

**ADMINISTRATIVE APPEAL DECISION**  
**OSTERMAN APPEAL**  
**SEATTLE DISTRICT**  
**FILE NUMBER NWS-2009-0569**  
**DATE: 03 DEC 2013**

**Review Officer (RO):** Ms. Mary J. Hoffman, U.S. Army Corps of Engineers, Northwestern Division, Portland, Oregon

**Appellant:** Mr. Thomas & Mrs. Cathleen Osterman, landowners

**Authority:** Rivers and Harbors Act of 1899 (33 USC 401, et seq.)

**Date Notification of Permit Denial and Notice of Appeal Rights were provided to the Appellant:** October 4, 2012

**Receipt of Request for Appeal (RFA):** November 19, 2012

**Date Administrative Record (AR) was received:** December 11, 2012 (initially) and additional documents added on May 30, 2013

**Site Visit/Appeal Meeting:** February 28, 2013

**Summary:** The Appellant is challenging the US Army Corps of Engineers (Corps), Seattle District (District) permit denial decision for a proposed personal recreational pier, ramp, float, boat lift, and mooring buoy in Port Madison Bay (Puget Sound) at Bainbridge Island, Kitsap County, Washington. The RFA identified six (6) reasons for appeal which met appeal criteria provided in Title 33 of the Code of Federal Regulations Part 331:

1. The Appellant asserts the Corps delay in processing the permit application violated promulgated standards for decision-making and resulted in a deprivation of his entitlement to a fair administrative process;
2. The Appellant asserts that the Corps denial of the permit is contrary to law and that it has incorrectly applied regulations and/or policies including, (a) Promulgated standards for processing applications for structures for small boats, and the (b) Treaty of Point Elliott;
3. The Appellant asserts that the Corps omitted material facts while evaluating his permit application;
4. The Appellant asserts the Corps did not support its determination that the proposed dock would result in more than a *de minimus* impact to tribal fisheries or the Tribe's reserved treaty rights;
5. The Appellant asserts that the Corps denial of the permit was arbitrary and capricious and an abuse of discretion; and
6. The Appellant believes there is no overriding public interest factor which would warrant denial of a permit.

In addition, the Appellant asked<sup>1</sup> to reserve the right to amend the grounds for appeal after being provided an opportunity to review the “entire record”, which was requested under the Freedom of Information Act (FOIA).<sup>2</sup> The Regulations, under 33 CFR 331.4, require that the District provide to the applicant a copy of the decision document for the permit application, which forms the basis of the permit decision. The District included its *Department of the Army Permit Evaluation and Decision Document*, as an enclosure with its letter to the applicant, dated October 4, 2012, along with a Notification of Administrative Appeal Options and Process and Request for Appeal (NAO/NAP) form. As stated in the NAO/NAP, the applicant has 60 days to submit a RFA; there is no requirement of law, regulation or policy that the RFA can or should be delayed while the “entire record” is obtained under FOIA or any other process. The District must provide a copy of the AR that it relied upon for its permit decision to the RO and appellant, typically within 15 days<sup>3</sup> of receiving a request from the RO, and prior to the appeal conference. The Corps Appeal Program regulations states that appellants are neither allowed to supplement the administrative record with new information or amending their appeal. Although this request could not be satisfied, an opportunity was afforded to the Appellant to clarify his reasons for appeal during the appeal conference.

The merit of each reason for appeal was evaluated. Three of the six reasons for appeal were found to have merit. The permit decision is being remanded to the District Engineer to address where the administrative record is not sufficient to support the decision.

**INFORMATION RECEIVED AND IT’S DISPOSAL DURING THE APPEAL REVIEW:**

The Division Engineer has the authority to hear the appeal of this permit denial.<sup>4</sup> However, the Division Engineer does not have authority under the appeal process to make a final decision regarding permit authorization or denial, because that authority remains with the District Engineer. Upon appeal of the District Engineer's decision, the Division Engineer or his delegate conducts an independent review of the AR to address the reasons for appeal cited by the Appellant. The AR is limited to information contained in the record by the date of the NAO/NAP form. Pursuant to 33 C.F.R. § 331.2, no new information may be submitted on appeal. Neither the Appellant nor the District may present new information. To assist the Division Engineer in making a decision on the appeal, the RO may allow the parties to interpret, clarify, or explain issues and information already contained in the AR. Such interpretation, clarification, or explanation does not become part of the District’s AR, because the District Engineer did not consider it in making the permit decision. However, in accordance with 33 C.F.R. § 331.7(f), the Division Engineer may use such interpretation, clarification, or explanation in determining whether the AR provides an adequate and reasonable basis to support the District Engineer's decision.

The District initially provided a copy of the AR to the RO and the Appellant on December 11, 2012, and later, on May 30, 2013, released an additional 134 pages of previously withheld

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<sup>1</sup>Attachment A to Osterman Appeal, #7

<sup>2</sup> FOIA request was pending at the time the RFA was submitted; more discussion regarding the FOIA request and appeal is included below in this document.

<sup>3</sup> An extension may be granted by the Division Engineer, when warranted.

<sup>4</sup> 33 C.F.R. § 331.3(a)(2)

documents. The AR is limited to information contained in the record by the date of the NAO/NAP form, which in this case is October 4, 2012.

A site visit and appeal conference was held on February 28, 2012. Representing the Appellant: Mr. Thomas Osterman, Appellant; Mr. Dennis Reynolds, legal advisor; Ms. Leann McDonald, permit application consultant; Dr. Jon Houghton, biological consultant. Representing the District: Mr. Darren Habel, Regulatory Project Manager; Mr. David Martin, Supervisor and Regulatory policy advisor; Ms. Virginia Ryan, Asst. District legal counsel. Representing the Division Commander and facilitating the meeting: Ms. Mary Hoffman, Administrative Appeal Review Officer (Northwestern Division).

Appeal conference participants met at the Appellant's property where the Appellant's team provided a brief overview of site features including property boundaries, location of the proposed dock structures, proximity to neighboring properties and existing docks within the vicinity. Participants reconvened in a nearby meeting room, arranged by Mr. Reynolds. The RO offered an opening statement pertinent to the appeal process and meeting 'ground rules.' The Appellant's team was provided an opportunity to discuss the reasons for appeal, and the District was asked to clarify a number of points regarding information in the AR or brought up during meeting discussions. Following the meeting, participants were invited to submit their written notes/talking points to the RO. Mr. Reynolds and Dr. Houghton submitted notes on March 8, 2013 and March 11, 2013 respectively which are included in the appeal record.

Additionally, on March 22, 2013, the Appellant submitted a request to stay this Regulatory administrative appeal for the duration of his pending Freedom of Information Act (FOIA) appeal. The FOIA request (that he is appealing) is seeking the "entire file" for the subject permit application. The request to stay the Regulatory appeal was based on the Appellant's belief that certain information necessary for inclusion in the AR exists and was being improperly withheld. The Appellant believes that the final disposition of the FOIA appeal may lead to a more complete AR.

The Appellant was notified on April 5, 2013 that his request to stay was denied. While both the FOIA and Regulatory permit appeal processes are administered by the Department of the Army, the processes are separate and distinct administrative procedures. There is no administrative or procedural basis to delay or suspend the Regulatory appeal pending the FOIA appeal decision, therefore the request was denied, and this permit denial appeal review continued.

The District was asked to compile a log of the documents withheld from the AR, citing reasons for any redactions of materials due to privilege or a prohibition against disclosure. The District determined that an additional 134 pages of documents, previously withheld, could be released.<sup>5</sup> The log and additional pages were provided to the Appellant on May 8, 2013, and to the RO on May 30, 2013, and were incorporated into the appeal record.

#### **APPEAL EVALUATION, FINDINGS, AND INSTRUCTIONS TO THE SEATTLE DISTRICT ENGINEER:**

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<sup>5</sup> Letter from Seattle District to Osterman, dated 8 May 2013

**Appellant's First Reason for Appeal:** The Appellant asserts the Corps delay in processing the permit application violated promulgated standards for decision-making and resulted in a deprivation of his entitlement to a fair administrative process.

**FINDING:** This reason for appeal has no merit.

**ACTION:** No further action required.

**DISCUSSION:** The RFA states that the Appellant submitted his permit application on August 13, 2009,<sup>6</sup> yet the Corps did not make a decision until September 27, 2012.<sup>7</sup> The Appellant asserts that the time delay indicates the Corps failed to meet its obligation to timely application processing.

The Corps regulations for processing Department of the Army applications, state that the District Engineer will decide on applications not later than 60 days after receipt of a complete application, unless precluded as a matter of law or procedures required by law. Those regulations acknowledge certain laws require procedures, including but not limited to, consultations which may prevent district engineers from being able to decide certain applications within 60 days.<sup>8</sup>

Conducting an efficient and effective Regulatory Program is an important aspect of the Corps mission. It is generally recognized that minor permit actions may be completed within a 60 day time frame, whereas more complex permit evaluations can take longer.<sup>9</sup>

Although the scope of the Appellant's permit request is limited (a 52-foot pier, 30-foot ramp, 35x8-foot float, and 30x18-foot boat lift) and along a residentially developed shoreline, the review required evaluation under the Endangered Species Act of 1973 (16 U.S.C. §1531), and the National Historic Preservation Act as amended (16 U.S.C. 470 *et seq.*). Most notably, the permit review required consultation with the Suquamish Tribe to determine whether the issuance of the proposed permit would be consistent with the federal government's trust obligation to tribes, specifically, that it does not violate terms of the 1855 Point Elliott Treaty. The controlling factor in the decision was the Corps tribal trust responsibility; the requirements of tribal consultation alone precluded the Corps from reaching a decision within 60 days.

The purpose and intent of the Corps Regulatory Appeal Program is to provide recourse to applicants/landowners to challenge a decision within the agency. The appeal process is designed to assure that decisions made by a Corps District are supported by the administrative record and consistent with relevant laws, regulations, executive orders, and officially promulgated policies.

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<sup>6</sup> The Seattle District received the Osterman's application requesting Department of the Army authorization to construct a single-use boat dock and appurtenant structures on 3 June 2009, AR pgs 006-029 (Bates Stamp)

<sup>7</sup> The Seattle District Commander's decision to deny the permit was signed on 4 October 2012, AR pgs 344-356 (Bates Stamp)

<sup>8</sup> 33 CFR 325.2(d)(3)

<sup>9</sup> The established Regulatory Program national performance standard is to complete 50% of all individual Permits within 60-120 days.

The 1,148 days the District took to render a final decision is well beyond 60 days. However, the appeal program is not intended to evaluate overall timeframes associated with or the efficiency of a District's final decision time; a timely permit decision is a *goal* of the Corps Regulatory but is beyond the focus and review under the Regulatory Appeal Program. This reason for appeal **does not have merit.**

**Appellant's Second Reason for Appeal:** The Appellant believes that the Corps denial of the permit is contrary to law and that it has incorrectly applied regulations and/or policies including (a) Promulgated standards for processing applications for structures for small boats, and the (b) Treaty of Point Elliott;

**FINDING:** This reason for appeal has merit.

**ACTION:** The permit decision is remanded to the District for further evaluation, analysis, and documentation.

**DISCUSSION:** (a) The Appellant asserts that the District's decision to deny his permit is contrary to the Corps policy regarding structures for small boats found at 33 CFR 322.5(d)(1), which states, "In the absence of overriding public interest, favorable consideration will generally be given to applications from riparian owners for permits for piers, boat docks, moorings, platforms and similar structures for small boats". The RFA also asserts that the Corps failed to consider property ownership in its public interest review referencing 33 CFR 320.4(g)(1 & 3).

Although the *Special Policies* section of the Corps' regulations<sup>10</sup> states applications for small boat structures from riparian owners may be afforded favorable consideration, there is still a requirement that the proposed structure is not contrary to the overall public interest or any other law or legal requirements. This does not guarantee authorization to riparian landowners. The District is required to conduct a site and case-specific evaluation to determine if the work as proposed can be authorized. The District summarized consideration of property ownership in its public interest factors statement of findings/MFR,<sup>11</sup> recognizing that "the proposed project does not affect property ownership *per se* but does involve consideration of how fully the applicant/property owner can actually utilize his property for in-water recreational purposes in light of treaty rights reserved by the Tribe for fin fish and shellfish harvesting on property not owned by the Tribe or the public." In this case, the District determined that authorization of the proposed dock structures would adversely impact the Suquamish Tribe's reserved treaty rights, and considered this an overriding public interest factor; therefore tribal trust responsibilities formed the basis of the District's denial of the permit. I find this specific assertion **does not have merit.**

(b) The Appellant asserts that the permit denial was contrary to the Stevens Treaties (1855-56), and specifically the Treaty of Point Elliott of 1855. In accordance with national policy,<sup>12</sup> the District identified its need to take into consideration rights reserved by the Suquamish Tribe

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<sup>10</sup> 33 CFR 322.5(d)(1)

<sup>11</sup> AR pgs 344-359

<sup>12</sup> Presidential Executive Order 13175, *Consultation and Coordination With Indian Tribal Governments*, November 6, 2000

under the 1855 Treaty of Point Elliott when making its permit decision. The Suquamish, a federally recognized tribe, has a government-to-government relationship and a special trust relationship with the United States government. These trust responsibilities and government-to-government relationships entail certain obligations and responsibilities on the part of the United States to the Suquamish. The Suquamish Tribe's rights are based on the 1855 Point Elliott Treaty.

The Corps national Regulatory Program encourages the development of local procedures on how to assess potential impacts to reserved treaty rights or access to a Tribe's Usual and Accustomed (U&A) fishing grounds. The Seattle District legal counsel has developed local procedural considerations, explained in a paper entitled, *Usual and Accustomed Fishing and Seattle District, U.S. Army Corps of Engineers Permitting*.<sup>13</sup> This paper discusses legal interpretations and application of northwestern tribal- and treaty-related court decisions and history. The District's coordination procedure under the Appellant's permit evaluation is consistent with Section VIII.C of this paper.

The District's approach is based on United States law that protects the inherent rights that the Suquamish did not relinquish under the treaty, including, but not limited to, their right to harvest shellfish and fin fish within their U&A fishing grounds. According to case law, the right to take fish at all U&A fishing places may not be abrogated without specific and express Congressional authority.<sup>14</sup> The District's decision and record reflects that approach and decision.<sup>15</sup> The District followed its established local procedures regarding the Federal government's fiduciary tribal treaty trust responsibilities during its permit evaluation.<sup>16</sup> This specific assertion **does not have merit**.

In addition, the Appellant argues that the exercise of treaty Indian Fishing Rights are subject to the *Stipulation and Order Amending Shellfish Implementation Plan*,<sup>17</sup> paragraph 7.4 which states, "Nothing in this Plan shall be interpreted to limit in any way the rights of a private property owner to build docks or other structures on their property." The Appellant argues that the Corps denial of the permit is in direct violation of the decrees entered in *US v. Washington* and the rights of non-Indian citizens of the state, and is plainly contrary to law.

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<sup>13</sup> AR 402-414. It is noted that this paper is footnoted with the statement, "The views, opinions, and conclusions expressed in this paper are those of the author and do not necessarily reflect the official position of the U.S. Army or the Corps of Engineers".

<sup>14</sup> *Muckleshoot v Hall*, at 1511

<sup>15</sup> AR pgs 354-355

<sup>16</sup> Sufficiency of documentation to support the District's conclusion is addressed below, and under the Appellant's Third, and Fourth reasons for appeal.

<sup>17</sup> AR pgs. 144-171. United States District Court Western District of Washington at Seattle, USA vs. State of Washington Case No. C70-9213, *Stipulation and Order Amending Shellfish Implementation Plan* found at 898 F.Supp. 1463 *et seq.* Primary objective of this plan is to provide a framework, principles, and course of action for effective cooperative management of the shellfish resources subject to Treaty harvest under the Court's decision of December 20, 1994. In effectuating the rights of the Tribes to take shellfish under the Treaties, this Order also recognizes the State's responsibilities for conservation of public shell fish resources, subject to the Treaty right to take fish at U&A places.

The Appellant raised this argument during the permit evaluation,<sup>18</sup> but the AR fails to address whether, and/or how, the Shellfish Implementation plan entered in *US v. Washington* has bearing on the Appellant's proposed permit decision. I find this specific assertion **has merit**, and is remanded for further evaluation, analysis, and documentation on this matter.

Further, this reason for appeal includes discussion of environmental protection, habitat, salmon restoration, fish life, and the aquatic environment with respect to treaty rights. The basis of the District's action is preservation of access rights for tribal fishers, not environmental or habitat protection or restoration. Therefore, I find this specific assertion **does not have merit**.

Finally, the Appellant challenges the District's application of a *de minimis* impact standard when determining whether a proposed work is contrary to the Corps trust responsibilities, and argues that there must be a showing of fisher use on a "more than extraordinary basis." Also, the Appellant asserts that the Tribes and non-Indian citizens of Washington State share equitably in treaty rights, and that their rights are not equitably recognized in the District's action. These arguments relate to the District's interpretation and application of case law. The District Engineer is generally due deference on these matters as the party responsible for the fiduciary duty to uphold treaty rights. Therefore, I find this specific assertion **does not have merit**.

**Appellant's Third Reason for Appeal:** The Appellant believes that the Corps omitted material facts while evaluating his permit application.

**FINDING:** This reason for appeal has merit.

**ACTION:** The permit decision is remanded to the District for further evaluation, analysis, and documentation.

**DISCUSSION:** The Appellant asserts a failure to acknowledge approvals received from other agencies. There are often various reviews and approvals of state and other Federal agencies associated with Corps permit actions. It is incumbent on the Corps to assure that any permit it might issue will not violate its Federal trust responsibilities. Those responsibilities cannot be delegated or overcome by any approval from other local, state, or federal agencies. I find that this specific assertion **does not have merit**.

The Appellant asserts that exhibits he provided showing the location of tribal fisheries relative to the proposed dock structures (and other documents the Appellant submitted which are identified as 'Osterman Decl.' and 'McDonald Decl' in the RFA) were not "adequately acknowledged or addressed" in the District's decision. The exhibits in questions are contained in the AR.<sup>19</sup> A summary of relevant factors raised in these exhibits were found in the permit statement of findings/Memorandum for the Record (MFR).<sup>20</sup> Incorporation of this information in the record is an indication it was considered, however, the AR does not sufficiently address if or how the District weighed and/or factored the information provided by the Appellant (which

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<sup>18</sup> Argument presented in letter dated December 9, 2011, AR, pgs 122-135

<sup>19</sup> AR, Part 1 of 5

<sup>20</sup> AR, part 2, pgs 344-360

claims fishing does not occur at the proposed dock location) into its decision. The AR states that “There are unresolved conflicts as to resource use.”<sup>21</sup> This paragraph continues, “Based on the evidence provided by the Tribe *and other available information . . .*” [Emphasis added]. It is unclear what specifically the District is referring to as “other available information.” This rationale and analysis is critical to support the District Engineer’s decision to deny the permit application, and should therefore be explained clearly in the District’s Statement of Findings, and disclosed to the Appellant.<sup>22</sup> I find that this specific assertion **has merit**.

The Appellant asserts that the Corps approved two docks in the vicinity of the Osterman proposal in the last five years<sup>23</sup> and pointed out there are six existing residential dock structures within the immediate vicinity of the proposed structure. Each permit application is evaluated on its own merits, subject to a case-specific evaluation. Previous authorization of similar structures is not a guarantee of future authorizations. In accordance with the District’s standard practices, federally recognized Native American Tribes, including the Suquamish, were notified of the Appellant’s proposed activities and permit request. The District explained at the Appeal Conference that some tribes are increasingly more involved in the permit review process, and are increasingly responding to proposed permit notifications with concerns with respect to the tribe’s treaty rights. While previous, albeit nearby, permit proposals may not have generated tribal objections, the Suquamish did respond to the notification of Appellant’s permit proposal.<sup>24</sup> The District determined through a case-specific evaluation of this permit application that authorization could not be granted without violating the federal government’s treaty trust responsibilities to the Suquamish Tribe. I find that this specific assertion **does not have merit**.

**Appellant’s Fourth Reason for Appeal:** The Appellant believes the Corps did not support its determination that the proposed dock would result in more than a *de minimus* impact to tribal fisheries or the Tribe’s reserved treaty rights.

**FINDING:** This reason for appeal has merit.

**ACTION:** The permit decision is remanded to the District for further evaluation, analysis, and documentation.

**DISCUSSION:** The Appellant asserts that the Corps decision to deny the permit is not supported by evidence sufficient to conclude that the proposal would have more than a *de minimis* impact to the Suquamish Tribe’s access to its U&A fishing grounds for shellfish and finfish.

Further, the RFA states that the Tribe’s “alleged concerns are pretextual, speculative and not based on competent evidence”, and that the Corps “should have rejected the Tribe’s pretextual reasons for opposing the Osterman’s dock.” In support, the Appellant referenced declarations by

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<sup>21</sup> AR, page 353, paragraph 9.b.

<sup>22</sup> Per 33 CFR 325.2(a)(7)

<sup>23</sup> see Osterman Declaration dated November 17, 2011, and McDonald Declaration dated December 5, 2011

<sup>24</sup> The Tribe, in the October 15, 2009 letter, specifically requests that the District deny a permit due to expected adverse impacts on the Tribe’s access to U&A fishing grounds for shellfish and finfish harvesting, as well as cumulative impacts to treaty reserved resources.

neighboring landowners and his consultants, contained in the AR, which indicate that the project area is not used for fishing or shell fishing due to the physical constraints at the site, water depth and tides, and points specifically to arguments set out in Dr. Houghton's declaration.<sup>25</sup> The RFA alleges that the Tribe's [declarations] "speak about fishing methods used in the area of the proposed Osterman pier," however "nothing shows actual utilization of the Tribal fishery at the [specific] project site."

In response to the District's requests<sup>26</sup> for documentation regarding the Tribe's U&A concerns (to include how, where, and when tribal members utilize the nearshore for shellfish harvesting in the vicinity of the proposed structure as well as how the proposed structure would impact the Tribe's shellfish harvesting practices) the Tribe provided declarations of three tribal members that Port Madison Bay and nearby areas on Bainbridge Island, "are exclusive ancestral fishing areas and lands of the Suquamish Tribe," and that "this area has been and continues to be very important to the tribal members because they exercise treaty rights to harvest finfish and shellfish for both commercial and subsistent uses".<sup>27</sup>

The District provided an opportunity to the Appellant to address the tribal members' declarations/affidavits. The Appellant responded by providing his own affidavit, and affidavits from his neighbors and declarations of two technical subject matter consultants.<sup>28</sup> The Appellant pointed to requirements in the *Stipulation and Order Amending Shellfish Implementation Plan*<sup>29</sup> to support his argument that the tribes do not use the site of his proposed structure. The appellant argues this implementation plan requires that "notice of a tribal harvest on private property shall be provided to the property owner and [Washington Department of Fish and Wildlife] WDFW no less than one month in advance of the harvest."<sup>30</sup> The AR contains signed declarations of the Appellant and 3 neighboring landowners that they have "never received a notice from the Tribe that [the Tribe] would like to exercise rights...for fishing or harvesting shellfish on or near [the landowner's] beach." Further, the Appellant's declaration states that he has observed tribal members harvesting salmon, crab or geoduck in areas no closer than 1,000 feet from his proposed dock location, and commercial fishing boats (purse seine and gillnet) in season approximately 2,000 to 3,000 feet away from his property; that the area within 400 to 600 feet of his proposed dock location is very shallow and goes completely dry at low tide; and that he has not observed fishing activities, nor has he received a request from a tribal member to fish or harvest, within the immediate vicinity of his proposed dock during his 8-year residence.

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<sup>25</sup> Senior Marine Biologist and Principal at Hart Crowser, Inc., engaged in marine biological and fishery related research and consulting in Puget Sound and Alaska since 1969.

<sup>26</sup> Email from Habel to Sullivan, dated 18 October 2010 (AR pg 099) , and Letter from Seattle District to Suquamish Tribe, dated 16 November 2010 (AR pg 106)

<sup>27</sup> AR pgs 107-115

<sup>28</sup> AR pgs 122-170

<sup>29</sup> AR pgs. 144-171. United States District Court Western District of Washington at Seattle, USA vs. State of Washington Case No. C70-9213, *Stipulation and Order Amending Shellfish Implementation Plan* found at 898 F.Supp. 1463 *et seq.* Primary objective of this plan is to provide a framework, principles, and course of action for effective cooperative management of the shellfish resources subject to Treaty harvest under the Court's decision of December 20, 1994. In effectuating the rights of the Tribes to take shellfish under the Treaties, this Order also recognizes the State's responsibilities for conservation of public shell fish resources, subject to the Treaty right to take fish at U&A places.

<sup>30</sup> *Stipulation and Order Amending Shellfish Implementation Plan* at 7.2.5

The District requested that the Tribe provide a “similar letter [that the Tribe] wrote for a mooring buoy denial request in Salmon Bay. [That] letter very descriptively outlined how the buoy will interfere with Tribal fishing in Salmon Bay and I was hoping to get a similar letter from the Tribe concerning Osterman and impacts from their PRF (sic).”<sup>31</sup> The Tribe’s February 10, 2012 response, from its Fisheries Director, stated, “a large and well-documented<sup>32</sup> adult herring holding and spawning habitat is present at the location and in the area of the proposed Osterman dock.” The response describes harvesting and fishing methods “used at this location,” and indicates that “the proposed location of the Osterman dock creates a navigational obstacle and physical obstacles for all three types of fin fishing methods by eliminating access to this fishing location” individually and cumulatively.

The District provided an opportunity to the Appellant to address the Tribe’s February 10, 2012 letter, and the Appellant responded with a declaration from Jonathan Parks Houghton, PH.D.<sup>33</sup> Dr. Houghton analyzed the Tribal fishery director’s claims, and challenged the Tribe’s assertions that the proposed dock would interfere with fisheries targeting harvest of herring aggregations, beach seine harvesting, gill net fishing or harvesting, or Tribal drift net fishing or harvesting.<sup>34</sup>

The Tribe later provided additional information to the District regarding potential closure of shellfish beds due to cumulative effects, and specific comments regarding their U&A areas.<sup>35</sup> The Tribe reiterated that the “proposed location of the Osterman’s pier [dock] would eliminate another fishing site using beach seine nets and would, therefore, eliminate the Tribe’s access.” The Appellant countered with a letter restating his assertion that the proposed dock would not physically interfere with Tribal fishing.<sup>36</sup>

The record contains claims and counter claims whether the proposed dock would constitute more than a *de minimis* obstruction to legitimate U&A fishing grounds. However, the District Engineer’s statement of findings/MFR did not provide a rational explanation for his conclusion that the proposal would have more than a *de minimis* impact to Suquamish Tribe’s access to U&A fishing grounds. This rationale may, or may not be explained in documents withheld from the Appellant, and from this Administrative Appeal, under attorney/client or other privilege, but it also should be explained clearly in the District’s findings since it is a critical aspect of the permit decision. For that reason, I find that this reason for appeal **has merit** and the decision must be remanded to the District Engineer to address that shortcoming in the record; it is essential that the reason/basis for the denial of any permit be fully disclosed.

**Appellant’s Fifth Reason for Appeal:** The Appellant asserts that the Corps denial of the permit was arbitrary and capricious and an abuse of discretion.

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<sup>31</sup> AR pg 172

<sup>32</sup> Documentation in support of this claim was not provided, nor referenced in the AR.

<sup>33</sup> Senior Marine Biologist and Principal at Hart Crowser, Inc., engaged in marine biological and fishery related research and consulting in Puget Sound and Alaska since 1969.

<sup>34</sup> AR pg 204-206

<sup>35</sup> AR pgs 224-226

<sup>36</sup> AR pgs 291-295

**FINDING:** This reason for appeal does not have merit.

**ACTION:** No further action required

**DISCUSSION:** The Appellant raised questions in the RFA relating to whether the District based its decision on a consideration of the relevant factors and whether there has been a clear error of judgment, as well as whether the District articulated a rational connection between the facts found and the choice made. The Appellant asserts that to survive the “rational connection” test, the decision must be rooted in factual determinations based upon: (1) the actual exercise of the treaty right to take fish/shellfish from the U&A grounds and stations; and (2) the location of the proposed project inside those grounds.

To be "arbitrary and capricious" there would be an absence of a rational connection between the facts found and the choice made. There would be a clear error of judgment; an action not based upon consideration of relevant factors, an abuse of discretion, failure to be in accordance with law, or failure to observe a procedure required by law.<sup>37</sup>

The District Engineer based denial of the Appellant’s permit on the following: “The proposed structures would have more than *a de minimis* impact to the Suquamish Tribe’s access to its U&A fishing grounds for shellfish and finfish harvesting,” and “The proposed work is contrary to the public interest.” To sufficiently support the District Engineer’s permit decision the AR must show the reasoning and decision making process, and draw a rational connection between the facts found and the conclusion reached.

The factual basis and sufficiency of the District Engineer’s documentation in support of these conclusions are reviewed in this appeal document under the Appellant’s Third, Fourth, and Sixth Reason(s) for Appeal, above, and below. Each of the Appellant’s assertions (stated here) is addressed elsewhere in this document. Where merit was found, the permit decision will be remanded to the District Engineer with instructions to address where the administrative record is not sufficient to support the decision.

Notwithstanding the issues warranting remand, the District Engineer identified the federal government’s fiduciary responsibility to assure that treaty rights are not impaired by the Corps regulatory actions, and it was within the District Engineer’s discretion to determine that the proposed structures were not permissible on the basis of adverse effects to rights reserved by the Suquamish Tribe under the 1855 treaty. I find this reason for appeal **does not have merit**.

**Appellant’s Sixth Reason for Appeal:** The Appellant believes there is no overriding public interest factor which would warrant denial of a permit.

**FINDING:** This reason for appeal does not have merit.

**ACTION:** No further action required.

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<sup>37</sup>Natural Resources Defense Council, Inc. v. United States EPA, 966 F.2d 1292, 1297 (9th Cir. 1992)

**DISCUSSION:** The RFA asserts that the Suquamish Tribe sought a total ban on new docks in the Port Madison area of Bainbridge Island and pointed out that no federal, state or local law bans docks in Port Madison, nor imposes a moratorium on new dock construction. It argues that it is beyond the authority of the Corps to impose unauthorized bans or a *de facto* moratorium based on generalized Tribal concerns expressed with respect to the Osterman dock. Further, the RFA asserts that only undue cumulative impacts might justify a ban [on new docks in the Port Madison area of Bainbridge Island] and the Corps Memorandum of Record “concedes that cumulative impacts are a non-issue.” Finally, the RFA states that the Appellant’s proposal meets all applicable criteria, implements important policies to facilitate recreation, causes no measurable impacts to the aquatic environment or to non-Indian or tribal fisheries, and thus, should have been approved.

Except where previously discussed, the AR supports the District’s case-specific evaluation of this permit application and conclusion that Federal authorization could not be granted without violating the federal government’s treaty trust responsibilities to the Suquamish Tribe. There is no indication in the AR that the District considered a “total ban on new docks” in the Port Madison area.

The District’s statement of findings/MFR<sup>38</sup> documents the evaluation, public interest review, environmental review, and permit decision regarding the Appellant’s application. This document concluded that the Appellant’s proposal did not meet criteria necessary to receive Department of the Army authorization.

That statement of findings/MFR indicates that public interest factors were evaluated.<sup>39</sup> It also concludes<sup>40</sup> that “if built the structure would have more than a *de minimis* impact on the Tribe’s access to the area and ability to utilize set nets, beach seines, and /or drift gillnets”, and identifies there is an unresolved conflict with the Tribe regarding resource use, specifically, that, “the Tribe believes the structure would eliminate, or at least interfere with its access to [U&A] fishing grounds.” The MFR summarized the Tribe’s treaty rights, and the District’s conclusion regarding those rights, relevant to the proposed structures.<sup>41</sup> The District concluded that if the overwater structures were constructed, the structures would impede the Tribe’s access to nearshore areas and interfere with the Suquamish Tribe’s treaty fishing rights and therefore not comply with the Federal government’s tribal trust responsibilities.<sup>42</sup>

Even so, the District’s public interest review<sup>43</sup> should not be confused with the District’s determination with respect to the Federal government’s fiduciary duty to American Indians.<sup>44</sup> It is established that the Corps of Engineers is required to assure that treaty rights are not impaired

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<sup>38</sup> AR pgs 343-360

<sup>39</sup> MFR, paragraph 6 and 7.

<sup>40</sup> MFR, Paragraph 7(a)

<sup>41</sup> MFR, paragraph 11(d),

<sup>42</sup> In paragraph 11(g), *Public Interest Determination*

<sup>43</sup> 33 CFR 320.4(a) and (e)

<sup>44</sup> *Northwest Sea Farms, Inc. v. United States Army Corps of Engineers*, 931 F. Supp. 1515, 1519-20 (W.D. Wash. 1996)

or limited by its regulatory actions.<sup>45</sup> The determination that the proposal would adversely impact Suquamish Tribe's reserved treaty rights is overriding in significance. Notwithstanding the issues warranting remand (discussed above under previous reasons for appeal, and which must be addressed to support the District Engineer's overall conclusion), it was reasonable for the District Engineer to draw the fiduciary conclusion that he did, and determine that this proposed permit could not be issued on the basis of adverse effects to rights reserved by the Suquamish Tribe under the 1855 treaty. I find this reason for appeal **does not have merit.**

**OVERALL CONCLUSION:** After reviewing and evaluating the RFA, the District's AR, and the recommendation of the RO, I find that this appealed permit denial has merit on 3 of the 6 reasons cited in the RFA. As a result, this permit denial is remanded to the District for further analysis and documentation. The final Corps permit decision will be made by the Seattle District Engineer pursuant to my remand.

Date



John S. Kem  
Brigadier General, US Army  
Division Commander

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<sup>45</sup> *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504 (W.D. Wash. 1988)