

HONORABLE ROBERT S. LASNIK

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CENTER FOR FOOD SAFETY,  
  
Plaintiff,  
  
v.  
  
U.S. ARMY CORPS OF ENGINEERS, *et al.*,  
  
Defendants,  
  
and  
  
PACIFIC COAST SHELLFISH GROWERS  
ASSOCIATION,  
  
Intervenor – Defendant.

Case No. 2:17-cv-01209-RSL

THE COALITION TO PROTECT PUGET  
SOUND HABITAT,  
  
Plaintiff,  
  
v.  
  
U.S. ARMY CORPS OF ENGINEERS, *et al.*,  
  
Defendants,  
  
and  
  
TAYLOR SHELLFISH COMPANY, INC.,  
  
Intervenor – Defendant.

Case No. 2:16-cv-0950-RSL

TRIBAL MOTION FOR RELIEF

NOTE FOR CALENDAR:  
November 15, 2019

**MOTION FOR RELIEF**

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2 The Court invited the parties to file motions regarding the appropriate relief for the APA  
3 violations it found. The *amici* – the Squaxin Island Tribe and Jamestown S’Klallam Tribe - would  
4 also like to offer their insights regarding the application of Nationwide Permit (NWP) 48 on the  
5 remaining issue of whether to invalidate all existing NWP 48 verifications or allow the permits to  
6 be left in place while the US Army Corps of Engineers (USACE) performs the required adequate  
7 impact analysis and environmental assessment.

8 Both proposed *amici curiae* have treaty rights that were adjudicated in the subject area in  
9 *United States v. Washington*, 384 F. Supp. 312, 377 (1974) (Squaxin Island Tribe); 626 F. Supp.  
10 1405, 1432 (Jamestown S’Klallam), 1486 (Jamestown S’Klallam Tribe). The *amici* have a mutual  
11 interest in the protection and restoration of treaty resources, and supporting habitats, including  
12 marine tidelands. The *amici*’s interests are in all marine resources.

13  
14 Dungeness and Sequim Bays are of particular and primary interest to *amici* Jamestown  
15 S’Klallam Tribe. Multiple restoration projects exemplify Jamestown’s longstanding commitment  
16 to improving marine resource conditions including at Dungeness, salt marsh restoration both east  
17 and west of the River mouth and at Sequim Bay, Jimmycomelately Estuary, Pitship Estuary and  
18 Washington Harbor.

19  
20 *Amici* Squaxin Island Tribe has significant salt marsh restoration activities ongoing in  
21 Oakland Bay, and enhancement and preservation projects in Eld, Totten and Henderson Inlets.  
22 Oakland Bay holds the richest habitat and most productive shellfish beds in Puget Sound. The  
23 Tribe dedicates significant resources to ensure that marine resource conditions are optimal. The  
24 Tribe also relies on shellfish for the exercise of its treaty rights, including the cultural values  
25 inherent in that exercise. The Tribe harvests for both commercial and subsistence purposes.  
26

1 The *amici* recommend a remedy other than the presumptive vacatur of permits or  
2 verifications under NWP 48. The *amici* do not recognize any immediate environmental benefit by  
3 revoking NWP 48 permits or verifications.

4 Rather, the *amici* encourage the Court to provide a transition period so that NWP 48  
5 permittees can obtain an individual permit as necessary. It is our opinion that maintaining valid  
6 permits will promote the best interim management of tidelands. Until an individual permit decision  
7 has been made, shellfish growers should be bound by the terms and conditions of the existing  
8 permits. Many of the conditions are specific to conservation and have been approved by U.S. Fish  
9 and Wildlife Service and National Oceanic and Atmospheric Administration for conservation of  
10 species with special status.  
11

12 It is also *amici's* opinion that the measures adopted at the USACE's district level are  
13 sufficient pending either revision or individual permits. See the Conservation Measures and  
14 applicable terms and conditions from the Programmatic Biological Opinions for Shellfish  
15 Activities in Washington State Inland Marine Waters (U.S. Fish and Wildlife Service (USFWS)  
16 Reference Number 01EWF00- 2016-F-0121, National Marine Fisheries Service (NMFS)  
17 Reference Number WCR-2014- 1502).<sup>1</sup>  
18

19 Likewise, the *amici* see no specific benefit with respect to revoking the permits in use for  
20 Sequim and Dabob Bays, where *amici* Jamestown Tribe operates as a grower or in Oakland Bay,  
21 where the *amici* Squaxin Island Tribe operates as a grower.  
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24 <sup>1</sup> Available at:  
25 [https://www.nws.usace.army.mil/Portals/27/docs/regulatory/NewsUpdates/20170418%20Verific  
26 \[ation%20Enclosure%201.pdf\]\(https://www.nws.usace.army.mil/Portals/27/docs/regulatory/20181206-PublicAnnounceBiOpConsMeasMods.pdf\)  
And, as subsequently modified at  
\[https://www.nws.usace.army.mil/Portals/27/docs/regulatory/20181206-  
PublicAnnounceBiOpConsMeasMods.pdf\]\(https://www.nws.usace.army.mil/Portals/27/docs/regulatory/20181206-PublicAnnounceBiOpConsMeasMods.pdf\)](https://www.nws.usace.army.mil/Portals/27/docs/regulatory/NewsUpdates/20170418%20Verification%20Enclosure%201.pdf)

1 The *amici* operate under best management practices. As described in the Jamestown Tribe  
2 NWP 48 permit and lease agreement with Washington State Department of Natural Resources, the  
3 Tribe implements best management practices including implementing native eelgrass (*Zostera*  
4 *marina*) buffers and on-going monitoring on all farm activities. The Sequim Bay farm has been  
5 operating since 2009, and has not observed any decline or impact to native eelgrass beds  
6 surrounding the farm. In Dabob Bay, the Tribe has developed a monitoring plan to protect native  
7 eelgrass and address concerns about a prey species for bald eagles that exist within the farm.

8 While found to be unlawful, NWP 48 provides useful management control of current  
9 Washington state shellfish operations. If the permits and verifications are vacated, *amici* are deeply  
10 concerned that terms and conditions currently required by NWP 48, will be blatantly disregarded.  
11 Indeed, the greater environmental harm will occur with the absence of any terms and conditions.  
12

13 Moreover, in *amici's* view the presumption that all facilities that are dependent on NWP  
14 48 will cease operation is a false presumption. In addition, it is doubtful that all facilities within  
15 Western Washington are currently permitted under NWP 48 and or individual Corps permits.  
16 Thus, absent enforcement to enjoin those currently acting without a permit and to enjoin those  
17 operating if NWP were vacated, the greater harm will be vacatur. We are convinced that the terms  
18 and conditions of NWP 48 are better from an environmental perspective in the interim than no  
19 conditions.  
20

21 Moreover, the commercial market for Washington growers' product remains and if permit  
22 holders cannot meet the demand because of vacatur, there will be strong incentive, and no  
23 disincentive, to respond to the market demand with illegal practices. If so, it would be a sad  
24 consequence of a court decision intended to provide environmental protection.  
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1 In addition, if NWP 48 were vacated it would upset the expectations inherent in the harvest  
2 plans adopted between the *amici* and commercial growers. Under the 2007 Shellfish Settlement,  
3 entered as a consent decree in *United States v. Washington*, Subproceeding 89-3, Dkt. No. 18839  
4 (the “2007 Settlement Agreement”), the *amici* and commercial operators negotiate harvest plans.  
5 Those plans may allocate ground or resources. Each presumes sustained commercial production  
6 and lawful practices. If there is a vacatur, those harvest plans may be void (under theories of either  
7 mutual mistake or impossibility), or, at minimum, require renegotiation. Further, the specific  
8 provisions of the 2007 Settlement Agreement applicable to, and employed by, the commercial  
9 growers may be put into question. The disruption would be significant insofar as there are  
10 hundreds of parcels covered under the 2007 Shellfish Settlement.  
11

12 Furthermore, we are deeply concerned that invalidating existing permits would be very  
13 disruptive to our tribal communities and businesses.

14 For example, *amici* Jamestown’s farms provide employment for its tribal citizens, as well  
15 as others in the surrounding community and Jamestown has up to 87 employees working  
16 throughout the year. Invalidating the Jamestown permit will leave it no choice but to lay off those  
17 employees with no certainty of when it will be able to resume operations. The *amici* Squaxin’s  
18 farm employs up to 60 and provides harvest opportunities, including for subsistence for 200  
19 licensed tribal members. The losses would adversely affect the cultural and economic fabric of  
20 *amici*’s communities.  
21

22 In addition, the *amici*’s farm and the aquaculture enhancements depend on shellfish seed  
23 provided by NWP 48 permittees. *Amici* Jamestown operates two shellfish hatcheries that generate  
24 essential revenue for its tribal social and community service programs by selling shellfish seed to  
25 many farms in Washington State.  
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1 For Squaxin, if the NWP 48 were vacated, an immediate result would be the loss of seed  
2 stock provided to the Tribe by NWP 48 permitted growers. The loss of seed stock would devastate  
3 the Tribe's enhancement and aquaculture programs. The Tribe depends on a constant and quality  
4 supply. Seed stock generally is in short supply and without the seed stock provided under NWP  
5 48 there is certain to be an interruption in the supply and likely to be none available.

6 The *amici* understand that USACE issuance of NWP 48 was found not to be in accordance  
7 with NEPA or the CWA but believe there would be no environmental benefit to revoking existing  
8 NWP 48 permits and, as stated above revocation would instead have a likelihood of unintended  
9 negative impacts. Current NWP 48 permit holders should be allowed to continue operations until  
10 the USACE can remedy the APA violation or allow enough time for impacted shellfish growers  
11 to complete the individual permit process.

12  
13 The *amici* recommend that no further permits or verifications issue under NWP 48 and that  
14 all those operating pursuant to NWP 48 have a limited period to transition and to file for an  
15 individual permit. We recommend this approach be in place for one year. The USACE should  
16 have a limited period to make a decision on the requested permit. We defer to the agency to advise  
17 as to its capacity to process applications. Absent a directive to the USACE to process an  
18 application within a limited period of time, the USACE should provide the court periodic reports  
19 of the status and priority of each individual permit substituting for a NWP 48 permit.  
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DATED this 30th day of October, 2019.

Respectfully submitted,

s/ Lauren P. Rasmussen

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Attorney for the Squaxin Island Tribe

**CERTIFICATE OF SERVICE**

I hereby certify that on the 30th day of October 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties which are registered with the CM/ECF system.

s/ Sharon Haensly  
Squaxin Island Legal Department