authorize
12 additional activities in the future—under the 2021 NWP 48 or an LOP. This includes members
13 such as Laura Hendricks, Maradel Gale, Susan Macomson, and Patrick Townsend, who live along
14 the shoreline of Puget Sound and regularly recreate in the surrounding intertidal and coastal areas,
15 and Thomas Buchele, who owns a vacation home in the Long Beach Peninsula and enjoys
16 spending time along the coast of Willapa Bay, where the Corps has improperly authorized several
17 commercial shellfish operations. These members live on or near Washington's shorelines and
18 have substantial property interests in protecting these areas from the adverse impacts of
19 commercial shellfish operations.. These members also enjoy spending time and recreating along
20 Washington's shorelines and have substantial aesthetic, recreational, and personal interests in
21 protecting these important coastal habitats and ecosystems from degradation and pollution. For
22 example, many members enjoy observing wildlife, walking along the beach, visiting state parks
23 and wildness areas, bicycling, kayaking, hiking, and other recreational activities in Washington's
24 nearshore and intertidal areas, including Totten Inlet, Case Inlet, Hammersley Inlet, Hood Canal,
25 Grays Harbor, and Willapa Bay. Some members have businesses and hobbies that rely on the
26 natural beauty, biodiversity, and ecological health of Washington's coastal ecosystems. These
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1 interests are harmed by the cumulative and direct adverse impacts of industrial shellfish
2 aquaculture, including pesticide use and drift, physical barriers to beach access, plastic use and
3 pollution, impairment of aesthetics, light and sound pollution, habitat destruction, and reduction
4 in biodiversity. Many members also enjoy eating fresh and locally grown shellfish, and some
5 members go to great lengths to find responsibly harvested shellfish grown without pesticides in
6 Washington.. Many members are concerned about the human health impacts of consuming
7 shellfish grown on commercial shellfish operations using pesticides, and plastic equipment and
8 other industrial methods, and some members are afraid to eat *any* shellfish grown near
9 commercial shellfish operations, including shellfish on their own property, due to pesticide use on
10 commercial shellfish growing beds in adjacent areas

11 137. Plaintiffs' members include people who have aesthetic, recreational, cultural,
12 scientific, and economic interests in the health of Washington's aquatic ecosystems and the
13 wildlife they support, including threatened and endangered species, like salmon. These members
14 have concrete interests in viewing aquatic wildlife, including listed species that rely on
15 Washington's intertidal areas for spawning, rearing, and feeding. These members' interests are
16 directly injured by the Corps' approval of commercial shellfish operations in Washington's
17 coastal and intertidal areas because the Corps failed to properly consider the direct and cumulative
18 effects of these operations or mitigate the risks to threatened and endangered species before
19 authorizing operations under the 2021 NWP 48 or an LOP. .. Plaintiffs and their members are
20 injured by the Corps' approval of 2021 NWP 48 and LOPs that will have more than minimal
21 adverse cumulative impacts to Washington's shorelines and bays, without adequate analysis of
22 these impacts or mitigation to avoid cumulative impacts.

23 138. If the Court declares the 2021 NWP 48 unlawful, and vacates the permit, the Corps
24 would no longer be able to rely on the permit to authorize shellfish operations that directly impair
25 Plaintiffs' and their members' interests in Washington's shorelines, aquatic ecosystems, wildlife,
26 and surrounding communities. Moreover, the Court could further prevent and reduce injuries to
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1 Plaintiffs and their members by ordering the Corps to fully consider the potential impacts before
2 re-issuing NWP 48, as required by federal statutes and the agency's own regulations.

3 **FIRST CLAIM FOR RELIEF**

4 **VIOLATION OF CWA AND APA**

5 **ADOPTION OF NWP WITH ADVERSE CUMULATIVE IMPACTS**

6 139. Plaintiffs re-allege paragraphs 1–138.

7 140. The Corps may issue general permits (including nationwide permits) only for
8 activities that are similar in nature, and that will cause no more than minimal adverse effects to
9 the environment, either separately or cumulatively. In issuing a nationwide permit, the Corps
10 must consider the separate and cumulative impacts, and make a finding that the permit will not
11 have more than minimally adverse cumulative impacts. As alleged herein, the Corps has violated
12 the CWA and its implementing regulations by issuing a nationwide CWA permit that will have
13 more than minimal adverse cumulative impacts on the environment and cause or contribute to
14 significant degradation of the aquatic ecosystem, due to the nature and extent of the commercial
15 shellfish aquaculture activities authorized under NWP 48.

16 141. The Corps' adoption of NWP 48 in Washington has and will continue to result in
17 more than minimal adverse cumulative impacts, cause or contribute to significant degradation,
18 and contradict the public interest. The Corps' decision was arbitrary, capricious, an abuse of
19 discretion, not in accordance with law, and without observance of procedures required by law, in
20 violation of CWA, 33 U.S.C. § 1344, its implementing regulations, and the APA, 5 U.S.C. §§
21 701–706. The actions and inactions of the Corps described in this Claim for Relief are causing
22 injuries to the Plaintiffs, for which they have no adequate remedy at law.

23 142. Pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, Plaintiff should be
24 awarded its costs, expenses, expert witness fees, and reasonable attorney fees associated with this
25 litigation.

SECOND CLAIM FOR RELIEF

VIOLATION OF CWA AND APA

FAILURE TO DOCUMENT IMPACTS AND MITIGATION MEASURES

143. Plaintiffs re-allege paragraphs 1–138 and 142.

144. The Corps must set forth in writing an evaluation of the potential individual and cumulative impacts of the category of activities to be regulated under a NWP permit, and provide documentation to support each factual determination, including the cumulative impacts.

145. By failing to adequately document and support the Corps’ factual determinations as to the impacts of NWP 48, including the cumulative impacts, the Corps’ adoption of NWP 48 in Washington was arbitrary, capricious, an abuse of discretion, not in accordance with law, and without observance of procedures required by law, in violation of CWA, 33 U.S.C. § 1344, its implementing regulations, and the APA. 5 U.S.C. §§ 701-706.

146. The actions and inactions of the Corps described in this Claim for Relief are causing injuries to the Plaintiffs, for which they have no adequate remedy at law.

THIRD CLAIM FOR RELIEF

VIOLATION OF NEPA AND APA

FAILURE TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT

147. Plaintiffs re-allege paragraphs 1–138 and 142.

148. The Corps’ issuance of the NWP 48 is a major federal action that will significantly affect the quality of the human environment.

149. Mitigation measures may be used when an agency seeks to forego issuing an EIS. However, proposed mitigation measures must be developed to a reasonable degree, and a perfunctory description, or mere listing of mitigation measures without supporting analysis, is insufficient to support a Finding of No Significant Impact.

150. The Corps’ Finding of No Significant Impact for NWP 48 fails to establish or describe how the mitigation measures, framed as general conditions and unanalyzed discretion

1 from District Engineers, would practically mitigate impacts.

2 151. The Corps' conclusion that issuance of NWP 48 would not significantly affect the
3 quality of the human environment was arbitrary, capricious, or otherwise violates federal law as
4 alleged herein.

5 152. The Corps' improper reliance on mitigation is arbitrary, capricious, and otherwise
6 violates federal law.

7 153. The actions and inactions of the Corps described in this Claim for Relief are
8 causing injuries to the Plaintiffs, for which they have no adequate remedy at law.

9 **FORTH CLAIM FOR RELIEF**

10 **VIOLATION OF NEPA AND APA**

11 **FAILURE TO PROPERLY ANALYZE DIRECT, INDIRECT, AND CUMULATIVE IMPACTS**
12 **OR DEVELOP REASONABLE RANGE OF ALTERNATIVES**

13 154. Plaintiffs re-allege paragraphs 1–138 and 142.

14 155. When preparing an EA and issuing a Finding on No Significant Impact, NEPA
15 requires that agencies take a hard look at the reasonably foreseeable direct, indirect, cumulative,
16 or synergistic environmental impacts from proposed actions.

17 156. The Corps relied on the 1978 CEQ Regulations in preparing the environmental
18 assessment for the 2021 NWP 48. In the 2021 NWP 48 Decision Document, the Corps' impact
19 analysis "focuse[d] on the impacts or effects that are reasonably foreseeable and have a
20 reasonably close causal relationship to the activities authorized by this NWP under the Corps'
21 permitting authorities." 2021 HQ Decision Doc. at 70. In doing so, the Corps used the 1978
22 Regulations, which required the agency to review "reasonably foreseeable" "indirect effects." *See*
23 40 CFR 1508.8(a) (1978).

24 157. Under the Trump Administration, CEQ revised its NEPA regulations for the first
25 time in over 40 years by removing the definition of "cumulative impact" and the terms "direct"
26 and "indirect" to encourage agencies to focus on "whether the proposed action causes an effect
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1 rather than on categorizing the type of effect.” Update to the Regulations Implementing the
2 Procedural Provisions of the NEPA, 85 Fed. Reg. 43,343 (Jul. 16, 2020). The 2020 Revisions
3 went into effect on September 14, 2020, one day after the Corps announced the proposed permit
4 and four months before the Corps issued the final 2021 NWP 48. Although the Corps had the
5 option to “choose whether to apply the revised regulations or proceed under the 1978 regulations
6 and [its] existing agency NEPA procedures,” *id.*, the Corps has long operated under the definition
7 of “effects” as defined in the 1978 NEPA Regulations, and the agency has existing NEPA
8 procedures aligned with the 1978 definitions. Moreover, the 2020 Revisions were not fully
9 consistent with NEPA. *See* NEPA Implementing Regulations Revisions, 86 Fed. Reg. 55,757
10 (Oct. 7, 2021) (proposed rule) (proposing to “generally revert[] to the language from the 1978
11 NEPA Regulations that was in effect for more than 40 years prior to 2020”). To the extent the
12 2020 Revisions allowed the Corps to omit critical categories of effects from analysis and
13 disclosure, contrary to NEPA’s statutory purpose to promote informed decision making, the
14 Corps’ implementing regulations, and the Corps’ longstanding practice, the 1978 CEQ
15 Regulations applied.

16 158. Under both the 1978 CEQ Regulations and the 2020 Revisions, the Corps is
17 required to conduct a thorough analysis of cumulative impacts under NEPA. The 2020 Revisions
18 required the Corps to fully consider reasonably foreseeable effects, including those categorized as
19 “cumulative impacts” under the 1978 CEQ Regulations. 40 CFR 1508.1(g) (2020); *see* 85 Fed.
20 Reg. 43,355 (“In general, the changes . . . retain[] requirements to analyze all activities and
21 environmental impacts covered within the scope of the statute.”). The consideration of cumulative
22 impacts follows longstanding legal precedent interpreting NEPA to require agencies to consider
23 cumulative effects. Even before CEQ issued its 1978 regulations, the U.S. Supreme Court
24 interpreted NEPA to require consideration of cumulative effects “when several proposals . . . that
25 will have *cumulative* or synergistic environmental impact upon a region are pending concurrently
26 before an agency.” *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976) (emphasis added).

1 159. The Corps failed to take the requisite hard look at the reasonably foreseeable
2 direct, indirect, cumulative, or synergistic environmental impacts likely to result from the
3 issuance of NWP 48.

4 160. The Corps' Finding of No Significant Impact was the result of a failure to consider
5 the impacts described by Plaintiffs and others in public comments, as well as those described
6 herein was arbitrary, capricious, or otherwise violates federal law.

7 161. An environmental assessment must include a purpose and need statement and
8 define the scope of reasonable alternatives that would satisfy the purpose.

9 162. The Corps' Decision Document failed to include a purpose and need statement,
10 and therefore failed to define the scope of reasonable alternatives in a manner arbitrary,
11 capricious, or that otherwise violates federal law as alleged herein.

12 163. The actions and inactions of the Corps described in this Claim for Relief are
13 causing injuries to the Plaintiffs, for which they have no adequate remedy at law.

14 **FIFTH CLAIM FOR RELIEF**

15 **VIOLATION OF RIVERS AND HARBORS ACT AND APA**

16 **ISSUANCE OF LETTERS OF PERMISSION WITHOUT PROPER EVALUATION**

17 164. Plaintiffs re-allege paragraphs 1–138 and 142.

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

24 166. As of the date of this filing, the Corps has issued over 400 LOPs to commercial
25 shellfish operations with potentially significant adverse environmental impacts on Washington's
26 tidelands . Exhibit A. Some of these operations cover hundreds of acres of Washington's
27

1 shoreline, and many of them overlap with areas listed as essential habitats for threatened or
2 endangered species. Many of these operations are also heavily concentrated in important coastal
3 waterbodies and estuaries, such as Willapa Bay, Puget Sound, Grays Harbor, and Squamish
4 Harbor. *See* Exhibit D. The total number of LOPs—and the potential threats to the environment
5 and Plaintiffs’ interests—will continue to increase as the Corps continues to improperly approve
6 commercial shellfish operations in Washington’s coastal areas.

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

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

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

18 170. The Corps failed to adequately consider the cumulative impacts of these
19 operations. Instead of analyzing the cumulative effects of each proposed operation on the
20 environment and local wildlife against the environmental baseline, the Corps compared proposed
21 operations with existing degradation to conclude that there were no significant cumulative
22 impacts on the environment. The Corps also failed to consider the cumulative impact of
23 approving multiple projects in the same area. Consequently, the Corps issued LOPs based on
24 improper cumulative impacts determinations. In issuing LOPs without conducting a proper
25 cumulative impacts analysis, the Corps' decisions have violated the Rivers and Harbors Act, and
26 arbitrary, capricious, an abuse of discretion, not in accordance with law, and without observance
27

1 of procedures required by law, 33 U.S.C. § 403, its implementing regulations, and the APA. 5
2 U.S.C. §§ 701–706.

3 171. The actions and inactions of the Corps described in this Claim for Relief are
4 causing injuries to the Plaintiffs, for which they have no adequate remedy at law.

5 **SIXTH CLAIM FOR RELIEF**

6 **VIOLATION OF ESA:**

7 **FAILURE TO CONSULT REGARDING ADOPTION OF NWP 48**

8 172. Plaintiffs re-allege paragraphs 1–138 and further allege:

9 173. Section 7(a)(2) of the ESA prohibits agency actions that jeopardize the survival of
10 listed species, or that destroy, or adversely modify their critical habitat 16 U.S.C. § 1536(a)(2).

11 174. An agency must engage in consultation with the Services for every agency
12 action—including “all activities or *programs* of any kind authorized, funded, or carried out,” by
13 an agency, 50 C.F.R. § 402.02 (emphasis added)—that “may affect” a federally listed species or
14 critical habitat in any manner, *id.* § 402.14(a), (g).

15 175. The Services’ regulations recognize that certain programmatic actions, such as the
16 Corps’ issuance of the NWP program, “approve[] a framework for the development of future
17 action(s),” and thus, “any take of a listed species would not occur unless and until those future
18 action(s) are authorized, funded, or carried out.” *Id.* § 402.02 (defining “framework programmatic
19 action”).

20 176. The Corps has erroneously and unlawfully determined that the NWP program does
21 not require programmatic ESA consultation. However, the agency’s “no effect” determination for
22 the NWP program is legally and factually flawed. Indeed, the Corps’ reliance on project-specific
23 reviews to avoid programmatic consultation is completely inconsistent with the Services’
24 implementing regulations. *See* 50 C.F.R. § 402.14(c)

25 177. The Corps’ failure to undertake programmatic consultation on NWP 48 also
26 constitutes a violation of ESA Section 7(a)(1), which requires the Corps to “carry[] out [a]
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1 program[] for the conservation of endangered species and threatened species.” 16 U.S.C. §
2 1636(a)(1).

3 178. Plaintiffs provided the Corps a 60-day notice letter outlining these violations on
4 February 4, 2021. Exhibit C.

5 179. The actions and inactions of the Corps described in this Claim for Relief are
6 causing injuries to the Plaintiffs, for which they have no adequate remedy at law.

7 180. Plaintiffs are entitled to fees, costs, expenses, and disbursements, including
8 reasonable attorneys’ fees, associated with this litigation under the ESA, 16 U.S.C. § 1540.

9 **PRAYERS FOR RELIEF**

10 WHEREFORE, the Plaintiffs respectfully request that the Court:

- 11 1. Adjudge and declare that the Corps’ decision to adopt 2021 NWP 48 in
12 Washington, as well as the Decision Document, EA, and FONSI issued by the
13 Corps in connection with that approval, are in violation of the CWA, NEPA, ESA,
14 RHA, and APA;
- 15 2. Adjudge and declare that the Corps violated NEPA and the APA by failing to
16 prepare an EIS prior to adopting 2021 NWP 48 in Washington;
- 17 3. Adjudge and declare that the Corps violated the CWA and its implementing
18 regulations when it adopted 2021 NWP 48 in Washington without adequately
19 supporting its determination that it would not cause more than minimal cumulative
20 adverse impacts or the effectiveness of its mitigation measures;
- 21 4. Adjudge and declare that the Corps violated the RHA in issuing LOPs for work in
22 jurisdictional waters without adequately supporting its determination that the
23 proposed work would be minor and not have significant individual or cumulative
24 impacts on environmental values and would encounter no appreciable opposition;
- 25 5. Adjudge and declare that the Corps violated the ESA and its implementing
26 regulations when it adopted 2021 NWP 48 in Washington without consulting with
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1 NMFS and FWS under Section 7 of the ESA;

- 2 6. Vacate, set aside, and/or enjoin the Corps' decision to adopt 2021 NWP 48 in
3 Washington, and declare that the Corps must comply with all requirements of
4 NEPA, the CWA, the ESA, and the APA, including preparing an EIS and
5 reinitiating consultation, if the agency proposes to adopt a new general permit for
6 commercial shellfish aquaculture in Washington;
- 7 7. Award the Plaintiffs their fees, costs, expenses, and disbursements, including
8 reasonable attorneys' fees, associated with this litigation under the Equal Access to
9 Justice Act, 28 U.S.C. § 2412 and the ESA, 16 U.S.C. § 1540; and
- 10 8. Grant such other relief as this Court deems just and proper.

11
12 DATED: April 15, 2022

Respectfully Submitted,

13
14 /s/ Karl G. Anuta

15

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19

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