June 24, 2015

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PETITION FOR: (1) SPECIAL CASE DETERMINATION; AND (2) APPROVED JURISDICTIONAL DETERMINATION UNDER § 404 OF THE CLEAN WATER ACT

INTRODUCTION

This is a formal petition for agency action to Region 10 of the Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers, Seattle District ("Corps") pursuant to Clean Water Act, 33 U.S.C. § 1344, and its implementing regulations and agreements. The petitioning parties include Sound Action, Friends of the San Juans, and Washington Environmental Council (the "Requesting Parties"), which are all 501(c)(3) non-profit membership organizations dedicated to preserving and protecting Puget Sound and its imperiled wildlife and habitats.

The Requesting Parties seek a formal agency resolution of the long-running dispute over the appropriate scope of Corps jurisdiction in marine shoreline areas of Puget Sound, Washington. As discussed below, the Seattle District has adopted an impermissibly limited definition of the term "high tide line" for purposes of establishing its jurisdiction over navigable waters under § 404 of the federal Clean Water Act ("CWA"). Specifically, the Corps interprets the reach of the CWA to only extend to the Mean Higher High Water ("MHHW") line in Puget Sound shorelines, rather than the actual regulatory high tide line, which is substantially higher. As a result, the Corps is failing to satisfy its obligation to protect waters of the United States, leading to continued habitat degradation through shoreline armoring and other activities.

In this petition, we ask the EPA to use authorities established under interagency agreement to designate marine shorelines between MHHW and true high tide as "waters of the United States"

under the CWA subject to § 404 permitting. Additionally, we ask the Corps to make formal jurisdictional determinations with respect to several specific shoreline armoring projects currently planned without federal CWA permits that will take place below high tide but above MHHW. These projects are illustrative of the many projects taking place all over Puget Sound that the Corps is failing to regulate, leading to greater damage to the values that the CWA seeks to protect, in violation of the law.[1]

THE HARM CAUSED BY SHORELINE ARMORING IN PUGET SOUND

It is well recognized that bulkheading and armoring of Puget Sound shorelines causes significant ecological degradation. Due to its adverse effects, the Puget Sound Partnership, a state agency tasked with coordinating the recovery of Puget Sound, uses armoring as one of its indicators of Puget Sound recovery.[2] As the Partnership explained in its 2012 Status of the Sound Report:

> Armoring directly alters geologic processes that build and maintain beaches and spits. Bulkheads also impact erosion patterns on nearby beaches, alter beach substrate and hydrology, and reduce the availability of large wood. These physical changes to beaches can diminish the availability and condition of key shoreline habitats. Armoring can also directly impact organisms and ecological processes by burying or displacing upper beach habitat and altering the natural transition between terrestrial and aquatic ecosystems. Impacts of armoring differ from one coastal setting to another, but have been demonstrated both on Puget Sound and elsewhere to impact habitat for fish, birds, and invertebrates.[3]

Due to these negative impacts, the Puget Sound Partnership has articulated a goal of removing more shoreline armoring between 2011 and 2020 than the amount of new armoring installed

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[1] On November 21, 2014, we sent a letter to the Corps outlining our concerns and seeking a discussion around resolving them. No response to that letter was ever received. The letter is attached as Exh. 1 to this request.

[2] Puget Sound Vital Signs, *Shoreline Armoring, Is there progress? Indicators and Targets*, Puget Sound Partnership (February 26, 2014) (attached as Exh. 2).

[3] Puget Sound Partnership, 2012 State of the Sound: A Biennial Report on the Recovery of Puget Sound, at 69 (attached as Exh. 3); *see also* WDFW, Protecting Nearshore Habitat and Functions in Puget Sound (revised 2010) (explaining various key nearshore habitats and making recommendations for regulating common shoreline modification activities) (attached as Exh. 4); Department of Ecology, *Healthy shorelines equal a healthy Puget Sound*, February 2010, (explaining the individual and cumulative impacts of shoreline armoring and recommending "softer alternatives" to armoring) (attached as Exh. 5); Department of Ecology, *Marine Shoreline Armoring and Puget Sound*, February 2010 (explaining the negative ecological impacts of shoreline armoring and answering frequently asked questions about the process) (attached as Exh. 6).

during the same time span.[4] From 2005 to 2011, Puget Sound shorelines netted nearly one additional mile of armoring per year.[5]

In 2014, a coalition of Washington State resource management agencies developed the Marine Shoreline Design Guidelines to promote the protection of naturally-functioning shorelines based on scientific data.[6] According to this guidance, about one third of Puget Sound shorelines are armored, and these artificial barriers prevent important sediment, wood, and detritus transport needed for natural beach formation and erosion processes. *Id.* at 1-10 - 1-12. State agencies have further found that the loss of upper beach and introduction of an artificial barrier not only changes critical nearshore functions for humans, such as runoff drainage and recreational opportunities, but it also reduces the amount of spawning beach available for forage fish like sand lance and surf smelt, and reduces the amount of invertebrate prey available for nearshore fish to eat.[7] Forage fish are important prey for salmon, who themselves are prey for Southern Resident Killer Whales; Chinook salmon and orcas are listed under the federal Endangered Species Act.[8]

Other negative impacts of armoring include the destruction of habitat for juvenile salmon, changes in sediment and water temperatures due to loss of vegetation and reduced moisture retention on artificial structures, and reduction of habitat for shellfish and eelgrass.[9]
The Corps and other federal agencies have long recognized the adverse effects of armoring in Puget Sound. For example, an interagency briefing memo prepared by the Corps, NOAA, and EPA recognized that "hard shoreline armoring can have a negative effect on ecological processes and can reduce the quality of nearshore habitat thus impacting ESA listed species." Briefing Paper, Puget Sound Shoreline Armoring (*see* Exh. 14 at 1). The paper recognized that a significant percentage of the Sound is already armored, and recent data showed a net increase in new armoring of around a mile per year, despite increasing efforts to remove existing armoring. *Id.* Similarly, in a 2011 letter to the Corps regarding its Nationwide Permit program, NOAA

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[4] 2012 State of the Sound, *supra* note 3, at 68.
[5] Puget Sound Partnership, 2013 State of the Sound: A Biennial Report on the Recovery of Puget Sound, 94-95 (Oct. 15, 2013) (attached as Exh. 7).
[6] Washington State Aquatic Habitat Guidelines Program, Marine Shoreline Design Guidelines, 2014 (attached as Exh. 8).
[7] *Id.* at 1-12 - 1-13; *see also* Dan Penttila, Washington Department of Fish and Wildlife, "Marine Forage Fishes in Puget Sound" (attached as Exh. 9); Jason D. Toft et al., "Fish and Invertebrate Response to Shoreline Armoring and Restoration in Puget Sound" (attached as Exh. 10).
[8] *See* Washington State Recreation and Conservation Office, Salmon Species Listed Under the Federal Endangered Species Act (attached as Exh. 11); NOAA Fisheries, Killer whale (*Orcinus orca*) page (attached as Exh. 12).
[9] Sarah A. Morley et al., "Ecological Effects of Shoreline Armoring on Intertidal Habitats of a Puget Sound Urban Estuary," Feb. 14, 2012 (attached as Exh. 13); Department of Ecology, "Shorelands and Environmental Assistance Program Frequently Asked Questions, Marine Shoreline Armoring and Puget Sound," Feb. 2010 (*see* Exh. 6).

Fisheries called for more rigorous regulation of bank stabilization projects:

> The continued steady and substantial loss of shoreline aquatic functions directly attributable to the 'hardening' of shoreline areas through the placement of fill, rock or other structures has a direct and considerable negative impact on the long-term survival and recovery of [...] listed fish populations. Marine nearshore and freshwater shallow-water habitats are critical to the health of marine, estuarine and freshwater ecosystems. Shoreline alteration is one of the greatest threats to these aquatic resources. ... Given the existing degree of alteration, even relatively small shoreline stabilization activities will add to the already extensive cumulative impacts, and further incremental degradation. The trend towards increasingly altered shorelines limits the region's ability to restore and protect salmon populations.

Exh. 15 at 2 (emphasis added).

These concerns are also shared by the state: in 2012, the Governor of Washington and the Commissioner of Public Lands echoed NOAA's request to the Corps that it better protect shorelines from armoring. ("Shoreline armoring is a major concern for Washington State given the long-term adverse effects which are widely documented on habitat and species listed under the federal Endangered Species Act.") (attached as Exh. 16). The problem of shoreline armoring will likely become even more severe in the face of global sea level rise.[10] It is, therefore, critical that the Corps properly implement its authority to protect aquatic resources now.

THE CLEAN WATER ACT PROTECTS RESOURCES UP TO THE TRUE HIGH TIDE LINE

Under Section 404 of the CWA, 33 U.S.C. § 1344, it is unlawful to discharge "dredge or fill" materials in navigable waters without a permit from the U.S. Army Corps of Engineers. The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* § 1362 (definitions). The Corps has defined "waters of the United States" via regulation: those regulations affirm that its jurisdiction extends to the limit of the "high tide line," 33 C.F.R. § 328.4, which is defined as follows:

> The term high tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore

[10] Kirk L. Krueger, *et al.*, *Anticipated Effects of Sea Level Rise in Puget Sound on Two Beach-Spawning Fishes, in* PUGET SOUND SHORELINES AND THE IMPACTS OF ARMORING—PROCEEDINGS OF A STATE OF THE SCIENCE WORKSHOP, MAY 2009: U.S. GEOLOGICAL SURVEY SCIENTIFIC INVESTIGATIONS REPORT 2010-5254, 171-78 (Hugh Shipman, *et al.* eds. 2010) (attached as Exh. 17).

> or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. **The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm**.

Id. § 328.3(d) (emphasis added).[11]

After the CWA was adopted in 1972, the Corps initially adopted a much narrower definition of its jurisdiction, essentially conflating its Rivers and Harbors Act and CWA jurisdictional reach and limiting it to the traditional test for navigability. That regulatory definition was struck down in *Natural Resources Defense Council v. Callaway*, 292 F. Supp. 685 (D.D.C. 1975). Additionally, several courts in enforcement cases found that discharges into waters above the mean high water mark were meant to be covered by the CWA. For example, in *U.S. v. Holland*, the court found that the mean high water line was not a limit to federal authority under the CWA. 373 F. Supp. 665, 676 (M.D. Fla. 1974) ("Pollutants have been introduced into the waters of the United States without a permit and the mean high water mark cannot be used to create a barrier behind which such activities can be excused.").

In adopting its regulatory definition of high tideline in 1977, the Corps recognized that:

> [m]any aquatic areas along the coast are located above the mean or mean higher high tide lines but do not fit within the definition of "wetlands" discussed above. These include sandflats, mudflats, and similar areas, that, while not covered with vegetation, are inundated with sufficient frequency and regularity to be included as part of the aquatic resource.… The term [high tide line] is intended to include areas covered by spring high tides and other high tides that occur with periodic frequency, but does not include those areas that are covered by tidal water as a result of storm surges, hurricanes, or other intense storms.

42 Fed. Reg. 37122, 37129 (July 19, 1977). The current definition of high tide, formally adopted in 1986, was not meaningfully changed from the 1977 definition.

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[11] Note that CWA jurisdiction is considerably more expansive than jurisdiction under the Rivers and Harbors Act, which only "extends to the line on the shore reached by the plane of the mean (average) high water." 33 C.F.R. § 329.12(a); *see also Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 754 (9th Cir. 1978) ("The district court's holding that the Corps' regulatory jurisdiction under the FWPCA is 'coterminous' with that under the Rivers and Harbors Act… is faulty… it is clear from the legislative history of the FWPCA that…Congress intended to expand the narrow definition of the term 'navigable waters…'").

A number of cases have applied these definitions to find unlawful discharge activities that occurred between the highest tide line and other markers like mean high water. For example, in *U.S. v. Malibu Beach*, 711 F. Supp. 1301 (D.N.J. 1989), ruling on a motion for a preliminary injunction, the Court ruled that the government was likely to succeed on its claim that defendants violated the CWA by filling in an area of dunes that could be inundated at high spring tide. The Court explicitly observed that the high spring tide was 1.6 feet higher than the mean high tide. In *U.S. v. Boccanfuso*, 882 F. 2d 666 (2nd Cir. 1989), the Court addressed a situation where fill activities took place above mean high water (the limit of RHA jurisdiction) but below "extreme high tide" (the limit of CWA jurisdiction). The Court found that even though a staff person had told the defendant no permit was necessary, the Corps would not be estopped from pursuing an enforcement action regarding defendant's failure to obtain a permit for activities in this zone.

However, the Seattle District Corps does not apply the regulatory definition of high tide line in implementing its CWA obligations in Puget Sound. Instead, it has adopted as its definition of "high tide line" the "mean higher high water" mark. *See, e.g.*, Seattle District, Online Permit Guidebook ("Under Section 404 of the Clean Water Act, the extent of Corps jurisdiction in tidal waters extends to the high tide line. Currently, the Seattle District uses the mean higher high water mark as the geographic limits of the high tide line."). The guidebook further defines mean higher high water ("MHHW") as "the average higher high tide at a benchmark over a period of 20 years."[12]

The difference between "true" high tide and MHHW in Puget Sound is significant. At a gentle shoreline gradient, this represents potentially hundreds of feet of shoreline that should be subject to Corps regulations but are not. The area between MHHW and true high tide is also ecologically significant. For example, the National Marine Fisheries Service ("NMFS") uses extreme high tide, not MHHW, in defining salmonid critical habitat. *See* Endangered and Threatened Species; Designation of Critical Habitat for 12 Evolutionarily Significant Units of West Coast Salmon and Steelhead in Washington, Oregon, and Idaho, 70 Fed. Reg. 52,630-01, 52,664 (September 2, 2005) ("We believe that the area inundated by extreme high tide is an appropriate delineation of the landward extent of critical habitat because it represents a regularly occurring intertidal fringe that is recognizable (e.g., vegetation and landform changes), and contains and includes PCE elements such as large wood, rocks and boulders and aquatic vegetation.")

[12] On the west coast, there are typically two high tides in a diurnal tidal cycle. Accordingly, MHHW refers to the mean of the higher of the two high tide cycles.

THE INTERAGENCY DISPUTE OVER THE CORPS' FAULTY APPROACH TO JURISDICTION

The subject of whether MHHW or high tide line is the appropriate limit of the Corps CWA § 404 jurisdiction has been the subject of extensive interagency discussion and disagreement. The National Marine Fisheries Service ("NMFS") has repeatedly emphasized the importance of asserting jurisdiction to the high tide line and requested action from the Corps. To date, however, no action has been taken to actually change the Corps' flawed approach.

NMFS staff produced a series of briefing papers laying out the problem and a path towards advocating that the Corps shift its approach to determining jurisdiction. For example, in an April 2, 2013 internal memo, NMFS observed that "much of the upper foreshore and perhaps all of the backshore of Puget Sound beaches are above MHHW" (attached as Exh. 18). The memo observed that "[m]ore than 1 mile of Puget Sound shoreline is newly armored each year, most without Corps permits and therefore without ESA consultation with NMFS." *Id.*; *see also id.* at 21 ("Many of these new and rebuilt bulkheads likely have adverse effects on designated salmon critical habitat, and this amount of shoreline armoring likely will continue without federal review or permitting unless the method for determining Corps jurisdiction is modified."). The memo recommended that the Seattle District use the "highest astronomical tide" ("HAT") rather than MHHW to establish the limit of its CWA jurisdiction.

NMFS also produced an "issue paper" laying out a number of concerns associated with the Corps' approach to determining its CWA jurisdictional boundaries in Puget Sound (attached as Exh. 19).[13] In it, NMFS explained how MHHW "is exceeded several days each month" and how the use of MHHW "results in many shoreline armoring actions in Puget Sound" being installed above MHHW, thereby avoiding compliance with the CWA and Endangered Species Act. *See id.* at 3 ("In Puget Sound, the MHHW is 1.5 to 2.5 feet below the high tide line.")

The document also produced a table laying out the difference between HAT and MHHW at a number of Puget Sound tidal stations. *Id.* at 2. The differences varied between 1.3 feet and 2.7 feet; the memo calculated that at a beach gradient of 1%, a difference of 2 feet in tidal elevation translated to 200 horizontal feet of shoreline "with functional aquatic habitat … outside federal regulatory review." *Id.* at 1. The paper went on to explain how a substantial portion of the tidal cycle is above MHHW, and how failure to regulate such projects will "impair" recovery of nearshore critical habitat. *Id.* at 3.

In a further briefing paper, NMFS stated bluntly that the Corps should use HAT, rather than MHHW, as the limit of its jurisdiction, noting that "the intertidal area between HAT and MHHW is biologically significant for the protection and recovery of ESA listed species and is essential fish habitat for salmon and other fishes" (*see Exh.* 20 at 1). The paper continued, "We are not

[13] Although labeled draft, the Issue Paper was sent to the Northwest Region Commander of the Army Corps in formal correspondence.

aware of any technical or legal support for the Corps' determination of jurisdictional boundary of MHHW. Instead, this appears to be an artifact of institutional knowledge." *Id.*

The Corps' own internal documentation reveals that the Seattle District considered whether to shift its approach to determining jurisdiction, but ultimately decided to take no action. In a May 17, 2013 internal memorandum, the Seattle District recognized the dispute over the appropriate definition of high tide, observing that each of the six Pacific Coast districts interprets the issue in different ways (attached as Exh. 21). The memo laid out a set of recommendations including a multi-year decision-making process to elevate and resolve the interagency dispute.

None of these recommendations were adopted. After extensive efforts to resolve the issue at a staff level proved unsuccessful, the issue was elevated to regional agency leadership. In an April 2, 2013 letter to Col. Bruce Estok, the District Commander of the Seattle District, NMFS Regional Administrator Will Stelle asked for the Colonel's help resolving the shoreline jurisdiction issue (attached as Exh. 22). In it, Stelle observed that the result of the Corps' approach to determining jurisdiction:

> is that many new projects and repairs to existing projects that directly affect the shoreline of Puget Sound are not reviewed, conditioned or permitted by your agency. The ecological effect is that extensive areas of intertidal and estuarine habitat that are important to ESA-listed salmon and multiple species of shellfish and other marine life are not adequately protected. Numerous scientific analyses have documented the important functions of these areas for both juvenile and adult salmonids, and the continuing loss of these habitats is an important limiting factor for rebuilding the productivity of the system for salmon and other trust resources.

It does not appear that the Corps ever responded to Stelle's letter. A March 16, 2015 letter from Stelle to Brigadier General John Kem, the Northwest Division Commander of the Corps, memorialized the paralyzed status of the interagency discussions (attached as Exh. 23). Even though "shoreline protection remains a priority for the [federal agencies in Puget Sound] and for the aquatic resources and habitats" subject to the agencies' trust responsibilities, the letter indicated that Gen. Kem had stated clearly that he "did not intend to change the Seattle District's approach to establishing jurisdiction." Again, it does not appear that any response to this letter was ever received.

EPA AUTHORITY TO DECIDE CWA § 404 JURISDICTION

It is well settled that it is the EPA, not the Corps, that has ultimate authority to determine the jurisdiction of the CWA § 404 program. In a 1979 Opinion issued to the Secretary of the Army, Attorney General Benjamin Civiletti concluded that the term "navigable waters" constitutes a "lynchpin" of the CWA, and that there could only be a single judgment as to whether and to what extent "any particular water body comes within the reach of the Federal Government's

pollution control authority." 43 Op. Att'y Gen. 197, 201 (1979) ("*Civiletti Memorandum*") (attached as Exh. 24). While the CWA gives the Corps authority to issue and assure compliance with § 404 permits, "it does not expressly charge [the Corps] with responsibility for deciding when a discharge of dredged or fill material into the navigable waters takes place so that the § 404 permit requirement is brought into play." *Id.* at 201. The final administrative authority for construing the reach of the program belongs with the administrator of the EPA, the Opinion concludes. *See also* EPA Office of General Counsel, *Jurisdiction of Sections 402 and 404 of the Clean Water Act Over Discharges of Solid Waste in Wetlands*, 1980 WL 30213 (Jan. 31, 1980) ("In case of disagreement between the Administrator [of the EPA] and the Secretary [of the Army], the Administrator has the ultimate authority to determine whether a discharge of solid waste in waters of the United States requires an NPDES permit or a § 404 permit.").

Consistent with this conclusion, the Corps and the EPA executed a Memorandum of Agreement in 1987 outlining a policy and procedures for addressing the agencies' respective roles in determining jurisdiction under § 404. *Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Section 404 Program and the Application of the Exemptions under § 404(f) of the Clean Water Act* (Jan. 19, 1989) ("*1989 MOA*") (attached as Exh. 25). The *1989 MOA* recognizes that while the Corps will perform the majority of jurisdictional determinations for the § 404 program, "EPA will be considered the lead agency and will make the final decision if the agencies disagree." Under the Corps' own regulation, an EPA determination of jurisdiction divests the Corps of authority to determine jurisdiction for itself. 33 C.F.R. § 325.9.

Under the 1989 MOA, EPA has authority to make a "final determination as to the geographic scope of the waters of the United States for purposes of § 404," termed a "special case." Special cases may be project specific, or generic, "where significant issues … are anticipated or exist" concerning the scope of jurisdiction. Thereinafter, each regional administrator is to maintain a "regional list" of special cases within each region.

As discussed further in this petition, the Corps' failure to exercise jurisdiction over the area below high tide and above MHHW qualifies for special case treatment under the MOA. Accordingly, the undersigned organizations hereby petition EPA to make a generic special case determination for tidal waters within the areas of Puget Sound, Strait of Juan de Fuca, and Georgia Strait in Western Washington. The examples that are provided in this petition are illustrative of the need for a generic jurisdictional determination for the entire region, but are not the focus of the petition.

CORPS' DUTY TO RESPOND TO REQUESTS FOR JURISDICTIONAL DETERMINATIONS

An approved jurisdictional determination ("approved JD") is an official determination from the Corps that jurisdictional waters of the United States are either present or absent on a particular site, and identifies with precision the limits of those waters determined to be jurisdictional. 33

C.F.R. § 331.2; Regulator Guidance Letter No. 08-02 (26 June, 2008) ("*2008 RGL*"). The 2008 RGL lists three scenarios under which the issuance of an approved JD is mandatory: (a) when requested by the applicant, landowner, or other "affected party"[14]; (b) where such party contests jurisdiction; and (c) "where the Corps determines that jurisdiction *does not exist*." (emphasis added). In other words, a requested JD is mandatory, even where the applicant, landowner, or other "affected party" does not request it, and where the Corps' position is that jurisdiction does *not* exist. *Id.* at 2. Additionally, the Corps has discretion to issue an approved JD wherever it deems doing so "appropriate given the facts of a particular case."

The requesting parties hereby petition the Corps to make an approved JD on each of the projects described below. An approved JD is required because it appears that the Corps will conclude that CWA jurisdiction does not exist for these projects, given its current policy of limiting jurisdiction to the MHHW mark. Moreover, a JD is "appropriate" on the facts of this case, given that the proponents of these projects are potentially subject to citizen suit enforcement for failing to obtain Corps permits that the Corps has effectively informed them that they do not need.

To the best of our knowledge, each of the examples below involves fill material above the MHHW but below the true high tide line, and in each case the proponents appear to incorrectly believe, based on the Corps' guidance and policy statements, that the projects are not subject to Corps jurisdiction and do not require CWA permits prior to any work in waters of the United States.

1. Mason County Public Works Bank Stabilization

This project will repair rock wall bulkheads at three sections of North Shore Road along Hood Canal in Mason County, totaling about 178 feet. These repairs will require the placement of large rocks along the shore, and 34 cubic yards of rock will be placed approximately two feet below the ordinary high water mark. Large woody material and root wads will also be placed along the bulkhead, and fill will be used below the ordinary high water mark at all three sections of the road that need repairing. Mason County Public Works applied for a standard hydraulic project permit with the Washington Department of Fish and Wildlife ("WDFW"). The WDFW issued a hydraulic project approval ("HPA") on February 9, 2015 (HPA 2015-6-70+01). Forage fish spawn at or adjacent to each of the three repair sites. The JARPA and other permitting documents for this project are attached as Exh. 26.

2. Kitsap County Public Works Beach Drive Seawall Repair

This project will replace seawalls at five sites along Beach Drive near Port Orchard in Kitsap County, totaling about 465 feet. These repairs will require the placement of woven fabric and large rocks along the shore, and will also involve "beach nourishment" (the dumping of sand

[14] "Affected party" is defined in 33 C.F.R. § 331.2 for purposes of the appeal process, but not the process of requesting a JD.

from another place) as a mitigation measure.[15] Kitsap County Public Works applied for a standard hydraulic project permit with the WDFW. The WDFW issued a HPA on April 1, 2015 (HPA 2015-6-205+01). Forage fish spawn at all of the project sites, and Kitsap County stated in its HPA application that "[t]he project will be done during low tide and during the WDFW prescribed fish window for Sinclair Inlet." On February 19, 2015, Kitsap County received an exemption from a Shoreline Substantial Development Permit pursuant to KCC 22.87(2)(b) and an exemption from SEPA under the emergency exemption in WAC 197-11-880. The JARPA and other permitting documents for this project are attached as Exh. 27.

3. Kitsap County Public Works Big Beef Seawall Maintenance

This project will repair a seawall along Seabeck Highway near Seabeck in Kitsap County, totaling about 110 feet. These repairs will require the placement of rocks and loose rip rap below ordinary high water mark. Kitsap County Public Works applied for a standard hydraulic project permit with the WDFW. The WDFW issued a HPA on April 29, 2015 (HPA 2015-6-279+01). Forage fish spawn in adjacent areas to the project site. The JARPA and other permitting documents for this project are attached as Exh. 28.

4. Multiple Projects on Samish Island, Skagit County

Several private landowners, represented by a single contractor, are proposing a series of significant beach armoring efforts across multiple individual property frontages on Samish Island, Skagit County. The initial proposal, at the Goodan/Pennington residence, involved over two hundred linear feet of significant armoring, including logs, crushed gravel, and rock up to eight feet high. The project was authorized by Skagit County under PL14-0517. An email from the project contractor, John Ravnik, describes how he calculated MHHW and purports to explain how the project will take place landward of that elevation. Recently, a number of additional projects along that stretch of shoreline have also been proposed by the same contractor. These adjacent projects involve rearranging existing rock armoring and, in some places adding imported rocks to add size to the armoring in response to a storm that occurred on November 29, 2014. A "geotextile fabric" will be placed between the rocks and the ground, and concrete rubble will be removed. The projects propose to use a barge to transport equipment to the area and use of an excavator to perform the work. The project applications explain and provide

[15] Although the county considers beach nourishment to be a mitigation measure, the practice has multiple adverse environmental impacts, including "disturbance of species' feeding patterns; disturbance of species' nesting and breeding habitats; elevated turbidity levels; changes in near shore bathymetry and associated changes in wave action; burial of intertidal and bottom plants and animals and their habitats in the surf zone; … increased sedimentation in areas seaward of the surf zone as the fill material redistributes to a more stable profile" and "impacts to endangered species such as sea turtles and shorebirds which use the beach as nesting areas." *State, Territory, and Commonwealth Beach Nourishment Programs: A National Overview*, National Oceanic & Atmospheric Administration, March 2000 (attached as Exh. 30).

considerable detail for the contractor's claim that the work will be conducted landward of mean higher high water. The JARPA and other permitting documents for the Goodan/Pennington project are attached as Exh. 29a. Since most of the permitting documents for the other projects on this road are identical, a sample JARPA and accompanying materials is included as Exh. 28b. Additional documents can be provided on request.

PROPER CORPS JURISDICTION WILL PROTECT CWA, ESA, AND TRUST RESOURCES

If the Corps revises its approach to determining jurisdiction, as required by the CWA, to include projects involving fill up to the true high tide line, better protection for Puget Sound and its imperiled resources and wildlife will result. In one of its internal briefing memos, NMFS explained why constructing bulkheads without oversight by the Corps harms resources in Puget Sound:

> By not extending jurisdiction above MHHW, the Corps allows unpermitted structures, e.g., bulkheads, to be constructed without Corps oversight within waters of the United States. Constructing or reconstructing bulkheads or other structures between MHHW and HAT reduces the productivity of the nearshore environment, results in adverse effects on beach processes, reduces or removes riparian vegetation and fish-prey input to the nearshore, eliminates upper intertidal vegetation such as pickleweed, and increases predation risk for migrating and rearing juvenile salmonids by removing shallow areas of upper-intertidal. In addition, long-term adverse effects of substrate coarsening in front of bulkheads at higher intertidal sites are also likely to degrade and remove important spawning habitats for forage fishes. Surf smelt have been documented spawning above MHHW. Also, ESA-listed salmon emigrate particularly during spring tides in March through July and inhabit the inundated beaches above MHHW during emigration. Recovery of nearshore salmon habitats will be impaired by not extending Corps jurisdiction above MHHW.

See Exh. 20 at 6. There are several reasons why expanding jurisdiction will increase the protection of Puget Sound and its resources.

First, the Corps is required by the CWA to review applications for § 404 permits to ensure that they are consistent with the Act and its implementing regulations. *See, e.g.*, 40 C.F.R. pt. 230 (404(b) guidelines); 33 C.F.R. pt. 323. Since the purpose of the CWA is to restore the integrity of the nation's waters, and to protect and recover beneficial uses—which include salmonid spawning and rearing in Puget Sound—this review gives the Corps oversight to ensure that the cumulative effects of extensive new and replaced bank armoring are consistent with the Act. As the § 404(b) guidelines state:

> Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that

> such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.... [T]he degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.

40 C.F.R. § 230.1(c), (d). Corps regulations further call for an extensive review of whether requested Army permits serve the public interest, a review that explicitly includes "cumulative impacts." 33 C.F.R. § 320.4(a). The review gives the Corps discretion to balance a wide number of factors, including the relative need for the project and its benefits, against the impacts to CWA resources. *Id.* The guidelines also call for a determination of whether activities affecting coastal zones are consistent with approved coastal zone management programs. *Id.* 320(h). The Corps' CWA review over projects that fall between MHHW and true high tide should result in less shoreline armoring in Puget Sound, and better mitigation for projects that cannot be avoided.

Second, the Corps' permitting process is subject to NEPA, which includes, in part, a duty to examine alternatives to the proposed action. 33 C.F.R. § 230. In many cases, "hard" armoring of shorelines can be avoided or significantly reduced by reliance on more environmentally responsible practices. As the WDFW has observed, "[i]n reality, hard armor is typically not necessary to slow erosion throughout much of the sheltered shores of Puget Sound. Yet the extensive application of armor as a 'one size fits all' solution has resulted in widespread impacts to nearshore processes." Marine Shorelines Design Guidance, *supra* note 8, at xxv. Other alternatives could include more robust mitigation for new armoring that cannot be avoided, in order to achieve the goal of a net reduction in the amount of armoring and increase in functional habitat in Puget Sound.

Third, issuances of CWA permits by the Corps are federal actions subject to the interagency consultation provisions of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2). Accordingly, the Corps will have to ensure that shoreline armoring permits do not jeopardize listed species like salmon, or adversely modify their critical habitat. Indeed, recognizing that shoreline areas merit special attention and protection, the designated critical habitat for Puget Sound Chinook and other ESUs explicitly includes areas that are "inundated by extreme high tide." 70 Fed. Reg. 52637 (Sept. 2, 2005). NMFS has recognized that the Corps' truncated view of its jurisdiction means that it "does not provide NMFS with an opportunity to review a large number of shoreline armoring actions under" § 7(a)(2) of the ESA. *See* Exh. 19 at 3.

We recognize that the Corps has workload concerns about expanding its jurisdiction in a way that would include more projects. While these do not absolve the agency from complying with the CWA, there are ways in which those concerns could be managed. First, given the rigors of requiring projects to go through full CWA and ESA review, many applicants may simply opt to

avoid armoring in the first place. For projects that do go forward, the Nationwide Permit Program offers streamlined permitting for projects with insignificant effects. 77 Fed. Reg. 10184 (Feb. 21, 2014). NWP 13 addresses certain bank stabilization measures. NWP 3 deals with rehabilitation or repair of certain previously authorized and currently serviceable structures.

Of course, there should be significant limits on the use of NWPs to engage in bank stabilization measures in Puget Sound because of the significant effects. 33 C.F.R. § 330.2 (NWPs for actions with "minimal" effects). This is recognized by the Corps itself, which limits the use of new bank stabilization with certain portions of Puget Sound. Seattle District, 2012 Nationwide Permits Final Regional Condition #3 (March 19, 2012) (attached as Exh. 31). It also requires extensive information for any new or maintenance bank stabilization, including a demonstration that the proposed project "incorporates the least environmentally damaging practicable bank protection methods." *Id.* at Condition #4. EPA and NOAA, among others, have advocated for extending this restriction to all areas of Puget Sound, not just the urbanized areas around Seattle. *See* Exh. 14 at 2 (EPA and NOAA "have proposed that the Corps further restrict the use of nationwide permits for new bank stabilization projects in Puget Sound.") Moreover, use of streamlined NWP procedures does not absolve the Corps from complying with the ESA, 77 Fed. Reg. at 10283 (National General Condition 18), and other laws like the Magnuson-Stevens Fishery Management and Conservation Act. *See* Regional Conditions, at 3 (activity cannot be authorized under NWP "until essential fish habitat requirements have been met by the applicant and the Corps").

That said, however, we believe that CWA, along with programmatic consultation procedures under the ESA, gives the Corps sufficient flexibility to authorize certain categories of actions without significantly expanding the agency's workload. For example, in cooperation with NOAA, the Corps could define new regional general conditions that would allow repairs of existing structures that improve baseline conditions, or authorize certain soft-armoring approaches where needed, with appropriate mitigation (e.g., removal of other existing bank armoring). It appears that other agencies would welcome this conversation. *See* Exh. 14 at 2. (EPA and NOAA "would like to explore ways in which [Corps] permits can require that applicants undertake effective in-kind mitigation for impacts their projects may cause.")

Until these projects fall under the Corps' jurisdiction, however, the Corps and NOAA will simply not have the opportunity to review these projects for compliance with CWA and ESA, thereby allowing continued degradation of habitat in Puget Sound and the likely continued slide of imperiled species like salmon towards extirpation. Expanding jurisdiction to comply with the CWA will also better position the Corps to meet its obligations under federal treaties. *See* Exh. 20 at 6. ("NMFS believes the Corps could better meet their tribal trust responsibilities by recognizing jurisdiction for federal permitting that is based on tidal elevations that provide a greater level of ecological integrity and function than using MHHW.")

CONCLUSION

The Army Corps' failure to exercise jurisdiction to the true high tide line violates the CWA, reduces protection for important ecological and trust resources, and subjects landowners to the risk of CWA citizen suits. Several years of interagency discussions have failed to result in any change to the Corps' position. Accordingly, we ask EPA to utilize its authorities, consistent with its past statements, to define CWA § 404 jurisdiction in Western Washington up to the true high tide line. Additionally, we ask the Corps to make formal determinations with respect to the above listed projects. We believe that all these projects should be within the Corps' jurisdiction and the Corps should so find via an approved JD. However, if the Corps wishes to defend its continued position, it should formally find that such projects are not within its jurisdiction.

Sincerely,

Jan Hasselman
Anna Sewell

On behalf of Sound Action, Friends of the San Juans and Washington Environmental Council