



Oregon

Kate Brown, Governor

Oregon Department of Land Conservation & Development

Oregon Coastal Management Program

Oregon Department of Fish & Wildlife

Marine Resource Program

Habitat Resources Program

Oregon Department of Environmental Quality

Water Quality Program

November 16, 2020

Headquarters

Army Corps of Engineers
Attn: CECW-CO-R
441 G Street NW
Washington, DC 20314-1000

Portland District

Army Corps of Engineers
Ms. Melody White
PO Box 2946
Portland, OR 97208-2946

Re: **Opportunity to Comment on Proposal to Reissue and Modify Nationwide Permits and Regional Conditions.**

Docket Numbers: COE-2020-0002; COE-2020-0002-0092

Comment Deadline: November 16, 2020

Dear Ms. White:

The Oregon Department of Land Conservation (DLCD), Oregon Department of Fish and Wildlife (ODFW), and Oregon Department of Environmental Quality (DEQ) appreciate the opportunity to work with the Army Corps of Engineers (Corps) on the Nationwide Permit Re-authorization process. This is an opportunity to provide Oregon perspectives on the proposed NWP rule and its implications for our collective efforts to protect the integrity of the nation's waters and other natural resources. We have been in communication with the Corps' Portland District, who has demonstrated dedication to consider state natural resource agency expertise and the Corps obligations under the Coastal Zone Management Act (CZMA), Clean Water Act (CWA), Endangered Species Act (ESA), and the Fish and Wildlife Coordination Act (FWCA). Therefore, we are encouraged that the end result has the opportunity to emerge with a 2020 NWP process that retains the integrity of this coordination and Oregon's natural resources.

Oregon's diverse ecosystems span the hydrologic spectrum, from the lush, wet rainforests near the coast to the arid, desert landscapes in eastern Oregon. This hydrology has also been altered in many areas of the state by urbanization, channelization, and re-routing of natural waterways through diversions and ditches. Multiple state agencies in Oregon have collective responsibility to carry out important federal and state environmental laws to ensure Oregon's treasured natural environment is protected and restored where needed. This correspondence specifically incorporates the comments and concerns from three of Oregon's natural resource agencies – DLCD, ODFW, and DEQ. All three agencies are networked partners within the Oregon Coastal Management Program (OCMP), but ODFW and DEQ jurisdictions are state-wide. As such, the following discussion includes both coastal zone and non-coastal zone comments and concerns. This letter also offers pathways available to the Portland District

and Corps Headquarters that may resolve current areas of concern with the OCMP and/or specific agencies. We believe that many issues can be resolved before the final permits and conditions are published.

GENERAL COMMENTS & PRIMARY CONCERNS

The Nationwide Permits (NWP) are general permits issued on a nationwide basis in an effort to “streamline the authorization of activities that result in no more than minimal individual and cumulative adverse environmental effects.” Many of the proposed NWPs currently require notification to the District Engineer before commencing those activities, to ensure that the activities authorized by those NWPs cause no more than minimal individual and cumulative adverse environmental effects. While we acknowledge the intent of the proposed modifications to the NWPs to streamline the regulatory process, the challenge is creating appropriate sideboards to ensure the proposed projects meet the requirements for a NWP, and are designed to achieve ecological benefits, while minimizing misuse and unintended adverse effects. Accordingly, the NWPs do not appropriately afford for a significant nor consequential streamlining of the authorization process. The NWPs are overly generalized because they cannot take into consideration the specific issues associated with siting, techniques, timing, species, concurrent uses, local ecological conditions, and other issues. Furthermore, the NWPs may be injurious to protect proponents because they may foster false expectations for rapid approval.

Although some activities proposed in the 2020 NWP Process may have minimal impacts on resources and may be appropriate candidates for a streamlined permitting process, the current proposal for reissuance and modification to the NWPs may result in individual and cumulative impacts to state resources. In general, we are concerned that the proposed NWPs, General Conditions (GC), and Regional Conditions (RC) will result in a reduction of protections compared to the current NWPs. Overall, we believe the proposed rules reduce the assurances currently provided in the NWPs, either by removing conditions completely, such as the need for a pre-construction notification, or increasing the amount of discharge with little oversight by the Corps (e.g., ½ of stream impacts). In addition, the truncated timeline associated with the 2020 NWP Process is likely to directly impede the coordination and consultation necessary to address agency concerns.

Activities that are applicable under the NWPs should be limited to actions with predictable environmental effects and outcomes, and will not result in more than minimal individual and cumulative adverse environmental effects. The NWP requirements and conditions need to be transparent for both the Corps and the applicants to implement, and to ensure projects are consistent with requirements of the Corps. In addition, the 2020 NWP process should also provide transparency so an applicant is aware of regional or state agency requirements (e.g., Oregon fish passage, in-water blasting permits, 401 Water Quality Certification, Local Land Use Authorizations, and Federal Consistency Review). It is important to understand the level of risk for each NWP, and if there are assurances that can be provided to reduce risks to the aquatic resources. This includes an understanding of how projects may affect the aquatic ecosystems in which they are placed, including stream function, sediment transport, water chemistry, habitat conversion, water quality and quantity, and how those effects vary depending on where and how they are constructed. The absence of assurances in many of the newly proposed NWPs, and the removal of standards for existing NWPs, elevates the risk for projects that may otherwise result in minimal adverse environmental effects. If assurances cannot be provided, an alternative regulatory framework is necessary to evaluate those types of projects and opportunities to avoid, minimize and mitigate the loss to aquatic resources. These assurances include, but are not limited to, limitations on impacts, threshold requirements, pre-construction notification (PCN) requirements, adequate general

conditions and regional conditions. Some of these assurances may be achieved through state agency coordination, the inclusion of additional NWP specific or regional conditions as necessary, or requiring projects to obtain an Individual Permit.

The following section provides an overview of the primary concerns and issues raised by DEQ, DLCD, and ODFW. It includes the concerns regarding the PCN, tracking of temporary and cumulative impacts, increasing impact threshold for streams, and definition of federal permittee.

PRE-CONSTRUCTION NOTIFICATIONS (PCN)

Issue: The proposed NWP process would significantly reduce the requirements for many of the NWPs to submit PCNs directly through the NWP conditions. The revisions also propose to exempt federal permittees from submitting PCNs. We recognize that in some situations, a PCN may still be required for those activities that occur within the coastal zone, may affect an ESA-listed species or designated critical habitat, or have the potential to affect a historic property. However, if a PCN is removed, the Corps would have reduced opportunity to influence the project outcomes, including the ability to track and evaluate temporary and cumulative effects, recommend measures to avoid/minimize adverse effects, and require mitigation for unavoidable impacts to aquatic resources.

Another concern is that Oregon's natural resource agencies would have less opportunity to ensure that state interests are considered during the issuance of federal permits. The PCN is an opportunity for the Corps District to review proposed NWP activity and determine eligibility, as well as for facilitating coordination between state agency partners. Our concerns are amplified by the simultaneous proposal to minimize regional conditions across all NWPs, further increasing the likelihood of individual or cumulative adverse environmental effects. In addition, in some NWPs, the PCN thresholds have been increased, which can result in more than minimal impacts.

Recommended Solutions: The PCN requirement for all permittees, including federal permittees, should be retained.

In addition, DEQ may require a federal agency to obtain a Section 401 Water Quality Certification for any project applicable under the Nationwide program, including those that typically require a PCN. All direct federal actions are also subject to DLCD's federal consistency review under 15 CFR §930 Subpart C.

TRACKING CUMULATIVE IMPACTS

Issue: For the NWPs, the assessment of cumulative effects occurs at three levels by the Corps: National, regional, and the verification stage. However, if a PCN is no longer required for many NWPs or the PCN is not triggered until a higher threshold is met, then the assessment of cumulative effects is greatly diminished at the regional level, and the opportunity to address the concerns at the verification stage is likely too late.

For the purposes of the Clean Water Act Section 404(b)(1) Guidelines, EPA defines "cumulative impacts" as "the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material." (See 40 CFR 230.11(g)(1).) The Guidelines require the permitting authority to predict cumulative effects in its 404(b)(1) Guidelines analysis for the issuance of a general permit by estimating "the number of individual discharge activities likely to be regulated under a general permit until its expiration, including repetitions of individual discharge activities at a single

location.”(See 40 CFR 230.7(b)(3).) The challenge is that without a PCN and trigger for verifying cumulative impacts, this evaluation of cumulative impacts is based on assumptions. These assumptions may be underestimated and actually result in more than minimal individual and cumulative adverse environmental impact.

In addition, clarity is needed on how cumulative impacts will even be considered through the National Environmental Policy Act (NEPA). If the cumulative effects are no longer evaluated through NEPA, what other regulatory safeguards are in place to consider them (e.g., CZMA, ESA)? If the regulatory processes do not adequately evaluate cumulative effects to aquatic resources, and the Corps has a reduced opportunity to track cumulative effects due to the absence of PCNs, the result is an inadequate regulatory process that may authorize significant losses to aquatic resources. This process may strive for creating permit streamlining, but at the expense of reduced transparency and accountability to the public to ensure that no more than minimal adverse impacts will occur.

Recommended Solutions: Retain PCN requirements. Clarify and improve the process for how cumulative effects are evaluated and monitored.

CHANGE FROM LINEAR FOOT TO AN ACREAGE THRESHOLD

Issue #1: The current proposal to increase the stream impact threshold to ½ acre limit is a significant concern to us. It would allow for stream impacts (both direct and indirect) to be greater than minimal without adequate oversight by the Corps. It is not consistent with the purpose of the NWP, which is to “*streamline the authorization of activities that result in no more than minimal individual and cumulative adverse environmental effects.*” The rule, as proposed, strives for simplicity at the expense of adequacy. The proposed change to the ½ acre threshold would lead to an insufficient accounting of the variability in stream functions, and result in increased risks to essential fish and wildlife habitat, and water quality. For example, using the ½ acre limit authorizing impacts to headwater streams that are very narrow in width (e.g., 3-4 feet width) could allow up to a mile (or 5,280 linear feet) of stream loss.

While the Corps acknowledges the challenges of attempting to quantify stream impacts or compensatory mitigation for streams that account for the scale or size of the affected stream reach, the proposed change to ½ acre threshold does not provide assurances that there will be minimal individual or cumulative adverse environmental impacts. There are significant concerns regarding the cumulative impacts to streams, which are uniquely vulnerable to adverse impacts under the proposed 2020 NWP process. Any threshold to streams can be challenging because it is so dependent on site conditions, channel conditions, proposed action, watershed context, etc. However, **if the intent of the NWP is to have no more than minimal individual and cumulative adverse environmental effects, the threshold and allowable impacts should be significantly less than the current threshold of 300 linear feet.** By allowing impacts up to ½ acre, and with many activities never even triggering a PCN, adverse individual and cumulative impacts to stream function are likely. For example, a project impacting an 8-foot wide stream could impact a 1/2 mile of stream and still be under the 1/2-acre threshold.

The proposed removal of the PCN requirement for stream and wetland impacts for projects less than ½ acre does not provide any additional assurances to account for this additional risk and impact to the resource. In addition, Federal permittees would not need to submit a PCN, unless triggered by a specific General Condition (e.g., GC 18 for ESA). The only NWP that seems to retain a linear threshold for streams is NWP 13 (Bank Stabilization), which is for impacts greater than 500 linear feet impact, and this threshold does not provide assurances that minimal individual and cumulative impacts will be achieved.

General Condition #23, which is discussed later in our comments, only requires consideration of mitigation for losses greater than 1/10 of an acre. The Corps proposal states that these NWP (as identified above for changing to ½ acre threshold) would rely on the ½ acre limit and PCN requirements to ensure that activities authorized by these NWPs result in no more than minimal adverse environmental effects. However, if a PCN is not required for stream impacts greater than ½ acre (unless triggered by a specific General Condition), significant impacts will be authorized without oversight by the Corps, including assurances that losses to aquatic resources will be replaced. The definition of “Loss of Waters of the US”, includes the following proposed language that removes from consideration the temporary impacts and cumulative effects. The proposed language states, “*the loss of stream bed includes the acres of stream bed that are permanently adversely affected by filling or excavation because of the regulated activity.*” The existing language in the 2017 NWP, which is proposed for omission states, “*The loss of stream bed includes the acres or linear feet of stream bed that are filled or excavated as a result of the regulated activity.*” For example, many of the linear activities may have multiple stream crossings, but it is not clearly identified how the Corps will consider the cumulative impacts from both temporary and permanent impacts, especially if a PCN is never submitted, which removes or reduces oversight by the District.

Streams are essential to protecting the overall health of a watershed including the protection of drinking water, recreation, fish, wildlife and their habitats, as well as economies dependent on those systems. They are important for the overall function of a watershed for sediment, nutrient, and flood control, and they help maintain biological diversity, and are essential for the water quality in downstream perennial streams, which are crucial for Oregon’s fish and wildlife, including ecologically and economically valuable cold-water species like salmon, steelhead, and trout, as well as other native fish and wildlife. The ability of those perennial waters to function as habitat for those species throughout the year is tied to this larger stream network. For example, during summer months when stream flows are low and water temperatures are elevated, some fish species rely on localized pockets of cooler water for survival delivered by these upstream networks. Many of these “cold water refugia” exist because subsurface hydrologic connections persist even after the seasonal loss of surface connectivity¹. Ephemeral waters feed surface and subsurface flows and contribute critical cold water flows to downstream waters. The conclusions above are supported by a 2019 American Fisheries Society Special Report², which documents the critical roles headwater streams and wetlands, including those that are intermittent or ephemeral, play in sustaining the nation’s ecosystems, imperiled species, recreational and commercial fisheries, and cultures.

Under the Navigable Waters Protection Rule, ephemeral streams are no longer jurisdictional waters of the United States, thereby removing them from CWA permitting protections. While ephemeral streams no longer qualify as “tributaries” under the new Navigable Waters Protection Rule, they account for most stream lengths in a watershed. As part of the tributary network, ephemeral streams connect to intermittent and perennial tributaries. Stream networks with significant intermittent or ephemeral extents are commonplace in eastern Oregon and throughout the arid West. In fact, the United States Geological Survey’s National Hydrography Dataset (NHDPlusV2) categorizes over half of the waterways

¹ Ebersole, J.L., P.J. Wigington, Jr., S. G. Leibowitz, R.L. Comeleo and J. Van Sickle. 2015. Predicting the occurrence of cold-water patches at intermittent and ephemeral tributary confluences with warm rivers. *Freshwater Science*, 34(1): 111-124. (<https://doi.org/10.1086/678127>)

² Colvin, S.A., M.P. Sullivan, P.D. Shirey, R.W. Colvin, K. O’Winemiller, R.M. Hughes, K.D. Fausch, D.M. Infante, J.D. Olden, K.R. Bestgen, R.J. Danahy and L. Eby. 2019. AFS Special Report: Headwater streams and wetlands are critical for sustaining fish, fisheries, and ecosystem services. *Fisheries*, 44(2): 73-91. (<https://doi.org/10.1002/fsh.10229>)

in Oregon as intermittent or ephemeral³. The loss of CWA protections for ephemeral streams emphasizes the increased importance of protecting remaining intermittent and perennial streams. Healthy populations of salmon and steelhead, as well as non-ESA listed native fish in Oregon, are not solely the product of permanently flowing waters. Rather, these species make their living through the use of a complex mosaic of habitat that includes ephemeral and intermittent waters as well as perennial streams. Intermittent streams can also provide important spawning habitat for adult coho salmon, and juveniles rearing in these habitats can experience faster growth rates than those rearing in perennial mainstem reaches⁴. Therefore, since most streambed lengths no longer receive CWA protections, more significant safeguards, such as reducing the current 300 linear foot threshold, are necessary to ensure the protection for the remaining aquatic resources health in a watershed.

Recommended Solution #1: The Corps should retain a linear foot threshold for stream impacts, but the existing 300 linear foot threshold should be significantly reduced to ensure the NWP's have no more than minimal individual and cumulative adverse environmental effects.

Issue #2: The proposed rule includes an option for a Hybrid Approach for some NWP's (21, 29, 39, 40, 42, 43, 44, 50, 51 and 52). This would allow for the current 300 linear foot limit to still apply when just stream impacts were being considered without other impacts to wetlands. However, if both wetlands and streams are proposed to be impacted, the evaluation of impacts would be based on the acreage. The Corps proposes to use the 300 linear foot limit in conjunction with the 1/2-acre limit to wetlands to further restrict losses of stream bed. While the Hybrid Approach seems to improve the mechanism for tracking impacts to aquatic resources, such as streams and wetlands, this proposal does not resolve the issue that up to 1/2 acre of impacts to streams would be authorized.

Recommended Solution #2: Within most waters in Oregon, a permit is required if a project will involve 50 cubic yards of fill and/or removal (cumulative) within the jurisdictional boundary. However, for activities in designated Essential Indigenous Anadromous Salmonid Habitat waters, State Scenic Waterways and designated compensatory mitigation sites, a permit is required for any amount of removal or fill. In addition, over the past 10 years, Oregon has been coordinating with our Federal partners (Corps and EPA) to develop and implement a stream mitigation program in Oregon, to support implementation of the Corps/EPA 2008 Final Mitigation Rule, which acknowledged that acreage based considerations were resulting in losses of streams. As a result, Oregon developed an Aquatic Resources Mitigation Framework⁵, and a Stream Function Assessment Method⁶, primarily for wadeable streams. It was developed to provide a standardized, rapid, more function-based method for assessing stream function and informing

³ Even this estimate may be biased low. Many existing mapping products do not provide a consistent and unbiased means for delineating permanent and seasonal waters. For example, delineation of the perennial extent based on NHD may be relatively unbiased in western Oregon while tending to overestimate the perennial extent in more semiarid/arid regions like those common in eastern Oregon. See Fritz, K.M., E. Hagenbuch, E. D'Amico, M. Reif, P.J. Wigington, Jr., S. G. Leibowitz, R.L. Comeleo, J.L. Ebersole, and T. Nadeau. 2013. Comparing the extent and permanence of headwater streams from two field surveys to values from hydrographic databases and maps. *Journal of the American Water Resources Association*, 49(4): 867-882. (<https://doi.org/10.1111/jawr.12040>)

⁴ Wigington Jr., P.J., J.L. Ebersole, M.E. Colvin, S. G. Leibowitz, B. Miller, B. Hansen, H.R. Lavigne, D. White, J.P. Baker, M.R. Church, J.R. Brooks, M.A. Cairns and J.E. Compton. 2006. Coho salmon dependence on intermittent streams. *Frontiers in Ecology and the Environment*, 4(10): 513-518. ([https://doi.org/10.1890/1540-9295\(2006\)4\[513:CSDOIS\]2.0.CO;2](https://doi.org/10.1890/1540-9295(2006)4[513:CSDOIS]2.0.CO;2))

⁵ <https://www.oregon.gov/dsl/WW/Pages/Aquatic-Resources-Mitigation-Framework.aspx>

⁶ <https://www.oregon.gov/dsl/WW/Pages/SFAM.aspx>

mitigation planning. A key objective in Oregon's new approach is to clarify stream mitigation standards to better achieve the goals of federal and state law.

The existing NWP program which evaluates stream impacts by length and acreage more accurately tracks the impacts to aquatic resources. However, the existing 300 linear foot threshold is already inadequate for protecting streams. In addition, the evaluation of acreage alone has already been determined to be an inadequate measure of losses to waters of the United States, based on the Corps/EPA 2008 Mitigation Rule. The proposal to remove the 300 linear foot limit for losses of stream bed does not result in more accurate quantification of losses of stream bed. The ½ acre threshold of discharge does not ensure that no more than minimal individual and cumulative impacts will result. As the preamble in the Notice states, *“Regional conditions are another tool to ensure that activities authorized by NWPs result in no more than minimal individual and cumulative adverse environmental effects. Under 33 C.F.R. § 330.5(c), division engineers have the authority to assert discretionary authority to modify, suspend, or revoke NWP authorizations for a specific geographic area, class of activity, or class of waters within his or her division, including on a statewide basis. If the 300 linear foot limit for losses of stream bed is removed from these NWPs, division engineers can impose regional conditions to put a smaller acreage limit on losses of stream bed, if such a lower limit is needed to satisfy the requirement that NWPs may authorize only activities that have no more than minimal individual and cumulative adverse environmental effects.”* Therefore, we recommend the Corps significantly reduce the current 300 linear foot limit for losses of stream bed in those NWPs that currently have that limit (NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51 and 52), apply this to new NWPs that may have impacts to streams, such as NWP 12, NWP C and NWP D, and require this for federal and non-federal permittees. The inclusion of a new Regional Condition (see Regional Conditions Section below) would ensure that impacts to small order and headwater streams in Oregon do not exceed the no more than minimal impact requirement applicable to the NWPs, especially for streams that support anadromous fish populations and important residential fish species.

DEFINITION OF “NON-FEDERAL PERMITTEE”

Issue: While we may acknowledge the Corps intent to exempt federal applicants from submitting PCN to further streamline activities permitted through NWPs based on the assumption that federal agencies have expertise capable of determining whether an activity meets NWP criteria, there is an increased risk with this assumption. Federal agencies do not consistently have this expertise. Therefore, the increased risk to aquatic resources, including the temporal and cumulative impacts that are not tracked with the absence of a PCN, may likely result in more than minimal individual and cumulative adverse environmental effects.

An additional significant concern is that the proposed rule does not adequately clarify who qualifies as a federal applicant. The Corps defines non-federal permittee” as *“Any person, organization (other than an agency or instrumentality of the United States federal government), or tribal, state, or local government agency that wants to use a NWP to conduct an activity that requires Department of the Army authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899.”*

Recommended Solutions: PCNs should be required for all applicants to ensure compliance with the intent of the NWP. There is a need to more clearly define which applicants may be eligible to qualify as “federal-permittees”.

We also recommend the addition of a new Regional Condition (see Regional Conditions Section below) that requires federal permittees to comply with General Condition 32 (PCN) for all applicable NWPs, and submit PCNs consistent with other non-federal applicants.

NATIONWIDE PERMITS

The following sections evaluate the concerns related to specific NWPs, General and Regional Conditions. We have attempted to identify the significant issues and provide recommended solutions for the Corps to consider. We welcome additional coordination to address the potential implications to Oregon’s fish, wildlife and habitat, and other natural resources.

NWP 3: MAINTENANCE

Issue #1: The new language of this proposed NWP revision, which allows for “*any currently serviceable structure or fill that did not require a permit at the time it was constructed*” to be eligible for maintenance, is problematic. This includes structures that were constructed prior to the establishment of the CWA, which likely are not meeting current environmental standards. The NWP process is explicitly designed for standardized projects that follow a well-defined and thoroughly reviewed process, and the “grandfathering” of old structures as proposed is especially problematic for ensuring minimal adverse effects. For example, even the minimum amount of riprap necessary to protect a structure in a modern coastal environment might be dramatically different than that originally conceived for an old, unauthorized structure due to changes in water level, land subsidence, wave climate, beach geomorphology, and human activities. It is not clear how the Corps will determine that at the time of construction, the structure did not require a permit. This seems to create an additional compliance issue for structures that may already be out of compliance with other federal or state environmental standards. For example, this may include structures that do not meet ODFW fish passage criteria, which is applicable to all native migratory fish in Oregon. The lack of a PCN may not trigger a review to coordinate with the state on fish passage compliance.

Recommended Solution #1: Recommend the existing language in the 2017 NWP be retained. This NWP should remain limited to previously authorized and serviceable structures. If that criteria cannot be met, an Individual Permit should be required.

Issue #2: The proposal also authorizes placement of new or additional riprap to protect the structure or fill without the requirement for a PCN, and may allow for some stream channel modification (“*the minimum necessary*”). Removal of the PCN requirement for federal applicants would thwart review by the District Engineer, which is necessary to evaluate maintenance projects that would add riprap to existing structures in the context of other local and regional structures. Such review is necessary for the Corps to determine the suitability of a project and to consider the cumulative impacts of multiple projects. The interaction of projects within a region such as sediment movement in a littoral cell, depends on local conditions and hydrographic context.

Recommended Solution #2: We recommend that the existing requirement for a PCN be retained, and that the PCN should be required (see General Condition 32, in General Conditions Section

below) for federal and nonfederal applicants. The PCN requirement should also be linked with the ARSC (see Regional Condition 2, in Regional Condition Section below).

Issue #3: For both previously permitted and unpermitted structures, further specificity is needed to define the “*minimum necessary*” amount of riprap to protect a structure. For example, with the expectation of rising water levels and subsiding structures, over what time period is the additional riprap designed to provide protection? Such a designation is necessary to determine whether a proposed design is the minimum necessary.

Recommended Solution #3: For previously permitted structures, one modification could be to limit the maintenance design to the minimum necessary to accomplish the originally designed level of protection (rather than, as currently specified in the text of NWP 3, purposes that were merely “contemplated” in the original design). Enhanced levels of protection should require separate individual permit authorization (see NWP-Specific Regional Conditions section below).

- We recommend a Regional Condition for NWP 3, where the placement of new or additional riprap to protect the structure or fill in excess of 25 cubic yards requires submission of a PCN in accordance with General Condition 32.
- Detailed review by the District Engineer is necessary to evaluate maintenance projects involving adding riprap to existing structures in the context of other local and regional structures, in order to suitably consider the cumulative impacts of such projects.
- Bioengineering must be used instead of riprap, unless a licensed professional engineer provides an explanation that it is the only material solution.

NWP 7: OUTFALL STRUCTURES AND ASSOCIATED INTAKE STRUCTURES

Issue: The Corps’ proposal to eliminate the requirement for PCN for federal applicants may severely undermine the District Engineer’s ability to conduct these reviews or fulfill its statutory obligation to coordinate with the state.

Recommended Solution: The PCN requirement for Federal agencies and non-Federal permittees should not be eliminated for activities authorized in Oregon under NWP 7.

NWP 8: OIL AND GAS STRUCTURES ON THE OUTER CONTINENTAL SHELF

Issue: Oil and natural gas infrastructure (including pipelines) in support of oil/gas drilling activities in Federal waters are prohibited on Oregon state lands and in state waters by Governor Executive Order (EO 18-28), 2019 Oregon Senate Bill 256, and codified in ORS 274.705 – 274.860 and ORS 390.620. Onshore support facilities are also prohibited. As such, the Corps should categorically exclude the state of Oregon from NWP 8 (see pg. 57306 on excluding state from NWP).

Recommended Solution: The state should be notified of any offshore oil/gas activities authorized under NWP 8 planned in Federal waters as these activities can directly affect the natural resources and fishing activities that are important to state interests. The PCN provides the necessary notification and facilitates coordination between the District Engineer and the state.

NWP 12: OIL OR NATURAL GAS PIPELINE ACTIVITIES

Issue #1: The 2020 NWP process proposes to remove several of the PCN thresholds currently required in the 2017 version of NWP 12. This includes a proposal to modify NWP 12 from utility line activities, to oil or natural gas pipelines, is too broad as to what types of projects may be eligible. The proposed language states “*for any purpose*”. This proposal raises concerns regarding the notification amendments, which significantly limit the requirement for PCN. The PCN threshold is being modified from 7 triggers to just 2 triggers (i.e. removes the PCN thresholds unless triggered by Section 10 permit, a new oil or natural gas pipeline greater than 250 miles, or impacts greater than 1/10 acre). Additional concerns with this proposal include the absence of a size threshold for the pipeline, or additional conditions/restrictions if the pipeline runs parallel to a waterway.

Recommended Solutions #1: Recommend the existing language in the 2017 NWP be retained, including the PCN trigger for impacts to forested wetlands. If this proposal is authorized, it is likely to result in more than minimal impacts in addition to the temporal impacts not being adequately addressed because a PCN is not required unless the impact is greater than 1/10 of an acre.

Currently, discharge through NWP 12 is not eligible per General Condition 22 if within or directly affecting critical resource waters. We recommend expanding this prohibition to within or directly affecting special aquatic sites (see comments related to General Condition 32 and Regional Condition 2), and PCN are required for impacts to all waters.

Issue #2: NWP 12 is proposing to remove the trigger for land clearing in a forested wetland and the proposed language does not address concerns regarding temporary impacts (e.g. constructed above or below ground). The proposed language is limited to ½ acre of waters of the US for each single and completed project. However, it is not clear how temporary or cumulative impacts will be considered if the pipeline was completed in multiple phases. In addition, the impacts will not be tracked due to the absence of PCN. This will allow for impacts to forested wetlands without accounting for mitigation or temporal loss (see GC 23, which includes language that mitigation “*may be required*”, but only if Corps is notified through PCN). Pipelines can cause significant direct and indirect impacts to fish and wildlife habitat, as well as the indirect impacts to water quality associated with an increase in watershed runoff, particularly in areas where a pipeline may be proposed on slopes exceeding 50%, and where vegetation will be removed from riparian corridors. This is a significant deficiency, both within- and outside of – the Coastal Zone Management Area.

Recommended Solution #2: Recommend the existing language in the 2017 NWP 12 be retained, including the PCN trigger for impacts to forested wetlands.

Additional clarification is needed for how temporal and cumulative impacts will be considered when evaluating facilities proposed to be authorized by NWP 12 or by multiple NWPs. For example, NWP 12 authorizes the use of horizontal directional drilling which could present increased risks to natural resources, beyond those analyzed by an applicant, from ongoing or long-term temporal effects or from cumulative effects of multiple activities. We recommend clearly identifying information required by all applicants to support the analysis of temporal and cumulative impacts. Recommend separate analysis for temporal and cumulative impacts on streams, wetlands, and “other waters” within the total impact limitation of ½ acre.

NWP 13: BANK STABILIZATION

Issue: Modifications to NWP 13 propose to approve bank stabilization activities necessary for erosion control or prevention, such as vegetative stabilization, bioengineering, sills, rip rap, revetment, gabion baskets, stream barbs, and bulkheads, or combinations of bank stabilization techniques, provided the specific activity meets identified criteria. When appropriate, the list of bank stabilization activities should be expanded to also include efforts that enhance living shorelines (see NWP 54 below).

Recommended Solution: The special conditions for NWP 13 should clearly identify that the allowable scope of bank stabilization activities must not result in undue harm to recognized aquatic resources located within or adjacent to the proposed project sites. NWP 13 should include a Note that would authorize living shorelines (NWP 54) as an appropriate option for bank stabilization in coastal waters. In some cases, local environmental conditions may be conducive to development of living shorelines (composed of submerged aquatic vegetation, native shellfish beds, salt marshes, etc.) as an appropriate technique to enhance or achieve bank stabilization.

To further limit individual and cumulative adverse environmental impacts, the NWP threshold for a PCN should be reduced from 500 to 300 linear feet. We also recommend adding a general definition of bioengineering:

Bioengineering refers to the installation of plant materials as a main structural component in controlling problems of land instability where erosion and sedimentation are occurring. (USDA-NRCS, 1992)

NWP 14: LINEAR TRANSPORTATION PROJECTS

Issue: This NWP triggers a PCN, however a PCN is not required for NWP 12, which may have significant impacts as well.

Recommended Solution: Reduce risk by including the requirement for obtaining ODFW fish passage approval in Regional Conditions. Currently, discharge through this NWP is not eligible per GC 22 (Designated Critical Resource Waters) if within or directly affecting critical resource waters. Recommend also prohibiting within Aquatic Resources of Special Concern (see General Condition 32 and Regional Condition 2).

NWP 18: MINOR DISCHARGES

Issue: The Corps proposes to eliminate the requirement for PCN will severely undermine the District Engineer's ability to conduct these reviews or fulfill its statutory obligation to coordinate with the state. It is essential that Federal and non-federal agencies have access to identical definitions, descriptions, characterizations of discharge materials, assessments of impacts for proposed projects that involve minor discharges

Recommended Solution: The PCN requirement for Federal agencies and non-Federal permittees should not be eliminated for any NWP authorized in Oregon.

NWP 19: MINOR DREDGING

Issue: The Corps proposes to increase the allowable volume of dredging from 25 cubic yards to 50 cubic yards from U.S. navigable waters, excluding sites that support submerged aquatic vegetation, sites

where submerged aquatic vegetation is documented to exist but may not be present in a given year, anadromous fish spawning areas, wetlands, or the connection of canals or other artificial waterways to U.S. navigable waters. The proposed criteria, however, do not give any consideration to conservation of living resources (i.e. shellfish beds, populations of infaunal invertebrates, macroalgal beds) or biogenic structures (i.e. shell rubble, large woody debris, etc.) that provide ecologically valuable habitat, forage areas, or refuge areas for fish, shellfish, or shorebirds.

Recommended Solution: Because the DSL 50 cubic yard exemption does not apply to those Oregon waterways designated as Essential Indigenous Anadromous Salmonid Habitat waters, we recommend the Corps should also give consideration to additional restrictions to where the minor dredging would be eligible to occur. This consideration would support the implementation of the NWP's to ensure minimal individual and cumulative adverse environmental impacts. The Corps should extend the list of sites that are excluded from the 50 cubic yard limit to include areas that contain significant living resources (i.e. shellfish beds, populations of infaunal invertebrates, macroalgal beds) or biogenic structures (i.e. shell rubble, large woody debris, etc.) that provide ecologically valuable habitat and/or forage areas.

NWP 36: BOAT RAMPS

Issue: The Corps proposes to allow activities associated with the construction of boat ramps, provided the specific activity meets a list of identified criteria.

Recommended Solution: For previously permitted structures, the Corps should also specify that the allowable design for repair or replacement of boat ramps is limited to the minimum necessary to accomplish the function of the original boat ramp. For new structures or improvements to structures beyond what existed before, the Corps should require the District to develop and impose a RC specifying that the allowable design for installation of new boat ramps should result in no more than minimal individual and cumulative adverse environmental effects.

NWP 48: COMMERCIAL SHELLFISH MARICULTURE ACTIVITIES

Issue #1: NWP 48 authorizes commercial shellfish mariculture activities, including installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures, into navigable waters of the United States, and the discharge of dredged or fill material necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. The ecological impacts of these commercial shellfish mariculture activities to estuarine resources have been the topic of extensive research and empirical studies completed over the past several decades (see recent review by Dumbauld *et al.*, 2009). In general, some commercial mariculture activities may have positive effects on estuarine processes (*i.e.*, cultivated oysters filter the water) while other activities have been demonstrated to result in negative impacts (*i.e.*, dense oyster culture reduces spatial cover and biomass of eelgrass beds; introduction of non-indigenous species). In many cases the ecological impacts are context-dependent, and assessments of ecological impacts must include detailed consideration of ambient parameters at shellfish mariculture areas, differences in the type and intensity of shellfish cultivation efforts, site-specific conditions of the substrata and aquatic vegetation at the mariculture site, local variability in resident and transitory fish and wildlife communities, legacy impacts from historical mariculture operations, and other factors associated with the sites and shellfish mariculture operations. Advance authorization of the broad suite of commercial shellfish mariculture activities afforded by the NWP 48 is impracticable because the

blanket authorization cannot take into account important details regarding local ecological conditions at the growing site and specific information about the shellfish cultivation techniques.

Recommended Solution #1: We recommend initial authorization of commercial shellfish mariculture activities should be made on a case-by-case basis, and the conditions under which the mariculture operations may occur in Oregon waters should be subject to ongoing monitoring and periodic review. Areas within Oregon that are suitable for commercial shellfish mariculture operations are limited to specific regions of Oregon's nearshore waters, bays and estuaries. These areas along the Oregon coast are subject to policies and provisions articulated by the Oregon Statewide Planning Goals and numerous applicable statutes. New and continued commercial shellfish mariculture activities that occur within state waters warrant the attention and individual review by federal, state, and local resource agencies, coastal tribes, and other stakeholders, especially during the initial period of a new NWP. These factors highlight the need for the Chief Engineer, Division Engineer, or District Engineer to assert discretionary authority to modify the regional conditions associated with NWP 48, and to add special conditions on a case-by-case basis prior to approval. It is currently difficult, if not impossible, for the Corps to determine *a priori* whether the potential adverse impacts are negligible or substantial without detailed knowledge about the local sites or information about the specific shellfish cultivation techniques.

Issue #2: The PCN requirement for Federal agencies and non-Federal permittees should not be eliminated for any shellfish activity authorized in Oregon for NWP 48. The Corps' proposal to eliminate the requirement for Pre-Construction Notifications (PCN) will severely undermine the District Engineer's ability to conduct these reviews or fulfill its statutory obligation to coordinate with the state.

Recommended Solution #2: We recommend that the requirement for PCN is retained for federal and non-federal projects, as currently required in the 2017 NWP 48.

Issue # 3: NWP 48 proposes to remove the ½ acre limit for impacts to submerged aquatic vegetation in project areas that have not been used for commercial shellfish mariculture activities in the past 100 years. This proposal to remove the ½ acre limit for impacts appears to be ill advised and unsupported at this time, particularly since several historic and established beds of submerged aquatic vegetation have experienced substantial loss and exhibit a trend toward substantial decline at specific sites in bays and estuaries located along the west coast of the United States. Removal of the ½ acre limit for impacts to submerged aquatic vegetation is not adequate as a precaution to ensure minimal impacts to these valuable living resources and essential aquatic habitats.

Recommended Solution #3: We recommend retaining the existing language that prohibits activities from directly affecting more than ½ acre of submerged aquatic vegetation beds in project areas that have not been used for commercial shellfish aquaculture activities during the past 100 years for the reasons stated above.

NWP 52: WATER BASED RENEWABLE ENERGY GENERATION PILOT PROJECTS

Issue #1: Changes to the 2017 NWP language regarding thresholds and PCN requirements are inconsistent in the proposed 2020 rule proposal. The proposed removal of the 2017 language "*losses of jurisdictional wetland and waters caused by the NWP activity cannot exceed ½ acre*" from the 2020

proposed revision (see FR pg. 57380) is contradicted elsewhere in the 2020 proposed changes (see FR pg. 57311 & 57301 & 57313 & 57320 & 57364).

Recommended Solution: Recommend that the Corps proposes to retain, for all pilot projects and attendant features authorized by NWP 52, the ½-acre limit (see FR pgs. 57301 & 57313 & 57320 & 57364) and the pre-construction notification (see FR pgs. 57320 & 57364 & 57381). All of the references to thresholds and PCN requirements should be consistent throughout the 2020 revised NWP 52.

Issue #2: Note 1 includes that “utility lines may be authorized by NWP 12 or another Department of the Army authorization” (see FR pg. 57381). However, per proposed revisions, electric transmission lines will no longer be authorized by NWP 12, but through a new NWP C.

Recommended Solution: Recommend Note 1 be revised to reflect authorization of transmission lines by NWP C rather than NWP 12.

NWP 54: LIVING SHORELINES

Issue: Removing the PCN requirement reduces the District Engineer’s review and coordination with the state resource agencies. Living shoreline infrastructure was untested in Oregon when NWP 54 was authorized in 2017, and remains untested in 2020. Environmental impacts have yet to be considered for Oregon. As stated in our 2017 comments to the Corps, the areas within coastal bays and estuaries that may be suitable for living shoreline implementation, by virtue of their relative rarity in the state and distribution within ecologically sensitive and economically important zones, warrant the benefit of individual review by resource agencies. Furthermore, Oregon is taking actions to eradicate introduced species. Coordination between the District and the state is necessary to determine appropriate species and locations for living shorelines.

Recommended Solution: Retain the PCN to facilitate the necessary review by the District Engineer, coordination with the state and appropriate conditioning of these activities. The special conditions for NWP 54 should make it clear that the allowable scope may include efforts to enhance bank stabilization, but the proposed activity should maintain the natural continuity of the land-water interface, retain or enhance shoreline ecological processes, and must not result in undue harm to recognized aquatic resources located within or adjacent to the proposed project sites.

NWP A: SEAWEED MARICULTURE ACTIVITIES

Issue #1: Seaweed mariculture would be a new industry in this region as there are currently no mariculture activities of any kind in Oregon state waters and adjacent Federal waters. The expected societal/economic and environmental impacts of seaweed mariculture in the region are not known. Furthermore, Seaweed mariculture has not been tested or studied here. The development of the U.S. seaweed mariculture industry in other regions (Alaska, New England) has demonstrated the importance of matching the growth requirements of specific strains of algae to the regional growth conditions, and this process has not been undertaken in Oregon. As such, mariculture projects proposed in Oregon state marine/estuarine waters and adjacent Federal waters require close scrutiny. Accordingly, a nationwide permit (NWP) is not the appropriate pathway for authorizing seaweed mariculture activities in these waters.

Recommended Solution #1: If the Corps proceeds with creating a NWP for seaweed mariculture activities, then we recommend that the Corps revoke the nationwide permit for activities proposed in Oregon waters and adjacent Federal waters, and instead require **individual permits**. The District Engineer should closely coordinate with Oregon's natural resource agencies to review proposed species and strains, to ensure agreement with state regulations and identify potential adverse environmental effects, user conflicts and impacts on other businesses under state authority. Coordination with the state agencies in this way should occur whether seaweed mariculture activities are authorized by a nationwide permit or individual permits. We are submitting mariculture-specific regional conditions for consideration to the Corps Portland District, which are applicable whether mariculture activities are authorized by nationwide or individual permit. These are provided below under NWP Specific Regional Conditions.

Issue #2: There are a number of potential adverse environmental effects of seaweed mariculture on marine/estuarine resources that heavily depend on the specific geographic and biological context of the proposed activity. These effects have not been evaluated in Oregon state waters and adjacent Federal waters:

- Effects on seafloor habitats and benthic organisms through disturbance from anchoring systems, shading, and smothering
- Introduction of non-indigenous species. Aquaculture is one of the most significant sources of seaweed invaders (Williams and Smith 2007);
- Escape of gametes into the estuary and ocean, colonizing and affecting wild stocks. Recent reductions in wild kelp abundance in Oregon and recent catastrophic losses of kelp coverage nearby in CA suggest a dynamic nearshore environment in which wild kelp populations are a vulnerable resource. The potential genetic impacts on dramatically reduced wild kelp stocks from nearby low-diversity aquaculture projects, and the potential competition for space or light from algal recruits deriving from seaweed cultures, add complex layers of environmental risk that would need to be evaluated individually.
- Entanglement of marine mammals, seabirds and turtles in floating and hanging lines and other installations
- Release of contaminants (algaecides, pesticides and antifoulants) into marine/estuarine waters
- Large installations anchored offshore face a substantial risk of mooring system breakage, potentially damaging important rocky reefs and shorelines, creating navigation hazards, increasing entanglement risk for marine mammals
- Commercial and recreational fisheries occupy much of state and Federal waters. Spatial conflicts with fishing, fishery research cruises and long-term ocean monitoring stations are highly likely. Conflicts include gear entanglement, displacement from traditional fishing areas, navigational hazards, and fishery income loss.

Recommended Solution #2: The magnitude and geographic extent of the potential effects from seaweed mariculture in Oregon state waters and adjacent Federal waters are unknown and will need project-specific analysis. Seaweed mariculture activities should be authorized under individual (rather than nationwide) permits by the District Engineer, thereby tailoring appropriate permit review for the potential adverse environmental impacts at the specific proposed project location. Additionally, the District Engineer should coordinate with Oregon's natural resource agencies to identify regional and site-specific concerns, needed analyses, and project-specific conditions. Coordination with the state in this way should occur whether

seaweed mariculture activities are authorized by NWP or individual permit. To support the Corps' review and coordination with the state, the Corps should require a descriptive and detailed PCN. Recommendations for PCN requirements are provided below under *Recommendations for PCN Requirements*. ODFW also submits specific regional conditions for consideration by the Portland District, which are applicable whether mariculture activities are authorized by nationwide or individual permit. These are provided below under NWP Specific Regional Conditions.

Issue #3: Spatial conflicts with existing ocean and estuarine uses, primarily the valuable commercial and recreational fishing activities that occupy much of state and Federal waters, could be particularly severe given the large footprint necessary for seaweed mariculture at commercially feasible scales. Arrays of seaweed mariculture operations could preclude fishing in the area surrounding the facility (up to a mile or more for trawl fisheries), increase gear entanglement risk and reduce navigation safety especially for commercial fisheries, because they rely on unconstrained navigation along north-south depth contours. Oregon's offshore and coastal environments are exposed to massive storm swells that are not consistent with year-round installations of mariculture infrastructure, and access too much of the coast is through relatively distant ports. This geography suggests that estuaries would be the primary sites for economically viable mariculture operations. Oregon's estuaries are relatively small, with numerous existing uses and sensitive ecological resources; therefore, space and navigation conflicts could be substantial, and mariculture activities would create additional stress on the ecological resources and fisheries in these estuaries.

Recommended Solution #3: Require **individual permits**, rather than a nationwide permit for finfish mariculture activities, thereby tailoring appropriate permit review for the specific constraints at the proposed operation location whether offshore (i.e. season- and condition-appropriate structures, avoidance of high-value fishing areas) or estuarine (requiring detailed siting and minimizing the project footprint to reduce conflicts with other estuarine users and ecological resources).

In advance of authorizing any mariculture activities in Oregon waters or adjacent Federal waters, the District Engineer should conduct a spatial siting analysis in coordination with the state, and with input from the fishing industry and the public to identify and avoid important fishing grounds, fishery research activities, and special area designations, including Designated Critical Resource Waters (i.e., *Aquatic Resources of Special Concern* / Portland District Regional Condition 2), PFMC essential fish habitat designations (i.e., habitat areas of particular concern, "areas of interest" and conservation areas), and Rocks and Islands National Wildlife Refuge.

To support the Corps' review and coordination with the state, the Corps should require a descriptive and detailed PCN. Recommendations for PCN requirements are provided below under *Recommendations for PCN Requirements*. ODFW also submits specific regional conditions for consideration by the Portland District, which are applicable whether mariculture activities are authorized by nationwide or individual permit. These are provided below under NWP Specific Regional Conditions.

Multi-trophic mariculture activities under NWP A or separate NWP:

Issue #4: The Corps has proposed that the seaweed mariculture nationwide permit (NWP A) could additionally permit the applicant to grow bivalve shellfish as part of a multi-trophic culture system.

Additionally, the Corps has requested input on whether a separate multi-trophic mariculture NWP should be developed to cover such multi-trophic systems.

The putative benefits of multi-trophic aquaculture systems, primarily characterized as reducing the net discharge of organic wastes leading to subsequent oxygen drawdown via water column respiration, and efficient trophic transfer directly among culture species, are entirely dependent on details of the aquaculture systems, species, growth conditions, and site hydrography that are far from standardized in the nascent field of multi-trophic aquaculture. Most implementations of these approaches are still experimental and unproven at commercial scales. Multi-trophic aquaculture is not without disease transmission between trophic levels, or predation that may require use of pesticides (e.g., a common cultured seaweed, *Ulva*, has many grazer species, and is prone to epiphyte infestation). Nationwide permits are appropriate only for activities with much more predictable outcomes and impacts, and as such are not suitable for the earliest stages of experimental industries.

Recommended Solution #4: The Corps should not authorize multi-trophic activities under a nationwide permit, nor develop a separate multi-trophic NWP, until such time as industry standards are established, and potential impacts are understood and minimized. For the reasons noted above, nationwide permits are appropriate only for activities with much more predictable outcomes and impacts, and as such are not suitable for the earliest stages of experimental multi-trophic mariculture industries. Multi-trophic mariculture activities should be authorized under individual permit by the District Engineer, thereby tailoring appropriate permit review for the potential adverse environmental impacts at the proposed project location. Additionally, the District Engineer should coordinate with Oregon's natural resource agencies to identify regional and site-specific concerns, needed analyses, and project-specific conditions. Coordination with the state in this way should occur whether multi-trophic mariculture activities are authorized by NWP or individual permit. To support the Corps' review and coordination with the state, the Corps should require a descriptive and detailed PCN, which takes into consideration the project's efficiency in capitalizing on multi-purpose infrastructure (anchors, buoys, reducing space use conflicts).

The Notice did not suggest finfish as a potential multi-trophic component of NWP A and it is unclear if this omission was intentional. ODFW does not support finfish as a multi-trophic component of NWP A, should that be the Corps intentions.

Recommendations for Requirements for Pre-Construction Notification (PCN):

Particularly because seaweed mariculture would be a new activity in Oregon, the PCN should contain highly descriptive and detailed information. This is necessary for the Corps to ensure that activities will result in no more than minimal individual and cumulative adverse environmental effects, and to determine compliance with regional conditions and project-specific conditions. ODFW recommends inclusion of the following information in the PCN:

- Scientific names of the proposed mariculture species;
- Detailed information on stock source and quantity;
- Identity and quantity of all substances used and released (e.g., nutrients, antifungals, and chemicals). Describe measures to minimize substance effects on water quality, habitat and marine life;
- Expected harvest biomass and any non-harvested biomass that may remain on site. Estimate biomass (if any) expected to be lost from the site (e.g. advection of broken kelp fronds);

- Site analysis incorporating available spatial information including depth, wave climate, current velocity, substrate type, proximity to any hard-bottom habitats;
- Detailed project information including: configuration, structures, techniques, proposed production quantities, densities, and spacing, and containment system;
- Detailed map(s) that include the site location and ecologically important marine/estuarine areas including those identified under Portland District Regional Condition 2: *Aquatic Areas of Special Concern*, PFMC-designated essential fish habitat (EFH) Conservation Areas, habitat areas of particular concern (HAPCs) marine mammal haulouts, seabird rookeries, and other important marine/estuarine resources delineated by state and Federal agencies;
- Describe measures to minimize physical effects of all structures on habitat and marine life, including structural design and spacing, wildlife deterrents, locating projects away from sensitive ecological resources (i.e., Regional Condition 2: *Aquatic Resources of Special Concern*, PFMC-designated essential fish habitat (EFH) habitat areas of particular concern, EFH conservation areas, Rocks and Islands NWR, seaboard rookeries, marine mammal haulouts);
- Describe measures to minimize attraction and entanglement of sharks, mammals, seabirds, and attraction of fish;
- Describe measures to avoid migration corridors for sharks, mammals, and seabirds;
- Describe measures to minimize displacement, disruption and risks to fishing activities (such as a siting analysis, configuration and spacing of structures, lines, netting, avoiding entangling fishing gear and other navigational hazards);
- Describe measures to minimize adverse economic impacts to fishing industries (e.g., locating projects away from traditional and high value fishing areas);
- Describe measures to minimize spatial conflicts with other ocean users (e.g., a thorough spatial siting analysis, consultation with state resource agencies, and project design and operations plans that accommodate other ocean users, including fishery research activities and ocean monitoring stations);
- Provide prevention, monitoring and response plans that address: escape of cultured species and gametes, antimicrobials and disease transmission to wild species, release and accumulation of nutrients and chemical pollution, structural failures, entanglement of fishing gear and marine species, small vessel strikes and marine debris;
- Provide a response plan in the event the facility becomes damaged or dislodged due to storms or other circumstances.
- Provide a decommissioning plan.
- Provide a mitigation plan

NWP B: FINFISH MARICULTURE ACTIVITIES

Finfish mariculture would be a new industry in this region as there are currently no mariculture activities of any kind in Oregon state waters and adjacent Federal waters. The expected environmental and social/economic impacts of initiating finfish mariculture in the region are not known. Numerous potential effects from finfish mariculture have not been evaluated, and climate-related ocean conditions have made the waters off Oregon particularly vulnerable to further degradation. In addition, the economics and logistics of commercial production and capacity for finfish mariculture off Oregon is unknown, nor is the degree of spatial conflict with Oregon fisheries. For multiple reasons, a nationwide permit (NWP) is not the appropriate pathway for authorizing mariculture activities in Oregon's marine/estuarine waters and adjacent Federal waters. The issues supporting this recommendation are discussed below.

Issue #1: The marine ecosystem off Oregon is at the forefront of the global climate change crisis. For over a decade, this region has been dealing with the impacts of ocean acidification and hypoxia (OAH) (Chan et al 2016; Chan et al 2008; Grantham et al 2004; Keller et al 2010; Siedlecki et al 2015; Pierce et al 2012; Peterson et al 2013). In addition, toxic algal blooms and marine heatwaves are also becoming a more common phenomena off Oregon. These oceanographic processes are having a direct effect on marine species in the region and the fisheries that depend on them. Organic nutrient load is an important driver in OAH processes, and finfish mariculture must be carefully considered since it could add substantial amounts of organic input depending on production volume of mariculture activities, individually and cumulatively. In response to this rapidly developing and potentially chronic OAH phenomenon, state and federal agencies in Oregon are leading policy development, scientific research, monitoring, and response-planning. The launch of several regional policy and scientific bodies to address OAH (e.g., International Alliance to Combat Ocean Acidification, and West Coast Ocean Acidification and Hypoxia Science Panel) is testimony to the urgency of averting ecosystem impairment. Scientists and policy specialists stress the need to implement protective measures to minimize risks of exacerbating OAH. For example, the EPA now prohibits discharges of offshore seafood processing waste in nearly 3,770 square miles of Federal waters on the continental shelf off Oregon and Washington after concluding that seafood processing waste has the potential to exacerbate hypoxia in the region ([EPA NPDES Permit No. WAG520000](#)). In addition, Oregon Department of Environmental Quality recently listed Oregon ocean waters in their impaired water body report: Oregon's 2018/2020 Integrated Water Quality Report and List of Water Quality Limited Waters (pending EPA approval). The listing includes a Category 3B, which are waters of potential concern, of biological integrity due to ocean acidification and dissolved oxygen (due to hypoxia). Oregon's long-standing water quality criteria for ocean waters is: "no measurable reduction in dissolved oxygen concentration" (OAR 340-041-0016(6)). The potential threats from finfish mariculture activities to Oregon's changing marine ecosystem must be thoroughly considered.

Recommended Solutions #1: First and foremost, finfish mariculture activities should not be authorized in hypoxic-prone ocean waters, as previously confirmed by marine scientists and resource managers. Furthermore, finfish mariculture activities should be held to the same EPA regional water quality standard as for offshore seafood processing waste in hypoxic-prone regions of Federal waters off Oregon and Washington (i.e., shoreward of 100 m depth and waters encompassing Heceta Bank and Stonewall Bank) ([EPA NPDES Permit No. WAG520000](#)⁷). Permittees seeking to operate in state and federal ocean waters off Oregon should provide scientific evidence that project activities will not contribute to hypoxia in the receiving waters, consistent with state water quality regulations ((OAR 340-041-0016(6)) and WAG520000.

The current state of the ocean conditions off Oregon provides solid rationale that finfish mariculture activities should only be authorized under very limited circumstances as small-scale demonstration projects to test proof of concept in the unique marine environment off Oregon. These demonstration projects should seek to identify, quantify, and monitor nutrient outputs, pollutants, and associated environmental effects in Oregon waters and adjacent Federal waters. If monitoring associated with a demonstration project verifies no measurable adverse

⁷ <https://www.epa.gov/sites/production/files/2019-03/documents/r10-npdes-offshore-seafood-gp-wag520000-final-permit-2019.pdf>

environmental effects, then the project could scale up with continued monitoring, provided that individual and cumulative effects remain minimal.

For the reasons discussed above, the nationwide permit is not the appropriate pathway for authorizing finfish mariculture activities in Oregon's marine/estuarine waters and adjacent Federal waters. We recommend a regional condition that revokes the use of NWP B for Oregon state waters and adjacent Federal waters. Mariculture activities should only be authorized by individual permit, reviewed and issued by the District Engineer using Discretionary Authority to impose activity-specific conditions tailored to Oregon's particular marine/estuarine conditions and ecological considerations (provided that proposed activities meet state water quality standards and avoid hypoxia-prone waters, as discussed above). The District Engineer should closely coordinate with Oregon's natural resource agencies in assessing a project's potential environmental effects and developing project-specific permit conditions. Coordination with the state in this way should still occur should finfish mariculture activities be authorized under NWP. ODFW is submitting mariculture-specific regional conditions to the Portland District for consideration.

Issue #2: The specific geographic and biological context of the proposed finfish mariculture activities determines the potential for adverse environmental effects on marine/estuarine resources. The following environmental effects have not been evaluated in Oregon state waters or adjacent Federal waters:

- Physiological effects on benthic organisms and secondary effects on prey species due to increases in organic nutrient loads and eutrophication
- Chemical contamination from therapeutants, antibiotics, and antifoulants into marine/estuarine waters
- Increased levels of phosphorus, nitrogen, and turbidity from feed
- Changes in benthic chemistry and community composition beneath and adjacent to structures from excess feed, feces, and antifoulant accumulation
- Effects on seafloor habitats through the disturbance from the placement of structures and anchoring techniques
- Effects on the benthic community composition and structure due to shading, smothering, and scouring from the placement of structures
- Introduction of non-indigenous species
- Escape of cultured adults, progeny, and gametes into the estuary and ocean; preying upon or colonizing and effecting wild fish stocks
- Overuse and spread of antimicrobials to wild fish stocks, and disease transmission to wild stocks
- Behavioral alterations of predators (sharks, seabirds, marine mammals) on fisheries species
- Potential for entanglement of marine mammals, turtles, and seabirds in floating and hanging lines and other installation structures

Recommended Solutions #2: The magnitude and geographic extent of the potential effects from finfish mariculture in Oregon state waters and adjacent Federal waters are completely unknown and dictate the need for project-specific analysis. Finfish mariculture activities should be authorized under individual (rather than nationwide) permit by the District Engineer, thereby tailoring appropriate permit review for the potential adverse environmental impacts at the proposed project location. As previously noted, the District Engineer should coordinate with Oregon's natural resource agencies to identify regional and site-specific concerns, needed

analyses, and project-specific conditions. Coordination with the state in this way should occur whether finfish mariculture activities are authorized by NWP or individual permit. To support the Corps' review and coordination with the state, the Corps should require a descriptive and detailed PCN. Recommendations for PCN requirements are provided below under *Recommendations for PCN Requirements*. ODFW also submits specific regional conditions for consideration by the Portland District, which are applicable whether mariculture activities are authorized by nationwide or individual permit. These are provided below under NWP Specific Regional Conditions.

Issue #3: Spatial conflicts with existing ocean and estuarine uses, primarily the valuable commercial and recreational fisheries that occupy much of state and Federal waters, could be particularly severe given the large footprint necessary for mariculture activities at commercially feasible scales. Likewise, fisheries research surveys and long-term ocean monitoring stations would also be subject to spatial conflict and disturbance. Finfish mariculture installations could preclude fishing in the area surrounding the facility (up to a mile or more for trawl fisheries), increase gear entanglement risk, and threaten navigation safety for commercial fisheries and research cruises that rely on unconstrained navigation along north-south depth contours. Furthermore, Oregon's offshore and coastal environments are exposed to massive storm swells that are not consistent with year-round installations of mariculture infrastructure, and access too much of the coast is through relatively distant ports. This geography suggests that estuaries might be the primary sites for economically viable mariculture operations. However, Oregon's estuaries are relatively small, with numerous existing uses and sensitive ecological resources; therefore space and navigation conflicts could be substantial, and mariculture activities would create additional stress on the ecological resources and fisheries in these estuaries.

Recommended Solutions #3: Require individual permits, rather than a nationwide permit for finfish mariculture activities, thereby tailoring appropriate permit review for the specific constraints at the proposed operation location whether offshore (i.e. season- and condition-appropriate structures) or estuarine (requiring detailed siting and minimizing the project footprint to reduce conflicts with other estuarine users and resources).

In advance of authorizing any mariculture activities in Oregon waters or adjacent Federal waters, the District Engineer should require a spatial siting analysis in coordination with the state, and input from the fishing industry and the public to identify and avoid important fishing grounds, fishery research activities, and special area designations, including Designated Critical Resource Waters (i.e., *Aquatic Resources of Special Concern* / Portland District Regional Condition 2), Pacific Fishery Management Council (PFMC) essential fish habitat (EFH) designations (i.e., habitat areas of particular concern, and conservation areas), and Rocks and Islands National Wildlife Refuge.

To support the Corps' review and coordination with the state, the Corps should require a descriptive and detailed PCN. Recommendations for PCN requirements are provided below under *Recommendations for PCN Requirements*. ODFW also submits specific regional conditions for consideration by the Portland District, which are applicable whether mariculture activities are authorized by nationwide or individual permit. These are provided below under NWP Specific Regional Conditions.

Issue #4: (Compliance with Oregon Administrative Rules) Finfish mariculture activities in state waters are regulated by Oregon Administrative Rules (OARs) and will require individual project review by

ODFW. The proposed nationwide permit review process for finfish mariculture activities does not include coordination with the state and the proposed PCN requirements for this nationwide permit lack sufficient detail for the state to determine project compliance with the following applicable state fish and wildlife rules:

- Fish Propagation License (OAR 635-007-0650)
- Fish Transport Permit (OAR 635-007-0600 to 635-007-0625)
- Nonnative Species (OAR 635-056-0000)
- Fish Health Management (OAR 635-007-0965 to 635-007-0995)

Recommended Solutions #4: The appropriate authorization pathway for finfish mariculture activities is by individual permits issued by the District Engineer, and in close coordination with ODFW. As previously noted, the PCN must contain descriptive and detailed information to determine compliance with OARs, among other requirements. Recommendations for PCN requirements are provided below under *Recommendations for PCN Requirements*.

Multi-trophic mariculture activities under NWP B or separate NWP

Issue #5: The Corps has proposed that the finfish mariculture nationwide permit could additionally permit the applicant to grow bivalve shellfish and/or seaweed as part of a multi-trophic culture system. Additionally, the Corps has requested input on whether a separate multi-trophic mariculture NWP should be developed to cover such multi-trophic systems.

The putative benefits of finfish multi-trophic aquaculture systems, primarily characterized as reducing the net discharge of organic wastes leading to subsequent oxygen drawdown via water column respiration, and efficient trophic transfer directly among culture species, are entirely dependent on details of the aquaculture systems, species, growth conditions, and site hydrography that are far from standardized in the nascent field of multi-trophic aquaculture. Most implementations of these approaches are still experimental and unproven at commercial scales. Multi-trophic mariculture is not without disease transmission between trophic levels, or predation that may require use of pesticides. Nationwide permits are appropriate only for activities with much more predictable outcomes and impacts, and as such are not suitable for the earliest stages of experimental industries.

Recommended Solutions #5: The Corps should not authorize multi-trophic activities under a nationwide permit, nor develop a separate multi-trophic NWP until such time as industry standards and BMPs are established, and potential impacts are understood and minimized. For the reasons noted above, nationwide permits are appropriate only for activities with much more predictable outcomes and impacts, and as such are not suitable for the earliest stages of experimental multi-trophic finfish mariculture industries.

Multi-trophic finfish mariculture activities should be authorized by individual (rather than nationwide) permit by the District Engineer, thereby tailoring appropriate permit review for the potential adverse environmental impacts at the proposed project location. Additionally, the District Engineer should coordinate with Oregon's natural resource agencies to identify regional and site-specific concerns, needed analyses, and project-specific conditions. Coordination with the state in this way should occur whether multi-trophic mariculture activities are authorized by NWP or individual permit. To support the Corps' review and coordination with the state, the Corps should require a descriptive and detailed PCN, which takes into consideration the

project's efficiency in capitalizing on multi-purpose infrastructure (anchors, buoys, reducing space use conflicts).

Recommendations for Requirements for Pre-construction Notification (PCN)

Particularly because finfish mariculture would be a new activity in Oregon, the PCN should contain descriptive and detailed information. This is necessary for the Corps to ensure that activities will result in no more than minimal individual and cumulative adverse environmental effects, and to determine compliance with regional conditions and project-specific conditions. ODFW recommends inclusion of the following information in the PCN:

- Scientific names of the proposed mariculture species;
- Detailed information on broodstock source and quantity;
- Identity and quantity of all substances used and released (e.g., nutrients, antimicrobials, and chemicals, feed and waste). Describe measures to minimize substance effects on water quality, habitat and marine life;
- Expected production quantities of fish, including mortalities;
- Site analysis incorporating available spatial information including depth, wave climate, current velocity, substrate type, proximity to any hard-bottom habitats;
- Detailed map(s) that include the site location and ecologically important marine/estuarine areas including those identified under Portland District Regional Condition 2: *Aquatic Areas of Special Concern*, EFH Conservation Areas, EFH habitat areas of particular concern, marine mammal haulouts, seabird rookeries, and other important marine/estuarine resources delineated by state and Federal agencies;
- Detailed project information including: configuration, structures, techniques, proposed production quantities, densities, spacing, and containment system;
- Describe measures to minimize physical effects of all structures on habitat and marine life, including structural design and spacing, wildlife deterrents, locating projects away from sensitive ecological resources (i.e., Portland District Regional Condition 2: *Aquatic Resources of Special Concern*, EFH Conservation Areas, EFH habitat areas of particular concern, marine mammal haulouts, seabird rookeries, and other important marine/estuarine resources delineated by state and Federal agencies);
- Describe measures to minimize attraction of wild fish;
- Describe measures to minimize attraction and entanglement of sharks, mammals, and seabirds;
- Describe measures to avoid migration corridors for sharks, mammals, and seabirds;
- Describe measures to minimize displacement, disruption and risks to fishing activities (such as a siting analysis, configuration and spacing of structures, lines, netting, avoiding entangling fishing gear and other navigational hazards);
- Describe measures to minimize adverse economic impacts to fishing industries (e.g., locating projects away from traditional and high value fishing areas);
- Describe measures to minimize spatial conflicts with other ocean users (e.g., a thorough spatial siting analysis, consultation with state resource agencies, and project design and operations plans that accommodate other ocean users, including fishery research activities and ocean monitoring stations);
- Provide prevention, monitoring and response plans that address: escape of cultured adults, progeny, and gametes, antimicrobials and disease transmission to wild species, release and accumulation of nutrients and chemical pollution, structural failures or movement of facilities,

structures, mooring systems etc., entanglement of fishing gear and marine species, small vessel strikes and marine debris;

- Provide a decommissioning plan.
- Provide a mitigation plan.

NWP C: ELECTRICAL AND TELECOMMUNICATION ACTIVITIES

Issue #1: This NWP proposes no more than ½ acre impacts to waters of the US per each single and complete project, which would include wetlands and other waters. The PCN is limited to only Section 10 waters or discharge results in losses greater than 1/10 acre. Previously covered by NWP 12, this new NWP authorizes “*activities required for the construction, maintenance, repair, and removal of electric utility lines, telecommunication lines, and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project*” (see FR pg. 57383). Associated facilities may include substations, foundations, access roads or other project components potentially authorized by another NWP (e.g. 52). It remains unclear, when associated facilities are authorized by multiple NWPs, whether the ½-acre threshold will be applied to multiple NWPs or only one NWP will be selected to authorize the associated facilities.

Recommended Solution #1: Revise the new NWP C to (1) clarify the relationship between projects authorized under this NWP and related activities authorized under a separate NWP (e.g., NWP 12), and (2) clearly outline how this is determined.

Issue #2: Authorizes “*work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing electric utility lines or telecommunication lines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District Engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing electric utility lines or telecommunication lines*” (see FR pg. 57383). This language is problematic in that remediation is required for inadvertent returns of drill fluid but a remediation plan is not explicitly required for all proposed activities or for all potential contingencies.

Recommended Solution #2: Every horizontal directional drilling operation should be required to have remediation plans in place to address inadvertent adverse impacts from operations that do not proceed as planned. Chief among these is the significant potential for inadvertent return of drilling fluids. Other unintended outcomes are also possible. District Engineers should review remediation plans to make sure that they appropriately identify regionally relevant risks of adverse outcomes, are well suited to protect such sensitive resources as exist in the project location, and include appropriate communication procedures for notification of relevant agencies.

Issue #3: This new NWP requires that “*the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) A section 10 permit is required; or (2) the discharge will result in the loss of greater than 1/10-acre of waters of the United States (see general condition 32)*” (see FR pg. 57383). The NWP specifies that “*Electric utility lines or telecommunication lines constructed over Section 10 waters and electric utility lines or telecommunication lines that are routed in or under Section 10 waters without a discharge of dredged or fill material require a Section 10*

permit” (see FR pg. 57383). Further “for activities that require preconstruction notification, the PCN must include 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... The District Engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23)” (see FR pg. 57384).

Recommended Solution #3: We support retaining PCN requirements for activities authorized by the new NWP C, and recommend the addition of a best management practice to extend distribution of relevant PCN materials from the District Engineers to state agencies involved in the regulatory oversight or environmental review of projects authorized by the new NWP C.

Issue #4: It is not clear how temporal and cumulative impacts will be considered when evaluating facilities proposed to be authorized by NWP C or by multiple NWPs. For example, NWP C authorizes the use of horizontal directional drilling which could present increased risks to natural resources, beyond those analyzed by an applicant, from ongoing or long-term temporal effects or from cumulative effects of multiple activities.

Recommended Solution #4: Clearly identify information required by all applicants to support the analysis of temporal and cumulative impacts. Recommend separate analysis for temporal and cumulative impacts on streams, wetlands, and “other waters” within the total impact limitation of ½ acre.

NWP D: UTILITY LINE ACTIVITIES FOR WATER AND OTHER SUBSTANCES

Issue: As stated above for other NWPs (e.g., NWP 12, NWP C), it is not clear how temporal and cumulative impacts will be considered when evaluating facilities proposed to be authorized by NWP D or by multiple NWPs.

Recommended Solution: Clearly identify information required by all applicants to support the analysis of temporal and cumulative impacts. Recommend separate analysis for temporal and cumulative impacts on streams, wetlands, and “other waters” within the total impact limitation of ½ acre. Recommend further defining the term “other substances”.

GENERAL CONDITIONS

GC 22: DESIGNATED CRITICAL RESOURCE WATER

Issue #1: General Condition 22 (b) applies to several nationwide permits (NWP 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38). The 2020 NWP process to exempt Federal agencies from submitting a PCN, which consequently exempts the Federal PCN requirement for General Condition 22 (b) for activities within designated critical resource waters. Removal of the PCN requirement leaves no mechanism in place for evaluating and minimizing the effects of Federal activities in designated critical resource waters. In Oregon, the Portland District has designated several ecologically important resources under **Regional Condition 2: Aquatic Resources of Special Concern**, consistent with GC 22. And we are proposing several more critical resources under Regional Condition 2 per the corresponding Public Notice for the Portland District.

Recommended Solution #1: Oregon strongly recommends that the Corps continue to require Federal agencies and non-Federal permittees to submit PCNs for any proposed activities within, or directly affecting, critical resource waters, which for the Portland District is **Regional Condition 2: Aquatic Resources of Special Concern**. Furthermore, the Corps should ensure that project proponents (Federal and non-Federal) are aware of Portland District Regional Condition 2. This could be achieved by creating a mechanism that specifically connects General Condition 22 to District Regional Conditions.

Issue #2: There are four new NWP that should be identified under General Condition 22.

Recommended Solution #2: We recommend including NWP A and NWP B under GC 22 (b). We also recommend including NWP C and NWP D under GC22 (a), consistent with NWP 12, under which these utility activities were previously authorized.

GC 23: MITIGATION

Issue: The Corps is proposing to add a 1/10-acre threshold for triggering compensatory mitigation for stream impacts, similar to the 1/10-acre threshold for wetland impacts. However, the existing General Condition under the 2017 NWP references “*for losses to streams and other open waters*”, but does not have the threshold. We are concerned that this proposed modification has created uncertainty for how “other waters” (e.g., marine and estuarine waters, lakes), will be evaluated and mitigation triggered, as the proposed language omits the reference to “other open waters”.

The Stream mitigation minimum is 1:1 and required for losses to streambeds that exceed 1/10 acre and require a PCN. However, it is not clear if mitigation is still triggered when a PCN is not required. In addition, the district engineer may be able to waive mitigation “if other measures are deemed preferable to offset the proposed impacts.” This results in an additional concern regarding the language that out-of-kind mitigation may be allowed for stream impacts. For example, the proposal allows for the compensatory mitigation requirement to be satisfied through the restoration or enhancement of riparian areas next to streams (e.g., impacts to the spawning habitat will not be offset by planting the riparian area. However, this does not adequately replace lost functions as a result of many activities in the NWPs.

Recommended Solutions: Retain language that compensatory mitigation is required for streams and **other open waters**, which reduces the uncertainty regarding mitigation for losses to those aquatic resources. Or, include additional conditions that compensatory mitigation for impacts to marine/estuarine waters, lakes, and streams should be determined on a case-by-case basis. In addition, the rule should prohibit out of kind mitigation for Designated Critical Resource Waters identified in General Condition 22 and Aquatic Resources of Special Concern identified in Regional Condition 2.

A detailed PCN should be required to provide advance notice regarding the amount of compensatory mitigation required by the District Engineer to ensure the authorized activity results in no more than minimal individual and cumulative adverse environmental effects, and to fulfill its statutory obligation to coordinate with the state. In particular, the PCN should include:

- Sufficient information to calculate the appropriate mitigation ratios needed to adequately offset impacts to aquatic natural habitats and aquatic resources.
- Information to describe efforts and activities to avoid detrimental impacts, to minimize unavoidable impacts, and to distinguish among proposed plans for habitat enhancement, restoration, and creation, their respective mitigation ratios, and an assessment of the likelihood of success or failure to meet the proposed requirements for mitigation.

It is essential that the project proponents be required to **generate and distribute a compensatory mitigation plan** that adequately identifies the type, amount, and current condition of natural resources that will be impacted by the project, as well as the activities that will be undertaken to minimize damage, offset unavoidable damage, identify ecological performance standards, monitoring of performance, and any corrective actions needed to ensure compliance with the compensatory mitigation plan.

GC 28: USE OF MULTIPLE NATIONWIDE PERMITS

Issue: The use of multiple NWP so a project can receive an expedited review goes against the *de minimis* purpose. The existing language in General Condition 28 prohibits the use of more than one NWP for a single and complete project, except when the acreage loss of waters does not exceed the acreage limit of the NWP with the highest specified acreage. The proposed General Condition 28 allows the use of multiple NWPs for a single and complete project, which raises concerns regarding cumulative impacts (both permanent and temporal losses) and tracking impacts with a PCN requirement (see General Comments and Primary Concerns, above). For example, projects that may trigger NWP 13 and NWP 14, would allow impacts up to 1/3 acre.

Recommended Solution: Recommend retaining language from the 2017 NWP to prohibit the use of more than one NWP for a single and complete project.

If the proposed NWP will be authorized, we recommend limiting the use of multiple NWPs to two NWPs per project to minimize the risk of cumulative impacts, especially for those NWPs that may not require a PCN. In addition, more clarity should be provided regarding how temporary and cumulative impacts will be considered, and how/when temporary impacts will be restored.

GC 32: PRE-CONSTRUCTION NOTIFICATION

Issue: The PCN requirement is a benefit for state agency coordination, which assists the applicant and regulatory agencies in permit streamlining. Removal of the PCN does not provide assurances to the resource (e.g., limited ability for Corps to modify conditions) or the applicant (e.g., lack of transparency that other requirements may exist as applicant designs/plans/implements project). PCNs are an important component of the review process and PCN requirements should be maintained similarly for all Federal and non-federal applicants for the NWPs listed above.

Recommended Solution: We recognize for some types of projects, other GC may be triggered (e.g., GC18 for ESA) which allow for some coordination on conditions. We recommend that the requirement for submitting PCNs not be eliminated for any NWP or for any applicant. The PCN includes agency coordination, especially for high risk projects or use of multiple NWPs,

regardless if another GC is triggering review. It is important that the Corps establish a transparent and accountable system to track and monitor cumulative impacts by watershed to ensure projects permitted through the 2020 NWP process result in no more than minimal adverse impacts.

REGIONAL CONDITIONS

RC 2: AQUATIC RESOURCES OF SPECIAL CONCERN

Issue #1: The District Engineer currently requires PCNs for all proposed activities (Federal and non-federal) in the ecologically important areas designated under RC2. We are concerned that the Corps proposal to exempt Federal agencies from submitting PCNs for NWPs will consequently also exempt Federal agencies from submitting PCNs as required by this regional condition.

Recommended Solution: Retain the requirement for a PCN for all activities proposed (Federal and non-federal) within or directly affecting an ARSC.

Issue #2: There is a discrepancy between the language of GC22 and Regional Condition 2 that should be rectified by revising the language of Regional Condition 2. GC 22 states that discharges are not authorized “for any activity within, or directly affecting, critical resource waters”. Missing from RC 2 is the clause: “or directly affecting”.

Recommended Solutions: For Regional Condition 2 (consistent with GC-22), add the text in bold font as follows:

“Aquatic Resources of Special Concern: Pre-construction notification to the District Engineer is required for all activities proposed in waters of the U.S. within, **or directly affecting**, an aquatic resource of special concern.

Issue #3: If the District Engineer reviews the project and determines there are more than minimal adverse effects, the activities may require a mitigation plan that “would reduce the adverse effect to the minimal level”. However, this does not actually require any compensatory mitigation to replace the losses to that ARSC, which can result in more than minimal individual and cumulative adverse impacts.

Recommended Solution: The condition should specifically reference compensatory mitigation to replace the lost functions to ARSC, with a preference for in-kind compensatory mitigation.

Issue #4: Regional Condition 2 does not include all ARSC for Oregon that should be considered. For example, the State of Oregon developed a Habitat Screening Tool⁸, which identifies important ecological areas requiring separate Federal Consistency Determination.

Recommended Solution: Require a PCN for the ecological resources within the coastal zone identified below. Activities affecting these resources will require separate Federal Consistency Reviews. This recommendation aligns with “Category 1 Permits” within the DLCDC-OCMPs consistency determination for the 2017 NWP Reauthorization process.

Additional ARSC Recommendations

RC2 currently includes the following ecological resources as ARSC:

⁸ <https://geo.maps.arcgis.com/apps/webappviewer/index.html?id=1b4a3202b66c4ab79b6907e7b4abf9db/>

- Native eelgrass bed
- Mature forested wetlands
- Bogs
- Fens
- Vernal pools
- Alkali wetlands
- Wetlands in dunal systems along the Oregon coast
- Estuarine wetlands
- Willamette valley wet prairie wetlands
- Marine gardens
- Marine reserves
- Kelp beds
- Rocky substrate in tidal waters

The following additional resources are not currently identified as ARSC, but are identified in the Coastal Habitat Screening Tool⁹. **These additional habitats should be included as ARSC:**

- Native oyster beds
- Marine subtidal rock substrate and reefs
- Marine protected areas
- Seabird protected area
- Marine research reserve
- State habitat refuge
- Shellfish preserves
- The entire state Territorial Sea. This nearshore ocean area has numerous sensitive resources and is an area of high human use, with many potential conflicts. In addition, the marine ecosystem off Oregon is at the forefront of the global climate change crisis¹⁰. For over a decade, this region has been dealing with the impacts of ocean acidification and hypoxia (OAH), toxic algal blooms and marine heatwaves. Natural resources are under extreme stress in this area and projects that may add further stress need to be carefully considered and reviewed.

The following coastal resources are not currently identified as ARSC and are not currently in the Coastal Habitat Screening Tool. However, they will be added in the near future, and therefore **should be included as ARSC:**

- Offshore Rocks and Islands NWR.
- Estuaries
- Estuarine areas encompassed by Habitat Areas of Particular Concern (HAPCs)
- Eelgrass Beds
- Pinniped Haul-out sites
- Sand or cobble beaches in close proximity (i.e. within 100 m shoreward or alongshore) to rock substrate, along rocky shores or in estuaries
- Coastal foredunes known to be occupied by Western Snowy Plover
- Coastal shoreline immediately adjacent to creeks and river mouths

⁹ <https://geo.maps.arcgis.com/apps/webappviewer/index.html?id=1b4a3202b66c4ab79b6907e7b4abf9db/>

¹⁰ https://secure.sos.state.or.us/oard/displayDivisionRules.action;JSESSIONID_OARD=gcab0BJtgQdf53LXqpr8gcxrEdzn8pHcWzWHL4br_DIOzEd2m3pel2068710242?selectedDivision=5922

The State of Oregon, through the Department of State Lands, also identifies “*Aquatic Resources of Special Concern*”, as habitat that provides functions, values and habitats that are limited in quantity because they are naturally rare or have been disproportionately lost due to prior impacts [OAR 141-085-0510(3)]. The Department of State Lands list of these resources should be included as a Note in the NWP to highlight these resources within the State of Oregon. In addition, ODFW recommends two additional ARSC that should be included in RC2:

- Cold water habitat, as defined by DEQ:
 - *Core Cold Water Habitat* are waters expected to maintain temperatures within the range generally considered optimal for salmon and steelhead rearing, or that are suitable for bull trout migration, foraging and sub-adult rearing that occurs during the summer (OAR 340-041-0002 [13]). Waters with a seven-day Average Maximum temperature $\leq 16^{\circ}\text{C}$ ($\sim 61^{\circ}\text{F}$) are considered Core Cold Water Habitat, which have been mapped by DEQ and are available on the [Mitigation Planning Map Viewer](#).
 - *Cold Water Refugia* are those portions of a water body where or times during the diel temperature cycle when the water temperature is at least 2°C (3.6°F) colder than the daily maximum temperature of the adjacent well mixed flow of the water body (OAR 340-041-0002 [10]).

- Shallow water habitat in the Willamette River: Much of the original off-channel habitat (e.g., alcoves, lagoons, backwaters, and secondary channels) has been eliminated from the Willamette River, so the habitat remaining provides essential functions for many species. ODFW considers shallow, littoral zone habitats in the lower Willamette intertidal reach, including Multnomah Channel, as important habitat for juvenile salmonids, particularly ESA listed Chinook salmon, for rearing, growth and migration. This habitat is also greatly limited by developments in harbor reach, emphasizing the importance to maintain the existing nearshore habitat. Additionally, the benefits of this habitat goes well beyond ESA listed fish use as intertidal habitats. These areas are also important feeding areas for resident and migratory shore birds, and to some extent Pacific lamprey ammocoetes that require soft sediments in shallow water areas for rearing.

Specifically, these shallow water nearshore habitats have been identified as important habitat for subyearling Chinook. This is supported by numerous studies which are unanimous in concluding that younger age classes of juvenile salmonids are highly associated with shallow, nearshore areas in both lotic and lentic environments (e.g., Lister and Genoe 1970, Johnsen and Sims 1973, Dauble et al. 1989, Kahler 2000, Tabor and Pioskowski 2002). Mapping or defining these key shallow water habitat locations can be either viewed by satellite imagery (e.g., Google Earth), bathymetry maps or charts (e.g., contour lines), Lidar maps, or onsite assessments in summer, either visually or using sonar. There may also be existing high priority areas defined by the City of Portland and NOAA Fisheries that are currently mapped associated with the NRDA process. Due to the fact these habitats are limited, ODFW recommends they are identified as an ARSC in RC 2 to ensure a pre-construction notification is submitted to evaluate if projects will result in no more than minimal individual and cumulative adverse impacts.

RC 4: BANK STABILIZATION

Issue: The RC includes language that states the use of riprap should be the “minimum necessary to protect the structure or fill”. However, this term is not defined.

Recommended Solutions: The RC should be amended to encourage consideration of efforts that enhance living shorelines (NWP 54). The condition should also make it clear that the allowable scope of bank stabilization activities must not result in undue harm to recognized aquatic resources located within or adjacent to the proposed project sites. In addition, this RC should:

- Encourage use of living shoreline, such as submerged aquatic vegetation, native shellfish beds, salt marshes, and tidal marshes, as appropriate techniques to enhance or achieve bank stabilization projects
- Define and quantify the term: “*minimum necessary*” for the term: “*minimum necessary to protect the structure or fill*”
- Require a PCN for all maintenance activities in Oregon under this NWP because living resources are sensitive to disturbance from such activities and requires attention to in-water work windows to minimize the effects on local species and habitats

RC 5-WORK AREA ISOLATION AND DEWATERING

Issue: The proposed language removes a Note regarding the requirement for an ODFW Scientific Take Permit, which was included in the 2017 Regional Conditions, RC 8.

Recommended Solution: Retain the Note from 2017 RC 8, which states, **Note:** The State of Oregon requires a Scientific Take Permit be obtained to salvage fish and wildlife. Permittee is advised to contact the nearest ODFW office for further information at http://www.dfw.state.or.us/fish/license_permits_apps/scientific_taking_permit.asp.

RC 7-MECHANIZED EQUIPMENT

Issue: Proposed language no longer has a condition that requires use of existing roads, paths, and drilling pads where available.

Recommended Solution: Retain language from the 2017 Regional Conditions, RC 10, which includes specific conditions for using existing roads and paths, as well as a requirement to remove temporary mats or pads within 30 days of completing the authorized work. This will further minimize aquatic resource impacts from new development.

PROPOSED NEW REGIONAL CONDITION FOR COMPENSATORY MITIGATION

Issue: As discussed above for General Condition 23, the proposed modification gives the district engineer the discretion to waive the compensatory mitigation requirement for losses greater than 1/10-acre of stream bed if its determined that the adverse environmental effects of the proposed activity are no more than minimal without compensatory mitigation. It is not clear how the district would determine when compensatory mitigation would be required, which could result in inconsistent implementation, as well as more than minimal individual and cumulative impacts without adequate replacement of those aquatic resources.

Recommended Solutions: We recommend the following regional condition be applied to all NWPs in Oregon to ensure consistent implementation and meet the intent of the NWPs to result in no more than minimal individual and cumulative adverse environmental impacts:

Compensatory mitigation at a minimum one to one ratio shall be required for all aquatic resource losses greater than 1/10 acre. The District Engineer may waive this compensation requirement only when: 1) the results of a site-specific function or condition assessment indicate that the proposed discharge would result in no more than minimal adverse environmental effects; 2) the District Engineer determines that the discharge would not contribute to cumulative adverse effects that are more than minimal; and 3) the District Engineer determines that compensation would not be practicable to provide.

PROPOSED NEW REGIONAL CONDITION FOR STREAMS

Issue: As the preamble in the Notice states, *“Regional conditions are another tool to ensure that activities authorized by NWP result in no more than minimal individual and cumulative adverse environmental effects. Under 33 C.F.R. § 330.5(c), division engineers have the authority to assert discretionary authority to modify, suspend, or revoke NWP authorizations for a specific geographic area, class of activity, or class of waters within his or her division, including on a statewide basis. If the 300 linear foot limit for losses of stream bed is removed from these NWPs, division engineers can impose regional conditions to put a smaller acreage limit on losses of stream bed, if such a lower limit is needed to satisfy the requirement that NWPs may authorize only activities that have no more than minimal individual and cumulative adverse environmental effects.”* As stated earlier in our comments, the rule, as proposed, strives for simplicity at the expense of adequacy. The proposed change to the ½ acre threshold and removal of a linear foot threshold would lead to an insufficient accounting of the variability in stream functions, and result in increased risks to essential fish and wildlife habitat, and water quality.

Recommended Solution: We recommend the Corps significantly reduce the current 300 linear foot limit for losses of stream bed in those NWPs that currently have that limit (NWPs (21, 29, 39, 40, 42, 43, 44, 50, 51 and 52), apply this to NWPs that may have impacts to streams, such as NWP 3, 12, NWP C and NWP D, and require this for federal and non-federal permittees. The inclusion of a new Regional Condition would ensure that impacts to small order and headwater streams in Oregon do not exceed the no more than minimal impact requirement applicable to the NWPs, especially for streams that support anadromous fish populations and important residential fish species.

PROPOSED NEW REGIONAL CONDITION RELATED TO IN-WATER BLASTING FOR NWP 6 & NWP 44

Issue: The existing 2017 NWPs prohibits the use of in-water blasting. However, the proposed 2020 NWPs would allow the use of explosives for NWP 6 and NWP 44. In-water blasting may result in significant impacts to aquatic resources. For example, the PCN requirement for NWP 44 is being modified from a 300 linear foot threshold to a ½ acre threshold, which increases the risk of adverse environmental impacts to streams.

ODFW regulates in-water blasting and a permit is required for any use of explosives, per Oregon Administrative Rules, Chapter 635, Division 425¹¹.

¹¹ <https://www.dfw.state.or.us/lands/inwater/>

Recommended Solution: The use of explosives should be prohibited for all NWPs, consistent with the existing language in the 2017 NWPs.

However, if the NWPs are modified that authorizes the use of explosives for NWP 6 and NWP 44, a PCN should be required. In addition, authorization should be required by the district engineer, regardless of acreage or linear foot threshold. The district engineer should only authorize blasting if the applicant demonstrates it is the only practicable method and will not result in more than minimal individual and cumulative impacts. In addition, the following Regional Condition should be included:

Use of Explosives: The State of Oregon requires an In-Water Blasting Permit be obtained, per Oregon Administrative Rules, Chapter 625, Division 425. Permittee is advised to contact the nearest ODFW office for further information at:
<https://www.dfw.state.or.us/lands/inwater/>

2017 REGIONAL CONDITION #4 (IN WATER WORK PERIODS):

Issue: The proposed revisions to the Regional Conditions removes the current Regional Condition for Oregon In-Water Work Windows¹². These guidelines establish work periods for named streams, all upstream tributaries, and associated lakes and estuaries within the watershed but not for the Pacific Ocean. Per [OAR 635-425](#), “waters of the state” include jurisdictional waters of the Pacific Ocean. Ocean waters are not specifically included in the in-water work guidelines because it is not possible to designate a single time period that can fit all projects due to the occurrence of multiple resources of concern, each with different time periods when they may be vulnerable to impacts. It is ODFW’s policy to prescribe preferred time periods for work in ocean waters on a case-by-case basis, dependent on the potential impacts of the proposed project. However, there are time periods when activities authorized under a NWP could have negative consequences on marine resources (e.g. building bank stabilization structures in proximity to snowy plover nesting habitat).

Recommended Solution: Retain the specific language from Regional Condition #4 from the 2017 Regional Conditions, and add a Note to account for projects in the Pacific Ocean, which states, “Any work performed in the Pacific Ocean be reviewed by ODFW for case-by-case determination of appropriate timing recommendations.”

2017 REGIONAL CONDITION #7 (FISH SCREENING):

Issue: The proposed 2020 Regional Conditions removes the existing condition for Fish Screening.

Recommended Solution: Retain the specific language in the existing Regional Condition #7 from the 2017 Regional Conditions. This Regional Condition states, “To prevent injury or mortality to fish due to entrainment, the permittee shall ensure that all intake pipes include adequately sized screens.” It also includes a Note that specifically references ODFW’s fish passage requirements, “Fish passage and screening criteria can be obtained from the National Marine Fisheries Service (NMFS) at http://www.westcoast.fisheries.noaa.gov/fish_passage/solutions/index.html. Information

¹² https://www.dfw.state.or.us/lands/inwater/Oregon_Guidelines_for_Timing_of_%20InWater_Work2008.pdf

regarding Oregon's fish passage laws can be obtained from ODFW at <http://www.dfw.state.or.us/fish/passagelinks.asp>".

NWP SPECIFIC REGIONAL CONDITIONS

NWP 3: MAINTENANCE

Issue: For both previously permitted and unpermitted structures, further specificity is needed to define the "minimum necessary" amount of riprap to protect a structure. For example, with the expectation of rising water levels and subsiding structures, over what time period is the additional riprap designed to provide protection? Such a designation is necessary to determine whether a proposed design is the minimum necessary.

Recommended Solution: For previously permitted structures, impose a RC specifying that the allowable maintenance design is limited to the minimum necessary to accomplish the originally designed level of protection (rather than, as currently specified in the text of NWP 3, purposes that were merely "contemplated" in the original design). Enhanced levels of protection should require separate individual permit authorization.

We recommend a new Regional Condition for NWP 3, where the placement of new or additional riprap to protect the structure or fill in excess of 25 cubic yards requires submission of a PCN in accordance with General Condition 32. In addition, a requirement that bioengineering must be used instead of riprap, unless a licensed professional engineer provides an explanation that it is the only material solution.

NWP 6: SURVEY ACTIVITIES:

Issue: The 2017 Nationwide Specific Conditions prohibited the use of explosives. The proposed 2020 NWP specific conditions does not explicitly prohibit using explosives. ODFW regulates in-water blasting in Oregon, and an authorization is required from ODFW per OAR 635-425. The use of explosives is not consistent with the intent of the NWP to ensure projects will not have more than minimal individual and cumulative adverse impacts.

Recommended Solution: Retain language from the 2017 NW Specific Conditions, which states, "The use of explosives in waters of the U.S. is not authorized by this NWP."

While not preferred, if the NWP authorizes the use of explosives, then the Regional Condition (as proposed above) should include a requirement for obtaining an ODFW authorization for in-water blasting per OAR 635-425.

Recommended Solution: Retain language from the 2017 NW Specific Conditions, which states, "The use of explosives in waters of the U.S. is not authorized by this NWP." If the NWP authorizes the use of explosives, then the RC should include a requirement for obtaining DEQ authorization and turbidity monitoring will be required.

NWP 8: OIL/GAS STRUCTURES ON OCS REGIONAL CONDITION

Issue: Oil and natural gas infrastructure (including pipelines) in support of oil/gas drilling activities in Federal waters are prohibited on Oregon state lands and in state waters by Governor Executive Order

(EO 18-28), 2019 Oregon Senate Bill 256, and codified in ORS 274.705 – 274.860 and ORS 390.620. Onshore support facilities are also prohibited. As such, the Corps should categorically exclude the state of Oregon from NWP 8.

Recommended Solution: Require a PCN for any activities planned under this NWP in Federal waters, as these activities can directly affect the biological resources and fishing activities important to state interests. The PCN provides the necessary notification and facilitates coordination between the District Engineer and the state.

NWP 12: OIL OR NATURAL GAS PIPELINE ACTIVITIES

Issue: The proposed NWP 12 authorizes a suite of activities associated with construction, maintenance, repair, and removal of oil and natural gas pipelines, as well as construction and operation of outfall and intake structures that will likely impact estuarine habitats, submerged aquatic vegetation, shellfish beds, and other aquatic resources.

Recommended Solution: Retain language from the 2017 NW Specific Conditions, which states, “Manholes placed in streams or other waterways require specific approval by the District Engineer. Note: To ensure there are no impacts to native shellfish beds, agency coordination by the Corps of Engineers is required where utility lines are proposed in estuaries.”

NWP 12 should include a new RC to require agency coordination by the Corps whenever the utility lines, intake, or outfall structures are proposed for installation and operation in estuarine waters to ensure that the impacts to submerged aquatic vegetation, shellfish beds, and other aquatic resources such as those identified in RC 2 for ARSC.

NWP 13: BANK STABILIZATION

Issue: The Specific Conditions for Bank Stabilization (NWP 13) currently do not include a mechanism to adequately gauge the spatial extent nor magnitude of the bank stabilization problem.

Recommended Solution: Proposed NWP 13 should include a condition that requires standardized photo documentation, a comparison of prior bank conditions and existing conditions at the proposed bank stabilization project site as a component of the Pre-Construction Notice.

New bank stabilization projects must use bioengineering techniques and natural materials to the maximum extent practicable and shall minimize the use of rock. Riprap may only be used if certified by a professional engineer in an alternatives analysis.

NWP 27: AQUATIC HABITAT RESTORATION, ENHANCEMENT & ESTABLISHMENT ACTIVITIES

NWP 27 should also specify that native species of shellfish and vegetation should be incorporated to the greatest extent possible into the design and implementation of aquatic habitat enhancement, restoration, creation, or establishment activities.

Sediment trapped behind reservoirs can have concentrated levels of pollutants and may contribute water quality deficiencies to 303(d) listed waterbodies. NWP 27 projects that propose releasing sediment from reservoirs should be required to conduct a sediment evaluation test prior to permit approval.

NWP 44: MINING ACTIVITIES:

Issue: The 2017 Nationwide Specific Conditions for NWP 44 prohibited the use of explosives. The proposed 2020 NWP specific conditions does not explicitly prohibit using explosives. ODFW regulates in-water blasting in Oregon, and an authorization is required from ODFW per OAR 635-425. The use of explosives is not consistent with the intent of the NWP to ensure projects will not have more than minimal individual and cumulative adverse impacts.

Recommended Solution: Retain language from the 2017 NW 44 Specific Conditions, which states, “The use of explosives in waters of the U.S. is not authorized by this NWP.”

While not preferred, if NWP 44 authorizes the use of explosives, then the Regional Condition (as proposed above) should include a requirement for obtaining an ODFW authorization for in-water blasting per OAR 635-425.

NWP 48: COMMERCIAL SHELLFISH MARICULTURE ACTIVITIES

Issue #1: The Corps’ proposal to eliminate the requirement for Pre-Construction Notifications (PCN) will severely undermine the District Engineer’s ability to conduct these reviews or fulfill its statutory obligation to coordinate with the state. The PCN requirement for Federal agencies and non-Federal permittees should not be eliminated for any NWP authorized in Oregon.

Recommended Solution #1: We recommend the Portland District develop a regional condition requiring a PCN for NWP 48, particularly considering the proposed removal of the current PCN provision for impacts to ½ acre of submerged aquatic vegetation. The PCN will allow the Portland District to evaluate activity-specific impacts on ecological resources and coordinate with the state on local conditions and impact concerns as necessary to ensure that shellfish mariculture activities result in no more than minimal adverse individual and cumulative effects.

Issue #2: The Corps should require the District to develop and impose a series of new Regional Conditions regarding the commercial mariculture of shellfish that are consistent with the conditions that are frequently applied to commercial shellfish lease areas in state waters, including:

Recommended Solution #2: The Corps should develop and impose a series of new RCs regarding the commercial mariculture of shellfish that are consistent with the conditions that are frequently applied to commercial shellfish lease areas in state waters. The conditions required by the State of Oregon typically include:

- Conduct a pre-application meeting with prospective commercial shellfish mariculture operators in advance of the permit application and review process;
- Adherence and compliance with the ODFW list of controlled and prohibited species in state waters;
- Conduct a review (or survey, as needed) of ecological conditions within proposed shellfish mariculture lease area prior to granting of the lease;
- Avoid direct and indirect impacts to submerged aquatic vegetation due to shellfish mariculture activities;
- Establish and delineate appropriately-sized spatial buffers to locate shellfish mariculture activities away from submerged aquatic vegetation that exhibit low, medium, and high densities of plants;

- Conduct periodic assessments to monitor the status of shellfish mariculture productivity and observe the condition of aquatic resources and habitats in the immediate vicinity of the commercial shellfish mariculture areas.

NWP 54: LIVING SHORELINES

Issue: Living shoreline infrastructure remains untested in Oregon. Environmental impacts have yet to be considered for Oregon. As stated in our 2017 comments to the Corps, the areas within coastal bays and estuaries that may be suitable for living shoreline implementation, by virtue of their relative rarity in the state and distribution within ecologically sensitive and economically important zones, warrant the benefit of individual review by resource agencies. Furthermore, Oregon is taking actions to eradicate introduced species. Coordination between the District and the state is necessary to determine appropriate species and locations for living shorelines.

Recommended Solution: The District Engineer should impose a RC that requires a PCN for Federal and non-Federal activities to facilitate the District Engineer's review, coordination with the state and appropriate conditioning of these activities.

Also, include as a regional condition or note, to make clear that if living shorelines are used to enhance bank stabilization, that the proposed activity should maintain the natural continuity of the land-water interface, retain or enhance shoreline ecological processes, and must not result in undue harm to recognized aquatic resources located within or adjacent to the proposed project sites.

NWP A: SEAWEED MARICULTURE ACTIVITIES (IF ISSUED)

As stated above under NWP A, we recommend that the Corps revoke NWP A for Oregon state waters and adjacent Federal waters because a nationwide permit for seaweed mariculture is not appropriate for these waters at this time due to the uncertainty in the environmental effects from an industry that does not currently exist in this region. The appropriate regulatory pathway for seaweed mariculture is by **individual permit**. Whether the Corps approves the issuance of NWP A or individual permit, regional conditions must be robust to minimize the threats of this unproven industry in Oregon marine/estuarine waters and adjacent Federal waters. First and foremost, the District Engineer should work in close coordination with Oregon's natural resource agencies to evaluate the potential environmental effects of individual projects, develop project-specific conditions, and address issues that may arise during the permit period, including the need to add or modify regional conditions and project-specific conditions.

We recommend the following regional conditions:

- Require a thorough spatial siting analysis as a component of the PCN for each applicant in advance of authorizing mariculture activities to determine locations of least impact to the environment, ecological resources, fisheries and other ocean and estuary uses.
- Require an initial small-scale pilot project that demonstrates successful identification of appropriate indigenous species and strains for growth in Oregon's coastal environment, adequacy of anchoring systems and system security, project design and operations plans that accommodate other ocean users, and minimal environmental impacts. If monitoring associated with a demonstration project verifies no measurable adverse environmental effects, then the

project could scale up with continued monitoring, provided that individual and cumulative effects remain minimal.

- Do not authorize mariculture activities within or directly affecting Aquatic Resources of Special Concern, and other ecologically sensitive marine/estuarine areas, such as pinniped haulouts, whale migration routes, seabird rookeries, PFMC-designated essential fish habitat (EFH) conservation areas, EFH habitat areas of particular concern, and resources newly designated as Aquatic Resources of Special Concern under this NWP Reissuance Notice. Establish buffers around these areas to minimize direct and indirect effects.
- Do not authorize cultivation of nonindigenous species.
- Do not authorize the use of genetically modified species where there is any risk of escape.
- Require measures to minimize unavoidable impacts such as appropriate anchoring structures that reduce fishery gear and marine mammal entanglement risk, locating projects away from sensitive ecological resources as identified above, and away from important fishing grounds, research activities and oceanographic monitoring stations.
- Require measures to minimize effects of project components on marine life and habitat; such as structural design, spacing, and wildlife deterrents.
- Require measures to minimize effects on water quality and marine life from chemicals, antimicrobials, therapeutants, and antifoulants.
- Require prevention, monitoring, notification, and response plans addressing potential unintended events such as structural or anchoring failure, or movement of facilities, structures, mooring systems, etc., entanglement, wildlife interactions, small vessel strikes and marine debris
- Require a decommissioning plan
- Require a mitigation plan

NWP B: FINFISH MARICULTURE ACTIVITIES (IF ISSUED)

For reasons discussed above under NWP B, we recommend that a nationwide permit for finfish mariculture is not appropriate for Oregon state waters and adjacent Federal waters at this time due to the uncertainty in the environmental effects from an industry that does not currently exist here. The appropriate regulatory pathway for finfish mariculture is by individual permit. Whether the Corps approves the issuance of NWP B or individual permit, permit conditions must be robust to minimize the threats of this unproven industry in Oregon marine/estuarine waters and adjacent Federal waters. First and foremost, the District Engineer should work in close coordination with Oregon's natural resource agencies to evaluate the potential environmental effects of individual projects, develop project-specific conditions, and address issues that may arise during the permit period, including the need to add or modify regional conditions and project-specific conditions.

We recommend the following regional (or individual permit) conditions:

- Impose a regional condition that revokes the use of NWP B for Oregon state waters and adjacent Federal waters.
- Impose a Regional Condition for water quality in state ocean waters consistent with Oregon's water quality criteria for ocean waters: *"no measurable reduction in dissolved oxygen*

concentration” OAR 340-041-0016. The Corps has not determined that mariculture activities off Oregon will not have “*no more than minimal individual and cumulative adverse environmental effects*”, which encompasses Oregon’s criteria of *no measurable reduction in dissolved oxygen*. Finfish mariculture in particular is known for elevated consumption rates of DO. Permittees should provide scientific evidence that project activities will result in no measurable reduction in DO in state ocean waters.

- Impose a regional condition that prohibits finfish mariculture activities in hypoxic-prone ocean waters (i.e., coastwide and shoreward of 100 m depth, and waters encompassing Heceta Bank and Stonewall Bank) as previously confirmed by marine scientists and resource managers, and consistent with EPA’s water quality standard for offshore seafood processing discharges off Oregon and Washington ([EPA NPDES Permit No. WAG520000](#)). Permittees seeking to operate in state and federal ocean waters off Oregon should provide scientific evidence that mariculture activities will not contribute to hypoxia in the receiving waters, consistent with state water quality regulations ((*OAR 340-041-0016(6)*) and WAG520000.
- Require a thorough spatial siting analysis as a component of the PCN for each applicant in advance of authorizing mariculture activities to determine locations of least impact to the environment, ecological areas, fisheries and other ocean or estuary uses.
- Limit mariculture activities to small-scale demonstration projects to demonstrate proof of concept at location, appropriate indigenous species, adequacy of anchoring systems and system security, minimize user conflicts through project design and operations plans that accommodate other ocean users, and minimize environmental impacts. If monitoring associated with a demonstration project verifies no measurable adverse environmental effects, then the project could scale up with continued monitoring, provided that individual and cumulative effects remain minimal.
- Do not authorize mariculture activities within or directly affecting Aquatic Resources of Special Concern, and other ecologically important marine/estuarine areas including EFH Conservation Areas, EFH habitat areas of particular concern (HAPCs), pinniped haul outs, seabird rookeries, whale migration corridors, and resources newly designated as Aquatic Resources of Special Concern under this NWP Reissuance Notice. Establish buffers around these areas to minimize direct and indirect effects.
- Do not authorize cultivation of nonindigenous species.
- Do not authorize the use of genetically modified species where there is any risk of escape.
- Require measures to minimize effects of project components on marine life and habitat, including structural design, spacing, and wildlife deterrents.
- Require measures to minimize effects on water quality and marine life from release of chemicals, antifoulants, antimicrobials, therapeutants, feed, and waste.
- Require measures to minimize unavoidable impacts such as appropriate anchoring structures that reduce fishery gear and marine mammal entanglement risk, locating projects away from sensitive ecological resources identified above, and away from important fishing grounds, research activities and oceanographic monitoring stations.
- Require prevention, monitoring, notification, and response plans addressing potential unintended events such as anchoring failure, entanglement, wildlife interactions, escape, disease, and spills.

- Require a decommissioning plan.
- Require a mitigation plan.

NWP C: ELECTRIC UTILITY LINE AND TELECOMMUNICATIONS ACTIVITIES (IF ISSUED)

Issue: As elaborated in the NWP C section above, we are concerned about the language regarding remediation. The proposal states it is required for inadvertent returns of drill fluid but a remediation plan is not explicitly required for all proposed activities or for all potential contingencies.

Recommended Solution: A remediation plan should be explicitly required to address inadvertent adverse impacts from operations that do not proceed as planned.

FEDERAL CONSISTENCY REVIEW

In general, we are concerned that the proposed regional conditions are less protective than the 2017 authorized conditions and recommend against less protective conditions. Many projects have minimal impacts on coastal resources and are appropriate candidates for a streamlined permitting process, like nationwide authorizations. However other projects, particularly those in sensitive resource areas, deserve full consideration under the standard permitting process in order to provide agencies and other stakeholders the ability to provide input and expertise, to which the Corps can respond and act accordingly. As the Corps is aware, the permitting process actualizes policy conceived to protect natural resources. Although streamlining efforts are important, they are not paramount to the protection of the natural resources for which the policy was created. The modified language in the 2020 regional conditions proposals either result in less protection for high value aquatic resources or distance the streamlined permitting process from some state authorities that must be adhered to do work in aquatic habitats of Oregon. It is this precise tension between state laws and federal actions that the Coastal Zone Management Act was created to address. In the Coastal Zone, the Corps is more closely tied to state and local authorities under federal law and has an obligation through the Oregon Coastal Management Program (OCMP) to adhere to them.

The Coastal Zone Management Act of 1972 (CZMA), as amended, requires “[e]ach Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.” (CZMA, Section 307(c)(1)) Regulations implementing the federal consistency provisions of the CZMA may be found at 15 CFR § 930, Subpart C. Those regulations expand upon Section 307(c)(1), saying in part “federal agencies shall consider the enforceable policies of management programs as requirements to be adhered to....” (15 CFR § 930.32(a)(2)).

For many reasons, chief among them the responsible conservation of Oregon’s natural resources, **it is important the Corps align themselves to the maximum extent practicable with partner agency recommendations for a streamlined process without a formal comment period.** Through the CZMA lens, DLCD has identified areas in need of greater alignment in the Coastal Zone and offers pathways toward better consistency with the OCMP so that DLCD can grant advance concurrence, thus saving many hours of staff time and shortening permit timelines for both agencies, while ensuring coastal effects are minimal and enforceable policies are followed.

TIMELINE

Issue: DLCD is the lead agency responsible for coordinating federal consistency reviews pursuant to the Coastal Zone Management Act of 1972 (CZMA) and governing regulations in Title 15 CFR §930 and §923. These reviews ensure that federal agency activities affecting any coastal use or resource are consistent to the maximum extent practicable with the enforceable policies of Oregon’s federally-approved coastal management program. DLCD is greatly concerned regarding the expedited timeline of the 2020 Nationwide Permit Reissuance Process and the possibility that this truncated process will impact states ability to implement their enforceable policies.

Although the general Nationwide Re-authorization process does not perfectly align with the regulations governing the CZMA, it’s concerning that in the 2020 NWP process that OCMP and other state coastal programs are tasked with reviewing and deciding the consistency of the proposed permits and conditions prior to the final versions being solidified. This uncertainty will likely lead to state Coastal Management Programs requesting supplemental review of the 2020 NWP Permits, subsequently increasing staff time and delays. Where supplemental review is not requested, the limited early coordination will also increase the number of individual consistency reviews required by state coastal programs, thus increasing permit review timelines and negating the purpose of the revised streamlined NWP’s.

An additional concern stems from the lack of procedural transparency regarding the submission of the federally required consistency determination. The Corps has submitted multiple consistency determinations pursuant to Title 15 CFR §930. The first was included in the Federal Register Notice on September 15, 2020, while the official determination was submitted on October 15, 2020 by the Portland District Office. This discrepancy can cause substantial procedural issues associated with the review timeline.

Recommended Solution: DLCD greatly encourages Corps Headquarters to coordinate with NOAA’s Office for Coastal Management (NOAA-OCM) prior to initiating future Nationwide Permit processes. This coordination will greatly improve transparency and alignment with federal regulations. Coordination should also extend to state agencies ahead of the publication of the federal notice to provide for substantial time to negotiate concerns.

The current truncated timeline associated with this process means that state Coastal Management Programs must review draft permits and conditions for federal consistency prior to understanding if any substantial changes will be made during the public comment and revision process, potentially creating substantial uncertainty in the consistency decision that must be addressed prior to verifying the proposed NWP’s.

FEDERAL CONSISTENCY CONSIDERATIONS

The Corps issued a consistency determination for the proposed NWP’s on October 15, 2020 and has agreed to a 90-day federal consistency review. Oregon’s decision is due on or before January 13, 2021. This section outlines a subset of the most significant concerns related to Oregon’s federal consistency review of the proposed NWPs and associated conditions. Note that this summary is not exhaustive and does not constitute a final federal consistency decision.

- The issues and recommended solutions identified in the above letter associated with the proposed NWP’s and conditions are concerns for the OCMP. The OCMP emphasizes the need for

these issues to be addressed by the Corps and encourages the Corps to incorporate the recommended solutions identified by state natural resource agencies.

- DEQ 401 Water Quality Certification is an enforceable policy of the OCMP. The federal consistency decision made on the pending 2020 Nationwide permits do not preclude the requirement for all entities (federal and non-federal applicants) to receive a Section 401 Water Quality Certification where applicable under the federal regulations.
- OCMP maintains the requirement that the Critical Habitat Mapping Tool¹³ be used to identify projects that require individual permit review. Projects identified as intersecting with critical habitat areas are not eligible for advanced concurrence.
- Oregon's fish Passage Law¹⁴ (ORS 509) is one of the OCMP's clearest and strongest enforceable policies associated with fish and wildlife administration. This law has the ability to derail or delay projects if not applied for early in the permitting process. We recommend the following in order to achieve greater alignment with the OCMP:
 1. Consider the addition of a Block to the Joint Permit Application in order to signal that the Fish Passage Approval process has begun. We believe this will increase consistency with this state law in the Coastal Zone better than simply re-inserting a Fish Passage Law condition into DLCD's advance concurrence standard conditions. It will also make the applicant aware, earlier in the process, of what is necessary for fish passage in the state of Oregon in order to obtain a legal and CZMA compliant federal permit authorization. During the 2017 NWP reauthorization process, the Corps indicated they were open to this avenue, provided a few issues are successfully managed. We encourage continued coordination to evaluate feasibility of this option.
 2. Retain Regional Condition #7 from the 2017 NWPs, which references Aquatic Life Passage and the Oregon Fish Passage requirements. This can assist applicants with understanding the specific state law to avoid permitting delays.
- The Oregon Wildlife Policy (ORS 496.012) and the Food Fish Management Policy (ORS 506.109) are both enforceable policies of the OCMP. These policies support the recommendations to include specific Regional Conditions (e.g., new RC for compensatory mitigation) and NWP specific conditions (e.g., NWP 6, NWP 8 and NWP 44).
- NWP 48: Commercial Shellfish Mariculture activities - see section on NWP #48 for details.
- Addition of NWP A and B: OCMP does not support the addition of these Nationwide Permits and highly recommends they be evaluated as individual permits by the Corps. If approved as Nationwide permits, OCMP intends to deny these permits and review each individually for federal consistency. Currently, there is little understanding on what kinds of projects are able to use these Nationwides, how many are authorized per year, and to ensure state and local authorities are properly incorporated. DLCD anticipates that these projects may have additional impacts, either short-term or long-term, that should be considered by the applicant. A formal federal consistency application and review, although not ideal, may provide such an opportunity. See sections on NWP A and B for additional details.

¹³ <https://geo.maps.arcgis.com/apps/webappviewer/index.html?id=1b4a3202b66c4ab79b6907e7b4abf9db>

¹⁴ <http://www.dfw.state.or.us/fish/passage/>

CONCLUSION

We thank you for the opportunity to comment and work with the Corps on solutions to these issues. If you have any questions or comments regarding these comments or the federal consistency review process, please contact Patty Snow (Patty.Snow@state.or.us) or a state agency contact listed below.

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Sincerely,



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ADDITIONAL REFERENCES

The majority of the following references are associated with the comments and suggestions for NWP A & NWP B:

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