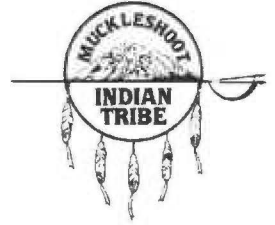


MUCKLESHOOT INDIAN TRIBE

Fisheries Division

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August 19, 2016

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

RE: 2017 Nationwide Permits, Seattle District, Proposed General and Specific Regional Conditions comments

Dear Ms. Urelius:

The Habitat Program of the Muckleshoot Indian Tribe Fisheries Division has reviewed the proposed General and Specific Regional Conditions proposed by the U.S. Army Corps of Engineers' Seattle District Branch. We offer the comments below in the interest of protecting and restoring the Tribe's treaty-protected fisheries resources.

The Tribe is a successor in interest to tribes and bands that were parties to the Treaty of Point Elliott, 12 Stat. 927, and the Treaty of Medicine Creek, 10 Stat. 1132. Through these treaties, the Tribe has reserved Treaty fishing, hunting, and gathering rights, including the right to take fish at its usual and accustomed fishing grounds and stations. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974); *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988).

We commented on the Corps' nationwide permit program renewal several times in the past (i.e. 1996; 2001; 2006; and 2012) because the Tribe's usual and accustomed fishing area is significantly impacted by this program given its overlap with the densely populated areas of King, Pierce, and Snohomish Counties. While the Nationwide Permit program has progressed in recent years, primarily through Corps' notifications of potential projects for tribal review, the program must be further improved to meet the Corps' responsibilities to tribes with regard to habitat protection and restoration in order to safeguard treaty fish resources and fishing rights going forward.

Our comments to the Seattle District's General and Specific Regional Conditions are listed below. We recommend that the Seattle District meet with us and other tribes to discuss our concerns before finalizing the Nationwide Permit program permit conditions for the Seattle District.

In the meantime, please let me know if you have any questions. You can call me at (253) 876-3116.

Sincerely,



Karen Walter
Watersheds and Land Use Team Leader

Attachments

Proposed Regional General Conditions comments

RGC 1 -Pre-Construction Notification

b. Documentation to meet NWP general or regional conditions

This regional condition should be modified so it is clear that all general and regional conditions are documented and addressed.

We suggest the language be changed with the additions underlined as noted below:

Documentation to meet all NWP general or regional conditions, including but not limited to, General Condition 18 or General Condition 20.

c. Drawings and checklist

We have five comments on the drawings and checklist:

1. Permit drawings should also include a measurable scale appropriate for the paper size.
2. The checklist should require applicants to provide details on substrate at the site.
3. The checklist should require applicants to provide known fish distribution information and nearest natural barriers for projects involving streams and ditches that can provide salmon habitat.
4. The checklist should require applicants to provide figures that show all existing water features on or within 300 feet of the project site.
5. The checklist should require applicants to provide a figure showing the project site location within the affected watershed.

RGC 3- Bank stabilization activities in Tidal Waters of the Salish Sea

We support the Corps proposal to revoke NWP authorization for any new bank stabilization projects in the Salish Sea. Projects proposing to replace currently serviceable or recently damaged, previously authorized bank stabilization should document the details of their previous authorization by the Corps.

RG4- Commencement Bay restrictions

We support the Corps' proposal to revoke NWPs 12, 13, 14, 23, 29, 39, 40, 41, 42, and 43 authorizations for Commencement Bay.

We also request that the Corps apply these same restrictions to Elliott Bay and the Duwamish River (up to River Mile 11) as these waterbodies have exceeded cumulative impact thresholds for stabilization, channel modifications, limited access to tributary areas (due to blocking culverts) etc. as described in the various habitat assessment materials for the Green-Duwamish Basin (WRIA 9). Specifically see attachments: Figure NS-5 from the WRIA 9 Limiting Factors (attachment 1); Pages 3-10 and 3-11 from the Green/Duwamish and Central Puget Sound Watershed Salmon Habitat Plan (attachment 2); and pages 2-26 through 2-48 from the Corps' 2014 Final Cumulative Impacts Analysis for Eastern Puget Sound (attachment 3). Full copies these three reports can be found via the following links:

http://www.pugetsoundnearshore.org/supporting_documents/WRIA_9_LFR.pdf

<http://www.govlink.org/watersheds/9/plan-implementation/habitatplan.aspx>

[http://www.nws.usace.army.mil/Portals/27/docs/regulatory/NewsUpdates/2017NWPs/Cumulative%20Effects%20Analysis%20Eastern%20Shore%20of%20Central%20Puget%20Sound%20\(wihout%20appendix\).pdf](http://www.nws.usace.army.mil/Portals/27/docs/regulatory/NewsUpdates/2017NWPs/Cumulative%20Effects%20Analysis%20Eastern%20Shore%20of%20Central%20Puget%20Sound%20(wihout%20appendix).pdf)

If the Corps allows further nationwide permit authorizations from the list above in Elliott Bay and the Duwamish River, then these projects can add to the existing cumulative impacts that have caused significant impacts to salmon habitat and conditions necessary to support the Tribe's fisheries and treaty rights.

RGC5- Bank Stabilization

Condition "c" should clarify that this RGC does not apply to tidal waters in the Salish Sea, as well as, Commencement Bay, Elliott Bay and the Duwamish River per our comments to RGC4.

Condition "d" should include both existing and expected post project habitat conditions that fully discuss existing habitat impairment, including temperature impaired areas and a risk assessment of further degradation in water quality from removal of trees that provide shade.

Condition "e" should add potential impacts to tribal fishing sites to the list of reasons why an increase in reach assessment may be needed for these projects.

Condition "f" should also require the results of any hydraulic investigations to be submitted with the PCN.

RGC 6- Crossings of Waters of the United States

Please see the Tribe's separate letter with proposed language changes to this Regional Condition.

RGC7- Stream Loss

The District's proposed regional general condition to restrict losses for perennial streambeds for NWPs in the Seattle District area is appropriate.

However, the proposed threshold condition of losses up to 300 linear feet of intermittent and/or ephemeral stream beds and ditches is too high for existing and potential salmon bearing streams and streams that contribute habitat functions downstream. Intermittent streams and ditches can provide habitat for salmon, in particular coho, which is one treaty-protected fish resource for the Muckleshoot Tribe. (Wigington, Jr. et al. 2006; Attachment 4).

The Corps proposed condition for intermittent/ephemeral stream beds should scaled based on the stream length of potential fish habitat with project impacts limited to be no greater than 10% maximum of the entire stream length from proposed and previous authorizations.

This recommendation should apply to all projects eligible for NWP authorizations.

RGC8- Mitigation

A PCN should be required for any project affecting perennial, intermittent, and ephemeral streams.

Compensatory mitigation should be required for permanent and temporary impacts to these streams in WRIAs 8, 9, and 10 in consultation with the Muckleshoot Indian Tribe to ensure that impacts and proposed mitigation meet GC17.

RGC9-Magnuson-Stevens Fishery Conservation and Management Act-Essential Fish habitat

Please note that Essential Fish Habitat considerations and requirements only apply to certain listed species but not all species protected under tribal reserved treaty rights. Many of the comments we are making are intended to address these gaps such that projects authorized under the NWP can meet GC17 regarding tribal treaty rights.

RGC10- Submerged Aquatic Vegetation and Forage Fish

We agree with the intent of this condition; however, there may be places and times where it is desirable to remove non-native submerged aquatic vegetation.

RGC 11- Notification of Permit Requirements

The Corps should retain these conditions in the final NWP. The permittee and contractors should also be required to have the nationwide permit authorization letter, conditions and permit drawings onsite during construction.

RGC13 -Construction Boundaries

This condition should be modified as follows:

“Once a project has been verified by the Corps, permittees must clearly mark all construction area boundaries...”

We know of two projects in the past 3 years where construction areas were laid out and work started before the Corps verified/authorized the work and impacts occurred to wetlands, aquatic sites and buffers. Trees that get cut down during unauthorized work cannot be equivalently replaced with younger trees, for example.

RGC 14-Temporary Impacts and Site Restoration

For Condition “a”, temporary impacts can adversely affect tribal fishing and fishing sites and should not be approved without tribal concurrence. Any extensions that are requested after a project is authorized should also be noticed to Tribes and not approved unless there is tribal concurrence.

For Condition “b”, which would allow ½ acre of temporary impact to streams that provides or could provide salmon habitat is too high for many streams in WRIAs 8, 9, and 10. These temporary impacts should be based on the amount of overall stream length/area and be no greater than 5-10% of this total stream length or area cumulatively for smaller streams and a maximum ½ acre for larger streams. Condition “e” should use plants that are native to the site where the project could directly or indirectly

affect salmon and potential salmon habitat waterbodies.

SPECIFIC REGIONAL CONDITIONS comments

NWP 1- Aids to Navigation

This NWP should require a PCN where they are proposed within any area covered by the Treaties of Point Elliott and Medicine Creek because these types of structures can adversely affect Muckleshoot Tribal treaty fishing access areas directly and indirectly.

NWP 3 – Maintenance

This NWP should require a PCN because these activities can affect tribal fishing; fishing sites and habitat that support tribal fisheries. As noted in NWIFC comments, many maintenance projects perpetuate ongoing impacts to salmon habitat by disrupting the processes that create and maintain habitat and have added to the cumulative impacts in WRIAs 8, 9, and 10. New approaches are needed that reduce impacts and provide sufficient mitigation where impacts are unavoidable to begin achieving no net loss goals and progress towards habitat restoration.

NWP 7- Outfall Structures and Associated Intake Structures

This NWP should require a PCN because these activities can affect tribal fishing; fishing sites; habitat; and water quality that support treaty fishing rights.

NWP 10- Mooring buoys

The regional conditions should be retained in the final Seattle District Regional Conditions.

NWP 12- Utility Line Activities

We agree with the proposed specific conditions 1, 2, and 3. With respect to Condition 4, a PCN should be required for all utility line projects in existing and potential salmon bearing waterbodies because these projects can adversely affect salmon habitat and tribal fishing sites.

NWP 13- Bank Stabilization

As we noted previously, we request that this Nationwide Permit be revoked for areas in Elliott Bay and the Duwamish River to River Mile 11.

We also request that this NWP be revoked for the Green River from River Mile 11 to River Mile 31 as salmon habitat in this reach of the Green River has already been severely degraded by past bank stabilization and levee projects such that in-stream and riparian habitat conditions are exceedingly poor and water temperatures are often in the lethal range as documented in the Green River Temperature TMDL report by the Washington Department of Ecology (2011). See

<http://www.ecy.wa.gov/programs/wq/tmdl/GreenRvrTMDLsummary.html> and

Figure HM-3C, Attachment 5 and the Green Duwamish habitat limiting factors report link in our RGC 4 comment.

NWP 14-Linear Transportation Projects

The first condition proposed should be retained in the final Seattle District Regional General Conditions.

The second condition should be modified to also require a PCN for linear transportation projects all waters of the U.S. in WRIAs 8, 9, and 10 to ensure that adverse impacts are adequately considered and mitigated as needed.

NWP 15- U.S. Coast Guard Approved Bridges

This NWP should require a PCN for all of these activities as they can adversely affect salmon habitat and Tribal fishing access directly and indirectly, even temporary fills.

NWP 20- Response Operations for Oil and Hazardous Substances

This NWP should require a PCN for all of these activities as they can adversely affect salmon habitat and potentially Tribal fishing access.

NWP 23-Approved Categorical Exclusions

The NWP 23 should be retained in the final Seattle District Regional General Conditions.

NWP25-Structural Discharges

This NWP should require a PCN where they are proposed within any area covered by the Treaties of Point Elliott and Medicine Creek because these types of actions, even temporary fills can adversely affect Muckleshoot Tribal treaty fishing access areas directly and indirectly.

NWP 28-Modifications of Existing Marinas

The NWP 28 should be retained in the final Seattle District Regional General Conditions.

NWP 29- Residential Developments

A PCN should be required for all of these projects as they can adversely affect salmon habitat and potentially fishing access.

NWP 31-Maintenance of Existing Flood Control Facilities

We request that NWP 31 be revoked for the Green, Cedar, White, Puyallup, Sammamish Rivers and Issaquah Creek based on existing cumulative impact conditions from flood control facilities along these waterbodies that has adversely affected salmon habitats and has degraded or eliminated tribal fishing sites. Instead, projects seeking to maintain these existing flood control facilities should be required to go through an individual permitting process that considers alternative approaches, avoidance, minimization, and mitigation measures to reduce the continued habitat to salmon habitat, including riparian areas and impacts to fishing sites.

Impacts to salmon habitats in these waterbodies are described in the 2016 State of the Watersheds Report (<http://nwifc.org/publications/state-of-our-watersheds/>) and WRIA specific reports. Regarding the Green River, the WRIA 9 Limiting Factors report (page 1-8) states: “*the construction of a nearly continuous*

system of revetments and levees within this area has eliminated functional riparian habitats along many miles of the river channel and has disconnected most remnant side channels and tributaries from the active floodplain.” Please see Attachment 5 that clearly shows this condition from River Mile 11 to River 31 on the Green River.

One of the key riparian functions affected by the maintenance of levees and revetments is water temperature, which far exceeds State Water Quality Standards established under the Clean Water Act in several segments of the Green and Sammamish Rivers such that water temperatures lethal to salmon are not uncommon. Disease and pre-spawning mortality among adult Chinook salmon, an ESA listed species was observed by state and tribal biologists in 2014 and 2015. In the Green River, the water temperature problem is primarily attributed to a deficiency of riparian shade. Modeling by the Washington Department of Ecology has shown that by restoring “system potential” riparian shade, the state water temperature standards would be met or closely approached. For more information about these temperature impairments, please see the Green River Temperature TMDL report (Ecology, 2011) as well as Ecology’s water quality atlas, available through these web links:

<https://fortress.wa.gov/ecy/publications/documents/1110046.pdf>

and

<https://fortress.wa.gov/ecy/waterqualityatlas/map.aspx>.

NWP 32-Completed Enforcement Actions

A PCN should be required for all of these projects as they can adversely affect salmon habitat and potentially fishing access.

NWP 35- Maintenance Dredging of Existing Basins

In addition to the regional condition regarding PCNs, this NWP should be conditioned to require permittees to provide documentation of previous authorizations and the extent of impacts authorized. These details are needed because these types of facilities generally adversely affect salmon habitat, particularly where they are located within streams that have spawning and rearing habitats. Mitigation should also be required in existing and potential salmon bearing waterbodies where habitat is degraded and maintenance will further degrade habitat conditions and functions.

NWP 36 Boat ramps

We agree with all four conditions provided in this NWP. There should be a fifth condition added that restricts new boat ramps at sites where there are already other moorage/access facilities (piers and mooring buoys). Existing boat ramps should also be removed at sites where existing piers and floats are expanded. These conditions are needed to reduce cumulative impacts to nearshore habitat areas for salmon.

NWP 39 Commercial and Institutional Developments

A PCN should be required for all of these projects as they can adversely affect salmon habitat and

potentially fishing access.

NWP 40 Agricultural Activities

A PCN should be required for all of these projects as they can adversely affect salmon habitat and potentially fishing access. The PCN should require an assessment of potential fish habitat using the physical criteria from WAC 222-16-031 and WA Forest Practices Board Manual 13 to determine these areas. All of the activities described for this NWP can adversely affect salmon habitat and should be required to go through mitigation sequencing to avoid/minimize impacts and provide mitigation where unavoidable impacts occur. Again, many agricultural areas within WRIAs 8, 9, and 10 have degraded salmon habitat and continue to do so with maintenance and ditching of streams and wetlands.

NWP 41 Reshaping Existing Drainage Ditches

A PCN should be required for ditch projects that have known salmon use or meet the physical criteria from WAC 222-16-031 to ensure that this work does not adversely affect salmon habitat. Even re-shaping these ditches to improve water quality can adversely affect salmon habitat. These projects should be required to go through mitigation sequencing to avoid/minimize impacts and provide mitigation where unavoidable impacts occur. Again, many ditches within WRIAs 8, 9, and 10 directly and indirectly provide salmon habitat, yet they are degraded.

NWP 42 Recreational Facilities

A PCN should be required for all of these projects as they can adversely affect salmon habitat and potentially fishing access.

NWP 43 Stormwater Management Facilities

The NWP 43 should only be available for use in HUC-12 watersheds where impervious cover is less than 5%. The details on these HUC-12 watersheds can be found in the NWIFC Seattle District NWP letter.

An additional condition should be added that requires stormwater management facilities to treat its stormwater discharges so that it is no longer lethal to coho and other salmon as described in the NWIFC letter to the Seattle District.

NWP 44 Mining Activities

A PCN should be required for all of these projects as they can adversely affect salmon habitat and potentially fishing access. A new condition should be added that revokes any aggregate mining in perennial streams that have known salmon use or potential salmon use (based on physical criteria from WAC 222-16-031) as these actions generally adversely affect habitat by removing materials needed for spawning habitat, channel stability and macroinvertebrates that provide food sources for salmon.

NWP 51 Land-based Energy Generation Facilities

A PCN should be required for all of these projects as they can adversely affect salmon habitat and

potentially fishing access.

NWP 52 Water Based Renewable Energy Generation Pilot Projects

A PCN should be required for all of these projects as they can adversely affect salmon habitat and potentially fishing access