

Kevin Bright

I encourage Ecology to use the best available science in setting regulations and conditions of the NPDES permits for aquaculture.

The 2010 BE updated EPA's data and analysis; however, its conclusions are unchanged from those articulated in the 2008 BE. After reconsidering the 2008 BE along with additional analysis and the best available scientific information, EPA concluded that its proposed approval of the revised SMS provisions is NLAA listed fish species or marine mammals or their critical habitat. As mentioned above, this second round of ESA consultation reached the same conclusions as the previous consultation, but includes additional analysis (i.e., best available science), such as the following two recovery plans:

1. National Marine Fisheries Service. 2007. Puget Sound Salmon Recovery Plan. Shared Strategy for Puget Sound adopted by National Marine Fisheries Service. Volumes I and II.
2. National Marine Fisheries Service. 2008. Recovery Plan for Southern Resident Killer Whales (*Orcinus orca*). National Marine Fisheries Service, Northwest Region, Seattle, Washington.

EPA also provided an analysis for the three newly listed species of rockfish in Puget Sound: bocaccio, canary, and yellow-eye rockfish.

EPA determined its approval of the new and revised portions of Washington's WAC 173-204 is not likely to adversely affect these newly listed rockfish species or their critical habitat.

After reviewing EPA's analysis in the 2010 BE, NMFS did not conclude that formal consultation was required. Rather, on April 8, 2011, NMFS concurred with EPA's determination that the proposed approval action may affect, but is not likely to adversely affect listed fish species or marine mammals or their critical habitat in Puget Sound.

Analysis included additional review of the best available science and new technical information. ESA consultation concluded when NMFS concurred with EPA's NLAA determination.



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

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APR 22 2011

OFFICE OF
WATER AND WATERSHEDS

Mr. Kelly Susewind
Washington Department of Ecology
Water Quality Program Manager
PO Box 47600
Olympia, Washington 98504-7600

Mr. Jim Pendowski
Washington Department of Ecology
Toxics Cleanup Program Manager
PO Box 47600
Olympia, Washington 98504-7600

Re: EPA's Re-Approval of Washington's Revised Sediment Management Standards (WAC 173-204) including the Marine Finfish Rearing Facility Provision, as submitted on June 3, 1996.

Dear Mr. Susewind & Mr. Pendowski:

On April 28, 2010, the U.S. District Court for the Western District of Washington set aside the U.S. Environmental Protection Agency's (EPA's) September 18, 2008, approval of revisions to Washington's Sediment Management Standards (SMS).¹ The Court ordered EPA and the National Marine Fisheries Service (NMFS) to reconsider whether formal consultation under the Endangered Species Act (ESA) is required in approving Washington's proposed SMS revisions. On reconsideration, EPA reached the same conclusion that the SMS revisions are not likely to adversely affect endangered or listed species or their designated critical habitat. NMFS concurred with EPA's conclusion and did not require formal consultation. Therefore, in accordance with its Clean Water Act (CWA) authority, 33 U.S.C § 1313(c)(3) and 40 C.F.R. part 131, EPA is reiterating its approval of Washington's 1996 revisions to the SMS consistent with the enclosed September 18, 2008 action document.

BACKGROUND

The SMS, a portion of Washington's water quality standards (WQS), are codified at WAC 173-204 *et. seq.* Under Sections 303(a)-(c) of the CWA, 33 U.S.C § 1313(a)-(c), states are required to establish water quality standards and submit them to EPA for approval or disapproval. Likewise, revisions to a state's water quality standards must also be submitted to EPA for approval or disapproval.

¹ Wild Fish Conservancy v. U.S. EPA, No. 08-0156 (W.D. Wash. 2010)

Water quality standards describe the desired condition of a waterbody and consist of three principle elements: (1) the “designated uses” of the state’s waters, such as public water supply, recreation, propagation of fish, or navigation; (2) “criteria” specifying the amounts of various pollutants, in either numeric or narrative form, that may be present in those waters without impairing the designated uses; and (3) antidegradation requirements, providing for protection of existing water uses and limitations on degradation of high quality waters. EPA’s regulations at 40 C.F.R. Part 131 describe the minimum requirements for each of these three elements of water quality standards.

In 1991, EPA approved Washington’s SMS, which address three primary areas: (1) standards for assessing the nature and extent of sediment contamination, (2) procedures for cleanup of historical sediment contamination, and (3) procedures for preventing future sediment contamination from discharges.²

On June 3, 1996, the Washington State Department of Ecology (Ecology) submitted to EPA revisions to WAC 173-204, which included minor revisions and the addition of a new section for Marine Finfish Rearing Facilities, WAC 173-204-412. Since EPA took no action on the SMS revisions by May 30, 2000, Washington’s SMS were subject to 40 CFR 131.21 (the Alaska Rule of 2000) since they were adopted by and effective under Washington State law prior to that date.³

Among the SMS revisions submitted to EPA were the addition of WAC 173-204-412, “Marine Finfish Rearing Facility” (Section 412). Section 412 allows exemptions from sections of the SMS for salmon netpen facilities located in Washington’s marine waters. The eight existing netpen facilities are all located in Puget Sound. The sediment quality compliance and monitoring requirements of these facilities are addressed through National Pollutant Discharge Elimination System (NPDES) permitting. The revision allows for a sediment impact zone within 100 feet from the outer edge of a marine finfish rearing facility, thereby exempting the facilities from: marine sediment quality standards, sediment impact zone maximum criteria, and sediment impact zone standards within that zone. The revision also allows Ecology to authorize sediment impact zones beyond 100 feet via NPDES permits or administrative actions, subject to increased monitoring. Section 412 does not exempt netpen facilities from meeting Washington’s water quality standards found in WAC 173-201A.

On September 18, 2008, EPA approved the 1996 revisions to the SMS which were considered water quality standards under section 303(c) of the CWA. The revisions included the addition of a new definition, WAC 173-204-200(13); a new section, WAC 173-204-412; and several other revisions to existing provisions contained in WAC 173-204. EPA reviewed and only took action on those sections of WAC 173-204 that are water quality standards which were

² Washington State Department of Ecology. “Sediment Cleanup Status Report.” June 2005. Publication Number 05-09-092. <<http://www.ecy.wa.gov/pubs/0509092.pdf>>

³ 40 C.F.R. § 131.21.

revised and submitted on June 3, 1996. EPA did not review any unrevised provisions in the SMS.

ESA CONSULTATION

On April 28, 2010, the U.S. District Court for the Western District of Washington set aside the EPA and NMFS' not likely to adversely affect (NLAA) determinations and informal consultation regarding EPA's September 18, 2008 approval of the revisions to Washington's SMS. The Court ordered EPA and NMFS to reconsider, based on the best available science, whether formal consultation on the SMS was needed under section 7 of the Endangered Species Act. In accordance with the April 28, 2010 court order, EPA reconsidered whether approval of the new and revised water quality standards in the SMS at WAC 173-204 may affect listed fish species or marine mammals or their critical habitat.

EPA submitted a revised Biological Evaluation to NMFS on December 13, 2010 ("2010 BE").⁴ In accordance with ESA Section 7(a)(2), EPA requested concurrence from NMFS on its NLAA determination for its proposed approval of the new and revised portions of WAC 173-204. Details regarding the provisions within the SMS that were revised and EPA's effect determinations for listed species and their critical habitat in Washington were described in a previous Biological Evaluation ("2008 BE") provided on April 17, 2008 and supplemented on August 6, 2008 to address six revised sediment testing methodology provisions. NMFS concurred with the conclusions of the 2008 BE on June 9, 2008 and the supplemental information on August 13, 2008.

The 2010 BE updated EPA's data and analysis; however, its conclusions are unchanged from those articulated in the 2008 BE. After reconsidering the 2008 BE along with additional analysis and the best available scientific information, EPA concluded that its proposed approval of the revised SMS provisions is NLAA listed fish species or marine mammals or their critical habitat. As mentioned above, this second round of ESA consultation reached the same conclusions as the previous consultation, but includes additional analysis (i.e., best available science), such as the following two recovery plans:

1. National Marine Fisheries Service. 2007. Puget Sound Salmon Recovery Plan. Shared Strategy for Puget Sound adopted by National Marine Fisheries Service. Volumes I and II.⁵

⁴ December 13, 2010. US EPA Region 10. *Update to the Biological Evaluation Submitted April 17 and August 6, 2008, Regarding EPA Action on Washington's Marine Finfish Rearing Facility Provision Contained in the Sediment Management Standards.*

⁵ Available online at: <http://www.nwr.noaa.gov/Salmon-Recovery-Planning/Recovery-Domains/Puget-Sound/PS-Recovery-Plan.cfm>

2. National Marine Fisheries Service. 2008. Recovery Plan for Southern Resident Killer Whales (*Orcinus orca*). National Marine Fisheries Service, Northwest Region, Seattle, Washington.⁶

EPA also provided an analysis for the three newly listed species of rockfish in Puget Sound: bocaccio, canary, and yelloweye rockfish. EPA determined its approval of the new and revised portions of Washington's WAC 173-204 is not likely to adversely affect these newly listed rockfish species or their critical habitat.

After reviewing EPA's analysis in the 2010 BE, NMFS did not conclude that formal consultation was required. Rather, on April 8, 2011, NMFS concurred with EPA's determination that the proposed approval action may affect, but is not likely to adversely affect listed fish species or marine mammals or their critical habitat in Puget Sound.⁷ NMFS' analysis included additional review of the best available science and new technical information. ESA consultation concluded when NMFS concurred with EPA's NLAA determination.

CONCLUSION

Thank you for your patience as we have worked to satisfy the court's order regarding ESA consultation on this CWA action. If you have questions concerning this letter, please feel free to contact me at (206) 553-4198 or have your staff contact Jannine Jennings at (206) 553-2724.

Sincerely,



Michael A. Bussell
Director
Office of Water and Watersheds

Enclosure

cc: Ms. Melissa Gildersleeve, Ecology
Ms. Susan Braley, Ecology
Ms. Elaine Spencer, Graham & Dunn
Mr. Brian Knutsen, Smith & Lowney

⁶ Available online at: <http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Killer-Whales/ESA-Status/upload/SRKW-Recov-Plan.pdf>

⁷ April 8, 2011. Letter from NMFS to EPA Region 10, Re: Endangered Species Act Section 7 Informal Consultation and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for the Proposed Approval of Finfish Rearing Facility Provision Contained in the Sediment Management Standards Rule Promulgated by the Washington State Department of Ecology. (HUC 17110019, Puget Sound).