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Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
11404 Moorage Way
LaConner, Washington 98257-0817

January 8, 2017

Brigadier General Scott A. Spellman
Northwest Division, Army Corp of Engineers
PO Box 2870
Portland, OR 97208-2870

sent via email: scott.a.spellman2@usac.army.mil

RE: Consultation regarding Nationwide Permit 48 and Regional General Conditions

Dear Brigadier General Spellman,

The Swinomish Indian Tribal Community recognizes the important role that the Corps of Engineers plays in managing the habitat that is essential for meeting the Tribe's treaty-reserved rights to take fish and shellfish. Accordingly, we continue to strive to achieve and maintain a meaningful government-to-government relationship. Development and implementation of a nationwide permit (NWP) program in the Seattle District that is consistent with the Clean Water Act and the Tribe's treaty rights is one of our key objectives. Protection of habitat critical to tribal resources is also central to the Corps of Engineers Federal Trust responsibility to the Swinomish Tribe.

We recently received two notices from the Seattle District regarding proposed regional general conditions applicable to proposed NWP 48 (shellfish aquaculture). The first notice (dated November 23rd) included two regional conditions (10 and 14) which provide protection for submerged aquatic vegetation and forage fish. This vegetation, along with forage fish, provide critical habitat and food for treaty-secured salmon. We were pleased to see that the Seattle District appeared to be taking our recommendations and treaty rights to heart. Then, a week later, we received a second "clarification" notice (dated November 30th) that inexplicably reversed this progress. The "clarification" notice was sent to remedy an "unintended interpretation" that regional conditions 10 and 14 might protect submerged aquatic vegetation and forage fish from the impacts of existing activities permitted by NWP 48. However, examination of the Seattle District's original notice to the public makes it abundantly clear that the Seattle District very explicitly did intend that regional conditions 10 and 14 would apply to all activities conducted under NWP 48:

The initial draft proposed Regional General Conditions (RGCs) can be found at <http://www.nws.usace.army.mil/Missions/Civil-Works/Regulatory/News-and-Updates/>. In this initial version of the draft proposed RGCs, RGCs 10 and 14 contained a note stating that the conditions do not apply to NWP 48 activities. This public notice clarifies that RGCs 10 and 14 have been revised to remove that statement. RGCs 10 and 14 will be applicable to NWP 48 activities. All applicable RGCs must be met for an activity to be verified under NWP 48. Listed below are the revised RGCs 10 and 14 which apply to NWP 48 activities.¹

We acknowledge Seattle District's effort to uphold its trust responsibility to treaty tribes and recommend regional conditions to the Northwest Office to protect submerged aquatic vegetation and forage fish from shellfish aquaculture activities that clearly affect the habitat. Unfortunately, we recently learned that a decision has been made either at the Regional level or at the NWP approval level of at Regulatory Headquarters has changed the decision.

The second "clarification" notice was sent without any scientific justification or any explanation for the Corps' dramatic change in position regarding protection of nearshore habitat, to the detriment of the Tribe's treaty resources. It is inconsistent with the Federal Task Force on Treaty Rights at Risk on which Colonel John Buck represents the Army Corps. It is very clear that the Corps believes that shellfish aquaculture needs to be conducted in a manner that protects submerged aquatic vegetation and forage fish. Otherwise, there would be no need for the Corps to require that new shellfish aquaculture activities provide buffers on eelgrass beds and avoid harm to forage fish habitat.² Given the Corps' view that some shellfish activities are harmful to salmon habitat and the Seattle District's desire to address that harm, we are deeply disturbed by the Corps' unfounded reversal of its position. Regional General Conditions are issued in response to specific regional unique circumstances, habitats, and species that are not adequately addressed by National General Conditions. Eelgrass, salmon, and forage fish are critical to the Swinomish Tribe and are not adequately addressed by national conditions. Regional General Conditions apply to all NWPs issued in a region. It is arbitrary and capricious to exempt NWP 48 from RGC 10 and RGC 14 when it is the NWP with the highest potential impact to eelgrass.

We recently sent a letter to Colonel Buck regarding the lack of adequate coordination on both our general comments on Nationwide Permits, and on a specific activity that was ultimately sanctioned by the Corps. Here now is another instance of the Corps moving forward absent any meaningful coordination. Accordingly, we respectfully request formal government-to-government consultation regarding the proposed NWP 48 and relevant regional conditions as well on the two previous issues we most recently wrote to Colonel Buck about. We also respectfully request that this consultation occur within a timeframe that will assure that the Corps will address our input and requests in a manner consistent with its 2012 tribal consultation policy:

¹ See Corps of Engineers, Seattle District, Special Public Notice Nationwide Permit 48 Reissuance Notice and Request for Comments (November 23, 2016) at 2.

² See *e.g.*, Corps of Engineers, Seattle District, Programmatic Biological Assessment on Shellfish Activities in Washington Inland Marine Waters (October 2015) at 49-50.

b. Consultation: Open, timely, meaningful, collaborative and effective deliberative communications process that emphasizes trust, respect and shared responsibility. To the extent practicable and permitted by law, consultation works toward mutual consensus and begins at the earliest planning stages, before decisions are made and actions are taken; an active and respectful dialogue concerning actions taken by the

USACE that may significantly affect tribal resources, tribal rights (including treaty rights) or Indian lands.

Again, we value our relationship with the Corps and we want to work with you to assure protection and eventual restoration of our treaty resources.

Sincerely,

A handwritten signature in cursive script that reads "Brian Cladoosby".

M. Brian Cladoosby
Chairman

Cc: Colonel John Buck, Commander of the Seattle District of the Army
Jo-Ellen Darcey, Assistant Secretary of the Army (Civil Works)
Lowry A Crook, Principal Deputy Assistant Secretary of the Army (Civil Works)
Major General, Donald E. Jackson, Deputy Commanding General, Civil and
Emergency Operations
Lieutenant General, Todd T. Semonite, Chief of Engineers
Jennifer Moyer, Chief of Regulatory of the Army
Lisa Morales, Senior Tribal Liaison of the Army