

MEMORANDUM FOR U.S. Army Corps of Engineers Seattle District (CENWS-PM-PL Steven Babcock) and (CENWS-PM-PL-ER Michael Scuderi)

SUBJECT: Policy and legal issues created by a diversion alternative that directs floodwater to the Padilla Bay National Estuarine Research Reserve (PBNERR) and CZMA.

1. The purpose of this memorandum is to discuss whether the designations of a Marine Protected Area and a National Estuarine Research Reserve impose protections on Padilla Bay that would be relevant to a diversion alternative which directs floodwaters to PBNERR. After careful review, it is the legal opinion of this office that the designations enjoyed by Padilla Bay present significant legal issues with regard to the viability of the proposed diversion alternative. Specifically, the potential environmental impacts and additional threats to the resources of PBNERR raise legitimate concerns regarding compliance with both the Coastal Zone Management Act § 16 U.S.C. § 1451 (2000) and consistency with the 1976 Skagit County Shoreline Management Master Program. In order to ascertain the depth of these concerns we await the outcome of environmental and hydraulic studies that are directed at determining the effect the diversion alternative may have on PBNERR.

#### Designation of a Marine Protected Area

2. Pursuant to Exec. Order No. 13158, 65 Fed. Reg. 105 (May 31, 2000) the PBNERR has been designated a Marine Protected Area (MPA). As a result of this designation PBNERR enjoys no additional protections. The order was issued to advance two objectives. First, in an effort to strengthen awareness of marine areas the order calls for the creation of a comprehensive national system of MPAs. This involves identifying marine areas that already hold a designation or protected status and placing them under the umbrella of the MPA designation. Once designated an MPA, the area is added to a national list of MPAs. As stipulated in subsection 4(d) of the order, this list is actively updated and can be viewed on a website jointly managed by the Department of Commerce and the Department of the Interior. Second, the order encourages federal agencies to take steps to improve the protection of marine areas. Section three of the order empowers federal agencies to take “appropriate actions to enhance or expand protection of existing MPAs.” Annual reports detailing such federal action are required under section six of the order.

3. To date no reports have been issued concerning actions taken to enhance or expand the protection of PBNERR; therefore, we must conclude that PBNERR enjoys no additional protection as a result of its MPA designation. However, compliance with section five of the order is recommended. Section five, “Agency Responsibilities,” states the following:

“Each Federal agency whose actions affect the natural or cultural resources that are protected by an MPA shall identify such actions. To the extent permitted by law and to the maximum extent

practicable, each Federal agency, in taking such actions, shall avoid harm to the natural and cultural resources that are protected by an MPA. In implementing this section, each Federal agency shall refer to the MPAs identified under subsection 4(d) of this order.”

### Designation of a National Estuarine Research Reserve

3. The potential impacts of the diversion alternative on the environment and resources of PBNERR may result in irreparable conflicts with Padilla Bay’s membership in the National Estuarine Research Reserve Program. Padilla Bay enjoys its protected status as a National Estuarine Research Reserve under 16 U.S.C. § 1461. The purpose of the System is to establish a Federal-state cooperative program that establishes and manages a national system of estuarine research reserves aimed at providing opportunities for long-term research, education and interpretation. 15 C.F.R. § 921.1 (2002). One of the goals of the program is to “ensure a *stable* environment for research through long-term protection of National Estuarine Research Reserve resources.” § 921.1. In order to ensure compliance with the purpose and goals of the program, a management plan is developed that outlines the objectives of the Reserve site. The National Oceanic and Atmospheric Administration (NOAA) enforces the provisions of the management plan. § 921.51.

4. The implementation of the diversion alternative threatens PBNERR’s compliance with the objectives identified in the 1984 Padilla Bay National Estuarine Sanctuary Management Plan. By increasing the amount of water flowing into the bay, and making alterations to the environment to accommodate this increased inflow, the diversion alternative will likely cause physical alterations to PBNERR’s environment. These alterations may result in the violation of the resource protection clause and the objective to manage the integrity of the sanctuary. Of particular concern, are the following three requirements that must be met to achieve this objective:

- i. Maintain sufficient quantities of *water inflow*. This is comprised of overland drainage, mainly from agriculture lands and local sloughs. Inflow should occur at appropriate seasonal and annual levels to maintain the existing estuarine system.
- ii. Maintain *water quality* by prevention of significant degradation of sanctuary waters. Enforcement is carried out by state and federal agencies, and the state Shoreline Management Act.
- iii. *Prevention of significant physical alterations*. This includes major dredging, filling, mineral extraction, waste discharge or disposal, or other uses suggested for the sanctuary which would significantly alter the hydrographic patterns, ecological productivity or surface area of the bay. Limited projects proposed for scientific study or wildlife habitat enhancement, and substantiated by qualified personnel and research data, may be allowed within the sanctuary. Authority to extend this protection is found in the state Shoreline Management Act.

5. In addition, the physical alterations imposed by the diversion alternative may produce adverse effects on the resources of PBNERR that render it incapable of meeting its research objectives. The management plan includes a research plan aimed at establishing an ecosystem that affords researchers an opportunity to study “undisturbed components of the larger Puget Sound estuary.” One of the primary objectives of the research plan is to “monitor aquatic and terrestrial plant and animal populations for species diversity and abundance.” Compliance with this objective is unlikely to occur if the resources of PBNERR are damaged or lost as a result of the diversion alternative. Moreover, the affects of the diversion alternative may render the ecosystem unsuitable for long-term research. Thereby, rendering PBNERR in violation of 16 U.S.C. § 1461(b)(2)(A), which provides that in order to retain the designation of a National Estuarine Research Reserve the Under Secretary must find that “the area is a representative estuarine ecosystem that is suitable for long-term research and contributes to the biogeographical and typological balance of the System.”

6. Breach of the management plan may result in possible sanctions being imposed upon PBNERR. In the event of a breach the Secretary may order the suspension of federal funding or withdrawal of Padilla Bay’s membership in the National Estuarine Research Reserve System. § 1461(f). When conducting an evaluation of a Reserve’s adherence to the management plan the Secretary or reviewing body will most likely rely on the “indicators of non-adherence” listed in 15 C.F.R. § 921.40. Provisions in this section that are of particular concern go as follows:

i. Inadequate implementation of the required *research plan*, including the monitoring design. Indicators of inadequate implementation could include: Not carrying out research or monitoring that is required by the plan, or carrying out research or monitoring that is inconsistent with the plan.

ii. Inadequate implementation of *Reserve protection plan*. Indicators of inadequate implementation could include: Evidence of non-compliance with Reserve restrictions, insufficient surveillance and enforcement to assure that restrictions on use of the Reserve are adhered to, or evidence that *Reserve resources are being damaged or destroyed* as a result of the above.

iii. Failure to carry out the terms of the signed Memorandum of Understanding (MOU) between the state and NOAA, which establishes a long-term state commitment to maintain and manage the Reserve in accordance with section 315 of the Act. Indicators of failure could include: *State action to allow incompatible uses of state-controlled lands or waters in the Reserve*, failure of the state to bear its fair share of costs associated with long term operation and management of the Reserve, or failure to initiate timely updates of the MOU when necessary.” § 921.40.

7. It is unlikely that the 2002 revised management plan, scheduled to be issued late this fall, will address the potential affects of the diversion alternative on PBNERR. In order to do so, the revised plan would have to make significant changes to provisions governing water in-flow, water quality and permissive physical alterations. However, it is probable that such changes would be inconsistent with the overall intent of the management plan,

which is to maintain an undisturbed estuary suitable for long-term research and education.

8. Amending the management plan could provide PBNERR with the flexibility needed to maintain compliance with the enumerated objectives of the management plan. The state has the authority to revise, as often as necessary, the management plan for a Reserve. § 921.33(c). In exercising this power the state could propose a “habitat manipulation for resource management” that is deemed necessary for the protection of public health. § 921.1(d). The state could argue that the floodwaters of Skagit River pose a substantial threat to public health, and that implementing the diversion alternative would relieve the county of this threat. However, it is unlikely that NOAA would approve the amendment for habitat manipulation. The amendment could be seen as inconsistent with the goals and objectives of the Reserve System and management plan.

#### Skagit County Shoreline Management Master Program

9. Congress enacted the Coastal Zone Management Act, 16 U.S.C. § 1451 (2000) in an effort to “encourage States” to use their authority over land and coastal areas to develop land & water use programs” aimed at managing and preserving coastal resources. Acting under the authority of § 1451 the state of Washington ratified the Shoreline Management Act, Wash. Rev. Code § 90.58 (2002), which empowers local governments to implement “master programs” aimed at regulating the use and protection of coastal resources. Pursuant to § 90.58, Skagit County initiated its Shoreline Management Master Program. Under this program Padilla Bay is recognized as a shoreline of statewide significance.

10. The diversion alternative may result in deviations from the Skagit County Shoreline Management Master Program. Federal agency activity within the coastal zone is subject to 16 U.S.C. § 1456(c)(1), which stipulates the following:

“Each federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the *maximum extent practicable* with the enforcement polices of approved State management programs.” § 1456(c)(1).

The diversion alternative has the potential to produce federal agency activity that is inconsistent with the regulations promulgated under Skagit County’s master program. For instance, the diversion alternative may involve dredging that is limited under chapter seven (Policies and Regulations) of the master program. Section 7.04(1)(B) of this chapter stipulates that dredging should not occur in estuaries or shoreline areas except for “beneficially public purposes consistent with this program.” In addition, section 7.16(2)(B)(4) (Shoreline Stabilization and Flood Protection) limits the use of river and stream channel direction modification to instances where such activity presents “substantiated purposes connected with uses consistent with this program.” Consequently, the Corps bears the burden of showing that their activities are consistent with the master program to the maximum extent practicable.

12. Though the Corps is not required to obtain local shoreline permits, or conditional use permits, it is useful review the criteria due to the need to be consistent to the maximum extent practicable. Section 11.03 of the Shoreline master program details the criteria for granting conditional use permits. The following identifies several of the criteria listed in this section that are of particular concern:

- i. That the proposed use will be *consistent* with the policies of this Master Program and policies of RCW 90.58.020.
- ii. That the proposed use of the site and design of the project will be *compatible* with other permitted uses in the area.
- iii. That the proposed use will cause *no unreasonable adverse effects* to the shoreline environment designation in which it is located.
- iv. That the public interest suffers *no detrimental effect*.

13. The Shoreline master program may have to be amended in order for the Corps to demonstrate consistency to the maximum extent practicable. However, it is unlikely that the Department of Ecology would approve these amendments. On the other hand, if the Corps elects to proceed without amending the Shoreline master program, the Department of Ecology will likely pursue a consistency determination and declare the Corps activities inconsistent. 15 C.F.R. § 930.43. As a result, the Corps could be subjected to a timely burdensome mediation process.

14. The federal exemption set forth in 16 U.S.C. § 1453(1), which excludes from the coastal zone “all land the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government,” is inapplicable because the diversion alternative will likely affect state owned land that enjoys the protection of the Skagit County Shoreline Management Master Program. Even if PBNERR is determined to fall under the purview of § 1453(1), the diversion alternative will likely affect other aspects of the coastal zone where the state exercises the authority to enforce the master program.

### Conclusion

15. This review only addresses issues related to the PBNERR and CZMA. Other legal issues may also exist with respect to this proposed alternative. As noted above, the potential impacts of the diversion alternative on PBNERR raise significant policy and legal issues. These issues threaten the viability of the diversion alternative. In order to overcome these concerns a cooperative effort involving the state, NOAA and the Corps is recommended. Moreover, results of the environmental and hydraulic studies will likely influence the Corps efforts to implement the diversion alternative.

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