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THE SUQUAMISH TRIBE

PO Box 498 Suquamish, WA 98392-0498

September 22, 2008

Casey Ehorn, Project Manager
U.S. Army Corps of Engineers
Seattle District
P.O. 3755
Seattle, WA 98124

Re: Bremerton Boardwalk Project

Dear Mr. Ehorn:

This letter transmits the Suquamish Tribe's ("Tribe") comments and objections concerning the Bremerton Boardwalk proposal as provided in the Joint Public Notice dated August 22, 2008. The Tribe's comments address the following areas and issues: fishing access; environmental, habitat and cumulative impacts; proposed mitigation, cultural resources; endangered species, Coastal Zone Management Act consistency and Clean Water Act 401 certification; and navigation.

The Bremerton Boardwalk proposal is located in Sinclair Inlet, more specifically within Port Washington Narrows, which lies within the Tribe's Usual and Accustomed ("U & A") fishing grounds and stations. The Tribe has a strong historical and present connection in the Port Washington Narrows/Sinclair Inlet area that is significant and well documented. Ethnographic and archaeological evidence demonstrates that the Suquamish people have lived, gathered food stuffs, ceremonial and spiritual items, and hunted and fished for thousands of years at the project location (personal communication, Dennis Lewarch, 2008).

The Tribe seeks protection of all treaty-reserved natural resources through avoidance of impacts to habitat and natural systems. The Tribe has taken a leadership position in efforts to protect, restore, and enhance the marine waters of Kitsap County to ensure protection of the Tribe's treaty and cultural resources. Proposed projects are reviewed that might affect the health and sustainability of Tribal resources through SEPA, NEPA, Corps Public Notices, and other public processes. The Tribe is also a partner in Water Quality cleanup plans (TMDLs), CERCLA (Superfund) remediation, and Salmon Recovery Funding Board proposals. In addition, the Tribe is a natural resource trustee in Federal Natural Resource Damage Assessment processes. To enhance the availability of resources the Tribe operates a Chinook salmon rearing facility the head of Sinclair Inlet that produces approximately two million Chinook salmon smolts per year for future harvest by Tribal and non-tribal fishermen. Tribal salmon fisheries exist in the inlet, including Port Washington Narrows.

PROJECT DESCRIPTION

The project description is described in the Joint Public Notice (“JPN”). The City of Bremerton (“City”) proposes to extend the Louis Mentor Boardwalk between the end of the existing boardwalk to Evergreen Rotary Park. This project will consist of three major components; (1) environmental remediation and redevelopment of the former Chevron Bulk Fuel Storage area into an extension of Evergreen Park, (2) replacement of an existing beach sewer main, and (3) construction of an extension of the existing boardwalk to serve as a pedestrian access. The addition of the boardwalk structure would add approximately 85,000 square feet of over water coverage (approximately two acres) and 179 new pilings.

Page nine of the Preliminary Joint Aquatic Resources Permit Application (“JARPA”) states, “The original project designs were substantially modified through coordination with various resource agencies and tribes to minimize potential impacts.” For the record, as part the City’s “outreach” efforts, the Tribe did not discuss, negotiate, or coordinate with the City to provide information to support its decision to make “substantial” modifications to its original project design for the purpose of minimizing potential impacts.

TRIBAL CONCERNS

The Tribe has previously communicated its complete support for the proposed environmental remediation and redevelopment of the former Chevron Bulk Fuel Storage area into an extension of Evergreen Park and the proposed replacement of the existing but failing beach sewer main in a letter to the City dated January 16, 2008. This project implements key aspects of the Governors Puget Sound Cleanup Initiative by restoring critical near-shore habitat. The Tribe also supports the replacement of the existing beach sewer main that is failing. The Tribe believes that a more practicable location for the sewer line is available to avoid future impacts to the near-shore environment and marine water quality rather than replacing the sewer main on the beach. An upland location would allow for efficient and cost-effective maintenance of the sewer and would minimize potential environmental impacts to the shoreline and impacts to treaty resources or activities.

As to the boardwalk component of the proposal, the Tribe objects to the construction of the 20-28’ wide and nearly 2/3 mile offshore boardwalk because the proposed offshore boardwalk creates significant overwater coverage that will impact the Tribe’s treaty rights to fishing access and to harvesting treaty resources. In addition, the environmental impacts from the proposed boardwalk have not been fully evaluated and therefore, do not appear to be fully mitigated to off-set impacts to fishery resources and habitat.

Fishing Access

The Tribe is a signatory to the 1855 Treaty of Point Elliott. In this Treaty, the Suquamish Tribe ceded its ancestral territory, including Sinclair Inlet, to the United States, but reserved rights to fish, hunt, and gather at all of its U&A grounds and stations. The Tribe’s U&A has been

adjudicated in federal court and Sinclair Inlet, including the Port Washington Narrows and other areas within Puget Sound are within the Tribe's U&A. The right to take fish under Article V of the Treaty of Point Elliott has both a geographical component and a fair share component. The Tribe's treaty rights are a property right which may not be abrogated without specific and express Congressional authority.

It is undisputed that the proposal to construct a 20-28' wide and 2/3 mile long boardwalk that is between 50 and 150 feet offshore and is parallel to the shore interferes with the Tribe's right to access fish and harvest fishery resources. This boardwalk obstructs fishing access to approximately 10-12 acres for tribal fishers' who use nets and other gear. This estimated total acreage includes approximately two acres of overwater structure plus eight to ten acres between the boardwalk and the shoreline. Moreover, the proposed overwater structure will impede tribal fishers' ability to safely and easily maneuver and/or access the shoreline. Vessels will be unable to anchor near the shoreline without risking damage due to currents and the placement of the boardwalk.

Environmental, Habitat Impacts and Cumulative Impacts

The granting of a federal permit is a major Federal action under National Environmental Policy Act ("NEPA). To date an environmental document for this proposal as required under NEPA has not been prepared to evaluate the alternatives and associated environmental impacts.

Pursuant to 40 CFR 1508.5, the Tribe requests status as a Cooperating Agency for the Corps NEPA process concerning this proposal. Because the proposal will have a significant effect on the Tribe's U&A and its treaty rights, the Tribe believes that meaningful participation in this process is critical to establishing a formal mechanism to address intergovernmental issues, fostering intra- and intergovernmental relationships and achieving a cooperative outcome. The Tribe would like to meet with the Corps to further discuss this request and our role in the future NEPA process for this project.

Some of the environmental effects of the proposed boardwalk project include but are not limited to:

- diminished primary productivity (prey resource availability) due to shading of nearshore, intertidal and subtidal areas by the physical structure itself.¹ Distributions of invertebrates, fishes, and plants (macroalgae) have been found to be severely limited in these environments when compared to adjacent unshaded habitat.²
- nighttime lighting impacts to wildlife and aquatic life (e.g. altered predator/prey relationships);
- over-water structures are suspected to affect the migratory behavior of migratory fish (including juvenile salmon);³
- fragmentation of beach habitat; and
- altered wind, tidal flow, sediment transport patterns and delivery of nutrients to existing habitats resulting from placement of physical structures.

The shading study is based on assumptions and impacts to macroalgae that may not be fully supported. For example, the study states that certain ranges still provide growth to maroalgae species but it is not clear if this is optimum growth or mediocre growth. An interagency meeting to discuss this issue is needed to further determine whether the proposed mitigation is adequate to address shading impacts.

The Tribe is also concerned about the cumulative impacts to the Port Washington Narrows and Sinclair Inlet. Scientific evidence increasingly indicates that the most devastating environmental effects are most likely not the direct effects of a particular action, but the combination of individually minor effects of multiple actions over time.⁴ As the number of overwater structures increases in an area, impacts accumulate resulting in a net loss of habitat.

The cumulative environmental impacts arising from overwater structures are not typically addressed at any level (local, regional, etc.). Reluctance to address cumulative issues has resulted in increased, unchecked alteration and modification of the natural environment.

The magnitude of these impacts depends upon site-specific factors and the type, characteristics and use patterns located at a specific site. The bathymetry of the Washington Narrows/Sinclair Inlet (essentially a narrow channel surrounded by a narrow strip of beach), intensifies the need to protect the integrity and continuity of this limited area of habitat due to the concentrated area of impact. Large structures such as the boardwalk that have load-bearing and vehicle maneuverability requirements may preclude design considerations and mitigations (such as grating, narrowed walkways, single piling) that other commercial/public facilities can implement.

A project of this magnitude may have dramatic impacts on the migration, behavior and predation of salmonid species. This area is an important migration corridor for several salmonid species as documented in the WRIA 15 process (www.ecy.wa.gov/apps/watersheds/wriapages/15.html). Construction of the proposed bulkhead precludes the use of more "fish friendly" soft shore stabilization measures should stabilization be necessary on any of the properties along the boardwalk shoreline. The City has already identified unstable slopes in this area in the materials provided. The Tribe supports the removal of bulkheads and does not support the addition of hard structures along shorelines for the above reasons.

Of equal concern are cumulative impacts to treaty-reserved resources that will result from development and disturbance of the shoreline environment. Port Washington Narrows has documented surf smelt spawning. The alteration of currents and sediment transport have the potential to severely impact this resource. Environmental threats have historically been approached by the "wait and see" method that allows for the continued degradation, pollution, or exploitation to occur so long as the environmental consequences are uncertain. Under the "wait and see" system, conservation measures are initiated only when there is irrefutable evidence that damage is occurring. Often the data needed to determine the extent of the impact are unavailable and only observable after irreversible damage or substantial effects to resources and habitat have occurred. Ecosystem stress can be reduced by taking a precautionary stand, promoting good stewardship, and implementing

actions that acknowledge that cumulative alterations to the estuarine environment can adversely affect aquatic resources.

In 1974, Dr. Eugene P. Odum stated that “(t)he dependency of so many important commercial and sport fisheries on estuaries is one of the major economic reasons for preservation of these habitats. The most productive, and hence most important, part of the nursery ground (for fish and shellfish) is the intertidal and adjacent shallow-water zones, which of course are first to suffer from ill-planned encroachment by man.” Since the 1970s the Puget Sound region has experienced tremendous change, resulting in further water quality degradation and alterations to nearshore habitat. These impacts have resulted directly and indirectly to the destruction of fish spawning areas, health advisories and closures for the harvesting of shellfish and fish, decreases in resident fish and shellfish populations, and the listing of chinook salmon on the Endangered Species List. Actions are needed to significantly address cumulative impacts to aquatic resources if future generations are to enjoy the use of fish and shellfish resources within Puget Sound.

Proposed Mitigation

The mitigation measures offered by the City to offset environmental impacts from the proposed boardwalk appear to be insufficient. In particular, the “Conceptual Mitigation Strategy Report” and other City reports fail to support the statement on page 8 of the JARPA that the project “is designed to provide a net environmental benefit by focusing on those components of the ecosystem that are critically important to aquatic resources and goes beyond simple compliance with the regulatory goals of no net loss.” The mitigation plan shows approximately 38,000 square feet of mitigation which is less than half of the 85,000 square feet of overwater coverage. In addition, the mitigation proposed is out of kind (not removal of existing overwater coverage) and a mitigation ratio of 1:1 may be insufficient. The information provided fails to show that the mitigation proposed offsets the impacts let alone demonstrates a net environmental benefit.

Further, the Tribe understands that the City is using federal grant funding that is specifically targeted for beach restoration and cleanup to pay for mitigation measures. The City claims it offsets the environmental impacts from the proposed boardwalk proposal to provide a “net environmental benefit by focusing on those components of the ecosystem that are critically important to aquatic resources.” It is the Tribe’s understanding that the intent of these grant funds is to restore, improve and protect Puget Sound not as a double dipping tool to offset future impacts from the proposed boardwalk project. Even if the boardwalk is not built, the restorations funds will be spent to complete the cleanup and shore enhancements.

Cultural Resources

The Public Notice identifies the Army Corps as the lead agency for determining compliance with Section 106 of the National Historic Preservation Act and initiates consultation with interested Tribes. The Suquamish Tribe is an interested tribe but has not yet been consulted under Section 106 for this undertaking. The Tribe requests the Corps to forward an Area of

Potential Effect for this proposed undertaking to the Suquamish Tribal Historic Preservation Office and point of contact for Section 106 consultation:

Dennis Lewarch, Archaeologist
Tribal Historic Preservation Office
Suquamish Tribe
PO 498
Suquamish, WA 98392
Phone: 360-394-8529

Endangered Species

The Public Notice indicates that the Endangered Species Act (ESA) requires that federal agencies consult with National Oceanic and Atmospheric Administration (NOAA – Fisheries) and the U.S. Fish and Wildlife Service (USFWS) on all actions that may affect listed species. As stated in the Public Notice, the City has determined that the proposed action may affect but is not likely to adversely affect nine federally listed species and will not effect critical habitat for these species. The City's determination is contained in the City's Biological Assessment.

The Tribe disagrees with City's determination in the BA. For example, the shoreline in the proposed project area is a designated "critical habitat" under ESA. NMFS states in their recovery plan supplement that "NMFS also supports the emphasis on nearshore and shoreline habitat protection measures for all watersheds, including the four watershed areas that do not have independent spawning populations but are used by Chinook salmon from multiple river basins, i.e. San Juan Islands, Island County, East Kitsap, and South Sound." The "Nearshore" Chapter of the Recovery Plan states that Sinclair Inlet "...supports abundance, productivity, spatial structure and diversity for populations from the main basin (Central Puget Sound). Juvenile Chinook salmon from non-natal populations use the area for feeding and growth, refuge, physiological transition and as a migratory corridor. Adults from non-natal populations also use the area." The City, however, found no effect.

Similarly, critical habitat for killer whales is present in the project area. The boardwalk will further narrow the channel providing less room for killer whales and boats to safely travel past one another, yet the City found no effect.

Coastal Zone Management Act (CZMA) Consistency and CWA 401 Certification

The Tribe is a consulting party under the state's implementation of the CZMA and CWA. The Tribe therefore expects meaningful consultation with Ecology prior final determinations that may include conditioning of CZMA or CWA 401 Certification, including specific pre- and post-construction sediment sampling or water quality monitoring in support of anti-degradation provisions of the state's water quality standards, the Shoreline Management Act, and all other applicable laws and regulations.

This boardwalk is large in scope (almost 2/3 of a mile). Shoreline Management Act ("SMA") policies applicable to marine shorelines of state-wide significance, in order of preference include: (1) recognize and protect the state-wide interest over local interest; (2) preserve the natural character of the shoreline; (3) resulting in long-term over short-term benefit; (4) protect the resources and ecology of the shoreline; (5) increase public access to publicly owned areas of the shorelines, and (6) increase recreational opportunities for the public in the shoreline. The City's proposal does not address the preference requirements of these policies and appears to place the two last items in preference of all others contrary to the SMA.

The SMA regulations also establish preference for shoreline uses that are unique to or are water-dependent or water-related on a shoreline location. Water-dependent means a "use or portion of a use which cannot exist in a location that is not adjacent to the water and which is dependent on the water by reason of the intrinsic nature of its operations." Although this proposal is characterized as arising from a sewer line replacement, the boardwalk does not support water dependent uses. An existing upland trail route that the city has identified in various planning documents already connects the downtown to Evergreen Park. Evergreen Park has shorelines that are accessible to the public as well as a community dock. The boardwalk does not promote access to and use of the water nor does it require use of the water to function (a series of upland observation points would serve the same scenic view). In addition, the boardwalk could be considered a visual and aesthetic impact to the natural shoreline. Access of the sewer can be via barge as it currently occurs.

Navigation

Section 10 of the Rivers and Harbors Act prohibits the creation of any obstruction to the navigable capacity of any of the waters of the United States that is not authorized by Congress. The boardwalk has a high potential to affect navigation because of its location in relation to Port Washington Narrows. In addition, safety may be an issue because of strong currents that may cause vessels to collide into the pilings of the boardwalk or the boardwalk itself at various tide levels.

SUMMARY

The boardwalk component of the proposal impairs the Tribe's right to fishing access and harvesting within its adjudicated U&A. In addition, the boardwalk will create significant environmental impacts including impacts fish habitat, fishery resources, and near-shore ecological functions. The proposed mitigation falls short of compensating for lost ecological functions and creates additional impacts of its own. For these reasons, the Tribe objects to the boardwalk component of the proposal.

In addition, because of the status of the applicant's proposal, formal consultation with the Tribe and the appropriate federal agencies has not yet occurred under Section 106 of the National Historic Preservation Act. The Tribe is prepared to engage in consultation with federal agencies

on this proposal.

Finally, the Tribe looks forward to further discussions with the Corps and Ecology concerning the issues raised in this letter. The Tribe anticipates that the Corps will keep it apprised of the project status and will engage in meaningful consultation when necessary. In addition, the Tribe will comment further should additional concerns or issues be identified. Please keep us informed of project status and any relevant project related actions. If you have any questions, please contact me directly at 360-394-8436.

Sincerely,

SUQUAMISH TRIBE



Rob Purser Fisheries Director

cc: Leonard Forsman, Suquamish Tribal Chairman
Melody Allen, Suquamish Tribal Attorney
Richard Brooks, Suquamish Environmental Program Manager
Alison O'Sullivan, Suquamish Biologist
Dennis Lewarch, Suquamish Archaeologist

References Cited:

- 1 Thom, Ronald M. et.al. Balancing the Need to Develop Coastal Areas with the Desire for an Ecologically Functioning Coastal Environment: Is Net Ecosystem Improvement Possible? Restoration Ecology, Vol 13, No. 1, pp. 193-203).
- 2,3 Nightingale, Barbara and Charles Simonstad. Overwater Structures: Marine Issues. Submitted to Washington Department of Fish and Wildlife, Washington Department of Ecology, and Washington Department of Transportation. University of Washington, Seattle. May 9, 2001.
- 4 Council on Environmental Quality 1997