



DYKES EHRLICHMAN LAW FIRM

Land Use, Real Estate, & Environmental Law

September 30, 2021

Mr. Carlos Clements, Program Manager
Spill Prevention, Preparedness, and Response
Washington Department of Ecology
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Via Electronic Mail

Mr. Brian Kirk, PMP
Prevention Section Manager
Washington Department of Ecology
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Re: Combined Comment Letter on Two Ecology Projects Under ESHB 1578:

- Scope of Work for Analysis of Tug Escorts; and
- Scope of Work for Analysis of Emergency Response Towing Vessel

Dear Carlos and Brian:

Thank you for the courtesy your office and staff have shown to staff for the Swinomish Indian Tribal Community during your ongoing study of vessel traffic risk in the Salish Sea. We look forward to continued dialog with you at the staff level as your work proceeds. At some point, we will work with you to arrange a formal government-to-government consultation between Director Watson and Swinomish Chairman Steve Edwards consistent with the outreach requirements of ESHB 1578.

At this time, at the staff level, we want to offer you our comments and input on your work to create a new oil spill risk model, and to create a scope of work for the associated two projects described above (Analysis of Tug Escorts and a proposed Emergency Response Towing Vessel (ERTV)). This comment letter incorporates various attachments, including the paper commissioned from Nash Maritime.

This model and the two analysis projects are important to the Swinomish Indian Tribal Community and treaty fishing tribes in general, because they are designed to serve as the basis for new rulemaking by the Board of Pilotage Commissioners on vessel safety. We can also anticipate that your analysis will be utilized in legislative and other public policy forums where it is important to characterize risk and evaluate new safety measures.

It is important to reaffirm the context for the work that you are doing in support of the Board's rulemaking. Because your work is designed to lead to rulemaking, we believe it must necessarily be guided by the goals of that rulemaking outlined in ESHB 1578:

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. . . the board of pilotage commissioners must also design the rules with a goal of avoiding or minimizing additional underwater noise from vessels in the Salish Sea, focusing vessel traffic into established shipping lanes, protecting and minimizing vessel traffic impacts to established treaty fishing areas, and respecting and preserving the treaty-protected interests and fishing rights of potentially affected federally recognized Indian tribes.

ESHB 1578, § (3)(6) (now codified at RCW 88.16.260) (emphasized added). We appreciate that you and your staff have conducted your work on the oil spill risk model in a way that demonstrates you are mindful of this nexus with the goals of the rulemaking.¹

To assist you further in that regard, we offer the attached evaluation prepared for the Swinomish Indian Tribal Community by a respected international maritime risk firm, Nash Maritime. As we have discussed, it has been Swinomish' intent that the Nash analysis support your work by offering an outside, peer review of methods described to date. Their analysis is complimentary of your model construct and offers suggestions to ensure that the model remain as flexible as possible, to answer the kinds of questions that must be answered when "protecting and minimizing vessel traffic impacts to established treaty fishing areas." We look forward to discussing their conclusions and recommendations with you in a staff-level meeting in the near future.

The analysis by Nash Maritime is also offered in the context of your immediate request for comments on Scope of Work. As you have acknowledged in your two descriptors for the Scope of Work, the risk model evaluated in the Nash Maritime paper serves as the underpinning of the Tug Escort and ERTV analyses captioned above. We would go so far as to say that the most critical component underlying these Scope of Work descriptors is the model. Accordingly, the Scope of Work descriptors should be amended to include a scope of work and timeline for completion of the model. We encourage you to revise your scope of work for the model to include study of the issues identified in the attached report.

One of the recommendations in the attached is that the scope of work and timeline for the model include a specific event in the future in which you display the workings of the initial model (in sample video displays), so that functionality can be discussed and adjusted in response to comments by tribes and stakeholders. We trust that the other recommendations for transparency and functionality in the Nash Maritime report will be given your full consideration.

Swinomish would also like to see the Scope of Work for the Tug Escort Analysis dedicate a portion of the analysis to an evaluation of how additional tug escorts would generate additional new vessel trips through treaty fishing areas. As discussed in multiple forums, risk reduction and mitigation measures often generate more vessel traffic, however well-intentioned. The report could include an assessment of the degree to which tribal fishermen already experience conflicts between tug transits and the laying of treaty fishing tribe gear for crab and salmon harvest.

¹ In the interests of a thorough summary of the legislative intent, we note that Section 1 of ESHB 1578 recognized that, among the community interests harmed by an oil spill, the spill could "violate the treaty interests and fishing rights of potentially affected federally recognized Indian tribes."

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The Scope of Work for the ETRV includes a discussion of how oil spill risk is distributed when different variables are adjusted. In line with the foregoing discussion of the rulemaking goals, we request that the Scope of Work be modified to include a statement that one of the variables to be adjusted to analyze risk would be the amount of oil or petroleum product on board vessels when transiting Rosario Strait or connected waterways, including those in transit and those at anchor. This will necessarily require development of the means to quantify historical levels of oil or product on board vessels in transit or at anchor.² We understand the complexities involved in the assessment of that variable, but it is a key concern in the areas where oil/petroleum product transport is highest – those connecting waterways between Anacortes and Ferndale. As we have discussed, this is prime fishing area for Swinomish and other treaty fishing tribes. In order to portray risk accurately, Ecology will have to solve this analytical question.

The Swinomish Indian Tribal Community remains committed to working with you to refine the oil spill risk modeling tools in a manner that ensures risks to treaty fishing interests from oil spills and vessel traffic are fully and accurately depicted.

Thank you for your attention to these comments and the attached report from Nash Maritime. If we can answer any questions concerning these suggestions, please call me (425) 268-5553 or Jim Jannetta (225) 313-4316.

Very truly yours,



Tom Ehrlichman

cc: Mr. Joe Williams, Swinomish Indian Tribal Community
Mr. Alex Hess, Department of Ecology alex.hess@ecy.wa.gov
Mr. James Jannetta, Office of Swinomish Tribal Attorney
Ms. Melody Allen, Office of Suquamish Tribal Attorney
Ms. Saza Osawa, Office of Tulalip Tribal Attorney
Mr. Ed Rogers, Nash Maritime
Mr. Andrew Rawson, Nash Maritime

² See Nash Maritime report, attached, at Page 12.