



MAKAH TRIBE

P.O. BOX 115 • NEAH BAY, WA 98357 • 360-645-2201



IN REPLY REFER TO:

October 6, 2019

Ms. Sonja Larson
Rulemaking Lead
Department of Ecology, Spills Program
PO Box 47600
Olympia, WA 98504-7600

Electronically Submitted

Re: Makah Tribal Council Office of Marine Affairs comments on the Department of Ecology's Washington State Oil Spill Contingency Plan Rule-Making (WAC 173-182)

Dear Sonja Larson:

The Makah Indian Tribe's Office of Marine Affairs submits these comments in response to the public comment opportunity for the review of the Washington State Oil Spill Contingency Plan Rule-Making (WAC 173-182). While we are supportive of several of the proposed changes to the plan, we do have some concerns and observations which are described below. Furthermore, while we recognize that this process was limited in both scope and timeline by the legislative direction included in SB 6269, we have identified three planning opportunities that are critical for enhancing the response capacity of Washington State and continuing to build a world-class safety regime in Washington waters. We look forward to working with Ecology to address our concerns and develop a Contingency Plan which is more comprehensively aligned and protective of treaty rights and resources.

The Makah Tribe and the Office of Marine Affairs:

The Makah Tribe is a federally recognized Treaty Tribe in Neah Bay, Washington. The ancestral homeland of the Makah Indian Tribe, the "People of the Cape," is located at the Northwest point of the Olympic Peninsula in Washington State. The current reservation is 30,067 acres and our treaty protected area includes Usual and Accustomed Hunting and Fishing Stations (U&A) in waters of the United States that extend off the outer coastline encompassing approximately 1,550 square miles of marine waters.

The existence and well-being of the Makah people has always been fundamentally tied to our relationship with the environment, especially the ocean. The Makah people hold a spiritual reverence to the ocean and have a subsistence dependence to its bountiful natural resources that is all inclusive and comprehensive in nature. Current tribal members are charged by tradition with ensuring the continuation of our culture through the preservation of, and continued access to, our natural resources. The 1855 Treaty of Neah Bay reserves the inherent rights of the Makah to retain and exercise inherent sovereign authority over our treaty protected area and ownership of the resources therein ("Treaty Resources"). The Terms and Conditions of the 1855 Treaty of Neah Bay also created the special relationship that exists between the federal government and the Makah Tribe called "Trust Responsibility." Federal Indian Trust Responsibility is one of the

legal obligations under which the United States bases its means to begin to meet its moral and fiduciary obligations to uphold the highest responsibility and trust toward American Indian tribes.

As a resource trustee, owner and a co-manager of marine resources, the Makah Tribal Council fully recognizes the ocean and its resources to be at the foundation of our cultural and economic way of life and fully embraces the protection and sustainability of the ocean environment and its resources as an essential obligation within our Tribal Trust Responsibility to our Tribal membership.

Given this responsibility, we are keenly aware and concerned with the threat oil spills pose to our way of life. Our previous experience with oil spills has demonstrated that even though the probability of an oil spill is small, the potential consequences to our precious ocean resources are very high. Over 1.5 million gallons of oil has been spilled in our treaty area since the early 1970s, and the Makah have witnessed firsthand the devastating effects of oil spilled by the *General Mieggs*, the *Nesstucca* barge and the *Tenyo Maru*. These experiences required the tribe to become more engaged in marine policy, vessel traffic safety, oil spill prevention, preparedness and response and natural resource damage assessment, in part through the creation of the Makah Tribe Office of Marine Affairs (OMA). The OMA addresses the tribe's oil pollution and vessel traffic safety treaty interests with our federal, state, tribal and industry partners through enhancing oil spill response capacity at the Makah Tribal level, the state and regional level, and the US/Canadian transboundary level. The Makah Tribal Council expresses its sovereign treaty status by participating in federal and state policy, legislative and rule-making processes that include representatives from industry and the general public, as a resource trustee based on our treaty status as a sovereign. The OMA participates in these forums in order to project our authorities, interests, and responsibilities to our membership in protecting our treaty resource interests at an adequately comprehensive geographic level because an oil spill does not recognize geo-political boundaries. OMA representatives have participated in some of the pre-publication Ecology workshops regarding the development of these proposed changes. It is with this experience that we provide the following commentary on the proposed changes to the WA State Contingency Plan.

Spill Management Teams:

We are supportive of the additional regulation of spill management teams (SMTs) and believe that this will result in SMTs being held to a higher standard and increase predictability and reliability of response. However, we request that Ecology retain the requirement for the Incident Commander representative to arrive on scene (as opposed to in state) within six hours. For remote areas like Neah Bay and most of the Makah Reservation and U&A, an Incident Commander who is in state may still require several additional hours to arrive on scene. We feel that requiring plan holders to have their Incident Commander representative on scene as quickly as possible is protective of treaty trust resources and of communities in remote areas of WA State. Furthermore, while we recognize the importance of planholders having an Environmental Unit representative as part of their SMT, the Northwest Area Contingency Plan states that the Environmental Unit shall not be led by the Responsible Party. We therefore request clarity on the need for the SMTs to include an Environmental Unit *Leader* (as opposed to representative) and request that the plan reference the NWAC requirement. We rely on our federal agencies and state

representatives with trust responsibility obligations (not industry) to support the protection of our treaty resources.

Sinking Oils:

We are supportive of the changes in the plan and the State’s recognition of the new and growing threat that the transportation of sinking oils in our waters poses to the health of the people and ecosystems of WA State. We recommend Ecology to designate the planholders and/or oil types which require this additional planning requirements – instead of allowing the planholders themselves to make a determination of whether oil may sink. We feel that this is particularly important as many unknowns remain with regards to the behavior of heavy oils (especially diluted bitumen) and data about weathering is limited and exact chemical composition information is proprietary. We also recommend Ecology to continue to track – and incentivize where possible – the identification and development of better technologies for recovering non-floating oils. We are concerned that the response technology to recover sinking oils has not kept pace with the expansion of on-water transportation of these products and recommend the State to both strictly and objectively evaluate existing response capacity as well as be readily capable in adjusting regulations if and when improved technologies become available. In the absence of improved technology, we want to reiterate the importance of both continued advancements in prevention technology and robust, updated, and frequently tested GRPs which incorporate the potential for sinking oils. We recommend that all GRP updates be undertaken with extensive tribal engagement, as tribal staff have detailed local knowledge of resources and potential risks (more below).

Chemical Dispersants:

While we are supportive of expanded planning requirements in the Contingency Plan, we are concerned that chemical dispersants are becoming the de facto response method of choice – regardless of the NWAC Plan’s requirement that mechanical recovery be the first-choice response method in this region. We request assurances that this expanded planning requirement does not inadvertently incentivize the use of chemical dispersants in situations where they will be less effective or where other methods are possible. We strongly recommend Ecology as well as the Regional Response Team and the federal government to incentivize both the development and adoption of more effective mechanical alternatives to dispersants as well as the stockpiling of less-toxic and more effective dispersant types.

Documenting Compliance with Planning Standards:

We are concerned about the proposed change to allow training exercises and planned drills (as opposed to unannounced drills and actual incident responses) to satisfy planning standard requirements. We recommend Ecology to continue to rely – or primarily rely - on unplanned drills (and incident responses – however rare) to verify the planholders’ compliance with planning standards as these types of drills most closely mimic the conditions of actual spills, which will not be announced in advance.

Transfer Sites & Facilities with Vessel Terminals:

We are supportive of the additional planning standards for transfer sites and supportive of additional planning standards for transfer sites and facilities with vessel terminals. We feel that the addition of the specific 4-hour planning standard for Current Buster (or similar) mechanical recovery technology is an important addition to our regional preparedness and response capacity. While there are not transfer sites in Neah Bay, this technology represents an important step forward - especially in areas like Neah Bay, the Strait of Juan de Fuca, and the Outer Coast, where weather conditions and ocean state may inhibit the use of less-robust and more traditional systems. However, we expect that Ecology will emphasize the need for *additional* response capacity to meet these standards – as opposed to the redistribution or re-accounting for existing response capacity. We also recognize the vital importance that regular training and exercising plays in ensuring effective response and recommend that Ecology incorporate the use of Current Buster technology into training, certification, and drill processes.

Requirements for Response and Protection Strategies:

We support the expanded spatial scope of Geographic Response Plans to include the water column and benthic species. We recommend that Ecology continue and expand their tribal engagement in GRP development and updates across the state. Tribes are uniquely qualified to contribute detailed local information about their lands, waters, and resources. We also urge Ecology to ensure that GRPs are tested and verified regularly. Again, Tribes are fishing, hunting, and gathering in the vicinity of their local GRP strategies year-round and can be an invaluable resource in understanding seasonal changes which may complicate GRP deployment and should be considered essential partners in ensuring that GRPs are successful and useful. We look forward to continuing to work with Ecology on updating the GRPs for the Strait of Juan de Fuca and the Outer Coast.

Planning Standards for Shoreline Cleanup and Air Monitoring:

We are supportive of the standardization of shoreline clean-up and air monitoring standards. We understand that much of the regulated community has already been adhering to these practices, and formalization through State authority is an important step in ensuring that these good practices continue and are adopted by any new actors in the response community.

Wildlife Response:

We are supportive of additional clarity on planning standard requirements and the focus on Southern Resident Killer Whale protection.

Drill Participation, Scheduling, Evaluation:

We recommend that Ecology include large-scale multi-plan holder drills on a regular basis that combine both the Incident Command System elements and the equipment deployment pieces to mirror real-time decision-making and deployment – as would occur in a real-world real-time spill.

The following section addresses the scope of the current rule-making and where we fully support Ecology taking some of the ongoing discussions around Contingency Planning, Best Achievable Protections, and enhancing the collective planning, preparedness, and response capacity of

Washington State in the future. We recognize that this process was limited by legislative directive in terms of both scope and timeline and look forward to continuing to contribute to more extensive and meaningful changes to the planning framework in a timeline which allows for robust scientific and legal review, tribal government to government interaction and consultation, and public process.

- **Effective Daily Recovery Capacity (EDRC):** We are concerned that the existing methodology used by the State to estimate recovery capacity is overestimating actual capacity and fails to take a systems approach to oil spill response. We feel strongly that EDRC methodology is the way forward, particularly given the introduction of additional vessels and petroleum products into the marine transportation system of our shared waters. We recognize that this would be a significant change requiring extensive process and input from the response community, the regulated community, tribal sovereigns, the environmental community, and other stakeholders. However, we feel that this is an imperative step towards protecting our treaty resources from the threat of oil spills. We look forward to working with Ecology to design a path forward to consider EDRC for Washington State, continuing the legacy of proactive and effective leadership in the oil spill response community.
- **Mechanical Recovery Technology Improvements:** While we are encouraged by the inclusion of specific references to current buster technology in the proposed update, research and development in mechanical recovery technology for oil spill response has lagged. We urge Ecology to identify, facilitate, and encourage creative opportunities and mechanisms to incentivize the creation and adoption of new, effective and innovative mechanical recovery technology.
- **Planning vs. Performance Standards:** The Makah Office of Marine Affairs has long urged the response community at all scales (transboundary, federal, state, local) to transition from planning to performance standards for contingency planning. Planning standards do not guarantee the protection of our treaty resources in an adequate manner. We recognize that the direction to shift from planning to performance standards may ultimately require federal action. However, we request that in demonstrating commitment to performance standards in WA State that Ecology assist the Makah Tribe in facilitating a drill which would serve as a tool to assess the reality of cascading response equipment and personnel to remote locations such as Neah Bay. This type of exercise is especially important for remote communities like Makah who intimately understand the logistical and transportation challenges of quickly and safely traveling to remote locations in emergency situations.

In closing, we look forward to working with Ecology to address our concerns with some aspects of the Contingency Plan – and the implementation of those aspects we support. We respectfully request that Ecology contact the Office of Marine Affairs to discuss the issues we have raised which are outside the scope of the current rule-making update. We look forward to continuing to work with the Department of Ecology and the response community to craft a world class vessel traffic safety and oil spill response regime that provides the highest level of protection for the lands, waters, and resources of the Makah Tribe and all Washingtonians.

Please contact the Manager of the Office of Marine Affairs, Chad Bovechop (chad.bovechop@makah.com or (360) 640-0295) if you have any questions or would like additional information. Thank you for your time and consideration.

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'Chad Bovechop', with a stylized flourish at the end.

Chad Bovechop
Manager, Makah Office of Marine Affairs