



LUMMI INDIAN BUSINESS COUNCIL

2616 KWINA ROAD · BELLINGHAM, WASHINGTON 98226 · (360) 384-1489

DEPARTMENT _____ EXT. _____

September 8, 2006

Colonel Michael McCormick,
District Engineer
US Army Corps of Engineers
Seattle District
PO Box 3755
Seattle, WA 98124

SUBJECT: Aerated Stabilization Basin (ASB) Impacts on Lummi Nation Treaty Rights

Dear Colonel McCormick,

I am writing to officially notify you that the Lummi Nation is not satisfied with the clean-up alternatives currently being considered by the Port of Bellingham to address both habitat impacts and contamination associated with the industrial development along portions of Bellingham Bay. The intent of this letter is to provide you with background information regarding the extent of these impacts on our Treaty-protected resources, and to identify actions that we think you should take in order to execute your fiduciary responsibilities consistent with legal rulings, the Indian policies of the United States, and the Corps of Engineers' Tribal Policy.

Background Information: The Lummi Nation is one of the signatories to the Point Elliot Treaty of January 22, 1855 (12 Stat. 927), which was ratified by the United States Senate on March 8, 1859, Proclaimed April 11, 1859, and which reserves certain rights for the Lummi people including but not limited to "the right of taking fish at usual and accustomed grounds and stations" and "hunting and gathering roots and berries on open and unclaimed lands." The decision of *United States v. Washington* (384 F. Supp. 312, 377 W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976)) and subsequent court orders, as upheld by the United States Supreme Court, provide rules of engagement of the Lummi Nation and other co-managers relating to natural resources management. The Lummi Nation is a federally recognized Indian tribe and the Lummi Indian Business Council (LIBC) is the duly constituted governing body of the Lummi Indian Reservation by the authority of the Constitution and By-laws of the Lummi Nation of the Lummi Reservation, Washington.

The Lummi Nation is a fishing tribe and has used the waters and shorelines of Bellingham Bay since time immemorial. Prior to and following the arrival of Euro-Americans, the shorelines of Bellingham Bay were used as fishing villages and the tidelands and waters of Bellingham Bay were used to harvest fin- and shellfish for commercial, subsistence, and ceremonial purposes. Although the Lummi Nation still fishes the waters of Bellingham Bay, the resources have been degraded by human activities and shoreline development has precluded the use of traditional hunting, fishing, and gathering sites along the bay. As shown in Figure 1 and detailed in Figure 2, approximately 748 acres of the Bellingham Bay nearshore has been impacted (dredged, filled, or armored) including the Whatcom Waterway and the Aerated Stabilization Basin (ASB). In addition to these actions, which have physically precluded the exercise of tribal treaty rights in these areas, the Whatcom Waterway, the ASB, and surrounding areas are contaminated with a number of substances released from industrial waterfront activities including mercury discharges from the former Georgia Pacific chlor-alkali plant.

Although cleanup activities have been underway since the 1970s, the Lummi Nation and the Corps of Engineers, along with numerous other federal, tribal, state, and local government agencies, most recently have been involved in efforts to cleanup portions of Bellingham Bay since the 1990s. Numerous clean-up plans have been proposed over the years and a few cleanup actions have been implemented. Throughout these efforts, the Lummi Nation position has been that contaminated sediments should be removed from the aquatic environment and disposed of at an appropriate upland disposal site. Due to cost constraints, alternative cleanup actions have occurred in some areas and no clean up actions have occurred in other areas. As a result, much of the contaminated sediments still remain in the Whatcom Waterway, the ASB, and surrounding areas.

The Port of Bellingham purchased the former Georgia Pacific site and associated ASB in January 2005 and has assumed the environmental cleanup responsibilities from Georgia Pacific. Consistent with the requirements of the Washington State Model Toxics Control Act (MTCA), the Port of Bellingham is preparing a draft Remedial Investigation and Feasibility Study (RI/FS). The RI/FS evaluates eight remediation alternatives but does not consider an alternative where the ASB and associated rip-rap and contaminants are removed and disposed of at an upland location, and the entire ASB area restored to the eelgrass beds that existed prior to the construction of the ASB. The Port of Bellingham intends to convert the ASB into a 450-slip "Clean Ocean" marina and to modify the Whatcom Waterway to provide temporary moorage for visiting recreational boaters.

The Corps of Engineers has committed to providing the Lummi Nation with technical support to review the draft RI/FS and associated draft environmental impact statement and other related documents and to provide technical comments on the following:

- Completeness and reliability of the human health and ecological risk assessments;
- Completeness and reliability of the Remedial Investigation methodology;
- Adequacies of the proposed remedial action objectives; and
- Completeness and reliability of the proposed remedial action alternatives.

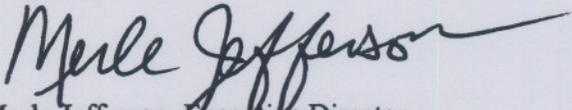
Requested Actions: As described above, approximately 748 acres of the Bellingham Bay nearshore has been impacted (dredged, filled, or armored) including the Whatcom Waterway and the Aerated Stabilization Basin (ASB). In addition to these actions that have physically precluded or have created conditions that interfere with the exercise of tribal treaty rights in these areas, the Whatcom Waterway, the ASB, and surrounding areas are contaminated. Historically the Corps of Engineers has either contributed directly to a number of these projects that continue to negatively impact tribal resources (e.g., the Bellingham Harbor Project in the 1950s, the Bellingham Harbor – I & J Street Waterway in the 1960s, and the Squalicum Harbor Expansion, Small-Boat Basin Project in the 1970s) or contributed indirectly through the issuance of permits authorizing projects (e.g., the construction of the ASB). There was no mitigation for the negative impacts of these projects on our ability to exercise our Treaty rights.

We understand that these previous direct and indirect actions by the Corps of Engineers occurred prior to the development of its Tribal Policies and prior to various legal rulings (e.g., *Northwest Sea Farms v. U.S. Army Corps of Engineers*, 931 F.Supp. 1515 (W.D. WA 1996)). Consistent with LIBC Resolution 92-126, the Lummi Nation's position is that it is time for the Corps of Engineers to take corrective actions for these past transgressions and to prevent any further impacts to tribal resources. Resolution 92-126 resolves that, "The policy of the Lummi Nation is to ensure no further loss of the resource base or of environmental quality, and to restore and enhance damaged areas within the Lummi homeland and territories." Accordingly, our position is that the Corps of Engineers should take the following actions with respect to the Port of Bellingham and their proposed re-development of Bellingham Bay:

1. Consistent with Condition "S" of Permit No. 071-OYB-2-004368 (the permit issued to Georgia Pacific Corporation to authorize the construction of the ASB), as the District Engineer you should require that the ASB and associated rip-rap and contaminants be completely removed and disposed of at an upland location and the ASB area restored to the eelgrass beds that existed prior to the construction of the ASB. This site was historically comprised of expansive eelgrass beds and remnants of these beds still exist along the exterior fringe of the ASB.
2. As part of any permitting associated with the ASB removal and clean-up activities envisioned by the Port of Bellingham, the Corps of Engineers should require the Port of Bellingham to retrofit their existing marinas and breakwaters in Bellingham Bay to incorporate fish habitat features and other "Clean Ocean" marina practices.
3. Due to the interference of recreational boat traffic on the ability of the Lummi Nation and its members to exercise its treaty fishing rights, no additional marina facilities should be authorized in Bellingham Bay unless the impacts of this additional boat traffic is mitigated to the satisfaction of the Lummi Nation.

Please ensure that I am kept informed about actions taken by the Corps of Engineers regarding the ASB restoration in Bellingham Bay. I can be contacted at the address above or via telephone (360-384-2225).

Sincerely,



Merle Jefferson, Executive Director
Lummi Natural Resources Department

cc Evelyn Jefferson, LIBC Chairwoman
Elden Hillaire, Lummi Natural Resources Commission Chairman
Michelle Walker, Corps of Engineers
Diane Lake, Corps of Engineers
Richard McAllister, Environmental Protection Agency

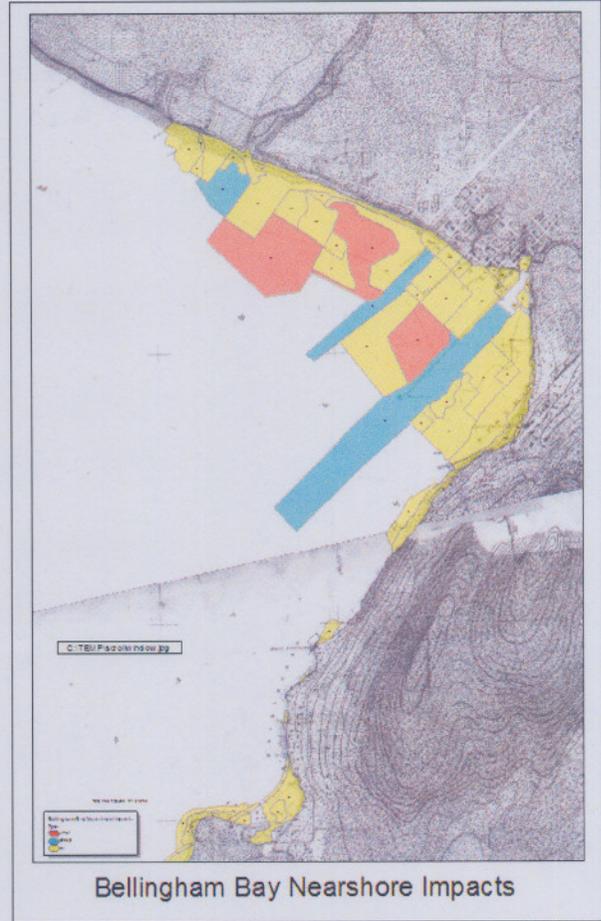
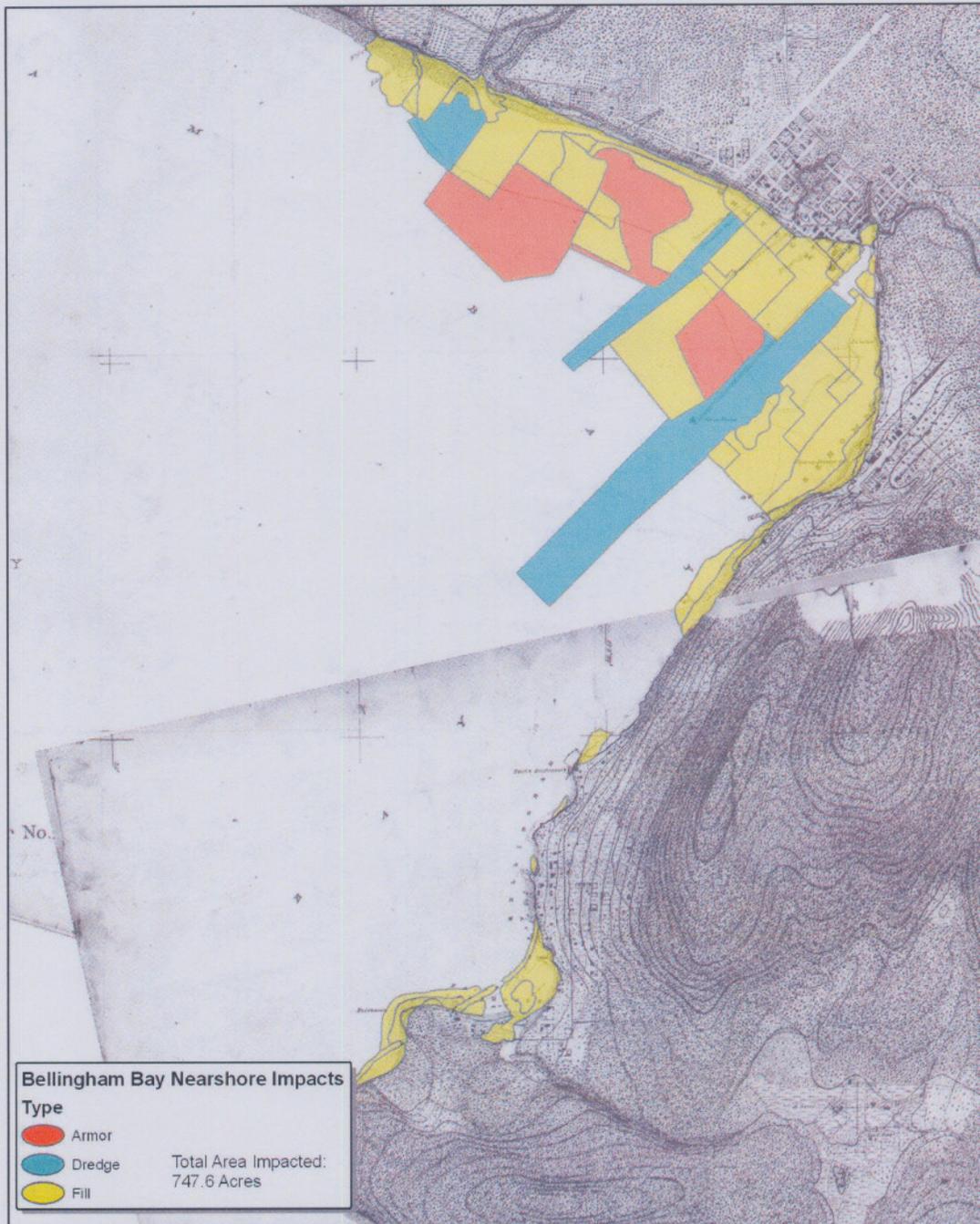


Figure 1. Bellingham Bay Nearshore Impacts



Bellingham Bay Nearshore Impacts

Figure 2. Bellingham Bay Nearshore Impacts