

The Honorable Richard S. Lasnik

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

\_\_\_\_\_)  
SWINOMISH INDIAN TRIBAL )  
COMMUNITY, ) Case No. 2:18-cv-00598-RSL  
)  
) **FEDERAL DEFENDANTS’**  
) **ANSWER TO COMPLAINT**  
)  
*Plaintiff,* )  
)  
)  
v. )  
)  
)  
U.S. ARMY CORPS OF ENGINEERS, *et al.*, )

1 )  
2 *Federal Defendants.* )

3  
4 **FEDERAL DEFENDANTS’ ANSWER**

5 Pursuant to Fed. R. Civ. P. 8, the United States Army Corps of Engineers, an agency of  
6 the United States of America and the National Marine Fisheries Service, an agency of the United  
7 States of America (collectively, “Federal Defendants”), through undersigned counsel, hereby  
8 submit the following Answer to Plaintiff’s Complaint dated April 24, 2018. ECF No. 1. The  
9 numbered paragraphs in this Answer correspond to the numbered paragraphs in the Amended  
10 Complaint. Federal Defendants incorporate certain headings from the Complaint to assist in the  
11 structure and organization of the Answer, but in doing so do not admit any allegation contained  
12 therein or waive any defense.<sup>1</sup>

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15 **GENERAL DENIAL**

16 Federal Defendants deny any allegations in the Complaint, whether express or implied,  
17 that are not expressly admitted, denied, or qualified herein.

18  
19 **INTRODUCTION**

20 1. The allegations contained in the first sentence of paragraph 1 constitute a  
21 characterization of Plaintiff’s action and require no response. To the extent that a response is  
22 required, Federal Defendants deny the allegations. The allegations contained in the second  
23 sentence of paragraph 1 purport to characterize the ecological value of eelgrass, which is detailed  
24 in the programmatic biological opinion, the national decision document (“NDD”) for Nationwide  
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27  
28 <sup>1</sup> When a textual sentence is followed by a citation or citations, the textual sentence and its  
accompanying citation are referred to as one sentence.

1 Permit 48 dated December 21, 2016, and the supplemental decision document (“SDD”) for  
2 Nationwide Permit 48 dated March 19, 2017, which speak for themselves and are the best  
3 evidence of their contents. Federal Defendants deny the allegations to the extent that the  
4 allegations are inconsistent with the programmatic biological opinion, the NDD, and the SDD.  
5

6 2. The allegations contained in the first through fourth sentences in paragraph 2  
7 purport to characterize the Corps’ nationwide general permit program, under the Clean Water  
8 Act (“CWA”), Section 404, and the Rivers and Harbors Act of 1899, Section 10, which speak for  
9 themselves and are the best evidence of their contents. Regarding the allegations in the fifth  
10 sentence in paragraph 2, Federal Defendants admit the potential presence of native eelgrass beds  
11 in North Puget Sound. Federal Defendants deny all remaining allegations.  
12

13 3. The allegations contained in paragraph 3 purport to characterize public comments  
14 received on the issuance of the 2017 Nationwide Permit, the Corps’ evaluation of the need for  
15 regional conditions on Nationwide Permit 48 Commercial *Shellfish Aquaculture*, and the  
16 conclusions reached by the Corps regarding the need for additional regional conditions, which  
17 are detailed in the SDD. The SDD speaks for itself and is the best evidence of its contents.  
18 Federal Defendants deny the allegations to the extent the allegations are inconsistent with the  
19 SDD.  
20

21 4. The allegations contained in paragraph 4 characterize Plaintiff’s claims and  
22 constitute conclusions of law, to which no response is required. To the extent that a response is  
23 required, Federal Defendants deny the allegations.  
24

25 5. The allegations contained in paragraph 5 characterize Plaintiff’s requested relief,  
26 to which no response is required. To the extent that a response is required, Federal Defendants  
27 deny the allegations.  
28

**PARTIES AND STANDING**

1  
2           6.       Federal Defendants admit that the Swinomish Indian Tribal Community is a  
3  
4 federally-recognized Indian tribe, organized pursuant to Section 16 of the Indian Reorganization  
5 Act of 1934, 25 U.S.C. § 476. Federal Defendants lack knowledge or information sufficient to  
6 form a belief as to the truth or accuracy of the remaining allegations in paragraph 6 and, on that  
7 basis, deny the allegations.

8           7.       Federal Defendants lack knowledge or information sufficient to form a belief as to  
9  
10 the truth or accuracy of the allegations in the first and second sentences in paragraph 7 and, on  
11 that basis, deny the allegations. The allegations contained in the third sentence in paragraph 7  
12 purport to characterize the Treaty of Point Elliott, which speaks for itself and is the best evidence  
13 of its contents. The allegations in the third sentence in paragraph 7 also quote *United States v.*  
14 *Washington*, 459 F. Supp. 1020, 1039, 1041 (W.D. 1978), which speaks for itself and is the best  
15 evidence of its contents. Federal Defendants deny the allegations to the extent the allegations are  
16 inconsistent with the treaty and the case. The allegations contained in the fourth sentence in  
17 paragraph 7 constitute conclusions of law, to which no response is required. To the extent a  
18 response is required, the allegations are denied.

19  
20           8.       Federal Defendants lack knowledge or information sufficient to form a belief as to  
21  
22 the truth or accuracy of the allegations in paragraph 8 and, on that basis, deny the allegations.

23           9.       Federal Defendants lack knowledge or information sufficient to form a belief as to  
24  
25 the truth or accuracy of the allegations in paragraph 9 and, on that basis, deny the allegations.

26           10.      Federal Defendants lack knowledge or information sufficient to form a belief as to  
27  
28 the truth or accuracy of the allegations in paragraph 10 and, on that basis, deny the allegations.

1           11. Federal Defendants admit the allegation contained in the first sentence of  
2 paragraph 11. Federal Defendants lack knowledge or information sufficient to form a belief as to  
3 the truth or accuracy of the allegations in the second sentence of paragraph 11 and, on that basis,  
4 deny the allegations. Federal Defendants deny the remainder of the allegations in paragraph 11.  
5

6           12. Federal Defendants admit that the United States Army Corps of Engineers is a  
7 Direct Reporting Unit of the Department of the Army, and is a Department within the  
8 Department of Defense. Federal Defendants deny any remaining allegations in the first sentence  
9 in paragraph 12. The allegations contained in the second sentence of paragraph 12 constitute  
10 conclusions of law, to which no response is required. To the extent a response is required, the  
11 allegations are denied. Federal Defendants admit the allegations in the third sentence of  
12 paragraph 12.  
13

14           13. Federal Defendants admit that the Seattle District is a District within the  
15 Northwestern Division of the U.S. Army Corps of Engineers. Federal Defendants admit that  
16 Seattle District is responsible for administering Section 404 permitting in Puget Sound, but deny  
17 the remaining allegations in the second sentence. Federal Defendants admit that they issued a  
18 document entitled “Supplemental Decision Document” for the Seattle District, but deny the  
19 remaining allegations contained in the third sentence.  
20

21           14. Federal Defendants admit that the National Marine Fisheries Service is an agency  
22 within the U.S. Department of Commerce. The allegations contained in paragraph 14 purport to  
23 characterize the Endangered Species Act (“ESA”) and its implementing regulations, which speak  
24 for themselves and are the best evidence of their contents. Federal Defendants admit that the  
25 National Marine Fisheries Service issued a programmatic biological opinion in 2016 that covers  
26 certain shellfish aquaculture activities permitted by the Corps in Washington State. Federal  
27  
28

1 Defendants deny the remaining allegations in paragraph 14 to the extent that the allegations are  
2 inconsistent with the ESA, its implementing regulations and the programmatic biological  
3 opinion.

4  
5 **JURISDICTION, VENUE, AND CAUSES OF ACTION**

6 15. The allegations contained in paragraph 15 constitute conclusions of law regarding  
7 jurisdiction, to which no response is required. To the extent a response is required, Federal  
8 Defendants deny the allegations.

9 16. The allegations contained in the first sentence in paragraph 16 constitute  
10 conclusions of law regarding venue, to which no response is required, and purport to characterize  
11 28 U.S.C. § 1391(e), which speaks for itself and is the best evidence of its contents. Federal  
12 Defendants deny the allegations to the extent the allegations are inconsistent with the statute and  
13 deny all remaining allegations.

14 17. The allegations contained in paragraph 17 characterize and selectively quote the  
15 Administrative Procedure Act (“APA”) which speaks for itself and is the best evidence of its  
16 contents. Federal Defendants deny the allegations to the extent the allegations are inconsistent  
17 with the APA.

18  
19  
20 **BACKGROUND**

21 18. The allegations contained in paragraph 18 purport to characterize the ecological  
22 value of eelgrass, which is detailed in the programmatic biological opinion, the NDD, and the  
23 SDD, which speak for themselves and are the best evidence of their contents. Federal  
24 Defendants deny the allegations to the extent that the allegations are inconsistent with the  
25 programmatic biological opinion, the NDD, and the SDD.  
26  
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1           19.     The allegations contained in paragraph 19 purport to characterize the ecological  
2 value of eelgrass, which is detailed in the programmatic biological opinion, the NDD, and the  
3 SDD, which speak for themselves and are the best evidence of their contents. Federal  
4 Defendants deny the allegations to the extent that the allegations are inconsistent with the  
5 programmatic biological opinion, the NDD, and the SDD.  
6

7           20.     The allegations contained in paragraph 20 purport to characterize the ecological  
8 value of eelgrass, which is detailed in the programmatic biological opinion, the NDD, and the  
9 SDD, which speak for themselves and are the best evidence of their contents. Federal  
10 Defendants deny the allegations to the extent that the allegations are inconsistent with the  
11 programmatic biological opinion, the NDD, and the SDD.  
12

13           21.     The allegations contained in paragraph 21 purport to characterize the findings of  
14 the Puget Sound Chinook Recovery Plan, which speaks for itself and is the best evidence of its  
15 contents. Federal Defendants deny the allegations to the extent that the allegations are  
16 inconsistent with the Plan.  
17

18           22.     The allegations contained in paragraph 22 purport to characterize the effect of  
19 shellfish aquaculture on eelgrass, which is detailed in the 2016 programmatic biological opinion,  
20 which speaks for itself and is the best evidence of its contents. Federal Defendants deny the  
21 allegations to the extent that the allegations are inconsistent with the 2016 programmatic  
22 biological opinion.  
23

24           23.     The allegations contained in paragraph 23 constitute conclusions of law, to which  
25 no response is required. To the extent that a response is required, Federal Defendants deny the  
26 allegations.  
27  
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1           24.     The allegations contained in the first, second and third sentences in paragraph 24  
2 purport to characterize the 2007 Nationwide Permit, which speaks for itself and is the best  
3 evidence of its contents. Federal Defendants deny the allegations to the extent the allegations are  
4 inconsistent with the Permit. With respect to the allegations contained in the fourth sentence in  
5 paragraph 24, Federal Defendants admit that at the Seattle District's discretion, the Seattle  
6 District engaged in a programmatic Endangered Species Act Section 7 Consultation with both  
7 National Marine Fisheries Services and U.S. Fish and Wildlife Service. The contents of these  
8 consultation documents (the programmatic biological assessment and the biological opinions  
9 issued by the respective Services) speak for themselves and are the best evidence of their  
10 contents. Federal Defendants deny the allegations to the extent that the allegations are  
11 inconsistent with the ESA consultation documents.  
12

14           25.     Federal Defendants admit that the Corps reissued Nationwide Permit 48 for a new  
15 five-year term in 2012. The allegations in the second sentence of paragraph 25 purport to  
16 summarize the terms of the 2012 Nationwide Permit 48, which speaks for itself and is the best  
17 evidence of its contents. Federal Defendants deny the allegations to the extent the allegations are  
18 inconsistent with the Permit. Federal Defendants deny the remaining allegations in paragraph 25  
19 to the extent that any ESA consultation was a requirement.  
20

22           26.     The allegations contained in the first sentence of paragraph 26 purport to  
23 characterize the 2017 Nationwide Permit 48, which speaks for itself and is the best evidence of  
24 its contents. Federal Defendants deny the allegations to the extent the allegations are  
25 inconsistent with the Permit. The allegations contained in the second sentence of paragraph 26  
26 purport to characterize the 2017 Decision Document for Nationwide Permit 48, which speaks for  
27  
28



1 itself and is the best evidence of its contents. Federal Defendants deny the allegations to the  
2 extent the allegations are inconsistent with the Decision Document.

3           27. The allegations contained in paragraph 27 purport to characterize the 2017  
4 Nationwide Permit 48, which speaks for itself and is the best evidence of its contents. Federal  
5 Defendants deny the allegations to the extent the allegations are inconsistent with the Permit.  
6

7           28. The allegations contained in paragraph 28 purport to characterize the 2017  
8 Nationwide Permit 48, which speaks for itself and is the best evidence of its contents. Federal  
9 Defendants deny the allegations to the extent the allegations are inconsistent with the Permit.  
10

11           29. The allegations contained in paragraph 29 purport to characterize the 2017  
12 Nationwide Permits and the General Conditions, which speaks for themselves and are the best  
13 evidence of their contents. Federal Defendants deny the allegations to the extent the allegations  
14 are inconsistent with the Permits and the General Conditions.

15           30. The allegations contained in paragraph 30 purport to characterize the 2017  
16 Nationwide Permit 48 and General Conditions 17 and 18, which speaks for themselves and are  
17 the best evidence of their contents. Federal Defendants deny the allegations to the extent the  
18 allegations are inconsistent with the Permit.  
19

20           31. The allegations contained in paragraph 31 purport to characterize portions of the  
21 Nationwide Permits and the CWA and regulations codified at 40 C.F.R. § 230.3, which speak  
22 for themselves and are the best evidence of their contents. Federal Defendants deny the  
23 allegations to the extent the allegations are inconsistent with the Nationwide Permits and the  
24 CWA.  
25

26           32. The allegations contained in paragraph 32 purport to characterize the Nationwide  
27 Permits, including Nationwide Permit 48 and its Decision Document, which speak for  
28

1 themselves and are the best evidence of their contents. Federal Defendants deny the allegations  
2 to the extent the allegations are inconsistent with the Permits and the Nationwide Permit 48  
3 Decision Document.

4  
5 33. Federal Defendants admit the allegations in the first sentence regarding  
6 conducting a public process in evaluating whether to modify or impose regional conditions on  
7 Nationwide Permit 48 in the Seattle District. The allegations contained in the second and third  
8 sentences in paragraph 33 purport to characterize the SDD and the Regional Conditions for  
9 Seattle District, which speak for themselves and are the best evidence of their contents. Federal  
10 Defendants deny these allegations to the extent the allegations are inconsistent with the SDD and  
11 the Regional Conditions documents.

12  
13 34. The allegations contained in paragraph 34 purport to characterize the SDD, which  
14 speaks for itself and is the best evidence of its contents. Federal Defendants deny the allegations  
15 to the extent the allegations are inconsistent with the SDD.

16  
17 35. Federal Defendants admit to engaging in consultation with Puget Sound tribes  
18 prior to issuing the SDD. Federal Defendants admit that the Swinomish Tribe provided written  
19 comments to the Corps and to Seattle District. These comments speak for themselves and are the  
20 best evidence of their contents. The remaining allegations contained in paragraph 35 purport to  
21 characterize the SDD, which speaks for itself and is the best evidence of their contents. Federal  
22 Defendants deny the allegations to the extent the allegations are inconsistent with the SDD.

23  
24 36. The allegations contained in paragraph 36 purport to characterize the SDD, which  
25 speaks for itself and is the best evidence of their contents. Federal Defendants deny the  
26 allegations to the extent the allegations are inconsistent with the SDD.

1           37. Federal Defendants admit that in 2014 the Seattle District elected to initiate an  
2 Endangered Species Act (“ESA”) Section 7 consultation with the U.S. Fish and Wildlife Service  
3 and the National Marine Fisheries Service and that the Corps submitted a programmatic  
4 biological assessment to the National Marine Fisheries Service to initiate a Section 7  
5 consultation. The remaining allegations contained in the first and second sentences of paragraph  
6 37 purport to characterize the Corps’ programmatic biological assessment, which speaks for  
7 itself and is the best evidence of its contents. Federal Defendants deny the allegations to the  
8 extent they allegations are inconsistent with the programmatic biological assessment. With  
9 respect to the allegations contained in the third and fourth sentences in paragraph 37, Federal  
10 Defendants admit that they engaged in back-and-forth discussions to develop the programmatic  
11 biological assessment on Shellfish Activities in Washington State Inland Marine Waters  
12 (“PBA”). Federal Defendants further admit that the National Marines Fisheries Service and the  
13 U.S. Fish and Wildlife Service shared portions of the draft programmatic biological opinion with  
14 the tribes. Federal Defendants lack knowledge or information sufficient to form a belief as to the  
15 truth of the allegations in the fifth sentence of paragraph 37, and on that basis, deny the  
16 allegations.  
17

18           38. The allegations contained in paragraph 38 purport to summarize comments made  
19 via a letter submitted to NMFS on a September 12, 2014 draft biological opinion. The letter  
20 speaks for itself and is the best evidence of its contents. Federal Defendants deny the allegations  
21 to the extent the allegations are inconsistent with the letter.  
22

23           39. The allegations contained in paragraph 39 purport to summarize comments made  
24 via a letter submitted to NMFS on a September 12, 2014 draft biological opinion. The letter  
25  
26  
27  
28

1 speaks for itself and is the best evidence of its content. Federal Defendants deny the allegations  
2 to the extent the allegations are inconsistent with the letter.

3           40.     The allegations contained in paragraph 40 purport to summarize comments made  
4 via a letter submitted to NMFS on a September 12, 2014 draft biological opinion. The letter  
5 speaks for itself and is the best evidence of its content. Federal Defendants deny the allegations  
6 to the extent the allegations are inconsistent with the letter.  
7

8           41.     The allegations contained in paragraph 41 purport to summarize a conservation  
9 measure contained in a draft version of the PBA. This PBA speaks for itself and is the best  
10 evidence of its content. Federal Defendants deny the allegations to the extent the allegations are  
11 inconsistent with the PBA. Federal Defendants deny the remainder of allegations in paragraph  
12 41.  
13

14           42.     The allegations contained in paragraph 42 purport to summarize comments made  
15 via a letter submitted to the Corps on March 13, 2015 from the Washington State congressional  
16 delegation. The letter speaks for itself and is the best evidence of its content. Federal  
17 Defendants deny the allegations to the extent the allegations are inconsistent with the letter.  
18 Federal Defendants admit that Conservation Measure number 7 was removed from the final  
19 PBA.  
20

21           43.     The allegations contained in paragraph 43 purport to summarize comments by the  
22 Environmental Protection Agency on June 9, 2015 regarding the consultation. These comments  
23 speak for themselves and are the best evidence of their content. Federal Defendants deny the  
24 allegations to the extent the allegations are inconsistent with the comments.  
25

26           44.     The allegations contained in paragraph 44 purport to summarize the October 30,  
27 2015 version of the PBA. This PBA speaks for itself and is the best evidence of its contents.  
28

1 Federal Defendants deny the allegations to the extent the allegations are inconsistent with the  
2 PBA.

3 45. Federal Defendants admit that the National Marine Fisheries Service issued a  
4 programmatic biological opinion, titled *Endangered Species Act Section 7 Formal Biological*  
5 *Programmatic Opinion and Magnuson-Steven Fishery Conservation and Management Act*  
6 *Essential Fish Habitat Consultation for Shellfish Aquaculture Activities in Washington State*, on  
7 September 2, 2016. The allegations in paragraph 45 purport to characterize the National Marine  
8 Fisheries Service programmatic biological opinion, a document that speaks for itself and is the  
9 best evidence of its contents. Federal Defendants deny the allegations to the extent the  
10 allegations are inconsistent with the programmatic biological opinion.

11 46. The allegations in paragraph 46 purport to characterize the programmatic  
12 biological opinion, a document that speaks for itself and is the best evidence of its contents.  
13 Federal Defendants deny the allegations to the extent the allegations are inconsistent with the  
14 biological opinion. Federal Defendants further deny any violation of law.

15 47. The allegations in paragraph 47 purport to characterize NWP 48, as well as  
16 unspecified “assessments” and “estimate” regarding the effects of NWP 48, which speak for  
17 themselves and are the best evidence of their contents. Federal Defendants deny any allegations  
18 inconsistent with NWP 48 and the referenced “assessments” or “estimates.”

19 48. The allegations contained in paragraph 48 purport to characterize the  
20 programmatic biological opinion, a document that speaks for itself and is the best evidence of its  
21 contents. Federal Defendants deny the allegations to the extent that they are inconsistent with  
22 the programmatic biological opinion.

**FIRST CAUSE OF ACTION**

1  
2 49. Federal Defendants incorporate by reference their responses to paragraph 1  
3 through 48 in the Complaint.

4  
5 50. The allegations contained in paragraph 50 purport to characterize the CWA,  
6 which speaks for itself and is the best evidence of its contents. Federal Defendants deny the  
7 allegations to the extent the allegations are inconsistent with the Clean Water Act, and deny any  
8 violation of law. In addition, the allegations constitute conclusions of law, to which no response  
9 is required. To the extent a response is required, the allegations are denied.

10  
11 51. The allegations contained in paragraph 51 purport to characterize the CWA or the  
12 Corps' regulations implementing the CWA, which speak for themselves and are the best  
13 evidence of their contents. Federal Defendants deny the allegations to the extent the allegations  
14 are inconsistent with the CWA and its implementing regulations, and deny any violation of law.  
15 In addition, the allegations constitute conclusions of law, to which no response is required. To  
16 the extent a response is required, the allegations are denied.

17  
18 52. The allegations contained in paragraph 52 purport to characterize the CWA,  
19 which speaks for itself and is the best evidence of its contents. Federal Defendants deny the  
20 allegations to the extent the allegations are inconsistent with the CWA, and deny any violation of  
21 law. In addition, the allegations constitute conclusions of law, to which no response is required.  
22 To the extent a response is required, the allegations are denied.

23  
24 53. The allegations contained in paragraph 53 purport to characterize the CWA,  
25 which speaks for itself and is the best evidence of its contents. Federal Defendants deny the  
26 allegations to the extent the allegations are inconsistent with the CWA, and deny any violation of  
27  
28

1 law. In addition, the allegations constitute conclusions of law, to which no response is required.  
2 To the extent a response is required, the allegations are denied.

3           54. The allegations in paragraph 54 purport to characterize the NDD, the Federal  
4 Register notice announcing the reissuance of Nationwide Permit 48 and other nationwide permits  
5 dated January 6, 2018, and the SDD, which speak for themselves and are the best evidence of  
6 their contents. Federal Defendants deny the allegations to the extent allegations are inconsistent  
7 with the NDD, Federal Register notice, and SDD.  
8

9           55. Federal Defendants deny the allegations in paragraph 55.

10           56. Federal Defendants deny the allegations in paragraph 56.

11           57. The allegations contained in paragraph 57 characterize and selectively quote the  
12 CWA, which speaks for itself and is the best evidence of its contents. Federal Defendants deny  
13 the allegations to the extent the allegations are inconsistent with the CWA. In addition, the  
14 allegations constitute conclusions of law, to which no response is required. To the extent a  
15 response is required, the allegations are denied.  
16  
17

18           58. The allegations contained in paragraph 58 characterize and selectively quote the  
19 implementing regulations of the CWA, which speaks for themselves and are the best evidence of  
20 their contents. Federal Defendants deny the allegations to the extent the allegations are  
21 inconsistent with the implementing regulations.  
22

23           59. The allegations contained in the first, second, third, fourth, fifth, and sixth  
24 sentences of paragraph 59 purport to characterize the NDD and SDD, which speak for  
25 themselves and are the best evidence of their contents. Federal Defendants deny the allegations  
26 to the extent the allegations are inconsistent with the NDD and SDD. The allegations in the  
27 seventh sentence of paragraph 59 regarding the Corps' legal obligations constitute conclusions of  
28

1 law to which no response is required. To the extent a response is required, Federal Defendants  
2 deny the allegations and deny that they violated 40 C.F.R. § 230.7.

3 60. Federal Defendants deny the allegations in paragraph 60, and deny any violation  
4 of law whatsoever.  
5

## 6 **SECOND CAUSE OF ACTION**

7 61. Federal Defendants incorporate by reference their responses to paragraph 1  
8 through 60 in the Complaint.

9 62. The allegations contained in paragraph 62 characterize the CWA, which speaks  
10 for itself and is the best evidence of its contents. Federal Defendants deny the allegations to the  
11 extent the allegations are inconsistent with the CWA. In addition, the allegations constitute  
12 conclusions of law, to which no response is required. To the extent a response is required, the  
13 allegations are denied.  
14

15 63. The allegations contained in paragraph 63 characterize and selectively quote  
16 implementing regulations of the CWA, which speaks for themselves and are the best evidence of  
17 their contents. Federal Defendants deny the allegations to the extent the allegations are  
18 inconsistent with the implementing regulations. In addition, the allegations constitute  
19 conclusions of law, to which no response is required. To the extent a response is required, the  
20 allegations are denied.  
21

22 64. The allegations in paragraph 64 purport to characterize the NDD, the Federal  
23 Register notice announcing the reissuance of Nationwide Permit 48 and other nationwide permits  
24 dated January 6, 2018, and the SDD, which speak for themselves and are the best evidence of  
25 their contents. Federal Defendants deny the allegations to the extent allegations are inconsistent  
26 with the NDD, Federal Register notice, and SDD.  
27  
28



1           65. Federal Defendants admit to evaluating a range of conditions dealing with  
2 shellfish activities located in eelgrass under both the Nationwide Permit and the programmatic  
3 ESA consultation. The remaining allegations in paragraph 65 characterize Section 404  
4 Guidelines and regulations, which speak for themselves and are the best evidence of their  
5 contents. Federal Defendants deny the allegations to the extent the allegations are inconsistent  
6 with the implementing regulations. In addition, the allegations constitute conclusions of law, to  
7 which no response is required. To the extent a response is required, the allegations are denied.  
8

9           66. The allegations contained in paragraph 66 characterize and selectively quote  
10 implementing regulations for the CWA, which speaks for themselves and are the best evidence  
11 of their contents. Federal Defendants deny the allegations to the extent the allegations are  
12 inconsistent with the implementing regulations. In addition, the allegations constitute  
13 conclusions of law, to which no response is required. To the extent a response is required, the  
14 allegations are denied.  
15

16           67. The allegations contained in paragraph 67 characterize and selectively quote  
17 implementing regulations for the CWA, which speaks for itself and is the best evidence of its  
18 contents. Federal Defendants deny the allegations to the extent the allegations are inconsistent  
19 with the CWA. In addition, the allegations constitute conclusions of law, to which no response  
20 is required. To the extent a response is required, the allegations are denied.  
21

22           68. Federal Defendants lack knowledge or information sufficient to form a belief as to  
23 the truth of the allegations in paragraph 68, and on that basis, deny the allegations. In addition,  
24 the allegations constitute conclusions of law, to which no response is required. To the extent a  
25 response is required, the allegations are denied.  
26  
27  
28



1 Defendants deny the allegations to the extent the allegations are inconsistent with the NEPA  
2 documentation. Federal Defendants deny all remaining allegations and deny any violation of  
3 law.

4  
5 76. The allegations contained in paragraph 76 purport to characterize the Corps'  
6 NEPA documentation, which speaks for itself and is the best evidence of its contents. Federal  
7 Defendants deny the allegations to the extent the allegations are inconsistent with the NEPA  
8 documentation. Federal Defendants deny all remaining allegations and deny any violation of  
9 law.

10  
11 77. The allegations contained in paragraph 77 characterize and selectively quote  
12 NEPA's implementing regulations and the Executive Order No. 11991, which speak for  
13 themselves and are the best evidence of their contents. Federal Defendants deny the allegations  
14 to the extent the allegations are inconsistent with the implementing regulations and the Executive  
15 Order.

16  
17 78. The allegations contained in paragraph 78 purport to characterize the NDD, the  
18 SDD, and the CEQ regulations, which speak for themselves and are the best evidence of their  
19 contents. Federal Defendants deny the allegations to the extent the allegations are inconsistent  
20 with the NDD, the SDD, and the CEQ Regulations. Federal Defendants deny all remaining  
21 allegations and deny any violation of law.

22  
23 79. The allegations contained in paragraph 79 purport to characterize the Nationwide  
24 Permit 48, which speaks for itself and is the best evidence of its contents. Federal Defendants  
25 deny the allegations to the extent the allegations are inconsistent with the Permit. Federal  
26 Defendants further deny the allegation in the first sentence that the SDD expands Nationwide  
27 Permit 48 coverage. Federal Defendants deny the remaining allegations in paragraph 79.  
28



1 contents. Federal Defendants deny the allegations to the extent the allegations are inconsistent  
2 with the ESA and its implementing regulations.

3 88. The allegations contained in paragraph 88 constitute conclusions of law, to which  
4 no response is required. To the extent that a response is required, Federal Defendants deny the  
5 allegations.  
6

7 89. Federal Defendants admit that at the Seattle District's discretion, the Seattle  
8 District engaged in a programmatic Endangered Species Act Section 7 consultation with both  
9 National Marine Fisheries Services and U.S. Fish and Wildlife Service for certain aquaculture  
10 activities in Washington State. The contents of these consultation documents (the programmatic  
11 biological assessment and the biological opinions issued by the respective Services) speak for  
12 themselves and are the best evidence of their contents. Federal Defendants deny the allegations  
13 to the extent that the allegations are inconsistent with the ESA consultation documents, and deny  
14 the remaining allegations in paragraph 89.  
15  
16

17 90. Federal Defendants admit the National Marine Fisheries Service issued a  
18 programmatic biological opinion covering certain shellfish aquaculture activities permitted by  
19 the Corps in marine waters in Washington State in September 2016. The remaining allegations  
20 in paragraph 90 purport to characterize the programmatic biological opinion, a document that  
21 speaks for itself and is the best evidence of its contents. Federal Defendants deny the allegations  
22 to the extent the allegations are inconsistent with the biological opinion and deny any violation  
23 of law.  
24

25 91. The allegations in paragraph 91 purport to characterize the programmatic  
26 biological opinion, a document that speaks for itself and is the best evidence of its contents.  
27  
28

1 Federal Defendants deny the allegations to the extent the allegations are inconsistent with the  
2 programmatic biological opinion and deny any violation of law.

3 92. Federal Defendants deny the allegations in paragraph 92, and deny any violation  
4 of law whatsoever.  
5

6 93. Federal Defendants deny the allegations in paragraph 93, and deny any violation  
7 of law whatsoever.  
8

### 9 **FIFTH CAUSE OF ACTION**

10 94. Federal Defendants incorporate by reference their responses to paragraph 1  
11 through 93 of this complaint.

12 95. The allegations contained in paragraph 95 purport to characterize the ESA and its  
13 implementing regulations, which speak for themselves and are the best evidence of their  
14 contents. Federal Defendants deny the allegations to the extent the allegations are inconsistent  
15 with the ESA and its implementing regulations.  
16

17 96. The allegations contained in paragraph 96 purport to characterize the ESA and its  
18 implementing regulations, which speak for themselves and are the best evidence of their  
19 contents. Federal Defendants deny the allegations to the extent the allegations are inconsistent  
20 with the ESA and its implementing regulations.  
21

22 97. The allegations contained in paragraph 97 purport to characterize the  
23 requirements of the ESA and its implementing regulations, which speak for themselves and are  
24 the best evidence of their contents. Federal Defendants deny the allegations to the extent the  
25 allegations are inconsistent with the ESA and its implementing regulations.  
26

27 98. Federal Defendants admit that the National Marine Fisheries Service issued a  
28 biological opinion on September 2, 2016, which contained an incidental take statement, and

1 issued an errata on September 30, 2016, documents that speak for themselves and are the best  
2 evidence of their contents. Federal Defendants deny the allegations to the extent the allegations  
3 are inconsistent with those documents.

4  
5 99. The allegations in the first sentence in paragraph 99 purport to characterize the  
6 National Marine Fisheries Service programmatic biological opinion, a document that speaks for  
7 itself and is the best evidence of its contents. Federal Defendants deny the allegations to the  
8 extent the allegations are inconsistent with the biological opinion. Federal Defendants deny the  
9 remaining allegations in paragraph 99, and deny any violation of law whatsoever.

10  
11 100. Federal Defendants deny the allegations in paragraph 100, and deny any violation  
12 of law whatsoever.

13 **PRAYER FOR RELIEF**

14 The remainder of the complaint contains Plaintiff's requested relief to which no response  
15 is required. To the extent that a response is required, Federal Defendants deny the allegations in  
16 Plaintiff's prayer for relief, and deny that Plaintiff is entitled to any relief in this case.

17  
18 **GENERAL DENIAL**

19 Federal Defendants deny all allegations not expressly admitted herein. In addition,  
20 Federal Defendants deny any violation of law.

21  
22 **AFFIRMATIVE DEFENSES**

23 1. Plaintiff's Complaint fails in whole or in part to state claims upon which the court  
24 can grant relief.

25 2. This court lacks jurisdiction over Plaintiff's Complaint.

26 WHEREFORE, Federal Defendants respectfully request that this Court enter judgment in  
27 favor of Federal Defendants, dismiss this action with prejudice, and grant Federal Defendants  
28 such additional relief as this Court deems appropriate.

1 Dated: July 13, 2018

Respectfully submitted,

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1 NOAA Office of General Counsel  
2 U.S. Department of Commerce

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 13, 2018, I filed the foregoing Answer to Supplemental Complaint with the Clerk of the Court using the CM/ECF system which will cause a copy to be served upon counsel of record.

*/s/ Dedra S. Curteman*