

Response to Comments

General Permit for Tribal Enhancement and Federal Research Marine Net Pen Facilities Within
Puget Sound

NPDES General Permit Number: WAG132000

April 2, 2022

Introduction

On February 9, 2021, the U.S. Environmental Protection Agency (EPA) issued a public notice for the proposed reissuance of a draft National Pollutant Discharge Elimination System (NPDES) General Permit for Tribal Enhancement and Federal Research Marine Net Pen Facilities Within Puget Sound (WAG132000). That same day, EPA requested final CWA § 401 certification of the draft general permit from the State of Washington Department of Ecology (Ecology) and Puget Sound Tribes in Washington with Treatment as a State. The comment period for the draft permit ended on March 26, 2021.

Prior to public notice, on December 23, 2020, EPA submitted a Biological Evaluation (BE) to the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) (collectively referred to as the “Services”) as required by the Endangered Species Act (ESA). In the BE, EPA determined that the permitting action was not likely to adversely affect (NLAA) any ESA-listed species or designated critical habitat that occur or may occur within the action area. EPA requested that the Services concur on this determination. On July 21, 2021, EPA received concurrence from USFWS. On November 18, 2021, NMFS notified EPA that it did not concur with the NLAA determination and, thus, formal consultation was required. On February 16, 2022, EPA received a Biological Opinion (BiOp) from NMFS which included reasonable and prudent measures (RPMs) and nondiscretionary terms and conditions that EPA is required to comply with to minimize the incidental take of listed species as a result of the proposed action.

This document presents EPA’s response to comments received during the public comment period, identifies conditions incorporated into the permit as the result of the CWA § 401 certifications, and identifies conditions incorporated into the permit as the result of ESA consultation.

CWA § 401 Certifications

EPA requested final CWA § 401 certification from the following states and tribes:

- Washington Department of Ecology (Ecology)
- Lummi Nation
- Swinomish Indian Tribal Community
- Tulalip Tribes
- Port Gamble S’Klallam Tribe
- Puyallup Tribe of Indians
- Makah Nation

EPA received the following responses to their CWA § 401 certification requests.

- Ecology transmitted their CWA § 401 certification, with conditions, to EPA on April 8, 2021.
- Lummi Nation transmitted their CWA § 401 certification, with conditions, to EPA on March 31, 2021.
- The Swinomish Indian Tribal Community transmitted their CWA § 401 certification denial on April 6, 2021.
- The Tulalip Tribes transmitted their CWA § 401 certification, with conditions, to EPA on April 13, 2021.
- Port Gamble S’Klallam Tribe transmitted their CWA § 401 certification, with conditions, to EPA on April 19, 2021.
- The Puyallup Tribe of Indians and Makah Nation both waived their CWA § 401 certifications.

Pursuant to CWA § 401(d), EPA is obligated to incorporate conditions from 401 certifications into permits. The following changes were made to the proposed GP pursuant to the requirements under CWA § 401(d):

- A provision was added to Part I.A of the permit stating that “this permit does not apply within Swinomish Indian Tribal Community waters”. See Permit Part I.A.5.
- A provision was added to Part III.A of the permit stating that facilities must achieve compliance with the following tribal water quality standards, as appropriate: Lummi Nation, Port Gamble S’Klallam Tribe, and Tulalip Tribes. See Permit Part III.A.5.
- Two provisions were added to Part III.B. of the permit that apply only to Port Gamble S’Klallam Tribal waters. Permit Part III.B.8.(a) requires that motorized boats in use for net pen operations shall be in good repair at all times when in use. Permit Part III.B.8.(b) requires that all marine anti-fouling compounds used shall be copper-free. See Permit Part III.B.8.
- A provision was added to Part III.D of the permit and applies only to facilities located in State waters. This provision requires the permittees to implement purchasing procedures that give preference for fish feed or ingredients that contain the lowest amount of PCBs that is economically and practically feasible. See Permit Part III.D.4.
- Provisions have been added to the permit clarifying the documents, reports, and notifications that must also be submitted to Tribes for facilities located in Tribal waters. Please see Permit Parts II.C.2; III.F.1; III.F.2; V.B.1; V.B.5; VI.B; Appendix A; and Appendix B.

Reasonable and Prudent Measures (RPMs) from ESA Consultation

On February 16, 2022, EPA received a BiOp from NMFS which included an Incidental Take Statement (ITS) and RPMs for EPA to implement in the permit. The ITS states that it “exempts take expected from six tribal enhancement net pens and one federal research net pen operation. Take would be exceeded if at any time more than six salmonid enhancement net pen facilities or more than one federal research sablefish net pen facility are covered by the GP”. Given these

statements in the ITS, if any additional facilities not analyzed in the BiOp submit a Notice of Intent (NOI) for permit coverage, EPA will evaluate whether ESA consultation needs to be reinitiated.

The BiOp sets forth RPMs which are considered by NMFS to be “necessary or appropriate to minimize the impact of the amount or extent of incidental take”. The BiOp sets forth Terms and Conditions that “the federal action agency must comply (or must ensure that any applicant complies) with” in order to be exempt from the prohibitions of section 9 of the ESA.”

RPM #1 states that EPA must provide NMFS with monitoring reports to confirm that the incidental take surrogate is not exceeded. To implement RPM #1, NMFS provided the following Term and Condition: “The EPA shall provide annually to NMFS a report that provides the number of tribal enhancement net pens and federal research net pen facilities and the annual fish biomass at each facility.” To implement this RPM, EPA included the email address for NMFS in the permit as a required recipient of Annual Reports from all facilities (See Section VI.B and Appendix B). Each annual report includes information on fish biomass, and the number of annual reports will indicate the number of facilities covered.

RPM #2 states that EPA must ensure the effectiveness of conservation measures, controls and regulations to minimize effects of fish escapes (at Manchester) and discharge on habitat conditions. To implement RPM #2, NMFS provided the following Term and Condition: “The EPA shall provide annually to NMFS a report that provides the following information for each net pen facility:

- i. Monitoring results for water quality, sediment quality and benthic condition; and
- ii. Observed or estimated escapes [from Manchester] based on fish counts and biomass; and
- iii. Any response/corrective actions to address exceedances of values permitted by the GP for the above monitored variables.”

To implement this RPM, EPA included the email address for NMFS in the permit as a required recipient of Annual Reports from all facilities (See Section VI.B and Appendix B) and as a required recipient of permittee submittals related to corrective action and non-compliance notifications (See Section V.B.5). Monitoring results for water quality, sediment quality, and benthic condition are included in the annual reports, in addition to a summary of any corrective actions from the given year, including fish escapes.

Response to Comments

During the public comment period, EPA received comments from the following:

- Anna Pigott, Environmental Reviewer, Environmental Review Inc. & Dr. Dwight Snow, Senior Environmental Reviewer, Environmental Review Inc.

The comments received are listed below *verbatim* followed by their corresponding response.

Comment 1: Section III.D.c Fish Feeding Rates

Under Section III, Fish Feed (C) states that “Other monitoring practices that ensure feeding rates are appropriate” will be utilized. These other monitoring practices should be further explained to avoid vagueness.

Response

Permit Part III.D.1.c. was included to provide the permittee flexibility in establishing appropriate fish feeding rates for their facility that prevent the accumulation of uneaten feed below the pens. Permit Part III.D.1. requires a combination of the practices specified therein. EPA notes that the permittee is required to describe the method used to reduce the loss of uneaten feed in their Notice of Intent (NOI) and to describe any changes to that process in their Annual Report (Section III of the Annual Report; Appendix B of the permit). As a result of these requirements, the monitoring practices used by a permittee will be transparent and will provide the permitting authority the opportunity to assess whether the alternative process is appropriate.

No changes were made to the permit as a result of this comment.

Comment 2: Sediment Characterization Timing

According to the Fact Sheet under Section VI. Monitoring Requirements, subsection A. Sediment Characterization, it is stated that if fish are released early during the second year of the permit term, at a facility that operates for less than 6 months a year, the sediment characterization test may be postponed until the next year. This was not explained in the permit draft.

Response

EPA agrees that this information should be in the permit.

Section IV.A of the permit was changed as a result of this comment to include the following language from the Fact Sheet: “If fish are released early during the second year of the permit term (from facilities required to carry out a single sediment characterization), the study may be postponed until the following year.”

Additional Changes to the Permit

EPA updated the penalty amounts in Section VII.B *Penalties for Violations of Permit Conditions* to reflect current amounts at the time of permit issuance.

EPA also updated the submittal process for noncompliance notifications and annual reports, replacing the mailing address for the EPA R10 enforcement section with an email address. This is part of EPA's efforts to move towards electronic recordkeeping.