



# POINT NO POINT TREATY COUNCIL

Port Gamble S'Klallam \* Jamestown S'Klallam

August 12, 2016

U.S. Army Corps of Engineers  
Regulatory Branch  
Attention: Karen Urelius  
P.O. Box 3755  
Seattle, WA 98124-3755

**RE: Comments on regional (general and specific) issues to the proposed 2017 Nationwide Permits**

Dear Ms. Urelius and the review committee,

Thank you for the opportunity to provide comments on the proposed draft 2017 Regional Conditions for the Seattle District for the newly proposed changes on the Nationwide Permits (NWP) regulations. The Point No Point Treaty Council (PNPTC) is concerned about the streamlining of certain shoreline (saltwater and freshwater) activities through regional conditioning of NWP's, which may include significant adverse effects on our Tribes' Treaty Rights and natural resources within our Tribes' Treaty Protected Usual and Accustomed fishing areas.

The PNPTC is a tribal organization that provides fisheries support services to the Jamestown S'Klallam and Port Gamble S'Klallam Tribes, which have Usual and Accustomed Fishing Areas in Hood Canal, Strait of Juan de Fuca, and the Puget Sound. Our tribes rely on the healthy habitat conditions that sustain critical finfish and shellfish populations which support fishing activities that are fundamental to the economies and cultures of our tribal communities.

The Jamestown S'Klallam Tribe and the Port Gamble S'Klallam Tribe are signatories to the 1855 Treaty of Point No Point, which is supported under the Judge Boldt (1974) decision that guarantees the Tribes' right to take fish "at usual and accustomed grounds and stations." Treaty of Point No Point, 12 Stat. 933, Article IV. While some of the language in the regional general and regional specific conditions offers better environmental protection, other components have a potential to impact tribal treaty rights.

***Overall Regional General Tribal Concerns:***

**A. Treaty-Reserved Resources**

As a federal trustee of tribal-reserved resources, the Army Corps of Engineers (Corps) is charged with a duty to ensure that tribes have the ability to exercise their constitution protected treaty rights, supported under the Judge Boldt (1974) and Judge Rafeedie (1994) decisions that uphold those rights. No NWP should be authorized if the proposed activity will adversely impact treaty reserved resources, or impede our Tribes' ability to exercise their treaty rights, without consultation with the Tribes.

**B. Cumulative Impacts**

There needs to be a more comprehensive Cumulative Impacts analysis for the proposed NWP's and we would like to see data regarding the amount of cumulative impacts that have occurred under already authorized NWP's. There should be an analysis that describes impact under each type of nationwide permit,

including the regional condition by watershed. This data should be made available for future reauthorizations so that trends in cumulative impacts can help inform future conditions and the need for regulatory changes.

### **C. Climate Change**

There needs to be inclusion of current up-to-date data that includes climate projections including but not limited to Sea Level Rise, and other potential changes to coastal areas (both riverine and saltwater). These data should be incorporated into the cumulative effects analysis, especially in areas that include bank stabilization and other shoreline modifying activities (NWP 13, 28, 42).

### **D. RGP 2 Aquatic Resources Requiring Special Attention**

We support the inclusion of various kinds of wetlands and lagoons as requiring special attention. We also request the inclusion of clam and oyster bed areas and known forage fish spawning areas (including surf smelt and sand lance). These species are critical to salmonid health, and should be included for protection. These habitats play an important role in the food web for salmonids.

### **E. In-water Work Window**

All NWP's in the Seattle District should also include a condition that in-water work can only occur for appropriate ESA and non ESA timing considerations. Applicants should be required to complete all in-water work within the preferred work-window specified on the Seattle District's page for ESA listed species and the WDFW timing for in-water work for non-ESA species.

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### ***Nationwide Specific Regional Conditions:***

#### **NWP 1- Aids to Navigation**

The Seattle District on Regional conditions should require a pre-construction notification (PCN) for all proposed aids to navigation device in all areas as these devices have the potential to interfere with tribal fishing activities.

#### **NWP 3- Maintenance**

In the context of "Bank Stabilization," these activities should be considered a new event and should be required to undergo an individual permit. Bank stabilization projects which require repeated maintenance are likely altering the rates of water and sediment flow that sustain stream banks and shorelines, and should be redesigned to allow a balance of natural watershed and coastal processes.

#### **NWP 7- Outfall structures and Associated Intake Structures**

It is found that storm water outfall structures and areas with high amounts of impervious surface are linked to Coho salmon die offs. Current weight-of-evidence suggests that Coho pre-spawn mortality is caused by toxic urban runoff.<sup>1</sup> The Tribes are also concerned about the unknown deleterious effects on shellfish beds. In addition to reviewing new outfalls being constructed and the associated procedures, EPA and the Corps should be notified about a monitoring plan to ensure outfalls meets national safety standards.

#### **NWP 10- Mooring Buoys**

The Seattle District should require permittees to have an individual permit to install mooring buoys in this region and should not be approved without tribal consent in areas with tribal treaty fishing rights. The individual permit allows for the use of the alternatives analysis process, which looks at a suite of alternatives if the applicant has docks, marinas or other options nearby. The PNPTC suggests that the Seattle District do

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<sup>1</sup> Spromberg, J.A. and N. Scholz. (2011). Estimating the Future Decline of Wild Coho Salmon Populations resulting from early Spawner Die-offs in the urbanizing watersheds of the Pacific Northwest, USA. Integrated Environmental Assessment and Management. SETAC. 9999.

a similar approach to the Regional Condition 3 but applied to NWP 10, which would no longer authorize NWP 10 to be used for buoys in tidal waters in the Hood Canal, Puget Sound, Admiralty Inlet and the Strait of Juan de Fuca. Should individual permits not be mandatory, we strongly support the Seattle district conditioning obligatory PCNs for all mooring buoys and also assert the need for further scrutiny on the placement of those buoys. For example, the 2010 Mystery Bay Management Plan in Mystery Bay resulted in failed management and improper regulation of mooring buoys. This failure resulted in the closure of shellfish beds which the S'Klallam tribes possess treaty reserved rights to fish. According to the National Shellfish Sanitation Program, there are strict sanitation standards for areas where shellfish are grown.<sup>2</sup> The FDA has stated that the area of one acre which has buoy moorage for at least 10 boats is also considered a marina. When an area surpasses the marina threshold, the surrounding waters cannot be considered safe for shellfish harvesting. In interpreting the National Shellfish Sanitation Program (NSSP) guide marina definition the DOH uses the one boat per acre as a screening tool to count boats toward the marina threshold. The density threshold may need to be decreased in water bodies that have poor dilution characteristics (like a shallow enclosed embayment).<sup>3</sup> In sum, the Corps should include sideboards so that these thresholds cannot be reached for areas not already identified by DOH.

It is not only important that NWP 10 not be used in DOH areas that are already closed, but also equally critical that NWP 10 does not put additional not already identified areas at more risk. In addition, mooring buoys obstruct tribal set net fisheries, shellfish fisheries (such as crabbing, etc.) and other fisheries that occur in the intertidal and subtidal zones. We are very concerned with the cumulative effects and the need for better tracking of buoys across the region. It is observed via satellite imagery or out in the field that there is an issue with many unpermitted buoys. Better enforcement to keep these mooring buoys permitted is necessary.

We suggest all permit applicants be required to adhere to the following conditions:

1. There must an inventory and map all buoys and docks within the waterway
2. The proposed mooring buoy must be situated such that there is no more than one buoy per acre
3. NWP may not be used to authorize a buoy in a waterway where there are nine or more existing buoys or docks.
4. Buoys must be a minimum of 1000 feet from the shoreline to avoid tribal set-net fisheries. Net fisheries can happen during tide changes and buoys interfere with these activities.
5. Tribal consent must be obtained prior to the installation of any buoy.
6. Should any new buoy installed not meet all of the above conditions, the buoy should be removed at the owner's expense.

Our tribes have Usual and Accustomed Fishing grounds in a large portion of the Puget Sound. See Appendix A at the end of the document.

### **NWP 13- Bank Stabilization**

This permit should be changed to individual permits. The PNPTC commends the Seattle District for proposing regional condition 3, which would no longer authorize NWP 13 to be used for new bank stabilization in tidal waters in the Salish Sea. This is a very important step toward the health and recovery for our saltwater shorelines. PNPTC supports the comment letters put forth by the Northwest Indian Fisheries Commission (NWIFC) to the Army Corps of Engineers both Nationwide and in the Seattle District. The NWIFC goes into great detail on the scientific evidence that demonstrate the shortcomings of this NWP.

<sup>2</sup> State of Washington Governor's Office for Regulatory Innovation and Assistance (2010). Mystery Bay Management Plan (2010). <http://search.usa.gov/search?utf8=%E2%9C%93&affiliate=oria&query=mystery+bay+management+plan+2010&commit=Search>

<sup>3</sup> State of Washington Governor's Office for Regulatory Innovation and Assistance (2010). Mystery Bay Management Plan (2010). <http://search.usa.gov/search?utf8=%E2%9C%93&affiliate=oria&query=mystery+bay+management+plan+2010&commit=Search>

However, in freshwater systems, the impacts of bank stabilization and shoreline armoring are also detrimental to many ESA and threatened salmonids, and other species. For example, a levee riprapping project along the Pilchuck River in Snohomish, documents significant reduction in use of habitat by ESA listed salmon, where banks are armored. Bank armoring, floodplain fill and development, and excessive levels of impervious surfaces have resulted in significant impacts to salmon in western Washington. These impacts are documented in the NMFS' biological opinion on FEMA's National Flood Insurance Program in Puget Sound.<sup>4</sup> Additionally, the impacts of the use of NWP's to authorize both new and/or existing bank stabilization projects will be exacerbated by the effects of climate change.

This NWP should also not authorize maintenance. Streams and shorelines must adjust to changing environmental conditions that influence rates of water and sediment flow for healthy habitats. In addition, maintenance and repair of bank stabilization projects and other structures reinforce the original impairment caused by projects by removing the opportunity to reduce impacts or restore habitat. Many times these types of projects that require constant maintenance, such as shoreline armoring, do not allow natural adjustment for watershed and coastal processes to protect habitat and does not minimize the additional need for more stabilization on the surrounding property.

#### **NWP 29- Residential Developments**

The tribes are concerned about multi-phase residential subdivisions. The regional general condition allows a loss of up to 300 linear feet of intermittent and ephemeral stream beds is too high and could adversely affect salmon habitat without mitigation.<sup>5</sup> This activity should not result in a loss of stream bed.

#### **NWP 39- Commercial and Institutional Developments**

The tribes are concerned about Commercial and Institutional Developments. The regional general condition allows a loss of up to 300 linear feet of intermittent and ephemeral stream beds is too high and could adversely affect salmon habitat without mitigation.<sup>6</sup> This activity should not result in a loss of stream bed.

#### **NWP 42- Recreational Facilities**

The tribes are concerned about Recreational Facilities. The regional general condition allows a loss of up to 300 linear feet of intermittent and ephemeral stream beds is too high and could adversely affect salmon habitat without mitigation.<sup>7</sup> This activity should not result in a loss of stream bed.

#### **NWP 52- Water-Based Renewable Energy Generation Pilot Projects**

These projects should not be allowed in western Washington without tribal consent in areas with tribal treaty fishing rights. These projects add additional obstruction to tribal fisherman trying to exercise their fishing rights.

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<sup>4</sup> NMFS, Endangered Species Act Section 7 Consultation and Magnuson-Stevens Fishery Conservation and management Act Essential Fish Habitat Consultation Regarding Implementation of the National Flood Insurance Program of Washington-Puget Sound Region (Sept 22, 2008) (NMFS Tracking No: 2006:0472 at 124-127.

<sup>5</sup> Wigington, Jr. et al. 2006. Coho Salmon Dependence on Intermittent Streams. *Frontiers in Ecology and the Environment*; 4(10): 513-518.

<sup>6</sup> Wigington, Jr. et al. 2006. Coho Salmon Dependence on Intermittent Streams. *Frontiers in Ecology and the Environment*; 4(10): 513-518.

<sup>7</sup> Wigington, Jr. et al. 2006. Coho Salmon Dependence on Intermittent Streams. *Frontiers in Ecology and the Environment*; 4(10): 513-518.

Thank you for the opportunity to comment on the Draft Proposed NWP regional general and specific conditions. We support the comments put forth by the Northwest Indian Fisheries Commission and the Port Gamble S'Klallam Tribe. Please do not hesitate to contact me at [crossi@pnptc.org](mailto:crossi@pnptc.org) or 360-297-6534 with any questions.

Sincerely,



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Cynthia A. Rossi  
Point No Point Treaty Council, Habitat Protection Lead Biologist

# Appendix A

**Map of Point No Point Treaty Area for the Jamestown S’Klallam and the Port Gamble S’Klallam Tribes.**



*This map is for illustrative purposes only and should not be relied on for any purpose other than to ascertain the general area where the PNPTC member Tribes currently authorize fishing activities under the Boldt decision and the Treaty of Point No Point. Authorized areas of fishing can be subject to change and in no way should be considered to limit the treaty rights of the member Tribes. If there are any questions regarding the area illustrated, or activities of the member Tribes outside of the area illustrated, please call Randy Harder, PNPTC Executive Director, (360) 297-6500.*