

Stephan C. Volker
Joshua A.H. Harris
Alexis E. Krieg
Stephanie L. Abrahams
Daniel P. Garrett-Steinman
Jamey M.B. Volker
M. Benjamin Eichenberg

Law Offices of
Stephan C. Volker
436 – 14th Street, Suite 1300
Oakland, California 94612
Tel: (510) 496-0600 ❖ Fax: (510) 496-1366
svolker@volkerlaw.com

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VIA EMAIL AND U.S. POST

Loree Randall
Department of Ecology, SEA Program
Post Office Box 47600
Olympia, Washington 98504-7600
ecyrefedpermits@ecy.wa.gov

Linda Storm
Environmental Protection Agency Resource Unit
1200 Sixth Avenue
Seattle, Washington 98101-1128
storm.linda@epa.gov

Re: EPA and Washington State Department of Ecology's Review of U.S. Army Corps of Engineers Nationwide Permits for Coastal Zone Management Act Consistency and State Water Quality Standards Certification

On behalf of the Case Inlet Shoreline Association ("CISA") and the Coalition to Protect Puget Sound Habitat ("CPPSH"), we submit the following comments addressing the Army Corps of Engineers' ("ACOE") 2012 Nationwide Permit ("NWP") 48's compliance with the State of Washington's water quality standards and consistency with its Coastal Zone Management Program ("CZMP").

BACKGROUND

The 2007 version of NWP 48 ("2007 NWP 48") "authorized the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures necessary for the continued operation of the existing commercial aquaculture activity." ACOE, Decision Document Nationwide Permit 48 (2007), p. 1 (*see* <http://www.ecy.wa.gov/programs/sea/shellfishcommittee/pdf/mtgs/nationwide -updated.pdf>, at p 15, last visited November 28, 2011). It also authorized "discharges of dredged or fill material necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities." *Id.* It did not authorize (1) "new operations or the expansion of the project area for an existing commercial shellfish aquaculture activity," (2) "the cultivation of new species" not previously cultivated in a water body, (3) "attendant features" associated with commercial aquaculture "such as docks, piers, boat ramps, stockpiles [or] staging areas," or (4) "the deposition of shell material back into waters of the United States as waste."

Id. Thus, 2007 NWP 48 applied only to the approximately 37,632 acres of shellfish farms already in existence at the time of its approval. U.S. Fish and Wildlife Service (“FWS”), 2009 Biological Opinion of the Nationwide Permit 48 (“FWS Bi-Op”), p. 28. These existing farms – often concentrated in groups (FWS Bi-Op, pp. 25-26) – cumulatively impact the water quality and usefulness of the coastal zones. 2007 NWP 48 does not currently apply to any of the dozens of commercial shellfish aquaculture projects that have been proposed since its approval.

The ACOE has proposed modifications to NWP 48 to (1) apply to applications to expand existing commercial shellfish aquaculture operations, (2) authorize new commercial shellfish aquaculture activities, (3) add pre-construction notification requirements for activities that propose to expand commercial shellfish production beyond existing project areas, and (4) remove reporting requirements for commercial shellfish aquaculture operations that do not fall under NWP 48’s pre-construction notification criteria. Proposal To Reissue and Modify Nationwide Permits (“Proposal”), 76 Fed. Reg. 9,174, at 9,183 (ACOE proposed February 16, 2011). The ACOE’s Seattle District has proposed regional conditions that prevent NWP 48’s application to expansion of any *existing* commercial shellfish aquaculture operations within the region.¹ ACOE Seattle District, 2012 Nationwide Permits Draft Final Regional Conditions (“Seattle District Conditions”) (August 31, 2011), p. 9. The Seattle District’s draft conditions *would not* prevent the use of NWP 48 to authorize *new* shellfish projects. *Id.*, pp. 9-10.

During the United States Environmental Protection Agency (“EPA”)’s review of 2007 NWP 48, EPA denied without prejudice Clean Water Act section 401 approval. ACOE Seattle District, 2007 Nationwide Permit 48 Terms and Conditions, p. 14 (*see* <http://www.ecy.wa.gov/programs/sea/shellfishcommittee/pdf/mtgs/nationwide-updated.pdf>, p. 14.) Instead, EPA mandated individual section 401 review for applicants on Native American Indian Tribal lands (for those tribes under EPA jurisdiction) or Federal lands under EPA’s exclusive jurisdiction within the state. *Id.* Likewise, Washington’s Department of Ecology (“Ecology”) required individual section 401 review for activities authorized under 2007 NWP 48 “if the project or activity is an existing geoduck application.” *Id.*, p. 12. Under 2007 NWP 48, Ecology required individual CMZ Consistency Responses for NWP 48 projects requiring individual section 401 review located within Washington’s 15 coastal counties. *Id.*, p. 14.

COMMENTS

As ACOE’s proposed 2012 NWP 48 expands the scope and scale of permitted aquaculture activities without significantly increasing regulatory scrutiny of those activities,

¹ The Seattle District has also proposed conditions preventing the harvest of clams with hydraulic escalator harvesting, and requiring additional pre-construction notification “for any subsequent event if applying more than 10 cubic yards of “frosting” . . . in specific aquatic sites.” Seattle District Conditions, pp. 9-10.

individual project review must still be required, and should be mandated for all new projects regardless of cultivated species. As discussed below, the projects authorized by ACOE's proposed 2012 NWP 48 have the potential to violate the state's water quality standards, and thus the CZMP. CISA and CPPSH request that (1) Ecology and EPA *deny section 401 Certification* for NWP 48 without prejudice, (2) Ecology *require individual CMZP consistency*, and (3) Ecology and EPA *require individual section 401 determinations* for projects authorized by NWP 48.

Water Quality Standards

ACOE's proposed changes to NWP 48 expand its applicability to include new commercial shellfish aquaculture operations. Seattle District Conditions, pp. 9-10; Proposal 76 Fed. Reg. 9,174, 9,183. As ACOE noted in its 2007 NWP 48 decision document, commercial shellfish aquaculture activities can increase pollutants and nutrients in the water, and may adversely impact water quality. Decision Document, *supra*, p. 25. By authorizing new commercial aquaculture within the State of Washington, ACOE's proposed 2012 NWP 48 will expand the potential for these activities to degrade the surface waters of the state. Given the variety of commercial shellfish aquaculture under the purview of this permit, and the variety of marine environment utilized for such aquaculture, EPA and Ecology must conduct individual review of new aquaculture projects.

The State of Washington has designated Ecology as the state's water pollution control agency for purposes of enforcing the Federal Clean Water Act. Revised Code of Washington ("RCW") 90.48.260. As part of this designation, Ecology has the sole authority to establish Washington's water quality standards. RCW 90.48.260 (1)(a). Ecology has promulgated Washington's surface water quality standards at chapters 173-201A (surface water quality standards) and 173-204 (sediment standards) of the Washington Administrative Code ("WAC"). WAC 173-201A-010(4).

Under the marine waters use designation standards established in WAC 173-201A-612, much of Puget Sound is designated as either extraordinary quality or excellent quality for aquatic life uses. WAC 123-201A-210 regulates nephelometric turbidity units ("NTUs") for waters designated as extraordinary or excellent quality for aquatic life so that turbidity caused by human activities in any one-day period must not exceed either (1) 5 NTU over background levels where background levels are less than 50 NTU, or (2) a 10 percent increase in turbidity when the background turbidity exceeds 50 NTU. WAC 123-201A-210 (1)(e). In these areas, dissolved oxygen, temperature and pH are also closely regulated to preserve the quality of the aquatic life uses of these areas. WAC 123-201A-210 (1)(c), (d) & (f). Most of the areas designated as extraordinary or excellent quality for aquatic life uses are also designated as shellfish harvest areas. WAC 173-201A-612.

As the FWS discussed in its Biological Opinion regarding 2007 NWP 48, commercial

shellfish aquaculture activities cause down-current increases in turbidity and sediment. FWS Bio-Op., p. 25. Commercial shellfish aquaculture causes turbidity increases during bed preparation activities such as gravel “frosting,” tilling or harrowing, as well as during harvesting, including the hydraulic dredge harvesting of oysters and the injection and liquification harvesting of geoducks, and often create dramatic turbidity plumes. FWS Bio-Op., pp. 134, 138-139, Figures 4.22, 4.23; Exhibit 1 (Geoduck Harvesting at Case Inlet, August 2007); *see also* Geoduck Harvesting at <http://www.youtube.com/watch?v=loRecKii48Y> (last visited 11/29/2011). The National Marine Fisheries Service (“NMFS”) 2009 Biological Opinion notes that “activities that generate sediment may cause turbid water to drift outside of the footprint of the active plot, expanding the affected area by as much as five percent.” Endangered Species Act – Section 7 Programmatic Consultation Biological and Conference Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation, Nationwide Permit 48 Washington (“NMFS Bi-Op”), p. 30. These plumes can be significant enough to violate the turbidity limits established by WAC 123-201A-210 (1)(e). While the Seattle District’s draft conditions would prevent hydraulic escalator harvesting of clams, the ACOE’s 2012 NWP 48 would not limit other types of turbidity-causing harvesting, including the dredge harvesting of oysters and the harvesting of geoducks. Seattle District Conditions, pp. 9-10. Because of the potential for commercial shellfish aquaculture projects to violate the turbidity standards during operation, these projects should be subject to individualized section 401 review.

Unlike 2007 NWP 48, which applied only to those projects already in operation, ACOE’s proposed 2012 NWP 48 would expand its application to *new* aquaculture projects, as discussed above. While Ecology approved section 401 certification for non-geoduck operations in 2007, it should refrain from doing so here, given the expanded scope of the proposed permit.

Coastal Zone Management Program

Ecology also oversees Washington’s CZMP, which was first approved in 1976. Ecology, *Managing Washington’s Coast*, Publication 00-06-029 (2001), p. 9. In order for a project authorized under NWP 48 to be considered consistent with the CZMP it must comply with the Clean Water Act (including Washington’s water quality standards), the Shoreline Management Act (including local shoreline master programs), the State Environmental Policy Act, and other applicable laws. *Id.*, pp. 97-98.

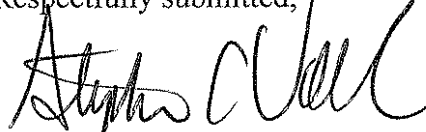
As previously discussed, the size and scope of new aquaculture projects that would be permitted under ACOE’s proposed 2011 NWP 48 are so broad that each project’s ability to meet water quality standards must be evaluated independently. As compliance with these water quality control standards is an integral part of CZMP consistency, blanket approval is likewise inappropriate.

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CONCLUSION

Given the dramatic increase in Washington's commercial shellfish aquaculture industry over the last fifteen years, and the resultant multiplication of this industry's impacts on water quality, wildlife habitat and human recreational uses, it follows that greater rather than less environmental review, public scrutiny and agency oversight are needed. Accordingly for the reasons stated above, CISA and CPPSH request that (1) Ecology and EPA *deny section 401 Certification* for NWP 48 without prejudice, (2) Ecology *require individual CMZP consistency*, and (3) Ecology and EPA *require individual section 401 determinations* for projects authorized by NWP 48.

Respectfully submitted,



Stephan C. Volker

Attorney for the Case Inlet Shoreline Association
and the Coalition to Protect Puget Sound Habitat

cc: CISA
CPPSH
Seattle District, US ACOE

EXHIBIT

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**Sediment plume/transport from intertidal geoduck harvest,
Case Inlet, Puget Sound, August, 2007**