



LOWER ELWHA KLALLAM TRIBE

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Submitted Electronically to Ecology Public Comment Website
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Casey Dennehy
Marine Policy Associate
Washington State Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Re: Lower Elwha Klallam Tribe’s Comments on DRAFT Guidance for Marine Net Pen Aquaculture in Washington State

Dear Mr. Dennehy:

The Lower Elwha Klallam Tribe (“Lower Elwha”) submits these comments on the Draft Guidance for Marine Net Pen Aquaculture in Washington State. As we understand it, this Guidance is in the nature of a compilation of the existing regulatory framework and best practices and more general practical guidance (as the title indicates) for developing, reviewing, and commenting on proposals for net pen aquaculture throughout the inland marine waters of the Puget Sound area and Strait of Juan de Fuca. This will be a very useful document and should promote a more coordinated regulatory approach under existing legal authorities and permitting processes. To that end, the Tribe has some suggestions to highlight the importance of consulting with Tribes early and often during the development and permitting of an aquaculture project, in order to understand and account for impacts to fundamental tribal interests. In addition, although the Guidance does not appear to promote new policy or regulatory requirements, its very nature as a compendium provides an opportunity to point out policy considerations that should be accounted for early in a coordinated regulatory review process.

At the outset, some background regarding Lower Elwha will help inform our comments. We occupy and govern the Lower Elwha Reservation at the mouth of the Elwha River, along the

Strait of Juan de Fuca, a few miles west of the City of Port Angeles. We hold treaty fishing rights under the 1855 Treaty of Point No Point, and our Usual and Accustomed fishing area includes all the surface streams that drain into the Strait of Juan de Fuca and the northern portion of Hood Canal, as well as the Strait of Juan de Fuca, all marine waters west of Whidbey Island, Admiralty Inlet, lower Hood Canal, and the San Juan Islands. Thus, our treaty rights encompass a very large expanse of marine water that could one day be affected by a net pen aquaculture proposal.

The Tribe has been very active for many years in stream restoration and rehabilitation throughout the north Olympic Peninsula. We have led the successful effort to remove the two hydro-electric dams on the Elwha River and are hard at work on restoration of its ecosystem; this dam removal effort is the largest ecosystem restoration project ever undertaken in the United States. We are also extremely active in the cleanup and restoration of Port Angeles Harbor. By agreement with the Department of Ecology and the U.S. Environmental Protection Agency (EPA), we have a major collaborative role in the cleanup of toxic contamination in Port Angeles Harbor, released by sawmills along the waterfront, which Ecology is leading under authority of the State's Model Toxics Control Act (MTCA). And in 2012, we initiated the formation of the Port Angeles Harbor Natural Resources Trustee Council, under which Tribal, Federal, and State agencies have been successfully negotiating settlement agreements to compensate for injuries caused to the Harbor's aquatic resources by the release of toxic contaminants. For several decades we have also carried out shoreline restoration projects along Ediz Hook, the spit that encloses the Harbor, on lands owned by the Tribe, DNR, the U.S. Navy, and the City of Port Angeles. Clearly, we have the strongest possible interest in restoring and protecting the aquatic resources in Port Angeles Harbor, based on the Tribe's aboriginal occupancy and treaty fishing rights in the Harbor.

Another form of pollution and resource injury in Port Angeles Harbor was caused by Atlantic salmon net pens, most recently operated by Cooke Aquaculture and its predecessor Icicle Seafoods. DNR canceled Cooke's lease in 2017 for chronic and flagrant violations. Cooke is now proposing a new net pen project at the same site, this time for triploid steelhead and other species; it has found a willing tribal partner in the Jamestown S'Klallam Tribe, which seems to be asserting the notion that somehow DNR has a legal obligation to issue a new lease to the company who committed serious violations of its previous lease. The Lower Elwha Klallam Tribe strongly opposes this project and notes emphatically that there is no treaty-based right to net pen aquaculture on aquatic lands owned by the State in an area where another Tribe holds treaty fishing rights that would be harmed by the proposed new net pens.¹

¹ The purpose of these comments is not to argue Lower Elwha's case against Cooke's new net pens proposal, but rather to illustrate that, as one of the very few pending proposals for a new project, it presents several significant issues implicated by the Draft Guidance. One is the misguided notion that there is a right to operate net pens. Another is the unprecedented situation presented by a Tribe partnering with international corporate aquaculture to seek a net pen lease over the objection of the Tribe with the greatest ties to the aquatic lands in question.

With the foregoing general comments as background, we offer the following specific comments on the Draft Guidance:

p.13 – Is there any process by which recommendations in this guidance document may be reviewed and codified as affirmative law and regulation? This page correctly acknowledges that the Draft does address impacts to tribal treaty rights, and Lower Elwha generally concurs in the statement that such impacts must be made on a project-specific basis. But we also think that the final Guidance should provide more guidance on how and when to address impacts to treaty rights and tribal cultural resources, which in Lower Elwha’s experience in Port Angeles Harbor, often go hand in hand. One way in which to do this is for each cognizant agency to engage in meaningful government-to-government consultation with affected Tribes at the earliest stages of net pen project evaluation. This should be undertaken by high-ranking officials in the agency, and consultation should be invited, not simply waited for. Permitting agencies – or DNR as the lessor of State aquatic lands must timely consult with affected tribes prior to undertaking substantial work on processing permit applications. Tribes are governments and co-managers of the resources in which they hold treaty rights and must not be relegated to the status of generic “stakeholders” in a public comment process.

p.14 – We agree that significant additional scientific research is required to study the myriad potential impacts of net pen systems on marine ecosystems.

p. 18 – Role of Tribal Governments:

This section should incorporate a stronger statement regarding the importance of consulting with Tribes as noted in our comment above on Draft at p. 13.

p. 21-22 – U.S. Army Corps of Engineers (USACE):

It should be noted that USACE is responsible for two permits usually needed for a net pens project – the Section 10 Rivers and Harbors Act Permit and the Clean Water Act Section 404 Permit – and in the case of each permit, USACE will be obliged to consult with the National Marine Fisheries Service (NMFS) under Section 7 of the Endangered Species Act to determine whether the requested permit will result in jeopardy to ESA-listed species – such as Puget Sound Chinook and Steelhead.

p. 34 – DNR Authorizations:

While it is true that DNR cannot act on the issuance of a lease until all other permits are in place, it should be noted in the Guidance that it does not follow that DNR is legally obliged to issue a lease if all permits are in place. There is a real concern that over-reliance on a set of permits can lead to segmented review of a project and lead to undue pressure to approve a lease as a kind of ministerial act. That is neither correct nor appropriate. Lower Elwha appreciates that the last bullet on page 34 makes a linkage between the rights of the public under the Public Trust Doctrine and the Treaty rights of Indian Tribes. DNR’s public trust obligations are rooted in the Statehood clause of the U.S. Constitution, which makes each State the owner and trustee of

submerged and aquatic lands. The public values of the resources of such lands are remarkably similar to the values embodied in the Treaty rights held by Tribes in aquatic resources.

p. 35, Table 2 – The Table should note that USACE will be obliged to consult with NMFS under Section 7 of the ESA.

p.40 – Environmental Considerations: Risks and Best Practices:

Site Selection – Additional factors to consider in the process of siting a new marine net pen facility should include comments from the local community and consultation with potentially affected tribes. Impacts to Treaty fishing areas (finfish and shellfish) should be included as part of the navigation and shipping lanes assessment process.

Shoreline Master Program – Local Shoreline Master planning entities across the state have had limited ability to develop restrictions on marine net pen operations, even in cases where counties or cities were adamantly opposed to the siting of these facilities. This is due to Legislative mandates that required local SMP planning units to include provisions for marine net pen as preferred water-dependent uses. There was considerable opposition to marine net pens in Clallam and Jefferson Counties in both SMP planning units. Therefore, it is inappropriate to use the boilerplate language promulgated by the Legislature to the local SMP entities as a means of justifying local support for marine net pen proposals.

p. 41 – The Draft states:

If an operator applies for permit(s) for a commercial finfish net pen through the local SMP, they will be required to provide a range of information about the proposed activity, including a characterization of the habitat and resources that are beneath and adjacent to the chosen site.

We note that it is critical that habitat assessments completed prior to the siting of a net pen operation should require eelgrass surveys and kelp surveys within at least 500 meters (1640 ft.) of the proposed infrastructure, including anchoring systems.

p.46 – *Adjacent and nearby sensitive and critical saltwater habitats* - this needs to be better defined.

p.47 – The Draft states regarding user conflicts:

The quantity and intensity of other water dependent uses also needs to be considered when evaluating locations for net pen facilities. Areas with existing high intensity uses should be avoided to minimize conflict. Depending on the type of use(s), it may also be necessary to avoid locations with low intensity uses if those uses are of high importance or is a prioritized type of activity.

We agree with this guidance, but how is this addressed in the regulatory environment? Port Angeles Harbor is an ideal example of a high intensity environment that includes commercial shipping, US Coast Guard vessel, Pilot, Naval vessel, and public recreational boat traffic in

concentrated areas. Other areas have sensitive shorelines with eelgrass beds that are only now recovering after years of adverse industrial impacts such as wood waste inputs.

p. 48 – *Consult with local government and their SMPs.* See comments for Draft at p. 40, above, captioned **Shoreline Master Program**, regarding limitations of local SMPs.

p. 52 – The Draft states:

Outside of the permitting process, an independent study of aquaculture techniques to reduce pollutant discharge and their economic feasibility can be conducted. Any independent AKART analysis must identify new and improved minimum technology to reduce or eliminate feed wastage and improve fish containment so to reduce or eliminate metabolic waste discharge and fish escape.

Under what scenario would an independent study be conducted if not required of the proponent by one of the regulatory agencies?

p.55 – The Draft states:

In Washington, project proponents work with local jurisdictions using their Shoreline Master Plan criteria and site-specific data to best site a net pen facility.

Again, local SMPs likely did not include this level of specificity to inform appropriate siting of marine net pen operations.

p.56 – The Draft states:

Monitoring sediment bacteria for resistance to antibiotics. Antibiotics are milled with fish feed after being prescribed by a state licensed veterinarian. Medicated feed use is reported monthly to the permit authorities, WDFW and Ecology. Use rates are monitored. If rates of use increase and there is concern the benthos may be at risk of concentrating uneaten medicated feed, monitoring may be required under the NPDES permit authority.

This appears to be a topic where there is little information in the literature to consider impacts to marine receptors. Other sections of this Draft Guidance provide citations of scientific studies, but this section does not appear to include relevant studies into potential adverse impacts of antibiotic application in marine environments. More study should be required prior to any significant resumption of net pen activities in Puget Sound and the Strait of Juan de Fuca. What media and ecological receptors would be sampled to evaluate impacts? How would resistance to antibiotics be assessed?

p. 60 -- *Mitigating Risks of Biofouling*

It seems that there should be language that directs marine net pen operators to properly dispose of derelict nets at an appropriate upland landfill.

p. 62 – *Best Practices to Prevent Marine Debris*

Most of these appear to be voluntary practices. However, as with other Best Practices in this Draft Guidance, many of these recommendations should be mandated under agency-specific

regulations (e.g. marking gear, financial security requirements, Marine Debris Action plan partnering).

p. 95 – The Draft provides Recommendations for Legislative Oversight and Support

Recommendation #1 - Implementing the guidance, ensuring the best practices are being used, and putting appropriate regulatory oversight in place requires funding beyond which is allocated currently in agency budgets.

This recommendation should be strengthened to propose that the Legislature provide funding for these underfunded compliance objectives *prior to allowing a resumption of marine net pen activities*. Alternatively, lease agreements and permits could include provisions that require fees to help defray these costs to Washington taxpayers.

Recommendation #3 – Fund an economic and engineering study to determine the minimum standard technology marine finfish net pen aquaculture should use in Washington for the elimination and prevention of impacts to Puget Sound.

Evaluation and assessment of upland re-circulating systems or in-water closed or semi-closed systems should be given priority in consideration of marine net pen operations. The additional costs ascribed to these systems should be considered part of a business model that reduces polluting effluent streams from marine systems. This is similar to ongoing efforts to reduce, capture, and treat the effluent streams from polluting industries along marine and freshwater shorelines.

Recommendation #4 – There are data gaps in our knowledge of how marine net pen aquaculture may affect the environment and natural resources....

We agree with the recommendation that the Legislature provide ample funding to support the research that addresses data gaps in knowledge (e.g. bacterial antibiotic resistance).

In conclusion, we hope these comments prove useful. The Lower Elwha Tribe appreciates this opportunity to comment. Our point of contact for further discussion is our Natural Resources Director Matt Beirne at matt.beirne@elwha.org. Please do not hesitate to contact him for questions or further discussion.

Sincerely,



Frances G. Charles
Tribal Chairwoman