

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PROTECT THE PENINSULA’S
FUTURE; COALITION TO PROTECT
PUGET SOUND HABITAT; and
BEYOND PESTICIDES,
Plaintiffs,

v.

DEB HAALAND, SECRETARY OF
THE INTERIOR; UNITED STATES
FISH AND WILDLIFE SERVICE;
MARTHA WILLIAMS, DIRECTOR OF
UNITED STATES FISH AND
WILDLIFE SERVICE; HUGH
MORRISON, REGIONAL DIRECTOR
OF THE PACIFIC REGION; and
JENNIFER BROWN-SCOTT, PROJECT
LEADER, WASHINGTON MARITIME
NATIONAL WILDLIFE REFUGE
COMPLEX,
Defendants.

Case No. CV23-5737-BHS

AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF

I. NATURE OF ACTION

1. This action seeks judicial relief compelling Defendants United States Fish and Wildlife Service (the “Service”) *et al.* to take action that is required by the National Wildlife Refuge

1 System Improvement Act of 1997 (“Refuge Improvement Act”), 16 U.S.C. §§ 668dd–668ee,
 2 pursuant to 5 U.S.C. § 706(1). In the alternative, this action seeks reversal of the Service’s decision
 3 that no approvals or permits are needed from the Service for commercial activities that are
 4 occurring in the Dungeness Wildlife Refuge as described in this complaint.

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 6 2. The Service has failed to fulfill its mandatory legal duty to conduct a compatibility
 7 determination and require a special use permit for a proposed commercial aquaculture use with the
 8 boundary of the Dungeness Wildlife Refuge. In addition, the Service’s decision that no approvals
 9 or permits are required for this commercial enterprise is arbitrary, capricious, an abuse of
 10 discretion, and otherwise not in accordance with law.

11 II. JURISDICTION

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 13 3. Jurisdiction is proper in this Court under 28 U.S.C. § 1331, 5 U.S.C. § 701, et seq.,
 14 and 28 U.S.C § 1346 because this involves the United States as a defendant and arises under the
 15 laws of the United States. The requested relief is proper under 28 U.S.C. § 2201-02 and 5 U.S.C.
 16 § 705–706. The challenged agency actions and/or inactions are subject to this Court’s review under
 17 the Administrative Procedure Act 5 U.S.C. § 702, 704, and 706.

18 III. VENUE

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 20 4. Venue is proper in this Court under 28 U.S.C. §1391. All or a substantial part of the
 21 events or omissions giving rise to these claims herein occurred within this judicial district,
 22 Defendants reside in this district, and the public lands and resources and agency records in question
 23 are located in this district.

24 IV. PARTIES

25
 26 5. Plaintiff Protect the Peninsula’s Future (PPF) is a Washington nonprofit public
 benefit corporation that has been engaged in environmental protection and wise land use on the

1 North Olympic Peninsula since 1973. PPF's main office is located in Sequim. Among other things,
2 PPF's mission is to defend the North Olympic Peninsula coasts from industrial shellfish operations
3 and other aquaculture projects, which ravage native marine and shoreline life and add plastic to the
4 marine ecosystems. PPF has over 200 individual members and supporters, many of whom are
5 located near the Dungeness National Wildlife Refuge. PPF's members use and enjoy the
6 Dungeness National Wildlife Refuge. PPF brings this action on its own behalf and on behalf of its
7 adversely affected members.

9 6. Plaintiff Coalition to Protect Puget Sound Habitat (the "Coalition") is an alliance of
10 interested citizens, environmentalists, scientists, and recreation users who are concerned about
11 current and expanding industrial aquaculture in both the nearshore environment and public waters,
12 and its impacts on plant, animal and ecological function. Its mission is to voice citizens' concerns
13 of industrial aquaculture, its impact to the health and quality of Puget Sound and coastal waters and
14 to effect changes to policies, regulations, and their enforcement to protect shoreline habitat. The
15 Coalition's members use and enjoy the Dungeness National Wildlife Refuge. The Coalition brings
16 this action on its own behalf and on behalf of its adversely affected members.

18 7. Plaintiff Beyond Pesticides is a 501(c)3 nonprofit organization headquartered in
19 Washington, D.C., which works with allies in protecting public health and the environment to lead
20 the transition to a world free of toxic pesticides. Beyond Pesticides seeks to protect healthy air,
21 water, land, and food for ourselves and future generations. By forging ties with governments,
22 nonprofits, and people who rely on these natural resources, Beyond Pesticides works to reduce the
23 need for unnecessary pesticide use and protect public health and the environment. Beyond
24 Pesticide's members use and enjoy the Dungeness National Wildlife Refuge. The organization
25 brings this action on its own behalf and on behalf of its adversely affected members.
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8. Defendant United States Fish and Wildlife Service is an administrative agency within the U.S. Department of the Interior whose primary responsibility is the conservation and management of fish, wildlife, plants, and their habitats for the American people.

9. Defendant Deb Haaland is named in her official capacity as Secretary of the United States Department of the Interior.

10. Defendant Martha Williams is named in her official capacity as Director of the U.S. Fish and Wildlife Service. Ms. Williams is the official responsible for leading the agency in its mission of conservation and management of fish, wildlife, plants and their habitats, including in the Dungeness National Wildlife Refuge.

11. Defendant Hugh Morrison is named in his official capacity as Regional Director of the Pacific Region of the U.S. Fish and Wildlife Service. Mr. Morrison is the official responsible for agency decisions within the Pacific Region, including the Dungeness National Wildlife Refuge.

12. Defendant Jennifer Brown-Scott is named in her official capacity as the U.S. Fish and Wildlife Service Project Leader for the Washington Maritime National Wildlife Refuge Complex.¹ Ms. Brown-Scott was the official responsible for managing the Dungeness National Wildlife Refuge, which is part of the Washington Maritime National Wildlife Refuge Complex.

V. STATEMENT OF STANDING

13. The interests at stake in this matter are germane to Plaintiffs' organizational purposes. Defendants' violations of law will harm plants, wildlife, and natural ecosystems in the Dungeness National Wildlife Refuge and thereby injure Plaintiffs' members who use and enjoy those resources.

¹ Lorenz Sollman has replaced Jennifer Brown-Scott as Acting Project Leader for the Washington Maritime National Wildlife Refuge Complex. However, Jennifer Brown-Scott was the Acting Project Leader when the original complaint was filed in this matter.

14. Plaintiffs and their members observe, enjoy, and appreciate the Refuge's native wildlife, water quality, and terrestrial habitat quality, and expect to continue to do so in the future, including in the specific area that will be affected by the Jamestown-S'Klallam Tribe's proposed industrial oyster operation. Members use and enjoy the waters, public lands, and natural resources throughout these areas for recreational, scientific, spiritual, educational, aesthetic, and other purposes. Plaintiffs' members enjoy hiking, bird watching, kayaking, study, contemplation, photography, and other activities in and around the waters and public lands throughout the affected area. Plaintiffs and their members also participate in information gathering and dissemination, education and public outreach, commenting upon proposed agency actions, and other activities relating to the U.S. Fish and Wildlife Service's management and administration of these public lands.

15. Defendants' action and failure to act adversely affects Plaintiffs' organizational interests, as well as their members' use and enjoyment of the Dungeness National Wildlife Refuge, including the affected area. The interests of Plaintiffs and their members have been and will continue to be injured and harmed by the U.S. Fish and Wildlife Service's action and failure to act as complained of herein. Unless the relief prayed for herein is granted, Plaintiffs and their members will suffer ongoing and irreparable harm and injury to their interests.

16. The injuries to Plaintiffs would be redressed by a favorable decision of this Court because Plaintiffs are seeking an order requiring that the Fish and Wildlife Service engage in a process required by law for the purpose of protecting and preserving natural areas and plant, fish, and animal species the Plaintiffs' members use and enjoy.

VI. STATUTORY AND REGULATORY BACKGROUND

1 17. The National Wildlife Refuge System is managed pursuant to the Refuge
2 Improvement Act, 16 U.S.C. §§ 668dd–668ee.

3 18. The primary mission of the National Wildlife Refuge System is “to administer a
4 national network of lands and waters for the conservation, management, and where appropriate,
5 restoration of the fish, wildlife, and plant resources and their habitats within the United States for
6 the benefit of present and future generations of Americans.” 16 U.S.C. § 668dd(a)(2).

7 19. In administering the Refuge System, the Service shall, among other things, “provide
8 for the conservation of fish, wildlife, and plants, and their habitats within the System...” 16 U.S.C.
9 668dd(a)(4)(A).

10 20. The term “conservation” means “to sustain and, where appropriate, restore and
11 enhance, healthy populations of fish, wildlife, and plants utilizing, in accordance with applicable
12 Federal and State laws, methods and procedures associated with modern scientific resource
13 programs. ...” 16 U.S.C. § 668ee(4).

14 21. The Refuge Improvement Act further asserts that the agency must “ensure that the
15 mission of the [Refuge] System . . . and the purposes of each refuge are carried out.” 16 U.S.C.
16 § 668dd(a)(4)(D).

17 22. According to the Refuge Improvement Act, “purposes of each refuge” means “the
18 purposes specified in or derived from the law, proclamation, executive order, agreement, public
19 land order, donation document, or administrative memorandum establishing, authorizing, or
20 expanding a refuge, refuge unit, or refuge subunit.” 16 U.S.C. § 668ee(10).

21 23. Under most circumstances, all areas included in the Refuge System are closed to
22 public access until and unless the Service opens the area for a use in accordance with the Refuge
23 Improvement Act and its regulations. 50 C.F.R. § 25.21(a); *see also United States v. Sams*, 45 F.
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1 Supp. 3d 524, 525 (E.D.N.C. 2014) (the Refuge Improvement Act “closes national wildlife refuges
2 in all states except Alaska to all uses until opened”).

3 24. The Service is authorized, under implementing regulations, to permit the use of any
4 area within the System for any purpose whenever it determines that such uses are compatible with
5 the major purposes for which such areas were established. 16 U.S.C. § 668dd(d)(1)(A).
6

7 25. With limited exceptions not applicable here, the Secretary cannot permit a new use
8 or expand, renew, or extend an existing use without first determining whether that use is
9 compatible. 16 U.S.C. § 668dd(d)(3)(A)(i).

10 26. To decide whether a use would be compatible, the Service must engage in a multi-
11 factored analysis called a “compatibility determination.” A compatibility determination is a written
12 determination signed and dated by the Refuge Manager and Regional Chief, signifying that a
13 proposed or existing use is or is not a compatible use. 50 C.F.R. § 25.12(a).
14

15 27. The Refuge Improvement Act also requires the Service to develop “comprehensive
16 conservation plans” for refuges, 16 U.S.C. § 668dd(e), which describe the desired future conditions
17 of a refuge or planning unit and provide long-range guidance and management direction to achieve
18 the purposes of the refuge. 50 C.F.R. § 25.12(a). They are intended to maintain and, where
19 appropriate, restore the ecological integrity of each refuge and the Refuge System. *Id.* The Service
20 must manage each refuge in a manner consistent with its plan, 16 U.S.C. § 668dd(e)(1)(E), and
21 may revise the conservation plan as may be necessary. 16 U.S.C. § 668dd(e)(1)(A)(iv).
22

23 28. The Refuge Improvement Act furthermore authorizes the Service to issue
24 regulations to carry out the act. 16 U.S.C. § 668dd(b)(5). These regulations “apply to areas of land
25 and water held by the United States in fee title and to property interests in such land and water in
26

1 less than fee For areas held in less than fee, the regulations . . . apply only to the extent that
 2 the property interest held by the United States may be affected.” 50 C.F.R. § 25.11(a).

3 29. Pursuant to Refuge Improvement Act regulations, no one may conduct commercial
 4 activities on a refuge unless they are issued a permit by the Service, often referred to as a “special
 5 use permit.” 50 C.F.R. § 27.97. Refuge Improvement Act regulations also specify that disturbing,
 6 injuring, spearing, poisoning, destroying, or collecting any plant or animal on any national wildlife
 7 refuge is prohibited except by special permit unless otherwise permitted. 50 C.F.R. § 27.51(a).

8 VII. FACTUAL ALLEGATIONS

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 10 30. Recognizing the importance of the fertile habitats in the area, President Woodrow
 11 Wilson established the Dungeness National Wildlife Refuge on January 20, 1915 as a refuge,
 12 preserve, and breeding ground for native birds.

13
 14 31. The mission of the National Wildlife Refuge System is to administer a national
 15 network of lands and waters for the conservation, management and, where appropriate, restoration
 16 of the fish, wildlife and plant resources and their habitats within the United States for the benefit
 17 of present and future generations of Americans.

18 32. The Dungeness National Wildlife Refuge shelters a bay rich in marine life. Eelgrass
 19 beds attract brant, shorebirds feed on the tideflats, and ducks find sanctuary in the calm waters. The
 20 Refuge is a preserve and breeding ground for more than 250 species of birds and 41 species of land
 21 animals.

22
 23 33. Dungeness Spit protects nutrient-rich tideflats for migrating shorebirds in spring and
 24 fall; a quiet bay with calm waters for wintering waterfowl; an isolated beach for harbor seals and
 25 their pups; and abundant eelgrass beds for young salmon and steelhead nurseries and some duck
 26 species, such as the Black Brant.

1 34. The Refuge is located near Sequim, Washington, in Clallam County on the north
2 end of the Olympic Peninsula.

3 35. The Jamestown S’Klallam Tribe is currently conducting commercial activities in
4 the form of a new industrial shellfish aquaculture operation within the Dungeness National Wildlife
5 Refuge. They have, so far, grown approximately 200,000 oyster seed within the Refuge.
6

7 36. This commercial enterprise involves cultivating 34 acres of non-native Pacific
8 oysters within a 50-acre tideland parcel leased from the Washington State Department of Natural
9 Resources within the Refuge.

10 37. The Service has not completed a final compatibility determination or issued a
11 special use permit for the Tribe’s commercial activities within the Refuge.

12 38. On March 16, 2023, counsel for plaintiffs sent a letter to defendants Jennifer Brown-
13 Scott and Hugh Morrison seeking confirmation that the Service had not issued a compatibility
14 determination or special use permit for the Tribe’s commercial activities. Counsel for plaintiffs
15 stated that plaintiffs intended to file a claim under the Administrative Procedures Act if the Service
16 stated that no action would be taken by the Service.
17

18 39. On or around April 4, 2023, counsel for plaintiffs received a letter from defendant
19 Hugh Morrison, the Regional Director of the Service for Pacific Region 1. The Regional Director
20 stated that the Service had not completed a compatibility determination or issued a special use
21 permit for the Tribe’s activities. He further stated that no approvals were needed from the Service
22 for the Tribe to engage in the above-described commercial activities in the Refuge. Mr. Morrison
23 stated that no approvals by the Service were needed because existing permits and leases with the
24 county, state, and federal approvals govern the project.
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40. The Pacific Regional Director, Hugh Morrison, is the official in charge of the Region and, therefore, Mr. Morrison had authority to issue the final decision on behalf of the Service described above.

VIII. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF: VIOLATION OF THE REFUGE IMPROVEMENT ACT – FAILURE TO COMPLETE A COMPATIBILITY DETERMINATION

41. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

42. The Service can open refuge areas to a use after ensuring that the use at issue is “compatible with the major purposes for which such areas were established.” 16 U.S.C. § 668dd(d)(1)(A).

43. To decide whether a use would be compatible, the Service must make a compatibility determination in writing. 50 C.F.R. § 25.12(a). This compatibility determination must take into consideration, among other factors, impacts of the use on the refuge’s purpose, whether the use is a priority public use, and where, when, and how a use would be conducted. 50 C.F.R. § 26.41(a)(6)(i)–(iv), (a)(8).

44. The Service has failed to conduct a compatibility determination for the proposed commercial aquaculture use with the boundary of the Dungeness National Wildlife Refuge.

45. By failing to conduct a compatibility determination, the Service has failed to comply with the Refuge Improvement Act, 16 U.S.C. § 668dd(d)(1)(A).

SECOND CLAIM FOR RELIEF: VIOLATION OF THE REFUGE IMPROVEMENT ACT – FAILURE TO REQUIRE A SPECIAL USE PERMIT FOR COMMERCIAL ACTIVITY

46. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

1 47. Refuge Improvement Act regulations prohibit “conducting a commercial enterprise
2 ... except as may be authorized by special permit.” 50 C.F.R. § 27.97.

3 48. The Service has not required a special use permit for the Jamestown S’Klallam
4 commercial aquaculture enterprise.

5 49. By failing to require that the Jamestown S’Klallam Tribe obtain a special use permit,
6 the Service has violated the Refuge Improvement Act.

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8 **THIRD CLAIM FOR RELIEF: ILLEGAL FINAL AGENCY ACTION**

9 50. Plaintiffs reallege and incorporate by reference all preceding paragraphs.

10 51. The above-described letter to counsel for plaintiffs from Defendant Hugh Morrison,
11 the Regional Director of the Service for Pacific Region 1 was a final agency action under the
12 Administrative Procedures Act (APA), 5 U.S.C. 706(2), that marked the consummation of the
13 agency’s decisionmaking process, determined rights and obligations, and had legal consequences.

14 52. The Regional Director’s conclusion that no approvals are needed from the Service
15 for the Tribe to engage in the above-described commercial activities in the Refuge was arbitrary,
16 capricious, an abuse of discretion, and otherwise not in accordance with law.

17 53. The Regional Director’s conclusion that no special use permit or compatibility
18 determination is required for these commercial activities because existing permits and leases with
19 the county, state, and federal approvals govern the project was arbitrary, capricious, an abuse of
20 discretion, and otherwise not in accordance with law.

21 54. Plaintiffs have no other adequate remedy at law aside from the APA to obtain the
22 relief requested.

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25 **IX. PRAYER FOR RELIEF**

1 Plaintiffs respectfully request that the Court grant the following relief:

2 A. Declare that Defendants are in violation of the Refuge Improvement Act and its
3 implementing regulations;

4 B. Order Defendants to conduct a compatibility determination for the Jamestown
5 S’Klallam commercial aquaculture enterprise in the Dungeness National Wildlife Refuge;

6 C. Order Defendants to require a special use permit for the Jamestown S’Klallam
7 commercial aquaculture enterprise in the Dungeness National Wildlife Refuge.

8 D. Issue an order declaring the Service’s conclusion that no approvals are needed from
9 the Service for the above-described commercial activities in the Refuge was arbitrary, capricious, an
10 abuse of discretion, and otherwise incompatible with law and vacating that decision;

11 E. Award Plaintiffs their costs, litigation expenses, expert witness fees, and reasonable
12 attorneys’ fees associated with this litigation pursuant to the Equal Access to Justice Act, and all other
13 applicable authorities; and

14 F. Grant Plaintiffs any such further relief as may be just, proper, and equitable.

15 Dated this 6th day of August, 2024.

16 Respectfully submitted,

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