UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
ECOSYSTEMS, TRIBAL
AND PUBLIC AFFAIRS

May 23, 2016

Ms. Lorraine Loomis, Chairperson
Northwest Indian Fisheries Commission
6730 Martin Way East
Olympia, Washington 98516-5540

Dear Ms. Loomis,

Thank you for your recent letter addressed to Administrator Gina McCarthy and Region 10 Administrator Dennis McLerran encouraging the EPA to require the Corps of Engineers Seattle District to apply Clean Water Act Section 404 jurisdiction in tidal areas up to the elevation of the highest astronomical tide (HAT). I want to assure you that the EPA takes our treaty rights responsibilities seriously and is endeavoring at multiple levels to fully evaluate this issue.

The Corps' regulations establish the limit of Section 404 jurisdiction in tidally influenced waters as the "high tide line" (HTL), defined as "the line of intersection of the land with the water's surface at the maximum height reached by a rising tide." 33 CFR 328.3(d). The regulations go on to explain that the HTL "encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide." The Corps adopted the HTL jurisdictional limit in 1977, explaining in the preamble to those regulations that their intent was to include areas that "are inundated with sufficient frequency and regularity to be included as part of the aquatic resource," 42 *Fed. Reg.* 37,122, 37,129 (July 19, 1977).

At present, the Seattle District's local policy is to use the tidal datum of mean higher high water (MHHW) to represent the HTL. Tidal datums, like MHHW and HAT, are calculated by the National Oceanic and Atmospheric Administration and represent a standard elevation defined by a certain phase of the tide. While tidal datums are available information that have demonstrated usefulness in a variety of regulatory contexts, neither the Corps' regulatory definition nor its preamble discussion of intent equate the HTL to a particular tidal datum. We recognize the importance of more fully understanding the application of tidal datums in determining the HTL, including an understanding of the connection between tidal datums—and other relevant tidal elevations—and the aquatic functions that the Clean Water Act is intended to protect, such as fish habitat. We also recognize that there are a variety of administrative considerations related to implementing any change to the local policy for HTL determinations, including clarity for the regulated public, the availability of data with which to identify the line, and the repeatability of such identifications.

With these ecological and logistical issues in mind, Region 10 technical, legal, and managerial staff have been working closely with counterparts from the Seattle District and the National Marine Fisheries Service since January of this year to investigate the potential implications of a number of other tidal datums or elevations, including HAT and several between it and MHHW. That group has been tasked with presenting its conclusions to Mr. McLerran, as well as the regional leaders of the Corps and NMFS, in June. The Agencies believe that a collaborative solution to the HTL issue would be the most

productive. The Agencies are also exploring options that would result in greater environmental protection for Washington's shoreline.

The EPA is firmly committed to its obligation to honor and respect tribal rights and resources protected by treaties. As your letter states, while treaties do not expand the EPA's authority, the EPA must ensure its actions do not conflict with tribal treaty rights. Furthermore, as expressed by Administrator McCarthy in the December 1, 2014 memorandum *Commemorating the 30th Anniversary of the EPA's Indian Policy*, and consistent with the principles in *EPA's Policy on Environmental Justice for Working with Federally Recognized Tribes and Indigenous Peoples*, "EPA programs should be implemented to enhance protection of tribal treaty rights and treaty-covered resources when we have the discretion to do so." EPA Region 10 will follow these guiding principles throughout its evaluation of this important issue.

If you have any questions, please feel free to call me at 206-553-2581. Our Puget Sound Program Director, Peter Murchie (206-553-1148) can field questions specific to the current efforts of the interagency workgroup. Thank you again.

Sincerely,

Linda Anderson-Carnahan for

R. David Allnutt, Director
Office of Ecosystems, Tribal and Public Affairs

cc: Jennifer Green, Clerical Lead
Northwest Indian Fisheries Commission

William Stelle, Jr., Regional Administrator
NOAA Fisheries, West Coast Region

Colonel John Buck, District Commander
U.S. Army Corps of Engineers, Seattle District