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No. 52906-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PROTECT ZANGLE COVE; COALITION TO PROTECT
PUGET SOUND HABITAT; AND WILD FISH CONSERVANCY,

Appellants,

v.

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE;
JOE STOHR, Acting Director of the Washington Department of Fish and
Wildlife; and PACIFIC NORTHWEST AQUACULTURE, LLC,

Respondents, and

TAYLOR SHELLFISH COMPANY, INC.,

Respondent-Intervenor.

BRIEF OF PACIFIC NORTHWEST AQUACULTURE, LLC
AND TAYLOR SHELLFISH COMPANY, INC.

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I. INTRODUCTION

The legislature has expressly limited the Washington Department of Fish and Wildlife's ("WDFW's") authority to regulate private sector cultured aquatic products and aquatic farmers to a discrete list of statutes, a list that does not include the statute requiring hydraulic project approval ("HPA") permits. Finding the statutory language clear and unambiguous, the Thurston County Superior Court, Honorable Judge Chris Lanese, properly dismissed Appellants' claims.

In spite of the clear statutory language, Appellants argue that WDFW nonetheless has HPA permit authority to regulate the cultivation of private sector cultured aquatic products by aquatic farmers. Appellants' case is based on an untenable interpretation of the law and an attempt to manufacture a conflict between statutes that are easily reconcilable.

Appellants' challenge to Pacific Northwest Aquaculture, LLC's ("PNA's") farm fails for the additional reason that it is an improper attempt to privately enforce the HPA permit program. Finally, even if private parties could enforce this program, Appellants have failed to demonstrate they have standing or that they are entitled to injunctive relief.

The Court of Appeals should affirm Judge Lanese's decision.

II. STATEMENT OF ISSUES

1. Can WDFW require aquatic farmers to obtain hydraulic permits under RCW 77.55.021 to do work in state waters as part of

cultivating aquatic products, when that hydraulic statute is not included in a short list of statutes that the legislature has said “constitute the only authorities of the department to regulate private sector cultured aquatic products and aquatic farmers”? RCW 77.115.010(2).

2. If WDFW lacks authority to require aquatic farmers to obtain hydraulic permits under RCW 77.55.021 to do work in state waters as part of cultivating aquatic products, does WAC 220-660-040(2)(1) violate the law when it states that no hydraulic permit is required for an aquatic farmer to install or maintain aquaculture facilities?

3. Can Appellants privately enforce the HPA permit program under the Uniform Declaratory Judgments Act?

4. Are Appellants entitled to an injunction preventing PNA from further cultivation activities until an HPA permit is obtained?

III. STATEMENT OF THE CASE

PNA and Taylor Shellfish Company, Inc. (“Taylor Shellfish”) adopt and incorporate WDFW’s brief. PNA and Taylor Shellfish provide additional case statements and arguments in this brief.

A. Shellfish Farming in Washington State

The issues presented in this case are legal issues regarding WDFW’s authority to regulate commercial shellfish farming. Nevertheless, Appellants requested the trial court take judicial notice of a number of documents related to shellfish farming activities, claiming they were merely

seeking notice of the existence and contents of the documents but were not requesting the court to determine the truth of their description of aquaculture activities. CP 274, 724. Despite this prior representation, Appellants' brief opens with four pages asserting shellfish aquaculture is rapidly growing in Washington State and has significant environmental impacts. Appellants' Br. 6-10. Appellants' assertions are both inaccurate and improper.

Commercial aquaculture in Washington State is highly regulated by multiple federal, state, and local agencies. CP 117, 181. Permitting a new farm often takes years to complete and requires extensive time, money, and resources. CP 117-18. Required approvals include multiple permits and reviews that specifically address impacts to fish life and habitat, including: permits issued by local governments and/or the Washington State Department of Ecology ("Ecology") under the Washington State Shoreline Management Act, chapter 90.58 RCW ("SMA"), and associated review under the State Environmental Policy Act, chapter 43.21C RCW ("SEPA"); permits issued by the U.S. Army Corps of Engineers ("Corps") under section 404 of the Federal Clean Water Act ("CWA"), 33 U.S.C. § 1344, and section 10 of the Rivers and Harbors Appropriation Act of 1899 ("RHA"), 33 U.S.C. § 403; consultations between the Corps and the National Marine Fisheries Service ("NMFS") and U.S. Fish and Wildlife Service ("USFWS") under section 7 of the Federal Endangered Species Act ("ESA"), 16 U.S.C. § 1536; and consultations between the Corps and NMFS under the Essential Fish Habitat protection provisions of the

Magnuson-Stevens Fishery Conservation and Management Act (“MSA”), 16 U.S.C. § 1855. CP 181, 965-1021, 1029-32, 1034-38.

Agencies with authority and expertise over shellfish aquaculture recognize this activity, as regulated, has minimal adverse to beneficial impacts. Ecology’s SMA regulations classify commercial shellfish beds as critical saltwater habitat that provide important ecological functions and require a high level of protection. WAC 173-26-221(2)(c)(iii). They further recognize that aquaculture is a preferred use of statewide interest that can result in long-term benefits and protect the ecology of the shoreline when properly managed. WAC 173-26-241(3)(b)(i)(A). Ecology and local governments regulate aquaculture under the SMA and shoreline master programs (“SMPs”) to ensure farms are properly managed, and new geoduck farms require conditional use permits. WAC 173-26-241(3)(b).

The Corps has issued a general CWA and RHA permit to authorize commercial shellfish activities, Nationwide Permit (“NWP”) 48. Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1995-96 (Jan. 6, 2017) (Ex. 1). General permits may only be issued for activities with minimal individual and cumulative impacts. 33 U.S.C. § 1344(e)(1). The Corps’ 2017 NWP 48 reissuance decision makes clear that commercial shellfish aquaculture, as regulated, not only has minimal adverse environmental impacts; it can result in environmental benefits including creating secondary production and providing habitat for other species. 82 Fed. Reg. at 1924.¹

¹ Indeed, the goals of the CWA include protecting and propagating shellfish, 33 U.S.C. § 1251(a)(2), in part because cultured bivalves enhance water quality by filtering

Additionally, the documents in the record demonstrate that commercial shellfish aquaculture in Washington State, as regulated, is neither rapidly expanding nor has significant adverse impacts:

- None of Appellants' citations state, as Appellants claim, that shellfish farming has "expanded rapidly" in the State. Appellants' Br. 6.² In fact, one document estimates there will only be a 3.8 percent increase of new farm acreage over the next 20 years. CP 361 (reporting a combined total of 36,999 continuing active and fallow acres and projecting there will be 1,401 new acres over the term of the term of the document (20 years)).

- The principal document Appellants rely upon as support for their claim that shellfish farming replaces native species with a monoculture, Appellants' Br. 6, actually states the opposite, recognizing oyster beds may have a comparable level of species diversity and abundance to eelgrass habitat, and artificial structures provide habitat benefits and may increase fish and macro invertebrate species. CP 348-49.

- With regard to Appellants' claim that shellfish reduce food for other species, Appellants' Br. 6, the referenced document reports only local phytoplankton reduction in the Puget Sound embayment with the highest density of shellfish culture, CP 477, and NMFS recently concluded shellfish

excess nutrients or other matter in the water that can be destructive to marine environments. *Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1010 (9th Cir. 2002).

² One document states bivalve aquaculture is a rapidly growing industry globally. CP 1259. The document provides no support for this statement, and the statement is not specific to Washington State.

activities provide long-term benefits by improving water quality and sequestering carbon and nutrients, CP 285.

- The 2017 Corps document that Appellants claim found aquaculture was having substantial impacts, Appellants' Br. 7, is a preliminary, unpublished analysis obtained through litigation in another case, CP 1129, that assumed only limited, regulatory conditions would be in place, CP 1264. The Corps' final, published analysis determines aquaculture activities in Washington State have minimal impacts when considered in light of the multiple regulatory restrictions that are in place. CP 1221, 1224.

- Appellants' claim that shellfish farmers clear tidelands of native plants and animals prior to planting, Appellants' Br. 8, is not fully supported by the referenced document; it was also recently advanced by Appellant Coalition to Protect Puget Sound Habitat and rejected by the Shorelines Hearings Board. *Coal. to Protect Puget Sound Habitat v. Pierce County*, SHB No. 14-024, 2015 WL 2452870, at *17 (Wash. Shore. Hrgs. Bd. 2015).

Commercial shellfish farming is encouraged and highly regulated under state and federal laws, and as practiced and conditioned it has minimal adverse to beneficial impacts. RCW 15.85.010; RCW 90.58.020; WAC 173-26-241(3)(b); 33 U.S.C. § 1251(a)(2); 16 U.S.C. § 2801.

B. PNA's Farm Is Conditioned to Protect Fish Life

PNA's geoduck farm demonstrates both the stringent regulatory process required for establishing a new farm as well as lack of impacts from this activity. PNA applied to Thurston County for a shoreline substantial

development permit (“SDP”) under the SMA and the County’s SMP in 2014, requesting authorization to operate a 1.1-acre intertidal geoduck aquaculture farm on private property owned by PNA’s agent, Dr. ChangMook Sohn. CP 962, 974. PNA is partnering with Taylor Shellfish. *Id.* Taylor is responsible for most planting and harvesting activities, and PNA is assisting in monitoring and communications. *Id.* Farm operations comply with environmental codes of practice. CP 1013.

The farm’s tidelands contain no eelgrass and are not a documented forage fish spawning beach, and the substrate is suitable for geoduck planting with no beach preparation. CP 975, 998, 1000. The uplands of the farm site and adjacent properties on the east side of Zangle Cove contain single family residences and mature forested shoreline buffers, while the west side of Zangle Cove is characterized by residentially developed parcels with bulkheads and minimal vegetative shoreline buffers. CP 974.

Thurston County thoroughly reviewed the farm proposal, and on May 3, 2016, it issued a mitigated determination of non-significance (“MDNS”) under SEPA. CP 966. The MDNS imposed 18 mitigating conditions. CP 977-79. The governor of Appellant Protect Zangle Cove, Patrick Townsend, along with Kathryn Townsend and Anneke Jensen, appealed the MDNS to the Thurston County Hearing Examiner. CP 966.

The Examiner conducted a consolidated open record public hearing on the SDP request and SEPA appeal, taking three days of testimony on October 17, 2016, November 7, 2016, and January 17, 2017. *Id.* The parties were represented by counsel and were allowed to cross-examine witnesses.

CP 967, 981, 983. The Examiner considered the testimony of numerous lay and expert witnesses on various issues, including potential impacts to fish life and habitat, and concerns regarding eelgrass, sedimentation, plastics, and prey resources. CP 965-1014. The Examiner issued a decision on February 17, 2017, affirming the MDNS and approving the SDP subject to 13 conditions in addition to the 18 conditions in the MDNS. CP 1013-14.

The Townsends and Anneke Jensen appealed the Examiner's decision to the Board of County Commissioners, and the Board affirmed the Examiner. CP 1025-27. The Townsends and Anneke Jensen then filed an appeal of the SDP with the Shorelines Hearings Board, and that appeal was dismissed. CP 245; *Townsend v. Thurston County*, SHB No. 17-009 (Wash. Shore. Hrgs. Bd. 2017) (Ex. 2).

The Corps authorized PNA's farm on August 16, 2018. CP 1029-32. The Corps authorization includes confirmation that the farm is covered by NWP 48 and consultations under the ESA and MSA. *Id.* The authorization imposes over 30 conditions; many of these conditions are designed to protect fish life, and they include limits on the timing and location of work activities, bed preparation, planting, and harvest. CP 1029-32, 1034-38.

Appellants filed this action against WDFW and PNA on April 12, 2018. CP 1. PNA began farm operations shortly after receiving final approval from the Corps. CP 246. Appellants did not seek a preliminary injunction in this case, but the Townsends and Anneke Jensen sought an injunction in a separate case pending before the Thurston County Superior Court. CP 245-46. That request was denied. *Id.*

The trial court heard argument on Appellants’ petition on December 7, 2018. RP 1-51. On December 11, 2018, the court dismissed Appellants’ claims, holding: “The unambiguous, plain language of RCW 77.115.010(2) dictates that the Washington State Department of Fish and Wildlife does not have authority to regulate the conduct in question.” CP 1272.

IV. ARGUMENT

A. Summary of Argument

WDFW can only exercise those powers expressly granted or necessarily implied by the legislature. In RCW 77.115.010(2), the legislature expressly limited WDFW’s authority to regulate private sector cultured aquatic products and aquatic farmers to a discrete list of statutes that does not include HPA permits under the Hydraulic Code, chapter 77.55 RCW. WDFW therefore lacks authority to regulate the cultivation of private sector cultured aquatic products by aquatic farmers under the Hydraulic Code. Appellants’ principal argument to the contrary—that the limitation on WDFW’s authority applies only to aquatic farmers and their products but not activities that farmers engage in with respect to those products—is untenable and must be rejected. Appellants’ various other arguments that RCW 77.115.010(2) does not apply to the cultivation of private sector cultured aquatic products by aquatic farmers similarly fail.

Appellants’ attempt to manufacture a conflict between RCW 77.115.010(2) and RCW 77.55.021 should also be rejected. RCW 77.55.021 does not purport to grant WDFW authority to regulate private sector

cultured aquatic products or aquatic farmers under the Hydraulic Code in conflict with RCW 77.115.010(2). Rather, RCW 77.55.021 is a general requirement that operates only when WDFW otherwise has authority over the activities in question. The two statutes are thus easily reconcilable.

Even if there were a conflict between RCW 77.115.010(2) and the HPA permit requirement in RCW 77.55.021, that conflict should be resolved in favor of RCW 77.115.010(2) for a number of reasons. RCW 77.115.010(2) is the later adopted of the statutes. It is also more specific. Further, the legislature has acquiesced to the interpretation of that provision adopted by the trial court, which was clearly articulated in an Attorney General Opinion over a decade ago.

Finally, even if WDFW had authority to regulate private sector cultured aquatic products and aquatic farmers under the Hydraulic Code, Appellants cannot privately enforce the Code against PNA. Administration of the Code is exclusively vested in WDFW. There is no private cause of action in the Hydraulic Code, and Appellants cannot use the Uniform Declaratory Judgments Act to privately enforce the Code. Furthermore, Appellants lack standing to bring their claim, and they have failed to demonstrate they are entitled to injunctive relief.

B. Appellants Bear the Burden to Prove WAC 220-660-040 Is Invalid

The main issue in this case concerns WDFW's statutory authority to regulate the cultivation of private sector cultured aquatic products by

aquatic farmers as set forth in WAC 220-660-040(2)(1).³ Judicial review of agency rules is governed by RCW 34.05.570(2)(c), which states “the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rulemaking procedures; or the rule is arbitrary and capricious.” Appellants bear the burden of demonstrating invalidity. RCW 34.05.570(1)(a). The only ground advanced by Appellants for declaring WAC 220-660-040(2)(1) invalid is that it exceeds WDFW’s statutory authority. Appellants’ Br. 41-42. Appellants have failed to meet their burden.

C. RCW 77.115.010(2) Prohibits WDFW from Regulating Private Sector Cultured Aquatic Products and Aquatic Farmers under the Hydraulic Code

1. RCW 77.115.010(2) Limits WDFW’s Authority to a List of Statutes that Omits the Hydraulic Code

WDFW is a statutorily created administrative agency. RCW 43.17.010(5). Administrative agencies have no “inherent or common-law powers . . . and may exercise only those powers conferred by statute, either expressly or by necessary implication.” *Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cty.*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998).

The legislature limited WDFW’s authority to regulate private sector cultured aquatic products and aquatic farmers in Section 8 of the Aquatic Farming Act (“AFA”). Laws of 1985, ch. 457, § 8 (codified as amended at

³ Appellants also request relief under the Uniform Declaratory Judgments Act, chapter 7.24 RCW. That request is discussed below. *Infra* § IV.I.

RCW 77.115.010(2)) (Ex. 3). The key provision states: “The authorities granted the department by these rules and by RCW 77.12.047(1)(g), 77.60.060, 77.60.080, 77.65.210, 77.115.030, and 77.115.040 constitute the only authorities of the department to regulate private sector cultured aquatic products and aquatic farmers as defined in RCW 15.85.020.” *Id.*

The Court’s primary duty in interpreting a statute is to discern and implement the intent of the legislature, and the starting point is the statute’s plain language. *State v. Marohl*, 170 Wn.2d 691, 698, 246 P.3d 177 (2010). If the statute is unambiguous, the inquiry ends, and courts accept the legislature means what it says. *Id.* The plain language of RCW 77.115.010(2) limits WDFW’s authority to “regulate,” without further qualification, aquatic farmers and private sector cultured aquatic products to a specific list of statutes. Appellants concede that the purpose of an HPA permit is to regulate activities. *E.g.* Appellants’ Br. 23. The HPA statute, RCW 77.55.021, is not one of the listed authorities granted WDFW “to regulate private sector cultured aquatic products and aquatic farmers” in RCW 77.115.010(2). Thus, the plain language of RCW 77.115.010(2) dictates that WDFW lacks authority to require aquatic farmers to obtain an HPA permit to cultivate private sector cultured aquatic products. WDFW properly recognized this lack of authority in WAC 220-660-040(2)(1).

2. The Limit of Authority in RCW 77.115.010(2) Applies to Shellfish Cultivation Activities

Appellants argue RCW 77.115.010(2) does not limit WDFW’s authority to regulate the cultivation of private sector cultured aquatic

products by aquatic farmers because the statute does not use the term “aquaculture.” Appellants’ Br. 26-31. Appellants are incorrect.

Appellants’ interpretation of RCW 77.115.010(2) is strained, unrealistic, and inconsistent with the plain language of the statute. *See Lewis v. Dep’t of Licensing*, 157 Wn.2d 446, 465, 139 P.3d 1078 (2006); *State v. Danner*, 79 Wn. App. 144, 149, 900 P.2d 1126 (1995). People and products cannot be regulated in a vacuum, and accordingly, the Hydraulic Code expressly regulates people rather than abstract processes. WDFW Br. § V.A. The trial court properly recognized Appellants’ attempt to distinguish the regulation of aquatic farmers and their products from activities is untenable, asking Appellants: “Do you have any cases that have endorsed this distinction? So we regulate ranchers and cattle but not ranching. We regulate runners and races but not racing. Do we have anything like that, any cases that support that distinction?” RP 41. Appellants conceded that they found no support for the distinction. *Id.* They have still failed to identify any support, and it is assumed none exists. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

The legislature’s decision to limit WDFW’s authority over “private sector cultured aquatic products and aquatic farmers” rather than “aquaculture” demonstrates the legislature’s intention to broadly limit the agency’s regulatory authority over aquatic farming activities and not only those that qualify as “aquaculture.” Aquatic farmers engage in numerous activities with respect to their products. Some of these activities qualify as aquaculture (growing, farming, or cultivating private sector cultured aquatic

products) and some do not (e.g., marketing, transporting, labeling, and selling products). *See* Laws of 1985, ch. 457, §§ 3-5, 18; RCW 15.85.020(1). The Department of Fisheries (“DOF”) regulated many such activities prior to the AFA, including aquaculture and non-aquaculture activities alike. *E.g.*, RCW 75.28.125 (1983) (delivery permit for shellfish and food fish other than salmon); RCW 75.28.265 (1983) (aquaculture permit to cultivate food fish or shellfish) (Ex. 4). By limiting DOF’s (now, WDFW’s)⁴ authority over aquatic farmers and their products without reference to a specific subset of these activities (e.g., aquaculture), the legislature limited the agency’s authority in a broad, not narrow, fashion. RCW 77.115.010(2). This broad limit is consistent with the purpose of the AFA to encourage aquatic farming given the many benefits this activity provides. Laws of 1985, ch. 457, § 1; RCW 15.85.010.

If the legislature intended to limit WDFW’s authority to only non-aquaculture activities, it easily could have done so, but it did not. Appellants’ attempt to restrict the scope of RCW 77.115.010(2) to non-aquaculture activities must be rejected because it would require adding words to the statute that the legislature chose not to include. *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). WDFW’s articulation of its authority over commercial shellfish farming in WAC 220-660-040(2)(1) is consistent with RCW 77.115.010(2) and should be upheld.

⁴ DOF and the Department of Game were consolidated into WDFW in 1993; WDFW now has sole responsibility over the Hydraulic Code. Laws of 1993, 1st Spec. Sess., ch. 2, §30 (CP 622).

3. Appellants' Argument that an Express Statutory Exemption is Required Would Render RCW 77.115.010(2) Meaningless

Appellants also argue that RCW 77.115.010(2) only limits WDFW's authority to the extent the legislature also included a subsequent, express statutory exemption of authority in the AFA. Because the HPA provision does not contain such an express exemption of authority, Appellants argue, WDFW retains HPA permit authority over aquatic farmers and their products. Appellants' Br. 24-25, 28. Appellants' argument must be rejected because it would render RCW 77.115.010(2) meaningless.

Section 8 of the AFA broadly limits WDFW's authority to regulate aquatic farmers and private sector cultured aquatic products. RCW 77.115.010(2). In subsequent sections of the AFA, the legislature also revised existing statutes within Title 77 to accomplish a number of objectives, including: to ensure consistency between Section 8 and other statutes that expressly addressed fish and shellfish farms, products, and aquaculturists (Sections 17, 18, and 20); to simplify requirements for harvesting clams (Section 19); and to remove private sector cultured aquatic products from the definition of "game fish" and exempt aquaculture from Department of Game licensing (Sections 21-25). Laws of 1985, ch. 457, §§ 17-25. Unlike other statutes that were amended in the AFA, the HPA statute did not reference food fish or shellfish products, farms, or farmers, and hence there was no reason to specifically amend the HPA statute in the AFA. RCW 75.20.100 (1983) (CP 603-04). To restrict Section 8(2)'s limit of authority only to those statutory provisions that were also specifically

amended in later sections of the AFA would render Section 8(2) redundant at best and meaningless at worst. AGO 2007 No. 1 (AR 952) (“RCW 77.115.010(2) has no meaning if it does not reflect a legislative intent to limit WDFW authority to regulate private sector cultured aquatic products”). Appellants’ argument must be rejected. *Stroh Brewery Co. v. Dep’t of Revenue*, 104 Wn. App. 235, 240, 15 P.3d 692 (2001).

Indeed, to advance this argument, Appellants are forced to mischaracterize Section 8(2), contending it only limits “WDFW’s authority to license who can farm and what they farm” or to “impose special regulations on the people who farm fish or shellfish.” Appellants’ Br. 26, 28. Section 8(2) is much broader in scope, revoking WDFW’s authority to “regulate,” without further qualification, aquatic farmers and their products except under a discrete list of statutes. RCW 77.115.010(2). Appellants’ need to mischaracterize RCW 77.115.010(2) demonstrates that their position is inconsistent with the clear statutory language.

D. WDFW’s Position Is Supported by Additional Sections, and the Structure, of the AFA

1. AFA Section 19 Confirms the Legislature Did Not Intend HPA Permitting to Apply to Aquatic Farmers and their Products

Appellants argue Section 19 of the AFA demonstrates the legislature intended for WDFW to retain the ability to regulate aquatic farmers and private sector cultured aquatic products under the Hydraulic Code. Appellants’ Br. 33-34. Section 19 demonstrates the opposite.

Section 19 of the AFA amended RCW 75.28.280, which addressed licensing for clam and oyster farms, by striking the first three sections of the statute and amending the fourth section to state, in part: “A mechanical harvester license is required to operate a mechanical or hydraulic device for commercially harvesting clams, other than geoduck clams, on a clam farm unless the requirements of RCW 75.20.100 are fulfilled for the proposed activity.” Laws of 1985, ch. 457, § 19. RCW 75.20.100 was the prior codification of RCW 77.55.021.

Section 19 makes clear that the legislature was mindful of HPA permitting when it enacted the AFA. Critically, however, Section 19 is not one of the statutes listed in Section 8(2) of the AFA under which WDFW has authority to regulate aquatic farmers and their products, Laws of 1985, ch. 457, § 8; RCW 77.115.010(2). This omission must be considered intentional. *State v. Bacon*, 190 Wn.2d 458, 466-67, 415 P.3d 207 (2018). Thus, Section 19 cannot be used to regulate aquatic farmers and their products, and its reference to HPA permits reaffirms the legislature did not intend aquatic farmers and their products to be subject to HPA permitting.

The broader statutory context further makes clear that Section 19 and RCW 75.28.280 did not apply to aquatic farmers and their products. In 1985, chapter 75.28 RCW addressed commercial license requirements. RCW 75.28.010 contained the general requirement to obtain a license or permit from DOF to conduct various activities, including, prior to the AFA, to “[o]perate a commercial food fish or shellfish farm.” RCW 75.28.010 (1983). The remaining sections of chapter 75.28 RCW contained industry-

specific provisions. RCW 75.28.265 addressed commercial permits and licenses for aquaculture. The statute required both a permit for “the commercial cultivation of food fish or shellfish” and a license to operate an “aquaculture farm.” RCW 75.28.265 (1983). RCW 75.28.280, which was amended by Section 19, separately addressed licenses to operate a “clam farm” or “oyster farm” and specific equipment on a “clam farm.” RCW 75.28.280 (1983). DOF thus regulated “aquaculture farms” under distinct permitting and licensing laws from a “clam farm” or “oyster farm.” This distinction is supported by case law from the period, which indicates that “clam farm” licenses were issued by DOF for wild, not cultivated, clams and the use of a mechanical or hydraulic device to harvest wild clams was of a particular concern. *Kitsap County v. Dep’t of Nat. Res.*, 99 Wn.2d 386, 388, 662 P.2d 381 (1983) (dredge harvest “operator must obtain a clam farm license from DOF and a clam harvest permit from [the Department of Natural Resources] which approves his specific dredge”); *English Bay Enters., Ltd. v. Island County*, 89 Wn.2d 16, 568 P.2d 783 (1977) (regulation of mechanical harvest of wild clams under the SMA).

The legislature took two important actions in the AFA regarding the regulation of aquaculture in connection with the limit of authority in Section 8(2). First, Section 18 amended RCW 75.28.010 by removing WDFW’s authority to require a license or permit to “[o]perate a commercial food fish or shellfish farm,” and it added a new subsection stating, in part: “No license or permit is required for the production or harvesting of private sector cultured aquatic products as defined in section 2 of this 1985 act or for the

delivery, processing, or wholesaling of such aquatic products.” Laws of 1985, ch. 457, § 18. Second, Section 28 of the AFA repealed RCW 75.28.265, which contained the license and permit provisions for commercially cultivating food fish or shellfish and operating an aquaculture farm. *Id.* § 28; RCW 75.28.265 (1983). Combined, these actions made clear that the commercial cultivation of shellfish was no longer subject to WDFW’s licensing and permit provisions.

Finally, it bears noting that the legislature amended RCW 75.28.280 in 1993 by removing the reference to “clam farm” and adding “fishery[.]” aligning the statute with current terminology. Laws of 1993, ch. 340, § 19 (Ex. 5).⁵ Thus, at the time WDFW adopted WAC 220-660-040(2)(1), which is the critical time for determining the rule’s validity, the statute referenced HPA permitting specifically with respect to the fishery. RCW 34.05.570(1)(b).

2. AFA Section 17 Supports the Validity of WAC 220-660-040(2)(1)

Appellants argue Section 17(3) of the AFA, RCW 77.12.047(3), supports its position that WDFW can regulate aquatic farmers and their products under the Hydraulic Code because it only limits WDFW’s rulemaking authority over products. Appellants’ Br. 27-29. Appellants reason that WDFW thus has unfettered authority to regulate aquatic farmers through rulemaking, noting WDFW has developed rules addressing aquatic farm registrations and educational programs. *Id.*

⁵ RCW 75.28.280 was recodified at RCW 77.65.250 in 2000.

Appellants' argument fails because it ignores that agencies may only make rules to the extent authorized by enabling legislation. *In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 156, 60 P.3d 53 (2002). Section 8(2) of the AFA expressly limits WDFW's authority to regulate aquatic farmers and their products to a discrete list of statutes that excludes the Hydraulic Code, and hence WDFW lacks authority to promulgate rules regulating aquatic farmers and their products under the Code. *Id.*; RCW 77.115.010(2). Thus, it was not necessary for the legislature to also expressly forbid WDFW from making rules regulating aquatic farmers. *Snohomish Cty. Pub. Transp. Benefit Area v. State Pub. Emp't Relations Comm'n*, 173 Wn. App. 504, 517, 294 P.3d 803 (2013) (agencies do not have authority by virtue of it not being expressly forbidden to them).

Appellants' reliance on WDFW rules relating to aquatic farm registrations, WAC 220-370-060, and educational programs, WAC 220-370-150, is misplaced. As to aquatic farm registrations, that is one of the few authorities listed in Section 8(2) of the AFA under which WDFW may regulate aquatic farmers and their products, and hence it is permissible for WDFW to regulate and develop rules in this arena. RCW 77.115.010(2); RCW 77.115.040. As to the education program described at WAC 220-370-150, it is just that—an educational program, not one that regulates aquatic farmers or their products in violation of RCW 77.115.010(2).

RCW 77.12.047(1)(g) is one of the limited authorities under which WDFW may regulate aquatic farmers and their products, and RCW 77.12.047(3) consistently reiterates that WDFW may develop rules under

(1)(g) that apply to private sector cultured aquatic products. RCW 77.115.010(2). Nothing in RCW 77.12.047, or elsewhere in Title 77, purports to grant WDFW rulemaking authority over aquatic farmers and their products in a manner that is inconsistent with RCW 77.115.010(2).

3. The General Purpose Section of the AFA Supports WDFW's Position

Appellants argue that restricting WDFW's authority to regulate aquatic farmers and their products under the Hydraulic Code elevates aquaculture above agriculture contrary to Section 1, the general purpose statement, of the AFA. Appellants' Br. 31-33. This argument is legally and factually meritless.

Legally, a purpose statement of an act cannot be used to negate the plain meaning of specific regulatory provisions. *State v. Granath*, 190 Wn.2d 548, 557, 415 P.3d 1179 (2018). Moreover, the AFA did not express an intent for aquaculture to be considered a branch of agriculture without limit, but rather to be subject to those laws "that apply to or provide for the advancement, benefit, or protection of the agriculture industry within the state." Laws of 1985, ch. 457, § 1. Thus, as noted by the Attorney General, aquaculture is not considered a branch of agriculture under laws that do not provide for the advancement of agriculture. AGO 2007 No. 1 (AR 958).

Factually, Appellants' contention that WAC 220-660-040(2)(1) elevates aquaculture over agriculture is not supported. Agriculture activities are typically located out of the water, and upland activities require an HPA permit only if they are reasonably certain to use, divert, obstruct, or change

the natural flow or bed of the salt or freshwaters of the state. RCW 77.55.011(11); RCW 77.55.021; *Spokane County v. Dep't of Fish & Wildlife*, 192 Wn.2d 453, 459–60, 430 P.3d 655 (2018). Given this, WDFW staff have previously stated that requiring HPA permits for accessory aquaculture structures but not activities directly associated with the products, as was done in WAC 220-660-040(2)(1), “would bring our regulatory philosophy in line with how we regulate structures on agricultural land. Where we issue HPAs for culverts, bridges, stream dredging, water diversions but do not regulate water use, plowing, chemical application, use of tractors or other equipment, or harvest.” CP 544.⁶

The plain language of RCW 77.115.010(2) precludes WDFW from regulating private sector cultured aquatic products and aquatic farmers through HPA permitting, and this limit of authority is consistent with the legislature’s general purpose of ensuring that aquaculture receives the same advancements, benefits, and protections as agriculture.

4. The Structure of the AFA Supports the Validity of WAC 220-660-040(2)(1)

Appellants claim the limit of authority in RCW 77.115.010(2) is hidden and argue the legislature did not intend to broadly restrict WDFW’s authority to regulate aquatic farmers and their products. Instead, Appellants

⁶ Aquaculture is not alone in receiving different treatment from the legislature; the legislature has enacted specific protections or benefits for certain agriculture activities in the Hydraulic Code. *E.g.* RCW 77.55.021(9), (10) (HPA permits to divert water for certain agricultural purposes do not require periodic renewal; stating WDFW bears the burden to demonstrate changed conditions warrant requested modifications to certain agricultural HPA permits); RCW 77.55.281 (limiting WDFW’s ability to require a fishway on certain agricultural drainage facilities).

argue, the limit only applies to subsequent sections of the AFA that revised existing statutes. Appellants' Br. at 33. Appellants are incorrect. The structure of the AFA supports the validity of WAC 220-660-040(2)(1).

The AFA was enacted to comprehensively address the regulation and advancement of aquatic farming. Laws of 1985, ch. 457, § 1. The first seven sections contain the AFA's declaration of purpose and definitions, along with assignments and directives to the Department of Agriculture to support aquaculture. *Id.* §§1-7. Section 27 created a new chapter in Title 15 RCW (Agriculture and Marketing) comprised of these sections. *Id.* § 27. That chapter is 15.85 RCW.⁷

Section 8 is the first section of the AFA that addresses the role of DOF (today, WDFW) with respect to aquaculture. *Id.* § 8. The legislature limited DOF's authority to regulate aquatic farmers and their products in this section to a set of statutes that excludes the Hydraulic Code. Moreover, the AFA created a new chapter within Title 77 comprised of Sections 8 through 11. *Id.* § 28. Cumulatively, this chapter sets forth the authorities under which WDFW may regulate aquatic farmers and their products, and it describes a new disease and inspection control program. *Id.* §§ 8-11. That chapter is currently 77.115 RCW, and the limit of authority remains in its first section, RCW 77.115.010(2). *See also* WDFW Br. § V.A.

The legislature included additional sections in the AFA to ensure consistency between Section 8's limit of authority and existing statutes that

⁷ The Governor vetoed Section 6 of the AFA, and hence chapter 15.85 RCW contains six sections, 15.85.010, .020, .030, .040, .050, and .060.

expressly addressed food fish or shellfish, farms, or aquaculturists, *supra* § IV.C.3, including a new provision stating no license is required from DOF to produce, harvest, deliver, process, or wholesale private sector cultured aquatic products, and it repealed RCW 75.28.265, which contained aquaculture permit and licensing provisions. Laws of 1985, ch. 457, §§ 18(3), 28. These sections, and the structure of the AFA as a whole, confirm the legislature's intent to broadly restrict DOF's authority to regulate aquatic farmers and their products as stated in WAC 220-660-040(2)(1).

5. Appellants' Reliance on Department of Game Authority Is Misplaced

Appellants contend it would be absurd to conclude that Section 8(2) of the AFA restricts WDFW's authority to regulate aquatic farmers and their products under the Hydraulic Code because in 1985, the Department of Game ("Game") had authority to issue HPA permits in addition to DOF. Appellants' Br. 35-36. This argument fails for several reasons.

First, Appellants provide no explanation or authority demonstrating this result would be absurd, *id.*, and to the contrary, most regulatory programs are administered by one rather than multiple agencies. Second, legislative materials reveal that DOF was perceived as uniquely hostile to aquaculture, and thus it was consistent with this concern to broadly limit DOF's authority. WDFW Br. § V.C. Third the AFA revised existing statutes to state that private sector cultured aquatic products are not to be considered game fish or subject to regulation by Game. Laws of 1985, ch. 457, §§ 21-25. Thus, the legislature did restrict Game's authority over aquatic farmers

and their products in the AFA. Finally, DOF and Game were consolidated in 1993, and at the time that WAC 220-660-040(2)(1) was adopted, the Hydraulic Code was solely administered by WDFW. Laws of 1993, 1st Spec. Sess., ch. 2, § 30 (CP 622-24).

E. Legislative and Administrative History Supports WDFW's Position

1. The Legislature Acquiesced in the Attorney General's Opinion that WDFW Lacks Authority to Require HPA Permits for Cultivating Shellfish

Because the language of RCW 77.115.010(2) is clear and supports WAC 220-660-040(2)(1), the Court need inquire no further to uphold that rule. *State v. Gray*, 151 Wn. App. 762, 768, 215 P.3d 961 (2009). To the extent the Court decides to consider legislative intent, however, the clearest, and most recent, indication of legislative intent with respect to this issue fully supports WDFW's rule.

On September 28, 2006, Representative Patricia Lantz submitted a request to the Attorney General for a formal opinion "concerning the application of the hydraulic project approval and the substantial development permit to intertidal geoduck aquaculture operations." CP 532. Representative Lantz stated the opinion "is vital as I consider moving forward with potential legislative action in this arena." *Id.* The Attorney General responded with a formal opinion on January 4, 2007, AGO 2007 No. 1 (AR 949-58), answering the HPA question with a firm no: "RCW 77.115.010(2) limits application of Washington Department of Fish and

Wildlife (WDFW) regulatory powers with respect to private sector cultured aquatic products. The limitation prevents WDFW from requiring a hydraulic project approval permit to regulate the planting, growing, and harvesting of geoducks grown by private aquaculturalists.” AR 950.⁸

The Attorney General issued the opinion in time for Representative Lantz to pursue legislation concerning these issues in the 2007 legislative session. AR 949-58. Representative Lantz did so but, crucially, only to a limited extent. Representative Lantz sponsored a bill, SSHB 2220, that resulted in statutes establishing a geoduck aquaculture scientific research program (RCW 28B.20.475) and account (RCW 28B.20.476); requiring Ecology to adopt guidelines addressing geoduck aquaculture operations (RCW 43.21A.681); setting rents, fees, and limits for geoduck aquaculture on state-owned tidelands (RCW 79.135.100); and amending WDFW aquatic farm registration provisions (RCW 77.115.040). Laws of 2007, ch. 216 (Ex. 6). Notably absent from SSHB 2220 was any attempt to reverse the firm conclusion in AGO 2007 No. 1 that RCW 77.115.010(2) prevents WDFW from requiring an HPA permit to regulate the planting, growing, and harvesting of geoducks grown by aquatic farmers. *Id.* In fact, Representative Lantz introduced no legislation to require an HPA permit for

⁸ The Attorney General’s answer to Representative Lantz’s SDP question was more nuanced. The Attorney General concluded that farm-raised geoducks may require an SDP in some cases, and local governments and Ecology may take civil enforcement actions against a substantial development that is undertaken without a permit or, alternatively, conditional use permits may be used to manage this activity. AR 950.

commercial shellfish farming activities, and no such legislation has been proposed or enacted since.⁹

Although not controlling, opinions of the Attorney General are entitled to deference. *Thurston Cty. ex rel. Bd. of Cty. Comm'rs v. City of Olympia*, 151 Wn.2d 171, 177, 86 P.3d 151 (2004). More importantly, attorney general opinions constitute notice to the legislature of an official interpretation of the law, and greater weight attaches to an opinion where the legislature has acquiesced to it. *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 63-64, 847 P.2d 440 (1993). Such is the case here, where, soon after AGO 2007 No. 1 was issued, the legislature adopted SSHB 2220 to address multiple aspects of geoduck aquaculture but left AGO 2007 No. 1 wholly intact. That inaction demonstrates agreement with AGO 2007 No. 1.

2. The Hydraulic Code Was Not Applied to Marine Waters Until Immediately Before Passage of the AFA

Appellants argue a lack of materials accompanying the AFA expressly stating DOF would lack authority to regulate aquatic farmers and their products under the Hydraulic Code proves DOF would retain such authority. Appellants' Br. 37-39. Appellants provide no support for the position that a lack of discussion regarding the applicability of the Hydraulic

⁹ Appellants note earlier versions of 2012 legislation referenced aquaculture in setting fee schedules and speculate the legislature therefore believed HPA permits may be required for the cultivation of private sector cultured aquatic products by aquatic farmers. Appellants' Br. 16-17, 39. Appellants make more of this than the record and law allow. The reference to aquaculture was removed from the bill prior to passage, potentially in part because WDFW has no such authority. Laws of 2012, 1st Spec. Sess., ch. 1, § 103. Even if the aquaculture reference remained, it would not be inconsistent with WAC 220-660-040(2)(1), which requires HPA permits for some aquaculture projects (construction of accessory hydraulic structures, such as bulkheads or boat ramps).

Code must be construed in favor of the Code applying, *id*, and the most revealing action by the legislature is its acquiescence to AGO 2007 No. 1.

Moreover, Appellants' claim that restricting WDFW's authority to regulate aquatic farmers and their products under the Hydraulic Code "would have been an unprecedented step with far-reaching and long-lasting consequences," Appellants' Br. at 37, is undermined by the history of the Hydraulic Code. The HPA permit program was first established in 1943. Laws of 1943, ch. 40 (CP 506-07). However, DOF did not begin applying the Hydraulic Code to salt waters until 1977, and even then it was reluctant to test this authority in court. CP 1208. DOF did not have explicit authority to require HPA permits for projects in salt waters until the Code was revised in 1983, Laws of 1983, 1st Ex. Sess., ch. 46, § 75 (CP 613-15); CP 1209, a mere two years before that AFA was enacted, Laws of 1985, ch. 457. There is no evidence that DOF considered the Hydraulic Code an important, or even relevant, tool to regulate aquatic farming prior to or during this two-year window. DOF was instead focused on using the Hydraulic Code to address impacts from shoreline residential development and bulkheads, CP 1202-03, such as those on the west side of Zangle Cove, across from PNA's farm, CP 974. To the extent the legislature saw a need to regulate shellfish activities under the Hydraulic Code, it was limited to a specific means of mechanically harvesting clams under a section of Title 77 that expressly did not apply to aquatic farmers and their products. Laws of 1985, ch. 457, § 19. The lack of legislative history stating HPA permits would not be required for cultivating private sector cultured aquatic products is therefore

understandable and does not provide a basis for ignoring the plain language of RCW 77.115.010(2).

3. WDFW's History of Administering the Hydraulic Code Cannot Mandate Ignoring the Plain Language of RCW 77.115.010(2)

Appellants argue WDFW has inconsistently applied the Hydraulic Code to aquaculture projects and that aquaculture industry guidance has indicated HPA permits are required. Appellants' Br. 38-39. Even if true, this cannot negate the plain language of RCW 77.115.010(2) and confer WDFW authority contrary to limits imposed by the legislature. *Cf. Marohl*, 170 Wn.2d at 698; *Skagit Surveyors*, 135 Wn.2d at 558.

Moreover, the record does not support Appellants' characterization that WDFW has inconsistently applied or interpreted the Hydraulic Code with respect to the focus of Appellants' lawsuit—shellfish aquaculture. CP 1-2; Appellants' Br. 6-10. The aquaculture projects noted by Appellants for which HPA permits have been issued or considered do not include such projects but rather finfish net pen facilities. CP 551-52; *In re Shorelines Substantial Dev. Permit Denied by Kitsap County to Mark Holland*, SHB No. 86-22, 1987 WL 56639 (Wash. Shore. Hrgs. Bd. 1987); *cf.* CP 554-70 (HPA permit considered, but deemed not required, for piling and floating dock replacement project). The potential rulemaking that WDFW considered near the turn of the century was stopped because of WDFW's limited authority over aquaculture. CP 541. And to the extent WDFW expressed uncertainty over the scope of its authority after issuance of AGO

2007 No. 1, it was limited to whether HPA permits could be required for constructing accessory hydraulic structures, not for planting, growing, and harvesting shellfish. CP 543-49. WDFW resolved this question in WAC 220-660-040(2)(1), which construes its authority broadly by requiring HPA permits for some aquaculture projects.

Finally, the “industry” guidance noted by Appellants referring to HPA permits was not issued by WDFW and is irrelevant to the agency’s interpretation or administration of state law. Appellants’ Br. 13-14, 39 (citing CP 1217-19, 1240). It is also for a broad audience that includes recreational, not just commercial, oyster and clam projects, and it recognizes the numerous, referenced permit programs may not apply to every project. CP 1217-19, 1226, 1240. It thus provides no evidence that people within or outside of WDFW believed the agency had authority to regulate aquatic farmers and their products under the Hydraulic Code.

F. RCW 77.115.010(2) and RCW 77.55.021 Do Not Conflict

Appellants incorrectly argue that if RCW 77.115.010(2) limits WDFW’s authority to regulate aquatic farmers and their products to a list of statutes that excludes the Hydraulic Code, then it conflicts with RCW 77.55.021 and must not be given effect. Appellants’ Br. 39-41.

Courts assume the legislature does not intend to create conflicting statutes, and thus statutes must be read together, whenever possible, to achieve a harmonious scheme that maintains the integrity of each statute. *State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp.*, 142 Wn.2d

328, 342, 12 P.3d 134 (2000). RCW 77.115.010(2) and RCW 77.55.021 are easily reconcilable. The former limits WDFW's authority to regulate aquatic farmers and their products to a discrete list of statutes that does not include RCW 77.55.021. RCW 77.55.021 does not purport to grant WDFW authority to regulate aquatic farmers and their products under the Hydraulic Code in conflict with RCW 77.115.010(2). It is a general regulatory provision that operates when WDFW otherwise has authority over the people and activities in question. RCW 77.55.021.

In arguing the two statutes conflict, Appellants contend that the legislature could restrict the need for aquatic farmers to obtain an HPA permit to cultivate private sector cultured aquatic products only through an express "exemption" in the Hydraulic Code. *E.g.* Appellants' Br. 18, 21-22, 24-25, 39. Appellants provide no support for this position, and it is contrary to the principle of administrative law that holds agencies can only exercise those powers conferred by the legislature. *Skagit Surveyors*, 135 Wn.2d at 558. The legislature restricted WDFW's regulation of aquatic farming in the most comprehensive manner possible in the AFA by limiting the agency's fundamental authority to regulate aquatic farmers and their products to a list of statutes that omits the Hydraulic Code. *Id.*; RCW 77.115.010(2). Because the Hydraulic Code does not grant WDFW conflicting authority over aquatic farmers or their products, there was no reason for the legislature to revise the Hydraulic Code to provide consistency with the AFA. RCW 77.115.010(2); chapter 77.55 RCW. In this respect, the Hydraulic Code contrasts with several other statutes in place in 1985 that did reference food

fish, shellfish, clam or oyster farms, or aquaculturists, and were revised in the AFA to ensure consistency with AFA Section 8(2). Laws of 1985, ch. 457, §§17-18, 20.

Appellants also stress that the Hydraulic Code contains several exceptions to the HPA permit requirement. RCW 77.55.021. But all of the exceptions listed in RCW 77.55.021 are for activities that WDFW would otherwise have authority to regulate under the Hydraulic Code. RCW 77.55.031 (driving across an established ford); RCW 77.55.041 (removal of derelict fishing gear and crab fishery pots); RCW 77.55.051 (spartina and purple loosestrife removal or control); RCW 77.55.361 (forest practices hydraulic projects). None are for activities that the legislature removed WDFW's authority to regulate under another statute in Title 77, as was done for aquatic farming. RCW 77.115.010(2).

Finally, Appellants argue that exceptions from HPA permitting are limited to activities that are beneficial, pose little environmental risk, or are subject to other regulatory programs that protect fish life. Appellants' Br. 23-24. These are not legislatively mandated limits, but if they were, shellfish farming would satisfy them. The AFA includes a legislative declaration that shellfish farming provides many benefits to the state. Laws of 1985, ch. 457, § 1. This declaration is consistent with additional state and federal laws that encourage shellfish farming for the many benefits it provides, including the Bush and Callow acts and the National Aquaculture Act. The Bush and Callow acts were first enacted in 1895 and authorized the sale of state tidelands to private parties for shellfish cultivation. Laws of 1895, chs. 24-

25 (Ex. 7). These acts were recodified in 2002 reaffirming the importance of shellfish farming to the State. Laws of 2002, ch. 123 (codified at 79.90.570, recodified at 79.135.010) (Ex. 8). The National Aquaculture Act declares a national policy to encourage aquaculture given its many environmental and other benefits. 16 U.S.C. § 2801. Shellfish farming is also subject to numerous regulatory programs that protect fish life and habitat, including permitting under the SMA, CWA, RHA, and consultations under the ESA and MSA. *Supra* § III.A. State and federal agencies, in addition to legislative bodies, recognize that shellfish farming, as regulated, has minimal adverse, as well as beneficial, impacts. *Id.*

G. In the Event of Conflict, Effect Must Be Given to RCW 77.115.010(2)

Because RCW 77.115.010(2) and RCW 77.55.021 do not conflict, there is no need to turn to further statutory canons of construction. *State v. Becker*, 59 Wn. App. 848, 852, 801 P.2d 1015 (1990) (the canon that more recent and specific statutes prevail over general statutes “applies only if the statutes deal with the same subject matter and conflict cannot be harmonized”). However, even if the statutes did conflict or further canons were considered, effect must be given to the plain language of RCW 77.115.010(2) because it is more specific and recent.

The issue in this case is whether WDFW has authority to regulate the cultivation of private sector cultured aquatic products by aquatic farmers under the Hydraulic Code. RCW 77.115.010(2) specifically addresses this issue and answers it in the negative. RCW 77.55.021, as Appellants admit,

is not specific to private sector cultured aquatic products or aquatic farmers. Appellants' Br. 29 ("The Hydraulic Code is agnostic as to persons and products"). Nor does it address WDFW's fundamental regulatory authority. That the Code contains exceptions from the HPA permit requirement does not render it more specific to WDFW's authority to regulate aquatic farmers and their products; rather, the existence of these exceptions is simply a step of Appellants' reasoning in an effort to find a conflict between the Code and RCW 77.115.010(2). Appellants' Br. 41.

RCW 77.115.010(2), enacted in 1985, is also more recent with respect to the issue presented. The HPA permit provision has been in place since 1943. Laws of 1943, ch. 40 (CP 06-07). While it has been amended several times before and after 1985, the most recent amendment concerning its scope for purposes relevant here was in 1983, two years before the AFA, when it was revised to apply to both salt and fresh waters. Laws of 1983, 1st Ex. Sess., ch. 46, § 75. Appellants place great emphasis on 2005 amendments to the Hydraulic Code in contending it is more recent. Appellants' Br. 40. However, as the Supreme Court of Washington recently recognized, these changes merely "reorganized the Hydraulic Code to increase its clarity without effectuating any policy changes." *Spokane County*, 192 Wn.2d at 462. *See also* AGO 2007 No. 1 (AR 951) (2005 revisions recodified the Code and imposed no new legal requirement).

The Court must give effect to the plain language of RCW 77.115.010(2), which specifically limits WDFW's authority to regulate

private sector cultured aquatic products and aquatic farmers to a discrete list of statutes that does not include RCW 77.55.021.

H. Any Relief Granted Should Be Narrowly Tailored

For the reasons discussed above and in WDFW's brief, WAC 220-660-040(2)(1) does not exceed WDFW's authority and hence should not be found invalid. But even if the rule were found invalid, the Court's relief should be limited to a tailored declaration of invalidity. RCW 34.05.574.

A tailored declaration would be particularly appropriate because WAC 220-660-040(2)(1) is not based on any interpretation as to which commercial shellfish aquaculture activities qualify as hydraulic projects under RCW 77.55.011(11). Appellants broadly state that "most shellfish facilities" qualify as hydraulic projects, but they have not attempted to comprehensively demonstrate exactly which facilities meet the statutory definition. Appellants' Br. 21. Nor would such an attempt be appropriate, given WDFW is vested with authority to administer the Hydraulic Code and can only determine which projects qualify on a case-specific basis.

I. Appellants' Claim Against PNA Fails

Appellants' petition includes three causes of action, only one of which (Claim Three) is directed against PNA. CP 26. Claim Three alleges PNA's farm is a hydraulic project and requires an HPA permit. *Id.* Appellants request in Claim Three for PNA to "be enjoined from beginning operations at its Facility until it has received the required HPA permit from WDFW under chapter 77.55 RCW." *Id.* Claim Three fails for multiple reasons.

1. An HPA Permit Is Not Required for PNA's Farm

Appellants can only succeed on Claim Three if WDFW has authority to require an HPA permit for PNA's farm. CP 26. Appellants do not dispute that PNA is an aquatic farmer or that its farm operations consist of cultivating native, private sector cultured aquatic products. CP 30-58; RCW 15.85.020. PNA does not propose to construct accessory hydraulic structures. CP 30-58; WAC 220-660-040(2)(1). For the reasons discussed above and in WDFW's brief, WDFW lacks authority to require an HPA permit for PNA's farm. Thus, Claim Three must be denied.

Even if an HPA permit were required for PNA's farm, however, this Court should affirm the trial court's dismissal of Claim Three on the additional, alternative grounds discussed below. *McGowan v. State*, 148 Wn.2d 278, 287, 60 P.3d 67 (2002) (appellate court may affirm trial court's decision on any basis supported by the record).

2. The Legislature Vested WDFW with Exclusive Authority to Administer and Enforce the Hydraulic Code

Appellants' petition failed to expressly identify a legal basis under which they were bringing Claim Three, but in the sub-heading for Claim Three, they indicated it is grounded in the Hydraulic Code. CP 26. The Hydraulic Code contains no cause of action authorizing private individuals to require others to comply with its provisions, and PNA filed a motion to have Claim Three dismissed on this basis. CP 225-36. In response, Appellants contended they were bringing Claim Three under the Uniform Declaratory Judgments Act, chapter 7.24 RCW ("UDJA"). CP 668-82. PNA replied,

disputing that Appellants pled Claim Three under the UDJA and arguing the claim would require dismissal even if it was so pled. CP 687-97. The court did not rule on PNA's motion, dismissing Claim Three on the alternative ground that PNA's farm does not require an HPA permit. CP 1272.

Regardless of which way they try to spin it, Appellants' claim against PNA is an impermissible attempt to privately enforce the Hydraulic Code.¹⁰ The legislature has granted third parties, such as Appellants, only the limited right to appeal certain HPA permit decisions. RCW 77.55.021(8). The legislature has exclusively vested administration and enforcement of the Hydraulic Code in WDFW, including changes to its enforcement authority and procedures in the 2019 legislative session. Laws of 2019, ch. 290, §§ 5-9 (Ex. 9). Notably, the legislature rejected a provision in the original version of the 2019 bill that would have classified violations of the Code as a public nuisance, which could have allowed private parties to maintain actions for Code violations. Ex. 10 (H.B. 1579, 66th Leg., 2019 Reg. Sess., § 10 (Wash. 2019)); RCW 7.48.210. The legislature's decision to reject that provision confirms its intent for WDFW to solely administer and enforce the Code.

3. Appellants' Attempt to Proceed under the UDJA Fails as a Matter of Law

Appellants' attempt to sidestep the lack of a private cause of action in the Hydraulic Code by framing its challenge to PNA's farm under the UDJA

¹⁰ Appellants do not contend in their opening brief that the Hydraulic Code contains an express or implied cause of action but base Claim Three solely on the UDJA; hence, Appellants waive any such argument. Appellants' Br. 42-46; *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992).

fails for two fundamental reasons. First, Appellants' UDJA claim against WDFW is displaced by the Administrative Procedure Act, chapter 34.05 RCW ("APA"). The UDJA does not apply to agency action reviewable under the APA. RCW 7.24.146. Appellants' UDJA claim against WDFW (Claim One) relates to the same action as its challenge to WAC 220-660-040(2)(1) (Claim Two)—the alleged failure of WDFW to require HPA permits for aquaculture. Appellants' Br. 42; CP 23-25. Thus, Appellants' UDJA claim fails as a matter of law, RCW 7.24.160, and Appellants necessarily cannot obtain declaratory or injunctive relief against WDFW or PNA under the UDJA, RCW 7.24.080. *See also* WDFW Br. § V.E.

Second, even if the APA did not displace Appellants' UDJA claim, the claim would fail because it does not satisfy the justiciability requirements of the UDJA, which include: (1) an actual, present and existing dispute, or the mature seeds of one; (2) between parties with genuine and opposing interests; (3) the interests are direct and substantial; and (4) a judicial determination that will be final and conclusive. *Brown v. Vail*, 169 Wn.2d 318, 334, 237 P.3d 263 (2010).

Appellants' action fails the fourth justiciability requirement because it requests the court to intervene in an agency's enforcement authority, which is impermissible regardless of whether the action is directed at the responsible agency or a third party. *Brown*, 169 Wn.2d at 333-34; *Bainbridge Citizens United v. Dep't of Nat. Res.*, 147 Wn. App. 365, 374-76, 198 P.3d 1033 (2008). In *Brown*, death row inmates filed a complaint that included a UDJA action asserting the Washington State Department of

Correction's handling of substances necessary for lethal injections violated state and federal controlled substance acts. 169 Wn.2d at 321. The court held the appellants' claim was not justiciable under the UDJA because it would not result in a final and conclusive determination. *Id.* at 333. The court noted that a declaratory judgment has no direct or coercive effect, and the court recognized that under established case law it could not intervene to disturb an agency's enforcement authority. *Id.* at 334.¹¹

The appellants in *Brown*, like Appellants here, argued they were not seeking to compel an agency to enforce the law but merely declaratory and injunctive relief for violations of the law. *Id.*; CP 679. The court rejected this argument, holding it could neither compel an agency to enforce laws it is charged with overseeing or step into the agency's shoes and enforce those laws itself through declaratory and injunctive relief under the UDJA. *Brown*, 169 Wn.2d at 334. "[W]e cannot see what purpose a judgment declaring a violation would serve when enforcement of the alleged violations remains in the discretion of the agency, and no party is bound to act in accord with such judgment." *Id.*

Similarly, in *Bainbridge Citizens United*, a citizens' group filed a UDJA petition against the Washington State Department of Natural Resources ("DNR"), contending DNR failed to enforce its regulations against parties

¹¹ The court in *Brown* relied principally on *Heckler v. Chaney*, 470 U.S. 821, 824-25, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985). *Heckler* involved an attempt by death row inmates to use the federal Administrative Procedure Act ("APA") to require the Food and Drug Administration to prevent violations of laws that it oversees. The Court held the FDA's decision not to take enforcement actions requested by the respondents was not subject to judicial review under the APA. 470 U.S. at 837-38.

who were trespassing on state-owned aquatic lands. 147 Wn. App. at 367-68. This Court held the action was outside the scope of the UDJA because it challenged the application or administration of a law rather than its construction or validity. *Id.* at 374-75. Additionally, this Court held the trial court did not have the power to enter a declaratory judgment under RCW 7.24.050 because a claim challenging an agency’s enforcement decisions “does not touch upon ‘rights, status, [or] other legal relations,’” and a declaration would not terminate the controversy. *Id.* at 375 (quoting RCW 7.24.010). This Court concluded:

Declaratory judgments are not meant to compel government agencies to enforce laws. If the UDJA allowed otherwise, the negative implications would be endless. Courts would be forced to supervise administrative agencies, a function we have long found contrary to the judiciary's proper role. And citizens could bring diverse, and even contradictory, actions in each of our 39 counties to compel an agency to act—or decline to act—upon its enforcement power in accord with their individual interests and priorities. The uniform rules committee and our legislature apparently foresaw such consequences when they adopted the UDJA. Accordingly, our legislature has declined to allow actions where, as here, citizens attempt to act as private attorneys general to dictate a state agency’s enforcement decision. *See* RCW 7.24.020, .050. This is not the proper subject for a declaratory judgment and the trial court did not err in granting summary judgment to the Department.

Id. at 375-76 (footnote omitted).

Appellants failed to address these limits to the UDJA in their response to PNA’s motion below and in their opening brief before this Court. Instead, Appellants argued the UDJA requires a showing of standing but not a private

cause of action, relying on *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 300-01, 268 P.3d 892 (2011). CP 677-78. Standing and justiciability have some overlapping elements but are not coextensive. *Brown*, 169 Wn.2d at 333-34. Moreover, the respondent in *Five Corners* did not challenge other justiciability requirements, and because the court disagreed with the appellants' construction of the statute it did not address whether injunctive relief would have been proper. 173 Wn.2d at 302 n.2.

Thus, even if an HPA permit was required for PNA's farm, Appellants' request to privately enforce the Hydraulic Code through the UDJA fails as a matter of law, and Claim Three requires dismissal.

4. Appellants Lack Standing

Claim Three must be denied for the additional reason that Appellants lack standing. To establish standing, each Appellant must: (1) assert an interest that is arguably within the zone of interests to be protected by the statute in question; and (2) demonstrate they will be specifically and perceptibly harmed by the action. *Branson v. Port of Seattle*, 152 Wn.2d 862, 875-76, 101 P.3d 67 (2004); *Save a Valuable Env't v. Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978). Standing requirements involving procedural rights are relaxed but still require plaintiffs to demonstrate a reasonable probability that the deprivation of a right will threaten their concrete interests. *Five Corners Family Farmers*, 173 Wn.2d at 303. A plaintiff's burden increases as the case proceeds, and at the final stage controverted facts must be adequately supported by the evidence. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119

L. Ed. 2d 351 (1992). Affidavits are not taken at face value but must be supported by specific facts in the record. *KS Tacoma Holdings, LLC v. Shorelines Hearings Bd.*, 166 Wn. App. 117, 126, 272 P.3d 876 (2012). Further, assertions of harm may be undermined by contrary record evidence. *Trepanier v. City of Everett*, 64 Wn. App. 380, 382, 824 P.2d 524 (1992).

Before the trial court, Appellant Wild Fish Conservancy (“WFC”) submitted two declarations in support of Appellants’ Opening Brief. CP 238-40, 256-59. Neither declarant even mentions PNA’s farm, let alone alleges or demonstrates it will cause WFC injury. Appellant Coalition to Protect Puget Sound Habitat (“CPPSH”) submitted one declaration. CP 268-71. This declaration identifies several concerns with shellfish aquaculture generally and states a belief that PNA’s “planting and harvesting techniques” are common to those used throughout the industry. CP 270. Appellant Protect Zangle Cove (“PZC”) submitted two declarations from its governor, Patrick Townsend, that assert several concerns with PNA’s farm, including with respect to eelgrass, forage fish, plastics, sedimentation, and fish and other wildlife. CP 242-55, 1126-53. The declarant admits that he has challenged PNA’s farm “at every turn,” including an unsuccessful challenge to the SDP, an unsuccessful appeal of the SDP to the Shorelines Hearings Board, a separate lawsuit against PNA’s governor, and a failed attempt to obtain a preliminary injunction in this separate lawsuit. CP 245-46.

These declarations fail to demonstrate Appellants have standing. Even assuming Appellants’ asserted interests in fish life are sufficient to satisfy the first prong of the standing test, none demonstrate they will suffer an injury in

fact. WFC fails to mention PNA's farm, let alone allege or demonstrate it will cause adverse impacts to fish life. CP 238-40, 256-59. CPPSH asserts a belief and expectation that PNA's farm will have adverse effects, CP 270, but these assertions cannot be taken at face value and lack factual support in the record. *Trepanier*, 64 Wn. App. at 383-84. PZC asserts PNA's farm will harm fish life even if operated in compliance with its numerous regulatory approvals. CP 1127. But PZC's declarant is not an expert in this field and does not provide facts that support this assertion; none of the documents attached to his declarations evaluate PNA's farm, as conditioned, let alone show the farm has a reasonable probability of adversely impacting fish life. CP 242-55, 1126-53.

More importantly, Appellants' assertions of harm are undermined by record evidence. The environmental impacts of PNA's farm have been thoroughly evaluated, including through multiple appeals by PZC's governor challenging the farm's impacts to fish life and habitat at the local and state levels. CP 245, 965-1023, 1025-1027. As discussed more fully below, decisionmakers have consistently rejected PZC's assertions that the farm fails to protect fish life, and Thurston County approvals include many conditions to protect fish. *Infra* at § IV.I.5. PNA's farm is also strictly regulated and conditioned at the federal level. The Corps has authorized the farm pursuant to NWP 48 subject to numerous conditions that protect fish and habitat, including conditions relating to work windows, bed preparation, planting, and harvest. CP 1029-32, 1034-38. These are precisely the types of conditions that Appellants concede are typically included in HPA permits. CP 270.

Appellants' assertions that PNA's farm will harm fish life are inadequately supported and contradicted by record evidence. *Trepanier*, 64 Wn. App. at 384. Appellants therefore lack standing to pursue Claim Three.

5. Collateral Estoppel Bars PZC from Relitigating the Farm's Impacts to Fish Life

PZC is collaterally estopped from claiming PNA's farm will harm fish life. Collateral estoppel prevents a party from relitigating an issue when there has been a final determination of the issue on the merits, the parties are the same or in privity, and injustice will not result. *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987). An administrative determination is given collateral estoppel effect if the agency made a factual decision within its area of competence, procedural safeguards are in place, and public policy would not be contravened. *Id.* at 509 (preclusion given when parties to administrative hearing had right to present evidence, to call and cross-examine witnesses, to be assisted by counsel, and to appeal).

These factors are satisfied here. PZC's governor appealed Thurston County's MDNS for PNA's farm and also appealed the SDP to the Board of County Commissioners. CP 965-1023, 1025-27. PZC's governor represented the same interests that PZC advances here, and he is the only declarant for PZC in this case; hence, PZC and its governor are in privity. *Feature Realty, Inc. v. Kirkpatrick & Lockhart Preston Gates Ellis, LLP*, 161 Wn.2d 214, 224, 164 P.3d 500 (2007); *cf. Stevens County v. Futurewise*, 146 Wn. App. 493, 504, 192 P.3d 1 (2008) (no privity between a citizens group and an individual who is not a member of the group).

Protection of fish life is the only ground upon which WDFW may condition or deny an HPA permit, and the Thurston County Hearing Examiner rejected the contention that the farm fails to protect fish life. RCW 77.55.021(7)(a); CP 965-1023. The Examiner held an open record hearing on the MDNS appeal and the SDP application, accepted documentary evidence, and allowed witness testimony and cross-examination. CP 966-74. The Examiner issued a 57-page decision denying the MDNS appeal and approving the SDP subject to 14 conditions (one of which incorporated all 18 MDNS conditions). CP 977-79, 1013-14. The Examiner considered and rejected PZC's concerns regarding impacts to fish life and habitat (including eelgrass), forage fish, plastics, and sedimentation, and imposed numerous conditions that protect fish and habitat. CP 966, 974-83, 986-91, 994-1014.

PZC's governor appealed the Examiner's decision to the Board of County Commissioners, which affirmed the Examiner's decision. CP 1025-27. PZC's governor appealed to the Shorelines Hearings Board, and the appeal was dismissed. CP 245; *Townsend v. Thurston County*, SHB No. 17-009. Though allowed to do so under statute, PZC's governor did not appeal the Shoreline Hearings Board's decision. RCW 90.58.180(3).

Collaterally estopping PZC from relitigating the farm's impacts to fish life will not cause injustice. PZC had a full and fair opportunity to litigate this issue, and it lost. CP 965-1023, 1025-27. PZC has also opposed the farm "at every turn," and still has separate litigation ongoing against the farm. CP 245. PNA has successfully defended itself against PZC's challenges, obtained all required approvals, and is subject to numerous conditions that ensure the farm

protects fish life and habitat. CP 965-1023, 1025-27, 1029-1032, 1034-38. The only injustice would be granting PZC yet another bite at the apple.

6. Appellants Are Not Entitled to Injunctive Relief

Even if an HPA permit were required for PNA's farm, and Claim Three did not warrant dismissal for the numerous reasons stated above, injunctive relief would not be an appropriate remedy. The decision to grant injunctive relief lies with the superior court, which is vested with broad discretion to shape and fashion relief to fit the particular facts, circumstances, and equities of the case. RCW 7.40.010. *Brown v. Voss*, 105 Wn.2d 366, 372, 715 P.2d 514 (1986). Here, the trial court dismissed Appellants' claims and did not make factual findings that could support Appellants' request for injunctive relief before this Court. CP 1272.

If this Court were to consider Appellants' request, the record shows they are not entitled to injunctive relief, which requires Appellants to demonstrate: (1) a clear legal or equitable right; (2) a well-grounded fear of immediate invasion of that right; and (3) that the acts complained of are either resulting in or will result in actual and substantial injury. *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). These criteria are examined in light of the interests of the parties. *Id.*

Appellants fail to satisfy the first criterion because they have no clear legal or equitable right. The Hydraulic Code was not enacted to confer rights upon any class of people, including Appellants. Instead, the Hydraulic Code establishes a general regulatory program requiring HPA permits for certain

activities, and protection of fish life is the only ground upon which permit approval may be denied or conditioned. RCW 77.55.021(7)(a). The only right it grants private parties (the right to appeal certain permit decisions) is not implicated here. RCW 77.55.021(8).

Appellants also fail the second and third criteria for granting injunctive relief because, as discussed above, they have not proven the PNA farm will result in any harm to fish life, much less result in substantial and actual injury to Appellants personally, given the numerous conditions of approval governing farm operations. *Supra* §§ IV.I.4-5.

The relative interests of the parties also weigh strongly against an injunction. PNA spent nearly four years diligently obtaining all necessary approvals to operate a native shellfish farm on privately owned property—an activity that is not only allowed but encouraged under state and federal law. CP 965-1023; *Supra* §§ III.A-B, IV.I.4-5. PNA prevailed in these efforts despite facing opposition from PZC “at every turn.” CP 245. Appellants contend that an HPA permit should be required for PNA’s farm, but it is undisputed that the current rule, as codified in WAC 220-660-040(2)(1), is that no such permit is required. While Appellants express general complaints and concerns with the farm, they have continually failed to produce evidence that the farm will harm fish life. *Supra* §§ IV.I.4-5.

Finally, Appellants’ request for declaratory and injunctive relief should be denied on the additional basis that Appellants have failed to demonstrate that a ruling in their favor regarding the scope of WDFW’s authority should apply retroactively to PNA’s farm, which has already

commenced operating. CP 246. A decision merits prospective-only application when: (1) it overrules clear precedent upon which parties relied; (2) retroactive application would impede the policy objectives of the new rule; and (3) retroactive application would produce a substantially inequitable result. *McDevitt v. Harborview Med. Ctr.*, 179 Wn.2d 59, 75, 316 P.3d 469 (2013). These factors apply here. The current, clear rule is that an HPA permit is not required for PNA's farm. This rule is codified at WAC 220-660-040(2)(1), is supported by AGO 2007 No. 1, and has been acquiesced to by the legislature. *Supra* § IV.E.1. PNA has reasonably relied on this rule and requiring it to undergo a new regulatory process and suspend further activities could cause serious operational disruptions. Appellants have failed to show that retroactive application would result in increased protection for fish, *supra* § IV.I.4-5, and granting retroactive effect could have endless negative implications for WDFW and strain agency resources away from other types of hydraulic projects that pose greater risks of harm. *Cf. Bainbridge Citizens United*, 147 Wn. App. at 375-76.

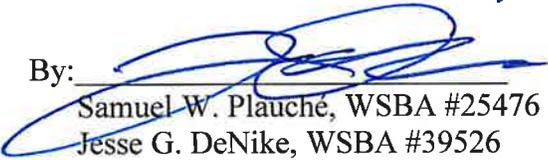
V. CONCLUSION

The plain statutory language at issue here makes clear that WDFW lacks authority to regulate private sector cultured aquatic products and aquatic farmers through HPA permitting. This limit is consistent with the Hydraulic Code, which does not contain a conflicting grant of authority. In the event of a conflict, RCW 77.115.010(2) must be given effect because it is more specific and recent. Even if the Court disagrees and finds WDFW

has authority to regulate aquatic farmers and their products under the Code, the Court's order should be limited to a tailored declaration of invalidity so that WDFW, the agency entrusted with administering the Code, can determine how to best implement HPA permitting on shellfish farms. Appellants' attempt to privately enforce the Hydraulic Code through the UDJA fails as a matter of law, and as applied to PNA's farm Appellants lack standing and are not entitled to injunctive relief.

Respectfully submitted this 16th day of August, 2019.

PLAUCHÉ & CARR LLP

By: 

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Northwest Aquaculture, LLC and
Respondent-Intervenor Taylor Shellfish
Company, Inc.

APPENDICES

Index of Exhibits to Brief of Pacific Northwest Aquaculture, LLC and Taylor Shellfish Company, Inc.

Protect Zangle Cove, et al., v. Dep't of Fish and Wildlife, et al.
No. 52906-8-II

Washington State Court of Appeals, Division Two

1. Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860-63, 1922-31, 1995-96, 1998-2004 (Jan. 6, 2017)
2. *Townsend v. Thurston County*, SHB No. 17-009 (Wash. Shore. Hrgs. Bd. 2017)
3. Laws of 1985, ch. 457
4. Chapter 75.28 RCW (1983)
5. Laws of 1993, ch. 340, § 19
6. Laws of 2007, ch. 216
7. Laws of 1895, chs. 24-25
8. Laws of 2002, ch. 123
9. Laws of 2019, ch. 290
10. H.B. 1579, 66th Leg., 2019 Reg. Sess., § 10 (Wash. 2019)

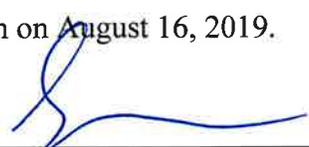
CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2019, I caused to be served a copy of the forgoing document to be delivered in the manner indicated below to the following persons at the following addresses:

Claire Loeb Davis Animal & Earth Advocates PLLC 2226 Eastlake Ave. E, Suite 101 Seattle, WA 98102 claire@animaladvocates.com	<input type="checkbox"/> by United States Mail <input type="checkbox"/> by Legal Messenger <input type="checkbox"/> by Facsimile <input checked="" type="checkbox"/> by JIS ECF <input checked="" type="checkbox"/> by Electronic Mail per Agreement
Jonathon Bashford Bashford Law PLLC 600 1 st Ave., Suite 405 Seattle, WA 98104 jon@bashfordlaw.com	<input type="checkbox"/> by United States Mail <input type="checkbox"/> by Legal Messenger <input type="checkbox"/> by Facsimile <input checked="" type="checkbox"/> by JIS ECF <input checked="" type="checkbox"/> by Electronic Mail per Agreement
Bob Ferguson, Attorney General Attn: Division of Fish, Wildlife and Parks 1125 Washington Street SE Olympia, WA 98501 NoelleC@atg.wa.gov Joe.panesko@atg.wa.gov JeanneR@atg.wa.gov fwdef@atg.walgov	<input type="checkbox"/> by United States Mail <input type="checkbox"/> by Legal Messenger <input type="checkbox"/> by Facsimile <input checked="" type="checkbox"/> by JIS ECF <input checked="" type="checkbox"/> by Electronic Mail per Agreement

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington on August 16, 2019.



Sarah Fauntleroy, Legal Assistant

Exhibit 1

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Chapter II

[COE–2015–0017]

RIN 0710–AA73

Issuance and Reissuance of Nationwide Permits

AGENCY: Army Corps of Engineers, DoD.
ACTION: Final rule.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is reissuing 50 existing nationwide permits (NWP), general conditions, and definitions, with some modifications. The Corps is also issuing two new NWPs and one new general condition. The effective date for the new and reissued NWPs is March 19, 2017. These NWPs will expire on March 18, 2022. The NWPs will protect the aquatic environment and the public interest while effectively authorizing activities that have no more than minimal individual and cumulative adverse environmental effects.

DATES: These NWPs, general conditions, and definitions will go into effect on March 19, 2017.

ADDRESSES: U.S. Army Corps of Engineers, Attn: CECW–CO–R, 441 G Street NW., Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson at 202–761–4922 or access the U.S. Army Corps of Engineers Regulatory Home Page at <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits.aspx>.

SUPPLEMENTARY INFORMATION:

Executive Summary

The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWP) to authorize certain activities that require Department of the Army permits under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. The purpose of this regulatory action is to reissue 50 existing NWPs and to issue two new NWPs. In addition, one new general condition is being issued. The NWPs can only be issued for a period of no more than five years and cannot be extended. These 52 NWPs go into effect on March 19, 2017 and expire on March 18, 2022.

The NWPs authorize activities that have no more than minimal individual and cumulative adverse environmental

effects. The NWPs authorize a variety of activities, such as aids to navigation, utility line crossings, erosion control activities, road crossings, stream and wetland restoration activities, residential developments, mining activities, commercial shellfish aquaculture activities, and agricultural activities. The two new NWPs authorize the removal of low-head dams and the construction and maintenance of living shorelines. Some NWP activities may proceed without notifying the Corps, as long as those activities comply with all applicable terms and conditions of the NWPs, including regional conditions imposed by division engineers. Other NWP activities cannot proceed until the project proponent has submitted a pre-construction notification to the Corps, and for most NWPs that require pre-construction notifications the Corps has 45 days to notify the project proponent whether the activity is authorized by NWP.

Background

The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWP) to authorize activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 that will result in no more than minimal individual and cumulative adverse environmental effects. The NWPs can only be issued for a period of five years or less, unless the Corps reissues those NWPs (see 33 U.S.C. 1344(e) and 33 CFR 330.6(b)). We are reissuing 50 existing NWPs and issuing two new NWPs. These NWPs will go into effect on March 19, 2017, and will expire on March 18, 2022. Division engineers will add regional conditions to these NWPs to ensure that, on a regional basis, these NWPs only authorize activities that have no more than minimal individual and cumulative adverse environmental effects.

Section 404(e) of the Clean Water Act provides the statutory authority for the Secretary of the Army, after notice and opportunity for public hearing, to issue general permits on a nationwide basis for any category of activities involving discharges of dredged or fill material into waters of the United States. The Secretary's authority to issue general permits has been delegated to the Chief of Engineers and his or her designated representatives. Nationwide permits are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities in jurisdictional waters and wetlands that have no more than minimal adverse environmental impacts (see 33 CFR

330.1(b)). Activities authorized by NWPs and other general permits must be similar in nature, cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment (see 33 U.S.C. 1344(e)(1)). Nationwide permits can also be issued to authorize activities pursuant to Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(f)). The NWP program is designed to provide timely authorizations for the regulated public while protecting the Nation's aquatic resources.

The phrase "minimal adverse environmental effects when performed separately" refers to the direct and indirect adverse environmental effects caused by a specific activity authorized by an NWP. The phrase "minimal cumulative adverse effect on the environment" refers to the collective direct and indirect adverse environmental effects caused by the all the activities authorized by a particular NWP during the time period that NWP is in effect (which can be no more than 5 years) in a specific geographic region. The appropriate geographic area for assessing cumulative effects is determined by the decision-making authority for the general permit. For each NWP, Corps Headquarters prepares national-scale cumulative effects analyses. Division engineers consider cumulative effects on a regional basis (e.g., a state, Corps district, or other geographic area) when determining whether to modify, suspend, or revoke NWPs on a regional basis (see 33 CFR 330.5(c)). When evaluating NWP pre-construction notifications (PCNs), district engineers evaluate cumulative adverse environmental effects in an appropriate geographic area (e.g., watershed, ecoregion, Corps district geographic area of responsibility, other geographic region).

When Corps Headquarters issues or reissues an NWP, it conducts a national-scale cumulative impact assessment in accordance with the National Environmental Policy Act (NEPA) definition of "cumulative impact" at 40 CFR part 1508.7. The NEPA cumulative effects analysis prepared by Corps Headquarters for an NWP examines the impact on the environment which results from the incremental impact of its action (i.e., the activities that will be authorized by that NWP) and adds that incremental impact to "other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions" (40 CFR 1508.7). In addition to environmental impacts caused by activities authorized

by the NWP, other NWPs, and other types of DA permits, the Corps' NEPA cumulative effects analysis in each of its national decision documents discusses, in general terms, the environmental impacts caused by other past, present, and reasonably foreseeable future Federal, non-Federal, and private actions. For example, wetlands and other aquatic ecosystems are affected by a wide variety of Federal, non-Federal, and private actions that involve land use/land cover changes, pollution, resource extraction, species introductions and removals, and climate change (Millennium Ecosystem Assessment (MEA) 2005b).

Corps Headquarters fulfills the requirements of NEPA when it finalizes the environmental assessment in its national decision document for the issuance or reissuance of an NWP. An NWP verification issued by a district engineer does not require separate NEPA documentation. (See 53 FR 3126, the Corps' final rule for implementing the National Environmental Policy Act, which was published in the February 3, 1988, issue of the **Federal Register**.) When a district engineer issues an NWP verification, he or she is merely verifying that the activity is authorized by an NWP issued by Corps Headquarters. That verification is subject to any activity-specific conditions added to the NWP authorization by the district engineer. When reviewing a request for an NWP verification, the district engineer considers, among other factors, the "cumulative adverse environmental effects resulting from activities occurring under the NWP" (33 CFR 330.5(d)(1)). When documenting the decision to issue an NWP verification, the district engineer will explain that the NWP activity, plus any applicable regional conditions and any activity-specific conditions added by the district engineer (e.g., mitigation requirements) will ensure that the adverse environmental effects caused by the NWP activity will only be minimal on an individual and cumulative basis.

If an NWP authorizes discharges of dredged or fill material into waters of the United States, the Corps also conducts a national-scale cumulative effects analysis in accordance with the Clean Water Act section 404(b)(1) Guidelines. The 404(b)(1) Guidelines approach to cumulative effects analysis for the issuance or reissuance of general permits is described at 40 CFR part 230.7(b).

For each NWP, Corps Headquarters issues a decision document, which includes a NEPA environmental assessment, a public interest review,

and if applicable, a 404(b)(1) Guidelines analysis. Each NWP is a stand-alone general permit.

When the Corps issues or reissues an NWP, Corps divisions are required to prepare supplemental decision documents to provide regional analyses of the environmental effects of that NWP. Those supplemental decision documents are not subject to a public notice and comment process. The supplemental decision documents also support the division engineer's decision to modify, suspend, or revoke the NWP in a particular region. An NWP is modified on a regional basis through the addition of regional conditions, which restricts the use of the NWP in the geographic area(s) where those regional conditions apply. The supplemental decision document includes a regional cumulative effects analysis, and if the NWP authorizes discharges of dredged or fill material into waters of the United States, a regional 404(b)(1) Guidelines cumulative effects analysis. The geographic region used for the cumulative effects analyses in a supplemental decision document is at the division engineer's discretion. In the supplemental decision document, the division engineer may evaluate cumulative effects of the NWP at the scale of a Corps district, state, or other geographic area, such as a watershed or ecoregion. If the division engineer is not suspending or revoking the NWP in a particular region, the supplemental decision document also includes a statement finding that the use of that NWP in the region will cause only minimal individual and cumulative adverse environmental effects.

For some NWPs, the project proponent may proceed with the NWP activity as long as he or she complies with all applicable terms and conditions, including applicable regional conditions. When required, Clean Water Act section 401 water quality certification and/or Coastal Zone Management Act consistency concurrence must be obtained or waived (see general conditions 25 and 26, respectively). Other NWPs require project proponents to notify Corps district engineers of their proposed activities prior to conducting regulated activities, so that the district engineers can make case-specific determinations of NWP eligibility. The notification takes the form of a pre-construction notification (PCN). The purpose of a PCN is to give the district engineer an opportunity to review a proposed NWP activity (generally 45 days after receipt of a complete PCN) to ensure that the proposed activity qualifies for NWP authorization. If it does not qualify for

NWP authorization, the district engineer will inform the applicant and advise him or her on the process for applying for another form of Department of the Army (DA) authorization. The PCN requirements for the NWPs are stated in the text of those NWPs, as well as a number of general conditions, especially general condition 32. Paragraph (b) of general condition 32 lists the information required for a complete PCN.

Twenty-one of the NWPs require PCNs for all activities, including the two new NWPs. Twelve of the proposed NWPs require PCNs for some authorized activities. Nineteen of the NWPs do not require PCNs, unless pre-construction notification is required to comply with certain general conditions or regional conditions imposed by division engineers. All NWPs require PCNs for any proposed NWP activity undertaken by a non-federal entity that might affect listed species or designated critical habitat under the Endangered Species Act (see general condition 18 and 33 CFR part 330.4(f)(2)). All NWPs require PCNs for any proposed NWP activity undertaken by a non-federal entity that may have the potential to cause effects to historic properties listed, or eligible for listing in, the National Register of Historic Places (see general condition 20 and 33 CFR part 330.4(g)(2)).

Except for NWPs 21, 49, and 50, and activities conducted by non-Federal permittees that require PCNs under paragraph (c) of general conditions 18 and 20, if the Corps district does not respond to the PCN within 45 days of a receipt of a complete PCN the activity is authorized by NWP (see 33 CFR 330.1(e)(1)). Regional conditions imposed by division engineers may also add PCN requirements to one or more NWPs.

When a Corps district receives a PCN, the district engineer reviews the PCN and determines whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects. The district engineer applies the criteria in paragraph 2 of section D, "District Engineer's Decision." If the district engineer reviews the PCN and determines that the proposed activity will result in more than minimal individual and cumulative adverse environmental effects, he or she will notify that applicant and offer the prospective permittee the opportunity to submit a mitigation proposal to reduce the adverse environmental effects so that they are no more than minimal (see 33 CFR 330.1(e)(3)).

Mitigation requirements for NWP activities can include permit conditions

(e.g., time-of-year restrictions or use of best management practices) to avoid or minimize adverse effects on certain species or other resources. Mitigation requirements may also consist of compensatory mitigation requirements to offset authorized losses of jurisdictional waters and wetlands so that the net adverse environmental effects are no more than minimal. Any compensatory mitigation that the district engineer requires for an NWP activity must comply with the Corps' compensatory mitigation regulations at 33 CFR part 332.

At the conclusion of his or her review of the PCN, the district engineer prepares a decision document to explain his or her conclusions. The decision document explains the rationale for adding conditions to the NWP authorization, including mitigation requirements that the district engineer determines are necessary to ensure that the verified NWP activity results in no more than minimal individual and cumulative adverse environmental effects. The decision document includes the district engineer's consideration of cumulative adverse environmental effects resulting from the use of that NWP within a watershed, county, state, or a Corps district. If an NWP verification includes multiple authorizations using a single NWP (e.g., linear projects with crossings of separate and distant waters of the United States authorized by NWPs 12 or 14) or non-linear projects authorized with two or more different NWPs (e.g., an NWP 28 for reconfiguring an existing marina plus an NWP 19 for minor dredging within that marina), the district engineer will evaluate the cumulative effects of those NWPs within the appropriate geographic area. Mitigation required by the district engineer can help ensure that the NWP activity results only in minimal adverse environmental effects. The decision document is part of the administrative record for the NWP verification.

Because the required NEPA cumulative effects and 404(b)(1) Guidelines cumulative effects analyses are conducted by Corps Headquarters in its decision documents for the issuance or reissuance of the NWPs, district engineers do not need to do comprehensive cumulative effects analyses for each NWP verification. For an NWP verification, the district engineer only needs to evaluate the cumulative adverse environmental effects of the applicable NWP(s) at an appropriate geographic scale (e.g., Corps district, watershed, ecoregion). In his or her decision document, the district engineer will include a statement

declaring whether the proposed NWP activity, plus any required mitigation, will or will not result in more than minimal individual and cumulative adverse environmental effects.

Some NWP activities that require PCNs also require agency coordination (see paragraph (d) of general condition 32). If, in the PCN, the applicant requests a waiver of an NWP limit that the terms of the NWP allow the district engineer to waive (e.g., the 300 linear foot limit for the loss of intermittent and ephemeral stream bed authorized by NWP 29), and the district engineer determines, after coordinating the PCN with the resource agencies, that the proposed NWP activity will result in no more than minimal adverse environmental effects, the district engineer's decision document explains the basis his or her decision.

If the district engineer determines, after considering mitigation, that there will be more than minimal cumulative adverse environmental effects, he or she will exercise discretionary authority and require an individual permit for the proposed activity. That determination will be based on consideration of the information provided in the PCN and other available information. Discretionary authority may also be exercised in cases where the district engineer has sufficient concerns for any of the Corps public interest review factors (see 33 CFR 330.4(e)(2)).

Regional conditions may be imposed on the NWPs by division engineers to take into account regional differences in aquatic resource functions and services across the country and to restrict or prohibit the use of NWPs to protect those resources. Through regional conditions, a division engineer can modify an NWP to require submission of PCNs for certain activities. Regional conditions may also restrict or prohibit the use of an NWP in certain waters or geographic areas, if the use of that NWP in those waters or areas might result in more than minimal individual or cumulative adverse environmental effects. Regional conditions may not be less **stringent** than the NWPs.

A district engineer may impose activity-specific conditions on an NWP authorization to ensure that the NWP activity will result in no more than minimal individual and cumulative adverse effects on the environment and other public interest review factors. In addition, activity-specific conditions will often include mitigation requirements, including avoidance and minimization, and possibly compensatory mitigation, to reduce the adverse environmental effects of the proposed activity so that they are no

more than minimal. Compensatory mitigation requirements for NWP activities must comply with the applicable provisions of 33 CFR part 332. Compensatory mitigation may include the restoration, establishment, enhancement, and/or preservation of wetlands. Compensatory mitigation may also include the rehabilitation, enhancement, or preservation of streams, as well as the restoration, enhancement, and protection/maintenance of riparian areas next to streams and other open waters. District engineers may also require compensatory mitigation for impacts to other types of aquatic resources, such as seagrass beds, shallow sandy bottom marine areas, and coral reefs.

Compensatory mitigation can be provided through mitigation banks, in-lieu fee programs, and permittee-responsible mitigation. If the required compensatory mitigation will be provided through mitigation bank or in-lieu fee program credits, the conditions in the NWP verification must comply with the requirements at 33 CFR 332.3(k)(4), and specify the number and resource type of credits that need to be secured by the permittee. If the required compensatory mitigation will be provided through permittee-responsible mitigation, the conditions added to the NWP authorization must comply with 33 CFR 332.3(k)(3).

Today's final rule reissuing the 50 existing NWPs with some modifications and issuing two new NWPs reflects the Corps commitment to environmental protection. In response to the comments received on the June 1, 2016, proposed rule, we made changes to the text of the NWPs, general conditions, and definitions so that they are clearer and can be more easily understood by the regulated public, government personnel, and interested parties. The terms and conditions of these NWPs protect the aquatic environment and other public interest review factors. The changes to the NWPs, general conditions, definitions, and other provisions are discussed below.

Making the text of the NWPs clearer and easier to understand will also facilitate compliance with these permits, which will also benefit the aquatic environment. The NWP program allows the Corps to authorize activities with only minimal adverse environmental impacts in a timely manner. The NWP program also provides incentives to project proponents to design their activities to avoid and minimize adverse impacts to jurisdictional waters and wetlands to qualify for the streamlined NWP authorization. In FY 2016, the average

evaluation time for a request for NWP authorization was 40 days, compared to the average evaluation time of 217 days for a standard individual permit application. Regional general permits issued by district engineers provide similar environmental protections and incentives to project proponents. In addition, the NWPs help the Corps better protect the aquatic environment by focusing its limited resources on those activities that have the potential to result in more severe adverse environmental effects.

Benefits and Costs of the NWPs

The NWPs provide benefits by encouraging project proponents to minimize their proposed impacts to waters of the United States and design their projects within the scope of the NWPs, rather than applying for individual permits for activities that could result in greater adverse impacts to the aquatic environment. The NWPs also benefit the regulated public by providing convenience and time savings compared to standard individual permits. The minimization encouraged by terms and conditions of an NWP, as well as compensatory mitigation that may be required for specific activities authorized by an NWP, helps reduce adverse environmental effects to jurisdictional waters and wetlands, as well as resources protected under other laws, such as federally-listed endangered and threatened species and designated critical habitat, as well as historic properties. For an analysis of the monetized benefits of the NWPs, refer to the Regulatory Impact Analysis which is available at www.regulations.gov, docket number COE-2015-0017.

The costs of the NWPs relate to the paperwork burden associated with completing the PCNs. See the section on Paperwork Reduction Act for a response to comments and additional discussion of the paperwork burden.

Grandfather Provision for Expiring NWPs

An activity completed under the authorization provided by a 2012 NWP continues to be authorized by that NWP (see 33 CFR part 330.6(b)). Activities authorized by the 2012 NWPs that have commenced or are under contract to commence by March 18, 2017, will have one year (*i.e.*, until March 18, 2018) to complete those activities under the terms and conditions of the 2012 NWPs (see 33 CFR 330.6(b)). Activities previously authorized by the 2012 NWPs that have not commenced or are not under contract to commence by March 18, 2017, will require

reauthorization under the 2017 NWPs, provided those activities still comply with the terms and conditions of qualify for authorization under the 2017 NWPs. If those activities no longer qualify for NWP authorization because they do not meet the terms and conditions of the 2017 NWPs (including any regional conditions imposed by division engineers), the project proponent will need to obtain an individual permit, or seek authorization under a regional general permit, if such a general permit is available in the applicable Corps district and can be used to authorize the proposed activity.

In response to the June 1, 2016, proposed rule, several commenters requested that the Corps provide a longer grandfathering period for activities authorized under the 2012 NWPs. A few commenters suggested changing the grandfather period to 2 years and some commenters recommended changing it to 3 years.

The one-year grandfathering period in 33 CFR 330.6(b) was established in the November 22, 1991, final rule amending 33 CFR part 330 (see 56 FR 59110). It would require a separate rulemaking to change section 330.6(b) to establish a longer grandfathering period for authorized NWP activities. We believe the one-year period is sufficient for project proponents to complete their NWP activities. If they determine more time is needed to complete the NWP activity, the one-year period gives them sufficient time to request verification under the reissued NWP(s). If a proposed activity was authorized by the 2012 NWPs, but is no longer authorized by these new or reissued NWPs, then the project proponent should apply for an individual permit during the grandfather period to try to obtain the individual permit before the one-year grandfather period expires.

Clean Water Act Section 401 Water Quality Certifications and Coastal Zone Management Act Consistency Determinations

The NWPs issued today will become effective on March 19, 2017. This **Federal Register** notice begins the 60-day Clean Water Act Section 401 water quality certification (WQC) and the 90-day Coastal Zone Management Act (CZMA) consistency determination processes.

After the 60-day period, the latest version of any written position taken by a state, Indian Tribe, or U.S. EPA on its WQC for any of the NWPs will be accepted as the state's, Indian Tribe's, or EPA's final position on those NWPs. If the state, Indian Tribe, or EPA takes no

action by March 7, 2017, WQC will be considered waived for those NWPs.

After the 90-day period, the latest version of any written position taken by a state on its CZMA consistency determination for any of the NWPs will be accepted as the state's final position on those NWPs. If the state takes no action by April 6, 2017, CZMA consistency concurrence will be presumed for those NWPs.

Discussion of Public Comments Overview

In response to the June 1, 2016, **Federal Register** notice, we received more than 54,000 comment letters, of which approximately 53,200 were form letters pertaining to NWP 12. In addition, we received over 700 form letters opposing the reissuance of NWP 21 and over 50 form letters opposing the issuance of proposed new NWP B. In addition to the various form letters, we received a several hundred individual comment letters. Those individual comment letters, as well as examples of the various form letters, are posted in the www.regulations.gov docket (COE-2015-0017) for this rulemaking action. We reviewed and fully considered all comments received in response to the proposed rule.

Response to General Comments

Many commenters expressed general support for the proposed rule, as well as the NWP program as a whole. Several commenters voiced their concerns about the proposed NWPs being able to be issued before the 2012 NWPs expire. One commenter said the NWPs are duplicative of state and local government permit programs. Another commenter requested that the final NWPs include a statement informing the public that many of the categories of activities authorized by NWP are also regulated by state or local government wetland regulatory programs. A commenter stated that Corps district engineers should not have the authority to add conditions to NWPs or be able to suspend NWP authorizations. One commenter expressed appreciation of the policy statements included in the NWPs, stating that such statements promote consistency in program implementation among Corps districts. One commenter requested that the Corps issue the NWPs for a period of ten years. One commenter stated that because of the effects of climate change, the predictability and confidence in the use of the NWPs are likely to decline, and recommend shortening the renewal cycle for certain NWPs, and require more frequent monitoring of specific

We have modified the fourth paragraph as follows, to be consistent with the other NWP's that have similar terms: "The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects."

This NWP is reissued with the modification discussed above.

NWP 45. *Repair of Uplands Damaged by Discrete Events.* To provide flexibility in the use of this NWP after major flood events or other natural disasters, we proposed to modify the PCN requirement to allow district engineers to waive the 12-month deadline for submitting PCNs.

One commenter said this NWP should not authorize restoration or repair activities involving structures waterward of the ordinary high water mark unless there is an immediate threat to the primary structure or associated infrastructure. One commenter recommended requiring the use of upland material to restore upland areas. One commenter asserted that the repair of upland areas damaged as a result of natural disasters should require individual permits. Another commenter stated that living shorelines should be encouraged as an alternative to restoring the affected upland areas and protecting them with hard bank stabilization techniques. One commenter said these activities should require advance notice to tribes. A commenter said that this NWP should state it does not authorize rerouting a stream to a historic course or alignment.

Any structures placed in navigable waters of the United States (*i.e.*, channelward of the ordinary high water mark or the mean high water in waters subject to section 10 of the Rivers and Harbors Act of 1899) require separate DA authorization. That authorization may be provided by another NWP, a regional general permit, or an individual permit. This NWP only authorizes restoration of the damaged upland areas up to the contours or ordinary high water mark that existed prior to the occurrence of the damage. It also authorizes bank stabilization activities, as long as those activities do not extend beyond the prior ordinary high water mark or contours. If the eroded material is still in the vicinity of the damaged upland areas, then that material can be used to repair those upland areas. The project proponent can use some material from the bottom of the waterbody, but cannot substantially alter the contours

of the waterbody that existed before the damaging event occurred. The repair of upland areas damaged by discrete events is limited to the ordinary high water mark and contours that existed prior to that discrete event, so the adverse environmental effects will be no more than minimal unless the district engineer reviews the PCN and determines that the proposed activity will result in more than minimal adverse environmental effects and exercises discretionary authority.

As an alternative to using this NWP, the property owner can approach mitigating the damage done by the discrete event in a different way. He or she can propose to construct a living shoreline and submit a PCN for NWP 54 authorization. Alternatively, he or she can propose another method of bank stabilization that might be authorized by NWP 13. Corps districts have consulted with tribes on the 2017 NWP's. These consultations may result in regional conditions on this NWP or other NWP's that ensure that the NWP's do not cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. These consultations may also result in coordination procedures to seek a tribe's views on a PCN for a proposed NWP 45 activity. This NWP only authorizes repair of upland areas damaged by storms, floods, or other discrete events. It does not authorize the relocation or rerouting of streams.

One commenter said that minor dredging should be limited to 25 cubic yards. Several commenters expressed support for the proposed modification that would allow district engineers to waive the 12-month deadline for submitting PCNs.

The NWP limits dredging to the minimum necessary to restore the damaged uplands and does not allow significant changes to the pre-event bottom contours of the waterbody. Limiting the dredging to 25 cubic yards could prevent removal of eroded material that would be used to restore the upland areas and restore the dimensions of the waterbody, if more than 25 cubic yards of material eroded ended up in the waterbody. We have adopted the proposed modification that allows the district engineer to waive the 12-month deadline.

This NWP is reissued as proposed.

NWP 46. *Discharges in Ditches.* We did not propose any changes to this NWP. One commenter requested that the acreage limit be reduced to 1/2-acre from the current 1 acre limit. This commenter also said that there should be no waivers of the acreage limit.

We have had a 1-acre limit for this NWP since it was first issued in 2007. This acreage limit differs from the 1/2-acre limit in a number of other NWP's because NWP 46 is limited to authorizing discharges of dredged or fill material into upland ditches that are determined to be waters of the United States. Pre-construction notification is required for all activities authorized by this NWP, to allow district engineers to evaluate the ecological functions and services being provided by specific ditches constructed in uplands and determine whether the adverse environmental effects caused by filling those ditches will be no more than minimal. When reviewing the PCN, the district engineer may also determine whether mitigation (*e.g.*, minimization) should be required to satisfy the terms and conditions of the NWP.

This NWP is reissued without change.

NWP 47. [Reserved].

NWP 48. *Commercial Shellfish Aquaculture Activities.* We proposed to modify this NWP to clarify that it authorizes new and continuing commercial shellfish aquaculture operations in authorized project areas. In addition, we proposed to define the project area as the area in which the operator is authorized to conduct commercial shellfish aquaculture activities during the period the NWP is in effect. Also, we proposed to define a "new commercial shellfish aquaculture operation" as an operation in a project area where commercial shellfish aquaculture activities have not been conducted during the past 100 years. We also proposed to modify the PCN thresholds and requirements and those proposed changes are more fully described in the June 1, 2016, proposed rule.

Several commenters expressed their support for the proposed reissuance of this NWP, including the proposed changes. Many commenters objected to the reissuance of this NWP, stating that it authorizes activities with substantial adverse environmental impacts. Several of these commenters said that commercial shellfish aquaculture activities should require individual permits. One commenter remarked that these activities should be authorized by regional general permits instead of an NWP, to take into account regional differences in aquaculture activities and the ecosystems in which they occur. Several commenters stated that NWP 48 does not authorize a category of activities that is similar in nature. Several commenters said that this NWP does not comply with section 404(e) of the Clean Water Act because it has no limits.

The terms and conditions of this NWP, including its PCN requirements, will ensure that commercial shellfish aquaculture activities authorized by this NWP will result in no more than minimal individual and cumulative adverse environmental effects. Any commercial shellfish aquaculture activity to be conducted by a non-federal permittee that might affect Endangered Species Act (ESA) listed species or designated critical habitat, or is located in designated critical habitat, requires a PCN under general condition 18, endangered species. The district engineer will evaluate the PCN, and if he or she determines the proposed activity may affect listed species or designated critical habitat, the district engineer will conduct ESA section 7 consultation with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service. Division engineers may impose regional conditions to require PCNs for proposed NWP 48 activities that might affect treaty rights, tribal trust resources, submerged aquatic vegetation, or other concerns.

When reviewing a PCN, if the district engineer determines that the proposed activity, after considering mitigation proposed by the prospective permittee, will result in more than minimal individual and cumulative adverse environmental effects, he or she will exercise discretionary authority and require an individual permit for that activity. Commercial shellfish aquaculture activities occur in various regions of the country, and NWP 48 has been used in Washington State, Alabama, California, Florida, New Jersey, New York, Oregon, and South Carolina. The availability of this NWP reduces the need for the Corps districts in those states to develop regional general permits, and an NWP can promote national consistency in the authorization of these activities.

This NWP only authorizes discharges of dredged or fill material into waters of the United States and structures and work in navigable waters of the United States associated with commercial shellfish aquaculture activities. That is a specific category of activities that is similar in nature. Section 404(e) of the Clean Water Act does not require that general permits, including NWPs, have acreage or other numeric limits. Section 404(e) only requires that general permits authorize categories of activities that are similar in nature that have no more than minimal individual and cumulative adverse environmental effects.

One commenter said that the Corps should clarify the scope of its authority under section 404 of the Clean Water

Act as it applies to commercial shellfish aquaculture activities. This commenter expressed the position that these activities are not regulated under section 404. One commenter requested that the Corps add a new Note to NWP 48 that would state that commercial shellfish aquaculture activities are not regulated under section 404 of the Clean Water Act. This commenter said that the Clean Water Act exempts normal farming activities from the requirement to obtain section 404 permits, and that on-going commercial shellfish aquaculture operations are normal farming operations eligible for the Clean Water Act section 404(f)(1)(A) exemption. This commenter remarked that NWP 48 should clearly state that the farming exemption applies to any commercial shellfish aquaculture operation in a project area where those activities have occurred during the past 100 years. This commenter also stated that bottom culture and off-bottom culture shellfish farming activities do not involve regulated discharges of dredged or fill material. This commenter said that sediment movement during shellfish harvesting activities are *de minimis* and should not be regulated under section 404 of the Clean Water Act. This commenter stated that only concentrated aquatic animal production facilities are point source aquaculture operations under the U.S. EPA's National Pollutant Discharge Elimination System regulations issued pursuant to section 402 of the Clean Water Act, and that shellfish farms are not included in EPA's regulations because there is no feed added to the water.

Typical commercial shellfish aquaculture activities, including those described in the provisions of NWP 48, may involve discharges of dredged or fill material into waters of the United States. For example, mechanized harvesting activities typically involve a discharge of dredged or fill material, but the culture of oysters in bags suspended on long-lines, where there is no discharge of shell or gravel for bed preparation, typically does not result in a discharge of dredged or fill material and therefore does not require authorization under section 404 of the Clean Water Act. The term "discharge of dredged material" is defined at 33 CFR 323.2(d). The term "discharge of fill material" is defined at 33 CFR 323.3(f). The U.S. EPA has the authority to make the final determination as to which activities qualify for the exemptions in section 404(f) of the Clean Water Act. That authority is described in the 1989 "Memorandum of Agreement Between

the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Geographic Jurisdiction of the Section 404 Program and the Application of the Exemptions Under Section 404(f) of the Clean Water Act."

Several commenters said that commercial shellfish aquaculture activities cause minimal adverse environmental effects and that they can have beneficial effects on aquatic habitat and water quality. Many commenters stated that commercial shellfish aquaculture activities cause adverse impacts to intertidal zones, submerged aquatic vegetation (especially eelgrass), community structure and function of intertidal and subtidal habitats, species composition, sediment and water chemistry, soil integrity, impediments to migration, exclusion or displacement of native species, endangered species, competition for food and space, fish spawning and migration areas, and aesthetics.

The effects of commercial shellfish aquaculture activities on the structure, dynamics, and functions of marine and estuarine waters are complicated, and there has been much discussion in the scientific literature on whether those effects are beneficial or adverse (e.g., Dumbauld et al. 2009). Oysters are ecosystem engineers that have substantial impacts on coastal ecosystems by adding habitat for other species, altering ecological and biogeochemical processes, and filtering large volumes of water, thus providing a number of ecosystem goods and services (Ruesink et al. 2005). For example, in Willapa Bay, Washington, two introduced cultured bivalve species (*Crassostrea gigas* and *Ruditapes philippinarum*) have increased secondary production in the waterbody by approximately 2.5 times more than the peak historic secondary production of native oysters (*Ostreola conchaphila*) (Ruesink et al. 2006). Sites where Pacific oysters (*Crassostrea gigas*) are grown provide hard substrate used by fish, invertebrates, and macroalgae in estuaries where such substrate is rare because those estuaries have mostly soft bottom habitats (Ruesink et al. 2006). The scale at which impacts are evaluated is an important factor in determining whether impacts are positive or negative (Dumbauld and McCoy 2015). For example, at a small spatial scale (e.g., the site directly impacted by a specific aquaculture activity) there will be an adverse effect, but at a landscape scale the adverse effects may be minor or there may be beneficial effects because of

management approaches and ecosystem resilience (Dumbauld and McCoy 2015).

While commercial shellfish aquaculture activities have some adverse effects on the biotic and abiotic components of coastal waters, including intertidal and subtidal areas, those adverse effects should be considered in a cumulative effects context. Commercial shellfish aquaculture activities also provide some ecosystem functions and services, such as water filtration that removes plankton and particulates from the water column, secondary production that results in food, and habitat for other organisms in the waterbody including fish and invertebrates (Ruesink et al. 2005). Under the Council on Environmental Quality's definition of "cumulative impact" at 40 CFR 1508.7, cumulative impacts are due to the effects of past, present, and reasonably foreseeable future actions taken by federal, non-federal, and private entities. In 2010, over 123,000,000 people (39 percent of the population of the United States) were living in coastal counties (NOAA and U.S. Census Bureau 2013). Categories of activities that directly and indirectly affect coastal intertidal and subtidal habitats include land use/land cover changes in the watershed (e.g., coastal development, agriculture), pollution from point and non-point sources throughout coastal watersheds, overexploitation of estuarine and marine resources including fish and shellfish, resource extraction, and human activities that contribute to climate change (MEA 2005b). Commercial shellfish aquaculture activities are a minor subset of human activities that affect coastal intertidal and subtidal habitats and contribute to cumulative effects to those coastal habitats.

Terrestrial areas, which include coastal lands, have been substantially altered by people for millennia (Perring and Ellis 2013). The high proportion of people living along the coasts have directly and indirectly altered coastal waters and their productivity (Vitousek et al. 1997). All marine ecosystems have also been altered to varying degrees by people (Halpern et al. 2008). Nearly all landscapes have been influenced or altered to some extent by past and present use by human communities, resulting in cultural, semi-cultural, and natural landscapes (Clewell and Aronson 2013). The bays and other waterbodies in which commercial shellfish aquaculture activities take place can be considered semi-cultural ecosystems because of their use by people over long periods of time for various activities. While shellfish

aquaculture activities have local and temporary effects on the structure, function, and dynamics of estuaries, they do not cause losses of intertidal and subtidal areas or degrade water quality, in contrast to the habitat losses and water quality degradation caused by other types of human activities in or near coastal waters, such as coastal development, pollution, wetland losses, and freshwater diversions (Dumbauld et al. 2009). According to Dumbauld et al. (2009), the disturbances caused by commercial shellfish aquaculture activities are similar in scope and intensity to natural disturbances such as storm events and disturbances caused by other ecosystem engineers such as eelgrass and burrowing shrimp.

Several commenters said that the Corps has not fully documented that commercial shellfish aquaculture activities provide water quality benefits similar to wild bivalves. Many commenters expressed concern about conversions of natural shorelines to commercial shellfish production and impacts to native shellfish, forage fish, salmon, eelgrass, and birds. One commenter stated that a certain amount of natural shoreline should be required between aquaculture sites. One commenter stated that NWP 48 should restrict the use of mechanical harvesting.

Both commercially-grown bivalves and wild bivalves are filter feeding molluscs with the same basic anatomy and physiology. Different oyster species have different filtration rates, with larger oyster species filtering more water (Ruesink et al. 2005). Bivalves influence water quality by filtering out particles from the water column and removing nutrients, which increases the clarity of the water in the waterbody and can help reduce anthropogenic causes of eutrophication (Dumbauld et al. 2009). While commercial shellfish aquaculture activities have some impacts on intertidal and subtidal habitats, fish, eelgrass, and birds, coastal development and other human activities in these waterbodies and the watersheds that drain to these waterbodies have substantial impacts on those resources as well (e.g., MEA 2005b). Commercial shellfish aquaculture activities are conducted near shorelines and coastal lands that have long been occupied and altered by people. The human occupation of these shorelines over time has changed the structure, function, and dynamics of these nearshore ecosystems, including the other species that use those ecosystems. Various coastal development activities have substantially altered shoreline characteristics, as well the water quality

of coastal waters and the species that utilize nearshore waters. Shorelines have been altered by a variety of human activities for many years. Land use decisions, including the use and development of shorelines, is the primary responsibility of state and local governments. States can manage coastal development through their authorities under the Coastal Zone Management Act and state laws. The Corps' authorities are limited to regulating activities that involve discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States.

Glascoc and Christy (2004) examined the effects of coastal urbanization on water quality, especially microbial contamination of shellfish production areas. The quality of coastal waters and their habitats are strongly influenced by coastal development, and the pollution generated by the people that live in coastal areas (Glascoc and Christy 2004). They found that non-point source pollution, including pollution from stormwater runoff, wastes generated by livestock on land-based farms, and failing on-site septic systems, is the leading cause of declines in water quality in shellfish growing areas. Point source discharges from industrial and municipal wastewater systems also contribute to declining water quality in estuaries where shellfish production occurs (Glascoc and Christy 2004). While commercial shellfish aquaculture activities do have some adverse effects on eelgrass and other species that inhabit coastal waters, especially competition for space (Tallis et al. 2009), there are also substantial adverse effects caused by coastal land use and land cover changes, other uses of coastal lands and waters by people, and the activities of people who live in these coastal watersheds, especially the pollution they generate through those activities.

Division engineers can also add regional conditions to ensure that mechanical harvesting activities that require Department of the Army authorization result in no more than minimal individual and cumulative adverse environmental effects.

Several commenters asserted that the use of canopy nets has caused extensive modification of shorelines. They said these nets also make it difficult for birds to feed and may trap birds. One commenter stated that commercial shellfish aquaculture operators should not be allowed to harass birds and use large canopy net to keep birds from feeding on planted shellfish. One commenter remarked that the Corps

must comply with regulations to protect migratory birds. Many commenters also expressed concern about use of chemicals to remove eelgrass and native invertebrates, the introduction of non-native species, the introduction of plastics into the marine food web, and risks of parasitism and disease.

The use of canopy nets and their effects on birds are more appropriately addressed by district engineers on a case-by-case basis if the use of canopy nets is directly linked to commercial shellfish aquaculture activities that require DA authorization. General condition 19 addresses the requirements of the Migratory Bird Treaty Act. The Corps does not have the authority to regulate discharges of pesticides. Discharges of pesticides may require authorization by states or the U.S. EPA under section 402 of the Clean Water Act. Division engineers can impose regional conditions to address the use of plastics, if plastic materials are used for the activities regulated under the Corps' authorities.

Invasions of species from one area to another is a natural biological phenomenon, while human activities have greatly sped up the rates of those invasions (Vitousek et al. 1997). Introductions of non-native species occur through a variety of mechanisms, such as land use/land cover changes, commerce (e.g., intentional introductions), and inadvertent introductions due to accidental transport (Vitousek et al. 1997), not just commercial shellfish aquaculture activities. Most ecosystems and human dominated lands are inhabited by native and non-native species and ecosystems, including their species composition, are changing a very rapid rate (Davis et al. 2011). The Corps does not have the authority to regulate the introduction of non-native species into waterbodies. In addition, the Corps does not have the authority to address risks of parasitism and disease from shellfish production or consumption. Those concerns are more appropriately addressed by state or local public health agencies.

Many commenters also said that there has not been a sufficient cumulative impact analysis conducted for NWP 48. One commenter said that the Corps needs to track cumulative impacts of these activities.

The cumulative effects analyses prepared by Corps Headquarters for the reissuance of this NWP were done in accordance with the definitions of "cumulative impact" provided in the applicable federal regulations. For the environmental assessment in the national decision document, we used the definition of "cumulative impact" in

the Council on Environmental Quality's NEPA regulations at 40 CFR 1508.7. For the 404(b)(1) Guidelines analysis in the national decision document, we predicted cumulative effects using the approach specified at 40 CFR 230.7(b)(3), which states that the permitting authority is to predict the number of activities expected to occur until the general permit expires. Corps districts track the use of NWP 48 and other NWPs in our automated information system, ORM2. In ORM2, we track NWP activities that require PCNs as well as NWP activities that do not require PCNs but are voluntarily reported to Corps districts in cases where the project proponents want written verifications from the Corps.

Many commenters objected to the proposed definition of "new commercial shellfish aquaculture operation" which stated that it is "an operation in an area where commercial shellfish aquaculture activities have not been conducted during the past 100 years." Many commenters objected to using 100 years as a threshold for identifying new commercial shellfish aquaculture activities. These commenters stated that the proposed definition would greatly expand fallow shellfish aquaculture areas, which they assert have recovered to their former natural state. Several of these commenters said that the proposed definition "grandfathers" commercial shellfish aquaculture operations, in contrast to the five year limits of other NWPs. One commenter recommended changing the threshold from 100 years to 5 years and another commenter suggested changing it to 4 years. Several commenters objected to paragraph (d) of the proposed NWP, which prohibits commercial shellfish aquaculture activities that directly affect more than 1/2-acre of submerged aquatic vegetation beds in project areas that have not been used for those activities during the past 100 years. They said that this paragraph essentially places no limits on the amount of submerged aquatic vegetation that can be disturbed by these activities.

Paragraph (d) of the proposed NWP 48 is linked to the proposed definition of "new commercial shellfish aquaculture operation" in the first paragraph of the proposed NWP as well as the definition of "project area." Our intent with the definition of "new commercial shellfish aquaculture operation" and the 100-year period is to recognize that many of these activities have taken place over long periods of time, even though some sections of project areas may have been fallow for a number of years. The long time frame provided by the 100-year period is also in recognition that

commercial shellfish aquaculture activities do not cause losses of intertidal and subtidal habitats and that components of those intertidal and subtidal ecosystems (e.g., submerged aquatic vegetation, benthic organisms, and nekton that utilize those habitats) are resilient to the impacts of these activities and other disturbances. In general, those groups of organisms recover in a relatively short time after disturbances caused by planting, harvesting, or other commercial shellfish aquaculture activities. The Corps' regulatory authorities are limited to discharges of dredged or fill material into waters of the United States and structures or work in navigable waters, and the direct and indirect effects caused by those activities. The use of rotation cycles for farmed and fallow areas of commercial shellfish aquaculture operations will not affect the Corps' determination of eligibility for NWP 48 authorization. This is because the Corps considers the entire project area, as well as the description of the 5-year commercial shellfish activity provided in the PCN in the context of the overall ecosystem function, when determining whether the proposed activities will, or will not, result in no more than minimal adverse environmental effects, and thus qualify, or not, for NWP 48 authorization.

In addition, commercial shellfish aquaculture activities and submerged aquatic vegetation have been shown to co-exist with each other. The combination of shellfish and submerged aquatic vegetation provides a number of ecosystem functions and services (Dumbauld and McCoy 2015). Submerged aquatic vegetation is resilient to disturbances caused by oyster aquaculture activities, and the disturbances caused by oyster aquaculture activities are comparable to natural disturbances caused by winter storms (Dumbauld and McCoy 2015). Intertidal and subtidal marine and estuarine ecosystems, as well as other ecosystems, are dynamic, not static. As long as ecosystems are not too degraded by human activities and other environmental factors, they have resilience to recover after disturbances. Compared to the disturbances and degradation caused by coastal development, pollution, and other human activities in coastal areas, commercial shellfish aquaculture activities present relatively mild disturbances to estuarine and marine ecosystems. Dumbauld et al. (2009) presents a review of empirical evidence of the resilience of estuarine ecosystems and their recovery (including the

recovery of eelgrass) after disturbances caused by shellfish aquaculture activities. Because of the demonstrated co-existence of shellfish aquaculture and submerged aquatic vegetation and their resilience to withstand disturbances, we do not believe it is necessary to impose buffers around submerged aquatic vegetation beds. In areas where there are concerns regarding impacts to submerged aquatic vegetation, division engineers can modify NWP 48 to require PCNs for all activities, so that district engineers can review each proposed NWP 48 activity to ensure that those activities result in no more than minimal individual and cumulative adverse effects on submerged aquatic vegetation.

One commenter expressed concern that the proposed definition of "new commercial shellfish aquaculture operation" would adversely affect treaty rights. One commenter said that the Corps has no legal basis to apply the 100-year threshold to tribal uses or treaty rights. Several commenters recommended reverting back to the requirements in the 2007 NWP 48, which limited commercial shellfish aquaculture operations to the "the area of waters of the United States occupied by the existing operation." These commenters also suggested an alternative of limiting new commercial shellfish aquaculture activities to areas where the operator can document that those areas have been part of a regular rotation of cultivation. One commenter stated that *U.S. v. Washington* subproceeding No. 89-3 set forth specific requirements to prove prior aquaculture activities and that these same requirements should be used for NWP 48. Several commenters expressed concern about the unknown quantity of new operations that would occur because of the 100-year threshold, the lack of a baseline, the lack of harvest records, cumulative impacts of changes to aquaculture species, and the potential to harm other species, including species listed under the Endangered Species Act. One commenter stated that large shellfish corporations have been gathering large numbers of leases in anticipation of the adoption of the 100-year threshold in NWP 48.

The definition of "project area" is focused on the geographic area in which the operator is authorized to conduct commercial shellfish aquaculture activities through a variety of instruments, including treaties. All NWP activities, including NWP 48 activities, must comply with general condition 17, tribal rights. General condition 17 has been modified to state that no NWP activity may cause more

than minimal adverse effects to tribal rights (including treaty rights), protected tribal resources, or tribal lands. Division engineers can add regional conditions to this NWP to ensure that commercial shellfish aquaculture activities do not result in more than minimal adverse effects on tribal rights. These regional conditions may require PCNs for activities that might have the potential to affect tribal rights (including treaty rights), protected tribal resources, or tribal lands, to provide district engineers the opportunity to consult with the appropriate tribe(s) to ensure that the NWP activity complies with general condition 17. If the district engineer is uncertain whether a proposed NWP 48 activity might cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands, he or she should consult with the appropriate tribe or tribes, as well as his or her Office of Counsel staff, to understand the relevant treaty or treaties and applicable case law when determining the applicability of NWP 48.

We do not agree that NWP 48 should revert to the 2007 terms and conditions of that NWP, which limited the project area to the area for an existing commercial shellfish aquaculture activity. After the experience of implementing the 2007 and 2012 versions of NWP 48, as well as our understanding of the no more than minimal adverse environmental effects caused by these activities, we believe the definition of project area in this NWP, as well as the 100-year threshold, is appropriate to allow long established commercial shellfish aquaculture operations to be authorized by this NWP. This approach takes into account the dynamic nature of these operations over space and time, and does not discourage shellfish growers from letting portions of their project areas go fallow for periods of time.

Nationwide permits, as well as other DA permits, do not grant any property rights or exclusive privileges (see 33 CFR 330.4(b)(3) and 33 CFR 325, Appendix A). If the operator has an enforceable property interest established through a lease or permit issued by an appropriate state or local government agency, a treaty, or any easement, lease, deed, contract, or other legally binding agreement, then the activity can be authorized by NWP 48 as long as the operator complies with all applicable terms and conditions of the NWP, including regional conditions imposed by the division engineer and activity-specific conditions imposed by the district engineer. As discussed above, we believe that commercial shellfish

aquaculture activities that comply with the terms and conditions of NWP 48 will have no more than minimal individual and cumulative adverse environmental effects because the disturbances caused by these activities on intertidal and subtidal ecosystems are temporary and those ecosystems have demonstrated their ability to recover from those temporary disturbances. These activities will cause little change to the environmental baseline of these intertidal and subtidal areas. They cause far less change to the environmental baseline than the adverse effects caused by development activities, pollution, and changing hydrology that results from the people living and working in the watersheds that drain to coastal waters where commercial shellfish aquaculture activities occur. To comply with the requirements for general permits issued under its authorities (*i.e.*, section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899), we do not need to examine historic records of harvests or cultivated species. Many species co-exist with commercial shellfish aquaculture activities and many species benefit from these activities (Dumbauld et al. 2009). Compliance with the Endangered Species Act is achieved through the requirements of general condition 18, and activity-specific and regional programmatic ESA section 7 consultations.

The 100-year threshold is used only to identify new commercial shellfish aquaculture activities for the purposes of applying the 1/2-acre limit for direct effects to submerged aquatic vegetation. If a commercial shellfish aquaculture activity is identified as a new activity and it will directly affect more than 1/2-acre of submerged aquatic vegetation, then the proposed activity does not qualify for NWP 48 authorization and an individual permit or a regional general permit would be required.

A couple of commenters supported the proposed 100-year threshold for identifying new commercial shellfish aquaculture operations because portions of shellfish farms lie fallow for extended periods of time. One commenter suggested modifying the definition to refer to a "project area" instead of an "area" because the term "project area" is used throughout the NWP. This commenter said that the general term "area" could be interpreted as applying to a smaller portion of the "project area." This commenter also recommended using the term "project area" in paragraph (d) of this NWP.

We have changed "an area" to "a project area" to consistently refer to

“project area” throughout the text of NWP 48. We have modified paragraph (d) to refer to “project area” instead of “area.” Paragraph (a) of this NWP states that the NWP does not authorize the cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody. The first PCN threshold in the “Notification” paragraph states that a PCN is required if the proposed NWP activity will include a species that has never been cultivated in the waterbody. To clarify the relationship between the prohibition in paragraph (a) and this PCN threshold, if an operator proposes to cultivate a nonindigenous species in the waterbody that has never been cultivated in that waterbody, an individual permit is required. If the operator wants to continue to grow that nonindigenous species in the waterbody after the 2017 NWP 48 expires, the regulated activities associated with the continued cultivation of that nonindigenous species could be authorized by future versions of NWP 48, if NWP 48 is reissued and the terms and conditions of the future NWP 48s are the same as the 2017 NWP 48.

One commenter referenced NWPs 19 and 27 and their restrictions or prohibitions of impacts to submerged aquatic vegetation and said that similar limitations should be placed on NWP 48. One commenter stated that commercial shellfish aquaculture activities should be separated by submerged aquatic vegetation beds by buffers that are a minimum of 25 feet wide. One commenter said that the Corps has ignored the recommendations of other federal agencies relating to the protection of eelgrass. One commenter stated that this NWP should impose strict limits on these activities.

Nationwide permit 19 prohibits dredging in submerged aquatic vegetation because the dredging may result in water depths in which the submerged aquatic vegetation might take a long time to recover. Nationwide permit 27 authorizes aquatic habitat restoration, enhancement, and establishment activities, as long as those activities result in net increases in aquatic resource functions and services. Nationwide permit 27 prohibits the conversion of tidal wetlands to other uses, including the explicit prohibition against the construction of oyster habitat in vegetated tidal waters, to help ensure that there are not trade-offs that will result in net decreases in aquatic resource functions and services. The terms and conditions of NWP 48 serve a different purpose: to authorize commercial shellfish aquaculture activities that require DA authorization

and result in no more than minimal individual and cumulative adverse environmental effects. In areas where there are concerns about cumulative effects to eelgrass or other species inhabiting areas where commercial shellfish aquaculture activities occur, division engineers can impose regional conditions to restrict or prohibit the use of this NWP.

One commenter stated that commercial shellfish aquaculture activities should be at least 100 feet from spawning areas to protect the species that spawn in those areas. In addition, this commenter said that this NWP should impose time-of-year restrictions to minimize impacts during spawning seasons. One commenter said that NWP 48 should not authorize activities that involve the cultivation of non-native species.

General condition 3, spawning areas, requires NWP activities to avoid, to the maximum extent practicable, being conducted in spawning areas during spawning seasons. We do not believe it is necessary, at a national level, to impose a buffer from spawning areas. Division engineers may impose regional conditions to restrict or prohibit NWP activities during certain periods during a year, such as spawning seasons. District engineers can impose similar conditions on specific NWP activities by adding conditions to the NWP authorization on a case-by-case basis. We do not agree that NWP 48 should be limited to the cultivation of native shellfish species. Five of the nine species of shellfish commonly cultivated on the west coast for commercial production are native species, and the other four species are from Europe or Asia. On the west coast, introduced shellfish species have been cultivated for decades (Ruesink et al. 2006), and are an important commercial commodity that provides more food for people than native oyster species.

One commenter said that the definition of “project area” could be interpreted in two different ways. One interpretation could be that the project area is the area in which an agreement specifically authorizes the operator to conduct aquaculture activities. Another interpretation could be that the project area is the area where a legally binding agreement establishes an enforceable property interest for the operator. This commenter stated that the proposed definition could mean that anyone who has a property interest in tidelands is also authorized to conduct commercial shellfish aquaculture activities. This commenter suggested modifying the definition of project area as: “the area in which the operator conducts

commercial shellfish aquaculture activities, as authorized by a lease or permit or other legally binding agreement.”

The definition of “project area” can be applied under either approach, depending on other laws and regulations that apply to areas that could be used for commercial shellfish aquaculture activities. An operator might not have an enforceable property interest because the state might own the subtidal lands that are needed for commercial shellfish aquaculture activities, but the state might issue a permit that allows that operator to conduct those activities on state submerged lands. In other states, the operator might be granted an enforceable property interest through an easement, lease, deed, contract, or other legally binding agreement to do commercial shellfish aquaculture. For example, in Washington State in 1895, the Bush and Callow Acts allowed nearly 19,000 acres of tidelands to be deeded for private ownership for the specific purpose of commercial shellfish aquaculture (Dumbauld et al. 2009). We believe the proposed definition is needed to provide clarity on the various types of instruments that could be used to establish an enforceable property interest for the grower, and provide flexibility to authorize these activities.

One commenter expressed support for the proposed definition of “project area” by including a lease or permit issued by an appropriate state or local government agency because such a lease or permit establishes a clear use or a clear intention of use of an area. A couple of commenters said that the definition of “project area” should not refer to deeds. One commenter said that in the State of Washington, large areas of tidelands were sold by the state that were made unsuitable for cultivation, but since those sales were made aquaculture practices have changed and those areas can now be used for cultivation.

A deed might be an appropriate instrument for conveying an enforceable property interest, depending on state law. If the tidelands can now be used for commercial shellfish aquaculture, even if they were unsuitable at the time the land was sold, then those activities can be authorized by NWP 48 if they require DA authorization.

One commenter requested that the NWP define “commercial shellfish aquaculture operations” and that the definition must not conflict with a tribe’s treaty-secured rights to take shellfish. Another commenter suggested adding a definition of “existing activity,” and define that term as the

area under cultivation when NWP was first issued in 2007 or where the operator can document that the area has been subject to a regular rotation of cultivation.

We do not think it is necessary to define the term "commercial shellfish aquaculture activity" in the text of the NWP. It is simply the commercial production of shellfish. General condition 17 states that NWP activities cannot cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. If there are disputes between operators with valid commercial shellfish aquaculture permits or leases or other enforceable property interests, and a tribe's rights under one or more treaties to take shellfish, those disputes need to be resolved by the appropriate authorities. It is not necessary to define "existing activity" in NWP 48 because the NWP is because NWP 48 authorizes existing commercial shellfish aquaculture activities as long as they have been conducted in the project area at some time during the past 100 years.

Two commenters voiced their support for the proposed changes to the PCN requirements for this NWP. Several commenters objected to the proposed removal of the PCN threshold for dredge harvesting, tilling, or harrowing in areas inhabited by submerged aquatic vegetation because they said submerged aquatic vegetation is important habitat. One commenter said the proposed removal of this PCN threshold is contrary to the Corps' and the Department of Defense's tribal consultation policies. One commenter said that a PCN should be required for an NWP 48 activity if the proposed activity will include a species that has never been cultivated in the waterbody, or the proposed activity occurs in a project area that has not been used for commercial shellfish aquaculture activities during the past 100 years.

We have determined it is no longer necessary to require PCNs for dredge harvesting, tilling, or harrowing activities in areas inhabited by submerged aquatic vegetation because the submerged aquatic vegetation recovers after those disturbances occur. In a geographic area where dredge harvesting, tilling, or harrowing activities might result in more than minimal adverse effects to submerged aquatic vegetation, the division engineer can add regional conditions to this NWP to require PCNs for those activities. The removal of this PCN requirement is not contrary to Corps tribal consultation policies and the Department of Defense American Indian and Alaska Native

Policy, because those policies do not directly address commercial shellfish aquaculture activities in areas inhabited by submerged aquatic vegetation. In addition, for the 2017 NWPs, Corps districts are consulting with tribes, and those consultations may result in regional conditions that address tribal concerns about impacts to submerged aquatic vegetation. Those consultations may also result in the development of procedures for coordinating NWP 48 PCNs with tribes before making decisions on whether to issue NWP 48 verifications to ensure that NWP 48 activities do not cause more than minimal adverse effects to treaty fishing rights or other tribal rights. A division engineer can impose a regional condition to require PCNs for dredge harvesting, tilling, or harrowing activities in areas inhabited by submerged aquatic vegetation, if he or she determines such a regional condition is necessary to ensure that NWP 48 activities cause no more than minimal individual and cumulative adverse environmental effects, which includes adverse effects to tribal rights (including treaty rights), protected tribal resources, and tribal lands. We have retained the proposed PCN thresholds in the final NWP.

Several commenters objected to the proposed removal of the PCN threshold for activities that involve a change from bottom culture to floating or suspended culture. One commenter stated that floating aquaculture facilities should be required to complete benthic surveys to adequately evaluate impacts to the benthos. Several commenters said that notification to tribes is important to avoid tribal treaty fishing access issues, especially in situations where the operator is proposing to change from bottom culture to suspended culture. These commenters stated that suspended culture can impact tribal net fisheries. One commenter stated that floating aquaculture disrupts the ability of the tribe to exercise their treaty rights as overwater structures interfere with net fisheries and takes away surface water areas of usual and accustomed fishing areas.

Because of the terms and conditions of this NWP, the activities it authorizes will result in no more than minimal individual and cumulative adverse environmental effects. The intertidal and subtidal habitats in which these activities occur are dynamic systems that recover after the short-term disturbances caused by commercial shellfish aquaculture activities and other short-term activities or natural events. The short-term disturbances caused by bottom culture versus floating

culture are not substantive enough to warrant requiring PCNs for those changes in culture methods. Given the dynamic nature of these intertidal and subtidal ecosystems, the ecological benefits of commercial shellfish aquaculture activities, and the minimal disturbances those activities cause, we do not believe it is necessary to require benthic surveys. For the 2017 NWPs, Corps districts have been consulting with tribes to identify regional conditions to protect tribal rights (including treaty rights), protected tribal resources, or tribal lands and ensure compliance with revised general condition 17, tribal rights. District engineers can also develop coordination procedures with interested tribes to ensure that proposed NWP 48 activities do not cause more than minimal adverse effects on tribal rights, protected tribal resources, or tribal lands. If an operator is authorized to conduct a commercial shellfish aquaculture activity because he or she was granted a permit, lease, or other enforceable property interest, and there is a dispute regarding the effects of that activity on net fisheries conducted by tribes, then that dispute needs to be resolved by the appropriate authorities.

Two commenters objected to the proposed change in the PCN threshold from "new project area" to an "area that has not been used for commercial shellfish aquaculture activities during the past 100 years." One commenter said tribes require notification and opportunity to comment on shellfish aquaculture projects as they may have impacts to treaty rights. One commenter said by defining new commercial shellfish aquaculture operations as operations occurring within the footprint of a previously authorized lease site within the past 100 years, almost all leases in North Carolina would be considered "new operations" and potentially require PCNs.

The proposed change in that PCN threshold is consistent with the proposed definition of "new commercial shellfish aquaculture operation." For this NWP, Corps districts can develop coordination procedures with interested tribes to help district engineers determine whether proposed NWP 48 activities comply with general condition 17, tribal rights. Division engineers can add regional conditions to this NWP to require PCNs for NWP 48 activities that have the potential to affect treaty rights, so that districts can review those activities and consult with the tribes that might be affected. The definition of "new commercial shellfish aquaculture activities" and the associated PCN

threshold do not require existing commercial shellfish aquaculture activities to have continuously conducted those activities in the project area for 100 years. Those activities only need to be conducted for some period of time during that 100-year period. Those activities may have been conducted by different operators over time. For example, if a particular tract has been used for commercial shellfish aquaculture during the past 100 years, and that tract has been transferred or leased to a different commercial shellfish aquaculture operator then that tract is not considered a "new" project area. As explained in the proposed rule, for NWP 48 we are including areas that have been fallow for some time as part of the "project area." We have also modified the "Notification" paragraph to state that if the operator will be conducting commercial shellfish aquaculture activities in multiple contiguous project areas, he or she has the option of either submitting one PCN for those contiguous project areas or submitting a separate PCN for each project area. We also made conforming changes to the last paragraph of NWP 48 to reference the project area or a group of contiguous project areas.

Two commenters suggested adding text to paragraph describing the information to be included in an NWP 48 PCN. Their suggested text is: "No more than one pre-construction notification must be submitted for a commercial shellfish operation during the effective term of this permit. The PCN may include all species and culture activities that may occur on the project area during the effective term of the permit. If an operator intends to undertake unanticipated changes to the commercial shellfish operation during this period, and those changes involve activities regulated by the Corps, the operator may contact the Corps district to request a modification of the NWP verification, instead of submitting another PCN. If the Corps does not deny such a modification request within 14 days, it shall be deemed approved." As an alternative to including this text in the terms of NWP 48, these commenters said that there could be a form signed by the operator in which he or she attests that there will be no changes in operation during the five year period this NWP is in effect.

We have added the suggested text to that paragraph, with some modifications. If the operator requests a modification of the NWP verification, he or she must wait for the verification letter from the district engineer. We cannot include a 14-day default approval of a proposed modification.

For example, the proposed modification may trigger a need to re-initiate ESA section 7 consultation if the prior NWP verification was for an activity that required an activity-specific ESA section 7 consultation. The added text to the paragraph discussing the information to be included in a PCN is a more appropriate means of reducing the number of PCNs that need to be submitted during the five year period this NWP is in effect. The development of a new form would likely require review and approval under the Paperwork Reduction Act. The added text to the "Notification" paragraph is a more efficient alternative to developing a new form.

One commenter said that NWP 48 PCNs should include information demonstrating compliance with the limits on impacts to submerged aquatic vegetation, providing mitigation for impacts to submerged aquatic vegetation and other special aquatic sites. One commenter stated that PCNs should include recent surveys identifying eelgrass, macroalgae, and forage fish. Several commenters said that PCNs should be required for each commercial shellfish aquaculture operation (*i.e.*, farm). Several commenters stated that any conversions of natural intertidal areas to intensive aquaculture farms should require PCNs. One commenter remarked that the PCN should state whether the operator will be applying pesticides to manage ghost shrimp or sand shrimp, which pesticides he or she will use, and if the operator will be using neonicotinoids.

As discussed above, we believe that the activities authorized by NWP 48 will have no more than minimal individual and cumulative adverse environmental effects on submerged aquatic vegetation and other special aquatic sites. The only limit to impacts to submerged aquatic vegetation is the 1/2-acre limit that applies to new commercial shellfish aquaculture operations. In areas where a Corps district determines that NWP 48 activities may have more than minimal adverse effects on submerged aquatic vegetation or other special aquatic sites, the district can request that the division engineer add a regional condition to this NWP to require PCNs for activities that have impacts to submerged aquatic vegetation or other special aquatic sites or impose limits on impacts to submerged aquatic vegetation or other special aquatic sites. As stated in paragraph (b)(5) of general condition 32, if a PCN is required then the PCN must include a delineation of special aquatic sites. We do not think it is necessary to require NWP 48 PCNs to include surveys of macroalgae or forage fish.

Only NWP 48 activities that trigger one or both PCN thresholds in the "Notification" paragraph require PCNs. Pre-construction notifications are also required for proposed activities to be conducted by non-federal permittees that trigger the PCN requirements in paragraph (c) of general condition 18, which addresses compliance with the Endangered Species Act. We do not think it is necessary to require PCNs for each farm. If there are concerns within a particular region regarding conversions of intertidal areas to commercial shellfish aquaculture, the division engineer can modify this NWP to add PCN requirements for those activities. The Corps does not have the authority to regulate the use of insecticides and other pesticides, so we cannot modify the PCN requirements to gather that information. The use of insecticides and other pesticides may be regulated under other federal or state laws.

Many commenters said that mitigation should be required for all impacts to submerged aquatic vegetation and other special aquatic sites. Several commenters asserted that compensatory mitigation should be required for conversions of intertidal and subtidal areas. Several commenters stated that if the NWP 48 activity does not require a PCN, then compensatory mitigation cannot be required. One commenter said that compensatory mitigation should be required for the following activities: Removal of embedded natural rocks, shells, et cetera; removal or relocation of aquatic life; clearing native aquatic vegetation; grading, filling or excavation of tidelands; adding gravel or shell to make tidelands suitable for aquaculture; operations near intertidal forage fish spawning sites; unnaturally high densities of filtering bivalves; plastic and canopy pollution from aquaculture gear; and the effects of periodic substrate harvest. Many commenters indicated that commercial shellfish aquaculture activities have adverse effects on aquatic ecosystems because they use large amounts of plastic. These plastics include PVC tubes, poly lines, and synthetic canopy nets. One commenter said that plastics pose threats to human and aquatic life. One commenter stated that the Corps failed to adequately describe the possible direct, indirect, and cumulative effects caused by commercial shellfish aquaculture activities or how Corps district might require mitigation measures to ensure that the adverse environmental effects of these activities are no more than minimal.

Commercial shellfish aquaculture activities are compatible with

submerged aquatic vegetation and other special aquatic sites, because those special aquatic sites quickly recover after disturbances caused by those aquaculture activities. Commercial shellfish aquaculture activities also provide important ecological functions and services. Therefore, as a general rule, we do not believe that these activities should require compensatory mitigation. We agree that if an NWP 48 activity does not require a PCN and the project proponent does not submit a voluntary request for an NWP verification, then the district engineer cannot require compensatory mitigation. None of the activities listed by these commenters in the preceding paragraph would normally result in a compensatory mitigation requirement, primarily because they are unlikely to cause resource losses that would result in more than minimal adverse environmental effects. Trash, garbage, and plastic wastes are not considered fill material regulated under section 404 of the Clean Water Act (see 33 CFR 323.2(e)(3), which excludes trash and garbage from the definition of "fill material"). As discussed above, we believe that the adverse effects of commercial shellfish aquaculture activities that comply with the terms and conditions of this NWP, including regional conditions imposed by division engineers and activity-specific conditions imposed by district engineers, will result in only minimal individual and cumulative adverse environmental effects.

Many commenters said that the terms and conditions of NWP 48 are not sufficient to protect species listed under the Endangered Species Act. Two commenters said that for NWP 48 the Corps must conduct ESA section 7 consultation and essential fish habitat consultation. One commenter stated that the Corps does not have enough staff to monitor compliance with those terms and conditions.

All activities authorized by this NWP must comply with general condition 18, endangered species. Paragraph (c) of general condition 18 requires that a non-federal permittee submit a PCN if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat. Corps districts will conduct ESA section 7 consultation for any activity proposed by a non-federal applicant that may affect listed species or designated critical habitat. The Corps district may conduct either formal or informal section 7 consultations, depending on whether there will be adverse effects to listed species or designated critical

habitat. Corps districts may also conduct regional programmatic ESA section 7 consultations, if appropriate. For proposed NWP 48 activities that may adversely affect essential fish habitat, district engineers will conduct essential fish habitat consultation with the appropriate office of the National Marine Fisheries Service. District engineers may also conduct regional programmatic essential fish habitat consultations. Corps districts have sufficient staff and other resources to monitor compliance with the terms and conditions of NWP 48 and the other NWPs.

Several commenters stated that commercial shellfish aquaculture activities pose navigation hazards because netting can become caught on boat props and wind surfers, limiting the use of waters of safe recreation and navigation. Two commenters said that the Corps should coordinate with Puget Sound recovery goals and should use the Puget Sound model to identify where impacts from NWP 48 activities are likely to occur and may result in more than minimal individual and cumulative adverse environmental effects.

All NWP 48 activities must comply with general condition 1, navigation. The U.S. Coast Guard may require the operator to install aids to navigation to ensure that boaters and recreational users of the waterbody do not accidentally encroach on the structures in navigable used for the commercial shellfish aquaculture activities. Note 1 recommends that the permittee contact the U.S. Coast Guard. The locations for NWP 48 activities will be identified through permits or leases or other instruments or documents that establish enforceable property interests for the operators. Corps participation in Puget Sound recovery goals is more appropriately conducted at the Corps district level, in coordination with the Corps division office, rather than a rulemaking effort by Corps Headquarters (*i.e.*, the reissuance of this NWP). Any regional conditions added to NWP 48 to support Puget Sound recovery goals must be approved by the division engineer.

Several commenters said that the draft decision document does not comply with the requirements of the National Environmental Policy Act (NEPA). Several commenters asserted that the reissuance of NWP 48 requires an environmental impact statement. Several commenters said that the draft decision document for NWP 48 did not provide sufficient information on cumulative impacts and the potential effects of NWP 48 activities, and

insufficient analysis of information to support a no more than minimal adverse environmental effects determination. Commenters also stated that the decision document did not include monitoring requirements. One commenter noted that the draft decision document stated that NWP 48 would result in impacts to approximately 56,250 acres of waters of the United States, including wetlands, and no compensatory mitigation would be required to offset those impacts. Several commenters said that the Corps did not present any peer reviewed scientific studies that have examined the effects of commercial shellfish aquaculture on natural shorelines, aquatic species, and birds. One commenter said that the Corps made no effort to provide information to the public on impacts of past NWP 48 activities, and there is no system in place to monitor and evaluate these impacts.

We believe that the final decision document fully addresses the requirements of NEPA, the 404(b)(1) Guidelines, and the Corps' public interest review. We prepared an environmental assessment with a finding of no significant impact to fulfill NEPA requirements. Therefore, an environmental impact statement is not required for the reissuance of this NWP. In addition, we determined that the reissuance of this NWP complies with the 404(b)(1) Guidelines. We also determined that the reissuance of this NWP, with the modifications discussed above, is not contrary to the public interest.

The NWP does not include explicit monitoring requirements. District engineers can conduct compliance inspections on NWP 48 activities, to ensure that the operator is complying with all applicable terms and conditions of this NWP, including any regional conditions imposed by the division engineer and activity-specific conditions imposed by the district engineer. If the district engineer determines that the permittee is not complying with those terms and conditions, he or she will take appropriate action. While the decision document states that we estimate that NWP 48 activities will impact approximately 56,250 acres of jurisdictional waters and wetlands during the 5-year period this NWP is in effect, it is important to remember that the vast majority of activities authorized by this NWP are on-going recurring activities in designated project areas. Many of these activities have been conducted in these project areas for decades. It is also important to understand that these activities do not

result in losses of jurisdictional waters and wetlands and that their impacts are temporary. The estuarine and marine waters affected by these activities recover after the disturbances caused by shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Those temporary impacts and the recovery of ecosystem functions and services results in no losses that require compensatory mitigation.

In this final rule, as well as the decision document, we discuss the effects of commercial shellfish aquaculture on natural shorelines, aquatic species, and birds. The Corps is not required to provide the public with information on the past use of NWP 48. The NEPA cumulative effects analysis in the decision document for this NWP includes past commercial shellfish aquaculture activities as the present effects of past actions.

Several tribes requested the development of regional conditions to address tribal concerns about NWP 48 activities. One commenter said that regional conditions must be consistent with treaty-reserved rights and support protection of nearshore habitat. One commenter said that NWP 48 is used a lot in some areas of the country, and that commenter believes that high usage results in more than minimal cumulative adverse environmental effects. One commenter recommended transferring the responsibility for processing NWP 48 PCNs for commercial shellfish aquaculture activities in Washington State to either North Pacific Division or Corps Headquarters.

The development of regional conditions is achieved through efforts conducted by the division engineer and the Corps district, and the approval of the regional conditions is made under the division engineer's authority. For the 2017 NWPs, Corps districts conducted consultation with tribes to develop regional conditions for this NWP and other NWPs. Those regional conditions can help ensure compliance with general condition 17, tribal rights, so that no NWP 48 activity will cause more than minimal adverse effects on reserved tribal rights (including treaty rights), protected tribal resources, or tribal lands. Division engineers can also modify, suspend, or revoke this NWP in geographic areas where there may be more than minimal individual and cumulative adverse environmental effects. Examples of such geographic areas include specific waterbodies, watersheds, ecoregions, or counties. Review of NWP 48 PCNs is the responsibility of Corps districts, and

Corps divisions have oversight over their districts.

This NWP is reissued with the modifications discussed above.

NWP 49. *Coal Remining Activities.* We did not propose any changes to this NWP. One commenter said this NWP should not be reissued. A commenter suggested that aquatic resources within previously mined areas should not be considered to be subject to Clean Water Act jurisdiction. One commenter recommended encouraging NWP 49 activities by allowing the permittee to use the net increases in aquatic resource functions to produce compensatory mitigation credits for sale or transfer to other permittees. One commenter said that a watershed approach should be used to quantify ecological lift resulting from NWP 49 activities.

The purpose of this NWP is to provide general permit authorization for the remining of an unreclaimed coal mining site. Requiring that these activities result in net increases in aquatic resource functions will help restore unreclaimed areas that might otherwise not be restored. The restoration of unreclaimed coal mining areas is one of the most effective ways to reverse degraded water quality in a watershed. District engineers will determine on a case-by-case basis using applicable regulations and guidance whether aquatic resources on previously mined areas are waters of the United States and therefore subject to the Clean Water Act. A former coal mining site might be a suitable mitigation bank or in-lieu fee project if the sponsor obtains the required approvals from the Corps in accordance with the procedures in 33 CFR 332.8. Rapid ecological assessment tools, or other tools, can be used to determine whether a proposed NWP 49 activity will result in net increases in aquatic resource functions. Such tools may include watershed considerations in determining increases in specific ecological functions or overall ecological condition.

One commenter asked if the net increase in aquatic resource functions applies to the new mining activities or collectively to the new mining and the remining activities. Several commenters requested clarification of the requirement that the total area disturbed by new mining must not exceed 40 percent of the total acreage covered by both the remined area and the area needed to do the reclamation of the previously mined area. One commenter said that the 40 percent requirement should be removed from this NWP.

The overall coal remining activity, which consists of the remining and reclamation activities, plus the new

mining activities, must result in the required net increases in aquatic resource functions. The text of the NWP states that the "total area disturbed by new mining must not exceed 40 percent of the total acreage covered by both the remined area and the additional area necessary to carry out the reclamation of the previously mined area." For examples illustrating the application of the 40 percent requirement, please see the preamble discussion for NWP 49 in the 2012 final NWPs, which were published in the February 21, 2012, issue of the *Federal Register* (77 FR 10233).

This NWP is reissued without change.

NWP 50. *Underground Coal Mining Activities.* We did not propose any changes to this NWP, other than to clarify that any loss of stream bed applies to the 1/2-acre limit. Several commenters objected to the reissuance of this NWP, stating that these activities should require individual permits because they result in more than minimal adverse environmental effects.

The 1/2-acre limit for this NWP, as well as the requirement that all activities require PCNs and written verifications from district engineers, will ensure that this NWP only authorizes activities that result in no more than minimal adverse environmental effects, individually and cumulatively. If the district engineer reviews the PCN and determines that the proposed activity, after considering any mitigation proposal submitted by the applicant, will result in more than minimal adverse environmental effects, he or she will assert discretionary authority and require an individual permit for that activity.

This NWP is reissued as proposed.

NWP 51. *Land-Based Renewable Energy Generation Facilities.* We proposed to split Note 1 of the 2012 NWP 51 into two notes. We also sought comments on changing the PCN threshold in this NWP, which currently requires PCNs for all authorized activities.

One commenter said that these activities should require individual permits, instead of being authorized by an NWP. One commenter recommended adding terms to this NWP to authorize temporary structures, fills, and work that are necessary to construct, expand, or modify land-based renewable energy generation facilities. One commenter stated that this NWP should not authorize facilities in channel migration zones and floodplains where there will be direct and indirect impacts to special status species. Several commenters said that Note 1 should be modified to include linear transportation projects

The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects.

The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre.

This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction-notification to the district engineer prior to commencing the activity. (See general condition 32.) If reclamation is required by other statutes, then a copy of the final reclamation plan must be submitted with the pre-construction notification.

(Authorities: Sections 10 and 404)

45. *Repair of Uplands Damaged by Discrete Events.* This NWP authorizes discharges of dredged or fill material, including dredging or excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by storms, floods, or other discrete events. This NWP authorizes bank stabilization to protect the restored uplands. The restoration of the damaged areas, including any bank stabilization, must not exceed the contours, or ordinary high water mark, that existed before the damage occurred. The district engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this NWP. The work must commence, or be under contract to commence, within two years of the date of damage, unless this condition is waived in writing by the district engineer. This NWP cannot be used to reclaim lands lost to normal erosion processes over an extended period.

This NWP does not authorize beach restoration or nourishment.

Minor dredging is limited to the amount necessary to restore the damaged upland area and should not significantly alter the pre-existing bottom contours of the waterbody.

Notification: The permittee must submit a pre-construction notification to the district engineer (see general condition 32) within 12 months of the date of the damage; for major storms, floods, or other discrete events, the district engineer may waive the 12-month limit for submitting a pre-construction notification if the

permittee can demonstrate funding, contract, or other similar delays. The pre-construction notification must include documentation, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration.

(Authority: Sections 10 and 404)

Note: The uplands themselves that are lost as a result of a storm, flood, or other discrete event can be replaced without a section 404 permit, if the uplands are restored to the ordinary high water mark (in non-tidal waters) or high tide line (in tidal waters). (See also 33 CFR 328.5.) This NWP authorizes discharges of dredged or fill material into waters of the United States associated with the restoration of uplands.

46. *Discharges in Ditches.* Discharges of dredged or fill material into non-tidal ditches that are: (1) Constructed in uplands, (2) receive water from an area determined to be a water of the United States prior to the construction of the ditch, (3) divert water to an area determined to be a water of the United States prior to the construction of the ditch, and (4) determined to be waters of the United States. The discharge must not cause the loss of greater than one acre of waters of the United States.

This NWP does not authorize discharges of dredged or fill material into ditches constructed in streams or other waters of the United States, or in streams that have been relocated in uplands. This NWP does not authorize discharges of dredged or fill material that increase the capacity of the ditch and drain those areas determined to be waters of the United States prior to construction of the ditch.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.)

(Authority: Section 404)

47. [Reserved]

48. *Commercial Shellfish Aquaculture Activities.* Discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States necessary for new and continuing commercial shellfish aquaculture operations in authorized project areas. For the purposes of this NWP, the project area is the area in which the operator is authorized to conduct commercial shellfish aquaculture activities, as identified through a lease or permit issued by an appropriate state or local government agency, a treaty, or any easement, lease, deed, contract, or other legally binding agreement that establishes an enforceable property

interest for the operator. A "new commercial shellfish aquaculture operation" is an operation in a project area where commercial shellfish aquaculture activities have not been conducted during the past 100 years.

This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures into navigable waters of the United States. This NWP also authorizes discharges of dredged or fill material into waters of the United States necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked.

This NWP does not authorize:

(a) The cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody;

(b) The cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990;

(c) Attendant features such as docks, piers, boat ramps, stockpiles, or staging areas, or the deposition of shell material back into waters of the United States as waste; or

(d) Activities that directly affect more than 1/2-acre of submerged aquatic vegetation beds in project areas that have not been used for commercial shellfish aquaculture activities during the past 100 years.

Notification: The permittee must submit a pre-construction notification to the district engineer if: (1) The activity will include a species that has never been cultivated in the waterbody; or (2) the activity occurs in a project area that has not been used for commercial shellfish aquaculture activities during the past 100 years. If the operator will be conducting commercial shellfish aquaculture activities in multiple contiguous project areas, he or she can either submit one PCN for those contiguous project areas or submit a separate PCN for each project area. (See general condition 32.)

In addition to the information required by paragraph (b) of general condition 32, the pre-construction notification must also include the following information: (1) A map showing the boundaries of the project area(s), with latitude and longitude coordinates for each corner of each project area; (2) the name(s) of the species that will be cultivated during the period this NWP is in effect; (3) whether canopy predator nets will be used; (4) whether suspended cultivation techniques will be used; and (5) general water depths in the project area(s) (a detailed survey is not required). No

more than one pre-construction notification per project area or group of contiguous project areas should be submitted for the commercial shellfish operation during the effective period of this NWP. The pre-construction notification should describe all species and culture activities the operator expects to undertake in the project area or group of contiguous project areas during the effective period of this NWP. If an operator intends to undertake unanticipated changes to the commercial shellfish aquaculture operation during the effective period of this NWP, and those changes require Department of the Army authorization, the operator must contact the district engineer to request a modification of the NWP verification; a new pre-construction notification does not need to be submitted.

(Authorities: Sections 10 and 404)

Note 1: The permittee should notify the applicable U.S. Coast Guard office regarding the project.

Note 2: To prevent introduction of aquatic nuisance species, no material that has been taken from a different waterbody may be reused in the current project area, unless it has been treated in accordance with the applicable regional aquatic nuisance species management plan.

Note 3: The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 defines "aquatic nuisance species" as "a nonindigenous species that threatens the diversity or abundance of native species or the ecological stability of infested waters, or commercial, agricultural, aquacultural, or recreational activities dependent on such waters."

49. Coal Remining Activities. Discharges of dredged or fill material into non-tidal waters of the United States associated with the remining and reclamation of lands that were previously mined for coal. The activities must already be authorized, or they must currently be in process as part of an integrated permit processing procedure, by the Department of the Interior Office of Surface Mining Reclamation and Enforcement, or by states with approved programs under Title IV or Title V of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Areas previously mined include reclaimed mine sites, abandoned mine land areas, or lands under bond forfeiture contracts.

As part of the project, the permittee may conduct new coal mining activities in conjunction with the remining activities when he or she clearly demonstrates to the district engineer that the overall mining plan will result

in a net increase in aquatic resource functions. The Corps will consider the SMCRA agency's decision regarding the amount of currently undisturbed adjacent lands needed to facilitate the remining and reclamation of the previously mined area. The total area disturbed by new mining must not exceed 40 percent of the total acreage covered by both the remined area and the additional area necessary to carry out the reclamation of the previously mined area.

Notification: The permittee must submit a pre-construction notification and a document describing how the overall mining plan will result in a net increase in aquatic resource functions to the district engineer and receive written authorization prior to commencing the activity. (See general condition 32.)

(Authorities: Sections 10 and 404)

50. Underground Coal Mining Activities. Discharges of dredged or fill material into non-tidal waters of the United States associated with underground coal mining and reclamation operations provided the activities are authorized, or are currently being processed as part of an integrated permit processing procedure, by the Department of the Interior, Office of Surface Mining Reclamation and Enforcement, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize coal preparation and processing activities outside of the mine site.

Notification: The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 32.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification.

(Authorities: Sections 10 and 404)

Note: Coal preparation and processing activities outside of the mine site may be authorized by NWP 21.

51. Land-Based Renewable Energy Generation Facilities. Discharges of dredged or fill material into non-tidal waters of the United States for the construction, expansion, or modification of land-based renewable energy production facilities, including attendant features. Such facilities include infrastructure to collect solar (concentrating solar power and photovoltaic), wind, biomass, or geothermal energy. Attendant features may include, but are not limited to roads, parking lots, and stormwater management facilities within the land-based renewable energy generation facility.

The discharge must not cause the loss of greater than 1/2-acre of non-tidal waters of the United States. The discharge must not cause the loss of more than 300 linear feet of stream bed, unless for intermittent and ephemeral stream beds the district engineer waives the 300 linear foot limit by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects. The loss of stream bed plus any other losses of jurisdictional wetlands and waters caused by the NWP activity cannot exceed 1/2-acre. This NWP does not authorize discharges into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the discharge results in the loss of greater than 1/10-acre of waters of the United States. (See general condition 32.)

(Authorities: Sections 10 and 404)

Note 1: Utility lines constructed to transfer the energy from the land-based renewable energy generation facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate single and complete linear project. Those utility lines may be authorized by NWP 12 or another Department of the Army authorization.

Note 2: If the only activities associated with the construction, expansion, or modification of a land-based renewable energy generation facility that require Department of the Army authorization are discharges of dredged or fill material into waters of the United States to construct, maintain, repair, and/or remove utility lines and/or road crossings, then NWP 12 and/or NWP 14 shall be used if those activities meet the terms and conditions of NWPs 12 and 14, including any applicable regional conditions and any case-specific conditions imposed by the district engineer.

54. *Living Shorelines.* Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction and maintenance of living shorelines to stabilize banks and shores in coastal waters, which includes the Great Lakes, along shores with small fetch and gentle slopes that are subject to low- to mid-energy waves. A living shoreline has a footprint that is made up mostly of native material. It incorporates vegetation or other living, natural "soft" elements alone or in combination with some type of harder shoreline structure (e.g., oyster or mussel reefs or rock sills) for added protection and stability. Living shorelines should maintain the natural continuity of the land-water interface, and retain or enhance shoreline ecological processes. Living shorelines must have a substantial biological component, either tidal or lacustrine fringe wetlands or oyster or mussel reef structures. The following conditions must be met:

(a) The structures and fill area, including sand fills, sills, breakwaters, or reefs, cannot extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes, unless the district engineer waives this criterion by making a written determination concluding that the activity will result in no more than minimal adverse environmental effects;

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the activity will result in no more than minimal adverse environmental effects;

(c) Coir logs, coir mats, stone, native oyster shell, native wood debris, and other structural materials must be adequately anchored, of sufficient weight, or installed in a manner that prevents relocation in most wave action or water flow conditions, except for extremely severe storms;

(d) For living shorelines consisting of tidal or lacustrine fringe wetlands, native plants appropriate for current site conditions, including salinity, must be used if the site is planted by the permittee;

(e) Discharges of dredged or fill material into waters of the United States, and oyster or mussel reef structures in navigable waters, must be the minimum necessary for the establishment and maintenance of the living shoreline;

(f) If sills, breakwaters, or other structures must be constructed to protect fringe wetlands for the living shoreline, those structures must be the

minimum size necessary to protect those fringe wetlands;

(g) The activity must be designed, constructed, and maintained so that it has no more than minimal adverse effects on water movement between the waterbody and the shore and the movement of aquatic organisms between the waterbody and the shore; and

(h) The living shoreline must be properly maintained, which may require periodic repair of sills, breakwaters, or reefs, or replacing sand fills after severe storms or erosion events. Vegetation may be replanted to maintain the living shoreline. This NWP authorizes those maintenance and repair activities, including any minor deviations necessary to address changing environmental conditions.

This NWP does not authorize beach nourishment or land reclamation activities.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the construction of the living shoreline. (See general condition 32.) The pre-construction notification must include a delineation of special aquatic sites (see paragraph (b)(4) of general condition 32). Pre-construction notification is not required for maintenance and repair activities for living shorelines unless required by applicable NWP general conditions or regional conditions.

(Authorities: Sections 10 and 404)

Note: In waters outside of coastal waters, nature-based bank stabilization techniques, such as bioengineering and vegetative stabilization, may be authorized by NWP 13.

C. Nationwide Permit General Conditions

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as applicable, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP. Every person who may wish to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR 330.1 through 330.6 apply to every NWP authorization. Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

1. *Navigation.* (a) No activity may cause more than a minimal adverse effect on navigation.

(b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. *Aquatic Life Movements.* No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. If a bottomless culvert cannot be used, then the crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

3. *Spawning Areas.* Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

4. *Migratory Bird Breeding Areas.* Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

5. *Shellfish Beds.* No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWPs 4 and 48, or is a shellfish seeding or habitat restoration activity authorized by NWP 27.

6. *Suitable Material.* 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 (see section 307 of the Clean Water Act).

7. *Water Supply Intakes.* 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.

8. *Adverse Effects From Impoundments.* 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.

9. *Management of Water Flows.* To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization, storm water management activities, and temporary and permanent road crossings, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (e.g., stream restoration or relocation activities).

10. *Fills Within 100-Year Floodplains.* The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

11. *Equipment.* Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance.

12. *Soil Erosion and Sediment Controls.* Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow, or during low tides.

13. *Removal of Temporary Fills.* Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

14. *Proper Maintenance.* 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.

15. *Single and Complete Project.* 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.

16. *Wild and Scenic Rivers.* (a) No NWP activity may 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, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status.

(b) If a proposed NWP activity 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 permittee must submit a pre-construction notification (see general condition 32). The district engineer will coordinate the PCN with the Federal agency with direct management responsibility for that river. The permittee shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

(c) Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service). Information on these rivers is also available at: <http://www.rivers.gov/>.

17. *Tribal Rights.* No NWP activity may cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands.

18. *Endangered Species.* (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation,

as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which "may affect" a listed species or critical habitat, unless ESA section 7 consultation addressing the effects of the proposed activity has been completed. Direct effects are the immediate effects on listed species and critical habitat caused by the NWP activity. Indirect effects are those effects on listed species and critical habitat that are caused by the NWP activity and are later in time, but still are reasonably certain to occur.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. If pre-construction notification is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under section 7 of the ESA.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that might be affected by the proposed activity or that utilize the designated critical habitat that might be affected by the proposed activity. The district engineer will determine whether the proposed activity "may affect" or will have "no effect" to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the activity, and has so notified the Corps,

the applicant shall not begin work until the Corps has provided notification that the proposed activity will have "no effect" on listed species or critical habitat, or until ESA section 7 consultation has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(d) As a result of formal or informal consultation with the FWS or NMFS the district engineer may add species-specific permit conditions to the NWP.

(e) Authorization of an activity by an NWP does not authorize the "take" of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the FWS or the NMFS, the Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word "harm" in the definition of "take" means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

(f) If the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed NWP activity, the non-federal applicant should provide a copy of that ESA section 10(a)(1)(B) permit with the PCN required by paragraph (c) of this general condition. The district engineer will coordinate with the agency that issued the ESA section 10(a)(1)(B) permit to determine whether the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation conducted for the ESA section 10(a)(1)(B) permit. If that coordination results in concurrence from the agency that the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation for the ESA section 10(a)(1)(B) permit, the district engineer does not need to conduct a separate ESA section 7 consultation for the proposed NWP activity. The district engineer will notify the non-federal applicant within 45 days of receipt of a complete pre-construction notification whether the ESA section 10(a)(1)(B)

permit covers the proposed NWP activity or whether additional ESA section 7 consultation is required.

(g) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the FWS and NMFS or their world wide Web pages at <http://www.fws.gov/> or <http://www.fws.gov/ipac> and <http://www.nmfs.noaa.gov/pr/species/esa/> respectively.

19. *Migratory Birds and Bald and Golden Eagles.* The permittee is responsible for ensuring their action complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting appropriate local office of the U.S. Fish and Wildlife Service to determine applicable measures to reduce impacts to migratory birds or eagles, including whether "incidental take" permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.

20. *Historic Properties.* (a) In cases where the district engineer determines that the activity may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of section 106 of the National Historic Preservation Act. If pre-construction notification is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation is not submitted, then additional consultation under section 106 may be necessary. The respective federal agency is responsible for fulfilling its obligation to comply with section 106.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties might have the potential to be affected by the

proposed NWP activity or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of, or potential for, the presence of historic properties can be sought from the State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted in the PCN and these identification efforts, the district engineer shall determine whether the proposed NWP activity has the potential to cause effects on the historic properties. Section 106 consultation is not required when the district engineer determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of section 106 of the NHPA: no historic properties affected, no adverse effect, or adverse effect. Where the non-Federal applicant has identified historic properties on which the activity might have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that NHPA section 106 consultation has been completed.

(d) For non-federal permittees, the district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. If NHPA section 106 consultation is required, the district engineer will notify the non-Federal applicant that he or she cannot begin the activity until section 106 consultation is completed. If the non-

Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that section 110k of the NHPA (54 U.S.C. 306113) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

21. *Discovery of Previously Unknown Remains and Artifacts.* If you discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by this permit, you must immediately notify the district engineer of what you have found, and to the maximum extent practicable, avoid construction activities that may affect the remains and artifacts until the required coordination has been completed. The district engineer will initiate the Federal, Tribal, and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

22. *Designated Critical Resource Waters.* Critical resource waters include, NOAA-managed marine sanctuaries and marine monuments, and National Estuarine Research Reserves. The district engineer may designate, after notice and opportunity for public comment, additional waters officially designated by a state as having particular environmental or ecological significance, such as outstanding national resource waters or state natural heritage sites. The district engineer may

also designate additional critical resource waters after notice and opportunity for public comment.

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, and 52 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and 54, notification is required in accordance with general condition 32, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

23. *Mitigation.* The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (*i.e.*, on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed $\frac{1}{10}$ -acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. For wetland losses of $\frac{1}{10}$ -acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects.

(d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation to ensure that the activity results in no

more than minimal adverse environmental effects. Compensatory mitigation for losses of streams should be provided, if practicable, through stream rehabilitation, enhancement, or preservation, since streams are difficult-to-replace resources (see 33 CFR 332.3(e)(3)).

(e) Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (*e.g.*, conservation easements) of riparian areas next to open waters. In some cases, the restoration or maintenance/protection of riparian areas may be the only compensatory mitigation required. Restored riparian areas should consist of native species. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to restore or maintain/protect a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or maintaining/protecting a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (*e.g.*, riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of minimization or compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(f) Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in no more than minimal adverse environmental effects. For the NWPs, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2) and (3)). However, if an appropriate number and type of mitigation bank or in-lieu credits are not available at the time the PCN is submitted to the district engineer, the

district engineer may approve the use of permittee-responsible mitigation.

(2) The amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.1(e)(3)). (See also 33 CFR 332.3(f)).

(3) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, aquatic resource restoration should be the first compensatory mitigation option considered for permittee-responsible mitigation.

(4) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)).

(5) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan only needs to address the baseline conditions at the impact site and the number of credits to be provided.

(6) Compensatory mitigation requirements (e.g., resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan (see 33 CFR 332.4(c)(1)(ii)).

(g) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of 1/2-acre, it cannot be used to authorize any NWP activity resulting in the loss of greater than 1/2-acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that an NWP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the NWPs.

(h) Permittees may propose the use of mitigation banks, in-lieu fee programs, or permittee-responsible mitigation. When developing a compensatory mitigation proposal, the permittee must consider appropriate and practicable options consistent with the framework at 33 CFR 332.3(b). For activities resulting in the loss of marine or estuarine resources, permittee-responsible mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee-responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.

24. Safety of Impoundment Structures. To ensure that all impoundment structures are safely designed, the district engineer may require non-Federal applicants to demonstrate that the structures comply with established state dam safety criteria or have been designed by qualified persons. The district engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

25. Water Quality. Where States and authorized Tribes, or EPA where applicable, have not previously certified compliance of an NWP with CWA section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The district engineer or State or Tribe may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

26. Coastal Zone Management. In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence

must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). The district engineer or a State may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

27. Regional and Case-By-Case Conditions. The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

28. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/3-acre.

29. Transfer of Nationwide Permit Verifications. If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

(Transferee)

(Date)

30. Compliance Certification. Each permittee who receives an NWP verification letter from the Corps must provide a signed certification documenting completion of the authorized activity and implementation of any required compensatory mitigation. The success of any required permittee-responsible mitigation,

including the achievement of ecological performance standards, will be addressed separately by the district engineer. The Corps will provide the permittee the certification document with the NWP verification letter. The certification document will include:

(a) A statement that the authorized activity was done in accordance with the NWP authorization, including any general, regional, or activity-specific conditions;

(b) A statement that the implementation of any required compensatory mitigation was completed in accordance with the permit conditions. If credits from a mitigation bank or in-lieu fee program are used to satisfy the compensatory mitigation requirements, the certification must include the documentation required by 33 CFR 332.3(l)(3) to confirm that the permittee secured the appropriate number and resource type of credits; and

(c) The signature of the permittee certifying the completion of the activity and mitigation.

The completed certification document must be submitted to the district engineer within 30 days of completion of the authorized activity or the implementation of any required compensatory mitigation, whichever occurs later.

31. *Activities Affecting Structures or Works Built by the United States.* If an NWP activity also requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers (USACE) federally authorized Civil Works project (a "USACE project"), the prospective permittee must submit a pre-construction notification. See paragraph (b)(10) of general condition 32. An activity that requires section 408 permission is not authorized by NWP until the appropriate Corps office issues the section 408 permission to alter, occupy, or use the USACE project, and the district engineer issues a written NWP verification.

32. *Pre-Construction Notification.* (a) *Timing.* Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, if the PCN is determined to be incomplete, notify the prospective permittee within that 30 day period to request the additional information necessary to make the PCN complete. The request must specify the information needed to

make the PCN complete. As a general rule, district engineers will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. **The prospective permittee shall not begin the activity until either:**

(1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or

(2) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or are in the vicinity of the activity, or to notify the Corps pursuant to general condition 20 that the activity might have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is "no effect" on listed species or "no potential to cause effects" on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)) has been completed. Also, work cannot begin under NWPs 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) *Contents of Pre-Construction Notification:* The PCN must be in writing and include the following information:

- (1) Name, address and telephone numbers of the prospective permittee;
- (2) Location of the proposed activity;

(3) Identify the specific NWP or NWP(s) the prospective permittee wants to use to authorize the proposed activity;

(4) A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; 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, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures. For single and complete linear projects, the PCN must include the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (e.g., a conceptual plan), but do not need to be detailed engineering plans);

(5) The PCN must include a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial, intermittent, and ephemeral streams, on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters on the project site, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many wetlands, other special aquatic sites, and other waters. Furthermore, the 45 day period will not start until the delineation has

been submitted to or completed by the Corps, as appropriate;

(6) If the proposed activity will result in the loss of greater than ¼-acre of wetlands and a PCN is required, the prospective permittee must submit a statement describing how the mitigation 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.

(7) For non-Federal permittees, if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat, the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed activity or utilize the designated critical habitat that might be affected by the proposed activity. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with the Endangered Species Act;

(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 have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with section 106 of the National Historic Preservation Act;

(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" (see general condition 16); and

(10) For an activity that requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers federally authorized civil works project, the pre-construction notification must include a statement confirming that the project proponent has submitted a written request for section 408

permission from the Corps office having jurisdiction over that USACE project.

(c) *Form of Pre-Construction Notification:* The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it is an NWP PCN and must include all of the applicable information required in paragraphs (b)(1) through (10) of this general condition. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals.

(d) *Agency Coordination:* (1) 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.

(2) Agency coordination is required for: (i) All NWP activities that require pre-construction notification and result in the loss of greater than ½-acre of waters of the United States; (ii) NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 activities that require pre-construction notification and will result in the loss of greater than 300 linear feet of stream bed; (iii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iv) NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.

(3) When agency coordination is required, the district engineer will immediately provide (e.g., via email, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (FWS, state natural resource or water quality agency, EPA, and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will have 10 calendar days from the date the material is transmitted to notify the district engineer via telephone, facsimile transmission, or email that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse environmental effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district

engineer will fully consider agency comments received within the specified time frame concerning the proposed activity's compliance with the terms and conditions of the NWPs, including the need for mitigation to ensure the net adverse environmental effects of the proposed activity are no more than minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(4) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

(5) Applicants are encouraged to provide the Corps with either electronic files or multiple copies of pre-construction notifications to expedite agency coordination.

D. District Engineer's Decision

1. In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If a project proponent requests authorization by a specific NWP, the district engineer should issue the NWP verification for that activity if it meets the terms and conditions of that NWP, unless he or she determines, after considering mitigation, that the proposed activity will result in more than minimal individual and cumulative adverse effects on the aquatic environment and other aspects of the public interest and exercises discretionary authority to require an individual permit for the proposed activity. For a linear project, this determination will include an evaluation of the individual crossings of waters of the United States to determine whether they individually satisfy the

Exhibit 2

1 **SHORELINES HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 PATRICK TOWNSEND, KATHRYN
4 TOWNSEND, and ANNEKE JENSEN,

5 Petitioners,

6 v.

7 THURSTON COUNTY, and
8 CHANGMOOK SOHN,

9 Respondents.

SHB No. 17-009

ORDER GRANTING MOTION TO
DISMISS FOR LACK OF JURISDICTION

10 On June 7, 2017, Petitioners Patrick Townsend, Kathryn Townsend, and Anneke Jensen
11 filed a petition with the Shorelines Hearings Board (Board) for review of a Shoreline Substantial
12 Development Permit (SSDP) issued by Thurston County (County) for Respondent Changmook
13 Sohn's commercial geoduck farm.

14 The County and Mr. Sohn filed separate motions to dismiss arguing that the Board lacks
15 jurisdiction because Petitioners failed to timely serve the County and Mr. Sohn. Petitioners
16 oppose the motions.

17 The Board considering this matter was comprised of Board Chair Thomas C. Morrill,
18 presiding and Members Joan M. Marchioro, Kay M. Brown, Grant Beck, Rob Gelder, and Allen
19 Estep. Deputy Prosecuting Attorney Donald R. Peters appeared on behalf of the County.
20 Attorneys Samuel W. Plauche and Jesse G. DeNike appeared on behalf of Mr. Sohn. Attorney
21 Thane Tienson appeared on behalf of the Petitioners.

In ruling on the motion to dismiss, the Board considered the following material:

1. Petition for Review, with Exhibits A-D;

- 1 2. Thurston County’s Motion to Dismiss for Lack of Jurisdiction;
- 2 3. Declaration of Donald R. Peters, Jr., with Exhibit A;
- 3 4. Respondent Changmook Sohn’s Motion to Dismiss Petition for Review;
- 4 5. First Declaration of Dr. Changmook Sohn;
- 5 6. Petitioners’ Response to Thurston County’s Motion to Dismiss for Lack of
- 6 Jurisdiction;
- 7 7. Petitioners’ Response to Changmook Sohn’s Motion to Dismiss for Lack
- 8 of Jurisdiction;
- 9 8. Declaration of Thane W. Tienson in Support of Response to Thurston
- 10 County and Changmook Sohn’s Motions to Dismiss for Lack of
- 11 Jurisdiction, with Exhibits A & B;
- 12 9. Declaration of Jeri G. Zwick in Support of Response to Thurston County
- 13 and Sohn’s Motions to Dismiss for Lack of Jurisdiction, with Exhibit A;
- 14 10. Declaration of Patrick Townsend in Response to Thurston County and
- 15 Changmook Sohn’s Motions to Dismiss for Lack of Jurisdiction, with
- 16 Exhibit A;
- 17 11. Thurston County’s Reply Brief in Support of Motion to Dismiss, with
- 18 Exhibits A-D; and,
- 19 12. Respondent Changmook Sohn’s Reply on Motion to Dismiss Petition for
- 20 Review.

21 Based on its review of the record and pleadings, the Board enters the following ruling:

BACKGROUND

On May 18, 2017, the County issued its final decision affirming the approval by the County Hearing Examiner of an SSDP that was issued to Mr. Sohn to develop an intertidal geoduck aquaculture operation on 1.1 acres of private tidelands. Petition for Review, Ex. D. The tidelands are located at 930 – 76th Avenue NW in Olympia, Washington. *Id.* Deputy

1 Prosecuting Attorney Donald R. Peters represented the County before the Hearing Examiner.
2 Tienson Decl., Ex. A, p.2. Attorneys Samuel W. Plauche and Jesse G. DeNike represented the
3 Applicant, Mr. Sohn before the Hearing Examiner.

4 On June 7, 2017, Petitioners filed their Petition for Review with the Board and emailed
5 and mailed copies of the Petition for Review to Mr. Peters and Mr. Plauche. Zwick Decl., ¶ 4.
6 On June 22, 2017, Petitioners mailed copies of the Petition for Review to the Thurston County
7 Resource Stewardship Department, the Thurston County Auditor, the Thurston County Board of
8 Commissioners, the Thurston County Hearing Examiner, and Mr. Sohn. *Id.* at ¶ 6.

9 The County and Mr. Sohn moved to dismiss for failure to properly serve the petition
10 within seven days of the filing of the Petition for Review. The County argues that service on a
11 county attorney does not meet the service requirements of WAC 461-08-355(3). Mr. Sohn
12 joined in the County’s motion and separately argued that service on Mr. Plauche, the attorney
13 who represented Mr. Sohn in the County proceedings, was inadequate to effectuate service on
14 Mr. Sohn.

15 ANALYSIS

16 A. Summary Judgment Standard¹

17 Summary judgment is a procedure available to avoid unnecessary trials where there is no
18 genuine issue of material fact. *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 675-
19 76, 292 P.3d 128 (2012). The summary judgment procedure is designed to eliminate trial if only
20

21 ¹ Because the parties referred to matters outside the pleadings and the Board reviewed those materials when considering the motions to dismiss filed by the County and Mr. Sohn, the Board will treat the motions as requests for summary judgment. *See* CR 12(b) and (c).

1 questions of law remain for resolution, and neither party contests the facts relevant to a legal
2 determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443
3 (1990), review denied, 117 Wn.2d 1004 (1991). The party moving for summary judgment must
4 show there are no genuine issues of material fact and the moving party is entitled to judgment as
5 a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307
6 (1997). A material fact in a summary judgment proceeding is one affecting the outcome under
7 the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). If the moving
8 party satisfies its burden, then the nonmoving party must present evidence demonstrating that
9 material facts are in dispute. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799
10 P.2d 250 (1990). Bare assertions concerning alleged genuine material issues do not constitute
11 facts sufficient to defeat a summary judgment motion. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127,
12 140, 331 P.3d 40 (2014). When determining whether an issue of material fact exists, all facts
13 and inferences are construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146
14 Wn.2d 291, 300, 45 P.3d 1068 (2002).

15 **B. Service of Process**

16 The Board is a creature of statute and has only those powers expressly granted to it or
17 necessarily implied therein. *See Skagit Surveyors and Engineers LLC v. Friends of Skagit*
18 *County*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998); *Kailin v. Clallam County*, 152 Wn. App.
19 974, 979, 220 P.2d 222 (2009). Compliance with filing and service deadlines is required for the
20 Board to acquire jurisdiction to hear and decide the appeal. RCW 90.58.180(1); WAC 461-08-
21 425.

1 Both the Shoreline Management Act (SMA) and the Board's rules of practice require
2 petitioners to serve a copy of their petition for review with the local government within seven
3 days of filing the petition with the Board. RCW 90.58.180(1); WAC 461-08-355. Petitioners
4 argue that the SMA only requires that service be made on the local government within seven
5 days. Petitioners assert they met the SMA service requirement by mailing the Petition for
6 Review to Mr. Peters who represented the County in the proceedings below.

7 Although the SMA does not set forth specific requirements for service on local
8 governments, the Board has authority to adopt a rule establishing procedures for service. *See*
9 RCW 90.58.175; RCW 34.05.437(3). The Board adopted WAC 461-08-355(3) to establish
10 procedures for serving local government. The rule provides:

11 (3) Service on the local government shall be accomplished in one of the
12 following ways:

13 (a) The petitioner shall serve local government as designated on the permit
14 decision within seven days of filing the petition with the board; or

15 (b) The petitioner shall serve the department or office within the local
16 government that issued the permit decision within seven days of filing the
17 petition with the board; or

18 (c) The petitioner shall serve local government pursuant to RCW 4.28.080
19 within seven days of filing the petition with the board.

20 WAC 461-08-355(3).

21 Petitioners have failed to demonstrate that they complied with any of the methods for
service set forth in WAC 461-08-355(3). First, the permit decision issued by the County did not
designate Mr. Peters as the individual who should be served with a Petition for Review of the
County's final decision. Second, there is no dispute that Petitioners did not serve the department
or official within the County that issued the permit decision within seven days of filing their

1 Petition for Review with the Board. Finally, there is no dispute that Petitioners did not serve the
2 County pursuant to RCW 4.28.080 within seven days of filing their Petition for Review with the
3 Board.

4 Petitioners also argue that service on the attorney who represented the County in the
5 County proceedings substantially complies with the service requirements under the SMA and
6 WAC 461-08-355. Petitioners' Response, pp. 7-10. The Board's jurisdiction is dependent on
7 proper service of the Petition for Review. The Board's rule at WAC 461-08-355(3) setting forth
8 the procedures for serving local governments is a part of that jurisdictional requirement.
9 Because compliance with WAC 461-08-355(3) relates to the Board's jurisdiction, compliance
10 with that rule may not be waived. WAC 461-08-405.

11 Finally, Petitioners argue that Civil Rule 5(b)(1) should be applied by the Board in this
12 instance, and that service on the County's attorney is effectively service on the County under CR
13 5(b)(1). Petitioners' Response, p. 10. As discussed above, the Board's rule concerning the
14 procedure for serving local government controls.

15 For the reasons discussed above, the failure of the Petitioners to properly serve the
16 County pursuant to WAC 461-08-355(3) has deprived the Board of jurisdiction over Petitioners'
17 appeal.²

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19
20 ² As noted above, Mr. Sohn also moved to dismiss on the ground that the Petitioners failed to properly serve him.
21 Although Mr. Sohn argues that Petitioners did not serve him within seven days of filing their Petition for Review,
Petitioners did serve Mr. Sohn on June 22, 2017. In his reply brief, Mr. Sohn focuses primarily on the Petitioners'
failure to serve the County as the basis for his motion to dismiss. Sohn Reply, p. 5. Because the Board is
dismissing the Petition for Review due to Petitioners' failure to properly serve the County, the Board does not need
to reach the issue of whether the later service on Mr. Sohn complied with WAC 461-08-365(4).

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ORDER

The Motions to Dismiss filed by Thurston County and Changmook Sohn are GRANTED and the appeal of Patrick Townsend, Kathryn Townsend and Anneke Jensen is DISMISSED.

SO ORDERED this 1st day of August, 2017.

SHORELINES HEARINGS BOARD

THOMAS C. MORRILL, Presiding

JOAN M. MARCHIORO, Member

KAY M. BROWN, Member

GRANT BECK, Member

ROB GELDER, Member

ALLEN ESTEP, Member

Exhibit 3

senate and the environmental affairs committee of the house of representatives, prior to each legislative session.

Passed the House April 22, 1985.

Passed the Senate April 18, 1985.

Approved by the Governor May 21, 1985.

Filed in Office of Secretary of State May 21, 1985.

CHAPTER 457

[Engrossed Senate Bill No. 3067]

AQUATIC FARMING

AN ACT Relating to aquatic farming; amending RCW 15.65.020, 15.66.010, 43.23.030, 46.16.090, 75.08.080, 75.28.010, 75.28.280, 75.28.300, 77.08.020, 77.12.570, 77.12.590, 77.12.600, and 77.32.010; adding a new section to chapter 75.08 RCW; adding a new chapter to Title 15 RCW; adding a new chapter to Title 75 RCW; creating new sections; repealing RCW 75.28.265 and 75.28.282; and prescribing penalties.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. The legislature declares that aquatic farming provides a consistent source of quality food, offers opportunities of new jobs, increased farm income stability, and improves balance of trade.

The legislature finds that many areas of the state of Washington are scientifically and biologically suitable for aquaculture development, and therefore the legislature encourages promotion of aquacultural activities, programs, and development with the same status as other agricultural activities, programs, and development within the state.

The legislature finds that aquaculture should be considered a branch of the agricultural industry of the state for purposes of any laws that apply to or provide for the advancement, benefit, or protection of the agriculture industry within the state.

The legislature further finds that in order to ensure the maximum yield and quality of cultured aquatic products, the department of fisheries should provide diagnostic services that are workable and proven remedies to aquaculture disease problems.

It is therefore the policy of this state to encourage the development and expansion of aquaculture within the state. It is also the policy of this state to protect wildstock fisheries by providing an effective disease inspection and control program and prohibiting the release of salmon or steelhead trout by the private sector into the public waters of the state and the subsequent recapture of such species as in the practice commonly known as ocean ranching.

NEW SECTION. Sec. 2. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Aquaculture" means the process of growing, farming, or cultivating private sector cultured aquatic products in marine or freshwaters and includes management by an aquatic farmer.

(2) "Aquatic farmer" is a private sector person who commercially farms and manages the cultivating of private sector cultured aquatic products on the person's own land or on land in which the person has a present right of possession.

(3) "Private sector cultured aquatic products" are native, nonnative, or hybrids of marine or freshwater plants and animals that are propagated, farmed, or cultivated on aquatic farms under the supervision and management of a private sector aquatic farmer or that are naturally set on aquatic farms which at the time of setting are under the active supervision and management of a private sector aquatic farmer. When produced under such supervision and management, private sector cultured aquatic products include, but are not limited to, the following plants and animals:

SCIENTIFIC NAME	COMMON NAME
Enteromorpha	green nori
Monostroma	awo-nori
Ulva	sea lettuce
Laminaria	konbu
Nereocystis	bull kelp
Porphyra	nori
Iridaea	
Haliotis	abalone
Zhamys	pink scallop
Hinnites	rock scallop
Tatinopecten	Japanese or weathervane scallop
Protothaca	native littleneck clam
Tapes	manila clam
Saxidomus	butter clam
Mytilus	mussels
Crassostrea	Pacific oysters
Ostrea	Olympia and European oysters
Pacifasticus	crayfish
Macrobrachium	freshwater prawn
Salmo and Salvelinus	trout, char, and Atlantic salmon
Oncorhynchus	salmon
Ictalurus	catfish
Cyprinus	carp
Acipenseridae	sturgeon

(4) "Department" means the department of agriculture.

(5) "Director" means the director of agriculture.

NEW SECTION. Sec. 3. The department is the principal state agency for providing state marketing support services for the private sector aquaculture industry.

NEW SECTION. Sec. 4. The department shall exercise its authorities, including those provided by chapters 15.64, 15.65, 15.66, and 43.23 RCW, to develop a program for assisting the state's aquaculture industry to market and promote the use of its products. The department shall consult with the advisory council in developing such a program.

NEW SECTION. Sec. 5. The director shall establish identification requirements for private sector cultured aquatic products to the extent that identifying the source and quantity of the products is necessary to permit the departments of fisheries and game to administer and enforce Titles 75 and 77 RCW effectively. The rules shall apply only to those private sector cultured aquatic products the transportation, sale, processing, or other possession of which would otherwise be required to be licensed under Title 75 or 77 RCW if they were not cultivated by aquatic farmers. The rules shall apply to the transportation or possession of such products on land other than aquatic lands and may require that they be: (1) Placed in labeled containers or accompanied by bills of lading or sale or similar documents identifying the name and address of the producer of the products and the quantity of the products governed by the documents; or (2) both labeled and accompanied by such documents.

The director shall consult with the directors of the departments of fisheries and game to ensure that such rules enable the departments of fisheries and game to enforce the programs administered under those titles. If rules adopted under chapter 69.30 RCW satisfy the identification required under this section for shellfish, the director shall not establish different shellfish identification requirements under this section.

****NEW SECTION. Sec. 6. (1) There is hereby created the aquaculture advisory council. The council shall consist of the following voting members appointed by the governor: One representative of private sector freshwater fin fish farmers; one representative of private sector marine fin fish farmers who does not practice ocean ranching; one representative of private sector marine shellfish farmers; one representative of marine plant farmers; one representative of farmers of oysters native to the state; and one representative of a state-wide sports fishing association or group. Each member shall serve a term of three years. The following shall serve as voting, ex officio members of the advisory council: A representative of the department of agriculture; a representative of the department of game; a representative of the department of fisheries; and the veterinary pathologist referred to in section 8(5) of this act. A representative of the department of natural resources shall serve as a nonvoting member of the advisory council.***

(2) The council shall advise the departments of agriculture, fisheries, and game on all aspects of aquatic farming including the performance, operation, expansion, development, promotion, and interdepartmental coordination.

(3) Any vacancies on the council shall be filled in the same manner as the original appointment.

(4) The council shall select a chairman by vote of the council members. A quorum consisting of at least six voting members must be present to conduct council business. The council shall meet at the call of the chairman or at the request of the director.

(5) The council shall expire June 30, 1991.

*Sec. 6 was vetoed, see message at end of chapter.

NEW SECTION. Sec. 7. The department shall adopt rules under chapter 34.04 RCW to implement this chapter.

***NEW SECTION. Sec. 8. (1)** The director of agriculture and the director of fisheries shall jointly develop, in consultation with the aquaculture advisory council, a program of disease inspection and control for aquatic farmers as defined in section 2 of this act. The program shall be administered by the department of fisheries under rules established under this section. The purpose of the program is to protect the aquaculture industry and wildstock fisheries from a loss of productivity due to aquatic diseases or maladies. As used in this section "diseases" means, in addition to its ordinary meaning, infestations of parasites or pests. The disease program may include, but is not limited to, the following elements:

- (a) Disease diagnosis;
- (b) Import and transfer requirements;
- (c) Provision for certification of stocks;
- (d) Classification of diseases by severity;
- (e) Provision for treatment of selected high-risk diseases;
- (f) Provision for containment and eradication of high-risk diseases;
- (g) Provision for destruction of diseased cultured aquatic products;
- (h) Provision for quarantine of diseased cultured aquatic products;
- (i) Provision for coordination with state and federal agencies;
- (j) Provision for development of preventative or control measures;
- (k) Provision for cooperative consultation service to aquatic farmers;

and

- (l) Provision for disease history records.

(2) The director of fisheries shall adopt rules implementing this section. However, such rules shall have the prior approval of the director of agriculture and shall provide therein that the director of agriculture has provided such approval. The director of agriculture or the director's designee shall attend the rule-making hearings conducted under chapter 34.04 RCW and shall assist in conducting those hearings. The authorities granted the department of fisheries by these rules and by RCW 75.08.080(1)(g), 75.24-.080, 75.24.110, 75.28.125, and sections 9, 10, and 11 of this act constitute

the only authorities of the department of fisheries to regulate private sector cultured aquatic products and aquatic farmers as defined in section 2 of this act. Except as provided in subsection (3) of this section, no action may be taken against any person to enforce these rules unless the department has first provided the person an opportunity for a hearing. In such a case, if the hearing is requested, no enforcement action may be taken before the conclusion of that hearing.

(3) The rules adopted under this section shall specify the emergency enforcement actions that may be taken by the department of fisheries, and the circumstances under which they may be taken, without first providing the affected party with an opportunity for a hearing. Neither the provisions of this subsection nor the provisions of subsection (2) of this section shall preclude the department of fisheries from requesting the initiation of criminal proceedings for violations of the disease inspection and control rules.

(4) It is unlawful for any person to violate the rules adopted under subsection (2) or (3) of this section or to violate section 11 of this act.

(5) In administering the program established under this section, the department of fisheries shall use the services of a pathologist licensed to practice veterinary medicine.

(6) The director in administering the program shall not place constraints on or take enforcement actions in respect to the aquaculture industry that are more rigorous than those placed on the department of fisheries, the department of game, or other fish-rearing entities.

(7) Whenever a civil action for damages is brought by an aquatic farmer as defined in section 2 of this act against the department of fisheries as a result of the department's ordering and obtaining the destruction of the farmer's private sector cultured aquatic product as defined in section 2 of this act, the court may award the farmer damages not exceeding three times the actual damages sustained if the court determines that the department was unreasonable in concluding that the risks presented by the disease or infestation warranted the destruction of the product.

*Sec. 8 was partially vetoed, see message at end of chapter.

NEW SECTION. Sec. 9. The directors of agriculture and fisheries shall jointly adopt by rule, in the manner prescribed in section 8(2) of this act, a schedule of user fees for the disease inspection and control program established under section 8 of this act. The fees shall be established such that the program shall be entirely funded by revenues derived from the user fees by the beginning of the 1987-89 biennium.

There is established in the state treasury an account known as the aquaculture disease control account which is subject to appropriation. Proceeds of fees charged under this section shall be deposited in the account. Moneys from the account shall be used solely for administering the disease inspection and control program established under section 8 of this act.

NEW SECTION. Sec. 10. (1) The director of fisheries shall consult regarding the disease inspection and control program established under section 8 of this act with the department of game, federal agencies, and Indian tribes to assure protection of state, federal, and tribal aquatic resources and to protect private sector cultured aquatic products from disease that could originate from waters or facilities managed by those agencies.

(2) With regard to the program, the director of fisheries may enter into contracts or interagency agreements for diagnostic field services with government agencies and institutions of higher education and private industry.

(3) The director of fisheries shall provide for the creation and distribution of a roster of biologists having a speciality in the diagnosis or treatment of diseases of fish or shellfish. The director shall adopt rules specifying the qualifications which a person must have in order to be placed on the roster.

NEW SECTION. Sec. 11. All aquatic farmers as defined in section 2 of this act shall register with the department of fisheries. The director shall develop and maintain a registration list of all aquaculture farms. Registered aquaculture farms shall provide the department production statistical data. The state veterinarian and the department of game shall be provided with registration and statistical data by the department.

NEW SECTION. Sec. 12. A new section is added to chapter 75.08 RCW to read as follows:

(1) It is unlawful for any person other than the United States, an Indian tribe recognized as such by the federal government, the state, a subdivision of the state, or a municipal corporation or an agency of such a unit of government to release salmon or steelhead trout into the public waters of the state and subsequently to recapture and commercially harvest such salmon or trout. This section shall not prevent any person from rearing salmon or steelhead trout in pens or in a confined area under circumstances where the salmon or steelhead trout are confined and never permitted to swim freely in open water.

(2) A violation of this section constitutes a gross misdemeanor.

Sec. 13. Section 2, chapter 256, Laws of 1961 as amended by section 2, chapter 7, Laws of 1975 1st ex. sess. and RCW 15.65.020 are each amended to read as follows:

The following terms are hereby defined:

(1) "Director" means the director of agriculture of the state of Washington or his duly appointed representative. The phrase "director or his designee" means the director unless, in the provisions of any marketing agreement or order, he has designated an administrator, board or other designee to act for him in the matter designated, in which case "director or his designee" means for such order or agreement the administrator, board or other person(s) so designated and not the director.

(2) "Department" means the department of agriculture of the state of Washington.

(3) "Marketing order" means an order issued by the director pursuant to this chapter.

(4) "Marketing agreement" means an agreement entered into and issued by the director pursuant to this chapter.

(5) "Agricultural commodity" means any distinctive type of agricultural, horticultural, viticultural, floricultural, vegetable or animal product, including private sector cultured aquatic products as defined in section 2 of this 1985 act, either in its natural or processed state, including bees and honey but not including timber or timber products. The director is hereby authorized to determine (on the basis of common usage and practice) what kinds, types or sub-types should be classed together as an agricultural commodity for the purposes of this chapter.

(6) "Production area" and "marketing area" means any area defined as such in any marketing order or agreement in accordance with RCW 15.65.350. "Affected area" means the marketing or production area so defined in such order, agreement or proposal.

(7) "Unit" of an agricultural commodity means a unit of volume, weight, quantity, or other measure in which such commodity is commonly measured. The director shall designate in each marketing order and agreement the unit to be used therein.

(8) "Affected unit" means in the case of marketing agreements and orders drawn on the basis of a production area, any unit of the commodity specified in or covered by such agreement or order which is produced in such area and sold or marketed or delivered for sale or marketing; and "affected unit" means, in the case of marketing agreements and orders drawn on the basis of marketing area, any unit of the commodity specified in or covered by such agreement or order which is sold or marketed or delivered for sale or marketing within such marketing area: PROVIDED, That in the case of marketing agreements "affected unit" shall include only those units which are produced by producers or handled by handlers who have assented to such agreement.

(9) "Affected commodity" means that part or portion of any agricultural commodity which is covered by or forms the subject matter of any marketing agreement or order or proposal, and includes all affected units thereof as herein defined and no others.

(10) "Producer" means any person engaged in the business of producing any agricultural commodity for market in commercial quantities. "Affected producer" means any producer of an affected commodity. "To produce" means to act as a producer. For the purposes of RCW 15.65.140 and 15.65.160 as now or hereafter amended "producer" shall include bailees who contract to produce or grow any agricultural product on behalf of a

bailor who retains title to the seed and its resulting agricultural product or the agricultural product delivered for further production or increase.

(11) "Handler" means any person who acts, either as principal, agent or otherwise, in processing, selling, marketing or distributing an agricultural commodity which was not produced by him. "Affected handler" means any handler of an affected commodity. "To handle" means to act as a handler.

(12) "Producer-handler" means any person who acts both as a producer and as a handler with respect to any agricultural commodity. A producer-handler shall be deemed to be a producer with respect to the agricultural commodities which he produces, and a handler with respect to the agricultural commodities which he handles, including those produced by himself.

(13) "Cooperative association" means any incorporated or unincorporated association of producers which conforms to the qualifications set out in the act of congress of the United States of February 18, 1922 as amended, known as the "Capper-Volstead Act" and which is engaged in making collective sales or in marketing any agricultural commodity or product thereof or in rendering service for or advancing the interests of the producers of such commodity on a nonprofit cooperative basis.

(14) "Member of a cooperative association" means any producer who markets his product through such cooperative association and who is a voting stockholder of or has a vote in the control of or is a party to a marketing agreement with such cooperative association with respect to such product.

(15) "Producer marketing" or "marketed by producers" means any or all operations performed by any producer or cooperative association of producers in preparing for market and marketing, and shall include: (a) selling any agricultural commodity produced by such producer(s) to any handler; (b) delivering any such commodity or otherwise disposing of it for commercial purposes to or through any handler.

(16) "Commercial quantities" as applied to producers and/or production means such quantities per year (or other period of time) of an agricultural commodity as the director finds are not less than the minimum which a prudent man engaged in agricultural production would produce for the purpose of making such quantity of such commodity a substantial contribution to the economic operation of the farm on which such commodity is produced. "Commercial quantities" as applied to handlers and/or handling means such quantities per year (or other period of time) of an agricultural commodity or product thereof as the director finds are not less than the minimum which a prudent man engaged in such handling would handle for the purpose of making such quantity a substantial contribution to the handling operation in which such commodity or product thereof is so handled. In either case the director may in his discretion: (a) determine that substantial quantity is any amount above zero; and (b) apply the quantity so

determined on a uniform rule applicable alike to all persons which he finds to be similarly situated.

(17) "Commodity board" means any board established pursuant to RCW 15.65.220. "Board" means any such commodity board unless a different board is expressly specified.

(18) "Sell" includes offer for sale, expose for sale, have in possession for sale, exchange, barter or trade.

(19) "Section" means a section of this chapter unless some other statute is specifically mentioned. The present includes the past and future tenses, and the past or future the present. The masculine gender includes the feminine and neuter. The singular number includes the plural and the plural includes the singular.

(20) "Represented in a referendum" means that a written document evidencing approval or assent or disapproval or dissent is duly and timely filed with or mailed to the director by or on behalf of an affected producer and/or a volume of production of an affected commodity in a form which the director finds meets the requirements of this chapter.

(21) "Person" as used in this chapter shall mean any person, firm, association or corporation.

Sec. 14. Section 15.66.010, chapter 11, Laws of 1961 as last amended by section 6, chapter 288, Laws of 1983 and RCW 15.66.010 are each amended to read as follows:

For the purposes of this chapter:

(1) "Director" means the director of agriculture of the state of Washington or any qualified person or persons designated by the director of agriculture to act for him concerning some matter under this chapter.

(2) "Department" means the department of agriculture of the state of Washington.

(3) "Marketing order" means an order issued by the director pursuant to this chapter.

(4) "Agricultural commodity" means any distinctive type of agricultural, horticultural, viticultural, vegetable, and/or animal product, including private sector cultured aquatic products as defined in section 2 of this 1985 act, within its natural or processed state, including bees and honey but not including timber or timber products. The director is authorized to determine what kinds, types or subtypes should be classed together as an agricultural commodity for the purposes of this chapter.

(5) "Producer" means any person engaged in the business of producing or causing to be produced for market in commercial quantities any agricultural commodity. For the purposes of RCW 15.66.060, 15.66.090, and 15.66.120, as now or hereafter amended "producer" shall include bailees who contract to produce or grow any agricultural product on behalf of a bailor who retains title to the seed and its resulting agricultural product or the agricultural product delivered for further production or increase.

(6) "Affected producer" means any producer of an affected commodity.

(7) "Affected commodity" means any agricultural commodity for which the director has established a list of producers pursuant to RCW 15.66.060.

(8) "Commodity commission" or "commission" means a commission formed to carry out the purposes of this chapter under a particular marketing order concerning an affected commodity.

(9) "Unit" means a unit of volume, quantity or other measure in which an agricultural commodity is commonly measured.

(10) "Unfair trade practice" means any practice which is unlawful or prohibited under the laws of the state of Washington including but not limited to Titles 15, 16 and 69 RCW and chapters 9.16, 19.77, 19.80, 19.84, and 19.83 RCW, or any practice, whether concerning interstate or intrastate commerce that is unlawful under the provisions of the act of Congress of the United States, September 26, 1914, chapter 311, section 5, 38 U.S. Statutes at Large 719 as amended, known as the "Federal Trade Commission Act of 1914", or the violation of or failure accurately to label as to grades and standards in accordance with any lawfully established grades or standards or labels.

(11) "Person" includes any individual, firm, corporation, trust, association, partnership, society, or any other organization of individuals.

(12) "Cooperative association" means any incorporated or unincorporated association of producers which conforms to the qualifications set out in the act of Congress of the United States, Feb. 18, 1922, chapter 57, sections 1 and 2, 42 U.S. Statutes at Large 388 as amended, known as the "Capper-Volstead Act" and which is engaged in making collective sales or in marketing any agricultural commodity or product thereof or in rendering service for or advancing the interests of the producers of such commodity on a nonprofit cooperative basis.

(13) "Member of a cooperative association" or "member" means any producer of an agricultural commodity who markets his product through such cooperative association and who is a voting stockholder of or has a vote in the control of or is under a marketing agreement with such cooperative association with respect to such product.

Sec. 15. Section 43.23.030, chapter 8, Laws of 1965 as last amended by section 5, chapter 248, Laws of 1983 and RCW 43.23.030 are each amended to read as follows:

The director of agriculture shall exercise all the powers and perform all the duties relating to the development of markets, for agricultural products, state and federal cooperative marketing programs, land utilization for agricultural purposes, water resources, transportation, and farm labor as such

matters relate to the production, distribution and sale of agricultural commodities including private sector cultured aquatic products as defined in section 2 of this 1985 act.

Sec. 16. Section 46.16.090, chapter 12, Laws of 1961 as last amended by section 45, chapter 136, Laws of 1979 ex. sess. and RCW 46.16.090 are each amended to read as follows:

Motor trucks or trailers may be specially licensed based on the maximum gross weight thereof for fifty percent of the various amounts set forth in the schedule provided in RCW 46.16.070, when such trucks or trailers are owned and operated by farmers, but only if the following condition or conditions exist:

(1) When such trucks or trailers are to be used for the transportation of such farmer's own farm, orchard, or dairy products, or such farmer's own private sector cultured aquatic products as defined in section 2 of this 1985 act, from point of production to market or warehouse, and of supplies to be used on ~~((his))~~ the farmer's farm: PROVIDED, That fish other than those that are such private sector cultured aquatic products and forestry products shall not be considered as farm products; and/or

(2) When such trucks or trailers are to be used for the infrequent or seasonal transportation by one such farmer for another farmer in ~~((his))~~ the farmer's neighborhood of products of the farm, orchard, ~~((or))~~ dairy, or aquatic farm owned by such other farmer from point of production to market or warehouse, or supplies to be used on such other farm, but only if such transportation for another farmer is for compensation other than money: PROVIDED, HOWEVER, That farmers shall be permitted an allowance of an additional eight thousand pounds, within the legal limits, on motor trucks or trailers, when used in the transportation of such farmer's own farm machinery between ~~((his))~~ the farmer's own farm or farms and for a distance of not more than thirty-five miles from ~~((his))~~ the farmer's farm or farms.

The department shall prepare a special form of application to be used by farmers applying for licenses under this section, which form shall contain a statement to the effect that the vehicle or trailer concerned will be used subject to the limitations of this section. The department shall prepare special insignia which shall be placed upon all such vehicles or trailers to indicate that the vehicle or trailer is specially licensed, or may, in its discretion, substitute a special license plate for such vehicles or trailers for such designation.

Operation of such a specially licensed vehicle or trailer in transportation upon public highways in violation of the limitations of this section is a traffic infraction.

Sec. 17. Section 75.08.080, chapter 12, Laws of 1955 as last amended by section 15, chapter 46, Laws of 1983 1st ex. sess. and RCW 75.08.080 are each amended to read as follows:

(1) The director may adopt, amend, or repeal rules as follows:

(a) Specifying the times when the taking of food fish or shellfish is lawful or unlawful.

(b) Specifying the areas and waters in which the taking and possession of food fish or shellfish is lawful or unlawful.

(c) Specifying and defining the gear, appliances, or other equipment and methods that may be used to take food fish or shellfish, and specifying the times, places, and manner in which the equipment may be used or possessed.

(d) Regulating the possession, disposal, landing, and sale of food fish or shellfish within the state, whether acquired within or without the state.

(e) Regulating the prevention and suppression of diseases and pests affecting food fish or shellfish.

(f) Regulating the size, sex, species, and quantities of food fish or shellfish that may be taken, possessed, sold, or disposed of.

(g) Specifying the statistical and biological reports required from fishermen, dealers, boathouses, or processors of food fish or shellfish.

(h) Classifying species of marine and freshwater life as food fish or shellfish.

(i) Classifying the species of food fish and shellfish that may be used for purposes other than human consumption.

(j) Other rules necessary to carry out this title and the purposes and duties of the department.

(2) Subsections (1)(a), (b), (c), (d), and (f) of this section do not apply to((:

~~(a) Licensed oyster farms or oysters produced thereon; or~~

~~(b)) private tideland owners and lessees of state tidelands, when they take or possess oysters, clams, cockles, borers, or mussels, excluding razor clams, produced on their own private tidelands or their leased state tidelands for personal use.~~

(3) Except for subsection (1)(g) of this section, this section does not apply to private sector cultured aquatic products as defined in section 2 of this 1985 act. Subsection (1)(g) of this section does apply to such products.

Sec. 18. Section 75.28.010, chapter 12, Laws of 1955 as last amended by section 101, chapter 46, Laws of 1983 1st ex. sess. and RCW 75.28.010 are each amended to read as follows:

(1) Except as otherwise provided by this title, a license or permit issued by the director is required to:

(a) Commercially fish for or take food fish or shellfish;

(b) Deliver food fish or shellfish taken in offshore waters;

(c) Operate a charter boat; or

~~(d) ((Operate a commercial food fish or shellfish farm; or~~

~~(e))) Engage in processing or wholesaling food fish or shellfish.~~

(2) It is unlawful to engage in the activities described in subsection (1) of this section without having in possession the licenses or permits required by this title.

(3) No license or permit is required for the production or harvesting of private sector cultured aquatic products as defined in section 2 of this 1985 act or for the delivery, processing, or wholesaling of such aquatic products. However, if a means of identifying such products is required by rules adopted under section 5 of this 1985 act, the exemption from licensing or permit requirements established by this subsection applies only if the aquatic products are identified in conformance with those rules.

Sec. 19. Section 75.28.280, chapter 12, Laws of 1955 as last amended by section 125, chapter 46, Laws of 1983 1st ex. sess. and RCW 75.28.280 are each amended to read as follows:

~~((1) A clam farm license is required for the licensee to operate a commercial clam farm of one or more tracts of lands on tidelands or beds of navigable waters. The annual license fee is fifteen dollars for residents and nonresidents:~~

~~A clam farm license is not required for subtidal geoduck tracts for which licenses have been obtained under RCW 75.28.287:~~

~~(2) An oyster farm license is required for the licensee to operate a commercial oyster farm on tidelands or beds of navigable waters. The annual license fee is fifteen dollars for residents and nonresidents:~~

~~(3) Separate clam farm and oyster farm licenses are required for each of the following districts as defined by rule of the director: Northern Puget Sound district, southern Puget Sound district, Grays Harbor district, and Willapa Harbor district:~~

~~(4)) A mechanical harvester license is required to operate a mechanical or hydraulic device for commercially harvesting clams, other than geoduck clams, on a clam farm unless the requirements of RCW 75.20.100 are fulfilled for the proposed activity. The annual license fee is three hundred dollars for residents and nonresidents.~~

Sec. 20. Section 75.28.300, chapter 12, Laws of 1955 as last amended by section 132, chapter 46, Laws of 1983 1st ex. sess. and RCW 75.28.300 are each amended to read as follows:

A wholesale fish dealer's license is required for:

(1) A business in the state to engage in the commercial processing of food fish or shellfish, including custom canning or processing of personal use food fish or shellfish.

(2) A business in the state to engage in the wholesale selling, buying, or brokering of food fish or shellfish. A wholesale fish dealer's license is not required of those businesses which buy exclusively from Washington licensed wholesale dealers and sell solely at retail.

(3) Fishermen (~~(or aquaculturists)~~) who land and sell their catch or harvest in the state to anyone other than a licensed wholesale dealer within or outside the state.

(4) A business to engage in the commercial manufacture or preparation of fertilizer, oil, meal, caviar, fish bait, or other byproducts from food fish or shellfish.

The annual license fee is thirty-seven dollars and fifty cents. A wholesale fish dealer's license is not required for persons (~~(buying or selling oyster seed for transplant)~~) engaged in the processing, wholesale selling, buying, or brokering of private sector cultured aquatic products as defined in section 2 of this 1985 act. However, if a means of identifying such products is required by rules adopted under section 5 of this 1985 act, the exemption from licensing requirements established by this subsection applies only if the aquatic products are identified in conformance with those rules.

Sec. 21. Section 77.08.020, chapter 36, Laws of 1955 as last amended by section 10, chapter 78, Laws of 1980 and RCW 77.08.020 are each amended to read as follows:

(1) As used in this title or rules of the commission, "game fish" means those species of the class Osteichthyes that shall not be fished for except as authorized by rule of the commission and includes:

SCIENTIFIC NAME	COMMON NAME
<i>Ambloplites rupestris</i>	rock bass
<i>Coregonus clupeaformis</i>	lake white fish
<i>Ictalurus furcatus</i>	blue catfish
<i>Ictalurus melas</i>	black bullhead
<i>Ictalurus natalis</i>	yellow bullhead
<i>Ictalurus nebulosus</i>	brown bullhead
<i>Ictalurus punctatus</i>	channel catfish
<i>Lepomis cyanellus</i>	green sunfish
<i>Lepomis gibbosus</i>	pumpkinseed
<i>Lepomis gulosus</i>	warmouth
<i>Lepomis macrochirus</i>	bluegill
<i>Lota lota</i>	burbot or fresh water ling
<i>Micropterus dolomieu</i>	smallmouth bass
<i>Micropterus salmoides</i>	largemouth bass
<i>Oncorhynchus nerka</i> (in its landlocked form)	kokanee or silver trout
<i>Perca flavescens</i>	yellow perch
<i>Pomixis annularis</i>	white crappie
<i>Pomixis nigromaculatus</i>	black crappie
<i>Prosopium williamsoni</i>	mountain white fish
<i>Salmo aquabonita</i>	golden trout

SCIENTIFIC NAME	COMMON NAME
Salmo clarkii	cutthroat trout
Salmo gairdnerii	rainbow or steelhead trout
Salmo salar	Atlantic salmon
Salmo trutta	brown trout
Salvelinus fontinalis	eastern brook trout
Salvelinus malma	Dolly Varden trout
Salvelinus namaycush	lake trout
Stizostedion vitreum	Walleye
Thymallus arcticus	arctic grayling

(2) Private sector cultured aquatic products as defined in section 2 of this 1985 act are not game fish.

Sec. 22. Section 77.28.020, chapter 36, Laws of 1955 as last amended by section 98, chapter 78, Laws of 1980 and RCW 77.12.570 are each amended to read as follows:

The commission shall adopt rules specifying the procedures, qualifications, and conditions for issuing a game farm license and governing the operation of game farms. Private sector cultured aquatic products as defined in section 2 of this 1985 act are exempt from regulation under this section.

Sec. 23. Section 77.28.080, chapter 36, Laws of 1955 as amended by section 100, chapter 78, Laws of 1980 and RCW 77.12.590 are each amended to read as follows:

Wildlife given away, sold, or transferred by a licensed game farmer shall have attached to each wildlife member, package, or container, a tag, seal, or invoice as required by the commission. Private sector cultured aquatic products as defined in section 2 of this 1985 act are exempt from regulation under this section.

Sec. 24. Section 77.28.090, chapter 36, Laws of 1955 as amended by section 101, chapter 78, Laws of 1980 and RCW 77.12.600 are each amended to read as follows:

A common carrier may transport wildlife shipped by a licensed game farmer if the wildlife is tagged, sealed, or invoiced as provided in RCW 77.12.590. Packages containing wildlife shall have affixed to them tags or labels showing the name of the licensee and the consignee. For purposes of this section, wildlife does not include private sector cultured aquatic products as defined in section 2 of this 1985 act. However, if a means of identifying such products is required by rules adopted under section 5 of this 1985 act, this exemption from the definition of wildlife applies only if the aquatic products are identified in conformance with those rules.

Sec. 25. Section 77.32.010, chapter 36, Laws of 1955 as last amended by section 2, chapter 284, Laws of 1983 and RCW 77.32.010 are each amended to read as follows:

(1) Except as otherwise provided in this chapter, a license issued by the commission is required to:

- (a) Hunt for wild animals or wild birds or fish for game fish;
- (b) Practice taxidermy for profit;
- (c) Deal in raw furs for profit;
- (d) Act as a fishing guide;
- (e) Operate a game farm;
- (f) Purchase or sell anadromous game fish; or
- (g) Use department-managed lands or facilities as provided by rule of the commission.

(2) A permit issued by the director is required to:

- (a) Conduct, hold, or sponsor hunting or fishing contests or competitive field trials using live wildlife;
- (b) Collect wild animals, wild birds, game fish, or protected wildlife for research or display; or
- (c) Stock game fish.

(3) Aquaculture as defined in section 2 of this 1985 act is exempt from the requirements of this section, except when being stocked in public waters under contract with the department of game.

*NEW SECTION. Sec. 26. (1) The department of fisheries shall report to the legislature on the expenditure of funds needed to implement the disease program called for in section 8 of this act. The report shall detail the percentage of the funds originating from user fees and the percentage of the funds from the state general fund. The report shall be delivered to the legislature by January 1, 1987.

(2) The department shall survey the boundaries of the state's Puget Sound oyster reserves and shall assess the ability of those lands to support aquatic products if actively cultivated. The department shall submit a report to the legislature by January 1, 1986, identifying its findings regarding the support capacity of the reserves and the optimum use of the reserves for cultivating aquatic products.

*Sec. 26 was partially vetoed, see message at end of chapter.

NEW SECTION. Sec. 27. (1) Sections 1 through 7 of this act shall constitute a new chapter in Title 15 RCW.

(2) Sections 8 through 11 of this act shall constitute a new chapter in Title 75 RCW.

NEW SECTION. Sec. 28. The following acts or parts of acts are each repealed:

(1) Section 2, chapter 35, Laws of 1971, section 124, chapter 46, Laws of 1983 1st ex. sess. and RCW 75.28.265; and

(2) Section 10, chapter 212, Laws of 1955, section 126, chapter 46, Laws of 1983 1st ex. sess. and RCW 75.28.282.

Passed the Senate April 16, 1985.

Passed the House April 9, 1985.

Approved by the Governor May 21, 1985, with the exception of certain items which are vetoed.

Filed in Office of Secretary of State May 21, 1985.

Note: Governor's explanation of partial veto is as follows:

"I am returning herewith, without my approval as to several portions, Substitute Senate Bill No. 3067, entitled:

"AN ACT Relating to aquatic farming."

Section 6 would create an aquaculture advisory council appointed by the Governor. I wholeheartedly support the purpose of the council, which will bring together private interests with the state agencies responsible for aquaculture promotion and regulation. This cooperation is essential to a successful program. However, the council should more appropriately be appointed by and report to the Director of the Department of Agriculture, who has the prime responsibility for promotion under the Act. The Director has authority under existing statute to appoint such an advisory body. The Director should consult the Departments of Fisheries and Natural Resources in making appointments.

Section 8(7) would provide treble damages in civil actions by aquatic farmers in cases where Department of Fisheries' orders for the destruction of aquatic products are held to be unreasonable. Treble damages against the state are without precedent and are, I believe, excessive and unnecessary. However, removing this provision in no way suggests that the Department should not be accountable for its actions. When the Department has committed an unreasonable act, the courts should continue, as under current law, to award actual and consequential damages.

Section 26(2) would require the Department of Fisheries to survey the boundaries of the state's Puget Sound oyster reserves, assess their ability to support aquaculture, and report to the legislature regarding their optimum use. The Department of Fisheries reports that the surveys required by this subsection would cost more than \$500,000, for which no funding has been provided. In recognition of the need to enhance Puget Sound oyster reserves, I have signed into law Substitute Senate Bill No. 4041. This requires that Fisheries categorize the reserves according to their best uses. It further requires that Fisheries undertake a pilot Olympia oyster cultivation project.

With the exception of Sections 6, 8(7) and 26(2), which I have vetoed, Substitute Senate Bill No. 3067 is approved."

CHAPTER 458

[Substitute Senate Bill No. 3384]
SALMON ENHANCEMENT

AN ACT Relating to salmon enhancement; amending RCW 75.08.065, 75.48.120, and 77.12.420; adding a new chapter to Title 75 RCW; prescribing penalties; making an appropriation; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. Currently, many of the salmon stocks of Washington state are critically reduced from their sustainable level. The best interests of all fishing groups and the citizens as a whole are served by

Exhibit 4

and fish for or possess anadromous salmon without the licenses required by this chapter. [1983 1st ex.s. c 46 § 99.]

75.25.160 Salmon angling licenses and razor clam licenses—Penalties. A person who violates a provision of this chapter or who knowingly falsifies information required for the issuance of a salmon angling license or razor clam license is guilty of a misdemeanor and is subject to the penalties provided in chapter 9A.20 RCW. [1983 1st ex.s. c 46 § 100; 1977 ex.s. c 327 § 16. Formerly RCW 75.28.660.]

Declaration of state policy—Severability—Effective date—1977 ex.s. c 327: See notes following RCW 75.25.100.

Chapter 75.28
COMMERCIAL LICENSES
(Formerly: Licenses)

Sections

- 75.28.010 Commercial licenses and permits required.
- 75.28.012 Licensing districts—Created.
- 75.28.014 Application deadlines for commercial salmon fishing licenses and Columbia river smelt licenses.
- 75.28.020 Qualifications for commercial licenses—Reciprocity with Oregon in concurrent waters of Columbia River.
- 75.28.030 Application for commercial licenses.
- 75.28.035 Application for commercial licenses—Vessel registration, license decals—Additional operator—Transfer or replacement.
- 75.28.040 Expiration and renewal of commercial licenses.
- 75.28.060 Licenses transferable—Determination of fee for gear operated by nonresident.
- 75.28.070 Display of license—Clam or oyster farm, oyster reserve, wholesale fish dealer.
- 75.28.081 Personal commercial fishing license—Salmon and Columbia river smelt.
- 75.28.095 Charter boat license—Fee—"Charter boat" defined—Restrictions on commercial fishing.
- 75.28.110 Commercial salmon fishing licenses—Gear—Fees.
- 75.28.113 Salmon delivery permit—Fee—Revocation.
- 75.28.116 Salmon single delivery permit—Fee (as amended by 1983 c 297).
- 75.28.116 Salmon single delivery permit—Fee (as amended by 1983 1st ex.s. c 46).
- 75.28.120 Commercial fishing licenses for food fish other than salmon—Gear—Fees.
- 75.28.123 Columbia river sturgeon endorsement required—Fees.
- 75.28.125 Delivery permit for shellfish and food fish other than salmon—Fee.
- 75.28.130 Commercial shellfish licenses—Gear—Fee.
- 75.28.134 Hood Canal shrimp endorsement—Fee—Limitation on shrimp pots.
- 75.28.140 Commercial fishing licenses for shellfish and food fish other than salmon—Fees.
- 75.28.255 Commercial fishing licenses for specified species—Columbia river smelt—Carp—Fees.
- 75.28.265 Commercial cultivation of food fish and shellfish—Aquaculture permits and licenses—Fee—Exemption.
- 75.28.280 Clam farm license—Oyster farm license—Mechanical harvester license—Fees.
- 75.28.282 Clam farm license, oyster farm license—Required.
- 75.28.285 Commercial razor clam license—Fees.
- 75.28.287 Geoduck tract license—Geoduck diver license—Fees.
- 75.28.290 Oyster reserve license—Fee.
- 75.28.300 Wholesale fish dealer's license—Fee.
- 75.28.350 Fish buyer's license—Fee.
- 75.28.370 Branch plant license—Fee.

75.28.690 Deckhand license—Fee—Sale of salmon roe by charter boat deckhands—Conditions.

75.28.010 Commercial licenses and permits required.

(1) Except as otherwise provided by this title, a license or permit issued by the director is required to:

(a) Commercially fish for or take food fish or shellfish;

(b) Deliver food fish or shellfish taken in offshore waters;

(c) Operate a charter boat;

(d) Operate a commercial food fish or shellfish farm; or

(e) Engage in processing or wholesaling food fish or shellfish.

(2) It is unlawful to engage in the activities described in subsection (1) of this section without having in possession the licenses or permits required by this title. [1983 1st ex.s. c 46 § 101; 1959 c 309 § 2; 1955 c 12 § 75.28.010. Prior: 1949 c 112 § 73; Rem. Supp. 1949 § 5780-511.]

75.28.012 Licensing districts—Created. The following licensing districts are created:

(1) The Puget Sound licensing district includes waters of the Strait of Juan de Fuca, Georgia Strait, Puget Sound and all bays, inlets, canals, coves, sounds and estuaries lying easterly and southerly of the international boundary line and a line at the entrance to the Strait of Juan de Fuca projected northerly from Cape Flattery to the lighthouse on Tatoosh Island and then to Bonilla Point on Vancouver Island.

(2) The Grays Harbor—Columbia river licensing district includes waters of Grays Harbor and tributary estuaries lying easterly of a line projected northerly from Point Chehalis Light to Point Brown and those waters of the Columbia river and tributary sloughs and estuaries easterly of a line at the entrance to the Columbia river projected southerly from the most westerly point of the North jetty to the most westerly point of the South jetty.

(3) The Willapa Bay—Columbia river licensing district includes waters of Willapa Bay and tributary estuaries and easterly of a line projected northerly from Leadbetter Point to Cape Shoalwater Light and those waters of the Columbia river and tributary sloughs described in subsection (2) of this section. [1983 1st ex.s. c 46 § 102; 1971 ex.s. c 283 § 2; 1957 c 171 § 1.]

Effective dates—1971 ex.s. c 283: See note following RCW 75.28.113.

75.28.014 Application deadlines for commercial salmon fishing licenses and Columbia river smelt licenses.

(1) An applicant for a commercial salmon fishing license shall submit a license application in accordance with this subsection.

(a) If an application is postmarked or personally delivered to the department in Olympia by April 15th of the license year, it shall be accompanied by the prescribed license fee.

(b) If an application is postmarked or personally delivered to the department in Olympia after April 15th

of the license year, it shall be accompanied by the prescribed license fee and a late application fee of two hundred dollars.

(2) Columbia River smelt license applications accompanied by the license fee shall be made in person or postmarked by January 10 of the license year. [1983 1st ex.s. c 46 § 103; 1981 c 201 § 1; 1965 ex.s. c 57 § 1; 1959 c 309 § 4; 1957 c 171 § 3.]

75.28.020 Qualifications for commercial licenses—Reciprocity with Oregon in concurrent waters of Columbia River. (1) The department may only issue a commercial license to a person who is sixteen years of age or older and who is a citizen and a bona fide resident of the United States. The deckhand license required by RCW 75.28.690 may be issued to persons under sixteen years of age. The department may only issue a commercial license to a corporation if it is authorized to do business in this state. A valid Oregon license which is comparable to a license under this title is valid in the concurrent waters of the Columbia River if the state of Oregon recognizes as valid the comparable Washington license. [1983 1st ex.s. c 46 § 104; 1963 c 171 § 1; 1955 c 12 § 75.28.020. Prior: 1953 c 207 § 9; 1949 c 112 § 63; Rem. Supp. 1949 § 5780-501.]

75.28.030 Application for commercial licenses. Except as otherwise provided in this title, the director shall issue commercial licenses and permits to a qualified person, upon the receipt of an application accompanied by the required fee. Applications shall be submitted on forms provided by the department. Applicants for commercial licenses and permits shall indicate at the time of application the species of food fish or shellfish they intend to take and the type of gear they intend to use. [1983 1st ex.s. c 46 § 105; 1959 c 309 § 7; 1955 c 12 § 75.28.030. Prior: 1953 c 207 § 2; 1949 c 112 § 65; Rem. Supp. 1949 § 5780-503.]

75.28.035 Application for commercial licenses—Vessel registration, license decals—Additional operator—Transfer or replacement. An application for issuance or renewal of a commercial fishing license or permit shall contain the name and address of the vessel owner, the name and address of the vessel operator, the name and number of the vessel, a description of the vessel and fishing gear to be carried on the vessel, and other information required by the department.

At the time of issuance of a commercial fishing license or permit the director shall furnish the licensee with a vessel registration and two license decals.

Vessel registrations and license and permit decals issued by the director shall be displayed as provided by rule of the director.

A commercial fishing license or permit is not valid if the vessel is operated by a person other than the operator listed on the license or permit. The director may authorize additional operators for the license or permit. The fee for an additional operator is ten dollars.

The vessel owner shall notify the director on forms provided by the department of changes of ownership or

operator and a new license or permit shall be issued upon payment of a fee of ten dollars.

A defaced, mutilated, or lost license or license decal shall be replaced immediately. The replacement fee is two dollars. [1983 1st ex.s. c 46 § 107; 1959 c 309 § 9; 1955 c 12 § 75.28.100. Prior: 1951 c 271 § 8; 1949 c 112 § 68; Rem. Supp. 1949 § 5780-506. Formerly RCW 75.28.100.]

75.28.040 Expiration and renewal of commercial licenses. Commercial licenses and permits expire at midnight on December 31st following their issuance and in accordance with this title may be renewed annually upon application and payment of the prescribed license fees. [1983 1st ex.s. c 46 § 108; 1955 c 212 § 2; 1955 c 12 § 75.28.040. Prior: 1949 c 112 § 64; Rem. Supp. 1949 § 5780-502.]

75.28.060 Licenses transferable—Determination of fee for gear operated by nonresident. Except as otherwise provided in this title, commercial fishing licenses are transferable. It is unlawful for a license to be operated by a person other than the person listed as operator on the license. Fishing gear operated by a nonresident shall be licensed as nonresident gear. If a commercial license is transferred from a resident to a nonresident, the transferee shall pay the difference between the resident and nonresident license fees at the time of transfer. [1983 1st ex.s. c 46 § 109; 1971 ex.s. c 283 § 4; 1965 ex.s. c 30 § 1; 1959 c 309 § 8; 1955 c 212 § 3; 1955 c 12 § 75.28.060. Prior: 1951 c 271 § 5; 1949 c 112 § 74, part; Rem. Supp. 1949 § 5780-512, part.]

Effective dates—1971 ex.s. c 283: See note following RCW 75.28.113.

75.28.070 Display of license—Clam or oyster farm, oyster reserve, wholesale fish dealer. Clam or oyster farm, oyster reserve, and wholesale fish dealer licenses shall be displayed at the business premises of the licensee. [1983 1st ex.s. c 46 § 110; 1955 c 12 § 75.28.070. Prior: 1949 c 112 § 74, part; Rem. Supp. 1949 § 5780-512, part.]

75.28.081 Personal commercial fishing license—Salmon and Columbia river smelt. A personal commercial fishing license is required for a person who takes or assists in taking any salmon while on board a troll vessel licensed under RCW 75.28.110(1)(c) or 75.28.113.

A personal commercial fishing license is required for a person who takes or assists in taking Columbia river smelt (*Thaleichthys pacificus*) under a Columbia river smelt license.

The annual license fee is ten dollars for a resident and twenty dollars for a nonresident.

The personal license shall be carried on the person while engaged in the taking of salmon or Columbia river smelt. [1983 1st ex.s. c 46 § 111; 1975-'76 2nd ex.s. c 40 § 2; 1971 ex.s. c 283 § 14.]

Effective date—1975-'76 2nd ex.s. c 40: "This 1976 amendatory act shall be effective January 1, 1977." [1975-'76 2nd ex.s. c 40 § 4.]

Effective dates—1971 ex.s. c 283: See note following RCW 75.28.113.

75.28.095 Charter boat license—Fee—"Charter boat" defined—Restrictions on commercial fishing. (1) A charter boat license is required for a vessel to be operated as a charter boat from which food fish are taken for personal use. The annual license fees are:

Species	Resident Fee	Nonresident Fee
(a) Food fish other than salmon	\$100	\$200
(b) Salmon and other food fish	\$200	\$200

(2) "Charter boat" means a vessel from which persons may, for a fee, fish for food fish, and which delivers food fish taken from offshore waters into state ports or from state waters into United States ports. "Charter boat" does not mean:

(a) Vessels not generally engaged in charter boat fishing which are under private lease or charter and operated by the lessee for the lessee's personal recreational enjoyment; or

(b) Vessels used by guides for clients fishing for salmon for personal use in freshwater rivers, streams, and lakes, other than Lake Washington or that part of the Columbia River below the bridge at Longview.

(3) A vessel shall not engage in both charter or sports fishing and commercial fishing on the same day. A vessel may be licensed for both charter boat fishing and for commercial fishing at the same time. The license or delivery permit allowing the activity not being engaged in shall be deposited with the fisheries patrol officer for that area or an agent designated by the director. [1983 1st ex.s. c 46 § 112; 1979 c 60 § 1; 1977 ex.s. c 327 § 5; 1971 ex.s. c 283 § 15; 1969 c 90 § 1.]

Severability—1979 c 60: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1979 c 60 § 4.]

Legislative intent—Funding of salmon enhancement facilities—Use of license fees—1977 ex.s. c 327: See note following RCW 75.48.120.

Severability—Effective date—1977 ex.s. c 327: See notes following RCW 75.25.100.

Effective dates—1971 ex.s. c 283: See note following RCW 75.28.113.

Limitation on issuance of salmon charter boat licenses: RCW 75.30.065.

Salmon charter boats—Angler permit required: RCW 75.30.070.

75.28.110 Commercial salmon fishing licenses—Gear—Fees. (1) The following commercial salmon fishing licenses are required for the licensee to use the specified gear to fish for salmon and other food fish in state waters. The annual license fees are:

Gear	Resident Fee	Nonresident Fee
(a) Purse seine	\$300	\$600
(b) Gill net	\$200	\$400

(1983 Ed.)

(c) Troll	\$200	\$400
(d) Reef net	\$200	\$400

(2) Holders of commercial salmon fishing licenses may retain incidentally caught food fish other than salmon, subject to rules of the director.

(3) A salmon troll license includes a salmon delivery permit.

(4) A separate gill net license is required to fish for salmon in each of the licensing districts established in RCW 75.28.012. [1983 1st ex.s. c 46 § 113; 1965 ex.s. c 73 § 2; 1959 c 309 § 10; 1955 c 12 § 75.28.110. Prior: 1951 c 271 § 9; 1949 c 112 § 69(1); Rem. Supp. 1949 § 5780-507(1).]

Legislative intent—Funding of salmon enhancement facilities—Use of license fees: See note following RCW 75.48.120.

Limitations on issuance of commercial salmon fishing licenses: RCW 75.30.120.

75.28.113 Salmon delivery permit—Fee—Revocation. (1) A person operating a commercial fishing vessel used in taking salmon in offshore waters and delivering the salmon to a place or port in the state shall obtain a salmon delivery permit from the director. The annual fee for a salmon delivery permit is two hundred dollars. Persons operating fishing vessels licensed under RCW 75.28.125 may apply the delivery permit fee of ten dollars against the salmon delivery permit fee.

(2) If the director determines that the operation of a vessel under a salmon delivery permit results in the depletion or destruction of the state's salmon resource or the delivery into this state of salmon products prohibited by law, the director may revoke the permit. [1983 1st ex.s. c 46 § 115; 1977 ex.s. c 327 § 3; 1971 ex.s. c 283 § 1; 1955 c 12 § 75.18.080. Prior: 1953 c 147 § 9. Formerly RCW 75.18.080.]

Legislative intent—Funding of salmon enhancement facilities—Use of license fees—1977 ex.s. c 327: See note following RCW 75.48.120.

Severability—Effective date—1977 ex.s. c 327: See notes following RCW 75.25.100.

Effective dates—1971 ex.s. c 283: "The provisions of this 1971 amendatory act are necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions, and shall take effect immediately. The provisions of sections 1 to 10 inclusive of this 1971 amendatory act shall take effect on January 1, 1972." [1971 ex.s. c 283 § 16.]

Limitations on issuance of salmon delivery permits: RCW 75.30.120.

75.28.116 Salmon single delivery permit—Fee (as amended by 1983 c 297). A commercial fishing vessel not qualified for a license or permit under *RCW 75.28.455 shall not land salmon in the state of Washington unless, as determined by the director or his designee on a case-by-case basis, a bona fide emergency exists. In such an emergency situation, the vessel owner shall obtain a single delivery vessel delivery permit. The fee for such permit shall be one hundred dollars. [1983 c 297 § 1; 1977 ex.s. c 327 § 4; 1974 ex.s. c 184 § 3. Formerly RCW 75.28.460.]

*Reviser's note: RCW 75.28.455 was recodified as RCW 75.30.120 by 1983 1st ex.s. c 46.

75.28.116 Salmon single delivery permit—Fee (as amended by 1983 1st ex.s. c 46). The owner of a commercial salmon fishing vessel which is not qualified for a license or permit under RCW 75.30.120 is required to obtain a salmon single delivery permit in order to make one

landing of salmon taken in offshore waters. The permit fee is one hundred dollars for residents and nonresidents. [1983 1st ex.s. c 46 § 116; 1977 ex.s. c 327 § 4; 1974 ex.s. c 184 § 3. Formerly RCW 75.28.460.]

Reviser's note: RCW 75.28.116 was amended twice during the 1983 sessions of the legislature, each without reference to the other.

For rule of construction concerning sections amended more than once at any session of the same legislature, see RCW 1.12.025.

Legislative intent—Funding of salmon enhancement facilities—Use of license fees—1977 ex.s. c 327: See note following RCW 75.48.120.

Severability—Effective date—1977 ex.s. c 327: See notes following RCW 75.25.100.

Legislative intent—Severability—1974 ex.s. c 184: See notes following RCW 75.30.120.

75.28.120 Commercial fishing licenses for food fish other than salmon—Gear—Fees. The following commercial fishing licenses are required for the licensee to use the specified gear to fish for food fish other than salmon in state waters. The annual license fees are:

Gear	Resident Fee	Nonresident Fee
(1) Jig	\$27.50	\$55
(2) Set line	\$35	\$70
(3) Set net	\$35	\$70
(4) Drag seine	\$45	\$70
(5) Gill net	\$200	\$400
(6) Purse seine	\$300	\$600
(7) Troll	\$27.50	\$55
(8) Bottom fish pots	\$35	\$60
Each pot over 100	\$0.25	\$0.50
(9) Lampara	\$57.50	\$115
(10) Dip bag net	\$27.50	\$55
(11) Brush weir	\$85	\$160

[1983 1st ex.s. c 46 § 117; 1965 ex.s. c 73 § 3; 1959 c 309 § 11; 1955 c 12 § 75.28.120. Prior: 1951 c 271 § 10; 1949 c 112 § 69(2); Rem. Supp. 1949 § 5780-507(2).]

Limitation on commercial herring fishing: RCW 75.30.140.

75.28.123 Columbia river sturgeon endorsement required—Fees. In addition to a set line license, a Columbia river sturgeon endorsement is required to take sturgeon commercially with set lines in the waters of the Columbia river or its tributaries. The annual endorsement fee is two hundred dollars for residents and four hundred dollars for nonresidents. [1983 c 300 § 2.]

Director to pursue elimination of set line sturgeon fishing—1983 c 300: "In an effort to enhance recreational opportunity and improve management of the resource, the director shall pursue the elimination of set line fishing for sturgeon through the Columbia river compact, RCW 75.40.010." [1983 c 300 § 1.]

Effective date—1983 c 300: "This act shall take effect on January 1, 1984." [1983 c 300 § 3.]

75.28.125 Delivery permit for shellfish and food fish other than salmon—Fee. A delivery permit is required to deliver shellfish or food fish other than salmon taken in offshore waters to a port in the state. The annual permit fee is ten dollars for residents and twenty dollars for nonresidents. A permittee under RCW 75.28.113 (salmon delivery permit) is not required to obtain a delivery permit under this section. [1983 1st ex.s. c 46 §

119; 1971 ex.s. c 283 § 5; 1965 ex.s. c 73 § 1; 1959 c 309 § 5. Formerly RCW 75.28.085.]

Effective dates—1971 ex.s. c 283: See note following RCW 75.28.113.

75.28.130 Commercial shellfish licenses—Gear—Fee. The following commercial fishing licenses are required for the licensee to use the specified gear to fish for shellfish in state waters. The annual license fees are:

Gear	Resident Fee	Nonresident Fee
(1) Ring net	\$27.50	\$45
(2) Shellfish pots		
(excluding crab)	\$35	\$60
Each pot over 100	\$0.25	\$0.50
(3) Crab pots	\$35	\$60
Each pot over 100	\$0.25	\$0.50
(4) Shellfish diver		
(excluding clams)	\$27.50	\$55

[1983 1st ex.s. c 46 § 120; 1977 ex.s. c 327 § 6; 1971 ex.s. c 283 § 7; 1965 ex.s. c 73 § 4; 1959 c 309 § 12; 1955 c 12 § 75.28.130. Prior: 1951 c 271 § 11; 1949 c 112 § 69(3); Rem. Supp. 1949 § 5780-507(3).]

Severability—Effective date—1977 ex.s. c 327: See notes following RCW 75.25.100.

Effective dates—1971 ex.s. c 283: See note following RCW 75.28.113.

Puget Sound crab license endorsement: RCW 75.30.130.

75.28.134 Hood Canal shrimp endorsement—Fee—Limitation on shrimp pots. (1) In addition to a shellfish pot license, a Hood Canal shrimp endorsement is required to take shrimp commercially in that portion of Hood Canal lying south of the Hood Canal floating bridge. The annual endorsement fee is one hundred sixty-five dollars for a resident and three hundred forty dollars for a nonresident.

(2) Not more than fifty shrimp pots may be used while commercially fishing for shrimp in that portion of Hood Canal lying south of the Hood Canal floating bridge. [1983 1st ex.s. c 31 § 2.]

Effective date—1983 1st ex.s. c 31: See note following RCW 75.25.015.

Recreational Hood Canal shrimp license: RCW 75.25.015.

75.28.140 Commercial fishing licenses for shellfish and food fish other than salmon—Fees. The following commercial fishing licenses are required for the licensee to use the specified gear to fish for shellfish and food fish other than salmon in state waters. The annual license fees are:

Gear	Resident Fee	Nonresident Fee
Trawl	\$87.50	\$135.00

[1983 1st ex.s. c 46 § 121; 1977 ex.s. c 327 § 7; 1971 ex.s. c 283 § 8; 1965 ex.s. c 73 § 5; 1959 c 309 § 13;

1955 c 12 § 75.28.140. Prior: 1951 c 271 § 12; 1949 c 112 § 69(4); Rem. Supp. 1949 § 5780-507(4).]

Severability—Effective date—1977 ex.s. c 327: See notes following RCW 75.25.100.

Effective dates—1971 ex.s. c 283: See note following RCW 75.28.113.

75.28.255 Commercial fishing licenses for specified species—Columbia river smelt—Carp—Fees. The following commercial fishing licenses are required for the licensee to fish for the specified species in state waters with gear authorized by rule of the director. The annual license fees are:

Species	Resident Fee	Nonresident Fee
(1) Columbia River smelt	\$200	\$200
(2) Carp	\$5	\$5

[1983 1st ex.s. c 46 § 122; 1955 c 212 § 5.]

75.28.265 Commercial cultivation of food fish and shellfish—Aquaculture permits and licenses—Fee—Exemption. (1) The director may authorize by an aquaculture permit the commercial cultivation of food fish or shellfish, subject to rules of the director. Cultivation includes all aspects of breeding, obtaining eggs or young of, raising, preparing for consumption or for market, and marketing of the food fish or shellfish.

(2) In addition to an aquaculture permit, a license is required to operate an aquaculture farm. The annual fee for an aquaculture license is one hundred dollars. A separate license is required for each county in which commercial cultivation is undertaken by the same person.

(3) Licensed clam farms, oyster farms, and geoduck tracts are exempt from this section. [1983 1st ex.s. c 46 § 124; 1971 c 35 § 2. Formerly RCW 75.16.100.]

75.28.280 Clam farm license—Oyster farm license—Mechanical harvester license—Fees. (1) A clam farm license is required for the licensee to operate a commercial clam farm of one or more tracts of lands on tidelands or beds of navigable waters. The annual license fee is fifteen dollars for residents and nonresidents.

A clam farm license is not required for subtidal geoduck tracts for which licenses have been obtained under RCW 75.28.287.

(2) An oyster farm license is required for the licensee to operate a commercial oyster farm on tidelands or beds of navigable waters. The annual license fee is fifteen dollars for residents and nonresidents.

(3) Separate clam farm and oyster farm licenses are required for each of the following districts as defined by rule of the director: Northern Puget Sound district, southern Puget Sound district, Grays Harbor district, and Willapa Harbor district.

(4) A mechanical harvester license is required to operate a mechanical or hydraulic device for commercially harvesting clams, other than geoduck clams, on a clam farm. The annual license fee is three hundred dollars for residents and nonresidents. [1983 1st ex.s. c 46 § 125; 1979 ex.s. c 141 § 3; 1969 ex.s. c 253 § 3; 1955 c 212 §

8; 1955 c 12 § 75.28.280. Prior: 1951 c 271 § 26; 1949 c 112 § 70; Rem. Supp. 1949 § 5780-508.]

Construction—Severability—1969 ex.s. c 253: See notes following RCW 75.24.100.

75.28.282 Clam farm license, oyster farm license—Required. Clam farm licenses or oyster farm licenses as provided in RCW 75.28.280 are required of:

- (1) A person owning an oyster or clam farm; or
- (2) A clam or oyster farm lessee operating an oyster or clam farm when the owner does not receive clams or oysters from the farm as total or partial consideration for the lease. [1983 1st ex.s. c 46 § 126; 1955 c 212 § 10.]

75.28.285 Commercial razor clam license—Fees. A commercial razor clam license is required to dig razor clams commercially from state waters or beaches. The annual license fee is fifty dollars for residents and one hundred dollars for nonresidents. [1983 1st ex.s. c 46 § 127; 1983 1st ex.s. c 31 § 3; 1965 ex.s. c 27 § 1; 1955 c 12 § 75.28.285. Prior: 1951 c 271 § 44.]

Reviser's note: This section was amended by 1983 1st ex.s. c 31 § 3 and 1983 1st ex.s. c 46 § 127, each without reference to the other. Both amendments are incorporated in the publication of this section pursuant to RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Effective date—1983 1st ex.s. c 31: See note following RCW 75.25.015.

75.28.287 Geoduck tract license—Geoduck diver license—Fees. (1) A geoduck tract license is required for the commercial harvest of geoducks from each subtidal tract for which harvest rights have been granted by the department of natural resources. The annual license fee is one hundred dollars for residents and nonresidents.

(2) Every diver engaged in the commercial harvest of geoduck or other clams shall obtain a nontransferable geoduck diver license. The annual license fee is fifty dollars for residents and nonresidents. [1983 1st ex.s. c 46 § 130; 1979 ex.s. c 141 § 4; 1969 ex.s. c 253 § 4.]

Construction—Severability—1969 ex.s. c 253: See notes following RCW 75.24.100.

Designation of aquatic lands for geoduck harvesting: RCW 79.96.085.
Geoducks, harvesting for commercial purposes—License: RCW 75.24.100.

75.28.290 Oyster reserve license—Fee. An oyster reserve license is required for the commercial taking of shellfish from state oyster reserves. The annual license fee is fifteen dollars for residents and nonresidents. [1983 1st ex.s. c 46 § 131; 1969 ex.s. c 91 § 2; 1955 c 12 § 75.28.290. Prior: 1951 c 271 § 27; 1949 c 112 § 71; Rem. Supp. 1949 § 5780-509.]

75.28.300 Wholesale fish dealer's license—Fee. A wholesale fish dealer's license is required for:

- (1) A business in the state to engage in the commercial processing of food fish or shellfish, including custom canning or processing of personal use food fish or shellfish.

(2) A business in the state to engage in the wholesale selling, buying, or brokering of food fish or shellfish. A wholesale fish dealer's license is not required of those businesses which buy exclusively from Washington licensed wholesale dealers and sell solely at retail.

(3) Fishermen or aquaculturists who land and sell their catch or harvest in the state to anyone other than a licensed wholesale dealer within or outside the state.

(4) A business to engage in the commercial manufacture or preparation of fertilizer, oil, meal, caviar, fish bait, or other byproducts from food fish or shellfish.

The annual license fee is thirty-seven dollars and fifty cents. A wholesale fish dealer's license is not required for persons buying or selling oyster seed for transplant. [1983 1st ex.s. c 46 § 132; 1979 c 66 § 1; 1965 ex.s. c 28 § 1; 1955 c 212 § 11; 1955 c 12 § 75.28.300. Prior: 1951 c 271 § 28; 1949 c 112 § 72(1); Rem. Supp. 1949 § 5780-510(1).]

75.28.350 Fish buyer's license—Fee. A fish buyer's license is required of a person engaged in this state as a representative of a wholesale fish dealer. The annual license fee is seven dollars and fifty cents.

The fish buyer's license shall be carried on the person of the licensee.

As used in this section, "fish buyer" means an individual who purchases food fish or shellfish at a place other than his employer's business premises, and who buys for only one wholesale fish dealer. An individual who buys for two or more persons, is required to be licensed as a wholesale fish dealer. [1983 1st ex.s. c 46 § 133; 1965 ex.s. c 29 § 1; 1955 c 12 § 75.28.350. Prior: 1951 c 271 § 31; 1949 c 112 § 72(6); Rem. Supp. 1949 § 5780-510(6).]

75.28.370 Branch plant license—Fee. A branch plant license is required for each branch plant of a business licensed as a wholesale fish dealer having more than one place of business in the state. One place of business shall be designated as headquarters and a license is required for every other place of business. A branch plant license shall be displayed on the business premises of the branch plant. The annual license fee is seven dollars and fifty cents. [1983 1st ex.s. c 46 § 134; 1979 c 66 § 2; 1955 c 12 § 75.28.370. Prior: 1953 c 207 § 15; 1951 c 271 § 33; 1949 c 112 § 72(8); Rem. Supp. 1949 § 5780-510(8).]

75.28.690 Deckhand license—Fee—Sale of salmon roe by charter boat deckhands—Conditions.

(1) A deckhand license is required for a crew member on a licensed salmon charter boat to sell salmon roe as provided in subsection (2) of this section. The annual license fee is ten dollars.

(2) A deckhand on a licensed salmon charter boat may sell salmon roe taken from fish caught for personal use, subject to rules of the director and the following conditions:

(a) The salmon is taken while fishing on the charter boat;

(b) The roe is the property of the angler until the roe is given to the deckhand. The charter boat's passengers are notified of this fact by the deckhand;

(c) The roe is sold to a licensed wholesale dealer; and

(d) The deckhand is licensed as provided in subsection (1) of this section and has the license in possession whenever salmon roe is sold. [1983 1st ex.s. c 46 § 137; 1981 c 227 § 2.]

Chapter 75.30

LICENSE LIMITATION PROGRAMS

(Formerly: Salmon charter boat licensing limitations)

Sections	
75.30.050	Advisory review boards.
75.30.060	Administrative review of department's decision—Hearing—Procedures.
75.30.065	Salmon charter boats—Limitation on issuance of licenses—Renewal—Transfer.
75.30.070	Salmon charter boats—Angler permit required.
75.30.090	Salmon charter boats—Angler permit—Number of anglers.
75.30.100	Salmon charter boats—Angler permit—Total number of anglers limited—Permit transfer.
75.30.120	Commercial salmon fishing licenses and delivery permits—Limitations on issuance—Waiver of landing requirement—Transfer.
75.30.130	Puget Sound commercial crab fishing—Limitations on license endorsements—Qualifications.
75.30.140	Commercial herring fishing—Herring validation required—Limitations on issuance.

75.30.050 Advisory review boards. (1) The director shall appoint three-member advisory review boards to hear cases as provided in RCW 75.30.060. Members shall be from:

(a) The salmon charter boat fishing industry in cases involving salmon charter boat licenses or angler permits;

(b) The commercial salmon fishing industry in cases involving commercial salmon licenses;

(c) The commercial crab fishing industry in cases involving Puget Sound crab license endorsements; and

(d) The commercial herring fishery in cases involving herring validations.

(2) Members shall serve at the discretion of the director and shall be reimbursed for travel expenses as provided in RCW 43.03.050 and 43.03.060. [1983 1st ex.s. c 46 § 138; 1977 ex.s. c 106 § 5.]

Legislative findings—Severability—1977 ex.s. c 106: See notes following RCW 75.30.065.

75.30.060 Administrative review of department's decision—Hearing—Procedures. A person aggrieved by a decision of the department under this chapter may request administrative review under the informal procedure established by this section.

In an informal hearing before a review board, the rules of evidence do not apply. A record of the proceeding shall be kept as provided by chapter 34.04 RCW. After hearing the case the review board shall notify in writing the director and the initiating party whether the review board agrees or disagrees with the department's decision and the reasons for the board's findings. Upon receipt of the board's findings the director may order

Exhibit 5

CHAPTER 340

[Senate Bill 5124]

COMMERCIAL FISHING LICENSES

Effective Date: 1/1/94

AN ACT Relating to commercial fishing licenses; amending RCW 75.28.010, 75.28.014, 75.28.020, 75.28.030, 75.28.040, 75.28.110, 75.28.113, 75.28.116, 75.28.120, 75.28.125, 75.28.130, 75.28.280, 75.28.290, 75.28.690, 75.28.287, 75.28.710, 75.30.050, 75.30.065, 75.30.070, 75.30.090, 75.30.100, 75.30.120, 75.30.125, 75.30.130, 75.30.140, 75.28.235, 75.28.245, 75.30.160, 75.30.170, 75.30.180, 75.30.210, 75.30.220, 75.30.240, 75.30.250, 75.08.230, 75.28.134, 75.24.100, 75.28.070, and 75.50.100; reenacting and amending RCW 75.28.095 and 75.08.011; adding new sections to chapter 75.28 RCW; adding new sections to chapter 75.30 RCW; adding new sections to chapter 75.12 RCW; creating new sections; recodifying RCW 75.28.070, 75.28.134, 75.28.235, 75.28.245, and 75.28.287; decodifying RCW 75.30.150; repealing RCW 75.28.012, 75.28.035, 75.28.060, 75.28.140, and 75.28.255; and providing an effective date.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. The legislature finds that the laws governing commercial fishing licensing in this state are highly complex and increasingly difficult to administer and enforce. The current laws governing commercial fishing licenses have evolved slowly, one section at a time, over decades of contention and changing technology, without general consideration for how the totality fits together. The result has been confusion and litigation among commercial fishers. Much of the confusion has arisen because the license holder in most cases is a vessel, not a person. The legislature intends by this act to standardize licensing criteria, clarify licensing requirements, reduce complexity, and remove inequities in commercial fishing licensing. The legislature intends that the license fees stated in this act shall be equivalent to those in effect on January 1, 1993, as adjusted under section 19, chapter 316, Laws of 1989.

Sec. 2. RCW 75.28.010 and 1991 c 362 s 1 are each amended to read as follows:

(1) Except as otherwise provided by this title, it is unlawful to engage in any of the following activities without a license or permit issued by the director (~~is required to~~):

- (a) Commercially fish for or take food fish or shellfish;
- (b) Deliver food fish or shellfish taken in offshore waters;
- (c) Operate a charter boat or commercial fishing vessel engaged in a fishery;
- (d) Engage in processing or wholesaling food fish or shellfish; or
- (e) (~~Operate~~) Act as a guide for salmon for personal use in freshwater rivers and streams, other than that part of the Columbia river below the bridge at Longview.

(2) (~~It is unlawful to~~) No person may engage in the activities described in subsection (1) of this section (~~(without having in possession)~~) unless the licenses or permits required by this title are in the person's possession, and the person is the named license holder or an alternate operator designated on the license.

(3) A valid Oregon license that is equivalent to a license under this title is valid in the concurrent waters of the Columbia river if the state of Oregon

commercially taken. Any species of food fish or shellfish commercially harvested in Washington state as of June 7, 1990, may be designated as a species in an emerging commercial fishery, except that no fishery subject to a license limitation program in chapter 75.30 RCW may be designated as an emerging commercial fishery.

(3) It is unlawful to take food fish or shellfish in a fishery designated as an emerging commercial fishery without an emerging commercial fishery license and a permit from the director. The director shall issue two types of permits to accompany emerging commercial fishery licenses: Trial fishery permits and experimental fishery permits. Trial fishery permits are governed by subsection (4) of this section. Experimental fishery permits are governed by RCW 75.30.220.

(4) The director shall issue trial fishery permits for a fishery designated as an emerging commercial fishery unless the director determines there is a need to limit the number of participants under RCW 75.30.220. A person who meets the qualifications of RCW 75.28.020 may hold a trial fishery permit. The holder of a trial fishery permit shall comply with the terms of the permit. Trial fishery permits are not transferable from the permit holder to any other person.

Sec. 19. RCW 75.28.280 and 1989 c 316 s 12 are each amended to read as follows:

A hardshell clam mechanical harvester fishery license is required to operate a mechanical or hydraulic device for commercially harvesting clams, other than geoduck clams, ((on a clam farm)) unless the requirements of RCW 75.20.100 are fulfilled for the proposed activity. ((Unless adjusted by the director pursuant to the director's authority granted in RCW 75.28.065, the annual license fee is four hundred ten dollars for residents and eight hundred twenty dollars for nonresidents.))

Sec. 20. RCW 75.28.290 and 1989 c 316 s 14 are each amended to read as follows:

A person who commercially takes shellfish from state oyster reserves under RCW 75.24.070 must have an oyster reserve fishery license ((is required for the commercial taking of shellfish from state oyster reserves. Unless adjusted by the director pursuant to the director's authority granted in RCW 75.28.065, the annual license fee is fifty dollars for residents and one hundred dollars for nonresidents)).

Sec. 21. RCW 75.28.095 and 1989 c 316 s 2, 1989 c 147 s 1, and 1989 c 47 s 2 are each reenacted and amended to read as follows:

(1) ((A charter boat license is required for a vessel to be operated as a charter boat from which food fish are taken for personal use. Unless adjusted by the director pursuant to the director's authority granted in RCW 75.28.065.)) The director shall issue the charter licenses and angler permits listed in this section according to the requirements of this title. The licenses and permits and their annual ((license)) fees and surcharges are:

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CHAPTER 216

[Second Substitute House Bill 2220]

SHELLFISH AQUACULTURE

AN ACT Relating to shellfish; amending RCW 79.135.100 and 77.115.040; adding new sections to chapter 28B.20 RCW; and creating new sections.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. A new section is added to chapter 28B.20 RCW to read as follows:

(1) The sea grant program at the University of Washington shall, consistent with this section, commission a series of scientific research studies that examines the possible effects, including the cumulative effects, of the current prevalent geoduck aquaculture techniques and practices on the natural environment in and around Puget Sound, including the Strait of Juan de Fuca. The sea grant program shall use funding provided from the geoduck aquaculture research account created in section 2 of this act to review existing literature, directly perform research identified as needed, or to enter into and manage contracts with scientific organizations or institutions to accomplish these results.

(2) Prior to entering into a contract with a scientific organization or institution, the sea grant program must:

(a) Analyze, through peer review, the credibility of the proposed party to the contract, including whether the party has credible experience and knowledge and has access to the facilities necessary to fully execute the research required by the contract; and

(b) Require that all proposed parties to a contract fully disclose any past, present, or planned future personal or professional connections with the shellfish industry or public interest groups.

(3) All research commissioned under this section must be subjected to a rigorous peer review process prior to being accepted and reported by the sea grant program.

(4) In prioritizing and directing research under this section, the sea grant program shall meet with the department of ecology at least annually and rely on guidance submitted by the department of ecology. The department of ecology shall convene the shellfish aquaculture regulatory committee created in section 4 of this act as necessary to serve as an oversight committee to formulate the guidance provided to the sea grant program. The objective of the oversight committee, and the resulting guidance provided to the sea grant program, is to ensure that the research required under this section satisfies the planning, permitting, and data management needs of the state, to assist in the prioritization of research given limited funding, and to help identify any research that is beneficial to complete other than what is listed in subsection (5) of this section.

(5) To satisfy the minimum requirements of subsection (1) of this section, the sea grant program shall review all scientific research that is existing or in progress that examines the possible effect of currently prevalent geoduck practices, on the natural environment, and prioritize and conduct new studies as needed, to measure and assess the following:

(a) The environmental effects of structures commonly used in the aquaculture industry to protect juvenile geoducks from predation;

(b) The environmental effects of commercial harvesting of geoducks from intertidal geoduck beds, focusing on current prevalent harvesting techniques, including a review of the recovery rates for benthic communities after harvest;

(c) The extent to which geoducks in standard aquaculture tracts alter the ecological characteristics of overlying waters while the tracts are submerged, including impacts on species diversity, and the abundance of other benthic organisms;

(d) Baseline information regarding naturally existing parasites and diseases in wild and cultured geoducks, including whether and to what extent commercial intertidal geoduck aquaculture practices impact the baseline;

(e) Genetic interactions between cultured and wild geoduck, including measurements of differences between cultured geoducks and wild geoducks in terms of genetics and reproductive status; and

(f) The impact of the use of sterile triploid geoducks and whether triploid animals diminish the genetic interactions between wild and cultured geoducks.

(6) If adequate funding is not made available for the completion of all research required under this section, the sea grant program shall consult with the shellfish aquaculture regulatory committee, via the department of ecology, to prioritize which of the enumerated research projects have the greatest cost/benefit ratio in terms of providing information important for regulatory decisions; however, the study identified in subsection (5)(b) of this section shall receive top priority. The prioritization process may include the addition of any new studies that may be appropriate in addition to, or in place of, studies listed in this section.

(7) When appropriate, all research commissioned under this section must address localized and cumulative effects of geoduck aquaculture.

(8) The sea grant program and the University of Washington are prohibited from retaining greater than fifteen percent of any funding provided to implement this section for administrative overhead or other deductions not directly associated with conducting the research required by this section.

(9) Individual commissioned contracts under this section may address single or multiple components listed for study under this section.

(10) All research commissioned under this section must be completed and the results reported to the appropriate committees of the legislature by December 1, 2013. In addition, the sea grant program shall provide the appropriate committees of the legislature with annual reports updating the status and progress of the ongoing studies that are completed in advance of the 2013 deadline.

NEW SECTION. Sec. 2. A new section is added to chapter 28B.20 RCW to read as follows:

The geoduck aquaculture research account is created in the custody of the state treasurer. All receipts from any legislative appropriations, the aquaculture industry, or any other private or public source directed to the account must be deposited in the account. Expenditures from the account may only be used by the sea grant program for the geoduck research projects identified by section 1 of this act. Only the president of the University of Washington or the president's designee may authorize expenditures from the account. The account is subject to the allotment procedures under chapter 43.88 RCW, but an appropriation is not required for expenditures.

Sec. 3. RCW 79.135.100 and 1984 c 221 s 10 are each amended to read as follows:

(1) If state-owned aquatic lands are used for aquaculture production or harvesting, rents and fees shall be established through competitive bidding or negotiation.

(2) After an initial twenty-three acres are leased, the department is prohibited from offering leases that would permit the intertidal commercial aquaculture of geoducks on more than fifteen acres of state-owned aquatic lands a year until December 1, 2014.

(3) Any intertidal leases entered into by the department for geoduck aquaculture must be conditioned in such a way that the department can engage in monitoring of the environmental impacts of the lease's execution, without unreasonably diminishing the economic viability of the lease, and that the lease tracts are eligible to be made part of the studies conducted under section 1 of this act.

(4) The department must notify all abutting landowners and any landowner within three hundred feet of the lands to be leased of the intent of the department to lease any intertidal lands for the purposes of geoduck aquaculture.

NEW SECTION. Sec. 4. (1) The shellfish aquaculture regulatory committee is established to, consistent with this section, serve as an advisory body to the department of ecology on regulatory processes and approvals for all current and new shellfish aquaculture activities, and the activities conducted pursuant to RCW 90.58.060, as the activities relate to shellfish. The shellfish aquaculture regulatory committee is advisory in nature, and no vote or action of the committee may overrule existing statutes, regulations, or local ordinances.

(2) The shellfish aquaculture regulatory committee shall develop recommendations as to:

(a) A regulatory system or permit process for all current and new shellfish aquaculture projects and activities that integrates all applicable existing local, state, and federal regulations and is efficient both for the regulators and the regulated; and

(b) Appropriate guidelines for geoduck aquaculture operations to be included in shoreline master programs under section 5 of this act. When developing the recommendations for guidelines under this subsection, the committee must examine the following:

(i) Methods for quantifying and reducing marine litter; and

(ii) Possible landowner notification policies and requirements for establishing new geoduck aquaculture farms.

(3)(a) The members of the shellfish aquaculture regulatory committee shall be appointed by the director of the department of ecology as follows:

(i) Two representatives of county government, one from a county located on the Puget Sound, and one from a county located on the Pacific Ocean;

(ii) Two individuals who are professionally engaged in the commercial aquaculture of shellfish, one who owns or operates an aquatic farm in Puget Sound, and one who owns or operates an aquatic farm in state waters other than the Puget Sound;

(iii) Two representatives of organizations representing the environmental community;

(iv) Two individuals who own shoreline property, one of which does not have a commercial geoduck operation on his or her property and one of which who does have a commercial geoduck operation on his or her property; and

(v) One representative each from the following state agencies: The department of ecology, the department of fish and wildlife, the department of agriculture, and the department of natural resources.

(b) In addition to the other participants listed in this subsection, the governor shall invite the full participation of two tribal governments, at least one of which is located within the drainage of the Puget Sound.

(4) The department of ecology shall provide administrative and clerical assistance to the shellfish aquaculture regulatory committee and all agencies listed in subsection (3) of this section shall provide technical assistance.

(5) Nonagency members of the shellfish aquaculture regulatory committee will not be compensated, but are entitled to be reimbursed for travel expenses in accordance with RCW 43.03.050 and 43.03.060.

(6) Any participation by a Native American tribe on the shellfish aquaculture regulatory committee shall not, under any circumstances, be viewed as an admission by the tribe that any of its activities, or those of its members, are subject to any of the statutes, regulations, ordinances, standards, or permit systems reviewed, considered, or proposed by the committee.

(7) The shellfish aquaculture regulatory committee is authorized to form technical advisory panels as needed and appoint to them members not on the shellfish aquaculture regulatory committee.

(8) The department of ecology shall report the recommendations and findings of the shellfish aquaculture regulatory committee to the appropriate committees of the legislature by December 1, 2007, with a further report, if necessary, by December 1, 2008.

NEW SECTION. Sec. 5. (1) The department of ecology shall develop, by rule, guidelines for the appropriate siting and operation of geoduck aquaculture operations to be included in any master program under this section. The guidelines adopted under this section must be prepared with the advice of the shellfish aquaculture regulatory committee created in section 4 of this act, which shall serve as the advisory committee for the development of the guidelines.

(2) The guidelines required under this section must be filed for public review and comment no later than six months after the delivery of the final report by the shellfish aquaculture regulatory committee created in section 4 of this act.

(3) The department of ecology shall update the guidelines required under this section, as necessary, after the completion of the geoduck research by the sea grant program at the University of Washington required under section 1 of this act.

Sec. 6. RCW 77.115.040 and 1993 sp.s. c 2 s 58 are each amended to read as follows:

(1) All aquatic farmers, as defined in RCW 15.85.020, shall register with the department. The director shall assign each aquatic farm a unique registration number and develop and maintain in an electronic database a registration list of all aquaculture farms. The department shall establish procedures to annually update the aquatic farmer information contained in the registration list. The

department shall coordinate with the department of health using shellfish growing area certification data when updating the registration list.

(2) Registered aquaculture farms shall provide the department ((production statistical data)) with the following information:

(a) The name of the aquatic farmer;

(b) The address of the aquatic farmer;

(c) Contact information such as telephone, fax, web site, and email address, if available;

(d) The number and location of acres under cultivation, including a map displaying the location of the cultivated acres;

(e) The name of the landowner of the property being cultivated or otherwise used in the aquatic farming operation;

(f) The private sector cultured aquatic product being propagated, farmed, or cultivated; and

(g) Statistical production data.

(3) The state veterinarian shall be provided with registration and statistical data by the department.

Passed by the House April 20, 2007.

Passed by the Senate April 20, 2007.

Approved by the Governor April 27, 2007.

Filed in Office of Secretary of State April 30, 2007.

CHAPTER 217

[House Bill 2240]

BREWERIES AND WINERIES—RETAILERS

AN ACT Relating to allowing certain activities between domestic wineries, domestic breweries, microbreweries, certificate of approval holders, and retail sellers of beer or wine; amending RCW 66.28.150; and reenacting and amending RCW 66.28.010.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 66.28.010 and 2006 c 330 s 28, 2006 c 92 s 1, and 2006 c 43 s 1 are each reenacted and amended to read as follows:

(1)(a) No manufacturer, importer, distributor, or authorized representative, or person financially interested, directly or indirectly, in such business; whether resident or nonresident, shall have any financial interest, direct or indirect, in any licensed retail business, unless the retail business is owned by a corporation in which a manufacturer or importer has no direct stock ownership and there are no interlocking officers and directors, the retail license is held by a corporation that is not owned directly or indirectly by a manufacturer or importer, the sales of liquor are incidental to the primary activity of operating the property as a hotel, alcoholic beverages produced by the manufacturer or importer or their subsidiaries are not sold at the licensed premises, and the board reviews the ownership and proposed method of operation of all involved entities and determines that there will not be an unacceptable level of control or undue influence over the operation or the retail licensee; nor shall any manufacturer, importer, distributor, or authorized representative own any of the property upon which such licensed persons conduct their business; nor shall any such licensed person, under any arrangement whatsoever, conduct his or her business upon property in which any manufacturer, importer, distributor, or authorized

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CHAPTER XXIV.

[H. B. No. 5.]

RELATIVE TO OYSTER PLANTING.

AN ACT providing for the sale and purchase of tide lands of the third class and the manner of conveying the same for the purposes of oyster planting, to encourage and facilitate said industry, and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. It shall be lawful for any person who is entitled to purchase tide lands pursuant to the act of March 26, 1890, as being an occupant of land planted with oysters, to survey or cause to be surveyd at his own expense, the land that pursuant to said act he is entitled to purchase, not exceeding one hundred acres in area: *Provided*, That the party making application to purchase under the provisions of this act shall accompany such application with a certificate under oath to the effect that lands purchased under the provisions of this act shall be used for oyster planting purposes only.

Duplicate records kept.

SEC. 2. Survey and description in duplicate of such tract shall be subject to the direction, oversight and approval of the board of state land commissioners, and one description of said tract as surveyed shall be filed with and be recorded by the county auditor of the county in which said tide lands are situated, in a book kept by him for such especial purpose, and a duplicate description in the office of the commissioner of public lands.

Lines of survey.

SEC. 3. The survey of such lands, as provided in the foregoing sections of this act, may not be required to follow the lines of United States government survey, but may follow the direction of the oyster beds actually occupied by the party proposing to purchase the same; the persons entitled to purchase such oyster beds under the provisions of this act may purchase the same at the rate of one dollar and twenty-five cents per acre, one-fourth of which price shall be paid at time of making such purchase, and the remaining three-fourths in three equal annual payments, each of which sums shall draw interest at the rate of eight per cent. per annum, the unpaid portion re-

Price per acre, and how sold.

maining as a lien upon said land until all payments shall be made in full, and the purchaser shall thereupon be entitled to a deed to the same; said deed shall be executed by the governor, attested by the secretary of state with the seal of the state thereunto attached, which deed shall contain the conditions of defeasance in this act provided.

SEC. 4. Any person having the right to purchase such Prior right. tide lands as provided by this act, and being an actual occupant of the same, shall have the prior right to purchase for a period of six months from and after the passage of this act and its being signed and approved by the governor.

SEC. 5. Upon the filing of a description of the survey of Application to purchase, notice of. such land, as provided for by the foregoing sections of this act, the person or persons having occupied or desiring to occupy such lands as described in section one of this act, may file with the commissioner of public lands an application to purchase said lands, together with a description of the lands applied for, by metes and bounds, and upon the receipt of the same the commissioner of public lands shall, at the expense of the applicant, publish, or cause to be published, for three successive weeks in any newspaper of general circulation printed and published in the county where such lands are situated, a notice of such application to purchase, giving therein a description of lands applied for. Adverse claimant. During the next thirty days following the last publication of said notice, any person claiming a prior right to purchase such tide lands may file with the commissioner of public lands a contest for the purpose of establishing a prior right to purchase, or, upon petition of ten citizens who shall be residents of the county wherein such lands are situated, a contest may be filed as hereinbefore provided, and such contest shall be upon the right of applicant to purchase, as provided in the foregoing sections of this act. If the party making contest shall fail to establish a prior right to purchase, said party shall be liable for the costs resulting direct from such contest, except private attorney fees, and the sum of such costs shall be paid by such contestant into the state treasury department, and, upon such payment being made, shall be entitled to a receipt for the same.

SEC. 6. This act shall in no manner apply to the provisions of the act of March 26, 1890, providing for the appraisal and disposition of tide and shore lands in the State of Washington except as far as it relates to lands actually used or to be used for the purpose of oyster planting.

SEC. 7. Any person desiring to purchase tide lands for the purposes of oyster planting may purchase tide lands of the third class not included in any natural oyster beds or any reserve pursuant to the provisions of this act, in subordination to any preëmption right confirmed by said act of March 26, 1890. Nothing in this act shall be construed so as to effect [affect] the preference rights of shore or upland owners, or improvers, as conferred by the provisions of said act or other provisions of law.

Persons authorized to purchase.

SEC. 8. No person shall be entitled, directly or indirectly, to the privileges of this act who is not an actual resident and citizen of the United States and State of Washington, and no person not a citizen of the State of Washington shall be competent to acquire deeds to any lands sold by the state under the provisions of this act: *Provided*, That any citizen of the United States and not a citizen of the State of Washington, or any corporation organized under the laws of any other state other than the State of Washington that has planted and cultivated and planted in oysters any tract or tracts or parcels of such lands for the period of five years next preceding January 1, 1895, shall have the exclusive right to purchase such tract or tracts or parcels of land so planted and cultivated as aforesaid, but not exceeding one hundred acres in the aggregate, such prior right to be within six months after the approval of this act. And failure to make application to purchase said lands within said six months by such person or corporation shall forfeit the right hereby granted to such person or corporations to purchase any such lands.

Abandoned oyster lands, how purchased.

SEC. 9. If from any cause any tract or tracts, parcel or parcels of land purchased under the provisions of this act shall become unfit and valueless for the purposes of oyster planting, the party having so purchased and being in the possession of the same may upon certifying such fact under

oath to the commissioner of public lands and to the auditor of the county wherein such lands are situated and also upon filing under oath a certificate of abandonment of such tract or tracts, parcel or parcels of land, in the office of each of said officials, such party shall then be entitled to again make purchase as hereinbefore provided; or if said land be used by the purchasers or any successors in interest of such purchaser in whole or in part for other than the purposes specified in this act, then upon application by any citizen to the state land commissioner such sale may be canceled, and the said land shall revert to the state and shall be subject to sale as herein provided, but not to such defaulting purchaser or such defaulting successor in interest.

SEC. 10. The provisions of this act shall not apply to such lands as have already been surveyed, appraised and platted.

SEC. 11. Whereas, planters of oysters not being adequately protected in the possession of their property, and it being the desire of certain oyster planters to engage in the planting of eastern oysters, and the season for ordering a supply of eastern oysters for spring planting being already at hand, an emergency is declared, and this act shall be in full force and effect upon its passage and approval by the governor.

Passed the house February 13, 1895.

Passed the senate February 27, 1895.

Approved March 2, 1895.

CHAPTER XXV.

[H. B. No. 399.]

RELATING TO THE SALE OF OYSTER LANDS.

AN ACT relating to the purchase and sale of oyster lands, and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That all persons having the qualifications provided by law to enable them to purchase tide lands

Right to purchase.

within the State of Washington, and who, prior to March 26, 1890, in good faith entered upon tide lands not in front of any incorporated city or town, nor within two miles thereof on either side, and planted and cultivated thereon artificial oyster beds, and who continued to occupy and work the same continuously and in good faith to March 26, 1890, and ever since said date, and who are now in possession of and working said oyster beds in good faith, shall be permitted to purchase the same for the purpose of cultivating oysters thereon, and for no other purpose, whether said tracts were originally covered by alleged natural oyster beds or not; and where, notwithstanding such prior occupancy and cultivation, any such tract or tracts so occupied prior to March 26, 1890, shall since such date have been reserved from sale or lease as natural oyster beds, the person or persons or their assigns who planted, occupied and cultivated such artificial beds may, by complying with the provisions of law touching the sale of artificial oyster beds and paying the value thereof fixed by the State of Washington, be and they are hereby entitled to receive a deed, subject to all the provisions of this act, to such tract or tracts not exceeding in area of forty acres to any one person, as they so in good faith improved as such artificial oyster beds prior to March 26, 1890.

Conditional
reversion
to state.

SEC. 2. It shall be expressly provided in the deed of conveyance of any such oyster bed and the tide land covered thereby, that said land, at the time of conveyance, is not in front of any incorporated city or town, nor within two miles thereof on either side, and that the said land is not now used for purposes of trade or commerce; that if at any time after the granting of said deed the land described therein shall cease to be used for the purposes of an artificial oyster bed, it shall thereupon revert to, and become the property of, the State of Washington, and that the same is conveyed to the grantee only for the purposes of cultivating oysters thereon, and the State of Washington hereby reserves the right to enter upon and take the possession of said tract or tracts if at any time the same is used for any other purpose than the cultivation of oysters; and the State of Washington reserves the further right to

enter upon and take possession of any tide lands sold under the provisions of this act, at any time when it desires, upon paying to the then owner or occupant the original purchase price of the lands together with the value of the improvements erected thereon, the then value of his artificial oyster beds and improvements erected thereon in connection with the carrying on of the raising and propagation of oysters by artificial cultivation.

SEC. 3. And there being great doubt and uncertainty in the question of obtaining title to oyster beds on tide lands, an emergency is hereby declared to exist, and this act shall take effect and be in force from and after its approval by the governor.

Passed the house February 18, 1895.

Passed the senate February 27, 1895.

Approved March 4, 1895.

CHAPTER XXVI.

[H. B. No. 215.]

REQUIRING PHYSICIANS TO REPORT DEATHS.

AN ACT relating to vital statistics and amending section 2609 of volume 1 of Hill's Annotated Statutes and Codes of Washington.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. Section 2609 of volume 1 of Hill's Annotated Statutes and Codes of Washington is hereby amended to read as follows: Sec. 2609. It shall be the duty of all physicians in this state to register their names and post-office address with the county auditor of the county where they reside; and every physician shall, under penalty of ten dollars, to be recovered in any court of competent jurisdiction in the state, at suit of any member of any state or local board of health, report to the county auditor on or before the 15th day of every month, all births and deaths which may come under his or her supervision during the

Exhibit 8

~~((37))~~ (38) "Residential property" includes property less than one acre in size zoned as residential by a city, town, or county, but does not include property zoned as agricultural or agricultural homesites.

~~((38))~~ (39) "Restricted use pesticide" means any pesticide or device which, when used as directed or in accordance with a widespread and commonly recognized practice, the director determines, subsequent to a hearing, requires additional restrictions for that use to prevent unreasonable adverse effects on the environment including people, lands, beneficial insects, animals, crops, and wildlife, other than pests.

~~((39))~~ (40) "Rodenticide" means any substance or mixture of substances intended to prevent, destroy, repel, or mitigate rodents, or any other vertebrate animal which the director may declare by rule to be a pest.

~~((40))~~ (41) "School facility" means any facility used for licensed day care center purposes or for the purposes of a public kindergarten or public elementary or secondary school. School facility includes the buildings or structures, playgrounds, landscape areas, athletic fields, school vehicles, or any other area of school property.

~~((41))~~ (42) "Snails or slugs" include all harmful mollusks.

~~((42))~~ (43) "Unreasonable adverse effects on the environment" means any unreasonable risk to people or the environment taking into account the economic, social, and environmental costs and benefits of the use of any pesticide, or as otherwise determined by the director.

~~((43))~~ (44) "Weed" means any plant which grows where it is not wanted.

NEW SECTION. **Sec. 3.** (1) Section 1 of this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

(2) Section 2 of this act takes effect July 1, 2002.

NEW SECTION. **Sec. 4.** Section 1 of this act expires July 1, 2002.

Passed the House February 14, 2002.

Passed the Senate March 2, 2002.

Approved by the Governor March 26, 2002.

Filed in Office of Secretary of State March 26, 2002.

CHAPTER 123

[Engrossed Substitute House Bill 2819]

SHELLFISH FARMING

AN ACT Relating to Bush act and Callow act lands; adding a new section to chapter 79.90 RCW; adding a new section to chapter 79.96 RCW; and creating a new section.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. **Sec. 1.** The legislature declares that shellfish farming provides a consistent source of quality food, offers opportunities of new jobs, increases farm income stability, and improves balance of trade. The legislature

also finds that many areas of the state of Washington are scientifically and biologically suitable for shellfish farming, and therefore the legislature has encouraged and promoted shellfish farming activities, programs, and development with the same status as other agricultural activities, programs, and development within the state. It being the policy of this state to encourage the development and expansion of shellfish farming within the state and to promote the development of a diverse shellfish farming industry, the legislature finds that the uncertainty surrounding reversionary clauses contained in Bush act and Callow act deeds is interfering with this policy. The legislature finds that uncertainty of the grant of rights for the claim and other shellfish culture as contained in chapter 166, Laws of 1919 must be fully and finally resolved. It is not the intent of this act to impair any vested rights in shellfish cultivation or current shellfish aquaculture activities to which holders of Bush act and Callow act lands are entitled.

NEW SECTION. Sec. 2. A new section is added to chapter 79.90 RCW to read as follows:

(1) A person in possession of real property conveyed by the state of Washington pursuant to the authority of chapter 24, Laws of 1895 (Bush act) or chapter 25, Laws of 1895 (Callow act), wherein such lands are subject to a possibility of reversion, shall heretofore have and are granted the further right to use all of the property for the purpose of cultivating and propagating clams and any shellfish.

(2) The rights granted under subsection (1) of this section do not include the right to use subtidal portions of Bush act and Callow act lands for the harvest and cultivation of any species of shellfish that had not commenced prior to December 31, 2001.

(3) For the purposes of this section, harvest and cultivation of any species of shellfish shall not be deemed to have commenced unless the subtidal portions of the land had been planted with that species of shellfish prior to December 31, 2001.

(4) No vested rights in shellfish cultivation may be impaired by any of the provisions of this act, nor is anything other than what is stated in subsection (2) of this section intended to grant any further rights in the subtidal lands than what was originally included under the intent of the Bush and Callow acts.

NEW SECTION. Sec. 3. A new section is added to chapter 79.96 RCW to read as follows:

Beds of navigable waters held under contract or deed from the state of Washington upon which a private party is harvesting or cultivating geoduck shall be surveyed by the private party and a record of survey filed in compliance with chapter 58.09 RCW prior to harvest. Property corners will be placed in sufficient quantity and location to aid in relocation of the oyster tract lines occurring or extending below extreme low tide. Buoys on anchors must be placed intervisibly along and at angle points on any ownership boundaries that extend below extreme low tide, for the harvest term. The survey of privately owned beds of navigable waters will be established on the Washington coordinate system in compliance

with chapter 58.20 RCW and property corners labeled with their coordinates on the record of survey.

Passed the House February 18, 2002.

Passed the Senate March 5, 2002.

Approved by the Governor March 26, 2002.

Filed in Office of Secretary of State March 26, 2002.

CHAPTER 124

[House Bill 2407]

REGIONAL JAILS

AN ACT Relating to establishing the authority to create and operate regional jails; and adding a new section to chapter 70.48 RCW.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. A new section is added to chapter 70.48 RCW to read as follows:

(1) Regional jails may be created and operated between two or more local governments, or one or more local governments and the state, and may be governed by representatives from multiple jurisdictions.

(2) A jurisdiction that confines persons prior to conviction in a regional jail in another county is responsible for providing private telephone, video-conferencing, or in-person contact between the defendant and his or her public defense counsel.

(3) The creation and operation of any regional jail must comply with the interlocal cooperation act described in chapter 39.34 RCW.

(4) Nothing in this section prevents counties and cities from contracting for jail services as described in RCW 70.48.090.

Passed the House March 9, 2002.

Passed the Senate March 4, 2002.

Approved by the Governor March 26, 2002.

Filed in Office of Secretary of State March 26, 2002.

CHAPTER 125

[Substitute House Bill 2541]

JAIL SERVICES—INTERLOCAL AGREEMENTS

AN ACT Relating to interlocal agreements for jail services; and amending RCW 70.48.090 and 70.48.220.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 70.48.090 and 1987 c 462 s 7 are each amended to read as follows:

(1) Contracts for jail services may be made between a county and a city (~~(located within the boundaries of a county)~~), and among counties and cities. The contracts shall: Be in writing, give one governing unit the responsibility for the

Exhibit 9

nongovernmental entities that contains proprietary, commercial, or financial information unless that information is aggregated. The requirement for aggregating information does not apply when information is shared by the department with emergency response agencies as provided in subsection (2) of this section.

(6) The department shall adopt rules to implement this section. The advance notice system required in this section must be consistent with the oil transfer reporting system adopted by the department pursuant to RCW 88.46.165.

Sec. 8. RCW 88.46.165 and 2006 c 316 s 1 are each amended to read as follows:

(1) The department's rules authorized under RCW 88.46.160 and this section shall be scaled to the risk posed to people and to the environment, and be categorized by type of transfer, volume of oil, frequency of transfers, and such other risk factors as identified by the department.

(2) The rules may require prior notice be provided before an oil transfer, regulated under this chapter, occurs in situations defined by the department as posing a higher risk. The notice may include the time, location, and volume of the oil transfer, as well as the region per bill of lading, gravity as measured by standards developed by the American petroleum institute, and type of crude oil. The rules may not require prior notice when marine fuel outlets are transferring less than three thousand gallons of oil in a single transaction to a ship that is not a covered vessel and the transfers are scheduled less than four hours in advance.

(3) The department may require semiannual reporting of volumes of oil transferred to ships by a marine fuel outlet.

(4) The rules may require additional measures to be taken in conjunction with the deployment of containment equipment or with the alternatives to deploying containment equipment. However, these measures must be scaled appropriately to the risks posed by the oil transfer.

(5) The rules shall include regulations to enhance the safety of oil transfers over water originating from vehicles transporting oil over private roads or highways of the state.

NEW SECTION. Sec. 9. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Passed by the House April 18, 2019.

Passed by the Senate April 12, 2019.

Approved by the Governor May 8, 2019.

Filed in Office of Secretary of State May 13, 2019.

CHAPTER 290

[Second Substitute House Bill 1579]

CHINOOK SALMON ABUNDANCE--VARIOUS PROVISIONS

AN ACT Relating to implementing recommendations of the southern resident killer whale task force related to increasing chinook abundance; amending RCW 77.32.010 and 43.21B.110; adding a new section to chapter 77.08 RCW; adding new sections to chapter 77.55 RCW; adding a new section to chapter 43.23 RCW; creating a new section; repealing RCW 77.55.141 and 77.55.291; prescribing penalties; and providing an expiration date.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. (1) The legislature finds that the population of southern resident killer whales has declined in recent years and currently stands at a thirty-year low of seventy-four animals.

(2) The governor convened the southern resident killer whale task force after the 2018 legislative session to study and identify actions that could be taken to help sustain and recover this important species. In the course of its work, the task force found that chinook salmon compose the largest portion of the whales' diet, and are therefore critical to the recovery of the species. Further, several runs of chinook salmon in Washington state are listed under the federal endangered species act, making chinook recovery all the more urgent.

(3) The task force identified four overarching southern resident killer whale recovery goals and adopted several recommendations for specific actions under each goal. Goal one identified by the task force is to increase chinook abundance, and actions under that goal relate to habitat protection, protection of chinook prey, such as forage fish, and reducing impacts of nonnative chinook predators.

(4) To address the need identified by the task force to increase chinook abundance, the legislature intends to take initial, important steps consistent with recommendations made by the governor's southern resident killer whale task force.

NEW SECTION. Sec. 2. A new section is added to chapter 77.08 RCW to read as follows:

The commission shall adopt rules to liberalize bag limits for bass, walleye, and channel catfish in all anadromous waters of the state in order to reduce the predation risk to salmon smolts.

Sec. 3. RCW 77.32.010 and 2014 c 48 s 26 are each amended to read as follows:

(1) Except as otherwise provided in this chapter or department rule, a recreational license issued by the director is required to hunt, fish, or take wildlife or seaweed. A recreational fishing or shellfish license is not required for carp, freshwater smelt, and crawfish, and a hunting license is not required for bullfrogs.

(2) A pass or permit issued under RCW 79A.80.020, 79A.80.030, or 79A.80.040 is required to park or operate a motor vehicle on a recreation site or lands, as defined in RCW 79A.80.010.

(3) The commission may, by rule, indicate that a fishing permit issued to a nontribal member by the Colville Tribes shall satisfy the license requirements in subsection (1) of this section on the waters of Lake Rufus Woods and on the north shore of Lake Rufus Woods, and that a Colville Tribes tribal member identification card shall satisfy the license requirements in subsection (1) of this section on all waters of Lake Rufus Woods.

NEW SECTION. Sec. 4. A new section is added to chapter 77.55 RCW to read as follows:

(1) A person proposing construction or other work landward of the ordinary high water line that will use, divert, obstruct, or change the natural flow or bed of state waters shall submit a permit application to the department. However, if a person is unsure about whether the work requires a permit, they may request a

preapplication determination from the department. The department must evaluate the proposed work and determine if the work is a hydraulic project and, if so, whether a permit from the department is required to ensure adequate protection of fish life.

(2) The preapplication determination request must be submitted through the department's online permitting system and must contain:

- (a) A description of the proposed project;
- (b) A map showing the location of the project site; and
- (c) Preliminary plans and specifications of the proposed construction or work, if available.

(3) The department shall provide tribes and local governments a seven calendar day review and comment period. The department shall consider all applicable written comments received before issuing a determination.

(4) The department shall issue a written determination, including the rationale for the decision, within twenty-one calendar days of receiving the request.

(5) Determinations made according to the provisions of this section are not subject to the requirements of chapter 43.21C RCW.

NEW SECTION. Sec. 5. A new section is added to chapter 77.55 RCW to read as follows:

(1) When the department determines that a violation of this chapter, or of any of the rules that implement this chapter, has occurred or is about to occur, it shall first attempt to achieve voluntary compliance. The department shall offer information and technical assistance to the project proponent, identifying one or more means to accomplish the project proponent's purposes within the framework of the law. The department shall provide a reasonable timeline to achieve voluntary compliance that takes into consideration factors specific to the violation, such as the complexity of the hydraulic project, the actual or potential harm to fish life or fish habitat, and the environmental conditions at the time.

(2) If a person violates this chapter, or any of the rules that implement this chapter, or deviates from a permit, the department may issue a notice of correction in accordance with chapter 43.05 RCW, a notice of violation in accordance with chapter 43.05 RCW, a stop work order, a notice to comply, or a notice of civil penalty as authorized by law and subject to chapter 43.05 RCW and RCW 34.05.110.

(3) For purposes of this section, the term "project proponent" means a person who has applied for a hydraulic project approval, a person identified as an authorized agent on an application for a hydraulic project approval, a person who has obtained a hydraulic project approval, or a person who undertakes a hydraulic project without a hydraulic project approval.

(4) This section does not apply to a project, or to that portion of a project, that has received a forest practices hydraulic project permit from the department of natural resources pursuant to chapter 76.09 RCW.

NEW SECTION. Sec. 6. A new section is added to chapter 77.55 RCW to read as follows:

(1) The department may serve upon a project proponent a stop work order, which is a final order of the department, if:

(a) There is any severe violation of this chapter or of the rules implementing this chapter or there is a deviation from the hydraulic project approval that may cause significant harm to fish life; and

(b) Immediate action is necessary to prevent continuation of or to avoid more than minor harm to fish life or fish habitat.

(2)(a) The stop work order must set forth:

(i) A description of the condition that is not in compliance and the text of the specific section or subsection of this chapter or the rules that implement this chapter;

(ii) A statement of what is required to achieve compliance;

(iii) The date by which the department requires compliance;

(iv) Notice of the means to contact any technical assistance services provided by the department or others;

(v) Notice of when, where, and to whom the request to extend the time to achieve compliance for good cause may be filed with the department; and

(vi) The right to an appeal.

(b) A stop work order may require that any project proponent stop all work connected with the violation until corrective action is taken. A stop work order may also require that any project proponent take corrective action to prevent, correct, or compensate for adverse impacts to fish life and fish habitat.

(c) A stop work order must be authorized by senior or executive department personnel. The department shall initiate rule making to identify the appropriate level of senior and executive level staff approval for these actions based on the level of financial effect on the violator and the scope and scale of the impact to fish life and habitat.

(3) Within five business days of issuing the stop work order, the department shall mail a copy of the stop work order to the last known address of any project proponent, to the last known address of the owner of the land on which the hydraulic project is located, and to the local jurisdiction in which the hydraulic project is located. The department must take all measures reasonably calculated to ensure that the project proponent actually receives notice of the stop work order.

(4) Issuance of a stop work order may be informally appealed by a project proponent who was served with the stop work order or who received a copy of the stop work order from the department, or by the owner of the land on which the hydraulic project is located, to the department within thirty days from the date of receipt of the stop work order. Requests for informal appeal must be filed in the form and manner prescribed by the department by rule. A stop work order that has been informally appealed to the department is appealable to the board within thirty days from the date of receipt of the department's decision on the informal appeal.

(5) The project proponent who was served with the stop work order or who received a copy of the stop work order from the department, or the owner of the land on which the hydraulic project is located, may commence an appeal to the board within thirty days from the date of receipt of the stop work order. If such an appeal is commenced, the proceeding is an adjudicative proceeding under the administrative procedure act, chapter 34.05 RCW. The recipient of the stop work order must comply with the order of the department immediately upon being

served, but the board may stay, modify, or discontinue the order, upon motion, under such conditions as the board may impose.

(6) This section does not apply to a project, or to that portion of a project, that has received a forest practices hydraulic project permit from the department of natural resources pursuant to chapter 76.09 RCW.

(7) For the purposes of this section, "project proponent" has the same meaning as defined in section 5(3) of this act.

NEW SECTION. **Sec. 7.** A new section is added to chapter 77.55 RCW to read as follows:

(1)(a) If a violation of this chapter or of the rules implementing this chapter, a deviation from the hydraulic project approval, damage to fish life or fish habitat, or potential damage to fish life or fish habitat, has occurred and the department determines that a stop work order is unnecessary, the department may issue and serve upon a project proponent a notice to comply, which must clearly set forth:

(i) A description of the condition that is not in compliance and the text of the specific section or subsection of this chapter or the rules that implement this chapter;

(ii) A statement of what is required to achieve compliance;

(iii) The date by which the department requires compliance to be achieved;

(iv) Notice of the means to contact any technical assistance services provided by the department or others;

(v) Notice of when, where, and to whom a request to extend the time to achieve compliance for good cause may be filed with the department; and

(vi) The right to an appeal.

(b) The notice to comply may require that any project proponent take corrective action to prevent, correct, or compensate for adverse impacts to fish life or fish habitat.

(2) Within five business days of issuing the notice to comply, the department shall mail a copy of the notice to comply to the last known address of any project proponent, to the last known address of the owner of the land on which the hydraulic project is located, and to the local jurisdiction in which the hydraulic project is located. The department must take all measures reasonably calculated to ensure that the project proponent actually receives notice of the notice to comply.

(3) Issuance of a notice to comply may be informally appealed by a project proponent who was served with the notice to comply or who received a copy of the notice to comply from the department, or by the owner of the land on which the hydraulic project is located, to the department within thirty days from the date of receipt of the notice to comply. Requests for informal appeal must be filed in the form and manner prescribed by the department by rule. A notice to comply that has been informally appealed to the department is appealable to the board within thirty days from the date of receipt of the department's decision on the informal appeal.

(4) The project proponent who was served with the notice to comply, the project proponent who received a copy of the notice to comply from the department, or the owner of the land on which the hydraulic project is located may commence an appeal to the board within thirty days from the date of receipt of the notice to comply. If such an appeal is commenced, the proceeding is an

adjudicative proceeding under the administrative procedure act, chapter 34.05 RCW. The recipient of the notice to comply must comply with the notice to comply immediately upon being served, but the board may stay, modify, or discontinue the notice to comply, upon motion, under such conditions as the board may impose.

(5) This section does not apply to a project, or to that portion of a project, that has received a forest practices hydraulic project permit from the department of natural resources pursuant to chapter 76.09 RCW.

(6) For the purposes of this section, "project proponent" has the same meaning as defined in section 5(3) of this act.

*NEW SECTION. **Sec. 8.** A new section is added to chapter 77.55 RCW to read as follows:

(1)(a) If section 13 of this act is enacted into law by June 30, 2019, the department may levy civil penalties of up to ten thousand dollars for every violation of this chapter or of the rules that implement this chapter. If section 13 of this act is not enacted into law by June 30, 2019, the department may levy civil penalties of up to one hundred dollars for every violation of this chapter or of the rules that implement this chapter. Each and every violation is a separate and distinct civil offense.

(b) Penalties must be authorized by senior or executive department personnel. The department shall initiate rule making to identify the appropriate level of senior and executive level staff approval for these actions based on the level of financial effect on the violator and the scope and scale of the impact to fish life and habitat.

(2) The penalty provided must be imposed by notice in writing by the department, provided either by certified mail or by personal service, to the person incurring the penalty and to the local jurisdiction in which the hydraulic project is located, describing the violation. The department must take all measures reasonably calculated to ensure that the project proponent actually receives notice of the notice of penalty. The civil penalty notice must set forth:

- (a) The basis for the penalty;
- (b) The amount of the penalty; and
- (c) The right of the person incurring the penalty to appeal the civil penalty.

(3)(a) Except as provided in (b) of this subsection, any person incurring any penalty under this chapter may appeal the penalty to the board pursuant to chapter 34.05 RCW. Appeals must be filed within thirty days from the date of receipt of the notice of civil penalty in accordance with RCW 43.21B.230.

(b) Issuance of a civil penalty may be informally appealed by the person incurring the penalty to the department within thirty days from the date of receipt of the notice of civil penalty. Requests for informal appeal must be filed in the form and manner prescribed by the department by rule. A civil penalty that has been informally appealed to the department is appealable to the board within thirty days from the date of receipt of the department's decision on the informal appeal.

(4) The penalty imposed becomes due and payable thirty days after receipt of a notice imposing the penalty unless an appeal is filed. Whenever an appeal of any penalty incurred under this chapter is filed, the penalty becomes due and payable only upon completion of all review proceedings and the issuance of a final order confirming the penalty in whole or in part. When the penalty becomes

past due, it is also subject to interest at the rate allowed by RCW 43.17.240 for debts owed to the state.

(5) If the amount of any penalty is not paid within thirty days after it becomes due and payable, the attorney general, upon the request of the director, shall bring an action in the name of the state of Washington in the superior court of Thurston county or of the county in which such a violation occurred, to recover the penalty. In all such actions, the rules of civil procedures and the rules of evidence are the same as in an ordinary civil action. The department is also entitled to recover reasonable attorneys' fees and costs incurred in connection with the penalty recovered under this section. All civil penalties received or recovered by state agency action for violations as prescribed in subsection (1) of this section must be deposited into the state's general fund. The department is authorized to retain any attorneys' fees and costs it may be awarded in connection with an action brought to recover a civil penalty issued pursuant to this section.

(6) The department shall adopt by rule a penalty schedule to be effective by January 1, 2020. The penalty schedule must be developed in consideration of the following:

- (a) Previous violation history;
- (b) Severity of the impact on fish life and fish habitat;
- (c) Whether the violation of this chapter or of its rules was intentional;
- (d) Cooperation with the department;
- (e) Reparability of any adverse effects resulting from the violation; and
- (f) The extent to which a penalty to be imposed on a person for a violation committed by another should be reduced if the person was unaware of the violation and has not received a substantial economic benefit from the violation.

(7) This section does not apply to a project, or to that portion of a project, that has received a forest practices hydraulic project permit from the department of natural resources pursuant to chapter 76.09 RCW.

**Sec. 8 was partially vetoed. See message at end of chapter.*

NEW SECTION. Sec. 9. A new section is added to chapter 77.55 RCW to read as follows:

(1) The department may apply for an administrative inspection warrant in either Thurston county superior court or the superior court in the county in which the hydraulic project is located. The court may issue an administrative inspection warrant where:

- (a) Department personnel need to inspect the hydraulic project site to ensure compliance with this chapter or with rules adopted to implement this chapter; or
- (b) Department personnel have probable cause to believe that a violation of this chapter or of the rules that implement this chapter is occurring or has occurred.

(2) This section does not apply to a project, or to that portion of a project, that has received a forest practices hydraulic project permit from the department of natural resources pursuant to chapter 76.09 RCW.

NEW SECTION. Sec. 10. A new section is added to chapter 77.55 RCW to read as follows:

(1) The department may disapprove an application for hydraulic project approval submitted by a person who has failed to comply with a final order issued pursuant to section 6 or 7 of this act or who has failed to pay civil

penalties issued pursuant to section 8 of this act. Applications may be disapproved for up to one year from the issuance of a notice of intent to disapprove applications under this section, or until all outstanding civil penalties are paid and all outstanding notices to comply and stop work orders are complied with, whichever is longer.

(2) The department shall provide written notice of its intent to disapprove an application under this section to the applicant and to any authorized agent or landowner identified in the application.

(3) The disapproval period runs from thirty days following the date of actual notice of intent or when all administrative and judicial appeals, if any, have been exhausted.

(4) Any person provided the notice may seek review from the board by filing a request for review within thirty days of the date of the notice of intent to disapprove applications.

NEW SECTION. Sec. 11. A new section is added to chapter 77.55 RCW to read as follows:

The remedies under this chapter are not exclusive and do not limit or abrogate any other civil or criminal penalty, remedy, or right available in law, equity, or statute.

Sec. 12. RCW 43.21B.110 and 2013 c 291 s 34 are each amended to read as follows:

(1) The hearings board shall only have jurisdiction to hear and decide appeals from the following decisions of the department, the director, local conservation districts, the air pollution control boards or authorities as established pursuant to chapter 70.94 RCW, local health departments, the department of natural resources, the department of fish and wildlife, the parks and recreation commission, and authorized public entities described in chapter 79.100 RCW:

(a) Civil penalties imposed pursuant to RCW 18.104.155, 70.94.431, 70.105.080, 70.107.050, 76.09.170, (~~77.55.291~~) section 8 of this act, 78.44.250, 88.46.090, 90.03.600, 90.46.270, 90.48.144, 90.56.310, 90.56.330, and 90.64.102.

(b) Orders issued pursuant to RCW 18.104.043, 18.104.060, 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070, 90.14.130, 90.46.250, 90.48.120, and 90.56.330.

(c) Except as provided in RCW 90.03.210(2), the issuance, modification, or termination of any permit, certificate, or license by the department or any air authority in the exercise of its jurisdiction, including the issuance or termination of a waste disposal permit, the denial of an application for a waste disposal permit, the modification of the conditions or the terms of a waste disposal permit, or a decision to approve or deny an application for a solid waste permit exemption under RCW 70.95.300.

(d) Decisions of local health departments regarding the grant or denial of solid waste permits pursuant to chapter 70.95 RCW.

(e) Decisions of local health departments regarding the issuance and enforcement of permits to use or dispose of biosolids under RCW 70.95J.080.

(f) Decisions of the department regarding waste-derived fertilizer or micronutrient fertilizer under RCW 15.54.820, and decisions of the department regarding waste-derived soil amendments under RCW 70.95.205.

(g) Decisions of local conservation districts related to the denial of approval or denial of certification of a dairy nutrient management plan; conditions contained in a plan; application of any dairy nutrient management practices, standards, methods, and technologies to a particular dairy farm; and failure to adhere to the plan review and approval timelines in RCW 90.64.026.

(h) Any other decision by the department or an air authority which pursuant to law must be decided as an adjudicative proceeding under chapter 34.05 RCW.

(i) Decisions of the department of natural resources, the department of fish and wildlife, and the department that are reviewable under chapter 76.09 RCW, and the department of natural resources' appeals of county, city, or town objections under RCW 76.09.050(7).

(j) Forest health hazard orders issued by the commissioner of public lands under RCW 76.06.180.

(k) Decisions of the department of fish and wildlife to issue, deny, condition, or modify a hydraulic project approval permit under chapter 77.55 RCW, to issue a stop work order, to issue a notice to comply, to issue a civil penalty, or to issue a notice of intent to disapprove applications.

(l) Decisions of the department of natural resources that are reviewable under RCW 78.44.270.

(m) Decisions of an authorized public entity under RCW 79.100.010 to take temporary possession or custody of a vessel or to contest the amount of reimbursement owed that are reviewable by the hearings board under RCW 79.100.120.

(2) The following hearings shall not be conducted by the hearings board:

(a) Hearings required by law to be conducted by the shorelines hearings board pursuant to chapter 90.58 RCW.

(b) Hearings conducted by the department pursuant to RCW 70.94.332, 70.94.390, 70.94.395, 70.94.400, 70.94.405, 70.94.410, and 90.44.180.

(c) Appeals of decisions by the department under RCW 90.03.110 and 90.44.220.

(d) Hearings conducted by the department to adopt, modify, or repeal rules.

(3) Review of rules and regulations adopted by the hearings board shall be subject to review in accordance with the provisions of the administrative procedure act, chapter 34.05 RCW.

***NEW SECTION.** *Sec. 13.* A new section is added to chapter 43.23 RCW to read as follows:

(1) The state conservation commission shall convene and facilitate the departments of ecology, agriculture, fish and wildlife, and natural resources, and the state conservation commission to work together cooperatively, efficiently, and productively on the expeditious construction of three demonstration projects. The legislature expects that the joint and contemporaneous participation of all these state agencies will expedite the permitting of these demonstration projects. The legislature further intends that the collaborative process that the stakeholder group creates, including local stakeholders among others, will be used as a model for river management throughout the state.

(2) The floodplain management strategies developed in the process in this section must address multiple benefits including: Reducing flood hazard to public infrastructure and other land uses caused by sediment accumulation or for other causes; improving fish and wildlife habitat; sustaining viable agriculture; and public access.

(3) The state conservation commission and the departments of agriculture, natural resources, fish and wildlife, and ecology must jointly identify and assess three demonstration projects that test the effectiveness and costs of river management by using various management strategies and techniques as applied to accomplish the following goals:

- (a) Protection of agricultural lands;*
- (b) Restoration or enhancement of fish runs; and*
- (c) Protection of public infrastructure and recreational access.*

(4)(a) The state conservation commission must convene and facilitate a stakeholder group consisting of the departments of agriculture, natural resources, fish and wildlife, and ecology, and the state conservation commission, local and statewide agricultural organizations and conservation districts, land conservation organizations, and local governments with interest and experience in floodplain management techniques. The stakeholder group must develop and assess three demonstration projects, one located in Whatcom county, one located in Snohomish county, and one located in Grays Harbor county. The departments must also seek the participation and the views of the federally recognized tribes that may be affected by each pilot project.

(b) The disposition of any gravel resources removed as a result of these pilot projects that are owned by the state must be consistent with chapter 79.140 RCW, otherwise they must be: (i) Used at the departments' discretion in projects related to fish programs in the local area of the project or by property owners adjacent to the project; (ii) made available to a local tribe for its use; or (iii) sold and the proceeds applied to funding the demonstration projects.

(5) At a minimum, the pilot projects must examine the following management strategies and techniques:

(a) Setting back levees and other measures to accommodate high flow with reduced risk to property, while providing space for river processes that are vital to the creation of fish habitat;

(b) Providing deeper, cooler holes for fish life;

(c) Removing excess sediment and gravel that causes diversion of water and erosion of river banks and farmland;

(d) Providing off-channels for habitat as refuge during high flows;

(e) Ensuring that any management activities leave sufficient gravel and sediment for fish spawning and rearing;

(f) Providing stable river banks that will allow for long-term growth of riparian enhancement efforts, such as planting shade trees and hedgerows;

(g) Protecting existing mature treed riparian zones that cool the waters;

(h) Restoring previously existing bank contours that protect the land from erosion caused by more intense and more frequent flooding; and

(i) Developing management practices that reduce the amount of gravel, sediment, and woody debris deposited into farm fields.

(6) By December 31, 2020, the state conservation commission must coordinate the development of a report to the legislative committees with

oversight of agriculture, water, rural economic development, ecology, fish and wildlife, and natural resources. The report should include the input of all state agencies, tribes, local entities, and stakeholders participating in, or commenting on, the process identified in this section. The report must include, but not be limited to, the following elements: (a) Their progress toward setting benchmarks and meeting the stakeholder group's timetable; (b) any decisions made in assessing the projects; and (c) agency recommendations for funding of the projects from federal grants, federal loans, state grants and loans, and private donations, or if other funding sources are not available or complete, submitting the three projects for consideration in the biennial capital budget request to the governor and the legislature. The departments must report annually thereafter by December 31st of each year.

(7) The stakeholder group must be staffed jointly by the departments.

(8) Within amounts appropriated in the omnibus operating appropriations act, the state conservation commission, the department of ecology, the department of agriculture, the department of fish and wildlife, and the department of natural resources shall implement all requirements in this section.

(9) This section expires June 30, 2030.

**Sec. 13 was vetoed. See message at end of chapter.*

NEW SECTION. Sec. 14. The following acts or parts of acts are each repealed:

(1) RCW 77.55.141 (Marine beach front protective bulkheads or rockwalls) and 2010 c 210 s 28, 2005 c 146 s 501, & 1991 c 279 s 1; and

(2) RCW 77.55.291 (Civil penalty) and 2010 c 210 s 31, 2005 c 146 s 701, 2000 c 107 s 19, 1993 sp.s. c 2 s 35, 1988 c 36 s 35, & 1986 c 173 s 6.

Passed by the House April 18, 2019.

Passed by the Senate April 10, 2019.

Approved by the Governor May 8, 2019, with the exception of certain items that were vetoed.

Filed in Office of Secretary of State May 13, 2019.

Note: Governor's explanation of partial veto is as follows:

"I am returning herewith, without my approval as to Sections 13 and 8(1)(a), Second Substitute House Bill No. 1579 entitled:

"AN ACT Relating to implementing recommendations of the southern resident killer whale task force related to increasing chinook abundance."

This bill implements recommendations of the Southern Resident orca task force (task force) related to increasing chinook abundance.

Current laws and protections are not sufficient. Salmon populations continue to decline putting our beloved orca at risk.

This bill provides the long needed tools to protect salmon habitat when development permits are issued along our marine and freshwater shoreline. Strengthening the hydraulic code will help ensure development projects that affect salmon and their habitats do no harm.

However, I am vetoing Section 13, which would require certain state agencies and local governments to identify river management demonstration projects in Whatcom, Snohomish, and Grays Harbor counties, because it is not a recommendation of the task force. As such, it is outside of both the title and scope of the bill, in violation of Article 2, Sections 19 and 38 of our constitution. Section 13 is

unrelated, unnecessary and an unfortunate addition to this important bill about salmon and orca habitat and recovery.

In addition, I am also vetoing Section 8(1)(a), which establishes maximum civil penalty amounts for violations of Chapter 77.55 RCW (Construction Projects in State Waters). Consistent with the task force's recommendations, the original bill established a maximum civil penalty of up to ten thousand dollars for each violation. When the Legislature amended the bill to add Section 13, it simultaneously amended Section 8 and tied the original civil penalty amount to passage of Section 13. It did so by reducing the maximum civil penalty to "up to one hundred dollars" if Section 13 is not enacted by June 30, 2019. By making the original civil penalty amount contingent on passage of an unconstitutional section of the bill, the Legislature further compounded the constitutional violation. In addition, by structuring the contingency language within a subsection of Section 8, the Legislature intentionally attempted to circumvent and impede my veto authority by entangling an unrelated and unconstitutional provision within a recommendation of the task force. In vetoing this subsection, I direct the department to continue to use its authority to secure the effect of the statute, to establish a maximum civil penalty not to exceed the penalty amount established in the original bill, and to use its rulemaking authority to support these efforts as needed.

I understand the concerns of landowners who are living and working in floodplains and the need for better approaches to protecting their property. We also need to find balance to provide habitat for salmon to spawn and grow if we want to save our orcas. We already have important programs in place to address ecosystem based river management. Watershed solutions should come from local efforts and I encourage people living in these communities to work collaboratively, with their neighbors, local governments, salmon recovery and agricultural preservation organizations to fund effective local solutions.

For these reasons I have vetoed Sections 13 and 8(1)(a) of Second Substitute House Bill No. 1579.

With the exception of Sections 13 and 8(1)(a), Second Substitute House Bill No. 1579 is approved."

CHAPTER 291

[Second Substitute Senate Bill 5577]

SOUTHERN RESIDENT ORCA WHALES--PROTECTION FROM VESSELS

AN ACT Relating to the protection of southern resident orca whales from vessels; amending RCW 77.15.740 and 43.384.050; adding new sections to chapter 77.65 RCW; adding a new section to chapter 77.15 RCW; prescribing penalties; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 77.15.740 and 2014 c 48 s 22 are each amended to read as follows:

(1) Except as provided in subsection (2) of this section, it is unlawful for a person to:

(a) Cause a vessel or other object to approach, in any manner, within ~~((two))~~ three hundred yards of a southern resident orca whale;

(b) Position a vessel to be in the path of a southern resident orca whale at any point located within four hundred yards of the whale. This includes intercepting a southern resident orca whale by positioning a vessel so that the prevailing wind or water current carries the vessel into the path of the whale at any point located within four hundred yards of the whale;

(c) Position a vessel behind a southern resident orca whale at any point located within four hundred yards;

(d) Fail to disengage the transmission of a vessel that is within ~~((two))~~ three hundred yards of a southern resident orca whale; ~~((or~~

Exhibit 10

HOUSE BILL 1579

State of Washington

66th Legislature

2019 Regular Session

By Representatives Fitzgibbon, Peterson, Lekanoff, Doglio, Macri, Stonier, Tharinger, Stanford, Jinkins, Robinson, Pollet, Valdez, Cody, Kloba, Slatter, Frame, and Davis; by request of Office of the Governor

Read first time 01/24/19. Referred to Committee on Rural Development, Agriculture, & Natural Resources.

1 AN ACT Relating to implementing recommendations of the southern
2 resident killer whale task force related to increasing chinook
3 abundance; amending RCW 77.08.020, 77.32.010, and 43.21B.110; adding
4 new sections to chapter 77.55 RCW; creating a new section; repealing
5 RCW 77.55.141 and 77.55.291; and prescribing penalties.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 NEW SECTION. **Sec. 1.** (1) The legislature finds that the
8 population of southern resident killer whales has declined in recent
9 years and currently stands at a thirty-year low of seventy-four
10 animals.

11 (2) The governor convened the southern resident killer whale task
12 force after the 2018 legislative session to study and identify
13 actions that could be taken to help sustain and recover this
14 important species. In the course of its work, the task force found
15 that chinook salmon compose the largest portion of the whales' diet,
16 and are therefore critical to the recovery of the species. Further,
17 several runs of chinook salmon in Washington state are listed under
18 the federal endangered species act, making chinook recovery all the
19 more urgent.

20 (3) The task force identified four overarching southern resident
21 killer whale recovery goals and adopted several recommendations for

1 specific actions under each goal. Goal one identified by the task
2 force is to increase chinook abundance, and actions under that goal
3 relate to habitat protection, protection of chinook prey, such as
4 forage fish, and reducing impacts of nonnative chinook predators.

5 (4) To address the need identified by the task force to increase
6 chinook abundance, the legislature intends to take initial, important
7 steps consistent with recommendations made by the governor's southern
8 resident killer whale task force.

9 **Sec. 2.** RCW 77.08.020 and 1989 c 218 s 2 are each amended to
10 read as follows:

11 (1) As used in this title or rules of the commission, "game fish"
12 means those species of the class Osteichthyes that shall not be
13 fished for except as authorized by rule of the commission and
14 includes:

15	Scientific Name	Common Name
16	Ambloplites rupestris	rock bass
17	Coregonus clupeaformis	lake white fish
18	Ictalurus furcatus	blue catfish
19	Ictalurus melas	black bullhead
20	Ictalurus natalis	yellow bullhead
21	Ictalurus nebulosus	brown bullhead
22	((Ictalurus punctatus	channel catfish))
23	Lepomis cyanellus	green sunfish
24	Lepomis gibbosus	pumpkinseed
25	Lepomis gulosus	warmouth
26	Lepomis macrochirus	bluegill
27	Lota lota	burbot or freshwater ling
28	((Micropterus dolomieu	smallmouth bass
29	Micropterus salmoides	largemouth bass))
30	Oncorhynchus nerka (in its	kokanee or silver trout
31	landlocked form)	
32	Perca flavescens	yellow perch
33	Pomixis annularis	white crappie
34	Pomixis nigromaculatus	black crappie
35	Prosopium williamsoni	mountain white fish
36	Oncorhynchus aquabonita	golden trout

1	Oncorhynchus clarkii	cutthroat trout
2	Oncorhynchus mykiss	rainbow or steelhead trout
3	Salmo salar (in its	Atlantic salmon
4	landlocked form)	
5	Salmo trutta	brown trout
6	Salvelinus fontinalis	eastern brook trout
7	Salvelinus malma	Dolly Varden trout
8	Salvelinus namaycush	lake trout
9	((Stizostedion vitreum	Walleye))
10	Thymallus arcticus	arctic grayling

11 (2) Private sector cultured aquatic products as defined in RCW
12 15.85.020 are not game fish.

13 **Sec. 3.** RCW 77.32.010 and 2014 c 48 s 26 are each amended to
14 read as follows:

15 (1) Except as otherwise provided in this chapter or department
16 rule, a recreational license issued by the director is required to
17 hunt, fish, or take wildlife or seaweed. A recreational fishing or
18 shellfish license is not required for carp(~~(, smelt,)~~) and crawfish,
19 and a hunting license is not required for bullfrogs.

20 (2) A pass or permit issued under RCW 79A.80.020, 79A.80.030, or
21 79A.80.040 is required to park or operate a motor vehicle on a
22 recreation site or lands, as defined in RCW 79A.80.010.

23 (3) The commission may, by rule, indicate that a fishing permit
24 issued to a nontribal member by the Colville Tribes shall satisfy the
25 license requirements in subsection (1) of this section on the waters
26 of Lake Rufus Woods and on the north shore of Lake Rufus Woods, and
27 that a Colville Tribes tribal member identification card shall
28 satisfy the license requirements in subsection (1) of this section on
29 all waters of Lake Rufus Woods.

30 NEW SECTION. **Sec. 4.** A new section is added to chapter 77.55
31 RCW to read as follows:

32 (1) When the department determines that a violation of this
33 chapter, or of any of the rules that implement this chapter, has
34 occurred or is about to occur, it shall first attempt to achieve
35 voluntary compliance. The department shall offer information and
36 technical assistance to the project proponent, identifying one or

1 more means to accomplish the project proponent's purposes within the
2 framework of the law. The department shall provide a reasonable
3 timeline to achieve voluntary compliance that takes into
4 consideration factors specific to the violation, such as the
5 complexity of the hydraulic project, the actual or potential harm to
6 fish life or fish habitat, and the environmental conditions at the
7 time.

8 (2) If a person violates this chapter, or any of the rules that
9 implement this chapter, or deviates from a permit, the department may
10 issue a notice of correction in accordance with chapter 43.05 RCW, a
11 notice of violation in accordance with chapter 43.05 RCW, a stop work
12 order, a notice to comply, or a notice of civil penalty as authorized
13 by law and subject to chapter 43.05 RCW and RCW 34.05.110.

14 (3) For purposes of this section, the term "project proponent"
15 means a person who has applied for a hydraulic project approval, a
16 person identified as an authorized agent on an application for a
17 hydraulic project approval, a person who has obtained a hydraulic
18 project approval, or a person who undertakes a hydraulic project
19 without a hydraulic project approval.

20 NEW SECTION. **Sec. 5.** A new section is added to chapter 77.55
21 RCW to read as follows:

22 (1) The department may serve upon a project proponent a stop work
23 order, which is a final order of the department, if:

24 (a) There is any violation of this chapter or of the rules
25 implementing this chapter;

26 (b) There is a deviation from the hydraulic project approval; or

27 (c) Immediate action is necessary to prevent continuation of or
28 to avoid more than minor harm to fish life or fish habitat.

29 (2) (a) The stop work order must set forth:

30 (i) The specific nature, extent, and time of the violation,
31 deviation, harm, or potential harm;

32 (ii) The specific course of action needed to correct or prevent a
33 continuing violation, deviation, harm, or potential harm; and

34 (iii) The right to an appeal.

35 (b) A stop work order may require that any project proponent stop
36 all work connected with the violation until corrective action is
37 taken.

38 (3) Within five business days of issuing the stop work order, the
39 department shall mail a copy of the stop work order to the last known

1 address of any project proponent, to the last known address of the
2 owner of the land on which the hydraulic project is located, and to
3 the local jurisdiction in which the hydraulic project is located.
4 Substantial compliance with these mailing requirements is deemed
5 satisfactory compliance with this subsection. For purposes of this
6 subsection, "substantial compliance" means mailing to the last known
7 address of the owner of the land on which the hydraulic project is
8 located, to the local jurisdiction in which the hydraulic project is
9 located, and to the last known address of any project proponent who
10 has applied for a hydraulic project approval, who is identified as an
11 authorized agent on an application for a hydraulic project approval,
12 or who has obtained a hydraulic project approval.

13 (4) Issuance of a stop work order may be informally appealed by a
14 project proponent who was served with the stop work order or who
15 received a copy of the stop work order from the department, or by the
16 owner of the land on which the hydraulic project is located, to the
17 department within thirty days from the date of receipt of the stop
18 work order. Requests for informal appeal must be filed in the form
19 and manner prescribed by the department by rule. A stop work order
20 that has been informally appealed to the department is appealable to
21 the board within thirty days from the date of receipt of the
22 department's decision on the informal appeal.

23 (5) The project proponent who was served with the stop work order
24 or who received a copy of the stop work order from the department, or
25 the owner of the land on which the hydraulic project is located, may
26 commence an appeal to the board within thirty days from the date of
27 receipt of the stop work order. If such an appeal is commenced, the
28 proceeding is an adjudicative proceeding under the administrative
29 procedure act, chapter 34.05 RCW. The recipient of the stop work
30 order must comply with the order of the department immediately upon
31 being served, but the board may stay, modify, or discontinue the
32 order, upon motion, under such conditions as the board may impose.

33 (6) For the purposes of this section, "project proponent" has the
34 same meaning as defined in section 4(3) of this act.

35 NEW SECTION. **Sec. 6.** A new section is added to chapter 77.55
36 RCW to read as follows:

37 (1)(a) If a violation of this chapter or of the rules
38 implementing this chapter, a deviation from the hydraulic project
39 approval, damage to fish life or fish habitat, or potential damage to

1 fish life or fish habitat, has occurred and the department determines
2 that a stop work order is unnecessary, the department may issue and
3 serve upon a project proponent a notice to comply, which must clearly
4 set forth:

5 (i) The nature, extent, date, and time of the violation;

6 (ii) Any necessary corrective action; and

7 (iii) The right to an appeal.

8 (b) The notice to comply may require that any project proponent
9 take corrective action to prevent, correct, or compensate for adverse
10 impacts to fish life or fish habitat.

11 (2) Within five business days of issuing the notice to comply,
12 the department shall mail a copy of the notice to comply to the last
13 known address of any project proponent, to the last known address of
14 the owner of the land on which the hydraulic project is located, and
15 to the local jurisdiction in which the hydraulic project is located.
16 Substantial compliance with these mailing requirements is deemed
17 satisfactory compliance with this subsection. For purposes of this
18 subsection, "substantial compliance" means mailing to the last known
19 address of the owner of the land on which the hydraulic project is
20 located, to the local jurisdiction in which the hydraulic project is
21 located, and to the last known address of any project proponent who
22 has applied for a hydraulic project approval, who is identified as an
23 authorized agent on an application for a hydraulic project approval,
24 or who has obtained a hydraulic project approval.

25 (3) Issuance of a notice to comply may be informally appealed by
26 a project proponent who was served with the notice to comply or who
27 received a copy of the notice to comply from the department, or by
28 the owner of the land on which the hydraulic project is located, to
29 the department within thirty days from the date of receipt of the
30 notice to comply. Requests for informal appeal must be filed in the
31 form and manner prescribed by the department by rule. A notice to
32 comply that has been informally appealed to the department is
33 appealable to the board within thirty days from the date of receipt
34 of the department's decision on the informal appeal.

35 (4) The project proponent who was served with the notice to
36 comply, the project proponent who received a copy of the notice to
37 comply from the department, or the owner of the land on which the
38 hydraulic project is located may commence an appeal to the board
39 within thirty days from the date of receipt of the notice to comply.
40 If such an appeal is commenced, the proceeding is an adjudicative

1 proceeding under the administrative procedure act, chapter 34.05 RCW.
2 The recipient of the notice to comply must comply with the notice to
3 comply immediately upon being served, but the board may stay, modify,
4 or discontinue the notice to comply, upon motion, under such
5 conditions as the board may impose.

6 (5) For the purposes of this section, "project proponent" has the
7 same meaning as defined in section 4(3) of this act.

8 NEW SECTION. **Sec. 7.** A new section is added to chapter 77.55
9 RCW to read as follows:

10 (1) The department may levy civil penalties of up to ten thousand
11 dollars for every violation of this chapter or of the rules that
12 implement this chapter. Each and every violation is a separate and
13 distinct civil offense.

14 (2) The penalty provided must be imposed by notice in writing by
15 the department, provided either by certified mail or by personal
16 service, to the person incurring the penalty and to the local
17 jurisdiction in which the hydraulic project is located, describing
18 the violation. The civil penalty notice must set forth:

- 19 (a) The basis for the penalty;
- 20 (b) The amount of the penalty; and
- 21 (c) The right of the person incurring the penalty to appeal the
22 civil penalty.

23 (3)(a) Except as provided in (b) of this subsection, any person
24 incurring any penalty under this chapter may appeal the penalty to
25 the board pursuant to chapter 34.05 RCW. Appeals must be filed within
26 thirty days from the date of receipt of the notice of civil penalty
27 in accordance with RCW 43.21B.230.

28 (b) Issuance of a civil penalty may be informally appealed by the
29 person incurring the penalty to the department within thirty days
30 from the date of receipt of the notice of civil penalty. Requests for
31 informal appeal must be filed in the form and manner prescribed by
32 the department by rule. A civil penalty that has been informally
33 appealed to the department is appealable to the board within thirty
34 days from the date of receipt of the department's decision on the
35 informal appeal.

36 (4) The penalty imposed becomes due and payable thirty days after
37 receipt of a notice imposing the penalty unless an appeal is filed.
38 Whenever an appeal of any penalty incurred under this chapter is
39 filed, the penalty becomes due and payable only upon completion of

1 all review proceedings and the issuance of a final order confirming
2 the penalty in whole or in part. When the penalty becomes past due,
3 it is also subject to interest at the rate allowed by RCW 43.17.240
4 for debts owed to the state.

5 (5) If the amount of any penalty is not paid within thirty days
6 after it becomes due and payable, the attorney general, upon the
7 request of the director, shall bring an action in the name of the
8 state of Washington in the superior court of Thurston county or of
9 the county in which such a violation occurred, to recover the
10 penalty. In all such actions, the rules of civil procedures and the
11 rules of evidence are the same as in an ordinary civil action. The
12 department is also entitled to recover reasonable attorneys' fees and
13 costs incurred in connection with the penalty recovered under this
14 section. All civil penalties received or recovered by state agency
15 action for violations as prescribed in subsection (1) of this section
16 must be deposited into the state's general fund. The department is
17 authorized to retain any attorneys' fees and costs it may be awarded
18 in connection with an action brought to recover a civil penalty
19 issued pursuant to this section.

20 (6) The department shall adopt by rule a penalty schedule to be
21 effective by January 1, 2020. The penalty schedule must be developed
22 in consideration of the following:

- 23 (a) Previous violation history;
- 24 (b) Severity of the impact on fish life and fish habitat;
- 25 (c) Whether the violation of this chapter or of its rules was
26 intentional;
- 27 (d) Cooperation with the department;
- 28 (e) Reparability of any adverse effects resulting from the
29 violation; and
- 30 (f) The extent to which a penalty to be imposed on a person for a
31 violation committed by another should be reduced if the person was
32 unaware of the violation and has not received a substantial economic
33 benefit from the violation.

34 NEW SECTION. **Sec. 8.** A new section is added to chapter 77.55
35 RCW to read as follows:

36 The department may apply for an administrative inspection warrant
37 in either Thurston county superior court or the superior court in the
38 county in which the hydraulic project is located. The court may issue
39 an administrative inspection warrant where:

1 (1) Department personnel need to inspect the hydraulic project
2 site to ensure compliance with this chapter or with rules adopted to
3 implement this chapter; or

4 (2) Department personnel have probable cause to believe that a
5 violation of this chapter or of the rules that implement this chapter
6 is occurring or has occurred.

7 NEW SECTION. **Sec. 9.** A new section is added to chapter 77.55
8 RCW to read as follows:

9 (1) The department may disapprove an application for hydraulic
10 project approval submitted by a person who has failed to comply with
11 a final order issued pursuant to section 5 or 6 of this act or who
12 has failed to pay civil penalties issued pursuant to section 7 of
13 this act. Applications may be disapproved for up to one year from the
14 issuance of a notice of intent to disapprove applications under this
15 section, or until all outstanding civil penalties are paid and all
16 outstanding notices to comply and stop work orders are complied with,
17 whichever is longer.

18 (2) The department shall provide written notice of its intent to
19 disapprove an application under this section to the applicant and to
20 any authorized agent or landowner identified in the application.

21 (3) The disapproval period runs from thirty days following the
22 date of actual notice of intent or when all administrative and
23 judicial appeals, if any, have been exhausted.

24 (4) Any person provided the notice may seek review from the board
25 by filing a request for review within thirty days of the date of the
26 notice of intent to disapprove applications.

27 NEW SECTION. **Sec. 10.** A new section is added to chapter 77.55
28 RCW to read as follows:

29 Any violation of this chapter or of the rules adopted to
30 implement this chapter is declared to be a public nuisance.

31 NEW SECTION. **Sec. 11.** A new section is added to chapter 77.55
32 RCW to read as follows:

33 The remedies under this chapter are not exclusive and do not
34 limit or abrogate any other civil or criminal penalty, remedy, or
35 right available in law, equity, or statute.

1 **Sec. 12.** RCW 43.21B.110 and 2013 c 291 s 34 are each amended to
2 read as follows:

3 (1) The hearings board shall only have jurisdiction to hear and
4 decide appeals from the following decisions of the department, the
5 director, local conservation districts, the air pollution control
6 boards or authorities as established pursuant to chapter 70.94 RCW,
7 local health departments, the department of natural resources, the
8 department of fish and wildlife, the parks and recreation commission,
9 and authorized public entities described in chapter 79.100 RCW:

10 (a) Civil penalties imposed pursuant to RCW 18.104.155,
11 70.94.431, 70.105.080, 70.107.050, 76.09.170, (~~77.55.291~~) section 7
12 of this act, 78.44.250, 88.46.090, 90.03.600, 90.46.270, 90.48.144,
13 90.56.310, 90.56.330, and 90.64.102.

14 (b) Orders issued pursuant to RCW 18.104.043, 18.104.060,
15 43.27A.190, 70.94.211, 70.94.332, 70.105.095, 86.16.020, 88.46.070,
16 90.14.130, 90.46.250, 90.48.120, and 90.56.330.

17 (c) Except as provided in RCW 90.03.210(2), the issuance,
18 modification, or termination of any permit, certificate, or license
19 by the department or any air authority in the exercise of its
20 jurisdiction, including the issuance or termination of a waste
21 disposal permit, the denial of an application for a waste disposal
22 permit, the modification of the conditions or the terms of a waste
23 disposal permit, or a decision to approve or deny an application for
24 a solid waste permit exemption under RCW 70.95.300.

25 (d) Decisions of local health departments regarding the grant or
26 denial of solid waste permits pursuant to chapter 70.95 RCW.

27 (e) Decisions of local health departments regarding the issuance
28 and enforcement of permits to use or dispose of biosolids under RCW
29 70.95J.080.

30 (f) Decisions of the department regarding waste-derived
31 fertilizer or micronutrient fertilizer under RCW 15.54.820, and
32 decisions of the department regarding waste-derived soil amendments
33 under RCW 70.95.205.

34 (g) Decisions of local conservation districts related to the
35 denial of approval or denial of certification of a dairy nutrient
36 management plan; conditions contained in a plan; application of any
37 dairy nutrient management practices, standards, methods, and
38 technologies to a particular dairy farm; and failure to adhere to the
39 plan review and approval timelines in RCW 90.64.026.

1 (h) Any other decision by the department or an air authority
2 which pursuant to law must be decided as an adjudicative proceeding
3 under chapter 34.05 RCW.

4 (i) Decisions of the department of natural resources, the
5 department of fish and wildlife, and the department that are
6 reviewable under chapter 76.09 RCW, and the department of natural
7 resources' appeals of county, city, or town objections under RCW
8 76.09.050(7).

9 (j) Forest health hazard orders issued by the commissioner of
10 public lands under RCW 76.06.180.

11 (k) Decisions of the department of fish and wildlife to issue,
12 deny, condition, or modify a hydraulic project approval permit under
13 chapter 77.55 RCW, to issue a stop work order, to issue a notice to
14 comply, to issue a civil penalty, or to issue a notice of intent to
15 disapprove applications.

16 (l) Decisions of the department of natural resources that are
17 reviewable under RCW 78.44.270.

18 (m) Decisions of an authorized public entity under RCW 79.100.010
19 to take temporary possession or custody of a vessel or to contest the
20 amount of reimbursement owed that are reviewable by the hearings
21 board under RCW 79.100.120.

22 (2) The following hearings shall not be conducted by the hearings
23 board:

24 (a) Hearings required by law to be conducted by the shorelines
25 hearings board pursuant to chapter 90.58 RCW.

26 (b) Hearings conducted by the department pursuant to RCW
27 70.94.332, 70.94.390, 70.94.395, 70.94.400, 70.94.405, 70.94.410, and
28 90.44.180.

29 (c) Appeals of decisions by the department under RCW 90.03.110
30 and 90.44.220.

31 (d) Hearings conducted by the department to adopt, modify, or
32 repeal rules.

33 (3) Review of rules and regulations adopted by the hearings board
34 shall be subject to review in accordance with the provisions of the
35 administrative procedure act, chapter 34.05 RCW.

36 NEW SECTION. **Sec. 13.** The following acts or parts of acts are
37 each repealed:

1 (1) RCW 77.55.141 (Marine beach front protective bulkheads or
2 rockwalls) and 2010 c 210 s 28, 2005 c 146 s 501, & 1991 c 279 s 1;
3 and

4 (2) RCW 77.55.291 (Civil penalty) and 2010 c 210 s 31, 2005 c 146
5 s 701, 2000 c 107 s 19, 1993 sp.s. c 2 s 35, 1988 c 36 s 35, & 1986 c
6 173 s 6.

--- END ---

PLAUCHE & CARR LLP

August 16, 2019 - 2:52 PM

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