

March 20, 2023

Angela Zeigenfuse, WQ Program
Washington State Department of Ecology
PO Box 47600
Olympia, WA 98504-7600
Email: angela.zeigenfuse@ecy.wa.gov

RE: Naval Base Kitsap Bangor NPDES Permit Reissuance, #WA0025577

Dear Ms. Zeigenfuse,

Thank you for the opportunity to provide comments on Washington State Department of Ecology's (Ecology's) Clean Water Act Section 401 Certification of the draft United States Department of the Navy Naval Base Kitsap Bangor National Pollutant Discharge Elimination System (NPDES) Permit (#WA0025577) (draft permit). Naval Base Kitsap Bangor, and the waters surrounding it, are culturally and materially important for the Port Gamble S'Klallam Tribe, as these lands and waters have been inhabited and utilized for thousands of years. Even today Tribal members harvest shellfish from beaches within the base. The Port Gamble S'Klallam Tribe has reviewed the draft permit and requests Ecology include certain conditions in its 401 Water Quality Certification so that the permit protects water quality and complies with federal and state law.

I. The Importance of the Waters to the Port Gamble S'Klallam Tribe

The Port Gamble S'Klallam Tribe is a fishing tribe. Since time immemorial, fishing has been the foundation on which the Port Gamble S'Klallam Tribe's culture, economy, and ceremonial life was based. In 1855, when the Port Gamble S'Klallam Tribe entered the Treaty of Point No Point¹ with the United States, sacred promises were made between sovereign nations. The Port Gamble S'Klallam Tribe and others ceded hundreds of thousands of acres of their homelands, while reserving certain rights to themselves. Chief among the rights reserved—and persistently defended by the Tribe—is the right to continue taking fish and shellfish as they always had throughout their usual and accustomed fishing grounds (U&A). Article 4 of the 1855 Treaty of Point No Point states:

The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands.

With this treaty language, the Port Gamble S'Klallam Tribe, like other Treaty Tribes in Western Washington, reserved fundamental rights that they had exercised since time immemorial. The Treaty was intended to allow the Port Gamble S'Klallam Tribe and its citizens to continue their ways of life in the face of white settlement, both at that time and in perpetuity, in large part by

¹ 12 Stat. 933.

continuing robust tribal harvest of fish in off-reservation marine waters and freshwater rivers and lakes. And in addition to extinguishing tribal land claims to pave the way for orderly non-native settlement, the treaty-makers' recognition of these reserved rights secured for the United States, as instructed by their superiors in Washington, D.C., the crucial practical benefit of not having to pay for the Indians' perpetual subsistence.

To this day, fish remain of central importance to the Port Gamble S'Klallam Tribe's culture, economy, ceremonies, and diets. However, despite the promises made, the Port Gamble S'Klallam Tribe's way of life is now severely threatened. Rivers, streams, bays, straits, lakes, and wetlands across the State of Washington—and throughout the Tribe's off-reservation usual and accustomed fishing grounds—are polluted and subject to advisories and closures. Shellfish are often the first animals to be impacted by pollutants in the water column, salmon numbers are in a precarious position, and forage fish are consistently declining. Tribal members are left with the dilemma of whether to continue sustenance fishing and imperil their health, or to forgo sustenance fishing and imperil their culture. In waters in which the Port Gamble S'Klallam Tribe reserved, through Treaty, their right to continue fishing as they had since time immemorial, tribal members should not be subjected to such a dilemma.

Today, over 150 years after signing the Treaty of Point No Point, the Port Gamble S'Klallam Tribe retains deep cultural and economic ties to the surrounding waters and to their fisheries. The Port Gamble Reservation comprises roughly 1,788 acres on Port Gamble Bay. The waters around this Reservation constitute a core area for the Tribe, but the Tribe also depends heavily on harvest of fish, shellfish, and other aquatic resources throughout the larger, shared U&A. The tribes that share the U&A are entitled to take half the harvestable fish and shellfish within it, and more than 150 Port Gamble tribal members continue to earn all or a portion of their livelihood working as commercial salmon and shellfish fishers. In addition, the Port Gamble S'Klallam Tribe conducts fisheries throughout the shared U&A to obtain fish for ceremonial use (including funerals, weddings, and honoring and gifting observances, as well as other ceremonies and practices), and subsistence harvests from the U&A are a key element of the diet of many tribal members. These treaty rights continue to be of central spiritual, cultural, subsistence and economic importance to the Port Gamble S'Klallam Tribe. Indeed, they are central to the Tribe's identity, and in reserving these rights, the Tribe reserved its lifeways.

The United States Supreme Court has recognized the central importance of fishing for tribes: it is “not much less necessary to the existence of the Indians than the air they breathed.” *United States v. Winans*, 198 U.S. 371, 381 (1905). A reserved right to take fish also impliedly reserves water—and water quality—necessary to fulfill that purpose, that is, water sufficient to keep streams suitable for fish reproduction and tribal harvest. *E.g.*, *United States v. Adair*, 723 F.2d 1394, 1414-15 (9th Cir. 1983) (tribe reserved the waters needed to “secure to the Tribe a continuation of its traditional . . . fishing lifestyle”); *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1033-34 (9th Cir. 1985) (water withdrawals that would destroy salmon eggs before they could hatch enjoined to protect treaty fishing right); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47-48 (9th Cir. 1981) (implied reservation of water to preserve tribe's replacement fishing grounds); *Dep't of Ecology v. Yakima Reservation Irrig. Dist. (Aquavella II)*, 121 Wash. 2d 257, 276-77 (Wash. 1993) (implied reservation of instream water to fulfill treaty right to take fish). And under the Stevens Treaties, the State of Washington may not take actions that diminish salmon populations and thereby tribal harvest. *See United*

States v. Washington (“*Culverts*”), 853 F.3d 946, 966 (9th Cir. 2017), *aff’d*, 138 S.Ct. 1832 (per curiam)).

As the federal government has long acknowledged, “[a]ny specific treaty requirements have the force of law,’ and therefore, ‘State water quality standards will have to meet any treaty requirements.’” 87 Fed. Reg. at 74,366 (citing 48 Fed. Reg. 51,400, 51,412 (Nov. 8, 1983)); *see also* Revision of Certain Federal Water Quality Criteria Applicable to Washington, 81 Fed. Reg. 85,417, 85,422-23 (Nov. 28, 2016) (“It is therefore appropriate and necessary for EPA (and states) to consider the tribal reserved rights within the framework of the CWA, to ensure water quality protection for treaty-reserved subsistence fishing rights.”). In reviewing proposed federal permits and applying the state’s water quality standards, Ecology must utilize its Clean Water Act 401 Water Quality Certification authority to assure compliance with applicable federal and state law and protect the Tribe’s treaty rights.

II. Effluent Temperature Limits

Clean Water Act Section 402(o) prohibits backsliding, or reissuing a permit with effluent limitations that are less stringent than comparable effluent limitations in the previous permit, subject to certain exceptions. 33 U.S.C. § 1342(o); *see also* 40 C.F.R. § 122.44(l)(1). One such exception is “information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance.” *Id.* § 1342(o)(2)(B).

Since its currently effective permit was issued, Naval Base Kitsap Bangor has consistency violated its 19°C 7-day average of the daily maximum effluent temperature limit: “The facility violated the 7-day average of the daily maximum (7-DADMax) temperature limits 27 times between September 2010 and September 2021.” Fact Sheet at 13. This leaves out violations in June, July, and September of 2022.

Effluent temperature limits exist for a reason. Hot effluent can harm or kill marine life, including species that are important to Tribal members like salmonids, shellfish, and forage fish; it can increase the risk of Vibriosis and other forms of illness transmitted by shellfish. Significantly, high temperatures can exacerbate existing problems with dissolved oxygen (numerous segments of Hood Canal adjacent to and in the vicinity of Naval Base Kitsap Bangor and the discharge location are designated as impaired category 5 waters for dissolved oxygen and require a TMDL or other pollution control mechanism). *See* Fact Sheet at 23 (“water has less capacity for dissolved oxygen at the higher temperatures expected in the cooling water discharge”).

Instead of addressing these violations, the draft permit proposes to achieve compliance by easing the permitted limit: the draft permit would recalculate the temperature effluent limit as a net effluent limit, i.e., difference between the intake and effluent temperature, as opposed to a gross effluent temperature limit, between May and September. Fact Sheet at 18. The Fact Sheet states:

This will ensure that the Navy will be able to comply with the limits even if

ambient temperatures in Hood Canal increase due to climate change or other nonpoint heat sources, while still ensuring that the temperature increase at the edge of the mixing zone is de minimis. Based on the May - September maximum 7-DADMax intake temperature in Table 3, the proposed net effluent limit of 5.9 °C would allow 7-DADMax effluent temperatures between 17.44 and 25.47 °C.

Fact Sheet at 18. The Fact Sheet further states: “EPA believes the primary reason the technology-based temperature limit that was established in the prior permit was not achievable was that it was based on year-round data.” Fact Sheet at 18.

Later, the Fact Sheet recognizes the draft permit allows backsliding but purports to justify its proposal as follows:

The applicable cause for allowing for a less stringent limit than the previous permit for the summer temperature limits in this permit is that EPA has received new information (CWA §402(o)(2)(B)(i); see also 40 CFR 122.62(a)(2)). The technology-based temperature limit in the prior permit was based on only 134 temperature results; see the fact sheet dated October 23, 2009 at Page 27. In recalculating the temperature effluent limits, EPA has used 1,032 7-DADMax differences between the intake and effluent temperature, which were calculated from 325,015 individual intake and effluent temperature measurements taken between May 2013 and September 2021. EPA considers this much more robust data set to be new information that was not available at the time the prior permit was issued.

Because the circumstances on which the previous permit was based have materially and substantially changed since the time the previous permit was issued and would constitute cause for permit modification under 40 CFR 122.62, EPA may revise the temperature limits to be less stringent than the previous permit.

Fact Sheet at 22.

The Tribe disagrees with this purported justification. First, the previous permit’s Fact Sheet explains the temperature limit of 19°C was set above the maximum daily effluent temperature in the summer months, already accounting for this issue. *See* October 23, 2009 Fact Sheet at 9 (maximum daily value of 13.9°C in winter months and 18.3°C in summer months), 27-29.² The claim that the current limit was based on year-round data is irrelevant or misleading. If anything, the data supports a more stringent limit for the winter months. The Fact Sheet does not provide any explanation for how the information has changed to support the weakened limitation; more data showing the same results is not materially or substantially changed

² In the visual plumes modeling for the previous permit, the Fact Sheet explains: “The analysis conservatively used the dataset from July 2005 to represent the critical ambient conditions. The July 2005 dataset displayed the warmest ambient water temperatures of any other set in recorded history for this particular station. Ambient velocity was chosen for the critical summer period. Conservative assumptions provide greater assurance the discharge will comply with water quality standards at all times.” October 23, 2009 Fact Sheet at 32.

circumstances required to allow backsliding. *See* Fact Sheet at 22 (citing 40 C.F.R. § 122.44(l)(1) and 40 C.F.R. § 122.62(a)(2)). Additionally, there is no support for the idea that the information now claimed as new could not have been obtained at the time of the previous permit's issuance or would have justified a less stringent limit at that time. While ensuring permit compliance is an important goal, that cannot be the justification for reducing the stringency of a permit condition. Taken to the extreme, this would defeat the purpose of the Clean Water Act and Washington's Water Pollution Control Act.

The Fact sheet states:

As explained on Page 12 of the fact sheet for the revised draft permit, dated October 23, 2009, "AKART [all known available and reasonable method of prevention, control and treatment] and Best Available Technology economically achievable (BAT) is minimizing the thermal load to Hood Canal at the existing performance...." Therefore, in the prior permit, EPA established a performance-based effluent limit of 19 °C.

Fact Sheet at 17, 48. That limit is based on analysis submitted in August 2009. *See* October 23, 2009 Fact Sheet at 12, 21-26. Without any elaboration, the Fact Sheet continues "Minimizing the thermal load to Hood Canal at the existing performance continues to be AKART and BAT for this facility." Fact Sheet at 48. Under WAC 173-201A-400, AKART must be determined and fully applied before a mixing zone, which the permit proposes to utilize, can be granted. This must be completed independent of anti-backsliding requirements. The Fact Sheet has not presented the results of an AKART and BAT analysis, and it proposes a less stringent limitation than that the analysis *thirteen years ago* concluded was technically and economically feasible. This is insufficient. The U.S. Navy is well positioned to get funding and technology that could allow cooling of its effluent prior to discharge.

As Ecology is evaluating whether the discharge will comply applicable provisions of the Clean Water Act and state law, Ecology should condition certification on effluent temperature limits that are based on AKART and BAT and do not violate the anti-backsliding requirements of the Clean Water Act, nor exacerbate already degraded waters.

III. PFAS

Both Washington and EPA have recognized the danger from PFAS and the need for action to address PFAS contamination. Ecology has recognized that "PFAS have been detected in Washington [] surface waters, groundwater, wastewater treatment plant (WWTP) effluent, freshwater and marine sediments, freshwater and marine fish tissue, and osprey eggs. Any toxic or other hazardous effects of these chemicals will be with us for many decades." Per- and Polyfluoroalkyl Substances Chemical Action Plan, Hazardous Waste and Toxics Reduction Program, Wash. State Dept. of Ecology, Publication 21-04-048, at 12 (Sept. 2022), <https://apps.ecology.wa.gov/publications/documents/2104048.pdf>. Bioaccumulation of PFAS has been confirmed in marine and terrestrial species, zooplankton and other invertebrates, and fish. *Id.* at 13. PFAS exposure in humans can occur through consuming contaminating water or food. PFAS have shown harmful effects to wildlife and to people. *Id. See also Environmental Working Group, Eating One Freshwater Fish Equals A Month Of Drinking 'Forever Chemicals' Water,*

ScienceBlog (Jan. 17, 2023), <https://scienceblog.com/536016/eating-one-freshwater-fish-equals-a-month-of-drinking-foreverchemicals-water/>; Nicole Ogrysko, *New Research Shows Dangers of Consuming Freshwater Fish Laced with PFAS*, Maine Public (Jan. 24, 2023), <https://www.mainepublic.org/environment-and-outdoors/2023-01-24/new-research-shows-dangers-of-consuming-freshwater-fish-laced-with-pfas>.

While specific effluent limitations and monitoring requirements have not been promulgated, Ecology has issued numerous recommended actions including managing environmental PFAS contamination by establishing PFAS cleanup levels for soil and groundwater and working to prevent PFAS releases from firefighting foam use and manufacturing. PFAS Chemical Action Plan at 56-64.

Similarly, EPA has issued guidance to states providing direction on addressing PFAS discharges in NPDES permits, recommending effluent and wastewater residuals monitoring and best management practices for discharges of PFAS for industrial categories known or suspected to discharge PFAS. Radhika Fox, Assistant Administrator to EPA Regional Water Division Directors, Regions 1-10, *Addressing PFAS Discharges in NPDES Permits and Through the Pretreatment Program and Monitoring Programs* (Dec. 5, 2022), https://www.epa.gov/system/files/documents/2022-12/NPDES_PFAS_State%20Memo_December_2022.pdf. In particular, EPA “recommends that monitoring include each of the 40 PFAS parameters detectable by draft method 1633 and be conducted at least quarterly to ensure that there are adequate data to assess the presence and concentration of PFAS in discharges.” *Id.* at 2. EPA also explained that site-specific technology-based effluent limits for PFAS discharges developed on a best professional judgment basis may be appropriate for facilities for which there are no applicable effluent guidelines. *Id.*

The Navy’s extensive use of firefighting foam makes its facilities categories known or suspected to discharge PFAS. *See Naval Base Kitsap Bangor Silverdale, Washington, PFAS Drinking Water Investigation Fact Sheet Summary of Results and Path Forward* (Jan. 2020), https://pacific.navfac.navy.mil/Portals/72/Northwest/Documents/Bangor_PFAS_FactSheet_2021_0518_screenview.pdf (“PFAS may be present in the soil and/or groundwater at NBK Bangor (Figure 1) as a result of historical uses of [aqueous film-forming foam].”); Josh Farley, *Well Near Bangor Found to Have Potentially Dangerous Levels of Contamination*, Kitsap Sun (March 11, 2020), <https://www.kitsapsun.com/story/news/2020/03/10/well-near-bangor-found-have-potentially-dangerous-levels-contamination/5011073002/>; The PFAS Project Lab, Whidbey Island, Washington, <https://pfasproject.com/whidbey-island-washington/>. Moreover, the activities that occur at the Intermediate Maintenance Facility at NBK Bangor may lead to additional PFAS discharge through the cooling water or floodwater.

NPDES permits such as this one must ensure that pollutants are removed from wastewater discharged directly to rivers or the environment as needed to protect our waters and public health. Consistent with the Clean Water Act requirements, Ecology’s PFAS Chemical Action Plan, and EPA’s Guidance, Ecology should condition the permit on PFAS monitoring and if any PFAS is detected, add best management practices immediately.

IV. Reopener Provision

Section IV.K. of the draft permit states:

This permit may be reopened to include any applicable standard for sewage sludge use or disposal promulgated under CWA § 405(d). The Director may modify or revoke and reissue the permit if the standard for sewage sludge use or disposal is more stringent than any requirements for sludge use or disposal in the permit, or controls a pollutant or practice not limited in the permit.

Draft Permit at 25. Section V.A. states “This permit may be modified, revoked and reissued, or terminated for cause as specified in 40 CFR 122.62, 122.63, 122.64, or 124.5.” Draft Permit at 25.

This reopener clause mirrors language found in 40 C.F.R. § 122.44(c) for permits issued to treatment works treating domestic sewage and improperly suggests a narrower scope of reopening than would be required to comply with federal and state law. The reopener clause ignores the requirements of 40 C.F.R. §§ 122.44(a), (b), (d), (e), 122.62(a)(2) and WAC 173-220-130 and 173-220-150. The modification clause is broader, but its permissive terminology does not capture federal and state law.

EPA is required to institute proceedings to modify or revoke and reissue a permit to conform to any more stringent toxic effluent standard or prohibition. *See, e.g.*, 40 C.F.R. § 122.62(a)(6). Federal regulations explain:

If any applicable toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under section 307(a) of CWA for a toxic pollutant and that standard or prohibition is more stringent than any limitation on the pollutant in the permit, *the Director shall institute proceedings* under these regulations to modify or revoke and reissue the permit to conform to the toxic effluent standard or prohibition.”

40 C.F.R. § 122.44(b)(1) (emphasis added).

Important Washington water quality standards are currently in the process of being revised and will be completed early on in the five-year life of the proposed permit, but the proposed reopener language does not assure the public that EPA will update the permit to reflect the more stringent criteria likely to be promulgated. Multiple toxic standards are likely to be updated for Washington waters, including Hood Canal, in the very near future. “Copper and compounds,” for example, are on the list of toxic pollutants designated pursuant to section 307(a)(1) of the Clean Water Act at 40 C.F.R. § 401.15. Copper is not only a pollutant of concern to this permit and one for which Hood Canal already has nearby sediment listings, but it is also one of the aquatic life criteria anticipated to be revised by Ecology soon.³ Therefore, this

³ Wash. Dep’t of Ecology Preproposal Statement of Inquiry (June 22, 2022); *available at* <https://ecology.wa.gov/DOE/files/ad/ad55ad81-0ae6-49f8-8be9-abe698752adf.pdf>; *Nw. Env’t Advocs. v. United*

is a parameter for which EPA will likely need to reopen the NPDES permit prior to its expiration to comply with federal regulation and to protect Hood Canal from toxic pollutants.

Finally, as explained above, Washington and EPA are well into the process of implementing requirements to protect human health and the environment from the harmful effects of PFAS. While requirements should be incorporated into the draft permit regarding PFAS as discussed above, in any event, the permit will likely need to be reopened as federal and state monitoring and limitations change in the near future.

For this permitted discharge to comply with the Clean Water Act and Washington state law, Ecology should require a broader reopener clause that mandates the reopening of the NPDES permit to conform: 1) to the state or federal promulgation of a new Human Health Criteria and Water Quality Standard for any parameter, 2) to the development of a new relevant Total Maximum Daily Load and its attendant new Waste Load Allocation, and 3) to the state or federal promulgation of a new Aquatic Life Criteria for toxics. This type of permit language would be consistent with that recently used by Ecology in response to similar concerns raised regarding imminent updates to water quality standards that could affect toxic discharges into the Spokane River.⁴ Alternatively, at the very least, Ecology should condition its certification on the recognition that the permit will be reevaluated if relevant standards change.

V. Copper Sampling Frequency

The draft permit recognizes that copper is a pollutant of concern for the discharge but proposes to reduce the required copper monitoring from six times yearly to four times yearly. Draft Permit at 5; Fact Sheet at 15-17. The Fact sheet is contradictory on the reasoning: it explains the monitoring is necessary so that a reasonable potential analysis may be performed when the permit is reissued but states that less monitoring is needed because the previous data show the discharge does not have a reasonable potential. Fact Sheet at 23. The data presented, only going into 2016, show that Copper continues to be detected in the discharges at variable amounts. Fact Sheet at 12, 32 (showing value's ranging from .697 to 19.1 micrograms per liter). The Fact Sheet contains no explanation for this variability or the higher discharge amounts, but those discharge levels would get lost with less frequent monitoring and make the next reasonable potential analysis less accurate.

Moreover, as stated above, Ecology is preparing to revise its water quality standards to be in accordance with the stricter CWA 304(a) standards and this will likely include more stringent copper effluent limits early in the life of the permit. In order to comply with these stricter standards, EPA would be required to perform a new analysis early in the life of the permit, with less accurate data. In addition to the reopener language above, Ecology should condition

States Env't Prot. Agency, No. C20-1362 MJP, 2021 WL 6134785 (W.D. Wash. Dec. 29, 2021) (describing EPA failure to act on aquatic life criteria petition including copper).

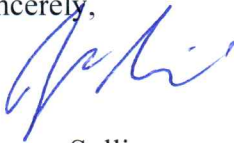
⁴ See, e.g., Kaiser Aluminum NPDES Permit (Effective Date June 1, 2022) (Section G3, Condition 2.d), available at <https://apps.ecology.wa.gov/paris/DownloadDocument.aspx?Id=408532>.

certification of the permit on the same level of copper monitoring in the previous permit to assure compliance with Washington's current and future water quality standards.

...

As the certifying authority, Ecology has great power in determining what pollutants enter the State of Washington's waters. We request that it do as much as it can to protect Puget Sound and the Tribe's treaty rights. Thank you again for the opportunity to comment on this Ecology's certification decision for the draft of the NDPES permit for Naval Base Kitsap Bangor. The Port Gamble S'Klallam Tribe requests regular updates on the status and development of this permit and would like to keep open this consultation. We are available and more than happy to discuss this matter further should you have any questions about our comments. You may contact Josh Carter at jcarter@pgst.nsn.us or 360-620-0927 and Ian Fisher at ifisher@kanjikatzen.com or 734-769-3122 with any questions you might have or to coordinate further discussion.

Sincerely,



Jeromy Sullivan
Chair, Port Gamble S'Klallam Tribe