

August 1, 2016

U.S. Army Corps of Engineers
Attn: CECW-CO-R
441 G Street NW
Washington, DC 20314-1000

Submitted Electronically to: NWP2017@usace.army.mil

Re: Reissuance of Nationwide Permits, Docket Numbers COE-2015-0017 and RIN 0710-AA73

To Whom It May Concern:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR) offers these comments regarding the reissuance of Nationwide Permits (NWP). The CTUIR DNR is in communication with the Corps' Portland District to consult on the reissuance of NWPs with plans to meet in the near future, but this letter is intended to describe our general concerns over NWPs. Our primary concern is that NWPs are not appropriate when Indian Treaty Rights are implicated by the proposed action. Two examples of problems caused by issuing NWP for projects affecting Treaty Rights are attached. In each instance the CTUIR objected to the use of generic NWPs because Treaty Rights were unaddressed. This is the fundamental flaw with this approach—NWPs do not look at indirect or cumulative effects on a case-by-case basis, and simply assume that indirect and cumulative effects are minimal. In our experience dealing with indirect and cumulative effects of construction in and along the Columbia River in the Pacific Northwest, development can have significant impacts, including impacts to the legal exercise of tribal Treaty Rights guaranteed by the U.S. Constitution.

The NWP process streamlines review of proposed activities in order to reduce the workload on regulatory staff by permitting routine activities assumed to have minimal individual and cumulative adverse effects. These activities often tend to be non-controversial, with limited complexity—but not always. The CTUIR DNR has found that many such projects, on closer examination, do in fact implicate Treaty Rights, often adding greater controversy and complexity. Two examples of this situation that the CTUIR has faced are illustrated in the attached letters. They involve two proposed NWPs: the Tesoro Savage Vancouver Energy Distribution Terminal, NWS-2013-0962, and the proposed Union Pacific Railroad Second Mainline in Mosier, Oregon, NWP-2014-364. Each of these projects has substantial potential impacts to Treaty Rights directly, indirectly and cumulatively, rendering them inappropriate for the simple, relatively cursory NWP process.

Tesoro Savage Vancouver Energy Distribution Terminal, NWS-2013-0962

Tesoro Savage is proposing to store and then transfer 360,000 barrels of oil per day from trains to ocean-going oil tanker vessels, which would make it the largest crude-by-rail transfer facility in the United States. The project was initially proposed under NWP #3 and #12. The CTUIR engaged in government-to-government consultation with the Corps' Seattle District Con and expressed our opposition to the use of NWP for this project, one which would result in four additional trains of crude oil traveling daily through the Columbia River Gorge National Scenic Area and multiple tribal treaty fishing sites along the River. The Seattle District ultimately determined that an NWP was inappropriate, but only did so after a year of consultation with the CTUIR and other tribes. Considerable time and resources were spent that could have been better utilized by tribal and Corps staff on more beneficial matters than having to convince the Corps that impacts to Treaty Rights require careful analysis and review and cannot be addressed in a perfunctory analysis under the NWP process.

Union Pacific Railroad (UPRR) Second Mainline, Mosier, Oregon, NWP-2014-364

The UPRR Second Mainline track proposed for Mosier, along the Columbia River, is currently proposed for authorization under NWP #14, Linear Transportation Projects, and entails construction of four miles of track to create a 5-mile second mainline. The asserted project purpose is to improve efficiency. Information provided by UPRR staff indicates that this could increase rail traffic in the area by 25%. Such an increase in traffic poses a significant threat to treaty fishing from both increased risk to tribal members crossing the railroad tracks and from potential spills, such as the oil train derailment, spill and fire that occurred on June 3, 2016, in Mosier (which was within the footprint of this proposed project). The Portland District still intends to proceed under a NWP for this project, though we are still in consultation. In our meetings with the Portland District it was clear that a NWP would not look at indirect or cumulative effects on this or other similar/related projects, and that indirect and cumulative effects to Treaty Rights would not be considered. When asked whether an NWP could be rejected in the event its indirect impacts would have more than a *de minimus* impact on Treaty Rights, the answer we received was, "we don't know." Individual permits can be denied if they have more than a *de minimus* effect on Treaty Rights, whether directly or indirectly. Clearly NWPs should be treated the same, but if there is no case-by-case analysis of indirect effects of a NWP-authorized project, indirect effects to Treaty Rights will never be considered. The CTUIR is awaiting a response to our comments on NWP-2014-364.

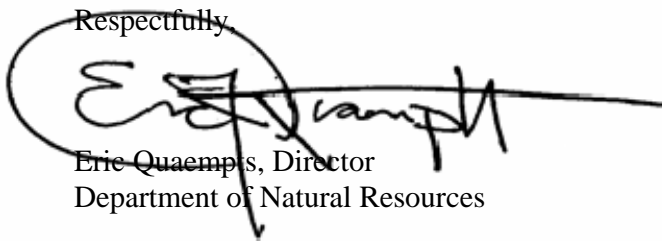
NWPs do not examine cumulative or indirect impacts on Treaty Rights because they don't analyze indirect or cumulative effects. This is a problem in the Northwest where proposed actions may affect Treaty Rights. Use of NWPs when Treaty Rights are implicated is therefore inappropriate. The CTUIR has commented similarly on other projects under NWPs including other linear transportation projects and dock upgrades, but the two examples above give the starkest instances in which NWPs are inappropriate and Individual Permits are necessary to ensure that tribal Treaty Rights are addressed in the review process.

CTUIR DNR Letter to Corps
Subject: Reissuance of Nationwide Permits
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The CTUIR DNR understands that NWP General Condition 17 prohibits NWP activities from impacting Treaty Rights; however, using NWPs that fail to examine indirect and/or cumulative effects virtually assures that Treaty Rights will not be adequately considered. We have consistently faced uphill battles trying to convince the Districts of this dilemma. We assert that clear Corps directives from headquarters that NWPs are not generally appropriate when tribal Treaty Rights are implicated would be helpful.

If you have any questions, please contact Audie Huber, CTUIR DNR Intergovernmental Affairs Manager, at 541-429-7228.

Respectfully,

A handwritten signature in black ink, appearing to read "Eric Quaempts", is written over a circular stamp. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Eric Quaempts, Director
Department of Natural Resources

Attachments:

March 28, 2014 Letter to Col. Estok, RE NWS 2013-0962, Tesoro Savage Terminal
May 11, 2016 Letter to Shawn Zinszer, RE NWP 2015-364, UPRR Mosier Second
Mainline

Cc: Shawn Zinszer, Chief Regulatory Branch, Portland District
Michelle Walker, Chief Regulatory Branch, Seattle District

**Confederated Tribes *of the*
Umatilla Indian Reservation**

Board of Trustees & General Council



46411 Timine Way • Pendleton, OR 97801
(541) 429-7030 • fax (541) 276-3095
info@ctuir.org • www.umatilla.nsn.us

March 28, 2014

Col. Bruce A. Estok, District Engineer
US Army Engineer District, Seattle
4735 East Marginal Way South
Seattle, WA 98134-2385

Subject: CTUIR Comments on NWS-2013-0962, Proposed Tesoro-Savage Vancouver Energy Distribution Terminal

Dear Colonel Estok:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) has significant concerns regarding NWS-2013-0962, Proposed Tesoro-Savage Vancouver Energy Distribution Terminal. The facility will be a major undertaking that could have serious, profound, far-reaching and long-lasting effects on the rights and interests of the CTUIR and its members in the Columbia River Basin. The CTUIR objects to the issuance of a Nationwide Permit under the “maintenance” category because the proposed use would be a significant change from the currently permitted use. This change warrants reopening the permit to evaluate the impacts in a thorough and comprehensive manner. Specifically, the evaluation should include adequate information to make an informed judgment as to the impacts to tribal Treaty Rights, traditional use areas and the near- and long-term health and sustainability of tribal First Foods. The CTUIR formally requests government-to-government consultation on this project to answer the questions posed in this letter and to collaboratively address the potential impacts to Treaty Rights.

The Tesoro-Savage Vancouver Energy Distribution Terminal is being considered under the Corps’ Nationwide Permits 3 and 12. Under Nationwide Permit General Condition 17, “[n]o activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.” The CTUIR believes that this project may substantially risk impairing rights and resources of the CTUIR protected under the Treaty of 1855, 12 Stat. 945. The terminal will be located on the Columbia River, the migration corridor for the downstream and upstream passage of salmon, lamprey and other fish species in which we and other tribes have rights reserved in treaties with the United States. Rail traffic transporting highly volatile oil will also increase in the Columbia River Basin, passing along Zone 6 (the principal mainstem tribal fishing zone) and various Columbia River tributaries where tribal members continue to actively fish pursuant to the treaties and federal court orders interpreting them.

A Nationwide Permit for this activity is also inappropriate because this work is far beyond routine maintenance and is essentially restoration and reconfiguration of the existing structure to accommodate a greatly-expanded use. The significant redevelopment of the facility and use for an oil terminal to transfer 360,000 barrels of oil a day to ocean-going vessels is a sufficient departure from the existing permit and of sufficient public concern that the permit should be reopened under Corps authority contained in 33 CFR § 325.7 (Modification, suspension, or revocation of permits).

Because this project has the potential to impact Treaty Rights, it must not go forward until, at a minimum, government-to-government consultation requested by the CTUIR is completed. We welcome discussions with the Corps pursuant to your responsibilities as the trustee of natural resources the CTUIR reserved in the Treaty of 1855. In furtherance of this process, we have developed a technical analysis of the proposed work as the CTUIR currently understands it, which is attached. The document contains concerns and questions that will need to be reviewed and answered during consultation process. The CTUIR requests that an Environmental Impact Statement (EIS) be done regarding this project that addresses all direct, indirect and cumulative effects. The EIS should include and incorporate all the necessary information to enable the Corps and the region to make an informed decision regarding the merits and drawbacks of this project and other projects that will have similar and related effects.

The CTUIR appreciates your attention to our comments and concerns. Please have your staff contact Audie Huber, Inter-Governmental Affairs Manager, at audiehuber@ctuir.org or (541) 429-7228 if you have any questions or to schedule the government-to-government consultation.

Sincerely,



Gary Burke
Chairman, Board of Trustees

GB: ah

Attachment: Initial Technical Comments on NWS-2013-0962,

Cc: Steve Manlow, Project Manager, U.S. Army Corps of Engineers, Seattle District
The Honorable Senator Ron Wyden
The Honorable Senator Jeff Merkley
The Honorable Senator Maria Cantwell
The Honorable Senator Patty Murray

Initial Technical Comments on NWS-2013-0962 Proposed Tesoro-Savage Vancouver Energy Distribution Terminal

Introduction

On March 3, 2014, the CTUIR Department of Natural Resources (DNR) received a notice from the Corps of Engineers (Corps) regarding a proposed Nationwide Permit for maintenance work at the Port of Vancouver, in Vancouver, Washington. The CTUIR was given 10 days to comment on this proposal and DNR requested an additional 15 days. NWS-2013-0962, the Tesoro-Savage Vancouver Energy Distribution Terminal, is being considered under the Corps' Nationwide Permits 3 and 12.

Nationwide Permits are inappropriate and would be insufficient to meet the Corps' public interest review obligations in this instance. First, under Nationwide Permit General Condition 17, "[n]o activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights." This project will impact reserved rights and resources of the CTUIR protected under the Treaty of 1855, 12 Stat. 945. Second, Nationwide Permits are inappropriate because the proposed work is far beyond the scope covered by either of the suggested Nationwide Permits. The work is not routine maintenance, but rather a restoration and reconfiguration of the existing dock structure to accommodate greatly-expanded uses. For these and the other reasons discussed below, the CTUIR DNR requests that the Corps conduct a full public interest review and not use the Nationwide Permits and their abbreviated review processes.

Discussion

The Northwest is currently under siege by a series of proposals to rapidly expand the transport of various fossil fuel products (oil, coal and natural gas) through enlarged or entirely new means and mechanisms of transportation. Based on the limited information available so far on this and the other proposals, many serious questions and concerns regarding resulting impacts remain unanswered.

The Tesoro-Savage terminal will be located on the Columbia River, the migration corridor for the downstream and upstream passage of salmon, lamprey and other fish species which the CTUIR and other tribes have rights to harvest that were reserved in treaties with the United States. Rail traffic will also increase along the Columbia River corridor, passing through Zone 6, the principal mainstem fishing area where large numbers of tribal members make their living exercising the Treaty-reserved rights.¹ The Tesoro-Savage facility will detrimentally impact tribal First Foods and the exercise of our Treaty Rights based on them, as well as other natural

¹ The proposed restoration and modification of the dock will enable the operation of a complex that will transfer 360,000 gallons of crude oil per day to ocean-going ships. The oil will be shipped to Vancouver by rail. Approximately 262 tankers of crude oil (assuming 500,000 bbls/vessel and 360,000 barrels per day) will traverse the estuary per year, and 8 to 10 trains per day will cross the Columbia River Basin in addition to current rail traffic. This increase is significant, particularly when there appears to be no upper limit on the number of trains that can transport fossil fuels or upper limit on the amount of fossil fuels transported.

and cultural resources. The Corps' review of this project raises issues of tribal sovereignty, co-management authority, and trust obligations.

The CTUIR's Treaty-secured "right of taking fish" extends to all "usual and accustomed stations" along the Columbia River and its tributaries. In order for this right to have any meaning, there must be fish to take, they must be healthy and sustainable, and access must be available. The project may negatively impact tribal fishing sites and the fish that migrate past them. Additional trains may also adversely affect the ability of tribal members to access tribal fishing sites due to increased obstruction of foot and vehicle traffic at crossings. More train traffic may also result in derailments and spills of oil and other pollutants into the rivers. Furthermore, the Corps cannot and should not make any dispositive decisions regarding permitting of the project until all necessary coordination and consultation with NOAA Fisheries and the U.S. Fish and Wildlife Service have been completed.

The Lower Columbia River Estuary is particularly important to salmon life history and development. The tribes and many federal and state agencies have spent enormous time and resources over many decades in efforts to protect and restore salmon in the Pacific Northwest. A healthy estuary has been identified as key to successful recovery. The Tesoro-Savage project and others like it could undermine much of the progress and improvements that have been made. The river, its water and its fish would be subject to significant risks from construction and operation of the facility and the entire range of activities associated with it. They are likely to degrade the immediate environment (for example, from increased emissions) and will exacerbate broader climate change effects, which are already occurring, and to which our people and our culture are particularly vulnerable.

In addition, rail transit and operations associated with the project will affect traditional cultural properties governed by the National Historic Preservation Act (NHPA). The transit corridor will pass through or otherwise affect tribal trust lands and traditional use areas. Information pertaining to changes in rail usage is needed to assess the effects the proposed undertaking will have on those properties. The dock itself and the upland area are within an Archaeological District that has been determined eligible for the National Register of Historic Places under the National Historic Preservation Act (NHPA). This action has the potential to adversely impact the Archaeological District and must therefore involve consultation with tribes and the Washington Department of Archaeology and Historic Preservation. It is unclear whether a traditional use study has been done to determine whether it is a historic property of religious and cultural significance to an Indian tribe. Such an analysis is necessary to determine tribal use of the area. Finally, the National Park Service has commented specifically on the potential impacts to adjacent and nearby historic properties, which the CTUIR incorporates herein by reference.²

Instead of the circumscribed analysis accompanying Nationwide Permits, the Corps should conduct an Environmental Impact Statement for the proposed project, which is linked to other proposed projects subject to permit actions in the Columbia River corridor. The EIS should not

² See <http://www.efsec.wa.gov/Tesoro%20Savage/Agency%20scoping%20comments/Agency%20SEPA%20Scoping%20Comment%20004.pdf>

analyze Tesoro-Savage in isolation, but in conjunction with those other regional fossil fuel transport proposals. Both individually and collectively, the projects raise issues related to the environment, economics, aesthetics, air quality, wetlands, historic and cultural properties, fish, wildlife, plants, water quality, flood hazards, floodplain values, land use, navigation, shoreline erosion and accretion, recreation, energy needs and production, public safety, food production, and property use and ownership, for both Indian and non-Indian communities.

Specific questions to be answered in an Environmental Impact Statement review of this project include, but are not limited to, the following:

- How many trains, and of what length, will convey the oil to the facility per day, week, and month?
- Is there a maximum or upper limit on the amount of oil and/or the number of trains and/or ships that will be used?
- What route(s) will the trains take?
- What type of auxiliary in-water services will be required (e.g., tugboats)?
- Will any dredging, or increased/alterd maintenance dredging, be required? If so, how often?
- What are the capabilities of the U.S. Coast Guard in the event of an oil spill at the facility? In the estuary? Along the Columbia River upstream, in the event of an accident or spill or that reaches the River?
- What is the source and ultimate destination of the oil? Is it Bakken shale crude oil which has recently been the subject of a United States Department of Transportation emergency restriction?³
- Have the potential characteristics and impacts of spills been examined for the fuel proposed to be shipped through the Port of Vancouver?
- For what purpose was the dock originally constructed?
- What are the potential impacts to threatened and endangered species from operation of the oil terminal and dock?
- What are the oil spill risks and impacts along the rail route, at the terminal, in the Columbia River, and in the Pacific Ocean?
- How much will rail and ship traffic increase?
- What will be the impacts to streams, wetlands, fish and fishing areas?
- What will be the air quality and respiratory impacts?
- Rail tank car safety
- Impacts of the terminal on local businesses (including tribal)
- Types of oil shipped (including their health risks), spill clean-up plans and contingencies
- Climate change impacts
- Impacts on historic and cultural resources and properties
- Effects on the Columbia River Gorge National Scenic Area

³ [http://www.dot.gov/sites/dot.gov/files/docs/Emergency%20Restriction%20-%20Prohibition%20Order%20\(Docket%20DOT-OST-2014-0025\).pdf](http://www.dot.gov/sites/dot.gov/files/docs/Emergency%20Restriction%20-%20Prohibition%20Order%20(Docket%20DOT-OST-2014-0025).pdf)

Finally, the Corps has the authority to reopen permit NWS-93-25 issued to the Port of Vancouver. The regulations for processing Department of the Army permits provide for authority to reopen a permit in order to modify, suspend or terminate permits when the public interest necessitates it under 33 CFR § 325.7(a).⁴ Due to the nature of the potential impacts of the proposed dock operations, the CTUIR believes it is in the public interest to reopen the permit and conduct an EIS to evaluate the impacts of these operations. Impacts have the potential to be significant, particularly when there appears to be no upper limit on the numbers of trains or ships to transport fossil fuels to or from the dock. Recently in scoping by Washington State regarding the location of the Tesoro Savage facility, over 30,000 comments were received as well as a 1100 page scoping report.⁵

Conclusion

The CTUIR DNR requests that the Corps not use Nationwide Permits for this project, and instead develop an Environmental Impact Statement. The potential direct, indirect and cumulative impacts are significant and more substantial than those contemplated under the Nationwide Permit review.

⁴ 33 CFR § 325.7 Modification, suspension, or revocation of permits.

(a) General. The district engineer may reevaluate the circumstances and conditions of any permit, including regional permits, either on his own motion, at the request of the permittee, or a third party, or as the result of periodic progress inspections, and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the public interest. In the case of regional permits, this reevaluation may cover individual activities, categories of activities, or geographic areas. Among the factors to be considered are the extent of the permittee's compliance with the terms and conditions of the permit; whether or not circumstances relating to the authorized activity have changed since the permit was issued or extended, and the continuing adequacy of or need for the permit conditions; any significant objections to the authorized activity which were not earlier considered; revisions to applicable statutory and/or regulatory authorities; and the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit. Significant increases in scope of a permitted activity will be processed as new applications for permits in accordance with § 325.2 of this part, and not as modifications under this section.

⁵ <http://www.efsec.wa.gov/Tesoro%20Savage/Scoping%20Report/Scoping%20report%202-24-14.shtml>

**Confederated Tribes of the
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info@ctuir.org • www.umatilla.nsn.us

May 11, 2016

Shawn Zinszer, Regulatory Chief
Army Corps of Engineers, Portland District
P.O. Box 2947
Portland, OR 97208-2946

**Re: UPRR Joint Permit Application No. 2014-364, Construction of 4.02 miles of track
creating a 5.37 miles second mainline track near Mosier, OR**

Dear Mr. Olmstead:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR or Umatilla Tribe) Fish and Wildlife Commission (FWC) appreciates the opportunity to provide input on the proposed track construction near Mosier, Oregon that will result in 4.02 miles of new track and a new 5.37 mile second mainline track. The CTUIR FWC has serious concerns regarding this project as it entails significant construction over two tributaries to the Columbia River and numerous wetlands, will increase rail traffic on the Columbia River and also allow for increased train speed and length. Additionally, the citizens of the CTUIR and other tribes access the river across railroad tracks, often at unmarked crossings to access the Columbia River to exercise their constitutionally-protected Treaty reserved right to fish. Increased rail traffic increases safety risks to tribal members crossing the tracks. Further, because the project potentially impacts Treaty rights, both directly and indirectly, the use of a Nationwide permit for this project is inappropriate. The CTUIR requests that the Corps of Engineers remove this project review form the Nationwide process and put it on an individual permit review process. Such a move will allow the Corps to conduct the required analyses to ensure there is little to no impacts to Treaty rights and the resources on which they depend.

The Umatilla Tribe's Constitutionally-Protected Treaty Fishing Rights

The Supreme Court of the United States has repeatedly recognized the significance of the treaty right to fish at off-reservation usual and accustomed places, holding that the right is "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Washington v. Washington State Comm'l Pass. Fishing Vessel*, 443 U.S. 658, 680, 99 S. Ct. 3055, 3071-3072 (1978), *quoting United States v. Winans*, 198 U.S. 371, 380 (1905). This treaty right to fish is a property right, protected by the Fifth Amendment to the Constitution of the United States. *See Muckleshoot Indian Tribe v. United States Corps of Engineers*, 698 F.Supp. 1504, 1510 (W.D. Wash. 1988), *citing Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411-412, 88 S.Ct. 1705, 1710-1711 (1968). The right to take fish includes a right to cross private property to access those areas, "imposing a servitude" upon the land. *Winans*, 198 U.S. at 381. Since 1968, the Umatilla Tribe has also protected these treaty rights as a plaintiff in *United States v. Oregon*, CV 68-513-KI, in the U.S. District Court for the District of Oregon.

The treaty fishing right carries with it an inherent right to protect the resource from despoliation from man-made acts. "[A] fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken." *United States v. Washington*, 506 F.Supp. 187, 203 (W.D. Wash.

1980). *See also, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 679 (1979) (Tribes with Treaty reserved fishing rights are entitled to something more tangible than “merely the chance...occasionally to dip their nets into the territorial waters.”) The ecosystem necessary to sustain the fish cannot be diminished, degraded or contaminated such that either the fish cannot survive, or that consuming the fish threatens human health. *United States v. Washington*, 2013 U.S. Dist. LEXIS 48850, 75 (W.D. Wash. Mar. 29, 2013)(State “impermissibly infringed” tribes’ treaty based fishing right in Washington by constructing culverts that “reduced the quantity of quality salmon habitat, prevented access to spawning ground, reduced salmon production...and diminished the number of salmon available for harvest.”) *See also, e.g., Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1034-35 (9th Cir. 1985)(Tribe’s fishing right can be protected by enjoining ground water withdrawals that would destroy eggs before they could hatch). This project, both in its immediate construction impacts, and its resultant long-term increase in rail traffic and speed, carry impermissible potential impacts to both the access of the treaty fishing right, and degradation of the ecosystem on which those treaty resources depend.

According to the JARPA permit document, the proposed project will construct approximately four miles of new double-track rail line, which includes two new bridges over tributaries to the Columbia River and going through multiple wetlands and adjacent lakes, many of which are spawning habitat for salmonid species listed on the Endangered Species Act. The proposal would also construct two new signal cabins, which are curiously omitted from the permit plans based on the applicant’s conclusory statement that “there are no waters for the United States what will be affected” (Project No. 2014-364 JARPA at pp 6-7.) The project also calls for over 1.5 acres of fill to open waters and wetlands. Further, the project includes a new paved area that directs any runoff from the increased train traffic to bare ground, possibly adjacent to wetlands, for “infiltration” into the ground. Given that the runoff will largely come from train traffic, and given the 250% increase in rail traffic between 2013 and 2014¹, it is likely that some type of contaminants would pollute this runoff. Any runoff that infiltrates into the bare ground will then go into the groundwater, which is often hydraulically connected to the Columbia River through the Gorge. The potential for the project to contaminate the Columbia River and adjacent wetlands, in which listed salmonids – treaty resources that the Corps has a trust duty to protect - is a potential effect the Corps must analyze, and is another reason a Nationwide Permit should not be used. Similarly, the potential impacts from the construction of bridges, cabins and tracks over sensitive wetlands and lake ecosystems in which listed species spawn and travel through requires the Corps abandon the use of the Nationwide process.

The Project will Likely Harm the Umatilla Tribe’s Treaty Resources and Interests

This proposal will increase rail traffic in the Columbia River Gorge. In a one page document prepared by Union Pacific Railroad entitled “Union Pacific to Enhance Infrastructure in Mosier” submitted in their public outreach effort, UPRR stated:

¹ http://www.oregonlive.com/environment/index.ssf/2014/07/everything_you_need_to_know_ab.html

The Federal Railroad Administration speed limit on the new track will be 35 mph. Union Pacific currently moves about 25 to 30 trains per day through Mosier. The new double track will allow us to move 5 to 7 more trains per day through Mosier.

This statement reveals several things. First, double-tracking this area will increase the railroad speed. The current speed limit in Mosier is 30 miles per hour.² Second, UPRR estimates that this project will increase traffic through in the area by approximately 25%. Also, the Columbia River Gorge is essentially a closed system for trains. If seven more trains go through Mosier, seven more trains go through Rufus, Biggs, The Dalles, Celilo, Hood River, Cascade Locks, etc. Increased traffic in Mosier generates impacts up and down the Columbia in the form of additional trains, pollution, noise and risks of derailment. Finally, while train traffic in Mosier is currently limited to 30 miles an hour, trains up river, between The Dalles and Boardman, travel up to 70 miles an hour.

The increased railroad traffic all along the Columbia River, particularly in Zone 6 between Bonneville and McNary Dams, will impair the Tribe's interests in the following ways: damage to treaty resources and the ecosystems they depend on, eradication of tribal fishing areas, impeded access to tribal fishing areas and increased risks to tribal member safety, and damage and access to cultural resources.

The ecosystem and treaty resources will suffer catastrophic damage from accidents and spills.

The Project would result in an increase in shipment of tank cars, many of which may carry crude oil or similarly dangerous products, traveling in the Columbia River Gorge and adjacent to the Columbia River, where many tribal fishing areas are located. Train derailments, shipping spills, and fire and explosions from those derailments are a certainty. This is evident from the cascade of derailments across the United States and Canada reported in the media. For example, on February 17, 2015, a town in West Virginia suffered the derailment of a unit train of more than 100 oil tank cars carrying Bakken crude. Fourteen of the tankers ignited in an explosion, and at least one went into the Kanawha River. Hundreds of families were evacuated, and two downstream water treatment plants were closed. Photos of the explosion and subsequent tour of the scene as reported by the Boston Globe and Newsweek are below.

² <http://www.fogchart.com/Down/Beta/PORTLAND.pdf>



Photo caption: "Steve Keenan/The Register-Herald via Associated Press."

John Raby, *Oil-bearing train derails in West Virginia, setting off explosion*, The Boston Globe, February 17, 2015, at <http://www.bostonglobe.com/news/nation/2015/02/17/west-virginia-train-derailment-causes-oil-spill-and-fires/opo6XRXLUV0URv8EiDSYQJ/story.html>



Photo caption: West Virginia Governor Earl Ray Tomblin surveyed the wreck site on February 17. "Many of the tanks had gaping holes in the tops where they had exploded," he tells Newsweek. Office of Governor Earl Ray Tomblin.

Max Kutner, *West Virginia Begins Investigating Massive Train Derailment*, Newsweek, February 20, 2015, at <http://www.newsweek.com/west-virginia-begins-investigating-massive-train-derailment-308428>.

The day before, February 16, witnessed the derailment and spill of more than 260,000 gallons of crude oil near Timmons, Ontario. The photograph below, from the Transportation Safety Board of Canada, shows workers fighting the oil spill fire.



Photo caption: “In this Feb. 16, 2015, file photo, provided by the Transportation Safety Board of Canada, workers fight a fire after a crude oil train derailment south of Timmons, Ontario. The train derailment this month suggests new safety requirements for tank cars carrying flammable liquids are inadequate, Canada’s transport safety board (sic) announced Monday, Feb. 23, 2105.”

Rob Gillies, *Canada safety board says latest oil train derailment shows new safety standards are inadequate*, U.S. News, February 23, 2105, at <http://www.usnews.com/news/world/articles/2015/02/23/canada-oil-train-accident-shows-new-safety-rules-inadequate>.

While the U.S. Department of Transportation is considering new standards for rail cars, newly built tanks cars do not appear to reduce the risk of accidents and spills as “both the West Virginia accident and the oil train derailment and fire in Ontario involved recently built tank cars that

were supposed to be an improvement,” but the Canadian Transportation Safety Board said these new cars still “performed similarly” to the older models. *Id.* It is an unfortunate reality that “[t]he number of gallons spilled in the United States in [2013], federal records show, far outpaced the total amount spilled by railroads from 1975 to 2012.” Clifford Kraus and Jad Mouawad, *Accidents Surge as Oil Industry Takes the Train*, N.Y. Times, Jan. 26, 2014, at A1, and <http://www.nytimes.com/2014/01/26/business/energy-environment/accidents-surge-as-oil-industry-takes-the-train.html>. If the Project goes forward, it is only a matter of time before a similar accident brings ecological catastrophe to the Columbia River, devastating the fishery and other resources the Umatilla Tribe depends on and has worked so hard to protect and restore. A derailment and spill along the Columbia River will not only be tragic for the resource, it will also work immeasurable hardships on the many tribal members that depend on the Columbia River and its riches for their living. It will likely eradicate productive fishing areas in the immediate area of the spill, and the consequences will be along the entire River, as a spill could wipe out stocks of salmon and steelhead that are already listed under the Endangered Species Act, erasing the many years and billions of dollars of effort that has gone into restoring the resource.

Increased rail traffic will inhibit access to fishing areas and endanger tribal members.

On both sides of the Columbia River, tribal members cross train tracks multiple times on a daily basis to exercise their treaty fishing rights. There is a great deal of scaffold fishing up stream and downstream of the project area that is visible from satellite images on Google Earth. This fishing is most often restricted by the crossing of the railroad tracks.

The increase in the number of trains, and possibly the length of such trains, will delay tribal members’ ability to cross the tracks to access fishing areas. Such delays become acute during adverse or impending weather, when members must sometimes get to their nets in the water as quickly as possible.

The increase in rail traffic and the speed of that traffic will also increase the incidence of tribal members stuck by rail cars. Tribal members are at risk of rail-strikes when crossing the tracks to access fishing sites, In-Lieu sites, Treaty Fishing Access Sites, homes and markets for the sale of harvested fish. Recently, on February 21, 2015, a man was killed by train strike near Kalama, WA. <http://www.khq.com/story/28168097/railroad-man-on-track-dies-after-being-struck-by-train>. According to railroad statistics, 27 people were killed by train strikes across Washington State in 2014.³ In Oregon, 11 were killed in 2015. *Id.* The likelihood of train-strike fatalities, injuries and property damage will increase from the increase in rail traffic and speed that would result from the Project.

Increased rail traffic will damage cultural and religious tribal interests.

The increased rail traffic will affect properties and items governed and protected by the National Historic Preservation Act, the Archaeological Resources Protection Act, the Native American

³ <http://safetydata.fra.dot.gov/Officeofsafety/publicsite/Query/TenYearAccidentIncidentOverview.aspx>

Graves Protection and Repatriation Act and other laws. The transit corridor passes through tribal trust and traditional use areas. There are ancestral human remains, traditional cultural properties, historic properties of religious and cultural significance to Indian Tribes, and archaeological resources and sites in these areas. Any accidents, spills, explosions and related fires can damage these properties and items, and cause irreversible loss. Similarly, the increased traffic could result in increased risks of earthquake, liquefaction, or landslide, rail caused fires (without derailment), contaminant leakage onto tracks and sites, all of which could damage cultural and religious resources.

All of the potential impacts discussed above counsel for removal of the project review from the abbreviated Nationwide process, and the conduct of a robust review under the individual permit process. Moreover, it appears the Corps does not have accurate and complete information about the project before it on which to make a decision.

The permit application contains inaccurate, inconsistent and incomplete information.

There are inaccuracies and inconsistencies in the application as well. For instance, in the November, 2014 Project Purpose and Need and Alternative Analysis, it stated that trains along this route can range up to 12,000 feet and that the siding in Mosier siding is the shortest in the 206 mile subdivision. In conversations with UPRR it was clarified that UPRR does not run 12,000 foot trains, though there is nothing preventing them from doing so. The average length of train in the Gorge is 6,200 feet, half the length referenced in the report prepared by CH2M Hill. Also, Mosier is not the shortest siding in the Portland subdivision. From our information, the Mosier siding is 6,751 feet. The Bridal Veil siding is 6,360. The report contends that “[s]tandard trains currently operating on the route can range in length up to 12,000 feet, and many of these standard-length trains are unable to use the Mosier Siding for passing.” However, most of the sidings between Troutdale and The Dalles, are less than 12,000 feet including Sandy (10,617 feet), Bridal Veil (6,360 feet), Dodson (10,617 feet), Cascade Locks (6,751 feet), and Meno (9,916 feet). A chart of the siding length and locations is attached. Further, in response to cultural resource concerns by Catherine Dickson, the contractor stated that “the total number of trains per day is anticipated to remain similar to existing levels. The existing main line track speed limit would not be increased as a result of the project.” A potential increase of 28% of train traffic is not similar to existing levels. Further, as noted above, in one pager, “Union Pacific to Enhance Infrastructure in Mosier,” the speed limit will increase from 30 mph to 35 mph. The point of all of these inconsistencies is that the information before the Corps at this time is inaccurate. The project needs an individual permit review process, not the abbreviated whitewashing of the Nationwide process.

At a staff meeting with the Corps of Engineers regarding this permit on April 15, 2016, Corps staff expressed the opinion that the increased rail traffic of this project would be an indirect effect of this project. However, the Corps also did not know whether they could deny a permit if the indirect effects of the project had more than a de minimus impact on tribal treaty rights. This is a critical issue. The CTUIR believes that any impact by Corps authorized projects on treaty rights is unacceptable. Further, whether the impacts of this project are direct or indirect, the results will increase rail traffic and that will affect tribal fishers. The CTUIR would like a formal response to the question of whether or not the increased rail traffic and the threats that increase pose to tribal fishers and potential impacts on Treaty rights are direct or indirect effects of this project?

Project elements have changed.

UPRR has proposed the transfer of 2.82 acres of land from the Oregon Parks and Recreation Commission (OPRC) on September 23, 2015 in order to construct the second mainline construction.⁴ On April 27, 2016, the OPRC unanimously rejected the proposal by UPRR to secure the lands from OPRC for the expansion. This denial will affect the project proposal. Since the project can no longer as designed, how will the Corps address mid-review changes?

The project is currently under county review.

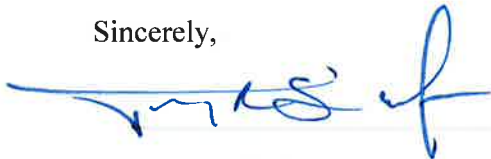
Finally, the Wasco County Planning Commission is currently reviewing the UPRR application under county rules that implement the Columbia River Gorge National Scenic Area Act (Scenic Area Act). Until this use is authorized under the county review process, with all limitations and conditions, Corps review of the project under a Nationwide permit is premature. The Scenic Area Act is federal law, and county ordinances implementing that law are federal in nature. Therefore limitations on state and local authority over railroads are inapplicable to county actions under the Scenic Area Act.

Conclusion:

Until these questions are answered, it remains unclear whether the Corps is willing or able to address treaty impacts of this project. Please provide the answers to these questions to Brent Hall, Tribal Attorney at 541-429-7200.

We look forward to consulting with the Corps on this issue further to address potential impacts to treaty rights.

Sincerely,



Jeremy Wolf, Chair
Fish and Wildlife Commission
Confederated Tribes of the Umatilla Indian Reservation

Cc: Wasco County
Yakama Nation Fish and Wildlife Committee
Warm Springs Fish and Wildlife Committee
Nez Perce Tribe Fish and Wildlife Committee
Paul Lumley, Executive Director, CRTIFC

⁴ <http://www.oregon.gov/oprd/Documents/Commission/2016.4-Salem/April6.pdf>



CONFEDERATED TRIBES
of the
Umatilla Indian Reservation
Department of Natural Resources
ADMINISTRATION

P.O. Box 638
73239 Confederated Way
Pendleton, Oregon 97801
Area code 541 Phone 276-3447 FAX 276-3317



January 31, 2006

U.S. Army Corps of Engineers
Attn: CECW-OR/MVD (David B. Olson)
441 G Street NW.
Washington, DC 20314-1000

Re: CTUIR DNR Comments on Nationwide Permits

DELIVERED ELECTRONICALLY

Dear Mr. Olson:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR) appreciates the opportunity to review the Corps of Engineers' (Corps) solicitation of comments on the proposal to reissue and modify Nationwide Permits (NWP), general conditions and definitions. On November 27th, the CTUIR requested a 60-day extension to address individual details regarding the NWPs. After review of DNR's original concerns from our November 27th letter, it is apparent that our concerns were justified and we reiterate our comments on General Conditions 16 and 18.

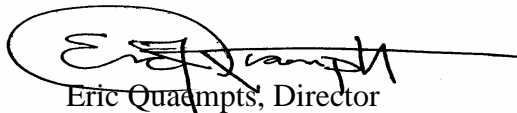
General Condition 16, Tribal Rights, states that "No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights." Further research of Corps records and conversations with Corps staff indicate that there exists no guidance within the Nationwide Permit process which tells potential permittees what is meant by "tribal rights," nor what standard is used to determine their impairment. Unless and until the Corps develops some form of guidance to potential permittees regarding General Condition 16, there is essentially no Corps oversight of impacts to tribal rights. The Corps of Engineers has a Trust Responsibility to manage resources entrusted to their care so that resources secured by treaty for Indian tribes are protected from destruction or degradation. Under the Nationwide Permitting scheme, the Corps is exercising no oversight of tribal treaty-reserved rights or resources and is therefore breaching that Trust Responsibility. Worse still, Condition 16 suggests that the Corps is ensuring protection of tribal rights, when in fact the Corps appears to have no intention of doing so. To remedy this failure, the Corps has an obligation to consult with tribes to determine what tribal rights are and what actions the Corps must take to protect them. This could be done on a division or district level.

General Condition 18, regarding Historic Properties, should reference the 36 CFR § 800 regulations for compliance with the National Historic Preservation Act (NHPA). The draft conditions cite the Corps' compliance with "the current procedures for addressing the requirements of Section 106 and the" NHPA. As of this date, the only lawful "current procedures" for the Corps to comply with the NHPA are in 36 CFR § 800. We would direct the Corps' attention to a letter sent to the CTUIR on November 14th from Don T. Riley, Major General, U.S. Army, Director of Civil Works. The letter, in the attached Appendix C Fact Sheet, states that "The ACHP has never concurred in our counterpart regulations due to disagreements primarily on jurisdictional issues." Further, the Fact Sheet states that "Appendix C lacks updated effect definitions, updated public involvement guidelines and does not address any tribal involvement." Until the ACHP concurs in the Appendix C regulations, they are a nullity, enacted without legal force or effect. To quote our November 27th letter:

The Corps of Engineers should immediately abandon Appendix C and comply with 36 CFR § 800. This should be done rather than embarking on an open-ended "consultation" on an unambiguously flawed Appendix C. During the time allocated to revise Appendix C, the Corps should comply with the law as it is written. . .

If you have any questions, please feel free to contact Audie Huber, Intergovernmental Affairs Manager, at (541) 966-2334.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric Quampts", is written over a circular stamp. The signature is fluid and cursive.

Eric Quampts, Director
Department of Natural Resources

Cc: NATHPO, D. Bambi Kraus
ACHP, Valerie Hauser, Tribal Liaison
Georgeie Reynolds, Tribal Liaison COE
Deborah Knaub, Seattle COE
Diane Lake, Seattle COE
Corrie Veenstra, Portland COE
Barbara Creel, Portland COE