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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DON'T CAGE OUR OCEANS, *et al.*,

Plaintiffs,

vs.

U.S. ARMY CORPS OF ENGINEERS, *et al.*,

Defendants.

Case No. 2:22-cv-01627-KKE

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT AND [PROPOSED] ORDER

NOTE ON MOTION CALENDAR: April 25, 2024

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

MOTION 1

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT 1

INTRODUCTION 1

FACTUAL BACKGROUND 3

I. INDUSTRIAL FINFISH AQUACULTURE. 3

II. THE PUSH FOR INDUSTRIAL AQUACULTURE IN THE U.S. 5

III. THE EXECUTIVE ORDER. 7

IV. NWP 56. 7

A. Defendants' Narrow Assessment. 8

B. Impacts to Wildlife and Water Quality Acknowledged by Defendants. 9

C. General Conditions. 11

STANDARD OF REVIEW 12

ARGUMENT 13

I. NWP 56 IS *ULTRA VIRES* AND MUST BE VACATED. 14

A. OCSLA Limits RHA Section 10 Permits to Structures Constructed for Energy Purposes. 14

B. NWP 56 Is Not Sufficient on Its Own to Authorize Aquaculture on the OCS. 16

1. OCSLA Does Not Grant Property Rights for Aquaculture. 18

2. Legislative History Reveals Congress Must Explicitly Authorize Activities on the OCS. 19

II. NWP 56 VIOLATES THE RHA AND APA BECAUSE ITS ADVERSE EFFECTS ARE MORE THAN MINIMAL. 20

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

A. Defendants Violated the RHA by Failing to Evaluate Critical Impacts Due to Their Purported Lack of Authority over Facilities' Operation. 21

B. Defendants Unlawfully Punted Cumulative Impacts Assessment and Mitigation to District Engineers and Provided No Support. 22

III. NWP 56 VIOLATES THE ENDANGERED SPECIES ACT..... 25

A. ESA Standards and the Section 7 Consultation Process. 25

B. NWP 56 Easily Surpasses the Low "May Affect" Threshold Triggering Consultation. 27

C. The Corps Cannot Rely on Possible Future Project-Level Review to Circumvent Its ESA Duties for this Action. 29

D. The Corps Unlawfully Delegated Its ESA Duties. 31

IV. NWP 56 VIOLATES THE NATIONAL ENVIRONMENTAL POLICY ACT. 33

A. Defendants Violated NEPA by Failing to Prepare an EIS. 34

B. Defendants Failed to Take a Hard Look at Reasonably Foreseeable Environmental Impacts. 35

1. Defendants Failed to Evaluate All Reasonably Foreseeable Impacts of NWP 56..... 36

2. The EA Fails to Analyze the Cumulative Effects of NWP 56. 39

V. THIS COURT SHOULD VACATE NWP 56. 41

CONCLUSION..... 42

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Ala. v. Tex.,
347 U.S. 272 (1954) 17

All. for the Wild Rockies v. Christensen,
663 F. App'x 515 (9th Cir. 2016) 31

All. for the Wild Rockies v. Krueger,
950 F.Supp.2d 1196 (D. Mont. 2013) 31

All. for the Wild Rockies v. U.S. Forest Serv.,
907 F.3d 1105 (9th Cir. 2018) 41, 42

All. to Prot. Nantucket Sound v. U.S. Dep't of the Army,
398 F.3d 105 (1st Cir. 2005) 19, 36

Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council,
462 U.S. 87 (1983) 33

Bostock v. Clayton Cnty., Ga.,
140 S. Ct. 1731 (2020) 14

Coal. to Protect Puget Sound Habitat v. U.S. Army Corps. of Eng'rs,
417 F.Supp.3d 1354 (W.D. Wash. 2019) ..... *passim*

*Coal. to Protect Puget Sound Habitat v. U.S. Army Corps. of Eng'r*s,
466 F.Supp.3d 1217 (W.D. Wash. 2020) 41, 42

Conner v. Burford,
848 F.2d 1441 (9th Cir. 1988) 25, 30

Cottonwood Env't L. Ctr. v. U.S. Forest Serv.,
789 F.3d 1075 (9th Cir. 2015) 30

Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.,
538 F.3d 1172 (9th Cir. 2008) 33, 34

Defs. of Wildlife v. Ballard,
73 F.Supp.2d 1094 (D. Ariz. 1999) 40

Eagle Cnty. v. Surface Transp. Bd.,
82 F.4th 1152 (D.C. Cir. 2023) 37

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

Federal Cases (Cont'd) **Page(s)**

Earth Island Inst. v. U.S. Forest Serv.,
351 F.3d 1291 (9th Cir. 2003) 38

Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.,
36 F.4th 850 (9th Cir. 2022) 35

Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.,
341 F.Supp.3d 632 (E.D. La. 2018) 6, 41

Gulf Fishermens Ass'n v. NMFS,
968 F.3d 454 (5th Cir. 2020) 6, 18

Karuk Tribe of Cal. v. U.S. Forest Serv.,
681 F.3d 1006 (9th Cir. 2012) 26, 29

Ky. Riverkeeper, Inc. v. Rowlette,
714 F.3d 402 (6th Cir. 2013) 21, 22, 40

League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.,
689 F.3d 1060 (9th Cir. 2012) 36

Cal. ex rel. Lockyer v. U.S. Dep't of Agric.,
575 F.3d 999 (9th Cir. 2009) 28

Monsanto v. Geertson Seed Farms,
561 U.S. 139 (2010) 34

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983) 13

N. Plains Res. Council v. U.S. Army Corps of Eng'rs,
454 F.Supp.3d 985 (D. Mont.) ..... *passim*

Nat'l Wildlife Fed'n v. Brownlee,
402 F.Supp.2d 1 (D.D.C. 2005) 30

Ocean Advocs. v. U.S. Army Corps of Eng'rs,
402 F.3d 846 (9th Cir. 2005) 37

Ohio Valley Env't Coal. v. Bulen,
429 F.3d 493 (4th Cir. 2005) 22, 39

Ohio Valley Env't Coal. v. Hurst,
604 F.Supp.2d 860 (S.D.W. Va. 2009) 23, 24, 39, 41

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

Federal Cases (Cont'd) **Page(s)**

Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank,
693 F.3d 1084 (9th Cir. 2012) 38

Pollinator Stewardship Council v. EPA,
806 F.3d 520 (9th Cir. 2015) 41

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989) 33, 35

Save Our Sonoran, Inc. v. Flowers,
408 F.3d 1113 (9th Cir. 2005) 37

Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs,
985 F.3d 1032 (D.C. Cir. 2021) 37

Tenn. Valley Auth. v. Hill,
437 U.S. 153 (1978) 25

Thomas v. Peterson,
753 F.2d 754 (9th Cir. 1985) 26, 38

United States v. Cumberland Farms of Conn., Inc.,
647 F.Supp. 1166 (D. Mass. 1986) 21

United States v. Locke,
471 U.S. 84 (1985) 17

United States v. Union Pac. R.R. Co.,
353 U.S. 112 (1957) 17

Utah Power and Light v. United States,
243 U.S. 389 (1917) 17

W. Watersheds Project v. Kraayenbrink,
632 F.3d 472 (9th Cir. 2011) 25

White Tanks Concerned Citizens, Inc. v. Strock,
563 F.3d 1033 (9th Cir. 2009) 36

Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs,
351 F.Supp.2d 1232 (D. Wyo. 2005)..... 40

Wyo. v. United States,
279 F.3d 1214 (10th Cir. 2002) 17

Center for Food Safety
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San Francisco, CA 94115
(415) 826-2770

Federal Statutes

5 U.S.C. § 702 12
5 U.S.C. § 704 12
5 U.S.C. § 706(2) 12, 14, 17, 20, 41
16 U.S.C. § 1531(b) 25
16 U.S.C. § 1536(a)(2) 25, 26
33 U.S.C. § 1503 18
42 U.S.C. §§ 4321 *et seq.* 33
42 U.S.C. § 4332(2)(C) 33, 35, 39
42 U.S.C. § 9111 18
43 U.S.C. § 1331(k)-(m) 15
43 U.S.C. § 1332(1) 17
43 U.S.C. § 1333(a) 15
43 U.S.C. § 1333(e) 14
43 U.S.C. § 1337(p)(1)(C) 20
Administrative Procedure Act ..... *passim*
Clean Water Act 21
Deepwater Port Act 18
Endangered Species Act ..... *passim*
ESA § 7(a)(2) 25, 32
National Environmental Policy Act ..... *passim*
Outer Continental Shelf Lands Act ..... *passim*
Rivers and Harbors Act ..... *passim*
Ocean Thermal Energy Conversion Act 18, 20

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

Rules

Federal Rule of Civil Procedure 56 ..... 1, 12

Regulations

33 C.F.R. § 320.4(a) 8, 21, 23
33 C.F.R. § 320.4(g) 16
33 C.F.R. § 330.1(b) 7
40 C.F.R. § 1501.9(e)(1)(ii) 38
40 C.F.R. § 1502.4(a) 33, 38
40 C.F.R. § 1508.1(g) 37
50 C.F.R. § 402.02 ..... 26, 27
50 C.F.R § 402.14 ..... *passim*

Constitutional Provisions

U.S. Const. Article IV, § 3, cl. 2 17

Other Authorities

47 Fed. Reg. 31,794, 31,798-31,800 (July 22, 1982) 21
81 Fed. Reg. 1762 (Jan. 13, 2016) 6
151 Cong. Rec. H2192-02 (2005) 20
AQUAA Act, H.R. 4013, 118th Cong. (2023) 5
Black's Law Dictionary (5th ed. 1979) 17
Exec. Order No. 13921, 3 C.F.R. § 344 (2020) 7
H.R. 2010, 110th Cong. §4(e) (2007) 6
H.R. Conf. Rep. 95-1474 (1978), 1978 U.S.C.C.A.N. 1674 16
H.R. Rep. No. 413, 83d Cong., 1st Sess., 3 (1953) 15
Keep Finfish Free Act of 2019, H.R. 2467, 116th Cong. (2019) 5

Center for Food Safety
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San Francisco, CA 94115
(415) 826-2770

Other Authorities (Cont'd) **Page(s)**

National Offshore Aquaculture Act of 2005, S. 1195, 109th Cong. (2005) 5

National Sustainable Offshore Aquaculture Act of 2011, H.R. 2373, 112th Cong. (2011) 5

S. Rep. No. 411, 83d Cong., 11 (1953) 16

Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 174-79 (2012) 15

U.C.C. § 2A-103(1)(j) 18

Center for Food Safety
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San Francisco, CA 94115
(415) 826-2770

GLOSSARY

APA	Administrative Procedure Act
CEQ	Council on Environmental Quality
DOI	Department of the Interior
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FONSI	Finding of No Significant Impact
FWS	U.S. Fish and Wildlife Service
MSA	Magnuson Stevens Act
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NWP	Nationwide Permit
OCS	Outer Continental Shelf
OCSLA	Outer Continental Shelf Lands Act
PCN	Pre-Construction Notice
RHA	Rivers and Harbors Act

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MOTION

Pursuant to Federal Rule of Civil Procedure 56, Plaintiffs Don't Cage Our Oceans, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Quinault Indian Nation, Los Angeles Waterkeeper, San Diego Coastkeeper, Santa Barbara Channelkeeper, Wild Fish Conservancy, Recirculating Farms Coalition, Food & Water Watch, and Center for Food Safety (Plaintiffs) move for an Order entering Summary Judgment in their favor, holding that the U.S. Army Corps of Engineers' (Corps or Defendants) approval of Nationwide Permit 56 (NWP 56) violates the Rivers and Harbors Act (RHA), Outer Continental Shelf Lands Act (OCSLA), Property Clause of the Constitution, National Environmental Policy Act (NEPA), Endangered Species Act (ESA), and Administrative Procedure Act (APA), and vacating the permit.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case is about a federal agency's misguided attempt to sail beyond its statutory authority: to, for the first time, throw open our nation's federal ocean waters to a newly minted industrial finfish aquaculture industry, without Congress passing a law giving it such authority. The Corps' NWP 56 allows industrial aquaculture operators to install cages, net pens, anchors, floats, buoys, and other similar structures in all federal waters over the Outer Continental Shelf (OCS) for one purpose: industrial aquaculture, also known as fish farming. It is the first time Defendants have issued an NWP for industrial finfish aquaculture development in federal waters.

The unprecedented decision is filled with holes. First and most fundamentally, Congress's decision not to invoke its constitutional authority to

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approve this new industry renders NWP 56 dead in the water. To be sure, numerous proposed Congressional bills from 2005 to the present *would* have authorized something like what Defendants are attempting, but crucially none passed and actually became law. Instead, Defendants decided to steer full steam ahead anyway based on only an Executive Order. But such executive branch documents are not *statutes*. And no federal law currently provides property rights for aquaculture on the federally controlled OCS, nor authorizes a regulatory permitting scheme for industrial aquaculture.

Next, even if Congress *had* authorized this novel industry, the permit issuance flounders upon several bedrock statutory mandates. Defendants violated the RHA because their own assessment indicates well more than the required merely minimal adverse impacts; the record evidence sinks Defendants' conclusion to the contrary. Defendants also violated the ESA—specifically Section 7, known as the ESA's "heart"—because they failed to ensure that their action would not jeopardize already endangered species. And finally, Defendants violated NEPA, our nation's overarching environmental charter, by failing to analyze and consider the profound environmental impacts of their unprecedented decision to open our oceans to a new industrial activity.

For any of these reasons alone, Defendants' issuance of NWP 56 was unlawful and must be vacated. Taken together they show a serious dereliction of duty by Defendants in their mission to protect federal waters. The Court should grant Plaintiffs' Motion for Summary Judgment and vacate NWP 56.

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FACTUAL BACKGROUND

I. INDUSTRIAL FINFISH AQUACULTURE.

Industrial aquaculture is controversial in the United States and abroad due to its plethora of well-known adverse environmental and intertwined socioeconomic consequences. It involves farming large numbers of fish inside net pens or cages in the open ocean, confining fish in mesh enclosures. NWP002510. The facilities' discharges cause numerous water quality concerns, including pollution from excess fish feed, dead fish, and fish feces, NWP010369, which kill aquatic life through low-oxygen "dead zones" and harmful algal blooms. NWP043505; NWP019759. Fish feed and antifoulants often contain heavy metals toxic to marine species. NWP010369.

The overcrowded net pens also breed diseases such as parasitic sea lice, bacterial infections, and viral infections. NWP043502-505; NWP019760; NWP048767. The unhealthy conditions necessitate the use of drugs and pesticides, NWP019761, toxic to aquatic life. *See* NWP043525-26; NWP043503. Sea lice alone costs wild salmon fisheries hundreds of millions of dollars annually, NWP043503, while disease caused by industrial aquaculture overall costs $6 billion annually. NWP019760.

Many of these chemicals also pose human health risks. For example, emamectin benzoate, used for sea lice, is a neurotoxin, toxic to humans, NWP043503, while formaldehyde, used to control fungus and parasites, is a known carcinogen. NWP043724; NWP043734. The prophylactic antibiotic use required by the confined conditions causes increased antibiotic resistance, reducing the efficacy of vital antibiotics needed to treat human infections. NWP043604; NWP043504 (World Health Organization considers the three most common aquaculture antibiotics essential). Waters around industrial aquaculture sites consistently reveal elevated levels of antimicrobial-resistant bacteria. NWP043604; NWP043525.

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Offshore aquaculture facilities are vulnerable to weather, which frequently results in fish escapes. NWP048831; NWP048348. Escapes due to wear and tear of netting, operational accidents, or biting of nets, are also considered inevitable, NWP048348, totaling several million escapes globally each year. NWP043501; NWP048348; NWP049180. For example, in 2017, hundreds of thousands of farmed Atlantic salmon escaped a net pen in Washington state waters, NWP043501; more than 100,000 were never recaptured. NWP043701.

Escapes adversely affect wild fish in a variety of ways, including predation, competition for food, habitat, and spawning areas, and interbreeding with wild populations. NWP019762; NWP043502; NWP048348; NWP049184-86. For example, escaped Atlantic salmon in Washington and British Columbia compete with wild Pacific stocks, NWP043492-93, NWP043705, and increasing numbers of Atlantic salmon are returning to West coast rivers. NWP043700-703. Reliance on the sterility of farmed fish to prevent interbreeding is never 100% guaranteed, NWP043493; thus, the "long-term consequences of continued farmed [fish] escapes and subsequent interbreeding … include a loss of genetic diversity." NWP043705. Studies show that when farmed and wild fish interbreed their offspring have diminished survival skills and reduced fitness. NWP019762-63.

Industrial aquaculture also impacts marine mammals and other wildlife. Aquaculture facilities require a complex system of anchors, chains, cables, and buoys, NWP002436, resulting in entanglements as well as noise pollution. NWP010330; NWP035281; NWP019682; NWP011123; NWP043597. This risk is increased by aquaculture facilities' propensity to attract fish and other wildlife. NWP047864; NWP048820; NWP019763.

Finally, industrial aquaculture causes significant socioeconomic costs. Traditional fishing communities rightly have concerns, knowing aquaculture has

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decimated fishing industries in other parts of the world, NWP043333-38, stating this industry is "incompatible with the sustainable commercial fishing practices embraced by our nation for generations and contravenes our vision for environmentally sound management of our oceans." NWP043333. Industrial aquaculture harms traditional fishing through degrading water quality and harming wild fish populations. NWP019771; NWP043333-34. And industrial aquaculture floods the market with cheap, low-quality seafood, reducing the price for wild and sustainable seafood. NWP043333; NWP019775.

In response to these now well-established impacts, some governments have recently prohibited or significantly curtailed aquaculture in their waters, including Denmark, British Columbia, and Washington state. NWP043547; NWP043546; Am. Compl. ¶ 136, ECF No. 14.

II. THE PUSH FOR INDUSTRIAL AQUACULTURE IN THE U.S.

Despite these impacts and the response, the U.S. has continued to attempt to establish offshore aquaculture. Beginning in 2005, Congress, on at least seven occasions, has introduced legislation that would have authorized offshore aquaculture operations in federal waters.[1] Specifically, these bills would have

[1] *See* National Offshore Aquaculture Act of 2005, S. 1195, 109th Cong. (2005) (legislation's purpose was "[t]o provide the necessary authority to the Secretary of Commerce for the establishment and implementation of a regulatory system for offshore aquaculture in the United States Exclusive Economic Zone"); National Offshore Aquaculture Act of 2007, H.R. 2010, 110th Cong. (2007) (same); National Sustainable Offshore Aquaculture Act of 2011, H.R. 2373, 112th Cong. (2011) (legislation's purpose was "[t]o establish a regulatory system and research program for sustainable offshore aquaculture in the United States exclusive economic zone"); Advancing the Quality and Understanding of American Aquaculture (AQUAA) Act, S. 3100/H.R. 6258, 117th Cong. (2020); Keep Finfish Free Act of 2019, H.R. 2467, 116th Cong. (2019); AQUAA Act. S. 1861, 118th Cong. (2023) (providing permitting scheme for aquaculture on OCS and property rights to lease); AQUAA Act, H.R. 4013, 118th Cong. (2023) (same). Several bills would have also provided DOI with

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authorized the Department of the Interior (DOI) to permit industrial aquaculture on the OCS. Yet *none* of these bills have passed.

This is not the first agency effort to circumnavigate the absence of Congressional authorization (just the first time in this manner). In 2016, the National Marine Fisheries Service (NMFS) purported to authorize a new aquaculture industry in the federal waters of the Gulf of Mexico pursuant to its "fishing" authority under the Magnuson Stevens Act (MSA). *See* Fisheries of the Caribbean, Gulf, and South Atlantic; Aquaculture, 81 Fed. Reg. 1762 (Jan. 13, 2016). In response, conservation and fishing groups—including several of the nonprofits and counsel as here—took the wind out of NMFS's sails by challenging the Fishery Management Plan, claiming, among other legal violations, that NMFS lacked authority to permit aquaculture. The MSA's text and legislative history showed aquaculture is very different than "fishing," the actions over which NMFS has MSA jurisdiction, and consequently the aquaculture regulations were *ultra vires*. The district court agreed that the MSA does not authorize aquaculture permitting and vacated the scheme. *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 341 F.Supp.3d 632, 642 (E.D. La. 2018) (The Department of Commerce "acted outside of its statutory authority in shoehorning an entire regulatory scheme" into its "fishing" authority). As to remedy, the district court vacated the permitting scheme, and the Fifth Circuit affirmed. *Gulf Fishermens Ass'n v. NMFS*, 968 F.3d 454 (5th Cir. 2020).

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authority to regulate aquaculture on the OCS to protect the OCS resources and public health. *See, e.g.*, H.R. 2010, 110th Cong. §4(e) (2007); S. 1609, 110th Cong. §4(e)(6) (2007); S. 1195, 109th Cong. §4(h) (2005).

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III. THE EXECUTIVE ORDER.

Nevertheless, in May 2020—still without any aquaculture-authorizing statute for a rutter and now without its MSA-based vessel—the Trump Administration chose to kickstart its offshore efforts anyway in an Executive Order titled, "Promoting American Seafood Competitiveness and Economic Growth." *See* Exec. Order No. 13921, 3 C.F.R. § 344 (2020). The Order sought to streamline permitting for offshore industrial aquaculture under the guise of addressing pandemic-related food insecurity. Specifically, the Order required that within ninety days Defendants develop and propose for public comment this NWP. The Order also provided some hints of where the facilities authorized by NWP 56 may be located, mandating that the Secretary of Commerce identify "Aquaculture Opportunity Areas," (AOAs): geographic areas suitable for aquaculture.[2]

IV. NWP 56.

Despite broad public opposition in the comments, Defendants published the final rule issuing NWP 56 in January 2021, and despite Congress's refusal to pass authorizing legislation. NWP000003-137. Specifically, NWP 56 greenlights "[s]tructures in marine and estuarine waters, including structures anchored to the seabed in waters overlaying the outer continental shelf, for finfish aquaculture activities." NWP002436 (including "cages, net pens, anchors, floats, buoys, and other similar structures").

Nationwide permits like NWP 56 are an alternative to the individual Corps permitting process. 33 C.F.R. § 330.1(b). If a category of "similar" activities will "cause only minimal individual and cumulative environmental impacts,"

[2] In 2020, NMFS designated the Gulf of Mexico and the Southern California Bight as AOAs. *See* Stevenson Decl., Ex. A. The agency then released atlases showing specific locations in each region. *See id.*, Exs. B & C.

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Defendants may issue an NWP. *Id.* § 322.2(f). Defendants must base their decision on "an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest." *Id.* § 320.4(a)(1). This public interest review must include cumulative effects on conservation, economics, aesthetics, general environmental concerns, fish and wildlife values, navigation, recreation, water quality, safety, food production, considerations of property ownership, and public welfare. *Id.* And Defendants must comply with NEPA and the ESA when issuing an NWP. *See id.* § 330.4(b)(2), (f).

A. Defendants' Narrow Assessment.

However, here Defendants undertook overly narrow evaluations, leaving unassessed the most critical impacts of the novel industrial aquaculture industry. First, Defendants cabined their assessment to impacts of the *structures themselves*, not the facilities' operation, due to their purported lack of authority to regulate industrial aquaculture. NWP002481 ("[T]he Corps does not have to conduct detailed analyses of … operational activities" because it lacks authority). Specifically, Defendants refused to analyze impacts of antibiotics, disease transfer, and escaped fish. NWP002495 ("The Corps does not have the authority to control the use of antibiotics."); *id.* ("[T]he Corps does not have the authority to regulate potential pathogen transfers between cultivated finfish and wild finfish stocks."); NWP002448 ("The Corps does not have legal authority to regulate the potential escapement of cultivated finfish."). But at the same time Defendants inconsistently assured the public that district engineers—who of course have the same authority—*will* mitigate impacts of aquaculture operation below the minimal threshold on a regional level: "Division and district engineers have the authority to … add conditions to the NWP either on a case-by-case or regional basis … to ensure that

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the cumulative adverse environmental effects of these *activities* are no more than minimal." NWP002478 (emphasis added); *see also* NWP002494.

Second, Defendants summarily concluded NWP 56 would not have significant cumulative impacts on the environment because district engineers will either revoke or modify permits they determine will result in more than minimal cumulative impacts. NWP002478; NWP002484. Despite recognizing that "repetitive disturbances at a single site over time" and "multiple activities occurring in a geographic area over time," NWP002477, can have cumulative effects, Defendants provided no additional data. Instead, Defendants attempted to stem the tide by assuring that district engineers will complete cumulative impacts assessments in the future. NWP002484 (district engineers will complete assessments and "modify, suspend, or revoke NWP authorizations" when the NWP's use causes more than minimal impacts).

B. Impacts to Wildlife and Water Quality Acknowledged by Defendants.

The impacts Defendants *did* acknowledge include a myriad of potential harms to wildlife, water quality, and public health. NWP002481-82; NWP002492-95; NWP002497-505. First, contrary to its Finding of No Significant Impact (FONSI) under NEPA and "no effect" ESA determination, Defendants describe aquaculture as a "*high risk activity* that could potentially have *substantial adverse ecological and socioeconomic outcomes*." NWP002494 (emphases added). Regarding wildlife, Defendants confirmed that marine mammals, birds, and sea turtles may become entangled in net pens or lines, NWP002505, and that facilities "may impede bird feeding activity and trap birds." NWP002502. And regarding operation, Defendants described "indirect effects on fish and wildlife," NWP002504, due to facilities attracting wild fish and rendering them more vulnerable to capture, NWP002504, as well as causing other modified behavior. NWP002504-505. Specific

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to wild fish, aquaculture harms populations "where fish meal derived from the harvesting of wild fish stocks is used to feed the cultivated finfish." NWP002503. Aquaculture also affects marine species through noise pollution, including from acoustic deterrent and harassment devices used to keep mammals away from the net pens. NWP002504. And Defendants also admitted that industrial aquaculture "may alter the habitat characteristics of tidal waters," which "provide[] food and habitat for many species." NWP002502.

Second, Defendants confirmed significant impacts on water quality. Discharges of fish feed degrades water quality, NWP002481, as fish feeds and feces settle on the seafloor faster than they break down, lowering oxygen levels. NWP002499, NWP002503. These discharges also release heavy metals, NWP002509, and contribute to algal blooms. NWP002495. Additionally, pesticide and chemical use affects non-target species, leading to mortality, non-lethal toxicity, or accumulation in the food web. NWP002500-501.

Third, Defendants briefly described potential adverse effects of fish escapes, while admitting they are "not completely preventable." NWP002493. Specifically, escaped fish adversely affect "the mortality and growth of wild individuals of finfish," as they compete, spread disease, interbreed, NWP002503, and destroy habitat. NWP002493. Despite these impacts, Defendants made a FONSI under NEPA, NWP002518, and an RHA minimal impacts determination. NWP002519.

Additionally, Defendants' 2021 Biological Assessment listed *hundreds* of endangered species obtained from the wildlife agencies but did not evaluate potential effects of NWP 56 on any of those species or their critical habitats. NWP003854-937; NWP003938-4045. In its comments the Fish and Wildlife Service (FWS) told Defendants that "consultation on proposed development or changes to the USACE's NWP program is required under the ESA" and that its proposal "will

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

directly and indirectly impair recovery of listed species and may threaten additional imperiled species such that their listing may be warranted." NWP009604. Despite this clear charge and Defendants' acknowledgement of a wide array of potential environmental effects, including to ESA-protected species, Defendants concluded that their issuance of NWP 56 has "no effect" on those protected species or their habitat, and thus did not consult with the expert wildlife agencies. NWP002514; NWP003609-610.

C. General Conditions.

Defendants reached their conclusions through general conditions, conditions which punt the duties to mitigate critical impacts to district engineers instead of mitigating *before* issuing the NWP. First, general condition 32 requires applicants to submit a pre-construction notice (PCN) to district engineers before constructing. NWP000133-34; NWP002480. If district engineers determine that a project does not comply with the NWP's terms and conditions, they must deny verification. But if the district engineer simply declines to respond to the PCN within 45 days, construction may go forward without further authorization. NWP002444.[3]

Second, Defendants relied on general condition 18 to erase their ESA duties. This condition requires permittees to submit PCNs for any proposed activity *they* believe might affect ESA-protected or designated critical habitat. NWP000128-29; NWP002514-15. Specifically, Defendants reasoned that this condition rendered their "no effect" determination acceptable because it would require "activity-specific" ESA consultations if a facility "may affect" ESA-protected species. NWP003610. In so doing, Defendants *delegated* ESA decisions to non-federal permittees, as PCNs need only include information about ESA-protected species

[3] The only exception is if the permittee was required to notify Defendants that ESA-protected species or designated critical habitat might be affected. NWP002444.

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

when permittees first make their own "might affect" determination. *See* NWP000133-34.

And finally, Defendants relied on general condition 23 to minimize all the adverse impacts to a level below the minimal threshold. NWP000130-132. Under it, district engineers determine on a case-by-case basis whether specific activities authorized by NWP 56 should require mitigation to ensure only minimal individual and cumulative adverse environmental effects. *Id*. District engineers can require the project proponent to submit a mitigation plan if, after reviewing a PCN, the district engineer determines mitigation is necessary to ensure the activity will cause no more than minimal individual and cumulative adverse environmental effects. NWP000130-31.

STANDARD OF REVIEW

Summary judgment is appropriate where there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56.

Issuance of an NWP is a final agency action under the APA, which provides the judicial review framework for agency action and requires the court to "hold unlawful and set aside" any agency action that it concludes is (1) "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or (2) "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or (3) adopted "without observance of procedure required by law." 5 U.S.C. §§ 702, 704, 706(2).[4]

[4] Plaintiff member organizations and their members have standing because their members' professional, cultural, recreational, aesthetic, economic, and personal interests in aquatic and wildlife resources, including federally protected species, are injured and will continue to be injured, by the Corps' *ultra vires* authorization of NWP 56 and failure to adequately analyze and take into account NWP 56's adverse

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

An action is "arbitrary and capricious" if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Courts must also evaluate whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* (internal quotation marks omitted).[5]

ARGUMENT

Defendants' rush to issue NWP 56 in the absence of statutory authority represents another attempt to sail close to the wind and create an industrial aquaculture industry without authority from Congress, and without even adhering to the safety net of federal laws intended to protect the environment and wildlife. First, Defendants lack both the property rights and statutory authority to issue NWP 56 and open U.S. waters to industrial aquaculture for the first time. And second, even if they had the proper authority, the Corps failed in its duty under the RHA, NEPA, and the ESA to evaluate reasonably foreseeable environmental

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impacts under numerous environmental statutes. *See* Honn Decl., Burke Decl., Arnesen Decl., Garland Decl., Kasserman Decl., Lininger Decl., Voss Decl., James Decl., Darmiento Decl., Diaz Decl., Doohan Decl., McMillan Decl., Soverel Decl., Quill Decl., Warner Decl., Telleen-Lawton Decl., Helverson Decl., Capoeman Decl., Morton Decl., Mitchell Decl., Spain Decl., Musegaas Decl., Reznik Decl., Cufone Decl., Jones Decl., Kimbrell Decl. (filed concurrently).

[5] For ease of readability, the relevant statutory background section for each of the six statutory frameworks at issue is provided at the beginning of the respective argument section rather than in a standalone section.

Center for Food Safety
303 Sacramento St., 2nd Floor
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(415) 826-2770

impacts. Instead, Defendants blindly relied on future regional conditions to protect water quality, wildlife, and ESA-protected species, without any detail as to what those conditions will entail and their efficacy. Because the Corps failed to support their approval of NWP 56, the agency violated these foundational environmental laws and the APA, warranting vacatur.

I. NWP 56 IS *ULTRA VIRES* AND MUST BE VACATED.

Defendants possess no authority to permit use of the OCS or its resources for industrial aquaculture. The reason is plain: Congress alone controls federal property and has not authorized aquaculture on the OCS. It is undisputed that any activity Defendants authorize cannot move forward without both a permit *and* property rights to engage in the activity on federal property. But here Defendants have neither: Nothing in OCSLA authorizes RHA permits for aquaculture, and no federal statute provides the requisite property rights for aquaculture on the OCS. This alone justifies vacatur, as the APA requires this Court to set aside any agency action "in excess of statutory jurisdiction." 5 U.S.C. § 706(2)(C).

A. OCSLA Limits RHA Section 10 Permits to Structures Constructed for Energy Purposes.

The first step and lodestar in statutory interpretation is always the statute's plain text. If the "express terms of a statute give us one answer," that answer does not buckle to "extratextual considerations." *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1737 (2020). Here, there is simply no indication in OCSLA that Congress intended for Defendants to issue RHA Section 10 permits for *any* possible purpose, regardless of whether Congress has authorized it.

To start, OCSLA Section 1333(e) expands Defendants' authority to "prevent obstruction to navigation in the navigable waters of the United States" under the RHA to "the artificial islands, installations, and other devices *referred to in subsection (a)*." 43 U.S.C. § 1333(e) (emphasis added). The relevant provision of

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(415) 826-2770

subsection (a)—which Defendants cited for their purported authority here—provides authority to permit "installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon *for the purpose of exploring for, developing, or producing resources, including non-mineral energy resources*." 43 U.S.C. § 1333(a) (emphasis added); NWP002479.[6] Defendants' decision to permit industrial aquaculture as "installations and other devices," overlooks the second part: "which may be erected thereon for the purpose of exploring for, developing, or producing resources, including non-mineral energy resources." *Id.* § 1333(a). This second clause modifies and qualifies, by definition, the installations and devices listed in subsection 1333(e), authorizing installations only for *energy purposes*.[7] If it did not, Congress would not have included it. A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 174-79 (2012) (surplusage canon of statutory interpretation).

Legislative history bolsters this conclusion. Congress explicitly enacted OCSLA seventy years ago to provide "a leasing policy for the purpose of encouraging the discovery and development of the oil potential of the Continental Shelf." H.R. Rep. No. 413, 83d Cong., 1st Sess., 3 (1953). In 1953, Congress had not envisioned other uses, such as renewable energy or, in this case, aquaculture. Thus, in addressing Section 1333 in 1953, the Senate Report states:

> [OCSLA] extends original jurisdiction of the Federal district court to cases and controversies arising out of operations on the outer shelf and to *artificial islands and the fixed structures* thereon, including

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[6] Each definition of "exploring for, developing, or producing resources" references mineral energy resources. 43 §§ U.S.C. 1331(k)-(m). And the statute defines "minerals" as those "*which are authorized by an Act of Congress*" to be produced from public lands. *Id.* § 1331(q)(emphasis added). It follows then that Congress must authorize the finfish to be produced from the OCS.

[7] *Which*, Cambridge (2023) (a pronoun "used in … statements having a limited number of possibilities").

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

> pipelines, *used in the development of the mineral resources of the seabed and subsoil* … [T]he responsibility which the Secretary of the Army now has with respect to obstructions to navigation in the navigable waters of the United States is extended to *such* artificial islands and fixed structures.

S. Rep. No. 411, 83d Cong., 11 (1953) (emphases added). In other words, Congress intended to extend Defendants' RHA permitting authority only to "*such* artificial islands and fixed structures" that are "used in the development of the *mineral* resources." *Id.* (emphases added).[8]

B. NWP 56 Is Not Sufficient on Its Own to Authorize Aquaculture on the OCS.

Even if this Court disagrees that OCSLA's plain language limits RHA permits to energy-related structures, Defendants' authorization remains unconstitutional because of Defendants' lack of property rights. While Defendants may claim this is not required until some future action, in reality, the issuance of NWP 56 and authorization for construction are pieces of the same agency action, inextricably intertwined: NWP 56 allows for construction to automatically move forward,[9] despite no property right from the RHA, OCSLA, nor from any statute. 33 C.F.R. § 320.4(g) (RHA Section 10 permits "*[do] not convey a property right*.") (emphasis added). Defendants know this, admitting aquaculture operators may require a lease from DOI. NWP002512. Thus, Defendants put the cart before the horse: they allowed an activity Congress has not authorized, "contrary to

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[8] Congress's 1978 amendment, which added authority over temporary structures, did not change this: It left untouched the *scope* of the Corps' existing authority, "but merely conform[ed] the description of the types of structures no matter what their purpose, to the types of structures listed in subsection (a)," H.R. Conf. Rep. 95-1474, at 82 (1978), 1978 U.S.C.C.A.N. 1674. In other words, OCSLA now provides jurisdiction over all structures for energy purposes, no matter the structure's type, but the amendment did not expand the scope beyond those for energy purposes.

[9] Applicants may begin construction 45 days after they submit PCNs with no further approval required. NWP002444.

Center for Food Safety
303 Sacramento St., 2nd Floor
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(415) 826-2770

constitutional right, power, privilege, or immunity," in violation of the APA. 5 U.S.C. § 706(2).

And undoubtedly this property right must come from *Congress*. Article IV of the Constitution vests Congress with "the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2; *Ala. v. Tex.*, 347 U.S. 272, 273 (1954) ("The power of Congress to dispose of any kind of property belonging to the United States is 'vested in Congress without limitation."). Courts have long displayed a tight-fisted attitude toward this authority, unwilling to resolve ambiguities in favor of federal land disposal without Congress's explicit permission. *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116 (1957) ("[N]othing passes except what is conveyed in clear language."); *Utah Power and Light v. United States*, 243 U.S. 389, 404 (1917) ("[T]he power of Congress is exclusive, and that only through its exercise in some form can rights in lands belonging to the United States be acquired.").

Further, Congress's explicit statutory authorization is required not only for leases of federal land, but also for specific *uses*. *United States v. Locke*, 471 U.S. 84, 104-05 (1985) ("[A]s owner of the underlying fee title to the public domain, [the United States] maintains broad powers over the terms and conditions upon which the public lands can be *used*, leased, and acquired.") (emphasis added); *Wyo. v. United States*, 279 F.3d 1214, 1227 (10th Cir. 2002) (Congress has "full power … to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them."). Congress even echoes this authority in OCSLA, declaring the OCS "subject to its … control and power of disposition." 43 U.S.C. § 1332(1).[10]

[10] Black's Law Dictionary (5th ed. 1979) (defining "disposition" as the "*transferring to the care or possession of another*. The parting with, alienation of, or *giving up* property.") (emphases added).

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

1. OCSLA Does Not Grant Property Rights for Aquaculture.

No such explicit property rights exist here. To the contrary, Defendants' attempt to shoehorn a new industrial aquaculture industry into a 70-year old statute is made all the more stark by Congress's concurrent failed attempts to provide those very property rights in new aquaculture-specific legislation, *see supra*, as well as the prior failed attempt to similarly shoehorn it into "fishing" authority under the MSA. *See Gulf Fishermens Ass'n*, 968 F.3d at 456-468.

As for property rights explicitly granted in OCSLA, Congress would have provided leasing authority, *i.e.* a transfer of property rights,[11] if it intended aquaculture on the OCS. But OCSLA instead limits leasing authority to two narrow categories: First, OCSLA allows leases for activities explicitly authorized in OCSLA, the Deepwater Port Act of 1974, the Ocean Thermal Energy Conversion Act of 1980, or "other applicable law." *Id.* § 1337(p)(1). None of these statutes mention aquaculture and, if anything, provide examples of the express Congressional authorization lacking here. Specifically, the Deepwater Port Act authorizes the construction of deepwater ports by requiring a license from the Secretary of Transportation, 33 U.S.C. § 1503; the Ocean Thermal Energy Conversion Act authorizes large thermal energy plants by requiring a license from NMFS, 42 U.S.C. § 9111; and OCSLA authorizes oil and gas leases, *id.* § 1337(a), sulphur leases, *id.* §§ 1337(i), (j), and other mineral leases, *id.* § 1337(k). In no way could Defendants interpret these statutes to grant property rights for aquaculture activities.

Second, OCSLA provides explicit authorization to issue leases for a handful of specific activities, including those that support the: (1) development, extraction,

[11] A lease is "a transfer of the right to possession and use of goods for a term in return for consideration." U.C.C. § 2A-103(1)(j).

Center for Food Safety
303 Sacramento St., 2nd Floor
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(415) 826-2770

and transportation of oil or natural gas; (2) development and production of energy from sources other than oil and gas; (3) "use, for energy-related purposes or for other authorized marine-related purposes, facilities currently or previously used for activities authorized under" OCSLA; "or" (4) "provide for, support, or are directly related to the injection of a carbon dioxide stream into sub-seabed geologic formations for the purpose of long-term carbon sequestration." *Id.* §§ 1337 (p)(1)(A-E). Again, none of these purposes come close to applying here.

2. Legislative History Reveals Congress Must Explicitly Authorize Activities on the OCS.

Legislative history further confirms that Congress only authorized property rights for purposes listed in OCSLA. In 2005, Congress directly responded to prior litigation regarding property rights for renewable energy by amending OCSLA to explicitly authorize DOI to issue leases, easements, and rights-of-way for renewable energy projects on the OCS. There, Cape Wind Associates, LLC (Cape Wind) submitted an RHA Section 10 permit application to Defendants to construct a temporary data tower on the OCS intended to assist in determining the feasibility of locating an offshore wind farm in the area. *All. to Prot. Nantucket Sound v. U.S. Dep't of the Army*, 398 F.3d 105, 107 (1st Cir. 2005). At the time, as is true here, no statute authorized the development of offshore wind resources. Accordingly, environmental groups challenged the permit issuance. *Id.* at 108.

Although that court held that the data tower permit was not arbitrary and capricious due to its temporary nature, it posed the then-unanswered question of "[w]hether, and under what circumstances, additional authorization is necessary before a developer infringes on the federal government's rights in the OCS." *All.,* 398 F.3d at 114. And Congress immediately answered: It amended OCSLA that same year to "give the Department of Interior permitting authority for 'alternative'

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

energy projects, such as wind projects, situated on the Outer Continental Shelf." 151 Cong. Rec. H2192-02, H2209 (2005*); Id.* ¶¶ H2180-01, H2186 (2005) (same). Specifically, Congress's post-Cape Wind amendment authorized DOI to issue leases, easements, and rights-of-way for "activities not otherwise authorized [by OCSLA], the Ocean Thermal Energy Conversion Act of 1980, or other applicable law," as long as the activities support the development and production of energy from sources other than oil and gas. 43 U.S.C. § 1337(p)(1)(C). In doing so Congress confirmed its express delegation of authority remains a *sine qua non* before executive agencies can transfer property rights for novel uses of the OCS. That is exactly what Defendants needed from Congress here, but *do not have*.

In sum, without property rights, Defendants' interpretation that they nevertheless have authority to issue NWP 56 leads to unconstitutional results. Their interpretation essentially allows the agency to (1) issue permits for structures for aquaculture but (2) that cannot actually be built or operated for aquaculture without additional Congressional authorization. It's an absurd result. And surely this is not what Congress intended in the OCS. Defendants' refusal to toe the line Congress set is "contrary to constitutional right, power, privilege, or immunity" in violation of the APA and must be vacated. 5 U.S.C. § 706(2).

II. NWP 56 VIOLATES THE RHA AND APA BECAUSE ITS ADVERSE EFFECTS ARE MORE THAN MINIMAL.

NWP 56 also violates the RHA and APA because Defendants failed to adequately assess numerous impacts and mitigation measures before issuing their minimal impacts determination. Namely, Defendants (1) improperly discounted impacts based on their purported lack of authority, (2) failed to complete a cumulative impacts assessment, and (3) relied on unspecified, post-issuance conditions (or mitigation measures) to reduce the impacts they failed to assess. In doing so, Defendants failed to document each potential impact of this admittedly

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

"*high risk activity* that could potentially have *substantial adverse ecological and socioeconomic outcomes*." NWP002494 (emphases added); *Ky. Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 412 (6th Cir. 2013) (holding NWP 21 deficient for lack of compliance with documentation requirement).[12] And in delaying cumulative impact review and mitigation measures, Defendants improperly relied on future evaluations at the *regional* level, rendering their *nationwide* determination arbitrary and capricious.

A. Defendants Violated the RHA by Failing to Evaluate Critical Impacts Due to Their Purported Lack of Authority over Facilities' Operation.

Regarding the scope of public interest review, Defendants' repeated excuse for failing to evaluate critical impacts is their alleged lack of authority. NWP002481; *see also supra* pp.8-9. This excuse does not float: The regulations state Defendants must base their determination on "an evaluation of the probable impacts, including cumulative impacts, of the proposed activity *and its intended use* on the public interest." 33 C.F.R. § 320.4(a)(1) (emphasis added). This Court has already held that Defendants cannot refuse to assess impacts from operations just because another agency regulates them. *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps. of Eng'rs*, 417 F.Supp.3d 1354, 1364 (W.D. Wash. 2019) (*Coalition*) (holding that Defendants must assess pesticide use under NWP 48 because "[e]ven if the Corps does not have jurisdiction to permit or prohibit the use

[12] Case law in this section refers to NWPs issued under the Clean Water Act (CWA), but the same reasoning applies. The Corps combined the CWA and the RHA nationwide permit regulations into Part 330 in 1982. *See* Interim Final Rule for Regulatory Programs of the Corps of Engineers, 47 Fed. Reg. 31,794, 31,798-31,800 (July 22, 1982); *United States v. Cumberland Farms of Conn., Inc.*, 647 F.Supp. 1166, 1179 (D. Mass. 1986).

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

of pesticides, it is obligated to consider … 'reasonably foreseeable future actions *regardless of what agency … undertakes such other actions.*'") (emphasis added) (citation omitted). Defendants know this, as they elsewhere repeatedly claim that their district engineers may impose mitigation measures to address impacts from *operation*, not only structure placement. NWP002492-93; NWP002497; NWP002494. Defendants must therefore evaluate "the probable impacts" not only of aquaculture facility construction, but also operation, including antibiotic use, NWP002495, disease transfer, NWP002494-95, and fish escapes, NWP002448, *see supra* pp.8-9 (refusing to assess due to lack of authority), whether another agency also has authority or not.

B. Defendants Unlawfully Punted Cumulative Impacts Assessment and Mitigation to District Engineers and Provided No Support.

And for the impacts Defendants did admit they have authority to address,[13] Defendants unlawfully punted both cumulative assessment *and* mitigation to district engineers. That choice is undercut by the strong current of both precedent and Defendants' own regulations. Courts, including this one, have *repeatedly* held "the Corps may not rely solely on post-issuance procedures to make its pre-issuance minimal impact determinations." *Coal.*, 417 F.Supp.3d at 1367; *Ky. Riverkeeper*, 714 F.3d at 412 (holding Defendants' conclusory mere-listing of "post-issuance mechanisms do not explain how the Corps arrived at its *preissuance* minimal cumulative-impact findings.") (emphasis in original); *Ohio Valley Env't Coal. v. Bulen*, 429 F.3d 493, 502 (4th Cir. 2005) ("We would have substantial doubts about the Corps' ability to issue a nationwide permit that relied solely on post-issuance,

[13] Numerous individual impacts Defendants do assess cut directly against the minimal impacts determination. *See supra* p.8 (harms to wildlife); *supra* pp.8-9 (impacts on water quality).

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

case-by-case determinations of minimal impact, with no general pre-issuance determinations."). And regulations provide that Defendants must document impact assessments and mitigation measures to support their determination. 33 C.F.R. § 320.4(a). As a result, Defendants' cursory cumulative impacts analysis cannot support NWP 56.

First, regarding the cumulative impacts assessment itself, Defendants made identical mistakes they made in *Coalition*. Namely, they again excused themselves from a nationwide assessment by simply stating, "[T]he cumulative impacts of this NWP are the product of how many times this NWP is used," without any further quantitative data. NWP002477; *cf. Coal.*, 417 F.Supp.3d at 1366 (The Corps cannot provide quantitative data regarding cumulative impacts beyond "the estimated number of times the permit will be used."). And here, as there, Defendants relied solely on the district engineers to assess cumulative impacts on a project-by-project basis in the future. NWP002478; NWP002484 (stating district engineers will conduct more detailed assessments); *cf. Coal.*, 417 F.Supp.3d at 1366-67.

Both excuses fail to accomplish what the RHA requires: a *nationwide* cumulative impacts assessment *before* issuing an NWP. Defendants' mere prediction of minimal cumulative impacts without any quantitative data cannot support their determination. *Coal.*, 417 F.Supp.3d at 1367. And even if post-issuance cumulative impacts assessments were acceptable, these regional determinations provide no information about the *nationwide* cumulative impacts. *Ohio Valley Env't Coal. v. Hurst*, 604 F.Supp.2d 860, 895 (S.D.W. Va. 2009) ("Deferred determination of [NWP 56's] cumulative impacts on a regional or watershed basis or for an individually authorized activity cannot compensate for the absence of a nationwide cumulative impacts determination."). For example, the risks presented to marine mammals cannot be properly evaluated or mitigated

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

when Defendants fail to assess cumulative impacts of projects that could take place anywhere on the OCS and could have any number of operational components, affecting migration routes.

Second, Defendants then abdicated their duty to actually *document* the mitigation measures they claim will minimize any cumulative impacts district engineers eventually document. As in *Coalition*, Defendants instead punted their duty to district engineers. *Coal.,* 417 F.Supp.3d at 1366 (PCNs "provid[e] the district engineer with an opportunity to review those activities and assess potential impacts on fish and wildlife values" in the future to ensure minimal impacts) (citation omitted); NWP002502-03 (same quote with slight alteration); *see also* NWP002477 ("Division and district engineers have the authority to … require mitigation measures to ensure that the cumulative adverse environmental effects of these activities are no more than minimal."); *see, e.g.,* NWP002494 (punting the duty to mitigate "high risk" fish escapes with "substantial adverse" outcomes to district engineers). Essentially, Defendants again opted to rely solely on district engineers to assess and mitigate cumulative impacts in the future.

This is the same arbitrary and capricious decision making this Court, and others, have squarely rejected. As in *Coalition*, Defendants' "entirely conclusory" minimal cumulative impact determinations and the regional conditions they rely on did not then exist. *Coal.,* 417 F.Supp.3d at 1366. Assessments and mitigation measures that are not described—much less supported with documentation and data—cannot support that an NWP will have only minimal cumulative impacts. *Coal.*, 417 F.Supp.3d at 1677; *Ohio Valley Env't Coal.*, 604 F.Supp.2d at 884, 903 (vacating and remanding NWP 21 for failure to provide rational explanation of mitigation measures).

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

III. NWP 56 VIOLATES THE ENDANGERED SPECIES ACT

Defendants' "no effect" ESA determination and issuance of NWP 56 are also arbitrary and capricious, and contrary to law, in violation of the ESA and APA for three main reasons. First, NWP 56 is a programmatic agency action that "may affect" threatened and endangered species, easily exceeding the low threshold necessitating ESA consultation. Second, Defendants unlawfully relied on later, site-specific project decisions in an attempt to circumvent their duty to consult programmatically on NWP 56. And third, because the Corps *itself* has a duty to determine whether any actions it authorizes require ESA consultation, its reliance on non-federal entities to make those initial determinations is an improper delegation of Defendants' duties.

A. ESA Standards and the Section 7 Consultation Process.

The ESA is "the most comprehensive legislation of 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, 185 (1978). The statute's purpose is to conserve threatened and endangered species and protect the ecosystems upon which those species depend. 16 U.S.C. § 1531(b). In all ESA 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).

The "heart of the ESA" is its consultation requirement at Section 7(a)(2), *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011), which requires federal agencies to "insure" any action "authorized, funded, or carried out" by the agency "is not likely to jeopardize the continued existence of any endangered or threatened species or result in the adverse modification of [critical] habitat." 16

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

U.S.C. § 1536(a)(2). The consultation process is integral to "ensur[ing]" the ESA's substantive protections. *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985).

As the "action agency," the Corps must determine "at the earliest possible time" if a proposed action, like the challenged NWP approval here, "may affect" any listed species or designated critical habitat. 50 C.F.R § 402.14(a). The "effects of the action" considered include "all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action" which may occur later and include consequences outside of the immediate action area. 50 C.F.R. § 402.02 (definition of "effects of the action"); *id.* § 402.17. Importantly, 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).

When an action agency makes a "may affect" determination, it must enter consultation with the expert wildlife agencies—FWS (for terrestrial and freshwater species) and NMFS (for marine and anadromous species) (collectively, wildlife agencies). 50 C.F.R. § 402.14(a); *id.* § 17.11; *id.* § 223.102; *id.* § 224.101. This consultation concludes with the wildlife agency's issuance of a biological opinion (BiOp) determining if the action will jeopardize listed species or adversely modify designated critical habitat. 16 U.S.C. § 1536(b)(3); 50 C.F.R. § 402.14(g)-(h). An agency is only relieved of its obligation to consult if an action will have absolutely "no effect" on listed species or critical habitat. *Karuk Tribe*, 681 F.3d at 1027.

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

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303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

consultation"). A programmatic action, such as Defendants' issuance of NWP 56, "approves a framework for the development of future action(s) that are authorized, funded, or carried out at a later time," 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"). Any later project-specific consultation "does not relieve the Federal agency of the requirements for considering the effects of the action or actions as a whole." *Id.* § 402.14(c)(4).

The wildlife agencies specifically named Defendants' NWP program as an example of a federal program subject to such programmatic consultation when issuing 2015 regulations defining programmatic consultations. NWP024828-29 (explaining that programmatic consultation "allows for a broad-scale examination" of the potential impacts of a program "that is not as readily conducted" through subsequent project-specific consultation); NWP019877 (2019 regulations, reiterating similarly).

B. NWP 56 Easily Surpasses the Low "May Affect" Threshold Triggering Consultation.

Despite Defendants' recognition of the potential for numerous impacts from activities authorized by NWP 56 to wildlife, including endangered species, *see supra* pp.9-11, the agency erroneously concluded NWP 56 has "no effect" on ESA-protected species or their critical habitat and thus concluded that programmatic ESA consultation was not required. NWP002514; NWP003609-610. But the activities authorized by NWP 56 easily surpass the low "may affect" threshold for ESA consultation.

While the Corps does not specifically name certain ESA-protected species when discussing impacts of NWP 56 in its Decision Document, the agency writes broadly about the adverse impacts on numerous classes of species—marine mammals, sea birds, sea turtles, fish, marine plants, and corals—and many

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303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

individual species within these groups are protected under the ESA, and likely to suffer impacts described by Defendants. NWP002502-505. Defendants make no attempt to distinguish ESA-protected species from these broad categories of admitted risk. In fact, ESA-protected species are likely the *most* vulnerable to any impacts of NWP 56, given they are already subject to numerous other threats to their survival.

And in some cases, most or all of the classes of ocean species Defendants discuss are threatened or endangered, so it is easy to see how their assessment directly applies. For example, *all six species* of sea turtles that are found in U.S. waters are protected under the ESA. *See* NWP003983-88; NWP003992-93; NWP004000; NWP004002-4007; NWP004014-15; NWP048105. Thus, when the Corps explains in its Decision Document that finfish aquaculture can have indirect effects on sea turtles *generally*, including a risk for sea turtles to become entangled in fish pens, nets, or lines used at finfish aquaculture facilities, NWP002504-505, it is glossing over that these are impacts to *ESA-protected* species. This admission easily clears the low "may affect" threshold for ESA consultation. *Cal. ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1018-19 (9th Cir. 2009) ("'[a]*ny possible effect*, whether beneficial, benign, adverse or of an undetermined character,'" triggers the consultation requirement) (citation omitted).

Similarly, numerous species of salmon and other fish are protected under the ESA, *see, e.g.*, NWP003961-73, and Defendants acknowledged multiple potential adverse effects to wild finfish individuals and populations. NWP002493-95; NWP002503-504. For example, Defendants explain that fish escapes, which "are not completely preventable," NWP002493, can impact wild fish through competition, disease transfer, and genetic degradation, NWP002493-95, easily surpassing the "may affect" threshold. This is not merely likely but proven: Farmed salmon have

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San Francisco, CA 94115
(415) 826-2770

time and time again caused harm to wild salmon populations all over the world. *See supra* pp.3-4; NWP043490-94; NWP043501-505; NWP048348; NWP048353; NWP049184-85.

Atlases of designated AOAs in the Southern California Bight and Gulf of Mexico further reveal the potential for impacts to ESA-protected species and their critical habitats, revealing considerable overlap between projected finfish aquaculture sites in federal waters and numerous ESA-protected species such as humpback whales, gray whales, leatherback and loggerhead sea turtles, giant manta rays, smalltooth sawfish, and many species of corals. Stevenson Decl., Ex. B pp.58, 233; *id.*, Ex. C pp.67-77. And in a letter to the Corps, FWS—again, an expert agency here, unlike the Corps—told Defendants that the proposed NWP "will directly and indirectly impair recovery of listed species and may threaten additional imperiled species such that their listing may be warranted." NWP009604. All of this damning evidence and these admissions show likely harm, easily surpassing the low "may affect" threshold that should have triggered consultation. *Karuk Tribe*, 681 F.3d at 1027.

C. The Corps Cannot Rely on Possible Future Project-Level Review to Circumvent Its ESA Duties for this Action.

Defendants instead made a "no effect" determination based on the flawed notion that consultation is unnecessary because Defendants plan to conduct future project-specific consultation. But potential future consultation on individual permits under NWP 56 is no substitute for Defendants' programmatic duties here.

It is well settled that project-level review does not relieve Defendants of their duty to consult on the issuance of programmatic NWPs where they must consider the effects of the entire agency action. *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, 454 F.Supp.3d 985, 992 (D. Mont.) ("Project-level review does not relieve the Corps of its duty to consult on the issuance of nationwide permits at the

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303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

programmatic level. The Corps must consider the effect of the entire agency action"); 50 C.F.R. § 402.14(c)(4); *Conner*, 848 F.2d at 1453 ("[T]he scope of the agency action is crucial because the ESA requires the biological opinion to analyze the effect of the *entire* agency action.") (emphasis in original).

This is because later, individual permit decisions will be inequivalent in scope, and will create impermissible piecemeal decision-making, a danger of death by a thousand cuts and the failure to capture cumulative impacts. *Nat'l Wildlife Fed'n v. Brownlee*, 402 F.Supp.2d 1, 10 (D.D.C. 2005) (holding that "overall consultation for the NWPs is necessary to avoid piece-meal destruction of [] habitat through failure to make a cumulative analysis of the program as a whole"); *N. Plains,* 454 F.Supp.3d at 993 (Programmatic consultation regarding NWP 12 "provides the only way to avoid piecemeal destruction of species and habitat.").

The expert agencies agree: NMFS previously highlighted the need for inclusion of protective measures for ESA-protected species *at the national level* in a programmatic BiOp for the Corps' NWP program. NWP072904-908. In fact, NMFS only made a "no-jeopardy" determination for the Corps' reauthorization of 48 NWPs in 2014 *after* the Corps agreed to adopt additional measures at the *national* level.[14] And, in comments on the proposed 2021 NWPs, FWS told the Corps that "consultation on proposed development or changes to the [the Corps'] NWP program," not just on individual permits, "is required under the ESA." NWP009604.

Whatever Defendants' ESA duties may be for future actions, such as individual permits, is legally irrelevant to their ESA duties for *this* programmatic action, *now*. *Cottonwood Env't L. Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1082 (9th

[14] NMFS also expressed its concern that "numerous studies have identified cumulative impacts resulting from activities historically authorized by Nationwide Permits." NWP073093.

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

Cir. 2015) (warning that "project-specific consultations do not include a unit-wide analysis comparable in scope and scale to consultation at the programmatic level"); *All. for the Wild Rockies v. Krueger*, 950 F.Supp.2d 1196, 1200 (D. Mont. 2013) ("The agencies cannot shift this analysis to the project level.")(citations omitted); *aff'd sub nom. All. for the Wild Rockies v. Christensen*, 663 F. App'x 515 (9th Cir. 2016). The only way Defendants can ensure NWP 56 will not jeopardize ESA-protected species is to consult at the programmatic level.

D. The Corps Unlawfully Delegated Its ESA Duties.

To sidestep programmatic review, Defendants also relied on general condition 18, which requires applicants (non-federal permittees) to submit a PCN whenever a project "might affect" ESA-protected species or designated critical habitat.[15] It is *only* when an applicant submits a PCN making this privatized "might affect" determination that the Corps will then examine whether the proposed project "may affect" ESA-protected species.[16]

This impermissibly delegates Defendants' initial ESA determination to non-federal applicants. But the ESA's regulations are clear—*federal agencies* are the ones responsible to "review [their] actions at the earliest possible time to determine whether any action may affect listed species or critical habitat." 50 C.F.R. § 402.14(a); *see N. Plains*, 454 F.Supp.3d at 993-94. Non-federal permittees cannot be relied upon to make an initial ESA determination, and Congress clearly required federal agencies to make these determinations *themselves*. (With good reason:

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[15] While all activities authorized by NWP 56 require submission of PCNs to the district engineer, NWP002443, PCNs need only include information about ESA-protected species when non-federal permittees make their own "might affect" determination. NWP000133-134.

[16] In situations where applicants do not make a "might affect" determination in their PCNs, if the district engineer declines to respond within 45 days, construction may begin immediately. NWP002444.

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

Unlike the agency, applicants have a vested economic interest in projects moving forward.) Nor does the applicant have the scientific expertise, as NMFS has explained: "[I]t would be an error" to assume that all permittees have "sufficient knowledge" of the ESA's requirements or "of the presence or absence" of listed species and critical habitat within a project area, or the "technical knowledge necessary to determine if their activity might have direct or indirect effects" on such species or habitat. NWP011250; NWP011256.

Courts have squarely rejected Defendants' reliance on general condition 18 for a "no effect" determination. *N. Plains*, 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."). Defendants are guilty of the same violation here: NWP 56 allows non-federal entities to make that "might affect" determination without any level of ESA assessment by the Corps. NWP002414-15 ("[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)."); *see also supra* p.31-32 notes 15-16.

For all these reasons, the Court should hold Defendants violated the ESA and vacate NWP 56.

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IV. NWP 56 VIOLATES THE NATIONAL ENVIRONMENTAL POLICY ACT.[17]

NEPA is our core national charter for environmental protection with a policy to (1) ensure fully informed agency decision-making, and (2) provide for public participation in analysis and decision-making. 42 U.S.C. §§ 4321 *et seq.*; *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983). NEPA "ensures that the agency … will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). To those ends, NEPA requires a detailed environmental impact statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.* (*NHTSA*), 538 F.3d 1172, 1219-20 (9th Cir. 2008).

As most relevant here, NEPA requires agencies to evaluate proposals in a single EIS that are closely enough related to effectively be a single course of action, prohibiting an agency from avoiding a FONSI by dividing a proposed program into component parts. 40 C.F.R. § 1502.4(a). Rather, a federal agency should prepare a programmatic EIS for the adoption of new agency programs. *Id.* § 1502.4(b). Major federal actions include the "[a]doption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive." *Id.* § 1508.1(q)(3)(iii). A programmatic EIS ensures that an

[17] For the issuance of NWP 56, Defendants rely on the Council on Environmental Quality's (CEQ) 2020 NEPA regulations. NWP002450-51 (citing 85 Fed. Reg. 43,304 (July 16, 2020)).

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303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

agency's NEPA review is "relevant to the program decision and timed to coincide with meaningful points in agency planning and decision making" and "should be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives." *Id.* § 1502.4(b) (1)(iii).

If, as here, the agency instead makes a FONSI, it must supply a "convincing statement of reasons" to explain how the action's impacts are insignificant. *NHTSA*, 538 F.3d at 1220 (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) ("The statement of reasons is crucial to determining whether the agency took a 'hard look' at the potential environmental impact…")).

Defendants violated NEPA in issuing NWP 56 by failing to prepare an EIS, despite evidence of significant impacts. In their EA and FONSI, Defendants failed to take the required "hard look" at the reasonably foreseeable environmental impacts associated with approving offshore finfish aquaculture facilities in federal waters, such as impacts on water quality, wildlife, and socioeconomic harms, in contravention of NEPA.

A. Defendants Violated NEPA by Failing to Prepare an EIS.

"[I]f substantial questions are raised as to whether a project ... *may* cause significant degradation of some human environmental factor," an EIS must be undertaken. *NHTSA*, 538 F.3d at 1219 (emphasis in original); *id.* at 1220 (to trigger this requirement Plaintiffs "need not show that significant effects *will in fact* occur," but only that there are substantial questions) (citation omitted). And there is logically more need for an EIS when the challenged action is novel, as NWP 56 is here.[18] *Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 177 (2010) (Stevens, J.,

[18] Finfish aquaculture has never before been attempted on a commercial scale in U.S. federal waters. *See supra* pp.5-6.

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

dissenting) (EIS especially important where threat is novel); *Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 879 (9th Cir. 2022) (holding EIS warranted, in part because the environmental impacts of offshore fracking were "largely unexplored").

Defendants made a FONSI and thus did not prepare an EIS. NWP002518. They claim that over the five-year period that NWP 56 will be in effect, which is expected to include 25 new facilities of undetermined size, it will only result in "minor changes to the affected environment." *Id.* But this finding does not comport with Defendants' acknowledgement of many of the risks of offshore finfish aquaculture in the decision. *See supra* pp.9-11. For example, Defendants acknowledge that marine mammals, marine birds, and sea turtles may become entangled in net pens or lines of the structures authorized by NWP 56. NWP002505. And they admit that "[c]ultivating finfish species in ocean waters outside their native ecoregions should be considered a *high risk activity* that could potentially have *substantial adverse ecological and socioeconomic outcomes*." NWP002494 (emphases added). Additionally, Defendants admit that adverse environmental effects of even a *single* fish farm may be more than minimal. NWP002480. These textual admissions are more than sufficient to trigger the low "substantial questions" bar requiring an EIS, particularly for an unprecedented approval of a new industry.

B. Defendants Failed to Take a Hard Look at Reasonably Foreseeable Environmental Impacts.

But there is plenty more record evidence that Defendants violated NEPA. NEPA requires an evaluation of "*any* reasonably foreseeable adverse environmental effects" of the proposed action "*to the fullest extent possible*." 42 U.S.C. § 4332(2)(C) (emphasis added). Defendants failed to take the requisite "hard look" at NWP 56, *Methow Valley*, 490 U.S. at 350 (citation omitted), in violation of NEPA, by failing to

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

evaluate *all* of the reasonably foreseeable impacts of NWP 56, improperly segmenting the project into construction and operation, deferring a full analysis to later review by district engineers, and failing to analyze cumulative effects. In other words, it's essentially the same story as the other statutory mandates already covered: Defendants impermissibly tried to kick the analysis can down the road regarding duties that are required now, for *this* approval action.

1. Defendants Failed to Evaluate All Reasonably Foreseeable Impacts of NWP 56.

Defendants admit that the facilities authorized by NWP 56 will cause environmental impacts, but limit their focus to only an assessment of the NWP 56-authorized *structures themselves*,[19] refusing to fully assess the impacts of operating the finfish aquaculture facilities based on the flawed notion that they were not required to fully analyze the effects of operation under NEPA because "the Corps does not have the authority to prevent or control the environmental impacts."[20] NWP002481. There are multiple problems with this approach.

First, Defendants failed to assess all reasonably foreseeable impacts of NWP 56. It is well-established that NEPA requires agencies to assess *all reasonably foreseeable* impacts of permitting decisions. *See, e.g., League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1075 (9th Cir. 2012) (NEPA's "hard look" mandate requires "considering all foreseeable direct and indirect impacts," in a manner that "does not improperly minimize negative side effects.") (citation omitted); *White Tanks Concerned Citizens, Inc. v. Strock*, 563

[19] And even there, Defendants did not properly analyze the impacts; instead, improperly deferring to project-level analyses by district engineers.

[20] Because Defendants' scope was so narrow, their analysis overlooked numerous foreseeable impacts such as escaped fish, nutrient pollution, antibiotic resistance, and harms to endangered species. *See supra* pp.3-5, 9-11; NWP002479-89.

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

F.3d 1033, 1040 (9th Cir. 2009) (holding the Corps must assess the entire project's environmental impacts under NEPA when a project cannot move forward without a Corps permit); *Save Our Sonoran, Inc. v. Flowers,* 408 F.3d 1113, 1122-23 (9th Cir. 2005) (holding Corps must consider environmental impact of entire residential subdivision before granting permit to fill waterways running through the subdivision). And CEQ's 2020 revised NEPA regulations continued to require an analysis of environmental impacts that "are reasonably foreseeable," including those effects that "occur at the same time and place" as the proposed action or alternatives and may include effects that are "later in time or farther removed in distance" from the proposed action or alternatives. 40 C.F.R. § 1508.1(g).

Second, although these reasonably foreseeable impacts include those from the operation of finfish aquaculture facilities, Defendants wrongly claim they do not need to analyze these impacts because they do not directly regulate them. *See supra* pp.8-9. But courts are clear that reasonably foreseeable impacts include those that an agency claims are outside of its authority. *See, e.g., Coal.*, 417 F.Supp.3d at 1364 (holding the Corps was required to analyze the impacts of pesticide use "[e]ven if the Corps does not have jurisdiction to permit or prohibit the use of pesticides"); *Eagle Cnty. v. Surface Transp. Bd.*, 82 F.4th 1152, 1179-80 (D.C. Cir. 2023) (agency erred by failing to consider the foreseeable upstream and downstream impacts of a fossil fuel railway project in its NEPA analysis and cannot avoid its responsibility to consider those impacts "on the ground that it lacks authority to prevent, control, or mitigate those developments"). Courts have similarly recognized Defendants' obligation to evaluate potential impacts from oil spills, even when the Corps does not have the authority to regulate the underlying activity or the spills. *See, e.g., Ocean Advocs. v. U.S. Army Corps of Eng'rs,* 402 F.3d 846, 867 (9th Cir. 2005); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1049 (D.C.

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

Cir. 2021). Whether the spill risk is oil or farmed fish, Defendants do not get a NEPA free pass.

Third, the construction and operation of finfish aquaculture facilities are essentially all one action, and even if considered to be separate, they are connected actions that must be considered in the same NEPA analysis. *See* 40 C.F.R. § 1501.9(e)(1)(ii) (defining "connected actions" as including actions that "[c]annot or will not proceed unless other actions are taken previously or simultaneously" or "[a]re interdependent parts of a larger action and depend on the larger scale for their justification."); *id.* § 1502.4(a). Agencies cannot circumvent NEPA by slicing up a project into multiple "actions," or segments, "each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1305 (9th Cir. 2003) (citation omitted). Yet Defendants here did just that, dividing finfish aquaculture in federal waters broadly into construction of facilities and operation of those facilities, and further segmenting the action by relying on project-level analyses in an attempt to avoid a broad-scale analysis of the environmental effects of NWP 56.

The construction and operation of aquaculture facilities fail the Ninth Circuit's "independent utility" test, "the crux of [which] is whether each of two projects would have taken place with or without the other." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1098 (9th Cir. 2012) (citation and internal quotation marks omitted). Here, the construction and operation of finfish aquaculture facilities are inextricably intertwined "connected actions" that must be analyzed together under NEPA, as one is not expected to exist without the other. *See Thomas*, 753 F.2d at 758-59. Finfish aquaculture operations clearly cannot proceed without the prior construction of the facilities, and it would be irrational to build the aquaculture facilities and then not operate them. *See id.*

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

Further, Defendants also improperly segmented their analysis by failing to assess impacts of NWP 56 as a whole and instead relying on district engineers to assess and mitigate impacts in their FONSI.[21] *See supra* pp.8-12; *see also* NWP002484-87. This reliance was another established violation: courts have repeatedly made plain that the Corps may *not* rely on later conditions district engineers may put in place to reach a NEPA determination of "minimal individual and cumulative environmental impacts." *Coalition*, 417 F.Supp.3d at 1367 ("[T]he Corps may not rely solely on post-issuance procedures to make its pre-issuance minimal impact determinations."). Rather, failure to fully assess an NWP's individual and cumulative impacts before issuance renders the Corps' decision arbitrary and capricious. *Id.* at 1367-68.[22] NEPA requires Defendants to analyze the reasonably foreseeable impacts from the activity that its action would allow (finfish aquaculture operations), not just direct impacts of the permitted action (installation of structures).

2. The EA Fails to Analyze the Cumulative Effects of NWP 56.

Defendants also violated NEPA by failing to fully consider the cumulative impacts of NWP 56. 42 U.S.C. § 4332(2)(C) (requiring an evaluation of "*any* adverse reasonably foreseeable environmental effects which cannot be avoided should the proposal be implemented," which must examine "the environmental effects of the proposed agency action" "to the fullest extent possible") (emphasis added).

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[21] For example, although Defendants acknowledged that marine mammals, marine birds, and sea turtles may become entangled in net pens or lines, NWP002505, they did not actually *analyze* these impacts of the structures approved by NWP 56, but instead deferred the analysis to the project-level.

[22] *See also Ohio Valley Env't Coal.*, 429 F.3d at 50; *Ohio Valley Env't Coal. v. Hurst*, 604 F.Supp.2d at 902.

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

Despite recognizing that "repetitive disturbances at a single site over time" and "multiple activities occurring in a geographic area over time" can have cumulative effects, Defendants admitted to limiting their cumulative effects analysis to the agency's estimates on the number of activities authorized on a nationwide scale, ignoring data on the nature or location of the estimated uses. NWP002477. Yet the same Executive Order that resulted in NWP 56 also mandated that the Secretary of Commerce designate AOAs in consultation with other agencies; thus, the Corps was well aware of the designation of AOAs in the Gulf of Mexico and Southern California Bight in 2020. S*ee supra* p.7; *see also* NWP035429. Nonetheless, Defendants failed to assess the potential cumulative effects of NWP 56 even in these regions, although they appear to be the areas most likely to have multiple finfish aquaculture facilities "occurring in a geographic area over time" that may have cumulative effects.

And Defendants acknowledge the potential for more than minimal cumulative impacts from finfish aquaculture facilities built under NWP 56, but again defer assessment to the project level. NWP002478 (in "a specific area of the ocean … division or district engineers may determine that the cumulative adverse environmental effects of activities authorized by this NWP are more than minimal."). This again fails to comply with NEPA, as Courts have repeatedly held that the cumulative effects analysis for NWPs must occur at the national level, satisfying NEPA on issuance of an NWP and not relying on additional later review or conditions. *See Ky. Riverkeeper*, 714 F.3d at 413; *Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs*, 351 F.Supp.2d 1232, 1243 (D. Wyo. 2005); *Defs. of Wildlife v. Ballard*, 73 F.Supp.2d 1094, 1114 (D. Ariz. 1999).

For all these reasons Defendants' failure to take the requisite "hard look" and conduct a full assessment of environmental impacts of NWP 56 rendered their

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303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

environmental assessment and FONSI arbitrary, capricious, and contrary to law, in violation of NEPA and the APA.

V. THIS COURT SHOULD VACATE NWP 56.

To remedy these violations and Defendants' arbitrary decision-making, this Court should vacate NWP 56.

The APA provides that a reviewing court "*shall* … hold unlawful and *set aside* agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and/or those "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2) (emphases added). As such, vacatur is the default, presumptive remedy for agency action held unlawful and *ultra vires*, and thus Defendants, not Plaintiffs, carry the burden to show why another result, such as remand without vacatur, is appropriate instead. *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121-22 (9th Cir. 2018); *see also Coal. to Protect Puget Sound Habitat v. U.S. Army Corps. of Eng'r*s, 466 F.Supp.3d 1217, 1226 (W.D. Wash. 2020) (vacating NWP 48); *Ohio Valley Env't Coal.,* 604 F.Supp.2d at 903 (vacating NWP 21); *N. Plains*, 460 F.Supp.3d at 1049 (vacating NWP 12 "pending completion of the consultation process and compliance with all environmental statutes and regulations."); *Gulf Fishermens Ass'n*, 341 F.Supp.3d at 642 (vacating *ultra vires* aquaculture rules).

Although "limited circumstances" can exist for remand without vacatur, they do not exist here. *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015). Instead, the "seriousness of the agency's errors" weighs heavily in favor of vacatur because, as in *Coalition*, the Corps' decision to delay cumulative assessments, ESA consultations, and mitigation until after issuing NWP 56 utterly failed to ensure NWP 56 has minimal impacts nationwide and will not harm ESA-

Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, CA 94115
(415) 826-2770

protected species. *See supra* pp.21-41; *see also Coal.,* 466 F.Supp.3d at 1222-23. What's more, here, Defendants greenlighted an entirely new industry without authorization or regulations to protect our nation's waters from this industry. The novelty of this industry renders any alleged economic harm or disruption to regulated entities minimal, and environmental impacts unavoidable. *All. for the Wild Rockies*, 907 F.3d at 1122 (vacatur "appropriate when leaving in place an agency action risks more environmental harm than vacating it") (citation omitted).

CONCLUSION

Defendants' "full steam ahead, damn the torpedoes" decision represents yet another attempt to create an aquaculture industry without Congressional authority, and without adhering to core environmental laws. Because Defendants failed to support their decision with proper authority and adequate support under NEPA, the ESA, and the RHA, this Court should grant Plaintiffs' Motion for Summary Judgment and vacate NWP 56.

Respectfully submitted this 9th day of November, 2023 in Portland, Oregon.

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WORD COUNT CERTIFICATION

I certify that this memorandum contains 11,973 words, in compliance with the Order at ECF No. 37.

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