From: Byron, Carrie
Sent time: 05/20/2015 01:43:11 PM
To: Storm, Linda
Subject: (b) (5) [redacted]

Hi Linda,

I had a chance to look this over and made a few comments to the TRAR paragraph. Thanks for putting all this together! If you'd like me to look over the document once it is in letter form, please let me know.

Thanks,
-Carrie

DRAFT –DRAFT –DRAFT - FOR INTERNAL REVIEW ONLY – NOT FOIABLE – PRE-DECISIONAL

Subject/Issue: Removal of Conservation Measure #7 from Corps Draft PBA for shellfish aquaculture activities

Key Questions to address:

1) Will eliminating the requirement (conservation measure #7) of a 16 foot setback from native eelgrass (*Zostera marina*) and the requirement to survey, delineate and map the presence and location of eelgrass for continuing shellfish activities in 'fallow' areas comply with the Clean Water Act regulatory requirements of Section 404(b)(1) to avoid, minimize and compensate unavoidable impacts?
2) How will removal of this 16 foot setback and survey requirement potentially impact 11,166 acres of fallow areas that contain eelgrass?
3) How will this action potentially affect the federal government's responsibility to uphold our treaty rights (to maintain habitat that supports treaty reserved resources, including habitat that supports juvenile salmonids, anadromous fish runs, and natal shellfish beds)?

What does Conservation Measure #7 Require?

"For continuing activities in 'fallow' areas, those activities shall not occur within 16 horizontal feet of native eelgrass (*Zostera marina*). If eelgrass is present in the vicinity of a fallow acreage proposed for shellfish activities, the eelgrass shall be delineate and a map or sketch prepared and submitted to the Corps. Surveys to determine the presence and location of eelgrass shall be done during times of peak above-ground biomass: June – August. The following information must be included to scale: parcel boundaries, eelgrass locations and on-site dimensions, shellfish activity locations and dimensions."

The above requirement would prevent shellfish aquaculture activities from encroaching on and impacting eelgrass beds in areas that were cultivated some-time in the past, but have returned to supporting native eelgrass. With the conservation measure in place, activities must be set back 16' from eelgrass; eelgrass must be surveyed; and activities proposing to encroach into 'fallow' areas supporting eelgrass would require individual consultation with the Services (e.g., not be authorized under the PBA). By removing this requirement, however, there would be no set back or 'buffer' requirement, no survey requirement to establish the density and extent of the eelgrass bed, and activities could encroach into fallow areas supporting eelgrass beds without any avoidance or minimization requirements. Currently, no compensatory mitigation is required for Corps' permitted shellfish aquaculture activity impacts.

The Corps estimates **11,166 acres** of 'fallow' area where 'continuing' shellfish operations could return where eelgrass co-occurs (see **Table E-1**). Of that (conservatively estimated) 11,166 acres 7,448 acres is in Willapa Bay, 2,194 acres is in North Puget Sound, 1,152 Grays Harbor, 257 acres is in Hood Canal, and 115 is in South Puget Sound.

Though precise distribution, density and extent of eelgrass in this 11,000+ acres is not known, the co-location has been identified by the Corps in such a way that this estimate likely under represents the extent. While the interspersion, density, and extent of eelgrass may vary across the 5 very different biogeographic regions (Willapa Bay, Grays Harbor, Hood Canal, South Puget Sound, and North Puget Sound), removing the requirement to survey and establish boundaries or delineate eelgrass extent poses a significant threat to this ecologically and regionally significant special aquatic site type.

Native eelgrass beds in general have been well documented as critical habitat that are nursery grounds for juvenile salmonids, and myriad other fish species. They provide significant primary productivity and trophic system support functions. They are not easily mimicked, or replaced and are difficult to replicate.

To comply with the Clean Water Act Section 404(b)(1) Guidelines – which are the substantive environmental criteria for the Corps to issue Section 404 permits - EPA believes avoidance and minimization measures to protect these 11,000+ acres with eelgrass should be required in these 'fallow' areas. Further, the 2008 Joint Agency Federal Rule on Compensatory Mitigation generally requires all permitted activities meet the avoidance, minimization and compensatory mitigation requirements (e.g., in this case replacement of lost eelgrass beds and their functions).

From a Clean Water Act Section 404(b)(1) compliance standpoint (Subpart B Restrictions on Discharge at 40 CFR Part 230.10) EPA Region 10 believes allowing shellfish aquaculture activities to return to or expand into 11,166 acres hosting native eelgrass would cause or contribute to significant adverse impacts on this regionally significant special aquatic site type, including impacts to trophic system interactions, physical and biotical processes, impacts to plankton, multiple species of fish, as well as native shellfish. This outcome does not comply with 40 CFR Part 230.10(c) "no discharge of dredge or fill material shall be permitted that will cause or contribute to significant degradation of waters of the U.S."

We see removal of the requirement for a 16-foot set-back from existing eelgrass and requirements to survey and delineate eelgrass in 'fallow' areas (conservation measure #7) as, in effect, leading to non-compliance with 40 CFR Part 230.10(d), 'no discharge … shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." EPA Region 10 views requiring a 16-foot setback and survey requirements as appropriate and practicable steps to avoid and minimize impacts that would (cumulatively) cause significant degradation to special aquatic sites.

The Clean Water Act 404(b)(1) guidelines requirements are clear, as is the 2008 Federal Rule on Compensatory Mitigation, and the 2012 Nationwide Permits General Condition #23 – that the Corps and EPA seek to ensure all adverse impacts to aquatic resources from permitted activities are mitigated. To do this, all measures to avoid, minimize, and provide compensatory mitigation for unavoidable impacts should be pursued.

It is EPA R10's view that without measures to ensure avoidance, minimization and compensation of 11,000+ acres of potential native eelgrass beds, the Corps decision would not comply with the Clean Water Act. Of further concern is that this federal action would further degrade a key indicator and resource used to track the condition of Puget Sound. No progress has been made to date to achieve the 2020 target for increasing eelgrass by 20%. With such ongoing impacts, the likelihood of achieving this goal is further thwarted.

We strongly encourage the Corps to incorporate conditions or measures to ensure all avoidance, minimization and compensatory mitigation measures and requirements are addressed and that the cumulative impacts associated with potential authorized permits in eelgrass beds comply with all provisions of the Clean Water Act federal regulatory requirements, including 40 CFR Part 230.10(a)-(d).

Of further significance and important consideration are our ~~fiduciary~~ responsibilities to uphold tribally reserved treaty rights. Treaty Reserved Resource Rights include harvesting fish and shellfish (*United*

States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *United States v. Washington*, 157 F.3d 630 (9th Cir. 1998), *cert denied* 119 S. Ct. 1376 (April 5, 1999)) as well as protecting the habitat upon which they depend (*culvert case proceedings, incl. March 29, 2013 permanent injunction*). Tribal Treaty rights to fish and shellfish, including maintaining and protecting the habitats upon which they depend, should be addressed. While this issue is very complex with regard to shellfish aquaculture, the essence is this: the Corps 404 permit decisions must demonstrate compliance not only with ESA and EHF requirements, but that all Clean Water Act requirements are met, *and* Tribal t~~T~~reaty harvest r~~R~~ights are upheld. Puget Sound ~~Tribes~~ tribal consortia (*Skagit Systems Cooperative and Northwest Indian Fish Commission*) have expressed concerns that treaty reserved resources would be significantly impacted by removing the currently required avoidance and minimization measures on eelgrass beds in fallow areas.

*'**Continuing activities'** are defined as:

Continuing shellfish activities are those activities that had been granted a permit, license, or lease from a state or local agency specifically authorizing commercial shellfish aquaculture activities and that were occurring within a defined footprint prior to 18 March 2007. The Corps has identified and recorded in a database permit applications previously submitted to the Corps.

New activities are those activities that were undertaken after 18 March 2007 and essentially include all activities that do not quality as continuing. The expansion of a continuing footprint or a new footprint that had not previously been in shellfish culture is treated as a new footprint or new activity for the purpose of the Corps Regulatory Program and this B=PBA. For purpose of the PBA, a new activity would not be reclassified as a continuing activity in the future, but would remain classified as new.

****'fallow areas'** definition**:**

Continuing activity footprints are further divided between areas in active cultivation/harvest and 'areas that are periodically allowed to lie fallow as part of normal operations' (reference from 72 FR 11092). The determination of continuing cultivated and continuing fallow acres is as of 18 March 2007. The nature and extent of historical shellfish activity conducted on fallow acreage is unknown except for the fact it was fallow between 2007 and remained in a fallow state until at least 2012 or 2013 when most of the continuing activities were authorized by the Corps (From p. 6 ***Corps December 2014 Programmatic Biological Assessment***). Fallow is defined in the 2007 version of the NWP 48 as "areas that are periodically allowed to lie fallow as part of normal operations."