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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

SOUND ACTION, FRIENDS OF THE SAN)
JUANS, AND WASHINGTON ENVIRONMENTAL)
COUNCIL,)

Case No.

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,)

Defendant.)

) COMPLAINT FOR
) DECLARATORY AND
) INJUNCTIVE RELIEF

INTRODUCTION

1. Sound Action, Friends of the San Juans, and Washington Environmental Council bring this action against the U.S. Army Corps of Engineers (“Corps”) to challenge the Corps’ actions, and inactions, in implementing federal laws that protect the marine shoreline ecosystem in the Puget Sound region from the harmful effects of shoreline armoring.
2. Since the 1970s, the Seattle District of the Corps (“Seattle District”) has defined its Clean Water Act (“CWA”) § 404 jurisdiction in the Puget Sound region to extend only up to the “mean higher high water” mark, which is an average of the higher of the two high water marks each tidal day observed over a nineteen-year period. Under the CWA’s implementing regulations, however, the Corps’ jurisdiction extends to the “high tide

1 line.” Approximately one quarter of high tides in the Seattle District exceed the mean
2 higher high water mark, meaning the Seattle District’s CWA jurisdictional marker is
3 significantly below the high tide line. As a result of this unlawful definition of § 404
4 jurisdiction, the majority of shoreline armoring projects in the Puget Sound region escape
5 federal review under the CWA, which in turn means that such projects are not evaluated
6 under other federal laws for the protection of environmental values, including the
7 Endangered Species Act (“ESA”) and National Environmental Policy Act (“NEPA”).
8

- 9 3. Plaintiffs challenge the Corps’ decision to reject an interagency recommendation
10 attempting to rectify the Seattle District’s unlawful CWA tidal jurisdictional boundary.
11 Specifically, Corps’ leadership decided in January 2018 to decline a 2016
12 recommendation from the Seattle District, Region 10 of the U.S. Environmental
13 Protection Agency (“EPA”), and the West Coast Region of the National Oceanic &
14 Atmospheric Administration (“NOAA”) to change the Seattle District’s CWA
15 jurisdictional marker on shorelines from mean higher high water to the “mean annual
16 highest tide,” a more suitable high tide elevation that would bring approximately 8,600
17 acres of shoreline habitat within the Seattle District’s recognized CWA jurisdiction. The
18 recommendation was based on an analysis of the relevant science, field studies of tidal
19 elevations in the Puget Sound region, administrative costs, and legal obligations; and
20 constituted a compromise between mean higher high water and other, higher,
21 jurisdictional markers. The Corps’ decision to summarily discard this analysis and
22 maintain an unlawful jurisdictional boundary is arbitrary and capricious under the
23 Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2).
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- 1 4. Separately, Plaintiffs challenge the Corps' failure to respond to a June 24, 2015 Petition
2 ("Petition") asking the Corps to complete individual "approved jurisdictional
3 determinations" for four specific shoreline armoring projects in the Puget Sound region,
4 each of which was located above the mean higher high water mark but below the true
5 high tide line. Close to three years have passed since the Petition was received, and the
6 Corps has taken no action on it, or even responded. Plaintiffs are entitled to a response to
7 their Petition in a reasonable amount of time under the APA. The time that has passed
8 without a response is not reasonable under the APA, 5 U.S.C. § 555.
- 9
- 10 5. Plaintiffs seek a declaration from this Court that the Corps violated the APA by
11 arbitrarily and capriciously deciding to maintain an unlawful CWA § 404 jurisdictional
12 boundary in the Puget Sound region, and by failing to respond to Plaintiffs' 2015 Petition
13 in a reasonable amount of time. Plaintiffs also seek an order requiring the Corps to set
14 aside its decision to maintain the Seattle District's unlawful CWA § 404 boundary, and to
15 issue a final decision on Plaintiffs' Petition within a court-ordered, thirty-day deadline.
16
17

18 JURISDICTION AND VENUE

- 19 6. This Court has jurisdiction over this action under 5 U.S.C. §§ 551 *et seq.* (APA), and
20 under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory judgment), and
21 28 U.S.C. § 2202 (injunctive relief).
- 22
- 23 7. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) because a substantial
24 part of the events or omissions giving rise to these claims occurred in this district, and
25 because Plaintiffs reside and maintain their offices in this district.

26 PARTIES

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- 1 8. Plaintiff Sound Action is a nonprofit organization working as a regulatory watchdog
2 group to protect nearshore habitat and species in Puget Sound. The organization reviews
3 permit applications for nearshore development projects—including bulkheads, piers, and
4 other overwater structures, dredging, marinas and export barging facilities—to ensure
5 that environmental regulations and the best available science are followed. Sound Action
6 works throughout the Salish Sea region, representing over 500 members living
7 throughout the geographic area. Sound Action is based in Seattle, Washington.
- 9 9. Plaintiff Friends of the San Juans (“Friends”) is a nonprofit organization dedicated to
10 protecting and restoring the San Juan Islands and the Salish Sea for people and nature.
11 The organization was founded in 1979 to protect the land, air, sea, and livability of the
12 San Juan Islands. Friends strives to preserve the rural character of the islands, conserve
13 natural resources, promote ecological stewardship, and promote the consistent
14 implementation of strong environmental policies and protections. Friends’ approximately
15 2,000 members live throughout the Salish Sea and share interests in intact shoreline
16 habitat, thoughtful land use practices, safe shipping, clean and ample water, recovering
17 endangered species, and recreating throughout the San Juans. Friends is based in Friday
18 Harbor, Washington.
- 21 10. Plaintiff Washington Environmental Council is a nonprofit advocacy organization
22 dedicated to protecting, restoring, and sustaining Washington’s environment for all. The
23 organization was founded in 1967 and works on issues related to clean energy and
24 climate justice, protecting and restoring Puget Sound, and sustaining Washington forests.
25 The organization has over 25,000 members, including residents of all 12 counties in the
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1 Puget Sound region. Washington Environmental Council is based in Seattle,
2 Washington.

3 11. Plaintiffs have standing to bring this action. Defendant’s violations of the CWA and
4 APA have had an adverse impact on Plaintiffs and Plaintiffs’ members’ ability to use and
5 enjoy the shorelines and water bodies in Washington state and have injured the health,
6 recreational, environmental, aesthetic, commercial, and/or other interests of Plaintiffs and
7 their members. These injuries are fairly traceable to Defendant’s violations and are
8 capable of redress by action of this Court.
9

10 12. Defendant U.S. Army Corps of Engineers is a federal agency authorized by law, among
11 other things, to issue permits for the discharge of dredged or fill material into navigable
12 waters under § 404 of the CWA and to make jurisdictional determinations as to whether
13 specific projects are subject to federal jurisdiction.
14

15 LEGAL BACKGROUND

16 I. CLEAN WATER ACT

17 13. Congress enacted the CWA, one of the nation’s foundational environmental laws, in 1972
18 in order to “restore and maintain the chemical, physical, and biological integrity of the
19 Nation’s waters.” 33 U.S.C. § 1251.
20

21 14. One of the primary methods for achieving this aquatic protection and restoration is the
22 Act’s prohibition against discharging dredged or fill materials into navigable waters
23 without a permit, contained in § 404 of the Act. *Id.* § 1344.
24

25 15. The construction of seawalls, bulkheads, and similar structures for shoreline armoring
26 within navigable waters constitutes a discharge of dredged or fill materials under the
27 CWA. *Id.* Such activities are prohibited absent a permit issued by the Corps. 33 C.F.R.
28 § 323.2.

1 16. “Navigable waters” are statutorily defined in the CWA to mean “the waters of the United
2 States, including the territorial seas.” 33 U.S.C. § 1362(7). As it relates to tidal waters,
3 the term “waters of the United States,” is defined by regulation to mean the area up to the
4 “high tide line.” 33 C.F.R. § 328.4(b). Therefore, projects involving the discharge of
5 dredged or fill materials in tidal waters up to the high tide line, including shoreline
6 armoring projects, are unlawful without a permit from the Corps.
7

8 17. The Corps has used the high tide line to define the limits of its coastal jurisdiction under
9 § 404 of the CWA since 1977. Prior to 1977, the Corps relied on its tidal jurisdictional
10 boundary under a separate statute, the Rivers and Harbors Act, to also define its tidal
11 jurisdiction under the newly formed CWA § 404 program. Under the Rivers and Harbors
12 Act at that time, the Corps asserted jurisdiction over traditionally navigable waters up to
13 the “mean high water” mark, or the “mean higher high water” mark on the west coast
14 where there are two daily high tides of different elevations. *See* 33 C.F.R. § 209.260. By
15 subsequently enacted regulation, the Rivers and Harbors Act’s jurisdiction now extends
16 only to “mean high water” in all coastal locations in the U.S. *Id.* § 322.2(a).
17
18

19 18. In response to 1975 litigation affirming that the term “navigable waters” under the CWA
20 “is not limited to the traditional tests of navigability,” *Nat. Res. Def. Council, Inc. v.*
21 *Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975), and therefore is broader than the
22 traditional navigability test in the Rivers and Harbors Act, the Corps reexamined its
23 CWA regulations and published a new CWA jurisdictional regulation in 1977 extending
24 its jurisdiction up to the “high tide line.”
25

26 19. In enacting this regulation, the Corps explained that the term “high tide line” was needed
27 to clarify that the regulation captures all of the shoreline aquatic areas that are above the
28

1 mean high water mark or the mean higher high water mark. In this way, the Corps' 1977
2 CWA regulation explicitly rejected the use of mean high water and mean higher high
3 water as inappropriate jurisdictional boundaries. The notice in the Federal Register
4 explained:

5
6 *“High tide line.”* Many aquatic areas along the coast are
7 located above the mean or mean higher high tide lines but do not
8 fit within the definition of “wetlands” discussed above. These
9 include sandflats, mudflats, and similar areas, that, while not
10 covered with vegetation, are inundated with sufficient frequency
11 and regularity to be included as part of the aquatic resource. While
12 these areas are identified in our previous definition of waters of the
13 United States, some commenters suggested the need for more
14 definitive guidance in delineating the shoreward limit of
15 jurisdiction in coastal areas when these circumstances exist. We
16 have, therefore, adopted the term “high tide line” to delineate these
17 areas. “High tide line” has been defined as “a line or mark left
18 upon tide flats, beaches, or along shore objects that indicates the
19 intersection of the land with the water’s surface at the maximum
20 height reached by a rising tide.” The term is intended to include
21 areas covered by spring high tides and other high tides that occur
22 with periodic frequency, but does not include those areas that are
23 covered by tidal water as a result of storm surges, hurricanes, or
24 other intense storms.

25 42 Fed. Reg. 37122, 37129 (July 19, 1977).

26 20. The current definition of “high tide line,” initially adopted in 1986, was not meaningfully
27 changed from the 1977 definition. “High tide line” is now defined as:

28
29 the line of intersection of the land with the water's surface at the
30 maximum height reached by a rising tide. The high tide line may
31 be determined, in the absence of actual data, by a line of oil or
32 scum along shore objects, a more or less continuous deposit of fine
33 shell or debris on the foreshore or berm, other physical markings or
34 characteristics, vegetation lines, tidal gages, or other suitable
35 means that delineate the general height reached by a rising tide.
36 The line *encompasses spring high tides and other high tides that*
37 *occur with periodic frequency* but does not include storm surges in
38 which there is a departure from the normal or predicted reach of
39 the tide due to the piling up of water against a coast by strong

1 winds such as those accompanying a hurricane or other intense
2 storm.

3 33 C.F.R. § 328.3(c)(7) (emphasis added).

4 21. The CWA “high tide line” definition was included in the “waters of the United States”
5 definitional rule commonly called the 2015 “Clean Water Rule.” When EPA passed the
6 2015 Clean Water Rule, the agency explicitly recognized that the definition of “high tide
7 line” in the 2015 Clean Water Rule remained unchanged from the Corps’ pre-2015
8 definition. *See* 80 Fed. Reg. 37,054, 37,073 (June 29, 2015). Although the 2015 Clean
9 Water Rule is the subject of ongoing EPA rulemakings, it is unlikely those efforts would
10 affect the definition of “high tide line.” EPA’s recent delay of the 2015 Clean Water
11 Rule for a period of two years instructs agencies to follow the pre-2015 regulatory
12 definitions of the “waters of the United States.” 83 Fed. Reg. 5,200 (Feb. 6, 2018).
13 Under both regulatory schemes, the “high tide line” definition is identical.
14
15

16 II. ADMINISTRATIVE PROCEDURE ACT

17 22. The APA directs courts to “hold unlawful and set aside agency action, findings, and
18 conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in
19 accordance with law.” 5 U.S.C. § 706(2).

20 23. An “agency action” under the APA “includes the whole or a part of an agency rule, order,
21 license, sanction, relief, or the equivalent or denial thereof, or failure to act.” *Id.*
22 § 551(13).
23

24 24. Pursuant to § 555(b) of the APA, each federal agency has a duty to “conclude a matter
25 presented to it” in “a reasonable time.” *Id.* § 555(b).
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1 25. Moreover, APA § 555(e) provides that “[p]rompt notice shall be given of the denial in
2 whole or in part of a written application, petition, or other request of an interested person
3 made in connection with any agency proceeding.” *Id.* § 555(e).

4 26. The APA requires that reviewing courts “compel agency action unlawfully withheld or
5 unreasonably delayed.” *Id.* § 706(1).

7 FACTUAL BACKGROUND

8 I. SHORELINE ARMORING

9 27. Puget Sound is one of the nation’s aquatic crown jewels, a vibrant and diverse ecosystem
10 that sustains one of the nation’s most dynamic economies. The region contains
11 approximately 2,500 miles of shoreline, as well as numerous rivers, bays, and inlets
12 which interact to create homes for a diverse array of terrestrial, freshwater, and marine
13 plants and animals. The rich ecological diversity, beauty, and corresponding functional
14 value of Puget Sound has attracted increasing numbers of people to the area. In the
15 process of developing the vast shorelines of Puget Sound for residential and commercial
16 purposes, humans have built numerous bulkheads, seawalls, and other kinds of artificial
17 shoreline armoring to harden and alter the natural shorelines.
18

19 28. Today, more than a quarter of Puget Sound’s shorelines are already armored.

20
21 Approximately 3,483 feet of new shoreline armoring were added annually, on average,
22 between 2011 and 2015.¹

23 29. The deleterious effects of shoreline armoring on the health of the Puget Sound ecosystem
24 are well documented. Among many other impacts, hardening or armoring of natural
25

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27 ¹ Puget Sound Partnership, *2017 State of the Sound* at 25 (undated),
28 <https://pspwa.app.box.com/s/pcmql1ik1otenheklg5sucz7bkmpjphq>; Puget Sound Partnership, Vital Sign:
Shoreline Armoring, http://www.psp.wa.gov/vitalsigns/shoreline_armoring.php.

1 shorelines alters critical ecological functions such as erosion and sediment movement,
2 causing beaches to lower, narrow, and eventually disappear. There is broad scientific
3 consensus that this replacement of upper beach areas with hard barriers negatively
4 impacts important habitat for plants and animals.

5
6 30. Puget Sound Partnership (“PSP”), a state agency tasked with coordinating the recovery of
7 Puget Sound, has identified armoring as one of the primary impediments to restoring
8 habitat in Puget Sound. The state agency has concluded that armoring “can [] directly
9 impact organisms and ecological processes by burying or displacing upper beach habitat
10 and altering the natural transition between terrestrial and aquatic ecosystems” and can
11 “cause once sandy beaches to become rocky and sediment starved, making them
12 inhospitable to many of our native species.”² PSP is working to reduce the amount of
13 new armoring in the region, with a goal of a net decrease in armoring by the year 2020.

14
15 31. Shoreline armoring prevents forage fish like surf smelt and sand lance from spawning in
16 upper beach areas. Armoring can directly bury forage fish spawning habitat and cause
17 other detrimental habitat changes, such as the elimination of vegetation and finer grained
18 sediments. A study of surf smelt spawning in San Juan County in the San Juan Islands
19 found 80% of surf smelt eggs in the upper third of the beach, and nearly one third of eggs
20 above the mean higher high water mark.³ Forage fish are important prey for threatened
21 and endangered salmon, who themselves are prey for endangered orcas, making them a
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25 ² Puget Sound Partnership, *2012 State of the Sound: A Biennial Report on the Recovery of Puget Sound* at
26 67, 69 (undated),

27 http://www.psp.wa.gov/downloads/SOS2012/sos2012_110812pdfs/SOS2012_ALL_110812.pdf.

28 ³ Friends of the San Juans, *Healthy Beaches for People and Fish: Protecting shorelines from the impacts
of armoring today and rising seas tomorrow*, Final Project Report to WDFW and the U.S. EPA at 11
(April 2014),

http://www.sanjuans.org/documents/FSJ_Healthy_Beaches_Project_Final_Report_May_2014.pdf.

1 critical link in the Puget Sound food chain.

2 32. Shoreline armoring also harms important juvenile salmon habitat by removing vegetation
3 that supplies young salmon shelter and insects for food, and it harms shellfish habitat as
4 well. Armoring also generally reduces shallow water refuges for smaller species and
5 allows larger species access to nearshore areas. It is well documented that shoreline
6 armoring is associated with an overall decrease in taxonomic diversity and abundance.
7

8 33. The Corps has long been aware of, and even acknowledged, these numerous harms. For
9 example, in its reissuance of the CWA nationwide permit for the construction of bank
10 stabilization structures that extend less than or equal to 500 feet in length, the Corps
11 stated:
12

13 In coastal waters, bank stabilization structures change natural shoreline
14 processes and alter habitats (Nordstrom 2014). Bank stabilization
15 structures in coastal waters create barriers to animal movements between
16 habitats, cause the loss of some habitat, reduce or eliminate intertidal
17 habitats, and alter species richness and abundance (Nordstrom 2014).
18 Gittman et al. (2016) concluded after conducting a meta-analysis of
19 coastal shore protection measures that a 23 percent decline in
20 biodiversity and a 45 percent decline in organism abundance occurred
21 near bulkheads and seawalls.

22 Issuance and Reissuance of Nationwide Permits, 82 Fed. Reg. 1860, 1892 (Jan. 6,
23 2017).

24 34. These ecological harms will be exacerbated by the effects of climate change.

25 Coastal areas will likely experience increasing demands for new installations of
26 bulkheads and other forms of hard armoring as global sea levels rise. The
27 interagency workgroup recommending that the Seattle District change its
28 jurisdictional boundary to the mean annual highest tide stated in a recent draft
report that “[t]here is wide concern that with sea level rise, and continued

1 development of the shoreline, forage fish will experience the ‘squeeze’ between
2 shoreline armoring and water that is too deep for spawning.” Moreover, as the
3 overall level of armoring increases with the rising seas, the cumulative adverse
4 impacts on wildlife will increase as well. Studies have found that armoring
5 causes not only localized shoreline impacts, but also system-scale, cumulative
6 harm to plants and animals that depend on the nearshore ecosystem.
7

8 II. THE SEATTLE DISTRICT’S USE OF MEAN HIGHER HIGH WATER AS ITS CWA
9 JURISDICTIONAL BOUNDARY

10 35. The Seattle District oversees CWA § 404 permits in Puget Sound on behalf of the Corps.

11 By law, the Seattle District must assert its CWA § 404 tidal jurisdiction up to the high
12 tide line, defined as the maximum height reached by a rising tide, 33 C.F.R.
13 § 328.3(c)(7).
14

15 36. The Seattle District uses mean higher high water as a proxy for the high tide line, even
16 though mean higher high water is unequivocally significantly lower than the maximum
17 height reached by a rising tide. In its online regional “permit guidebook” on § 404
18 permitting, the Seattle District explicitly identifies mean higher high water as the limit of
19 its tidal jurisdiction under CWA § 404. This guidebook expressly directs the public that
20 armoring projects above mean higher high water but below the high tide line do not
21 require CWA § 404 permits, contrary to the language of the CWA and governing
22 regulations.
23

24 37. Because mean higher high water uses a statistical average, the boundary is frequently
25 exceeded. Specifically, the mean higher high water mark is surpassed between three to
26 five times a week in Washington state, meaning about a quarter of high tides are above
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28

1 mean higher high water in the Seattle District. Therefore, the mean higher high water
2 boundary excludes many periodic high tides.

3 38. The Corps does not apply a consistent rule for determining the high tide line in its various
4 west coast districts. The Seattle and Portland districts use mean higher high water. In
5 Alaska, the district uses extreme high tide, and in Los Angeles, the district uses an on-site
6 determination and/or the calculated highest predicted tide of the year. Finally, in San
7 Francisco, the district uses only on-site determinations.

9 39. According to the 2016 interagency report recommending a change to mean annual
10 highest tide, the Seattle District adopted mean higher high water as its high tide line
11 marker when the CWA was initially passed because that was the highest tidal elevation
12 data available at the time. However, data for higher tidal elevations are now accessible.

14 40. NOAA is responsible for collecting tidal data in Puget Sound, including various “tidal
15 datums” used as baseline references. Tidal datums are standard elevations defined by
16 certain phases of the tide. Among other elevations, NOAA collects the mean higher high
17 water tidal datum at its Puget Sound tide stations. In its “Tide and Current Glossary,”
18 NOAA defines “high water mark” as:

20 A line or mark left upon tide flats, beach, or along shore objects
21 indicating the elevation of the intrusion of high water. The mark
22 may be a line of oil or scum on along [sic] shore objects, or a more
23 or less continuous deposit of fine shell or debris on the foreshore or
24 berm. This mark is physical evidence of the general height reached
by wave run up at recent high waters. It should not be confused
with the mean high water line or mean higher high water line.⁴

27
28 ⁴ NOAA, *Tide and Current Glossary* at 11 (Jan. 2000), <https://co-ops.nos.noaa.gov/publications/glossary2.pdf>.

1 Although the “high water mark,” is not one of the tidal datums collected by NOAA,
2 NOAA does collect a datum called the “highest astronomical tide” at many tidal stations,
3 which constitutes the highest predicted periodic astronomical tide occurring every 19
4 years. NOAA also collects the data necessary to determine the mean annual highest tide,
5 which is the average of the highest annual tide predicted over a period of 19 years. The
6 mean annual highest tide is substantially higher than mean higher high water, but still
7 below the highest astronomical tide.
8

9 41. The difference between mean higher high water and highest astronomical tide on a
10 shoreline in Puget Sound varies by location, ranging from 15 to 32 vertical inches. The
11 difference between mean higher high water and mean annual highest tide ranges from 13
12 to 29 inches. The area between mean higher high water and mean annual highest tide
13 represents up to 8,600 acres of shoreline area in Washington state.
14

15 42. Because mean higher high water is below the true high tide line, the majority of shoreline
16 armoring projects in the Puget Sound region do not fall within the Seattle District’s
17 unlawfully narrow definition of its tidal jurisdiction. Even the Corps acknowledged in a
18 2014 report that their mean higher high water jurisdictional boundary is a factor
19 contributing to the minimal amount of federal permitting in the Puget Sound region for
20 armoring projects, stating that a potential explanation for this circumstance is that “much
21 of the identified shoreline hardening is above [mean higher high water] and not under
22 [Corps] jurisdiction.”⁵
23
24

25
26 ⁵ U.S. Army Corps of Engineers, Seattle District, *Cumulative Effects Analysis: Eastern Shore of Central*
27 *Puget Sound Washington* at 5-6 (Feb. 7, 2014),
28 [http://www.nws.usace.army.mil/Portals/27/docs/regulatory/NewsUpdates/2017NWPs/Cumulative%20Eff](http://www.nws.usace.army.mil/Portals/27/docs/regulatory/NewsUpdates/2017NWPs/Cumulative%20Effects%20Analysis%20Eastern%20Shore%20of%20Central%20Puget%20Sound%20(wihout%20appendix).pdf)
[ects%20Analysis%20Eastern%20Shore%20of%20Central%20Puget%20Sound%20\(wihout%20appendix](http://www.nws.usace.army.mil/Portals/27/docs/regulatory/NewsUpdates/2017NWPs/Cumulative%20Effects%20Analysis%20Eastern%20Shore%20of%20Central%20Puget%20Sound%20(wihout%20appendix).pdf)
[\).pdf](http://www.nws.usace.army.mil/Portals/27/docs/regulatory/NewsUpdates/2017NWPs/Cumulative%20Effects%20Analysis%20Eastern%20Shore%20of%20Central%20Puget%20Sound%20(wihout%20appendix).pdf).

1 43. As a result of the Corps' unlawfully narrow assertion of its CWA jurisdiction, most
2 armoring projects that should be reviewed through the federal permitting process are
3 escaping review. Federal permitting is an important and meaningful process because it
4 requires: a review of the project's impacts on water quality and the "public interest"
5 under the CWA; analysis of environmental impacts under the NEPA; and a review of
6 effects to federally protected species under the ESA, among other things. This entire
7 layer of federal law is unlawfully circumvented for most armoring projects in the Puget
8 Sound region.
9

10 44. Multiple entities in and around Washington state have previously requested that the
11 Seattle District use a higher jurisdictional boundary for CWA § 404 jurisdiction in the
12 Puget Sound region, including the National Marine Fisheries Service ("NMFS"), the
13 Northwest Indian Fisheries Commission ("NWIFC"), and the State of Washington.
14

15 45. NMFS is a federal agency charged with protecting our ocean resources and habitats,
16 including the administration of the ESA as it relates to the protection of marine wildlife
17 and anadromous fish species. NMFS uses "extreme high tide" in defining endangered
18 salmonid critical habitat under the ESA. For years, staff at the NMFS West Coast
19 Regional Office have requested that the Seattle District change its jurisdictional marker
20 from mean higher high water to highest astronomical tide. These requests are
21 memorialized in various NMFS memoranda, issue papers, and letters. For example,
22 NMFS formally requested that the Corps use a jurisdictional boundary that is higher than
23 mean higher high water in a letter dated April 2, 2013. In this letter, NMFS explained the
24 adverse effects of the mean higher high water boundary as follows:
25
26

27 The ecological effect is that extensive areas of intertidal and estuarine
28 habitat that are important to ESA-listed salmon and multiple other

1 species of shellfish and other marine life are not adequately protected.
2 Numerous scientific analyses have documented the important functions
3 of these areas for both juvenile and adult salmonids, and the serious
4 continued loss of these habitats as an important limiting factor for
rebuilding the productivity of the system for salmon and other trust
resources.

5 NMFS reiterated its request for the Corps to use highest astronomical tide instead of
6 mean higher high water in another formal letter dated March 16, 2015, explaining again
7 that the use of highest astronomical tide is important to support the food webs of salmon
8 and other species.

9
10 46. The NWIFC consists of designated representatives from the twenty treaty Indian tribes of
11 western Washington that possess treaty-reserved rights to take fish and shellfish in
12 marine and freshwaters in western Washington. On April 22, 2016, the NWIFC
13 requested in a letter that EPA establish CWA § 404 jurisdiction in Washington up to the
14 highest astronomical tide. NWIFC explained that the use of mean higher high water has
15 caused significant adverse impacts to treaty-reserved salmon, and urged EPA to establish
16 the most protective jurisdictional boundary under § 404 to maximize the protection of
17 water quality and treaty resources. On February 9, 2017, NWIFC sent a letter to the
18 Corps reiterating its request for highest astronomical tide jurisdiction.

19
20
21 47. The Governor of the State of Washington, Jay Inslee, requested in a letter dated
22 December 16, 2016, that the Seattle District change its CWA § 404 tidal jurisdiction to
23 highest astronomical tide, or something similar. Like NMFS and NWIFC, Governor
24 Inslee cited the need to protect ESA-listed salmon as one of the primary motivators for
25 requesting the change. Governor Inslee expressed concern that salmon stocks continue to
26 decline despite significant recovery efforts, impacting treaty rights, ecology, and the
27 economy.
28

1 III. THE CORPS' DECISION TO REJECT AN INTERAGENCY RECOMMENDATION
2 TO CHANGE THE JURISDICTIONAL BOUNDARY IN THE SEATTLE DISTRICT
3 AND MAINTAIN AN UNLAWFUL JURISDICTIONAL BOUNDARY

4 48. In 2016, the Seattle District, EPA Region 10, and the West Coast Region of NOAA
5 formed an interagency workgroup to address the issue of the Seattle District's inadequate
6 CWA tidal jurisdiction boundary. This workgroup reviewed available scientific data,
7 consulted with scientists, collected tidal data at field sites, and conducted an interagency
8 analysis of the relevant legal and scientific factors.

9 49. In November 2016, the interagency workgroup completed a draft recommendation to the
10 Corps' Northwestern Division that it adopt mean annual highest tide as the high tide line
11 proxy for the Seattle District region. The draft report concluded that mean annual highest
12 tide "is an elevation that is reasonably representative of the intersection of the land and
13 the water's surface at the maximum height reached by the rising tide, is based on
14 gravitational forces, is predictable, reliable, repeatable, reasonably periodic, measurable,
15 simple to determine, scientifically defensible, and based on data that is reasonably
16 available and accessible to the public." This compromise was reached even though the
17 workgroup recognized that highest astronomical tide is the most ecologically protective
18 elevation, stating that highest astronomical tide "would extend CWA review process to
19 the uppermost reaches of the intertidal zone, including all forage fish spawning habitat . .
20 . ." and that it "would encompass the designated Critical Habitat for threatened and
21 endangered species listed in Puget Sound."

22 50. Nonetheless, in a memorandum from the Northwestern Division of the Corps to the
23 Seattle District dated January 19, 2018, Major General Scott Spellmon rejected the
24 recommendation to use mean annual highest tide, and instead formally directed the
25 Seattle District to stop considering a change to its high tide line jurisdictional boundary.
26
27
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1 51. Major General Spellmon offered two short explanations for his decision. First, he stated
2 that changing the high tide line definition would not be a good use of agency resources
3 because there is an ongoing effort by the EPA to delay and repeal its 2015 “Clean Water
4 Rule,” which defines the term “waters of the United States.” Major General Spellmon
5 did not explain the relevance of the 2015 Clean Water Rule, which by its express terms
6 does not affect the high tide line definition. Second, he stated, without explanation, that
7 he “maintain[s] that elevations such as [mean annual highest tide] as they would be
8 applied in Puget Sound are not consistent with the intent of the current definition of [high
9 tide line].” Major General Spellmon also expressed a general desire to pursue other
10 opportunities to encourage natural shoreline armoring instead of changing the high tide
11 line boundary, without explaining how these opportunities foreclose the recommended
12 change to mean annual highest tide.
13
14

15 52. Pursuant to Major General Spellmon’s January 2018 directive, the Corps will continue to
16 implement an unlawful and harmful jurisdictional scope in Puget Sound, absent an order
17 from this Court.
18

19 IV. 2015 PETITION

20 53. On November 21, 2014, Plaintiffs sent a letter to the Seattle District expressing concern
21 about the District’s insufficient shoreline jurisdiction and requesting a meeting. Plaintiffs
22 never received a written response to this letter.
23

24 54. On June 24, 2015, Plaintiffs sent a formal Petition to EPA Region 10 and the Seattle
25 District regarding the Seattle District’s unlawful use of mean higher high water as its
26 jurisdictional boundary. With respect to the Seattle District, Plaintiffs’ Petition requested
27 that the Seattle District complete individual “approved jurisdictional determinations” for
28

1 four specific shoreline armoring projects in the Puget Sound region, each of which was
2 located above the mean higher high water mark but below the true high tide line.

3 55. As of the date of this Complaint, Plaintiffs have not received any formal response to their
4 Petition.

5 56. Plaintiffs are aware of no further action being taken with respect to the Petition, or the
6 four projects—all of which involved unpermitted discharge below the high tide line.

7
8 CLAIMS FOR RELIEF

9 I. ARBITRARY AND CAPRICIOUS AGENCY ACTION UNDER APA § 706(2)

10 57. Plaintiffs reincorporate the allegations in all preceding paragraphs.

11 58. The Seattle District’s CWA § 404 mean higher high water tidal jurisdictional boundary is
12 unlawful under the CWA’s regulatory definition of the high tide line because it excludes
13 many “spring high tides and other high tides that occur with periodic frequency” which
14 are included in the CWA definition of high tide line. 33 C.F.R. § 328.3(c)(7).

15 59. The highest astronomical tide “encompasses spring high tides and other high tides that
16 occur with periodic frequency but does not include storm surges in which there is a
17 departure from the normal or predicted reach of the tide due to the piling up of water
18 against a coast by strong winds such as those accompanying a hurricane or other intense
19 storm.” *Id.* Therefore, the Seattle District’s CWA § 404 jurisdiction must extend to the
20 highest astronomical tide.

21 60. An interagency workgroup, including the Seattle District, EPA Region 10, and the West
22 Coast Region of NOAA, analyzed the law and the best available science and reached a
23 compromise recommendation that the Seattle District change its high tide line boundary
24 from mean higher high water to mean annual highest tide in order to better fulfill its legal
25 obligations and protect the nearshore ecosystem from the harms associated with shoreline
26
27
28

1 armoring.

2 61. The Corps' January 19, 2018 memorandum nonetheless directed the Seattle District to
3 stop considering a change to the high tide line boundary and to continue to use mean
4 higher high water to delineate the limits of its CWA § 404 authority, without adequate
5 explanation.

6
7 62. The Corps' failure to act to correct its unlawful CWA § 404 jurisdictional boundary is an
8 arbitrary and capricious agency decision that is an abuse of discretion and not in
9 accordance with the terms of the CWA and its regulations. This affirmative decision is
10 particularly unreasonable because the ecologically important nearshore ecosystem in the
11 Puget Sound region, and the humans, plants, and wildlife that rely on this habitat,
12 continue to be harmed by shoreline armoring that is largely unregulated by federal
13 agencies.

14
15 63. The Corps' decision to reject the recommended change to the Seattle District's high tide
16 line definition is a final agency action under APA, 5 U.S.C. §§ 551(13), 704, 706(2).

17
18 **II. VIOLATION OF APA § 555 – FAILURE TO RESPOND TO PETITION WITHIN A
REASONABLE AMOUNT OF TIME**

19 64. Plaintiffs reincorporate the allegations in all preceding paragraphs.

20
21 65. By failing to respond to Plaintiffs' 2015 Petition regarding CWA § 404 tidal jurisdiction
22 in the Puget Sound region, Defendant has unreasonably delayed agency action under the
23 APA.

1 66. Defendant’s unreasonable delay and failure to act violates the APA, which directs each
2 agency to “within a reasonable time ... conclude a matter presented to it,” 5 U.S.C.
3 § 555(b), and which mandates that “[p]rompt notice shall be given of the denial in whole
4 or in part of a written application, petition, or other request of an interested person made
5 in connection with any agency proceeding.” *Id.* § 555(e).

6
7 67. This Court is authorized to review Defendant’s unreasonable delay and failure to act
8 under the APA. *Id.* §§ 551(13), 702. The APA further mandates that the Court shall
9 “compel agency action unlawfully withheld or unreasonably delayed.” *Id.* § 706(1).

10 RELIEF REQUESTED

11 WHEREFORE, Plaintiffs respectfully request that this Court:

12
13 A. Adjudge and declare that the Corps’ decision to reject a recommended
14 change to mean annual highest tide for its definition of “high tide line” in the Seattle
15 District is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance
16 with law under the APA and the CWA;

17
18 B. Order the Corps to set aside its decision to maintain the Seattle District’s
19 unlawful “high tide line” definition of mean higher high water and adopt highest
20 astronomical tide as its definition of “high tide line”;

21
22 C. Adjudge and declare that Defendant’s failure to respond to Plaintiffs’
23 Petition violates the APA;

24
25 D. Order Defendant to issue a final decision on the Petition within thirty
26 days;

27
28 E. Retain jurisdiction of this matter until Defendant has fulfilled its legal and
Court-ordered obligations as set forth in this Complaint;

1 F. Award Plaintiffs their reasonable fees, expenses, costs, and disbursements,
2 including attorneys' fees associated with this litigation; and

3 G. Grant any further relief the Court deems just and proper.
4

5 Respectfully submitted this 21st day of May, 2018.
6

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