



THE TULALIP TRIBES

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**NATURAL AND CULTURAL RESOURCES
DEPARTMENT
6406 Marine Drive
TULALIP, WA 98270**

The Tulalip Tribes are the successors in interest to the Snohomish, Snoqualmie, and Skykomish tribes and other tribes and band signatory to the Treaty of Point Elliott

August 4, 2016

Karen Urelius
US Army Corps of Engineers
Seattle District, Regulatory Branch
P.O. Box 3755
Seattle, WA 98124-3755

Subject: 2017 Nationwide Permit Reissuance - Regional Conditions

Dear Ms. Urelius,

The Tulalip Tribes of Washington submit their comments on the reissuance of the U.S. Army Corps of Engineers Nationwide Permits – Regional Conditions. The Tulalip Tribes is the successor in interest to the Snohomish, Snoqualmie, Skykomish and associated dependent tribes who were parties to the Treaty of Point Elliott of January 22, 1855 (12 Stat. 927). Through this Treaty, the Tribes reserved and the US Government guaranteed, vital inherent rights of taking fish at usual and accustomed grounds and stations, as well as hunting and gathering on open and unclaimed lands. Indian treaty rights are property rights protected under the fifth amendment of the U.S. Constitution. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 88 S.Ct. 1705 (1968). Pursuant to the Point Elliott Treaty, and the historical government-to-government relationship between the Tulalip Tribes and the United States, the U.S. Army Corps of Engineers has a trust responsibility to uphold the US Government’s treaty obligations to the Tulalip Tribes and to act as a trustee in protecting the rights and interests of the Tulalip Tribes. [See, e.g., *U.S. v. Mitchell*, 463 U.S. 206, 225 (1983)].

Tulalip Tribes reserved the right to take fish in their usual and accustomed fishing places pursuant to the Treaty. The Tulalip Tribes’ treaty-reserved fishing rights have been consistently confirmed by the Federal District Court, *U.S. v. Washington*, 459 F. Supp. 1020, 1038 (W.D. Wash. 1978); *U.S. v. Washington*, 626 F. Supp. 1405, 1527 (W.D. Wash. 1985), *Aff’d*, 841 F.2d 317 (9th Cir. 1988). The right to take fish includes the right to habitat protection to support continuation and enhancement of fish runs. *United States v. Washington*, (W.D. WA 2007) WL 2437166. The Tulalip Tribes possess significant rights and obligations to co-manage fisheries and habitat protection, and restoration efforts jointly



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with the federal government and the State of Washington. The Tribes is federally recognized with its community and tribal government located on the Tulalip Indian Reservation in Snohomish County, Washington.

The Tulalip Tribes depend upon salmon and shellfish for economic and cultural sustainability. As sovereign nations, the tribes signed treaties with the United States, ceding most of the land that is now western Washington, but reserving rights to harvest salmon and other natural resources. Today those fishing rights are being rendered meaningless because the federal and state governments are allowing salmon habitat, to be exploited or destroyed faster than habitat can recover. Tribal harvest has been reduced to levels not seen since prior to 1974, when *U.S. v. Washington* reaffirmed the tribes' treaty-reserved rights and their status as co-managers with rights to half the harvestable salmon returning to Washington waters. As salmon disappear, tribal cultures, communities and economies are threatened as never before. Some treaty tribes have lost even the most basic ceremonial and subsistence fisheries -- a foundation of tribal life.

General Comments

The National Marine Fisheries Service (NMFS) has listed Puget Sound Chinook salmon and bull trout and steelhead as threatened under the Endangered Species Act of 1973 (ESA). Since listing Chinook and Coho salmon and steelhead populations are at or near historic lows. Recent assessments indicate Chinook salmon productivity levels in the Snohomish and Stillaguamish basins are so low that if current trends continue, extinction risk is a real possibility. The impacts of activities covered by Nationwide Permits may appear minimal on an individual basis, but in aggregate can have serious consequences to treaty-reserved resources. Cumulatively, with other sources of mortality, permitted activities can create new sources of mortality, which impairs the Tribe's ability to achieve salmon recovery and maintain resources of cultural importance.

With the predicted levels of population growth in Washington State, 59% increase by 2030 (*State of Our Watershed Report 2016*), non-tidal water impacts of ½ acre and losses of 300 feet of stream habitat, project by project, from a cumulative effects basis is no longer minimal. Along with the historically low salmon and steelhead population levels, greater restrictions are needed to reduce the impacts to habitats needed by Treaty reserved resources. Any impacts to critical habitat and essential fish habitat needs to be mitigated to replace lost area and function.

Compensatory mitigation is often used to lessen the impact of a proposed activity. A much used requirement in compensatory mitigation is the objective of no net loss. For activities



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where redevelopment is planned or in areas where landscapes (e.g. riparian areas) have been previously highly modified the no net loss requirement should not be applied. This requirement creates conditions where nonfunctional habitat remains nonfunctional and poor habitat remains poor. If the federal agencies including the U.S. Army Corps of Engineers take salmon recovery seriously these system requirements need to be revised to protect Treaty reserved resources and move habitat protection and salmon recovery forward. Habitat restoration, based on our observations over the last 16 years of implementation, cannot achieve salmon recovery alone (*State of Our Watershed Report 2016*). Greater habitat protections are required.

General Comments on Regional Conditions

5. Bank Stabilization

The Nationwide Permit activity must comply with applicable FEMA-approved state or local floodplain management requirements. These requirements include the FEMA requirements for the protection of essential fish habitat described in the National Marine Fisheries Service 2008 Biological Opinion on elements of the National Flood Insurance Program throughout Puget Sound in Washington

Bank stabilization within the Tribes usual and accustomed fishing areas is a significant issue. It reduces habitat complexity and rearing capacity. Cumulatively, it has become a significant impairment to fish habitat. Within the Snohomish, Skykomish, and Snoqualmie rivers 33% of river banks are diked, bermed or armored. Within the Snohomish Estuary 66% of the mainstem and distributary channels are either diked or armored. Along the shoreline north and south of the Snohomish Estuary, 40% of the shoreline is armored (*Snohomish Basin Salmon Recovery Forum. 2005*).

Because of these existing conditions, cumulative effects restrictions need to be incorporated in the areas noted. Additional restrictions should include requiring a PCN, mitigation, and length limits established on a case by case basis. Restrictions should also be applied to forage fish spawning areas/critical habitat, channel migration zones, and habitats occupied by ESA listed species. Repair or new projects should be required to provide improved habitat functions in situations where the current condition is disturbed.

7. Stream Loss

The allowable loss or impacts to 300 feet of stream for a permit is difficult to accept given the current depressed condition of salmon stocks in Puget Sound; and runs counter to the salmon recovery planning efforts occurring throughout the region. Proposed actions that



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impact streams and rivers occupied by anadromous salmon should be severely restricted, mitigated or prohibited.

In those basins occupied by anadromous salmon, intermittent and ephemeral streams can be occupied by salmon during wetter time of year. Actions that impact these stream types should not be waived unless on site information determines these habitats are not occupied by salmon over the course of a year.

8 Mitigation

Riparian mitigation requirements should be consistent with the jurisdiction where the mitigation is occurring. In locations where no preexisting native riparian vegetation was present the riparian area should be rehabilitated to mimic what would have been present historically.

Compensatory mitigation at a minimum should be two-for-one ratio for wetland and stream area impacted by the action. This ratio increase is justified to cover the difficulty in replacement, the lag time in habitat recovery and to ensure habitat is being recovered at a greater level than it is being lost. A compensatory mitigation at a one to one ratio, just guarantees a status quo condition, which does not achieve any habitat improvement progress.

The Tribes also urge the U.S. Army Corp of Engineers to reevaluate the amount of mitigation required for impacts. The current mitigation requirements maintain habitat in its current form – often poor. If the federal agencies including the U.S. Army Corps of Engineers take Treaty Rights and salmon recovery seriously this requirement needs to be revised to better protect Treaty reserved resources and move habitat protection and salmon recovery forward.

12. Cultural Resources and Human Burials

Permittees and contractors should receive training on what to look for before beginning the activity.

Proposed Specific Regional Conditions

(Also see attached letter from the Tulalip Tribes commenting on Docket COE -2015-0017)

NWP 10 Mooring Buoys

The installation of mooring buoys legal and illegal within the Tribes usual and accustomed fishing areas has become a significant issue. The presence of buoys can interfere with Treaty fishing rights. The US Army Corps of Engineers needs to evaluate this activity more



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thoroughly to better inform the decisions on approving the installation of additional buoys. A PCN should be required along with advanced information on the number of buoys present in the embayment the buoy is proposed. We would also recommend the U.S. Army Corps of Engineers perform a Puget Sound wide shoreline assessment to better determine the extent of this activity.

NWP 13. Bank Stabilization

This Nationwide Permit should be prohibited for use within the Snohomish, Skykomish, and Snoqualmie rivers and within the Snohomish Estuary.

NWP 14 Linear Transportation Project

Mitigation should be required for these activities. Linear transportation projects also lead to increases in impervious surfaces. Within the Tribes usual and accustomed areas there are many basins where impervious surface levels are on the verge of an impaired threshold (11%). The Snohomish Estuary is at a 9% impervious level, urban areas around the estuary fringe have impervious level on average of 22%. In habitats used by ESA listed species and where current impervious levels are high, cumulative effects restrictions should be added to the areas noted. This should include either mitigation or prohibition.

NWP 29 Residential Developments

This Nationwide permit should be severely restricted, mitigated and possibly prohibited for developments in channel migration zones or floodplains - areas occupied or critical to salmon populations. We also can no longer exclude single family residences and the impacts generated by these activities. Developments proposed in channel migration zones, and floodplains, projects can directly and indirectly impact essential fish habitat, critical habitat, and habitats occupied by ESA listed species. In light of climate change these developments will also be at a greater safety risk.

Residential and commercial developments in floodplains that may apply for a Nationwide Permit also fall within areas under FEMA jurisdiction. Conditions need to be consistent with the 2008 Biological Opinion prepared by the National Marine Fisheries Service?

NWP 39 Commercial and Institutional development

This Nationwide permit should be severely restricted, mitigated and possibly prohibited for developments in channel migration zones or floodplains - areas occupied or critical to salmon populations.



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NWP 40 Agricultural Activities

Agricultural activities should be restricted or mitigated. Allowing impacts up to ½ acre non-tidal water and 300 feet of stream under current watershed conditions and salmon population status is excessive.

NWP 41 Reshaping Existing Drainage Ditches.

Many ditches, because they are conveying groundwater are connected to fish bearing streams and are often occupied by salmon and trout. Reshaping drainage ditches may directly impact salmon and trout. Where and how this is done needs to be evaluated on a case by case basis.

NWP 42 Recreational Facilities

Allowing the filling of up to a ½ acre non-tidal water and impacts up to 300 feet of stream is excessive for this type of activity. Recreational facilities should be severely restricted, mitigated or prohibited from a Nationwide Permit in non-tidal waters and stream channels or in floodplains and channel migration zones that directly or indirectly impact critical habitat, or essential fish habitat for anadromous salmon.

NWP 43 Stormwater Management Facilities

This NWP allows the loss of ½ acre of non-tidal waters and 300 feet of stream channel, both thresholds are excessive. These facilities should be restricted to upland locations. This permit and these actions should be restricted, mitigated or prohibited from channel migration zones or floodplains, and wetlands.

NWP 44 Mining Activities

Because many mining activities in Washington State occur in channels, floodplains or adjacent to non-tidal waters occupied by anadromous salmon. Mining activities that are located in these areas should be prohibited from obtaining Nationwide Permit for their actions.

NWP 52 Water-Based Renewable Energy Generation Pilot Projects

Actions under this permit may interfere with Tribal Treaty Rights in Washington State. Projects that interfere with Treaty Fishing should be prohibited or be restricted. In addition, the operational impacts from these activities after construction are poorly understood. Pilot projects for experimental purposes should include a requirement for robust information gathering to inform decision makers of the ecological impacts of these energy generating structures.

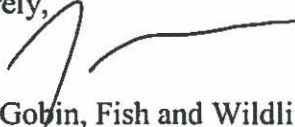
The Tulalip Tribes of Washington have reviewed the June 20, 2016 Public Notice along with the federal register and the decision documents associated with the reissuance of the U.S.



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Army Corps of Engineers Nationwide Permits and have concerns with the continued loss of critical and essential fish habitat that is likely through the Nationwide Permit process. With the expected population growth for the State of Washington and predicted climate change impacts, a continuation of this regulatory authority without significant alterations (restrictions) will make it increasingly difficult to recover salmon within Puget Sound. As salmon disappear, tribal cultures, communities and economies disappear. These are Tribal Trust responsibilities and part of the US Government's treaty obligations. The Tribes urge the U.S. Army Corp of Engineers to reevaluate authorized limits, and prohibit the use of Nationwide permits in areas where existing conditions from cumulative impacts necessitate restricting impacts. Prohibiting the use of Nationwide Permits in areas where critical and essential habitat exists (e.g. channel migration zones and floodplains) for ESA listed species as well as other salmon and forage fish is essential. The Tribes also urge the U.S. Army Corp of Engineers to reevaluate the amount of mitigation required for impacts. The current mitigation requirements maintain habitat in its current form – often poor. If the federal agencies including the Army Corps of Engineers take Treaty Rights and salmon recovery seriously this requirement needs to be revised to better protect Treaty reserved resources and move habitat protection and salmon recovery forward.

Sincerely,


Jason Gobin, Fish and Wildlife Director
Tulalip Tribes Natural and Cultural Resources Department

cc: Tulalip Tribes Board of Directors
Tim Brewer, Reservation Attorney

REFERENCES

Snohomish Basin Salmon Recovery Forum. June 2005. Snohomish River Basin Salmon Conservation Plan, Snohomish County Department of Public Works, Surface Water Management Division, Everett, WA.

Stillaguamish Implementation Review Committee (SIRC). 2005 Stillaguamish Watershed Chinook Salmon Recovery Plan. Published by Snohomish County Department of Public Works, Surface Water Management division, Everett WA

State of Our Watersheds, 2016 A Report by the Treaty Tribes in Western Washington, Northwest Indian Fisheries Commission Member Tribes, Olympia, WA.