WFWOComments, FW1 <wfwocomments@fws.gov>

WDNR Aquatic Land HCP EIS

1 message

Cindi Kaneshige <ckaneshige@amforest.org> Thu, Dec 4, 2014 at 2:26 PM
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Cc: "megan.duffy@dnr.wa.gov" <megan.duffy@dnr.wa.gov>

Attached are the American Forest Resource Council's comments on the Washington State Department of Natural Resources Aquatic Lands HCP EIS.

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DNR Aquatic HCP AFRC Comments 12-04-12.pdf
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AMERICAN FOREST RESOURCE COUNCIL

December 4, 2014

Tim Romanski
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Scott Anderson
NOAA Fisheries West Coast Region
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VIA email: WFWOComments@fws.gov

RE: Washington State Department of Natural Resources Aquatic Lands Habitat Conservation Plan Draft Environmental Impact Statement [WDNR Aquatic Land HCP EIS] 79 Fed. Reg. 53020-53026 and Draft Aquatic Lands Habitat Conservation Plan

Dear Mr. Romanski and Mr. Anderson:

Please accept these comments on Draft Environmental Impact Statement (DEIS) for issuance of Incidental Take Permits for implementation of the Washington State Department of Natural Resources Aquatic Habitat Conservation Plan made on behalf of the American Forest Resource Council (AFRC) and its members. Because our review of the DEIS is inextricably bound with our review of the DNR Draft Aquatic Lands Habitat Conservation Plan (Draft HCP), we will also submit them to DNR as comments on that document, as well.

AFRC is a nonprofit corporation that represents the forest products industry throughout Washington, Oregon, Idaho, Montana, and California. AFRC represents over 60 forest product businesses and forest landowners. AFRC members operate 43 mills within the State of Washington, and many members with mills in Oregon are frequent purchasers of DNR timber. AFRC's mission is to create a favorable operating climate for the forest products industry, ensure a reliable timber supply from public and private lands, and promote sustainable management of forests by improving state and federal laws, regulations, policies and decisions regarding access to, and management of, forest lands. Its members are among the primary purchasers of DNR timber sales. Many of our members' operations are highly dependent on timber from DNR-managed trust lands as a source of raw material.

The transportation of logs through waterborne methods remains an integral part of the overall log transportation process in Washington State, ultimately supporting the entire industry and the jobs it creates. While log booming is a small percentage of what it was during the '60s and '70s, log booming and storage remains a critical tool of the industry. The ability to move logs via water

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allows mills to access needed raw materials from a variety of sources, including importing logs from Canada. Canadian shipments via water supply are approximately 200 to 500 million board feet (MMBF)/year. The ability to transport logs via water is key to maintaining the economic viability of the existing milling infrastructure, especially those served by waterborne log transportation. The removal of this approximately 200-500 MMBF / year from the overall log supply in the region would lead to the closure of additional mills.

There continues to be roughly 20 to 30 MMBF of logs moved via log boom/raft and barging per month on Puget Sound and the Straits of Juan de Fuca. These logs in boom form also require water storage space prior to and after towing to facilities. Columbia River log transportation and storage is also a significant amount of volume and integral to the success of the many mills served.

Additionally, waterborne log shipments can help to reduce traffic congestion on area roadways and potentially reduce carbon emissions from log trucks. Every 1 MMBF of logs moved via water equates to roughly 200 truck loads. The transportation of logs via water in the Puget Sound area alone has the potential of removing between 3,700 and 4,500 loaded truck trips per month from the highways in the Puget Sound - I5 corridor; resulting in a potential reduction of nearly 90% of total fuel consumption of loaded log trucks versus towboat[1]. The associated reduction in carbon emissions through the reduced burning of fuel in log trucks, poses potential environmental benefits to the State of Washington.

General Comments

The Department of Natural Resources Aquatic Resources Division has engaged with the forest products industry throughout the HCP development process. This effort was to gather information for the development of protocols for log booming and storage activities permitted by DNR on state owned aquatic lands. Unfortunately, based on our review of the proposal, aside from the specific characteristics of log booms and rafts (i.e. size, number of logs, log volume, etc.), little to none of the information we are aware of that was provided by industry was used to examine the potential economic impacts of the Action Alternatives.

AFRC is disappointed that aside from Figure 1-1 on page 1-1 of the DEIS we are unable to locate any maps in the documents. That one map is simply a large scale map of the State of Washington showing the State Owned and Managed Aquatic Lands. A proposal of this magnitude and far reaching potential impacts would be well served by more detailed maps. For example, these maps could be used to show the extent of authorizations and their spatial relation to littoral areas and other areas of concern. These maps would also help to gauge the potential impacts of the Action Alternatives on authorized uses. In the case of log booming activities, these maps could also show historic areas of use which may be available for use under the Action Alternatives. Development of additional maps to aid and supplement the proposal should be a primary addition to the final document.

[1] AFRC letter June 18, 2007: estimated 264,000 gallons of fuel consumed by towboat per year versus 2.5 million gallons of fuel per year by loaded log truck.

Specific Comments

Wood Debris:
Review of the DEIS shows a significant concern for negative impacts of wood debris deposits resulting from log booming and storage. We are pleased to see the operations measures outlined in the Draft HCP Appendix I pages I-10, 11 (also Table 2-1 DEIS pg. 2-38) consider the current realities of the log handling infrastructure, specifically debarking opportunities.

- We support development of guidelines for proper handling and disposal of bark in the upland setting.
- One concern in Item 4 on Draft HCP page I-10 (also Table 2-1, DEIS pg. 2-38) is the requirement for sorting individual logs in the upland setting. While in general this can be implemented in most normal circumstances, however, there are situations, such as damage to booms and rafts from storms, when this is impracticable. In the event a boom breaks apart during a storm, it could result in the need to occasionally "sort" logs during the re-assembly of damaged booms/rafts. There should be some acknowledgement of these limited situations where log sorting in the water may be required.
- We are concerned about how levels of debris accumulation will be accounted for on authorized sites in river systems due to the potential for offsite debris to be transported through river currents to the permitted use locations. AFRC would ask that a survey protocol be developed to assess the percentage of debris created by the permittee, which does not make them responsible for removal of debris transported into the permit site through natural means.
- It is difficult to comment on the surveys which will be required under either of the two Action Alternatives. Defined criteria for what are acceptable rates of debris accumulation and area covered by wood debris would be helpful in order to make a more informed comment. Undefined measurement criteria is concerning to AFRC. Inclusion of survey protocols and measurement criteria would allow the reader to make a more informed review of his proposal.

Location of log booming and storage facilities:

- As noted previously, the ability for mills to use waterborne booming and storage of logs is an important aspect of the economic viability of their operations.
- Although it is not specifically stated, our reading of the Draft HCP leads us to conclude that log booming and storage facilities will inevitably be phased out over the life of the HCP: Upon reauthorization, existing log booming and storage facilities will be required to move or be reconfigured to reduce impacts on nearshore areas (Draft HCP, p. 5-19, item 1); new or expanded facilities will not be allowed except in historical locations (p. 5-20, item 10); this creates either an unintended contradiction or an intended phasing out of these facilities.
- Buffers for Aquatic Vegetation - Table 2-1 pg 39. It is unclear if this buffer distance is a horizontal or vertical measurement. While we assume it is horizontal due to discussions of moving log storage facilities to areas of 66 feet in depth, it is not clear. We would ask for more detailed discussion of the buffer needs and locations.

- AFRC is concerned about the implications in several places in the document (DEIS Section 4.2.3.4 and 4.2.4.4, for example) that log booming/storage and certain aquaculture activities have negative impacts on the visual and audible environment for waterfront locations. The document goes on to imply that by removing these permitted uses, certain waterfront locations may become more desirable for other commercial, residential and recreational uses. This appears to be a purely subjective assessment and we have not found any analysis in the document to show these other uses will or will not have greater negative environmental or economic impacts from the current situation. We would suggest that only analyzed uses be addressed. Non-analyzed uses and their benefit or lack thereof are purely based on the authors' assumptions. Moreover, p.3-23 of the Draft HCP clearly states that "Log booming is also defined as a water-dependent use (WAC 332-30-145(7)), and, as a result, is a preferred use of state-owned aquatic lands." To suggest that the elimination of this preferred use will lead to uses of the uplands which are potentially incompatible with the preferred use is a contradiction that should lead to the realization that agency policies that favor its elimination are incorrect and misguided.
- Shading: While we understand that in certain situations shading of potential habitat is of a concern, we wish to point out that log storage is a somewhat transient activity. Logs are moved in and out of storage areas as mills acquire inventory, then process that inventory. Unlike a dock or pier, which creates perpetual shade in a given location, shading from log booms can be minimized through normal rotation of log inventory.
- Draft HCP Section 3.3.5, pages 3-29, 30 (also Table 3.12) states there are 29 agreements and applications encumbering 475.46 acres "of state-owned aquatic lands." Table 5.1 on Draft HCP p. 5-8 identifies there are 26 agreements in "Extended or Holdover" status or expected for renewal during the life of the HCP. The implication is there are 3 "new" applications pending, which account for the discrepancy of the 26 versus 29 agreements. Additionally page 4-36 of the DEIS states, "Approximately 2,600 acres of state-owned aquatic land are currently affected by log booming and storage (Washington DNR 2013)." It is unclear where the difference of 475.46 acres of "encumbered" land and 2,600 acres of "affected" land come from. We feel the variance in both acres and number of agreements should be explained in more detail.

Economics:

- As stated previously, the ability to transport logs via water is an important tool for the forest products industry. Measures within the scope of the Draft HCP which serve to protect this tool are critical.
- The economic impact as described on DEIS pg. 4-154 is lacking in appropriate rigor. DNR states that 50% of the "authorizations active in 2011" would be up for renewal by 2021 and this number would rise to 90% by 2034. The assumption is that due to this long time frame any "substantial adverse effects" on the economics of affected industries would be relatively low. However, a review of Table 5.1 (Draft HCP pg. 5-8) shows in the case of log booming and storage, 84.6% of the agreements are expected to be renewed prior to 2021 (a mere 7 years from now). Additionally 100% of the agreements would reach this point by 2027. In reality, the economic impacts truly can only be analyzed by evaluating the individual authorizations and the impacts the conservation measures will have on them. The scope and scale of impacts on each authorization are

independent of time frame to renewal. Costs borne by one industry may be significantly higher or lower than another. Evaluating economic impacts on authorized uses as an aggregate is flawed and can provided misleading results. Using time to renewal as a surrogate for economic impact may not be well founded. Given the finite number of leases, this analysis is not beyond the ability of the agencies and should be undertaken.

- We are concerned that adverse economic impacts from either Action Alternative will disproportionally impact rural communities. In many cases the milling facilities and the jobs they support, both in the mill and in the woods, are found in rural communities. Table 4-1, DEIS p. 4-165-166, supports our belief that many counties with a more rural population will be more heavily impacted by the Alternatives than more urban communities. In most cases the unemployment rate in these more rural counties where these authorizations are located are higher than urban counties.[2] The potential loss of log booming and storage areas could potentially further erode the economic well-being of these communities.
- A complete economic analysis of the impacts to jobs in log booming and storage operations and their associated jobs should be done. On DEIS pg. 3-93, it is stated there were 47,900 direct employment jobs in the forest products industry (WA Employment Security 2011), with "approximately 60 percent of the jobs were in manufacturing." This equals 28,740 direct employment jobs in manufacturing. Log booming and storage operations support manufacturing facilities (e.g., sawmills) through transportation of raw materials. To make the conclusion "it is likely that log booming and storage supported a small proportion of the jobs in the forest products industry" without more rigorous analysis is troubling. Additionally there are the jobs supported in the marine industry which also should be accounted for. Maintenance of equipment such as towboats and associated equipment and supplies used in the booming and storage operation create jobs and therefore need to be included in the analysis.
- Due to the concerns above, we feel a more in depth economic impact analysis is needed before a rational choice among alternatives can be made.

We generally are in support of a well-constructed Aquatic Lands HCP which protects traditional water uses, including log booming and storage. However, this proposal has failed to reach that bar. Lack of detail, lack of rigorous analysis of impacts specifically economic, and the appearance of significant use of subjective assumptions in place of qualitative data, leads us at this time to only be able to support Alternative 1, the No Action Alternative.

Because of the incomplete analysis in the HCP and DEIS, these documents are insufficient to allow the reviewing public and the decision maker to fully and properly analyze the environmental, economic and social consequences of the proposed action. We ask that a Revised DEIS be issued that examines at least one Action Alternative that does not result in the curtailment of waterborne log transport and storage. Absent such an alternative, the No Action alternative must be chosen.

[2] https://fortress.wa.gov/esd/employmentdata/reports-publications/economic-reports/monthly-employment-report/map-of-county-unemployment-rates

AFRC stands ready to work with DNR and the Services in the preparation of a sound HCP which protects both the environment and the economy of the State of Washington.

Sincerely,

/s/ *Matt Comisky*

Matt Comisky
Washington Manager

cc: Megan Duffy, Dep. Supervisor, Aquatics Division, DNR

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WDNR Aquatic Lands HCP EIS

3 messages

Wendy Steffensen <wendys@re-sources.org> Thu, Dec 4, 2014 at 5:39 PM
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Thank you for the opportunity to comment. Please accept these comments from the Cherry Point Aquatic Reserve Citizen Stewardship Committee.

–

Wendy Steffensen, North Sound Baykeeper
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Wendy Steffensen <wendys@re-sources.org> Thu, Dec 4, 2014 at 5:56 PM
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Thank you for the opportunity to comment. Please accept these comments on the behalf of the Fidalgo Bay Aquatic Reserve Citizen Stewardship Committee.

–

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Thank you Wendy for all your hard work pulling this together in a very short time!

Wayne

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cc: Lalena Amiotte
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December 4, 2014,

Re: Draft Aquatic Lands Habitat Conservation Plan

I. Introduction

As a citizen committee working for the betterment of The Cherry Point Aquatic Reserve we want to thank you for the opportunity to comment on the draft Aquatic Lands Habitat Conservation Plan (HCP). We believe that our roles as volunteer stewards of one of the Washington State Aquatic Reserves under the management of the Washington Department of Natural Resources(DNR) gives us unique perspectives on this HCP draft document.

II. Who We Are

The Cherry Point Aquatic Reserve Citizen Stewardship Committee (CPARCSC) is a volunteer citizen group whose mission is to conserve the unique habitats, plants and animals of the Cherry Point Aquatic Reserve through leadership in scientific monitoring, environmental literacy, citizen education, local stewardship and cooperation with governmental and nongovernmental (NGO) agencies. We implement education and outreach projects and scientific monitoring projects to help fulfill the Washington State Department of Natural Resources (DNR) Cherry Point Aquatic Reserve Management Plan. We also review proposed laws, ordinances and development projects that may affect the function of the reserve. We base our review on the management plan and on available science. Our views do not represent those of the Department of Natural Resources.

III. Aquatic Reserves

DNR is the lead agency in managing aquatic reserves established throughout the state to protect important native ecosystems. The focus of the Aquatic Reserves Program is to promote the preservation, restoration, and enhancement of state-owned aquatic lands that are of special educational, scientific, or environmental interest.

Habitat Conservation Plan and Aquatic Reserves: The regulatory framework for Aquatic Reserves should be designed to protect and preserve these habitats and be extensively and explicitly described, for the Aquatic Reserves as unique and special entities in the HCP.

IV. Cherry Point Aquatic Reserve

The Cherry Point Aquatic Reserve is a unique aquatic ecosystem located in the Strait of Georgia in northern Puget Sound on the western shores of Whatcom County, Washington. Offshore water depths of 70 feet make the Reserve's shoreline a significant contributor to the unique ecosystem. Preservation of this unique ecosystem needs to encompass habitat and species in their entirety. Additionally, we propose that some species be added to the covered species list given in the HCP. These are given in section XVII.

Species and Habitat:

- **Birds**: Cherry Point is considered a "significant bird area" because shorelines along the Reserve provide nesting, breeding, feeding, and resting grounds for many different species. These species include the Great Blue Heron, which nest north of the Reserve in one of the largest heron rookeries in the state.

- **Marine Mammals**: Marine mammals including Orca whales, Dall's porpoise, Steller sea lions, California sea lions, and harbor seals are all known to frequent the Reserve.
- **Salmon**: Five species of salmon (Chum, Coho, Pink, Chinook, and Sockeye), Steelhead trout, and Bull trout use Cherry Point as rearing habitat, a place for young fish to feed and adjust to salt water before heading out to the ocean.
- **Forage Fish**: Forage fish are the small schooling fish that make up the majority of marine birds, salmon, and other large marine predators' diets. Three species of forage fish spawn in the Reserve: The Cherry Point stock of Pacific herring have a unique spawning cycle, spawning in late spring. This spawn event coincides with the migration of surf scoter and other marine birds, and has been found to be one of their main food items during this time. The Cherry Point herring use submerged marine vegetation, such as eelgrass and a variety of seaweeds in the shallower waters just offshore. Surf smelt use upper intertidal areas during the summer months, and northern anchovy use the open water.
- **Marine Invertebrates**: Invertebrates such as marine worms, snails, clams, crabs, shrimp, and countless others call the Reserve home. These critters provide vital links in the Reserve's food chain by becoming food for the local bird, fish, and mammal populations.
- **Submerged Aquatic Vegetation**: Eelgrass and macro-algae provide various habitat functions for many species. These functions include rearing and foraging habitat for juvenile salmon, crab, and other fish, spawning substrate for Pacific herring, shelter for an abundance of prey species, and shade in the summer, cooling the water during low tides and hot days.

V. Significance of a Habitat Conservation Plan

The members of the CPARCSC are very supportive of, and eager to help DNR with, the following goals as stated in section 1.1.1:

> *The HCP will also provide assurances that authorized uses of state-owned aquatic lands may continue without jeopardizing covered species or their habitat.*

We agree with the general goals of the Habitat Conservation.:

> *Generally stated, the goals for the Aquatic Lands HCP are to:*
> *• Avoid and minimize effects to covered species and habitats.*
> *• Improve and restore habitat conditions on state-owned aquatic lands.*
> *• Identify and protect important habitats on state-owned aquatic lands.*

We remain concerned that lack of specificity in the wording, and the near absence of concrete metrics for enforcement and progress may lead to poor outcomes. We believe that the HCP should hold DNR to quantifiable performance standards. That is, we are concerned that it would be relatively easy for DNR to accept claims that compliance is infeasible or impractical. We are not so sure that society should grant a blanket pass allowing "takings" otherwise prohibited by the Endangered Species Act unless "No Net Loss" standards can be upheld. DNR needs to set limits for its decision space. For example, how will DNR know when 'minimizing' effects is adequate, what does minimization entail,

and how will DNR ensure that minimization is protective of ecological systems? Without quantifiable bounds on "minimizing", how can we be assured that the upward trend in habitat will really happen? We find this to be especially troublesome when we consider the size and political weight of the lessees at Cherry Point.

We disagree with Section 1.1.2 Terms of the plan:

> *Washington DNR is seeking an incidental take permit from NOAA Fisheries and U.S. Fish and Wildlife Service for a term of 50 years to run concurrently with the Aquatic Lands HCP.*

50 years is too long. Given the expected changing conditions, including human population growth and climate change, we feel that a 25 year term for renewal of the permit would better address the need for additional or amended conditions that reflect future circumstances and public involvement.

"No Surprises Clause" and Lease Length: The legal stipulation of the "No Surprises Clause" should lead to shortened lease or HCP approval lengths. The "No Surprises Clause" is designed to protect Incidental Take Permit-holders from having to make future revisions to their approved plan due to unforeseen circumstances. But this also restricts the opportunities for adaptive management of ecosystems. At the public presentations by DNR, staff emphasized that new leases are considerably shorter now than in the past. This should be codified as part of the HCP document.

"Incidental Takings" The absolution of legal responsibility under the Endangered Species Act for both DNR and the entity obtaining a permit is not a matter to be extended lightly. We are very concerned that without very defined metrics and the funding necessary for adequate monitoring, that even the most well intended Habitat Conservation Plan may be inadequate for protection of our priceless aquatic ecosystems.

VI. Cooperation and Coordination with other Agencies

The HCP document should acknowledge and reference the investments being made by Tribes, state and local governments, NGOs, and citizens to support habitat restoration and conservation. Part of the HCP process should ensure that neighboring activities do not impinge on the success of ecological restoration projects done by these other agencies, Tribes, or NGOs.

Tribal Rights: In the HCP, Chapter 2, page 2-5 notes that:

> *The Boldt Decision (1974) and Rafeedie Decision (1994) are two prominent decisions in the ongoing case affecting state-owned aquatic lands. The state, through both the Washington Department of Fish and Wildlife and Washington DNR, continues to work*

with tribal authorities and other affected parties to reach agreement on management and harvest issues.

We ask that the HCP process documentation explicitly note and include the need for tribal consultation by DNR on shoreline construction, or habitat changes that affect these rights. The HCP should also call for close coordination with WDOE, USACE, and USFWS regarding potential water quality degradation from stormwater outfalls and other sources of non-point pollution. This is especially important in the case of large facilities like terminals, and even more so in Aquatic Reserves.

We also ask that the Department work more closely with the Department of Fish and Wildlife than it has in the past to impose appropriate conditions protecting critical habitat and associated populations.

The Puget Sound Action Agenda is a roadmap for restoring Puget Sound which identifies priorities for the protection, restoration and cleanup of Puget Sound and articulates opportunities for federal, state, local, tribal and private entities to invest resources and coordinate actions. The HCP document needs to demonstrate how it is in accord with this framework.

VII. Best Available Science

HCPs should address monitoring such that data collected becomes part of a steadily increasing knowledge base regarding aquatic species, habitat, and physical and chemical processes.

Thus, not only should the best available science be utilized in formulating new HCPs, but the baseline of science available should be continuously improving.
In that regard, statements such as that on Page 4-42 "not possible to obtain data that adequately portray the species distribution" should be addressed with adaptive management protocols in which acquiring the needed scientific information is emphasized.

Ignorance of the science should not be an excuse for environmental degradation.

VIII. Landscape Scale:

We find the overall concept of the landscape scale promising, but we find that implementation may be difficult or inadeqaute.

The HCP states, on page 5-47 that:

> *Aquatic landscape plans will provide the broad ecologically based planning needed to guide Washington DNR's management decisions by water body, embayment, reach or drift cell, and so on.*

These plans have yet to be developed. This is an indicator of how dependent on future funding this HCP process actually is. Since part of the effort here is to provide a protective framework that operates in as good (or better) fashion than DNR does now, there should be some way of linking the creation of these landscape based plans to the granting of DNR's HCP.

The following Aquatic Landscape Planning Intents and Effects are viewed by CPARCSC to be inadequate due to the lack of prioritization between avoiding and minimizing.

> *Implementation of the landscape prioritization process will address effects on covered species and their habitats by avoiding and minimizing:*
> *1. Permanent loss of habitat in areas where habitat is determined to be intact and identified as significant.*
> *2. Loss of physical habitat features and biological communities that support the covered species.*
> *3. Disturbance of, displacement of, or harm to covered species.*
> *4. Alteration of natural habitat-forming processes.*
> 5*. Increases in cumulative effects* (or reductions in the rate of impacts) on *state-owned aquatic lands in the most important habitat areas.*

The use of the term "minimizing" is troubling. Restoration of already degraded habitat needs to be a significant component of the HCP process. Lessening the rate of cumulative effects should not be the goal of an HCP; working to eliminate these effects and reversing the degradation of habitats is what is expected, especially from a state agency.

On the other hand, we find that concept of the Aquatic Landscape Planning is excellent, and could be a very effective tool for understanding and reducing cumulative effects on species. For example, except for formal designation by state or federal government, the Cherry Point herring meets all the requirements for species whose core habitat should be protected as a priority conservation area. In fact, part of its spawning grounds, the Cherry Point reach, has some protection as an Aquatic Reserve. However, to our knowledge no effort to expand the geographic scope of concern and planning beyond the Aquatic Reserve exists. We look forward to DNR's implementing the Aquatic Landscape Planning effort to

look at neighboring land managers' actions, historical events, conditions in adjacent areas, and cumulative effects on this unique population's habitat and numbers.

IX. Habitat Connectivity:

In chapter 5, the first two goals are given as:

> *Goal 1: Avoid or minimize effects on covered species and their habitats*
> *Goal 2: Identify and protect habitats that are important to covered species*

The aquatic landscape plan on pages 5-47, 48 notes that:

> *Washington DNR will identify and protect remnant habitat for the most highly vulnerable species in Washington.*

The plan is not sufficient for species protection if it does not take into account the need for habitat connectivity, and restoration. Remnant habitats may not meet thresholds for habitat viability. Without habitat connectivity, species may not retain the genetic diversity and resiliency to survive over time. This HCP document needs benchmarks with an established timeframe to set quantifiable performance standards for establishment of habitat connectivity and active efforts to prevent piecemealing.

X. Native Species and Habitats Should be Supported

Habitat and Species protection and restoration should support native species. For example, macro-algae at the Cherry Point Aquatic Reserve plays a key role in forage fish and salmon habitat. This ecosystem is degraded and invasive species have taken hold. We would like to see DNR take a stronger role in examining the role of Sargassum in the area and determining whether it can be removed.
There are places in this document where language should emphasize the need for protection of native species and habitats. For example, in Appendix F, the Adaptive Management Program, in the objectives listed under Goal 1, the first bullet point mentions the area of aquatic vegetation, and the second the biodiversity, both without saying NATIVE. Both could be accomplished by introduction of foreign exotics.

XI. Short Term and Long Term Effects

Not all incidental takings of species are readily visible and measurable. Habitat degradation or pollution may inhibit reproduction or decrease species lifespan. Methods

for detecting and addressing these hidden and longer term effects need to be developed and implemented.

Habitat degradation takes place over a long time period and involves nonlinear and interacting systems. The mystery of the disappearance of the Cherry Point herring demonstrates the complexity of habitat and species interrelationships.

XII Non Habitat Impacts:

We need better protections for items such as the following, which may result from the use of HCP permitted structures and facilities:

- Preventing and responding to oil spills; this may include mandatory booming or limits on bunkering and lightering
- Preventing noise disturbances; this may include regulating ship traffic and activity
- Managing stormwater and ballast water; this may include preventing untreated waters from leaving DNR facilities, and
- Regulating ship traffic at the dock; this may include ensuring that docks and the egress/ ingress to the docks are not crowded and at risk of collisions and spills

XII. Large Scale Impacts

Large projects and existing leases for facilities with a large footprint and /or potential to greatly impact the environs (i.e. refineries, quarries, etc.) need more scrutiny and stricter rules beyond what is stated in the HCP. In particular, the presence of Aquatic Reserves should lead to extra scrutiny to ensure that their ecological integrity is protected, and that long-term restoration of these key aquatic lands function is enhanced.

We ask that large industries have their own separate agreement with the services, in addition to the DNR HCP, to ensure no damage to species and critical habitat. At Cherry Point, this would include the BP Oil Refinery, Phillips66 Oil Refinery, and the Alcoa Aluminum Smelter. We also ask that leases with these larger entities ensure that baseline monitoring of species and habitats be rigorous, and that requirements for monitoring, metrics for compliance, and triggers that require re-negotiating lease conditions be included in the leases to ensure no net loss of habitat on these lands.

XIII. Small Scale and Cumulative Impacts

This HCP appears to leave open the possibility that many small projects could be approved, each with impacts viewed as insignificant if looked at individually and for which a 'taking' could be seen as incidental. In aggregate, they may add up a significant impact. We do not

see safeguards in the HCP to prevent this. Procedures are needed to guard against significant harmful cumulative effects as well as harmful project-level effects.

For example, docks and marinas with moorage for more than 10 boats must have a written plan that identifies sewage management, including options for disposing of wastewater from vessel holding tanks and portable toilets and availability of upland restroom facilities. Docks and marinas that have moorage for 5 to 10 boats and that lack a pumpout must clearly post the location of the nearest sewage pumpout facility and upland restroom. But 10 boats, moored individually, would be exempt. These individual boats should have plans for the utilization of appropriate sewage handling facilities.

At Cherry Point, also, we would like to ensure that the aggregate effects on biota of having 3 piers on one reach, are being assessed and considered.

We hope that DNR will work to insure that the effects of such things as "incidental" or "minimized" effects are not, in a cumulative fashion, significant and detrimental.

XIV. Long Term Effects

Climate Change: The HCP contains inadequate analysis and discussion of the manifestations and implications of climate change on our aquatic resources and how climate change, sea level rise, and ocean acidification will be addressed through the best management practices[1]. Given the 50-year proposed duration, this is unacceptable.

Human Population Growth: Washington State population is projected to rise to 8.2 million by 2030, from 6.8 million in 2012, with much of that growth in the Puget Sound area. Cumulative impacts will need to be taken into account. Actions that may have been minor in isolation may become ecologically significant if repeated by large numbers of people.[2]

XV. Monitoring and Adaptive Management

Throughout this Habitat Conservation Plan, some important descriptive terms are employed without defining metrics, limits or boundaries. What is meant by avoid, minimize, and compensate? When is each appropriate?

[1] http://www.ecy.wa.gov/water/marine/oa/2012panel.html
[2] http://www.wsdot.wa.gov/planning/wtp/datalibrary/population/popgrowthcounty.htm

Metrics: The HCP needs quantifiable measures that will define the decision space within which the Department of Natural Resources can monitor outcomes and ensure that compliance with plans is achieved.

Funding and Staffing: For adaptive monitoring to succeed, staff time needs to be devoted to monitoring. Without monitoring, the HCP is meaningless and should not be granted. Dedicated FTE's must be included in the plan.

Species Monitoring: Species populations must also be monitored as part of this plan to ensure that the HCP is effective in protecting species, not just habitat.

Cumulative Impacts: The standard for cumulative impacts of projects associated with an aquatic lease should be no net loss of habitats or native plant and animal populations. Robust baseline and trends monitoring should be included in order to achieve this. Monitoring must be coordinated with other state and federal resource and regulatory agencies to ensure compliance with permit and lease conditions and completion of monitoring programs.

Benchmarks: The use of benchmarks and re-openers need to be included in the HCP and in leases. Benchmarks must ensure that BMPs are implemented in a timely fashion. Re-opening a lease should be possible, if lessees do not meet benchmarks, new Best Available Science comes available, or another change is needed to ensure habitat and species vitality.

Unforeseen Consequences: The adaptive management plan needs to be flexible enough to adapt to unanticipated changes. For example, sea stars, previously abundant, now appear to be rare and threatened. Habitat not used at the present time may still be vital for future regeneration or migration of a species.

Non Habitat Related Stressors: Monitoring in this plan only includes habitat. While habitat is an essential component that affects species, other components that affect species include discharge of pollutants, noise, lighting, physical disturbance, and unregulated harvesting.

Monitoring Frequency: The frequency of field monitoring should be based on the size of a project (yearly seems inadequate for big projects and excessive for "little" ones)

No Advance Notice of Inspection Requirement: There should be no advance notice required. While many of the items to be inspected are built and unable to be hidden or removed, an unannounced onsite inspection can uncover operational issues. Funding for such inspections should be built into the HCP fee process. Reliance on written reports in lieu of on-site inspections should be minimized.

XVI. Expansion of Critical Species Listed

Additional species may warrant protection under the HCP. We expect that if these species exist on DNR aquatic lands and DNR has the authority to control actions on these lands, that they will be covered and that species-specific protections will be developed for them.

Separate Designation for Cherry Point Herring Stock: The Cherry Point herring stock spawns significantly later than other Puget Sound Herring stocks. The Washington Department of Fish and Wildlife site below indicates that the Cherry Point Herring can be genetically differentiated, and that this stock is independent of the Puget Sound Herring metapopulation.[3] The members of CPARCSC believe that metrics and goals for Habitat Conservation Plans should account for habitat and populations of the Cherry Point Herring stock independently of other Pacific Herring stocks.

Olympia oyster: Efforts for restoration of the Olympia oyster in 19 historical sites and the Puget Sound Action Agenda plan to restore shellfish beds need to be taken into account. The Olympia oyster was not included as a covered species because DNR considered, "Direct effects unlikely; indirect affects encompass a relatively small percentage of available habitat." (Appendix B-30) Were the all historical distribution sites and proposed restoration sites[41] of the Olympia oyster taken into account? Are there any effects on larvae from motorized boat activity? With varying water parameters in the Puget Sound, site specific wild oyster genetic diversity needs to be protected. In anticipating ocean acidification and climate change it is imperative to create resiliency by having larger populations and genetic diversity. We ask that you reconsider the Olympia oyster.

Nooksack spring chinook: The population of Nooksack Spring Chinook are in danger despite a captive brood stock rearing program.[5] We ask that you consider adding this population if there are actions DNR can take in Puget Sound and the South Fork Nooksack to help recover its population.

Vulnerable bird species: We note that the following species were not evaluated in the 2007 papers. Please provide evaluations for them and include them as part of the HCP, if it is possible to meaningfully protect them.

- **Great Blue Heron:** These birds are state-monitored. Their vulnerability stems from the fact that they aggregate in large rookeries. Thus, many birds can be wiped out with one

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[3] http://wdfw.wa.gov/conservation/research/projects/marine_fish_monitoring/herring_population_assessment/index.html

[4] Brady Blake and Alex Bradbury. Washington Department Fish & Wildlife, Washington Department of Fish and Wildlife Plan for Rebuilding Olympia Oyster (Ostrea lurida) Populations in Puget Sound with a Historical and Contemporary Overview. Pg 19-20.

[5] http://epa.gov/sciencematters/climatechange/salmon.htm

catastrophic event, such as an oil spill during nesting season. It has also been documented that construction, development, and human disturbance can lead to low fecundity and nest abandonment. [6] Rookeries for the Great Blue Heron exist near both the Cherry Point and Fidalgo Bay Aquatic Reserves.

- **Western Grebe:** These birds are state candidate species. These species have shown significant declines of 81-95% across three different studies.[7]
- **Surf Scoter:** These birds are in steep decline and their migration fitness seems to be closely linked with the survival and timing of herring spawn at Cherry Point. [8, 9] The CPARCSC, in coordination with the North Cascades Audubon Society and under the supervision of Dr. John Bower, have undertaken a study of seven marine birds within the Cherry Point Aquatic Reserve. This study corroborated the steep downward trend of surf scoters in the area. [10]

XVII. Wider Ecosystem Effects:

Plankton forms the base of food web. In particular, studies of crustacean zooplankton are beginning to reveal important effects of ocean acidification which causes large decreases in growth and survival of keystone zooplankton species. The fate of plankton, while not a threatened species, per se, can have a controlling effect on threatened and endangered species.

Phytoplankton blooms can have adverse effects also, such as reducing oxygen levels and producing toxins. These blooms often occur in response to nutrients, which may have been introduced by human activity.[11,12] We ask that DNR cooperate and coordinate with other agencies and institutions to monitor plankton mass and content, investigate its role and controlling factors more fully, and implement BMPs, where appropriate, to enable a plankton population that supports the food web.

Adaptive management and landscape based planning under the HCP process needs to account for greater ecosystem effects, such as the role of phytoplankton, nutrients, and ocean acidification.

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[6] Eissinger, A.M. 2007. Great Blue Herons in Puget Sound. Puget Sound Nearshore Partnership Report No. 2007-06. Published by Seattle District, U.S. Army Corps of Engineers, Seattle, Washington.

[7] http://marineornithology.org/PDF/37_1/37_1_9-17.pdf

[8] http://marineornithology.org/PDF/37_1/37_1_9-17.pdf

[9] Lewis, T.L., D. Esler, and W. S. Boyd. 2007. Foraging Behaviors of Surf Scoters and White-Winged scoters during Spawning of Pacific Herring. The Condor. 109: 216-222. http://www.jstor.org/discover/10.2307/4122549?uid=2&uid=4&sid=21105361778283

[10] https://drive.google.com/viewerng/viewer?a=v&pid=sites&srcid=cmUtc291cmNlcy5vcmd8bWFpbi0yfGd4OjQxNGM3ZjIxNDViMDEyOGM&u=0

[11] http://www.ecy.wa.gov/programs/eap/mar_wat/mwalgae.html

[12] http://www.cosee.net/engaging_scientists/apple/atwork_bellingham_bay.htm

XVIII. Data and Surveys need to be updated:

Much of the information that forms the basis of the HCP is dated, to 2007 and before. It is important that new information is used and incorporated as soon as possible. Static information from 2007, for example, should not be used to guide the HCP conservation measures over the next 50 years. Below are two examples we discovered in our cursory review of the document.

- **Oregon spotted frog**: According to the HCP (page 4-4), these frogs do not exist in Whatcom County, In fact, they do. These frogs are present in three locations in Whatcom County: the Samish River, the Sumas River, and Black Slough. See the Washington Department of Fish and Wildlife Draft Recovery Plan for the most recent information.[13]
- **Rockfish:** The status and distribution information for rockfish needs to be updated. Last month, National Marine Fisheries Service designated critical habitat for rockfish. It includes Cherry Point.[14]

XIX. Conclusion

The Cherry Point Aquatic Reserve Citizens Stewardship Committee is very supportive of the adoption and implementation of a strong Habitat Conservation Plan.

We believe, however, that this document needs to be strengthened:

- The HCP and all leases must minimize harmful risks and impacts, and then mitigate for any remaining harmful risks and impacts, with a standard requirementof No Net Loss.

- Scientifically defensible and legally enforceable aquatic standards must be part of the HCP and all leases.

- The HCP should not only retain existing levels of threatened species, but be focused on the recovery of now degraded or somewhat impacted aquatic ecosystems.

- Time frames for this HCP document, and for approvals of individual leases should be limited, and specified by category. This is necessary so that true adaptive management will take place that can accommodate now unforeseen circumstances. It is especially needed given the "No Surprises Clause".

- Aquatic Reserves should receive special attention for protection and monitoring.

[13] http://wdfw.wa.gov/publications/01505/

[14] 79 FR 68041 11/13/14, http://www.gpo.gov/fdsys/granule/FR-2014-11-13/2014-26558

- Large projects and existing leases for facilities with a large footprint and /or potential to greatly impact the environment (i.e. refineries, quarries, etc.) need more scrutiny and stricter rules beyond what is stated in the HCP.

Sincerely,

The Cherry Point Aquatic Reserve Citizen Stewardship Committee

Ben Albers
Lyle Anderson
Bill Beers
Laura-Leigh Brakke
John Bremer
Jeremy Brown
Bob Cecile
Kim Clarkin
Steve Harvey
Marie Hitchman
John Stockman
Gaythia Weis
Kathy Willis

Fidalgo Bay Aquatic Reserve Citizen Stewardship Committee
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cc: Lalena Amiotte
lalena.amiotte@dnr.wa.gov

December 4, 2014,

Re: Draft Aquatic Lands Habitat Conservation Plan

Dear Sirs:

The Fidalgo Bay Aquatic Reserve Citizen Stewardship Committee is a citizen group whose mission is to conserve the unique habitats, plants and animals of the Fidalgo Bay Aquatic Reserve through leadership in scientific monitoring, environmental literacy, citizen education, local stewardship and cooperation with governmental and nongovernmental agencies. We implement education, outreach, and scientific monitoring projects to help fulfill the Department of Natural Resources Fidalgo Bay Aquatic Reserve management plan. We also review proposed laws, ordinances and development projects that may affect the function of the reserve. We base our review on the management plan and on available science. Our views do not necessarily reflect the views of the Department of Natural Resources.

We wish to thank you for the opportunity to comment on DNR's proposed plan. In general we are supportive of the plan because it will increase protections to the Salish Sea and, in particular, to Fidalgo Bay. We believe the plan should be strengthened so that we are not just

preserving and protecting the status quo, but actually improving habitats and ecosystem functioning. More detailed comments are found below.

Sincerely,

The Fidalgo Bay Aquatic Reserve Citizen Stewardship Committee:

Shawn Arrellano
Phyllis Bravinder
Betty Carteret
Morty Cohen
Pete Haase
Jan Hersey
Wayne Huseby
Michael Kyte
Mira Lutz

1. **Fifty years is too long for the Aquatic Lands Habitat Conservation Plan.** While the desire for long-term certainty is understandable, we are concerned that such an important document will be held in effect for 50 years, governing waters for which current science identifies changes on a much more short-term scale. For example, less than five years ago, the impacts and implications of ocean acidification were not understood. Ahead, there are unknown new challenges and an improving body of scientific research. The adaptive approaches written into the document do not provide a strong enough opportunity to make adjustments over a 50-year span.

   We recommend the HCP be authorized for 25 years, with a requirement that a re-authorization entail a detailed examination of the science and conditions at that time.

   A mandatory revision is especially important because of the "No Surprises" clause (i.e., if unforeseen circumstances arise, no additional commitments or restrictions will be required). Climate change and other conditions with significant impacts are highly likely to come into play much sooner than 50 years.

2. **Adaptive Management needs to be emphasized.** The use of benchmarks and re-openers need to be included in the HCP and in lease agreements. Benchmarks must ensure that best management practices (BMPs) are implemented in a timely fashion. Re-opening the HCP and/or lease should be possible, if lessees do not meet benchmarks, new Best Available Science becomes available, or changing conditions, such as ocean acidification, climate change, or sea level raise, necessitate new management practices.

3. **Funding—a required component of the plan—is not adequately assured.** It is required that funding be assured as part of an HCP. Unfortunately, DNR's proposed HCP does not adequately provide this assurance, and instead states that "Washington DNR's capacity to fund implementation of the habitat conservation plan depends on legislative

appropriation." Please ensure that the incidental take permit is allowed only when all components of this plan are funded and on-track, including all needed monitoring, research of BMPs, and adaptive management steps.

4. **Avoidance of projects is not emphasized.** The HCP emphasizes *minimization* rather than *avoidance* of the need to construct facilities and conduct activities in sensitive areas. We recommend a strengthening of avoidance language be included as the first option.

   The HCP should provide guidance on the conditions under which minimization and/or compensation are adequate strategies.

5. **Cumulative impacts are not assessed.** While the assessment model incorporates aggregate effects of multiple activities and facilities authorized by DNR, the *cumulative* impact of DNR-authorized activities—in addition to other impacts on waters from other activities or sources—are not included. For assessing harm to species, the additive effects of these impacts need to be incorporated. For example, food chain impacts of non-listed species on listed ones need consideration.

   The standard for cumulative impacts of projects associated with an aquatic lease should be no net loss of habitats or native plant and animal populations. Robust baseline and trends monitoring should be included in order to achieve this. Monitoring must be coordinated with other state and federal resource and regulatory agencies to ensure compliance with permit and lease conditions and completion of monitoring programs.

6. **Data and studies used as basis for HCP are out of date.** We realize that the planning of the HCP was a lengthy process and that the studies and data used to formulate it are now out of date. We ask that updated data be used for each new or reauthorized lease, as it is reviewed.

7. **Impacts from activities is incomplete, especially shipping and oil transport.** Shipping impacts to aquatic lands should be considered. Moorings for ships and barges should be restricted to locations and mooring methods where they will not cause bedlands scouring and/or shading. At marinas, there should be a requirement that all boats fueled at these facilities be equipped (retrofitted, if necessary) with adapters that prevent over-filling tanks. Underwater noise from shipping is the largest source of acoustic pollution in the Salish Sea, and many species, from herring to killer whales, have been shown to be highly sensitive to such disturbance. We need better protections for the following:
   a. Preventing and responding to oil spills;
   b. Preventing noise disturbances;
   c. Managing stormwater; and
   d. Regulating ship traffic at the dock.

8. **Monitoring—a required component of the plan—is not adequately described.** The proposed plan acknowledges a high degree of uncertainty. Specifically, the plan states:

> The measures and standards presented in this chapter are based on best available science and are assumed to be capable of improving habitat and habitat conditions for covered species. However, aquatic ecosystem processes are often not directly observable. In addition, there is often significant uncertainty associated with the response of habitat and species to the proposed measures. This uncertainty is further complicated by a lack of fine-scale distribution data for species and habitat, spatially accurate leasing data, and data related to the cumulative effects that uses of state-owned aquatic lands may have on habitat and species.

A strong, fully funded monitoring program, therefore, is *critical* to the success of the plan. It is of concern that the plan substitutes physical, vegetation and invertebrate indicators for actual monitoring of covered species. While some conceptual models are presented (which are incomplete) in Appendix F, the selected indicators do not represent the key ecosystem attributes. For example, there is no indicator for any upper trophic level organisms, many of which are included in the HCP, such as Killer whales and birds. It is inappropriate to request exemption from take of endangered species by assuming others will do the monitoring of these species. Unless covered species are monitored, the HCP in no way assures protection of the covered species. Monitoring in this plan includes only habitat. While habitat is an essential component that affects species, other components that affect species include discharge of pollutants, noise, lighting, physical disturbance, and unregulated harvesting. Species populations also must be monitored as part of this plan, in coordination with other agencies, to ensure the HCP is effective in protecting species, not just habitat.

9. **Restoration lands are inadequate.** DNR plans to compensate for unavoidable or irreversible impacts on covered species and their habitats through four land restoration and protection programs. While these programs are good, they are inadequate in scope and funding to provide full compensation and maintenance of a viable ecosystem. We recommend this component of the HCP be significantly strengthened.

   Please incorporate the standards of "no net loss of habitat" to ensure that adequate compensation is achieved.

10. **Stakeholder and advisory groups associated with the HCP should include all user groups**. As part of the adaptive management component of the plan, DNR plans to convene stakeholder groups of user groups (such as marina operators and shellfish growers), tribal representatives, and regional planning entities (such as the Puget Sound Nearshore Restoration Project and the Salmon Recovery Fund). Stakeholder groups also should include user groups other than those who hold leases, such as non-governmental organizations, Aquatic Reserve Citizen Stewardship Committees, wildlife viewers, and

beach walkers. The advisory teams should reflect the people with interest in the safeguarding of these lands and the species to be protected.

11. **A better tie-in to the Puget Sound Action Agenda is needed.** A large effort by the scientific, technical and policy experts in the Puget Sound region, including DNR staff, has been underway since 2007 to build a program to recover the health of Puget Sound. The proposed HCP does not provide a strong tie-into the Puget Sound Partnership's Action Agenda and the recovery goals. A connection to the Action Agenda should be explicitly included in the HCP.

12. **Olympia oyster should be reconsidered under the HCP.** Efforts to restore the Olympia oyster in 19 historical sites and the Puget Sound Action Agenda plan to restore shellfish beds need to be taken into account. The Olympia oyster was not included as a covered species because DNR considered, "Direct effects unlikely; indirect effects encompass a relatively small percentage of available habitat." (Appendix B-30) Were all historical distribution sites and proposed restoration sites[1] of the Olympia oyster taken into account? Are there any effects on larvae from motorized boat activity? With varying water parameters in the Puget Sound, site specific wild oyster genetic diversity needs to be protected. With the increase of ocean acidification and climate change, it is imperative to create resiliency by having larger populations and genetic diversity. We ask that you reconsider the Olympia oyster.

13. **Vulnerable bird species should be considered under the HCP.** We note that the following species were not evaluated in the August 2007 Covered Species Technical Paper (CS paper) and the November 2007 Potential Effects and Expected Outcomes Technical Paper (PEEO paper). Please provide evaluations for them and include them as part of the HCP, if it is possible to meaningfully protect them.

    Great Blue Heron: These birds are state-monitored. Their vulnerability stems from the fact that they aggregate in large rookeries. Thus, many birds can be wiped out with one catastrophic event, such as an oil spill during nesting season. It has also been documented that construction, development and human disturbance can lead to low fecundity and nest abandonment.[2] Rookeries for the Great Blue Heron exist near both the Cherry Point and Fidalgo Bay Aquatic Reserves.

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[1] Brady Blake and Alex Bradbury. Washington Department Fish & Wildlife, Washington Department of Fish and Wildlife Plan for Rebuilding Olympia Oyster (Ostrea lurida) Populations in Puget Sound with a Historical and Contemporary Overview. Pg 19-20.

[2] Eissinger, A.M. 2007. Great Blue Herons in Puget Sound. Puget Sound Nearshore Partnership Report No. 2007-06. Published by Seattle District, U.S. Army Corps of Engineers, Seattle, Washington.

Western Grebe: These birds are state candidate species. These species have shown significant declines of 81-95% across three different studies.[3]

14. **The harbor porpoise should be considered under the HCP.** The harbor porpoise, *Phocoena phocoena,* should be evaluated for protection as its habitat includes nearshore bays and channels. Harbor porpoise habitat has steadily decreased as human development takes up bays and inland waterways; it avoids human interaction, yet relies on shoreline habitat for production of forage fish, an important food source. Because of their position near the top of the food chain, the porpoise may be considered a sentinel species in our waters, indicating through its population size and physical health the health of the ecosystem in which it is found.

15. **The pressure washing standards in the HCP are inadequate.** Pressure washing speeds the release of contaminants into the water by dislodging particles and chemicals on surfaces. Under the Washington's Municipal and Industrial Stormwater permits, pressure washing, even of seemingly clean surfaces like sidewalks, creates illicit discharges when the water flows into a storm drain or water body. As well, pressure washing a boat hull is also illegal; pressure washing ablative paint creates pollution. Please ensure that DNR pressure washing standards are as stringent as those of the Department of Ecology.

16. **Emphasis should be put on restoration of native vegetation and forage fish habitat**. The DNR's proposal regarding native vegetation and forage fish habitat restoration and protection is primarily focused on avoiding further impact, with minimal discussion of programmatic approaches to facilitate restoration. A proactive approach to restoration of native vegetation and forage fish habitat should be more thoroughly identified and funded, such that a standard of no net loss or net gain of these productive habitats can be achieved with respect to the cumulative impacts of covered activities

[3] http://marineornithology.org/PDF/37_1/37_1_9-17.pdf

WFWOComments, FW1 <wfwocomments@fws.gov>

WDNR Aquatic Lands HCP DEIS

1 message

Will Miller <willmiller@busetimber.com> Thu, Dec 4, 2014 at 3:30 PM
To: "WFWOComments@fws.gov" <WFWOComments@fws.gov>

Tim Romanski,

See the attached WDNR Aquatic Lands HCP DEIS Comment letter from Buse Timber & Sales. Thanks.

Will Miller

Buse Timber & Sales

Timber Manager

425-258-5849 Direct

SKMBT_C35214120416050.pdf
690K

DOUGLAS FIR HEMLOCK
BUSE TIMBER & SALES INC.
An employee owned company!
3812 28th PL NE, Everett, WA 98201

December 4, 2014

RE: WDNR Aquatic Lands HCP DEIS

Tim Romanski US Fish and Wildlife Service
510 Desmond Dr SE, Suite 102
Lacey, WA 98503

Buse Timber operates a small sawmill adjacent to our aquatic lease with the DNR for log booming and storage. We are very dependent on logs rafted to our mill. We have purchased rafted logs from Olympia, Port Angeles & Canada for over 50 years. We have the following concerns regarding the proposed Aquatic Habitat Conservation Plan (HCP):

SHADING: Aquatic vegetation is mostly non-existent in rivers, channels and bays due to tide and current scouring as evidenced by extensive mud flats except in lakes. Shading is not the limiting factor in these areas. In addition, rafted logs are transient and rarely stay in one place for very long.

WATER MOVEMENT, WAVES, and IMPACTS TO SEDIMENTS: Built structures like armored shoreline, piers and pilings provide areas for small fish to hide and rest much like the restoration structures installed in our rivers.

CRUSHING THE SEDIMENT HABITAT: Crushing sediments is not the limiting factor for vegetation where currents prevent plants from rooting.

WOOD and BARK ACCUMULATION (DEIS Table 2-1, 2-38): Containment booms will collect considerable amounts of debris from upstream every time it rains. Separating on-site debris from off-site is impossible. Lease holder contributions are negligible in comparison and may in fact be beneficial to natural biological processes (i.e. Elwah Dam removal claims).

UNDERWATER SURVEYS (DEIS Table 2-1, 2-39): Underwater surveys can be problematic. Accumulation rates and baseline benthic conditions change with the seasons. Accumulation and deposit rates also vary by tide and current velocities. Any naturally occurring wood and bark deposits from offsite also need to be accounted for.

WOOD DEBRIS CLEAN-UP (DEIS Table 2-1, 2-39): The term "excessive accumulations" is subjective and undefined in the HCP. Do some or part of lease holder accumulations have biological process benefits? Should relatively small "excessive accumulation" footprints be factored into the Incidental Take Permit?

SITING IN PRIORITY CONSERVATION AREAS (DEIS Table 2-1, 2-39): The DEIS should show the Priority Conservation areas on a map. Moving or reconfiguring facilities in rivers beyond the near shore and littoral area may not be an option due to spatial limitations.

ONE SIZE FITS ALL IS NOT SITE SPECIFIC: The conditions at every site are unique. Rules that apply at one place my not be appropriate at another. Conditions in a harbor are much different than a river.

SCIENCE IS CONSTANTLY EVOLVING: Any modeling system is only as good as the inputs. Past models for climate, critical habitat and other predictions are often lacking and have proven to be off. Unfortunately decisions can be guided more by politics than science.

HCP DOES NOT PROVIDE CERTAINTY: As we have seen from the DNR's Timberland HCP, it does not prevent Environmental organizations from challenging the HCP and suing to prevent the DNR from implementing the HCP.

HCP LOCKS RULES IN FOR 50 YEARS: An HCP provides little flexibility should conditions change. It is difficult to back out of the agreement. Current laws are adequate and can be changed to address issues that come up.

DEIS IS INADEQUATE: Many specifics are missing; the underwater survey protocols, the "excessive accumulation" definition, and a Priority Conservation Area map to name a few. The DEIS needs to be rewritten.

OVER RESTRICTIVE RULES HAVE UNINTENDED CONSEQUENCES:

1. Increased Use of Fossil Fuels: Should log rafting operations shut down due to onerous regulations, the logs would have to be trucked. One tug transporting upwards of 500 truckloads of logs burns far less fuel than individual trucks. Also everyone benefits from taking those log trucks off our crowded highways.
2. Loss of Sawmills and Revenue to the State: Again if log rafting operations shut down due to onerous regulations, several log raft dependent sawmills will shut down requiring logs to travel even greater distances on our highways. This will mean a significant loss of revenue to the State. Some of these mills buy a significant amount of logs from the DNR. These logs would be less valuable to the DNR because of the increased transportation costs.

CONCLUSION: Given the above reasons, Buse prefers Alternative 1, the no action alternative at this time.

Sincerely,

Will Miller
Timber Manager

Tom Parks
President

CALPORTLAND®

December 4, 2014

Scott E. Anderson
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Tim Romanski
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Washington Fish and Wildlife Office
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Dear Mr. Anderson and Mr. Romanski:

We are writing to request a 90-day extension of the public comment period on the Draft Environmental Impact Statement (DEIS) for Washington DNR's proposed Aquatic Lands Habitat Conservation Plan (HCP), issued jointly by NMFS and USFW under both the National Environmental Policy Act and the Washington State Environmental Policy Act.

Our company holds several use authorizations from DNR in connection with the company's sand and gravel and other aggregate operations in the City of DuPont, Jefferson County and Clark County along the Columbia River, and other locations in Washington State. Our DuPont facility is the largest supplier of sand and gravel in the Puget Sound Region, and is consistently one of the top producers in the nation. It is the closest producer to the region's major metro areas that provides waterborne transportation. The DuPont facility has provided the materials needed for transportation infrastructure, stormwater management and sewage treatment facilities, contaminated sediment remediation, and is a key resource needed to provide the materials needed to construct this infrastructure and achieve regional growth management goals.

Although the HCP is extremely broad in geographic scope, it is unclear how it will be applied to existing uses and current leases, such as our current Aquatic Lands Lease (No. 20-013511) for our DuPont operation. The HCP's provisions in this regard (pages 5-7 to 5-9) do not clearly explain how the HCP will be applied to renewals of various types of leases (some of which contain automatic lease renewal rights), or to improvements undertaken by lessees during the

term of the lease. We have tried through written correspondence to obtain clarification from DNR, but have not received a response.

In order to obtain this clarification, and then provide appropriate and well-informed technical comments on the extensive range of new regulations and requirements contained in the HCP, and in particular Chapter 5, CalPortland requests an extension from NMFS and USFW of the comment period for the DEIS for an additional 90 days. We understand that other stakeholders may be submitting extension requests as well, for some of the same reasons. The additional time will ensure that all stakeholders have an opportunity to provide feedback and comments that will assist the federal agencies and Washington DNR in producing a Final HCP that both protects listed species and avoids unnecessary obstacles to continued use of aquatic lands for a variety of activities that benefit the public and our regional economy.

Thank you in advance for your consideration of this request. CalPortland looks forward to the opportunity for future discussions as the agencies move forward with preparing a Final EIS and Final HCP. Please do not hesitate to call me if you have any questions or need any further information.

Sincerely,

Pete Stoltz
Permit Manager

WFWOComments, FW1 <wfwocomments@fws.gov>

Columbia Riverkeeper DNR HCP Public Comments

3 messages

Lauren Goldberg <lauren@columbiariverkeeper.org> Thu, Dec 4, 2014 at 1:43 PM
To: "AMIOTTE, LALENA (DNR)" <lalena.amiotte@dnr.wa.gov>, scott.anderson@noaa.gov, wfwocomments@fws.gov, tim.romanski@fws.gov
Cc: Julie Carter <CARJ@critfc.org>, Elmer Ward <elmer.ward@wstribes.org>, Carey Miller <AudieHuber@ctuir.org>, Carl Merkle <CarlMerkle@ctuir.org>, Brady Kent <bkent@yakama.com>, Rich Nafziger <kristin.swenddal@dnr.wa.gov>

On behalf of my client, Columbia Riverkeeper, I am submitting the attached public comments. I would greatly appreciate if you could confirm receipt of these comments.

Thank you,

Lauren

–

Lauren Goldberg | Staff Attorney
Columbia Riverkeeper | 111 Third St. Hood River, OR 97031
541.965.0985 | lauren@columbiariverkeeper.org

www.columbiariverkeeper.org

2014.12.4 FINAL Riverkeeper WDNR HCP comments.pdf
492K

AMIOTTE, LALENA (DNR) <Lalena.Amiotte@dnr.wa.gov> Thu, Dec 4, 2014 at 3:15 PM
To: Lauren Goldberg <lauren@columbiariverkeeper.org>, "scott.anderson@noaa.gov" <scott.anderson@noaa.gov>, "wfwocomments@fws.gov" <wfwocomments@fws.gov>, "tim.romanski@fws.gov" <tim.romanski@fws.gov>
Cc: Julie Carter <CARJ@critfc.org>, Elmer Ward <elmer.ward@wstribes.org>, Carey Miller <AudieHuber@ctuir.org>, Carl Merkle <CarlMerkle@ctuir.org>, Brady Kent <bkent@yakama.com>, "SWENDDAL, KRISTIN (DNR)" <KRISTIN.SWENDDAL@dnr.wa.gov>

We received the comments. Thank you for submitting them. Lalena

From: Lauren Goldberg [mailto:lauren@columbiariverkeeper.org]
Sent: Thursday, December 04, 2014 1:43 PM
To: AMIOTTE, LALENA (DNR); scott.anderson@noaa.gov; wfwocomments@fws.gov; tim.romanski@fws.gov
Cc: Julie Carter; Elmer Ward; Carey Miller; Carl Merkle; Brady Kent; SWENDDAL, KRISTIN (DNR)
Subject: Columbia Riverkeeper DNR HCP Public Comments

[Quoted text hidden]

SWENDDAL, KRISTIN (DNR) <KRISTIN.SWENDDAL@dnr.wa.gov> Thu, Dec 4, 2014 at 4:51 PM
To: Lauren Goldberg <lauren@columbiariverkeeper.org>, "AMIOTTE, LALENA (DNR)" <Lalena.Amiotte@dnr.wa.gov>, "scott.anderson@noaa.gov" <scott.anderson@noaa.gov>, "wfwocomments@fws.gov" <wfwocomments@fws.gov>, "tim.romanski@fws.gov" <tim.romanski@fws.gov>
Cc: Julie Carter <CARJ@critfc.org>, Elmer Ward <elmer.ward@wstribes.org>, Carey Miller <AudieHuber@ctuir.org>, Carl Merkle <CarlMerkle@ctuir.org>, Brady Kent <bkent@yakama.com>

Received. Thanks!

Kristin Swenddal
Division Manager
Aquatic Resources Division
Washington State Department of Natural Resources
(360) 902-1124
kristin.swenddal@dnr.wa.gov
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From: Lauren Goldberg [mailto:lauren@columbiariverkeeper.org]
Sent: Thursday, December 04, 2014 1:43 PM
To: AMIOTTE, LALENA (DNR); scott.anderson@noaa.gov; wfwocomments@fws.gov; tim.romanski@fws.gov
Cc: Julie Carter; Elmer Ward; Carey Miller; Carl Merkle; Brady Kent; SWENDDAL, KRISTIN (DNR)
Subject: Columbia Riverkeeper DNR HCP Public Comments

On behalf of my client, Columbia Riverkeeper, I am submitting the attached public comments. I would greatly appreciate if you could confirm receipt of these comments.

[Quoted text hidden]

COLUMBIA RIVERKEEPER
111 Third Street
Hood River, OR 97031
phone 541.387.3030
www.columbiariverkeeper.org

December 4, 2014

Lalena Amiotte
Washington Department of Natural Resources
lalena.amiotte@dnr.wa.gov

Scott Anderson
NOAA Fisheries
scott.anderson@noaa.gov

Tim Romanski
U.S. Fish and Wildlife Service
tim.romanski@fws.gov

Submitted via email to wfwocomments@fws.gov

Re: Comments on Washington DNR Aquatics Habitat Conservation Plan.

Washington DNR, NOAA Fisheries, and U.S. Fish & Wildlife Service:

Columbia Riverkeeper ("Riverkeeper") submits the following comments on the proposed Aquatic Habitat Conservation Plan ("HCP") for the Washington Department of Natural Resources ("DNR"). Riverkeeper also filed comments as part of a coalition of conservation groups. *See* Comments on DNR HCP Submitted by Earthjustice on behalf of Conservation Groups (Dec. 4, 2014) (hereafter "Coalition Comment"). Riverkeeper files the following comments to emphasize the unique threats of fossil fuel development to the Columbia River Estuary and, in turn, the particular value of treating fossil fuel projects differently than other aquatic development projects. As the Coalition Comment explains, the HCP is ill-suited for application to major shipping terminals involving transportation of fossil fuels, and should explicitly exclude these terminals from its coverage. Riverkeeper also reiterates the Coalition's request that DNR evaluate the use of Port Management Agreements ("PMA") in light of, first, the findings and recommendations for the proposed HCP and, second, the significant threat of fossil fuel development projects within PMA jurisdiction.

Riverkeeper is a nonprofit public interest group with approximately 8,000 members and supporters working to protect and restore the water quality of the Columbia River and all life

connected to it, from the headwaters to the Pacific Ocean. To achieve these objectives, Riverkeeper operates scientific, educational, and advocacy programs aimed at protecting water quality and habitat in the Columbia River and Estuary. Riverkeeper's members and supporters have diverse interests in the Columbia River, including fishing, boating, swimming, farming, working, and living.

The Columbia River Estuary is a federally-designated Estuary of National Significance under the Clean Water Act's National Estuary Program, and the Columbia River was designated in 2006 as one of the U.S. Environmental Protection Agency's ("EPA") seven Priority Large Aquatic Ecosystems. The Columbia River Estuary is an "ecologically critical area," 40 C.F.R. § 1508.27(b)(3), that is essential to the survival juvenile salmon and steelhead, waterfowl, and many other species.[1] The Columbia River Estuary is lined with wetlands, riparian areas, and park lands[2] which could all be impacted by increased aquatic development and associated vessel traffic. Multiple studies and publications have identified the Columbia River Estuary as vitally important for juvenile salmonid rearing and endangered species recovery.[3] The Columbia River also supports a vibrant tradition of subsistence, commercial, and sport salmon fishing. Salmon fishing in the Estuary is a cultural and economic practice with a rich history reaching back many generations. In short, the Columbia River Estuary is a local and regional treasure, and a national priority for watershed health and salmon recovery.

Riverkeeper is deeply concerned by a variety of controversial proposals threatening to significantly increase high-risk fossil fuel terminals in the Columbia River Estuary. These proposals involve shipping coal, crude oil, liquefied natural gas, methanol, and propane through some of the most important salmon habitat in the continental United States. For example, shipping Bakken or tar sands crude oil in bulk by rail car is a relatively new enterprise, and a number of high-profile, disastrous accidents have occurred. The risks and controversy associated with shipping fossil fuels justifies the thorough, individualized review requested by Riverkeeper and other conservation organizations.

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[1] NMFS, *Columbia River Estuary ESA Recovery Plan Module for Salmon and Steelhead* (2011); Fresh *et al*., *NOAA Technical Memorandum NMFS-NWFSC-69: Role of the Estuary in the Recovery of Columbia River Basin Salmon and Steelhead* (2005); 78 Fed. Reg. 2,726 (January 14, 2013) (*Proposed Critical Habitat Designation for Lower Columbia Coho Salmon*).

[2] *See e.g.* Julia Butler Hansen Refuge for the Columbian White-Tailed Deer, Lewis and Clark National Wildlife Refuge.

[3] NMFS, *Columbia River Estuary ESA Recovery Plan Module for Salmon and Steelhead* (2011); Fresh *et al*., *NOAA Technical Memorandum NMFS-NWFSC-69: Role of the Estuary in the Recovery of Columbia River Basin Salmon and Steelhead* (2005); 78 Fed. Reg. 2,726 (January 14, 2013) (*Proposed Critical Habitat Designation for Lower Columbia Coho Salmon*).

I. The Unique and High-Impact Threats Posed by Oil-by-Rail Terminals in the Columbia River Estuary Demands Site-Specific ESA treatment.

The Columbia River Estuary is at the epicenter of a series of high-profile proposal to develop fossil fuel transport projects, including the proposed Tesoro-Savage oil-by-rail terminal in Vancouver, Washington. These proposals would vastly increase oil tanker and oil-train traffic, posing a risk of oil spills. Tesoro Savage proposes to modify an existing dock to accommodate a massive oil terminal. The dock is located within an area covered by the Port of Vancouver-DNR Port Management Agreement. The terminal would receive as much as 360,000 barrels of crude oil per day by train,[4] loading it onto 365 vessels per year[5] for shipment along the Columbia River. In the State of Oregon, Global Partners proposes to expand an existing oil terminal to receive up to 120,000 barrels of crude oil per day by train, loading it onto 133 vessels per year for shipment along the Columbia River.[6] DNR should consider existing oil-by-rail terminals, proposals for new terminals, and the potential for additional proposals as it weighs how to treat aquatic development that facilitates oil-by-rail in the HCP.

a. Aquatic development that facilitates oil-by-rail terminals poses unique threats to the Columbia River Estuary and DNR should account for these threats in treating oil-by-rail development on a case-by-case basis.

DNR's HCP fails to account for the unique risks posed by oil-by-rail aquatic development. Riverkeeper urges DNR to consider historic vessel traffic and the relative change in vessel traffic—and the associated risks to ESA-listed species—from just two new terminals in the Columbia River Estuary. This information supports site-specific treatment of oil-by-rail aquatic development rather than the statewide HCP approach. Between 1991 and 2010, for example, there were never more than 12,000 tons of crude oil shipped through the Estuary in a single year, and most years there was no crude oil vessel traffic at all.[7] By contrast, the Tesoro-Savage terminal and Port Westward could barge respectively 49,093 tons and 160,364 tons of

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[4] Tesoro Savage, Application for Cite Certification Agreement, Vancouver Energy Distribution Terminal at 2-86. (Aug. 29, 2013).
[5] Tesoro Savage, Appendix H.1 to EFSEC Application, Vancouver Energy Distribution Terminal Biological Resources Report at 68. (Aug. 29, 2013).
[6] Oregon Department of Environmental Quality Public Notice. February 28, 2014. Global "significantly increased crude oil storage and loading and now intends to receive and transload as much as 1,839,600,000 gallons per year." One barrel of oil is 42 gallons. According to DEQ's notice, and converting gallons per year to barrels per day, Global intends to ship 120,000 barrels/day – an increase of 115,000 barrels over currently permitted levels. Assuming the same ratio of ships to barrels as the Vancouver Tesoro/Savage project (both hope to use Panamax vessels), the Global oil terminal will require roughly 115 additional ships outgoing per year.
[7] Freight Policy Transportation Institute, *Historical Waterborne Commerce on the Columbia-Snake River System: Commodity Movements up and down River*, 1991-2010 (Nov. 2010) at 18, Appendix A.

crude oil *daily*, or over 23 million tons per year between the two proposals.[8] In addition, the risk of oil spills from single-commodity oil tank trains is a relatively new one for the area, since oil unit trains along the river only started arriving in September 2012.[9] Both the Tesoro and Port Westward proposals together could require close to 500 full oil vessels per year,[10] carrying up to nearly a half million barrels of crude oil per day in the Columbia River.[11] This significant increase in vessel traffic increases the risk of a crude oil spill into waters used by ESA-listed species.

The United States has a history of large, devastating oil spills from vessels transporting oil. Infamously, the Exxon Valdez spilled almost 11 million gallons of crude oil off the coast of Alaska in 1989, impacting 1,100 miles of Alaska's coastline.[12] Numerous subsequent incidents illustrate that Exxon Valdez was not an isolated accident, and cannot be confined to the past or dismissed as an anomaly. A brief summary of examples is provided below:

- **June 8, 2000: 59,600 gallons** of oil spilled into the Chelsea River when the *Posavina* collided with a tugboat in the Boston Harbor.[13]
- **November 28, 2000: 554,400 gallons** of crude oil spilled into the Mississippi River when oil tanker *M/T Westchester* lost its main engines and struck an unidentified hazard.[14] The oil reached 35 acres of shoreline habitat.[15]
- **April 27, 2003: 98,000 gallons** of fuel oil spilled into Buzzard's Bay in Massachusetts when a barge ran aground.[16] Oil reached approximately 90 miles of

[8] There are 7.333 barrels in one ton of North American crude oil, so 360,000 barrels/7.333 = 49,093 tons for Tesoro, and 120,000/7.333 = 16, 354 tons for Port Westward. *See:* http://www.eia.gov/cfapps/ipdbproject/IEDIndex3.cfm?tid=94&pid=57&aid=32. 49,093 tons daily from Tesoro plus 16,354 tons daily from Port Westward times 365 days/year = 23,885,235 tons per year.
[9] Rob Davis, *oil trains – pipelines on wheels-headed to Northwest terminals and refineries from North Dakota fracking,* OREGONIAN, May 13, 2013, available at *http*://www.oregonlive.com/environment/index.ssf/2013/05/oil_trains_--_pipelines_on_whe.html, Appendix B.
[10] 365 vessels from Tesoro (Tesoro Savage, Appendix H.1 to EFSEC Application, Vancouver Energy Distribution Terminal Biological Resources Report at 68. (Aug. 29, 2013)), plus 133 vessels from Port Westward (*Supra* note 3).
[11] 360,000 barrels from Tesoro (Tesoro Savage, Application for Cite Certification Agreement, Vancouver Energy Distribution Terminal at 2-86. (Aug. 29, 2013)), plus 120,000 vessels from Port Westward (*Supra* note 3).
[12] NOAA Incident News: T/V Exxon Valdez, http://www.incidentnews.noaa.gov/incident/6683 (accessed June 23, 2014).
[13] NOAA, *Damage Assessment and Restoration Plan/Environmental Assessment for the June 8, 2000 T/V Posavina Oil Spill* at 5, http://www.gc.noaa.gov/gc-rp/posa-drp.pdf (accessed July 23, 2014).
[14] NOAA, *Shoreline Assessment and Environmental Impacts from the M/T Westchester oil spill in the Mississippi River* at 3-1, http://www.epa.gov/osweroe1/docs/oil/fss/fss02/michelpaper.pdf (accessed July 23, 2014).
[15] *Id*. at 3-7.
[16] Mass. Office of Energy and Environmental Affairs, *Bouchard 120 Oil Spill NRD Damages Assessment*, http://www.mass.gov/eea/agencies/massdep/cleanup/nrd/bouchard-120-oil-spill-nrd-damages-assessment.html, Appendix E.

shoreline, killing around 450 birds, including ESA-listed Roseate Terns and Piping Plovers.[17]

- **November 27, 2004: 263,371 gallons** of heavy crude oil spilled into the Delaware River when oil tanker *Athos I* struck a large underwater anchor.[18] Oil from the spill reached 1,729 acres of shoreline habitat, 412 acres of aquatic habitat, and killed an estimated 11,869 birds.[19]
- **November 7, 2007: 53,569 gallons** of fuel oil spilled into the San Francisco Bay when freighter *Cosco Busan* struck the Bay Bridge.[20] Oil from the spill impacted 3,367 acres of shoreline habitat. The incident killed 6,489 birds from 65 different species, including the ESA-listed Marbled Murrelets and Snowy Plovers.[21] In addition, an estimated 14-29% of herring stock was lost that winter due to oil-related egg mortality.[22]
- **July 23, 2008: 212,089 gallons** of fuel oil spilled into the Mississippi River when a barge collided with another vessel near New Orleans, Louisiana.[23] Wildlife Group observed oil from the spill on 813 birds, 26 mammals, and 13 reptiles.[24] The spill occurred upstream of the Delta National Wildlife Refuge, placing important habitat for waterfowl at risk.[25]
- **January 23, 2010: 462,000 gallons** of crude oil spilled into the Sabine-Neches Canal when oil tanker *Eagle Otome* collided with another vessel in Port Arthur, Texas.[26]
- **February 22, 2014: 23,500 gallons** of Bakken crude oil spilled into the Lower Mississippi River when oil tanker *E2MS 303* collided with another vessel.[27]

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[17] *Id*.
[18] NOAA, *FINAL RESTORATION PLAN AND ENVIRONMENTAL ASSESSMENT For the November 26, 2004, M/T Athos I Oil Spill on the Delaware River near the Citgo Refinery in Paulsboro, New Jersey* at 1, http://www.darrp.noaa.gov/northeast/athos/pdf/Athos_Final_RP.pdf (accessed July 23, 2014).
[19] *Id*. at vii.
[20] Cosco Busan Oil Spill Trustees, *Cosco Busan Oil Spill Final Damage Assessment and Restoration Plan/Environmental Assessment* at 14, http://www.fws.gov/contaminants/Restorationplans/CoscoBusan/Cosco_Settlement/FinalCoscoBusanDARP.pdf (accessed July 23, 2014).
[21] *Id*. at 16.
[22] *Id*. at 15.
[23] U.S. FWS, After Action Report Barge DM932 Oil Spill, Mississippi River New Orleans, Louisiana at 1, http://www.fws.gov/contaminants/Documents/DM932Spillreport.pdf (accessed July 23, 2013).
[24] *Id*. at 4.
[25] *Id*. at 2.
[26] National Transportation Safety Board, *Collision of Tankship Eagle Otome with Cargo Vessel Gull Arrow and Subsequent Collision with the Dixie Vengeance Tow, Sabine-Neches Canal, Port Arthur, Texas, January 23, 2010. Marine Accident Report* at 1, http://www.ntsb.gov/doclib/reports/2011/MAR1104.pdf (accessed July 23, 2014).
[27] NOAA Incident News: Barge E2MS 303, http://www.incidentnews.noaa.gov/incident/8729 (accessed June 23, 2014).

- **March 22, 2014: 168,000 gallons** of fuel oil spilled into Galveston Bay when an oil tanker collided with another vessel.[28] Just over a week after the incident, 21 dolphins and 150 birds were reported dead in the area.[29] Oil from the spill also reached Matagorda Island, part of an important wildlife refuge which provides the winter home to the world's only naturally wild flock of whooping cranes.[30]

As these incidents illustrate, oil vessels have the potential to spill large quantities of crude oil into the Columbia River Estuary. In light of the limited history of oil tanker traffic,[31] and the dramatic increase that would result from just two proposals,[32] the risk of an oil spill on the Columbia will increase substantially if new terminals are built. Given the history of vessels releasing oil into waterways, DNR should not include aquatic land development associated with oil-by-rail terminals in the proposed HCP.

b. DNR should carefully consider the relationship between increased rail traffic and increased accidents before it includes oil-by-rail aquatic development in the HCP.

DNR should evaluate the risk of oil spills from rail cars transferring oil to marine terminals in evaluating whether to treat aquatic development related to oil development distinctly from other aquatic development. Since 2010, the amount of oil train traffic in the United States has skyrocketed: the year 2013 saw eleven times more crude oil being transported by rail than in all the years between 2005 and 2009 combined.[33] Along with increased oil train traffic comes increased oil train accidents: Politico reported that the number of oil-train incidents has increased from as low and 1 and 9 in 2009 and 2010 respectively, to 118 incidents in 2013.[34] DNR should carefully consider the relationship between increased rail traffic and increased accidents before it includes oil-by-rail aquatic development in the HCP.

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[28] Handbook at 4-23-26.
[28] NOAA Office of Response and Restoration, *Texas City "Y" Incident: Aftermath of the Oil Spill in Galveston Bay, Texas*, http://response.restoration.noaa.gov/about/media/texas-city-y-incident-aftermath-oil-spill-galveston-bay-texas.html-0, Appendix F.
[29] *Id*.
[30] U.S. FWS National Wildlife Refuge System, *Impacts at Texas Oil Spill*, http://www.fws.gov/refuges/news/ImpactsAtTexasOilSpill.html, Appendix G.
[31] *See supra* note 4.
[32] *See supra* note 47.
[33] Eric de Place, *The Growth of Oil by Rail in One Picture,* SIGHTLINE INST, Feb. 24, 2014, available at http://daily.sightline.org/2014/02/24/the-growth-in-oil-by-rail-in-one-picture/, Appendix H.
[34] Kathyrn A. Wolf & Bob King, *Oil Boom Downside: Exploding Trains*, POLITICO, June 18, 2014, available at http://www.politico.com/story/2014/06/exploding-oil-trains-energy-environment-107966.html, Appendix I.

Recent oil train spills illustrate the dangers such trains pose to the Columbia River, as many spills have been quite severe, spilling large amounts of oil that that has made its way into rivers and wetlands. More oil was spilled in 2013[35] than was spilled in all the years between 1975 and 2012, according to an analysis of PHMSA data by McClatchyDC.[36] For example, on February 12, 2014, a train derailed in Vandergrift, Pennsylvania, spilling almost 10,000 gallons of crude oil.[37] Fortunately, the cold weather and the fact that the oil was the heavier tar sands variety slowed it, preventing it from entering the nearby Kiski River.[38] On April 30, 2014, a train in Lynchburg, Virginia derailed along the James River, spilling almost 30,000 gallons of volatile Bakken crude oil.[39] It is unknown how much oil was burned in the accompanying explosion versus how much made it into the river. However, three of the derailed trains were submerged in the river after the accident, and the visible oil sheen on the river was measured at 17 miles long.[40] On May 9, 2014, a train derailment near the South Platte River in Colorado caused 6,000 gallons of oil to leak into a nearby shallow water table.[41] These examples illustrate a logical conclusion: Increasing oil train traffic increase the risk of oil spills. The unique risks counsel in favor of DNR treating oil-by-rail development on a case-by-case basis rather than adopting the statewide HCP approach.

c. Oil spills pose unique risks to ESA-listed species.

DNR should treat aquatic development associated with oil-by-rail on a case-by-case basis based on the importance of the Columbia River Estuary for salmon and steelhead recovery, the proximity of endangered fish to the proposed actions, the persistence of oil in river ecosystems, and the sensitivity of salmonids to crude oil. Research demonstrates that the short-term effects of crude oil on salmonids can be devastating. In particular, studies completed immediately

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[35] This is without including the derailment and massive explosion in Lac-Megantic, Quebec that killed 47 people and spilled an estimated 26,000 gallons of crude oil into a nearby river. Monique Beaudin, *Lac Magantic oil spill even worse than first feared, investigation shows*, MONTREAL GAZETTE, Oct. 22, 2013, available at http://www.montrealgazette.com/news/M%C3%A9gantic+spill+even+worse+than+first+feared+investigation+shows/9063521/story.html, Appendix J. Of course, any analysis of spill risk in the US would include only domestic spills.

[36] Curtis Tate, *More oil spilled in 2013 than in previous 4 decades, federal data show*, MCCLATCHY DC, Jan. 20, 2014, available at http://www.mcclatchydc.com/2014/01/20/215143/more-oil-spilled-from-trains-in.html, Appendix K.

[37] Pipeline and Hazardous Safety Administration, *Incident Reports Database*, https://hazmatonline.phmsa.dot.gov/IncidentReportsSearch/search.aspx (accessed June 23, 2014).

[38] Mary Ann Thomas, *Vandergrift's 10,000 gallon oil spill among the nation's worst in recent years*, PITTSBURGH TRIBUNE-REVIEW, May 29, 2014, available at http://triblive.com/neighborhoods/yourallekiskivalley/yourallekiskivalleymore/6128787-74/cars-crude-oil#axzz357dvovrs, Appendix L.

[39] PHMSA, *Incident Reports Database*, https://hazmatonline.phmsa.dot.gov/IncidentReportsSearch/search.aspx (accessed June 23, 2014).

[40] Curtis Tate, *Lynchburg, Va., oil train derailment illustrates threat to rivers*, MCCLATCHYDC, May 2, 2014, available at http://www.mcclatchydc.com/2014/05/02/226425/lynchburg-va-oil-train-derailment.html, Appendix M.

[41] Ryan Maye Handy, *Crude Oil Rule Targets Train Safety*, COLORADOAN, May 23, 2014, available at http://www.coloradoan.com/story/news/local/2014/05/22/crude-oil-rule-targets-train-safety/9427701/, Appendix N.

following the Exxon Valdez spill offer insight into the nature and intensity of the effects of crude oil on salmon. These studies demonstrate that salmon exposed to oil have decreased growth rates.[42] While decreased growth rate might seem like a relatively benign effect, the data show that the effect was in fact quite intense: in the year following the Exxon spill, scientists estimated that just under two million salmon (a full 28% of the local population) did not return to the area.[43] The study attributed this loss to mortality from the effects of the oil on salmon growth.[44]

Furthermore, the effects of oil on salmon are likely to be long-term, and studies following Exxon Valdez show that the severity of the effects is significant. In streams impacted by Exxon Valdez oil, salmon embryos showed an increased mortality for a full five years after the spill.[45] And even for the salmon that survived past that stage, there were still persistent decreases in growth rates resulting in increased mortality due to predation.[46] Some of these ongoing effects which contribute to the severity of the disturbance may be due to the fact that even small amounts of oil can block ion channels in heart cells resulting in abnormal hearts causing secondary deformities to the jaw, eyes, and spine of developing fish.[47] These studies show that crude oil spills' effects on salmon can impact large portions of a population in significant ways, and that many of these effects can persist for years after an event.

Aquatic development that facilitates oil-by-rail terminals also poses severe and unique long-term risks to ESA-listed species. Again, these risks supports DNR applying a case-by-case ESA analysis for oil-by-rail development rather than employing the statewide HCP.

First, because river water does not contain salt,[48] it is less dense than ocean water, meaning that some oil will sink in rivers when it would float in the ocean.[49] Although most of the oil proposed at the Tesoro-Savage terminal is the lighter Bakken crude oil, there is no reason why this terminal or future proposed terminals might not ship heavier tar sands oil which may

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[42] Rice et al., *Synthesis of long-term impacts to salmon following the Exxon Valdez oil spill: persistence, toxicity, sensitivity, and controversy.* Final Report, Exxon Valdez Trustee Council. (Jan. 18, 2001) at 20-23.
[43] Geiger et al., *Exxon Valdez Oil Spill Natural Resource Damage Assessment Final Report* at 1. (Alaska Dept. of Fish and Game, Aug. 1995).
[44] *Id*.
[45] *Id.* at 35.
[46] *Id*. at 46.
[47] NOAA Fisheries, *How Oil affects fish populations: 25 years of research since Exxon Valdez*, http://www.nmfs.noaa.gov/stories/2014/03/3_24_14exxon_valdez.html, Appendix O.
[48] Although there is some salt in part of the estuary where ocean water and river water mix, both proposed projects are located in parts of the estuary with no salinity. *See* U.S. Army Corps of Engineers Portland District, *Overview of Controlling Factors*, http://www.nwp.usace.army.mil/Missions/Environment/Estuary/Factors/Salinity.aspx, Appendix Q.
[49] NOAA Office of Response and Restoration, *Oil Spills in Rivers*.

sink in rivers.[50] Sinking crude oil thwarts the ability of booming to prevent spread, and makes cleanup via traditional methods such as "skimming" less useful.[51] After the Enbridge pipeline spill into the Kalamazoo River, for example, the river had to be dredged and the sediment stirred up in order to release the oil from the sediments in the bottom of the river.[52] This kind of disturbance can cause collateral damage by damaging important parts of the ecosystem at the bottom of the river and increasing turbidity.[53]

Second, the presence of vegetation makes the removal of oil from shores of rivers more difficult and costly than it is for the sandy shores of oceans.[54] To remove oil from these shores, spill responders often have to burn or cut the riverside vegetation.[55] DNR should carefully consider the damage to Columbia River riparian areas as well as the impact the vegetation will have on the cleanup and response.

In addition, DNR should consider the proximity of the potential effects to areas vital to salmon survival. For example, both the Port Westward and Tesoro-Savage projects are downstream of the Bonneville dam, which is the part of the Columbia River Estuary. Estuaries are important transition zones that provide productive feeding areas, refuge from marine predators, and serve as a place for juveniles to slowly acclimate to salt water.[56] Both proposed projects are in the upstream portion of the estuary where there is no residual ocean salinity, known as the "tidal-fluvial" zone.[57] All Columbia River salmonids pass through the Estuary at least twice in their lifetimes, once as juveniles and once as adults returning "home" to spawn.[58] Given that every ESA-listed salmonid will pass through the estuary, any oil spill in this area would have the potential to impact the entire population of Columbia River salmon. Riverkeeper requests that DNR consider all of these in evaluating whether to treat aquatic development associated with oil-by-rail on a case-by-case basis instead of through the statewide HCP.

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[50] NOAA Office of Response and Restoration, *What are the increased risks from transporting tar sands oil,* http://response.restoration.noaa.gov/about/media/what-are-increased-risks-transporting-tar-sands-oil.html, Appendix R.
[51] NOAA Office of Response and Restoration, *As Oil Sands Production Rises, What Should We Expect at Diluted Bitumen Spills?* http://response.restoration.noaa.gov/about/media/oil-sands-production-rises-what-should-we-expect-diluted-bitumen-dilbit-spills.html, Appendix S.
[52] *Id*.
[53] *Id*.
[54] NOAA Office of Response and Restoration, *Oil Spills in Rivers.*
[55] *Id*.
[56] NOAA, *Salmon at River's End: The Role of the Estuary in the Decline and Recovery of Columbia River Salmon,* NOAA technical memorandum at 7 (Aug., 2005).
[57] *Supra,* note 94.
[58] *Id.* at 6.

II. DNR should Exclude Aquatic Development Associated with Other Fossil Fuel Development Projects, including Coal, Methanol, and Natural Gas, from the Statewide HCP.

Fossil fuel terminals, including coal, methanol, and liquefied natural gas projects, each involve unique, often very significant impacts that need to be assessed for impacts to ESA-listed species and habitat at an individual level. A critical element of the impacts from the fossil fuel terminals is entirely absent from the HCP: the impacts to DNR resources associated with transporting fossil fuels. Increasing large vessel traffic will have a number of unintended consequences on the Columbia River Estuary. In addition to the risks described above, increased vessel traffic is associated with increases in shoreline erosion, the introduction of invasive species, injury to ESA-listed marine mammals, and wake stranding of juvenile salmonids, which frequent shallow, near-shore habitats in the Estuary.

For perspective on why case-by-case treatment is appropriate for fossil fuel development projects, DNR should evaluate the current proposals for fossil fuel terminals in the Columbia River Estuary and the cumulative increase in Panamax and ocean-going barge vessel traffic. A brief summary is provided below:

- **Ambre Millennium Bulk coal export terminal.** Longview, WA. At two loaded vessels per day, Ambre's Millennium project would add **730** outgoing Panamax vessels per year. [59]

- **Oregon LNG pipeline & terminal.** Warrenton, OR. Oregon LNG proposes **125** new outgoing LNG supertankers crossing the Columbia River Bar every year.[60]

- **Tesoro/Savage oil-by-rail terminal.** Vancouver, WA. Tesoro/Savage's application to Washington EFSEC states that the project could require as many as **365** vessels per year to transport 360,000 barrels of crude oil each day. [61]

- **Global Partners oil-by-rail terminal.** Port Westward, OR. Global intends to sharply increase its shipments of crude oil through Port Westward. According to Oregon DEQ, Global could ship as much as 120,000 barrels/day, increasing vessel traffic by **115** vessels per year. [62]

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[59] Millennium Bulk Terminals, Joint Aquatic Resources Permit Application, 10 (2010) [hereinafter Millennium Bulk Terminals JARPA] ("At maximum throughput, approximately two vessels per day would be loaded.")
[60] Oregon LNG, Biological Assessment, 2-2 (2013).
[61] Tesoro/Savage, Biological Resources Report, Appendix H.1 to application to the Energy Facility Site Evaluation Council (EFSEC), 75 (2013) ("It is estimated that the proposed Facility will result in approximately 140 ship transits per year in 2016 (first full year of operations) up to 365 ship transits per year at full buildout.").
[62] Oregon Department of Environmental Quality Public Notice. February 28, 2014. (Global "significantly increased crude oil storage and loading and now intends to receive and transload as much as 1,839,600,000 gallons per year." One barrel of oil is 42 gallons. According to DEQ's notice, and converting gallons per year to barrels per day,

- **Northwest Innovation Works methanol export terminals.** Kalama, WA and Port Westward, OR. Two methanol export proposals would use large volumes of natural gas to produce and export methanol to China from the Port of Kalama and Port Westward. Each facility would send out 2 ships per week,[63] totaling **208** ships per year.

These new projects would add **1,676 new outgoing deep draft vessels**, increasing vessel traffic by 117%.[64] This estimate does not include increase Panamax vessel traffic from a recently proposed propane terminal at the Port of Portland. To understand these projections in historical context, the Columbia has not seen this many ships in over 20 years.

Increased vessel traffic poses unique risks to ESA-listed species in the Columbia River Estuary. These risks include:

- *Shoreline erosion*: Since large vessels cause large wakes, when there is more vessel traffic on the river there is a higher rate of shoreline erosion.[65] When a shoreline erodes, sediment is detached from the bank and suspended in water.[66] This increases turbidity, decreasing water clarity.[67] Reduced water clarity can make it difficult for fish to find food, reduce the amount of light available for waterbed plants, and affect water temperature.[68] According to both the Tesoro-Savage EFSEC application and Ambre Energy's Biological Assessment, erosion will be a risk from propeller wash from ships in transit as well as wakes breaking on shore.[69]

- *Invasive Species*: Ballast water from large ships causes of the introduction of invasive species worldwide. According to one estimate, 7,000 different species are transported around the world daily in ballast water.[70] A report from USGS found "the regions

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Global intends to ship 120,000 barrels/day – an increase of 115,000 barrels over currently permitted levels. Assuming the same ratio of ships to barrels as the Vancouver Tesoro/Savage project (both hope to use Panamax vessels), the Global oil terminal will require roughly 115 additional ships outgoing per year.).

[63] http://www.thechronicleonline.com/news/article_b96d4192-82f7-11e3-a2be-001a4bcf887a.html.

[64] Combining all the vessels from the various projects (730+125+365+133+115+208 = 1676)

[65] Larissa Laderoute and Bernard Bauer, *River Bank Erosion and Boat Wakes Along the Lower Shuswap River, British Columbia for the Regional District of North Okanagan Fisheries and Oceans Canada*, 13 (2013) *available at* http://www.rdno.ca/docs/River_Bank_Erosion_Lower_Shu_River_Final_Project_Report.pdf.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] TS EFSEC app 3-282b (2013)

[70] *Id.*

strategic importance in Asia-Pacific trade makes it exceptionally vulnerable to ballast water introductions."[71]

- *Vessel Strikes:* Large vessels hit and kill marine mammals. The proposed fossil fuel projects will increase the number of boats entering and exiting the Columbia River, making vessel strikes more likely.

- *Wake Stranding:* Wakes caused by deep draft vessels can strand juvenile salmon on shorelines.[72] Although much of the Columbia River remains unstudied, from the research conducted at Barlow Point, Sauvie Island, and County Line Park, a study concluded 42,605 juvenile salmonids were killed annually on those beaches.[73] Other studies have concluded that stranding is not a significant cause of salmon mortality, but the fact remains that salmon stranding in the Lower Columbia River is "not thoroughly understood."[74] Juvenile salmon frequent near shore areas because there is more food, protection from certain predators, and low water velocities that limit their energy expenditure.[75] Since juvenile salmon prefer near shore areas it is more likely for them to get swept up on to shore and stranded by large waves.

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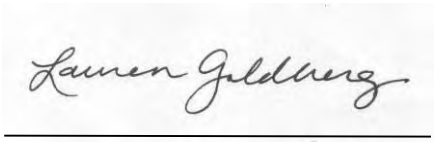
[71] United States Geological Survey, *Ballast Water Research at the WFRC* (2006).
[72] United States Geological Survey, *Review of a Model to Assess Stranding of Juvenile Salmon by Ship Wakes along the Lower Columbia River, Oregon and Washington*, 2 (2013) *available at* http://pubs.usgs.gov/of/2013/1229/pdf/ofr20131229.pdf.
[73] *Id.* at 12 (*citing* Pearson, W.H., and Skalski, J.R., 2007, *Assessing the loss of juvenile salmon to stranding by ship wakes at three sites along the Lower Columbia River: Report prepared for Entrix, Inc., Olympia, Washington*).
[74] *Id.*
[75] *Id.* at 17.

III. Conclusion.

Agency decisions that would turn the Columbia River Estuary into an industrial fossil fuel shipping corridor deserve the most searching and transparent environmental and endangered species reviews possible. As no other state agency has the unique authority of DNR vis-à-vis in-water development, Riverkeeper urges DNR to treat these projects on a site-specific basis rather than employing the Statewide HCP.

Thank you for considering Riverkeeper's input on DNR's Aquatic Habitat Conservation Plan.

Sincerely,



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cc via email:

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Julie Carter, Columbia River Inter-Tribal Fish Commission
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BISON CONNECT

WFWOComments, FW1 <wfwocomments@fws.gov>

Comments on Washington DNR Aquatics Habitat Conservation Plan

1 message

Catherine Hamborg <chamborg@earthjustice.org> Thu, Dec 4, 2014 at 2:03 PM
To: "lalena.amiotte@dnr.wa.gov" <lalena.amiotte@dnr.wa.gov>, "scott.anderson@noaa.gov" <scott.anderson@noaa.gov>, "WFWOComments@fws.gov" <WFWOComments@fws.gov>
Cc: Jan Hasselman <jhasselman@earthjustice.org>

Attached are Comments on Washington DNR Aquatics Habitat Conservation Plan submitted by Jan Hasselman of Earthjustice on behalf of Washington Environmental Council, RE Sources, Climate Solutions, Columbia Riverkeeper, Friends of the Columbia Gorge, Washington Chapter of the Sierra Club, Association of Northwest Steelheaders, Friends of Grays Harbor, and ForestEthics ("Conservation Groups"). Please let me know if you need any additional information. If you have any questions, please contact Mr. Hasselman.

Cathy

Cathy Hamborg

Litigation Secretary

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ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

December 4, 2014

Lalena Amiotte
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lalena.amiotte@dnr.wa.gov

Scott Anderson
NOAA Fisheries
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Tim Romanski
U.S. Fish and Wildlife Service
WFWOComments@fws.gov

Re: Comments on Washington DNR Aquatics Habitat Conservation Plan

To Whom it May Concern:

These comments are offered on behalf of the following organizations: Washington Environmental Council, RE Sources, Climate Solutions, Columbia Riverkeeper, Friends of the Columbia Gorge, Washington Chapter of the Sierra Club, Association of Northwest Steelheaders, Friends of Grays Harbor, and ForestEthics (hereinafter, "Conservation Groups"). These organizations and their members are committed to the protection of Washington State's aquatic environment and have a keen interest in the standards articulated in this document. This comment letter is specifically focused on the role of the Habitat Conservation Plan ("HCP") standards in the context of major fossil-fuel transportation projects that are or will be under review by the Department of Natural Resources. The groups signing this letter may individually submit separate comments about other elements of the proposal.

In general, the Conservation Groups strongly support robust HCP standards that ensure that new projects will not cause additional habitat degradation that harms already imperiled species, and begins moving the trajectory of degraded habitat towards recovery and eventual delisting, as required by the Endangered Species Act ("ESA"). We urge DNR to improve, strengthen, and then finalize the HCP, after considering input from Tribes, the federal wildlife agencies, and the public, and implement protective standards as soon as practicable.

The HCP does not explicitly reference any of the major fossil fuel terminals like coal, oil, liquefied natural gas, or methanol that have become a focus of public controversy. Indeed, the HCP process predates this controversy by several years. The Conservation Groups believe that the HCP is ill-suited for application to major shipping terminals involving transportation of fossil fuels, and should explicitly exclude these terminals from its coverage. The same is true of major oil refineries when leases come up for renewal. There are several reasons for this.

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First, while a programmatic approach to reviewing multiple small projects with individually minor but cumulatively significant impacts makes sense, the fossil fuel terminals each involve unique, often very major impacts that need to be assessed for impacts to ESA-listed species and habitat at an individual level. For example, the Gateway Pacific Terminal ("GPT") proposal involves construction in an aquatic reserve and one of the most significant forage fish habitats left in Puget Sound. The Millennium Bulk Logistics ("MBL") proposal involves major construction in ESA-designated salmon critical habitat in the Columbia River. Oil terminals and refineries involve unique and serious risks to wildlife and habitat from spills, both at the terminal site and elsewhere. These are not the kind of risks that can adequately be dealt with at a programmatic level but must be subjected to the highest individualized scrutiny from DNR and the federal wildlife agencies.

Second, a critical element of the impacts from the fossil fuel terminals is entirely absent from the HCP: the impacts to DNR resources associated with transporting dangerous and polluting substances to and from the terminals. This includes rail and vessel traffic impacts, public safety, habitat impacts, and interference with fishing and tribal treaty rights. Of particular concern is the elevated risk of oil spills, including both catastrophic incidents as well as smaller but more common ones. This concern is even more acute due to the proliferation of projects in the Columbia, Grays Harbor and the Salish Sea (including projects in British Columbia) that will increase these impacts cumulatively. Their absence from this document is a significant problem, and means that DNR and the terminals should not receive the liability coverage of the ESA proposed in the HCP.

The ESA requires consideration of the increase in the risk of these catastrophic incidents caused by fossil fuel transportation projects.[1] So does SEPA and NEPA. Indeed, Ecology has already concluded that cumulative marine traffic impacts are to be included in the SEPA and NEPA EISs for the GPT and MBL projects. As the HCP recognizes, state-owned lands include the entire bed and shoreline of Puget Sound, and three miles into the Pacific Ocean. Draft HCP at 1-10. All of this state-owned land is potentially affected by spills caused by the dramatic proposed increase in oil and other fossil fuel traffic. Accordingly, DNR cannot close its eyes to these impacts in authorizing shipping terminals. Since they are not evaluated or discussed in the HCP, the document cannot serve as DNR's up-front review of the terminals. The document should make clear that the major terminals do not automatically comply with the ESA simply by virtue of meeting the generic substantive standards contained in the HCP.

Third, many of the fossil fuel terminals will require federal permitting or authorization and hence will be subject to a separate federal Endangered Species review pursuant to § 7 of the

[1] For example, in its ESA reviews of drilling activities, the federal wildlife agencies review risks of oil spills associated with drilling. *See, e.g.*, U.S. FWS, Biological Opinion—Oil and Gas Activities in the Beaufort and Chukchi Sea Planning Areas (FWS 2013).

ESA. These are critically important—and judicially reviewable—reviews of impacts carried out by the federal fish and wildlife agencies to ensure that the projects meet ESA standards. Premature coverage of the terminals in an HCP potentially complicates the federal process and analysis.[2] For projects with no federal permitting to trigger a § 7 review, an individual HCP is appropriate to ensure that the projects meet ESA § 9 prohibitions on take of listed species.

For these reasons, we ask that the final HCP make explicit that fossil fuel terminals are not covered up front by its terms, but that they will require individual reviews to ensure that both DNR governing statutes as well as the ESA's standards are satisfied. Of course, many of the standards contained in the draft HCP are highly relevant to the fossil fuel projects, and any departure from the general aquatic lands HCP would either be impermissible or have to be justified in substantial detail. In other words, the HCP contains suitable minimum standards—effectively, a "floor"—that major fossil fuel projects need to meet. It plainly does not contain a "ceiling," i.e., satisfaction of all the minimum standards in this HCP should not be considered adequate for these major industrial projects, and the HCP should say so explicitly.

In addition to the priority issue identified above, we offer the following comments for your consideration:

Mitigation sequencing: It is our understanding that DNR's intent in pursuing this HCP process was to set firm, programmatic standards and avoid case-by-case relaxation of such standards. For example, given the known failures of compensatory mitigation as a substitute for protection of habitat, it should be a chief goal of this document to ensure that standards don't immediately devolve into a mitigation sequencing exercise that results in new habitat degradation with questionable compensatory mitigation. However, the draft does not make this clear and indeed appears to invite mitigation sequencing in many respects. For example, the repeated invocation of the DNR's goals to "avoid *or minimize*" harm to habitat seems to invite a discussion around minimizing effects (leaving open the question of precisely what that means) rather than simply avoiding new habitat harm altogether, which should be the default standard. Similarly, the HCP leaves open what compensatory mitigation should look like for any given project. *See* Draft HCP at 5-5 ("The exact nature of such compensatory mitigation will be determined individually for each authorization."). That is highly inappropriate for a programmatic HCP. DNR should articulate clear standards as to when compensatory mitigation should be allowed (infrequently or never) and what standard shall be applied to ensure its adequacy.

Adequate Definitions: The HCP does not define the term "avoid," as such, it is unclear whether standards such as "the need for dredging must be avoided" means either: a) dredging is flatly prohibited under all circumstances to comport with this HCP; or b) proponents must "do

[2] Accordingly, we concur with DNR's statement at page 1-9 of the draft HCP that it will not relieve proponents of their § 7 consultation duties under the ESA.

their best" to structure their project to avoid dredging but its permissible based on some unspecified showing. We urge you to adopt a more categorical approach (i.e., option "a") in this HCP, recognizing that compliance with its standards is not an absolute regulatory requirement and that ESA compliance can be demonstrated through other means such as an individual § 7 consultation or project specific HCP. Similarly, the HCP does not define the term "minimize," leaving it very open to the proponent to make some demonstration that they have satisfied this vague standard. For example, the HCP states that lighting must be "minimized," but in the absence of some kind of measurable or accountable standard, it's a fairly meaningless requirement. For a programmatic approach, the law requires clear, robust standards that are applicable in all instances rather than genetic exhortations to avoid or minimize impacts, which have historically been implemented in a way that continues habitat degradation.

Port Management Agreements: The HCP makes clear that it will not apply in areas governed by Port Management Agreements. Accordingly, projects governed by PMAs would not receive any of the assurances of ESA compliance that are provided by the HCP, and would develop their own ESA compliance plans with the Services in order to comply with the ESA. DNR's delegation of its important trust authorities over aquatic lands to ports is a matter of considerable public concern, and a cause for re-evaluation of whether DNR should continue to enter into such agreements in the future.

Thank you for the opportunity to comment and we look forward to discussing these issues further with you.

Sincerely,

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Attorney for Washington Environmental Council, RE Sources, Climate Solutions, Columbia Riverkeeper, Friends of the Columbia Gorge, Washington Chapter of the Sierra Club, Association of Northwest Steelheaders, Friends of Grays Harbor, and ForestEthics

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U.S. FISH & WILDLIFE SERVICE
DEC 08 2014

Jane S. Kiker
kiker@ekwlaw.com

December 4, 2014

Via Email (WFWOComments@fws.gov, Tim.Romanski@fws.gov), Facsimile (360-753-9405), and U.S. Mail

Tim Romanski
U.S. Fish and Wildlife Service
510 Desmond Drive SE, Suite 102
Lacey, WA 98503

RE: WDNR Aquatic Lands HCP DEIS; Preliminary Comments From Jensen Motorboat Company and Spencer's Landing Marina

Dear Mr. Romanski:

This office represents Anchor DeWitt Jensen, the owner of Jensen Motorboat Company on Portage Bay in Seattle, and Spencer's Landing Marina, on Shoal Bay, Lopez Island. Mr. Jensen, a long-time aquatic lands lessee was only just this week made aware of the comment period that purportedly expires today on the Draft EIS for the Aquatic Lands Habitat Conservation Plan ("HCP").

We understand from other stakeholders and state officials that the public comment period on the HCP DEIS was poorly publicized in this case. There is no question that the required notice was defective in Mr. Jensen's case. In light of the largely ineffective notification of the pending DEIS and other HCP background documents, these comments are necessarily preliminary. We have reviewed comments submitted by several other marine businesses and organizations, including Ballard Mill Properties, LLC, Fremont Boat Company, Inc., and the Lake Union Association, and we concur in and incorporate those comments by reference here. The proposed HCP contains overreaching provisions that would be financially devastating to the marine community and its critical role in Washington State commerce and trade, and would certainly have indirect, if not direct, significant adverse impacts on the environment. Mr. Jensen joins the many other responders in requesting a 90-day extension of the comment period on the DEIS and a broadly expanded outreach program in the interim to ensure meaningful engagement by the many stakeholders that would be significantly and adversely affected by the proposed Plan.

The HCP's apparent requirements for extensive retrofitting of marine facilities over leased aquatic lands would significantly jeopardize the ability of many marine businesses to continue operations, even where they have existed for decades in compliance with all applicable

environmental and land use regulations. Certain "conservation measures" are proposed that would apparently require lessees to implement physical improvements at their marine facilities, including but not limited to increased grating on floats and the removal of certain structures, without regard to how recently these facilities were constructed, or the complex and expensive regulatory process a marine business was required to undergo to obtain approvals for said facilities. This is because the proposed HCP implementation standards would require lessees to implement several of these measures at the end of their current lease term, without regard to the existing facilities/structures' useful life and/or a cost benefit analysis. Further, we understand the Plan references new "work windows" related to operational aspects of any facilities under lease, suggesting that certain marine businesses may even be required to halt general operations for certain periods of time in the future. The economic burdens these requirements would place on marine businesses are disproportionate to the HCP's stated goals and purported, unproven benefits.

Overburdening the marine business community as proposed would also have probable significant adverse impacts on the natural environment and species/habitat the HCP purports to protect. The practical feasibility of any mitigation proposed must be duly considered. In the worst case scenario, economic hardship would inevitably result in abandoned marine businesses and a consequent decline in the level of shoreline stewardship that exists today while the number of derelict facilities increased. In addition, the DEIS fails to adequately acknowledge and address the environmental impacts and upheaval associated with the widespread, substantial nearshore construction and demolition that would result from the HCP, in light of various removal and replacement requirements.

As noted above, these comments are necessarily preliminary due to the inadequate dissemination of notice of a review and comment period on the draft HCP and DEIS. Extension of the comment period on this DEIS is therefore essential in order to comply with the purposes and intents of NEPA itself.

Thank you for your consideration of the foregoing.

Sincerely,

EGLICK KIKER WHITED PLLC

Jane S. Kiker

cc: Scott Anderson, NOAA Fisheries
Lalena Amiotte, WA DNR
Client

WFWOComments, FW1 <wfwocomments@fws.gov>

WDNR Aquatic Lands HCP DEIS

1 message

John Kane <jkane@kane-environmental.com> Thu, Dec 4, 2014 at 10:02 PM
To: "WFWOComments@fws.gov" <WFWOComments@fws.gov>

Please include the following letter for your public comment record.

Regards,

John Kane

John Kane, CEO/President
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HCP Comment Ltr Kane Environmental 12-4-14.pdf
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KANE ENVIRONMENTAL INC

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December 4, 2014

Mr. Tim Romanski
U.S. Fish and Wildlife Service
510 Desmond Drive SE, Suite 102
Lacey, Washington 98503

Re: Habitat Conservation Plan Comments

Mr. Romanski:

The proposed HCP will adversely impact the ability to create and sustain family-wage jobs in the maritime and industrial maritime and fishing sectors. This will impact the job growth for lower income wage earners in the state of Washington.

The total number of pages of the Habitat Conservation Plan and the DEIS is approximately 1000 pages. It is my understanding that the state has spent years in the production of this document. I request an extension from NMFS and USFW for an additional 120 days to complete a review of both documents. I also request that a representative from NMFS and USFW attend one of the North Seattle Industrial Association (NSIA) monthly meetings to discuss the proposed changes.

- It is not clear whether DNR intends for the HCP requirements to be included in development of cleanup activities required by state and federal agencies.
- The HCP overlaps with regulations already in place by the Washington State Department of Ecology under the NPDES program and creates potential conflicts with NPDES permit requirements.
- Biologic evaluations required for Section 7 ESA consultation and SEPA review commonly discusses habitat conditions for new, in-water projects. I recommend that the HCP state that users must comply with existing hydraulic code, federal requirements and local shoreline master program requirements, rather than create overlapping and potentially conflicting regulatory requirements.
- New bulkheads or hard bank armoring are not allowed on state-owned aquatic lands except under circumstances associated with public safety. The proposed requirements would not allow hard armoring if it is structurally required to protect infrastructure such as port facilities, marinas, and other working maritime facilities.

Sincerely,
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CEO / President

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WFWOComments, FW1 <wfwocomments@fws.gov>

DNR HCP Comment Letter

1 message

Robert Smith <robert@plauchecarr.com> Thu, Dec 4, 2014 at 10:20 AM
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Cc: "margaretbarrette@pcsga.org" <margaretbarrette@pcsga.org>, Chris Cziesla <chriscz@confenv.com>, Billy Plauche <billy@plauchecarr.com>, Marcus Pearson <marcus@plauchecarr.com>

Attached please find a comment letter submitted on behalf of the Pacific Coast Shellfish Growers Association regarding the Washington Department of Natural Resources draft Aquatic Lands Habitat Conservation Plan and associated Draft Environmental Impact Statement. Please let me know if you have any questions. Thank you for your time and consideration.

Robert M. Smith

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DNR HCP Comment Letter on behalf of PCSGA.PDF
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December 4, 2014

Via email: WFWOComments@fws.gov

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RE: Comments on the Washington Department of Natural Resources Aquatic Lands Habitat Conservation Plan and Draft Environmental Impact Statement

Dear Mr. Romanski, Mr. Anderson, and Ms. Duffy:

Thank you for the opportunity to comment on Washington State Department of Natural Resources' ("DNR's") Draft Aquatic Lands Habitat Conservation Plan ("Aquatic Lands HCP") and associated Draft Environmental Impact Statement ("Draft EIS"), prepared by U.S. Fish and Wildlife Service ("USFWS") and National Marine Fisheries Service ("NMFS") (collectively the "Services").

I. Introduction

We are submitting these comments on behalf of the Pacific Coast Shellfish Growers Association ("PCSGA"). Founded in 1930, PCSGA represents shellfish growers in Washington, Alaska, Oregon, California, and Hawaii. PCSGA works on behalf of its members on a broad spectrum of issues, including environmental protection, shellfish safety, regulations, technology, and marketing. Its members grow a wide variety of healthful, sustainable shellfish including oysters,

clams, mussels, and geoduck. PCSGA has over 80 members in Washington, many of whom currently lease state-owned aquatic lands for commercial shellfish cultivation.

The Washington State Department of Ecology ("Ecology") recognizes that shellfish aquaculture is of statewide interest, can provide long-term benefits, and can protect the resources and ecology of the shoreline aquatic lands.[1] The best available science on shellfish aquaculture demonstrates that this use of aquatic lands results in beneficial ecosystem services by improving water quality through filtration of nutrient pollution and providing three-dimensional habitat for a wide variety of aquatic species, including federally-listed fish. Ecology has characterized aquaculture as a preferred, water-dependent shoreline use under Washington's Shoreline Management Act ("SMA").[2] Moreover, Ecology identifies commercial shellfish beds as critical saltwater habitat, to be protected similar to other critical saltwater habitats, including kelp and eelgrass beds and forage fish spawning areas.[3]

Providing lands for shellfish aquaculture is also a key component of DNR's statutory obligations. DNR must manage state-owned aquatic lands in a way that fosters water-dependent uses, utilizes renewable resources (such as shellfish), encourages public use and access, and ensures environmental protection.[4] Generating revenue from state-owned aquatic lands consistent with DNR's management guidelines provides a tangible statewide public benefit.[5] Moreover, DNR must prioritize commercial and recreational food production on state-owned aquatic lands, in particular shellfish aquaculture.[6] Ensuring that shellfish growers may continue to responsibly utilize state lands for shellfish aquaculture in a manner that is economically feasible is consistent with DNR's statutory requirements.

Furthermore, in 2011 the National Oceanic and Atmospheric Administration ("NOAA") announced its National Shellfish Initiative. NOAA's stated goal under the National Shellfish Initiative is "to increase shellfish aquaculture for commercial and restoration purposes, thereby stimulating coastal economies and improving ecosystem health."[7] The National Shellfish Initiative recognizes that shellfish aquaculture provides a "broad suite of benefits" by improving water quality, conserving habitat, stabilizing coastlines, restoring depleted species, and creating jobs.[8]

In 2012, President Obama and NOAA followed up the National Shellfish Initiative with the release of a National Ocean Policy. In 2013, the White House released an Implementation Plan for the National Ocean Policy. Noting that the United States faces an $11.2 billion seafood trade deficit and imports 91% of its seafood, the Implementation Plan called for the expansion of

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[1] WAC 173-26-241(3)(b)(i)(A).
[2] *Id.*
[3] WAC 173-26-221(2)(c)(iii).
[4] RCW 79.105.030.
[5] *Id.*
[6] RCW 79.105.050.
[7] NOAA FISHERIES, NATIONAL SHELLFISH INITIATIVE, 1 (2011), available at: http://www.nmfs.noaa.gov/aquaculture/docs/policy/natl_shellfish_init_factsheet_summer_2013.pdf.
[8] *Id.*

domestic aquaculture.[9] The Implementation Plan identified reducing permitting inefficiency as a crucial factor in expanding aquaculture, finding that "government inefficiency in the siting, permitting and approval processes for aquaculture may be hindering the domestic aquaculture industry's growth" which presents a threat to domestic jobs and economic stability.[10] This recognition of shellfish aquaculture's multi-faceted ecological and economic value by the White House, NOAA, and Department of Commerce underscores the industry's desire to ensure that the Aquatic Lands HCP provides adequate protection for listed species' habitat while recognizing aquaculture's net benefits.

The State of Washington shares these goals. The State adopted the Washington Shellfish Initiative in 2011, recognizing that "shellfish are critical to the health of Washington's marine waters and the state's economy."[11] One of the goals of the Washington Shellfish Initiative is to expand harvestable shellfish acres in the state, including areas where harvest is currently prohibited in Puget Sound, both to support local economies and "help filter and improve the quality of our marine waters thereby being part of the solution to restore and preserve the health of endangered waters."[12]

PCSGA appreciates DNR's and the Services' extensive and thoughtful work developing the Draft EIS and Aquatic Lands HCP. PCSGA shares with the Services and DNR a concern for protecting Washington State's natural resources and state-owned aquatic lands, as well as the various federally-listed species that use those lands as part of their breeding, feeding, and shelter habitat. PCSGA is concerned, however, that certain proposed policies and development standards pertaining to shellfish aquaculture, as well as some programmatic measures applicable to all covered activities under the Aquatic Lands HCP, are inconsistent with the best available science, are duplicative or internally inconsistent, and/or are overly burdensome.

Therefore, PCSGA requests that the Services amend the Draft EIS and Aquatic Lands HCP consistent with the proposed revisions detailed below. If applicable, additions are shown in underline and deletions are in ~~strikethrough~~.

II. Comments and Proposed Revisions to DNR Draft Aquatic Lands HCP

This Part addresses PCSGA's comments and recommendations to Chapters 4 and 5, which deal with conservation measures DNR imposes on covered activities as well as programmatic measures DNR will apply to all uses of state-owned aquatic lands.[13]

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[9] National Ocean Council, National Ocean Policy Implementation Plan, 6 (2013), available at: http://www.whitehouse.gov//sites/default/files/national_ocean_policy_implementation_plan.pdf.

[10] *Id.*

[11] WASHINGTON SHELLFISH INITIATIVE (2011), available at: http://pcsga.org/wprs/wp-content/uploads/2013/04/Washington-Shellfish-Initiative.pdf.

[12] *Id.*

[13] These comments also apply to the Draft EIS discussion of HCP conditions, included in Section 2 of the Draft EIS. Any changes to the HCP should be incorporated into and noted in the Final EIS.

A. Predator Exclusion Devices – Shellfish Aquaculture Conservation Measure 1 and Floating Raft Aquaculture Conservation Measure 3

PCSGA recommends making the following changes to this provision:

1. Predator exclusion devices, such as nets or PVC pipe, must be installed securely so that they do not break free and litter surrounding areas. ~~The lessee will be required to monitor the farmed lands on a weekly basis to comply with this requirement and document surveys in a record that is available for review upon request by Washington DNR. Additionally, any fish or wildlife entangled or caught in these devices, if dead, will be collected, frozen, and submitted to Washington DNR for identification. If wildlife and fish are still alive, photographs of the animals should be taken for identification purposes; the animals should then be released and Washington DNR notified immediately. Photographs of the organisms shall be provided to Washington DNR within 10 calendar days.~~[14]

Predator exclusion devices typically do not pose a danger of breaking free, although waves generated under storm conditions may place additional strain on the devices. The requirement for monitoring, photographing, and cataloguing any entanglement of fish and wildlife places a significant burden on shellfish growers, who may have numerous DNR leased parcels. Growers also may have difficulty accessing certain tidelands on a weekly basis to collect any entrapped wildlife and fish if the tide cycle or adverse weather conditions prevent safe access. As currently worded, the conservation measures could require growers to inspect for and document any fish or wildlife that is entangled in netting, not simply ESA-listed species, regardless of the size of the animal, how long it is entrapped, or how it is impacted (if at all). Moreover, the weekly monitoring requirement in Conservation Measure 1 imposes an unnecessary burden on both growers and private upland owners in those instances where a grower must cross private property to reach state-owned aquatic lands.

B. Bed Preparation – Shellfish Aquaculture Conservation Measure 4

PCSGA recommends making the following changes to this provision:

4. If mechanical and hydraulic harvest, grading, cleaning, tilling, harrowing, or other bed preparation activities are proposed within a mapped tidal reference area and outside the specified work windows for Pacific herring, Washington DNR will require the work area to be surveyed for the presence of herring spawn. Vegetation, substrate, and aquaculture materials shall be inspected by qualified ~~trained and certified~~ personnel. If Pacific herring spawn is present, these activities are prohibited in areas where spawning has occurred until such time as the eggs have hatched and herring spawn are no longer present.

[14] DNR Aquatic Lands HCP, at 5-15 and 5-17. Although Floating Raft Aquaculture Conservation Measure 3 contains slightly different language, PCSGA's proposed revision to Measure 3 also strikes everything except the first sentence for the reasons discussed here.

> Surveys must be documented in a record that is available for review upon request by Washington DNR.[15]

The HCP is unclear what process is required for training and certification. The Washington Department of Fish and Wildlife ("WDFW") currently does not have a program to formally certify individuals for herring spawn surveys. However, most shellfish growers have extensive experience in the intertidal environment and are capable of conducting visual inspections to determine the presence or absence of herring spawn, without the need for third-party consultants or technical training.

C. Forage Fish Spawning Substrate – Shellfish Aquaculture Conservation Measure 7

PCSGA recommends making the following changes to this provision:

> 7. Activities that disturb the substrate of documented surf smelt and sand lance spawning areas—above 1.5 to 1.8 meters or 5 to 6 feet mean lower low water (MLLW), as defined by local tidal datums—may not occur during the no-work window of the species that use the site. Alternatively, Washington DNR may authorize shellfish growers to work within the no-work window, provided that the growers monitor for surf smelt or sand lance spawn to evaluate if the area is spawning habitat and whether spawning is occurring. If the results indicate forage fish or spawn are present, work will be halted <u>until</u> ~~for 14 days to allow eggs to hatch. Work may be resumed once~~ a subsequent survey shows no viable eggs are present. All monitoring work shall be conducted in accordance with Washington Department of Fish and Wildlife protocols using workers certified by the Washington Department of Fish and Wildlife to conduct this work. Operators must document surveys in a record that is available for review upon request by Washington DNR.[16]

The two-week moratorium arbitrarily delays shellfish operations without any scientific justification. Deleting the mandatory 14-day work stoppage provision will provide more flexibility to growers as well as DNR. The required time for closure will depend on when the eggs are discovered during the gestation cycle. Because surf smelt and sand lance eggs incubate between two and five weeks,[17] it is possible that the survey may be conducted on the last day of the gestation cycle and growers would be able to begin the proposed work shortly after the eggs hatch. Conversely, the survey may lead to longer closure periods if the spawning period has just begun.

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[15] DNR Aquatic Lands HCP, at 5-16.

[16] *Id.*

[17] Washington Department of Fish and Wildlife, *Surf Smelt Fact Sheet, Biology and Fisheries*, 1 (Rev. Apr. 2013), available at: http://wdfw.wa.gov/publications/01219/wdfw01219.pdf [hereinafter "WDFW Surf Smelt Fact Sheet"].

D. Forage Fish Spawning Substrate Alterations – Shellfish Aquaculture Conservation Measure 8

PCSGA recommends striking the following provision:

> ~~8. Activities that disturb the substrate of potential and documented surf smelt and sand lance spawning areas – above 1.5 to 1.8 meters or 5 to 6 feet mean lower low water (MLLW), as defined by local tidal datum – must not alter the substrate such that it is no longer suitable for spawning. Placement of materials within potential or documented spawning habitat will require pre- and post-disturbance surveys of the substrate to demonstrate that there has been no change in suitability. Documentation must be presented in a record that is available for review upon request by Washington DNR.~~[18]

This condition is extremely vague. The HCP does not describe under what conditions the substrate may become unsuitable for spawning. The HCP does not identify what, if any, aquaculture activities would result in the permanent removal of forage fish spawning habitat. Moreover, the HCP does not define how DNR or WDFW will identify or define "potential" spawning habitat. Given the broad language of this conservation measure, it could be read to require all growers to conduct pre- and post-disturbance surveys for any activities in the defined area to determine whether their activity has made the substrate "unsuitable" for spawning, even if the area has not been documented as spawning habitat for forage fish.

Likewise, the provision does not state what will occur if post-disturbance surveys indicate a change in suitability; it is unclear whether shellfish growers will have to abandon or alter operations to restore potential spawning habitat, or whether DNR merely seeks the information to improve its knowledge of surf smelt and sand lance spawning habitat. As written, the conservation measure imposes a significant burden on shellfish growers that may severely impact the viability of their operations on state leases.

The conservation measure also appears inconsistent with the state and federal policies identified above, such as the National Shellfish Initiative and Washington Shellfish Initiative. These policies seek to expand shellfish aquaculture while ensuring that such activities occur in a responsible manner that does not affect the surrounding environment. Conservation Measure 7, discussed above, accomplishes this goal by protecting documented spawning habitat. If interpreted broadly, Conservation Measure 8 could ban most aquaculture activities in "potential" forage fish spawning areas. Given the breadth of the measure, and potential impact to the aquaculture industry, PCSGA recommends that the provision be deleted in its entirety.

E. Native Aquatic Vegetation Buffer – NAV Conservation Measure 1.b

PCSGA recommends correcting a typo in the following conservation measure:

> In the case of new areas of existing leases or new leases with native aquatic vegetation attached to or rooted in substrate, longlines or other similar culture

[18] DNR Aquatic Lands HCP, at 5-16.

systems that are suspended, but attached to the bottom culture of oysters, may be allowed. ~~The lines may be attached to or rooted in substrate~~ if a distance of 5 feet is maintained between each line. Alternatively, groups of two to four lines may be spaced 1 to 2.5 feet apart, provided that an open space of 10 feet is left between each group.[19]

F. Native Aquatic Vegetation Buffer – NAV Conservation Measure 2.a

PCSGA has no recommended changes to the language of the condition; however, the condition does not specify when the buffer is established. To assist DNR staff and other regulatory agencies in evaluating the appropriate buffer, PCSGA would recommend including a footnote that provides that "Final buffers will be based upon science available at the inception of the National Environmental Policy Act environmental review process."

G. Habitat Conservation Standard for Fill

The draft HCP includes a conservation standard for fill applicable for all uses. PCSGA recommends revising this condition as related to shellfish aquaculture uses, and moving the revised condition to the conditions related to shellfish aquaculture under Section 5.2.1, with a note that the specific conservation measure supersedes the more general habitat conservation standard:

Shell or washed gravel is not considered fill under this standard and may be applied as a substrate amendment for authorized shellfish aquaculture activities on a site-by-site basis when the authorizing agreement defines the bathymetric, seasonal, and quantitative limits of the application. ~~Gravel or shell may not be placed on existing or suitable forage fish spawning habitat or native aquatic vegetation protected by this habitat conservation plan.~~[20]

This revision clarifies the language to identify the language specific to shellfish aquaculture, without revising the fill regulations generally applicable to other shoreline uses. The condition, as revised, would clarify that locations suitable for placement of shell and washed gravel associated with an aquaculture project would be determined on a case-by-case basis.[21]

H. Habitat Conservation Standard for Pesticide Application

PCSGA recommends making the following changes to this conservation measure:

~~Washington DNR will use the preceding information to assess whether there is potential for harm to covered species, their habitats, and their prey. If there is indication of the potential for harm, Washington DNR will not allow use of the pesticide on state-owned aquatic lands.~~ Washington DNR will rely upon the state and federal determinations listed above, and their analysis regarding potential

[19] DNR Aquatic Lands HCP, at 5-18.

[20] DNR Aquatic Lands HCP, at 5-25.

[21] Note that this will also require revisions to the implementation language in the same section.

> harm to covered species, their habitats, and their prey, to govern whether a pesticide will be permitted for use on state-owned aquatic lands. Washington DNR may, in some circumstances, make an exception for ~~state agencies~~ using pesticides to control invasive species. ~~In addition to the above criteria, all new use authorizations must avoid applying pesticides whenever forage fish or eggs are present.~~[22]

DNR's standard for pesticide application already requires that the U.S. Environmental Protection Agency ("EPA") and the Services engage in consultation, and that the Services either determine that the pesticide will not jeopardize a listed species or issue an Incidental Take Statement ("ITS") authorizing incidental takes due to pesticide treatment subject to certain conditions. These determinations take into account whether the proposed pesticide use has the potential to harm covered species, their habitats, and their prey. These determinations would also take into account whether the pesticide use has the potential to impact forage fish spawn or habitat.

DNR's proposed language is subject to an interpretation that would allow it to ban pesticide use if it makes a subjective decision that "an indication of the potential for harm" exists. This review would be duplicative of the review already performed by the Services based on exhaustive scientific and environmental studies and could result in conflicting state and federal regulation. For example, if DNR prohibited pesticide use on state lands, but it was permitted on privately-owned tidelands based on federal approval, it would create significant problems for coastal users due to confusing regulations and potential enforcement issues.

Even if the pesticide met all of the criteria in the standard, the language above could be interpreted to grant DNR the authority to disregard the prior federal review at its discretion, based on standards that have not been codified in state or federal regulations. DNR should rely on the Services' risk assessments and evaluations to determine whether or not to allow a pesticide on state-owned aquatic lands rather than conducting a post-hoc critique of the Services' conclusion.

Also, this Aquatic Lands HCP forms a crucial part of DNR's own separate ITP application for covered activities on state-owned aquatic lands. It informs the Services of the various activities that may occur on DNR's aquatic lands so that they have sufficient information to issue an ITP to DNR authorizing those activities even if incidental harm may occur. If the Services already have approved incidental takes for use of a certain pesticide, or a process to approve certain pesticide uses despite the indication of potential for harm, then it makes additional DNR review unnecessary.

PCSGA also recommends expanding the invasive species exception to all users, public or private, who apply registered pesticides in compliance with all labels to control invasive species. While state agencies oversee most uses of aquatic pesticides, private parties have also received authorization. Given that the impact would be similar regardless of the entity using the pesticide, the exception should cover all legally registered users.

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[22] DNR Aquatic Lands HCP, at 5-26 and 5-27.

I. Habitat Conservation Standard for Pressure Washing

PCSGA recommends revising this condition as related to shellfish aquaculture uses, and moving the revised condition to the conditions related to shellfish aquaculture under Section 5.2.1, with a note that the specific conservation measure supersedes the more general habitat conservation standard:

> Power-assisted pressure washing or cleaning of equipment, machinery, and floating or fixed structures must be conducted in a manner that avoids scouring of the substrate. ~~Equipment that contains or is covered with petroleum based products may not be pressure washed in or over the water, and wash water must be contained and taken to an approved treatment facility.~~
>
> ~~Structures and equipment must first be cleaned using dry methods and equipment. Debris accumulations on the structure must be collected or swept up and properly disposed of prior to fresh water flushing. To prevent detergents or other cleaning agents from entering waters of the state, flushing must involve the use of clean water only.~~
>
> ~~Pressure washing of structures must be done using appropriate filter fabric to control and contain paint particles generated by the activity.~~
>
> ~~Pressure washing of concrete structures must be held to the minimum necessary to maintain the structure's integrity. (Pressure washing of concrete structures can result in an increased pH discharge, with a potential to violate Washington state water quality criteria.)~~
>
> ~~Wash water and debris resulting from pressure washing (including, but not restricted to, dirt and old paint chips) shall be filtered through a filter structure capable of collecting all such debris.~~[23]

If applied to shellfish aquaculture operations, this condition would result in a significant restriction to shellfish operations. Shellfish growers use pressure washing to wash and dislodge fouling materials from a variety of in-water structures, including floating upwelling systems (FLUPSYs), nursery rafts, and mussel and clam rafts. While these activities only dislodge natural organic material, the condition, as written, would require shellfish growers to collect all such dislodged organic material from the water and clean such in-water structures using dry methods and equipment. This is simply not feasible for a variety of aquaculture uses.

[23] DNR Aquatic Lands HCP, at 5-27 and 5-28.

J. Habitat Conservation Standard for Covered Species Work Windows and Salmon Early Life Stages[24]

These work windows are already addressed through the specific conservation measures associated with shellfish aquaculture.[25] Therefore, the HCP should note that "The specific application of these conservation standards is superseded by shellfish aquaculture-specific conservation measures as described in Section 5.2.1." This would resolve inconsistencies between the general measures and more specific shellfish standards. Shellfish aquaculture should be further exempted from the work windows concerning juvenile salmonids, as the HCP and EIS provide no evidence that aquaculture disturbs or blocks migration or disrupts salmonid foraging habitat.

K. Programmatic Measures for Protection of Native Aquatic Vegetation and Forage Fish Spawning Habitat[26]

These work windows are already addressed through the specific conservation measures associated with shellfish aquaculture, that provide for specific avoidance measures and criteria.[27] Therefore, the HCP should note that "The specific application of these conservation standards is superseded by shellfish aquaculture-specific conservation measures as described in Section 5.2.1." This would resolve inconsistencies between the general measures and more specific shellfish standards.

L. Programmatic Measures for Pesticide Use in Forage Fish Spawning Habitat

PCSGA recommends making the following changes to this conservation measure:

6. ~~No pesticides may be used in documented or potentially suitable forage fish spawning areas when fish or eggs are present, regardless of whether the pesticide complies with the application standard of this habitat conservation plan. Washington DNR will use studies and opinions to assess whether there is potential for harm to covered species, their habitats, and their prey. If there is indication of the potential for harm, Washington DNR will not allow use of the pesticide on state-owned aquatic lands. All new use authorizations must avoid applying pesticides whenever forage fish or eggs are present. Exceptions may be made for state and federally sanctioned invasive species control.~~[28]

The recommended changes to this provision mirror changes discussed in Section I.H, *supra*. Part I.H discusses issues regarding the proposed duplicative review by DNR of pesticide uses in addition to the review conducted by the federal agencies as part of the federal and state approval processes.

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[24] DNR Aquatic Lands HCP, at 5-29 and 5-30.
[25] DNR Aquatic Lands HCP, at 5-16 and 5-17.
[26] DNR Aquatic Lands HCP, at 5-31 — 5-34, 5-37 — 5-40.
[27] DNR Aquatic Lands HCP, at 5-17 and 5-18.
[28] DNR Aquatic Lands HCP, at 5-38.

M. Section 4.3: Potential Aquaculture Effects on Listed Species Habitat

Section 4.3 defines the scope and size of shellfish aquaculture's effects on covered species habitat.

1. Scope of HCP

To clarify that the Aquatic Lands HCP only applies to state-owned aquatic lands, PCSGA recommends the following change:

> The area of alteration includes the area under cultivation and adjacent areas on state-owned aquatic lands, as defined in Section 1.3 of this HCP, where support activities or other direct effects occur.[29]

As drafted, Section 4.3 may be interpreted to impermissibly expand DNR's authority to impose habitat conservation measures on contiguous private aquatic lands. Clarifying this uncertainty avoids imposing habitat conservation measures on adjacent private tidelands on which DNR has no authority to impose restrictions.

2. Impact Assessment Methodology

PSCGA is concerned with the manner in which the HCP determines potential impacts to listed species habitats. The HCP uses the concept of coincident habitat as an indicator of the likelihood of interaction, which is then used to inform the potential effects determination.[30] After this step, the HCP uses a qualitative ranking (based on DNR's professional judgment) to determine the magnitude of effect. As currently described in the HCP, the determination of the magnitude of effect does not appear to account for recognition of beneficial effects associated with certain activities, and shellfish aquaculture in particular. The effects are evaluated on a scale that presumes that all impacts are negative, ranging from a value of 0 (no effect) to 1 (total loss).[31]

The methods for determining potential impacts to listed species also do not allow for the differentiation of short term, transitory effects as compared to ongoing or permanent effects, or circumstances where the effects may only occur in a small fraction of the entire area where HCP authorized activities would occur. While the described methods of impact assessment may work for permanent activities such as overwater structures, the HCP overstates impacts associated with shellfish aquaculture, where many of the activities and areas of overlap with listed species habitats are within a limited area, temporary, and/or beneficial in nature.

3. Lack of Analysis Concerning Positive Effects from Aquaculture

An example of the limited recognition of beneficial effects from shellfish aquaculture is apparent in the HCP section 4.3.[32] Despite citing several studies that establish some of the beneficial effects of shellfish aquaculture, the HCP assumes that "change" of an existing condition results

[29] DNR Aquatic Lands HCP, at 4-63.
[30] DNR Aquatic Lands HCP, at 4-47.
[31] DNR Aquatic Lands HCP, at 4-51.
[32] DNR Aquatic Lands HCP, at 4-65 – 4-66.

in a negative impact. PCSGA recommends revisions to the relevant HCP sections to acknowledge such beneficial effects, identified below. Additionally the section should be revised to use neutral language when referring to alteration or change from existing conditions as opposed to language which implies a negative effect. For example, in recognizing some of the positive interactions between shellfish aquaculture and the surrounding environment, PCSGA would recommend revising "Destruction of habitat from shellfish culture…"[33] to state "Alteration of habitat from shellfish culture…"

The following table summarizes many of the ecological functions and values provided by shellfish aquaculture:

Table 12 Ecosystem Functions and Values Provided by Eelgrass and Shellfish Aquaculture.[34]

Category	Function	Value	Provided by Shellfish Aquaculture
Water Quality	Nutrient and contaminant filtration	Improve water quality and support fisheries	X
	Sediment filtration and trapping	Improve water quality, counter sea level rise, support fisheries, and expand eelgrass growth	X
	Nutrient regeneration and recycling	Support primary production and fisheries	X
	Remove nitrogen from the system at harvest	Improve water quality and support fisheries	X
	Enhanced benthic-pelagic coupling	Improve nutrient cycling, improve water quality, and support secondary production and fisheries	X
Habitat Structure	Canopy structure	Habitat, refuge, nursery, settlement, and support fisheries	X
	Mosaic of habitat	Habitat, refuge, nursery, settlement, and support fisheries	X
Circulation and Energy	Wave and current energy dampening	Prevents erosion/ resuspension and increases sedimentation	X
	Stabilize sediments/ protect from erosion	Support eelgrass growth/expansion and fisheries	X

[33] DNR Aquatic Lands HCP, at 4-65.

[34] Shumway, S.E. 2011. Shellfish aquaculture and the environment. Wiley-Blackwell.

Category	Function	Value	Provided by: Shellfish Aquaculture
Prey Resources	Epibenthic and benthic production	Support of food web and fisheries	X
	Epiphyte and epifaunal substratum	Support of secondary production and fisheries	X
Species Utilization	Self-sustaining ecosystem	Recreation, education, and landscape level biodiversity	X
Other Ecological Functions	Bioturbation/fertilization of sediment	Support eelgrass growth/expansion and fisheries	X
	Organic matter accumulation	Support of food webs and counter sea level rise	X

4. Impacts from Pesticides for Aquaculture

The HCP states that the use of pesticides for control of burrowing shrimp may result in short-term impairment of water and sediment quality, loss of biomass, and incidental mortalities of salmonids.[35] The HCP notes that these impacts are related to carbaryl, which is a pesticide no longer used by shellfish aquaculture growers to address burrowing shrimp. The Willapa Grays Harbor Oyster Growers Association is currently seeking all appropriate approvals for the use of Imidacloprid to control burrowing shrimp in shellfish beds. Imidacloprid has been shown to have insignificant effects to the environment. Further, any use of Imidacloprid, or any other pesticide, must be approved by relevant state and federal agencies, which will ensure that any such use minimizes any adverse effects to the surrounding environment.

5. Impacts to Specific Species

PCSGA also has the following concerns with respect to the HCP's characterization of effects to specific species:

Common loon, Marbled murrelet, Western snowy plover. The HCP identifies effects to these species from aquaculture to include: (1) permanent habitat destruction/displacement; (2) energy resource reduction; (3) water and sediment quality degradation; and (4) increased human activity, impaired behavior, and physical harassment.[36] It is unclear which activities associated with aquaculture would result in "permanent habitat destruction/displacement." The HCP also does not specify how water or sediment quality changes associated with aquaculture could affect loons, and any such effects are highly unlikely. PCSGA recommends removing these two mechanisms of effect.

[35] DNR Aquatic Lands HCP, at 4-64.

[36] DNR Aquatic Lands HCP, at 4-88, 4-90, and 4-91.

Fish species including bull trout, chinook salmon, chum salmon, coastal cutthroat trout, coho salmon, pink salmon, sockeye salmon, steelhead trout, green sturgeon, and white sturgeon. The HCP identifies effects to these species from aquaculture to include: (1) permanent habitat destruction/displacement; (2) temporary habitat degradation; (3) energy resource reduction resulting from decreased prey abundance; (4) water and sediment quality degradation; and (5) increased human activity, impaired behavior, and physical harassment.[37] It is unclear which activities associated with aquaculture would result in "permanent habitat destruction/displacement" for fish to a scale which could be interpreted as an effect to the species.

Similarly, PCSGA is concerned that the HCP fails to recognize the beneficial influence of shellfish aquaculture for fish species which include prey resources and refugia. For example, Pinnix et al. (2005) researched fish utilization between eelgrass, oyster culture, and mudflat habitats of Humboldt Bay.[38] Although results varied depending on the type of gear used, both shrimp and fyke net sampling resulted in fish abundance that was significantly higher in oyster culture habitat compared to the other two habitat types. When species diversity (which normalizes for abundance) was calculated, it was noted that oyster culture and eelgrass beds supported a similar diversity.

Overall, it is evident that fish are attracted to structure, and shellfish aquaculture operations can provide a surrogate for structure compared to eelgrass habitat. In Willapa Bay, Washington, juvenile Chinook salmon and English sole were found in association with all studied habitats (e.g., eelgrass, oyster aquaculture, and mudflats) without an apparent preference (Hosack et al. 2006, Dumbauld et al. 2009).[39] Dealteris et al. (2004) found that shellfish aquaculture gear supported more organisms, had higher species richness and higher species diversity than non-vegetated seabed, and was similar or superior to eelgrass or submerged aquatic vegetation habitat.[40] Likewise, Meyer and Townsend (2000) showed that created oyster reefs had a higher number of fish, and molluscan, and crustacean invertebrate species than adjacent natural reefs.[41] As noted in other areas of the HCP, shellfish aquaculture can improve water quality through nutrient and sediment filtration and nitrogen removal, which provides another benefit to fish habitat. PCSGA recommends adjusting this section to acknowledge the beneficial effects to fish from aquaculture.

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[37] DNR Aquatic Lands HCP, at 4-93.

[38] Pinnix, W.D., T.A. Shaw, K.C. Acker, and N. J. Hetrick. 2005. Fish communities in eelgrass, oyster culture, and mudflat habitat of North Humboldt Bay, California, Final Report. U.S. Fish and Wildlife Service, Arcata Fish and Wildlife Office, Arcata Fisheries Program Technical Report Number TR2005-02. Arcata, California.

[39] Hosack G. R.,*,B. R. Dumbauld, J L. Ruesink, and D. A. Armstrong. 2006. Habitat Associations of Estuarine Species: Comparisons of Intertidal Mudflat, Seagrass (Zostera marina), and Oyster (*Crassostrea gigas*) Habitats. Estuaries and Coasts Vol. 29, No 6B, 1150-1160; Dumbauld, B. R. J. L. Ruesink, S. S. Rumrill. 2009. The ecological role of bivalve shellfish aquaculture in the estuarine environment: A review with application to oyster and clam culture in West Coast (USA) estuaries. Aquaculture 290:196-223.

[40] DeAlteris, J.T., B.D. Kilpatrick, and R.B. Rheault. 2004. A comparative evaluation of the habitat value of shellfish aquaculture gear, submerged aquatic vegetation and a non-vegetated seabed. Journal of Shellfish Research. 23: 867–874.

[41] Meyer, D. L., and E. C. Townsend. 2000. Faunal utilization of created intertidal eastern oyster (*Crassostrea virginica*) reefs in the southeastern United States. Estuaries. 23: 34-45.

Southern resident killer whale. The HCP identifies effects to this species from aquaculture to include: (1) permanent habitat destruction/displacement; (2) temporary habitat degradation; (3) energy resource reduction resulting from decreased prey abundance; (4) water and sediment quality degradation; and (5) increased human activity, impaired behavior, and physical harassment.[42] The HCP acknowledges that the potentially affected habitat from aquaculture for killer whales is zero acres; therefore it unclear why effects from aquaculture to killer whales are listed in this section. Based on the process used to determine effects outlined in the HCP, when spatial overlap does not occur, no effects to the species are listed. PCSGA recommends removing aquaculture as having the potential to affect killer whales.

III. PCSGA's Comments on DNR's Aquatic Lands HCP Adaptive Management and Monitoring Program

PCSGA recognizes and appreciates the value of adaptive management and monitoring to provide a decision-making process that can adjust resource management actions based on newly acquired science and the results of monitoring; however, PCSGA has several specific concerns with the HCP adaptive management and monitoring program as currently described. The three objectives listed under Goal 2 (Decrease the quantity of known pressures to state owned aquatic lands) include: (1) decrease the area of aquatic vegetation shaded by structures; (2) decrease disturbance of sediment transport/deposition processes on state-owned aquatic lands; and (3) decrease alteration of native sediment type of sediment chemistry. Objectives 2 and 3 both rely on the supposition that existing conditions are appropriate or represent a benefit to covered species. Existing and/or native conditions are a snapshot in time and therefore may not represent optimal or even appropriate conditions for covered species. PCSGA recommends clarifying these objectives to specify a relationship to the ecological needs of covered species versus relying on existing/native or other characterizations of habitats or processes. Any adaptive management plan must also take into account internannual variability in aquatic vegetation and species, as well as account for other external environmental stressors that are completely independent of shellfish aquaculture, such as ocean acidification, climate change, migratory changes, and other potential anthropogenic sources that may adversely impact the species or indicator being monitored.

The HCP adaptive management and monitoring program also does not currently include a conceptual model or any additional research proposals for shellfish aquaculture. PCSGA requests inclusion of scientists and industry representatives with a thorough understanding of the interactions of shellfish aquaculture and ecological processes to ensure conceptual models and additional research proposals appropriately include an examination of the beneficial aspects of shellfish aquaculture. Similarly PCSGA requests participation in the development of any new management alternatives outlined in Appendix F Section 3.3 of the adaptive management and monitoring program to ensure any proposed management alternatives accurately reflect both shellfish aquaculture activities as well as extant scientific literature.

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[42] DNR Aquatic Lands HCP, at 4-104.

IV. PCSGA's Comments on DNR's Operational Definition of Eelgrass Bed

DNR has developed an operational definition of eelgrass beds to include all areas where eelgrass shoots occur within one meter of another shoot. This definition is based on an evaluation of the lowest density of eelgrass which still provides at least one of the ecosystem functions typically provided by seagrasses. PCSGA is concerned with this definition for several reasons.

First, this operational definition, if used in combination with the HCP's provisions regarding eelgrass buffers, may result in an extreme decline in the amount of state lands available for shellfish aquaculture. If growers are required to avoid patchy eelgrass beds (currently defined as one shoot within one meter of another shoot), this definition could eliminate significant parts of northern Puget Sound and coastal estuaries such as Willapa Bay where small and isolated strands of eelgrass are common. This may result in a significant reduction in available revenue for DNR, and would represent an abrogation of DNR's statutory mandate to prioritize commercial and recreational food production on state-owned aquatic lands and Ecology's mandate to protect shellfish beds as a critical saltwater habitat. While PCSGA supports the State's goal to expand and protect eelgrass, it cannot be done at the expense of eliminating a key industry from large portions of the State.

It is important to note that shellfish aquaculture provides many of the same ecological functions important to listed species as eelgrass (see comments in Section 4.3 and Table 1 above). As recognized in the scientific literature and HCP, certain shellfish aquaculture activities (e.g., appropriately spaced long-line culture) can occur within eelgrass without any net loss of eelgrass or eelgrass ecological function. PCSGA recommends that the operational definition of an eelgrass bed be adjusted to acknowledge that the definition should not be used to define where shellfish aquaculture activities would be permissible or to establish buffers around eelgrass areas where aquaculture activities would be restricted.

Additionally, the operational definition does not take into account interannual and seasonal variability in eelgrass bed locations. Eelgrass distribution across Washington State varies by hundreds of acres annually, both in naturally dynamic areas (e.g., river deltas, tidal channels, etc.) and areas which are physically stable (e.g., sand or mudflats). Similarly, seasonal expansion and contraction of eelgrass beds is dramatic in both wintertime and throughout the growing season (i.e., June-October). While the operational definition may be able to be used to create a time-specific snapshot of eelgrass distribution, it would not be feasible to use the definition in the context of evaluating compliance with HCP conditions or an adaptive management plan.

The operational definition also imposes unrealistic demands on users of DNR state lands. The level of effort (e.g., using experienced environmental scientists as described in Appendix J) associated with delineating eelgrass beds and patches based on this definition is extremely labor-intensive. The extensive effort required and specialized skill set translates into excessive costs and associated economic impacts to shellfish growers and other covered activities. This effort is multiplied by the need to account for interannual variability and ephemeral nature of eelgrass at any given location, which may require multiple rounds of surveys or monitoring.

The DNR operational definition of eelgrass beds is also inconsistent with published WDFW eelgrass survey guidelines.[43] WDFW survey guidelines do not result in the collection of information that would allow eelgrass beds to be mapped according to the DNR operational eelgrass bed definition. This inconsistency could result in multiple survey methods and efforts being required for HCP covered activities which include WDFW involvement.

PCSGA requests that DNR refine the operational definition of eelgrass beds to allow a variety of eelgrass survey methods to be applied when delineating eelgrass beds. At least one of the methods should include low survey costs as an objective. PCSGA would offer to assist in the development of such a definition.

V. PCSGA's Comments on the Services' Draft EIS

PCSGA has several comments on the Draft EIS related to shellfish aquaculture regarding the characterization of certain aquaculture activities and the potential effects associated with shellfish aquaculture.

A. Sediment Composition

The Draft EIS references "materials such as excess food" which can contribute to modification of sediment composition.[44] Shellfish aquaculture in Washington does not include any activities where food is added for shellfish. Shellfish placed in growing areas rely on existing food resources such as phytoplankton in the water column. PSCGA therefore requests deletion of the reference to "excess food".

B. Effects on Biological Communities

This section suggests listed effects (i.e., modification of sediment composition, substrate disturbance, resuspension of fine sediments, sediment grain size shift, interruption of waves and current) result in "harm" to plant and animal communities in marine and freshwater areas.[45] These are conclusory statements without any explanation as to how shellfish aquaculture may result in the stated impacts. Further, the section states that spawning substrates for HCP covered fish species and areas where amphibians lay eggs could be disturbed or eliminated. None of the covered fish species spawn in marine waters nor do amphibian lay eggs in marine areas. PCSGA recommends revising this section to eliminate the factually incorrect and vague statements.

C. Benthic Impacts

This section suggests that shellfish aquaculture may change benthic communities and uses citations from Otero et al (2005), Bendell-Young (2006), Carvalho et. al. (2006) and others, which are focused on mussel rafts and clam farming.[46] While PCSGA does not necessarily agree

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[43] Washington Department of Fish & Wildlife, Eelgrass/Macroalgae Habitat Interim Survey Guidelines, June 16, 2008, available at: http://wdfw.wa.gov/publications/00714/.

[44] Draft EIS, at 4-12.

[45] *Id.*

[46] Draft EIS, at 4-21.

with the conclusions of these studies, even the conclusions stated therein do not concern shellfish aquaculture as a whole. Given that clam and mussel operations are a small fraction of the shellfish aquaculture footprint on DNR aquatic lands, PCSGA requests modifying this section to acknowledge these studies are limited to the evaluation of clam and mussel raft operations.

D. Visual Resources

PCSGA recommends making the following clarification the Services' discussion of visual resources and impacts related to covered activities:

> WAC 332-30-118(8) states that structures used for aquaculture on the beds of navigable waters must be located in a way that "strive(s) to reduce adverse visual impacts."... Scenic qualities are given some consideration in some areas managed under shoreline master programs but per WAC 173-26-241(b) and 173-26-221 the local government may not protect scenic qualities over preferred, water dependent uses of the shoreline such as aquaculture. Per WAC 173-26-221(5)...[47]

PCSGA recommends that the Services clarify this language to ensure that it adequately captures the intent of the SMA to balance multiple shoreline uses. The Shorelines Hearings Board has previously confirmed that mere aesthetic impacts from aquaculture operations do not outweigh aquaculture's inherent value as a preferred, water-dependent shoreline use under the SMA.[48] Thus, the recommended change accurately describes the SMA's intent. While shellfish growers may not have the ability to reduce all visual impacts, the Aquatic Land HCP respects DNR's regulatory requirement to minimize those impacts to the fullest extent possible. For example, shellfish growers may not leave gear or equipment in the intertidal zone for longer than seven days, must ensure predator exclusion devices are secure, and must minimize light pollution and detritus from flotation devices.[49]

E. Socioeconomic Impacts and Proposed Mitigation

As acknowledged in the Draft EIS, adoption of the HCP may result in adverse economic impacts to the shellfish aquaculture industry by reducing operational efficiency or the amount of area available for aquaculture operations through avoidance of forage fish spawning areas or eelgrass.[50] While PCSGA supports the conservation efforts and goals of the HCP, it realizes that the economic impact from the HCP's proposed conservation measures may have a significant impact on many of its growers, particularly smaller growers in Puget Sound, Grays Harbor, and Pacific County. The HCP could also have a significant impact on the general public, given that many of the conditions and measures addressed above, if not revised, could result in a significant decline in state lands considered suitable, or economically feasible, for shellfish cultivation. This would result in a significant reduction in revenue to the State, which is inconsistent with DNR's statutory obligations identified in Section I above.

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[47] Draft EIS, at 3-77.

[48] *Marnin, et al. v. Mason County, et al.*, Shorelines Hearings Board No. 07-021, COL 17 (Modified Findings of Fact and Conclusions of Law, Feb. 6, 2008).

[49] *See, e.g.*, DNR Aquatic Lands HCP, at 5-15, 5-20, 5-26.

[50] Draft EIS, at 4-155.

PCSGA would strongly support measures to reduce the economic impact of the HCP on its members. For example, the Draft EIS describes funding for the accelerated implementation of best management practices by shellfish producers.[51] PCSGA would appreciate the opportunity to work with DNR and the Services to determine if there are similar funding mechanisms available for Washington growers. If such funding options are not available, PCSGA would recommend that DNR consider reducing rent for state-owned aquaculture parcels if implementation of the HCP results in a reduction of the available growing area on the parcel or requires additional expenditures or equipment to meet its requirements.

VI. Conclusion

PCSGA appreciates the opportunity to comment on the Aquatic Lands HCP and Draft EIS. Thank you for your consideration of our proposed changes and comments. Please feel free to contact us if you have any questions regarding the comments or need additional clarification.

Very truly yours,

Robert M. Smith
Samuel W. Plauché
Marcus Pearson

RMS:tat
cc: Margaret Barrette, PCSGA
Chris Cziesla, Confluence Environmental

[51] Draft EIS, at 3-89.

WFWOComments, FW1 <wfwocomments@fws.gov>

DNR Comment from PSSA

1 message

Will Yates <yatesw@ludd.com> Thu, Dec 4, 2014 at 4:43 PM
To: "WFWOComments@fws.gov" <WFWOComments@fws.gov>

On behalf of the Puget Sound Shipbuilders Association (PSSA), I am submitting comments on the Washington State Department of Natural Resources (DNR) Draft Aquatic Land Habitat Conservation Plan (HCP).

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SUBJECT: COMMENTS ON WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES AQUATIC LAND HABITAT CONSERVATION PLAN

Dear Mr. Romanski:

On behalf of the Puget Sound Shipbuilders Association (PSSA), I am submitting comments on the Washington State Department of Natural Resources (DNR) Draft Aquatic Land Habitat Conservation Plan (HCP).

The proposed HCP has significant consequences to marine businesses including our shipyard constituents. The intent of the HCP to protect aquatic species and improve shoreline conditions is currently being met by a range of others laws and regulations that our shipyard members are in full compliance with. These include updates to local shoreline ordinances, aquatic permitting requirements under the Joint Aquatic Resource Permit Application (JARPA) process, and pollution prevention regulations including National Pollutant Discharge Elimination System (NPDES) regulations regarding discharges to the environment. Our members' facilities have been constructed and are maintained under this range of laws, which are implemented with the intent of protecting aquatic species. Our point of view is that the provisions of the Draft HCP are redundant, confusing, and in disagreement, in many cases, with the existing laws that govern shoreline management.

Although PSSA has formally requested a 90-day extension period to prepare more detailed comments, and hopes this extension will be granted, PSSA is submitting abbreviated comments in case this extension is not formally granted. These comments are not intended to be exhaustive or detail all potential concerns with the HCP, but rather are intended to highlight key issues to our industry and the potential negative ramifications to our members' businesses. As mentioned earlier, our members' shipyards were constructed with local, state, and federal approvals and authorization, and are currently regulated by multiple environmental and safety programs such as the Washington State Department of Ecology's NPDES program and the

Occupational Safety and Health Administration (OSHA), as well as the Washington Industrial Safety and Health Act (WISHA). The HCP overlaps current regulations, and, in some cases, creates contradictory directives to other environmental and safety programs, with broadly written, subjective standards.

Furthermore, the entire HCP is predicated on a causal link between required management actions developed to avoid an unlawful "take" under the Endangered Species Act (ESA); however, this causal link is often entirely presumed and not justified, particularly on a local scale. Chapter 4 of the Environmental Impact Statement (EIS), a companion document to the HCP, clearly states that the role of aggregate effects in aquatic ecosystems is not well studied, that ecosystem quality is influenced by a variety of factors, and that ecosystem value declines until the percentage of shoreline development reaches a threshold of 30 percent, after which no further ecosystem quality declines are observed. In light of this threshold and the understanding that many DNR leased lands are located within densely populated and highly developed shorelines, it is unclear what benefit the provisions will have at improving ecosystem quality, even if implemented to the fullest extent possible under the Draft HCP. In this case, facility operators at state-leased lands would be asked to commit substantial resources toward site redevelopment to improve habitat quality, and the end result of these actions may not have any effect in increasing ecosystem value.

Additionally, as the DNR HCP EIS clearly states, most authorized uses with the potential to affect the environment are already subject to review and/or permitting under one or more local, state, and federal statutes or regulations. For instance, in-water work such as dock construction, repair, or reconfiguration requires federal permitting under the Rivers and Harbors Act, which necessitates consultation with the U.S. Fish and Wildlife Service and National Oceanic and Atmospheric Administration Fisheries West Coast Region (the Services) under Section 7 of the ESA, as does dredging and bulkhead construction. Now the DNR HCP introduces a much more broadly written, prescriptive, and ultimately subjective overlay on top of an existing, functional process to structures that were already subject to and constructed in accordance with ESA Section 7 consultation. Finally, the EIS itself concludes that the proposed alternative (Alternative 2, the proposed action) under the HCP is not expected to change the listing status and critical habitat designations for *any* of the species covered by the incidental take authorization. As such, it has not been established that an incidental take authorization or an HCP is required or necessary for compliance with the ESA by lessees or the DNR.

Of significant concern to the PSSA is the HCP's approach to overwater structure and bank armoring mitigation, which appears to be a new restriction on the use of state-owned land. DNR can decide that a tenant must provide mitigation, and the type of mitigation, in order to continue to use a structure that already exists on state-owned land. There is no information presented on how DNR will determine compensatory mitigation dollar amounts, nor any estimates on what lessees can expect to pay. Finally, compensatory mitigation for hard armoring is already required under local, state, and federal rules. It is unclear whether multiple jurisdictions, including DNR, would require compensatory mitigation for the same project.

It is difficult to meaningfully comment on an HCP that leaves so much for later determination. Nevertheless, we have compiled high-level comments, which have been organized by broad categories below.

BANK ARMORING AND BULKHEADS

The HCP disallows new bulkheads or hard bank armoring except under extraordinary circumstances, and states that existing bank armoring must be removed, or replaced with a softer shoreline protection system, or, if replacement is unduly onerous, lessees may be allowed to continue using hard materials, but this must be justified and compensatory mitigation will be required. Certain exceptions "for public safety" will be allowed, with exceptions based on "specific conditions," but the specific conditions for exceptions are not clearly outlined in the document. The timeframe for replacement that will be applicable to any given site is also unclear. For other types of mitigation strategies and standards designed to improve shoreline habitat quality (for other structures), replacement or reconfiguration of the site feature to meet the new standards is tied to the lifetime of the structure, with action to meet the new Draft HCP standards not typically being required until the end of the lifetime of the structure. For bulkheads and bank armoring, however, the wording in the Draft HCP seems to allow DNR to specify an earlier timeframe for replacement based on factors that are currently unknown and that may be inconsistently applied to lessees across the state. This makes planning for bulkhead replacement or bank re-armoring projects and projection of the resultant required capital expense extremely difficult.

Though authorizations for replacement of an existing bulkhead or armoring will require the lessee to commission or prepare an engineering report that clearly defines the continued need for armoring, ultimately, the Draft HCP assigns DNR the ability to determine the "least damaging shoreline protection method, with associated replacement materials." The Draft HCP does not provide any information regarding how DNR will perform this evaluation for any given site. Lessees should be able to provide input into the shoreline protection method and replacement materials for existing structures, rather than being held to a determination made by DNR, which may not take into account site-specific activities or operations that would affect the effectiveness or longevity of the bulkhead or armoring.

This is particularly important given the Draft HCP's requirement that replacement bulkhead or armoring using hard materials must occupy "the same or smaller footprint." Given uncertainty surrounding water level rise and storm and wave action intensity due to global warming, inclusion of this standard in the HCP may prevent lessees from installing structurally necessary bulkheads or armoring that will be capable of protecting existing facilities on the land adjacent to aquatic lands.

Obviously, shoreline armoring and bulkheads were constructed and exist for a reason, and many nearshore facilities will continue to require hard armoring and bulkheads. Given that, there is no information presented on how DNR will determine compensatory mitigation dollar amounts, or estimates on what lessees can expect to pay if site constraints necessitate the continued use of hard bank armoring or bulkheads. Finally, given that the continued use of both requires preparation of a formal engineering report and review and approval by a DNR engineer, and that there is no information provided on DNR's time frame for providing review and concurrence; this may create a significant backlog in DNR's ability to review and/or approve new leases.

VEGETATIVE BUFFERS

The Draft HCP requires vegetative buffers for activities covered by the plan (such as overwater structures, log booming, etc.). Vegetative buffers will protect any of four types of native aquatic vegetation (i.e., saltwater plants, kelps, complex freshwater algae, and rooted freshwater plants), if they are present/existing. In particular, "For structures associated with motorized watercraft: To avoid dredging and scour caused by propellers on motorized watercraft, the buffer distance between the outside of the vessel and the vegetation is 8 meters (25 feet) whenever there is a vertical distance of 2 meters (7 feet) of water above the substrate at the lowest low water." The potential impact of scour and dredging is applied to all water depths and to all potential substrates in the broadest possible way. This measure will be impossible to implement at many existing facilities without making substantial infrastructure modifications. Much of the existing infrastructure was designed and constructed to accommodate a range of factors such as use, navigation, and limitations of the upland property.

Vegetative buffers for new and reconfigured outfalls will also now be required, even though outfalls are not an activity covered by the Draft HCP. Buffer distance will be the extent of the mixing zone, as defined in the current NPDES permit; if no permit exists, mixing zone analysis must be completed to determine the buffer distance. This, again, is a duplicative requirement that overlaps with other regulatory programs, and would require every outfall to have an associated mixing zone analyses, which is way beyond what the NPDES program requires.

The Draft HCP also specifies that the "buffer between the building and aquatic vegetation must be equal to or greater than the longest shadow cast by the structure into the water body." Shadows are transitory in nature and during overcast weather the significance of shadows is severely diminished. Additionally, native vegetation such as tree cover on banks create natural shadowed nearshore areas without negatively impacting habitat quality. Thus, proposed restrictions on the construction or expansion of nearshore buildings, which may cast periodic shadows over the nearshore environment, should not be imposed.

GRATING REQUIREMENTS

The Draft HCP has a requirement that piers and docks above the nearshore or littoral area must have unobstructed grating over 100 percent of their surface area, and floats must have unobstructed grating over at least 50 percent of their surface; there are additional requirements pertaining to grating.

Most waterfront industrial facilities use overwater structures to store materials and to manage stormwater runoff for controlling pollutants, which are typically covered by NPDES permits. In fact, the HCP also requires that applicants and lessees assess water drainage and runoff patterns and develop and implement a plan to alter or treat them, as necessary, to reduce direct inputs of contaminants and nutrients into state waters. The use of grating to allow light penetration, and the need for stormwater controls, are absolutely contradictory. Stormwater control is more appropriately regulated by the Washington State Department of Ecology under the Clean Water Act, not DNR. Given that hard surfaces acts as a barrier to materials entering the waters, complying with this requirement will actually greatly increase the risks of spills and releases to the environment.

Furthermore, this is a cost prohibitive and difficult-to-implement measure that is not adequately captured by the EIS' economic statement. Many of our members' facilities have piers equipped with utilities, sometimes even with earth fill, that are not conducive to grating.

Finally, to adapt piers with load requirements to grated areas would require significant engineering challenges such as changes to structural piling spacing and overall structural components, especially when combined with restrictions on treated material use.

ARTIFICIAL LIGHTING

Industrial waterfront facilities must follow OSHA and U.S. Coast Guard requirements for lighting for worker safety, which trumps any HCP requirement, as recognized in the HCP. This is an example of a requirement that is in direct conflict with another requirement (the use of grating to allow light transmission). Because shipyards must provide artificial light for worker safety, in theory, when OSHA lighting requirements are combined with HCP grating requirements, even more habitat would be exposed to artificial light. No provisions are made with respect to the prioritization schema that DNR representative will use to resolve these conflicting habitat protection and safety goals, which may cause considerable delays in the lease granting or renewal process, and may result in unintended negative impacts to habitat.

PILING AND TREATED WOOD

Text in the Draft HCP indicates that restrictions on the use of treated wood would be more strict than the requirements of other state and federal agencies, and would prohibit the use of all new treated wood and would only allow treated wood to be retained at an existing structure if fully encased to "preclude exposure to water and sediments and potential leaching into the aquatic environment." This requirement would impose a significant financial burden on many facilities with treated wood present in the subsurface environment, particularly if wrapping or replacement is required prior to the end of the lifecycle of the treated wood currently in use at a facility, as was implied by a DNR representative at one of the public hearing sessions. Many facilities have access constraints associated with the areas where treated wood is in use, which increases the cost of wrapping or replacement and makes conducting such activities without altering the structural integrity of the supported structure difficult. Further, some data exist that suggests that leaching from certain types of treated wood is actually minimal, even without the presence of a protective casing: the Best Management Practices (BMPs) from the American Wood Protection Association indicate that intense pressure and kiln drying create a product with minimal leaching after a matter of weeks, and near zero leaching when the wood is not fully submerged for the remainder of its life.

Further, removal of pilings may disturb sediments; in some areas with treated pilings, these pilings have been in place for many years and any continued leaching is likely to be minimal. However, sediment contaminated as a result of historical operations may be present in the vicinity of the pilings. Disturbing the sediments to wrap or remove pilings may prove more detrimental to habitat quality than leaving the pilings in place unwrapped.

TRANSLUCENT ROOFING

The Draft HCP includes provisions to increase the presence of translucent or transparent horizontal surfaces for roofs of buildings over the nearshore environment. The Draft HCP stipulates that for existing overwater structures, the authorizing document "will define a schedule for removal or renovation to maximize light transmission, as well as the appropriate construction materials and transmission levels." It is unclear what this requirement will be, but if light transmission levels are similar to those specified in the Draft HCP for covered moorage and boathouses (i.e., coverage of "50 percent of the roof surface and 100 percent of horizontal surfaces" with materials "that are rated by the manufacturer as having 85 percent or better light transmittance" and without "side walls or barrier curtains") this requirement will incur significant expense to the facility operator in engineering and design costs. It is unlikely that glass materials will be suitable in all cases, and, as such, it is likely that translucent plastics may be used. Plastics contain plasticizers, often including phthalates, which can leach to the nearshore environment and have negative effects on water quality. Therefore, it is unlikely that this provision will be implementable and beneficial to the nearshore environment in all cases, nor is it clear what options will be available to a facility if the structural engineer cannot design a structure that will meet the requirements specified by the HCP in a manner that is cost effective and will accommodate operations specific to the facility.

NEARSHORE BUILDING MATERIALS

The Draft HCP includes a provision that stipulates: to "avoid leaching harmful materials into receiving waters, building exteriors should not include the use of zinc or copper unless the stormwater is filtered through a pre-treatment facility before it leaves the site." Copper and zinc are found in road runoff and compose a significant portion of particles deposited onto the ground and surface of waters via air deposition. It is unclear what, if any, beneficial effect this standard would have on the nearshore environment. As copper and zinc concentrations in stormwater are already regulated via the use of BMPs and adaptive management responses under the NPDES permitting program, imposing this additional requirement would require the owners of nearshore buildings to incur major expenses for no additional benefit.

Further, this provision would impose restrictions on the use of materials containing either of two metals without consideration of the toxicity of the materials that may replace them. Prior experience has shown that in many cases, harmful substances with known properties are replaced with other substances with unknown properties, which in some cases prove to be more toxic than the original compound. The inclusion of this provision in the final HCP may have similar unintended consequences.

REQUIREMENT TO MINIMIZE DREDGING

The Draft HCP allows for dredging (to remove contamination, when required for navigation, for flood control, etc.), but stipulates that covered activities must be designed to minimize the need for dredging through the following provisions: "…the need for dredging must be avoided through the use of naturally deep water" (i.e., "by extending piers and docks into naturally deep water") or by "locating facility openings in a manner that promotes flushing…to prevent water stagnation and to prevent or reduce the need for dredging."

Many existing facilities were constructed in areas that have been heavily altered for nearly a century to accommodate navigation and deep water vessels. These facilities may rely on dredging to provide access; relocating facility openings is entirely unrealistic, and extension of piers and docks into naturally deep water will often be infeasible given the existing layout of the uplands portion of the facility.

The Draft HCP stipulates that "grounding of boats, prop scour, and the need for dredging must be avoided through the use of naturally deep water" and also that dredging is allowed when "required for navigation." It is unclear whether dredging to allow for modification of existing facilities to accommodate larger vessels within the footprint of the existing facility will be allowed. The ability to reconfigure existing facilities to accommodate larger structures is particularly important as increasing globalization requires growth in the size of many types of ship. Presumably, expansion of existing facilities to accommodate larger ships has less of an impact on habitat than development of new, non-state-owned aquatic lands; it is, therefore, difficult to quantify whether dredging will negatively impact habitat availability or quality, particularly at facilities with poor initial habitat quality. The final HCP should be written to allow for more flexibility in when dredging will be allowed, particularly for areas where historical or existing site uses create a need for ongoing dredging.

INCONSISTENT APPLICATION OF HCP STANDARDS

The provision in Section 5.2 restricting the application of the provisions of the Draft HCP to all state-owned aquatic lands "except in areas managed under port management agreements" and "transportation projects managed by the Washington State Department of Transportation" raises significant equity issues. Shipbuilding, shipping, and ferry transportation activities, both public and private, require access to navigable waters, and have similar types of structures and similar activities conducted across facilities, and thus could reasonably be expected to have similar impacts on the nearshore ecosystem regardless of whether the facility is located on land covered under a port management agreement, or managed as part of the Washington State Department of Transportation ferry system. The Draft HCP does not provide a justification or rationale behind excluding these two types of state-owned aquatic lands from the provisions of the Draft HCP – it is blatantly unfair. Requiring small, independently owned facilities who lease publicly owned land to comply with the provisions of the Draft HCP seems likely to cause these companies to be driven out of business or to a new location that is not on state-owned land as a result of the costs that will be associated with lease renewal. If DNR is not able to find a new tenant for this land, it is unclear what will be done: will taxpayers bear the burden of the costs associated with infrastructure removal and renovation to the standards in the Draft HCP? Will the land be left in its current state, thus providing no benefit to nearshore habitat? Further, if a company moves their operations to privately owned land that has previously not been developed, the net result could be habitat loss, rather than incremental habitat improvement through a series of habitat-improving actions over subsequent lease terms.

CONCLUSIONS

As proposed, the Draft HCP contains requirements that have extremely significant negative impacts to the Washington State economy and to maritime businesses. In general, we are very concerned with the scope and reach of the proposed HCP when applied to operations and

overwater infrastructure at existing water-dependent industrial facilities. Most of these facilities, were constructed with local, state, and federal approvals, and with significant private and public investment. If even partially implemented, the standards and programmatic measures outlined in the HCP would threaten the on-going viability of established operations and infrastructure, and in some cases could lead to closure of facilities.

Ultimately, PSSA hopes to participate in a constructive dialog with DNR concerning the Draft HCP content, with the hopes of generating an implementable final HCP that will result in improvements to nearshore habitat quality, but not at the expense of the viability of Washington's shipbuilding industry.

Thank you for your time.

Sincerely,

Will Yates
Vice President
Puget Sound Shipbuilders Association

WFWOComments, FW1 <wfwocomments@fws.gov>

WDNR Aquatic Lands HCP EIS

1 message

Wendy Steffensen <wendys@re-sources.org> Thu, Dec 4, 2014 at 8:40 PM
To: WFWOComments@fws.gov, "AMIOTTE, LALENA (DNR)" <lalena.amiotte@dnr.wa.gov>, scott.anderson@noaa.gov, Kate Blystone <kateb@re-sources.org>, Eddy Ury <eddyu@re-sources.org>, Matt Petryni <mattp@re-sources.org>

Please accept the attached comments from RE Sources for Sustainable Communities. Thank you for this opportunity.
Wendy

–

Wendy Steffensen, North Sound Baykeeper
North Sound Baykeeper Team
RE Sources for Sustainable Communities
2309 Meridian St.
Bellingham, WA 98225

360 733-8307 (office)
360 223-6707 (cell)

RE SOURCES_ HCP_120414_FINAL.pdf
232K

RESOURCES FOR SUSTAINABLE COMMUNITIES
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2309 Meridian Street
Bellingham, WA 98225
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December 4, 2014

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tim.romanski@fws.gov
WFWOComments@fws.gov

Scott Anderson
NOAA Fisheries
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scott.anderson@noaa.gov

cc: Lalena Amiotte, Washington Department of Natural Resources

Re: Draft Aquatic Lands Habitat Conservation Plan

Dear Sirs:

Thank you for the opportunity to review the Department of Natural Resources (DNR) application for a Habitat Conservation Plan (HCP). We have found the DNR staff to be very helpful in explaining the proposal and we believe that their efforts to protect the environment are sincere and commendable.

RE Sources for Sustainable Communities is a nonprofit environmental organization in Bellingham, Washington. Our mission is to promote sustainable communities and protect the health of northwest Washington's and ecosystems through application of science, education, advocacy and action. Our organization is also home to the North Sound Baykeeper, part of the international alliance of water keepers working to protect and enhance our most precious waters. We represent more than 17,000 members in northwest Washington and submit these comments on their behalf.

Many of our concerns are shared by the Puget Sound Partnership Environmental Caucus and Earthjustice and we have signed onto both of their letters.

We also have additional or more detailed concerns, and these are presented in this letter. We believe the HCP conservation measures are important steps to protect our environment, but they are not yet strong enough to warrant an incidental take permit. We hope that you will ensure that the HCP is strengthened if it is to be adopted.

Primary concerns with the proposed HCP.

We believe the HCP is flawed in a number of critically important ways that must be addressed before DNR is allowed to move forward:

- Large projects should be excluded from the HCP and subjected to further scrutiny to avoid and minimize impacts. The HCP is not an appropriate to address the impacts of large projects such as fossil fuel refining and export facilities, quarries, or other impactful proposals for DNR aquatic lands. They should be managed separately where stronger measures can be implemented to avoid and minimize impacts, or be rejected outright.
- The HCP lacks meaningful protection of species. We are concerned that the HCP fails to adequately protect species.

Avoidance of impacts is not emphasized enough in the activities that DNR does cover under the HCP and some significant activities are not addressed at all. Please revise to ensure that important objectives -- like avoiding and minimizing impacts and preventing harm to species are clearly identified and realistically achievable within the context of the HCP.

- Implementation of the HCP will be flawed without adequate funding, monitoring and compliance, clearly defined benchmarks, and commitment to adaptive management. In many cases, the conservation measures identified in the HCP are heavily dependent on legislative appropriations. The funding mechanisms necessary to implement effective monitoring and adaptive management are not clearly identified and are likely to fall short in absence of legislative action. The HCP should examine this question more clearly and determine alternatives that will allow its goals to be met under different financial scenarios, to the extent they can be projected.

Large projects should be excluded from HCP and required to follow a more rigorous review process.

Large projects and existing leases for facilities with a large footprint and/or potential to greatly impact the environs (i.e. refineries, large export projects, quarries, etc.) need more scrutiny and stricter rules beyond what is stated in the HCP to prevent long-term harm of aquatic lands.

We ask that they have their own separate agreement with NOAA Fisheries and the US Fish and Wildlife Service (henceforth "The Services"), in addition to the DNR HCP, to ensure no damage to species and critical habitat. We also ask that leases with these larger entities ensure that baseline monitoring of species and habitats be rigorous, that benchmarks be included in the leases for monitoring, compliance, and adaptive measurement triggers, and that there is no net loss of habitat on these lands.

The HCP lacks meaningful protection of species.

The habitat conservation plan needs to be strengthened to meaningfully protect species, such that they qualify for an incidental take permit. To qualify for a take permit, all reasonable efforts should be made to protect those species. Adequate protections are not included in this plan. Under section 4 of the HCP, the "percent decrease in potentially affected area" is listed for each species, indicating the potential harm reduction from DNR's actions. These values of "percent decrease" are typically low.

For example, the percent decrease is 15% for harlequin duck, 33% for chinook, and there is no data analysis for any of the forage fish species. In order to get a take permit, this percent decrease combined with DNR's other efforts at restoration should be 100% or more, to ensure that every effort is being made to protect the species – only then, should a take permit be issued. We do not believe that DNR's mitigation, in the form of aquatic reserves, conservation leases, commissioners' orders, and aquatic restoration programs are sufficient enough to get to 100% protective effort.

Program Goals and Objectives

The HCP is unclear on the following terms: avoid, minimize, and compensate. When is each appropriate? Please give guidance about the conditions under which minimization and/or compensation are adequate strategies. For example, at page 5-3, objectives state "avoid or minimize". This makes it seem as if there is a choice to avoid or minimize. Please state that avoidance is preferred, when possible. Minimization should be used when necessary.

The standard of no net loss should be the goal of the HCP and that should be stated upfront. When minimization or compensation is used, the standard should be no net loss of habitat.

The standard of using best available science (BAS) should also be applied. BAS should be used in the formulation of the HCP,

survey and monitoring, research programs, and adaptive management. Without the use of BAS, the work is not defensible and will likely give a lesser result.

Species protection as identified in supporting technical papers to the HCP.

The background information that was used to determine the covered species often appears to not support the decision for a take permit.

For example, the August 2007 Covered Species Technical Paper (CS paper) and November 2007 Potential Effects and Expected Outcomes Technical Paper (PEEO paper) give the following information for harlequin ducks:

The CS paper (page 2-40) states that some of the activities that DNR authorizes can be harmful to harlequin ducks. These were: transportation projects that result in habitat loss, stormwater runoff that degrades habitat, invasive species control projects that disrupt nesting habitat, wetland alteration that can destroy habitat and/or birds, wastewater outfalls that can degrade habitat or disturb nesting, and construction and operation of harbors, ports, shipyards, marinas, petroleum and ferry terminals that could reduce and degrade habitat, increase disturbance and increase risk of an exposure to oil.

Of the activities that DNR says can harm harlequin ducks, few seem to be affected by the HCP. Wastewater and stormwater runoff will not be addressed by DNR, nor will wetland fill, invasive species control projects, or roadway or bridge transportation projects. The only item from the CS paper that will be affected appears to be the construction and operation of overwater structures (not including bridges).

It does not seem appropriate to obtain a "take" permit, when the activities that harm the animal are not being addressed. According to the PEEO paper and, conservation measures associated with aquaculture and log booming do not overlap with the harlequin duck, and those for overwater structures will only reduce the amount of affected habitat by 12%. According to the HCP (page 4-89) the reduction is 15%. Reducing harm is important, but in order to get a "take" permit, harm reduction should be over 100%, through various measures applied.

Species Protection and Activities that are Not Covered.

As referenced above, many of the activities that harm animals that occur on DNR lands are not covered activities. Given this, DNR is not protecting the species on its lands to the extent that it can. The habitat conservation plan needs to account for whole categories of impacts, which adversely affect the target species. These include:

1. Preventing and responding to oil spills; this may include mandatory booming or limits on bunkering and lightering
2. Preventing noise disturbances; this may include regulating ship traffic and activity
3. Managing stormwater and ballast water; this may include preventing untreated waters from leaving DNR facilities, and
4. Regulating ship traffic at the dock; this may include ensuring that docks and the egress/ ingress to the docks are not crowded and at risk of collisions and spills.

Species protection and overwater structures

Over-water structures not only directly impact light availability but also sediment transport and fish behavior. They also allow activities that would not otherwise occur, such as disturbances from noise, light, and pollution.

The conservation measures outlined in the PEEO paper for overwater structures included the following measures which we believe should be incorporated into the HCP's conservation measures: prohibition of filling of additional lands, the use of upland boat storage whenever possible, and off-season boat haulout whenever possible.

One of the overwater structures conservation measures is to, "develop and implement a plan to alter and treat drainage and runoff." Reducing contaminants in new and reauthorized leases is a very good activity to protect our state waters. We recommend that the drainage and runoff plan be made available for public comment. This would be similar to a stormwater permit, where public notice and comment is part of open government and ensuring the best possible plans for water quality. BMPs appropriate to the control and minimization of pesticides should also be included.

Figures 3.2 of Appendix F show a conceptual model of overwater structures. We would like to point out a few impacts that were missed. Over-water structures not only directly impact light availability but also sediment transport and fish behavior. They also allow activities that would not otherwise occur, such as disturbances from noise, light, and pollution. Please include best management practices (BMPs) to directly address these impacts.

Species protection and shellfish aquaculture

We believe that restricting noise and light to the extent possible is a conservation measures that should be included for shellfish aquaculture; it was listed in the PEEO paper, but not in the HCP. Standards and best management practices are needed for noise, which may affect aquatic organisms.

The conservation measures do not include mention of the pesticides that are used on DNR land in the aquaculture process. BMPs appropriate to the control and minimization of pesticides should be included.

Species protection and log booming

Conservation measures for log booming and storage refers to interim and final cleanup measures for debris accumulation on the sediment bottom. Impacting the bottom of the sea floor, by smothering it, is not acceptable.

No new log booming and storage areas should be allowed, regardless of the historical use of the area. Historically used areas, not currently in operation, should be restored. Debarking prior to logs being held in the water must be written into all lease reauthorizations.

At a time when the Department of Ecology and DNR are struggling with cleaning up wood waste issues around Puget Sound, we must ensure that we are not creating more cleanup sites.

Figure 3.3 of Appendix F represents log rafts. We find that the direct impact of debris accumulation on the sediment bed not only affects turbidity, but also decreases dissolved oxygen and increases the sulfides and tannins, toxic metabolites. All of these impacts should be considered.

Conservation standards

The pressure washing standards are inadequate. Pressure washing creates water pollution, by dislodging particles and chemicals on surfaces. Under the Washington's Municipal Stormwater permits, pressure washing, even of seemingly clean

surfaces like sidewalks, creates illicit discharges when the water flows into a storm drain or water body. As well, pressure washing a boat hull is also illegal; pressure washing ablative paint creates pollution. These standards should be more protective in the final HCP.

Programmatic measures related to Native Aquatic Vegetation Protection

Conservation measures to protect native vegetation are primarily focused on avoiding further impact, with minimal discussion of programmatic approaches to facilitate restoration. We believe a greater emphasis on restoration is needed because native aquatic vegetation is disturbed on an ongoing basis by existing leasing activities, vegetation control measures and invasive species. A proactive approach to native vegetation restoration should be more thoroughly identified and funded such that a standard of no net loss or net gain of native vegetation can be achieved with respect to the cumulative impacts of covered activities.

Programmatic measures related to Forage Fish Spawning Habitat Protection

Conservation measures to protect forage fish spawning habitat through eight standards that primarily involve minimization of covered activities' impact while suggesting that those activities will generally continue. In the implementation subsection, it is noted that DNR will "consider" withdrawing documented forage fish spawning habitat from the leasing program for the purposes of habitat conservation on a case-by-case basis. This consideration should be elevated as a standard, and should establish that DNR will avoid activities that result in degradation and when necessary reject proposed leases in areas where forage fish habitat or their populations are critically threatened, specifically in and around designated Aquatic Reserves such as Fidalgo Bay and Cherry Point.

Forage fish restoration should be implemented and monitored at both the levels of habitat and species population. The protection of forage fish spawning habitat should also include the goal of restoring the forage fish population, as well as standards and monitoring that ensures habitat restoration is resulting in population growth. The plan should have standards to address the importance of temporally distinct population segments of forage fish, such as the pacific herring stock at Cherry Point.

While the DNR proposes to look for opportunities to restore historical forage fish habitats, the critical importance of addressing the degradation or destruction of these habitats for the purpose of protecting or restoring usual and accustomed fishing areas protected by tribal treaties should be specifically identified in the implementation subsection. The conservation efforts pursued by DNR should be expanded to both provide greater ecosystem function through spawning habitat restoration and to explicitly restore usual and accustomed fishing areas.

DNR management practices

DNR proposes to bring 65% of all private recreational docks on DNR land into compliance after 1 term of the HCP, 50 years. This is far too small of a goal. DNR should bring at least 80-90% into compliance within a 50 year period.

Additional species should be protected by the HCP.

Additional species may warrant protection under the HCP. If these species exist on DNR aquatic lands and DNR has the authority

to control actions on these lands, these species should be covered if DNR can develop species-specific protect for them.

1. The Cherry Point herring stock spawns significantly later than other Puget Sound Herring stocks. The Washington Department of Fish and Wildlife site cited below indicates that the Cherry Point Herring can be genetically differentiated, and that this stock is independent of the Puget Sound Herring metapopulation.[1] It is known that the spawning of this stock is important to migratory bird survival. (See discussion of birds below). The metrics and goals for the HCP should account for habitat and populations for each of the of the unique herring stocks.

2. We note that the following vulnerable bird species were not evaluated in the 2007 CS and PEEO papers. Please provide evaluations for them and include them as part of the HCP, if it is possible to meaningfully protect them.

   Great Blue Heron: These birds are state-monitored. Their vulnerability stems from the fact that they aggregate in large rookeries. Thus, many birds can be wiped out with one catastrophic event, such as an oil spill during nesting season. It has also been documented that construction, development, and human disturbance can lead to low fecundity and nest abandonment.[2] Rookeries for the Great Blue Heron exist near both the Cherry Point and Fidalgo Bay Aquatic Reserves.

   Western Grebe: These birds are state candidate species. These species have shown significant declines of 81-95% across three different studies.[3]

   Surf Scoter: These birds are in steep decline and their survival seems to be closely linked with the survival and timing of herring spawn at Cherry Point.[4, 5] The Cherry Point Aquatic Reserve Citizen Stewardship Committee (CPARCSC), in coordination with the North Cascades Audubon Society and under the supervision of Dr. John Bower, have undertaken a study of seven marine birds within the Cherry Point Aquatic Reserve. This study corroborated the steep downward trend of surf scoters in the area.[6]

Implementation of the HCP will be flawed without clearly defined benchmarks, monitoring and compliance, adequate funding, and a commitment to adaptive management.

Clearly Defined Benchmarks, Monitoring and Compliance

The standard for cumulative impacts of projects associated with an aquatic lease should be no net loss of habitats or native plant and animal populations. Robust baseline and trends monitoring should be included in order to achieve this. Monitoring must be coordinated with other state and federal resource and regulatory agencies to ensure compliance with permit and lease conditions and completion of monitoring programs.

Species monitoring should be included. Monitoring in this plan only includes habitat. While habitat is an essential component that affects species, other components that affect species include discharge of pollutants, noise, lighting, physical disturbance, and unregulated harvesting. Species populations must also be monitored as part of this plan to ensure that the HCP is effective

[1] http://wdfw.wa.gov/conservation/research/projects/marine_fish_monitoring/herring_population_assessment/index.html

[2] Eissinger, A.M. 2007. Great Blue Herons in Puget Sound. Puget Sound Nearshore Partnership Report No. 2007-06. Published by Seattle District, U.S. Army Corps of Engineers, Seattle, Washington.

[3] http://marineornithology.org/PDF/37_1/37_1_9-17.pdf

[4] http://marineornithology.org/PDF/37_1/37_1_9-17.pdf

[5] Lewis, T.L., D. Esler, and W. S. Boyd. 2007. Foraging Behaviors of Surf Scoters and White-Winged scoters during Spawning of Pacific Herring. The Condor. 109: 216-222.
http://www.jstor.org/discover/10.2307/4122549?uid=2&uid=4&sid=21105361778283

[6] https://drive.google.com/viewerng/viewer?a=v&pid=sites&srcid=cmUtc291cmNlcy5vcmd8bWFpbiOyfGd4OjQxNGM3ZjIxNDViMDEyOGM&u=0

in protecting species, not just habitat.

The habitat monitoring plans that are included appear to be well thought-out. In order for them to be more effective, we request the following:

1. A commitment to devote staff time to compliance, baseline and trends monitoring. Without trends monitoring for adaptive management, the HCP is meaningless and should not be granted. Dedicated FTE's must be included in the plan.
2. Compliance monitoring should be unannounced, and the frequency of monitoring should be based on the potential impact of the facility.

The use of benchmarks and performance measures need to be included in the HCP and in leases. Benchmarks must ensure that BMPs are implemented in a timely fashion. Re-opening a lease should be possible, if lessees do not meet benchmarks, new BAS comes available, or another change is needed to ensure habitat and species vitality.

Given the changing climate, BAS is likely to change also. The HCP contains inadequate analysis and discussion of the manifestations and implications of climate change on our aquatic resources and how climate change will be addressed through the best management practices (BMPs). Impacts of ocean acidification and climate change are acknowledged in the Draft EIS. Recognition of these changes should also be addressed in the adaptive management plan.

Funding limitations for monitoring and program implementation.

Given that "failure to maintain adequate funding shall be grounds for suspension or partial suspension of the incidental take permit," (page 5-54) stronger assurances should be established in the HCP. Many of the programs identified rely on legislative appropriations. It needs to be clearer how the plan will be implemented (or if it can) over a 50-year timeframe when those funding sources are far from certain.

Minimum requirements for monitoring should be established, and the DNR should clearly identify how effective monitoring will be conducted if the legislature fails to appropriate adequate funding to support it. Under the current plan, "DNR will maintain a sustainable level of funding for Adaptive Management that reflects the elasticity of Washington state's biennial budget. Washington DNR will carefully evaluate design costs over the course of the experiment, as well as potential costs of implementation before any research commitments are made."

It is unclear how the level of funding proposed is to be sustainability maintained, which raises concern that this critical element of the adaptive management program may not be feasible over the planning period. Page F-6 states, "the scope of the adaptive management program is contingent on the level of resources provided to monitoring and assessment from interested parties other than DNR." The HCP should be revised to develop a proposal for effective outcome monitoring in the absence of legislative appropriations or interest from third parties, and the HCP should establish clear minimum standards for monitoring that can be used to evaluate implementation over time.

Adaptive management, which will be scaled to "realistic design costs," could fall short of goals under budget constraints, beholden to the discretion of the legislature to appropriate funds biennially out of the Resource Management Cost Account (RMCA) and Aquatic Lands Enhancement Account (ALEA).

Leasing agreements should include funding for monitoring and compliance, as a supplementary source or alternate to legislative appropriation. Given that the activities of certain lessees of aquatic lands create more impacts to habitats, monitoring for effectiveness and compliance should be conducted at the expense of the lessee, commensurate with the full extent that their

impacts warrant monitoring for compliance and adaptive management, and in accordance with conservation goals set forth in the HCP.

One of DNR's core priorities for implementation of the HCP is the sustained management and restoration of areas in Puget Sound currently identified as Aquatic Reserves, as well as potential new Aquatic Reserves as necessary to avoid and minimize impacts to critical habitat areas. This aspect of the plan relies on continued appropriations from the legislature over the course of the planning period and potentially higher appropriations to support new staff if needed to expand the program or adjust management practices. The HCP should incorporate provisions for continuing to fund this program if legislative appropriations are reduced over the planning period, or the DNR should develop alternatives that would better reflect the outcomes that are expected if DNR is required to implement the Aquatic Reserves Program at a lower level of state funding support. It might be necessary to identify alternatives to the Aquatic Reserves Program to continue to meet the goals of the HCP through commissioner's orders, conservation leasing, or other similar programs that may remain functional if the legislature fails to appropriate necessary funds to support Aquatic Reserves management.

Similar to the Aquatic Reserves Program, the success of conservation leasing as an effective conservation measure relies heavily on legislative action. Based on the information provided in the HCP, it is challenging to assess whether the conservation leasing program will be sufficiently implemented to have any meaningful impact on ecosystem quality. The DNR plans to recommend legislation that will improve their ability to implement the conservation leasing program, but should identify alternatives that will meet the goals of this proposed approach if the legislature fails to act.

Further issues related to adaptive management.

On page F-7 of the HCP, presumably the Science Review Committee not only reviews the work done by the Implementation Team, but reviews BAS and provides direction to the Advisory Team. This is unclear in the HCP and should be made more explicit. The diagram in Figure 2.1 shows a one-way arrow, and BAS is not mentioned anywhere in the adaptive management appendix.

Appendix F of the HCP refers to a "technical team", but does not clarify who they are. The nature of this team should be clarified in the HCP.

Similarly, the HCP needs more clarification on the makeup of the advisory team. The HCP does not prevent the appointment of members to this team whose interests clearly conflict with the mission. Members of the advisory team are selected by a coordinator; perhaps the member selection process should include approval by a DNR science committee, such that one person does not have undue influence.

We believe the preliminary research proposal expressed in Table 3.2 is a good start, and the answers provided may lead us to better management actions and increasing the pool of best available science. Some items within the proposal, however, need some clarification or adjustment. For example, are all the research measures based on recent BAS? If not, they should be. Additionally, as detailed above in comments on Figures 3.2 and 3.3, additional research measures are needed to fully determine the effects of the three covered activities. Finally, these measures include finfish operations, not shellfish operations. Finfish is not a covered activity, whereas shellfish is. Thus, the entire research proposal needs to be updated. For shellfish, a research proposal to evaluate the use of integrated pest management on oyster beds should be included.[7] After the research measures in Table 3.2 are updated, the public should be allowed to review and comment upon them.

At page F-29, the following is stated with regard to the reporting-feedback framework: The cycle will continue either until the defined endpoint is reached or until all uncertainty regarding the ecological functions and management alternatives is

[7] http://naldc.nal.usda.gov/naldc/download.xhtml?id=27533&content=PDF

eliminated. Unfortunately, given the passage of time and ever-changing conditions, it is unclear why baseline or trend monitoring would ever be complete. This needs clarification.

Additional concerns with the Draft EIS.

We note that many sections of the Draft EIS are outdated and may be inadequate to address the impacts of the proposed conservation measures. It is a challenge to know whether DNR will be able to feasibly assess the likely outcomes of the HCP due to the length of the proposed timeframe.

Comprehensive monitoring, benchmarks and evaluation measures that supplement the EIS review process and manage adaptively will be necessary to ensure implementation of the HCP is achieving its intended goals of minimizing and avoiding impacts to covered species. This approach should also ensure that the implementation reflects the best available science over the planning period, rather than at the time of the draft EIS preparation.

Additionally, the Draft EIS should more fully examine the potential consequences of an incidental take permit to first nations indigenous communities in its assessments of impacts to Environmental Justice, Cultural Resources, and Social and Economic Environment. Impacts to tribal treaty fishing rights must be fully examined and adequately addressed in both the HCP and Draft EIS, especially such that conservation measures do not rely on or allow for the disruption or degradation of usual and accustomed tribal fishing areas.

Conclusion.

We hope that the HCP can be resolved to address these issues of clarity and provide stronger conservation measures that would improve its effectiveness as a planning document. We are concerned that the HCP and incidental take permit could be detrimental to restoration of species over the long-term if it remains in its current form.

We encourage the DNR to strengthen the HCP by excluding large projects, providing stronger protections for species, and ensuring implementation of clear protective benchmarks, robust monitoring and compliance, adaptive management through clarifying language in the HCP and better identifying alternative funding sources.

Thank you for considering our comments and for all of your work on this important programmatic approach. We appreciate the opportunity to consult further and to engage in public education that helps to improve the HCP and the conservation practices for state-owned aquatic lands.

Sincerely,

Wendy Steffensen, North Sound Baykeeper
Kate Blystone, Program Director
Matt Petryni, Clean Energy Program Manager
Edward Ury, Clean Energy Program Field Organizer
RE Sources for Sustainable Communities

WFWOComments, FW1 <wfwocomments@fws.gov>

WDNR Aquatic Lands HCP DEIS

1 message

Charles Draper <cdd111@nwlink.com> Thu, Dec 4, 2014 at 2:28 PM
To: WFWOComments@fws.gov
Cc: Margaret Freeman <fmmargaret@qwestoffice.net>, tim_romanski@fws.gov, scott.anderson@noaa.gov, david.palazzi@dnr.wa.gov, derrick.toba@dnr.wa.gov

Dear Mr. Romanski,

Attached, please find comments and a request for additional time to review the HCP information. In addition we have a request that in consideration of the attached information concerning the Lake Washington Ship Canal from the Federal Government archives and the Washington State Archives, the Lake Washington Ship Canal be exempt from the HCP. The attached letters respond to that exemption. The documentation includes current characteristics of "habitat science" and "economic science" and request for further information about the economic impact that will occur if the HCP is placed into effect in the Lake Washington Ship Canal.

I have attempted to send via email the support documentation for the letters however your systems do not accept the file length. I am therefore sending via US Postal service the support Documentation.

Respectfully

Charles Draper III

Salmon Bay Marina

Association of Independent Moorages (AIM) President

3 attachments

2014HCP-rqstExtend+ExempShpCnl.doc
149K

2014-Nov12 Toba-DNR Ltr KlUnionLkWn Waterways.doc
133K

2014SeaTim-FilterWtrCohoStdyRunoff.pdf
856K

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December 4, 2014

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David Palazzi DNR-Aquatics Program david.palazzi@dnr.wa.gov
Mr. Derrick Toba DNR - derrick.toba@dnr.wa.gov

Re: WDNR Aquatic Lands HCP DEIS - Request a greater review period to ascertain the legal and scientific aspects pertaining to the proposed HCP and inclusion of a alternate plan excluding the Lake Washington Waterway, Lake Union Waterway and Salmon Bay Waterway (known as the Lake Washington Federal Ship Canal).

Dear Mr. Romanski

On November 5, 2014 a presentation of the HCP "Aquatic Lands Habitat Conservation Plan" representing 12 years of review by Government agencies, was presented to a few members of the Lake Union Association. The presentation was made by Mr. Toba and Mr. Palazzi of the DNR.

The presentation was to inform citizens of the State of Washington and in particular those who have permits or leases with the State of Washington DNR, of the proposed HCP (Habitat Conservation Plan).

Mr. Toba and Mr. Palazzi forward HCP copies to Margie Freeman's office the week of November 10th for distribution.

We were fortunate to have several attendees who will be significantly affected by the HCP at the meeting. The HCP in its current form will cause significant economic impacts to Lake Washington Ship Canal users and property owners adjacent to the ship canal waterways. Several concerns were raised and are included within a letter I sent to Mr. Toba.

I am attaching a copy of the letter sent to Mr. Toba concerning our brief discussion of facts that he was unaware of.

During the meeting of November 5th 2014 with Mr. Toba and Mr.Palazzi, it was stated that only lands owned and controlled by the State of Washington were to be included in the HCP. Mr. Palazzi specifically indicated that the two cuts including the Freemont Cut and the Montlake Cut were excluded from the HCP.

This brings up the question of jurisdiction within the Right-Of-Way (ROW) of the Lake Washington Ship Canal.

The intent of Congress was to have total control of the Lake Washington Ship Canal (ROW), established in 1894 and including flowage rights upon, along, over and through the ROW. I am attaching a document from the Sixtieth Congress, Sess. I Chapter 157 of 1908, that explicitly states that the Federal Government Granted the City of Seattle a ROW across the Federal Government Reserve in Salmon Bay at 3rd Ave. West.(currently 23rd Ave Northwest in Ballard) In order to grant a ROW the Federal Government had to have control over the ROW and not the State of Washington. Therefore the ROW would be exempt from the HCP. I am also attaching copies of the Congressional Acts referencing total control of Federal Government over all of the ROW and not just the cuts between Lake Union and Salmon Bay and Lake Union and Lake Washington. (1890-1920 Congressional Acts-LkWnShipCanal),(1908 60th Congress-Canal a Federal Reserve).

In addition, State of Washington Legislative Acts includes the jurisdiction in the ROW of the State of Washington being Ceded to the United States

> "…authorized by any act of Congress, and all deeds, conveyances of title papers for the same shall be recorded as in other cases, upon the land records of the county in which the land so acquired may lie: and in like manner may be recorded a sufficient description by metes and bounds, courses and distances, of any tract or tracts, legal divisions or subdivisions of any public land belonging to the United States which may be set apart by the general government for any or either of the purposes before mentioned by an order, **Patent or other official document or papers describing such land**; the consent herein and hereby given …"

The official documents refer to the drawings prepared by the Federal Government showing the ROW.

> "…Provided that this state shall retain a concurrent jurisdiction with the United States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under authority of this state against any person or persons charged with crimes committed, or for any cause of action or suit occurring without the bounds of any such tract, may be executed therein, in the same manner and with like effect as thought this assent and cession had not been granted." ---------(1901-RightsCeded to US-ExceptCriminal(+Rainier) –Chapter XXIII Rights Ceded the United States – Washington State Act - 6853. (2110) Consent to Acquisition of Certain Rights by United States, etc.)

This is the same jurisdiction granted the Federal Government for the Mount Rainier National Park, (6854 ½, Jurisdiction Over Rainier National Park) with the exception that Mount Rainier allowed taxation:

> "saving further to the said state the right to tax persons and corporation, their franchises and property on the lands included in said park:…"

The "right to tax" was not included with the ROW for the Lake Washington Ship Canal.

Today there seems to be a misunderstanding as to what was actually indicated in the 1894 Congressional Act to be the Right-of-Way. Today, some think it was only that portion between Salmon Bay and Lake Union and a second portion between Lake Union and Lake Washington.

November 6, 1896 the Secretary of War required:

> "…the precise area and boundaries upon the ground of the proposed waterway, including not only the area and boundaries of the right of way but those also of the ground required for locks, keepers houses, etc., and the area and boundaries of the properties which will be covered or liable to be damaged by flowage through the rising of waters in Salmon Bay or Lake Union, in consequence of the

proposed improvement of the waterway connecting the waters of Puget Sound at Salmon Bay with lakes Union and Washington…" (1894Nov6-ROWBoundaries-SecWarIncludedLocks&ROW)

In 1896 this was also addressed between Captain Fisk and Brigadier General Craighill. It was necessary to determine the intent prior to the War Department fulfilling the Congressional Act.

> "From the wording of the river and harbor act of August 17, 1894, reference being made to "the waterway connecting Puget Sound at Salmon Bay with Lakes Union and Washington," and as the only existing waterway opened into Shilshole Bay, the latter was understood to be the route preferred by Congress.
> The estimate for this route by the board of engineers referred to was $2,902,859.23, and included provision for all land needed for the work and all necessary changes of the several railroads affected, and for raising or removing various buildings mills, and wharves.
> Deducting all these contingencies, as they seem to be included in the provision that **"the entire right of way and a release from all liability to adjacent property owners are to be secured to the United States** free of cost and to the satisfaction of the Secretary of War, the board's estimate reduces to $2,471,751.26 for actual construction." (emphasis added – 1896Apr2CaptFiskBrigGenCraighill-EntireROW)

In 1909 the war department also considered the Right of Way titled with the U.S. Government (1909 April 28 – US Title to ROW sole & Exclusive), as did the Department of Justice in 1910 December 6 (1910Dec6DeptOfJusticeTitleVestInROW)

From the time of the Congressional Act of 1894 through 1930's, the Federal Government considered ownership of the entire ROW not just the Fremont cut and the Montlake cut and included Flowage Rights. (1910Dec6DeptOfJusticeTitleVestInROW). Since the Congressional Act provision of the Ship Canal Construction was for forever, how did it change? If it has not changed then the whole ship canal from Admiralty Inlet to Webster Point, would be exempt from the conditions being suggested within the HCP. Since Flowage rights were also given to the Federal Government by the State of Washington and King County for the whole ship canal, not just the cuts, then what habitat rights could be established for the federal water by the State of Washington? Flowage rights control the whole water column and everything in it. Does the HCP cover Federal Water? If so, then the Montlake and Fremont cuts could not be exempt as originally described.

The State of Washington should make an accurate assessment of habitat and address the ramifications that will result from an inaccurate assessment. Those ramifications include an apparent inaccurate assessment as to what is actually affecting "fish", what are state policies on lakes vs waterways vs artificially created waterways, and what control the State has in relation to non-public lands ie the Lake Washington Ship Canal. (The Lake Washington Ship Canal was dedicated to a particular purpose in law by Act of Congress in 1894 and included ALL lands from Admiralty Inlet to Webster point in Lake Washington within the platted right of way. This fact eliminates the Lake Washington Ship Canal from "Public Lands" according to the laws of Washington State.)

Session Laws 1927. Chapter 255 Public Lands.

> "Public lands of the State of Washington are lands belonging to or held in trust by the state, which are not devoted to or reserved for a particular use by law, and include state lands, tide lands, shore lands and harbor areas as hereinafter defined, and the beds of navigable waters belonging to the state."

The United States Congress, State of Washington and King County dedicated the lands between Admiralty Inlet in Puget Sound and Webster Point in Lake Washington, for a particular use in law. It is a Platted Federal Ship Canal in accordance with the Congressional Act of 1894 and accepted on October 4 1917 by the United States Assistant Secretary of War Wm. Ingraham.

Does the HCP include Mount Rainier? Mount Rainier is a National Park and was dedicated the same as the Lake Washington Ship Canal. According to the State Supreme Court Mount Rainier does not fall under the jurisdiction of the State of Washington. (Dirt and Aggregate v State of Washington)

The HCP, should exclude the Lake Washington Ship Canal due to the Federal Government control established by congress and its unique development characteristics.

In addition to the question of jurisdiction within a very special controlled waterway (different than any other waterway in the State of Washington), we have concern about the direction the HCP is taking.

It appears that the plan is a pre-ordained wish list. It appears little considerations were made within the HCP for a complete analysis of ecological **and** economic effectiveness.

It is my understanding that the intent of the HCP was to use "good, reasonable and accurate science" to substantiate the suggested requirements indicated within the HCP. The group was told that the developers of the HCP included not only the science of chemistry and ecology for evaluation but also the science of economics. (There is a Nobel economic science award.)

I have not reviewed or seen the EIS which Mr. Palazzi indicated should be part of the HCP. I have not had time to review the 12 years of work in the short review period offered by the Agencies allowing input.

In addition to the justification of what lands of the state are being affected by the HCP, recent science seems to indicate a dichotomy of scale concerning what is existing in the water vs what is actually causing a problem with fish habitat.

A news article published in the Seattle Times on November 19, 2014 indicated that recent NOAA and other scientific research has shown the affect on Salmon from metals and oil products are insignificant compared to road runoff. (2014SeaTim-FilterWtrCohoStdyRunoff)

> "In an experiment two years ago, the scientists exposed adult Coho to artificial cocktails of metals and petroleum hydrocarbons in runoff and found that they didn't kill the fish.
>
> Actual runoff was another matter. …" (Article attached-2-14SeaTim-FilterWtrCohoStdyRunoff)

The article goes on to explain how future research will affect the Coho embryos.

Does the HCP document give any consideration concerning at what point creosote pile do not affect the surrounding water? In reviewing the References, the paper from Hutton and Samis was conspicuously absent.

Research from" Canadian Technical Report of Fisheries and Aquatic Sciences 2314- Hutton and Samis", published in 2000 indicate that while decommissioning treated wood structures is a preference, wood that has been in place for over 1000 days no longer poses a hazard due to the rate of microbial degradation of PAH's exceeding the deposition rate.

> "A single six-piling creosote-treated dolphin in low current marine area would be expected to have localized, short-term impacts on benthic infauna. Part of this impact would be due to the physical disturbance during installation and the on-going physical presence of the structure. After the microbial flora have built up to break down PAH's following installation of the treated-wood structure (at Sooke Basin it took as much as 1000 days), the rate of microbial degradation of PAH's should exceed the deposition rate." (Pg 15 – Guidelines to Protect Fish and Fish Habitat from treated wood used in Aquatic Environments in the Pacific Region"- 245973)

All of the Salmon Bay Waterway, Lake Union Waterway and the Lake Washington Waterway would fall into the "low current marine area" category. (Lake Union, Lake Washington declared waterway see attached Toba letter) In addition any creosote pile that has been in place for three years should be allowed to be left in place without further disturbance or sheathing.

It is further recommended in the study, that creosote treated wood be shaded so as to not release the hydrocarbons into the air. This in itself is contrary to the HCP plan of not shading. Are there other materials that should have shading and that are located around or on the water? What about plastics and their degeneration from ultraviolet light?

Has the HCP considered the "shading of materials vs the shading of water"?

Shading is apparently a touchy subject in that the DNR has stressed the need to increase light in the water so the salmon and other fish can see predatory fish species. The "fish psychologist" within the governmental departments have determined that structures over water that generate a significant economic impact to the region are doing harm to the fish as a result of the shading caused by the structures. (Recreational Marinas in Seattle have a One Billion Dollar annual economic impact to Seattle and the State of Washington according to Mr. Hebert of Hebert Research-Bellevue Wa.) Is this economic engine important?

What about the positive economic effect of shaded areas that do not promote the growth of evasive plant species such as *Brazilian Ellendea* (a type of mill foil). *Brazilian Ellendea* does not flourish in shaded areas. Eliminating shading promotes the growth of the evasive species and results in greater chemicals being placed into the waters to control the weed, causing greater hardships and more detrimental economic impact

While the shading concept may have arisen from the fact that predatory fish may hide under the structures, the science shows that the "taking" by predatory fish of salmonids is insignificant at least as far as the Bass population within the Lake Washington Ship Canal. (Smallmouth Bass and Largemouth Bass Predation on Juvenile Chinook Salmon and Other Salmonids in the Lake Washington Basin"- Attached2007-23-Smallmouth Bass and Largemouth Bass) Before requiring the elimination of shading on the Lake Washington Ship Canal, quantification of the salmonid taking should be established for each of the other predatory fish species to confirm if, in fact there is a problem or if, like the bass study, there is no effect.

Further research has shown that tagged salmon are non-descript as to where they swim, covered or uncovered surfaces. The studies show random selection as to where they swim, at least in the Lake Washington Ship Canal. (Tagged fish survey attached- Fish run 3,). Might this indeed be an anomaly within the Lake Washington Ship Canal? If so, then the Ship Canal should be exempt from the HCP.

With this knowledge, what is the predatory fish that lurks beneath the structures and do they make a significant contribution to the reduction of salmonids? Why is there a push to eliminate shade within the artificial Lake Washington Ship Canal and the artificially changed Lake Washington Basin? Could it be that a greater understanding is necessary before a HCP is implemented within the Lake Washington Basin which is a unique situation different than any other part of the State of Washington.

The HCP document has Chapter 6 "Alternatives to the Habitat Conservation Plan". This chapter should include an additional alternative that excludes the Lake Washington Basin and the Duwamish River basin from the HCP. This exclusion is necessary due to the intricacies and apparent non-applicable issues covered within the HCP. The boundaries of the Lake Washington Ship Federal Canal are unique, with artificial development, Federal Government control and significant economic impact to the State of Washington and City of Seattle.

Due to the limited amount of time to review the HCP document and lack of review of the EIS that is supposed to correspond to the HCP a significant amount of questions still exist. Additional questions will surface as we delve further into the HCP document.

I respectfully submit that:

1. The preferred plan within the alternatives **NOT be implemented.**

2. An additional plan that excludes the Lake Washington Waterway, Lake Union Waterway and Salmon Bay Waterway be added to the HCP.
3. A delay until March 1 is made so further study of the existing plans and support documents may be addressed, thereby allowing greater input and review of what critical issues are.

Respectfully

Charles Draper III
Salmon Bay Marina
President Association of Independent Moorages (AIM)

Attachments:
2014-Nov12 Toba-DNR Ltr KIUnionLkWn Waterway
1907 June 4 LkUnion declared Waterway by State
1908 Feb 15 – Lk Wn Declared Waterway by State
1908 60th Congress – Canal a federal Reservation
1890-1920CongressionalActs-LkWnShipCanal
1894CongressAct53rd-enlargeWtrWayIntoShipCanal
1896Apr2CaptFiskBrigGenCraighill-EntireROW
1894Nov6-ROWBoundaries-SecWarIncludeLocks
1909 April 28 – US title to ROW Sole & Exclusive
1910Dec6DeptOfJusticeTitleVestInROW
2014SeaTim-FilterWtrCohoStdyRunoff
2007-23-Smallmouth Bass and Largemouth Bass
fish run3

Salmon Bay Marina

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November 12, 2014

Mr. Derrick Toba
Assistant Division Manager
Washington State Dept. Natural Resources
950 Farman Ave. N.
Enumclaw Wa 98022

Re: Lake Union and Lake Washington declared waterways 1907 and 1908.

Dear Mr. Toba

Thank you for reviewing potential policies that the State of Washington DNR anticipates placing into effect concerning the HCP. I recognize that the DNR has been working on a HCP for many years however it appears the DNR does not recognize that the Lake Washington Federal Ship Canal is a unique artificially created body of water unlike any in the State of Washington. It cannot be considered the same as all other Aquatic lands within the State of Washington due to the jurisdiction, control and guidance required by the Federal Government, State of Washington Land Commission, State of Washington Legislature and Court rulings at its inception.

In the meeting of November 5, 2014 several issues arose concerning permitted aquatic lands and leased aquatic lands.

People employed by the State of Washington DNR, have been given direction from within their agency. Some of that direction appears to be in conflict with historical documents, legislative intent and legal jurisdiction. That inaccurate information unfortunately results in questionable decisions and questionable direction by the DNR.

Managers of the DNR should be made aware of some of the historical documents that will assist them in making appropriate decisions. Hopefully, those decisions will not hide the truth or attempt to hide past errors but will bring to light the intent of past laws, legislation, and the Federal Governments involvement and responsibility.

You and Mr. Palazzi appeared genuinely interested in choosing a direction that included accurate science and historical intent of Washington legislature and Federal involvement that was asked for by the State of Washington and its citizens. It appears that you are open to explore a direction that would not only be based on ecological issues but include quantitative assessments of “degrees of problem” and if, in fact, some of the potential policies that are currently being developed make economic sense. Many of the attendees in the meeting, myself included, reflected a concern that the State of Washington did not take into consideration the big picture of what is actually “harming the environment” and to what degree that harm is actually making a difference, and if the economic return of trying to eliminate the minute amount of “environmental harm” vs the overall good that could result from the “minute environmental harm”.

In the case of pollution or contamination, although we can all agree that pollution is not good, we should also agree that there are degrees of pollution that are acceptable. For example Seattle has polluted all of the waters within its boundaries since it added fluoride to its drinking water.

Mr. Herbert of Herbert Research (Bellevue Wa.) has indicated that the Recreational Moorage Industry (excluding the working boats, fishing boats etc) within the Lake Washington Federal Ship Canal (Shilshole to Webster Point) had an annual economic impact of over One Billion Dollars ($1,000,0000,000.00). This economic impact is not paid directly to Marinas. A very miniscule part goes to the marinas. Most of the economic impact goes to the People of the State of Washington. That economic engine disappears if the marinas disappear.

My impression received from you during our recent meeting is that you are interested in revealing what is true and not what you have been told.

With that, as I said I would, I am attaching some of the documents that are in conflict with the Policy of the DNR, or that you had indicated you questioned in disbelief.

With this letter I include:

1. Proof from the State of Washington Land Commission dated 1907 declaring Lake Union as a Platted Waterway (June 4, 1907)
2. Proof from the State of Washington Land Commission dated 1907 declaring Lake Washington as a Platted Waterway. (Feb 15, 1908)
3. Proof from the State of Washington Legislature that Platted waterways that connect other waterways from Salt water cannot be vacated or changed. (Session Laws Chap 255 of 1927 pg.259 “Waters accepted by Act”)

Item 3 above would include all the waterways from the Cedar River through the Ship Canal to Salt Water and those street ends that were included with the original plat of the Lake Washington Federal Ship Canal.

I have significant other documentation about the unique character of the aquatic lands created by the Act of Congress in 1894 (The Lake Washington Federal Ship Canal) and why the actions were taken, including directions from the US War Department and Washington State Supreme Court rulings.

There has been significant misunderstanding of the Lake Washington Federal Ship Canal design and construction and the intent of the Federal Government as well as that of the State of Washington.

I will forward additional information to Mr. Palazzi concerning creosote in the environment and “fish studies”, so he too can incorporate those studies for consideration including the benefit or detrimental economic effects that will result from policies being forged by the DNR.

I am interested to review the studies received from the economists about how the proposed policies for the HCP and requirements of the proposed DNR permits/ lease requirements will affect the economics of the Ship Canal Area and not just one property.

Mr. Palazzi indicated that the EIS will have the economic impact for the HCP which he will be forwarding to Margie Freeman for distribution to the group.

Is this economic impact also being used for evaluation of Permits / leases with the DNR?

I realize that the DNR permits/ leases are contractual between the State and adjacent property owner, however if the State is promoting the permits / leases and overall benefit to the people of the State of Washington then some type of economic study must have been evaluated in order to incorporate the various restrictions being adopted in today's "boiler plate" lease/ permit.

Hopefully the economists' results were not pre-ordained by whoever directed the study to be completed.

The copy of the "boiler plate" lease / permit that I received a few months ago from the DNR appears to be very onerous. The "boiler plate" was obviously made prior to the HCP in that the HCP has not been adopted and the "boiler plate" lease / permit is currently in circulation. Therefore there must be another economic study concerning the requirements of the "boiler plate" lease / permit that addresses what is being requested of current permit / lease holders.

Would you direct me to where I may be able to review those economic studies so I can further understand how they may be applied to the Lake Washington Ship Canal?

As I indicated earlier, I have a significant library on the Construction of the Federal Lake Washington Ship Canal going back to the mid 1800's. I may be able to help answer or provide information concerning how and why certain directions were take on behalf of the citizens of King County.

Respectfully

Charles Draper III
VP / Sec
Draper Machine Works Inc. dba Salmon Bay Marina.

Encl.3

FILTERED RUNOFF LOWERS THREAT TO COHO RUNS, STUDY SUGGESTS

SALMON | Research being conducted by WSU and federal agencies offers a promising solution to stormwater pollution.

By PHUONG LE
The Associated Press

POULSBO, Kitsap County — Just hours into the experiment, the prognosis was grim for salmon that had been submerged in rain runoff collected from one of Seattle's busiest highways. One by one, the fish were removed from a tank filled with coffee-colored water and inspected: They were rigid. Their typically red gills were gray.

"He's way dead," David Baldwin, a research zoologist with the National Oceanic and Atmospheric Administration's (NOAA) Northwest Fisheries Science Center, declared at the four-hour mark.

This was the fate of coho exposed to the everyday toxic brew of dirt, metals, oil and other gunk that washes off highway pavement after rains, directly into Puget Sound.

When that runoff was filtered through a simple mixture of gravel, sand and compost, however, the outlook was much brighter. Salmon exposed to treated water were healthy and responsive, even after

See > FISH, B6

ps newstips@seattletimes.com

< Fish
FROM B1

STUDY SUGGESTS RUNOFF SOLUTION

Filtered water boosts salmon survival

TED S. WARREN / THE ASSOCIATED PRESS

Julann Spromberg, left, and Jenifer McIntyre pour filtered runoff into a tank before live salmon are added.

24 hours.

The research being conducted by scientists with NOAA, Washington State University and the U.S. Fish and Wildlife Service offers a promising solution to stormwater pollution, a major problem for Puget Sound and other streams and lakes in the nation.

With pollution from industrial pipes closely regulated, cities and states are more often tackling stormwater runoff that results from everyday activities: oils from leaky cars, pesticides from lawns and other pollutants that wash off roads and sidewalks and into streams and lakes.

Across the country, there's been an aggressive push for rain gardens and other green techniques that rely on vegetation, soil or natural elements to slow and filter stormwater.

"The results are pretty stark," said Jenifer McIntyre, a researcher with WSU who is part of the salmon experiment. "So far, what we're seeing is that, absolutely, things like rain gardens are going to be part of the solution."

Washington state now requires municipalities to adopt such green techniques to get a stormwater permit under the Clean Water Act after a conservation group sued.

A campaign is trying to get 12,000 rain gardens in Puget Sound to help reduce water pollution. Portland, Philadelphia, Kansas City, Mo., and other cities have embraced similar green technologies.

"It's really promising, showing that rain gardens and bio-filtration are removing the pollutants that are killing the salmon," said Chris Wilke, with Puget Soundkeeper Alliance.

More than a decade ago, researchers began noticing adult coho dying before they could spawn in urban creeks in Seattle. Monitoring over eight years, they observed fish consistently dying at high rates in Longfellow Creek and other urban creeks compared with a stream that wasn't in an urban area.

The salmon swam erratically near the water's surface, appeared disoriented and displayed other neurological symptoms. Disease or typical water issues such as temperature or dissolved oxygen didn't appear to be a problem.

The evidence pointed to one or more chemical contaminants, most likely carried into urban streams through stormwater runoff, according to a study by NOAA and others.

The scientists are still seeking the underlying cause of death: what contaminant or mixture of contaminants in that runoff is harmful to salmon.

"There used to be coho salmon runs all through Puget Sound and creeks. There haven't been for decades," said Julann Spromberg, a toxicologist working for NOAA Fisheries. "They're coming back, and they're dying. We need to figure out what's going on."

"A silver bullet would be nice, but it doesn't appear to exist," she added.

In an experiment two years ago, the scientists exposed adult coho to artificial cocktails of metals and petroleum hydrocarbons in runoff and found that they didn't kill the fish.

Actual runoff was another matter.

One morning at Grovers Creek Hatchery in Poulsbo, Spromberg and her colleagues ran an experiment to find out how fish respond to stormwater runoff and runoff that had been treated.

About a dozen salmon were netted and placed in 2-foot-long PVC tubes and then submerged into one of three holding tanks.

One tank was filled with runoff collected from a downspout off Highway 520 in Seattle. In a second tank, that same runoff had been seeped through a mulch layer and into 55-gallon drums filled with gravel, sand and compost to simulate a rain garden. A third tank with well water was used as a control.

Over the next few weeks, the scientists repeated the experiment two additional times. Each time, salmon in the dirty water died while the others survived.

In the next phase of the research, they plan to expose coho embryos to find out how stormwater runoff affects fish development.

"People don't understand necessarily how all those tiny, little actions can make a combined effect — tires worn down, exhaust from my car. It's not something that people are thinking about on a daily basis," McIntyre said.

SCHNITZER STEEL INDUSTRIES, INC.

TACOMA

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U.S. FISH & WILDLIFE SERVICE
RECD
DEC 0 8 2014
ACTION
RESERVED

December 4, 2014

Tim Romanski
U.S. Fish and Wildlife Service
510 Desmond Drive SE, Suite 102
Lacey, Washington 98503

(Submitted via email: WFWOComments@fws.gov)

Subject: Schnitzer Steel Industries, Inc. Request for Review Extension on the WDNR Aquatic Lands HCP DEIS

Dear Mr. Romanski:

Schnitzer Steel Industries, Inc. ("Schnitzer") is submitting this request for a review extension on the above- referenced Draft Aquatic Lands Habitat Conservation Plan (HCP) dated August 2014. In its comments below, Schnitzer presents a few specific issues of concern regarding the current draft HCP and formally requests that the review period be extended for 60 days.

Schnitzer is the leading metals recycler in Washington State. Schnitzer is currently engaged in recycling operations at eight Washington facilities, two of which are located on waterways with port facilities. Schnitzer's Washington operations recycle hundreds of thousands of tons of scrap metal each year. Schnitzer's recycling activities provide significant benefits to the citizens of Washington as scrap metal is diverted from being disposed in landfills or illegal dump sites, and is recycled for beneficial use in making new products. Scrap metal recycling provides additional environmental benefits due to substantially reduced raw material and energy requirements when compared to producing steel products from iron ore. Schnitzer's scrap metal recycling activities reduce waste disposal, raw material mining, and greenhouse gas emissions associated with both mining and steel production processes. Schnitzer is concerned about the several items in the HCP, including the operating conservation program. Without additional revision and clarification, these requirements could impede our ability to provide basic metal recycling activities and diminish our ability to reduce raw material use.

The comments below are based on our initial review of the Draft HCP, which has necessarily been preliminary given the limited time the HCP has been available. We feel that sufficient time has not been allotted to allow for a critical review of this important document. Schnitzer's concerns are shared by many other Washington businesses, including several colleagues within the metals recycling industry.

DNR has stated that it developed the draft HCP to ensure that their objectives are met without risk of violating the Endangered Species Act (ESA) or resulting in an unlawful take of threatened and endangered species. The Draft HCP contains proposed

conservation measures and standards related to the operation of marinas, shipyards, ports, and marine terminals on lands leased from the State of Washington. The HCP lists three goals: 1) avoid or minimize effects on listed species and their habitats, 2) identify and protect habitats that are important to listed species, and 3) improve and restore habitat quality to compensate for unavoidable effects of listed activities. The objectives associated with each goal would be met through the operating conservation program, which has four components: 1) conservation measures, 2) standards, 3) programmatic measures, and 4) management practices. Under the currently proposed draft of the HCP, DNR would greatly increase the requirements for project proponents to restore and improve the overall quality of habitat that supports covered species on state-owned aquatic lands. This authority would apply to all new and existing activities and would include explicit requirements, conditions, and timelines for implementation (e.g., surveys, biological evaluations, and permit applications). For existing activities, DNR would require a project to meet compliance standards defined in the HCP prior to granting reauthorization. This proposed HCP requirement far exceeds the current authorities of the National Marine Fisheries Service and the U.S. Fish and Wildlife Service for habitat restoration under the ESA due to its application to existing structures and activities. Potential issues with the operating conservation program include:

- **Conservation Measures: Activity specific conservation measures and practices to avoid and minimize direct and indirect effects on the species and habitats covered under the HCP** – Under the HCP portions of some piers and elevated docks that are above the nearshore or littoral area must have unobstructed grating over 100% of their surface area. This is especially problematic for our port facility in Tacoma because it's contrary to the requirements of our NPDES permit that requires all stormwater to be managed on site and treated prior to discharge. The impacts and interactions between the HCP and other existing regulatory requirements have not been fully considered and must be evaluated further.

- **Standards: Standards, which apply to all uses of state-owned aquatic lands, to compensate for unavoidable impacts from authorized uses**

    - Artificial night lighting on and from overwater structures must be minimized by focusing on dock surface. This is not possible for ship loading and or other permitted night time operations and conflicts with the above requirement for grating to allow ambient light to reach the water surface during daylight hours. This night lighting standard creates a potentially serious risk to the safety of workers performing such night time operations.

    - Bank Armoring – New bulkheads or hard bank armoring are not allowed on state owned aquatic lands except under extraordinary circumstances. Existing bank armoring must be removed or replaced with softer materials unless approved by DNR. Compensatory mitigation will be required if continued use of bank armoring is authorized. Our Tacoma facility is an active port. Maintaining the integrity of the bulkheads is critical to the operation of the site and the safety of workers. Removal of the existing bulkhead or unmerited mitigation measures could severely affect the viability of the business at its current location.

- **Management Standards – Agency business management practices that contribute to meeting the goals and objectives of the HCP –** This element is not well defined in the HCP and it is not possible to determine if and how it would affect our facilities.

In addition, there is language in the HCP that states that DNR will conduct inspections of facilities to determine if compliance is achieved. However, the frequency of the inspections is not stated, the process by which the facility is evaluated is not clearly identified, and the consequences range from "appropriate remedies" to "legal action." However there are no guidelines or boundaries outlining compliance requirements or the range of non-compliance consequences. The magnitude and scope of potential mitigation requirements for existing structures and future facility alterations is also not appropriately defined in the draft HCP.

Thank you for the opportunity to provide comments on the subject draft HCP and for considering our request for extension. Schnitzer strongly supports environmental protection; however, given the broad scope and potential significant impacts of the HCP, we believe that insufficient time has been provided for review and comments, and there are too many unanswered questions regarding implementation and application of the draft HCP. A review extension for 60 days is thereby requested to allow us and other valued stakeholders to carefully review this important document and work with DNR to provide useful and significant comments in order to create a document that is consistent with other applicable regulations, and ensures that the people of Washington benefit from the use of aquatic lands while also ensuring environmental protection of the state's aquatic resources.

If you have any questions or concerns, please do not hesitate to contact me at (253) 404-6686.

Sincerely,
Schnitzer Steel Industries, Inc.

Bryan Graham, R.G., L.Hg.
Environmental Manager

cc: **Scott Anderson, NOAA Fisheries**

WFWOComments, FW1 <wfwocomments@fws.gov>

WDNR Aquatic Lands HCP DEIS

1 message

Susan North <susann@seattleaudubon.org> Thu, Dec 4, 2014 at 3:58 PM
To: "WFWOComments@fws.gov" <WFWOComments@fws.gov>

Good afternoon,

Please accept the attached comments in response to the draft DNR Aquatic Lands HCP.

Thank you very much and please feel free to be in touch with any questions.

Best regards,

Susan North

Conservation Manager

Seattle Audubon Society

Seattle Audubon Society_Comments on DNR Aquatic HCP.pdf
278K

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December 4, 2014

Re: Washington Department of Natural Resources draft Aquatic Lands Habitat Conservation Plan Draft Environmental Impact Statement

Dear Mr. Romanski, Mr. Anderson, Mr. Goldmark, and Ms. Amiotte,

Thank you for the opportunity to comment on the draft Washington Department of Natural Resources (DNR) Aquatic Lands Habitat Conservation Plan (HCP), a land management document jointly prepared by the National Oceanic and Atmospheric Administration (NOAA) and the United States Fish and Wildlife Service (USFWS) (hereafter, wildlife agencies), and DNR.

The goal of the Aquatic Lands HCP is to provide a way for DNR to help protect and recover at-risk native aquatic species on 2.6 million acres of state-owned lands in marine and fresh waters of the state. Specifically the plan is designed to protect 29 sensitive, threatened, and endangered species through management of lands supporting these species, including DNR authorized public and private uses.

Positive Achievements of the Aquatic Lands HCP

We would like to take this opportunity to commend those involved for including beneficial measures that previously have not been provided on aquatic lands under the authority of DNR. Example of such beneficial measures include:

- DNR has taken a logical and systematic approach to developing the HCP. While we have comments on some of the specific items, overall the plan has many protective components.
- Important standards are included, such as addressing artificial lighting, treated wood, pesticide use, shoreline armor, and derelict structures.

Use of Best Available Information

Unfortunately, much information provided in the draft Aquatic Lands HCP is already out of date, particularly with regards to bird distributions. Most information is from a 2007 compendium (DNR 2007), meaning the majority of these documents are pre-2007, with many dated from the 1990's and earlier. Even some of the major work pre-2007 work is not included. However, much information on species' status has been improved and updated since 2006. For example, the Seattle Audubon Society initiated the Puget Sound Seabird Survey (PSSS) in 2006, and has now collected a wealth of information on the distribution and abundance of seabirds in the Puget Sound. Another major study, the Puget Sound Ambient Monitoring Program (PSAMP) winter aerial survey, does not seem to be included. Therefore, habitat usage calculations provided in the HCP are flawed, causing any modeled calculations on impacts to be grossly inaccurate. For example, Harlequin Duck (*Histrionicus histrionicus*) is listed as wintering on the coast, strait, and north Puget Sound, but there is no mention of occurrences in central and south Puget Sound, both of which have been documented in PSSS and PSAMP surveys (Nysewander et al. 2005; Everson et al. 2010).

Several species have been excluded from consideration for coverage due to incorrect distributional information. We strongly encourage the wildlife agencies to consider using current distribution and abundance data provided by the PSAMP and PSSS. The Seattle Audubon Society would be happy to provide PSSS data upon request. We also strongly encourage the use of all

data (historical and current) in evaluation of species considered for coverage under the HCP. This is necessary to provide an indication of population trends for each species. Without a thorough analysis of trends, there is a danger of using only recent or short-term data as a baseline, which may not accurately reflect a species' trajectory and conservation status. At the end of this comment letter, we provide a list of additional species for consideration, as well as a list of updated citations that appear to be missing from the HCP.

Duration, Implementation, and Compliance

We strongly disagree with the potential issuance of an Incidental Take Permit for an HCP with a 50-year duration. There is simply too much that remains unknown to move forward with such a long permit period. This is particularly true with regards to effects related to climate change. The approach of issuing such a long permit is outdated, and lessons learned from HCPs with similar lengths have shown that adaptive management in response to new circumstances is difficult to incorporate due to the "no surprises" clause.

We recommend implementing planning measures that will help address new and changing information over time. Elsewhere, USFWS has implemented an approach known as "rough-step" whereby take and impacts associated with take are issued in segments to be accompanied by an equivalent segment of conservation, as agreed upon and required by the HCP. Should the agreed upon conservation measures go unimplemented in step with the approved take and impacts associated with take, then the permitted activities become suspended. An example of such an HCP is the Coachella Valley Multiple Species Habitat Conservation Plan in southern California. Furthermore, take and impacts associated with take must be monitored in a cumulative fashion over time to ensure that DNR does not exceed the authorized levels permitted by the wildlife agencies. Triggers must be put in place to prevent take and impacts beyond what the wildlife agencies authorize. The wildlife agencies are

also required to find that the applicant is likely to implement the permit (section 10(a)(2)(B)(v)). We would like to take this opportunity to point out that DNR, as an HCP permittee, has failed to implement both the Forest Practices HCP (e.g., Clean Water Act milestones remain unaddressed) and the State Trust Lands HCP. Important aspects of the conservation agreed to by DNR in the State Trust Lands HCP have remained unimplemented for 17 years (e.g., the development of a Long-term Conservation Strategy for Marbled Murrelet (*Brachyramphus marmoratus*)). Furthermore, DNR has willfully exceeded take and habitat impacts authorized through the State Trust Lands HCP, specifically related to Marbled Murrelet. How can the wildlife agencies reasonably conclude that DNR will implement the Aquatic Lands HCP, when it is currently failing to implement both the State Trust Lands HCP and the Forest Practices HCP?

Though not a complete solution, rough-step and triggers are tools that can be used by the wildlife agencies in the design of the HCP to help prevent a lack of implementation. Finally, we remind the wildlife agencies and DNR that the "no surprises" clause is only valid if the permittee (DNR) is implementing the HCP. This is stated very plainly in the HCP Handbook (Habitat Conservation Planning and Incidental Take Permit Processing Handbook; USFWS and NMFS 1996, p. 3-29). Thus, the wildlife agencies should recognize their obligation to enforce implementation of the Aquatic Lands HCP in the future, including adding new conservation measures and suspending the approved permit, should DNR fail to implement the HCP.

Required Funding

Section 10(a)(2)(B) of the Endangered Species Act requires the specific criteria to be met before USFWS or the National Marine Fisheries Service (NMFS) may issue an Incidental Take Permit for an HCP. If these criteria are

not met and the HCP and supporting information are not statutorily complete, the permit cannot be issued.

According Issuance Criterion No. 3: The applicant will ensure that adequate funding for the HCP and procedures to deal with unforeseen circumstances will be provided. "The Services must ensure that funding sources and levels proposed by the applicant are reliable and will meet the purposes of the HCP, and that measures to deal with unforeseen circumstances are adequately addressed. Without such findings, the section 10 permit cannot be issued." (USFWS and NMFS 1996, p. 7-4).

This obligation has been confirmed in Federal court. "The permittee must explicitly guarantee that it will fund an HCP" (*National Wildlife Federation v. Babbitt*, 128 F. Supp. 2d, 1274, 1275 (E.D. Cal. 2000). To adequately ensure funding, the applicant must independently guarantee funding for the duration of the permit (*Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976 (9th Cir. 1985); *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987); *Natomas I*, 128 F. Supp. 2d, p. 1294-95; *Sierra Club v. Babbitt*, 15 F. Supp. 2d 1274; Bartel, 470 F. Supp. 2d at 1155-57). Adequacy of funding must depend on more than unenforceable promises and the best intentions of the permittee or the unenforceable commitments of third parties; adequacy must be based on concrete and enforceable guarantees that are explicitly incorporated into the Incidental Take Permit, HCP, or Implementing Agreement (*National Wildlife Federation v. Norton* ("Metro Air Park"), 306 F. Supp. 2d 920 (E.D. Cal. 2004); *National Wildlife Federation v. Norton* ("Natomas II"), 2005 WL 2175874 (E.D. Cal 2005); *Loggerhead Turtle v. County Council of Volusia County*, Fl., 120 F. Supp. 2d. 1005 (M.D. Fl. 2000)). Furthermore, the inherent authority of the wildlife agencies to revoke an Incidental Take Permit does not relieve these agencies from ensuring "adequate funding" in the Incidental Take Permit or the Implementing Agreement.

Contrary to the legal requirements and court history underlining the importance of guaranteed funding for an HCP, as indicated by the numerous citations above, section 5.3.2 of the Aquatic Lands HCP states that funding for all programs is to be provided by the Washington State Legislature. Further, this is despite funds being received from leases going to the Resource Management Cost Account (RMCA) and the Aquatic Lands Enhancement Account (ALEA). Additionally, the section of the HCP describing the Adaptive Management and Monitoring Program further states, "DNR will maintain a sustainable level of funding for Adaptive Management that reflects the elasticity of Washington State's biennial budget. Washington DNR will carefully evaluate design costs over the course of the experiment, as well as potential costs of implementation before any research commitments are made." (DNR 2014, p. F-3).

HCP funding that is dependent upon awards from a State Legislature is far from assured. Under Issuance Criterion No. 3, the wildlife agencies have a burden to prove that funding awarded by the Washington State Legislature is "reliable and will meet the purposes of the HCP." This assurance cannot be provided under these circumstances. Indeed, DNR already has difficulty acquiring funding for the Forest Practices HCP, and thus far has been unable to secure stable long-term funding for the adaptive management program that is critical component of that HCP. Politics change over time, and other funding needs in the State may often trump DNR's ability to gain funding from the Legislature (for example, the Washington Supreme Court's recent *McCleary* decision has created an enormous need for funding of education, which has taken top priority in the State). In short, the funding plan outline in the Aquatic Lands HCP is an area of significant uncertainty, with great potential to undermine the effectiveness of this HCP. Unless DNR has adequate funds for implementation of this HCP, including adaptive management and unforeseen circumstances, it should not be protected from violations of the Endangered Species Act. While the wildlife agencies have

the authority to suspend the section 10 permit if DNR fails to fund its conservation, mitigation, and monitoring programs, we emphasize that this authority does not displace the requirement to ensure adequate funding under the law. This concern must be remedied.

We offer one option for a solution based upon the Salmon Recovery Funding Board (SRFB) model, which designates 10 percent of all monies received to be dedicated to monitoring, and distributes funding awarded to the State by NOAA through the Pacific Coast Salmon Recovery Fund (PCSRF). The primary goal of PCSRF is to fund priority salmon recovery projects across the state, but as a condition of the grant to the state (i.e., a clause is written into the grant award contract), 10 percent of the total funds must go to monitoring. Note that the requirement is that 10 percent of the total grant is set aside for monitoring, not 10 percent of each sub-award. This allows the SRFB to consider funding larger-scale and long-term monitoring programs, as opposed to allocating funding to individual projects separately. If such a model were to be used to fund the Aquatic Lands HCP, it would provide assurances that various programs would be implemented, including conservation, mitigation, monitoring, adaptive management, and unforeseen circumstances.

Avoidance, Minimization, and Mitigation

Because the Incidental Take Permit will allow otherwise illegal harm to an imperiled species, section 10 of the ESA sets forth a rigorous and detailed permit application process that the applicant and the wildlife agencies must follow prior to permit issuance. Before issuing the permit, the wildlife agencies must find that all the Issuance Criteria will be met, including Issuance Criterion No. 2: the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such (incidental) taking. *See* 50 C.F.R. § 17.32; 50 C.F.R. § 222.307.

We are concerned that the Aquatic Lands HCP emphasizes minimization rather than avoidance of the need to construct facilities and conduct activities. We recommend that a strengthening of avoidance language be included. Additionally, determination of the required mitigation appears to be largely discretionary and to be decided at a later date. This is completely at odds with Issuance Criterion No. 2. For example the HCP states, "The elements of the operating conservation program required under this habitat conservation plan will apply in all instances for which they are deemed by Washington DNR to be the most protective measure and the best option for achieving the plan's goals." (DNR 2014, p. 5-5). Further, "Washington DNR will require that project proponents provide compensatory mitigation for unavoidable impacts. The exact nature of such compensatory mitigation will be determined individually for each authorization." (DNR 2014, p. 5-5). These points make clear that the intention is for DNR, not the wildlife agencies, to determine when the protections of the HCP apply, and what those protections are on a site-specific basis.

As a second example of improper discretion attributed to DNR, the HCP states, "Dredging, including sand and gravel mining, will not be allowed on state-owned aquatic lands except where Washington DNR determines that it is required for navigation, trade and commerce, flood control, maintenance of water intakes, or other public health and safety purposes. " (DNR 2014, p. 5-24). These supposed protections provide no actual specific guarantee of habitat protection or improvement. This is concerning because the authorized take is certain to occur, while the required mitigation is uncertain and discretionary. This aspect of the HCP places significant and undo risk upon on the covered species. Section 10 of the ESA requires mitigation measures to be specific, concrete, and enforceable. Additionally, by empowering DNR to implement mitigation at its discretion, this HCP violates ESA section 10(c), which requires public comment on all aspects of an HCP. If mitigation measures are to be determined by DNR at a later permitting proceeding, then

the public cannot comment on the adequacy of the mitigation measures now, at the time of HCP development.

Monitoring

The Aquatic Lands HCP requires extensive monitoring. This includes effectiveness monitoring, compliance monitoring, and status monitoring. However, the biggest uncertainty is the funding of these ambitious ideas, as described above. Additionally, substituting physical, vegetation, and invertebrate indicators for actual monitoring of the covered species is entirely inappropriate. Here we describe a short list of concerns related to the monitoring plans identified in the HCP (DNR 2014).

- Table 3-1 in Appendix F: Regarding Exotic Species Invasion, please add WDFW Ballast Water Work Group and the Washington Invasive Species Council.

- Page F-17: "Washington DNR has focused its baseline sampling on parameters that serve as good indicators for detecting habitat change associated with the specified activities: bathymetry, sediment characteristics (grain size, sorting), aquatic vegetation density and distribution, and benthic invertebrate assemblages. Effects to aquatic vegetation and benthic habitat received the highest priority for systematic observation for baseline, reference and targeted comparative studies."

  Valid indicators must be robust. According to the Washington Academy of Science, in reviewing the Dashboard Indicators assigned by the Puget Sound Partnership, "An effective indicator set should comprehensively but concisely represent current understanding of the condition and key functional processes of the focal system. Such an

understanding can best be formed and expressed using a conceptual framework that includes the system's components and their dynamical interactions. This framework can guide the selection of indicators so that every key ecosystem attribute is represented by an indicator" (Washington Academy of Sciences 2012). While some conceptual (yet incomplete) models are presented in Appendix F, the selected indicators do not represent the key ecosystem attributes. For example, there is no indicator for any upper trophic level organisms, many of which are included in the HCP, such as killer whales (*Orcinus orca*) and birds. It is inappropriate to request exemption from take of endangered species by assuming others will do the monitoring of these species.

- Page F-25: "The habitat conservation plan uses habitat monitoring as a substitute for species counts and will quantify the impact of covered activities as the amount of each species' habitat affected." If there is adequate science that specifies the required habitat for specific species, this might be adequate. However, our knowledge of the effects of drivers and pressures is inadequate to predict the status of these covered species by habitat composition. Instead, direct monitoring of the covered species must be done. Unless covered species are monitored, the HCP in no way assures protection of the covered species.

- Fundamental changes are taking place in Puget Sound due to the introduction of tunicates, exotic bivalves and other exotic species. Any ecosystem model needs to include these invaders and their effects on aquatic ecosystems.

- Missing from all discussions of ecosystem variables are data from the lowest trophic levels: phytoplankton and zooplankton. Changes in their species composition, abundance and seasonal timing are

fundamental to the success of filter feeders and thus higher trophic levels. DNR has some responsibility in ensuring that these variables be monitored.

Climate Change

Climate change is occurring now and is already affecting near-shore waters. One of the most observable changes is that of the summer range of neotropical and resident terrestrial bird species. Changes in water temperature, and the changes induced by the El Nino Southern Oscillation (ENSO) and North Pacific Oscillation (NPO) are also observable. There are already trajectories established for many climate variables. While there is reference to climate change impacts, the proposed plan does not incorporate consideration of certain expected changes, such as sea level rise, ocean acidification, more intense precipitation events, and increased temperature, into the conditions listed in the HCP (DNR 2014, Chapter 5). Much more consideration of potential climate change impacts should be incorporated, including a margin of safety in the assessment model.

A probable target date of 2050 is proposed for when preventive and mitigation measures will no longer be effective in arresting climate change. In this context, an HCP under which no mitigation responses would occur is entirely in appropriate, particularly for an HCP addressing aquatic activities and species. Adaptive management must be employed, in a continuous process to be initiated now. Again, the effects associated with climate change must be addressed and adapted to on a much shorter timeframe than allowed by a 50-year HCP permit. Even 25 years does not allow for responses to currently changing conditions. The most important circumstances are already foreseen. To be at all workable and to conform the greatest advantage to adaptive management, a 10-year span allowing for updates and changed regulations is more realistic.

Shipping

The HCP does not address shipping or oil transport. Shipping impacts to aquatic lands should be considered, including the scouring of the seafloor from large vessels, especially the ones that use the Cherry Point Aquatic Reserve. This applies to both prop wash and to the effects of anchoring. New moorings for ships and barges should be restricted to areas that have the least impact to bedlands from the cumulative impacts of scouring and shading. The report should anticipate additional nearshore shipping traffic with the addition of oil transport of Bakken crude oil, Tar Sands crude oil, and coal. In Cherry Point, only the immediate area around the docks are excluded from the Aquatic Reserve, so much of the shipping, servicing, and waiting activities will occur in the Reserve. The report is also silent on the introduction of invasive species from the discharge of ship ballast. The HCP should require that no ballast water be discharged in any state waters.

Marinas

The report makes no major comments on additional oil-spill prevention from marinas on leased lands. There should be a requirement that all boats fueled at these marinas be equipped (retrofitted, if necessary) with adapters that prevent over-filling tanks, or at least temporary overflow devices.

General Comments

The following are comments concerning structures suggested in the draft HCP (DNR 2014):

- Page 5-55: “Stakeholder groups will consist of representatives from user groups (such as marina operators and shellfish growers), tribal representatives, and regional planning entities (such as the Puget Sound Nearshore Restoration Project and the Salmon Recovery

Fund).” This is an inadequate list of stakeholder representatives and reflects intent to incorporate user groups that hold leases. This list should also include non-governmental organizations (NGOs), Aquatic Reserve Citizen Stewardship Committees, birders, and aquatic resource users.

- Page 5-57: states the measures to be taken by DNR in the case that a leaseholder is not in compliance. This list should include actions taken under similar circumstances by the Washington Department of Ecology, which requires mitigation of impacts caused by lack of compliance, or simply the revoking of a lease.

- Appendix F, Figure 1-1: does not represent Adaptive Management. According to a document by the Department of the Interior (Williams et al. 2009), adaptive management as an example of structured decision-making should include the following items:
    - Engaging the relevant stakeholders in the decision-making process
    - Identifying the problem to be addressed
    - Specifying objectives and tradeoffs that capture the values of stakeholders
    - Identifying the range of decision alternatives from which actions are to be selected
    - Specifying assumptions about resource structures and functions
    - Projecting the consequences of alternative actions
    - Identifying key uncertainties
    - Measuring risk tolerance for potential consequences of decisions
    - Accounting for future impacts of present decisions

- Accounting for legal guidelines and constraints

- Page F-2: "Although Washington DNR is the proprietary manager of state-owned aquatic lands, there are a number of governmental entities, tribes, businesses and individuals who regulate or use the land or associated biological communities. Therefore, DNR's Adaptive Management Program organizational structure will include an Advisory Team of invited individuals selected from Tribal governments, industry and state and federal agencies that have expertise to serve in an advisory role in the designing, implementing, and integrating adaptive management."

  This excludes many of the stakeholders of public waters and lands. The advisory team should reflect the people with interest in the safeguarding of these lands and the species to be protected. This should include NGOs and multiple other user groups.

- Page F-3: "While adaptive management has helped make decision-making easier in the face of uncertainty, this approach has been criticized as weak from a conflict resolution perspective (Johnson 1999). Washington DNR will address this weakness through the use of a conflict resolution process led by a qualified and independent facilitator."

  This implies that the goal is to reach a consensus by mutual concessions. This is not a method to protect species and their habitats. The precautionary principle should always be used. Biology is not based upon opinion. Rather, it provides absolutes that cannot be mediated by a facilitator.

- Pages F-4–F-5: The goals listed are inadequate in that they do not address many concerning threats, such as prevention of invasive

species introductions, adaptation to climate change, threats of oil spills from both marinas and shipping, and many more threats.

- Appendix F, Section 2.2: Deals with the structure of those overseeing and designing the program. This structure lacks participation from NGOs, and other stakeholders.

- Section 2.2.3: Discusses the Scientific Review Committee. While the HCP states that those appointed will have no immediate connection with DNR, there is no assurance that the team will be objective. Such a committee would be better served if the Washington Academy of Sciences was responsible for either appointing or confirming the members. Additionally, all materials from this group should be subject to independent peer review.

Additional Unaddressed Issues of Concern

The HCP fails to address many pertinent issues, particularly in the context of a 50-year planning period. Examples include:

- Climate change
- Cumulative impacts
    - including those associated with adjacent areas
    - including those resulting from DNR management practices elsewhere (e.g. Marbled Murrelet impacts resulting from the State Trust Lands HCP, and other species impacts associated with the State Trust Lands HCP).
- How do the actions required of DNR meet the goals of the Marbled Murrelet Recovery Plan (USFWS 1997)?
- How does the Aquatic Lands HCP fit in with objectives of the Puget Sound Partnership and US Environmental Protection Agency for the

recovery of the Puget Sound, as opposed to maintaining the status quo?

- Why is there no acknowledgement of the Puget Sound Ecosystem Monitoring Program (PSEMP) and how the monitoring programs match up with the identified monitoring gaps and indicator identifications?

Additional Species Recommended for Coverage

Chapter 1 and Appendix B list the bird species being considered for coverage. The following birds should also be considered:

- **Western Grebe (*Aechmophorus occidentalis*), State Candidate**: Breeding was documented by Wahl (2005). Large decline in Puget Sound abundance. A partial reason for the creation of the Maury Island Aquatic Reserve was that 8 percent of Western Grebe population in Washington depended upon Quartermaster Harbor (DNR 2004; Cullinan 2001). Western Grebes have now declined significantly in the Puget Sound (Nysewander et al. 2005; Bower 2009; Everson et al. 2010).

- **Brandt's cormorant (*Phalacrocorax penicillatus*), State candidate**: This is a mostly resident species that is common along the outer coast, Strait of Juan de Fuca, and in north Puget Sound. It primarily feeds in the California Current and is susceptible to changes in conditions, such as El Nino (BirdWeb 2005). This makes this species extremely vulnerable to ecosystem changes associated with climate change. The population is also currently declining (Birdlife International 2012).

- **Common Murre (*Uria aalge*), State Candidate**: Extremely susceptible to oil spills. For example, the 1986 Apex oil spill caused

an estimated 8,978 birds to be killed, including 6,287 Common Murres (http://www.dfg.ca.gov/ospr/NRDA/apex-houston.aspx). Additionally, an estimated 3,740-19,559 Common Murres were killed as a result of the Tenyo Maru oil spill near the mouth of the Strait of Juan de Fuca (http://www.gc.noaa.gov/gc-rp/ten-rp2.htm).

- Appendix B states that Common Murre was excluded *because, "Species nests on cliff tops; five of the six murre colonies in Washington are located in marine sanctuaries offering a high level of protection."* The fact that these species use marine sanctuaries is irrelevant because they are completely dependent on the waters for feeding and resting. Additionally, nesting areas located in the sanctuaries provide little protection from activities away from the nests, while threats such as oil spills in adjacent areas are not lessened. Furthermore, the nesting areas are technically not in the sanctuaries, as they are located on cliffs outside the boundaries of the sanctuaries.

- **Eared Grebe (*Podiceps nigricollis*), State Candidate**: Appendix B states that there is no overlap with State lands. This is inaccurate, as indicated by the Seattle Audubon Society PSSS data. This is another example of the insufficiency of the biological dataset that has been considered in this HCP.

- **American White Pelican (*Pelecanus erythrorhynchos*), State Endangered**: Appendix B says this species was excluded due to lack of a Federal listing status and a lack of biological information. Again, current references provide much information related to this species' biology. For example, the Encyclopedia of Puget Sound contains a species account (http://www.eopugetsound.org/articles/american-white-pelican-pelecanus-erythrorhynchos) and BirdWeb

(www.birdweb.org). These references provide documentation of breeding in Eastern Washington, as well as documentation of non-breeding colonies using the State's lakes and rivers.

Missing References

Many significant references pertaining to the distribution of birds are not included, especially those references published in recent years. Below is a short list of missing references. This is not a comprehensive list. We strongly recommend additional literature searches to verify that the best available information standard is being met by the wildlife agencies.

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Bower, J.L. 2009. Changes in marine bird abundance in the Salish Sea. *Marine Ornithology* 37:9-17.

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Gaydos, J.K., and S.F. Pearson, 2011. Birds and mammals that depend on the Salish Sea: A compilation. Northwest Naturalist: 92:79–94.

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[USFWS] United States Fish and Wildlife Service. 1997. Recovery Plan for the Threatened Marbled Murrelet (*Brachyramphus marmoratus*) in Washington, Oregon, and California. Region 1. U.S. Fish and Wildlife Service. September 24, 1997.

[USFWS and NMFS] United States Fish and Wildlife Service and National Marine Fisheries Service. 1996. Habitat Conservation Planning and Incidental Take Permit Processing Handbook. November 4, 1996.

Washington Academy of Sciences, 2012. Sound Indicators: A Review for the Puget Sound Partnership. http://www.washacad.org/about/files/WSAS_Sound_Indicators_wv1.pdf

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Thank you for the opportunity to comment on the draft Washington DNR Aquatic Lands HCP. The Seattle Audubon Society is available to clarify points contained in this letter and to provide additional information to DNR and the wildlife agencies in order to improve the final Aquatic Lands HCP. Please be in touch with any questions at your convenience.

Sincerely,

Susan North
Seattle Audubon Society

WFWOComments, FW1 <wfwocomments@fws.gov>

Aquatic DEIS and HCP comments

1 message

Bill Turner <BTurner@spi-ind.com> Thu, Dec 4, 2014 at 10:44 AM
To: "WFWOComments@fws.gov" <WFWOComments@fws.gov>

Please find the attached comments regarding the Aquatic Lands HCP and DEIS. Thank you for the opportunity to comment.

Bill Turner

Division Timber Manager

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December 4, 2014

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Re: Washington State Department of Natural Resources Aquatic Lands Habitat Conservation Plan Draft Environmental Impact Statement
Washington State Department of Natural Resources Draft Aquatics Habitat Conservation Plan

Dear Mr. Romanski and Mr. Anderson:

Thank you for the opportunity to comment on the Draft Environmental Impact Statement (DEIS) and the Aquatic Lands Habitat Conservation Plan (HCP) for the Washington Department of Natural Resources (DNR). Since the term of the potential HCP is for a period of 50 years, it deserves a thorough examination with an in depth analysis of the potential consequences.

These comments are being made on behalf of Sierra Pacific Industries. Sierra Pacific Industries is a family owned forest products company with three mills and two biomass cogeneration plants in Washington State. We transport logs and mill residual byproducts on the waterways, and are, therefore, very interested in the process and the outcomes. These comments will be centered on log booming and storage.

The Draft Aquatics HCP page 3-23 defines log booming. It states, "Log booming is also defined as a water-dependent use (WAC 332-30-145(7)) and, as a result, is a *preferred* use of state-owned aquatic lands." (Italics added). The DEIS identifies 29 current agreements with the DNR that will be impacted by this HCP, as well as any future proposed booming operations. These 29 agreements encompass only 475.46 acres out of the total HCP coverage of 2,666,171 acres. Or to put it another way, 0.018% of the area covered by this HCP. The significant benefits derived by water storage and transportation are quite large when measured against the small foot print of 475 acres. Therefore, it is imperative to remember that this *preferred* use of state owned lands has significant benefits to not only the State, but the industries that rely on their use. The cost of

added restrictions, or the elimination of log booming and storage, were not adequately assessed in the DEIS.

Log Booming and Storage Conservation Measures

Chapter 5 of the Draft Aquatics HCP addresses the necessary conservation measures under the Draft EIS. Historical booming grounds have been located close to the shore and log take out areas to facilitate the ease of the operation. As a result, these facilities are in the nearshore marine area.

1. The DEIS and Aquatic HCP call for debarking of logs before they are placed in the water, "where infrastructure exists" under both Alternative 2 and Alternative 3. Please be more specific in defining what "infrastructure" means. Without specifically defining what the expanse, or limits to the word "infrastructure" is, it is difficult to assess what will be required by this constraint.

2. "At the time of reauthorization, existing log booming and storage facilities must be moved or reconfigured as necessary to reduce impacts to nearshore/littoral areas. Where navigational and harbor line designations allow, facilities must be moved beyond the nearshore or littoral area and out of areas that are important habitat for covered species." (Draft Aquatics HCP page 5-19 item 1.)

   The definition of littoral or nearshore found in the Draft Aquatics HCP page 1-23 does not define an exact depth, but describes the zone that sunlight can penetrate through the water to the ocean floor. What is the depth that the booming grounds will be required to be at in the future if either Alternative 2 or 3 are selected?

   For the 29 current log storage and booming leases, which ones currently meet this standard? For those that do not meet this standard, where would the closest alternative be?

3. Similar to #2 above, "grounding" is prohibited. The Draft plan is calling for the moving of log storage facilities if grounding occurs. Please show on a map where the nearest acceptable location would be to move the storage facility.

4. It is stated that new and expanded log booming and storage facilities will not be allowed unless located where the activity has historically occurred (Draft Aquatics HCP page 5-20 item 10.). In light of potentially having to move these areas (See 2. and 3. above), how can this be accomplished?

According Table 3-3 on page 3-9 of the Draft EIS, 96% of the historic booming grounds found in salt water are in the Nearshore Marine and therefore, upon lease termination, they will have to be moved. However, they cannot move to a new location unless it was used historically as booming grounds. The EIS and the Draft Aquatics HCP have set up a "Catch 22". Under all of the

Alternatives except Alternative 1(No Action alternative), it appears that the historic booming grounds are being condemned without any opportunity for replacing grounds. Please show mapping of areas that existing lease holders may use in the future for continuation of their operations during the next lease term for Alternatives 2 and 3.

Wood Debris:

It is difficult to comment on the surveys which will be required under either of the two Action Alternatives. Defined criteria for what are acceptable rates of debris accumulation and area covered by wood debris would be helpful in order to make a more informed comment. Please specifically define what will be considered acceptable and/or unacceptable rates of debris and debris accumulation.

Economics

The DEIS has not adequately looked into the current economic condition of the Forestry Sector, nor the potential impacts of the proposed Alternatives. The Draft EIS pages 3-93 and 3-94 addresses this sector. However, only one statistic is quoted in this whole section and that is the 2010 employment number for the forest products industry as a whole in the State of Washington (47,900). The lack on of precise analysis left the document with the following quotes: "The extent to which the use of state-owned aquatic lands for log storage and log booming contributes to the generation of revenue, jobs, and income in the forestry industry in Washington State is *unknown*." (Italics added). "The number of jobs that were directly related to log booming or storage on state-owned aquatic lands is *unknown*." (Italics added). These values and effects can be known with research. Since the HCP will be spanning a time frame of 50 years I would request that some attempts be made to accurately define these values.

Another quote that seems to dismiss the significance of this sector of the Forest Products industry is, "it is *likely* that log booming and storage supported a *small* proportion of the jobs in the forest products industry." (Italics added). On what basis is this statement made? There are thousands of jobs that tie into the supply stream that is log booming. Timber Cruisers, timber fallers, road builders, choker setters, hook tenders, yarder operators, loader operators, log truckers, etc. All of these jobs depend on the log booming facilities that are tributary to their operations. On the back side of the booming facilities are milling operations, remanufacturing plants, pulp and paper mills and distribution of finished products. These operations include even more categories of employees doing specific jobs. The number of people who are directly employed in the booming and storage of logs may be small, but so is any other one of these specific jobs when taken out of context of the overall economy. A more complete analysis of the impacts of moving or closing booming and storage operations as a consequence of either Alternative 2 or 3 needs to be done before an accurate decision can be made.

The people directly employed in the booming and water transportation of logs facilitate a large industry. There are nearly 50,000 jobs directly involved in Washington's forest products

industry. In Puget Sound alone, logs transported and stored on the waterways of Washington each year exceeds one hundred million board feet. This quantity of logs could build approximately 15,000 average single family homes each year, all from a footprint of 475 acres. This is a significant positive contributor to the economic engine of Washington State. Both Alternative 2 and 3 will jeopardize this mode of transportation.

Section 4 on Environmental Consequences of the Draft DEIS is equally insufficient. Section 4.13 (pages 4-149 to 4-158) is discussion on the Social and Economic Environment. It is interesting to note that not once in the ten page section discussing economic impacts was the dollar amount of any cost or benefit quantified. Neither was one Alternative compared to another in financial benefits, or costs of implementation.

I would propose that the DNR undertake a sampling of the existing use authorizations that are in place to determine actual costs and benefits in dollars. For example, of the 29 booming grounds, The DNR could sample a representative cross section of the booming grounds. What is their current status? Would changes need to be made to these operations under the HCP Alternative 2 or Alternative 3? What would the changes be? What would they cost? These values are not unattainable as is suggested in the DEIS, but they will take real analysis to achieve. If a 50 year HCP is proposed, then these values must be quantified before a decision on the Alternatives can be made.

Page 4-158 of the DEIS states, "As a result, similar to Alternative 2, Alternative 3 would reduce the amount of aquatic areas available for private use, compared to Alternative 1, and would have a greater potential to lead to decreases in revenue, jobs, or income in aquaculture, forestry, recreation, or commerce industries". What will the actual reduction in acres be when the HCP is fully implemented in either Alternative 2 or 3 after all leases are renewed? Will those acres be proportioned across all booming grounds, or will it force some booming grounds to close? There are currently 475 acres in use. For each Alternative, what will be the resulting area that remains available for booming and storage, and where will they be located?

The DEIS states there are 29 leases related to log booming and storage covering less than 500 acres. If these facilities will only be impacted in a minimal manner, and since the use is defined as a preferred use of state owned lands, then could DNR extend all of the current leases for the life of the HCP? If so, please do. If it is not possible, then a further economic analysis is required.

In addition, the benefits of water transportation are not adequately addressed. One tugboat (and therefore one engine, albeit a larger engine) often will move what it could take over 500 log trucks to move. This not only reduces the use of fossil fuels and resulting emissions, but decreases the burden to our already congested highways and streets.

Conclusion

Since the state already has determined that booming and log storage is a preferred use of these areas, a precise analysis of the costs and benefits of the Alternatives are necessary. The HCP will be in place for 50 years and in that time frame there will be, undoubtedly, several issues that arise that were unforeseen when the document is established. Therefore, it is important to do a thorough analysis at this time of the factors that can be known. The effects on the booming grounds are one of those factors that can be known. If grounding will not be allowed and the booming and storage needs to be in 60 feet of water, then current depth charts can be used to define where these areas will be allowed. However, if, as currently stated in the Draft HCP, these areas were never used as historic booming grounds, they will not be allowed.

Alternatives 2 and 3 do not allow for any flexibility in addressing unique circumstances such as log booming and storage. Please consider allowing for the continued use of booming and storage on the existing foot print (475 acres) within Alternatives 2 and 3.

Due to the incomplete analysis of these documents, there is not enough information for the public, or decision makers to make a reasoned decision. Therefore, we respectfully request that the DEIS and HCP be rewritten and updated before proceeding forward. Until an actual analysis is completed, the effects of either Alternative 2 or 3 will remain unknown. Therefore, at this time, Sierra Pacific supports the no action alternative, Alternative 1, and we request that the documents be rewritten, with appropriate analysis of the economic, social and environmental consequences of the all alternatives. Further, we request that at least one action alternative be reviewed that does not call for the curtailment or elimination of log booming and storage.

Sincerely,

William S. Turner
Division Timber Manager
Burlington Division

WFWOComments, FW1 <wfwocomments@fws.gov>

WDNR Aquatic Lands HCP DEIS - - Comment letter from Skagit Audubon Society

1 message

Tim and Brenda <bctm@fidalgo.net> Thu, Dec 4, 2014 at 4:02 PM
To: WFWOComments@fws.gov
Cc: lalena.amiotte@dnr.wa.gov

Dear Mr. Romanski and Mr. Anderson:

Please accept the attached letter from Skagit Audubon Society with our organization's comments on the WDNR Aquatic Lands HCP and DEIS.

Thank you.

Sincerely,

Timothy Manns

Conservation Chair

Skagit Audubon Society

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Skagit Audubon comments on DNR's Aquatic Lands Habitat Conservation Plan Dec 4 2014.pdf
112K

Skagit Audubon Society
P.O. Box 1101
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December 4, 2014

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Lalena Amiotte
Aquatic Lands HCP Team Lead
WA Department of Natural Resources
Olympia, WA

Dear Mr. Romanski, Mr. Anderson, and Ms. Amiotte:

We are writing on behalf of Skagit Audubon Society to offer our comments on the Washington Department of Natural Resources (WDNR) Aquatic Lands Habitat Conservation Plan (HCP) and Draft Environmental Impact Statement (DEIS). Clearly, an impressive amount of thought and care have gone into the preparation of these and the related reports, and we appreciate the opportunity to review and comment on them.

Skagit Audubon Society is the chapter of National Audubon centered in Skagit County, Washington. Our 204 member families reside in or near this county and share a common interest in Audubon's mission: to conserve and restore natural ecosystems, focusing on birds, other wildlife and their habitats for the benefit of humanity and the earth's biological diversity. As you can see, this focus makes habitat conservation plans of particular interest to our organization. Many of our members live near aquatic lands which DNR manages on the public's behalf and enjoy activities related to these lands. We all value living in a place where wildlife habitat is seen as important and where there are concerted efforts underway to redress past practices which resulted in habitat degradation and species loss.

While the Aquatic Lands Habitat Conservation Plan has a very clear organization and is well written, it is voluminous enough that we may have missed content addressing concerns we detail later in this letter. If so, please pardon our lapses and know that we appreciate the hard work that has gone into this HCP over years of time.

There are many things about the Aquatic Lands HCP which are very good. For example, the concerted emphasis on the importance of protecting and restoring forage fish habitat, from the inclusion of forage fish on the species coverage list to relevant conservation measures, standards, and programmatic strategies (for example, at page 5-37: Protection of Forage Fish Spawning

Habitat). Another specific instance of the many measures beneficial to protecting and restoring forage fish populations occurs in Appendix I (Meeting Habitat Conservation Plan Goals Through the Operating Conservation Program), p.I-8, concerning work at shellfish aquaculture facilities even outside the specified work windows for Pacific herring: "If Pacific herring spawn is present, these activities are prohibited in the areas where spawning has occurred until such time as the eggs have hatched and herring spawn is no longer present." Forage fish are key to the survival of many other vulnerable species in the marine environment.

We appreciate that the described standards and programmatic strategies apply to all DNR activities, not only to the 3 areas of activity covered under the Aquatic Lands HCP (aquaculture, log booming and storage, and overwater structures). As one welcome example we cite the prohibition on hard bank armoring except in extraordinary circumstances and the requirement that existing hard bank armoring be removed.

In the following pages, we outline specific areas of concern.

Potential Addition of Species to the HCP in future years

The Aquatic Lands HCP, as a contract between DNR and the 3 federal agencies charged with protecting listed species, is to have a term of 50 years. The likelihood of additional species associated with aquatic habitat being federally or state-listed during the next half century is high, in fact very high. We would draw your attention to the *Audubon Birds and Climate Change Report* issued in September 2014 after 7 years of work by National Audubon's science staff (http://climate.audubon.org/sites/default/files/Audubon-Birds-Climate-Report-v1.2.pdf). This study predicts how climate change is likely to affect the ranges of 588 North American birds over the next 50 and 80 years. The subset of bird species whose ranges include Washington State can be found at http://wa.audubon.org/climate-change-0. Of the 314 North American birds identified as either climate threatened or climate endangered, 189 species commonly occur in Washington. Given uncertainties about the regional effects of climate change, perhaps the Aquatic Lands HCP should run for a considerably shorter term than half a century.

In our review of the Aquatic Lands HCP and associated documents we did not note mention of climate change and how it was considered in developing the plan or how it might affect DNR's ability to meet the management commitment which the HCP represents. Furthermore, neither in the documents nor in information available online from the U.S. Fish & Wildlife Service were we able to find an answer to this question: Does the "no surprises" commitment that is part of the HCP process under Section 10 of the federal Endangered Species Act include a commitment to not require DNR to modify its HCP-covered management practices in the event of additional species being listed? (We searched, for example, in the U.S. Fish & Wildlife Service Q&A document at http://www.fws.gov/endangered/esa-library/pdf/hcp.pdf under the question, "What are "No Surprises" assurances?" through the section 10(a)(1)(B) process of the Endangered Species Act which provides for habitat conservation plans. The Audubon study, which we believe is the best of its type currently available, clearly shows that bird species not included among the 5 selected for coverage under the Aquatic Lands HCP will be in great jeopardy and warrant listing before the 50 year term of the plan is up.

We want to be clear in stating that Skagit Audubon supports the overall concept of the Aquatic Lands HCP. We value the fact that it represents a commitment to environmentally beneficial management practices over the long term and has promise to reduce the vagaries of politics in the management of this particular portion of our public lands. However, we believe it important that the HCP not eliminate necessary flexibility. We would like to see included in the Aquatic Lands HCP an explicit statement that when additional species (not limited to birds) dependent to a significant degree on DNR-managed aquatic lands are federally or state listed, they will be added to the list of species covered by the Aquatic Lands HCP.

Four Species to Add to the 29 Selected for Coverage

After studying the list of 29 species, including 5 birds, selected for coverage under the Aquatic Lands HCP and noting the reasoning applied, we request that the following 4 bird species be added. We note that HCP's can cover species not listed under state or federal endangered species laws and that DNR's Aquatic Lands HCP does so. We believe an important case can be made for also including the following 4, none of them state or federally listed at this time.

We note in the Aquatic Habitat Conservation Plan's draft E.I.S. at 2.3.5 the reasons given for not including more species in the list of those covered by the proposed HCP. However, we believe that the reasons given do not apply to, at a minimum, the following 4 bird species. We urge you to add them to the list of species covered.

1. Great Blue Heron

Although the Great Blue Heron is common and in places abundant around Puget Sound, it depends on the nearshore to a high degree and is increasingly vulnerable around the Salish Sea. We note that the list of covered species includes Harlequin Duck, a decision we certainly support, which, like the Great Blue Heron, is not listed under state or federal endangered species laws but is highly vulnerable and could be affected by the DNR management actions addressed in this HCP. The same is true for the Great Blue Heron in different ways.

Great Blue Herons in Puget Sound[1], a report by heron biologist Ann Eissinger for the Puget Sound Nearshore Partnership, points out that the habitats Great Blue Herons require include "1. Marine Shoreline and Intertidal: protected embayments, shoals, eelgrass, salt marsh 2. Estuaries: stream and river outfall and delta" (p.9). In recent decades, an increasing proportion of the Salish Sea heron population has concentrated its nesting activity into fewer but much larger heronies, a situation which puts the population at risk of sudden reduction due to loss of nearby foraging habitat (eel grass beds, for example) or other catastrophic events.

Eissinger states, at page 9 of her report:

> "Marine shoreline habitats are important year-round use areas for Great Blue Heron and are vital to the successful productivity of coastal heron colonies. As a wading bird, herons seek relatively shallow and low-gradient intertidal areas in which to forage, selecting

[1] Eissinger, A.M. 2007. Great Blue Herons in Puget Sound, Puget Sound Nearshore Partnership Report No. 2007-06. Published by Seattle District, U.S. Army Corps of Engineers, Seattle, Washington. http://www.pugetsoundnearshore.org/technical_papers/herons.pdf

> sites to maximize their foraging time and effort (Simpson 1984, Butler 1995, Norman 2001; Eissinger unpubl. data; G. Hayes, WDFW, Olympia, Washington, unpubl. data)."

Clearly, such uses of DNR-managed aquatic lands as overwater structures, buoys, and others could impact this habitat and affect this increasingly vulnerable species.

Two additional citations from Eissinger's report further the case for providing closer attention to Great Blue Heron foraging habitat under the proposed HCP:

> p.13 "Great Blue Heron breeding populations throughout the Salish Sea have redistributed into larger colonies and have become more concentrated, particularly within Washington's inland marine area." … (p.14) The consequence of this shift is the population as a whole becomes more at-risk in the event one or more large colonies abandons or loses its productivity, even for a single season."
>
> p.15 "Currently, four colonies represent about 50 percent of the breeding population in the Salish Sea. Of these, the largest is located at March Point with an estimated 600 or more breeding pairs. This is followed by Tsawwassen (previously Point Roberts) with over 400 pairs, Birch Bay averaging 300 pairs and Samish Island with over 200 pairs. … The concentrated breeding centers create a high level of localized sensitivity and vulnerability, potentially placing regional populations at risk (E. Dunn et al., Long Point Bird Observatory, Port Rowan, Ontario, Canada)."

The very large March Point heronry, possibly the largest in the western U.S., looks out on Padilla Bay and is a short flight from DNR's Fidalgo Bay Aquatic Reserve. The Samish Island heronry (now over 300 nests by counts more recent than Eissinger's report) is close to Samish Bay. Both of these bays, in addition to nearby Skagit Bay and Port Susan Bay, are designated Important Bird Areas under the Birdlife International Program managed in the U.S. by National Audubon to identify places essential to one or more bird species for at least a portion of their year. We would note that this program has been officially recognized by the Washington State Legislature with a relationship to DNR's Natural Heritage Program.

We were pleased to see that the 4 most important forage fish in the Salish Sea (Pacific herring, Pacific sand lance, surf smelt, and Pacific smelt) are included in the species the HCP covers. These are important food for Great Blue Herons, and it would make sense to include in the HCP this species because it depends on these fish and is vulnerable to sudden population decline.

2. Western Grebe

We make a similar argument in relation to forage fish for our urging that the Western Grebe be added to the species covered by the Aquatic Lands HCP. Years of surveys have documented a 90% decline in the population of Western Grebes wintering on Puget Sound. This bird's diet depends on forage fish among other species; therefore, any management actions affecting forage fish also affect Western Grebes.

3. Surf Scoter

We suggest covering the Surf Scoter, and possibly White-winged and Black Scoters, in the HCP. Surf Scoter wintering populations on the Salish Sea are roughly half what they were a few

decades ago, as has been noted in reports by the Puget Sound Partnership coordinating the restoration of Puget Sound. Bivalves are a principal food source for scoters during the winter. Shellfish aquaculture, one of the activities on DNR lands covered in this HCP, affects scoters by reducing the foraging area available to them and possibly in other ways. Chapter 4 of the HCP at pp.65-67 states, "Shellfish culture … can also alter prey/food resource availability for covered species in the habitat conservation plan; and it can reduce the quality of structural habitat for covered species." As described in the HCP, shellfish culture involves treatment of tidelands to remove the existing fauna, including by chemical treatment (HCP, p.3-18), to prepare the way for farming shellfish. Birds such as scoters are then, of course, excluded from these farms by netting.

Particularly as they prepare to migrate and move northwards towards their inland breeding areas, Surf Scoters feed and depend heavily on herring eggs, as do Harlequin Ducks (HCP p.4-8). Any event or action affecting herring spawning has the potential to further depress the already greatly reduced Salish Sea population of Surf Scoters and possibly the other 2 scoter species. Herring spawning often takes place on eelgrass, a species affected by overwater structures, one of the principal uses covered under the Aquatic Lands HCP. It makes sense to include the Harlequin Duck in the list of HCP covered species, as you have. The section of the HCP, Chapter 4, concerning Harlequin Duck states:

> "Threats warranting coverage in the habitat conservation plan"
> Overwater Structures
> 1. Habitat destruction, conversion, and degradation
> 2. Impaired behavior
> 3. Changes in habitat structural matrices
> 4. Water and sediment quality degradation
> 5. Human disturbance
> 6. Related prey abundance and reductions in energy resources
>
> Log booming and storage**:** Potentially affected habitat from log booming and storage
>
> Aquaculture: Potentially affected habitat from aquaculture"

The above list (and the similar one for the Marbled Murrelet, covered in the HCP) also applies to the Surf Scoter with a significant degree of overlap and some differences.

4. Dunlin

The most abundant wintering shorebird in northern Puget Sound is the Dunlin. In a 2006 report for the Puget Sound Nearshore Partnership, J.B. Buchanan (WDFW) notes (p.v):

> "National and regional conservation plans have identified Black Oystercatchers and Dunlins as priorities for management, particularly for the northern Pacific coast of North America, due to the Black Oystercatcher's small global population and specialized use of habitat, and the high proportion of the Pacific coast wintering population of Dunlins in western Washington. Populations of these two shorebird species appear to be stable. Puget Sound qualifies as an area of regional importance for Dunlins (and other shorebirds) according to criteria established by the Western Hemisphere Shorebird

> Reserve Network; a hemisphere-scale conservation plan is being developed for this species."[2]

The nature of Black Oystercatcher habitat is such that this species probably does not belong on the list of those covered in the HCP, but Dunlin are very dependent on tide flats for foraging, probably including large areas under DNR management. This dependency on the part of a significant percentage of the entire Dunlin population for a significant portion of the year led a few years ago to the designation of Skagit and Port Susan Bays as part of the Western Hemisphere Shorebird Reserve Network. For the sake of this species and the many other shorebird species using Washington tidelands during their twice-annual migrations, these and other particular tidelands need special care when it comes to any management activity which would impact them.

Data Analysis and Methods

We appreciate the effort made in chapter 4 of the HCP to describe and explain the model for predicting potential habitat impacts of DNR's aquatic leasing for the activities covered under the plan (aquaculture, overwater structures, and log booming & storage). We lack the technical background to fully understand or evaluate the validity of this model. However, it does appear that given the lack of detailed information on some or many of the 29 covered species, there is necessarily a considerable degree of subjectivity involved in the inputs to the model. We appreciate your involving subject matter experts from outside DNR, for example from Washington Department of Fish & Wildlife, so that they can apply their experience in rating the biological effectiveness of each conservation measure. Nonetheless, the need to apparently in many instances use best guesses emphasizes in our minds the great importance of adequate monitoring and adaptive management during the long term of the HCP. If the plan remains static, it will become less and less effective as the years pass.

Monitoring and Adaptive Management

The Aquatic Lands HCP clearly states the importance of monitoring and need for adaptive management, adjusting the provisions of the HCP as better and more sufficient data are acquired. In chapter 5 at page 5-6, the following statement appears: "This uncertainty (*about the response of habitat and species to the proposed measures*) is further complicated by a lack of fine-scale distribution data for species and habitat, spatially accurate leasing data, and data related to the cumulative effects that uses of state-owned aquatic lands may have on habitat and species." The subject HCP states that the basic approach is ecosystem-based rather than species-based. Page5-54 states: "Because the persistence of individual species, species groups, and their habitats is the result of complex interactions between biotic and abiotic factors, Washington DNR's monitoring program uses an ecosystem-based approach to ensure that essential habitats and populations of covered species are protected within the boundaries of the habitat conservation plan." This approach is again described at page 5-56: "5.4.2 Baseline and effectiveness monitoring - Populations of covered species may change or fluctuate over time for many reasons, whether naturally or due to human influence. Washington DNR has proprietary control over habitat

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[2] Buchanan, J.B. 2006. Nearshore Birds in Puget Sound. Puget Sound Nearshore Partnership Report No. 2006-05. Published by Seattle District, U.S. Army Corps of Engineers, Seattle, Washington. http://www.pugetsoundnearshore.org/technical_papers/shorebirds.pdf

conditions on state-owned aquatic lands; therefore, Washington DNR will monitor habitat conditions over time, focusing on surveying and assessing changes to the quantity and quality of the habitat of covered species to determine whether conservation measures and programmatic strategies are effective."

The monitoring plan is then consistent with this described approach in monitoring habitat parameters rather than focusing on species. We understand the importance and necessity of habitat monitoring but how and whether the protected habitats actually support the covered species cannot be omitted from effective monitoring. It is the ultimate test. If a covered species that baseline monitoring showed to be using DNR-managed aquatic habitat is at some future point no longer observed to be doing so, appropriate conclusions need to be drawn. As the plan points out, species populations can fluctuate. These fluctuations happen for reasons, some of which may say something important about habitat that the monitoring of habitat itself is missing. Changes in species numbers and/or use of particular habitat could suggest that management actions are in fact not accomplishing the goals and objectives of the HCP and need to be modified. Species monitoring needs to be included in the monitoring plan.

Private Recreational Docks

We appreciate DNR's determination under the Aquatic Lands HCP to reverse the long-time lack of management of private recreational docks on publicly owned, DNR-managed aquatic lands. At page 5-51, we find the statement that DNR will "manage the construction and maintenance of private recreational docks to ensure that the conservation standards and measures described in the habitat conservation plan's operating conservation program (Section 5.2) are incorporated into new docks at the time of construction and existing docks as they are maintained or re-built." The HCP text includes an estimate of between 9,000 and 19,000 such docks requiring DNR's attention (p.5-51). We appreciate the enormity of this workload and applaud the stated determination to address it; however, the timeline given on page 5-51 seems excessive: "Washington DNR will conduct the following actions to manage private recreational docks on state-owned aquatic lands, with the goal of bringing 65 percent of all private recreational docks that are determined to be on state-owned aquatic lands into compliance with Washington DNR's operating conservation program standards (Section 5.2.2) by the end of the term of the incidental take permit." We understand the term of the incidental take permit to coincide with the term of the Aquatic Lands HCP, which is 50 years. Given the current state of the Salish Sea and its associated species and approaching changes from industrial development, increased marine traffic, human population growth, ocean acidification, and climate change, 50 years is an overly long time to address just 65% of the private dock situation, which affects eelgrass, forage fish spawning areas, etc. We urge DNR to change this to a more ambitious timeframe and do its best to obtain the funding needed to accelerate the schedule.

Large Projects

It may already be present in the HCP, and we may have missed it, but we would like there to be explicit recognition that large projects with potentially extensive habitat impacts, such as fossil-fuel export terminals and facilities, must have additional scrutiny and may be disallowed if such impacts jeopardize the viability of listed species. One example is the coal export terminal proposed for Cherry Point (Gateway Pacific Terminal) immediately adjacent to the very significant herring spawning area in Cherry Point Aquatic Reserve.

Financing Implementation of the HCP

While an approved HCP requires a commitment to provide the financial resources needed to implement the plan, including such things as monitoring that tend to lack adequate funding, we appreciate the frank statement that funding depends on the state legislature (HCP p.5-53). To proceed with developing the HCP despite this reality is admirable. We also appreciate the fact that inadequacy of funding, as stated also on page 5-53, could constitute grounds for the federal agencies to cancel the HCP ("Washington DNR recognizes that failure to maintain adequate funding shall be grounds for suspension or partial suspension of the incidental take permit."). We hope that DNR will take whatever avenues are available to the agency to call upon the public and interested conservation groups, such as Audubon, to support adequate funding by communicating with the our elected officials. These are our public lands, and we expect ourselves to play an active role in seeing that they are appropriately managed.

Thank you again for your work on this large and ambitious project and for both informing us and providing the opportunity for comment. If there are questions about our comments, we can be reached at conservation@skagitaudubon.org or 360/336-8753 or c/o Skagit Audubon Society, P.O. Box 1101, Mount Vernon, WA 98274.

Sincerely,

Philip Wright
President
Skagit Audubon Society

Timothy Manns
Conservation Chair
Skagit Audubon Society

WFWOComments, FW1 <wfwocomments@fws.gov>

WDNR Aquatic Lands HCP DEIS

1 message

Miller, Jeff <Jeff_Miller@treated-wood.org> Thu, Dec 4, 2014 at 3:42 PM
To: "WFWOComments@fws.gov" <WFWOComments@fws.gov>, "lalena.amiotte@dnr.wa.gov" <lalena.amiotte@dnr.wa.gov>, "scott.anderson@noaa.gov" <scott.anderson@noaa.gov>, "tim.romanski@fws.gov" <tim.romanski@fws.gov>

December 4, 2014

Washington State Department of Natural Resources

Attn: Ms. Lalena Amiotte
1111 Washington St. SE
Olympia, WA 98504-7027

US Fish and Wildlife Service

Attn: Mr. Tim Romanski

510 Desmond Drive SE, Suite 102

Lacey, WA 98503

NOAA Fisheries

Attn: Mr. Scott Anderson

510 Desmond Drive SE, Suite 103

Lacey, WA 98503

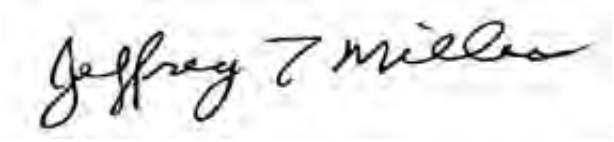
Re: Treated Wood Council comments & suggestions on proposed Washington DNR Aquatic Lands Habitat Conservation Plan

Dear Ms. Amiotte, Mr. Romanski and Mr. Anderson:

The Treated Wood Council (TWC) is pleased to submit the attached comments and suggestions regarding the Washington Department of Natural Resources proposed Aquatic Lands Habitat Conservation Plan.

Thank you again for giving us the opportunity to share our suggestions with you. Please contact me if you have any difficulty opening the attachment, or it you have any questions.

Respectfully submitted,



Jeffrey T. Miller

Jeff Miller

President & Executive Director

Treated Wood Council

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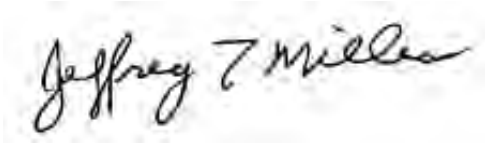
jeff_miller@treated-wood.org

2 attachments



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3K

TWC comments on WA DNR Aquatic Lands Plan 12 4 14.pdf
141K

TREATED WOOD COUNCIL

1101 K Street, NW
Suite 700
Washington, DC 20005
Phone: (202) 641-5427
Fax: (202) 463-2059

(via WFWOComments@fws.gov, lalena.amiotte@dnr.wa.gov, scott.anderson@noaa.gov, tim.romanski@fws.gov)

December 4, 2014

Washington State Department of Natural Resources
Attn: Ms. Lalena Amiotte
1111 Washington St. SE
Olympia, WA 98504-7027

US Fish and Wildlife Service
Attn: Mr. Tim Romanski
510 Desmond Drive SE, Suite 102
Lacey, WA 98503

NOAA Fisheries
Attn: Mr. Scott Anderson
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Lacey, WA 98503

Re: Treated Wood Council comments & suggestions on proposed Washington DNR Aquatic Lands Habitat Conservation Plan

Dear Ms. Amiotte, Mr. Romanski and Mr. Anderson:

The Treated Wood Council (TWC) is pleased to submit these comments and suggestions regarding the Washington Department of Natural Resources proposed Aquatic Lands Habitat Conservation Plan.

TWC serves more than 440 organizations in the wood treating industry, including wood suppliers, sawmills, wood preservative manufacturers, and treating companies, include those with 15 facilities in the State of Washington.

TWC works closely with the Western Wood Preservers Institute (WWPI) and the Timber Piling Council on issues affecting our industry. We support their position that a complete ban, as included in the proposed Plan, is not appropriate. We suggest that the proposed Plan be amended to adopt the WWPI Risk Assessment Model for use on projects that prefer to use preserved wood.

We propose the following alternative language for Treated Wood 5-29 (new language underlined, deleted language lined-through):

"Treated wood

Standard

Treated wood may only be used for above-water structural framing and may not be used as decking or pilings or for any other uses unless an encasement method approved by Washington DNR is determined to fully preclude exposure to water and sediments and potential leaching into the aquatic environment. No exposed treated wood may be used as part of the decking, pilings, or other components of any in-water structures, such as floats, docks, wharves, piers, marinas, rafts, shipyards, and terminals. ~~Treated wood may only be used for above-water structural framing and may not be used as decking or pilings or for any other uses.~~

During maintenance that involves replacing treated wood, the existing treated wood must be replaced with alternative materials, such as untreated wood, steel, concrete, or recycled plastic. Alternatively, the treated wood must be encased in a manner that prevents metals, hydrocarbons, and other toxins from leaching out.

Treated wood can be used for a new structure or retained at an existing structure if an encasement method approved by Washington DNR is determined to fully preclude exposure to water and sediments and potential leaching into the aquatic environment.

Intent and effects addressed

Treated wood has the potential for the preservative to move from the wood into the aquatic environment. ~~Treated wood leaches harmful chemicals into the aquatic environment, degrading water and sediment quality.~~ Chemicals in treated wood ~~can~~ may be absorbed or ingested by covered species and may cause biological dysfunction. ~~Many~~ Some of these chemicals can bioaccumulate in higher trophic levels through food web dynamics, impacting health and reproduction. This standard is designed to avoid and minimize impacts on water and sediment quality and on covered species and their habitats.

Implementation

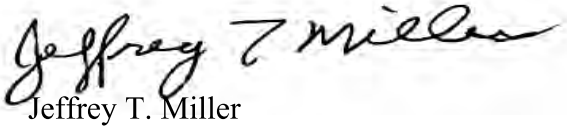
All authorizations for new construction will include the prohibitions on treated wood as discussed in this section. For existing structures, the authorizing document will define a schedule for replacing treated wood and will specify acceptable replacement materials, such as untreated wood, steel, concrete, or recycled plastic, or encasement in a manner that prevents environmental contamination. Disposal of treated wood at a state authorized disposal facility—such that reuse of this material is precluded— will be required."

We believe this language more accurately reflects the reality of preserved wood usage in navigable waterways. It also provides more than adequate safeguards for the environment while

accommodating prudent use of preserved wood products that are desirable to the citizens of the state of Washington.

Thank you again for giving us the opportunity to share our suggestions with you. Please contact me if you have any questions.

Respectfully submitted,



Jeffrey T. Miller
President & Executive Director

WFWOComments, FW1 <wfwocomments@fws.gov>

WDNR Aquatic Lands HCP DEIS

1 message

Alan Sprott <Alan.Sprott@vigorindustrial.com> Thu, Dec 4, 2014 at 1:22 PM
To: "wfwocomments@fws.gov" <wfwocomments@fws.gov>

Attached are comments prepared by Vigor Industrial for the Washington Department of Natural Resources HCP Draft EIS.

DNR_EIS_VigorComments.pdf
868K

VIGOR
INDUSTRIAL

December 4, 2014

Mr. Tim Romanski
U.S. Fish and Wildlife Service
510 Desmond Drive SE
Suite 102
Lacey, WA 98503

RE: Comments on Proposed WDNR Aquatic Lands HCP DEIS

Mr. Romanski:

These comments are submitted on behalf of Vigor Industrial regarding the Draft Environmental Impact Statement (DEIS) on the Habitat Conservation Plan (HCP) proposed by Washington Department of Natural Resources (DNR). Vigor Industrial operates vessel repair facilities in Tacoma, Seattle, Everett, and Port Angeles, Washington.

In general, we are very concerned with the scope and reach of the proposed HCP when applied to operations and overwater infrastructure at existing water-dependent industrial facilities. Most of these facilities, including those operated by Vigor, were constructed with local, state, and federal approvals, and with significant private and public investment. If even partially implemented, the standards and programmatic measures outlined in the HCP would threaten the on-going viability of established operations and infrastructure, and in some cases could lead to closure of facilities. The generic nature of the standards and measures provide for overly broad and subjective applications without a requirement for DNR to establish or even consider whether there is actually a link between a facility, its associated operations, and harm to species listed under the Endangered Species Act (ESA). The result is that major capital costs could be mandated as a condition for renewing a lease that is crucial to the survival of a business, even though the improvements are unnecessary and the facility was built and operated in accordance with state and federal authorizations.

We are concerned that the proposed HCP and its implementation tied to lease renewals will create an unfair competitive advantage in the market place, and enable gaming of the system through manipulation of terms. Lease terms for companies in the same industry differ in length

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INDUSTRIAL EVOLUTION

and expiration dates. This allows a business with a lease expiring in the distant future to enjoy the benefits of its competitors with shorter terms having to potentially absorb millions of dollars in infrastructure costs and additional operational restrictions, while it coasts through the grandfather period.

We also fundamentally question DNR's rationale and need for the HCP. Section 1.1 of the HCP states that its purpose is to: "*ensure that legally authorized, planned, and mandated management actions may continue to occur on state-owned aquatic lands without risk of violating the Endangered Species Act or resulting in an unlawful take of threatened and endangered species.*" Yet, nowhere in the HCP or in the DEIS is there any information demonstrating that there actually is take or violations of the ESA by lessees or DNR under the current regime for leasing aquatic lands, which has been in place for decades. In addition, there is no compelling information provided in either document demonstrating that existing permits, reviews and authorizations provided by state and federal resource agencies on waterfront infrastructure and operations are inadequate for protecting ESA species, and that implementation of the HCP will have any meaningful effect on current or future listings. In fact, Section 4.9.3.3 of the EIS concludes that the chosen alternative under the HCP is not expected to change the listing status for any of the species covered by the incidental take authorization. As such, it has not been established that an incidental take authorization or an HCP is required or necessary for compliance with the ESA by lessees or the DNR.

Table 2-1 of the DEIS provides a comparison and general description of the anticipated effects on specific resources of the three alternatives considered by DNR for inclusion in the HCP. Sections 5.2.1, 5.2.2, and 5.2.3 of the HCP provide detailed descriptions of the conservation measures, standards, and programmatic measures that would be implemented by DNR for overwater structures and all covered activities. Our comments are organized to address the measures and standards as presented in the HCP since they apply to multiple resources included in Table 2-1.

Comments on Section 5.2.1 of the HCP

Overwater structures

3. *At the time of application or reauthorization, applicants and lessees shall assess water drainage and runoff patterns and shall develop and implement a plan to alter or treat them, as necessary, to reduce direct inputs of contaminants and nutrients into state waters.*

This requirement is unnecessary and redundant when a facility is already covered by a National Pollutant Discharge Elimination System (NPDES) permit issued and administered by the Washington Department of Ecology.

Complex and multiple element structures

1. For structures associated with motorized watercraft: To avoid dredging and scour caused by propellers on motorized watercraft, the buffer distance between the outside of the vessel and the vegetation is 8 meters (25 feet) whenever there is a vertical distance of 2 meters (7 feet) of water above the substrate at the lowest low water.

This measure will be impossible to implement at many existing facilities without making substantial infrastructure modifications. Much of the existing infrastructure was designed and constructed to accommodate a range of factors such as use, navigation, and limitations of the upland property.

2. Grounding of boats and the need for dredging must be avoided through the use of naturally deep water. Methods for achieving this include the following:
a. Locate slips for deeper draft boats in deeper water or moor deeper draft boats offshore.
b. Orient new construction or expansions of complex facilities so that entrances align with natural channels.
c. Provide onshore storage facilities.

Many existing facilities were constructed in areas that have been heavily altered to accommodate navigation and deep water vessels. As such, there is no longer any "naturally deep water" at most facilities in industrial waterways. Natural and anthropogenic processes redeposit sediment within these areas, and the need for periodic maintenance dredging is unavoidable.

3. Multiple element structures must maximize water flow to reduce effects on water quality. Measures to achieve this include, but are not limited to:
a. Locating facility openings in a manner that promotes flushing (for example, at opposite ends) to prevent water stagnation and to prevent or reduce the need for dredging.
b. Orienting docks with currents or prevailing winds to prevent trapping surface debris and oily residue.
c. Maintaining dredged basins in a manner that prevents internal deeper pockets that can act

as unflushed holding basins. Generally, depth should increase with distance from the shore.

This measure is impractical to implement at many existing facilities without completely rebuilding waterfront infrastructure, upland structures, and utilities.

4. The portions of piers and elevated docks that are above the nearshore or littoral area must have unobstructed grating over 100 percent of their surface area. Floats must have unobstructed grating over at least 50 percent of their surface. Floats less than 1.5 meters (5 feet) in width may reduce the amount of unobstructed grating to a minimum of 30 percent of the surface area if it is a structural requirement specified by engineering design. All grating material must have at least 60 percent functional open space. Grating requirements can also be met if the combination of grated surface area and grating open space are equal to or better than the above standards.

Many waterfront industrial facilities use the hard surface of overwater structures to store materials, support heavy loads, serve as a barrier to spills, and to manage stormwater runoff for controlling pollutants. Complying with this measure will actually increase the risk to the aquatic environment. Furthermore, many facilities have very large relieving platforms equipped with utilities and even filled with earth materials. The cost of implementing this measure at even a medium-sized facility could approach one hundred million dollars.

5. Post and enforce no-wake advisories to minimize effects on sediments and important habitats and to prevent stranding of juvenile fish.

Private lessees of aquatic land do not have the authority to enforce wake advisories.

6. Work on overwater structures and associated vessels that could introduce toxins into the water is prohibited unless the following protective measures are enacted to prevent discharge to the water:
a. In-water repair and refinishing of boats is limited to decks and superstructures.
b. In-water hull scraping, or any process that removes paint from the boat hull underwater, is prohibited.
c. Refinishing work from boats and temporary floats is prohibited unless permitted by an industrial National Pollutant Discharge Elimination System (NPDES permit).
d. Dust, drip, and sand spill control measures, such as tarps placed to contain spills, are mandatory to ensure that there is no discharge to waterways.

Shipyards and many other waterfront operations are already covered by an NPDES permit administered by the Washington Department of Ecology. As such, this requirement is unnecessary at many facilities. As written, measure 6.a. will severely restrict vessel repair activities that are already covered under an NPDES permit.

10. Skirting is prohibited. When existing structures undergo maintenance or repair or when the structure is reauthorized (whichever comes first), the replaced portions must meet these standards.

Skirting is often necessary as a security measure to prevent unauthorized access to a facility.

Comments on Section 5.2.2 of the HCP

Standards

Artificial lighting

Standard
Artificial night lighting on and from overwater structures must be minimized by focusing the light on the dock's surface and by using shades that minimize illumination of the surrounding environment and reduce glare on the surface of the water.

This standard is impractical to implement at a shipyard, and would create unsafe working conditions. Overwater operations are routinely conducted at night that require adequate illumination using crane lights, tree lights, and vessel lights. Glare and direct lighting of the water surface around such facilities is unavoidable.

Bank armoring

Standard
Existing bank armoring on state-owned lands must be removed or, if the need for continued protection is documented in an engineering report, replaced with softer (less intrusive) shoreline protection systems. Where engineering or infrastructure protection issues make replacement of bulkheads and hard bank armoring with softer shoreline armoring systems unduly onerous, Washington DNR may allow the lessee to use hard materials, provided that the new bulkhead or armoring occupies the same or smaller footprint. Authorizations for replacement of existing

bank armoring will require a licensed professional engineer's report that clearly defines the continuing need for armoring. All engineering reports will be reviewed for validity by Washington DNR's structural engineer. Compensatory mitigation will be required if continued use is authorized.

We see no purpose in requiring an engineering study at existing facilities where it is obviously impractical to remove bulkheads and bank armoring. Most developed industrial facilities with wharves and piers fall into this category. It is unreasonable to require compensatory mitigation at existing facilities, particularly if there had already been mitigation required as part of the original construction of the infrastructure.

Pesticide application

Standard
Washington DNR will allow pesticide4 to be used on state-owned aquatic lands if all of the following criteria are met:

- *The Environmental Protection Agency has conducted an ecological risk assessment and registered the pesticide.*
- *The U.S. Fish and Wildlife Service or NOAA Fisheries (or both) have evaluated use of the pesticide, and either 1. they have concluded that there is neither jeopardy to species listed under the habitat conservation plan, nor adverse modification of federally designated critical habitat, or 2. they have issued an incidental take statement pursuant to the Endangered Species Act Section 7(b)(4) upon completion of a formal consultation (16 U.S.Code 1536(b)(4)).*
- *The use of pesticides on aquatic lands is in compliance with the laws of Washington State.*
- *If the use of pesticide is subject to an incidental take statement, the terms and conditions of the incidental take statement will be a condition of Washington DNR's agreement to allow use of the pesticide on state-owned aquatic lands.*

Washington DNR will use the preceding information to assess whether there is potential for harm to covered species, their habitats, and their prey. If there is indication of the potential for harm, Washington DNR will not allow use of the pesticide on state-owned aquatic lands. Washington DNR may, in some circumstances, make an exception for state agencies using pesticides to control invasive species. In addition to the above criteria, all new use authorizations must avoid applying pesticides whenever forage fish or eggs are present.

Antifoulant coatings applied to vessels are pesticides approved and licensed by the Environmental Protection Agency under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). As written, this standard would prohibit the application of antifoulant coatings by DNR lessees operating drydocks and boatlifts since the second criterion would not be met for the variety of products applied to vessels. In addition, the restriction that antifoulant coatings cannot be applied when forage fish or eggs are present would severely limit operations at most shipyards in Washington.

Treated wood

Standard
No exposed treated wood may be used as part of the decking, pilings, or other components of any in-water structures, such as floats, docks, wharves, piers, marinas, rafts, shipyards, and terminals. Treated wood may only be used for above-water structural framing and may not be used as decking or pilings or for any other uses.

During maintenance that involves replacing treated wood, the existing treated wood must be replaced with alternative materials, such as untreated wood, steel, concrete, or recycled plastic. Alternatively, the treated wood must be encased in a manner that prevents metals, hydrocarbons, and other toxins from leaching out.

Treated wood can be used for a new structure or retained at an existing structure if an encasement method approved by Washington DNR is determined to fully preclude exposure to water and sediments and potential leaching into the aquatic environment.

Wood preservatives are licensed pesticides under FIFRA with approved freshwater and marine uses. The use of treated wood should be permitted if performed in accordance with the license and use instructions.

Implementation
All authorizations for new construction will include the prohibitions on treated wood as discussed in this section. For existing structures, the authorizing document will define a schedule for replacing treated wood and will specify acceptable replacement materials, such as untreated wood, steel, concrete, or recycled plastic, or encasement in a manner that prevents environmental contamination. Disposal of treated wood at a state authorized disposal facility—such that reuse of this material is precluded— will be required.

The requirement to replace existing treated wood would be cost prohibitive and completely impractical to implement at many facilities.

Covered species work windows and buffer distances

Standard
Species work windows will be used both for the timing of any in-water construction and operational activities, and to protect covered species during sensitive life history phases (such as reproduction and migration). Work windows will be established by Washington DNR based on the recommendations of state and federal wildlife management agencies and in consultation with species experts.

Implementation
All authorizations will specify established work windows for species predicted or observed to occur at the site, with implementation of the windows considered part of the design criteria and operational plan. The work windows are established based on requirements of state and federal wildlife management agencies. They are therefore based on best available science concerning the life history of each covered species. These windows will be modified as new information is developed by the U.S. Fish and Wildlife Service, NOAA Fisheries, and the Washington Department of Fish and Wildlife throughout the term of this habitat conservation plan.

Restricting operational activities during the sensitive life phases of species could render a facility unusable. Considering the large number of species included in the HCP, it is likely that restrictions would be applied for multiple species at a single location. Even one operational restriction could cause significant hardship since it is unlikely business activities at a particular facility would correlate with sensitive life phases of species covered by the HCP.

Comments on Section 5.2.3 of the HCP

Programmatic measures

Protection of native aquatic vegetation and Protection of forage fish spawning habitat

The Programmatic Measures under these two categories are extremely restrictive, and will be expensive and impractical to implement at many existing facilities.

Finally, while we acknowledge that the Services and DNR appropriately conducted the required public notification processes, based on a query of our network in the maritime industry there is a broad lack of awareness that the DNR intends to implement the HCP or that it even exists. The HCP implementation is the equivalent of a massive regulatory expansion that has the high potential to significantly impact many waterfront businesses. We are concerned that the far-reaching economic implications of the HCP have not been adequately considered, and that DNR has not been well informed during its decision making through robust engagement with the parties that will be most affected by this action. Accordingly, we urge that any formal action on the DEIS and HCP be delayed for a sufficient period to enable knowledgeable engagement in the process by all interested and affected parties.

Respectfully,
VIGOR INDUSTRIAL

T. Alan Sprott
Vice President, Environmental Affairs

WFWOComments, FW1 <wfwocomments@fws.gov>

WDNR Aquatic Lands HCP DEIS

2 messages

Heather Trim <Heather@futurewise.org> Thu, Dec 4, 2014 at 4:50 PM
To: "WFWOComments@fws.gov" <WFWOComments@fws.gov>, "cpl@dnr.wa.gov" <cpl@dnr.wa.gov>, "scott.anderson@noaa.gov" <scott.anderson@noaa.gov>, "tim.romanski@fws.gov" <tim.romanski@fws.gov>, "lalena.amiotte@dnr.wa.gov" <lalena.amiotte@dnr.wa.gov>
Cc: "trolfe@celp.org" <trolfe@celp.org>, "convergence@wildblue.net" <convergence@wildblue.net>, "felleman@comcast.net" <felleman@comcast.net>, "mkeever@foe.org" <mkeever@foe.org>, Heather Trim <Heather@futurewise.org>, "president@lwvwa.org" <president@lwvwa.org>, "darlenes@olympus.net" <darlenes@olympus.net>, "chris@pugetsoundkeeper.org" <chris@pugetsoundkeeper.org>, "crinah@re-sources.org" <crinah@re-sources.org>, "susann@seattleaudubon.org" <susann@seattleaudubon.org>, "amy@soundaction.org" <amy@soundaction.org>, "ggates@surfrider.org" <ggates@surfrider.org>, "pdye@tnc.org" <pdye@tnc.org>, "mark@wecprotects.org" <mark@wecprotects.org>, "kurt@wildfishconservancy.org" <kurt@wildfishconservancy.org>, Wendy Steffensen <wendys@re-sources.org>, Rebecca Ponzio <rebecca@wecprotects.org>, Jerry Joyce <MoonJoyce@comcast.net>, Ann Aagaard <ann_aagaard@frontier.com>, Mark Hersh <mark@wildfishconservancy.org>, "howard@orcanetwork.org" <howard@orcanetwork.org>, Stephanie Buffum Field <stephanie@sanjuans.org>

Dear Commissioner Goldmark, Mr. Romanski, Mr. Anderson and Ms. Amiotte,

As environmental and conservation groups that are concerned with the recovery of Puget Sound, we are writing in response to the proposed *Aquatic Lands Habitat Conservation Plan* (HCP).

Our comments are attached.

Thank you so much for your consideration.

Sincerely,

Trish Rolfe, Executive Director

Center for Environmental Law & Policy

trolfe@celp.org

Sue Patnude, Executive Director

Deschutes Estuary Restoration Team

convergence@wildblue.net

Fred Felleman, NW Consultant

Marcie Keever, Oceans & Vessels Prog. Director

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felleman@comcast.net

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Kim Abel, President

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Darlene Schanfald, Project Coordinator

Olympic Environmental Council

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Kurt Beardslee, Executive Director

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kurt@wildfishconservancy.org

Joint Comment letter DNR HCP Dec 4 2014.pdf
663K

Chris Wilke <chris@pugetsoundkeeper.org> Thu, Dec 4, 2014 at 5:37 PM
To: Heather Trim <Heather@futurewise.org>, "WFWOComments@fws.gov" <WFWOComments@fws.gov>, "cpl@dnr.wa.gov" <cpl@dnr.wa.gov>, "scott.anderson@noaa.gov" <scott.anderson@noaa.gov>, "tim.romanski@fws.gov" <tim.romanski@fws.gov>, "lalena.amiotte@dnr.wa.gov" <lalena.amiotte@dnr.wa.gov>
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Thanks Heather for pulling this together and for all that contributed!

Chris

From: Heather Trim [mailto:Heather@futurewise.org]
Sent: Thursday, December 04, 2014 4:50 PM
To: WFWOComments@fws.gov; cpl@dnr.wa.gov; scott.anderson@noaa.gov; tim.romanski@fws.gov; lalena.amiotte@dnr.wa.gov
Cc: trolfe@celp.org; convergence@wildblue.net; felleman@comcast.net; mkeever@foe.org; Heather Trim; president@lwvwa.org; darlenes@olympus.net; Chris Wilke; crinah@re-sources.org; susann@seattleaudubon.org; amy@soundaction.org; ggates@surfrider.org; pdye@tnc.org; mark@wecprotects.org; kurt@wildfishconservancy.org; Wendy Steffensen; Rebecca Ponzio; Jerry Joyce; Ann Aagaard; Mark Hersh; howard@orcanetwork.org; Stephanie Buffum Field
Subject: WDNR Aquatic Lands HCP DEIS

[Quoted text hidden]

December 4, 2014

Peter Goldmark
Commissioner of Public Lands
WA State Department of Natural Resources
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Aquatic Lands HCP Team Lead
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lalena.amiotte@dnr.wa.gov

RE: Proposed Aquatic Lands Habitat Conservation Plan and Draft Environmental Impact Statement

Dear Commissioner Goldmark, Mr. Romanski, Mr. Anderson and Ms. Amiotte,

As environmental and conservation groups that are concerned with the recovery of Puget Sound, we are writing in response to the *Aquatic Lands Habitat Conservation Plan* (HCP) proposed by the Washington State Department of Natural Resources (DNR).

The goal of the HCP is to provide a way for DNR to help protect at-risk native aquatic species on 2.6 million acres of state-owned lands under marine and fresh waters of the state. Specifically the plan is designed to protect 29 sensitive, threatened, and endangered aquatic species—many listed under the federal Endangered Species Act – through management of those lands, including DNR authorized public and private uses.

There are many benefits to the proposed HCP:

- Existing facilities and activities in the State's aquatic lands are harming wildlife and implementation of this plan will help reduce that harm.
- DNR has taken a logical and systematic approach to developing the HCP. While we have comments on some of the specific items, overall the plan has many protective components.
- Important standards are included such as addressing artificial lighting, treated wood, pesticide use, shoreline armor and derelict structures.

Overall, we are concerned about long time-frame of the plan (in the face of changing science), the use of out-of-date data, and lack of strong assurance of adequate resources and staff capacity, including lack of assured funding for accountability, monitoring, and restoration lands. Comments that are more detailed are provided below.

However, we support DNR moving the Aquatic HCP forward if the following changes are made:

1. **The HCP should be limited to an initial twenty-five years, with an evaluation conducted in 2040 to address changes and updates needed for the next twenty-five years.** Fifty years is too long of a period not to have a robust evaluation period set for assessing any needed changes and updates the Aquatic Lands Habitat Conservation Plan. While it is understandable that there is a desire for long-term certainty, it is concerning such an important document might be in effect for fifty years for waters without the incorporation of new science and best management practices. For example, less than five years ago, the impacts and implications of ocean acidification were not understood. Ahead there are unknown new challenges and a much-improved body of scientific research. Additionally, the adaptive approaches written into the document do not provide a strong enough opportunity to make adjustments over a fifty-year span.

   We recommend that the HCP be authorized for an initial twenty-five years with a requirement that a re-submittal for an additional twenty-five years would entail a detailed examination of the science and conditions of the covered species at that time and the adequacy of the protections in the HCP.

   A mandatory revision is especially important because of the "No Surprises" clause (i.e., if unforeseen circumstances arise, no additional commitments or restrictions will be required). Climate change and other conditions are highly likely to come into play with significant impacts much sooner than fifty years.

2. **Funding needs to be assured.** Funding is a required component of the plan but is not adequately assured. Instead, the plan states "Washington DNR's capacity to fund implementation of the habitat conservation plan depends on legislative appropriation." A

model that could be replicated to provide funding (using leasing fees), especially for the critical monitoring component of the plan, is that of the Salmon Recovery Funding Board which designates 10% of total monies received to be dedicated to monitoring.

Lease fees should be set at a rate that adequately covers the full cost of staff and other needs to fully implement the HCP, including monitoring. Legislative action could be sought to ensure this steady source of funding from leases is used to support HCP implementation and monitoring.

3. **Benchmarks and re-openers are needed**. The use of benchmarks and re-openers needs to be included in the HCP and in leases. Benchmarks must ensure that BMPs are implemented in a timely fashion. Re-opening the HCP and/or lease should be possible, if lessees do not meet benchmarks, new Best Available Science comes available, or another change is needed to ensure habitat and species vitality.

4. **Mega Fossil Fuel and Other Projects Need Additional Scrutiny.** The impact of large fossil fuel projects and other types of mega projects such as large marinas need additional evaluation and assessment beyond the scope of the HCP. We believe that these types of projects, including the proposed Cherry Point terminal, should be explicitly excluded from coverage under the Aquatic HCP. We also believe that the reevaluation of existing leases that have significant impact, such as the five Puget Sound refineries, should receive additional evaluation beyond the HCP.

5. **Avoidance of projects needs to be emphasized.** The HCP emphasizes minimization rather than avoidance of the need to construct facilities and conduct activities. We recommend that a strengthening of avoidance language be included.

   Further, while we appreciate the recognition of the Public Trust Doctrine, please specify how it will be incorporated in the evaluation of the need statement asserted in permit applications.

6. **Cumulative impacts should be assessed and addressed.** While the assessment model incorporates aggregate effects of multiple activities and facilities authorized by DNR, the cumulative impacts of projects authorized by DNR along with other impacts from other activities or sources are not included. Best management practices should include actions that address and assess the harm to species and the additive effects of these impacts needs to be incorporated, including food chain impacts of non-listed species on listed species.

7. **Updated data and studies need to be incorporated.** We are concerned that the information used for the HCP is up to 10-15 years old, rather than using the more recent data that are available. Most of the studies referenced in Chapter 1 (physical, chemical, and biological information) are from reports that were published in 2007 and earlier. Those studies contain analysis of data that are from 2005 and earlier, including lake data water quality from 1999, the freshwater water quality index from 2005, the 2009 303(d) list (rather than the most recent December 2012 version).

   More up-to-date data and studies should be used to conduct the assessments that form the basis of the HCP. Some examples of newer studies and reports include the South Sound

Dissolved Oxygen studies, Megan Dethier and her team's studies of impacts of shoreline armor, recent musselwatch studies, etc., as well as additional basic monitoring data and assessment of species that should be incorporated.

Additionally, Species data (Chapter 4) are primarily pre-2008 and most are pre-2007. As one example, bird information is not included (Puget Sound Seabird Survey, PSAMP winter aerial bird surveys, etc.). Therefore, their habitat usage calculations are flawed so any modeled calculations on impact would be highly inaccurate.

The plan uses calculations of direct and indirect effects based on a qualitative model that assesses the physical, chemical, and biological impacts associated with existing authorized activities but the data reported are out of date and should be updated.

8. **HCP conditions should be considered minimum thresholds and more site-specific analysis be conducted for each facility and activity.** Highly generalized potential effects analysis and the habitat-based approach may provide less protection for some species. While a logical approach is taken to calculate potential effects (Chapter 4), the document acknowledges "Because of the broad scope of this project, focus was placed on using widely available, standardized information." This broader approach means that analysis of entire life histories, habitat locations and use, and other species features are generalized. Locations and activities were generalized due to stated limitations in the data and how the data are managed at DNR as well as staff capacity.

   Further, it is particularly concerning that a habitat approach *assumes* protection of all covered species as there is no evidence that this is the case. The document states (emphasis added):

   > "For species that lacked sufficient information to estimate the species' distribution, no distribution map was created and no screening or potential effects determination was performed as these species were listed under ESA and added to the habitat conservation plan after the potential effects document was developed. The habitat protections provided in this plan for these species will ***provide substantial benefits for the habitat within the areas of assumed habitat overlap*** with the aquatic lands covered."

   Given this generalization and assumption in the establishment in the proposed HCP, we recommend that the HCP conditions be viewed as a minimum threshold and more site-specific analysis be conducted for each facility and activity.

9. **Climate change impacts and threats need to be addressed.** While there is reference to climate change impacts, the proposed plan does not incorporate consideration of potential changes, such as sea level rise, ocean acidification, more intense precipitation events, and increased temperature, into the conditions listed in Chapter 5. Much more consideration of potential climate change impacts should be incorporated, including a margin of safety in the assessment model.

10. **Impacts from activities, especially shipping and oil transport, are incomplete.** Shipping impacts to aquatic lands should be considered, including the scouring of the seafloor from large vessels and from prop wash, vessel wakes, the effects of anchoring, and discharges associated with oil transfers. Locations for new moorings for ships and barges should be restricted to locations that have the least impact on the bedlands from scouring and shading. Introduction of invasive species from the discharge of ship ballast is also not addressed.

    At marinas, there should be a requirement that all boats fueled at these facilities be equipped (retrofitted, if necessary) with adapters that prevent over-filling tanks, or as a minimum, requiring use of temporary external overflow prevention devices is a simple achievable solution. Additional best management practices (BMPs) will be necessary to address gray water, boat sewage, hazardous materials, boat maintenance, and solid waste concerns associated with boating and marinas. A review of tenant BMPs should be conducted with all lessees to ensure BMPs are comprehensive, protective of aquatic habitat and are being adequately communicated to tenants and guests.

11. **Noise should be included as a standard.** Underwater noise from shipping is the largest source of acoustic pollution in the Sound and many species, from herring to killer whales, have been shown to be highly sensitive to such disturbance. For example, the impact of noise generated by vessels on species from herring to orcas has been well established. The significance of vessel noise has recently been recognized by the International Maritime Organization (IMO) calling for efforts to reduce ship-based noise pollution. Given the long phase-in period allowed for by IMO action, it is imperative that the HCP seek efforts to reduce noise pollution especially during sensitive periods such as during spawning periods of species located near terminals.

12. **The monitoring program is inadequate and needs to be more comprehensive.** The proposed plan acknowledges a high degree of uncertainty. Specifically, the plan states:

    > The measures and standards presented in this chapter are based on best available science and are assumed capable of improving habitat and habitat conditions for covered species. However, aquatic ecosystem processes are often not directly observable. In addition, there is often significant uncertainty associated with the response of habitat and species to the proposed measures. This uncertainty is further complicated by a lack of fine-scale distribution data for species and habitat, spatially accurate leasing data, and data related to the cumulative effects that uses of state-owned aquatic lands may have on habitat and species.

    A strong monitoring program (that is fully funded), therefore, is <u>critical</u> to the success of the plan. It is concerning that the plan substitutes physical, vegetation, and invertebrate indicators for actual monitoring of the covered species. While some partial conceptual models are presented in Appendix F, the selected indicators do not represent the key ecosystem attributes. For example, there is no indicator for any upper trophic level organisms, many of which are included in the HCP, such as Killer whales and birds.

It is inappropriate to request exemption from "take of endangered species" by assuming that others will do the monitoring of these species. Unless covered species are monitored, the HCP in no way assures protection of the covered species.

13. **The restoration lands component needs to be strengthened.** DNR plans to compensate for unavoidable or irreversible impacts on covered species and their habitats through four land restoration and protection programs. While these programs are good, they are inadequate in scope and funding to provide full compensation nor is there assurance that the lands will be set aside. We recommend that this component of the HCP be significantly strengthened.

14. **Existing outfalls should be given consideration.** The discharge of stormwater and wastewater into waters on state aquatic lands is a major concern and is already leaving a long-term liability for the state taxpayers to pay for clean up in the future. Existing water quality permits do not in all cases prevent contamination of the sediment in the vicinity of the outfalls. While we recognize the site-specific nature of outfalls, we believe that they need to be addressed in the HCP.

15. **Additional species should be covered**. The plan excludes coverage of numerous species which are listed as "sensitive" by the State or are candidates for listing. For birds alone, there are a number of species that warrant coverage as recent data are available about the extent and habitat of these animals: Western Grebe, Murre, Eared grebe, and White Pelican.

16. **Stakeholder and advisory groups associated with the HCP should include all user groups**. As part of the adaptive management component of the plan, DNR plans to convene stakeholder groups of user groups (such as marina operators and shellfish growers), tribal representatives, and regional planning entities (such as the Puget Sound Nearshore Restoration Project and the Salmon Recovery Fund). These stakeholder groups should also include user groups other than those who hold leases. These would include non-governmental organizations, Aquatic Reserve Citizen Stewardship Committees, wildlife viewers, and beach walkers. The advisory teams should reflect the people with interest in the safeguarding of these lands and the species to be protected.

17. **Enforcement repercussions should be strengthened.** In addition to requiring correction of a violation, DNR should include a requirement, similar to that by WA Dept of Ecology, for mitigation caused by non-compliance and violations.

18. **Finally, a better tie-in to the Puget Sound Action Agenda is needed.** A large effort by the scientific, technical, and policy experts in the Puget Sound region, including DNR staff, has been underway since 2007 to build a program to recover the health of Puget Sound. The proposed HCP does not provide a strong tie-into the Puget Sound Partnership's Action Agenda and the recovery goals. A connection to the Action Agenda should be explicitly included in the HCP.

Thank you for your consideration. If you have any specific questions or concerns, we can be reached at the email addressed listed below. In addition, we would to meet with your staff in early 2015 to discuss our concerns.

Sincerely,

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Sue Patnude, Executive Director
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Washington Forest Protection Association Comments on WDNR Aquatic Lands Draft HCP and DEIS

1 message

Karen Terwilleger <KTerwilleger@wfpa.org> Thu, Dec 4, 2014 at 5:33 PM
To: "WFWOComments@fws.gov" <WFWOComments@fws.gov>
Cc: "tim_romanski@fws.gov" <tim_romanski@fws.gov>, "scott.anderson@noaa.gov" <scott.anderson@noaa.gov>, "lalena.amiotte@dnr.wa.go" <lalena.amiotte@dnr.wa.go>

Tim and Scott,

I've attached comments from WFPA on WDNR's Aquatic Lands Draft HCP and DEIS. Please let me know if you have any questions. I look forward to working with you

Karen Terwilleger

Senior Director of Forest and Environmental Policy

Washington Forest Protection Association

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Washington Forest Protection Association Comments on DNR Draft Aquatic Lands HCP and DEIS.pdf
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December 4, 2014

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Attention: WDNR Aquatic Lands HCP DEIS

Re: Comments on Washington State Department of Natural Resources Draft Aquatic Lands Habitat Conservation Plan and Draft Environmental Impact Statement

Dear Mr. Romanski and Mr. Anderson:

Thank you for this opportunity to comment on the Washington State Department of Natural Resources Draft Aquatic Lands Habitat Conservation Plan (AL-HCP) and associated Draft Environmental Impact Statement (DEIS). The Washington Forest Protection Association (WFPA) is a trade association representing large and small forest landowners and managers of nearly 4 million acres of productive working timberland located in the coastal and inland regions of Washington State. WFPA was founded in 1908 as the trade association for private forestry in Washington State. Our mission remains primarily unchanged: Advancing sustainable forestry by establishing forest policies that encourage investment in forestland, protection of fish, water and wildlife. Our members are large and small companies, individuals and families, many of whom are multi-generational businesses, founded before statehood. WFPA also has members that are multi-national timber investors that manage globally diversified timberland portfolios for public and corporate pension plans, foundations and endowments. Our members support rural and urban communities through the sustainable growth and harvest of timber and other forest products for domestic and international markets. We have a vested interest in long-term management of the land base and fish and wildlife on our lands. WFPA members are founding partners in the historic

Forests & Fish Agreement that created a forestry blueprint for science-based, collaborative compliance with the Endangered Species Act (ESA) and the Clean Water Act (CWA).

WFPA is pleased to offer the following comments regarding this proposal. Three key criteria guide our evaluation of state or federal regulatory actions:

- Does the action exceed the jurisdictional limitations of the agency's authority, duplicate current regulatory provisions, or acknowledge federal existing actions regarding habitat protection?
- Is the action justified by an appropriate scientific basis?
- Is the regulation clear and certain – does the regulated community understand the requirement and how to comply?

Unfortunately, this proposed AL-HCP falls short on each of these tests.

Regulatory Expansion, Duplication and Confusion

DNR manages state-owned aquatic lands under RCW Title 79. DNR's authority under this statute relates to a trust/proprietary interest in state-owned aquatic lands with several goals: encouraging direct public use and access; fostering water-dependent uses; ensuring environmental protection; and utilizing renewable resources. RCW Title 79 does not grant DNR regulatory authority. The AL-HCP contains an exhaustive list of local, state and federal regulatory programs that regulate covered activities in Washington. There is no indication of how the AL-HCP's independent restrictions and potentially conflicting requirements coordinate with the well-established regulatory system. In effect, the AL-HCP's approach to activities such as log booms and over-water structures amounts to a new regulatory program in which DNR can decide, without reference to any specific standards, what prescriptions for construction, mitigation or operations that an applicant must provide to continue activities or utilize structures that may already exist on state-owned land. As demonstrated by the language of the AL-HCP, these activities or structures are already significantly regulated and reviewed for impacts to endangered species. Creation of these new regulatory requirements goes far beyond DNR's statutory authority under RCW Title 79.

Even more concerning, is that while the AL-HCP claims to limit its scope to three covered activities (shellfish aquaculture, log booming and storage, and over-water structures), the document commits the state to conservation measures, standards and other requirements covering an expansive range of activities. One significant example is regulation of any in-water activities determined by DNR to "potentially disturb or block migration [of salmon early life stages] and disrupt or preclude foraging" as determined by DNR "on a site-by-site basis" for "species predicted or observed to occur at the site". Under this provision, work windows will be established and then be applied to both the "design criteria and operational plan" without limitation. In the forest environment, this activity is regulated by the forest practices code.

As background, the Forests & Fish Law is a historic, science-based set of forest practices regulations that protect 60,000 miles of streams running through 9.3 million acres of state and private forestland. In 2006, the Forests & Fish Law was endorsed by the federal government, through a statewide Forest Practices Habitat Conservation Plan (FP-HCP). As one of the largest and most comprehensive pieces of environmental legislation in the U.S., the law is designed to fully comply with both the federal

Endangered Species Act (ESA) and the Clean Water Act (CWA) to protect Washington's native fish and aquatic species and assure clean water compliance. The FP-HCP received significant federal review at the time of adoption and continues to utilize a dynamic adaptive management program. Although the AL-HCP acknowledges the existence and potential overlap with provisions of the FP-HCP, there is no explicit statement that activities covered by the FP-HCP have already received federal assurances and are exempt from the AL-HCP. In fact, there is no acknowledgement that any activities are already covered by other habitat conservation plans or those that have been through a federal permitting processes requiring ESA Section 7 consultation should be exempt from this AL-HCP. Once a federal consultation process is completed, applying a new set of standards to these activities is duplicative and unnecessary.

Proposal Lacks Adequate Science Review

Under both the State and National Environmental Policy Acts, (SEPA, NEPA), environmental impact statements (EIS) provide analysis of the proposed activity and various alternatives to provide a basis for a reasoned decision among alternatives having differing environmental impacts. *Barrie v. Kitsap County,* 93 Wn.2d 843, 854, 613 P.2d 1148, (1980) (citing RCW 43.21C.030(2)(c)(iii)); *Weyerhaeuser v. Pierce County,* 124 Wn.2d 26, 38, 873 P.2d 498 (1994); *Brinnon Group v. Jefferson County,* 159 Wn. App. 446, 245 P.3d 789 (2011). An EIS must sufficiently disclose, discuss, and substantiate environmental effects and reasonable alternatives and support them with opinion and data. *Barrie,* 93 Wn.2d at 854; *SWAP v. Okanogan County,* 66 Wn. App. 439, 442, 832 P.2d 503 (1992). The required discussion of alternatives "is of major importance, because it provides a basis for a reasoned decision among alternatives having differing environmental impacts." *Barrie,* 159 Wn. App. at 481. Adequacy of an EIS is judged by the "rule of reason" which requires a "reasonably thorough discussion of the significant aspects of the probable environmental consequences of the agency's decision". *Weyerhaeuser,* 124 Wn.2d at 38 (internal quotations omitted); *see also Barrie,* 93 Wn.2d at 854; *SWAP,* 66 Wn. App. at 445 (citation omitted); *Weyerhaeuser,* 124 Wn.2d at 41; *CAPOW v. City of Auburn,* 126 Wn.2d 356, 894 P.2d 1300 (1995) (citations omitted); *Cascade Bicycle Club v. Puget Sound Regional Council,* 175 Wn. App. 494, 306 P.3d 1031 (2013); *Gebbers v. Okanogan County Public Utility District,* 144 Wn. App. 371, 183 P.3d 324 (2008).

WAC 197-11-440(5) establishes guidelines for the discussion of alternatives. The EIS must identify alternatives "that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation." WAC 197-11-440(5)(b); *Cascade Bicycle Club,* 175 Wn. App. at 510. These include alternatives over which an agency with jurisdiction has authority to control either directly or indirectly. WAC 197-11-440(5)(b)(iii). While the alternatives do not need to be exhaustively analyzed, the EIS "must present sufficient information for a reasoned choice among alternatives." *SWAP,* 66 Wn. App. at 442. Unfortunately, it is impossible to meaningfully comment on the AL-HCP that leaves so much for determination later in terms of standards and applicability. Not only is the AL-HCP deficient in presenting a clear proposal, the DEIS is legally insufficient.

The AL-HCP also states that it can only be implemented if the legislature provides the necessary funding and that “DNR recognizes that failure to maintain adequate funding shall be grounds for suspension or partial suspension of the incidental take permit.” This funding uncertainty exists not only upon initial entry into the AL-HCP, but will remain during each state budgeting cycle. Nowhere is this more apparent

than in the discussion of funding adaptive management. WFPA's experience with the FP-HCP Adaptive Management Program demonstrates that securing funding can be challenging – particularly for basic research.

Rules Lack Clear & Certain Direction

Instead of providing certainty for the regulated community, the AL-HCP may create more confusion and reduces certainty. The AL-HCP may also result in re-analyses of previously federally approved projects. The AL-HCP is a very complex document; stakeholders have not had enough time to digest the information or ask for clarification. One of the strengths of the FP-HCP negotiation and the associated Adaptive Management Program is the extensive stakeholder involvement at every step along the way. In closing, we support the request of many other reviewers to provide an additional time for the interested public to review the draft HCP and to provide comments.

Considering these defects, WFPA respectfully requests that EPA and the Corps withdraw their proposal and work with all stakeholders to create a science-based rule that fits within the agency's authority and provides clear and certain direction to the regulated community.

Again, thank you for the opportunity to comment. We look forward to working with DNR and the federal services.

Sincerely,

Karen Terwilleger
Senior Director for Forest and Environmental Policy

WFWOComments, FW1 <wfwocomments@fws.gov>

WDNR Aquatic Lands HCP DEIS

1 message

Mandy Lill <mlill@washingtonports.org> Thu, Dec 4, 2014 at 9:40 AM
To: "WFWOComments@fws.gov" <WFWOComments@fws.gov>
Cc: Gerry O'Keefe <gokeefe@washingtonports.org>

Here is a PDF of the hard copy letter that was mailed this morning.

Thank you,

Mandy Lill

Information & Member Services Coordinator

Washington Public Ports Association

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WPPA HCP Comment Letter - FinalPDF.pdf
711K

WASHINGTON PORTS

December 2, 2014

Tim Romanski
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Lacey, Washington 98503

Scott Anderson,
NOAA Fisheries
510 Desmond Drive SE
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Dear Mr. Romanski and Mr. Anderson:

On behalf of the Washington Public Ports Association (WPPA), I am writing to provide comments on the proposed Habitat Conservation Plan (HCP) developed by the National Marine Fisheries Service, the U.S. Department of Fish & Wildlife in cooperation with the Washington Department of Natural Resources. Thank you for your consideration of our comments and requests.

WPPA and our members have reviewed and are working through the HCP and the associated Draft Environmental Impact Statement (DEIS). Needless to say, these are complex documents with potentially far reaching consequences for the state's near-shore habitat and the built environment in these areas. Despite our best efforts we are not convinced that we have been able to complete an adequately thorough review of the HCP and DEIS. We are concerned not only that our review is incomplete, but also that because the public was not engaged in the development of the HCP and DEIS earlier, many of our partners-in-interest were not aware of the documents in time to review them and provide comments.

As a result, we request that you provide an additional 90 days for the public to review the draft HCP and DEIS and to provide comments to you. It is imperative to our membership that you provide this additional time and this request ranks at the top of our requests.

As a general comment, the HCP states unambiguously that it can only be implemented if the legislature provides the funding necessary to do so (page 5-53), and that "DNR recognizes that failure to maintain adequate funding shall be grounds for suspension or partial

Washington Public Ports Association

A Trade Association Representing the 75 Public Port Districts of Washington State

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suspension of the incidental take permit" (page 5-54). This funding uncertainty exists not only upon initial entry into the HCP, but will remain during each state budgeting cycle. WPPA urges DNR to set aside the HCP until this funding is made available by the legislature. Federal agencies are not authorized to enter into HCPs unless funding is provided to support them. It would be irresponsible to adopt an HCP and impose its requirements on lessees of state-owned aquatic lands prior to securing the necessary funding to support those requirements.

WPPA recognizes that the HCP states,

> "This HCP does not cover areas managed under port management agreements, or aquatic lands sold into private ownership, managed by agencies other than Washington DNR, or under waters that are not navigable for the purpose of establishing state title."

However, as owners and operators of overwater structures we must be attentive to new regulations that affect the assets and activities that form the basis of our activities. As a practical matter WPPA believes that mitigation standards proposed and adopted by a state agency may well be required in subsequent permits issued by the federal agencies at our facilities. Our members take their environmental stewardship responsibilities seriously and vigorously support regulatory standards consistent with these values.

Our specific comments are grouped based on several basic issues, with detail provided in bullets below each issue. The first 5 comments challenge the need for an HCP of this scope. We do not believe that using the HCP approach to address all shoreline and overwater structures is warranted or represents good public policy, and the first five comments touch on some of the reasons why. The remaining comments focus on more specific aspects of the draft HCP that are unjustified or unwise. Note that our preference is that the overwater structures component of the HCP be reworked to cover only specific activities and our comments on technical aspects of the draft HCP should not be interpreted as agreement with the underlying approach.

1. The HCP is far too broad in its coverage of all overwater structures with one-size-fits all standards.

    - Structures and their potential environmental impacts vary widely. Using a single, very limited set of standards, such as 100% grating on all structures, is an arbitrary approach, given that structures can vary dramatically in extent and potential impacts. We are also not aware of any technical or scientific justification demonstrating that these standards are necessary to avoid take. Further evidence of this is the fact that we have not heard that the Services have previously required that the standards articulated in the HCP be met as part of ESA Section 7 consultations for newly permitted overwater structures, indicating they are not, as a blanket matter, necessary to avoid take.

2. Generally, the use of an HCP is a better fit for specific types of activities that DNR authorizes, such as log booming and aquaculture. The overwater structure HCP should be broken down into specific activities or structures that could potentially affect listed species, rather than applying to structures that are part of baseline conditions.

    - The HCP erroneously focuses on DNR leasing decisions as "actions" that could result in "take." However, DNR's leasing decisions do not necessarily dictate whether existing overwater structures remain in place. An overwater structure could remain in place even if DNR fails to renew a lease. As a result, the lease decision is not an "action" that results in "take" of listed species under the Endangered Species Act, because the DNR leasing decision does not cause the overwater structure to come into existence, it is already there.

    - Further, HCPs are intended to protect parties from incurring ESA "take" liability for their actions. Entering into a lease authorizing a party to use an existing overwater structure is not an action that can be interpreted to take listed species due to the mere ongoing existence of the structure. If the lessee plans to use the structure in a fashion that could cause take to occur, that liability would be better addressed through standards and requirements of an HCP applicable to that particular type of use. As there is no potential take liability, it makes no sense for an HCP to address DNR's actions related to existing overwater structures.

3. The overwater structure HCP should not apply to structures or actions that have already gone through federal permitting processes requiring ESA Section 7 consultation.

    - Any new shoreline/overwater structure and most actions to repair/replace/modify an existing structure are likely to require one or more federal permits for which the requirements of ESA Section 7 will apply. Permittees are protected from ESA liability by going through the Section 7 consultation process. Potential take liability is addressed through Section 7 consultation, meaning no take liability can exist for DNR related to the existence of an overwater structure that is being maintained in compliance with the terms of a permit that was issued following ESA Section 7 consultation with the Services. Any ESA liability DNR might have would derive from the liability of DNR's lessee. Therefore, the lessee's compliance with Section 7 requirements and the lessee's resultant protection from ESA liability also insulates DNR from liability. Applying a new set of standards to lessees of those structures when their leases are renewed is duplicative and unnecessary. It cannot be justified as needed for DNR's protection against take liability and is therefore arbitrary.

    - A permitting process that includes Section 7 consultation with the Services requires a direct review by the Services of a particular facility's potential effects on listed species. This focused review provides a much more direct and meaningful analysis of potential ESA issues than the blanket, "one-size-fits-all" approach in the HCP, and allows those issues to be addressed through project-specific permit conditions.

To conserve state resources and efficiently address issues of concern, facilities that have gone through this process should not be required to engage in an unnecessary, duplicative review under an HCP.

4. It is impossible to meaningfully comment on an HCP that leaves so much for determination later. We expect DNR to focus the HCP on specific tenant actions and activities and provide standards that can be evaluated through a public review and comment process. To proceed otherwise is irresponsible and outside the tradition of good government in Washington State. Leaving such broad and important decisions "to be determined" after the HCP is adopted is an unacceptable approach to policy-making of this significance.

    - When structures cannot reasonably be altered to comply with the HCP criteria, the HCP provides that mitigation will be required, yet without providing standards or criteria for how the mitigation decisions will be made. Very few, if any, commercial and industrial overwater structures can meet the standards in the HCP and still be functional for their intended purpose, and without understanding what mitigation will be required, the owners of these structures face unacceptable uncertainty.

    - The HCPs approach to overwater structure mitigation amounts to a new regulatory program wherein DNR can decide, without reference to any articulated standards, what the tenant must provide as mitigation in order to continue having the right to make use of a structure that already exists on state-owned land. The lack of standards for this decision violates tenants' and others' rights to be able to meaningfully comment on the impact of the proposed HCP. SEPA and NEPA require that an opportunity to meaningfully comment on a proposal be provided. The HCP for overwater structures and the associated DEIS are hopelessly vague with respect to decisions that must be evaluated through the public comment process.

5. The Draft overwater structure HCP would violate DNR's statutory mandate to manage public lands in order "to provide a balance of public benefits for all citizens of the state."

    - The benefits to be balanced specifically include: "encouraging direct public use and access" and "fostering water-dependent uses," as well as "ensuring environmental protection" as set forth in RCW 79.105.030. DNR is specifically directed to recognize that generating revenue in a manner consistent with the required balancing of public benefits is itself a public benefit.

    - The draft HCP provisions related to overwater structures would decrease public benefits by limiting direct public use and access and restricting water-dependent uses (both of which frequently involve overwater structures), and by driving lessees away from public lands managed by DNR. Because the standards included in the HCP for overwater structures cannot be justified technically, and because many

overwater structures on aquatic lands managed by DNR have already been determined to not harm or otherwise take listed species, the decrease in public benefits that would occur due to entry into such an overly-broad HCP would not be balanced by any significant increase in public benefits from increased environmental protection. Entry into the HCP as currently drafted would therefore violate DNR's obligations under RCW 79.105.030.

6. The analysis of the no action alternative and the anticipated benefits of the HCP are flawed and misleading. The HCP and the accompanying DEIS must be revised in order to facilitate appropriate review of benefits and impacts of the proposal.

    - The scope of existing ESA reviews implemented under the no action alternative is dramatically underestimated, resulting in a flawed statement of impacts under the no action alternative and a false statement of benefits associated with implementation of the HCP. Virtually all activities to be regulated under the HCP are already subject to regulation under the Endangered Species Act. The role of existing Section 7 consultations under individual and programmatic permits and the benefits associated with similar fisheries, shorelines and habitat requirements under state regulations must be better acknowledged throughout Sections 1.6 (including tables 1.10 and 1.12), Section 2.3, the legal framework portions of Section 3 (subsections 3.2.2, 3.3.2 and 3.4.2; including Tables 3.3, 3.11, and 3.15), throughout Section 6 and in the corresponding sections of the DEIS.

    - The HCP and the DEIS analysis of HCP-related benefits inappropriately take credit for a number of existing programs and authorities neither created nor directly affected by the HCP, including the State program for removal of derelict vessels, the Aquatic Reserves program, Conservation Leasing program, management decisions implemented through Commissioner's Orders, and the Aquatic Restoration Program. With respect to these programs, they currently exist and provide benefits, and would continue to do so under the "No Action" Alternative. The implementation of the HCP simply has no causal relationship to the programs' existence or the benefits they provide.

    - The HCP and the DEIS assume a number of speculative benefits from proposed actions that 1) are so overly broad that their benefits and impacts cannot be meaningfully reviewed, and 2) that are implementable under the no action alternative and are therefore not fairly considered as a benefit of the HCP. Examples of actions that should not be considered as a direct benefit of HCP implementation (in comparison to the no action alternative) include aquatic landscape planning and prioritization; interagency collaboration, increased oversight by DNR of private recreational docks located on state aquatic lands, implementation of expanded habitat monitoring and monitoring of the effectiveness of existing programmatic measures.

- The DEIS also fails to consider the impacts associated with implementation of the conservation measures and other standards presented in Sections 5.1 and 5.2 of the HCP. As one example, consider how the application of grating to certain industrial dock/pier/wharf, shipyard or terminal structures (e.g., pages 5-11 and 5-13) is in conflict with common design solutions focused on the capture and treatment of spills, and fugitive dusts and stormwater for these types of structures. This type of conflict between two environmental considerations and the adverse impacts to stormwater quality are not considered as part of the DEIS for the HCP. As a second example, consider the proposed requirement for removal of all structures from DNR land (page 5-23). As written, this requirement would equally apply to over-water and subsurface structures (e.g., buried cables or pipes that could alternatively be abandoned in place without associated impacts of removal), yet the DEIS does not consider the potential adverse impacts of the removal requirement if applied.

7. The Scope of the HCP is Much Broader than Stated and Must be Refocused: The ability for affected parties and stakeholders to meaningfully comment on the HCP proposal and the analysis of impacts presented in the DEIS is fatally compromised by the overly broad nature of the plan. Despite assurances to the contrary, the HCP continues to cover an incredibly wide-range of activities and the DEIS fails to adequately evaluate the impacts associated with all activities regulated under the proposed HCP provisions.

    - Section 1.6 of the HCP (including Tables 1.9, 1.10, 1.12) misleads the public by claiming to limit the scope of the HCP to three covered activities (shellfish aquaculture, log booming and storage, and over-water structures). However, the HCP subsequently commits the state to conservation measures, standards and other requirements covering an expansive range of activities. Many of these are described in Section 1.6 and Tables 1.10 and 1.12 as being specifically excluded from the HCP, yet far-reaching regulatory requirements are then imposed on these activities. Examples contained in the current draft of the HCP and that need to be either removed (or appropriately and comprehensively evaluated in the HCP and accompanying DEIS) include the following:

        - Broad prohibitions on dredging (pages 5-10, 5-11, 5-13, 5-24) without sufficient clarification of when exceptions to these prohibitions may apply (e.g., "where Washington DNR determines that it is required for navigation, trade and commerce, flood control, maintenance of water intakes, or other public health and safety purposes"). This could also result in conflicts with federal maintenance obligations – such as where a federal navigational channel overlays state-owned aquatic lands.

        - Design standards for buildings located in upland areas if constructed on filled state-owned aquatic lands (page 5-14).

        - Standards for lighting design (page 5-20).

- Bank armoring prohibitions and associated new requirements for removal or mitigation (page 5-21).

- Fixed-breakwater prohibitions and associated requirements for retrofitting of existing breakwaters (page 5-22).

- Broad requirements without limitation for removal of structures, vessels and equipment (requirement appears to apply to both over-water and underground structures without considering differences in impact/benefit) (page 5-23).

- Broad prohibitions on placement of fill on state-owned aquatic lands except under certain exceptions that are not sufficiently defined (e.g., what facilities are considered to be "transportation facilities of statewide significance currently located on the shoreline"?) (pages 5-25 and 5-26).

- Regulation of pressure-washing activities not necessarily associated with over-water or in-water equipment, machinery or structures (pages 5-27 to 5-28).

- Application of work windows to be specified by DNR to both in-water construction and other "operational activities" (this term "operational activities" is sufficiently broad as to encompass any virtually non-construction use of aquatic lands whatsoever) (pages 5-29 to 5-30).

- Regulation of any in-water activities determined by DNR to "potentially disturb or block migration [of salmon early life stages] and disrupt or preclude foraging" as determined by DNR "on a site-by-site basis" for "species predicted or observed to occur at the site". Work windows will be established under these overly-broad and undefined requirements and will then be applied to both the "design criteria and operational plan" (page 5-30) without limitation.

- Location requirements for finfish aquaculture (page 5-33).

- Location standards for new and reconfigured storm or wastewater outfalls (page 5-33).

- Imposition of review and approval requirements for all aquatic vegetation surveys, apparently without limitation (page 5-33).

- Broad regulation of vegetation management and control activities (page 5-34).

- Broad and unclearly defined limitations on structures and uses "located in or adjacent to documented forage fish spawning areas", including application of additional use restrictions, pier design standards and turbidity limitations as well as application of new work windows not only to in-water construction, but also to "operational work" (pages 5-37 to 5-39).

- The matters covered under the HCP are so broad (including but not limited to the examples listed above) that evaluation of the impacts of the proposal cannot be reasonably reviewed or measured. In order to provide a meaningful opportunity for review and comment on the HCP proposal and the associated DEIS, the documents should be clearly focused on and limited to specific activities rather than broad categories of both actions and pre-existing conditions.

8. The exclusion for Port Management Agreements (PMAs) should be expanded. Section 1.3 of the document currently excludes from HCP coverage those areas that are managed under port management agreements. Given that many of the conservation measures, standards and other requirements of the HCP do not confine themselves within the narrow boundaries of an existing PMA Parcel (e.g., dredging at the face of an existing Port terminal in an existing waterway, but located just beyond the defined limits of the Port's PMA parcel) the exclusion should be expanded. This exclusion should include additionally the following:

    - Activities otherwise regulated under the HCP but that are associated with another activity occurring wholly or partially under a PMA.

    - Properties that have been identified by a Port for future inclusion within a PMA amendment, (including but not limited to aquatic lands abutting properties recently acquired by a Port).

    - Aquatic lands managed by a Port under a use authorization or lease but not specifically included in a PMA.

9. Many of the conservation measures and design standards are arbitrary, unclear or infeasible as currently described. Though requirements imposed as conservation measures or other standards appear arbitrary or infeasible, the language used in the document is strict. Without correction of these requirements or inclusion of language ensuring flexibility during application, the HCP will be unworkable. This will result in non-compliance soon after adoption. Some of these deficiencies could be corrected by better aligning the requirements to each group of structures rather than lumping disparate structures (e.g., marinas and industrial marine terminals) into a single group. Selected examples of arbitrary, unclear or infeasible measures and standards in the current HCP draft include the following:

    - Application of dock grating has been applied to all "near shore" areas to 100 percent of the coverage, without allowing for the unique structural/seismic

considerations, spill control or stormwater management expectations associated with many structures. These requirements will particularly apply to shipyard and terminal structures. This requirement appears to apply broadly to nearly all over-water docks and piers in Washington State as the term "near shore" is defined in the document as marine aquatic lands up to 20 meters or 66 feet in depth or to the entire "littoral" area in lakes regardless of depth.

- Broad commitments for stormwater collection, alteration or treatment (page 5-11) are applied to all overwater structures without considering whether this is feasible (e.g., how this requirement might be applied to mooring buoys or floating breakwaters) or how this is addressed given conflicting requirements for application of deck grating.

- Arbitrary requirements are included to align docks with prevailing winds and currents (page 5-11) without considering the implications of such requirements (e.g., how will this requirement affect the length/size and associated impacts on the utility of the structure)

- Enforcement of no-wake advisories is required without limitation at all shipyards and terminals (page 5-11) in addition to marinas where these requirements are more appropriate.

- Application of new vegetation buffer requirements has been made broadly to all docks, wharves, piers, marinas, rafts, shipyards and terminals (page 5-32).

10. While WPPA believes that Section 7 consultation is working and, as a result, no HCP is needed for overwater structures the counterproposals section must be expanded if it is to be adopted. A possible strategy for improving the document is to significantly expand the "Counterproposals" section currently included on pages 5-9 and 5-10. DNR staff currently applies flexibility and professional judgment (including review of engineering reports and studies and consideration of best practices applied elsewhere within Washington) during stewardship reviews of proposed or existing uses. During those reviews, DNR staff currently consider potential project requirements, anticipated impacts, design alternatives, the practicability of those alternatives and the associated trade-offs with specific design requirements are considered. In order for the HCP to be implementable, it will be important for most or all of the design requirements currently proposed as conservation measures and other standards to be subject to this balanced type of review. This review process should be clearly spelled out and be an integral part of any HCP implementation so that these reviews do not require separate authorizations and approvals.

11. Arbitrary implementation timeframes established in the HCP need to be more flexible. The HCP currently applies an arbitrary time limit of 20 years for the retrofit of most existing structures (page 5-9). Any replacement or retrofit requirement should not apply until the structure requires replacement due to wear-and-tear or change in use.

- Many in-water structures have anticipated design lives far longer than 20 years (e.g., concrete dock and terminal structures, breakwaters). No basis has been given for the imposition of an arbitrary 20-year requirement, and no consideration has been given to the additional environmental impacts that could be triggered by prematurely replacing or retrofitting an existing structure prior to the end of its useful life.

- The arbitrary nature of the 20-year standard applied to certain over-water structures is made clear by the fact that this requirement is not uniformly applied under the HCP. For example, the time-frame to be applied to private recreational docks is the 50-year duration of the HCP, and that goal is applied only to 65 percent of the private recreational dock structures (page 5-51). Similarly a broad exclusion is applied to long-term leases (page 5-52).

12. Lack of clarity and over-broad definitions for key HCP terms and requirements must be addressed. Certain terms and procedures that are critical to the interpretation of the HCP and to its feasibility are either not defined or are poorly defined. This compromises the ability of stakeholders and the public to review and comment meaningfully on the documents.

    - Mitigation: Mitigation is described as an alternative to strict compliance with the compensation measures, standards or other requirements listed in the HCP (page 5-5). However, the requirements associated with that mitigation are not defined, nor is the process by which the mitigation requirements would be determined. Further it is not clear if mitigation that was already conducted (e.g., removal of an over-water structure to mitigate for construction of a new dock) would be considered during a subsequent DNR review of a lease renewal.

    - Nearshore: This term is used many places within the document to describe when, where and how specific requirements of the HCP are to be applied. However, it is not clear whether the term is used consistently in the document. For lake habitats the term appears to include the entire littoral zone regardless of depth (page 1-23). For marine areas, the term "nearshore" appears to represent all aquatic lands up to 20 meters or 66 feet in depth (page 1-32). The term does not appear to be defined for river systems. Despite this overly-broad use, the term "nearshore" is used as part of multiple design and siting requirements under the HCP. The use of this term in this expansive way results in potential requirements well beyond those typically implemented in existing ESA reviews during permitting of new structures. Important examples of the usage of the term "nearshore" in the current HCP include the following:

        - Requirements for "100 percent unobstructed grating" for portions of piers and elevated docks that are above the nearshore or littoral area (page 5-11 and 5-13).

- Requirements for 100 percent grating for piers and elevated docks and gangways associated with floating homes (page 5-12).
- Limitations on siting for covered moorage, watercraft lifts and boathouses (page 5-15).
- Requirements for relocation of existing log booming and storage areas (page 5-19).
- Outfall construction requirements are described as "must be installed below the substrate within the nearshore..." (page 5-33).

- Best Management Practices: Requirements to implement best management practices under the HCP (e.g., page 5-9 as a mandatory requirement for new use authorizations at existing facilities) are sprinkled throughout the document. Yet the term is only defined in one location (see narrow definition on page 5-12 as applied to marina best management practices). The meaning of the term in other portions of the document is not clear making it impossible to provide meaningful review and comment on the HCP proposal provisions where this term is used.

- Work Windows and Application to "Operational Activities": A potentially far-reaching requirement of the HCP is the proposed application of work windows (typically used to regulate in-water construction activities) to the undefined scope of "operational activities" (see pages 5-29, 5-30, 5-38). The only apparent exclusion to this term is for vessel movements (exclusion used on page 5-38 but not on pages 5-29 or 5-30). The application of work windows to non-construction activities is a huge and inappropriate expansion over existing regulatory authorities. The scope of this proposed expansion is unclear. For example, is DNR proposing to establish work windows during which unloading of cargo at a marine terminal would be prohibited? Is DNR proposing to limit the use of marinas or log rafting areas to only certain seasons?

13. The scope and divergent needs of the recreational dock program are problematic. Section 3.4.5 of the HCP provides an estimate of the number and location of overwater structures currently covered under existing agreements and applications. While the number of agreements appears impressive (1872 total agreements listed in Table 3.16, including 1,058 mooring buoy agreements listed in Table 3.20 and 814 other types of non-buoy agreements), these numbers pale in comparison to the estimated number of private recreational docks to be regulated under the HCP. DNR's estimate for the number of these structures is from 9,000 to more than 19,000 (page 5-51), ten to twenty times the number of other types of docks or over-water structures (excluding buoys). The HCP defines seven actions that DNR will take (page 5-52), and successful implementation of the HCP will require completion of all of these actions. This will be challenging given the huge number of affected docks and property owners and the lack of existing clarity about how to accomplish these actions. As the requirements and challenges associated with the

residential dock program are unique to this category of activity, it would be better broken out as a separate DNR program rather than joined at the hip with over-water structures at facilities such as shipyards, industrial wharves and commercial marinas (these facilities are radically different from private recreational docks).

14. The HCP exacerbates the lack of certainty for regulated community. Though cast as a way of providing greater certainty and a more streamlined regulatory and permitting process, the HCP in fact provides no guarantee of such benefits. Further, any potential benefits are offset by substantial new risks to users of state-owned aquatic lands. Examples of this imbalance between benefits and risks include the following:

- Though the HCP is intended to streamline permitting reviews for agency staff and users of state-owned aquatic lands, in fact this is not achieved. The HCP provides no relief from requirements to conduct individual Section 7 consultations (see page 1-5) or to address other regulatory requirements.

- Any benefits to the State or to other parties under an incidental take permit may be fleeting if effectiveness and compliance monitoring (Sections 5.4.2 and 5.4.3) do not demonstrate the success of the overall DNR implementation program. As these monitoring activities are broad, undefined and outside the control of any one regulated entity, this uncertainty is substantial for any potential beneficiary of the HCP.

- In contrast to the uncertainties listed above regarding any HCP benefits, the HCP introduces substantial new uncertainties and threats to potential users of aquatic lands:

    - Substantial new and poorly defined HCP requirements (see preceding comments)

    - Expansive enforcement authorities (see page 5-57) including the right to unilaterally terminate or reject a proposed use authorization (page 5-7)

    - Expanded lease/use authorization default provisions (page 5-9)

    - Additional liability for actions taken by DNR under HCP enforcement authorities (page 5-57)

In closing I need to emphasize that our members and others in the regulated community need more time to evaluate the proposal to ensure that it is fully vetted prior to adoption. Under no circumstances should the HCP be adopted by the federal agencies until it is fully funded by the State Legislature.

Again, thank you for the opportunity to provide a critique of the proposed HCP.

Best Regards,

Gerry O'Keefe
Assistant Director for Environmental Affairs

WFWOComments, FW1 <wfwocomments@fws.gov>

WDNR Aquatic Lands HCP DEIS

1 message

Connelly, Leslie (RCO) <leslie.connelly@rco.wa.gov> Thu, Dec 4, 2014 at 4:10 PM
To: "WFWOComments@fws.gov" <WFWOComments@fws.gov>
Cc: "Gibbs, Heather (DNR)" <Heather.Gibbs@dnr.wa.gov>

December 4, 2014

TO: Tim Romanski, U.S. Fish and Wildlife Service

Scott Anderson, NOAA Fisheries

FROM: Leslie Connelly, Policy Specialist, Washington State Recreation and Conservation Office

RE: WDNR Aquatic Lands HCP DEIS

The Washington State Recreation and Conservation Office (RCO) requests your consideration of the following comments regarding the Washington Department of Natural Resources (DNR) Aquatic Lands Habitat Conservation Plan (HCP). One of RCO's core business functions is to provide grant funding for public recreation, open space, and salmon recovery. Within this work, our grant recipients often work on state-owned aquatic lands and need authorization for DNR to implement their grant projects. As such, RCO's comments focus on how we might collaborate with DNR to ensure grant applications are scoped according to the requirements of the Habitat Conservation Plan, can be implemented once funded, and meet the statutory requirements and policies of our grant programs.

Timeframe for Use Authorizations

RCO requests an opportunity to work with DNR to align timeframes for use authorizations with the timeframes required in RCO's grant programs. Depending on the RCO grant program, the DNR timeframe may not be long enough to achieve the RCO grant program requirements. The time period required for RCO grant programs ranges from 10 to 25 years and are set by federal or state law, federal or state rule, or policy, depending on the grant program. DNR's HCP identifies a range of timeframes from one to 30 years for DNR use authorizations depending on the activity. It would be helpful to clarify the timeframes allowed for certain types of projects to ensure RCO's grant projects will not be in conflict with the HCP requirements.

For example, RCO administers the Boating Infrastructure Grant program in partnership with the federally funding partner with the U.S. Fish and Wildlife Service (USFWS). The USFWS requires a 20-year commitment for Boating Infrastructure Grants from the time the project is complete. This often translates into a minimum 25-year use authorization for major over-water infrastructure improvements or new developments. It would be helpful to identify now whether DNR will be able to issue a 25-year use authorization for these types of projects funded by this grant program. As previously mentioned, each RCO grant program has different requirements and similar examples could be provided to start this conversation.

Compliance with the Americans with Disabilities Act

Any public recreation project funded through RCO must comply with federal and state accessibility requirements. The standards for overwater structures are clear on the minimum design standards for unobstructed grating. Do the design standards take into consideration accessibility? Please clarify in the HCP how such design standard are to interact with the Americans with Disabilities Act (ADA) and the minimum requirements in Section 302.3 Openings of the 2010 ADA Standards for Accessible Design. If there is a conflict between the HCP and the ADA, which requirement will prevail? Will a project be denied if it cannot achieve the HCP design standards within the requirements of the ADA? Is there an opportunity to design an overwater structure that meets ADA and seek a waiver of the HCP design standards? RCO welcomes a discussion on how to meet the design standards of the HCP and provide accessible public access to aquatic lands.

Project Scoping

RCO grant applicants must provide a conceptual design and cost estimate with their grant application. RCO encourages applicants to work early with landowners on what requirements may come any lease or use authorization. Having specific guidance early in the grant application process on specific design requirements will help applicant's better scope, design and budget their proposals. RCO asks that DNR staff provide support during the application process to help applicants understand the new HCP requirements to ensure grant applications are implementable if funded.

Bank Armoring

RCO currently encourages its grant recipients to follow the Aquatic Habitat Guidelines adopted by a coalition of federal and state agencies including of the Departments of Fish and Wildlife, Ecology, Natural Resources, and Transportation and RCO. Recently, the group approved the Marine Shoreline Design Guidelines for shoreline armoring with intent to provide best management practices on how to alleviate impacts to natural processes. Please address in the HCP whether these design guidelines are a valid tool for practioners to use when they are working in the shoreline environment or at a minimum that the guidelines are not in conflict with the requirements of the HCP.

Existing Facilities

Section 3.4.2 states that DNR will incorporate the HCP requirements into existing use authorizations at the time of renewal or amendment. What is unclear is what will occur if the lessee cannot meet the terms of that renewal of amendment. Will the lessee be removed, and if so, what will become of the structures on site? Of interest to RCO is whether any of the sites that will come up for renewal or amendment were funded with RCO grant funds and are still within our grant compliance period. If the lessee cannot or is unwilling to meet the new requirements, but still is required to maintain an RCO-funded site, then RCO, along with DNR, will have a compliance issue to work on together.

Thank you for the opportunity to comment.

Leslie Connelly

Natural Resource Policy Specialist

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BISON CONNECT

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WSPA Comments on the WDNR Aquatic Lands HCP DEIS

1 message

Lisa Venegas <lvenegas@wspa.org> Thu, Dec 4, 2014 at 12:06 PM
To: "tim_romanski@fws.gov" <tim_romanski@fws.gov>, "WFWOComments@fws.gov" <WFWOComments@fws.gov>, "scott.anderson@noaa.gov" <scott.anderson@noaa.gov>
Cc: Frank Holmes <fholmes@wspa.org>

Sent on behalf of Frank Holmes, Western States Petroleum Association

Dear Messrs. Romanski and Anderson:

Please find the attached Western States Petroleum Association comments on the WDNR Aquatic Lands HCP DEIS.

Thank you.

Frank E. Holmes

Western States Petroleum Association

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WSPA Comment Letter WDNR Aquatic Lands HEP DEIS 120414.pdf
36K

Western States Petroleum Association
Credible Solutions • Responsive Service • Since 1907

Frank E. Holmes
Director, Northwest Region & Marine Issues

December 4, 2014

VIA EMAIL AND U.S. MAIL

Mr. Tim Romanski
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Mr. Scott Anderson
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Re: WDNR Aquatic Lands HCP DEIS

Dear Messrs. Romanski and Anderson:

The Western States Petroleum Association ("WSPA") appreciates the opportunity to provide the U.S. Fish & Wildlife Service ("FWS") and the National Oceanic and Atmospheric Administration ("NOAA Fisheries") (collectively, the "Services") with the following comments and information to assist FWS, NOAA Fisheries, and the Washington State Department of Natural Resources ("WDNR") in developing WDNR's Draft Aquatic Lands Habitat Conservation Plan ("HCP"), and the Services' Draft Environmental Impact Statement ("DEIS") on the HCP.

WSPA is a trade association which represents commercial marine transport companies, oil terminals, refineries, and pipelines in Washington State, and throughout the West Coast of the United States. Member companies operate marine vessels that transport a range of crude oil, petroleum products, and other economically important materials to and from ports in Washington. Critical to member companies' operations are lands leased from WDNR for ports, terminals, and related facilities. Continued safe, secure, efficient, and environmentally-responsible operation of member facilities in Washington State on state-owned aquatic lands is of primary importance to our members. Consequently, WSPA and its members possess a high degree of interest in this process.

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WSPA has reviewed and analyzed the HCP and DEIS and offers the following comments on these draft documents. In summary, WSPA has identified several fundamental concerns regarding proposed Avoidance, Minimization and Mitigation Measures ("AMMs"), and remains unclear how such measures will apply to existing and proposed industrial facilities. These concerns include the following:

- The lack of industry involvement to date in developing AMMs contained in the plan, and the potential inability to implement AMMs at existing industrial facilities;
- The lack of consideration of the economic impacts of AMMs on industrial facilities;
- Procedural uncertainties regarding how and when AMMs will be applied at existing and potential future facilities; and
- The lack of a detailed analysis of the indirect affects of AMM implementation at existing facilities.

1. Lack of Industry Consultation Leading to Potentially Impracticable Standards

In Section 5.2.1 of the HCP, WDNR proposes to implement numerous AMMs for overwater dock structures and marine terminal facilities as a part of lease review. The HCP and DEIS fail to consider whether it is feasible for industry to implement these measures. In addition, the DEIS fails to disclose the potential environmental impacts of implementing these measures at marine facilities, or how implementing such standards may affect marine terminal and vessel safety and structure integrity.

WSPA notes that it and its members have not previously been contacted for input regarding the technical feasibility of the proposed AMMs despite the fact that application of these measures could significantly impact existing and proposed marine facilities. WSPA recommends that WDNR engage in a more extensive technical discussion with industry over AMMs prior to their inclusion in an HCP.

Examples of HCP measures that are not practicable from an industry standpoint because they are either not technically or economically feasible include the following:

- The HCP appears to impose the same kind of requirements on petroleum marine terminals as it does on small recreational docks, without any consideration for size, use, structural or engineering limitations, or regulatory limitations on that facility – the HCP requirements may not be technically practicable or consistent with other regulatory and engineering requirements; this includes:
    - Unobstructed grating over 100% of surface area;
    - Best management practices specified in the "Resource Manual for Pollution Prevention in *Marinas*"; and
    - Vegetative buffers for structures.
- Other new standards triggered under the plan (Section 5.2.2), even where they would not be triggered under existing rules and ESA review, that may not be practicable or achievable include:
    - Treated wood prohibition for dock maintenance (HCP, pg. 5-29); and
    - Covered species work windows for operational activities (HCP, pg. 5-29).
- For those major dock/wharf facilities, the requirement of at least sixty (60) percent functional open space (grating) on top of a dock (HCP, pgs. 5-11 - 5-13), could prove onerous for facilities once leases expire and renewals are required.

The HCP should incorporate site-specific flexibility for the above identified and other HCP requirements. The HCP should also consider excluding refinery docks from the HCP's requirements. There are very few refinery docks in Washington and the environmental, safety, and security requirements that apply to these docks create an already complex web of regulations. Refinery dock activities that could potentially

impact listed species will likely require U.S. Army Corps of Engineer permitting (and ESA Section 7 Consultation) - applying the HCP's requirements, on top of other permitting requirements, to refinery docks is not likely to significantly, if at all, improve species recovery.

In addition, WDNR needs to clarify its intentions for implementation of the HCP on long-term lease holders. WDNR has not included any specific language about implementation schedules but appears to leave the determination of what requirements will be implemented and when those requirements will be implemented up to the land manager. For example on page 3-31 the HCP states:

> *. . . [I]nclusion in the habitat conservation plan allows Washington DNR to avoid or minimize impacts associated with ongoing operations and maintenance of the structures. It also allows Washington DNR to reduce the effects of the structures themselves on all covered species when the lessee performs required maintenance or the lease is up for renewal.*

This language lacks specificity regarding WDNR's intention on the timing for implementation of AMMs at existing structures with long-term leases. The HCP and DEIS thus needs to provide more specificity on the issue of implementation timing, and how such timing may impact ongoing facility operations.

In order to address the above and below issues, and to successfully implement an HCP, the Services and WDNR should collaborate with industry, including WSPA and its members, to discuss in detail these proposed AMMs.

2. Inconsistency with Endangered Species Act (ESA) Requirements

Neither the HCP nor the DEIS adequately explain how proposed AMMs comply with ESA Section 10 permit requirements, including if such proposed are rationally related to the impacts of the take potentially associated with WDNR's aquatic lands leases.

Section 9 of the ESA prohibits "take" of any species listed as "endangered" or threatened." 16 U.S.C. § 1538(a). Section 10 of the ESA authorizes the issuance of an Incidental Take Permit ("ITP"), 16 U.S.C. § 1539(a)(1)(B), if the permit includes, among other things, a Habitat Conservation Plan and the steps that the applicant will take to minimize and mitigate the impact to the species or its habitat. 50 C.F.R. § 17.22(b)(1); *see also* 50 C.F.R. § 222.22(b). The Services may issue an ITP if they find that, among other things, "the applicant will, to the maximum extent practicable, minimize and mitigate the impact of such taking." 16 U.S.C. § 1539(a)(2)(B)(ii) (emphasis added); *Southwest Ctr. for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1157-58 (S.D. Cal. 2006). The term "maximum extent practicable" is not defined in the statute, nor in any formal agency regulations. *Nat'l Wildlife Fed'n v. Norton*, 306 F. Supp. 2d 920, 927 (E.D. Cal. 2004).

To determine whether an alternative, in this case the HCP, is appropriate, the Services must determine that measures are "rationally related to the level of take under the plan." *Id.* at 927-28 (internal quotation marks omitted). "Practicable" is defined as "reasonably capable of being accomplished." *Id.* at 927 n.12. There appears to be no evidence that the Services or WDNR have assessed whether the AMMs outlined in the HCP are rationally related to the impacts of the take associated with WDNR's aquatic lands leases, or whether those measures are practicable to implement. For example, the HCP and DEIS fail to adequately explain why all gangways must be entirely composed of grating materials that have at least sixty (60) percent functional open space, and why such a requirement is rationally related to the impact caused by the lack of light penetration through such structures. Accordingly, WSPA recommends that the Services and WDNR correct this deficiency and better explain the need for proposed AMMs.

Leaving aside the need for proposed AMMs, the HCP fails to articulate whether the cost associated with implementing the proposed AMMs is rationally related to the benefits of proposed measures. The costs associated with implementing proposed AMMs could likely be very significant, even if such measures are feasible to implement. Nowhere does the HCP or DEIS attempt to quantify the amount of take proposed to be authorized under an ITP such that it can be evaluated relative to proposed AMMs, or monitored in the event of ITP issuance. This lack of quantification makes the HCP, ITP, and any associated Biological Opinion(s) evaluation permit issuance inconsistent with the requirements of the ESA.

Finally, from a procedural standpoint, it is unclear how measures and processes contained in the HCP will be addressed during ESA Section 7 consultations on Clean Water Act Section 404 permits. The HCP should explain in more detail how projects obtaining take authorization through a Section 7 consultation will be evaluated during the WDNR lease process.

3. <u>Inconsistency with National Environmental Policy Act (NEPA) Requirements</u>

The DEIS does not appear to comply with NEPA's requirements. NEPA requires that an Environmental Impact Statement discuss and analyze the environmental consequences of a proposed action, and the direct and indirect effects of that action. *See, e.g.*, 40 C.F.R. § 1502.16. The environmental consequences analysis must "include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of [the human] environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented." *Id.* Direct and indirect effects that must be analyzed include "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, [and] health, whether direct, indirect, or cumulative." *Id.* § 1508.8. NEPA is explicit that "[e]ffects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial." *Id.*

The DEIS does not make clear that the Services have fully considered the environmental consequences and cumulative effects of the HCP's conservation measures. For example, among other issues, while the Services and WDNR may believe that on balance, replacing and reconstructing certain overwater structures is more beneficial then leaving them in place, it is not clear that the Services and WDNR have fully, if at all, considered the environmental impacts and consequences associated with demolishing and/or reconstructing overwater facilities to meet the HCP's conservation measures. It is also not clear from the DEIS that the removal, replacement, and reconstruction of certain overwater facilities is in the best interests of the environment, public health and safety, and the engineering integrity of overwater facilities that are currently constructed and in operation. NEPA requires this type of analysis, and WSPA therefore recommends that the Services and WDNR correct this deficiency.

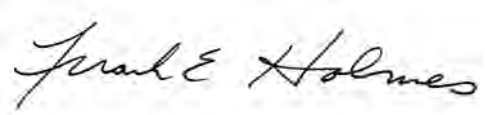
Aside from the issues identified above, it is unclear from the HCP and the DEIS in what circumstances supplemental NEPA or ESA Section 7 consultation may be required for projects that vary from AMMs specified in the HCP. The HCP and FEIS should address this issue, and clarify in what circumstances, if any, supplemental NEPA or ESA Section 7 consultation is required.

4. **Conclusions**

In closing, WSPA has identified a number of comments and concerns with the draft HCP and DEIS that will likely require significant revisions to these documents. WSPA recommends a process of stakeholder engagement whereby industry can play a more direct role in development of feasible AMMs. In addition, WSPA recommends that prior to development of a final HCP or EIS, WDNR and the Services provide additional opportunities for review and comment on technical and procedural issues outlined above.

WSPA appreciates the opportunity to provide comments on the draft HCP and DEIS. Please feel free to contact me at (360) 352-4506 if you have any questions regarding these comments or recommendations.

Sincerely,



Frank E. Holmes

cc: WSPA Environmental Committee
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