



MAKAH TRIBAL COUNCIL

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December 12, 2017

Jennifer Hennessey
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Washington State Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

Re: Makah Tribe's comments on Washington's Draft Marine Spatial Plan

Dear Ms. Hennessey,

The Makah Tribal Council appreciates the opportunity to provide comments on the Draft Marine Spatial Plan (Draft Plan). We also appreciate the technical and policy meetings that have been held throughout this process over the past several years, including allowing tribal input, technical assistance with data collection, and opportunities for comments in the development of this marine spatial plan. This is our first review of the Draft Plan in its entirety, however, and we are seeing many new sections for the first time in the context of the whole Draft Plan.

As you are aware, the Marine Waters Management and Planning Act requires that the Plan "be developed and implemented" in a way that "recognizes and respects existing uses and tribal treaty rights."¹ We believe that, given our legal co-management status over natural resources with the State of Washington and treaty status with the federal government, language must be added to the final version of the Plan that is sent to NOAA as discussed below. We offer the following comments in order provide clarity to the document regarding Makah Tribal governance and authority. If this language is not added to the Draft Plan, the Makah Tribal Council would need to continue formal consultation with the Department of Ecology and/or the National Oceanographic and Atmospheric Administration (NOAA) to address our concerns.

History of Makah Tribe

The Makah Indian Tribe is a treaty tribe that operates as a domestic sovereign government and resource trustee with the right of self-determination and treaty-reserved rights to fishing, whaling, sealing, hunting, and gathering that protects and preserves our cultural and spiritual way of life for current and future generations. Since time immemorial the Makah people and culture have depended upon the ocean and its bounty. Located at the northwestern tip of the Olympic Peninsula of Washington State, the Makah Indian Reservation currently encompasses a

¹ RCW 43.372.040(4)(a).

land area of approximately 47 square miles. During the negotiation of the 1855 Treaty of Neah Bay, a tribal leader declared, "I want the sea. That is my country."² This statement is a testament to the Makah's unique connection to the ocean.

The 1855 Treaty of Neah Bay, as reaffirmed and interpreted in 1974 *U.S. v. Washington* (known as the "Boldt Decision")³ and subsequent decisions,⁴ supports the Tribe's right to harvest up to 50% of all fisheries and other marine resources that reside in and pass through the Makah Usual and Accustomed Area (U&A). These decisions also establish the tribes as co-managers of fisheries and marine resources with the State of Washington, empowering tribes to develop infrastructure and capacity to manage treaty protected resources.⁵ Federal regulations further recognize the sovereign status and overlapping jurisdiction as co-managers that Indian tribes share over Federal and tribal fishery resources.⁶

The Makah Tribe's traditional use of the ocean has included areas that extend offshore at least 100 miles, north through what is now Canadian waters to the Bering Sea, south to the Columbia River, and into Puget Sound. However, the Makah Tribe's current U&A is constrained by the U.S./Canada border to the north, extends to 48° 02' 15" N (Norwegian Memorial) to the south, extends to 125° 44' 00" W (approximately 40 nautical miles offshore) to the west, and extends to 123° 42' 30" W (Tongue Point) to the east.⁷ This area represents approximately 1,550 square miles of marine waters.

Makah maritime culture has been sustained through an ecosystem-based management approach to natural resources, including an understanding that utilization and protection of resources go hand-in-hand. A thriving ecosystem in the Makah U&A and adjacent areas provides resources for fishing and hunting, preservation of cultural, spiritual and ceremonial practices, as well as jobs, tourism, recreation, aesthetic enjoyment and other economic activities.

² "Ratified Treaty No. 286: Documents Relating to the Negotiation of the Treaty of January 31, 1855, with the Makah Indians," Documents Relating to the Negotiation of Ratified and Unratified Treaties with Various Tribes of Indians, 1801-69 (Nat'l Archives Microfilm Publication T494, roll 5), Records of the Bureau of Indian Affairs (BIA), RG 75, National Archives and Records Administration (NARA), Washington, D.C., 2.

³ *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676, 684-687 (9th Cir. 1975).

⁴ E.g., *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 685-687 (1979) (salmon); *U.S. v. Washington*, 459 F. Supp. 1020, 1065 (W.D. Wash. 1978) (herring); *U.S. v. Washington*, No. C85-1606R, Subproceeding No. 92-1 (W.D. Wash. Dec. 29, 1993) (halibut); *U.S. v. Washington*, 873 F. Supp. 1422, 1445, n.30 (W.D. Wash. 1994), aff'd in part and rev'd in part, 157 F. 3d 630, 651-652 (9th Cir. 1998) (shellfish); *U.S. v. Washington*, No. 9213, Subproceeding 96-2 (Nov. 4, 1996) (Pacific whiting).

⁵ See generally *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975).

⁶ See, e.g., 50 C.F.R. § 660.50(d)(2).

⁷ *U.S. v. Washington*, 626 F. Supp. 1405, 1466 (W.D. Wash. 1985), aff'd, 730 F.2d 1314 (9th Cir. 1984); see also *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).

Inherent Disparity in the Coastal Zone Management Act

It is our understanding that the Marine Spatial Plan will be submitted for approval to NOAA under the Coastal Zone Management Act (CZMA), which, if approved, will then be adopted into the State's Coastal Zone Management Program (CZMP). The CZMA affords the State, through the Federal Consistency Clause, the ability to review and recommend through the State's enforceable policies a decision that avoids or minimizes adverse impacts to coastal resources in State waters. Additionally, through identifying a Geographic Location Description (GLD) and a series of potential new uses, this process will be streamlined for State review of Federal actions. Tribal governments are not included within the statutory framework of the CZMA, but that does not diminish or alter NOAA's federal Trust Responsibility or the obligation to consult government to government with the Treaty Tribes where ocean and coastal Trust Resources are under review or are at issue. Under past and current practice, Tribes have not been afforded the same review process the State has under the CZMA's Federal Consistency Clause despite the fact that Tribes are resource trustees and have co-equal jurisdiction over these resources as a legal co-manager. As equal resource managers with the Makah Tribe, both the state and federal governments have a Trust Responsibility to ensure that the Tribes are fully able to participate.

Unfortunately, due to this failure to recognize tribes in the state and federal statutory framework and the regulations that carry out coastal zone management laws, Tribal governments have not been allocated a proportional amount of funding to perform necessary due diligence to ensure that projects, plans and policies proposed under the CZMA are consistent with tribal sovereignty and do not adversely affect Treaty resources. As a result, this lack of recognition and funding has resulted in state and federal governments diminishing the Tribe's sovereign authority over its Treaty resources, as well as its ability to serve as a co-manager collaborating as a co-equal owner. For the record, we reiterate our objection to both the lack of express tribal authority in the CZMA and the federal governments' lack of support for the Makah Tribe's requests for funding that would enable it to meet its resource trustee responsibilities.

This inherent disparity is again playing out in the Draft Plan. Accordingly, the Makah Tribe insists that the State recognize the Tribe's sovereign authority over its Treaty Resources as a co-equal owner and manager with NOAA and Ecology, as more fully set forth below, and looks to the federal government to provide the Tribe with a proportional amount of financial resources in the future to perform the due diligence, project review and consultation necessary to ensure that any proposed project does not directly or indirectly cause adverse impacts to our Treaty Resources.

State and Federal Trust Responsibility

The federal government is a resource trustee with a duty to uphold its Federal Trust Responsibility. The State of Washington also has a trust responsibility to the Makah Tribe and other Treaty Tribes by virtue of our legal co-management status over marine resources and fisheries. This Trust Responsibility imposes an affirmative duty on the state and federal governments, by and through all of their departments and agencies, with a legal and moral

obligation to protect ocean and aquatic habitats and resources therein, and the Tribe's treaty reserved right to harvest those resources, in perpetuity. The language throughout the marine spatial plan exerting ownership over the resources, as Washington's resources, excludes this co-management relationship with the treaty tribes.

This legal co-management status with the state is inadequately applied in the Draft Plan. The management framework in chapter 4 does not include clear, concise language that state agencies have an affirmative duty to Treaty Tribes in both a procedural and substantive context. The Plan acknowledges Tribes as sovereign governments in section 1.6, but the management framework does not represent tribal governments as having the clear right of any decision-making authority over marine resources in their Treaty areas.

In an effort to better exercise our sovereign authority over Treaty protected resources and help direct our resource co-managers in their engagement with us, the Makah Tribal Council approved by resolution the Makah Ocean Policy in January 2017. The purpose of this Policy is to "protect and exercise the treaty-reserved rights and culture" of the Makah Tribe that are inextricably tied to the health of the ocean. The Policy acknowledges that in order for the Makah Tribe to preserve its treaty rights, "it is critical for the Tribe to be informed of and actively involved in decisions on actions that may affect the Tribe's use of treaty resources or the health of the ecosystems upon which these resources depend." The Makah Ocean Policy contains consultation procedures that establish the requirements for when consultation is needed, including when it should begin, as well as pre-notification requirements, points of contact at the Tribe, and what is required of state and federal permitting agencies to initiate formal closure of consultation. The Makah Tribe has provided state resource management agencies with a copy of its 2017 Makah Ocean Policy, which we incorporate by reference.

The Makah Tribe's 2017 Ocean Policy, Section 1,⁸ states in part, that:

The Makah Tribal government expects federal, state and local governments to ensure that all actions undertaken, permitted, funded or authorized will not adversely affect the Makah Tribe's exercise of its treaty-reserved right to harvest marine resources and access to ocean and marine areas for ceremonial, subsistence, cultural and commercial use or other tribal interests.

The Makah Tribe must be informed of and be provided the opportunity to engage in discussions on proposals, plans, actions, activities, and rule-making in the Tribe's U&A, as well as those areas outside the U&A that may affected tribal resources and their ecosystems. Many of the Tribe's treaty resources and tribal interests span large geographic areas and thus can be affected by marine and coastal actions outside the U&A.

⁸ Makah Ocean Policy (2017).

As a legal co-manager of marine and natural resources covering 1,550 square miles of marine waters, and as a sovereign tribal government, the Makah Tribe must be afforded the same measure of notice, review and consultation as any other government, as well as the full opportunity to comment and impose mitigation measures to avoid adverse impacts to its Treaty area and resources. This is a bedrock principle that is essential to the success of the Marine Spatial Plan, and it should be fully incorporated into the Draft Plan.

Tribal Consultation and Ocean Policy Management

We appreciate the inclusion of the language in section 1.6, Pacific Coast Tribes and Treaty Rights, which outlines the Boldt decision, its meaning and the existence of the Tribes' legal co-management relationship with the State over natural resources, as well as the federal governments Trust Responsibility to the Tribes. While we do not disagree with any of the language in that section, we believe it is missing an important, essential discussion of what those legal rights mean when applied in the context of the Draft Plan. Treaty Tribes are possessed with the legal right and obligation of co-management of marine resources within their Treaty area, and all duties and responsibilities that flow from that legal co-management status – including consultation and project approval - must be fully acknowledged and incorporated into the operation of the Plan. This essential discussion is not included anywhere in Chapter 1, including section 1.6, but instead a reference to Chapter 4 is included.⁹

In the Chapter 4 discussion of the Management Framework, the Draft Plan makes a brief reference at the beginning of the chapter to the fact that tribes have Treaty rights and that the Draft Plan does not alter those rights. We certainly agree with these statements, though we proposed additional language below to clarify and strengthen them (both for the MSP and the designation of ISUs). However, ***the Draft Plan fails to make clear to the reader that the any government permitting agency, working with a project proponent, has a proactive, mandatory responsibility to consult with all impacted tribal governments at the earliest possible stage of the process and that this is integral to the management and success of the Plan.*** The need to clearly state this affirmative duty is especially important in light of the fact that Ecology plans to submit the final Plan to NOAA to be incorporated into its federally-approved Coastal Zone Management Program.

The inclusion of the "Government Coordination" section on page 4-12 is insufficient to address our concerns in both substance and process because that section fails to represent to the reader that tribal governments are legal co-managers of resources under review or at issue under the Plan and that, as such, they have decision-making authority over projects that may impact their Treaty resources. As a result, the Draft Plan should be substantially revised to clearly state in multiple places, from the introductory language and throughout Chapters 4 and

⁹ Section 1.6 cites to RCW 43.376, a law that outlines a high-level structure for state and tribal government-to-government consultation. However, those statutory provisions do not establish a consultation process with any detail. Thus it is imperative that the Makah Tribe's Ocean Policy Consultation Procedures be followed for any proposed project that may directly or indirectly impact the Makah's Treaty area or resources.

5 as we suggest below, that any government agency working with a project proponents has an affirmative duty to tribal governments to engage in consultation at the earliest possible state of a newly proposed project whenever Treaty resources may be affected by activities within or outside of the Tribe's U&A.

It should also be made clear that it is the sole province of each Treaty Tribe to determine the potential impacts of a proposal on their treaty rights and resources, and this can only happen to a sufficient degree if the Plan accurately articulates that Tribal Governments must be afforded early notice and consultation throughout the project application process. At this point the Draft Plan does not do this.

For example, in Table 4.1.4-2: Local permits and other authorities for aquatic projects, the only mention of the need for tribal consultation is in a footnote that ambiguously states, "Formal and informal consultations among various federal, state, local, and tribal governments occur as part of these processes. The process varies by permit and lead agency." This vague language operates to dilute the clear duty that a permitting authority has to the Makah Tribe, and the vague statement's ambiguousness is compounded by the omission in Table 4.1.4-2 of any mention that a project should receive a formal determination by an impacted Tribal government that it does not adversely impact Treaty resources. While Ecology may be the lead agency for purposes of issuing state permits, the fact remains that this clear duty is not expressed in a sufficient manner in the Draft Plan, and a mere reference to RCW 43.376 is inadequate.

As a result of the Draft Plan's omission of these essential points, we propose the following text edits to remedy our concerns.

Proposed Text Changes

The Makah Tribe's specific language additions and deletions are reflected below, with additions underlined and proposed deletions have a strikethrough, and include the page number, subject matter heading and proposed text changes as follows:

Page xvi

What's in the plan?

The MSP provides information and guidance intended for use throughout the development of new ocean use proposals along Washington's Pacific Coast. It assists agencies, tribal governments and others in evaluating and engaging in proposals for new ocean uses and guides potential applicants as they develop those proposals.

Page xvi, after the bullet points:

The State of Washington and tribal governments are legal co-managers of marine resources within the planning area. The information in the MSP will also assist the state and tribal

governments, in reviewing and influencing federal activities that may affect Washington's ocean resources or uses off the Washington coast, including those proposed in federal waters.

Page xvii

Outline of the Plan

A MSP management framework that covers process and substantive requirements tied to existing state laws and policies and consultation with tribal governments (Chapter 4). It provides overall guidance and recommendations for applicants, agencies and third parties on using the plan in practice, including:

- o Identifying ecologically-sensitive resources in state and tribal waters to protect from adverse effects of offshore development.
- o Defining policies in state and tribal waters to protect fisheries from long-term significant adverse impacts of offshore development and to ensure all reasonable steps are taken to avoid and minimize adverse impacts to fisheries.
- o Detailing the data, information, and plans necessary for proposed projects. Specifies the effects to people, communities, tribal rights and interests and the environment that need to be evaluated, including state standards and policies that need to be met.
- o Creating a process for enhanced coordination with stakeholders and among state and tribal governments as co-managers.
- o Evaluating projects on a case-by-case basis. Recommending industrial-scale renewable energy development as likely incompatible in state waters.

Page 1-5

Goal 1, Objective 1, 4th bullet point:

Following existing laws, protect and preserve existing uses by first avoiding and then minimizing significant individual and cumulative adverse impacts from potential future activities, including impacts . . .

Page 1-7

Goal 4, Objective 4, 2nd bullet point:

Engage local, state, federal and tribal governments in all phases of the marine spatial planning process to ensure relevant management information and requirements are integrated into the process. The use or activity must comply with all applicable local, state, tribal and federal laws and regulations.

Page 1-14

1.6 Pacific Coast Indians and Treaty Rights

Through signing those treaties, the treaty tribes agreed to allow the peaceful settlement of much of western Washington and ceded land to do so, in exchange for among other things, their continued reserved right to access-harvest fish, shellfish, wildlife, and plants, and exercise

other cultural practices both on and off-reservation. The treaties reserved the right to fish in “usual and accustomed ~~areas~~ grounds and stations” beyond a tribe’s reservation boundaries. Other tribes were recognized by the federal government through federal processes and maintain tribal reservations, but do not have treaties with the United States. The Shoalwater Bay Tribe did not complete the treaty process and is a federally-recognized tribe (Map 2). In 1974, the U.S. District Court for the Western District of Washington (Judge Boldt presiding) upheld ~~these the tribes’~~ treaty fishing rights, affirming the tribal right to ~~access-harvest~~ up to 50% of the harvestable salmon passing through their respective usual and accustomed fishing areas (U&As) (U.S. v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974). This ruling became known as the Boldt Decision. In 1979, the United States Supreme Court upheld the Boldt ~~d~~Decision. The ~~federal~~-court has also acknowledged that the concurrent jurisdiction of treaty tribes creates a co-management relationship with the State. A court decision in 1994 (U.S. v Washington, 873 F. Supp. 1422 (W.D. Wash. 1994), also known as the ~~Rafedie~~-Shellfish decision (~~named for the judge~~), recognized that the treaty fishing right of the coastal Washington treaty tribes and other treaty tribes in Washington includes the right to harvest shellfish to take up to 50% of all fish, including naturally occurring shellfish, in their respective U&As.

The management of the marine environment is crucial to each of the coastal tribes, as the marine environment is integral to their history, culture, identity, and future. Marine resource management as a matter of law is shared with the State and the federal government. The MSP Study Area overlaps with 3,956 square nautical miles of the tribal U&As and can be seen in Map 2 (National Oceanic and Atmospheric Administration, 2016). The MSP provides an opportunity for the State of Washington to progressively plan for new ocean uses, while protecting the current uses, culture, environment, and identity of coastal Washington, including respecting the treaty rights and interests of the five federally-recognized tribes within to the Study Area. The State’s relationship with each of the tribes is of high importance in the MSP process for current and future “new” use discussions.

Footnote 5: The Shoalwater Bay Tribe is a federally recognized tribe but is not party to ~~the a~~ treaty with the United States Stevens treaties.

Page 1-15

Government-to-Government Relationship

The State of Washington and the federally-recognized tribes ~~created~~-signed government- to-government agreements through the Centennial Accord and subsequent Millennium Agreement to consult ~~with each other~~ on matters that may affect ~~one another~~ tribal and State interests (Governor’s Office of Indian Affairs, 2015). In 2012, a state law established state agency procedure requirements for the government-to-government relationship with tribes (RCW 43.376).

The federal government has a ~~federal~~ trust responsibility to federally-recognized tribes. I through this obligation, the federal government works directly with tribes as sovereign nations.

Fishing Treaty Rights Co-Management

Each treaty tribe regulates the fishing activities ~~for~~ of its members within ~~their~~ its respective U&As in accordance with tribal law and judicially-prescribed fishery management responsibilities. Each tribe also maintains its own fisheries management and enforcement staff, enters into management agreements with other co-managers, and engages in a wide variety of research, restoration, and enhancement activities to protect marine resources and improve the scientific basis for resource stewardship (Olympic Coast National Marine Sanctuary, 2011). The coastal treaty tribes, the State of Washington, specifically the Washington Department of Fish and Wildlife (WDFW), and United States government (NOAA Fisheries and USFWS), are co-managers of federal fishery resources in Washington. ~~One example of state and tribal co-management is the Dungeness Crab fishery, which occurs in federal and state waters.~~ The MSP does not address, alter or attempt to influence the fisheries co-management process or relationship.

Page 1-16

The Makah Tribe is active in both domestic and international fisheries management forums (e.g. Pacific Fishery Management Council, Pacific Salmon Commission, North of Falcon, International Pacific Halibut Commission, US Canada Whiting Agreement, International Whaling Commission), ocean policy forums (National Ocean Policy's Governance Coordinating Committee, West Coast Regional Planning Body, and Washington Sub-Regional Planning Team as well as the Intergovernmental Policy Commission), and research. The fisheries of the Makah Tribe include but are not limited to Pacific ~~h~~Halibut, salmon, whiting, ~~B~~black ~~C~~cod, groundfish, and others. The Makah Tribe is currently ~~pursuing~~ seeking a waiver under the Marine Mammal Protection Act so that it can resume the exercise of its treaty the reinstatement of whaling rights, as secured in the 1855 Treaty of Neah Bay.

The concerns of the Makah Tribe relevant to marine spatial planning include, but are not limited to: impacts to treaty fishing grounds and the ability to exercise treaty rights through the siting of permanent or temporary offshore development in important habitats within and outside the Makah U&A; temporary spatial conflicts such as military exercises, vessel traffic, etc.; ~~and~~ oil spill risk and the associated impacts to treaty resources and the environmental conditions on which they depend (i.e., fish, marine mammals, seabirds, etc.); and regulatory actions planned, proposed, or taken by the State or federal government. Climate change impacts, especially on species distribution and harvest access, including but not limited to ocean temperature increases, ocean acidification, hypoxic events, and harmful algal blooms, may also impact marine resources subject to Makah treaty rights are also of great concern.

Makah Tribe statement, end of last paragraph

Add the following: In January 2017, the Makah Tribal Council approved by formal resolution the Makah Ocean Policy. The purpose of this Policy is to "protect and exercise the treaty-reserved rights and culture" of the Makah Tribe that are inextricably tied to the health of the ocean. The Policy acknowledges that in order for the Makah Tribe to preserve its treaty rights, "it is critical for the Tribe to be informed of and actively involved in decisions on actions that

may affect the Tribe's use of treaty resources or the health of the ecosystems upon which these resources depend." The Makah Ocean Policy contains consultation procedures that establish the requirements for when consultation is needed, including when it should begin, as well as pre-notification requirements, points of contact at the Tribe, and what is required of state and federal permitting agencies to initiate formal closure of consultation. The Makah Tribe has provided all state resource management agencies with a copy of the Makah Ocean Policy.

Page 2-41

To be added prior to OCNMS paragraph:

The State of Washington stationed an emergency response towing vessel at Neah Bay in 1999. Since then, the response tug has been called out 57 times, thus preventing an estimated 18,677,954 gallons of spilled oil and gas in the waters off Cape Flattery.

Citation: http://www.ecy.wa.gov/programs/spills/response_tug/tugresponsemainpage.htm

Page 2-105

Tribal Fisheries

Each treaty tribe regulates the fishing activities ~~for~~ of its members within ~~their~~ its respective U&As in accordance with tribal law and judicially prescribed fishery management responsibilities, maintains its own fisheries management and enforcement staff, enters into management agreements with other co-managers, and engages in a wide variety of research, monitoring, restoration, and enhancement activities to protect marine resources and improve the scientific basis for resource stewardship

The ~~coastal~~ treaty tribes also participate in the PFMC process, where these four tribes ~~and~~ as well as other West Coast tribes participate ~~in committees~~ within many of the subcommittees established under PFMC. One and are represented by a tribal seat is appointed on PFMC by the Secretary of Commerce from nominees submitted by the federally recognized tribes with recognized fishing rights in California, Oregon, Washington and Idaho. PFMC does not set ~~fisheries~~ fisheries management regulations for the tribes, as each tribe manages its own ~~fishers~~ fisheries directly. Catch sharing and other management measures are negotiated with state, federal, and tribal co-managers through forums that can differ ~~fishery~~ by fishery (see Section 1.6: Pacific Coast Indian Tribes and Treaty Rights). The tribal fisheries profiles below summarize available information on fishing activities and economic impacts for each of the four coastal treaty tribes.

Makah Tribe

Fisheries are an important component of the Makah Tribe's ~~livelihood~~ culture, ceremonies, subsistence and economy.

Currently, about 70 tribal fishing vessels ~~are operating~~ are operating out of Neah Bay (Makah Fisheries Management, 2017).

Page 2-155

Emergency Towing Vessel, last paragraph:

Update first sentence to include current information as follows: The State of Washington stationed an emergency response towing vessel at Neah Bay in 1999. Since then, the response tug has been called out 57 times, thus preventing an estimated 18,677,954 gallons of spilled oil and gas in the waters off Cape Flattery.

Page 4-1

Introduction to the Management Framework, 2nd paragraph

The MSP Management Framework provides overall guidance and recommendations for applicants, agencies, and third parties on using the plan in practice. The State of Washington and tribal governments are legal co-managers of marine resources within the planning area, and it is essential that tribal consultation occur at the earliest possible stage of project inquiry. Some of the coastal tribes have adopted ocean policies or tribal marine spatial plans that establish resource protection standards as well as formal consultation procedures. Those tribal policies and procedures should be reviewed and adhered to at the earliest stages of project planning. The MSP also contains new enforceable policies that state and local agencies will use in their regulatory processes, and that the Department of Ecology will use to review federal actions under the Coastal Zone Management Act and the Washington Coastal Zone Management Program.

Page 4-1

Introduction to the Management Framework, 3rd paragraph

The information and processes outlined in the Management Framework are essential to assist agencies in evaluating whether a new ocean use project satisfies compliance with the Ocean Resources Management Act and its regulations, and to support tribal government review in determining whether a new ocean use project may have any direct, indirect or cumulative adverse impacts to Treaty protected resources.

Page 4-2

4.1.2 Requirements to Implement the Final MSP

The MSP and state law are not intended to and does not alter or affect tribal treaty rights.

Page 4-8

Table 4.1.4-2: Local permits and other authorities for aquatic projects.

Include an additional row on the table as follows:

Action: All federal, state and local permits and actions affecting U&A Treaty areas

Agency: Tribal Councils

Primary Authority: Treaty of Neah Bay, Treaty of Olympia

Location: State and federal shorelines and waters

Focus Area/Purpose: Protects Treaty marine, aquatic, riparian and terrestrial resources for current and future generations

Page 4-11

4.2 State Plan Implementation, first bullet at top of page

Applicant conducts pre-application meetings with agencies, affected tribal governments and stakeholder groups. Applicant continues to receive feedback from and respond to requests of agencies and tribal governments and others to refine proposed project. (Section 4.2.1)

Page 4-11

4.2.1 Implementation: Process for Reviewing Ocean Uses

1. State agency coordination of review of renewable energy and other new ocean uses

As noted in section 4.1, state and local agencies are required to implement the MSP consistent with their authorities (RCW 43.372.050) and tribal governments must be consulted with beginning at the earliest possible stage of a new proposed project, and a review of tribal ordinances, policies and consultation procedures should be initiated at the earliest possible stage of project planning.

Page 4-22

Important, Sensitive and Unique Areas (ISUs)

The ISUs include standards to maintain the high values of these areas and to protect the ISUs from adverse effects of offshore development, while allowing existing compatible uses such as fishing. Designation of an ISU, like the MSP itself, is not intended to and does not alter or affect tribal treaty rights.

Page 4-29

4.5 Effects Evaluation

To enable evaluation of compliance with the state's ocean use policies and regulations, including the criteria of RCW 43.143.030(2), as well as tribal ordinances, policies and consultation procedures, applicants must provide a written effects evaluation that complies with the contents of Section 4.5 and the applicable Review Standards (Sections 4.6 and 4.8). The evaluation must include the reasonably foreseeable adverse effects on Washington State's coastal resources or uses associated with the development, placement, operation, and decommissioning of a proposed new ocean use. This section does not provide the full list of other state laws and policies or requirements with which an applicant will have to demonstrate compliance (see Section 4.1.4 and 4.1.5). WCMAC's problem statements and recommendations also informed the development of the listed effects. Applicants should review these for more detailed information on stakeholder concerns about impacts (see Chapter 5).

Fisheries Maps

We recommend the Plan strengthen the language surrounding analyses of existing uses to better reflect the lack of tribal uses data in these analyses. For example, the commercial fisheries maps need to reflect that those maps are solely non-tribal fisheries. The current language does not sufficiently emphasize the lack of tribal use data so that a project proponent would know the full extent of ocean uses within these maps. For example, Table 2.4-8 and Maps 17-25 should clarify that they are maps of non-tribal commercial fishing. Additionally, on page 135, when discussing vessel participation in the Dungeness crab fishery it would be important to clarify the number of vessels do not include tribal vessels. These suggested changes would not alter the length or intent of these figures; however, they would clarify within the plan that these figures are not comprehensive because they do not include tribal uses.

Important, Sensitive, and Unique (ISU) Habitats

We have concerns about the State's unilateral designation of ISUs. The process to designate ISUs has not included tribal consultation, despite that this new designation has the potential to affect Treaty resources and/or future economic development opportunities of the Makah Tribe. The northern coast is an ecologically rich region, in large part due to the strong stewardship ethic practiced by the Makah for generations, and this area represents a significant portion of the designated ISUs. It needs to be clear within the MSP and the designation of ISUs, that the designation of an ISU, like the MSP itself, is not intended to and does not alter or affect tribal treaty rights. We have provided language to support this point above. Identifying ISUs to protect existing uses, such as fishing, from offshore development is beneficial for the Tribe's Treaty fishing rights. However, the Makah Tribe strongly objects to the potential use of ISUs to restrict future economic development opportunities, such as energy security through the pursuit of marine renewable energy, for the Makah Tribe.

There needs to be clarity within the Draft Plan on where ISUs are being designated, the maps depicting ISUs extend far beyond state waters, however, the description of ISUs indicate they are only designated within state waters, *i.e.*, shoreward of 3 nautical miles. We recommend each map make clear that designated ISUs are located only in state waters rather than in other waters depicted in the maps.

We would appreciate additional technical and policy information on the designation of ISUs, and additional clarity on how the State's proposed designations will avoid conflicting with Makah's sovereignty and exercise of treaty rights. Once we have received and reviewed this information, we can determine if formal consultation is required to resolve any remaining disagreements and, if appropriate, provide further comments or engage in further discussions.

Use of New Data and Information

The Coastal Treaty Tribes with the Northwest Indian Fisheries Commission and NOAA have developed a Habitat Framework Initiative. This project standardizes existing seafloor data into a

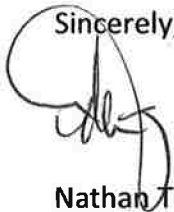
consistent habitat classification scheme, the Coastal and Marine Ecological Classification Standard, or CMECS. These data are available for the entire west coast and for the State's marine spatial planning area of interest. This new data should be included in the marine spatial plan, specifically Map 3.

Conclusion

We appreciate the opportunity to provide comments on the Draft Plan. As stated above, the Makah Tribe strongly believes that, given our legal co-management status over natural resources with the State of Washington and federal government, language must be added to the final version of the Plan as provided above in order for us to find the Plan satisfactory. The Makah Tribe expects to complete our tribal marine plan in the near future and look forward to continued collaboration and management of our shared marine resources with the State.

If you have any questions or would like to discuss these comments further, please contact the Makah Tribe's Natural Resource Policy Analyst, Katie Wrubel (katie.wrubel@makah.com or (360) 640-2491). Thank you for your time and consideration.

Sincerely,



Nathan Tyler, Chairman
Makah Tribal Council

Cc: Governor Jay Inslee
Senator Maria Cantwell
Senator Patty Murray
Ms, Maia Bellon, Director of Washington State Department of Ecology
Ms. Rebecca Smyth, West Coast Director, NOAA Office for Coastal Management
Chairman Tony Foster, Quileute Tribe
Chairman Bernard Afterbuffalo, Hoh Tribe
President Fawn Sharp, Quinault Indian Nation