



LUMMI INDIAN BUSINESS COUNCIL

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DEPARTMENT _____

DIRECT NO. _____

November 14, 2008

Mr. Andrew Maron,
Alternate SEPA Official
Port of Bellingham
P.O. Box 1677
1801 Roeder Avenue
Bellingham, WA 98227-1677

**SUBJECT: Lummi Natural Resources Department Comments on the October 15, 2008
New Whatcom Redevelopment Project Supplemental Draft Environmental
Impact Statement**

Dear Mr. Maron,

The purpose of this letter is to provide comments by the Lummi Natural Resources Department on the Supplemental Draft Environmental Impact Statement (SDEIS) for the proposed New Whatcom Redevelopment Project. The Lummi Cultural Resources Department may be submitting comments on this document under a separate cover.

1. As stated in our March 10, 2008 comment letter regarding the DEIS, the SDEIS should also address National Environmental Policy Act (NEPA) requirements. Writing the SDEIS in a manner that addresses both State Environmental Policy Act (SEPA) and NEPA requirements would ensure that the required federal permitting for the proposed clean up actions would be more stream-lined. This combined approach would better achieve Bellingham Bay Pilot Goal 6 (i.e., *Implement actions that are more expedient and more cost-effective, through approaches that achieve multiple objectives*). As written, the SDEIS does not comply with NEPA both because cumulative effects and environmental justice issues associated with the considered alternatives are not evaluated and because the SDEIS does not appropriately evaluate the proposed conversion of the ASB to a marina.

Federal impact assessments specifically require treatment of cumulative effects during EIS procedures: "Cumulative impacts result when the effects of an action are added to or interact with other effects in a particular place and within a particular time. It is the combination of these effects, and any resulting environmental degradation, that should be the focus of cumulative impact analysis. While impacts can be differentiated by direct, indirect, and cumulative, the concept of cumulative impacts takes into account all disturbances, since cumulative impacts result in the compounding of the effect of all actions over time. Thus, the cumulative impacts of an action can be viewed as the total effects on a resource, ecosystem, or human community of that action and all other activities affecting that resource, no matter what entity (federal, non-federal or private) is taking the actions." (EPA 315-R-99).

In addition, Executive Order 12898 of February 11, 1994 requires federal agencies to achieve environmental justice by addressing "disproportionately high and adverse human health and environmental effects on minority and low-income populations." The impacts of the project, both

negative and positive, on minority and low-income populations must be analyzed. Environmental Justice issues include potential impacts on the physical and natural environment as well as social, cultural, and economic effects of the project. Based on the 2000 Census, the Lummi tribal members comprise the largest low income, minority population in the area and the physical, natural, social, cultural, and economic impacts of each of the proposed alternatives on the Lummi people need to be specifically addressed.

The SDEIS should be revised to comply with NEPA and specifically address both cumulative effects and environmental justice issues for each alternative.

2. As stated in our March 10, 2008 comments on the DEIS, the conversion of the Aerated Stabilization Basin (ASB) to a marina is an action that could significantly affect the quality of the human environment and should not be considered as part of the No Action alternative. By assuming that the ASB will be converted to a marina regardless of what else happens with the project area, the Port provides an inadequate analysis. The proposed ASB conversion should be evaluated as part of an alternative action, not part of the No Action alternative, because:
 - It will have an environmental impact;
 - It will result in adverse impacts which cannot be avoided with the proposed implementation;
 - The proposed conversion of the ASB should be compared to other alternative actions. At a minimum the proposed ASB conversion should be compared to the alternative identified as Habitat Action No. 13 the Bellingham Bay Pilot Team. As described in Appendix A of the 2006 draft Supplemental Environmental Impact Statement (SEIS), Habitat Action No. 13 is the removal of the ASB from the water and establishment of intertidal and shallow subtidal habitat and marine buffers and/or eelgrass. This alternative would result in the single largest habitat gain (33 acres) of all of the actions identified by the inter-agency Bellingham Bay Pilot Team. Habitat Action No. 13 is much more aligned with the Lummi Nation interests than the proposed ASB conversion and would therefore help the Port better address the cumulative effects of the proposed action, achieve environmental justice, and protect Lummi Nation treaty rights;
 - It will have both short and long-term effects; and
 - It is associated with irreversible and irretrievable commitments of resources.

The logic and level of analysis presented by the Port regarding the proposed conversion of the currently permitted ASB to a currently unpermitted marina defeats the purpose of NEPA and SEPA. The Port's presented logic is like stating that since an oil refinery is allowable in an area zoned for heavy impact industrial uses, constructing a new oil refinery could be considered as part of a No Action Alternative for a project to construct a new road network. Similar to the DEIS, the SDEIS fails to analyze the alternative uses of the ASB.

3. The listed elements on Page 2-7 that may require additional environmental review at the time applications for permits are submitted to relevant agencies should be expanded to include the conversion of the ASB to a marina. The in-water work associated with the proposed conversion will require a Section 404 permit from the U.S. Army Corps of Engineers (Corps) and, since it is a federal agency, the Corps will have to comply with NEPA. Since the SDEIS does not address either cumulative effects or environmental justice issues, which are required under NEPA, or alternatives to converting the ASB to a marina, additional environmental review will be required for this element of the proposed action.

4. The SDEIS erroneously concludes that there will be no impacts to navigation associated with the alternatives that were evaluated and therefore no mitigation measures are needed. In fact, the increased boat traffic in Bellingham Bay from the addition of the marina will interfere with the navigation of tribal fishers and therefore our ability to exercise our treaty rights.

The DEIS and the SDEIS do not adequately evaluate impacts of the proposed alternatives to tribal members and, without listening to Lummi Nation representatives, actually portrays each of the proposed alternatives as a benefit to tribal members. A full discussion of the effects of each alternative on tribal members is needed. As described above, the DEIS and SDEIS present a single-focused evaluation that results in a marina regardless of any other action without actually conducting an appropriate assessment of alternative uses of the ASB. All of the alternatives that were evaluated have impacts on Lummi Nation members. As examples:

- The proposed conversion of the ASB to a marina will preclude opportunities for tribal members to exercise our treaty right of taking fish at usual and accustomed grounds and stations (U&A). Although the ASB currently prevents the exercise of this treaty right in a portion of the U&A, restoring the ASB site pursuant to Condition "S" of Permit No. 071-OYB-2-004368 (the permit issued to Georgia Pacific Corporation to authorize the construction of the ASB under Section 404 of the Clean Water Act) could restore eelgrass beds, associated habitat, and Lummi Nation fishing grounds. It should be noted that this permit was issued in 1976 without regard to active treaty fishing activity that was taking place at this location, which the ASB displaced, and without any consultation with the Lummi Nation. The nearshore and tidal waters, and the tidelands, along all of Bellingham Bay are U&A of the Lummi Nation. *United States v. Washington*, 384 F.Supp. 384, 360-1 (WD WA 1974).
- Tribal members cannot physically deploy fishing nets or crab pots in an area that is covered by a marina or that has large volumes of vessel traffic (nor can they harvest shellfish in these areas due to contamination associated with marinas and associated shellfish bed closures).
- The additional vessel traffic associated with the proposed marina, boat launch ramp, and temporary moorage development will interfere with tribal fishing in Bellingham Bay and nearby areas.
- Drifting off-site pollution, including without limitation human waste and chemical runoff resulting from marina use and misuse and chemical pollution from increased vessel traffic will result in closure of shellfishing and fishing areas around Bellingham Bay that are currently used by tribal members in the exercise of treaty fishing rights.

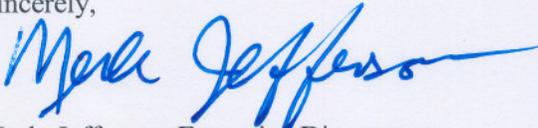
These treaty right impacts need to be addressed in consideration of the current law, including without limitation, *Northwest Sea Farms v. U.S. Army Corps of Engineers*, 931 F.Supp. 1515 (WD WA 1996) and *Muckleshoot Indian Tribe v. Hall*, 698 F.Supp. 1504 (WD WA 1988); the failure of the initial permit issuance to consult with the Lummi Nation; and the failure of the initial permit issued to Georgia Pacific Corporation to address treaty right impacts.

5. Similar to the DEIS, the fact sheet (Page vii) in the SDEIS includes the following errors:
 - A Section 402 (NPDES) permit will be needed from Ecology both for the construction and for operation of the proposed plan (not the U.S. Army Corps of Engineers).
 - The U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency jointly administer section 404 of the Clean Water Act.
 - The Corps of Engineers does not issue Section 401 Certifications. For the proposed project, the certification is issued either by the EPA or Ecology (in consultation with the Lummi Nation).

6. The off-site impacts associated with extracting and transporting the estimated 680,000 to 700,000 cubic yards of fill to the proposed project site need to be addressed. Specifically, particularly if the fill is going to be imported via barge, the effects of this increase traffic on tribal fisheries in the area needs to be evaluated.
7. The level of detail provided in the SDEIS related to mitigation measures for many of the analyzed elements is inadequate to support a finding of non-significant impacts. The identified mitigation measures in the SDEIS generally include a list of mitigation measures that could occur. Without knowing which, if any, of the listed mitigation measures will actually occur, it is not possible to evaluate whether or not identified impacts will be adequately mitigated.

In summary, objectively addressing NEPA requirements including those for cumulative effects and environmental justice issues, removing the marina conversion from the No Action alternative, evaluating other appropriate alternatives including restoration of the ASB site, addressing navigation and treaty rights impacts, evaluating offsite impacts associated with the proposed fill activities, and identification of mitigation measures that will occur rather than listing measures that could occur, would help complete the analysis, support the selection of an appropriate preferred alternative, and potentially lead to a finding of non-significant impacts. As currently written, the analysis is incomplete and does not support a finding of non-significant impact.

Sincerely,



Merle Jefferson, Executive Director
Lummi Natural Resources Department

cc Henry Cagey, LIBC Chairman
Elden Hillaire, Lummi Natural Resources Commission Chairman
Richard Grout, Washington Department of Ecology
Michelle Walker, Corps of Engineers
Richard McAllister, Environmental Protection Agency
Dan Pike, Mayor of Bellingham