Northwest Indian Fisheries Commission

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April 22, 2016

Ms. Gina McCarthy, Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., Mail Code 1101A
Washington, D.C. 20460

Mr. Dennis McLerran, Regional Administrator
U.S. EPA, Region 10
1200 6th Avenue, Suite 900
Seattle, WA 98101

Re: Federal Obligation to Interpret Section 404 Geographic Scope to the Highest Astronomical Tide Line to Help Protect Treaty Rights

Dear Administrator McCarthy and Regional Administrator McLerran:

Since the inception of Treaty Rights at Risk, the Northwest Indian Fisheries Commission and its member tribes have been working with the EPA, Corps of Engineers, National Marine Fisheries Service, and Natural Resources Conservation Service to better align federal actions and programs with protection and restoration of tribal treaty rights and achievement of water quality standards. This is necessary because current federal and state salmon protection efforts have placed the lion's share of the burden of protecting naturally produced salmon on treaty fisheries while failing to require reasonable and commensurate conservation actions by those who would damage the habitat on which treaty fisheries depend. An important initial step to begin rectifying this imbalance is for EPA to require that the Corps of Engineers Seattle District fully apply the Clean Water Act's jurisdiction to issue section 404 permits to protect marine shorelines up to the level of the highest astronomical tide.

Since 1979 with the publication of the Civiletti Memorandum, EPA has been acknowledged as the agency responsible for interpretation of the geographic scope of the Corps' jurisdiction under Clean Water Act Section 404.[1] In exercising its authorities under the Clean Water Act, EPA has a trust responsibility to uphold relevant Indian treaties. This means that, in using its authorities to construe the Clean Water Act, EPA must do so in a manner that is consistent with meeting the letter and spirit of the federal government's treaties with Indian tribes. EPA acknowledges this in its recently-adopted Policy on Consultation and Coordination with Indian tribes where it states that treaties are part of the supreme law of the land and that "treaties should be construed liberally in

[1] *See* 43 Op. Att'y Gen. 197 (1979) (Civiletti Memorandum)

favor of tribes, giving effect to the treaty terms as tribes would have understood them, with ambiguous provisions interpreted for their benefit."[2]

EPA's policy is careful to note that its treaty rights guidance does not "expand the authorities granted by EPA's underlying statutes." Recognizing EPA's position on this matter, the Commission is not asking EPA to take action beyond that already authorized by the Clean Water Act. Instead, we are simply requesting that EPA – and the Corps of Engineers – fully utilize all of their existing authorities in a manner that gives full effect to the treaty terms as tribes would have understood them. At a minimum, this means two things. First, EPA must not cede to the Corps its Clean Water Act authority to make final jurisdiction determinations on matters that affect treaty rights. Second, it means the substance of these determinations must implement treaty rights to the maximum extent possible consistent with the authorities that have been granted to EPA (and the Corps). Consequently, as stated in the Civiletti Memorandum and also reflected in EPA's Memorandum of Agreement with the Corps of Engineers, it must be EPA – not the Corps of Engineers – that makes final determinations regarding the geographic scope of the Corps' permitting authority under Section 404. Similarly, the determination of jurisdiction made by EPA must protect treaty resources – salmon and shellfish and the habitat on which they depend – to the maximum extent possible under the Clean Water Act.

Why it is important that the Corps employs the full geographic scope of its Section 404 Authority

The Corps of Engineers' past and present exercise of its Clean Water Act Section 404 permitting authority has resulted in significant impacts to marine shorelines and harm to ESA-listed and treaty-reserved salmon.[3] Harm to marine shorelines is such a serious problem that the Puget Sound Partnership, the state agency charged with facilitating and coordinating recovery of Puget Sound, has identified a key goal of reversing the ongoing process of armoring shorelines by 2020.[4] In 2011, to help implement this goal, the Commission, NMFS, EPA, and the State of Washington all called for the Corps of Engineers to stop expediting shoreline armoring via nationwide permits and other general permits in the marine waters of Puget Sound due to the need to restore nearshore habitat necessary for salmon recovery.[5] The Corps partially complied in 2012 by concluding that

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[2] *See* EPA, Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights (February 2016) at 1.

[3] *See e.g.*, Corps of Engineers, Seattle District, Supplement to the National Decision Document for 2012 Nationwide Permits 11-21 (March 19, 2012) at electronic pages 126-133 (discussing impacts of shoreline armoring). *See also* Petition to Colonel John Buck, Corps of Engineers, Seattle District, and Dennis McLerran, Regional Administrator, EPA, from Earth Justice, Regarding (1) Special Case Determination; and (2) Approved Jurisdictional Determination under §404 of the Clean Water Act (June 24, 2015) at 2-4 (referencing studies and reports documenting the impacts of marine shoreline armoring).

[4] *See e.g.*, Puget Sound Partnership, Report on Puget Sound Vital Signs (2015) at 49.

[5] *See* Letter to Colonel Bruce Estok, Seattle District, Corps of Engineers, from Kate Kelly, Director, Office of Ecosystems, Tribal and Public Affairs, EPA Region 10 (Oct. 3, 2011) at 2 (recommending barring the use of NWP 13 along both marine waters and fish-bearing freshwaters); Letter to Michelle Walker, Regulatory Branch Seattle District, Corps of Engineers, from Steven Landino, Washington State Habitat Director, NMFS (December 20, 2011) at 2 (recommends precluding new shoreline armor or bank stabilization activities in all designated critical habitat and all waters containing ESA-listed species); Letter from Washington Governor Christine Gregoire and Peter Goldmark, Commissioner of Washington Public Lands, to Christine Godfrey , Acting Chief, Environmental Community of Practice, Corps of Engineers, and General John McMahon, Division Commander, Corps of Engineers

nationwide permits had caused cumulative effects on marine shorelines and halting the use of nationwide permits for authorizing new bank stabilization activities in some of the most heavily developed shorelines in Puget Sound, because the Clean Water Act did authorize permits causing such impacts.[6] Unfortunately, the Corps continues to allow streamlined permitting of new shoreline armoring in the best and most important remaining nearshore habitat in Puget Sound and along the coast. In addition – and of critical importance to our current request – at the same time as the Corps continues to streamline incremental degradation of nearshore salmon habitat, it also refuses to exercise jurisdiction over shoreline armoring projects that occur above the mean higher high water jurisdictional limit chosen by the Seattle District, even though such projects can harm salmon habitat.

For some time, NMFS has been urging the Corps to utilize its Section 404 authority and regulate shoreline activities located up to the elevation reached by the highest astronomical tide (HAT). The HAT is the highest level that the tide is expected to reach (in the absence of wind or storm surge) during the 19 year tidal cycle. This is the same elevation that NMFS uses to delineate the upper boundary of its critical habitat designation for salmon in Puget Sound marine waters. As elaborated by NMFS in a letter to the Corps, the marine shoreline area between MHHW and HAT "provides habitat for ESA-listed salmon for migration, feeding, and refuge. It also supports the food webs of salmon and other species."[7] Among these other species are forage fish such as surf smelt and Pacific sand lance. Surf smelt spawning studies in the San Juan Islands [northern Puget Sound] found that 80 percent of incubating eggs were in the upper third of the beach.[8] They can even spawn at the highest part of the beach at the toe of the upland bank, and nearly a third of the eggs were found above the MHHW line.[9]

Additional analysis indicates that existing shoreline armor, when combined with the effects of sea level rise, will likely eliminate a large amount of existing Puget Sound forage fish habitat by the turn of the century. A recent study, making conservative assumptions[10] found that 75% of surf smelt eggs located on armored shorelines would be inundated.[11] In addition to this large loss of surf

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(March 7, 2012) (requesting that all new marine shoreline armoring projects be processed via individual permits rather than NWP 13); Letter to Kristina Tong, Seattle District, Corps of Engineers, from Michael Grayum, Executive Director, NWIFC (April 8, 2011) at 3-6 (documenting the impacts of shoreline armor and bank stabilization actions and recommending that no new projects be authorized by nationwide permit within the fresh or marine waters of the Seattle District).

[6] Corps of Engineers Seattle District, Nationwide Permit Regional General Condition 3 (2012).

[7] *See* Letter to John Kem, Brigadier General, Corps of Engineers, from William Stelle, Jr., Regional Administrator, National Marine Fisheries Service (March 16, 2015) at 2.

[8] Whitman, T., D. Penttila, K. Krueger, P. Dionne, K. Pierce, Jr. and T. Quinn. 2014. Tidal elevation of surf smelt spawn habitat study for San Juan County Washington. Friends of the San Juans, Salish Sea Biological and Washington Department of Fish and Wildlife.

[9] Penttila, D. 2011. Pilot tidal elevation of Surf Smelt spawn study. Prepared for Friends of the San Juans. Friday Harbor, WA.

[10] These assumptions include that: (1) beach morphology (shape and substrate) would remain unchanged by sea level rise; (2) shoreline armor is located at MHHW +1.5 feet; and (3) sea level would not rise more than 27.3 inches. *See infra*, note 11.

[11] *See* Krueger, K.L, Pierce, Jr., K.B., Quinn, Timothy., and Penttila, D.E., 2010 Anticipated Effects of Sea Level Rise in Puget Sound on Two Beach-Spawning Fishes, *in* Shipman, H., Dethier, M.N., Gelfenbaum, G., Fresh, K.L., and Dinicola, R.S., eds., 2010, Puget Sound Shorelines and the Impacts of Armoring – Proceedings of the State of the

smelt spawning habitat, it can also be expected that sea level rise will provoke additional calls for new shoreline armor, thereby exacerbating the predicted impacts further. These direct, indirect, and cumulative effects pose significant threats to the food web and habitat upon which treaty-protected salmon rely. All of this underscores the need for EPA (and the Corps) to implement the geographic scope of the Corps' Section 404 jurisdiction to the full extent of the authority granted by Congress in the Clean Water Act.

The Current Federal Process for Assessing the Corps' Section 404 Jurisdiction Is Not Consistent with EPA's New Treaty Rights Policy.

At the March 8 meeting with representatives of the Commission and several member tribes, the regional representatives of EPA, NMFS, and the Corps announced that their agencies had initiated a closed process to evaluate alternative demarcations of the Corps of Engineers Seattle District's Section 404 geographic permitting jurisdiction. They also stated that the end result will be a recommendation to the General in charge of the Corps' Pacific Northwest Division who will make the final decision. Rather than committing to fully implement the authority granted by Congress to achieve the goals of the Clean Water Act and protect treaty-reserved resources, EPA and the other agencies have offered up a process of indeterminate duration with unidentified criteria whereby they may consider alternative jurisdictional boundary lines, including maintaining the inadequate status quo, and then allowing the Corps to make the final decision. This approach ignores EPA's statutory and trust obligations to interpret the Clean Water Act to fully protect both the designated uses and the tribes' treaty-reserved rights.

Accordingly, we respectfully request that EPA use its existing statutory authority to require the Corps of Engineers to fully utilize the geographic jurisdiction available to it under §404 to maximize the protection of water quality and treaty resources under the Clean Water Act, both within Puget Sound and along the Washington coast. We would appreciate hearing back from you by May 31st so that we can assess whether our request needs to be elevated further as an important issue raised by the tribes' Treaty Rights at Risk initiative.

Sincerely,

Lorraine Loomis

Lorraine Loomis,
Chairperson

cc: NWIFC Commissioners
William Stelle, Jr., NOAA Fisheries
Colonel John Buck, Corps of Engineers Seattle District

Science Workshop, May 2009: U.S. Geological Survey Scientific Investigations Report 2010-5224, p.171-178 (accessed on April 21, 2016 at: http://pubs.usgs.gov/sir/2010/5254/pdf/sir20105254_chap17.pdf).