



## THE MARICULTURE NATIONWIDE PERMITS

Collin Dowson, 2L, Northwestern Law

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The U.S. Army Corps of Engineers is authorized to issue permits under both Section 10 of the Rivers and Harbors Act (RHA) and Section 404 of the Clean Water Act (CWA). RHA Section 10 requires permits for “structures”—for mariculture operations, this might include cages, nets, racks, lines, pilings, ropes, trays, and tubes placed in navigable waters.<sup>1</sup> Section 404 of the CWA gives the Corps the ability to issue permits “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”<sup>2</sup> The Corps issues RHA and CWA permits on a general or individual basis.<sup>3</sup> General permits may be authorized at the state, regional, or nationwide level for any category of activities which are similar in nature and will have only minimal adverse environmental effects both individually and cumulatively.<sup>4</sup> Individual permits may be issued for projects which do not meet the criteria of a general permit, and often are those which will have a more significant impact on the environment.<sup>5</sup>

## **I. Nationwide Permits**

Nationwide permits (NWP) are a form of general permit issued by the Corps at the national level. Like all general permits, they cover projects which fall into certain predefined categories of activities, which must be similar in nature, and expected to have only minimal adverse environmental effects either individually or cumulatively.<sup>6</sup> It is important to note that, despite its name, a NWP permit may not apply everywhere in the country. The Corps’ districts implement the regulatory program for each NWP, so the use of general permits is not uniform throughout the districts. The vast majority of permitting is done through the NWPs due to the fact that the approval process for NWPs is very streamlined compared to other permit types.

NWPs permits are subject to a number of general terms and conditions set by the Corps.<sup>7</sup> Certain regions impose additional conditions which projects in that region must follow as well as continuing to abide by the national conditions.<sup>8</sup> In addition, when examining a particular project application, District Engineers, the Corps representatives who make on-the-ground permit decisions, have the authority to attach individual conditions which the project must also meet to retain eligibility.

To qualify for a NWP, a project must comply with a number of general conditions established by the Corps. These conditions range from restrictions on how projects may be

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<sup>1</sup> 33 U.S.C. § 403.

<sup>2</sup> *Id.* § 1344.

<sup>3</sup> *Id.* § 1344(e)(2).

<sup>4</sup> *Id.* § 1344(e)(1).

<sup>5</sup> NICOLE CARTER, CONG. RESEARCH SERVICE, THE ARMY CORPS OF ENGINEERS’ NATIONWIDE PERMITS PROGRAM: ISSUES AND REGULATORY DEVELOPMENTS ii (2017).

<sup>6</sup> 33 U.S.C. § 404(e)(1).

<sup>7</sup> U.S. ARMY CORPS OF ENGRS., INDEX OF 2021 NATIONWIDE PERMITS, CONDITIONS, DISTRICT ENGINEER’S DECISION, FURTHER INFORMATION, AND DEFINITIONS 47 (2021) [hereinafter Index].

<sup>8</sup> Carter, *supra* note 5, at 14.

developed and maintained, to limitations on interference with pre-existing life and uses of the waterbody concerned. While nearly all of the 32 general conditions currently listed by the Corps potentially apply to mariculture projects, there are a few which will likely be relevant in nearly all permit applications.

General Condition 1 requires that a project have no more than a minimal adverse impact on navigation.<sup>9</sup> General Conditions 2, 3, 4, and 5 concern minimizing impacts on wildlife in the area. Through these conditions, permittees are prohibited from disrupting aquatic life movement, spawning, migratory bird breeding, and concentrated shellfish beds.<sup>10</sup> General Condition 6 requires that no projects use “unsuitable material.”<sup>11</sup> This includes not using any material in construction or discharge which contains any toxic pollutants in toxic amounts. General Conditions 11, 12, 13, and 14 govern the use and maintenance of equipment and structures associated with permitted projects. Steps should be taken during construction to minimize soil disturbance and erosion, including a preference for performing work during low tides or at other times when erosion is less likely to occur. Temporary structures should be removed when they are no longer being used, and structures which do remain in place should be properly maintained.

General Condition 18 requires permittees to ensure that their project complies with the Endangered Species Act (ESA). If it is suspected that the project might have an impact on an endangered or threatened species, the critical habitat of such a species, or a species or habitat which has been proposed for designation, information about each potentially impacted species must be included when submitting a Pre-Construction Notification (PCN).<sup>12</sup> A PCN is “a request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit.”<sup>13</sup> Permittees may not begin work on their projects until they have received notice from their local District Engineer that the project will be able to comply with the requirements of the ESA. Additional, species-specific conditions may be placed on the project to ensure compliance.

General Conditions 25, 26, and 27 concern water quality certifications, coastal zone management concurrences, and regional conditions. Projects must comply with water quality certifications issued by state agencies under section 401 of the CWA. States who are part of the Coastal Zone Management Program must confirm that the project would be consistent with their state Coastal Zone Management Plan. States frequently use these extra levels of review to place additional conditions on, or to entirely prohibit, the use of NWP which they feel are not environmentally advisable. Corps district offices also have the authority to place regional conditions on NWP which permittees must follow in addition to the general conditions.

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<sup>9</sup> *Id.* at 47.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 48.

<sup>12</sup> *Id.* at 49-51.

<sup>13</sup> *Id.* at 68.

General Condition 32 governs the rules surrounding PCNs, which must be submitted by applicants for certain NWP automatically, and on a case-by-case basis for other projects which meet certain criteria.<sup>14</sup> Permittees who have submitted a PCN must generally wait to begin construction until they have heard back from the district engineer, who will either grant or deny the use of an NWP. If other state or Federal agencies make comments, the district engineer will consider them when making their decision. If the use of an NWP is denied, the project must be authorized through an individual permit.

A table describing each of the above conditions in more detail and listing information about the other nationwide general conditions can be found in the attached Appendix.

## **II. Regional Permits**

In addition to the Corps's role in issuing nationwide general permits and conditions, each Corps district office is directly involved in setting permit policy at the regional level.<sup>15</sup> These regional policies come in two primary forms: regional permits and regional conditions on permits. Regional General Permits are carefully crafted to protect particularly vulnerable bodies of water within the region and apply only to projects located in those geographic areas.<sup>16</sup>

Many Corps districts impose their own regional conditions, which projects in the district must follow in addition to abiding by the nationwide conditions applicable to all projects. Like regional permits, regional conditions are usually aimed at protecting especially vulnerable waters.<sup>17</sup> Because of this narrower focus, most regional conditions apply only to projects in certain areas, rather than broadly to all projects of a certain kind. For instance, in the Corps' Los Angeles District, Regional Condition 4 prohibits the use of NWPs specifically within small sections of the San Diego and San Juan Creek watersheds in Orange County.<sup>18</sup>

However, at other times, regional conditions can go as far as entirely banning the use of certain NWPs throughout the entire region. The Corps New England District has completely suspended the use of all NWPs and replaced them with state-level general permits.<sup>19</sup>

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<sup>14</sup> *Id.* at 59.

<sup>15</sup> Including the ones which are overseas, there are 43 different Corps districts.

<sup>16</sup> [Obtain a Permit](#), U.S. ARMY CORPS OF ENGRS. (last visited June 20, 2024).

<sup>17</sup> Carter, *supra* note 5, at 14.

<sup>18</sup> U.S. ARMY CORPS OF ENGRS., L.A. DISTRICT, [FINAL 2021 NATIONWIDE PERMIT \(NWP\) REGIONAL CONDITIONS FOR THE STATE OF CALIFORNIA](#) (2024).

<sup>19</sup> [State General Permits](#), U.S. ARMY CORPS OF ENGRS., NEW ENGLAND DISTRICT (last updated Sep. 7, 2019).

### III. Individual Permits

While the vast majority of permitting is done through one form or another of general permit, some projects will not meet the requirements of a general permit. In such cases, project proponents must obtain an individual permit. Individual permits are issued to applicants on a case-by-case basis, usually for those projects which will have more than a minimal adverse environmental impact. Unlike general permits, individual permits must go through “public notice, public interest review, public hearing, and activity-specific environmental documentation.”<sup>20</sup> This causes a vast discrepancy in processing time, with general permits typically taking 40 days, while individual permits often take an average of 217 days.<sup>21</sup> For this reason, both permittees and the Corps tend to prefer to use general permits when possible.

### IV. Mariculture Nationwide Permits

In 2021, the Corps reissued 52 pre-existing NWP and created an additional five.<sup>22</sup> Two of the new NWPs were the direct result of Executive Order 13921, which directed the Secretary of the Army to begin development of permits for seaweed and finfish aquaculture, which eventually became NWPs 55 and 56 respectively.<sup>23</sup> These new NWPs brought the number of mariculture permits to three as they joined the pre-existing NWP 48, which concerns commercial shellfish mariculture.<sup>24</sup>

#### A. Nationwide Permit 48

NWP 48 covers commercial shellfish mariculture activities, where operators are approved to work in specific project areas.<sup>25</sup> Project areas are defined by leases or permits, which are issued by state or local government agencies. NWP 48 authorizes operators to install a variety of structures into navigable waters for the purposes of commercial shellfish mariculture. Operators are also permitted to discharge dredge or fill material into navigable waters for the same purpose. In addition to following all general national conditions, applicants for NWP 48 must also abide by a number of conditions specific to the permit. First, the nearest U.S. Coast Guard office must be informed of the project. No material taken from a different waterbody may be used in the project unless it has been treated to avoid the introduction of aquatic nuisance species. There are also a number of activities which are expressly not covered by NWP 48. Permittees may not cultivate aquatic nuisance species, nor may they cultivate non-indigenous

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<sup>20</sup> Carter, *supra* note 5, at 2.

<sup>21</sup> *Id.*

<sup>22</sup> U.S. ARMY CORPS OF ENGRS., *Reissuance and Modification of Nationwide Permits*, 86 Fed. Reg. 245, 73,522 (2021).

<sup>23</sup> Exec. Order No. 13921, 85 Fed. Reg. 28471, 28474 (May 7, 2020).

<sup>24</sup> Index, *supra* note 7, at 2.

<sup>25</sup> *Id.* at 31.

species which have not previously been cultivated in that waterbody. The permit also does not authorize the use of “attendant features” such as docks or piers, nor does it allow for the deposition of shell material back into the waters of the United States.<sup>26</sup>

Finally, if the project will directly affect more than a one-half acre of submerged aquatic vegetation, the permittee must submit a PCN to the district engineer. A district engineer must examine the PCN, along with other application materials, to ensure that a proposed project meets NWP requirements, including a determination that the project will have no more than a minimal impact on the environment. The exact contents of a PCN vary by NWP, but they all serve to ensure that a project receives an extra level of review before being approved.

### *B. Nationwide Permit 55*

NWP 55 authorizes the creation of structures “in marine and estuarine waters” for seaweed mariculture activities.<sup>27</sup> It should be noted that NWP 55 only authorizes structures, and not any of the operational aspects of seaweed mariculture. NWP 55 also only covers the RHA, as the Corps has taken the position that activities authorized by the NWP does not result in discharges that would implicate the CWA.

Under NWP, seaweed mariculture structures may also be used for bivalve shellfish mariculture if the cultivation is part of one integrated project alongside the seaweed cultivation. NWP 55 requires that floating structures be securely anchored and clearly marked, and that they be removed if they will no longer be used for mariculture activities. If a structure is erected in an area designated by the U.S. Coast Guard as an anchorage area, its center may not be located less than two nautical miles from the center of any pre-existing structure in that area.<sup>28</sup> Structures cannot be placed in restricted areas or danger zones as defined in 33 CFR part 334.<sup>29</sup> Structures also may not be erected in “[f]ederal navigation channels, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard.”<sup>30</sup> Finally, such structures are also prohibited from being placed in areas deemed open water dredged material disposal areas by either Corps or the U.S. Environmental Protection Agency (EPA).

NWP 55 shares many restrictions with NWP 48. Again, permittees must notify the U.S. Coast Guard about their projects, and must take steps to prevent the introduction of aquatic

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 38.

<sup>28</sup> 33 C.F.R. § 322.5(1)(2).

<sup>29</sup> A danger zone is “a defined water area (or areas) used for target practice, bombing, rocket firing or other especially hazardous operations, normally for the armed forces.” A restricted area is “a defined water area for the purpose of prohibiting or limiting public access to the area.” 33 C.F.R. § 334.2.

<sup>30</sup> Index, *supra* note 7, at 38.

nuisance species into water bodies.<sup>31</sup> Permittees under NWP 55 are also not allowed to cultivate aquatic nuisance species or non-indigenous species not previously cultivated in the applicable water body or to install attendant features such as docks or piers. The major difference between the restrictions imposed by NWPs 48 and 55 is that Permit 55's PCN must include additional information. When filing a PCN under NWP 55, operators must provide "(1) a map showing the locations and dimensions of the structure(s); (2) the name(s) of the species that will be cultivated during the period this NWP is in effect; and (3) general water depths in the project area(s)."<sup>32</sup> The notification should also describe all species and culture activities anticipated to be involved in the project.

### *C. Nationwide Permit 56*

NWP 56 authorizes the creation of structures to be used for finfish mariculture activities. Like NWP 55, NWP 56 only authorizes structures and not any of the operational aspects of seaweed mariculture. Like NWP 55, NWP 56 only covers the RHA, as the Corps has again taken the position that activities authorized by the NWP 56 does not result in discharges that would implicate the CWA.

These structures must be in marine and estuarine waters, as the permit does not allow for the construction of land-based fish hatcheries.<sup>33</sup> Structures created under this permit can also be used for bivalve shellfish or seaweed mariculture provided that they are "part of the single and complete project."<sup>34</sup> NWP 56 also authorizes the use of items such as net pens and cages, provided that floating structures are securely anchored, clearly marked, and are removed if they will no longer be used for mariculture activities. NWP 56 is subject to the same restrictions and limitations which exist for NWP 55. In response to comments received on the draft NWPs, NWP 56 distinguishes the Corps's authority to authorize the installation of finfish farm structures from the authority of the EPA, U.S. Food & Drug Administration (FDA), and other agencies to regulate finfish farming activities.

## **V. Looking Forward**

The three 2021 mariculture NWPs will soon be up for reauthorization. While there has not been any litigation concerning the seaweed permit, NWP 55, the previous version of NWP 48 for shellfish and current version of NWP 56 for finfish have both faced legal challenges. In fact, the 2021 version of NWP 48 was altered in response to previous litigation. Thus, it may be

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<sup>31</sup> *Id.* at 39.

<sup>32</sup> *Id.* at 38.

<sup>33</sup> *Id.* at 39.

<sup>34</sup> *Id.*

helpful to consider the NWP 48 and NWP 56 lawsuits in thinking about the upcoming mariculture NWPs reauthorization process.

#### A. *NWP 48 Litigation*

In 2019, a number of environmental advocacy groups, including The Coalition to Protect Puget Sound Habitat (the Coalition), sued the Corps over their issuance of NWP 48. This iteration of NWP 48, which was issued in 2017, and expired in 2021, governed “commercial shellfish aquaculture activities.”<sup>35</sup> It permitted the installation of structures in navigable waters of the United States, and also authorized the discharge of dredge or fill material “necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities.”<sup>36</sup> As part of its mandatory National Environmental Policy Act (NEPA) analysis before issuing NWP 48, the Corps stated that the permit would not cause a significant environmental impact. The Corps also claimed that they anticipated that NWP 48 would have no more than a minimal individual or cumulative impact on the aquatic environment, as is required by Section 404 of the CWA. The coalition brought suit in the Western District of Washington, arguing that these findings were not supported by the record before the Corps, and therefore requesting that NWP 48 be set aside under the terms of the Administrative Procedure Act (APA).<sup>37</sup>

The U.S. District Court for the Western District of Washington examined the analyses put forth by the Corps to justify its decisions and found them wanting. First, the court criticized the Corps for attempting to frame its impact analysis only at the nationwide cumulative level rather than also examining the extent of harm at a particular site caused by a particular project.<sup>38</sup> The court also rejected the Corps’ use of a study which suggested that clam aquaculture would cause minimal impacts on seagrass at the site at which it was used<sup>39</sup> and chastised the Corps for its numerous statements suggesting that because marine environments were already severely degraded by other human uses, the impact of aquaculture projects would be barely noticeable in comparison. The court explained that such reasoning ran directly counter to the purposes of NEPA and the CWA, which were both meant to prevent impacts which moved an environment further from its natural baseline, not merely impacts which produced a noticeable difference in combination with other sources of harm.<sup>40</sup>

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<sup>35</sup> U.S. ARMY CORPS OF ENGRS., 2017 NATIONWIDE PERMITS, GENERAL CONDITIONS, DISTRICT ENGINEER’S DECISION, FURTHER INFORMATION, AND DEFINITIONS 31 (2017)

<sup>36</sup> *Id.* at 32.

<sup>37</sup> *Coalition to Protect Puget Sound Habitat v. U.S. Army Corps. of Engineers*, 417 F.Supp.3d 1354 (W.D. Wash. 2019).

<sup>38</sup> *Id.* at 1360.

<sup>39</sup> *Id.* at 1363.

<sup>40</sup> *Id.* at 1364.



In its analysis, the Corps had relied heavily on a number of the general conditions which it applies to all NWPs to make its minimal impact determination. The court stated that the broad application of these general conditions did not constitute taking a “hard look” at potential impacts, as NEPA requires.<sup>41</sup> The court next turned to the large role the Corps left for District Engineers in ensuring that the NWP would comply with the law. The court says that while the Corps is permitted to have District Engineers “cement” Headquarter’s determination that a program will have only a minimal impact, there must first be a national decision document actually evaluating impacts.<sup>42</sup> The court found that the national decision document in this instance was “entirely conclusory” and that the Corps had effectively given the entire burden of analysis to District Engineers, which the court held was not permissible.<sup>43</sup>

For the above defects, the court held that the Corps’ determination that NWP 48 would have no more than a minimal impact was “was arbitrary and capricious and not in accordance with NEPA or the CWA” and therefore held NWP 48 unlawful and set it aside, meaning it could no longer be used for activities in Washington.<sup>44</sup> Aquaculture projects would need to obtain individual permits to continue operations.

On appeal, the Ninth Circuit affirmed the decision of the lower court.<sup>45</sup> In the months before the appeal, the Corps had provisionally issued the updated, 2021 iteration of NWP 48, leading the court to first consider whether the lingering issues regarding the 2017 iteration were moot. The court concluded that the issue was not moot, given that, at the time it issued its opinion, the 2017 iteration of NWP 48 would still be in effect for at least another month and even the 2021 version’s timely issuance would not necessarily grant appellants full relief.<sup>46</sup> The Ninth Circuit agreed with the lower court that the Corps had abused its discretion in issuing NWP 48 without conducting adequate analyses of potential impacts, and said that several of the reasons which the Corps gave for not performing these analyses were “illogical.”<sup>47</sup> Finally, the Ninth Circuit found that the lower court had not abused its discretion in crafting an equitable remedy and vacating the permit.<sup>48</sup>

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<sup>41</sup> *Id.* at 1365.

<sup>42</sup> *Id.* at 1366.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1368.

<sup>45</sup> *Coalition to Protect Puget Sound Habitat v. U.S. Army Corps. of Engineers*, 843 Fed.Appx. 77 (9th Cir. 2021).

<sup>46</sup> *Id.* at 79.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 80.

## B. NWP 56 Lawsuit

After being prompted by Executive Order 13921, the Corps began work on developing a permit for commercial finfish mariculture. In September of 2020, the Corps received public comments on a proposed version of the permit.<sup>49</sup> In response to concerns about the original wording of the permit, the Corps removed language suggesting that NWP 56 would permit “work” in US waters, and emphasized that the NWP only permit the installation of structures.<sup>50</sup> The Corps conducted an Environmental Assessment (EA), as is required by NEPA. An EA is a shorter, more streamlined version of an Environmental Impact Statement (EIS), typically used for projects not expected to have a significant impact. After conducting its EA, the Corps issued a Finding of No Significant Impact (FONSI), declaring that NWP 56 would result “in only minor changes” to the environment.<sup>51</sup> The Corps also declined to conduct a programmatic consultation under the ESA, instead relying on district engineers to make decisions for individual projects after reviewing PCNs submitted by applicants. The final version of NWP 56 was published on March 15th, 2021. In 2022, several environmental advocacy groups sued the Corps for its decision to issue NWP 56.<sup>52</sup> The Plaintiffs claim that the Corps’ conclusion that NWP 56 will have only a minimal adverse environmental impact is arbitrary and capricious, and that the permit should be set aside as unlawful.

First, the Plaintiffs claim that the Corps violated the U.S. Constitution’s Property Clause, which gives Congress the exclusive right to control federal property, by granting individuals permits to conduct aquaculture on the outer continental shelf (OCS).<sup>53</sup> They also claim that the Outer Continental Shelf Lands Act (OCSLA) only allows leases to be granted for the purposes of mineral extraction and energy projects.<sup>54</sup> The Corps responded to this argument first by stating that NWP 56 does not grant property rights, and that any permittees would have to obtain such rights from another source.<sup>55</sup> Second, the Corps said that Plaintiffs are misconstruing OCSLA, and points to Congressional language which indicates that the act was not meant to limit the kinds of projects which can be permitted.<sup>56</sup> The Corps also points to the case *Alliance to Protect Nantucket Sound, Inc. v. U.S. Department of Army*, where a nearly identical argument was rejected, and the Corps was given permission to grant permits for the construction of scientific

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<sup>49</sup> U.S. ARMY CORPS OF ENGRS., DECISION DOCUMENT NATIONWIDE PERMIT 56 5 (2021).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 83.

<sup>52</sup> *Don’t Cage Our Oceans v. United States Army Corps of Engineers*, 2023 WL 6959289 (W.D. Wash. Oct. 20, 2023).

<sup>53</sup> Plaintiffs’ Motion for Summary Judgment and Memorandum in Support at 24, *Don’t Cage Our Oceans v. United States Army Corps of Engineers*, 2023 WL 6959289, 2023 LEXIS 189183 (No. 22-cv-01627).

<sup>54</sup> *Id.* at 29.

<sup>55</sup> Defendants’ Cross-Motion for Summary Judgment and Opposition to Plaintiffs’ Motion for Summary Judgment at 25, *Don’t Cage Our Oceans v. United States Army Corps of Engineers*, 2023 WL 6959289 2023 U.S. Dist. LEXIS 189183 (No. 22-cv-1627).

<sup>56</sup> *Id.* at 24.

measurement devices. The court in that case concluded that it was clearly Congressional intent to give the Corps broader permit granting authority on the OCS.<sup>57</sup>

The Plaintiffs also raise a number of complaints regarding the potential environmental impacts of finfish aquaculture, including undue pressure on wild fish stocks, pollution and disease spreading from net pens, and the risk posed by cultivated fish escaping from net pens into the wild. The Corps pushes back on the Plaintiff's claim that they did not consider the impact of certain activities, such as the use of antibiotics and fish escapes. The Corps points out that the use of antibiotics is not something they directly control, but is controlled by other agencies such as the FDA and EPA. They also point to instances in their initial decision document where they did address the possibility of fish escapes, the risk of which they believe will be reduced to a minimal level by the use of evolving aquaculture practices.

The Plaintiffs also allege that the Corps failed to perform adequate analyses under a host of environmental laws, including NEPA, ESA, and RHA. They argue that much of the required analysis was either entirely absent from the Corps' decision document, or present but vague and conclusory in nature. The Corps did not prepare a programmatic EIS, which Plaintiffs claim NEPA calls for in this situation. A programmatic EIS is a detailed, in-depth examination of all potential environmental impacts of a project, including multiple opportunities for public comment, rather than the far more concise and streamlined EA which the Corps performed. Plaintiffs also allege that the Corps failed to take a hard look at several of the impacts brought to its attention by public commenters and did not appropriately address cumulative impacts. The Corps also did not conduct a programmatic consultation under Section 7 of the ESA, leaving this task to district engineers on a case-by-case basis, allegedly violating its own implementation guidelines.<sup>58</sup> The Plaintiffs also claim that the Corps violated the RHA by approving a program which will have more than minimal cumulative adverse impacts.<sup>59</sup>

Here, the Corps argues that the analysis it performed was as complete and robust as possible for a newly forming national program, and that many of their statements were only able to be predictive in nature.<sup>60</sup> The Corps states that its analysis of cumulative impacts was sufficient, given that with a nationwide program with no operating projects at the time of issuance, the analysis was necessarily "forecast only."<sup>61</sup> Corps also argues that the cumulative impact analysis it has asked district engineers to engage in is not punting, as the Plaintiffs claim, but instead is an additional safeguard given that the national level analysis was already completed to the extent possible. The Corps also pushes back on the Plaintiffs' arguments

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<sup>57</sup> *Id.*

<sup>58</sup> Complaint for Declaratory and Equitable Relief at 89, *Don't Cage Our Oceans v. United States Army Corps of Engineers*, 2023 WL 6959289 (No. 22-1627).

<sup>59</sup> *Id.* at 82.

<sup>60</sup> Defendants' Cross-Motion, *supra* note 55, at 27.

<sup>61</sup> *Id.* at 26.

surrounding the ESA, stating that because district engineers are able to review PCNs for every project, a programmatic consultation was not needed, and NWP 56 as a whole is in compliance with the act.

One additional issue the Plaintiffs point to is the Corps' reliance on District Engineers, the local officials who approve or deny projects, to prevent impacts on a case-by-case basis. They point out that although the Corps relied heavily on mitigation by district engineers and regional offices to make its FONSI, it provided no guidance for how this mitigation would occur. The Plaintiffs liken this flimsy analysis with the analysis the Corps conducted in the 2018 *Coalition to Protect Puget Sound* case, where NWP 48 was vacated in Washington. The Plaintiffs say that the punting of impact examinations to District Engineers which was unacceptable for NWP 48 is exactly what the Corps has done with NWP 56.

The Corps argues that the comparison Plaintiffs draw to *Coalition to Protect Puget Sound* is misplaced, because, unlike in that case, the national analysis conducted for NWP 56 is detailed, and the District Engineers are therefore helping to "cement" rather than being forced to analyze from scratch.<sup>62</sup> The Corps argues that the case at hand is different, because in this case a nationwide analysis was conducted and, unlike NWP 48, NWP 56 is brand new, meaning that the Corps necessarily had less information on which to base its impact analyses.

In addition to its responses to the Plaintiffs' claims, the Corps also raises the issue of standing. It claims that due to the kinds of injuries alleged by Plaintiffs, as well as the lack of a causal connection between NWP 56 and those injuries, there is not a legitimate case or controversy for a judge to hear.<sup>63</sup> To counter the standing issues raised by the Corps, Plaintiffs argue that in procedural challenges to programmatic decisions, injuries caused by site-specific approvals are not needed. They point to 9th Circuit precedent which suggests that an interest in any one part of the larger area which will be impacted by a program is sufficient for standing. They also assert that a "reasonable probability" that the challenged action will hurt their concrete interests is all that is required to establish a connection to the defendant's actions and redressability by a favorable court decision.<sup>64</sup>

In the case, both parties have motioned for summary judgment. In order to grant a summary judgment motion in either party's favor, the court would have to find that there was no genuine dispute as to the facts and the law clearly entitled the party to win based on the arguments already filed by the parties. If the Court were to grant this motion, the prevailing party would win before the case reached trial and be granted the remedies that they sought without having to continue litigation. The Court agreed to hear oral argument on the motions on July 8th,

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<sup>62</sup> *Id.* at 29.

<sup>63</sup> *Id.* at 21.

<sup>64</sup> *Id.* at 17.

2024.<sup>65</sup> As of the writing of this document, the Court has taken the arguments presented by both parties under advisement and has stated that an order will be issued at an undisclosed future date.

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<sup>65</sup> Joint Notice On Oral Argument, *Don't Cage Our Oceans v. United States Army Corps of Engineers*, 2023 WL 6959289 (No. 2:22-CV-01627-KKE).

## Appendix

### Nationwide General Conditions

#	Requirements (as listed in <a href="https://www.federalregister.gov/publications/2021-01-27/2021-01-27-index-of-2021-nationwide-permits">Index of 2021 Nationwide Permits (oclc.org)</a> )	Pg. #
1	Requires that a project have no more than a minimal adverse impact on navigation in waters of the United States. If it is determined that the structures or work associated with a project are having a more than minimal impact, a permittee may be required to remove or relocate to reduce their impact. In addition, permittees are required to maintain lights and signals, as prescribed by the U.S. Coast Guard.	47
2	Projects should not substantially disrupt the necessary life cycle movements of species who are indigenous to or migrate through the waterbody, any water crossings should be designed to minimize impact to these movements.	47
3	Activities in spawning areas during spawning seasons should be avoided.	47
4	Activities in waters that serve as breeding areas for migratory birds should be avoided.	48
5	No activity should occur in concentrated shellfish beds, unless the activity is directly related to shellfish harvesting, seeding, or habitat restoration.	48
6	“No activity may use unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts.”	48
7	“No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.”	48
8	“If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.”	48
9	The flow of open waters should be maintained and normal or high flows should not be restricted, unless such a restriction is the primary purpose of the project or if such a restriction would benefit the aquatic environment.	48
10	“The activity must comply with applicable FEMA approved state or local	48

	floodplain management requirements”	
11	“Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance.”	48
12	Soil erosion prevention measures should be taken, and exposed soil and work below the ordinary high water mark should be stabilized. Permittees are encouraged to work during periods of low-flow or no-flow, or during low tides.	48
13	Temporary structures and fills should be removed once their use has concluded. Affected areas should be returned to pre-construction levels and revegetated.	48-49
14	“Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable NWP general conditions, as well as any activity-specific conditions added by the district engineer to an NWP authorization.”	49
15	“The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.”	49
16	Activities should not occur in components of the National Wild and Scenic River System, or in areas designated for possible future inclusion in the system, unless it has been determined that the activity will not adversely affect the designation or status of the area. Any activity in such an area shall require the submission of a pre-construction notification.	49
17	“No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.”	49
18	Condition 18 requires permittees to ensure that their project complies with the Endangered Species Act. If it is suspected that the project might have an impact on an endangered or threatened species, the critical habitat of such a species, or a species or habitat which has been proposed for designation, they must include information about each potentially impacted species when submitting their Pre-Construction Notification (PCN) to the Corps. Permittees may not begin work on their projects until they have received notice from their local district engineer that the project will be able to comply with the requirements of the ESA. Additional, species-specific conditions may be placed on the project to ensure compliance.	49-51
19	Activities must comply with the Migratory Bird Treaty Act and the Bald and	51

	Golden Eagle Protection Act.	
20	No activity is authorized which may affect properties listed, or eligible for listing, in the National Register of Historic Places, unless, after a PCN has been submitted, the district engineer determines that there will be no impact, or the project successfully undergoes a Section 106 consultation under the National Historic Preservation Act.	51-53
21	Permittees that discover “any previously unknown historic, cultural or archeological remains and artifacts” during their project must inform the district engineer and cease activities which could potentially affect the remains or artifacts until it can be determined whether a recovery operation or listing in the national register of historic places is warranted.	53
22	Discharges of dredge or fill material into critical resource waters are not permitted for NWP 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, 52, 57 and 58. For NWP 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and 54, the district engineer must verify that any discharges into critical resource waters will be no more than minimal	53-54
23	Mitigation efforts must be used to keep a permitted project from having a more than minimal environmental impact. One form of mitigation is one-to-one compensation for wetlands and stream beds lost as a result of the project. This compensation will often focus on restoring or replacing damaged riparian areas near the project site. The most common method of compensation for the NWP program is the purchase of mitigation bank or in-lieu fee program credits. However, if such credits are not available, the permittee may be approved to develop their own plan for mitigation and submit it for approval to the district engineer.	54-56
24	District engineer may require verification from operators that any impoundment structures qualify with dam safety criteria, or were designed and reviewed by qualified persons, with modifications made to ensure safety.	56
25	Projects must obtain water quality certifications or have the requirement waived.	57
26	Projects must obtain CZMA consistency concurrence or a presumption of concurrence.	57
27	Projects must comply with regional and case-specific conditions added by the Corps, the EPA, or the state or Indian tribe concerned.	57



28	Multiple NWPs may be obtained for a single and complete project. If more than one of the involved NWPs has an associated acreage limit, each activity cannot exceed its respective acreage limit.	57-58
29	If a permitted project/operation is sold, the NWP verification can be transferred to the new owner. A notice of transfer should be submitted to the appropriate Corps district office, along with a letter containing the following language and signature: “When the structures or work authorized by this [NWP] are still in existence at the time the property is transferred, the terms and conditions of this [NWP], including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this [NWP] and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.”	58
30	Within 30 days of completion of the permitted activity, all permittees must sign a document certifying that they have complied with all conditions imposed upon them, and that any necessary compensatory mitigation was completed.	58-59
31	PCN are required for any projects which “will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers federally authorized Civil Works project.”	59
32	<p>After receiving a PCN the district engineer will consider any comments from federal and state agencies concerning the proposed activity’s compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the activity’s adverse environmental effects so that they are no more than minimal. A PCN must include:</p> <ul style="list-style-type: none"> <li>(1) Name, address and telephone numbers of the prospective permittee;</li> <li>(2) Location of the proposed activity;</li> <li>(3) The specific NWP or NWP(s) the prospective permittee wants to use;</li> <li>(4) A description of the proposed activity; the activity’s purpose; direct and indirect adverse environmental effects the activity would cause, a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity;</li> <li>(5) A delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial and intermittent streams, on the project site;</li> <li>(6) ) If the proposed activity will result in the loss of greater than 1/10-acre of wetlands or 3/100-acre of stream bed, a statement describing how the mitigation</li> </ul>	59-63

<p>requirement will be satisfied, or explaining why the adverse environmental effects are no more than minimal and why compensatory mitigation should not be required. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan;</p> <p>(7) For non-federal permittees, if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat (or critical habitat proposed for such designation), the PCN must include the name(s) of those species that might be affected by the proposed activity or utilize the critical habitat that might be affected by the proposed activity. Federal permittees must provide documentation demonstrating compliance with the ESA;</p> <p>(8) For non-federal permittees, if the NWP activity might have the potential to cause effects to a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, the PCN must state which historic property might be affected by the proposed activity or include a vicinity map indicating the location of the historic property. Federal permittees must provide documentation demonstrating compliance with section 106 of the National Historic Preservation Act;</p> <p>(9) For an activity that will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a “study river” for possible inclusion in the system while the river is in an official study status, the PCN must identify the Wild and Scenic River or the “study river;”</p> <p>(10) For an NWP activity that requires permission from, or review by, the Corps because it will alter or temporarily or permanently occupy or use a Corps federally authorized civil works project, the PCN must include a statement confirming that the project proponent has submitted a written request for section 408 permission from, or review by, the Corps office having jurisdiction over that Corps project.</p>	
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