



CENTER FOR FOOD SAFETY

June 22, 2022

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Re: 60 Day Notice of Intent to Sue: Violations of the Endangered Species Act for Issuance of Nationwide Permit 56

The Center for Food Safety on behalf of the organizations listed below, hereby provides formal notice, pursuant to Section 11 of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), of their intent to sue the U.S. Army Corp of Engineers (Corps) for violations of the ESA, 16 U.S.C. §§ 1531-1544 in its January 13, 2021 issuance of Nationwide Permit (NWP) 56 without conducting programmatic ESA Section 7 consultation.

The Corps' issuance of NWP 56 is in violation of the ESA because the Corps failed to ensure, through consultation with the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) (collectively "wildlife agencies"), against jeopardy to threatened and endangered species protected under the ESA, and to ensure against adverse modification of designated critical habitat of any protected species.¹

¹ The Corps' "no effect" determination is also arbitrary and capricious under the Administrative Procedure Act. 5 U.S.C. § 706(2)(a).

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I. Identity of the Organizations Giving Notice

The name, address, and phone number of the organizations giving notice of intent to sue under the ESA are:

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Taholah, WA 98587
360-276-8211

Don't Cage Our Oceans Coalition
5208 Magazine St, #191
New Orleans, LA 70115
504-515-0161

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5208 Magazine St, #191
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PO Box 11170
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San Diego Coastkeeper
3900 Cleveland Ave, Suite 102
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Wild Fish Conservancy
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II. Legal Background

As recognized by the U.S. Supreme Court, the Endangered Species Act is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation” and “reveals a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180, 185 (1978). In all ESA analyses and decisions, agencies must “give the benefit of the doubt to the species,” *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988), and use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2).

Section 7(a)(2) of the ESA requires every federal agency to consult the appropriate federal fish and wildlife agency (NMFS and/or USFWS, collectively “wildlife agencies”) to “insure” that its actions are not likely “to jeopardize the continued existence” of any listed species, or “result in the

destruction or adverse modification” of critical habitat. 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 402.01(b). The ESA requires this analysis be done “at the earliest possible time.” 50 C.F.R. § 402.14(a).

Section 7 applies to all actions in which there is discretionary federal involvement or control. 50 C.F.R. § 402.03. The scope of the agency actions subject to consultation are broadly defined to encompass “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02 (definition of “action”).

For each federal action, the action agency must ask the wildlife agencies whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, the action agency must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *Id.* The biological assessment must generally be completed within 180 days. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(i).

Section 7(a)(2) requires the Corps, as the “action agency,” to determine if a proposed action, like the issuance of NWP 56, “may affect” any listed species or designated critical habitat. If so, then the Corps must enter consultation with the expert wildlife agencies, USFWS (for terrestrial and freshwater species) and NMFS (for marine species). 50 C.F.R. § 402.14(a); *id.* § 17.11; *id.* § 223.102; *id.* § 224.101. Effects determinations are based on direct, indirect, and cumulative effects of the action when added to the environmental baseline and other interrelated and interdependent actions. 50 C.F.R. § 402.02 (definition of “effects of the action”). Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration. *Id.*

If an action agency determines that its action “may affect” but is “not likely to adversely affect” a listed species or its critical habitat, the regulations permit “informal consultation,” during which the wildlife agencies must concur in writing with the action agency’s determination. 50 C.F.R. § 402.14(a)-(b). If the action agency determines that its action is “likely to adversely affect” a listed species or critical habitat, or if wildlife agencies do not concur with the action agency’s “not likely to adversely affect” determination, the action agency must engage in “formal consultation,” as outlined in 50 C.F.R. § 402.14 (“General Formal Consultation”). 50 C.F.R. §§ 402.02, 402.14(a).

An agency is relieved of the obligation to consult on its actions only where the action will have “no effect” on listed species or designated critical habitat. The “may affect” standard is extremely low: “[A]ctions that have any chance of affecting listed species or critical habitat—even if it is later determined that the actions are ‘not likely’ to do so—require at least some consultation under the ESA.” *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012) (*en banc*); *see also* *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 496 (9th Cir. 2011). “Any possible effect, whether beneficial, benign, adverse or of an undetermined character,” triggers the consultation requirement. *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1018-19 (9th Cir. 2009) (quoting 51 Fed. Reg. 19,926, 19,949 (June 3, 1986)) (emphasis in *Lockyer*).

The status quo must be maintained until an agency has fulfilled its legal obligations under ESA section 7. Section 7(d) of the ESA provides that “[a]fter initiation of consultation . . . the Federal agency . . . shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.” 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09.

Certain programmatic actions, including “[a] proposed program, plan, policy, or regulation providing a framework for future proposed actions,” are subject to programmatic consultation. 50 C.F.R. § 402.02 (defining “programmatic consultation”). A framework programmatic action, such as the Corps’ issuance of NWP 56, “approves a framework for the development of future action(s),” and thus, “any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out.” *Id.* (defining “framework programmatic action”). Accordingly, “an incidental take statement is not required at the programmatic level,” *id.* § 402.14(i)(6), but rather is issued during subsequent project-specific consultation. However, a later project-specific consultation “does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.” *Id.* § 402.14(c)(4).

The wildlife agencies specifically named the Corps’ nationwide permit program as an example of a federal program subject to such programmatic consultation when issuing regulations in 2015. These regulations explain that programmatic consultation allows “a broad-scale examination of a program’s potential impacts on a listed species and its designated critical habitat—an examination that is not as readily conducted when the later, action-specific consultation occurs on a subsequent action developed under the program framework.” 80 Fed. Reg. 26,832, 26,835 (May 11, 2015). The agencies reiterated the importance of programmatic consultation in the preamble to their 2019 issuance of regulations, stating that the ESA “still requires a programmatic consultation to meet the requirements of section 7(a)(2)[,]” even if “specific projects . . . developed in the future . . . are subject to site-specific stepped-down, or tiered consultations where incidental take is addressed.” 84 Fed. Reg. 44,976, 44,997 (Aug. 27, 2019).

III. Factual Background

The Corps published the final rule issuing NWP 56 on January 13, 2021. 86 Fed. Reg. 2744. It authorizes “[s]tructures in marine and estuarine waters, including structures anchored to the seabed in waters overlaying the outer continental shelf, for finfish aquaculture activities.” U.S. Army Corps of Engineers, *Decision Document NWP 56*, at 1 (Jan. 12, 2021) (NWP 56 Decision Document). The permit also authorizes “integrated multi-trophic” aquaculture structures, for facilities that also have bivalve shellfish aquaculture and/or seaweed aquaculture in addition to finfish. *Id.* The structures authorized by the NWP for installation include “cages, net pens, anchors, floats, buoys, and other similar structures.” *Id.* The Corps estimates that NWP 56 will be used for 25 activities over the course of the 5-year life of the permit, impacting 50 acres of coastal waters. *Id.* at 52.

Finfish aquaculture involves farming large numbers of finfish inside net pens or cages in the open ocean, which has not previously been attempted on a commercial scale in U.S. federal waters. The Corps acknowledges that finfish aquaculture can have numerous environmental impacts including adverse impacts on wildlife. NWP 56 Decision Document at 46-47, 57-60, 62-70. These potential impacts to wildlife, which include threatened and endangered species, may result directly or indirectly from the structures themselves that are approved by NWP 56. For example, marine mammals, marine birds, and sea turtles may become entangled in net pens or lines used in finfish aquaculture. *Id.* at 70. And “[e]quipment used for finfish mariculture activities, such as cages, net pens, lines, cables, and anchors, may impede bird feeding activity and trap birds.” *Id.* at 67. Finfish aquaculture “can have indirect effects on fish and wildlife, such as marine mammals, sea birds, sea turtles, fish, marine plants (e.g., seagrasses), and corals.” *Id.* at 69. And the presence, as well as the operation, of an aquaculture facility itself may lead to modified wildlife behavior, where wildlife may be either attracted to or avoidant of a facility. *Id.* at 69-70.

The Corps also acknowledges that NWP 56 authorizes activities that “may alter the habitat characteristics of tidal waters,” which “provide[] food and habitat for many species, including foraging areas, resting areas, corridors for fish movement, and nesting and breeding grounds.” *Id.* at 67. In addition, the operation of the facilities authorized by NWP 56 are likely to have numerous environmental impacts through escapes of cultivated fish, the release of pesticides, antibiotics, therapeutics and other chemicals, and the release of fish feed and fish waste. *Id.* at 46, 68.

The production of feed and the release of unconsumed feed in the vicinity of finfish aquaculture facilities may cause environmental impacts. *Id.* at 46. When fish feeds and fish feces are flushed from the cages or pens they may settle on benthic habitats, which can affect biogeochemical cycling processes in benthic sediments, as well as the water quality within the water column. *Id.* at 64, 68. The expected use of pesticides and other chemicals in finfish aquaculture may affect non-target species, leading to mortality, non-lethal toxicity, or accumulation in the food web. *Id.* at 65-66. Aquaculture activities can also affect marine organisms through their contributions to noise pollution in oceans, including from acoustic deterrent devices and acoustic harassment devices used to keep marine mammals away from the facilities. *Id.* at 69.

The Corps also contemplated potential adverse effects to both wild finfish individuals and to populations as a result of escapes from finfish aquaculture activities: “[e]scapes of cultivated finfish can have adverse effects on the mortality and growth of wild individuals of finfish . . . Escapes of cultivated finfish can have adverse effects on wild fish populations by competing with those wild fish for food and other resources, transferring diseases and pathogens, and interbreeding between the cultivated fish and wild fish that may reduce the fitness of those species to survive and reproduce.” *Id.* at 68. These escapes are not completely preventable. *Id.* at 58.

In its 2021 Biological Assessment the Corps included lists of hundreds of threatened and endangered species obtained from the wildlife agencies but did not evaluate the potential effects of any NWP on any of those species or their critical habitats. Biological Assessment for Proposed Issuance and Reissuance of the 2021 Nationwide Permits, Appendices A & B. Examples of ESA-listed species that may be affected by activities authorized by NWP 56 include but are not limited

to: humpback and grey whales, loggerhead and leatherback sea turtles, coho and chinook salmon, Atlantic and Gulf sturgeon, scalloped hammerhead and ocean whitetip sharks, and giant manta ray.²

Despite the Corps' acknowledgement of a wide array of potential environmental effects, including to threatened and endangered species, the agency concluded that its issuance of NWP 56 has "no effect" on threatened and endangered species or on designated critical habitat, and did not consult with the wildlife agencies. Decision Document at 79; Biological Assessment at 46-47 (Jan. 2, 2021). The Corps claims this determination is appropriate because NWP general condition 18 and the Corps' regulation at 33 CFR 330.4(f) require "activity-specific" ESA consultations if an activity authorized by NWP 56 "may affect" ESA-listed species. Biological Assessment at 47.

IV. Violations of the ESA

As discussed above, despite the Corps' recognition of the potential for numerous impacts to threatened and endangered species from activities authorized by NWP 56 that easily surpass the low "may affect" threshold for ESA consultation, the Corps erroneously and unlawfully made a "no effect" determination and concluded that programmatic ESA consultation was not required. Rather, in an attempt to avoid its duties under the ESA in issuing NWP 56, the Corps relied on NWP 56's requirement that future project-specific activities under the NWP must comply with NWP general condition 18 and 33 CFR 330.4(f). However, reliance on general condition 18 and 33 CFR 330.4(f) for later site-specific consultation does not absolve the Corps of its requirement to comply with the ESA through programmatic consultation for issuance of NWP 56 at this juncture. The Corps' claims are contrary to the ESA's implementing regulations and have already been squarely rejected by two federal courts. See *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, 454 F. Supp. 3d 985, 992 (D. Mont.), amended, 460 F. Supp. 3d 1030 (D. Mont. 2020); *Nat'l Wildlife Fed. v. Brownlee*, 402 F. Supp. 2d 1 (D.D.C. 2005).

The Corps cannot circumvent ESA Section 7(a)(2) consultation requirements by relying on project-level review. *N. Plains Res. Council*, 454 F. Supp. 3d at 992. Project-level review does not relieve the Corps of its duty to consult on the issuance of nationwide permits at the programmatic level because the Corps must consider the effect of the entire agency action, here the issuance of NWP 56. 50 C.F.R. § 402.14(c)(4); *N. Plains Res. Council*, 454 F. Supp. 3d at 992 ("Project-level review does not relieve the Corps of its duty to consult on the issuance of nationwide permits at the programmatic level. The Corps must consider the effect of the entire agency action"). This is because later, individual-permit decisions will not be equivalent in scope, and will create impermissible piecemeal decision-making, a danger of death by a thousand cuts. *Nat'l Wildlife Fed.*, 402 F. Supp. 2d at 10; *N. Plains Res. Council*, 454 F. Supp. 3d at 993.

² Aquaculture Opportunity Area maps also show there is considerable overlap between ESA critical habitats and projected aquaculture sites. NOAA, *Aquaculture Opportunity Area Atlas for Gulf of Mexico*, 3140, <https://repository.library.noaa.gov/view/noaa/33304>. NOAA, *Aquaculture Opportunity Area Atlas for Southern California*, 24-26, <https://repository.library.noaa.gov/view/noaa/33303>.

And specifically, the Corps cannot sidestep programmatic review using general condition 18. In *Northern Plains* the court squarely rejected the Corps' reliance on general condition 18 for its "no effect" determination. 454 F. Supp. 3d at 994 ("General Condition 18 fails to ensure that the Corps fulfills its obligations under ESA Section 7(a)(2) because it delegates the Corps' initial effect determination to non-federal permittees" and programmatic consultation is the only way to avoid "piecemeal destruction of species and habitat").

Here, too, the Corps unlawfully delegated initial ESA effects determinations to non-federal permittees. NWP 56 immediately authorizes "activities proposed by non-federal entities that do not meet the 'might affect' threshold of general condition 18 and that are not located in designated critical habitat (or critical habitat proposed for such designation)." Biological Assessment at 33. NWP 56 allows non-federal entities to make that 'might affect' determination without any level of ESA assessment by the Corps. See Decision Document at 80 ("[G]eneral condition 18 requires a non-federal applicant to submit a pre-construction notification to the Corps if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) might be affected or is in the vicinity of the project, or if the project is located in designated critical habitat (or critical habitat proposed for such designation)"). This reliance on permittees to make initial ESA determinations violates the ESA because the Corps *itself* has a duty to determine whether any actions it authorizes require consultation. See 50 C.F.R. § 402.14(a); *N. Plains Res. Council*, 454 F. Supp. 3d at 993-94 ("General Condition 18 fails to ensure that the Corps fulfills its obligations under ESA Section 7(a)(2) because it delegates the Corps' initial effect determination to non-federal permittees"); cf. *Gerber v. Norton*, 294 F.3d 173, 184-6 (D.C. Cir. 2002) (FWS may not delegate species protection obligations to a private permit applicant).

The Corps' unlawful reliance on only site-specific ESA consultation also fails to capture the cumulative impacts that NWP 56 may have on listed species and their critical habitats. The only way the Corps can ensure that NWP 56 will not jeopardize ESA-listed species or adversely modify critical habitat is to consult at the programmatic level. The potential impacts discussed above and detailed in the Corps' Decision Document easily meet the low "may affect" threshold, requiring the Corps to consult with the wildlife agencies on NWP 56's potential impacts to threatened and endangered species and their critical habitats. See Biological Assessment Appendices A & B (species lists provided by the wildlife agencies). Therefore, the Corps' "no effect" determination is arbitrary, capricious, and in violation of the ESA.³

Until the Corps fulfills its obligation to consult under ESA Section 7, NWP 56 cannot be relied upon by permittees pursuant to ESA Section 7(d), which require the status quo to be maintained pending the completion of consultation. See 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09.

³ The Corps' 2021 Biological Assessment is also itself inadequate because it never "evaluate[s] the potential effects of the action on listed species" or "critical habitat," nor does it consider the "cumulative effects" of the NWP, as the ESA implementing regulations require. 50 C.F.R. §§ 402.12(a), (f)(4).

V. Conclusion

For the foregoing reasons, the Corps has violated and remains in violation of Section 7 of the ESA. If these violations are not cured within sixty days, the listed organizations intend to file suit for declaratory and equitable relief, as well as for fees and costs. 16 U.S.C. § 1540(g)(4). This notice letter was prepared based on good faith information and belief after reasonably diligent investigation. If you believe that any of the foregoing is factually erroneous or inaccurate, please promptly notify us.

Sincerely,
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