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October 1, 2013

Kristin Swenddal  
Division Manager Aquatic Resources  
Department of Natural Resources  
1111 Washington St. SE  
P.O. Box 47027  
Olympia, WA 98504-7027

In Re: SEPA Compliance - US Navy JARPA #51-089388

Ms. Swenddal:

I note with approval that the previous determination by the (then unnamed) DNR Responsible Official indicating that the above referenced project proposal was not an action subject to compliance with the State Environmental Policy Act (RCW 43.21C) has been reversed and that a Threshold Determination was issued/published one week (September 23, 2013) after my previous letter to you (September 16, 2013) on this subject.

I also note that the Environmental Checklist (EC) upon which the Threshold Determination is based was submitted by Ms. Cyrilla Cook of DNR on the same day as the Declaration of Nonsignificance was issued by Ms. Swenddal as DNR Responsible Official.

While the expeditious action of your agency is remarkable, it appears from the vague, incomplete and erroneous substantive content of the EC and apparent lack of reasoned reflection and fact-checking that significant errors and omissions have been made in an apparent rush to issue this Threshold Determination. In fact, neither the Environmental Checklist or the Threshold Determination contain any evidence of the independent analysis required by WAC 197-11-330 (1)(a)(i).

My comments on the Threshold Determination are as follows:

1. At A. 7 a vague reference to “one other easement on the east side of Hood Canal” is made without specification. Additional information/specification is required as to the scope and purpose of this reference in order to evaluate its environmental consequences. If we assume, subject to your correction, that “the other easement” referred to is in fact Application for Lease No. 51090437, August 12, 2013, not yet published on the DNR web site, then this “other easement” proposal (for the east side of Hood Canal I Kitsap County) is essentially the same, including an intent/attempt to preclude new commercial and industrial facilities in the proposed easement area, as the proposal that is subject to this Threshold Determination. If this is correct, I am sure that you will recognize that this proposal has been improperly segmented for the purposes of SEPA compliance in violation of WAC 197-11-060 (3)(b). Also, please advise whether these two proposals are a part of any further contemplated easement activity of a similar nature in other geographical areas.

2. At A.9 there is a vague/incomplete reference to a pending industrial use application (MLA 03-00155) currently pending (and vested) in the Jefferson County permitting process since 2003.

This application is for a marine transport facility designed for shipment of aggregates by barge and vessel to markets, and is commonly known as Thorndyke Resource and/or “Pit-to-Pier”. This project is an allowed use under the Jefferson County Comprehensive Plan and Unified Development Code subject to approval of Conditional Use, Shoreline Conditional Use and Substantial Development Permit approvals. This project application is currently in preparation of an Environmental Impact Statement and when complete will be heard and decided by the Jefferson County Hearing Examiner. (See further discussion below.)

3. At A. 11 the proposed 55 yr. lease period violates RCW 79.130.010, nor is the specific authority which authorizes DHN to lease bedlands for a purpose beyond that specified/cited.

Please cite the specific authority (not simply a generic reference to RCW 79.105) under which DNR proposes to lease this public property for the purpose of restricting/preventing a water dependent commercial or industrial use as opposed to the contrary and specific direction of RCW 79.105.210 which states (in pertinent part):

(1) The management of state-owned aquatic lands shall preserve and enhance water-dependent uses. Water-dependent uses shall be favored over other uses in state-owned aquatic land planning and in resolving conflicts between competing lease applications. In cases of conflict between water-dependent uses, priority shall be given to uses which enhance renewable resources, water-borne commerce, and the navigational and biological capacity of the waters, and to statewide interests as distinguished from local interests.

(2) Nonwater-dependent use of state-owned aquatic lands is a low-priority use providing minimal public benefits and shall not be permitted to expand or be established in new areas except in exceptional circumstances where it is compatible with water-dependent uses occurring in or planned for the area. (Emphases added.)

Further, since the proposal is for a non-water dependent use, please specify that the lease rate for the requested easement (if executed) shall always be more than the amount that would be charged as rent for a water-dependent use of the same parcel as provided in RCW 79.105.270. The “appraisal” currently under preparation must reflect this statutory requirement.

4. In B.5.d. please provide foundation for the speculative assertion that the proposed easement “may” preserve wildlife in light of the fact that any approved project must be constructed and operate pursuant to adopted statutory and regulatory requirements of the federal, state and local governments as well as any additional mitigation/monitoring features required as a result of the environmental evaluation.

5. In 8.f. an erroneous/misleading statement is made that would seem to imply that the adopted Jefferson County Shoreline Master Program is not an integral element of the Jefferson County Comprehensive Plan. Of course, this impression is incorrect:

RCW 36.70A.480  
Shorelines of the state.

(1) For shorelines of the state, the goals and policies of the shoreline management act as set forth in RCW 90.58.020 are added as one of the goals of this chapter as set forth in RCW 36.70A.020 without creating an order of priority among the fourteen goals. The goals and policies of a shoreline master program for a county or city approved under chapter 90.58 RCW shall be considered an element of the county or city's comprehensive plan. All other portions of the shoreline master program for a county or city adopted under chapter 90.58 RCW, including use regulations, shall be considered a part of the county or city's development regulations.

Further, until such time as the Department of Ecology approves the Jefferson County LASMP it has no force and effect. The applicable Jefferson County Shoreline Master Program is codified at Jefferson County Unified Development Code (UDC) Section 18.25 (2000).

6. In 8.i. the erroneous/incomplete/misleading statement is made that the proposal is consistent with existing land use plans. It is not. The stated intent of the proposal is to preclude/foreclose water dependent commercial and industrial uses that are allowed outright subject to appropriate permits. Further, the Checklist is devoid of any discussion of the various goals and policies contained in adopted Jefferson County plans which favor water dependent uses of the shorelines. These adopted Jefferson County plans implement policies of the Shoreline Management Act (RCW 90.58) and the Growth Management Act (RCW 36.70A).

As to “projected” uses in the proposed lease area, the Checklist is absolutely silent. A complete recitation of the provisions of the adopted Jefferson County plans applicable to MLA 03-00155 is available at the Jefferson County Department of Development for your information.

7. In 14.e. it is erroneously stated that the proposed action would not occur in the immediate vicinity of water transportation.

The analysis/information presented here clearly indicates that the Environmental Checklist lacked the substantive detail and accuracy upon which a Responsible Official could reach a reasoned judgment as to the probable significant environmental impacts of this restrictive easement proposal.

I request that an expanded and accurate Environmental Checklist be prepared and that the Responsible Official conduct a more thorough and informed analysis, including the reasonably expected environmental impacts that would result from preclusion of MLA 03-00155, including those impacts associated with the delivery of similar volumes of aggregate materials by land as opposed to marine transport as outlined in my previous letter.

This Threshold Determination should be withdrawn, revised and reconsidered before reaching a final judgment and re-publication of a decision pursuant to WAC 197-11-340 (3)(ii) and (iii).

This comment letter sets forth some, but not all, of our concerns relating to DNR authority to enter into such a proposed restrictive easement. I look forward to further specification of that authority in response to the questions I have raised thus far, and upon receiving that information will more fully set forth my reasons why I believe such action contravenes DNR statutes (RCW 79.30), the Shoreline Management Act (RCW 90.5), the Growth Management Act (RCW 36.70A) and the constitutionally protected federal and state rights of my client, Thorndyke Resource.

The proposal is premised on an assumption that the Navy’s operations are incompatible with the mere existence of a commercial or industrial water dependent use (e.g. a marine transport facility) in a small portion of the proposed easement area. The operator of that marine transport facility has already indicated that it will temporarily suspend marine transport operations in the event of conflict with any active Navy operation. Under these circumstances, the applicant’s assertion of “incompatibility” is not justifiable. DNR appears to have failed to demand and investigate whether a rational foundation exists for the applicant’s assertion of “incompatibility”.

This attempt by the Navy, apparently with the cooperation/complicity of the DNR to preemptively supplant the normal land use permitting process and essentially foreclose water dependent commerce is totally beyond the scope of the law or necessity.

Under the general authority of Title 14 of the United States Code and specific authority under the Ports and Waterways Safety Act (PWSA) of 1972 (33 USC 1221 et seq.) and the Port and

Tanker Safety Act (PTSA) of 1978, the U.S. Coast Guard is responsible for increasing navigation and vessel safety; protecting the marine environment; and protecting life, property, and structures in, on, or immediately adjacent to the navigable waters of the United States. Under authority of the PWSA, the Coast Guard has established Vessel Traffic Service – Puget Sound which controls vessel movement, establishes requirements for vessel operation, and imposes other related port safety controls within Puget Sound, including Hood Canal.

Naval operations, including transit of the Hood Canal Bridge, are common in the area of Hood Canal where the proposed marine transport project (MLA 03-00155) would operate. The Protection of Naval Vessels rule 33 CFR 165.2010 provides protective measures for naval vessels and bases. This regulation establishes protection zones surrounding large naval vessels (> 100 feet) in navigable waters of the U.S. and requires that no vessels or person come within 500 yards of a naval vessel unless authorized by the U.S. Coast Guard or senior Naval officer in command. For U.S. Navy Submarines operating in Hood Canal, a security zone that encompasses all waters of Hood Canal is required (33 CFR 165.1328). All persons or vessels located with the Regulated Navigation Area covered under this regulation must follow all lawful orders and/or directions given to them by Coast Guard security escort personnel.

DNR also fails to recognize that the two of the Navy's own recent NEPA EIS documents, for the Keyport Range Expansion and the Bangor Explosives Handling Wharf, acknowledged that the proposed marine transport facility did not have a significant environmental or operational impact on Navy operations in Hood Canal.

DNR has delayed disclosure of this proposal for an extended period and has only now begun the process of SEPA compliance which should have begun (at minimum) when the application was submitted in September, 2012. There simply is no emergent situation which would dictate the suspension of normal statutory procedures and requirements by DNR.

I sincerely hope that the fact you have seen fit not to respond to my prior letter will not be repeated in this case. I look forward to a thoughtful response in an equally expeditious manner as applied to your action on the initial Threshold Determination.

Sincerely,

James C. Tracy, WSBA #15656  
Land Use Counsel  
Thorndyke Resource/Hood Canal Sand & Gravel LLC