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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE COALITION TO PROTECT PUGET
SOUND HABITAT,

Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS, *et*
al.,

Defendants,

and

TAYLOR SHELLFISH COMPANY, INC.

Intervenor.

Case No. 2:16CV-00950-RSL
SUPPLEMENTAL COMPLAINT
(Environmental and Administrative
Procedure Act Claims)

SUMMARY

1.

This action is an as-applied challenge to decisions of the United States Army Corps of Engineers (hereafter “the Corps”) authorizing commercial aquaculture operations on the shores of the Puget Sound under Nationwide Permit 48 (hereafter “NWP 48”). The challenges are based on the defendants’ actions and failures to comply with the National Environmental Policy Act (“NEPA”), and/or the Clean Water Act (“CWA”), and/or the Administrative Procedure Act (APA), in making those

1 decisions. This action was originally filed in June of 2015. Since then additional
2 actions by the Corps have occurred, and as a result plaintiffs file this Supplemental
3 Complaint.

4 2.

5 Defendants violated NEPA because they: (i) improperly determined that
6 activities authorized under 2012 and 2017 NWP 48 would not significantly adversely
7 affect the environment; (ii) conducted permitting actions in a manner other than
8 specified in their environmental documents; and (iii) failed to prepare supplemental
9 environmental documents despite the occurrence of significant new circumstances
10 relevant to environmental effects of the authorized activities. Defendants violated the
11 CWA in the issuance and administration of 2017 NWP 48, by authorizing activities
12 that result in more than minimal adverse environmental effects and contribute to
13 significant degradation of waters of the United States. Defendants violated the APA
14 by making arbitrary and capricious decisions not in accordance with law, and by
15 unreasonably withholding or delaying action on a still pending Petition filed by Plaintiff
16 with Defendants, seeking suspension or revocation of 2012 NWP 48 in Puget Sound.

17 3.

18 By initiating this action, Plaintiff seeks to:

- 19 (a) Obtain a declaration that the Corps violated NEPA and its implementing
20 regulations when it improperly found that activities in Puget Sound
21 authorized under NWP 48 would not significantly adversely affect the
22 environment, and decided not to prepare an EIS;
- 23 (b) Obtain a declaration that the Corps violated NEPA and its implementing
24 regulations, when it failed to prepare a supplemental environmental
25 document following the dramatic increase in the number of activities in
26 Puget Sound authorized (or seeking authorization) under NWP 48;

- 1 (c) Obtain a declaration the Corps violated the Clean Water Act and its
2 implementing regulations, when it issued NWP 48;
- 3 (d) Obtain a declaration that the Corps violated the Clean Water Act and its
4 implementing regulations, when it failed to take required actions to
5 ensure that activities authorized under NWP 48 would have minimal
6 adverse effects on the environment and not significantly degrade waters
7 of the United States;
- 8 (e) Obtain a declaration that the Corps violated the Clean Water Act and its
9 implementing regulations, when it verified that certain activities in Puget
10 Sound are authorized under NWP 48;
- 11 (f) Obtain an order vacating, setting aside, and/or remanding the Corps'
12 most recent authorizations that certain activities are authorized under
13 NWP 48;
- 14 (g) Obtain an order directing the Corps to advise prospective permittees
15 under NWP 48 in Puget Sound to seek authorization through an
16 individual permit, instead of under NWP 48;
- 17 (h) Obtain an order directing the Corps to act upon Plaintiff's Petition to
18 revoke or suspend NWP 48 in Puget Sound; and
- 19 (i) Obtain an order enjoining the Corps from issuing any further
20 authorizations under NWP 48 in Puget Sound, until the Corps complies
21 with NEPA by producing a new supplemental environmental document,
22 and/or complies with the CWA by completing adequate effects analyses,
23 to ensure that authorized activities will have minimal effects on the
24 environment and comply with 33 U.S.C. § 1344(b)(1) and the
25 regulations adopted pursuant to that law.
- 26

1 **JURISDICTION**

2 4.

3 Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 (federal
4 question); 28 U.S.C. § 1346 (action against agent of the United States); 28 U.S.C. §
5 1361 (action to compel officer of United States to perform his or her duty); 28 U.S.C. §
6 2201 (declaratory relief); and 28 U.S.C. § 2202, (injunctive relief). This cause of
7 action arises under the laws of the United States, including the Administrative
8 Procedure Act (“APA”), 5 U.S.C. §§ 701–706; the National Environmental Policy Act
9 (“NEPA”), 42 U.S.C. §§ 4321 et seq.; and the Clean Water Act (“CWA”), 33 U.S.C. §§
10 1251 *et seq.* An actual, justiciable controversy exists between Plaintiff and
11 Defendants. The requested relief is proper under 28 U.S.C. §§ 2201, 2202, and
12 2412, and 5 U.S.C. §§ 705 and 706.

13 **VENUE**

14 5.

15 Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e). A substantial
16 part of the events or omissions giving rise to the claims occurred within this District.
17 The U.S. Army Corps’ office that is responsible for substantial portions of the actions
18 or omissions giving rise to this case is also located in this judicial District, in Seattle,
19 King County, Washington. In addition, Plaintiff’s office is located in and a number of
20 Plaintiff’s members reside in, this judicial District.

21 **PARTIES**

22 6.

23 Plaintiff THE COALITION TO PROTECT PUGET SOUND HABITAT
24 (“Coalition”) is a non-profit organization incorporated under the laws of the state of
25 Washington and recognized by the Internal Revenue Service as a tax-exempt
26 organization under Section 501(c)(3) of the Internal Revenue Code. The Coalition is

1 an alliance of interested citizens, environmentalists, scientists, and recreational users
2 who reside on or near Puget Sound, and study, work to protect and recreate in the
3 waters of Puget Sound. Plaintiff and its members are concerned about the expanding
4 aquaculture in both the nearshore environment and public waters of Puget Sound,
5 and its impact on plants, animals and ecological function. Plaintiff and its members
6 are also concerned about the impact of currently approved and expanding
7 aquaculture on their recreational activities and aesthetic enjoyment both near their
8 homes and throughout the areas of the Sound that they visit. Plaintiff and/or its
9 member has repeatedly commented to the Corps, both before the issuance of the
10 2012 NWP 48 and before the issuance of the individual authorization at issue in this
11 case, raising these types of concerns.

12 7.

13 The Coalition seeks to give a voice to citizens' concerns about aquaculture and
14 its impact on the health and quality of the shoreline and waters of Puget Sound, as
15 well as the flora and fauna that depend upon these irreplaceable resources.
16 Members of the Coalition live in and/or use Puget Sound and are and will be directly
17 and adversely affected by the rapid and massive expansion of the aquaculture
18 industry of the type at issue under NWP 48. This type of expansion can potentially
19 undermine the protection and enhancement of the quality of the waters of Puget
20 Sound, as well as the many plant and marine species that depend upon those waters
21 for food and habitat. As such, the industrialization of aquaculture that is being allowed
22 by the Seattle District of the Corps interferes with the ability of the plaintiff's members
23 to enjoy and recreate in the waters of the Sound.

24 8.

25 Plaintiff has representational standing to bring this action. The Defendants'
26 violations of the CWA, APA and NEPA have had an adverse impact on Plaintiff's

1 members' ability to use and enjoy the waters of Puget Sound, and the Defendants'
2 actions have injured the health, recreational, environmental, aesthetic, commercial
3 and/or other interests of Plaintiff's members. These injuries are fairly traceable to the
4 Defendants' violations, and are capable of redress by this Court.

5 9.

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

15 10.

16 Defendant UNITED STATES ARMY CORPS OF ENGINEERS ("Corps") is an
17 agency of the U.S. Department of Defense. The Corps has a District Office in Seattle,
18 Washington. The Corps and its officers are responsible for the lawful execution of the
19 CWA, NEPA, and the APA, in so far as those laws pertain to issuing permits for
20 dredging and filling-in public waters.

21 11.

22 Defendant LIEUTENANT GENERAL TODD T. SEMONITE is the Commanding
23 General and Chief of Engineers of the Corps. The Commanding General and Chief of
24 Engineers is charged with the supervision and management of all Corps decisions
25 and actions, including the evaluation of Corps decisions and actions under NEPA and
26 § 404 of the CWA, which are the subject of this lawsuit. The Chief of Engineers is

1 authorized to issue a NWP. The Chief of Engineers is charged with reviewing NWPs
2 and proposing modifications, revocations, and reissuance, as well as preparing NEPA
3 documents and Section 404(b)(1) Guidelines compliance analyses for proposed
4 NWPs. Both Lieutenant General Thomas P. Bostick and before him Major General
5 Merdith W.B. Temple were Chief of Engineers during a substantial portion of the
6 actions or omissions at issue in this lawsuit. Lieutenant General Semonite replaced
7 Lieutenant General Bostick prior to the filing of this lawsuit.

8 12.

9 Defendant BRIGADIER GENERAL SCOTT A. SPELLMON is the Commander
10 and Division Engineer of the Northwestern Division of the Corps. Division Engineers
11 are authorized to modify, suspend, or revoke NWP authorizations within their divisions
12 and are responsible for preparing supplemental documentation for modifications or
13 revocations made as a result of their authority. According to the Corps, regional
14 conditions are imposed by Division Engineers at their discretion and Corps
15 Headquarters cannot mandate the adoption of regional conditions. The Northwestern
16 Division is responsible for a substantial portion of the actions or omissions at issue in
17 this lawsuit, including the regional effects analysis and determination that NWP 48, as
18 well as the terms and conditions, all regional conditions, and limitations, and the
19 finding that NWP 48 allegedly would have only minimal and not significant effects on
20 the aquatic environment here. The Northwestern Division includes the Seattle District.
21 Brigadier Generals John S. Kem and John R. McMahon were Commanders and
22 Division Engineers of the Northwestern Division during a substantial portion of the
23 actions or omissions at issue in this lawsuit. Brigadier General Spellman replaced
24 Brigadier General Kem prior to the filing of this lawsuit.

25 ////

26 13.

1 Defendant COLONEL JOHN G. BUCK is the Commander and District Engineer
2 of the Seattle, Washington District of the Corps. Under Corps regulations, a District
3 Commander is responsible for compliance with NEPA for actions within district
4 boundaries. The Seattle District of the Corps administers Section 404 permitting in
5 Puget Sound. The Seattle District is responsible for a substantial portion of the actions
6 or omissions at issue in this lawsuit, including, but not limited to, the issuance of
7 regional conditions for NWP 48, findings in support of those conditions, responding to
8 requests for authorization and pre-construction notifications for NWP 48, in Puget
9 Sound and issuance or denials of authorizations that activities proposed for Puget
10 Sound are (or are not) authorized under NWP 48. The Seattle District Engineer is
11 authorized to add, modify, suspend, or revoke a case specific activity's authorization
12 under an NWP. Colonel Bruce A. Estok was actually Seattle District Engineer during
13 a substantial portion of the actions or omissions at issue in this lawsuit. Colonel Buck
14 replaced Colonel Estok prior to the filing of this lawsuit.

15 **LEGAL BACKGROUND**

16 **A. The Administrative Procedure Act**

17 14.

18 The APA, 5 U.S.C. §§ 701–706, confers a right of judicial review on any person
19 adversely affected by agency action. The APA provides a cause of action to
20 challenge any final agency action taken pursuant to any statute where the action is
21 made reviewable by that statute, or where there is no other adequate remedy in a
22 court. The APA also authorizes a reviewing court to compel agency action that is
23 unlawfully withheld or unreasonably delayed. Pursuant to APA § 706(2)(A) and (D), a
24 court must set aside and hold unlawful agency action found to be arbitrary, capricious,
25 an abuse of discretion, or otherwise not in accordance with law, or without
26 observance of procedure required by law.

1 15.

2 Neither NEPA, nor the CWA, contain a specific private right of action applicable
3 to Plaintiff's claims. As a result, those claims are reviewable under the APA.

4 **B. The Clean Water Act**

5 16.

6 The objective of CWA 33 U.S.C. §§ 1251–1387 is to restore and maintain the
7 chemical, physical, and biological integrity of the Nation's waters. As part of
8 implementing that objective, the CWA prohibits the unauthorized discharge of a
9 pollutant to navigable waters from a point source. A person discharging dredged or fill
10 material into a wetland or water of the U.S. must first obtain a Section 404 permit from
11 the Corps. Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of
12 the Army to issue permits for the discharge of dredged or fill material into water of the
13 United States when certain conditions are met. Attached as Exhibit A, and
14 incorporated into this complaint by reference, is an excerpt of a presentation that the
15 Seattle District of the Corps made in April 2016 wherein the District confirmed on
16 page 12 of that presentation (page 2 of Ex. A) its understanding of the Regulatory
17 Authority of the District under Section 404.

18 17.

19 Under 33 U.S.C. § 1344(e)(1), the Corps can issue a single permit for a class
20 of polluters, if actions "in such category are similar in nature, will cause only minimal
21 adverse environmental effects when performed separately, and will have only minimal
22 cumulative adverse effects on the environment." These permits can be issued to a
23 class of discharges on the state, regional, or nationwide basis. Permits issued for a
24 nationwide class of dischargers are referred to as Nationwide Permits ("NWP"). If
25 they are qualified, an applicant may request authorization under an existing NWP,
26 rather than applying for an individual 404 permit.

18.

Pursuant to 40 C.F.R. § 230.12(a)(3), the Corps is prohibited from issuing a permit or an NWP authorization if:

(a) There is a practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem, so long as such alternative does not have other significant adverse environmental consequences; or

(b) The proposed discharge will result in significant degradation of the aquatic ecosystem; or

(c) The proposed discharge does not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem; or

(d) There does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with the Guidelines.

19.

When issuing an NWP, the Corps must conduct an analysis of compliance with the 404(b)(1) Guidelines and prepare a statement of findings. The Corps must deny a permit that does not comply with those Guidelines. Pursuant to the 404(b)(1) Guidelines, the Corps is prohibited from issuing a Section 404 permit or an NWP authorization under an NWP if the discharge will cause or contribute to significant degradation of the waters of the United States. "Significant degradation" includes significantly adverse effects on fish, shellfish, wildlife, and special aquatic sites. "Significant degradation" also includes significantly adverse effects on life stages of aquatic life, as well as on aquatic ecosystem diversity, productivity, and stability. The Guidelines require the Corps to predict cumulative effects by evaluating the number of individual discharges of dredged or fill material into waters of the United States that

1 already exist and that are expected to be authorized by a NWP until it expires.

2 20.

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

11 21.

12 Under Corps regulations, a Division Engineer may modify, suspend, or revoke
13 a NWP authorization by geographic area, class of activity, or class of waters within
14 their division to address effects of authorized activities under the 404(b)(1) Guidelines
15 or any factor of the public interest or that otherwise may be more than minimal. Some
16 NWP's, including NWP 48, require Pre-Construction Notification (PCN) or application
17 to the District Engineer prior to undertaking covered activities.

18 22.

19 Upon receipt of a PCN or application, the District Engineer must determine
20 whether the activity will result in more than minimal individual or cumulative adverse
21 environmental effects or may be contrary to the public interest. A District Engineer
22 must perform a case-by-case review of each PCN or application submitted under an
23 NWP to determine whether the proposed activity will result in more than minimal
24 individual or cumulative adverse effects or be contrary to the public interest. In doing
25 so, the District Engineer must consider the environmental setting, the resources
26 affected, the functions of affected resources, the degree to which resources perform

1 those functions, the extent of loss of aquatic resource functions, the duration of
2 adverse effects, the importance of aquatic resource functions lost, and required
3 mitigation.

4 23.

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

12 **C. The National Environmental Policy Act**

13 24.

14 Pursuant to 40 C.F.R. § 1500.1, NEPA is our basic national charter for
15 protection of the environment. Regulations promulgated by the Council on
16 Environmental Quality (“CEQ”) establish that NEPA’s twin aims are to (1) ensure fully
17 informed decision-making, and (2) to provide for public participation in environmental
18 analysis and decision-making.

19 25.

20 As provided for by 40 C.F.R. § 1507.3(a), the Corps has adopted regulations to
21 implement NEPA. The Corps’ NEPA regulations supplement—and do not
22 supersede—the CEQ’s regulations.

23
24 26.

25 According to CEQ regulations, NEPA requires that high quality environmental
26 information be available to public officials and citizens before decisions are made and

1 before actions are taken. Accurate scientific analysis, expert agency comments, and
2 public scrutiny are essential to implementing NEPA.

3 27.

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

12 28.

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

20 29.

21 Pursuant to CEQ guidelines found in 40 C.F.R. § 1508.18, “[m]ajor Federal
22 action includes new and continuing actions with effects that may be major and which
23 are potentially subject to Federal control and responsibility.” Actions include projects
24 and programs entirely or partly financed, assisted, conducted, regulated, or approved
25 by a federal agency, as well as new or revised agency rules, regulations, plans,
26 policies, or procedures.

1 30.

2 “Significantly” refers to the context and intensity of a project. An agency should
3 consider 10 factors outlined in the CEQ regulations when assessing significance and
4 deciding whether to prepare an EIS. According to 40 C.F.R § 1508.27(b), the factors
5 include: (i) unique characteristics of the geographic area such as proximity to
6 wetlands and ecologically critical areas; (ii) the degree to which effects on the equality
7 of the human environment are likely to be highly controversial, are highly uncertain, or
8 involve unique or unknown risks; (iii) the extent to which the action sets a precedent
9 for future decisions, (iv) cumulative effects; (v) the degree to which the action may
10 adversely affect endangered or threatened species or critical habitat; and (vi)
11 conformity with other law or requirements. The effects of an action are controversial if
12 there is a substantial dispute about the nature or effects of the action that casts doubt
13 on the reasonableness of the agency’s conclusions.

14 31.

15 NEPA requires disclosure of all environmental effects, and specifically requires
16 federal agencies to discuss the direct, indirect, and cumulative impacts of a proposed
17 action. A “cumulative impact” results from the incremental impact of the action when
18 added to other (i) past, (ii) present, and (iii) reasonably foreseeable future actions,
19 regardless of who undertakes the action. Cumulative impacts can result from
20 individually minor but collectively significant actions taking place over a period of time.
21 An agency must consider reasonably foreseeable direct, indirect, and cumulative
22 effects, including growth-inducing effects and other effects related to induced changes
23 in the pattern of land use, population density or growth rate, and related effects on air
24 and water and other natural ecosystems.

25 32.

26 An effect may not be determined to be insignificant merely because it is

1 temporary or a small component part. Under CEQ Guidance, a FONSI that relies on
2 project terms or mitigation to determine that the effects are not significant should
3 apply adaptive management provisions to account for instances where mitigation fails
4 to achieve projected environmental outcomes.

5 33.

6 Under the Corps' NEPA regulations, an EIS is normally required when a
7 proposed change substantially increases the size of a project. In deciding not to
8 prepare an EIS, an agency must thoroughly analyze the environmental effects of the
9 action before concluding that no significant environmental impacts will result. To this
10 end, an EA must consider the environmental impacts of the action and provide
11 "sufficient evidence and analysis" to support the agency's decision. It must discuss
12 the need for the proposed action, alternatives, and the environmental impacts of the
13 proposed action and the alternatives.

14 34.

15 CEQ regulations provide that the agency must rigorously explore and
16 objectively evaluate all reasonable alternatives, and for all alternatives that were
17 eliminated from detailed study, briefly discuss the reasons for their having been
18 eliminated. The agency must also consider a No Action alternative, as a means to
19 measure the environmental impacts of action alternatives. According to the CEQ
20 regulations, the alternatives section is the "heart" of NEPA.

21 35.

22 An EA must also fully consider the cumulative impacts of the action. To do so,
23 it must provide sufficiently detailed information about past, present, and future
24 projects and adequately analyze their environmental effects. An agency may not rely
25 on mitigation measures to offset project impacts in an effort to avoid preparation of an
26 EIS where there are insufficient legal authorities or where it is not reasonable to

1 foresee the availability of sufficient resources. Furthermore, the agency must disclose
2 and evaluate the environmental consequences of mitigation failure. CEQ regulations
3 provide that where an applicant prepares information for an EA, the Corps shall make
4 its own evaluation of the environmental issues and take responsibility for the scope
5 and content of the EA.

6 36.

7 Once an original EIS has been completed, NEPA requires that a federal
8 agency, such as the Corps, must prepare a Supplemental EA or EIS whenever the
9 agency makes substantial changes in the proposed action that are relevant to
10 environmental concerns or “there are significant new circumstances or information
11 relevant to environmental concerns, and bearing on proposed action or its impacts.” If
12 the action has unanticipated effects, or happens with unanticipated intensity, then a
13 supplemental environmental review document is required. The threshold for
14 supplementation is low: there need only be a substantial question about whether an
15 action will have significant effects.

16 **D. The Endangered Species Act**

17 37.

18 According to 16 U.S.C. § 1531(b), Congress enacted the Endangered Species
19 Act (“ESA”) for the express purpose of providing “a means whereby the ecosystems
20 upon which endangered species and threatened species depend may be conserved,
21 [and] to provide a program for the conservation of such endangered species and
22 threatened species . . .” The statute defines “conservation” as “the use of all methods
23 and procedures which are necessary to bring any endangered species or threatened
24 species to the point at which the measures provided to this Act are no longer
25 necessary.” Pursuant to 50 C.F.R. § 402.02, the term conservation is synonymous
26 with “recovery” of listed species because the ESA defines “recovery” to mean

1 “improvement in the status of a listed species to the point at which listing is no longer
2 appropriate under the criteria set out in Section 4(a)(1) of the Act.”

3 38.

4 Section 7 of the ESA, 16 U.S.C. § 1536(a)(1), requires that all federal agencies
5 work toward recovery of listed species. Specifically, the statute states that federal
6 agencies “shall, in consultation with and with the assistance of the Secretary, utilize
7 their authorities in furtherance of the purposes of this Act by carrying out programs for
8 the conservation of endangered species and threatened species . . .” Compliance with
9 this mandate plays a crucial role in determining whether or not many listed species
10 have a chance of ever recovering. In Exhibit A to this Complaint, specifically on page
11 15 of the presentation (page 3 of Ex. A) the Seattle District of the Corps
12 acknowledges this obligation under the ESA, and its application to NWP 48
13 authorizations.

14 39.

15 16 U.S.C. § 1536(a)(2), also requires federal agencies to ensure that any
16 action authorized, funded, or carried out by the agency is not likely to jeopardize the
17 continued existence of any threatened or endangered species, or result in the adverse
18 modification of critical habitat for such species. Pursuant to 50 C.F.R. § 402.02,
19 “jeopardize the continued existence” means to engage in an action that reasonably
20 would be expected, directly or indirectly, to reduce appreciably the likelihood of both
21 the survival and recovery of a listed species in the wild by reducing the reproduction,
22 numbers, or distribution of that species.

23 ////

24 40.

25 The ESA prohibits all persons, including federal agencies, from “taking”
26 endangered species; this ban also applies by regulation to most threatened species.

1 The ESA and its implementing regulations specifically, 16 U.S.C. § 1532(18) and
2 50 C.F.R. § 17.3, define “take to include habitat degradation that results in the actual
3 death or injury of protected species.

4 41.

5 Pursuant to 16 U.S.C. § 1536(a)(2), in order to effectuate the ESA’s duty to
6 avoid jeopardy and adverse modification, where anadromous or marine creatures are
7 involved the ESA directs an agency proposing an action to consult with the National
8 Marine Fisheries Service (“NMFS”) aka NOAA Fisheries (the expert agency),
9 depending on the species at issue, to evaluate the consequences of a proposed
10 action on a listed species. If the action agency determines that a proposed action
11 “may affect” a threatened or endangered species, then pursuant to 16 U.S.C. §
12 1536(a)-(c) and 50 C.F.R § 402.14, that agency must consult with the appropriate
13 expert agency, after which the latter must provide the action agency with a “Biological
14 Opinion” (or “BiOp”) explaining how the proposed action will affect the species or its
15 habitat.

16 42.

17 Under 16 U.S.C. § 1536(b)(3)(A), if the expert agency concludes that the
18 proposed action “will jeopardize the continued existence” of a listed species, the BiOp
19 must outline “reasonable and prudent alternatives,” that would allow an action agency
20 to carry out the purpose of its proposed activity without jeopardizing the existence of
21 listed species. If the BiOp concludes that the action will not result in jeopardy but may
22 incidentally cause the death or injury of members of a protected species, the expert
23 agency has authority to provide the action agency with an “incidental take statement.”
24 Pursuant to 16 U.S.C. § 1536(b)(4), this statement must specify the impact of such
25 incidental taking on the species, set forth “reasonable and prudent measures” that the
26 expert agency considers necessary to minimize such impact, and include the “terms

1 and conditions” that the action agency must comply with to implement those
2 measures.

3 43.

4 If the action agency adopts such measures and implements their terms and
5 conditions, the resulting “take” of listed species is not a violation of the ESA Section 9
6 prohibition on take of listed species or their habitat. If the action agency fails to adopt
7 and implement the reasonable and prudent alternatives and measures, or the action
8 agency issues permits that it knows or should know will result in more “take” than the
9 incidental take statement authorized, then the action agency is acting contrary to the
10 mandate of the ESA.

11 44.

12 Regulations implementing Section 7 of the ESA, specifically 50 C.F.R.
13 § 402.02, define “jeopardize the continued existence of” as “an action that reasonably
14 would be expected, directly or indirectly, to reduce appreciably the likelihood of both
15 survival and recovery of a listed species in the wild by reducing the reproduction,
16 numbers, or distribution of that species.” The Section 7 Handbook (Handbook), a
17 document released jointly by the US Fish and Wild Life Services and the NMFS to
18 further clarify the agencies’ interpretation of federal responsibilities under Section 7,
19 defines the term “survival” in part to be “the condition in which a species continues to
20 exist into the future while retaining the potential for recovery.”

21 45.

22 In fulfilling the requirements of Section 7(a)(2) of the ESA, 16 U.S.C. §
23 1536(a)(2), each agency must use the best scientific and commercial data available.
24 A finding of compliance with the ESA is not the same as a finding of compliance with
25 NEPA or with the CWA, as the statutes have different statutory standards and goals.

26 **FACTUAL BACKGROUND**

1 46.

2 On February 21, 2012, the Corps reissued a number of NWP's authorizing
3 certain activities that require Corps permits under Section 404 and/or Section 10 of
4 the Rivers and Harbors Act of 1899, 33 U.S.C. § 403. These NWP's included NWP 48
5 – Commercial Shellfish Aquaculture Activities. In reissuing the NWP, the Corps
6 imposed an accompanying suite of General Conditions on authorized activities. For
7 example, General Condition 2 prohibits activities authorized under a NWP from
8 disruption of necessary life cycle movements of indigenous aquatic species; General
9 Condition 3 requires activities authorized under a NWP to avoid spawning areas; and
10 General Condition 6 prohibits activities under NWP from utilizing unsuitable materials.

11 47.

12 General Condition 18 excludes from authorization under an NWP any activity
13 that may jeopardize an ESA-listed or candidate species or adversely modify critical
14 habitat of a listed species, and requires non-federal applicants to submit a PCN or
15 application for activities that may affect species listed under the ESA. General
16 Condition 27 requires conformance with regional and case-by-case conditions. And
17 General Condition 31 governs contents, submission, and review of a PCN or
18 application for NWP 48 coverage.

19 48.

20 As applied under NWP 48, General Condition 31 requires a PCN or application
21 to include information about the permittee; a description of the proposed project, its
22 purpose, its adverse environmental effects, and any associated permits; sketches; a
23 wetland delineation; names of endangered species that might be affected or use
24 critical habitat that might be affected; a map showing the boundary area; the names of
25 cultivated species; and whether canopy predator nets are being used. Projects
26 resulting in losses of more than 0.1 acre of wetlands must describe compensatory

1 mitigation.

2 49.

3 In reissuing 2012 NWP 48, the Corps modified the permit such that it
4 authorized new and expanded aquaculture operations. The 2007 version of NWP 48
5 authorized existing activities only. The Corps recognized this change as one of the
6 three greatest substantive changes to NWPs made in the 2012 reissue. The Corps
7 expressly recognized that this 2012 change to NWP 48 would result in a greater
8 number of commercial shellfish aquaculture activities authorized by NWP.

9 50.

10 In support of its 2012 reissue of the NWP, the Corps produced a Decision
11 Document, which purports to document the public interest review required by 33 CFR
12 § 320.4(a)(1) and (2); the environmental analysis required by NEPA; and the impact
13 analysis required by Subparts C through F of the 404(b)(1) Guidelines (40 CFR Part
14 230). The Decision Document addresses effects of authorization on a national and
15 programmatic basis and contains a cursory cumulative impacts discussion with little or
16 no application to local conditions. The Decision Document is an EA for the purposes
17 of NEPA. It asserts that the reissue of NWP 48 will have no significant effect on the
18 quality of the human environment and that preparation of an EIS is not required.

19 51.

20 The Nationwide Decision Document acknowledges potential adverse impacts
21 may result from authorized or previously authorized activities but largely fails to
22 describe what those impacts are or how they arise from the authorized activities. The
23 Decision Document asserts that impacts will be rendered minor and insignificant by:
24 (i) permit terms, (ii) General Conditions, (iii) Division and District authority to impose
25 regional conditions; and (iv) case-by-case review of PCN's to ensure that adverse
26 effects are minimal.

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52.

To support the conclusion in the decision document the Corps relied heavily on subsequent exercises of discretionary authority by Division and District Engineers to regionally revoke, modify, or suspend the NWP or to make case by case determinations regarding individual activities. In doing so, the Corps unreasonably relied on *regional* or *case-by-case* review to assess the cumulative effects of a *nationwide* authorization. The Corps conducted little or no substantive analysis of potential effects of authorized activities and provided little or no meaningful guidance or criteria for the exercise of discretionary authority by division and district engineers.

53.

The Corps also failed to provide adequate documentary support or substantive evidence for its conclusions that permit terms and conditions would be sufficient to ensure that environmental effects would be minimal and not significant. Nor did the Corps impose monitoring requirements that would ensure that NWP terms and conditions, including those resulting from subsequent exercises of discretionary authority would be adequately policed. The Corps failed to consider at all whether Division and District Engineers are obliged to or capable of faithfully exercising discretionary authority in response to the myriad potentially significant adverse effects of the issue of NWP 48 that the Corps deferred consideration of when it issued the NWP.

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54.

On March 19, 2012, the Seattle District announced regional conditions applicable activities in Washington State authorized under NWP 48. In doing so, the District clarified that under the provisions of General Condition 18, all authorizations under NWP 48 in Washington State require submittal of a PCN or application. These

1 regional general conditions also require that a PCN or application include information
2 about essential fish habitat that may be affected by a proposed authorized activity.

3 55.

4 Also on March 19, 2012, the Seattle District produced a Supplemental Decision
5 Document for NWP 48. The Supplemental Decision Document estimated that there
6 were only “101 commercial shell fish growing areas in Washington State” and that
7 NWP 48 would be used “approximately 50 times” each year during the life of the
8 permit. The Supplemental Decision Document concluded that NWP terms and
9 conditions, including provisions for post-issuance PCN review, would supposedly
10 ensure that NWP 48 authorizes only activities with minimal effects on the
11 environment.

12 56.

13 The Seattle District also developed special conditions for commercial shellfish
14 aquaculture activities. As suggested by the blank reference number in its heading
15 (“Corps Reference Number: NWS-XXXX-XXXXX”), that document is merely a
16 template of conditions, and has no effect except as such conditions are applied to an
17 individual activity on case-by-case review.

18 57.

19 At the time it reissued the 2012 NWP, the Corps had initiated but had not yet
20 completed an ESA Section 7 consultation with NMFS for the national NWP program.
21 On Nov. 24, 2014, after the conclusion of consultation, NMFS issued a Biological
22 Opinion (“2014 BiOp”). On the grounds that the NWP program would address any
23 incidental take in subsequent consultations, the 2014 BiOp did not provide an
24 incidental take statement (“ITS”) for the NWP program, and does not exempt any
25 incidental take from the prohibitions in ESA Section 9.

26 58.

1 The 2014 BiOp concluded that shellfish farming was not likely to adversely
2 affect critical habitat for salmon. However, the NMFS analysis and conclusions were
3 premised on the Corps estimate that 2012 NWP 48 permit would only be used roughly
4 50 times a year, for the life of the permit.

5 59.

6 The reality has turned out to be something **starkly** different. Once the 2012
7 NWP 48 was available for use, the Seattle District granted approximately **800** or more
8 authorizations in Puget Sound under NWP 48 in just first few years alone. Since then
9 the Seattle District of the Corps has granted roughly 120 additional authorizations
10 under 2012 NWP 48. In addition, the Seattle District of the Corps has granted a so far
11 unknown number of individual aquaculture permits, for the same or similar activities'
12 in Puget Sound.

13 60.

14 In its March 2012 NEPA analysis the Seattle District anticipated that NWP 48
15 would be used approximately 250 times, over the **entire** five-year permit period, and
16 the one year extension of the permit authorizations available under 33 C.F.R. 33.6(b).
17 The District concluded, **based on that estimation**, that the cumulative impacts of the
18 NWP 48 authorizations were most likely minimal or "*de minimis*."

19 61.

20 However, the 2012 version of NWP 48 was actually used by the Seattle District
21 **already** more than 920 times. Attached as Exhibit A, and incorporated into this
22 complaint by reference, is an excerpt of a presentation that the Seattle District made
23 to the industry and the public in April 2016. On page 20 of that presentation (page 4
24 of Ex. A) the District acknowledged using NWP 48 approximately 920 times so far.
25 The Seattle District also recognizes that it is the largest or primary user of the 2012
26 NWP 48 in the entire nation. The Seattle District acknowledges issuing 92% of all the

1 NWP 48 authorizations issued in the nation. The Seattle District's 920 authorizations
2 under the 2012 NWP 48 cover approximately 37,000 acres of Washington shoreline.

3 62.

4 There were also many more applications for authorization under the 2012 NWP
5 48 pending before the Seattle District. Attached as Exhibit B, and incorporated into
6 this complaint by reference, is a print out of a spreadsheet created by the Seattle
7 District which lists the then pending applications for authorizations under 2012 NWP
8 48, as of April 28, 2016. There were over 80 active applications on file with the Seattle
9 District. The unanticipated intensity with which 2012 NWP 48 was used during its first
10 few years constituted significant new information. However, the Seattle District never
11 performed a supplemental NEPA or CWA analysis for 2012 NWP 48 that took this
12 significant new information into account.

13 63.

14 Despite being aware of the dramatic increase in the number of authorized
15 activities, the Seattle District of the Corps repeatedly issued authorizations under
16 2012 NWP 48 in Puget Sound. For example, on November 17, 2014, the Corps
17 issued 2012 NWP 48 coverage to a permittee with authorization NWS-2014-65 for yet
18 another operation of a near shore aquaculture facility on Case Inlet on Harstine
19 Island, Mason County, Washington. On March 10, 2015, the Corps issued 2012 NWP
20 48 coverage to a permittee with authorization NWS-2013-759 for another operation of
21 a separate near shore aquaculture facility on Case Inlet near Vaughn, in Pierce
22 County, Washington. On October 21, 2015, the Corps issued 2012 NWP 48 coverage
23 to a permittee under authorization NWS-2015-121 for another operation of a separate
24 near shore aquaculture facility in Totten Inlet, Puget Sound near Shelton, Mason
25 County, Washington. On October 21, 2015, the Corps also issued 2012 NWP 48
26 coverage to authorization NWS-2015-147 for operation of a separate near shore

1 aquaculture facility near Totten Inlet, Puget Sound near Shelton, Mason County,
2 Washington. On February 1, 2016 the Corps also issued 2012 NWP 48 coverage to
3 authorization NWS-2013-1288 for operation of a separate near shore aquaculture
4 facility on Hood Canal in Puget Sound, near Lilliwaup, Mason County, Washington.
5 On March 14, 2017, the Corps issued NWS-2017-203, which consisted of three
6 permit applications for operations in Hood Canal in recognized eel grass beds.

7 64.

8 Each of these operations is located in the District. Each authorizes another
9 permittee to place PVC tubes in the near shore habitat. Into each tube the permittee
10 will place a geoduck clam, or some other form of aquaculture, which will be harvested
11 after several years. Depending on the operation, netting will be put over the entire
12 plot of polyvinyl chloride (PVC) tubes, or will be place over each one individually.
13 Those PVC tubes and/or netting that have not already been washed away by storms
14 or torn up by aquatic animals or tangled in boats, may sometimes be removed after
15 roughly two years. When the shellfish at issue are ready for harvest, the permittee
16 will often use a high volume low-pressure hose to “liquefy” the nearshore beach to
17 retrieve the shellfish.

18 65.

19 Plaintiff (and other citizens) repeatedly submitted comments to the Corps.
20 Plaintiff (and others) repeatedly pointed out the problems with inadequate analysis of
21 cumulative impacts. Those comments were submitted prior to issuance of both the
22 2012 NWP 48 issuance and prior to the authorizations listed in paragraph 64.
23 Plaintiffs also repeatedly pointed out the need for a Supplemental NEPA analysis, as
24 well as raising concerns about other CWA and ESA issues. Plaintiff did not receive
25 copies of the specific authorizations, and their related Corps Decision Memo’s, that
26 are identified in paragraph 64 until late 2015 or early 2016. Plaintiff filed the original

1 complaint less than one year after obtaining copies of all but the last of the decisions
2 listed in paragraph 64.

3 66.

4 Plaintiff also filed a Petition with the Corps, in May 2015, requesting
5 suspension of the use of 2012 NWP 48 in Puget Sound in light of the extensive and
6 unanalyzed use of 2012 NWP 48 in the area by the Seattle District. A true copy of the
7 plaintiff's Petition is attached hereto and incorporated by reference as Exhibit C.
8 Although over two years have passed, the Corps has yet to Act on that Petition. In the
9 interim, the Corps has reissued NWP 48 for a five-year period starting March 19,
10 2017.

11 67.

12 On January 6, 2017, the Corps again reissued NWP 48, to be effective March
13 19, 2017. The Corps made substantive changes to NWP 48 that only exacerbate the
14 issues raised by the 2012 NWP 48.

15 68.

16 In its reissuance of NWP 48, the Corps has relaxed the protection provided by
17 several key General Conditions. For example, the 2017 General Condition 32
18 (previously General Condition 31) no longer requires agency cooperation for
19 authorizations under NWP 48.

20 ////

21 69.

22 In the reissuance, the Corps also modified the permit by redefining "new
23 shellfish aquaculture operations" to have a 100 year horizon. Specifically, only "an
24 operation in a project area where commercial shellfish aquaculture activities have **not**
25 been conducted during the last 100 years" would be considered new. The 2017 NWP
26 48 exempts activities that do not come under the new definition from PCN

1 requirements.

2 70.

3 The Corps recognized this change as effectively grandfathering in operations
4 that have lain fallow for decades or more. Despite this, and without explanation, the
5 Corps estimated that only 50 “new” NWP 48 authorizations would occur between
6 2017 and 2022. In support of the 2017 reissue of the NWP, the Corps produced
7 another National Decision Document. The 2017 Decision Document inherits a
8 substantial portion of the 2012 Decision Document’s language addressing effects of
9 authorization on a national and programmatic basis. The core of the cumulative
10 impacts discussion in the 2017 document adopts the entirety of the 2012 document
11 virtually verbatim.

12 71.

13 There are some new additions in the 2017 Decision Document, but they fail to
14 provide adequate discussion of cumulative impacts of the 2012 NWP 48
15 authorizations in Puget Sound, or the now massively expanded scope of the
16 properties eligible for registration under 2017 NWP 48.

17 72.

18 The 2017 Nationwide Decision Document does little more than repeat the 2012
19 discussion. The document again fails to describe the cumulative impacts that will
20 likely arise from the authorized activities. The Decision Document again asserts that
21 any impacts will be rendered minor and insignificant by: (i) permit terms, (ii) General
22 Conditions, (iii) Division and District authority to impose regional conditions; and (iv)
23 case-by-case review of PCN’s to ensure that adverse effects are minimal.

24 73.

25 In the 2017 Decision Document, the Corps repeated its heavy reliance on
26 subsequent exercises of discretionary authority by Division and District Engineers to

1 regionally revoke, modify, or suspend the NWP. The Corps ignored the fact that a
2 Petition to do just that has been pending for over two years in the Seattle District,
3 without any action by the District or Division.

4 74.

5 As was the case for the 2012 document, this practice of relying on *regional* or
6 *case-by-case* review remains unreasonable for the assessment of cumulative effects
7 of a *nationwide* authorization. The 2017 NWP 48 fails to remedy the lack of
8 substantive analysis of potential effects of authorized activities, as well as the lack of
9 guidance or criteria for the exercise of discretionary authority by division and district
10 engineers.

11 75.

12 The 2012 NWP 48 did not authorize operations in areas in which the operator
13 had not been currently active in 2007, or activities that would affect more than ½ acre
14 of submerged aquatic vegetation beds. The 2017 NWP 48 now authorizes operations
15 in all those areas, if commercial shellfish aquaculture activities have occurred at **any**
16 time within the past 100 years.

17 76.

18 In addition to the continuing failure to address the potential adverse impacts,
19 the nationwide Decision Document also fails to adequately address the cumulative
20 impacts of the vastly broadened definition to “new operation.” The 2007 NWP 48
21 cumulative impacts analysis stated that NWP 48 did not authorize expansion of
22 actually existing commercial shellfish operations. The 2012 NWP 48 cumulative
23 impacts analysis estimated that only 3,320 acres of navigable waters would be
24 impacted. The 2017 NWP 48 vastly expands the scope of aquatic acreage open to
25 NWP 48 authorization. The Corps now estimates that this expansion would impact
26 approximately 56,250 acres. The Corps’ analysis fails, however, to address the

1 cumulative impacts of this massive expansion.

2 77.

3 On March 19, 2017, the Seattle District of the Corps produced a supplement to
4 the national decision document for NWP 48. The 2017 supplement acknowledges
5 that approximately 1,020 operations have been commenced under 2012 NWP 48, yet
6 it entirely fails to explain why the drastic increase from the 2012 supplement's
7 estimate of 200 authorizations continues to have only minimal environmental impacts.

8 78.

9 The 2017 supplement identifies eelgrass and forage fish as indicator groups.
10 Though the 2017 supplement acknowledges the potential for significant impact
11 caused by shellfish aquaculture, it again relies entirely on the discretionary authority
12 of the district engineer to impose special conditions to keep impacts minimal.

13 79.

14 In the 2017 reissuance of NWP 48 and the Seattle District's supplement, the
15 Corps again failed to provide adequate documentary support or substantive evidence
16 for its conclusions that permit terms and conditions would be sufficient to ensure that
17 environmental effects would be minimal and not significant. The 2017 NWP 48 also
18 fails to impose the monitoring requirements that would ensure adequate policing of
19 NWP terms and conditions.

20 ////

21 80.

22 The Corps' minimal effects and no significant impacts determinations for
23 issuing 2017 NWP 48 should have been based on the number and extent of the
24 requested authorized activities that occurred under the prior 2007 and 2012 NWP 48.
25 It is Plaintiff's understanding and belief that the Corps had over 800 authorizations
26 ready to be issued, under the 2007 NWP 48, but that due to a concerns about ESA

1 coverage the Corps did not issue those authorizations until after 2012 NWP 48 was
2 adopted. However, the 2012 and 2017 NWP 48 NEPA and CWA analysis did not
3 account for the dramatic increase in the number of authorized activities that the Corps
4 knew or should have known would result from issuance of the 2012 NWP 48,
5 particularly in light of the number of pending applications or authorizations that the
6 Corps knew had been received and/or considered under the 2007 NWP 48. The
7 2017 NWP 48 and the Seattle District's supplement continues to fail to account for the
8 dramatic increase in authorized activities.

9 81.

10 Also, in issuing 2012 and 2017 NWP 48, the Corps expressly relied on the
11 subsequent exercise of discretionary authority by the Division Engineer to reach a
12 finding that the impacts of authorized activities are minimal, consistent with the public
13 interest, and not significant. The Northwestern Division Engineer's principal exercise
14 of discretionary authority to date has been the imposition of regional conditions. The
15 Northwestern Division Engineer allegedly analyzed the effects 2012 and 2017 NWP
16 48 with regional conditions in the Supplemental Decision Documents, which expressly
17 state that the cumulative impacts of the NWP 48 on the aquatic environment are
18 "dependent on the number times the NWP is used." Even though the Corps knew it
19 had many many hundreds of authorizations and/or applications or PCN's pending
20 from the 2007 NWP 48, both the Supplemental Regional and the National Decision
21 Documents projected the number of authorized activities based on an unreasonably
22 low and inaccurate assessment of the amount of usage. The 2017 NWP 48 and the
23 Seattle District's Supplemental Regional Decision Documents do not address these
24 deficiencies, and they, too, underestimate the number of activities that will be
25 authorized under the 2017 NWP 48.

26 82.

1 Authorized activities are resulting in more than minimal and significant adverse
2 environmental effects and contributing to significant degradation of waters of the
3 United States by effects on water quality, effects arising from the introduction of
4 plastics, and effects on eelgrass, salmon, birds, herring, and flat fish. The cumulative
5 magnitude of these effects is increased by the greatly increased number of authorized
6 activities.

7 83.

8 Shellfish aquaculture may result in adverse water quality impacts and
9 geochemical changes in the intertidal environment. The Corps was advised of this in
10 public comments regarding the adverse impacts of geoduck cultivation.

11 84.

12 Environmental impacts may arise from unstable plastic material, including
13 PVC. PVC can leach dangerous chemicals into the environment that affect the
14 reproduction, development, and genetics of a variety of organisms. 2012 NWP 48
15 authorizes the installation of plastic tubes and other structures into waters of the US.
16 The 2017 NWP 48 renews this authorization. Reliance on General Condition 6 and
17 case-by-case exercise of discretionary authority by District Engineers was and is
18 unreasonable, because it is vague and because a District Engineer would not
19 necessarily have an opportunity to exercise case-by-case review for all activities
20 where PVC might be introduced into waters of the U.S.

21 85.

22 Eelgrass is an important habitat component in Puget Sound. Eelgrass beds are
23 sensitive to human-caused disturbances, including increased sedimentation from
24 aquacultural harvesting activities. Since the 2012 NWP 48 issuance, additional
25 information has become available regarding effects on eelgrass arising from geoduck
26 harvesting. This new information regarding the effects on eelgrass, coupled with the

1 increased number of activities authorized under 2012 NWP 48 over those projected in
2 the Corps' environmental analyses, raises substantial questions regarding the
3 potential for significant adverse effects on eelgrass arising from activities authorized
4 under 2012 NWP 48 in Puget Sound. The continued failure of the 2017 NWP 48 in
5 addressing these deficiencies again raises substantial questions regarding the
6 potential for significant adverse effects on eelgrass. Though the 2017 supplement
7 identifies shellfish aquaculture as having potentially significant environmental impacts
8 on eelgrass, the 2017 supplement again relies entirely on the District engineer's
9 discretion to prevent such impacts when there is no evidence to support that reliance
10 and ample evidence to demonstrate that reliance is misplaced.

11 86.

12 ESA-listed Puget Sound Chinook salmon and Hood Canal Summer Run chum
13 salmon occupy Puget Sound. Activities authorized under 2012 NWP 48, and then
14 again under 2017 NWP 48, will likely adversely affect these salmon and their critical
15 habitat. Greatly expanding the geographical scope and intensity of aquaculture, by
16 authorizing almost or perhaps even more than 1,000 projects under 2012 NWP 48
17 and by expanding the scope of what constitutes and "existing" project to extend to any
18 property that was farmed in the last 100 years in 2017 NWP 48, significantly
19 increases these effects.

20 ////

21 87.

22 Industrial-scale aquaculture also causes a variety of negative impacts to marine
23 birds. The Corps received public comments regarding effects of harassment and
24 destruction of marine birds. The Corps has at times asserted that impacts to breeding
25 areas for such birds are addressed by General Condition 4. However, General
26 Condition 4 only applies to activities in migratory bird breeding areas. The Condition

1 will have no effect on non-migratory birds, or on activities outside of migratory bird
2 breeding areas, such as key **foraging** areas.

3 88.

4 Authorized activities may also adversely affect Southern Resident Killer
5 Whales. The Corps acknowledged public comments on interference with whale
6 recovery. The Corps provided no other substantive assessment of the effects of
7 activities authorized under 2012 NWP 48 on killer whales. The 2017 NWP 48 did not
8 resolve this significant error. The inclusion of new activities and the dramatic
9 expansion in the number of authorized activities renders reliance on the existing BiOp
10 findings (regarding adverse effects of authorized activities on killer whales and Puget
11 Sound Chinook salmon and Hood Canal summer-run chum salmon) unreasonable.

12 89.

13 Shellfish aquaculture has displaced beds of sand dollars in the past, and will
14 likely do so in the future. The Corps asserted that provisions relating to submerged
15 aquatic vegetation, General Condition 18 (endangered species), General Condition 14
16 (proper maintenance), PCN or application review, and prospective Regional
17 Conditions will ensure minimal effects to sand dollars. However, no Regional or
18 Seattle District Special Conditions are directed at sand dollars. The unanticipated
19 number of activities authorized under 2012 NWP 48, the reasonably expected further
20 increase that 2017 NWP 48 will create, and the failure of the Corps to impose special
21 conditions directed at minimizing harm to sand dollars, invalidates the premise the
22 Corps relied on to determine in its adoption of 2012 and 2017 NWP 48 that effects on
23 sand dollars are minimal and not significant.

24 90.

25 Shellfish aquaculture can have major negative effects on fish such as herring,
26 which can get caught in netting. The Corps acknowledged this but claimed that

1 Section 7 consultation, PCN or application review, and special Regional Conditions
2 will be enough to ensure that effects are minimal. However, the unanticipated
3 number of activities authorized under 2012 NWP 48 and the failure of the Seattle
4 District of the Corps to impose Special Conditions directed at minimizing harm to
5 herring invalidates the premise the Corps relied on the adoption of 2012 NWP 48 to
6 determine that effects on herring are minimal and not significant. The continued failure
7 of the 2017 NWP 48 in addressing these deficiencies only serves to exacerbate this
8 problem. The 2017 Regional Supplement now identifies shellfish aquaculture as
9 having potentially significant environmental impacts on forage fish, but the
10 Supplement again relies entirely on the District Engineer's discretion to prevent such
11 impacts - when the Corps' own records show that has never worked in this District
12 under NWP 48.

13 91.

14 The presence of aquacultural nets and tubes may also result in loss of habitat
15 for flat fish. These effects increase with the dramatic increase of authorized
16 aquacultural activities. The Corps acknowledged public comment regarding effects on
17 flat fish. The unanticipated number of activities authorized under 2012 NWP 48 and
18 the failure of the Seattle District of the Corps to impose Special Conditions directed at
19 minimizing harm to flat fish invalidates the premise the Corps relied on in its adoption
20 of 2012 NWP 48 to determine that effects on flat fish are minimal and not significant.
21 The 2017 NWP 48 did not resolve these deficiencies .

22 **FIRST CLAIM FOR RELIEF**

23 **(Violation of CWA in Implementation of 2017 NWP 48)**

24 92.

25 Plaintiff realleges paragraphs 1 through 91, and further alleges:

26 93.

1 Guidelines in response to the great number and extent of those activities in Puget
2 Sound constitutes the unlawful withholding and unreasonable delay of an agency
3 action reviewable under 5 U.S.C. § 706(1).

4 97.

5 The Corps' failure to address the deficiencies of 2012 NWP 48 in 2017 NWP
6 48 constitutes a continued failure to ensure that authorized activities will not result in
7 greater than minimal adverse environmental effects or otherwise fail to conform with
8 the 404(b)(1) Guidelines. The Corps' scheme to implement 2017 NWP renders the
9 exercise of its authority to revoke, suspend, or modify 2017 NWP 48 a discrete action
10 that is legally required as an essential part of the Corps' compliance with the CWA.

11 98.

12 The Corps determined that the reissuance of the permit was in the public
13 interest. However, that determination was based on an estimated volume of permit
14 use that has already been exceeded many times over. The Corps has not remedied
15 this deficiency in 2017 NWP 48. Thus, the Corps based its CWA public interest review
16 on grossly inaccurate information. The Corps' determination that the authorization(s)
17 under 2017 NWP 48 are in the public interest was arbitrary, capricious, an abuse of
18 discretion, or otherwise not in accordance with law. Accordingly, the Corps'
19 determination to issue this and any future 2017 NWP 48 authorization must be set
20 aside.

21 99.

22 The Corps has failed to adequately analyze the effect that the aquaculture
23 industry, (operating at ten times the level that the Corps expected) would have on fish,
24 shellfish, wildlife and other special aquatic sites, such as eel grass beds. Aquaculture
25 operations operating at the current level are causing or contributing to more than
26 minimal adverse environmental effects and "significant degradation" of waters of the

1 U.S. in violation of the CWA. Issuance of one or more additional 2017 NWP 48
2 authorizations in such circumstances is unlawful.

3 100.

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

7 **SECOND CLAIM FOR RELIEF**

8 **(Violation of NEPA and APA in Implementation of 2017 NWP 48)**

9 101.

10 Plaintiff realleges paragraphs 1 through 91, as well as 100, and further alleges:

11 102.

12 The Corps' continued authorization of commercial aquaculture activities under
13 NWP 48 in Puget Sound is arbitrary, capricious, and contrary to law, in violation of the
14 APA, 5 U.S.C. § 706(2)(A), NEPA, and implementing regulations because it failed to
15 implement 2012 NWP 48 in the manner committed to by the Corps in the
16 environmental documents supporting its decision to issue this NWP. In the decision
17 to issue 2012 NWP 48, the Corps committed that the Division Engineers and District
18 Engineers would revoke, suspend, or modify 2012 NWP 48 as necessary to ensure
19 that authorized activities will not significantly affect the environment. Although
20 authorized activities are significantly affecting the environment in Puget Sound,
21 neither the Northwestern Division Engineer, nor the Seattle District Engineer revoked,
22 suspended, or modified 2012 NWP 48 as necessary to ensure that authorized
23 activities will not significantly affect the environment. The Seattle District instead
24 continued to issue authorization for activities or projects under 2012 NWP 48.

25 103.

26 The Corps' 2017 reissuance of NWP 48 fails to remedy the deficiencies of

1 2012 NWP 48 and demonstrates that it is the Corps' intent to continue issuing
2 authorization for activities or projects that significantly affect the environment in Puget
3 Sound. Neither the Corps, the Northwest Division Engineer, nor the Seattle District
4 Engineer have indicated an intent to revoke, suspend, or modify 2017 NWP 48 as
5 necessary to ensure that authorized activities will not significantly affect the
6 environment, and they have instead ignored for years the pending request by plaintiff
7 to act in such a manner.

8 104.

9 The Corps' issuance and implementation of 2012 NWP 48, and issuance of
10 2017 NWP 48 with its new 100 year scope indicates that the Corps has a pattern and
11 practice of underestimating the significant environmental effects of NWP 48 activities,
12 and it also shows that the Corps does not intend to remedy these deficiencies in its
13 continued implementation of 2017 NWP 48.

14 105.

15 The Corps failed to include accurate information in its 2012 NWP 48
16 cumulative impacts analysis. The Corps 2017 analysis adopts the 2012 analysis
17 virtually verbatim with only a few additions that fail to remedy the deficiencies of the
18 2012 analysis. The issuance of further authorizations under 2017 NWP 48, without
19 proper NEPA analysis, is a violation of NEPA and its implementing regulations.

20 **THIRD CLAIM FOR RELIEF**

21 **(Violation of CWA and APA in Issuing 2017 NWP 48)**

22 106.

23 Plaintiff realleges paragraphs 1 through 91, and 100, and further alleges:

24 107.

25 Defendants' 2012 reissue of NWP 48 was arbitrary, capricious, an abuse of
26 discretion, and otherwise not in accordance with law, in violation of the APA, 5 U.S.C.

1 § 706(2)(A), the CWA, 33 U.S.C. § 1344(e), and implementing regulations of the CWA
2 for at least the following reasons:

- 3 (a) The Corps' determination that 2012 NWP 48 will have only minimal
4 adverse environmental individual and cumulative effects relied on
5 projections of the number and extent of authorized activities that were
6 unreasonable at the time that they were made. The Corps' projections
7 were unreasonable because they failed to account for the foreseeable
8 increase in authorized activities attributable to the 2012 modification of
9 NWP 48 providing for authorization of new and expanded operations.
10 The Corps reliance on unreasonable projections undermines its minimal
11 effects, 404(b)(1) Guidelines, and public interest findings regarding
12 many, if not all, of the potential adverse effects arising from authorized
13 activities—including effects on eelgrass, ESA-listed salmon, marine
14 birds, southern resident killer whales, sand dollars, herring, and flat
15 fish—and meaningful consideration of such effects in determining that
16 issuing 2012 NWP 48 was in the public interest;
- 17 (b) The Corps failed to provide a reasoned explanation, scientific basis, or
18 substantial evidence to support its determination that appropriate steps
19 have been taken to minimize the adverse water quality effects of
20 shellfish aquaculture authorized under 2012 NWP 48 and to
21 meaningfully consider such effects in determining that issuing 2012
22 NWP 48 was in the public interest;
- 23 (c) Disregarding the impact of the enormous expansion of commercial
24 shellfish aquaculture outside of its historical area and the culturing of
25 species, including exotic species not native to Puget Sound that were
26 never part of the historic commercial shellfish industry and never

1 included the use of plastic oyster bags, plastic nets, PVC tubes, plastic
2 netting, rubber bands and plastic zip ties, anchors and discs;

3 (d) The Corps also failed to substantively or meaningfully address to public
4 comments regarding (i) the lack of independent peer reviewed science
5 in conjunction with the proposed issuance of 2012 NWP 48, (ii) the
6 presence and potential spread of parasites and disease as a result of
7 the intensive industrial scale cultivation of shellfish in Puget Sound, (iii)
8 the adverse impacts to eelgrass, (iv) the potential adverse impact on the
9 available food supply for other aquatic species, including eggs and
10 larvae ingested by large numbers of farmed bivalves, (v) adverse
11 impacts on the sand lance and forage fish habitat due to expanded
12 cultivation and harvest activities, (vi) the disruption of macro algae and
13 sand dollar beds and other Essential Fish Habitat, (vii) adverse impacts
14 to food, shelter and habitat for both ESA listed and non-listed species,
15 and (viii) the adverse impacts on forage and refuge for both migratory
16 and other marine bird species;

17 (e) The Corps failed to provide a reasoned explanation, scientific basis, or
18 substantial evidence to support its determinations that adverse effects of
19 authorized activities on ESA-listed salmon will be minimal, that the
20 aquatic environment would not be significantly degraded through
21 significant adverse effects on ESA-listed salmon species, and that 2012
22 NWP 48 incorporated all appropriate and practicable measures to
23 minimize potential harm to the aquatic ecosystem and failed to weigh
24 the benefits of issuing 2012 NWP 48 against the potential adverse
25 effects to ESA-listed salmon species;

26 (f) The Corps failed to provide a reasoned explanation, scientific basis, or

1 substantial evidence to support its determination that appropriate steps
2 have been taken to minimize the adverse effects of netting and
3 displacement of food sources on birds arising from activities authorized
4 under 2012 NWP 48 and to meaningfully consider such effects in
5 determining that issuing 2012 NWP 48 was in the public interest;

6 (g) The Corps failed to provide a reasoned explanation, scientific basis, or
7 substantial evidence to support its determinations that adverse effects of
8 authorized activities on ESA-listed southern resident killer whales will be
9 minimal, that the aquatic environment would not be significantly
10 degraded through significant adverse effects on southern resident killer
11 whales, and that 2012 NWP 48 incorporated all appropriate and
12 practicable measures to minimize potential harm to the aquatic
13 ecosystem and failed to weigh the benefits of issuing 2012 NWP 48
14 against the potential adverse effects to ESA-listed salmon species and
15 southern resident killer whales in determining that issuing 2012 NWP 48
16 was in the public interest;

17 (h) The Corps failed to provide a reasoned explanation, scientific basis, or
18 substantial evidence to support its determinations that adverse effects
19 on herring arising from anti-predator nets will be minimal, that the
20 aquatic environment would not be significantly degraded through
21 significant adverse effects on herring, and that 2012 NWP 48
22 incorporated all appropriate and practicable measures to minimize
23 potential harm to herring and failed to weigh the benefits of issuing 2012
24 NWP 48 against the potential adverse effects to herring;

25 (i) The Corps failed to provide a reasoned explanation, scientific basis, or
26 substantial evidence to support its determinations that adverse effects of

1 habitat exclusion on flat fish arising from aquacultural tubes and nets will
2 be minimal, that the aquatic environment would not be significantly
3 degraded through significant adverse effects on flat fish, and that 2012
4 NWP 48 incorporated all appropriate and practicable measures to
5 minimize potential harm to flat fish;

6 (j) The Corps failed to properly weigh the benefits of issuing 2012 NWP 48
7 against the potential adverse effects to flat fish in determining that
8 issuing 2012 NWP 48 was in the public interest; and

9 (k) The Corps otherwise failed to support its decision to reissue 2012 NWP
10 48 with substantial evidence or reasoned decision-making and failed to
11 respond meaningfully to public comments.

12 108.

13 The Corps' 2017 NWP 48 fails to remedy some or all of the deficiencies
14 alleged in the preceding paragraph. The Corps' implementation of 2012 NWP 48, as
15 well as the continued deficiency in the Seattle District's 2017 Regional Supplement,
16 establish that it is unlikely that the Corps will take the necessary actions to remedy
17 these deficiencies. Thus, defendants' determination that the 2017 NWP 48 has
18 minimal environmental impacts continues to be arbitrary, capricious, and contrary to
19 law, in violation of the APA, 5 U.S.C. § 706(2)(A), NEPA, and implementing
20 regulations. Though the Corps has addressed some environmental concerns in
21 response to comments or supplemental analysis, the Corps again failed to provide a
22 reasoned explanation, scientific basis, or substantial evidence to support its claim of
23 minimal impacts.

24 109.

25 In addition, the Corps has failed to provide a reasoned explanation, scientific
26 basis, or substantial evidence to support its claim that its vast expansion of potential

1 projects authorized by NWP 48 to basically include almost any area that has had
2 commercial shell activities at any time over the past 100 years, will have no significant
3 impacts on the environment. The Corps' cumulative impacts analysis of the 2017
4 NWP 48 entirely fails to address the significant expansion of NWP 48 to projects that
5 affect greater than ½ acre of aquatic vegetation in areas where commercial shellfish
6 aquaculture activities may have once occurred over the past 100 years. The Corps'
7 failure to analyze the cumulative impacts of this substantial expansion in the scope of
8 the activities covered under NWP 48 makes the Corps' analysis incomplete and the
9 issuance of the 2017 NWP 48 unlawful under NEPA.

10 **FOURTH CLAIM FOR RELIEF**

11 **(Violation of NEPA and APA in**
12 **Issuing 2017 NWP 48)**

13 110.

14 Plaintiff realleges paragraphs 1 through 91, and 100, and further alleges:

15 111.

16 The 2017 reissue of NWP 48 was a major federal action for the purposes of
17 NEPA.

18 112.

19 Defendants' issuance of the 2012 NWP 48 under a FONSI was arbitrary,
20 capricious and contrary to law, in violation of the APA, 5 U.S.C. § 706(2)(A), NEPA,
21 and implementing regulations because:

22 (a) The Corps failed to sufficiently analyze the direct and indirect
23 environmental effects of the activities authorized under 2012 NWP 48
24 when it determined that no significant environmental impacts would
25 result;

26 (b) The Corps failed to provide a substantive analysis of the potential

1 adverse effects of authorized activities;

2 (c) The Corps unreasonably relied on subsequent regional and case-by-
3 case determinations to assess cumulative impacts of a national action;

4 (d) The Corps failed to provide documentary support or substantive
5 evidence for its determinations that permit terms and conditions,
6 including those arising from subsequent exercise of discretionary
7 authority by division and district engineers, would be sufficient to ensure
8 that environmental effects would be minimal and not significant;

9 (e) The Corps failed to disclose or consider the environmental
10 consequences of the failure of permit terms and conditions, including
11 those arising from subsequent exercise of discretionary authority by
12 division and district engineers, to effectively address adverse
13 environmental effects;

14 (f) The Corps failed to prepare an EIS; and

15 (g) The Corps determined that the potential adverse effects of issuing 2012
16 NWP 48 were not significant was improper because; (i) there was
17 controversy regarding the effects of authorized activities; (ii) the effects
18 of authorized activities were highly uncertain; (iii) the issuance of 2012
19 NWP 48 was precedential for and represented a decision in principle for
20 subsequent case by case authorizations to a great extent; (iv) the
21 authorized activities were likely to adversely affect endangered species
22 and their critical habitat; and (v) because the Corps issuance of 2012
23 NWP 48 threatened violation of the CWA and its implementing
24 regulations because it authorizes activities with greater than minimal
25 effects.

1 The Corps' 2017 NWP 48 fails to remedy the deficiencies alleged in the
2 preceding paragraph, and its implementation of 2012 NWP 48, as well as the
3 continued deficiency in the Seattle District's 2017 Regional Supplement, establish that
4 it is unlikely that the Corps will take supplemental actions to remedy these
5 deficiencies. Thus, defendants' issuance of the 2017 NWP 48 under a FONSI
6 continues to be arbitrary, capricious, and contrary to law, in violation of the APA, 5
7 U.S.C. § 706(2)(A), NEPA, and implementing regulations.

8 114.

9 In addition, the Corps has failed to provide a reasoned explanation, scientific
10 basis, or substantial evidence to support its claim that its vast expansion of potential
11 projects authorized by NWP 48 to basically include almost any area that has had
12 commercial shell activities at any time over the past 100 years, will have no significant
13 impacts on the environment. The Corps' cumulative impacts analysis of the 2017
14 NWP 48 entirely fails to address the significant expansion of NWP 48 to projects that
15 affect greater than ½ acre of aquatic vegetation in areas where commercial shellfish
16 aquaculture activities may have once occurred over the past 100 years. The Corps'
17 failure to analyze the cumulative impacts of this substantial expansion in the scope of
18 the activities covered under NWP 48 makes the Corps' analysis incomplete and the
19 issuance of the 2017 NWP 48 unlawful under NEPA.

20 **FIFTH CLAIM FOR RELIEF**

21 **(Violation of CWA and APA in Issuing Specific Authorizations)**

22 115.

23 Plaintiff realleges paragraphs 1 through 91, and 100, and further alleges:

24 116.

25 Defendants' conclusions that NWS-2013-759, NWS-2014-65, NWS-2015-121,
26 NWS-2015-147, NWS-2013-1288, and NWS-2017-203 were properly authorized

1 under 2012 NWP 48 were arbitrary, capricious, an abuse of discretion, and otherwise
2 not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A), the CWA, 33
3 U.S.C. § 1344(e), and implementing regulations of the CWA, for one or more the
4 following reasons:

5 (a) The Corps failed to properly assess the individual and/or cumulative
6 adverse effects that would result from one or more of these activities;

7 (b) The Corps authorized one or more activities that, by virtue of their
8 individual or cumulative effect(s), will have more than negligible
9 impacts; and

10 (c) The Corps issued authorizations for one or more activities that were not
11 in conformance with the terms & conditions of 2012 NWP 48.

12 117.

13 Some or all of these authorizations will be “re-verified” or reissued by the
14 Corps, under 2017 NWP 48.

15 **SIXTH CLAIM FOR RELIEF**

16 **(Violation of NEPA and APA by Failing to Prepare a**
17 **Supplemental NEPA Analysis)**

18 118.

19 Plaintiff realleges paragraphs 1 through 91, and 100, and further alleges:

20 119.

21 Pursuant to 40 C.F.R. § 1502.9(c)(1)(ii), the Corps must prepare a
22 Supplemental NEPA analysis when there are significant new circumstances or
23 information relevant to environmental concerns and bearing on proposed action or its
24 impacts. Failure to complete a Supplemental EA or SEIS before issuance of more
25 NWP 48 authorizations is a violation of NEPA and its implementing regulations.

26 120.

1 The dramatic difference between the number of authorized activities
2 anticipated in the National and Supplemental Decision Documents and the number of
3 activities authorized since issuing those documents, raised or should have raised a
4 substantial question of significant impacts arising from significant new circumstances.
5 That constituted new information bearing on authorized activities and their impacts.
6 These changed circumstances would most likely have changed the Corps' analysis of
7 environmental effects, because of the nature of the cumulative impacts resulting from
8 the unanticipated number of times that 2012 NWP 48 was used by the Corps,
9 primarily by the Seattle District.

10 121.

11 Under the permitting scheme established by 2012 NWP 48, regional
12 conditions, and Corps regulations, the authorization of an activity under 2012 NWP 48
13 in the Seattle district was a discrete action that the Corps was required to undertake.
14 After the anticipated 250 authorizations were issued, while knowing the number of
15 additional authorizations or applications for authorizations that were pending, each
16 additional authorization or groups of authorizations that the Corps issued either
17 individually or collectively constituted a major federal action related to authorization of
18 activities under 2012 NWP 48.

19 ////

20 122.

21 Despite only estimating that 2012 NWP 48 usage in the Seattle District would
22 be roughly 250 authorizations over the five year life of the permit; despite knowing
23 that it had already vastly exceeded that estimated level of usage of 2012 NWP 48;
24 despite being repeatedly warned about the unevaluated cumulative impacts of its
25 excessive use of 2012 NWP 48; and despite being Petitioned to cease issuance of
26 further authorizations until a cumulative impacts analysis was complete; the Corps

1 has to date refused or failed to issue or complete any supplemental NEPA document
2 that includes analysis of the cumulative impacts of the authorizations issued under
3 2012 NWP 48.

4 123.

5 The 2017 NWP 48 and its supporting documents continue to fail to address the
6 excessive use of 2012 NWP 48 in the Puget Sound area. Further, the Corps'
7 implementation of 2012 NWP 48 establishes that it is unlikely that the Corps will take
8 supplemental actions to remedy these deficiencies.

9 124.

10 The Corps violated NEPA by failing to prepare a supplemental environmental
11 analysis in response to its authorization of a dramatically greater number of activities
12 in the Seattle District under 2012 NWP 48 than the Corps contemplated or evaluated,
13 when it issued 2012 NWP 48 and/or the Seattle District Regional Conditions for 2012
14 NWP 48. The Corps' ongoing failure to remedy this deficiency in the 2017 NWP 48 is
15 a violation of NEPA.

16 125.

17 To the extent the Corps has rejected Plaintiff's requests to prepare a
18 supplemental environmental document, the Corps' failure to prepare a supplemental
19 environmental document either for the issue of 2012 NWP 48 or for the issue of
20 regional conditions on activities authorized under 2012 NWP 48 in the Seattle District,
21 or for the issuance of additional authorizations under 2012 NWP 48, was arbitrary,
22 capricious, an abuse of discretion, and otherwise not in accordance with law, in
23 violation of the APA, 5 U.S.C. § 706(2). To the extent that the Corps consciously
24 refused to prepare, or evaluate and determine whether to prepare, such a
25 supplemental environmental document, the Corps' conduct constitutes the unlawful
26 withholding and unreasonable delay of an agency action in violation of 5 U.S.C. §

1 706(1).

2 126.

3 The Corps' implementation of 2012 NWP 48 and issuance of 2017 NWP 48
4 establishes a likelihood that the Corps will continue these violations of the APA.

5 **SEVENTH CLAIM FOR RELIEF**

6 **(Violation of the APA – Agency Action**

7 **Unlawfully Withheld and/or Unreasonably Delayed)**

8 127.

9 Plaintiff realleges paragraphs 1 through 91, and 100, and further alleges:

10 128.

11 5 U.S.C. § 706(1) provides in pertinent part that the courts shall compel agency
12 action that is unlawfully withheld or unreasonably delayed.

13 129.

14 On or about May 5, 2015, Plaintiff filed a legal Petition with the Corps,
15 addressed to the predecessor of Defendants Semonite and Spellmon and to
16 Defendant Buck, asking that the Seattle District of the Corps suspend use of 2012
17 NWP 48, to authorize commercial shellfish aquaculture activities in Puget Sound “until
18 such time as the Corps has initiated and completed a new review of the
19 environmental effects of authorized activities and imposed conditions on 2012 NWP
20 48 as appropriate to ensure that the effects of authorized activities are minimal,
21 consistent with the public interest, and not significant.” In the Petition, Plaintiff cited
22 and submitted over 50 studies, documents, and/or publications, highlighting the
23 potential harm from industrial scale aquaculture. This included, but was not limited to,
24 the dramatic increase in plastic pollution in Puget Sound waters as a consequence of
25 the deployment of hundreds of thousands of plastic PVC tubes, high density
26 polyethylene (HDPE) netting, plastic bands, and HDPE oyster bags and mussel disks

1 by commercial aquaculture operators. Plaintiff also noted in its Petition that when
2 2012 NWP 48 was issued, the accompanying analysis by the Corps presumed that
3 the authority that 2012 NWP 48 conferred would be used only about 50 times a year
4 over a five-year period and the Defendants conducted their evaluations of the
5 projected environmental impacts of 2012 NWP 48 predicated on the assumption that
6 there would be at most approximately 250 authorizations of shellfish aquaculture
7 operations over the permits' expected five-year duration. However, in the first few
8 years of the existence of 2012 NWP 48, the Seattle District of the Corps issued
9 almost a thousand authorizations -- almost a 400% increase over the Defendant's
10 evaluated level of permit usage.

11 130.

12 Despite these dramatically-changed circumstances signaling the need for
13 immediate suspension and re-evaluation, and the passage of a full two years, the
14 Defendants have, to date, taken no action with respect to Plaintiff's Petition. Both the
15 Clean Water Act itself and Corps' own regulations expressly provide for modification,
16 suspension or revocation of NWP authorizations for any specific geographic area,
17 class of activities or class of waters within a specific Division, such as Seattle District
18 of the Northwestern Division. The District Engineer, Defendant Buck, also has
19 authority under 33 U.S.C. § 1344(d); 33 U.S.C. § 1344(e)(2); 33 C.F.R. § 330.1(d); 33
20 C.F.R. § 330.2(g); 33 C.F.R. § 330.4(e); 33 C.F.R. § 330.5(c)(1); 33 C.F.R. §
21 330.5(d)(2)(ii); 33 C.F.R. § 330.5(d)(2)(iii); 33 C.F.R. § 330.5(d)(3); and/or 40 C.F.R. §
22 330.7(b)(2), to suspend any already issued specific authorizations under an NWP, as
23 long as the engineer notifies the Permittee in writing and takes certain steps specified
24 by the law.

25 131.

26 In issuing 2012 NWP 48 and making a finding that 2012 NWP 48 was in the

1 public interest, the Corps expressly invoked and relied upon its authority to suspend,
2 revoke and modify the NWP at a later date in its National Decision document. The
3 Corps also expressly relied upon its ability to revoke 2012 NWP 48 on a geographic
4 basis to ensure that the individual and cumulative impacts would be minimal and not
5 significant in the same document.

6 132.

7 The Seattle District of the Corps made the same determination in its own
8 Supplemental Decision documents regarding 2012 NWP 48. Indeed, the NMFS
9 repeatedly referenced and relied upon the Corps' ability to revoke, suspend or modify
10 2012 NWP 48 in the NMFS 2014 BiOp. That BiOp not only relies upon that
11 presumption, it requires re-initiation of consultation "if the Corps fails to modify,
12 suspend or revoke nationwide permits" to address any concerns mutually identified by
13 the Corps and NMFS.

14 133.

15 The number of authorizations already issued under the 2012 NWP 48 (to say
16 nothing of the number of NWP 48 applications also still pending and the unknown
17 number of individual permits for the same type of operations in the same areas)
18 dramatically exceeds the number anticipated when the Corps' made its minimal
19 effects, public interest and no-significant impact findings allowing issuance of 2012
20 NWP 48. There is also significant new information regarding the potential effects of
21 authorized activities on the environment that has been repeatedly provided to the
22 Corps. As a result there is no longer a reasonable basis to conclude that the 2012
23 NWP 48 was consistent with the requirements of 33 U.S.C. § 1344(3) for the issuance
24 of general permits. Furthermore, the changes have raised substantial questions as to
25 the adequacy of the Corps' prior environmental analysis and should have triggered
26 the requirement for suspension or revocation of the permit.

1 134.

2 The 2017 NWP 48 fails to remedy the deficiencies alleged in the preceding
3 paragraphs. The Corps' implementation of 2012 NWP 48 and issuance of 2017 NWP
4 48 without remedying these deficiencies establishes that the Corps has no intention to
5 modify, suspend, or revoke 2017 NWP 48 despite evidence that it does not ensure
6 that authorized activities do not cause significant adverse environmental impact.

7 135.

8 The Corps should be required to act upon the plaintiff's Petition, as the Corps
9 has now unreasonably or unlawfully withheld action regarding that Petition for over
10 two years. Plaintiff submits that its Petition should have been granted and that the
11 Corps should accordingly have already suspended further authorizations under 2012
12 and 2017 NWP 48 in Puget Sound, so that all future commercial shellfish operations
13 under CWA § 404 and/or § 10 of the Rivers Harbors Act are authorized by individual
14 permit only. That suspension of 2012 and 2017 NWP 48 should remain in effect until
15 the Seattle District of the Corps has completed a supplemental NEPA and CWA
16 review of the effects of the already authorized activities under 2012 NWP 48 and the
17 potential effects of any further 2017 (or future) NWP 48 authorizations. The Corps
18 should be required to supplement its existing analysis with detailed information and
19 analysis regarding the cumulative impacts of the existing and future projected levels
20 of aquaculture in Puget Sound. The Corps should be required to hold one or more
21 public hearings to take testimony on and collect evidence regarding the existing and
22 likely cumulative impacts of the 2012 and 2017 NWP 48. The Corps should be
23 required to reassess whether authorization of activities under 2012 and 2017 NWP 48
24 will result in "take" of ESA-listed species, including Puget Sound Chinook Salmon,
25 jeopardize their continued existence or adversely modify their habitat.

26 **RELIEF REQUESTED**

1 WHEREFORE, Plaintiff respectfully requests that this Court:

2 (a) Declare that the Corps violated NEPA and its implementing regulations
3 when it improperly found that activities in Puget Sound authorized under 2017 NWP
4 48 would not significantly adversely affect the environment and decided not to prepare
5 an EIS;

6 (b) Declare that the Corps violated NEPA and its implementing regulations
7 when it failed to prepare a supplemental environmental document following the
8 dramatic increase in the number of activities in Puget Sound authorized and seeking
9 authorization under 2017 NWP 48;

10 (c) Declare that the Corps violated the Clean Water Act and its
11 implementing regulations when it issued 2017 NWP 48;

12 (d) Declare that the Corps violated the Clean Water Act and its
13 implementing regulations when it failed to take required actions to ensure that
14 activities authorized under 2017 NWP 48 have minimal adverse effects on the
15 environment and do not significantly degrade waters of the United States;

16 (e) Declare that the Corps violated the Clean Water Act and its
17 implementing regulations when it authorized that the specific projects listed in the
18 Complaint are allowed under 2017 NWP 48;

19 (f) Vacate, set aside, and/or remand the Corps' authorizations of those
20 same projects under 2017 NWP 48;

21 (g) Order the Corps to direct the prospective and/or current permittees of
22 those activities to seek authorization through an individual permit;

23 (h) Order the Defendants to act on Plaintiff's Petition to suspend or revoke
24 2017 NWP 48 in Puget Sound, and/or enjoin Defendants from issuing any further
25 authorizations under 2017 NWP 48 in Puget Sound until Defendants comply with
26 NEPA by producing a new supplemental environmental document and/or comply with

1 the CWA by completing adequate effects analyses to ensure that authorized activities
2 will have minimal effects on the environment and conform with the 33 U.S.C. §
3 1344(b)(1) and the regulations adopted pursuant to that statute;

4 (i) Award to Plaintiff its costs, expenses, expert witness fees, and
5 reasonable attorney fees associated with this litigation; and

6 (j) Grant Plaintiff such further equitable relief as the court may believe just
7 and proper.

8 Dated this 5th day of June, 2017

9
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE COALITION TO PROTECT
PUGET SOUND HABITAT, a non-profit
Corporation,

Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS,
an agency of the United States of
America, et al,

Defendants.

Case No. 2:16-CV00950-RSL

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2017, I electronically filed the foregoing
SUPPLEMENTAL COMPLAINT with the Clerk of the Court using the CM/ECF system
which will send notification of such filing on the following:

////

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Dated this 5th day of June 2017

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