From: Storm, Linda
Sent time: 04/23/2015 10:57:00 AM
To: Storm, Linda; Allnutt, David; Szerlog, Michael
Subject: Debrief on ESA/EHF Programmatic BA for Shellfish Aquaculture - concern change to BA to include fallow areas returned to eelgrass beds

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Appointment

Required attendees:	Allnutt, David; Szerlog, Michael
Location:	your office
Start time:	Thursday, April 23, 2015 2:30:00 PM
End time:	Thursday, April 23, 2015 3:00:00 PM

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

OFFICE OF
ECOSYSTEMS, TRIBAL
AND PUBLIC AFFAIRS

May 27, 2015

Michelle Walker, Branch Chief
U.S. Army Corps of Engineers
Seattle District Regulatory Branch
P.O. Box 3755
Seattle, Washington 998124-3755

Dear Ms. Walker:

Thank you for the opportunity to review the Programmatic Biological Assessment ('PBA') on Shellfish Activities in Washington State Inland Marine Waters (U.S. Army Corps of Engineers Regulatory Program, December 2014). We have reviewed this document and have significant concerns regarding the removal of Conservation Measure #7 from this PBA. What follows is a detailed explanation of these concerns, and our rationale for finding that without avoidance and minimization measures (like those Conservation Measure #7 required) authorized shellfish activities would not comply with Clean Water Act section 404(b)(1).

Conservation Measure #7 as previously proposed would require that: "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 delineated and a map or sketch prepared and submitted to the Corps."

The above requirement would prevent shellfish aquaculture activities from encroaching on and impacting eelgrass beds in areas that were cultivated in the past, but have returned to supporting native eelgrass. With the conservation measure in place, activities must be set back 16 feet from eelgrass; eelgrass must be surveyed; and activities proposing to encroach into 'fallow' areas supporting eelgrass would require individual consultation with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (e.g., not be authorized under the PBA). By removing this stipulation, 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 provisions. Further, no compensatory mitigation is currently required for Corps' permitted shellfish aquaculture activity impacts.

The Corps estimates 11,166 acres of 'fallow' area where 'continuing' shellfish operations could return and eelgrass co-occurs (Table E-1, page E-9 of the PBA). Of that conservatively estimated 11,166 acres, there are 7,448 acres in Willapa Bay, 2,194 acres in North Puget Sound, 1,152 acres in Grays Harbor, 257 acres in Hood Canal, and 115 acres in South Puget Sound. While the interspersion, density and extent of eelgrass may vary across these very different biogeographic regions, 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 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.

In order for the proposed activities to comply with the Clean Water Act (CWA) Section 404(b)(1) Guidelines ('Guidelines'), which are the substantive environmental criteria used in evaluating discharges of dredged or fill material proposed under §404 of the CWA, the EPA believes avoidance and minimization measures to protect these 11,000+ acres with eelgrass should be required. In addition, the 2008 Joint Agency Federal Rule on Compensatory Mitigation generally requires all Corps' permitted activities meet avoidance, minimization and compensatory mitigation requirements (e.g., in this case, replacement of lost eelgrass beds and their functions).

The EPA's Region 10 believes allowing shellfish aquaculture activities to return 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. The anticipated impacts, which are identified at 40 CFR Part 230.10[1], include impacts to trophic system interactions, physical and biotic processes, impacts to plankton and multiple species of fish, as well as native shellfish. This outcome would not comply with 40 CFR Part 230.10(c) which states "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 as, in effect, leading to non-compliance with 40 CFR Part 230.10(d), which states "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." The EPA's 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 are both the 2008 Federal Rule on Compensatory Mitigation and the 2012 Nationwide Permits General Condition #23 – that the Corps and the 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 the EPA's Region 10 view that without measures to ensure avoidance, minimization and compensation for the potential loss or damage to 11,000+ acres of native eelgrass beds, the Corps' decision would not comply with the Guidelines. Of further concern is that this federal action (to remove Conservation Measure #7) would further degrade this key resource, which is used as a critical biological indicator to track the condition of Puget Sound. No progress has been made to date to achieve the 2020 target for increasing eelgrass by 20%. Given the possibility of such impacts, the likelihood of achieving this goal is further reduced.

We strongly encourage the Corps to incorporate conditions or measures to ensure that 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).

[1] Section 40 CFR 230.10 *et seq.,* identified as Subpart B: Restrictions on Discharge

Of further significance and important consideration is the federal government's responsibility to address tribally reserved treaty rights to harvest fish and shellfish and maintain the habitats upon which they depend. 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 the Endangered Species Act and Essential Fish Habitat requirements, but ensure all Clean Water Act requirements are met and tribal treaty rights are upheld. We understand Puget Sound tribal consortia (Skagit Systems Cooperative and Northwest Indian Fish Commission) have expressed strong concerns that treaty reserved resources would be significantly impacted by removing the currently required avoidance and minimization measures on eelgrass beds in fallow areas.

I welcome the opportunity to discuss our concerns with you further. Please feel free to call me at (206) 553-2581 or Ms. Linda Storm of my staff at (206) 553-6384 or storm.linda@epa.gov with any questions or concerns.

Sincerely,

R. David Allnutt, Director
Office of Ecosystem, Tribal, and Public Affairs

Cc: Dan Opalski, EPA Region 10 Office of Water Director