



May 29, 2020

SUBMITTED VIA E-MAIL

U.S. Army Corps of Engineers, Regulatory Branch
Attention: Pamela Sanguinetti,
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Re: Comments on Joint Public Notice for Dept. of Army Permit NWS-2007-1213

Ms. Sanguinetti:

Please accept these comments on behalf of Center for Food Safety and Friends of the Earth on the Joint Public Notice for the Jamestown S'Klallam proposed 34-acres Pacific oyster operation on tidelands in the Dungeness National Wildlife Refuge near Sequim, Clallam County, Washington. Our tens of thousands of members and activists in Washington value healthy marine waters, wildlife habitat, and protecting wild shorelines from industrial food production.

Before the Army Corps can issue any individual or other permit for shellfish aquaculture operations in Washington it must engage in a meaningful cumulative impacts analysis required by the Clean Water Act (CWA) and National Environmental Policy Act (NEPA) that is missing despite decades of Army Corps permitting of this industry. The Army Corps must also consult with the Services under the Endangered Species Act (ESA), and the Magnuson-Stevens Fishery Conservation and Management Act on impacts to listed species and Essential Fish Habitat before issuing any permit. It does not appear that any of this analysis has been undertaken, or it is not publicly available to inform comments. Moreover, the Army Corps should not be permitting commercial aquaculture in a National Wildlife Refuge, since the National Wildlife Refuge System was created specifically to set aside lands for "the conservation of fish and wildlife, including species that are threatened with extinction." 16 U.S.C. § 668dd(a)(1). Any NEPA environmental assessment on the project must be jointly prepared with the U.S. Fish and Wildlife Service to ensure that the assessment addresses the potential wildlife and environmental impacts of the proposed operation, and to ensure that the proposed operation is compatible with the purposes of the Dungeness National Wildlife Refuge. *Id.* § 668dd(d)(1)(A). Private commercial use of tidelands in a National Wildlife Refuge does not serve the public interest. The Army Corps should deny this permit but if it is going to go forward, it must complete these analyses and provide the public an opportunity to meaningfully comment on any individual permit.

The Joint Public Notice indicates that the operation will cultivate 34 acres of Pacific oysters using "mesh bag culture" and "loose culture." First a total of 20,000 mesh (presumably plastic) bags will be placed on 5 acres to grow juvenile oysters. Then those oysters will be placed directly on the substrate on 29 acres, "outside the eelgrass conservation area." Joint Public Notice at 2. Work is proposed to avoid native eelgrass by establishing a minimum 25-foot buffer set-back for all cultivation activities. *Id.* The Army Corps proposes not compensatory mitigation because the project has "proposed to avoid work in native eelgrass and forage fish spawning areas." However, as the FWS comments on the project stated, more information is

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needed as to the details of the proposed operation before the full scope of impacts can be determined, including whether mechanical harrowing or graveling/frosting will occur, as these techniques are common in on-bottom oyster culture and have significant impacts on habitat and wildlife.¹ Nor can impacts on aesthetics be discerned from the limited information in the Joint Public Notice.

As the Army Corps is well aware, the District Court for the Western District of Washington recently held that the Army Corps failed to meaningfully evaluate the cumulative impacts from tens of thousands of acres of commercial shellfish aquaculture to Washington's environment. *Center for Food Safety v. US Army Corps of Engineers*, No. 2:17-cv-01209-RSL (W.D. Wash. Oct. 10, 2019), ECF No. 65. The Army Corps is now mandated to go back to the drawing board and actually take a hard look at the impacts of this industry under both the CWA and NEPA. 33 U.S.C. § 1344(e)(1); 42 U.S.C. § 4332. The proposed project at issue here is a single operation, presumably to receive an individual permit, but the requirement is the same. Because this operation may significantly affect the environment, especially given its placement in a special and sensitive area, the Army Corps must prepare an Environmental Impact Statement and include a real cumulative impact assessment. See 40 C.F.R. §§ 1508.8, 1508.9, 1508.13, 1508.18, 1508.27. A cumulative impact analysis is especially important here, where the operation was initially much larger, but the applicant is now taking a "phased" approach. Under NEPA the Army Corps must evaluate the entire plan and not segment it into smaller pieces to avoid significance. For all the reasons outlined in the Court's order finding NWP 48 unlawful, the Army Corps must undertake a full evaluation of the impacts from the proposed oyster operation.

Furthermore, any environmental assessment of the proposed oyster operation must involve the U.S. Fish and Wildlife Service, and must take into account the legal mandates of Dungeness National Wildlife Refuge. National Wildlife Refuges were created specifically for "the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." 16 U.S.C. § 668dd(a)(2). Specifically, the Dungeness National Wildlife Refuge was established "as a refuge, preserve, and breeding ground for native birds"² and to provide critical habitat for wildlife and viewing and educational opportunities for people.³ As U.S. Fish and Wildlife Service pointed out, the proposed oyster operation could impact bird species found on the refuge species found on the refuge, from both the operation's structure as well as human activities related to the farm's operations.⁴ The proposed oyster operation do not fulfill, and is in fact incompatible with, these purposes of the Dungeness National Wildlife Refuge, and must not be allowed to go forward without at least a full analysis of its impacts on the Wildlife Refuge by U.S. Fish and Wildlife Service.

¹ FWS, Comments to Steve Gray, Deputy Director/Planning Mgr. re: Dungeness Harbor proposed oyster farm (Apr 4, 2018), http://www.protectpeninsulasfuture.org/wp-content/uploads/2020/05/FWS-Comments-Attachmetns_JSKT-Shoreline-Permit_Final040418.pdf.

² <https://www.fws.gov/refuge/Dungeness/about.html>

³ https://www.fws.gov/refuge/Dungeness/what_we_do/resource_management.html

⁴ FWS, Comments to Pamela Sanguinetti re: Permit Application NWS-2007-1213 for commercial oyster operations within Dungeness National Wildlife Refuge (May 22, 2019), available at http://websrv2.clallam.net/tm_bin/tmw_cmd.pl?tmw_cmd=FileOp&shl_opt=download&shl_case_no=SHR2017-00011&shl_id=SHR2017-00011&shl_docfile=USFW+LETTERS+REGARDING+JST+OYSTER+FARM.

Sincerely,

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