



WFWOComments, FW1 <wfwocomments@fws.gov>

Swinomish Indian Tribal Community Comments on DNR and EIS

1 message

Debra Lekanoff <dlekanoff@swinomish.nsn.us>

Wed, Dec 3, 2014 at 6:53 PM

To: "WFWOComments@fws.gov" <WFWOComments@fws.gov>, "cpl@dnr.wa.gov" <cpl@dnr.wa.gov>, "lalena.amiotte@dnr.wa.gov" <lalena.amiotte@dnr.wa.gov>, Joenne McGerr <Joenne.McGerr@dnr.wa.gov>

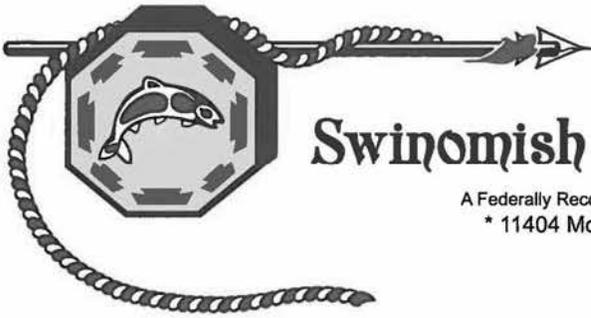
Thank you all accepting comments from the Swinomish Indian Tribal Community. We look forward to extending our relationship and discussion on this issue in the near future.

Best
Debra

Debra Lekanof
Office of the Chairman
Swinomish Indian Tribal Community
360-391-5296

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Letter of Information DNR and EIS 12 4 14.pdf
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Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
* 11404 Moorage Way * La Conner, Washington 98257 *

December 3, 2014

Via Electronic Mail:

WFWOComments@fws.gov

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

Scott Anderson
NOAA Fisheries
510 Desmond Drive SE, Suite 103
Lacey, Washington 98503

Re: WDNR Aquatic Lands HCP DEIS

Dear Mr. Romanski and Mr. Anderson,

Please accept the following comments on your proposed Environmental Impact Statement for the programmatic coverage sought by the Department of Natural Resources under the Endangered Species Act. As you know, the Swinomish Indian Tribal Community has substantial cultural, historic, property, and economic interests in the protection of shoreline resources in our Usual and Accustomed fishing areas, which include the Cherry Point Aquatic Reserve and other Aquatic Lands administered by DNR. These unceded interests are protected by our treaty with the U.S. Government.

While the proposal before you is termed a "Habitat Conservation Plan," we are concerned that your approval of the plan would actually authorize a considerable number of shoreline development activities in a "cookie cutter" approach, immunizing potentially destructive industrial development from individual review under the ESA. A number of shorelines that are of central significance to the exercise of our treaty rights are therefore in jeopardy from this proposed action, in its current form.

Recently, our staff and consultants met with David Pallazio and Lalena Amiotte from DNR and gained a better understanding of the conservation aspects of the proposal that could serve us and Washington residents well over the years, as a stronger conservation policy framework is created through the HCP adoption. However, in our discussions it became clear that the current draft of the HCP and the environmental analysis need revision, in order to alleviate our concern that the HCP could also impose a false ceiling on the level of scientific review each industrial proposal receives.

We urge your agencies and DNR to consider changes to the language in the draft HCP and DEIS that will clarify the limits of the scientific conclusions and impact mitigation analysis in the documents and their underlying studies. Much of the science that formed the basis for the conclusions in the HCP and the DEIS is now outdated, having been conducted in 2005 and 2006. The HCP, the DEIS and their underlying studies should not be used by the agencies or DNR to evaluate the impacts of individual industrial shoreline proposals into the future. This "cookie cutter" approach to permitting under ESA would not ensure projects are evaluated under the most recent and best available science.

Projects should not receive a free pass under this HCP. We understand this is intended to be a thirty-year compact with your agencies intended to provide durable conservation guidelines for future DNR policymaking and prioritization of restoration efforts. Therefore, it is critical that the HCP clearly limit its reach and explicitly state that it will not in any way substitute for either environmental review or ESA compliance review of any lease or permit application for non-restoration activities within DNR Aquatic Lands. Those individual permits and leases must always be subject to robust environmental review using the latest best available science at the time of project review.

Our tribe and others have a substantial archive of scientific knowledge on areas likely to be adversely affected by further industrialization of the Salish Sea. That science is constantly evolving. We invest a considerable amount of resources updating that science, in part because federal and state agencies have failed to establish any framework by which the current state of the Salish Sea is evaluated in light of continuing industrial pollution, increased vessel traffic and skyrocketing oil/barge and bunkering in our Usual and Accustomed fishing areas.

We look forward to working with you as you amend these draft documents, to ensure that current science is reviewed and included in your analysis. Even then, the HCP and EIS must include language that limits the use of the scientific analysis and mitigation assessment to formulation of programmatic conservation measures. This is a useful and appropriate function for the documents. The new language must make clear that the HCP, EIS and supporting studies *cannot and will not* be used by applicants or agencies as a substitute or baseline for any individual project review necessary to determine compliance under the Endangered Species Act. The language should clarify that the ten-year old data underlying these documents guides policymaking, not permitting.

Thank you for your consideration of these comments. We look forward to talking with you further as you consider revisions to the Draft Environmental Impact Statement, and Habitat Conservation Plan, to ensure our requested language is incorporated and that you have access to scientific information developed by our staff. Please coordinate with my governmental affairs lead, Debra Lekanof, 360-391-5296, or email her at dlekanof@swinomish.nsn.us.

Sincerely,



Brian Cladoosby, Chairman

cc: Hon. Peter Goldmark, WA State Commissioner of Public Lands
Ms. Lalena Amiotte, Aquatic Lands HCP Team Lead



Jones, LouEllyn <louellyn_jones@fws.gov>

Fwd: Nisqually Indian Tribe Comments on DNR draft Aquatic Lands HCP and DEIS

1 message

Scott Anderson - NOAA Federal <scott.anderson@noaa.gov>

Mon, Jan 12, 2015 at 1:59 PM

To: LouEllyn Jones <louellyn_jones@fws.gov>, "AMIOTTE, LALENA (DNR)" <Lalena.Amiotte@dnr.wa.gov>

—— Forwarded message ——

From: **Margaret Homerding** <homerding.margaret@nisqually-nsn.gov>

Date: Monday, January 12, 2015

Subject: Nisqually Indian Tribe Comments on DNR draft Aquatic Lands HCP and DEIS

To: "Scott.Anderson@noaa.gov" <Scott.Anderson@noaa.gov>

Cc: "James Weber (jwweber@nwifc.org)" <jwweber@nwifc.org>, David Troutt <troutt.david@nisqually-nsn.gov>

Scott,

Thank you for the chance to submit comments in regards to DNR's HCP and draft EIS after the deadline. Attached is a letter with our comments, we have submitted a hard copy via mail as well.

Margaret R. Homerding

Shellfish Biologist

Nisqually Indian Tribe

Cell: (360) 481-1107

Office: (360) 456-5221 ext. 2138

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Scott E. Anderson

ESA Biologist

National Marine Fisheries Service

360.753.5828



Nisqually Indian Tribe Comments on DNR draft Aquatic Lands HCP and DEIS.pdf
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NISQUALLY INDIAN TRIBE

Department of Natural Resources

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www.nisqually-nsn.gov

January 12, 2015

Scott E. Anderson
ESA Biologist
National Marine Fisheries Service

RE: Comments on DNR Aquatic Lands Draft HCP and Draft EIS

Mr. Anderson;

Thank you for the opportunity to provide comments on the Washington Department of Natural Resources' (WA DNR) draft Habitat Conservation Plan and draft Environmental Impact Statement. Upon review of the provided documents the Nisqually Tribe has the following comments and concerns:

Several of the proposed measures require lessees to adhere to very strict standards and self-regulate to a large degree. The Nisqually tribe appreciates the WA DNR's efforts to protect and manage state lands and the proposed levels of protection the WA DNR has placed on aquatic habitats, however we would like to see how the WA DNR intends to monitor and enforce the adherence to these measures.

Habitat Conservation Plan:

5.2.1 Overwater structures: Mooring buoys (page 5-14): Much like PNPTC and NWIFC, mooring buoy density is of concern to the Nisqually Tribe. The Washington State Department of Health (WA DOH) defines a marina as any body of water that has a density of 10 or more mooring buoys over a 10 acre area. This is important since the National Shellfish Sanitation Program Guide for the Control of Molluscan Shellfish (NSSP Guide) restricts all commercial shellfish activities within any area influenced by marinas. We recommend WA DNR incorporate measures setting a maximum mooring ball density below the WA DOH threshold of 10 mooring balls per 10 acre area in areas of potential bivalve harvest.

Environmental Impact Statement:

Section 2.2.3.3 Additional Commitments by Washington DNR- Creation of Improved Mapping Tools (page 2-22): We agree that nearest square mile section is too broad of gradient and that more refined scales should be used, especially in aquatic environments where scales are typically

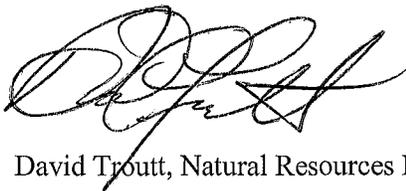
measured in feet. We strongly support DNR's efforts to refine their geographic databases and would especially encourage DNR to assess and map habitat type and extent, vegetation cover and extent, upland activity, and foot print of active aquaculture activities when creating their GIS databases.

Section 2.2.3.3 Additional Commitments by Washington DNR –Protection of Aquatic Vegetation (page 2-19) and Table 2.1 (page 2-32): The proposed conservation measures listed only consider aquatic vegetation when placing outfalls. Wastewater discharge has a high potential to degrade water quality in the nearshore, potentially downgrading shellfish growing areas. We highly recommend WA DNR add measures that restrict the placement of outfalls adjacent to areas of potential shellfish harvest.

Section 4.1.3.2 Treatment of Uncertainty (page 4-7): The Nisqually Tribe appreciates the level of complexity considered when making management decisions especially when data is sparse. Geographic distribution and percent ownership can be important tools when making managerial decisions, but additional data should always be utilized when available. This is especially true in nearshore habitats which can vary greatly over a small geographic range. We would like to take this opportunity to further encourage WA DNR to refine their geographic data and use the data collected to better inform them of the unique characteristics of the lands they manage.

Thank you again for affording us the opportunity to provide comments. We appreciate the efforts put forth by the WA DNR and the National Marine Fisheries Service and the U.S. Fish and Wildlife Service to include us in their management planning process and look forward to working with you for the duration of this plan.

Sincerely,



David Troutt, Natural Resources Director
Nisqually Indian Tribe

CC: James Weber, Conservation Policy Analyst, NWIFC



Jones, LouEllyn <louellyn_jones@fws.gov>

Fwd: Nisqually Indian Tribe Comments on DNR draft Aquatic Lands HCP and DEIS

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Scott Anderson - NOAA Federal <scott.anderson@noaa.gov>

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Scott E. Anderson

ESA Biologist

National Marine Fisheries Service

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THE SUQUAMISH TRIBE

PO Box 498 Suquamish, WA 98392-0498

December 4, 2014

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

Scott Anderson
NOAA Fisheries West Coast Region
510 Desmond Drive SE, Suite 103
Lacey, WA 98503

Re: Draft Aquatic Lands Habitat Conservation Plan (August 2014)

Dear Mr. Romanski and Mr. Anderson,

The Suquamish Tribe has reviewed the Draft Aquatic Lands Habitat Conservation Plan. This letter transmits the Tribe's comments for your consideration.

The Suquamish Tribe is a federally recognized Indian Tribe and as a signatory to the 1855 Treaty of Point Elliott, the Tribe reserved the right to fish and gather shellfish at its "usual and accustomed" (U & A) fishing grounds and stations in Puget Sound which includes a vast areas of the Puget Sound. Projects that impact the Tribe's ability to access its usual and accustomed grounds interfere with treaty reserved rights [see *Northwest Sea Farms v. Wynn* 931 F.Supp 1515, 1522 (W.D. Wash. 1996) and *Muckleshoot v. Hall*, 698 F.Supp. 1504, 1511 (W.D. Wash. 1998)]. Ethnographic and archaeological evidence demonstrates that the Suquamish people have hunted, fished, and gathered natural resources for sustenance and cultural purposes for thousands of years in the area.

The Suquamish Tribe seeks protection of all treaty-reserved natural resources through avoidance of impacts to habitat and natural systems. The Tribe has taken a leadership position in efforts to protect, restore, and enhance the marine waters of Puget Sound to ensure protection of the Tribe's treaty and cultural resources. The Tribe reviews proposed projects that might affect the health and sustainability of Tribal resources. The Tribe has reviewed the above referenced document and has the following comments.

General Comments

The proposed document is a good first step to the Washington State Department of Natural Resources taking a larger scale look at marine activities. The traditional piecemeal approach to marine uses has not been successful due to the focus on small, incremental impacts to an ecosystem.

Tribal Treaty Rights at Risk

The Tribal Treaty Rights at Risk document examined Tribal Treaty Rights and determined that Tribal culture, communities, and economies are at risk due to a lack of habitat protection. The net decline in habitat demonstrates the federal government's failure to protect Tribes treaty-reserved rights by allowing destruction of habitat faster than it can be restored.

The federal courts have recognized four basic values associated with treaty-reserved rights of the Tribes.

- Conservation of the resource,
- Ceremonial, religious and spiritual values,
- Subsistence, and
- Commercial

The Tribal Treaty right to fish and gather are property rights of the Tribes and are protected under the Fifth Amendment of the U.S. Constitution. In failing to protect habitat the federal government will also fail their trust responsibilities to Tribes. The Tribe requests that the federal agencies honor their obligations to the Tribes and the treaties they signed by applying more stringent standards to habitat protection than what has been implemented in the past.

Direct, Indirect, and Cumulative Impacts

Most of the discussion in the document addresses direct (immediate impact of a particular activity) and the EIS text focuses mainly on how an analysis of cumulative impacts is not feasible. There is little to no discussion addressing indirect (interrelated) impacts and cumulative impacts (impacts that accrue over time from a series or related actions). What are the effects of DNR authorized activities at full buildout? Are there potential threshold effects? Are these acceptable? 33 CFR 320.4 general policies for evaluating permit applications states:

- (1) "The decision whether to issue a permit will be based on an evaluation of the probable impacts, **including cumulative impacts** of the proposed activity and its intended use on the public interest."

Tribal Coordination

The document fails to identify relevant coordination with affected tribes throughout the document. When a proposed action may affect tribal rights or tribal trust resources, the Tribe(s) shall be notified and encouraged to participate in the consultation process. In developing reasonable and prudent alternatives, full consideration shall be given to all comments and information received from any affected tribe. A written determination describing (i) how the selected alternative is consistent with their trust responsibilities, and (ii) the extent to which tribal conservation and management plans for affected tribal trust resources are incorporated into the proposal (ESA Section 7 Consultation Handbook).

As co-managers of fishery resources in Puget Sound in an equal partnership with the State of Washington, Tribes need to be consulted and included in the decision-making process. The Bolt decision (February 12, 1974) reaffirmed Washington State's federally recognized Indian Tribes as co-managers of fisheries resources within their U & A. As a resource co-manager, the Suquamish Tribe is active in participating in the environmental review process for developments within its U & A. The Tribe not only has the right to fish but also the right to preserve and maintain the resource. The Suquamish Tribe requests notification of all DNR SEPA project and non-projection actions as well as proposed policies, plans, rules or programs occurring within the Suquamish U&A to determine if there are impacts to Tribal treaty cultural or natural resources.

Specific Comments

Chapter 1.2.2 Section 7

Additional language needs to be added to address consultation with Tribes (Executive Order 13175). This has been brought up by Tribes in the past and has not been addressed to date. Because of the unique government-to-government relationship between Indian tribes and the United States, the Departments and affected Indian tribes need meaningful consultation to promote the conservation of sensitive species (including candidate, proposed and listed species) and the health of ecosystems upon which they depend. In addition to the federal relationship Tribal governments are also co-managers (with the state) of land and aquatic resources and often have local and/or specific information and expertise available important to the consultation

Chapter 1.2.4 Changed Circumstances

Language needs to be added to address aquaculture related events including but not limited to disease outbreaks and escape.

Chapter 1.2.4 Sale, Acquisition and Exchange of Aquatic Land

Add language to include "Leasing".

Chapter 2.1.1 Ownership and Other Rights Associated with Aquatic Lands

There is no mention of Tribal presence pre-contact and their reserved rights. Treaties negotiated by Isaac Stevens on behalf of the United States *reserved* rights to usage of natural resources beyond reservation boundaries. It is important to emphasize that these rights were *reserved by the tribes in the treaty, not granted by the federal government*.

Chapter 2.1.1 Public Trust Doctrine

The Public Trust Doctrine essentially states that the waters of the state are a public resource owned by and available to all citizens equally for the purposes of navigation,

conducting commerce, fishing, recreation and similar uses and that this trust is not invalidated by private ownership of the underlying land. The doctrine limits public and private use of tidelands and other shorelands to protect the public's right to use the waters of the state. The protection and preservation of our shorelines is clearly the foundation of the Shoreline Management Act (RCW 90.58), which recognizes public trust interests over individual interests. Despite the fact that some shoreline property owners believe they have every right to do whatever they please on the shorelines, they do not own public resources and do not have a right to destroy, or degrade these ecosystems. It is the DNR's responsibility to protect and preserve what resources remain and prevent actions which will benefit a few yet take away from many.

Chapter 2.1.1 Tribal Interests

- This section should be titled “Tribal Treaty Rights”.
- The Suquamish Tribe and other tribes ability to access and harvest treaty-reserved resources is part and parcel of the treaty right to fish. Neither states, counties nor private property owners may bar tribal access to areas subject to treaty fishing rights. *United States v. Winans*, 198 U.S. 371, 394 (1905).

Chapter 2.3.1 Federal Authorities

There is little mention of treaty rights. The unique political relationship between the United States and Indian tribes is defined by treaties, statutes, executive orders, judicial decisions, and agreements, and differentiates Tribes from other entities that deal with, or are affected by, the Federal government. This relationship has given rise to a Federal trust responsibility, involving legal responsibilities and obligations of the United States toward Indian tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights.

When the U.S. Fish and Wildlife Service or National Marine Fisheries Service (the Services) actions may affect the reserved lands, tribal trust resources or the exercise of reserved rights of tribal governments, the Services will cooperate with affected tribal governments to encourage and facilitate tribal participation in the consultation process. Where the Services are a party to a proposed agency action that may affect the reserved lands or the exercise of reserved rights under the jurisdiction of tribal governments, the Services should ensure that the action agency that they work with will engage affected tribal governments to participate in a meaningful consultation process.

Chapter 3.2.3 Shellfish Aquaculture

- At this time the Suquamish Tribe does not support “frosting”. Frosting is the addition of gravel or shell fragments to make a mudflat environment more conducive to shellfish aquaculture. As with any farming activities, this practice sacrifices the ecological benefits of one habitat to suit one that is more desirable for a particular activity. In this case there are certainly benthic organisms that are going to be displaced by the change from fines and/or mud to gravel. In time other

benthic organisms will recolonize the gravel, but likely will be different and it may take a long time to recolonize. If “frosting” happens every other year, or every third year, a stable ecosystem will never be attained; harvest activities need to be considered. There have been reports of “frosting” turning small bays in the south sound completely muddy for several days. This can occur at any time as aquaculture is viewed as having “no impact” but yet this activity could affect forage fish, juvenile salmonids, etc. because there is no “work window” requirement.

- Storage of aquaculture gear should not occur waterward of the OHW and should be outside of critical areas (wetlands, streams, etc.).
- Aquaculture leases should only include areas currently in active farming.
- Aquatic vegetation surveys should be reviewed and approved by DNR as well as WDFW and the Tribes (co-managers of the resource).
- Large predator nets should be avoided (due to impacts to wildlife and high maintenance requirements needed to prevent smothering of the benthic environment. Preferred alternatives should be the individual netting of geoduck tubes or overseeding manila beds to avoid the use netting altogether.

Chapter 5.2 Implementation schedule for structural requirements for existing uses

“Life Expectancy” is ambiguous. Additional language needs to be added in the event there is a question regarding life expectancy or end of life and that if that occurs, DNR will request an engineering analysis for a more accurate determination.

Chapter 5.2.1 – Shellfish Aquaculture

(1) Predator exclusion nets are discussed but there is no mention of duration. They should only remain in place temporarily (when needed) and should then be removed. In geoduck aquaculture the use of individual nets on tubes should be preferred over blanket nets.

(7) Areas of documented forage fish spawning should not be disturbed during the no work window. What would the survey frequency be to determine if a site is not being used? This information should be reviewed by WDFW and the Tribes prior to any work occurring.

Chapter 5.2.2 – Washington DNR Programs for Protection and Restoration of Habitat

- Add language regarding coordination with Tribes (co-managers) in these processes, whether it is identifying remnant habitats or aquatic landscape planning.
- Add language regarding incorporating other additional important information that should also be considered in protection and restoration prioritization including but not limited to: Salmon Recovery Plans, local watershed plans, local shoreline inventories, Puget Sound Nearshore Restoration Projects (PSNERP) and the Salmon Recovery Lead Entity Habitat Work Schedule.

Chapter 5.2.4 Private Recreational Docks

Language needs to be added to address impacts to shellfish (classification downgrade/shellfish closure) and interference with Tribal treaty right to access and harvest as a result of too many docks. The cumulative impacts tied to private recreational docks and their interference with reserved tribal treaty rights also need to be addressed.

Chapter 5.5 Enforcement

- Has DNR used its authority to rescind a permit or lease?
- How exactly will unauthorized uses be addressed?

Appendix I Activity Specific Conservation Measures

- Over Water Structures
 - The Tribe is concerned that the addition of an undetermined number of docks and/or mooring buoys may interfere with the Tribe's treaty right to harvest fishery resources. The Tribe harvests many species including but not limited to: geoduck, horse clams, sea cucumbers, Dungeness crab and shrimp for subsistence and commercial purposes. Harvest of these resources requires unobstructed, safe access. Allowing an undetermined number of docks and/or mooring buoys will increase congestion and will obstruct safe access to resources. In addition, increased boat traffic and potential conflicts with fishing activities will impede Tribal fishers' ability to maneuver and safely manage fishing gear and will increase the risk of damage to fishing gear. Conflicts with the Tribe's fishing rights arising from an undetermined number of docks needs to be addressed and resolved.
 - National Shellfish Sanitation Program (NSSP) determines health risks by the number and location of boats, not water sample results. When permitting docks and buoys DNR needs to consider potential shellfish bed closures/classification downgrades with regard to the number of moored vessels (the Mystery Bay closure is a good example of the negative impact of failing to manage overwater structures and creating closure zones). These closures/downgrades can be a significant impact to both the Tribe and the public. The Tribe requests that the DNR evaluate and develop a strategy for maintaining approved commercial shellfish growing area classifications and getting closed areas recertified in coordination with the Washington Department of Health and the Suquamish Tribe. Closures due to pollution or other environmental degradation are a direct impact to the Tribes' ability to access shellfish beds and violate their treaty rights.
 - There has been impact assessment associated with the uses of both docks and floating homes. For example: the impacts of the vessels moored and the rafting of multiple vessels.

Thank you for the opportunity to comment on the above referenced project. Please keep us informed of any discussions and/or meetings related to this document. We will provide additional comments as information becomes available.

Sincerely,

A handwritten signature in black ink, appearing to read 'AOS', with a long horizontal flourish extending to the right.

Alison O'Sullivan
Biologist, Suquamish Tribe



WFWOComments, FW1 <wfwocomments@fws.gov>

WDNR Aquatic Lands HCP DEIS

1 message

Randy Hatch <randy.hatch@pnptc.org>

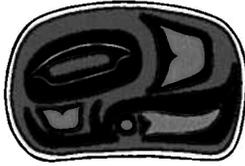
Thu, Dec 4, 2014 at 1:51 PM

To: WFWOComments@fws.gov

To Mr. Tim Romanski or Mr. Scott Anderson,

The Point No Point Treaty Council is submitting the attached comments on the proposed WDNR Aquatic Lands HCP. A written copy of the comments is also being mailed today, but we wanted to be sure our comments reached you before the cut-off date. Should you have any questions, you can contact Randy Harder (rharder@pnptc.org) or Randy Hatch (rhatch@pnptc.org) at the PNPTC.

 **WDNR-HCP_PNPTC 12.4.14.pdf**
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Point No Point Treaty Council

Port Gamble S'Klallam • Jamestown S'Klallam

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

December 4, 2014

RE: WDNR Aquatic Lands HCP DEIS

Dear Mr. Romanski:

The Point No Point Treaty Council is an intergovernmental natural resource agency representing the interests of the Port Gamble S'Klallam and the Jamestown S'Klallam Tribes. While we are submitting this response to the WDNR Aquatic Lands HCP on behalf of both Tribes, either or both Tribes may also choose to submit their own separate responses. In the event that any individual Tribal responses submitted conflict with the response contained herein, the individual Tribal responses should be given priority.

Our review of the draft HCP has focused primarily on the proposed conservation measures as they apply to shellfish aquaculture activities, and not on the other two activities identified in the HCP, log booming/storage and overwater structures. On one hand, we support conservation measures designed to recover listed species for which our Tribes have a Treaty reserved right. On the other hand, we are also mindful of the desire of our Tribes to pursue shellfish aquaculture as a means to supplement and enhance existing native shellfish populations for the benefit of their tribal communities. Our comments therefore focus on the adequacy and/or necessity of some of the conservation measures proposed for shellfish aquaculture in light of these potentially competing goals. Our specific comments follow.

Chapter 5, Overwater Structures, p. 14, Mooring Buoys: The proposed conservation measures only address the minimum depth and acceptable anchoring system for mooring buoys. Of equal concern to the Port Gamble and Jamestown Tribes is the total allowable density of mooring buoys in an area adjacent to shellfish beds. The National Shellfish Sanitation Program (NSSP) defines a marina as “any water area with a structure (docks, basin, floating docks, etc.) which is: (a) used for docking or otherwise mooring vessels; and (b) constructed to provide temporary or permanent docking space for more than 10 boats.” The Washington Department of Health has determined that a concentration of 10 or more mooring buoys within a surface area of 10 acres or less (one boat per acre threshold) constitutes a marina applicable to NSSP restrictions, which results in the prohibition of all commercial shellfish activities within a defined area influenced by the “marina”. Examples of this situation have already occurred in Mystery Bay and in Port Hadlock. We propose that the WDNR include in the conservation measure a maximum density, below the NSSP marina threshold, for mooring buoys in areas likely to impact existing shellfish beds.

Chapter 5, Shellfish Aquaculture, p. 16, Paragraph 7: Although we do not object to the conservation measures for surf smelt and Pacific sand lance as proposed, we have witnessed from our own experiences that once either species begins to spawn, the spawning process is more or less continuous. This will be the fourth season we have sampled specific index sites at Indian Island for surf smelt and

Pacific sand lance spawn. Each index site is sampled twice per month, and the results to date indicate that surf smelt generally spawn over a period of 4-6 months and sand lance continue spawning for 3-4 months. The requirement for a 14 day wait time before resuming aquaculture operations will not likely result in the immediate resumption of those activities in areas that traditionally exhibit significant spawning activity by either species. This information should be taken into account in the proposed HCP.

Chapter 5, Native aquatic vegetation conservation measures for shellfish aquaculture activities, p. 18,

Paragraph 2: Under the *Setback Option*, new aquaculture leases and existing leases with new expansions outside existing lease areas will have a required minimum setback from existing native aquatic vegetation of 8 meters (25 feet). However, existing scientific evidence regarding eelgrass buffers, as summarized in Appendix J, Table 12, indicate buffer distances of 4-5 meters from the edge of an eelgrass bed as protective of submerged rhizomes and an accommodation to seed dispersal and genetic uniqueness. What is the rationale for seeking a buffer distance of 8 meters, and what additional protection is being provided with the expanded buffers? In the HCP, we propose that buffers should be reviewed periodically in light of adaptive management and include any additional and current scientific evidence gathered and applied appropriately to this measure.

Chapter 5, Implementation, Defining Eel Grass Bed Boundaries, p. 34: We have actively participated in the technical workgroup that reviewed and discussed potential criteria for defining an eel grass bed, and while we appreciate the difficulty in attempting to define the minimum requirements needed to protect existing eel grass beds, we do not entirely agree with the recommendations of the WDNR, as summarized in Appendix J. We feel that some of the recommendations are too conservative, particularly when applied to shellfish aquaculture activities, and are not supported in the existing literature. Our specific concerns and recommendations are as follows:

1. Within Appendix J, Table 11 summarizes the proposed criteria to be used to identify a persistent eelgrass bed edge of sufficient density to warrant protection under DNR's Aquatic Habitat Conservation Plan. Criteria for the terms Persistent Bed Edge, Shoots or Patches, and Ephemeral Shoots and Patches are provided. For Persistent Bed Edge, the criteria for minimum density is expressed as 3 shoots/0.25 m², based on a minimum ecological function from the literature and observed persistence within Puget Sound. No minimum size (area) for a bed is specifically proposed, but rather it is implied that a contiguous bed exists as long as you encounter 3 shoots/0.25 m² that are at least within 1 meter of another patch exhibiting a density of at least 3 shoots/0.25 m². The logical extension of this approach yields a minimum shoot density of approximately 6 shoots/m² within a bed. It was not found anywhere in either the field investigations within Puget Sound or in the scientific evidence presented that a bed density had ever approached this minimum. The proposed minimum of 3 shoots/0.25 m² is summarized in Table 8 and based on a single site within Puget Sound. The criteria represent a minimum density for a patch having a minimum area of 0.3 m² that was observed to persist for more than one season. However, the average density for patches that persisted more than one season was 54.4 shoots/0.25 m² and the average area of these patches was 0.9 m². In addition, for those patches that did not persist for more than one season, the average density was 13.7 shoots/0.25 m² and the average area of these patches was 0.6 m². In other words, there was a great deal of overlap and variability between the density and area of patches when persistence beyond one season was considered as a criterion, but the proposed criteria of 3 shoots/0.25m² was at the extreme low end of the range.

2. After examining the average bed densities at various sites throughout Puget Sound (Table 10) and considering other agencies' criteria for defining an eelgrass bed (Table 1), we would support a definition of an eelgrass "bed" as an occurrence of eelgrass having a minimum density of 20 shoots/m², provided that any occurrence of eelgrass within 1 meter of the bed edge, as defined below, and having a minimum shoot density of 20 shoots/m², would also be considered part of the "bed". This minimum density is at the low end of the range of average densities found throughout Puget Sound. Alternatively, we would support a definition of an eelgrass bed as an occurrence that would likely equate to a cover of between 10% to 25% of the substrate, which has been proposed in the literature (Tampa Bay Estuary Program; U.S. Corps of Engineers Regional General Permit-6) as an operational definition of an eelgrass or seagrass bed. Finally, we do not agree with the WDNR position that the minimum area of a functioning eelgrass bed requiring regulatory protection is 0.25 m². Rather, we would support the recommendation of the Oskar Commission (Table 1) that the minimum area of a bed should be set at 2 m², although we could also support regulatory protection for eelgrass patches having a minimum area of 1 m², as was suggested by site-specific data within Puget Sound (Table 8).
3. The criteria to determine the bed edge is somewhat confusing, but appears to be determined by finding the last shoot along any radial transect from the bed interior to an outer (or interior) margin, in which a shoot is within 1 m of another shoot. As long as one shoot is detected within a meter of another shoot along this transect, it is implied that one is still within the interior of the bed. We feel a more straightforward approach in identifying the edge of a bed would be preferable. We propose that a bed edge is identified by the reduction in density of eelgrass below the proposed minimum of 20 shoots/ m². The proposed extension of 0.5 m beyond this point to accommodate rhizome length seems appropriate.

We appreciate the opportunity to comment.

Sincerely,



Randy Harder, Executive Director
Point No Point Treaty Council

Cc: Wm. Ron Allen, Chair, Jamestown S'Klallam Tribe
Jeromy Sullivan, Chair, Port Gamble S'Klallam Tribe
Scott Chitwood, Natural Resources Director, Jamestown S'Klallam Tribe
Paul McCollum, Natural Resources Director, Port Gamble S'Klallam Tribe
Kelly Toy, Shellfish Manager, Jamestown S'Klallam Tribe
Tamara Gage, Shellfish Manager, Port Gamble S'Klallam Tribe



WFWOCComments, FW1 <wfwocomments@fws.gov>

WDNR Aquatic Lands HCP DEIS

1 message

Katie Krueger <katie.krueger@quileutenation.org>

Wed, Nov 5, 2014 at 9:41 AM

Reply-To: katie.krueger@quileutenation.org

To: WFWOCComments@fws.gov

Cc: frank.geyer@quileutenation.org, Mel Moon <mel.moon@quileutenation.org>, Jennifer Hagen <jennifer.hagen@quileutenation.org>

Please find comments that Quileute made to the draft for which tribes had a preview. Some of these may not be applicable to the current version but we are a small tribe with a small multi-tasking staff and going through the entire very large document is not feasible right now. I hope these attached comments are helpful to the agencies.

These comments were provided to applicable DNR personnel in late 2013.

Li/qtskal/ax2

Katie Krueger, staff attorney and policy analyst

Quileute Natural Resources

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Go to <http://www.quileutenation.org/natural-resources>

to check out our programs and find our staff directory

**Quileute Tribe Comments on DNR Aquatic HCP.docx**

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Quileute Tribe Comments on DNR Aquatic HCP

These comments are derived from notes made onto the chapters while reading through them and the best way for the Agency to track where they relate is to proceed through in that manner. Accordingly, they are ranked by appearance in the overall document rather than by importance. We will discuss importance when we address particular items, however.

Introduction:

In the first paragraph, there is an RCW citation (56.06.010) regarding Port Management Agreements. This should be 53.06.010.

On page 1-5, 1-2.2, re the Section 7 topic, there is also a requirement of the services to consult with the tribes. That needs to be mentioned.

On page 1-7, 1-2.4 Changed circumstances: among the lengthy list of changes that could be anticipated, and could affect ESA, might you also include mining permits, drilling permits, or aquaculture? We have determined that requirements for finned fish net pen aquaculture are thin. For example, a plan for escaped fish is required, but no specifics for the plan are in writing, to “check off” as having been met, and we submit that once farm fish escape, one cannot catch them, unlike a horse out of the barn. So long as the state and NOAA accept fish farms on the coast as a proper use, this is a real risk that should be in your list.

Also on 1-2.4 but on page 1-9, may DNR also lease land? We see Sale, Acquisition, and Exchange of Land, but not Leasing. If Leasing is allowed, it should be included. How does your Conservation Leasing Program fit into this? (See, for example, that reference to the CLP on page 5-48 and again on page 5-50 through 5-54.)

Figure 1-1 on page 1-11 does not show tribal aquatic lands. For all the treaty tribes with coastal reservations, they have rights out to the lowest low tide. That is actually part of their respective reservations. Maybe this is too thin to show on your map scale, but perhaps a comment line under the graphic can address it. Perhaps the comment goes better on page 1-13, where you address Tidelands. Again, just a need to indicate the narrow but real tribal ownership that overlaps with the state.

Looking at your lake discussions starting at page 1-23 (and in particular trophic status on page 1-26 and 1-45—water quality), there is no discussion of the relatively recent problem on the Pacific Coast, of methyl mercury pollution in the lakes. It has gotten so bad that people are now cautioned not to eat the resident fish in Lake Ozette. Rivers so far are not at a dangerous level, nor, so far as we know, calm waters east of the Olympic Mountains. You may wish to include this subject. How soon birds and mammals are adversely impacted is hard to predict. We will attach peer-reviewed articles on this for you, along with these comments. We are aware of the problem because Lake Ozette is already adversely impacted and we are part of its Steering Committee for recovery of the sockeye there.

Regarding 1-7 Species Covered by this HCP, beginning at page 1-64, we note brown pelicans are not included among the birds. Looking at bull trout on page 1-66, the EFH goes up the Pacific Coast as far as the Hoh River. Perhaps it is encompassed in the term “Coastal Puget Sound”? Lake Ozette sockeye have been included in Puget Sound recovery plans but you distinguish their habitat by the Lake, in that

category, so the level of precision in these charts is unclear to us (seems inconsistent) but perhaps we don't understand the setup.

Chapter 2

Generically speaking this chapter needs a section of its own discussing the Stevens Treaties and the fact that treaty tribes on the coasts and shores have within their treaties *reserved* rights to the natural resources. This jurisdiction overlaps with the state's. We are not speaking here only of the reservations. Tribes have off-reservation rights to the resources as well. For fish and shellfish of all species, this is in the U&A and extends over the entire three-mile distance of the state's jurisdiction. For hunting and gathering it exists on all state and federal public lands within the treaty boundaries for each respective tribe and its treaty. So that is even a larger area.

It is important to understand that in these treaties negotiated by Isaac Stevens on behalf of the USA, rights to usage of natural resources beyond reservation boundaries was *reserved by the tribes in the treaty, not granted back to them by the federal government*. This is much the same as deeding property to someone but retaining the right to go on the land, forever harvest or hunt, etc. It is a perpetual right and was not rescinded when the treaty was signed. More on this later, in subsequent places.

Page 2-6. Here in the last paragraph the drafter discusses the Boldt decision (misspelled as "Bolt") and the Rafeedie decision but it is not seen in context. They are two subproceedings of a single tribal lawsuit against the state to enjoin it from interference with tribes' exercise of treaty rights. The case is ongoing and numbered by subproceedings. It is all one case. You have provided the case "nicknames" for the judges that decided the particular subproceedings. We think it is important to insert a sentence referencing the case as *United States v. Washington*. We also think you left out one of your agencies. So, we would rewrite that paragraph as follows:

"In the 1970s, federal and treaty tribes in Western Washington initiated a lawsuit regarding how the state of Washington relates with treaty tribes regarding fishing rights. (*United States vs. Washington*). The first decision on this case (1974), known as the Boldt decision for its judge, determined that treaty tribes hold their fishing rights in common with the state and therefore, state and tribes are supposed to co-manage them. Another important decision by Judge Rafeedie in the 1990s interpreted the treaty fishing right to include not just finned fish, but also shellfish. Among all of the subproceedings for this case (it is ongoing and there are nearly 100), these two are the most important from the standpoint of aquatic lands management. The State of Washington, through the Department of Fish and Wildlife, Department of Ecology, and Department of Natural Resources, continues to work with tribal authorities and other affected parties to reach agreement on management and harvest issues."

We added Ecology because of their role in the Shoreline Management Act, as well as for water quality oversight. They also have the lead in marine spatial planning, which is going to be affecting the area over which DNR manages aquatic lands. It is really important for people to understand how that US v WA case works and without the minimum we added here, we suspect they won't.

So in your next paragraph regarding the two specific cases: we would drop the last sentence because it really goes with the Rafeedie decision and I would add to it that the 50-50 means co-management. That is where the co-management comes from. Because you provided a pdf, it seems best to type out the changes under each heading. We have no changes to make to your boldface capitalized case name headers—just the contents under them.

For Boldt:

“The United States District Court (Judge Boldt) upheld the right of the treaty tribes in the Northwest to take up to fifty percent of the harvestable surplus of anadromous fish that pass through the usual and accustomed fishing areas of the various tribes. The non-Indian share is likewise fifty percent. The state and tribes have a shared responsibility to co-manage these resources. Recognizing that many treaty issues were not resolved in this single lawsuit, the judge provided for its continuation by invoking its paragraph 25, which has led to many subproceedings of the same case, up into the present.”

We think the public needs to know *US v WA* never ended. New subproceedings are filed yearly. It is an odd lawsuit in that regard.

For Rafeedie :

“One of the subproceedings involved the “Shellfish decisions”, of which there were several in the 1990s as the case was appealed and reheard. The principle of the treaty fishing right was extended to all species of fish and shellfish, whether marine or freshwater. This treaty right therefore included intertidal and subtidal shellfish populations, whether or not tribes fished for them at the time the treaties were signed. The opinion also included a shellfish implementation order to settle disputes. This case is ongoing, as details of rights between treaty tribes and shellfish growers, and refinements to that settlement plan, are worked out. “

We are not sure your drafters knew that the Shellfish case has been resuscitated and is being heard right now in Tacoma federal court. There are several subdivisions of this subproceeding, which was 89-3 but is splitting and splitting into new subsets of subsets. Probably you don't need that in this HCP, but it is important to know the case is still being debated.

Under 2-3.1 Federal Authorities, we do have some major suggestions (starting at page 2-10). We think you need to start the list with the U.S. Constitution, because that is where the tribes derive their authority, not from the district court decisions discussed above, which simply affirmed the treaties and explained to the state what this meant for its operations. We have our treaty rights per Article VI of the U.S. Constitution.

“Clause 2: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

In fact, any federal statute that attempts to abrogate treaty rights must explicitly do so. It has been held many times by the U.S. Supreme Court that without such explicit reference, the

statute failed to abrogate them (reduce or eliminate them). This is because only the U.S. Congress can reduce or eliminate these treaty rights. They are quite simply the highest law of the land.

As you go through the federal statutes, you might consider adding the one establishing Olympic National Park, as well as the one establishing the Olympic Coast National Marine Sanctuary. These both have jurisdiction overlapping with the WDNR. And finally, there is the Energy Policy Act of 2005 regarding where coastal energy development is allowed (or not).

Chapter 5. Conservation Program.

On page 5-9 (we note the pagination style is a little different in this chapter), in the 3rd paragraph under Existing Uses, you have some punctuation and verb form issues in the sentence beginning with “Holdovers”.

On page 5-19, under Shellfish Aquaculture, paragraph 2, line 2—what is “long term”? On the next page, in paragraph 7, re “Activities that disturb the spawning substrate...”—have they been described? Along with this, see in paragraph 8 below “may not alter the substrate such that it is no longer suitable for spawning.” Is that specific enough?

On page 5-48 you address Creating and Managing Aquatic Reserves. We see you include tribes in the mix of parties to share in such a process (top full paragraph of page 5-49) so that is good. Tribes depend on fishing for subsistence as well as ceremony and in some cases, commerce, so their treaty rights need to be considered whenever setting up any type of reserve. And remember, only Congress can abrogate a treaty right. The same tribal concerns exist regarding Conservation Leasing on State-owned aquatic lands (pages 5-50 through 5-54). This subject bears more discussion in the HCP document. We did not spot a discussion of the tribal role or potential impact to a treaty tribe in the Leasing section. See also Aquatic Landscape Prioritization, running from page 5-56 through 5-60. It is advisable to include a paragraph here to involve the co-manager tribes in this process, whether it is identifying remnant habitats or aquatic landscape planning.

We note at Section 5.2-4 under Management Practices, and subtitle Interagency Collaboration, that outreach and communication with federal and tribal parties will take place (page 61). In light of treaty rights that might be impacted, please add to provide us with timely notice of planned management practices so that we may participate in the planning in a timely way, as co-managers. Our position is that we are not only advisory in certain issues (case by case). In the second paragraph of page 61 you have noted that fish commissions will be included. Please understand that the Northwest Indian Fisheries Commission is not a sovereign and not a party to *US v Washington*. It is an organization designed to serve its member tribes and provide technical or policy support when that is sought. It does not have treaty rights. It is the tribes that are the sovereign governments with the co-manager rights and it is important to always speak with us directly where an action by the DNR might impact one of us.



WFWOComments, FW1 <wfwocomments@fws.gov>

NWIFC Comments on DNR draft Aquatic Lands HCP and DEIS

1 message

James Weber <jwweber@nwifc.org>

Tue, Dec 23, 2014 at 2:53 PM

To: Scott Anderson - NOAA Federal <Scott.Anderson@noaa.gov>, WFWOComments@fws.gov
Cc: Scott Mazzone <smazzone@quinault.org>, Dave Bingaman <dbingaman@quinault.org>, Mark Mobbs <mmobbs@quinault.org>, Katie Krueger <katie.krueger@quileutenation.org>, Jennifer Hagen <jennifer.hagen@quileutenation.org>, Nicole Rasmussen <Nicole.Rasmussen@quileutenation.org>, Warren Scarlett <wjscarlett@yahoo.com>, Russ Svec <Russell.Svec@makah.com>, Doug Morrill <doug.morrill@elwha.nsn.us>, Scott Chitwood <schitwood@jamestowntribe.org>, Thom Johnson <tjohnson@pnptc.org>, Randy Hatch <rhatch@pnptc.org>, Paul McCollum <paulm@pgst.nsn.us>, Dave Herrera <dherrera@skokomish.org>, Randy Lumper <rlumper@skokomish.org>, ceardley@skokomish.org, Kelly Toy <ktoy@jamestowntribe.org>, Tamara Gage <tgage@pgst.nsn.us>, David Troutt <troutt.david@nisqually-nsn.gov>, Margaret Homerding <homerding.margaret@nisqually-nsn.gov>, Russ Ladley <russ.ladley@puyalluptribe.com>, David Winfrey <david.winfrey@puyalluptribe.com>, bill.sullivan@puyallup.com, Lisa Brautigam <Lisa.Brautigam@puyalluptribe.com>, Andy Dalton <Andy.Dalton@muckleshoot.nsn.us>, Holly Coccoli <holly.coccoli@muckleshoot.nsn.us>, Isabel Tinoco <Isabel.Tinoco@muckleshoot.nsn.us>, "Glen St. Amant" <Glen.StAmant@muckleshoot.nsn.us>, Joshua Kubo <jkubo@tulaliptribes-nsn.gov>, Daryl Williams <darylwilliams@tulaliptribes-nsn.gov>, Kurt Nelson <knelson@tulaliptribes-nsn.gov>, Pat Stevenson <pstevenson@stillaguamish.com>, Scott Morris <smorris@sauk-suiattle.com>, Scott Rockwell <srockwell@stillaguamish.com>, Jason Griffith <jgriffith@stillaguamish.com>, Grant Kirby <gkirby@sauk-suiattle.com>, Jon-Paul Shannahan <jonpauls@upperskagit.com>, rickh@upperskagit.com, Tim Hyatt <thyatt@skagitcoop.org>, Larry Wasserman <lwasserman@skagitcoop.org>, Ned Currence <ncurrence@nooksack-nsn.gov>, Oliver Grah <ograh@nooksack-nsn.gov>, Alan Chapman <alanc@lummi-nsn.gov>, Jeremy Freimund <jeremyf@lummi-nsn.gov>, Elden Hillaire <eldenh@lummi-nsn.gov>, Scott Steltzner <ssteltzner@squaxin.us>, Alison O'Sullivan <aosullivan@suquamish.nsn.us>, Mike Grayum <mgrayum@nwifc.org>, Gary Graves <ggraves@nwifc.org>, David Fyfe <dfyfe@nwifc.org>, Viviane Barry <vbarry@suquamish.nsn.us>

Scott,

We appreciate your stated willingness to consider NWIFC comments on the DNR's draft Aquatic Lands HCP and draft EIS after the deadline. The attached comments have been under review by the Commission's member tribes and are submitted in the interest of getting them to you before more time elapses.

Jim

Jim Weber

Conservation Policy Analyst

Northwest Indian Fisheries Commission

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NWIFC staff comments on HCP-DEIS jw 122314.doc

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DATE: December 23, 2014
TO: Scott Anderson, NMFS
FROM: Jim Weber, NWIFC
RE: Comments on DNR Aquatic Lands Draft HCP and Draft EIS

Thank you for this opportunity to provide comments on the WA Dept. of Natural Resources' draft EIS and HCP for state-owned aquatic lands. As you are aware, the Northwest Indian Fisheries Commission is composed of representatives of the 20 western Washington tribes with rights reserved by treaties with the federal government to take fish, shellfish, and other natural resources. These treaty-reserved rights include rights of access necessary to exercise treaty-reserved rights.

The HCP Must Not Interfere with the Tribes' Treaty-Reserved Rights

Among the rights reserved by the Commission's member tribes is the right to cross land owned by others, including private lands and lands owned and/or managed by state, federal, and local governmental entities, as necessary to fully exercise their treaty rights.¹ The HCP needs to more explicitly recognize and preserve these treaty-reserved rights. An important component of this obligation would be, for example, to provide for inclusion of standard provisions (agreed to by the tribes) in permits and agreements for the use of state lands. Such provisions would assure that DNR-issued permits or agreements for the use of state lands would not interfere with the exercise of pre-existing treaty-reserved rights.

We note that the draft EIS tends to look at the tribes' treaty rights as being a regulatory mechanism. *See e.g.*, DEIS at 3-64 (Indian treaty rights are included as a statute, regulation, or policy pertinent to DNR's authorization of the use of state-owned aquatic lands). Treaty rights are also an interest in land – a property right that must be protected no less than any other and that can only be taken (with just compensation) by an Act of Congress. The HCP and DEIS fail to adequately recognize this key interest.

The DEIS also recognizes the relevance of Secretarial Order 3206 (DEIS at 1-19), which references the established federal case law relevant to decision-making affecting treaty rights in the context of implementing the ESA. In particular, the Secretarial Order calls for reasonable regulation of non-Indian activities prior to calling for any conservation-related restrictions applicable to the exercise of treaty rights.² To the extent that the HCP may call for any

¹ Relevant case law includes *United States v. Winans*, 198 U.S. 371 (1905); *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988); *Northwest SeaFarms v. U.S. Corps of Engineers*, 931 F. Supp. 1515 (W.D. Wash. 1996).

² *See* Depts. of the Interior and Commerce, Secretarial Order 3206 (June 5, 1997) at 6 (Principle 3).

limitations on the exercise of treaty-reserved rights in order to protect listed species, NMFS and USFWS need to consult with the tribes and assure that any conservation-related regulatory actions by DNR are appropriately limited.

The Benefits and Impacts of the Draft HCP on Listed Species Are Not Disclosed in a Manner that Allows One to Determine the Effects of the Action on Recovery.

The impacts of the proposed action on listed species are generally described in qualitative terms relative to status quo DNR management. The impacts to listed species and how these impacts may affect their survival and/or recovery, are not addressed. Consequently, the DEIS sheds little light on what effect implementation of DNR's proposed HCP will have on listed species. Will the proposed HCP result in eventual recovery? Or perhaps a slight, but insignificant improvement to listed species? Or a lessened rate of decline to extinction? The DEIS fails to provide the information needed to address these critical questions.

The lack of information regarding the extent to which the proposed action will address the needs of the species makes it impossible to determine whether the proposed impact minimization and mitigation measures are adequate to support survival and recovery of listed species and adequate protection for non-listed species. For example, the draft HCP proposes to bring 65% of recreational docks into compliance with DNR's proposed conservation measures over the term of the HCP (50 years). As discussed below, the number of docks being discussed could range from 5,850 to 12,350. If one doesn't know how many docks are at issue, it's difficult to say how much benefit will result and whether that will be enough. If the standard is merely improvement over the existing condition, then one could simply promise to implement the proposed conservation measures for all new docks and one existing dock and the commitment to achieve a net improvement over existing conditions would be met. This begs the question: Why 65 percent? Why not 45 percent or 100 percent? The DEIS and draft HCP fail to provide the information needed to assess the adequacy of the proposed conservation measures.

DNR Management of Recreational Docks Does Not Appear to Adequately Protect Treaty Access Rights, Support Salmon Recovery, or Meet Existing Obligations Under State Law.

The DEIS and HCP concede that, for many years, DNR has declined to exercise its authority to meaningfully regulate/condition recreational docks, as needed to protect aquatic lands and related resources. DEIS at 2-13. An unknown number of recreational docks, estimated to range from 9,000 to 19,000, are located on state-owned aquatic lands. *Id.* Under state law (RCW 79.105.430), DNR has the authority to regulate these docks as necessary to protect salmon, shellfish, and the tribes' right to exercise their treaty reserved rights. As the provision cited by

DNR makes clear, recreational docks are “subject to applicable local, state, and federal rules and regulations governing location, design, construction, size, and length of the dock.” *Id.* at (1). The statute further elaborates that DNR is authorized to both revoke permits for, or require relocation of, docks or mooring buoys that interfere with access rights, public health, or public resources based on a finding of public necessity. The statute defines public necessity as follows:

Circumstances prompting a finding of public necessity may include, but are not limited to, the dock, buoy, anchoring system, or boat posing a hazard or obstruction to navigation or fishing, contributing to degradation of aquatic habitat, or contributing to decertification of shellfish beds otherwise suitable for commercial or recreational harvest.

RCW 79.105.430(3). DNR is clearly authorized to take those actions necessary to prevent degradation of aquatic habitat, prevent obstructions to fishing, and to assure that docks and boats do not create conditions that contribute to decertification of shellfish beds. Accordingly, state law already obligates DNR to manage aquatic lands to protect tribal access and tribal fish and shellfish resources.

As stated above, the DNR concedes that, for various reasons, it has not managed recreational docks sited on state-owned aquatic lands. Additionally, DNR also discloses that the construction and ongoing presence of these docks both disturbs near-shore habitat and creates light and predation conditions that adversely affect aquatic vegetation and salmon. *See e.g.*, DEIS at 3-42-44; 3-62; 4-18-21. Additionally, docks containing treated wood leach chemicals into the environment that can bio-accumulate in higher trophic levels thereby affecting many other species. DEIS at 4-16. And of course, most of the vessels that tie up to docks, recreational and otherwise, inevitably leak pollutants, such as sewage and/or hydrocarbons, into the water. This harms aquatic habitat, to the detriment of aquatic vegetation, fish, and shellfish. An unknown, but likely significant, number of the 9,000 to 19,000 existing docks estimated by DNR to be located on state aquatic land are unpermitted. DNR lacks data on the number, location, composition, and condition of docks (and mooring buoys) and adjacent aquatic habitat. We have not found a commitment from DNR in the draft HCP to allocate the necessary resources to actually inventory all existing overwater structures, permitted and unpermitted, on state-owned aquatic lands. Instead, the draft HCP commits to “updating” its existing database every 10 years and promises to share information concerning the inventorying of recreational docks. Draft HCP at 5-51-52. If DNR intends to commit to doing the full inventory, that commitment does not seem to be adequately reflected in the draft HCP and DEIS.

To meet its obligations under the ESA to protect listed species, DNR promises to more fully implement its existing authority under RCW 79.105.430.³ Over the 50 year term of the HCP, DNR proposes to have a goal of bringing 65% of all private recreational docks that are determined to be on state-owned aquatic lands into compliance with its operating conservation program standards. Draft HCP at 5-51. But 65 percent of what? Is the state goal to implement conservation measures for 65 percent of 9,000 docks (5,850) or 65 percent of 19,000 docks (12,350)? Since DNR does not appear to be committing itself to a full inventory, it doesn't really know how many docks it needs to manage and consequently no one can know whether it is actually going to hit its goal. And, as discussed above, one cannot determine whether this goal will sufficiently alleviate the impacts of docks on listed species so as to reasonably facilitate their recovery.

How does DNR propose to treat unpermitted docks? Its 65 percent goal appears to be focused on new docks and existing docks whose owners volunteer to get a permit (but from whom?). See Draft HCP at 5-51. Without an inventory, DNR cannot take reasonable measures to bring unpermitted docks into compliance with state (and federal) law. Additionally, if a dock has been permitted by WDFW or the Corps of Engineers or a local government, do DNR (and NMFS and USFW) believe that DNR has been relieved of its obligation to assure that any such dock adequately protects treaty access, fish habitat, and shellfish? Have the measures currently being implemented by WDFW, the Corps, and local governments been evaluated to determine whether they are adequate to support recovery of listed species? If they haven't, then it doesn't seem like it would be appropriate to rely on such measures in an HCP.

It is not clear how DNR will be able to implement the measures for reducing dock impacts identified in its draft HCP.

DNR states that it will bring new docks, and existing docks seeking a permit for maintenance or replacement, into compliance by reviewing applications for shoreline permits, HPAs, and state SEPA documents and providing "letters of approval (including conditions) or denial for all proposed new and replacement private recreational docks." Draft HCP at 5-52. Examination of the most recent draft of WDFW's HPA rules does not indicate any procedure for DNR to review and condition or deny applications to construct or repair recreational docks. There is no process identified for reconciling the differing protection standards afforded by the Hydraulic Code, RCW 77.55 versus RCW 79.105.430. What happens if WDFW conditions or denies

³ The draft HCP states: "The agency is committed, under this habitat conservation plan, to use its authority under Section 79.105.430 of the Revised Code of Washington to 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." Draft HCP at 5-51

an HPA based upon DNR's proposed "letter of approval" process and the applicant appeals the decision? Appeals of HPAs are governed by the Hydraulic Code and we are unaware of any authority for WDFW to implement RCW 79.105.430. Similarly, outside of the realm of forest practices, we are unaware of any authority for DNR to implement the Hydraulic Code. Consequently, it seems that the means by which DNR is proposing to implement its HCP commitments regarding recreational docks require significant additional explanation.

There appear to be analogous problems with DNR's proposal to write "letters of approval" for shoreline permits. How will DNR assure that its commitments are met via a process being administered by local governments who likely lack the authority to fully implement DNR's authorities? Moreover, it is not clear that local governments are currently viewed as being able to use their Shoreline Management Act authorities to implement the ESA,⁴ which it seems that DNR is seeking to ask them to do. Even if all affected local governments were to agree to implement DNR's proposed letter of approval process⁵ it is not clear that they have the authority to require implementation of DNR's conditions. Additionally, the draft HCP does not address what procedures will be followed when the inevitable appeals of DNR's permit conditions or denials occur.

In summary, it does not appear that DNR has adequately explained proposals for addressing recreational docks. It has not clearly articulated a quantifiable target; it hasn't clearly explained how its proposed goal and associated conservation measures adequately support the survival and recovery of listed species; and it hasn't adequately explained the means by which its proposed conservation measures will be implemented on new docks, existing docks seeking permits for repair or replacement, and unpermitted docks whose owners have not sought permits. In addition, DNR appears to be asking USFWS and NMFS to approve a course of action for 50 years that appears to allow DNR to not fully exercise its responsibilities to protect public (and tribal) resources required by state law. We do not believe that it is appropriate for the Services to agree to such a request. Finally, we suggest that consultation between the Services and the tribes regarding the adequacy of the conservation measures for protecting tribal access rights and assuring conservation of salmon habitat would be appropriate.

Protection and Management of Eelgrass

⁴ *C.f.*, *Association of WA Business v. WA Dept. of Ecology*, SHB No. -0037 at 8-9 (2001) where the Shoreline Hearing Board held that the Legislature did not delegate to Ecology (or local governments) the authority to adopt Shoreline Master Program guidelines that implement the Endangered Species Act. In contrast, the Legislature did delegate similar authority to DNR in the context of adopting the forest practices HCP.

⁵ DNR does not provide an explanation of how local governments or WDFW can be required to implement DNR's proposed letter of approval process.

Unlike any other entity, the tribes have treaty-reserved rights to take both fish and shellfish. Tribal culture, since time immemorial, has depended upon the availability of both fish and shellfish. Consequently, the tribes have a unique interest in assuring that conservation measures protect both fish and shellfish and not one, to the detriment of the other. Staff from the Point No Point Treaty Council participated in the development of the proposed eelgrass protection measures, with a particular focus on the questions of defining what constitutes a bed of eelgrass and where that bed of eelgrass ends.

The Point No Point Treaty Council has developed proposals for defining eelgrass beds and edges that merit careful consideration by DNR and eventual incorporation into their HCP. See Letter to Tim Romanski (USFWS) and Scott Anderson (NMFS) from Randy Harder (PNPTC) (December 4, 2014) (Comments on DNR Draft HCP for Aquatic Lands and DEIS) (attached). The NWIFC supports the PNPTC recommendations for eelgrass protection as being a reasonable, well-balanced, and scientifically justified approach for protecting the habitat needs of both fish and shellfish. It is our view that DNR's focus on protecting individual shoots⁶ of eelgrass from new (not existing) shellfish aquaculture operations lacks balance. This point is driven home even more when one compares DNR's relative lack of concern about the impacts of recreational docks on eelgrass. There, even though DNR concedes that docks create and maintain habitat conditions that are not conducive to eelgrass, DNR seeks authorization to allow 35% of an unknown number of existing docks to continue their impacts. This "balance" protects neither salmon nor shellfish.

Management of Mooring Buoys

The Commission also supports the position of the Point No Point Treaty Council regarding management of mooring buoys. We note that RCW 79.105.430 states that DNR is authorized to address or regulate mooring buoys that it finds are "contributing to the decertification of shellfish beds otherwise suitable for commercial or recreational harvest." A mooring buoy does not need to actually trigger a decertification in order for the DNR to take action. The mooring buoy need only "contribute." This further supports PNPTC's recommendation that DNR identify a maximum density of mooring buoys that is below the threshold that requires a shellfish harvest closure.

Thanks again for this opportunity to provide comments. We suggest that consultation between the Services and the tribes would be appropriate given the tribes' treaty-secured interests in accessing aquatic lands for shellfish management and assuring that aquatic lands are managed in a manner supports recovery of listed species, including salmon.

⁶ See Draft HCP Appendix J at Table 11.