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UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

SWINOMISH INDIAN TRIBAL	)	
COMMUNITY, a federally recognized	)	Cause No.
Indian Tribe,	)	
	)	COMPLAINT FOR DECLARATORY AND
Plaintiff,	)	VACATUR RELIEF
	)	
v.	)	
	)	
ARMY CORPS OF ENGINEERS, SEATTLE	)	
DISTRICT OF THE ARMY CORPS OF	)	
ENGINEERS, and NATIONAL MARINE	)	
FISHERIES SERVICE,	)	
Defendants	)	

INTRODUCTION

1. This case challenges the U.S. Army Corps of Engineers’ (Corps’) Nationwide Permit 48 (NWP 48) as applied to native eelgrass beds in North Puget Sound because NWP 48 authorizes large-scale commercial shellfish aquaculture without mandatory avoidance or minimization measures to protect this eelgrass. Native eelgrass beds serve as nurseries, cover, and feeding grounds for threatened Puget Sound Chinook salmon, Dungeness crabs, and other aquatic species. Plaintiff Swinomish Indian Tribal Community (Swinomish Tribe or Tribe) depends for its way of life on Puget Sound marine resources, including salmon and shellfish. The Tribe supports shellfish farming, but, to preserve the Tribe’s way of life for future

1 generations, seeks to ensure that shellfish farming is conducted in a sustainable and lawful  
2 manner.

3           2.       The Corps' first nationwide permit covering shellfish aquaculture issued in 2007  
4 applied only to active commercial shellfish operations which had a state or local permit. As  
5 reissued in 2017, NWP 48 reaches beyond active commercial shellfish operations to cover any  
6 area that was used for commercial shellfish aquaculture at any time within the last 100 years.  
7 This definition extends into "continuing fallow" areas, which are areas that previously had  
8 shellfish operations at some time, but not since 2007 when the first NWP 48 was issued. NWP  
9 48 contains measures requiring avoidance of eelgrass beds in "new" operations that have never  
10 been cultivated, but makes those mandatory avoidance measures inapplicable to eelgrass beds in  
11 continuing fallow areas. In North Puget Sound, thousands of acres of so-called continuing  
12 fallow areas have mature eelgrass beds, yet NWP 48's mandatory avoidance measures are not  
13 applicable to these fallow areas.  
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15           3.       Throughout the development of NWP 48, the Tribe urged the Corps to adopt  
16 avoidance and minimization measures to protect eelgrass. The Corps considered various  
17 avoidance and minimization measures, such as extending the same protection afforded for new  
18 shellfish operations to eelgrass in continuing fallow areas or limiting the shellfish aquaculture  
19 methods that may be used on eelgrass beds to those that minimize damage to the eelgrass. In the  
20 end, however, the Corps adopted NWP 48 without any avoidance and minimization measures to  
21 protect eelgrass. It left the development of such protective measures to the discretion of the  
22 Corps' district engineer when reviewing specific projects to verify whether they comply with  
23 NWP 48.  
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1           4.       This case challenges the application and implementation of NWP 48 in North  
2 Puget Sound in areas with eelgrass beds for violating three laws and their implementing  
3 regulations. First, under the Clean Water Act (CWA), the Corps can issue a nationwide permit  
4 only if it will have no more than minimal adverse impacts on aquatic resources and must  
5 implement practicable and available alternatives that avoid or minimize harm to such resources.  
6 The Corps violated the CWA in finding, without record support, that NWP 48 will have no more  
7 than minimal adverse aquatic effects and in failing to implement practicable and available  
8 alternatives that would avoid or minimize the harm to eelgrass beds. Second, the Corps must  
9 prepare environmental reviews under the National Environmental Policy Act (NEPA) to inform  
10 its minimum effects and related determinations for nationwide permits. The Corps fell short of  
11 its NEPA obligations because it failed to assess in its environmental assessments the adequacy of  
12 avoidance and minimization measures that will be put in place under NWP 48 to protect eelgrass  
13 beds and it found no significant impacts despite the lack of mandatory avoidance and  
14 minimization measures. Third, because applying NWP 48 in Puget Sound may adversely affect  
15 Puget Sound Chinook salmon, which are listed as threatened under the Endangered Species Act  
16 (ESA), the Corps must engage in an ESA consultation with the National Marine Fisheries  
17 Service (NMFS). The Corps initiated such a consultation on its shellfish regulatory program in  
18 Washington State over the next 20 years, and NMFS issued a biological opinion on that program.  
19 The Tribe challenges the biological opinion's finding that the shellfish activities will not  
20 jeopardize the survival and recovery of threatened Puget Sound Chinook or destroy Chinook  
21 critical habitat, even though the Corps included no conservation measures to minimize the harm  
22 to eelgrass and ensure the eelgrass can recover after disturbances. The Tribe also challenges the  
23 incidental take limit established by NMFS on the allowable amount of harm to eelgrass because  
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1 NMFS allowed shellfish activities to occur on all eelgrass beds in North Puget Sound and  
2 therefore this limit will be reached only when all the harm has been done. It, therefore, will not  
3 serve as a meaningful trigger for reinitiating ESA consultation.

4 5. The Tribe respectfully asks the Court to declare that the Corps acted arbitrarily,  
5 capriciously, and contrary to the CWA, NEPA, and the ESA. The Tribe further asks the Court to  
6 vacate and set aside NWP 48 as applied to native eelgrass beds in North Puget Sound, along with  
7 the associated NEPA assessments and ESA determinations.

8  
9 **PARTIES AND STANDING**

10 6. Plaintiff Swinomish Indian Tribal Community is a federally-recognized Indian  
11 tribe, organized pursuant to Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §  
12 476, which occupies the Swinomish Indian Reservation located on Fidalgo Island in Skagit  
13 County, Washington.

14 7. Since time immemorial, the Tribe and its predecessors have occupied and used  
15 areas of land and water in the Puget Sound region to support its fishing lifestyle. Pacific salmon  
16 and other marine resources have played central and enduring roles in the Tribe's subsistence,  
17 culture, identity, and economy. The Tribe is a present-day political successor-in-interest to  
18 certain of the tribes and bands that signed the Treaty of Point Elliott, 12 Stat. 927 (1855), a  
19 Treaty with the United States that established the Swinomish Reservation and that reserved to the  
20 Tribe certain other rights, including without limitation the "right of taking fish at usual and  
21 accustomed grounds and stations." *United States v. Washington*, 459 F. Supp. 1020, 1039, 1041  
22 (W.D. Wash. 1978). The Tribe's right to take fish under the Treaty of Point Elliott is a legally  
23 protected interest.  
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1 8. Declines in salmon abundance, including Puget Sound Chinook abundance, have  
2 limited the Tribe's ability to harvest fish in its salmon fisheries, impaired the Tribe's subsistence,  
3 culture, identity, and economy, and undermined its ability to exercise its Treaty fishing rights.  
4 Puget Sound Chinook have declined, in part, due to the reduction in estuary habitat, including  
5 native eelgrass. Native eelgrass provides cover and feeding areas for juvenile Chinook salmon.  
6 Native eelgrass also supports other Treaty fishing resources, including Dungeness crab.

7  
8 9. The Tribe has engaged in shellfish aquaculture and anticipates doing so in the  
9 future in a manner fully consistent with the relief sought in this litigation.

10 10. The Corps' approval and implementation of NWP 48 without general or regional  
11 conditions to avoid or mitigate impacts to native eelgrass causes a concrete and demonstrable  
12 injury to the Tribe. If the Corps had included conditions to avoid or minimize harmful impacts  
13 to native eelgrass, the injuries to the Tribe's Treaty fishing resources could have been avoided.

14 11. Under the current implementation of NWP 48, the Tribe receives notice when a  
15 party proposes to commence shellfish aquaculture operations under NWP 48 in North Puget  
16 Sound. The Tribe is expending resources and will continue expending resources to review the  
17 proposals, identify the extent to which they will take place in areas with native eelgrass beds,  
18 assess the extent to which the proposed shellfish aquaculture operations will avoid or minimize  
19 harm to this eelgrass, and suggest or work to negotiate appropriate avoidance and mitigation  
20 measures to avoid such harmful impacts. If the Corps had issued a lawful NWP, the Tribe would  
21 not need to invest its resources to obtain such measures in the district engineer's review of each  
22 individual proposed shellfish aquaculture operation.

23  
24 12. Defendant U.S. Army Corps of Engineers is an agency of the United States  
25 government, and a division of the U.S. Army in the U.S. Department of Defense. It is charged  
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1 with regulating, dredging, and filling of the waters of the United States under Section 404 of the  
2 Clean Water Act and with complying with NEPA before issuing nationwide permits. The Corps  
3 issued NWP 48 and its predecessors and completed a nationwide environmental assessment for  
4 NWP 48.

5 13. Defendant Seattle District of the Corps is a district office of Defendant Army  
6 Corps located in Seattle, Washington. The Seattle District administers Section 404 permitting in  
7 Puget Sound and is responsible for issuing regional conditions for NWP 48 in Puget Sound and  
8 for complying with NEPA for its decision regarding whether to impose such regional conditions.  
9 The Seattle District issued a Supplement to NWP 48.

10 14. Defendant National Marine Fisheries Service is an agency of the U.S. Department  
11 of Commerce. The Department has delegated to the National Marine Fisheries Service or NMFS  
12 (also called NOAA Fisheries) its responsibility for administering the ESA with regard to  
13 threatened and endangered marine species, including threatened Puget Sound Chinook salmon.  
14 NMFS issued a programmatic biological opinion on the Corps' shellfish regulatory program in  
15 Washington State for the next 20 years.

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18 JURISDICTION, VENUE, AND CAUSES OF ACTION

19 15. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362  
20 because this action is brought by a federally-recognized Indian tribe and the matter in  
21 controversy arises under the laws of the United States. Under 28 U.S.C. §§ 2201-2202, this  
22 Court has authority to issue declaratory and other necessary and proper relief.

23 16. Venue in this district is appropriate under 28 U.S.C. § 1391(e) because Plaintiff  
24 Swinomish Tribe resides in this district, a substantial part of the events or omissions giving rise  
25 to this case occurred in this district, and Defendant Seattle District resides in this district.

1 17. The Administrative Procedure Act (“APA”) authorizes courts to review agency  
2 actions and to hold unlawful and set aside final agency actions, findings, and conclusions that are  
3 arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5  
4 U.S.C. § 706(2)(A).

## 5 BACKGROUND

### 6 I. NATIVE EELGRASS AND SHELLFISH AQUACULTURE

#### 7 A. The Ecological Importance of Native Eelgrass in Puget Sound.

8 18. Native eelgrass (*Zostera marina*) is an aquatic flowering plant found in soft-  
9 sediment intertidal and subtidal habitats. It provides numerous high-value regional ecosystem  
10 services within the shallow-water coastal ecosystem.  
11

12 19. As an ecological engineer, native eelgrass is a foundational element of near-shore  
13 habitats. Native eelgrass provides rearing and feeding habitat for Dungeness crab, Pacific  
14 salmon, and many other aquatic species as well as spawning habitat for Pacific herring, itself a  
15 food source for salmon. Native eelgrass beds also improve water quality by filtering sediments  
16 and nutrients, mitigate wave energy and protect shorelines from erosion, and serve as a globally  
17 significant carbon sink.

18 20. Native eelgrass serves as a nursery and provides cover for threatened juvenile  
19 Puget Sound Chinook salmon and other fish in the vulnerable early life phase. Juvenile Chinook  
20 feed in native eelgrass beds in estuaries and near-shore areas and use native eelgrass beds to  
21 evade predators. The ability of juvenile Chinook to feed and grow in estuaries and near-shore  
22 habitat in this early life phase is an important factor in their ocean survival.  
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24 21. The Puget Sound Chinook Recovery Plan determined that the preservation of  
25 functioning estuary and near-shore habitat is crucial for recovery of Chinook from the Skagit  
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1 River, which plays a disproportionate role in Puget Sound Chinook recovery efforts given its  
2 relative abundance of Puget Sound Chinook stocks. The recovery plan recommends limiting  
3 harm to eelgrass beds and ensuring that any adverse impacts are fully mitigated.

4 B. The Negative Impacts of Shellfish Aquaculture on Native Eelgrass.

5 22. Without appropriate avoidance and minimization measures, shellfish aquaculture  
6 competes for space, disturbs or destroys native eelgrass, and reduces densities, production, and  
7 size of this eelgrass. Some aquaculture practices, like dredging, completely destroy native  
8 eelgrass beds. Other practices may shade native eelgrass beds with aquaculture operations that  
9 deprive the eelgrass of the light it needs to exist. Some activities that destroy or disturb native  
10 eelgrass may be episodic or periodic. Native eelgrass can regrow or recover to some extent over  
11 a period of years after the disturbance ends. The recovered eelgrass generally consists of smaller  
12 plants and less dense and productive populations than undisturbed native eelgrass.

14 II. NWP 48 AUTHORIZES SHELLFISH AQUACULTURE IN AREAS WITH NATIVE  
15 EELGRASS BEDS

16 23. The Corps can issue nationwide permits to authorize a category of activities that  
17 discharge dredge or fill material into U.S. waters. To issue a nationwide permit, the Corps must  
18 find that the discharges will have no more than minimal adverse impacts on aquatic resources,  
19 including eelgrass, and must adopt practicable and available alternatives to minimize harm to  
20 aquatic resources. The Corps must also comply with NEPA by conducting environmental review  
21 and the ESA by consulting with the expert fish and wildlife agency.

22 A. Prior Iterations of NWP 48.

23 24. Shellfish aquaculture operations require dredge or fill permits under the Clean  
24 Water Act. While the Corps historically issued individual permits for shellfish aquaculture  
25 operations, it adopted its first NWP 48 for commercial shellfish operations in 2007. The 2007  
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1 NWP authorized shellfish aquaculture only if it operated under a state or local permit and it was  
2 operating in fact. 72 Fed. Reg. 11,092, 11,145 (Mar. 12, 2007). The Corps engaged in an ESA  
3 consultation with NMFS, leading to a biological opinion finding that the operations would not  
4 cause jeopardy to Puget Sound Chinook salmon or adversely modify Chinook critical habitat.

5 25. In 2012, the Corps reissued NWP 48 for a new five-year term. 77 Fed. Reg.  
6 10,184, 10,228-32 (Feb. 21, 2012). The 2012 NWP 48 extended the application of NWP 48 to  
7 provide for the expansion of existing commercial operations and to authorize new activities.  
8 NMFS indicated that, because the 2012 NWP covered new as well as existing operations, the  
9 Corps needed to engage in a new ESA consultation for the 2012 NWP.  
10

11 B. NWP 48.

12 26. The Corps issued NWP 48 with the current set of General Conditions (“GCs”) in  
13 January 2017. 82 Fed. Reg. 1,860, 1,995 and 1,998-2,004 (Jan. 6, 2017). The Corps also issued  
14 Decision Document Nationwide Permit 48 (Decision document) which included a public interest  
15 review required by Corps regulations, discussion of environmental considerations as required by  
16 NEPA, and a required CWA impacts assessment.

17 27. Under NWP 48, continuing shellfish aquaculture operations are no longer limited  
18 to the defined footprint of those that had already been permitted or leased and under active  
19 cultivation since the 2007 NWP 48 was issued. Continuing operations now include any area that  
20 has been used for commercial shellfish aquaculture within the last 100 years, as long as  
21 aquaculture is allowed under an enforceable property right. Under the 2017 reissuance of NWP  
22 48, a “new” operation is in an area that has not had shellfish aquaculture in the last 100 years and  
23 a continuing operation includes both “active” areas that have been cultivated since March 2007  
24 and “fallow” or “continuing fallow” areas that had been cultivated before 2007 but were not  
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1 actively cultivated at the time the 2007 NWP was issued.

2 28. NWP 48 provides that “new” commercial shellfish aquaculture operations cannot  
3 directly affect more than ½ acre of submerged aquatic vegetation, *e.g.*, eelgrass beds. This  
4 restriction is inapplicable to continuing operations, including fallow areas not in cultivation after  
5 2007.

6 C. NWP General Conditions.

7 29. Nationwide permits authorize discharges into regulated waters without any further  
8 approvals by the Corps as long as the discharges comply with the terms and conditions of the  
9 NWP and all of the General Conditions applicable to all nationwide permits. Certain General  
10 Conditions, if triggered, require the proponent of the action to file a “pre-construction  
11 notification” (PCN) and the Corps must verify that the proposed action is consistent with the  
12 terms of the NWP before any discharge can occur.

13 30. Two General Conditions require such pre-construction notification and  
14 verification throughout North Puget Sound. General Condition 17 provides that “[n]o NWP  
15 activity may cause more than minimal adverse effects on tribal rights (including treaty rights),  
16 protected tribal resources, or tribal lands.” 82 Fed. Reg. at 1999. General Condition 18 provides  
17 that no activity that “may affect” listed species is authorized under any NWP unless an ESA  
18 Section 7 consultation has been completed. *Id.* at 1999-2000.

19 31. The nationwide permits and the Clean Water Act contemplate the protection of  
20 special aquatic sites and submerged aquatic vegetation, such as eelgrass. Special aquatic sites  
21 are areas that “possess[] special ecological characteristics of productivity, habitat, wildlife  
22 protection, or other important and easily disrupted ecological values.” 40 C.F.R. § 230.3(m).

23 32. In its decision document adopting NWP 48, the Corps indicated that additional  
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1 mitigation may be required in sensitive areas, such as those impacting: (1) Treaty resources; (2)  
2 threatened and endangered species, like Puget Sound Chinook; and (3) special aquatic sites, like  
3 eelgrass. The Corps recognized that Puget Sound contains all three types of sensitive areas,  
4 however, NWP 48 did not adopt minimization or avoidance measures. The Corps determined  
5 that any adverse effects on species listed under the ESA would be identified in a PCN pursuant  
6 to General Condition 18, and that compliance with the ESA would occur through the  
7 requirements set forth in General Condition 18 and activity-specific and regional programmatic  
8 ESA consultations. The Corps Decision Document also indicated that Corps districts were in  
9 consultation with tribes to address tribal concerns that may result in regional conditions or  
10 consultation procedures. The Corps determined that for impacts to tribal treaty resources,  
11 endangered species, and special aquatic sites, district engineers can impose regional conditions  
12 on activities, require PCNs, or require individual permits if they determine that a regional  
13 condition is necessary for an NWP to have no more than minimal individual or cumulative  
14 adverse effects.  
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17 D. The Seattle District Considered, but Rejected, Additional Protections for Native  
18 Eelgrass in Puget Sound.

19 33. The Seattle District conducted a public process to determine whether to modify or  
20 add regional conditions to NWP 48 to ensure cumulative adverse environmental effects in the  
21 region would be no more than minimal. On March 19, 2017, the Seattle District issued a  
22 Supplement to the National Decision Document for 2017 Nationwide Permit 48 and Regional  
23 Conditions (Supplement). The sole regional condition pertaining to shellfish aquaculture  
24 prohibits commercial harvest of clams by means of hydraulic escalator harvester equipment.  
25 Supplement at 114.  
26

1           34.     The Seattle District considered and rejected adopting regional conditions to avoid  
2 or minimize impacts to eelgrass from new shellfish aquaculture footprints in fallow or continuing  
3 fallow areas. It decided not to limit covered shellfish aquaculture operations to the current  
4 footprint of ongoing activities. Supplement at 73. It rejected another regional condition that  
5 would prohibit new encroachments on eelgrass beds. Supplement at 74-75. It also decided not  
6 to limit the amount of habitat loss in specific waterbodies. Supplement at 7, 69-70. Instead, the  
7 sole mechanism for avoiding and minimizing harm to eelgrass will come from any conditions  
8 imposed by the district engineer in individual reviews of PCNs that are required under General  
9 Conditions 18 and 23. Supplement at 74-75.

11           35.     The Seattle District engaged in consultation with Puget Sound tribes prior to  
12 issuing the Supplemental decision document. The Swinomish Tribe engaged in this process and  
13 commented that additional avoidance and minimization efforts were required in order to protect  
14 native eelgrass beds. The Seattle District established Tribal Notification Procedures with 23  
15 tribes, including Swinomish Tribe, whereby the Seattle District requests comments from the  
16 appropriate tribe (or tribes) on proposed projects. Supplement at 4.

18           36.     The Seattle District made a finding that the adverse environmental effects from  
19 application of NWP 48 in Washington will be individually and cumulatively minimal based on  
20 compliance with the regional conditions and the district engineer's ability to require activity-  
21 specific conditions or require an individual permit. Supplement at 108-09, 115-16. Since none  
22 of the regional conditions protect native eelgrass, the sole basis for the Seattle District's  
23 minimum-impacts finding rests on the subsequent, project-by-project district engineer reviews.

1 E. The Tribe Extensively Engaged in Consultation and Public Processes in an  
2 Attempt to Obtain Native Eelgrass Protection from the Corps Through the  
3 Endangered Species Act.

4 37. Because Puget Sound Chinook salmon are listed as threatened under the ESA, the  
5 Seattle District of the Corps initiated consultation with NMFS. The scope of that consultation  
6 extended beyond NWP 48 to cover the Corps' entire shellfish aquaculture regulatory program in  
7 Washington State over the next 20 years. The Corps and NMFS engaged in extensive back-and-  
8 forth discussions to develop the Programmatic Biological Assessment on Shellfish Activities in  
9 Washington State Inland Marine Waters (PBA) laying out the Corps shellfish aquaculture  
10 program that would undergo formal consultation. The agencies shared drafts of the PBA and the  
11 Programmatic Biological Opinion (PBO) with affected tribes. The Swinomish Tribe provided  
12 extensive input seeking avoidance or minimization measures to protect eelgrass and expressly  
13 outlined the Tribe's concerns with the scope of NWP 48 as reissued and the lack of minimization  
14 or avoidance measures to protect eelgrass beds in North Puget Sound.

15 38. On November 5, 2014, the Swinomish and the Sauk-Suiattle Indian Tribes  
16 submitted comments to NMFS on a September 12, 2014 draft biological opinion. The letter  
17 began by explaining that the two Tribes:

18 emphatically support a vigorous and successful shellfish industry, provided that  
19 protection for salmon, steelhead, crab, and the habitat on which those species depend is  
20 also assured. [...] We support the growth of the industry, but we need to make sure that  
21 expansion does not come at the expense of eelgrass and other nearshore habitats that  
22 support a diverse and productive ecosystem.

23 39. The Tribes objected to allowing the conversion of thousands of acres of  
24 continuing fallow areas with native eelgrass beds into shellfish aquaculture operations. The  
25 Tribes complained that:

26 NMFS has come to a conclusion of minimal effect that ignores many of the impacts that  
27 are identified in the literature, and indeed in the BiOp itself. It's as if after examining all

1 the relevant effects, NMFS reaches the opposite conclusion that would be supported by  
2 the data.

3 40. The Tribes urged the agencies to avoid or mitigate any impacts to eelgrass and  
4 follow its precedent of requiring a buffer around existing eelgrass for Corps permits for docks or  
5 dredging.

6 41. On December 29, 2014, the Corps responded by adding Conservation Measure 7  
7 to the draft PBA:

8 For continuing activities in “fallow” areas, those activities shall not occur within 16  
9 horizontal feet of native eelgrass (*Zostera marina*). If eelgrass is present in the vicinity of  
10 the fallow acreage proposed for shellfish activities, the eelgrass shall be delineated and a  
map or sketch prepared and submitted to the Corps.

11 42. On March 13, 2015, the Washington State congressional delegation sent a letter to  
12 the Corps asking that Conservation Measure 7 be eliminated because of its impacts on the  
13 shellfish industry. The Corps subsequently removed Conservation Measure 7.

14 43. On June 9, 2015, the Environmental Protection Agency (EPA), which developed  
15 jointly with the Corps the applicable CWA Guidelines, submitted comments raising significant  
16 concerns regarding removal of Conservation Measure 7. It found that removing the conservation  
17 measure “would pose a significant threat” to eelgrass, which is characterized as “ecologically  
18 and regionally significant.” EPA concluded that “without avoidance and minimization measures  
19 (like those Conservation Measure 7 would require), authorized shellfish activities would not  
20 comply with” Section 404 of the CWA.

21 44. On October 30, 2015, the Corps finalized its PBA, which lays out its shellfish  
22 aquaculture program for Washington State for the next 20 years. The PBA includes a condition  
23 comparable to Conservation Measure 7, now called Conservation Measure 6, but makes that  
24 condition applicable only to new shellfish operations, and not to continuing fallow areas. PBA at  
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1 50.

2 45. On September 2, 2016, NMFS issued its biological opinion for the Corps'  
3 Washington State shellfish aquaculture program, as set out in the final PBA, which contains no  
4 conservation measures to protect native eelgrass in continuing fallow areas.

5 46. In its programmatic biological opinion, NMFS determined that commercial  
6 shellfish aquaculture is likely to adversely affect, but is unlikely to jeopardize the survival and  
7 recovery of threatened Puget Sound Chinook salmon or adversely modify their critical habitat.  
8 NMFS' no jeopardy finding included a limit on the amount of native eelgrass that could be  
9 brought into shellfish production, which serves as a trigger for reinitiation of consultation under  
10 the ESA.

11 47. The areas where NWP 48 would co-occur and adversely affect native eelgrass  
12 beds are extensive. Although there is some discrepancy in acreage numbers in the various  
13 assessments, the most often-used estimate is that there are 22,196 acres of active cultivation and  
14 14,803 acres of fallow areas in Washington State, and 1,354 acres of active and 2,333 acres of  
15 fallow in North Puget Sound. An estimated 96% of the fallow areas in North Puget Sound co-  
16 occur with mature, native eelgrass beds. Allowing fallow areas to be authorized under NWP 48  
17 will dramatically increase the acreage covered and the amount of native eelgrass that may be  
18 disturbed or destroyed.

19 48. NMFS determined that take is reasonably certain to occur for Puget Sound  
20 Chinook salmon from loss of cover due to suppression of native eelgrass beds in North Puget  
21 Sound. NMFS estimated that take will occur when the effects of active shellfish cultivation are  
22 combined with the reductions in native eelgrass due to development of fallow areas. NMFS  
23 assumed that all native eelgrass beds would be converted to commercial shellfish aquaculture  
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1 and set as the maximum amount of allowable take the development of 2,628 acres of continuing  
2 fallow areas in Puget Sound. Only after the development of 2,628 acres of fallow eelgrass beds  
3 would reinitiation of programmatic consultation occur.

4 CAUSES OF ACTION

5 FIRST CAUSE OF ACTION

6 VIOLATION OF CLEAN WATER ACT BECAUSE NWP 48 WILL HAVE MORE THAN  
7 MINIMAL ADVERSE ENVIRONMENTAL EFFECTS ON NATIVE EELGRASS BEDS IN  
8 NORTH PUGET SOUND

9 49. Plaintiff re-alleges and incorporates each and every allegation set forth in this  
10 complaint.

11 50. Congress enacted the CWA in order to “restore and maintain the chemical,  
12 physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). The CWA  
13 prohibits the discharge of any pollutant, including dredged spoil or other fill material, into waters  
14 of the United States unless authorized by a permit. *Id.* § 1311(a).

15 51. The Corps is authorized to issue individual and general permits under Section  
16 404. *Id.* The Corps issues individual Section 404 permits on a case-by-case basis. *Id.* § 1344(a).  
17 The Corps issues individual permits after reviewing site-specific documentation, allowing public  
18 notice and an opportunity for a hearing, and making a formal determination that the statutory and  
19 regulatory requirements have been met. 33 C.F.R. § 322.3; parts 323, 325.

20 52. The CWA authorizes the Corps to issue general permits on a state, regional or  
21 nationwide basis for a period of no more than five years, provided that the activities “will cause  
22 only minimal adverse environmental effects when performed separately, and will have only  
23 minimal cumulative adverse effect on the environment.” 33 U.S.C. § 1344(e)(1).  
24



1           53. Shellfish aquaculture operations require permits under Section 404 of the CWA  
2 because they discharge fill or dredged material into U.S. waters.

3           54. In January 2017, the Corps issued NWP 48, and in March 2017, the Seattle  
4 District adopted the Supplement governing application of NWP 48 in Washington State. NWP  
5 48 and the Supplement impose avoidance and minimization measures to protect eelgrass beds  
6 only for what are considered “new” shellfish aquaculture operations. For other operations, the  
7 Corps relied on two General Conditions that require PCNs and verifications by the district  
8 engineer for activities impacting Treaty resources or threatened and endangered species. In  
9 doing so, the Corps deferred the minimum-impacts determination it is required to make before  
10 issuing a general permit to subsequent case-by-case reviews.  
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12           55. The Corps has put off the development of any avoidance and minimization  
13 measures to these district engineer reviews. It imposed no criteria on the district engineer  
14 reviews. Nor did it ensure that the district engineer reviews would require any avoidance and  
15 minimization measures or that such measures imposed would be sufficient to ensure adverse  
16 aquatic impacts would be no more than minimal individually or cumulatively.  
17

18           56. Because it did not require avoidance and minimization measures to protect native  
19 eelgrass beds in NWP 48 or the Supplement, the Corps did not assess or ensure the efficacy of  
20 such measures when it issued NWP 48 and the Supplement. The Corps did not have an adequate  
21 basis for determining that the activities covered by NWP 48 “will cause only minimal adverse  
22 environmental effects when performed separately, and will have only minimal cumulative  
23 adverse effect on the environment.” 33 U.S.C. § 1344(e)(1).

24           57. To permit discharges of dredge or fill material into waters of the United States,  
25 including through general permits, the Corps must make findings set out in guidelines developed  
26

1 jointly by EPA and the Corps under Section 404(b)(1) of the CWA, which are called the 404  
2 Guidelines. 33 U.S.C. § 1344(d)(1), 40 C.F.R. part 230. The 404 Guidelines note that “the  
3 degradation or destruction of special aquatic sites . . . is considered to be among the most severe  
4 environmental impacts covered by these Guidelines.” 40 C.F.R. § 230.1(d). Special aquatic  
5 sites include areas that significantly influence or contribute positively to the vitality of the entire  
6 ecosystem of a region. *Id.* § 230.3(m). Eelgrass beds, along with other vegetated shallows, are  
7 designated as special aquatic sites warranting heightened protection under the CWA because of  
8 their positive contributions as cover, nurseries, and forage areas to the vitality of aquatic  
9 ecosystems. 40 C.F.R. § 230.43; *see id.* § 230.3(m).

11 58. The 404 Guidelines provide:

12 Activities otherwise similar in nature may differ in environmental impact due to their  
13 location in or near ecologically sensitive areas . . . . If there are specific geographic areas  
14 within the purview of a proposed General permit . . . which are more appropriately  
15 regulated by individual permit due to the considerations cited in this paragraph, they shall  
16 be clearly delineated in the evaluation and excluded from the permit.

17 40 C.F.R. § 230.7.

18 59. The Corps recognized that North Puget Sound consists of ecologically sensitive  
19 areas because of the presence of Treaty resources, threatened Puget Sound Chinook, and native  
20 eelgrass beds. At the nationwide level, it indicated that additional avoidance and minimization  
21 measures may be required in Puget Sound to protect these resources. The Seattle District  
22 similarly recognized the ecologically significant resources in North Puget Sound and eelgrass in  
23 particular. It relied on district engineer reviews to develop appropriate and necessary avoidance  
24 and minimization measures for individual shellfish operations. In doing so, the Corps  
25 acknowledged that shellfish aquaculture operations in North Puget Sound are more appropriately  
26 regulated individually due to these ecologically sensitive areas. This is especially the case for

1 operations in fallow areas that co-occur with native eelgrass beds. The Corps had an obligation  
2 under the 404 Guidelines, 40 C.F.R. § 230.7, to delineate and exclude such ecologically sensitive  
3 areas from the general permit, but it did not do so.

4 60. In issuing NWP 48 and the Supplement, which allow NWP 48 to be applied in  
5 areas with native eelgrass beds in North Puget Sound, the Corps authorized shellfish aquaculture  
6 operations that have more than minimal adverse environmental effects and acted arbitrarily,  
7 capriciously, and contrary to the CWA and the 404 Guidelines, and in violation of the APA, 5  
8 U.S.C. § 706(2)(A).  
9

10 SECOND CAUSE OF ACTION

11 VIOLATION OF THE CLEAN WATER ACT FOR FAILING TO ADOPT PRACTICABLE  
12 ALTERNATIVES THAT WOULD REDUCE HARM TO NATIVE EELGRASS BEDS IN  
13 NORTH PUGET SOUND

14 61. Plaintiff re-alleges and incorporates each and every allegation set forth in this  
15 complaint.

16 62. Under the CWA, the Corps can issue general permits on a nationwide or regional  
17 basis for a period of no more than five years for a category of similar activities that “will cause  
18 only minimal adverse environmental effects when performed separately, and will have only  
19 minimal cumulative adverse effect on the environment.” 33 U.S.C. § 1344(e).

20 63. General permits must be based on the joint Corps-EPA Guidelines. *Id.* Under the  
21 Guidelines, the Corps is prohibited from issuing a permit: (1) if there is a practicable and  
22 available alternative that would have less adverse impact on the aquatic environment; (2) if it  
23 will cause or contribute to significant degradation; or (3) unless appropriate and practicable steps  
24 have been taken to minimize potential adverse impacts on the aquatic ecosystem. 40 C.F.R. §§  
25 230.10(a), (c), (d), 230.12(a)(3)(i)-(iii).  
26

1           64.     In January 2017, the Corps issued NWP 48, and in March 2017, the Seattle  
2 District adopted the Supplement governing application of NWP 48 in Washington State. NWP  
3 48 and the Supplement impose avoidance and mitigation measures to protect eelgrass beds only  
4 for what are considered “new” shellfish aquaculture operations.

5           65.     Throughout its development of NWP 48 and conservation measures in the ESA  
6 consultation, the Corps considered a range of conditions that could avoid, minimize, or mitigate  
7 adverse impacts of shellfish aquaculture operations on native eelgrass beds. These conditions  
8 constitute practicable and available alternatives that would have less adverse impacts on eelgrass  
9 beds. In failing to impose any such practicable and available conditions, the Corps acted  
10 contrary to the 404 Guidelines’ prohibitions on issuing general permits if there is a practicable  
11 and available alternative that would have less adverse impact on the aquatic environment and  
12 unless appropriate and practicable steps have been taken to minimize potential adverse impacts  
13 on the aquatic ecosystem. 40 C.F.R. §§ 230.10(a), (d), 230.12(a)(3)(i), (iii).

14           66.     The 404 Guidelines provide that, where an activity would occur at a special  
15 aquatic site, practicable alternatives that do not involve special aquatic sites are presumed to be  
16 available and are presumed to have less adverse impacts on the aquatic ecosystem, unless clearly  
17 demonstrated otherwise. *Id.* § 230.10(a)(3).

18           67.     Eelgrass beds, along with other vegetated shallows, are designated as special  
19 aquatic sites warranting heightened protection under the CWA because of their positive  
20 contributions as cover, nurseries, and forage areas to the vitality of aquatic ecosystems. 40  
21 C.F.R. § 230.43; *see id.* § 230.3(m).

22           68.     The Corps generally requires avoidance and compensatory mitigation of  
23 submerged aquatic vegetation, including eelgrass, in its Section 404 permitting. For example, it  
24  
25  
26

1 requires avoidance and compensatory mitigation for impacts to eelgrass in permitting of piers,  
2 docks, and mooring buoys. Department of Army RAP 6.

3 69. At the nationwide level, the Corps indicated that additional avoidance and  
4 minimization measures may be required in Puget Sound to protect eelgrass and other  
5 ecologically sensitive resources. The Seattle District similarly recognized the ecologically  
6 significant resources in North Puget Sound and eelgrass in particular. Nonetheless, NWP 48 and  
7 the Supplement include conservation measures to protect eelgrass beds only for new operations  
8 and not for fallow areas. In adopting NWP 48 and the Supplement, the Corps failed to  
9 demonstrate that practicable alternatives for fallow areas that would avoid eelgrass beds were  
10 unavailable.  
11

12 70. In issuing NWP 48 and the Supplement without adopting practicable and  
13 available alternatives to reduce the potential harm to native eelgrass beds in North Puget Sound,  
14 the Corps acted arbitrarily, capriciously, and contrary to the CWA and the 404 Guidelines, and in  
15 violation of the APA, 5 U.S.C. § 706(2)(A).  
16

### 17 THIRD CAUSE OF ACTION

#### 18 VIOLATION OF NEPA BY FAILING TO ASSESS THE EFFICACY OF AVOIDANCE AND 19 MINIMIZATION MEASURES AND FAILING TO PREPARE AN ENVIRONMENTAL 20 IMPACT STATEMENT

21 71. Plaintiff re-alleges and incorporates each and every allegation set forth in this  
22 complaint.

23 72. NEPA is our “basic national charter for protection of the environment.” 40  
24 C.F.R. § 1500.1(a). NEPA requires that federal agencies take a “hard look” at environmental  
25 concerns. One of its primary purposes is to ensure that an agency will have before it detailed  
26 information concerning significant environmental impacts of a proposed action and alternatives  
27

1 to it. NEPA requires agencies to investigate and disclose all potential adverse environmental  
2 impacts of their proposals before deciding to proceed. 42 U.S.C. § 4332(C).

3 73. Under NEPA, federal agencies are required to prepare an EIS for “major Federal  
4 actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).  
5 If it is unclear whether impacts are significant enough to warrant an EIS, the agency may prepare  
6 an EA to assist in making that determination. 40 C.F.R. § 1501.4. If the agency determines that  
7 no EIS is required, it must document that finding in a “finding of no significant impact”  
8 (FONSI).  
9

10 74. In its decision document for NWP 48, the Corps included an EA and made a  
11 finding of no significant impact. In its Supplement, the Seattle District similarly made a finding  
12 of no significant impact.

13 75. In its EAs, the Corps acknowledged that shellfish aquaculture operations in areas  
14 with native eelgrass beds disturb and destroy eelgrass beds. The Corps considered a range of  
15 measures to avoid, minimize, or mitigate such impacts. It did not require any such avoidance,  
16 minimization, or mitigation measures as part of NWP 48 or the Supplement. It left the  
17 development of any such measures to district engineer reviews.

18 76. The EAs prepared by the Corps for these decisions did not assess the efficacy of  
19 avoidance and minimization measures to protect native eelgrass beds that could be required  
20 under NWP 48 and the Supplement. To the extent that the EAs assumed such avoidance and  
21 minimization measures would be imposed by the district engineer, they relied on the possibility  
22 of such measures without any assurance such measures would be put in place or that they would  
23 provide an adequate buffer against negative aquatic impacts. The Corps lacked a reasoned  
24 explanation for its conclusion that adequate avoidance and minimization measures would be  
25  
26

1 required by the district engineer and would prevent significant adverse aquatic impacts,  
2 particularly on a cumulative basis.

3         77. The Council on Environmental Quality (CEQ) is charged with issuing binding  
4 regulations on compliance with NEPA's procedural requirements. Exec. Order No. 11991, 3  
5 C.F.R. 124 (1978). The CEQ regulations identify factors to be considered in determining the  
6 significance of environmental impacts, including adverse effects to endangered species or their  
7 habitat, cumulatively significant impacts, unique or ecologically crucial characteristics of the  
8 geographic area, whether the action represents a decision in principle about a future  
9 consideration, and whether the effects are likely to be highly controversial. 40 C.F.R.  
10 § 1508.27(b)(3), (4), (5), (6), (7), (9).

11  
12         78. In its assessment of NWP 48, the Corps acknowledged that application of NWP  
13 48 in Puget Sound would negatively affect important and sensitive Treaty resources, threatened  
14 species, and eelgrass beds. The CEQ regulations treat as significant impacts to listed species,  
15 unique resources like Treaty resources, and ecologically crucial geographic areas like designated  
16 special aquatic sites. In issuing NWP 48, the Corps left it to the Seattle District to assess the  
17 need for avoidance and mitigation measures to avoid more than minimal impacts to such  
18 resources. The Seattle District imposed no regional conditions to protect native eelgrass beds in  
19 North Puget Sound from shellfish aquaculture operations occurring under NWP 48, except for  
20 measures limited to what are defined as new operations. It left the assessment and development  
21 of any such measures to the district engineer reviews of individual projects. The Corps and the  
22 Seattle District approved applying NWP 48 in areas in North Puget Sound with mature eelgrass  
23 beds without any assurance that adequate avoidance and minimization measures would be  
24 required by the district engineer. In doing so, the Corps made a decision in principle about  
25  
26

1 future considerations, a factor suggesting significance under the CEQ regulations, particularly  
2 when the decision is programmatic and could lead to cumulatively significant impacts, another  
3 CEQ significance factor.

4 79. The NWP 48 and Supplement have both been extremely controversial because  
5 they expand NWP 48 coverage beyond those areas that have been in active shellfish aquaculture  
6 operations during the last ten years. NWP 48 will now cover areas that were in shellfish  
7 cultivation at some point in time over the past 100 years, even if there have been no operations in  
8 recent years and native eelgrass beds have fully recovered. Applying this expanded scope to  
9 North Puget Sound threatens to convert mature eelgrass beds into shellfish aquaculture  
10 operations over thousands of acres.

12 80. Under the significance factors laid out in the CEQ regulations, the impacts of  
13 applying NWP 48 to areas with native eelgrass beds in North Puget Sound are significant and  
14 therefore the Corps was required to prepare an EIS, instead of an EA.

15 81. The Corps acted arbitrarily, capriciously, contrary to the evidence before it, and in  
16 violation of NEPA and the CEQ regulations and contrary to the APA, by offering no reasoned  
17 explanation for its conclusion that adequate avoidance and minimization measures would be  
18 developed and required by the district engineer and in finding that applying NWP 48 to eelgrass  
19 beds in North Puget Sound would have no significant environmental impacts and would not  
20 require preparation of a full EIS.

22 **FOURTH CAUSE OF ACTION**

23 **THE PROGRAMMATIC BIOLOGICAL OPINION IS ARBITRARY, CAPRICIOUS, AND**  
24 **CONTRARY TO THE ESA**

25 82. Plaintiff re-alleges and incorporates each and every allegation set forth in this  
26 complaint.



1           83.     The ESA establishes a “means whereby the ecosystems upon which endangered  
2 species and threatened species depend may be conserved” and makes it Congressional policy that  
3 “all Federal departments and agencies shall seek to conserve endangered species and threatened  
4 species[.]” 16 U.S.C. § 1531(b)-(c).

5           84.     Section 7 of the ESA requires federal agencies to ensure, in consultation with the  
6 expert fish and wildlife agencies, and with the use of the best available scientific data, that any  
7 action authorized, funded, or carried out by such agency is not likely to jeopardize the continued  
8 existence of any threatened or endangered species or result in the destruction or adverse  
9 modification of its critical habitat. 16 U.S.C. § 1536(a)(2).

10           85.     “Action” is defined broadly to encompass “all activities or programs of any kind  
11 authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02.

12           86.     Section 7 establishes an interagency consultation process to assist federal agencies  
13 in complying with their duty to avoid jeopardy to listed species or destruction or adverse  
14 modification of critical habitat. Under this process, a federal agency proposing an action that  
15 “may affect” a listed species, including salmon, must prepare and provide to the appropriate  
16 expert agency a biological assessment of the effects of the proposed action. 16 U.S.C. §  
17 1536(a)(2); 50 C.F.R. § 402.14(a).

18           87.     For actions that may adversely affect a listed species or critical habitat, a formal  
19 consultation with the expert fish and wildlife agency is required. 50 C.F.R. § 402.14. At the  
20 conclusion of a formal consultation, the expert fish and wildlife agency issues a biological  
21 opinion determining whether the action is likely to jeopardize the continued existence of the  
22 listed species or adversely modify its critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §  
23 402.14(g)-(h).

1 88. NWP 48 and the Seattle District's Supplement are agency actions subject to ESA  
2 Section 7.

3 89. The Corps initiated Section 7 consultation by submitting to NMFS a  
4 programmatic biological assessment on its shellfish regulatory activities in Washington over 20  
5 years. The Corps found in its programmatic biological assessment that the activities authorized  
6 under its shellfish regulatory program are likely to adversely affect Puget Sound Chinook salmon  
7 and their critical habitat. It, therefore, had to complete formal consultation before undertaking  
8 such activities.  
9

10 90. In September 2016, NMFS issued a programmatic biological opinion finding that  
11 the Corps shellfish regulatory program is not likely to jeopardize the continued existence of  
12 Puget Sound Chinook or adversely modify its critical habitat. NMFS acknowledged that the  
13 Corps shellfish regulatory program could disturb or destroy native eelgrass beds in 2,464 acres of  
14 fallow areas in Puget Sound and that this, in turn, would reduce cover for, and negatively impact,  
15 juvenile Chinook salmon. 96% of the 2,464 acres of fallow areas in Puget Sound co-occur with  
16 native eelgrass beds. NMFS recognized that the Corps program authorizes operations that could  
17 be largely continuous over the 20-year period covered by the consultation. It therefore assumed  
18 all 2,464 acres of fallow areas in Puget Sound could be cultivated under the Corps program. It  
19 also recognized that shellfish aquaculture impedes, prevents, or reduces recolonization of native  
20 eelgrass beds unless the operations cease entirely for a period of many years. Nonetheless,  
21 NMFS made findings of no-jeopardy and no adverse modification of critical habitat based  
22 largely on the fact that disturbed or destroyed eelgrass can partially recover over time. Since the  
23 Corps regulatory program neither requires that aquaculture operations cease, nor that they avoid  
24 the types of culture methods that cause the greatest harm to native eelgrass and impediments to  
25  
26

1 eelgrass recovery, NMFS no-jeopardy and no adverse modification of critical habitat conclusions  
2 are at odds with the program undergoing consultation and the evidence before NMFS.

3 91. NMFS also acknowledged that bottom culture is the primary method of growing  
4 oysters and clams in North Puget Sound, and that bottom culture can impede or prevent recovery  
5 of native eelgrass during shellfish operations. NMFS included a reasonable and prudent measure  
6 in its incidental take statement to minimize take of Puget Sound Chinook by limiting the types of  
7 culture methods in fallow areas. PBO at 96-97. The incidental take statement includes a term  
8 and condition that limits the culture methods that can be used in fallow areas to oyster long lines  
9 spaced laterally at 10-foot intervals with flip bags suspended above the substrate so they will not  
10 rest on the substrate at low tide. PBO at 98. This reasonable and prudent measure and term and  
11 condition flow from the biological opinion's recognition that oyster bottom culture is particularly  
12 destructive of native eelgrass beds. Neither the Corps shellfish regulatory program nor the  
13 biological opinion imposes a similar limitation to reduce the harm to native eelgrass beds from  
14 shellfish aquaculture in fallow areas. NMFS did not reconcile its reliance on the recovery of  
15 native eelgrass with the widespread use of bottom culture in North Puget Sound and its  
16 recognition that bottom culture can prevent or impede eelgrass recovery.

17  
18 92. NMFS's conclusion that the Corps regulatory program is not likely to jeopardize  
19 the survival and recovery of threatened Chinook salmon or adversely affect its critical habitat  
20 lacks a rational basis in the biological opinion's analysis and is undercut by NMFS findings.

21  
22 93. NMFS acted arbitrarily, capriciously, and contrary to ESA Section 7, in violation  
23 the APA, 5 U.S.C. § 706(2)(A), in concluding in the biological opinion that the Corps shellfish  
24 regulatory program as applied to native eelgrass beds in North Puget Sound is not likely to  
25 jeopardize the survival and recovery of Puget Sound Chinook salmon or destroy or adversely  
26

1 modify its critical habitat.

2 FIFTH CAUSE OF ACTION

3 THE LIMIT IMPOSED BY NMFS ON TAKE IS ARBITRARY, CAPRICIOUS, AND IN  
4 VIOLATION OF THE ESA

5 94. Plaintiff re-alleges and incorporates each and every allegation set forth in this  
6 complaint.

7 95. Section 9 of the ESA prohibits “take” of endangered species by any person, which  
8 includes federal agencies. 16 U.S.C. § 1538(a)(1). NMFS has extended the take prohibition to  
9 listed salmon, including Puget Sound Chinook. 50 C.F.R. § 223.203(a); 65 Fed. Reg. 42,422  
10 (2000). “Take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or  
11 collect.” 16 U.S.C. § 1532(19). NMFS has defined “harm” to include “significant habitat  
12 modification or degradation which actually kills or injures fish or wildlife by significantly  
13 impairing essential behavioral patterns, including breeding, spawning, rearing, migrating,  
14 feeding or sheltering.” 50 C.F.R. § 222.102.

15  
16 96. If a federal action undergoing consultation will take a listed species, the biological  
17 opinion must include an “incidental take statement” that specifies the amount and extent of  
18 incidental take of listed species that may occur. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).  
19 The incidental take statement provides a safe harbor, insulating from take liability activities  
20 undertaken in compliance with the terms and conditions in the incidental take statement. 16  
21 U.S.C. § 1536(o)(2); *see* 16 U.S.C. § 1536(b)(4)(C).

22  
23 97. NMFS must include in an incidental take statement a limit on the allowable  
24 amount of take of the listed species. This limit serves as a check on the biological opinion’s  
25 assumptions and conclusions. It sets out an unacceptable level of take that invalidates the safe  
26 harbor provided by the incidental take statement. In addition, if the take limit is exceeded,

1 reinitiation of formal consultation is required. 50 C.F.R. § 402.16(a).

2 98. The PBO's incidental take statement set a numerical limit on take equivalent to  
3 development of all acres of continuing fallow areas that overlap with native eelgrass beds in  
4 Puget Sound. PBO at 95. It initially set this limit at 2,464 acres, but subsequently issued an  
5 errata increasing it to 2,628 acres in Puget Sound and Hood Canal, combined. Reinitiation of  
6 consultation is required if the amount of shellfish cultivation exceeds this acreage.

7  
8 99. Cultivation of all fallow areas is the same as full implementation of the Corps' 20-  
9 year shellfish regulatory program. If the take limit is reached, all native eelgrass beds in fallow  
10 areas in Puget Sound will have been converted into shellfish aquaculture operations without any  
11 requirement that such shellfish operations avoid native eelgrass beds or use culture methods that  
12 allow native eelgrass to recover. The take limit provides no check on the assumptions made in  
13 the biological opinion about native eelgrass recovery or the impacts of destroying or disturbing  
14 eelgrass on juvenile Chinook.

15 100. NMFS acted arbitrarily, capriciously, and contrary to the ESA, in violation of the  
16 APA, 5 U.S.C. § 706(2)(A), in setting the take limit at the level that coincides with full  
17 implementation of the action undergoing consultation.

18  
19 PRAYER FOR RELIEF

20 WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

21 1. Declare that the Corps acted arbitrarily, capriciously, and contrary to the Clean  
22 Water Act, and in violation of the APA, 5 U.S.C. § 706(2)(A), by finding that application of  
23 NWP 48 to fallow areas in North Puget Sound with eelgrass beds will have no more than  
24 minimal adverse impacts on aquatic resources and by failing to adopt practicable and available  
25 alternatives that would have less adverse impacts on native eelgrass;

1           2.       Vacate NWP 48 as applied to native eelgrass beds in North Puget Sound;

2           3.       Declare that the Corps acted arbitrarily, capriciously, and contrary to NEPA and  
3 the CEQ regulations, and in violation of the APA, 5 U.S.C. § 706(2)(A), by failing to assess the  
4 efficacy of avoidance and minimization measures in connection with applying NWP 48 in fallow  
5 areas with eelgrass in North Puget Sound, making a finding of no significant impact, and failing  
6 to prepare an EIS on applying NWP 48 to fallow areas in North Puget Sound;

7           4.       Vacate the Corps' EA and FONSI as applicable to implementation of NWP 48 in  
8 fallow areas in North Puget Sound with native eelgrass beds;

9           5.       Declare that NMFS acted arbitrarily, capriciously, and contrary to ESA Section 7  
10 and its implementing regulations, and in violation of the APA, 5 U.S.C. § 706(2)(A), by  
11 concluding in its programmatic biological opinion that application of the Corps' shellfish  
12 regulatory program in areas with eelgrass beds in North Puget Sound is not likely to jeopardize  
13 the continued existence of threatened Puget Sound Chinook salmon or adversely modify  
14 Chinook critical habitat;

15           6.       Declare that NMFS acted arbitrarily, capriciously, and contrary to ESA Section 7  
16 and its implementing regulations, and in violation of the APA, 5 U.S.C. § 706(2)(A), by setting a  
17 take limit in its incidental take statement that coincides with development of all eelgrass beds in  
18 North Puget Sound;

19           7.       Vacate the programmatic biological opinion and take limit as applied to shellfish  
20 aquaculture operation in areas with native eelgrass beds in North Puget Sound;

21           8.       Award plaintiff its reasonable attorneys' fees, costs, expenses, and disbursements  
22 associated with this litigation; and

23           9.       Grant plaintiff such further and additional relief as the Court may deem just and  
24  
25  
26

1 proper.

2 Respectfully submitted this 24<sup>th</sup> day of April, 2018.

3  
4 

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