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Vacatur of NWP 48 in Washington: Insight and Implications

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Key Points

On June 11, 2020, Judge Robert S. Lasnik of the U.S. District Court for the Western District of Washington issued a court order that vacated (i.e., set aside) Nationwide Permit 48 in the State of Washington. Nationwide Permit 48 streamlines the permitting process for certain commercial shellfish aquaculture activities by eliminating the need for operators to apply for individual permits. This decision, therefore, has profound implications for shellfish aquaculture operations in the Evergreen State and across the nation.

What did the court decide?

The district court vacated Nationwide Permit 48 (NWP 48) in Washington State following a determination that the U.S. Army Corps of Engineers (the Corps) failed to comply with requirements for environmental review under the Clean Water Act (CWA) and the National Environmental Policy Act (NEPA). In an earlier order dated October 10, 2019, the court announced its decision that the Corps had violated the CWA and NEPA when preparing to re-issue NWP 48 by failing to adequately consider the permit's environmental impacts and erroneously finding that the activities authorized by NWP 48 would have minimal effects on aquatic resources.

Because vacating NWP 48 would have a substantial impact on interests not represented in this case's proceedings, the court sought additional input from the Swinomish Indian Tribal Community before moving ahead with vacatur. Nevertheless, the court ultimately decided that vacating NWP 48 was the only appropriate remedy in light of the seriousness of the Corps' errors and the absence of evidence that vacatur's financial impacts outweigh the environmental consequences of leaving NWP 48 in place.

Perhaps in acknowledgment of the significant impact this ruling will have on the shellfish industry in the state, the court's order includes several key exceptions. Under the terms of the order, producers may continue to maintain and harvest shellfish that were planted or seeded before June 11, 2020, and they may also maintain and harvest any shellfish that is planted or seeded by December 11, 2020. In addition, the court order was stayed—i.e., temporarily suspended—for any Native American operations cultivating shellfish pursuant to the terms of an earlier court case, *United States v. Washington*. Finally, the order was stayed in anticipation of appeal. Taylor Shellfish appealed the court's order on June 18, 2020. Although the request has

not yet been considered, the order will likely remain stayed while the Ninth Circuit Court of Appeals hears Taylor Shellfish's appeal of the district court ruling.

Why does this matter outside Washington State?
The outcome of the NWP 48 case in Washington reflects a development in litigation strategies for challenging NWPs that has achieved success elsewhere, most notably the Keystone XL Pipeline case in Montana. Additionally, President Trump recently issued an executive order (EO) that requires the Corp to prepare nationwide permits for multiple types of offshore aquaculture by September 6, 2020. It may prove difficult for the Corps to fulfill the EO's instructions while complying not only with Judge Lasnik's decision, but also with the decision in the Keystone XL Pipeline case (discussed below) that found the Corps' review for a different NWP—NWP 12—to be inadequate.

Order is available at: https://www.centerforfoodsafety.org/files/order-vacating-nwp-48-in-the-state-of-washington_89778.pdf

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I. Background

The Clean Water Act (CWA) authorizes the U.S. Army Corps of Engineers (the Corps) to issue permits for the discharge of dredged material into the navigable waters of the United States. The CWA allows the Corps to issue five-year general permits on a statewide, regional, or nationwide basis for activities that the Corps determines to be (1) similar in nature and (2) causing minimal adverse effects on the environment when performed separately or cumulatively. NWP 48 is the Corps' authorization mechanism for discharges, structures, and work related to commercial shellfish aquaculture activities in the waters of the United States.[1]

When NWP 48 was renewed in 2017, the Seattle District of the Corps implemented only one regional condition: that the commercial harvest of clams by means of hydraulic escalator would not be authorized under the permit. Many environmentalists believed that NWP 48 would facilitate the rapid expansion of commercial aquaculture operations in the state—with potentially serious consequences for ecosystems—and one nonprofit organization in particular, the Center for Food Safety (CFS), filed a complaint against the Corps in federal court. Although Judge Lasnik originally heard only CFS's suit, the order represents the conclusion of trial court litigation for three legal challenges to NWP 48 that were brought in the Western District of Washington.[2] While the court order vacates NWP 48 in Washington, which would otherwise immediately imperil the state's many commercial aquaculture operations, the order provides for some notable, broad exceptions.

II. Why NWP 48 Was Found to be Unlawful

This court order comes off the heels of Judge Lasnik's October 2019 order that held the reissuance of NWP 48 was not in accordance with the CWA or NEPA. The court found (a) there was insufficient evidence in the administrative record to support the Corps' conclusion that the 2017 reissuance of NWP 48 would have minimal individual and cumulative impacts on the aquatic environment for purposes of the CWA; and (b) the Corps' Environmental Assessment (EA) related to NWP 48 did not satisfy the requirements of the National Environmental Policy Act (NEPA). The court determined that the Corps had interpreted the CWA's "similar in nature" requirement so broadly that it was virtually impossible to evaluate the impacts of commercial shellfish aquaculture activities in a way that captured all of the varying operations in the varying ecosystems throughout the nation.[3] Furthermore, the court found the Corps' EA to be inadequate because it acknowledged that reissuing NWP 48 would have foreseeable environmental

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[1] "Waters of the United States" is a legal term of art and does not apply to all waters in the U.S.
[2] Those three cases are: *Coalition to Protect Puget Sound Habitat v. U.S. Army Corps of Engineers*, Case No. C16-0950RSL; *Center for Food Safety v. U.S. Army Corps of Engineers*, Case No. C16-0950RSL; and *Swinomish Indian Tribal Community v. U.S. Army Corps of Engineers*, Case No. C18-0598RSL.
[3] Order Vacating NWP 48 in the State of Washington at 11, *The Coalition to Protect Puget Sound Habitat v. U.S. Army Corps. of Engineers* (Case No. C16-0950RSL) and *Center for Food Safety v. U.S. Army Corps. of Engineers* (Case No. 17-1209RSL)(W.D. Wash 2020).

consequences for water quality, the balance between native and non-native species, and various fish and bird habitats, but failed to describe—much less quantify—these consequences.[4] Put more plainly, the court found that the Corps fell short of its statutory duties by acknowledging some environmental impacts but failing to explain why these impacts would be minimal or insufficient to trigger the preparation of a more detailed Environmental Impact Statement.

The Corps anticipated this issue while preparing NWP 48 and attempted to overcome it by asserting that Corps District Engineers would consider the impacts of activities covered by the permit on a project-by-project basis. The court, however, indicated that this did not satisfy the agency's obligation to "thoroughly examine the environmental impacts of permitted activities" before issuing a nationwide permit.[5] It was on this basis that the court held the Corps' reissuance of NWP 48 was not in accordance with the CWA or NEPA. The default legal consequence of such a holding is usually to set aside the unlawful agency action–here, NWP 48. However, courts retain considerable discretion in crafting the appropriate remedy.

In the Ninth Circuit Court of Appeals, whose jurisdiction includes the U.S. District Court for the Western District of Washington, courts must consider two factors when weighing whether to vacate an agency action: (1) the seriousness of an agency's errors and (2) the disruptive consequences of an interim change that may itself be changed.[6] In other words, when looking at the second part of this test, the court may decline to vacate an agency decision when it would cause harm that significantly outweighs the agency's error.

III. Summary of Order Vacating NWP 48 in Washington State

Judge Lasnik's most recent order purports to vacate NWP 48 and all authorizations or verifications issued pursuant to it in the State of Washington. However, there are some key exceptions to the court's broad order.

First, the order does not apply to maintenance and harvesting activities related to shellfish that were already planted or seeded as of the date of the order (June 11, 2020), as well as for seeding and planting activities occurring within six months of the order (i.e., by December 11, 2020) in areas that do not contain mature eelgrass. This means that commercial shellfish aquaculture operations in Washington can continue to seed and plant shellfish until December 11, 2020 subject to this condition. The court order does not impose a date by which operations must cease maintaining and harvesting shellfish, so operations can continue to maintain and harvest shellfish after December 11, 2020 as appropriate.

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[4] Order Holding NWP 48 Unlawful in the State of Washington and Requesting Additional Briefing at 10, *The Coalition to Protect Puget Sound Habitat v. U.S. Army Corps. of Engineers* (Case No. C16-0950RSL) and *Center for Food Safety v. U.S. Army Corps. of Engineers* (Case No. 17-1209RSL)(W.D. Wash 2019). NEPA requires agencies to identify and consider the environmental impact of proposed activities.
[5] *Id.* at 2.
[6] Order Vacating NWP 48 in the State of Washington at 3.

The order also does not apply to shellfish activities which occur pursuant to any treaty rights adjudicated under *United States v. Washington*, a series of cases pertaining to shellfish rights between Native American tribal communities in the Evergreen State. This effectively exempts the Swinomish and any other Native American tribal communities in Washington with shellfish aquaculture operations from the court's order, allowing them to continue operations under the terms of NWP 48 until December 11, 2020. However, the court mandates all commercial shellfish growers—corporate or tribal—intending to plant, seed, or harvest shellfish in accordance with the order to submit an application for an individual or other existing Corps permit no later than 6 months from the date of the order (i.e., by December 11, 2020).

Finally, the court stayed the order for 60 days to allow the Corps or intervenors to appeal to the Ninth Circuit Court of Appeals. One of the intervening defendants, Taylor Shellfish Company, has already taken advantage of this window and filed an appeal of Judge Lasnik's decision in the Ninth Circuit. As a result, the district court ruling has no immediate impact because the order is further stayed pending appeal and will likely remain stayed while the Ninth Circuit hears the case.

IV. Helpful Context – *Northern Plains Resource Council v. U.S. Army Corp of Engineers*

NWP 48 is not the only NWP suffering legal setbacks. The U.S. District Court for the District of Montana recently ruled against the Corps over Nationwide Permit 12 (NWP 12) in *Northern Plains Resource Council v. U.S. Army Corp of Engineers*,[7] better known as the Keystone Pipeline case. There, the Northern Plains Resource Council (NPRC) sought review of the Corps' decision to reissue NWP 12, which authorizes discharges of dredged or fill material into waters of the United States as required for the construction, maintenance, repair, and removal of utility lines and associated facilities.[8] The definition of utility lines in this context is very broad, and extends beyond electric, telephone, internet, and television cables to oil and gas pipelines.[9] The NPRC alleged that the Corps' environmental reviews for NWP 12 were inadequate for purposes of not only the CWA and NEPA, but also the Endangered Species Act (ESA). Prior to reissuing NWP 12, the Corps determined that the nationwide permit would not affect any endangered species and, thus, a consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Services ("the Services") was not necessary.

The U.S. District Court for the District of Montana found that "[t]here exists 'resounding evidence' from experts and from the Corps itself that the discharges authorized by NWP 12 may affect listed species and critical habitat."[10] It was on this basis that Judge Morris remanded NWP

[7] 2020 WL 1875455.
[8] 82 Fed. Reg. at 1985-1986.
[9] *Id.* at 1985.
[10] *Northern Plains Resource Council v. U.S. Army Corp of Engineers*, 2020 WL 1875455 at 6 (D. Mont. 2020)(quoting *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 498 (9th Cir. 2011)).

12 to the Corps.[11] In doing so, the court declined to rule on the Corps' determination that (1) NWP 12 would not have a significant impact on the quality of the human environment for purposes of NEPA, and (2) NWP 12 would have only minimal cumulative effects on the environment purposes of the CWA. Instead, the court explicitly anticipated that the Corps will need to conduct additional environmental analyzes based on the findings of its consultation with the Services on remand.[12] Much like Judge Lasnik's decision in the NWP 48 litigation, the Montana court found that the Corps fell short of lofty statutory obligations triggered by nationwide permitting of such a broad range of activities with so many potential environmental impacts.

It should be noted that the Ninth Circuit Court of Appeals declined to overturn Judge Morris' ruling, but the Trump administration has requested Supreme Court review of the case.[13]

V. Looking Ahead – Implications for Trump's Executive Order on Seafood

The somewhat complicated legal landscape surrounding aquaculture in the United States became even more convoluted on May 7, 2020, when President Trump signed Executive Order (EO) 13921, entitled "Promoting American Seafood Competitiveness and Economic Growth."[14] Most relevant to this discussion, the EO requires the Corps to develop NWPs for finfish aquaculture, seaweed aquaculture, and multi-species aquaculture in the U.S.'s Exclusive Economic Zone (EEZ), meaning ocean waters extending from 3 nautical miles (nm) to 200 nm from shore. The outcomes of the NWP 12 and NWP 48 litigation suggest that the EO may be imposing a substantial burden on the Corps. The NWPs for offshore finfish, seaweed, and multi-species aquaculture will very likely prompt lawsuits and, in order to overcome them, the Corps must satisfy its legal obligations under the CWA, NEPA, and ESA.

First, with respect to the CWA, President Trump's directive to develop nationwide permits for these activities seems to assume that each class of activities will, in fact, cause minimal adverse effects on the environment when performed separately or cumulatively. The EO presumably puts immense pressure on the Corps to certify such a finding. However, the U.S. EEZ is the largest in the world. The new EO effectively requires the Corps to identify and quantify or otherwise account for the environmental externalities of these respective activities across 3.4 million square miles of ocean[15]—no small feat. Additionally, a diverse range of species are under consideration for offshore cultivation. As such, there may be legitimate reasons why the effects of these types of aquaculture on the many ecosystems in the EEZ will be more than minimally adverse.

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[11] Specifically, NWP 12 was remanded to the Corps for consultations with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service.
[12] *Id.* at 7-9.
[13] ASSOCIATED PRESS (AP), Trump Administration takes Keystone dispute to Supreme Court (June 16, 2020). Available at https://apnews.com/32019063e65d2606f167b3ef3422418a.
[14] Exec. Order No.13921, 85 FR 28471 (2020). Available at https://www.federalregister.gov/documents/2020/05/12/2020-10315/promoting-american-seafood-competitiveness-and-economic-growth.
[15] https://www.gc.noaa.gov/documents/2011/012711_gcil_maritime_eez_map.pdf.

Second, as to NEPA, the Corps will have to analyze the environmental impacts of several new NWPs for aquaculture. In his NWP 48 decision, Judge Lasnik identified a vast array of potential impacts that the Corps will need to not only acknowledge, but also describe and quantify, when preparing environmental review documents for nationwide aquaculture permits.[16] In light of the recent court decisions out of Washington and Montana, it will be exceedingly difficult for the Corps to conclude that the new NWPs for aquaculture will have no significant environmental impacts. Moreover, in order to fulfill its statutory obligations, the Corps will need to describe and quantify these impacts wherever possible in its environmental reviews for the aquaculture NWPs.

Finally, the Corps will also need to fulfill its obligations under the ESA. There are currently about 150 endangered species which reside in the US EEZ.[17] The Corps must consider the impact of offshore aquaculture on these species and initiate consultation with the Services if appropriate.

[16] The impacts that Judge Lasnik enumerated are: biotic and abiotic components of coastal waters, the intertidal and subtidal habitats of fish, eelgrass, and birds, the marine substrate, the balance between native and non-native species, pollution, and water quality.
[17] Ellen Spooner, *Progress for Eight Endangered Ocean Creatures*, SMITHSONIAN INST. (Jan. 2017). Available at https://ocean.si.edu/ocean-life/marine-mammals/struggling-survive-chance-thrive.