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The Honorable James L. Robart

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SOUND ACTION, FRIENDS OF THE SAN JUANS, AND WASHINGTON ENVIRONMENTAL COUNCIL, Plaintiffs, v. UNITED STATES ARMY CORPS OF ENGINEERS, Defendant.	Case No. 2:18-cv-00733-JLR PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS NOTE ON MOTION CALENDAR: November 15, 2018 ORAL ARGUMENT REQUESTED

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INTRODUCTION

Puget Sound's natural shorelines teem with biological life, from plants and insects, to bivalves, crustaceans, and small fish. Among other habitat functions, shallow, vegetated beaches provide safe refuges and food for juvenile salmon, and protective spawning grounds for forage fish at the base of the marine food web. Natural shorelines also replenish themselves through the free movement of sand and gravel in drift cells and feeder bluffs, maintaining plentiful beach habitat for marine wildlife and humans alike. However, these functions are under nearly constant assault throughout the Sound. Seawalls and other artificial shoreline armoring barriers extinguish natural shoreline functions by cutting off supplies of sand and gravel, burying forage fish spawning grounds, and generally making shorelines inhospitable to plant and insect life due to the elimination of shallow beaches. The overall diversity of marine life plummets next to artificial shoreline armoring. This degradation of habitat function cascades upwards through the ecosystem, contributing to the loss of the region's iconic species like salmon and orcas.

Shoreline armoring projects are prohibited without a permit under § 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344. However, the Seattle District of the U.S. Army Corps of Engineers (the "Corps") has abdicated its obligations under the CWA to protect the Sound's vulnerable shorelines. The Corps unlawfully uses the "mean higher high water" ("MHHW") tidal elevation to define the boundary of its CWA jurisdiction in Puget Sound, even though that elevation is exceeded by a quarter of high tides. As a result, the vast majority of shoreline armoring projects in Puget Sound are not reviewed under the CWA, or any other federal environmental law. This lawsuit challenges the Corps' violation of the CWA. Specifically, Plaintiffs challenge the Corps' January 2018 decision to reject an interagency recommendation to

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change its CWA tidal jurisdiction boundary, as well as the Corps' failure to respond to Plaintiffs' June 2015 petition on this issue. The Corps has moved to dismiss the first of these claims. The motion should be denied. Because the Corps made a final decision to reject a recommended change to MHHW, this Court has subject matter jurisdiction to review the decision under the Administrative Procedure Act ("APA"), and to vacate the directive as unlawful.

STANDARD OF REVIEW

For motions to dismiss under Fed. R. Civ. P. 12(b)(1), well-pleaded facts alleged in the complaint must be taken as true. *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1189 (9th Cir. 2001). When faced with a motion to dismiss under Rule 12(b)(1), the court must first determine if the challenge is facial to the sufficiency of the pleadings, or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial challenge, the court must accept the allegations of the complaint as true and look only to the allegations in the complaint to determine whether a lack of jurisdiction appears on its face. *Robinson v. Hampton*, 2010 WL 2541824, at *1 (W.D. Wash. June 21, 2010). In contrast, in a factual challenge, no presumption of truthfulness attaches to the allegations and the movant must present evidence that disproves the allegations which would, if true, invoke jurisdiction. *Wichansky v. Zoel Holding Co., Inc.*, 702 F. App'x 559, 560 (9th Cir. 2017). The Corps' motion to dismiss only claim one of the complaint is a facial challenge because the Corps does not dispute Plaintiffs' factual allegations and instead challenges the finality of an agency action that itself is not in dispute.

BACKGROUND

I. SHORELINE ARMORING IS A MAJOR DRIVER OF ECOLOGICAL DEGRADATION.

Puget Sound contains approximately 2500 miles of shorelines that create homes for a diverse array of marine plants and animals. Compl. ¶ 27. As the shorelines of Puget Sound have

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been developed for residential and commercial purposes, humans have built bulkheads, seawalls, and other kinds of artificial shoreline armoring to harden the natural shorelines. More than a quarter of Puget Sound's shorelines are already armored, and approximately 3483 feet of new shoreline armoring were added annually, on average, between 2011 and 2015. *Id*. ¶ 28.

Shoreline armoring causes a multitude of well-documented adverse effects on the health of Puget Sound's nearshore ecosystems. First, armoring of natural shorelines alters critical ecological functions such as erosion and sediment movement, causing beaches to lower, narrow, and eventually disappear. *Id*. ¶ 29. Shoreline armoring also harms important juvenile salmon habitat by removing vegetation that supplies young salmon with shelter and insects for food. *Id*. ¶ 32. In addition, armoring harms shellfish habitat, and generally reduces shallow water refuges for smaller species by giving larger predators access to nearshore areas. *Id*. Finally, shoreline armoring prevents forage fish like surf smelt and sand lance from spawning in upper beach areas, and causes other detrimental habitat changes such as the elimination of vegetation and fine sediments. *Id*. ¶ 31. These changes carry meaningful cumulative impacts for the marine food web. For example, the reduction in forage fish spawning habitat makes this prey less available to threatened and endangered salmon, who themselves are prey for endangered orcas. *Id*. It is well documented that shoreline armoring is associated with an overall decrease in taxonomic diversity and abundance—indeed, the Corps itself has recognized as much. *Id*. ¶¶ 32-33. These ecological harms will be exacerbated by the effects of climate change, as sea levels rise and coastal areas experience increasing demands for new installations of armoring. *Id*. ¶ 34.

II. THE SEATTLE DISTRICT CORPS USES AN UNLAWFULLY LOW CWA JURISDICTIONAL BOUNDARY FOR SHORELINES.

Section 404 of the CWA prohibits the discharge of dredged or fill materials into navigable waters without a permit. 33 U.S.C. § 1344. The jurisdiction of the CWA extends to

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"navigable waters," and the CWA defines that term as "the waters of the United States, including the territorial seas." *See id.* §§ 1251, 1321, 1342, 1344; *id.* § 1362(7). For tidal waters, the term "waters of the United States" is defined by regulation to mean water up to the "high tide line." 33 C.F.R. § 328.4(b). "High tide line" is defined as "the line of intersection of the land with the water's surface at the maximum height reached by a rising tide . . . encompass[ing] spring high tides and other high tides that occur with periodic frequency . . . ." 33 C.F.R. § 328.3(c)(7).

The construction of seawalls, bulkheads, and similar structures for shoreline armoring within navigable waters constitutes a discharge of dredged or fill materials under § 404 of the CWA. 33 C.F.R. § 323.2. Therefore, shoreline armoring projects below the high tide line are prohibited without a permit issued by the Corps. *Id.* The Seattle District of the Corps issues CWA § 404 permits in Puget Sound, and it uses MHHW as a proxy for the high tide line, even though MHHW is significantly lower than the maximum tidal height. Compl. ¶ 36. Because MHHW uses a statistical average, the boundary is frequently exceeded. Specifically, the MHHW mark is surpassed between three to five times a week in Washington State, meaning about a quarter of high tides are above MHHW in the Seattle District. Def. Br. Ex. 2 at 19, 13-18 (Fig. 5a -5f). Therefore, the MHHW boundary excludes many periodic tides. Because the Seattle District treats MHHW as the CWA high tide line in Puget Sound, it does not require CWA § 404 permits for armoring projects above MHHW but below the true high tide line, in contravention of the language of the CWA and governing regulations.

The Seattle District adopted MHHW as its high tide line marker when the CWA was initially passed because it was the highest tidal elevation data available at the time. Def. Br. Ex. 2 at 19. However, data for higher tidal elevations are now accessible, including the "highest astronomical tide" ("HAT"), which constitutes the highest predicted periodic astronomical tide

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occurring every 19 years, and the "mean annual highest tide" ("MAHT"), which is the average of the highest annual tide predicted over a period of 19 years. Compl. ¶ 40. Compared with MHHW, the MAHT is available at far more tide stations – more than double the number of tide stations that collect MHHW. Def. Br. Ex. 2 at 22. The MAHT is substantially higher than MHHW, but still below the HAT. Compl. ¶ 40. The difference between MHHW and HAT on a shoreline in Puget Sound varies by location, ranging from 15 to 32 vertical inches. *Id*. ¶ 41. The difference between MHHW and MAHT ranges from 13 to 29 inches. *Id*. The area between MHHW and MAHT represents up to 8600 acres of shoreline area in Washington. *Id*.

As a result of the Corps' unlawfully narrow assertion of its CWA jurisdiction, most armoring projects that should be reviewed through the federal permitting process are escaping review. Simply put, any entity wishing to construct a shoreline armoring project above MHHW is told by the Corps that no § 404 permit is required, even where it is below the high tide line. The Corps' refusal to exercise its CWA duties up to the high tide line is consequential. Federal permitting is an important process because it requires: a review of the project's impacts on water quality and the "public interest" under the CWA; analysis of environmental impacts under the National Environmental Policy Act ("NEPA"); and a review of effects to species protected by the Endangered Species Act ("ESA"), among other things. *Id*. ¶ 43. This entire layer of federal law is unlawfully circumvented for most armoring projects in the Puget Sound region.

For many years, Indian Tribes, government agencies, and environmental organizations in and around Washington state have urged the Seattle District to use a higher jurisdictional boundary for CWA § 404 jurisdiction in the Puget Sound region. For example, on June 24, 2015, Plaintiffs sent a formal petition to Region 10 of the Environmental Protection Agency ("EPA") and the Seattle District regarding the Seattle District's unlawful use of MHHW as its

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jurisdictional boundary. *Id*. ¶ 54. Plaintiffs have not received any formal response to their petition.[1] *Id*. ¶ 55. The National Marine Fisheries Service ("NMFS"), the federal agency charged with the administration of the ESA as it relates to the protection of marine wildlife and anadromous fish species, has advocated for years for the use of HAT to define CWA § 404 jurisdiction in the Puget Sound. *Id*. ¶ 45. The Northwest Indian Fisheries Commission ("NWIFC"), an organization consisting of designated representatives from the twenty treaty tribes in western Washington, has also long advocated for HAT due to the significant adverse impacts to treaty-protected salmon caused by the use of MHHW. *Id*. ¶ 46. Finally, the Governor of the State of Washington requested in a letter dated December 16, 2016, that the Seattle District change its CWA § 404 tidal jurisdiction to HAT, or something similar. *Id*. ¶ 47. Like NMFS and NWIFC, Governor Inslee cited the need to protect ESA-listed salmon as one of the primary motivators for requesting the change, and he expressed concern that salmon stocks continue to decline despite significant recovery efforts, impacting treaty rights, ecology, and the economy. *Id*. These efforts reflect a long-standing consensus that the Corps' failure to properly implement the CWA is contributing to serious and ongoing degradation of shoreline habitat in the Puget Sound.

III. THE CORPS REJECTED AN INTERAGENCY RECOMMENDATION TO CHANGE THE CWA JURISDICTIONAL BOUNDARY IN THE SEATTLE DISTRICT.

In 2016, the Corps' Seattle District, EPA Region 10, and the West Coast Region of the National Oceanic and Atmospheric Administration ("NOAA") responded to the long-standing advocacy on this issue by forming an interagency workgroup specifically to address the Seattle District's inadequate CWA tidal jurisdiction boundary. This workgroup reviewed available

[1] Claim two of Plaintiffs' complaint alleges the Corps unreasonably failed to respond to this petition. This claim is not at issue in the present motion to dismiss.

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scientific data, consulted with scientists, collected tidal data at field sites, and conducted an interagency analysis of the relevant legal and administrative implications. Def. Br. Ex. 2 at 1-5.

In November 2016, the interagency workgroup completed a report that made a recommendation to the Corps' Northwestern Division that it adopt MAHT as the high tide line marker for the Seattle District region. *Id*. at 26. The report concluded that MAHT would be more protective of critical shoreline habitat, would only minimally impact the Seattle District's workload, and is an elevation that "is predictable, reliable, repeatable, reasonably periodic, measurable, simple to determine, is scientifically defensible, and based on data that is reasonably available and accessible to the public." *Id*. This compromise was reached even though the workgroup recognized that HAT is the most ecologically protective elevation, stating that HAT "would extend CWA review process to the uppermost reaches of the intertidal zone, including all forage fish spawning habitat . . ." and that it "would encompass the designated Critical Habitat for threatened and endangered species listed in Puget Sound." *Id*. at 24.

Nonetheless, in a memorandum from the Northwestern Division of the Corps to the Seattle District dated January 19, 2018, Major General Scott Spellmon formally rejected the workgroup's recommendation to use MAHT. Moreover, Gen. Spellmon directed the Seattle District to stop considering *any* change to its high tide line jurisdictional boundary, stating: "I am directing [the Seattle District Corps] to shift away from further consideration of changing the Corps Clean Water Act jurisdiction limit in tidal waters." Def. Br. Ex. 1, ¶ 8. Gen. Spellmon offered two brief explanations for this decision. First, he stated that changing the high tide line definition would not be an "organizationally consistent" use of resources because there is an ongoing effort by the EPA to delay and repeal its 2015 "Clean Water Rule" defining the term "waters of the United States" under the CWA. *Id*. ¶¶ 3, 4. Gen. Spellmon did not explain the

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relevance of the 2015 Clean Water Rule, which by its express terms does not affect the nationwide high tide line definition (*see infra*), nor did he state or imply that the Corps would revisit the decision about the high tide line proxy in the Seattle District at the conclusion of those rulemaking efforts. Second, Gen. Spellmon stated, without explanation, that he "maintain[s] that elevations such as MAHT as they would be applied in Puget Sound are not consistent with the intent of the current definition of [high tide line]." *Id*. ¶ 5. This lawsuit followed.

ARGUMENT

The Corps does not seek to defend Gen. Spellmon's decision to reject the interagency recommendation to raise the Seattle District's CWA high tide line marker. Instead, the Corps argues this Court lacks jurisdiction because the Spellmon Memo is not "final agency action" under the APA, and because Plaintiffs lack standing. The Corps' arguments are incorrect as a matter of law, and the motion to dismiss should be denied.

I. THE SPELLMON MEMO CONSTITUTES FINAL AGENCY ACTION.

An agency action is "final" under the APA when it "mark[s] the 'consummation' of the agency's decisionmaking process" and is an action "by which 'rights or obligations have been determined.'" *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal citations omitted). Under the APA, there is a presumption favoring judicial review of agency actions. *See Sackett v. EPA*, 566 U.S. 120, 128 (2012); *City of Chicago v. U.S.*, 396 U.S. 162, 164 (1969).

Final agency actions are not limited to formal rules, and courts frequently find that informal agency documents containing directives and decisions are final agency actions. *See, e.g.*, *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1007 (D.C. Cir. 2014) (holding that a directive that provided "guidance to enforcement officials about how to handle permitting decisions" was a final agency action); *Appalachian Power Co. v. EPA*, 208 F.3d

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1015, 1022-23 (D.C. Cir. 2000) (holding that a guidance document that contained an agency position on certain permit requirements was a final agency action); *Navajo Nation v. U.S. Dept. of Interior*, 819 F.3d 1084, 1091-92 (9th Cir. 2016) (holding that a written decision about the return of human remains and funerary objects was a final agency action). Contrary to the Corps' argument, the Spellmon Memo is reviewable final agency action under the law of this circuit.

A. The Spellmon Memo was the consummation of the Corps' decision-making process.

The first prong of the *Bennett* test is whether an action "mark[s] the 'consummation' of the agency's decisionmaking process." *Bennett*, 520 U.S. at 178. This analysis asks "whether the agency has rendered its last word on the matter," for the purpose of "determin[ing] whether an action is final and is ripe for judicial review." *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 984 (9th Cir. 2006) (internal quotation marks and citation omitted). In other words, agency statements released in the middle of an ongoing decision-making process are not reviewable. For example, when an agency announces that it will make a decision on an issue at a later point in time, that deferral does not mark the end of the decision-making process. *See API v. EPA*, 216 F.3d 50, 68-69 (D.C. Cir. 2000). In contrast, when an agency has concluded the decision-making process, the substantive decision at the end of that process is a reviewable action, even if the agency retains the discretion to change that decision at a later point in time. *See Nat'l Envtl. Dev. Ass'n's Clean Air Project*, 752 F.3d at 1006-07.

1. Rejection of the recommendation to change the high tide line jurisdictional boundary from MHHW to MAHT

The Spellmon Memo satisfies the first finality factor under *Bennett* because it constituted the end of the Corps' decision-making process regarding the high tide line marker in the Seattle District. After years of advocacy from local tribes, government agencies, and environmental

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organizations, in 2016 three federal agencies convened a workgroup to address the proper high tide line marker in the Seattle District. The group consisted of thirteen lawyers, scientists, and agency leaders, representing each of the three agencies. Def. Br. Ex. 2 at App. D, 42. The workgroup spent approximately eleven months evaluating the legal, scientific, and practical implications of five alternative tidal elevations. *Id*. at 1-5. Of those five options, the workgroup eventually selected MAHT as the most appropriate tidal elevation, and prepared a report formally recommending that the Northwestern Division of the Corps adopt that marker for the Seattle District. *Id*. at 26. In short, the agencies identified a problem, spent nearly a year analyzing the most appropriate solution, and then presented their recommendation to the decision maker – Gen. Spellmon, the commander of the Northwestern Division of the Corps.

Gen. Spellmon formally rejected that recommendation. In fact, he went further, specifically forbidding any future consideration of any change to the CWA tidal marker. In the Memo, Gen. Spellmon incorrectly stated that MAHT is "not consistent with the intent of the current definition of [high tide line]," and concluded: "I am directing [the Seattle District Corps] to shift away from further consideration of changing the Corps Clean Water Act jurisdiction limit in tidal waters . . . ." Def. Br. Ex. 1, ¶¶ 5, 8. It is hard to imagine how a decision could be more "final" than this: Spellmon made a formal decision on the issue and ended the discussion. Gen. Spellmon neither stated nor implied that his decision was temporary or otherwise subject to change. It was the "last word on the matter." *Or. Nat. Desert Ass'n*, 465 F.3d at 984. Therefore, the decision to reject the recommended change to MAHT and instead continue using MHHW is "the agency's settled position, a position it plans to follow in reviewing [ ] permits," and "a position it will insist [ ] authorities comply with . . . ." *Appalachian Power Co.*, 208 F.3d at 1022.

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In a similar case, the Navajo Nation sued the Department of Interior and National Park Service for their failure to return certain human remains and funerary objects taken from the tribe's land. *Navajo Nation v. U.S. Dept. of Interior*, 819 F.3d 1084 (9th Cir. 2016). In that case, the Navajo Nation had been requesting the return of the remains and objects since the mid-1990s, and had received informal denials by the Park Service on the grounds that the agency was conducting an ongoing inventory to determine the correct cultural affiliations under the Native American Graves Repatriation Act ("NAGPRA"). *Id*. at 1089-90. The U.S. Department of the Interior Solicitor also issued an opinion during this time that the remains and objects must be inventoried under NAGPRA. *Id*. Finally, in 2011, the Navajo Nation sent a letter to the Park Service threatening to file a lawsuit if the agency did not immediately return the remains and objects. *Id*. at 1090. The Park Service wrote a letter in response, in which the agency again denied the request for the remains and objects due to the agency's decision to apply NAGPRA, reiterating its longstanding position on the issue. *Id*. at 1090-92. Faced with an argument that the Park Service's letter did not constitute final agency action, the 9th Circuit Court of Appeals "ha[d] no trouble concluding that the decision to follow Interior's solicitor's guidance and continue inventorying the remains and objects consummated the Park Service's decisionmaking process." *Id*. at 1092. The court further rejected an argument that the decision to apply NAGPRA was ongoing action (and thus not final) because the Park Service was still in the process of determining the cultural affiliation of the remains and objects under NAGPRA. *Id*.

This case is very similar. Here, the Corps made a decision in a letter to formally and finally reject a recommendation to make a change to its longstanding position on its CWA jurisdictional boundary. The rejection marked the end of the decision-making process. Moreover,

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as with the ongoing inventorying in *Navajo Nation*, the decision is concluded even if the Corps continues other unrelated efforts pertaining to the problem of hard armoring of shorelines.

2. Separate "Waters of the U.S." rulemaking

The Corps attempts to conflate the decision-making process at issue in this case—the recommended change to the Seattle District's high tide line marker—with the separate, nationwide decision-making process regarding the scope of the definition of "waters of the U.S." under the CWA. Def. Br. at 16. That effort should be rejected. As previously explained, the nationwide "high tide line" definition under the CWA is included in the nationwide "waters of the U.S." definitional regulation. 33 C.F.R. § 328.3(c)(7). That broader "waters of the U.S." regulation has been the subject of recent rulemakings, beginning with the 2015 rule commonly called the "Clean Water Rule." However, when EPA passed the 2015 Clean Water Rule, the agency explicitly recognized that the definition of "high tide line" in the 2015 Clean Water Rule remained unchanged from the Corps' pre-2015 definition. *See* 80 Fed. Reg. 37,054, 37,073 (June 29, 2015). Under both regulatory schemes, the national "high tide line" definition is identical, and no agency has proposed changing the definition during the recent reconsiderations of the 2015 Clean Water Rule.[2] Therefore, there is no indication the national "waters of the U.S."

[2] The most recent reconsiderations include the agencies' February 2018 delay of the 2015 Clean Water Rule for a period of two years, which instructs agencies to follow the pre-2015 regulatory definitions of the "waters of the United States." 83 Fed. Reg. 5200 (Feb. 6, 2018). The U.S. District Court for the District of South Carolina vacated the agencies' two-year delay of the 2015 Clean Water Rule because the agencies did not provide a sufficient opportunity for the public to comment on the rule. *See S.C. Coastal Conservation League v. Pruitt*, 318 F. Supp.3d 959 (D. S.C. 2018). Due to court injunctions of the 2015 Clean Water Rule in some states, the 2015 Clean Water Rule is currently in effect in part of the country, and the pre-2015 "Waters of the U.S." regulations are in effect in the remainder of the country. However, because the definition of "high tide line" is the same in both the 2015 regulatory regime and the pre-2015 regime, these Clean Water Rule developments have no effect on the definition of "high tide line."

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rulemakings will have any effect on the nationwide definition of high tide line, much less the narrower application of that definition in a tidal elevation that is specific to the Seattle District.

While the Spellmon Memo does reference the ongoing developments regarding the "waters of the U.S." rulemakings, it never suggests that the decision on the Seattle District's high tide line marker is contingent on the outcome of those proceedings, or that it will change at the conclusion of those proceedings. Def. Br. Ex. 1, ¶ 3. Contrary to the Corps' suggestion in the motion to dismiss, the Memo neither explicitly nor implicitly indicates the agency is "deferring" its decision due to the "waters of the U.S." rulemakings. Def. Br. at 16-17. Instead, the Memo merely observes that the high tide line "definition is contained in the regulations that are the subject of this ongoing interagency rulemaking effort," without explaining the relevance of that statement. Def. Br. Ex. 1, ¶ 3. Again, the rulemakings are irrelevant because EPA and the Corps have not proposed to change the definition of "high tide line" in any of these rulemaking efforts.[3] Gen. Spellmon was faced with the narrow task of deciding whether to accept an interagency recommendation to change the high tide line marker in the Seattle District, not the broader scope of the "waters of the U.S." definition or the national "high tide line" definition. Therefore, the

[3] Additionally, the Corps' implicit suggestion that the 2015 Clean Water Rule impacts the decision about the high tide line marker in the Seattle District because the Rule uses the term "high tide line" as a reference for the determination of whether certain non-tidal waters are jurisdictional under the CWA, is a red herring. Def. Br. at 8-9. The high tide line defines the landward limits of the tidal waters that are subject to the jurisdiction of the CWA, and the 2015 Clean Water Rule did not change that definition, as the Corps admits. *Id*. at 8. This definition is the only "waters of the U.S." definition that is relevant here because the issue in this case only addresses the way the Seattle District measures tidal waters on a beach up to the high tide line. The fact that the Clean Water Rule made certain determinations for "neighboring" waters that are not tidal waters and that fall within a given numeric distance from the high tide line, is irrelevant to the issue here. 80 Fed. Reg. at 37,059, 37,071, 37,105.

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decision on the Seattle District's high tide line marker unequivocally ended with Gen. Spellmon's command in the Memo.

Moreover, even if the EPA and Corps later decide to change the "high tide line" definition during the ongoing "waters of the U.S." rulemakings (and there is no indication that they plan to do so), that potential for future hypothetical changes cannot vitiate the finality of the agency decision in the Memo. "The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment." *Appalachian Power Co.*, 208 F.3d at 1022. For example, in *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, the D.C. Circuit Court of Appeals rejected an argument by EPA that its policy directive to enforcement officials about how to handle permitting decisions was not the consummation of its decision-making process because it was "still 'assessing what additional actions may be necessary,'" and had "'ongoing'" "'deliberations surrounding the matter.'" *Nat'l Env'l Dev. Ass'n's Clean Air Project*, 752 F.3d at 1006 (citation omitted). In finding that this directive was still a final agency action, the court explained that "[a]n agency action may be final even if the agency's position is 'subject to change' in the future." *Id*. (citation omitted). The court further found that this conclusion was "hardly surprising because many agency actions are subject to reconsideration." *Id*. at 1007; *see also Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1289 (D.C. Cir. 2016) ("The 'possibility' that the Service 'may revise [its decision] . . . based on 'new information' . . . is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal.'") (citation omitted); *Scenic America, Inc. v. U.S. Dept. of Transportation*, 836 F.3d 42, 56 (D.C. Cir. 2016) (holding that an agency guidance document which interpreted a prohibition on billboards with flashing or moving lights was a final agency action, even though the guidance document stated that the agency "may provide further guidance in the future as a result of additional information"

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and explaining that "[t]he fact that a regulation might be interpreted again at some point in the indeterminate future cannot, by itself, prevent the initial interpretation from being final."). Therefore, the possibility that EPA and the Corps could later revisit the definition of "high tide line" does not affect the finality of the Corps' decision to reject the recommended change to the Seattle District's high tide line marker.

3. Directive to undertake other shoreline projects that do not involve changing the high tide line jurisdictional marker

Similarly, the fact that the Spellmon Memo also instructs the Seattle District to undertake efforts to explore different shoreline measures related to "natural and restorative approaches," instead of changing the high tide line, does not hold open the decision about the high tide line marker, as the Corps suggests. Def. Br. at 17. For example, in *Sackett v. EPA*, the U.S. Supreme Court held that a "compliance order" under the CWA was the consummation of EPA's decision about the Sackett family's property, even though "a portion of the order that invited the Sacketts to 'engage in informal discussion of the terms and requirements' of the order with the EPA and to inform the agency of 'any allegations [t]herein which [they] believe[d] to be inaccurate.'" 566 U.S. 120, 127 (2012); *see also Navajo Nation*, 819 F.3d at 1092 (holding that a decision to reject a request for the return of human remains and funerary objects was a final agency action even though there was an ongoing inventory of those remains and objects to determine the appropriate cultural affiliations). In other words, once an agency has made a final decision regarding a discrete query, the existence of ongoing agency activities that are tangential to the topic involved in the decision do not undermine the finality of the specific decision.

The cases cited by the Corps regarding deferrals of agency actions are inapposite. Def. Br. at 16-17. In *In re Bluewater Network*, the D.C. Circuit granted a writ of mandamus to force the Coast Guard to promulgate certain rules mandated by the Oil Pollution Act of 1990. 234 F.3d

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1305, 1316 (D.C. Cir. 2000). In doing so, the court rejected the agency's argument that the petition for a writ should be construed as an untimely petition challenging its earlier, temporary regulations, and, in *dicta*, observed that deferrals of future rulemakings are not generally final agency actions. *Id*. at 1313. The observation is irrelevant in this case because the Corps has given no indication it is deferring a decision on the Seattle District's high tide line marker. The Corps' additional reliance on *API v. EPA*, Def. Br. at 16, is misplaced for the same reason. In that case, in which environmental petitioners sought review under the Resource Conservation and Recovery Act of EPA's decision to defer a hazardous waste listing determination for certain wastes, EPA had explicitly stated it would "defer" making a listing determination. 216 F.3d at 68-69. There was no such explicit, or even implicit, statement of deferral of the decision to reject the interagency recommendation in this case.

B. The Corps' decision determines "rights or obligations."

Under the second *Bennett* factor, an agency action is final when it is an action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178 (citation omitted). The Corps' decision to reject the interagency recommendation to change the high tide line marker in the Seattle District from MHHW to MAHT, Def. Br. Ex. 1, was a decision that determined obligations for permitting under § 404 of the CWA. As a result of the decision, the Seattle District will continue applying MHHW as its legal high tide line, instead of switching to MAHT. Landowners will not need to obtain CWA permits for armoring projects proposed between MHHW and MAHT on the shoreline, and tribes, the State of Washington, and Plaintiffs will continue to feel the impacts of inadequate implementation of the CWA.

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Courts have repeatedly found that when responding to requests for decisions, agency decisions to *not* change the status quo are still final agency actions. In *City of Chicago v. U.S.*, the U.S. Supreme Court held that a decision by the Interstate Commerce Commission to discontinue investigations into the terminations of certain rail lines, and thus to continue the status quo of those terminations, was a final agency action. The Court found it would be illogical to hold that an affirmative decision to halt the terminations was final agency action without also holding that the reverse, "negative" decision of allowing the terminations to continue was final agency action. *City of Chicago*, 396 U.S. at 166. The Court explained: "[a]n order of the Commission dismissing a complaint on the merits and maintaining the status quo is an exercise of administrative function, no more and no less, than an order directing some change in status. . . . We conclude, therefore, that any distinction, as such, between 'negative' and 'affirmative' orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose." *Id*. at 166-167. *See also Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d at 987, 990 (holding that annual operating instructions issued to grazing permit holders were final agency actions even though they did not alter the legal regime, and citing cases that "demonstrate that *Bennett's* second requirement can be met through different kinds of agency actions, not only one that alters an agency's legal regime."); *Alliance To Save Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 1, 10 (D.D.C. 2007) (noting that EPA's failure to veto a permit was "a consummated 'agency action' that APA views as final, notwithstanding the fact that the agency 'did' nothing."); *Havasupai Tribe v. Provencio*, 2018 WL 5289028, at *5 (9th Cir. Oct. 25, 2018) (holding that a "mineral report" that validated a preexisting mining interest was a final agency action, even though the legal right to mine was previously conferred by the miner's discovery of valuable minerals and the report merely "determined" that those rights were valid).

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In a case that is similar to the CWA high tide line jurisdictional determination at issue here, the U.S. Supreme Court recently addressed the finality of "approved jurisdictional determinations" under the CWA. In *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc*., the Court held that the Corps' determination that certain waters are "waters of the U.S." subject to the jurisdiction of the CWA, is a final agency action because there are "direct and appreciable legal consequences." 136 S. Ct. 1807, 1814 (2016). In so holding, the Court also addressed whether a "negative" jurisdictional determination—*i.e*., a determination that certain waters are not "waters of the U.S." and thus no CWA permit is needed—is also a final agency action. *Id*. The court found that a negative jurisdictional determination is still a final agency action because it "both narrows the field of potential plaintiffs and limits the potential liability a landowner faces for discharging pollutants without a permit." *Id*. Likewise, the decision by the Corps in this case to not require CWA permits for activities between MHHW and MAHT was a decision that determined rights and obligations because it allows landowners to proceed with projects above MHHW without permits and limits the liability of those landowners. *See also Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1279-80 (D.C. Cir. 2005) (holding that the reissuance of blanket, nationwide CWA permits was a final agency action because the permits "authorize certain discharges of dredged and fill material into navigable waters without any detailed, project-specific review by the Corps' engineers" and thus "directly affect the investment and project development choices of those whose activities are subject to the CWA").

The cases cited by the Corps are distinguishable. Def. Br. at 18-19. First, in *City of San Diego v. Whitman*, the Ninth Circuit held that an EPA letter was not final agency action because it addressed the application of a statute to a permit renewal application that had not yet been submitted, and therefore the agency decision-making process had not even begun and would not

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begin until the permit renewal application was submitted. 242 F.3d 1097, 1098-1102 (9th Cir. 2001). Unlike the premature letter in *Whitman*, the Spellmon Memo made a final decision and was not a prelude to a decision that would be made in the future. The Corps also cites *Indep. Equip. Dealers Ass'n v. EPA*, a case in which the D.C. Circuit held that a "purely informational" agency letter about its longstanding interpretations, which did not contain any mandatory language or directives, was not a final agency action because it was a restatement of its interpretations in an "abstract setting" which "imposed no obligations and denied no relief." 372 F.3d 420, 424-27 (D.C. Cir. 2004). The letter "compel[led] no one to do anything." *Id*. at 427. Unlike the letter in *Indep. Equip. Dealers Ass'n*, the Spellmon Memo was not "purely informational," and instead specifically denied requested relief and compelled the Seattle District Corps to apply MHHW as its jurisdictional marker going forward. *See also Nat'l Envtl. Dev. Ass'n's Clean Air Project*, 752 F.3d at 1007 (distinguishing *Indep. Equip. Dealers Ass'n* for similar reasons). Finally, the Corps cites *Nat'l Ass'n of Home Builders v. Norton*, a case in which the D.C. Circuit held that recommended, voluntary survey protocols for an endangered butterfly did not have legal effect because the protocols were not mandatory and a failure to use the protocols would not change legal statuses. 415 F.3d 8, 14-16 (D.C. Cir. 2005). Unlike in *Norton*, the directive to stop considering a change to the tidal marker was not a merely "voluntary" suggestion. Rather, it had the legal effect of determining the limit of the Corps' CWA jurisdiction. As explained above, purposeful agency decisions to continue the legal status quo in the face of requested relief, are final agency actions. *See also Navajo Nation*, 819 F.3d at 1092 (holding that a decision to reject a request for the return of remains and objects was a final agency action even though it reiterated and refused to change a longstanding legal position).

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Furthermore, contrary to the Corps' suggestions, Plaintiffs do not challenge a "broad programmatic" policy rather than a final agency action. Def. Br. at 20-21. Unlike in the *Lujan v. Nat'l Wildlife Fed'n* line of cases cited by the Corps, the challenge in this case is to a specific agency decision to reject a proposal to change a jurisdictional marker. This is not an overall challenge to an ongoing program without reference to a specific agency decision, as was the case in *Lujan*. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890-91 (1990). Moreover, in each of the other cases cited by the Corps that applied *Lujan*, there were future decision-making steps that the plaintiff could challenge. *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 670 (9th Cir. 1998) (holding that agency management programs did not make specific decisions and when there is a proposal to implement actual strategies at a later date that proposal would be a reviewable action); *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 925 (9th Cir. 1999) (holding that the agency's ongoing monitoring efforts in a forest were not a final agency action, and explaining that "monitoring is several steps removed from final agency action" because it takes place before decisions are made about management changes).[4] That is not the case here.

Finally, the Corps blithely suggests that instead of challenging its decision to reject the working group's recommendation to implement MAHT, Plaintiffs can sue an innocent landowner for failing to obtain a § 404 CWA permit for a project above MHHW. Def. Br. at 19. The argument can only be described as astonishing. The Corps has *instructed* the public they do

[4] The Corps also cites *Neighbors of Cuddy Mtn. v. Alexander*, a case in which the Ninth Circuit Court of Appeals found that forest "monitoring and management practices are reviewable when, and to the extent that, they affect the lawfulness of a particular final agency action," and held that the plaintiffs in that case successfully challenged monitoring and management practices that were reviewable because they challenged the Forest Service's management practices in the context of specific timber sales. 303 F.3d 1059, 1067-70 (9th Cir. 2002). Therefore, this case demonstrates the ability of plaintiffs to challenge specific agency decisions that are made in the context of broader policies, as is the case here.

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not need permits for projects above MHHW. Instead of accepting responsibility for its own failure to comply with the CWA, the Corps has expressed a willingness to burden members of the public with thousands of dollars of potential fines and fees under CWA enforcement actions. Similarly, the Corps' suggestion that Plaintiffs could alternatively challenge a permit issued by the Corps for a shoreline armoring project purposefully misses the point—the Corps is not issuing permits for shoreline armoring projects in the Seattle District due to the unlawfully low high tide line marker. Def. Br. at 18-19. Plaintiffs cannot challenge a permit that does not exist.

For these reasons, Gen. Spellmon's decision rejecting the working group recommendation and formally closing the door on further discussion about the Seattle District's high tide marker is a "final agency action" for purposes of APA review.

II. PLAINTIFFS HAVE STANDING TO BRING THIS ACTION.

Next, the Corps contends that Plaintiffs do not have standing to bring this action because they cannot allege concrete harm stemming from the rejection of the interagency recommendation. This effort also must be rejected, particularly in the context of a motion to dismiss. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) ("'At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim'") (citation omitted). Plaintiffs have associational standing to challenge the Corps' decision to maintain the unlawful high tide line definition in the Seattle District because their members have suffered, and continue to suffer, concrete harms due to the application of MHHW instead of a lawful and appropriate jurisdictional marker. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the

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organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000) (citation omitted). Plaintiffs satisfy this standard because their members have suffered injuries-in-fact that are redressable by a favorable court decision, the shoreline ecosystem and wildlife protection interests at stake are germane to these conservation organizations' purposes, and the lawsuit does not require the participation of individual members. Compl. ¶ 11; *Hughes Aircraft Co.*, 243 F.3d at 1189 (facts alleged in the complaint must be taken as true).

Contrary to the Corps' assertions, Plaintiffs have suffered concrete harms directly related to the Corps' decision to reject the interagency recommendation regarding a change to the high tide line boundary in the Seattle District, and these harms are continuing. Members of the plaintiff organizations have submitted declarations demonstrating their recreational and aesthetic interests in specific Puget Sound shorelines, which are at risk from the harms associated with continued shoreline armoring that escapes review under federal environmental laws.[5] McCoughey Decl. ¶¶ 5-7; Gale Decl. ¶¶ 2, 6-7; Sundberg Decl. ¶¶ 1, 10-11, 15. For years, these members have experienced harms related to the shorelines and the species they care about due to armoring that is unregulated at the federal level; when the Corps rejected the interagency recommendation, the Corps ensured that those harms will continue unabated. Without federal review under the CWA, ESA, and NEPA, no federal agency is considering the numerous adverse impacts on the public and on endangered and threatened species. Due to the Corps' decision to

[5] Although this motion to dismiss should be decided on the face of the complaint, and "general factual allegations of injury" should suffice for a motion to dismiss, *Maya*, 658 F.3d at 1068, Plaintiffs nonetheless submit declarations to demonstrate standing in order to fully respond to the pending motion.

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maintain a high tide line proxy which excludes federal review of these known harms, the member declarants will continue to be harmed by the federally unregulated armoring of the shorelines and marine species they care about. McCoughey Decl. ¶¶ 7-13; Gale Decl. ¶¶ 9-14; Sundberg Decl. ¶¶ 11-15, 17. Each time shoreline armoring occurs without consideration of the attendant harm to the public, it causes long-lasting, ongoing harm.

Finally, the harms stemming from the Spellmon Memo are not abstract or theoretical. For example, Plaintiffs requested approved jurisdictional determinations under the CWA on four specific shoreline armoring projects above MHHW but below the true high tide line in their 2015 petition to the Corps. *See* Ex. A at 10-12 (Plaintiffs' 2015 Petition to the Corps and EPA). As stated above, Plaintiffs have not received a response to that request for a determination about the applicability of the CWA to those four projects. Furthermore, since the Spellmon Memo was released on January 19, 2018, at least 60 shoreline armoring projects have been permitted by the State of Washington on shorelines, all or nearly all of which are above MHHW but below the true high line. Carey Decl. ¶ 14. Because the Spellmon Memo rejected the recommendation to raise the tidal marker to MAHT, none of those projects were reviewed under the CWA or other federal environmental laws. *Id*. This circumvented federal review, going forward, continues the harm that stems from the absence of consideration of projects' impacts on water quality and the "public interest" under the CWA, as well as a review of effects to species protected by the ESA and an analysis of environmental impacts under the NEPA. *Id*. ¶ 15. These harms concretely manifest in specific shoreline armoring projects, such as the many projects permitted in 2018 in documented surf smelt and sand lance spawning habitat, and those harms will continue as long as the tidal marker remains at MHHW because armoring projects will continue to be proposed and

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permitted above MHHW and outside the scope of the Seattle District Corps' jurisdictional boundary.[6] *Id*. ¶¶ 14-16.

CONCLUSION

This matter is properly before this Court and this Court has subject matter jurisdiction under the review provisions of the APA, 5 U.S.C. § 706. The Corps has taken final action that has real legal consequences for the regulated public, and Plaintiffs have standing to bring this lawsuit. Plaintiffs respectfully request that the Court deny the Corps' motion to dismiss claim one of the complaint.

Respectfully submitted,

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[6] This case is very different from *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009), where the conservation groups settled the only part of their case that presented a concrete harm but then continued to challenge the "regulation in the abstract" based on standing declarations that failed to identify any connection between areas that plaintiffs used and the nationwide application of the regulations. *Ctr. for Biological Diversity v. Kempthorne*, 588 F.3d 701, 707 (9th Cir. 2009) (citing *Summers*, 555 U.S. at 494-95). Plaintiffs here have already been injured by site-specific action.

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2018, I electronically filed the foregoing PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/Anna Sewell
Anna Sewell

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