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SUPREME COURT OF THE
STATE OF WASHINGTON

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

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.

**AMICI CURIAE MEMORANDUM OF CENTER FOR
FOOD SAFETY, CENTER FOR BIOLOGICAL
DIVERSITY, AND FRIENDS OF THE EARTH
IN SUPPORT OF PETITION FOR REVIEW**

George Kimbrell (WSBA#36050)
Center for Food Safety
2009 NE Alberta Street, Suite 207
Portland, OR 97211
Phone: (971) 271-7372

Attorney for Amici

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
IDENTITY & INTERESTS OF AMICI	1
INTRODUCTION	1
ARGUMENT	2
I. Industrial Shellfish Operations Have Adverse Impacts on Aquatic Wildlife and Habitats.	2
A. <i>Use of Plastic</i>	2
B. <i>Use of Pesticides</i>	5
C. <i>Conversion of Intertidal Areas</i>	8
II. Existing Laws Do Not Protect Aquatic Species from Industrial Shellfish Activities.	13
A. <i>Clean Water Act</i>	14
B. <i>National Environmental Policy Act</i>	15
C. <i>Endangered Species Act</i>	16
D. <i>Rivers & Harbors Act</i>	17
CONCLUSION	18

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Eng'rs</i> , 417 F. Supp. 3d 1354 (W.D. Wash. 2019)	10, 15, 16
<i>Nw. Ctr. for Alternatives to Pesticides, et al., v. U.S. EPA</i> , No. C10-01919 (W.D. Wash.)	5
<i>Swinomish Indian Tribal Cmty. v. U.S. Army Corps of Eng'rs</i> , No. 2:18-CV-598-RSL, 2019 WL 469842 (W.D. Wash. Feb. 6, 2019)	17
STATUTES	
16 U.S.C. § 1536	16
33 U.S.C. § 403	17
33 U.S.C. § 1344	14
42 U.S.C. §§ 4321–4370m	15
REGULATIONS	
33 C.F.R. § 323.2	14
50 C.F.R. § 424.02	9
50 C.F.R. § 600.10	10
82 Fed. Reg. 1,860 (Jan. 6, 2017)	14
86 Fed. Reg. 2,744 (Jan. 13, 2021)	14, 17

	Page(s)
 OTHER AUTHORITIES	
<p>A. Bringer et al., <i>High Density Polyethylene Microplastics Impair Development & Swimming Activity of Pacific Oyster D-Larvae</i>, 260 ENVTL. POLLUTION 113978 (2020).....</p>	4
<p>B. Dumbauld et al., <i>Estimating Long-Term Trends in Populations of Two Ecosystem Engineering Burrowing Shrimps in Pacific Nw. Estuaries</i>, 848 HYDROBIOLOGIA 993 (2021)</p>	5
<p>B. Legare et al., <i>The Impacts of Hydraulic Clamming in Shallow Water</i>, 33 AQUATIC LIVING RESOURCES 13 (2020)</p>	12
<p>L. Bendell, <i>Favored Use of Anti-Predator Netting Applied for the Farming of Clams Leads to Little Benefits to Industry While Increasing Nearshore Impacts & Plastics Pollution</i>, 91 MARINE POLLUTION BULLETIN 22 (2015)</p>	3
<p>J. Shaffer et al., <i>Kelp Forest Zooplankton, Forage Fishes, & Juvenile Salmonids of the Northeast Pacific Nearshore</i>, 12 MARINE COASTAL FISHERIES (2020)</p>	8
<p>K. SHERMAN ET AL., EELGRASS HABITATS ON THE U.S. WEST COAST (2018), https://www.pacificfishhabitat.org/wp-content/uploads/2017/09/EelGrass_Report_Final_ForPrint_web.pdf</p>	7, 11
<p>K. Tallec et al., <i>Nanoplastics Impaired Oyster Free Living Stages, Gametes & Embryos</i>, 242 ENVTL. POLLUTION 1226 (2018)</p>	4

	Page(s)
OTHER AUTHORITIES (CONT'D)	
L. Kennedy et al., <i>Eelgrass as Valuable Nearshore Foraging Habitat for Juvenile Pacific Salmon in the Early Marine Period</i> , 10 MARINE COASTAL FISHERIES 190 (2018)	11
M. Solan et al., <i>Anthropogenic Sources of Underwater Sound Can Modify How Sediment-Dwelling Invertebrates Mediate Ecosystem Properties</i> , 6 SCI. REP. 20540 (2016).....	12
NMFS, Biological Opinion for Shellfish Activities in Washington (Sep. 2, 2016), https://www.nws.usace.army.mil/Portals/27/documents/regulatory/160907/NMFS_2016_09-02_WA%20Shellfish%20Aquaculture_WCR-2014-1502.pdf	3, 4, 13, 17
NOAA FISHERIES, LARGE WHALE ENTANGLEMENTS OFF THE U.S. WEST COAST (2021), https://www.fisheries.noaa.gov/resource/document/large-whale-entanglements-us-west-coast-1982-20172	4
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	Page(s)
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NOAA Fisheries, <i>Seagrass on the West Coast</i> (last visited Oct. 15, 2021), https://www.fisheries.noaa.gov/west-coast/habitat- conservation/seagrass-west-coast	11
NOAA Fisheries, <i>The Importance of Eelgrass</i> (Nov. 7, 2014), https://www.fisheries.noaa.gov/feature- story/importance-eelgrass	11
NOAA Fisheries, <i>What is Nearshore Habitat & Why Does it Matter to Orcas?</i> (Jan. 27, 2021), https://www.fisheries.noaa.gov/feature-story/what- nearshore-habitat-and-why-does-it-matter-orcas	10
Notice of Intent to Sue from Center for Biological Diversity (Feb. 8, 2021), https://www.biologicaldiversity.org/programs/ biodiversity/pdfs/2-4-2021-NWP-NOI-with- attachments.pdf	17
O. Lönnstedt et al., <i>Environmentally Relevant Concentrations of Microplastic Particles Influence Larval Fish Ecology</i> , 352 SCIENCE 1213 (2016)	4
R. Sussarellu et al., <i>Oyster Reproduction is Affected by Exposure to Polystyrene Microplastics</i> , 113 PNAS 2430 (2016)	4

	Page(s)
OTHER AUTHORITIES (CONT'D)	
S. Ragnarsson et al., <i>Short & Long-term Effects of Hydraulic Dredging on Benthic Communities</i> , 109 MARINE ENVTL. RES. 113 (2015)	13
S. Rubin et al., <i>Juvenile Chinook Salmon & Forage Fish Use of Eelgrass Habitats in a Diked & Channelized Puget Sound River Delta</i> , 10 MARINE & COASTAL FISHERIES 435 (2018)	11
Settlement Agreement, <i>Willapa-Grays Harbor Oyster Growers Ass'n v. Wash. Ecology Dep't</i> , Pollution Control Hearing Bd. No. 18-073 (Oct. 15, 2019), https://ecology.wa.gov/DOE/files/53/534d0e26-e446-4f0d-ada1-48822f559ae0.pdf	7
U.S. EPA, Draft National Level Listed Species Biological Evaluation for Imidacloprid (2021), https://www.epa.gov/endangered-species/draft-national-level-listed-species-biological-evaluation-imidaclopridz	6
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U.S. FWS, <i>Listed Species: Washington</i> (last visited Oct. 15, 2021), https://ecos.fws.gov/ecp/report/species-listings-by-state?stateAbbrev=WA&stateName=Washington&statusCategory=Listed	9

	Page(s)
OTHER AUTHORITIES (CONT'D)	
U.S. GOV'T ACCOUNTABILITY OFF., INFORMATION ON SHELLFISH AQUACULTURE PERMITTING ACTIVITIES (2019), https://www.gao.gov/assets/gao-19-145.pdf	14
Wash. Ecology Dep't, Aquatic Plant General Permit (Apr. 21, 2021), https://fortress.wa.gov/ecy/ezshare/wq/permits/APAMGeneralPermitFinal.pdf	8
Wash. Ecology Dep't, Aquatic Weed General Permit (Jul. 5, 2019), https://apps.ecology.wa.gov/paris/DownloadDocument.aspx?id=274802	8
Wash. Ecology Dep't, Final Permit Determination (Sep. 27, 2018), https://ecology.wa.gov/DOE/files/9f/9f907372-0c3d-4d5c-aea2-116a38516e10.pdf	6
Wash. Ecology Dep't, Final Supp. Env'tl. Impact Statement for Burrowing Shrimp Control Using Imidacloprid (2018), https://apps.ecology.wa.gov/publications/documents/1810002.pdf	6
Wash. Ecology Dep't, Z. japonica General Permit (April 4, 2020), https://fortress.wa.gov/ecy/ezshare/wq/permits/ZJ-FinalPermit.pdf	7

IDENTITY & INTERESTS OF AMICI

The identity and interest of amici are set forth in the accompanying motion.

INTRODUCTION

Washington is the leading shellfish producer in the United States, largely due to the expansion of industrialized operations. However, these operations pose significant threats to Washington's coastal communities and wildlife.

The Hydraulic Code is Washington's central tool for protecting aquatic wildlife and habitats from the harmful effects of industrial shellfish operations. The Court's resolution of whether the Code applies to the shellfish industry has profound consequences for the ongoing fight to protect culturally and economically valuable ecosystems along Washington's coast.

Amici are environmental organizations with experience challenging the harmful impacts of industrial shellfish at the state and federal level. Without the Code, advocates have few enforcement options. We respectfully ask this Court to grant

review to address whether Washington's Fish and Wildlife Department has the authority and duty to protect Washington's coastal wildlife and habitats by enforcing the Hydraulic Code against shellfish operations.

STATEMENT OF CASE

Amici adopt the statement of the case set forth in the petition for review.

ARGUMENT

I. Industrial Shellfish Operations Have Adverse Impacts on Aquatic Wildlife and Habitats.

Industrial shellfish operations rely on plastics, pesticides, and conversion of intertidal areas to maximize production. Consequently, the rapid expansion of these operations has devastating impacts on Washington's coastal areas, including increased pollution, habitat destruction, and wildlife loss.

A. Use of Plastic

Industrial shellfish operations rely heavily on plastic nets and lines to anchor farmed shellfish to structures in the water

and to protect shellfish from predators.¹ For example, geoduck operations stick polyvinyl chloride (PVC) tubes into sandy substrate at a rate of 42,000 tubes per acre, and then cover the tubes with anti-predator nets.² These PVC tubes, lines, and nets erode over time, increasing plastic waste and microplastics in Washington’s coastal waters.³

Plastic pollution adversely affects marine ecosystems. When aquatic species (including farmed shellfish) ingest debris, they can suffer serious physical injuries. Microplastics are a “poison pill” to wildlife, including fish at the bottom of the

¹ L. Bendell, *Favored Use of Anti-Predator Netting Applied for the Farming of Clams Leads to Little Benefits to Industry While Increasing Nearshore Impacts & Plastics Pollution*, 91 MARINE POLLUTION BULLETIN 22 (2015).

² Nat’l Marine Fisheries Serv., *Biological Opinion for Shellfish Activities in Washington*, 25–26 (Sep. 2, 2016) [hereinafter 2016 NMFS BiOp], https://www.nws.usace.army.mil/Portals/27/docs/regulatory/160907/NMFS_2016_09-02_WA%20Shellfish%20Aquaculture_WCR-2014-1502.pdf.

³ See *supra* note 1.

food chain and shellfish produced for human consumption, impairing their growth, reproductivity, mobility, and survival.⁴

In addition, entanglements with hanging lines or detached gear can cause death or serious injury to wildlife, including endangered whales.⁵ These injuries are particularly harmful for juvenile salmon and other species that travel long distances for feeding and rearing.

⁴ See, e.g., K. Tallec et al., *Nanoplastics Impaired Oyster Free Living Stages, Gametes & Embryos*, 242 ENVTL. POLLUTION 1226 (2018); A. Bringer et al., *High Density Polyethylene Microplastics Impair Development & Swimming Activity of Pacific Oyster D-Larvae*, 260 ENVTL. POLLUTION 113978 (2020); R. Sussarellu et al., *Oyster Reproduction is Affected by Exposure to Polystyrene Microplastics*, 113 PNAS 2430 (2016); O. Lönnstedt et al., *Environmentally Relevant Concentrations of Microplastic Particles Influence Larval Fish Ecology*, 352 SCIENCE 1213 (2016).

⁵ NOAA FISHERIES, LARGE WHALE ENTANGLEMENTS OFF THE U.S. WEST COAST 32 tbl.7 (2021), <https://www.fisheries.noaa.gov/resource/document/large-whale-entanglements-us-west-coast-1982-20172>; 2016 NMFS BiOp, *supra* note 2, at 73, 94 (“take is reasonably certain to occur for green sturgeon, PS Chinook salmon, canary rockfish, and HCSR chum salmon from entanglement with loose shellfish cover nets”).

B. Use of Pesticides

Industrial shellfish operations use pesticides to kill “pests” in growing areas, threatening non-target aquatic species.

1. Insecticides on Aquatic Invertebrates

Since the 1960s, operations have used carbaryl, a carcinogenic insecticide, to kill burrowing shrimp in shellfish beds across Willapa Bay and Grays Harbor. Burrowing shrimp are a native species of “ecosystem engineers” because they influence benthic communities, alter habitats, and play a role in estuarine food webs as both predator and prey.⁶ In 2014, EPA only agreed to prohibit carbaryl after activists (including Amici’s members) sued EPA for failing to protect salmon and steelhead from pesticides.⁷

⁶ See, e.g., B. Dumbauld et al., *Estimating Long-Term Trends in Populations of Two Ecosystem Engineering Burrowing Shrimps in Pacific Nw. Estuaries*, 848 HYDROBIOLOGIA 993 (2021).

⁷ See *Nw. Ctr. for Alternatives to Pesticides, et al., v. EPA*, No. C10-01919 (W.D. Wash.).

Operators attempted to replace carbaryl with imidacloprid, an insecticide with highly toxic effects on aquatic species.⁸ Despite the risks to aquatic wildlife, EPA approved imidacloprid for use on shellfish beds. *See* 78 Fed. Reg. 33,736. In 2018, after years of “experimental spraying,” Washington prohibited the use of imidacloprid on beds.⁹ Although the industry settled its Ecology’s denial challenge, operators intend

⁸ *See* Wash. Ecology Dep’t, Final Supp. Env’tl. Impact Statement for Burrowing Shrimp Control Using Imidacloprid (2018) (imidacloprid causes death and other adverse impacts on juvenile worms and crustaceans), <https://apps.ecology.wa.gov/publications/documents/1810002.pdf>; EPA, Draft National Level Listed Species Biological Evaluation for Imidacloprid (2021) (imidacloprid is “likely to adversely affect” 1,445 species and 658 critical habitats), <https://www.epa.gov/angered-species/draft-national-level-listed-species-biological-evaluation-imidaclopridz>.

⁹ Wash. Ecology Dep’t, Final Permit Determination (Sep. 27, 2018), <https://ecology.wa.gov/DOE/files/9f/9f907372-0c3d-4d5c-aea2-116a38516e10.pdf>.

to find alternative chemicals and may request an imidacloprid permit in the future.¹⁰

2. *Herbicides on Aquatic Plants*

Operators use imazamox to kill non-native eelgrass (*Z. japonica*) on clam beds in Willapa Bay,¹¹ jeopardizing native eelgrass (*Z. marina* and *Z. pacifica*). Eelgrass provides several valuable ecosystem services, including nutrient cycling, water quality improvement, carbon sequestration, sediment stabilization, and habitat (including nursery and forage areas) for numerous species.¹²

¹⁰ See Settlement Agreement, *Willapa-Grays Harbor Oyster Growers Ass'n v. Wash. Ecology Dep't*, Pollution Control Hearing Bd. No. 18-073 (Oct. 15, 2019), <https://ecology.wa.gov/DOE/files/53/534d0e26-e446-4f0d-ada1-48822f559ae0.pdf>.

¹¹ See Wash. Ecology Dep't, *Z. japonica* General Permit (April 4, 2020), <https://fortress.wa.gov/ecy/ezshare/wq/permits/ZJ-FinalPermit.pdf>.

¹² *E.g.*, K. SHERMAN ET AL., EELGRASS HABITATS ON THE U.S. WEST COAST 1–2, 54 (2018), https://www.pacificfishhabitat.org/wp-content/uploads/2017/09/EelGrass_Report_Final_ForPrint_web.pdf.

Imazamox and other herbicides approved for use on shellfish beds have devastating impacts on Washington's coastal areas.¹³ Despite these risks, Washington continues to approve herbicide use on aquatic plants,¹⁴ making Washington's aquatic ecosystems more vulnerable to habitat loss and other threats.

C. Conversion of Intertidal Areas

As shellfish operations expand, operators have converted coastal areas into unvegetated shellfish beds at increasing rates, resulting in seagrass removal, destruction of benthic communities, and other adverse impacts.

¹³ Other aquatic plants are also important. *See, e.g.,* J. Shaffer et al., *Kelp Forest Zooplankton, Forage Fishes, & Juvenile Salmonids of the Northeast Pacific Nearshore*, 12 MARINE COASTAL FISHERIES 4 (2020) (“kelp forests are important for culturally and economically valuable forage fishes and salmonids”).

¹⁴ *See* Wash. Ecology Dep't, Aquatic Plant General Permit (Apr. 21, 2021), <https://fortress.wa.gov/ecy/ezshare/wq/permits/APAMGeneralPermitFinal.pdf>; Aquatic Weed General Permit (Jul. 5, 2019), <https://apps.ecology.wa.gov/paris/DownloadDocument.aspx?id=274802>.

1. Washington's Intertidal Areas Are Important Habitats.

Industrial shellfish operations use intertidal areas along Washington's shoreline, which are essential habitats for many species of aquatic plants (like seagrass), finfish (like endangered salmon), wild shellfish (including native oysters, clams, and crabs), birds (including migratory and shorebirds), and marine mammals (like endangered whales). Many of these species are listed as threatened and endangered under the Endangered Species Act (ESA).¹⁵ These areas are recognized as "critical habitats" under the ESA,¹⁶ as well as "essential fish habitats" and "habitats of particular concern" under the

¹⁵ U.S. FWS, *Listed Species: Washington* (last visited Oct. 15, 2021), <https://ecos.fws.gov/ecp/report/species-listings-by-state?stateAbbrev=WA&stateName=Washington&statusCategory=Listed>; NOAA Fisheries, *Listed Species: West Coast* (last visited Oct. 15, 2021), https://www.fisheries.noaa.gov/species-directory/threatened-endangered?title=&species_category=any&species_status=any®ions=1000001126&items_per_page=all&sort=.

¹⁶ 50 C.F.R. § 424.02 (defining critical "habitat" as the "setting that . . . contains the resources and conditions necessary to support . . . life processes of a species").

Magnuson-Stevens Act.¹⁷ For example, Puget Sound is an important habitat for threatened Chinook salmon and the endangered Southern Resident killer whales that depend on those salmon for prey.¹⁸

2. *Industrial Shellfish Operations Destroy Aquatic Areas.*

Shellfish operations are a serious threat to Washington’s aquatic areas because they require construction and maintenance of physical structures, and continuous bed preparation and harvesting activities.

i. Eelgrass Removal

Shellfish activities destroy seagrass in Washington’s intertidal areas. *See, e.g., Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Eng’rs*, 417 F. Supp. 3d 1354, 1359,

¹⁷ *Id.* § 600.10 (defining “essential fish habitats” as the areas “necessary to fish for spawning, breeding, feeding, or growth”).

¹⁸ *See, e.g.,* NOAA Fisheries, *What is Nearshore Habitat & Why Does it Matter to Orcas?* (Jan. 27, 2021), <https://www.fisheries.noaa.gov/feature-story/what-nearshore-habitat-and-why-does-it-matter-orcas>.

1362–63 (W.D. Wash. 2019). Seagrass (including eelgrass) is a highly valued and protected habitat for many aquatic species,¹⁹ including juvenile salmon.²⁰ Seagrass is also considered an “ecosystem engineer” because it provides several “key ecological functions in coastal and estuarine ecosystems.”²¹ Removal of seagrass and other important aquatic plants has devastating impacts on forage fish, endangered salmon, and other species.²²

¹⁹ Eelgrass is federally protected as an “essential fish habitat,” and a “habitat area of particular concern” for groundfish and salmon. See NOAA Fisheries, *The Importance of Eelgrass* (Nov. 7, 2014), <https://www.fisheries.noaa.gov/feature-story/importance-eelgrass>; *Seagrass on the West Coast* (last visited Oct. 15, 2021), <https://www.fisheries.noaa.gov/west-coast/habitat-conservation/seagrass-west-coast>.

²⁰ E.g., L. Kennedy et al., *Eelgrass as Valuable Nearshore Foraging Habitat for Juvenile Pacific Salmon in the Early Marine Period*, 10 MARINE COASTAL FISHERIES 190 (2018); S. Rubin et al., *Juvenile Chinook Salmon & Forage Fish Use of Eelgrass Habitats in a Diked & Channelized Puget Sound River Delta*, 10 MARINE & COASTAL FISHERIES 435 (2018).

²¹ K. SHERMAN, *supra* note 12, at 1–2, 47, 54.

²² *See id.*

ii. *Seafloor Disturbance*

Industrial shellfish operations are a threat to wildlife near the seafloor (known as the “benthic” zone). Operations insert structures in the sand, significantly modifying the substrate, changing water flow, disturbing spawning areas, and destroying buried eggs and larvae.²³ These construction-related activities harm ecological engineers found in benthic communities,²⁴ causing widespread impacts on the entire ecosystem.

These disturbances are continuous throughout production. From bed clearing to harvesting, operators use mechanical equipment, such as high-pressure water jet probes,

²³ See, e.g., NOAA, REVIEW OF THE ECOLOGICAL EFFECTS OF DREDGING IN THE CULTIVATION & HARVEST OF MOLLUSCAN SHELLFISH 11–17 (2011), <http://shellfish.ifas.ufl.edu/wp-content/uploads/Review-Ecological-Effects-of-Dredging-to-Harvest-Molluscs.pdf>.

²⁴ See, e.g., B. Legare et al., *The Impacts of Hydraulic Clamming in Shallow Water*, 33 AQUATIC LIVING RESOURCES 13 (2020) (“Hydraulic clamming . . . changes the benthic invertebrate community.”); M. Solan et al., *Anthropogenic Sources of Underwater Sound Can Modify How Sediment-Dwelling Invertebrates Mediate Ecosystem Properties*, 6 SCI. REP. 20540 (2016).

disturbing benthic communities.²⁵ Given the cyclical nature of shellfish production, many species cannot recover, resulting in habitat loss, population decline, and other adverse impacts.²⁶

II. Existing Laws Do Not Protect Aquatic Species from Industrial Shellfish Activities.

Although industrial shellfish operations pose significant threats to aquatic species and habitats, federal enforcement has been insufficient. The U.S. Army Corps of Engineers has permitting authority over certain shellfish activities under the Rivers and Harbors Act (RHA) and the Clean Water Act (CWA). In reviewing these activities, the Corps must comply with the ESA and National Environmental Policy Act (NEPA). However, the Corps has failed to protect Washington’s coastal areas from harmful shellfish activities.

²⁵ 2016 NMFS BiOp, *supra* note 2, at 26, 106–11.

²⁶ *See, e.g.,* S. Ragnarsson et al., *Short & Long-term Effects of Hydraulic Dredging on Benthic Communities*, 109 MARINE ENVTL. RES. 113 (2015) (“The effects of dredging on ocean quahogs were drastic and long-lasting.”).

A. Clean Water Act

Section 404 of the CWA, 33 U.S.C. § 1344, requires a permit for activities resulting in the discharge of dredged or fill material into waters of the United States. Relevant activities include “[p]lacing gravel . . . on the [seafloor] . . . for [farmed shellfish] larvae.”²⁷

Until recently, nearly all shellfish operations in Washington were authorized under a “nationwide” general permit.²⁸ The Corps may only issue nationwide permits for activities with “minimal” individual and cumulative adverse effects on the environment. *See* 33 U.S.C. § 1344(e); 33 C.F.R. § 323.2(h). Despite never conducting a proper cumulative impacts analysis for Washington, the Corps re-issued a nationwide permit for shellfish activities (NWP 48) in January 2017. *See* 82 Fed. Reg. 1,860. In October 2019, the U.S.

²⁷ 86 Fed. Reg. 2,790.

²⁸ U.S. GOV’T ACCOUNTABILITY OFF., INFORMATION ON SHELLFISH AQUACULTURE PERMITTING ACTIVITIES 15 tbl.4 (2019), <https://www.gao.gov/assets/gao-19-145.pdf>.

District Court for the Western District of Washington held that the 2017 permit violated the CWA because the Corps failed to consider the environmental impacts. *Protect Puget Sound*, 417 F. Supp. 3d at 1367; 466 F. Supp. 3d 1217 (W.D. Wash. 2020), *aff'd*, 843 F. App'x 77 (9th Cir. 2021).

In January 2021, the Corps re-issued NWP 48. *See* 86 Fed. Reg. 2,744. Despite CFS's victories in federal court, the 2021 permit is even more lax than the permit deemed unlawful. Moreover, the Corps has still not evaluated the cumulative impacts, choosing instead to authorize operations under a "streamlined" permit with no public input. Accordingly, the Corps fails to protect Washington's nearshore areas from the harmful effects of industrial shellfish activities.

B. National Environmental Policy Act

NEPA requires the Corps to evaluate the environmental impacts of proposed actions. 42 U.S.C. §§ 4321–4370m. In ruling in CFS's favor in 2019, the district court held that the Corps violated NEPA by failing to consider the cumulative

impacts of industrial shellfish activities. *See Protect Puget Sound*, 417 F. Supp. 3d at 1367. The Corps still has not adequately analyzed the cumulative impacts.

C. Endangered Species Act

Under ESA Section 7, 16 U.S.C. § 1536(a)(2), the Corps must consult with the National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (FWS) before authorizing activities that may affect threatened or endangered species or their habitats. Almost all shellfish locations in Washington are critical habitats.²⁹ However, the Corps has failed to comply with the ESA for shellfish aquaculture.

In 2016, the Corps completed a programmatic consultation with NMFS and FWS for all shellfish activities, which concluded that the shellfish activities “will have

²⁹ *See supra* note 15.

measurable adverse effects,”³⁰ but will not jeopardize listed species or their habitats.³¹ The Swinomish Tribe is currently challenging the NMFS’s biological opinion in federal court.³² Amici intend to sue the Corps for failing to consult before re-issuing NWP 48.³³

D. Rivers & Harbors Act

Section 10 of the RHA, 33 U.S.C. § 403, requires a permit for work or structures in navigable waters of the United States. Industrial shellfish “structures” include “tubes” “installed in the substrate” and anti-predator “nets.”³⁴ Relevant

³⁰ U.S. FWS, Biological Opinion for Shellfish Activities in Washington (Aug. 26, 2016), https://www.nws.usace.army.mil/Portals/27/docs/regulatory/160907/USFWS_Final%20BiOp_AQ%2020160826.pdf.

³¹ 2016 NMFS BiOp, *supra* note 2.

³² *See Swinomish Indian Tribal Cmty. v. U.S. Army Corps*, No. 2:18-CV-598-RSL, 2019 WL 469842, *1 (W.D. Wash. Feb. 6, 2019).

³³ Notice of Intent to Sue from CBD (Feb. 8, 2021), <https://www.biologicaldiversity.org/programs/biodiversity/pdfs/2-4-2021-NWP-NOI-with-attachments.pdf>.

³⁴ 86 Fed. Reg. 2,788–89.

“work” includes “harvesting and bed preparation activities.”³⁵

The RHA does not provide any permitting standards.

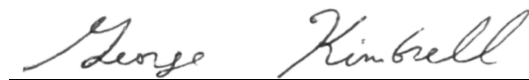
CONCLUSION

Despite Amici’s efforts to enforce federal laws, industrial shellfish operations still threaten Washington’s residents and wildlife. Without the Hydraulic Code, local communities lack an essential enforcement tool applied to other industries. The Court must grant review to provide a definitive ruling on this issue of substantial public interest.

This document contains 2,492 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated October 19, 2021.

Respectfully submitted,



George Kimbrell (WSBA#36050)
Center for Food Safety
2009 NE Alberta Street, Suite 207
Portland, OR 97211
Attorney for Amici

³⁵ *Id.*

CENTER FOR FOOD SAFETY

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Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 100,112-6
Appellate Court Case Title: Protect Zangle Cove, et al. v. Washington Department of Fish and Wildlife, et al.
Superior Court Case Number: 18-2-01972-6

The following documents have been uploaded:

- 1001126_Briefs_20211019153751SC625143_0838.pdf
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- claire@animalearthlaw.com
- danni.friesner@atg.wa.gov
- fwdef@atg.wa.gov
- jesse@plauchecarr.com
- joe.panesko@atg.wa.gov
- jon@bashfordlaw.com
- ksinclair@centerforfoodsafety.org
- tammy@plauchecarr.com

Comments:

(1) Motion to File Amici Curiae Memorandum in Support of Petition for Review, and (2) Amici Curiae Memorandum of Center for Food Safety, Center for Biological Diversity, and Friends of the Earth in Support of Petition for Review

Sender Name: Russell Howze - Email: rhowze@centerforfoodsafety.org

Filing on Behalf of: George A Kimbrell - Email: gkimbrell@centerforfoodsafety.org (Alternate Email: rhowze@centerforfoodsafety.org)

Address:
303 Sacramento St, 2nd Floor
San Francisco, CA, 94111
Phone: (415) 826-2770

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