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**COMMUNITY PLANNING &
ECONOMIC DEVELOPMENT DEPARTMENT**

Joshua Cummings, Director

Creating Solutions for Our Future

MEMORANDUM

TO: Thurston County Planning Commissioners

FROM: Jennifer Davis, Community Planning Manager
Andrew Deffobis, Associate Planner

DATE: November 27, 2019

SUBJECT: Recent Court Decision on U.S. Army Corps of Engineers' Nationwide Permit 48 Issuance

Aquaculture is an activity permitted under Thurston County's Shoreline Master Program (SMP), which is currently undergoing review and update. The topic of aquaculture's impacts and regulation has received frequent testimony by concerned citizens during recent Planning Commission meetings. Concerns brought forward by the public include marine pollution by microplastics and derelict gear, aesthetic impacts, impacts on wildlife (birds, eelgrass, forage fish, salmon), and the use of chemicals in operations, among others.

Aquaculture is also regulated by the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, WA Dept. of Ecology, WA Dept. of Natural Resources, WA Dept. of Health, and the U.S. Army Corps of Engineers (ACOE).

A recent federal district court ruling concerns the ACOE permit issued for aquaculture, Nationwide Permit 48 (NWP 48). The district court found that the ACOE failed to adequately consider the impacts of commercial shellfish aquaculture activities authorized by NWP 48, and that the ACOE's issuance of NWP 48 was not in accordance with National Environmental Policy Act (NEPA) or the Clean Water Act (CWA). The Court held NWP 48 unlawful, setting the permit aside in Washington State. However, the Court still needs to decide whether NWP 48 should be vacated outright or left in place while unlawful actions are being corrected.

Citizens have asked Thurston County how the ruling would impact regulation of aquaculture under the SMP. Staff are monitoring the issue and are not currently proposing specific amendments to the SMP related to this federal court decision because:

- Federal and state permitting authority over aquaculture operations remain.

- County permitting requirements and standards are different and not necessarily reliant on the criteria of NWP 48.
- The draft SMP includes application requirements for aquaculture operations and allows applicants to use information submitted for state and federal permits necessary for their operations. If information submitted for other agencies does not provide adequate analysis of potential impacts, the draft SMP allows the County to request additional information.
- The Court decision does not change the responsibility of the County to ensure that any proposed aquaculture activities do not result in net loss of shoreline ecological function.
- The Court has not yet identified a specific remedy for the ACOE permit.

Below is a more detailed summary of the Court decision for reference.

Summary of Court Decision (Case No. C16-0950RSL)

- In 2017, the U.S. Army Corps of Engineers (ACOE) reissued Nationwide Permit 48 (NWP 48), which covers certain activities related to commercial shellfish aquaculture in waters of the United States. Nationwide permits are issued every five years. Aquaculture operations in Washington are required to comply with the terms of this permit or seek individual approval from ACOE.
- An environmental group alleged that issuance violated the Clean Water Act (CWA), the National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA).
- In October 2019, the U.S. District Court for the Western District of Washington held that the agency's conclusion that the permit would have a minimal environmental impact was not supported by the evidence; therefore, the issuance of NWP 48 was arbitrary and capricious and not in accordance with NEPA or the CWA.
- The Court held that NWP 48 is "unlawful" and set it "aside in Washington state in so far as it authorizes activities in Washington." However, the Court has not yet ruled on the specific remedy.
- The parties are currently submitting legal briefs on whether NWP 48 should be vacated outright, which would invalidate existing activities under the permit, or whether it should be left in place while the agency considers how to remedy deficiencies in the permit.
- The Court is expected to consider arguments on the issue of remedy on November 15, 2019.