

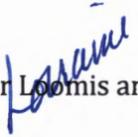


UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
Sustainable Fisheries Division
510 Desmond Drive SE, Suite 103
Lacey WA, 98503

January 19, 2016

Honorable Lorraine Loomis, Chair
Northwest Indian Fisheries Commission
6730 Martin Way East
Olympia, Washington 98516

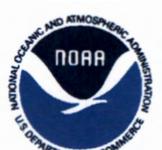
Mr. Jim Unsworth, Director
Washington Department of Fish and Wildlife
600 Captiol Way North
Olympia, Washington 98501

Dear Chair  Loomis and Director  Unsworth:

In 2015, and even as we now enter the North of Falcon process for 2016, considerable discussion has focused on consequences that could occur should the co-managers fail to reach agreement on fisheries in Puget Sound through the North of Falcon process. Those consequences have broad reach, but certainly could affect decisions to be made by NOAA Fisheries under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) regarding the ocean salmon fisheries (Pacific Fishery Management Council or PFMC fisheries); and NOAA's ability to make timely determinations under the Endangered Species Act (ESA) regarding Puget Sound fisheries.¹ I would like to take this opportunity to examine the related decisions and determinations NOAA Fisheries must make in 2016 and be as forthcoming as possible about the process so that co-managers and others have the same level of information about our thinking as negotiations move forward. We do not address – nor have we anticipated - all possible scenarios for the coming North of Falcon process, and do not suggest that the information below is inclusive of all considerations that may arise over time. Please feel free to share this information with others.

At the outset, NOAA Fisheries believes that fisheries *south* of Cape Falcon, Oregon, would not be affected by the issues discussed here as those fisheries have negligible impact on Puget Sound salmon and fisheries north of Cape Falcon have minimal effect on the southern populations. Nor do we believe that co-manager agreements related to fisheries within the Columbia River would be directly affected. Therefore, in this letter I would like to consider the context surrounding approval of PFMC fisheries north of Cape Falcon and federal determinations related to state and tribal fisheries in Puget Sound. As you know well, acknowledging and accounting in each instance for the interrelationship between the “outside” fisheries and the “inside” fisheries is unavoidable.

¹ Similar concerns conceivably could, but thus far have not, arisen in the context of Columbia River fisheries and implementation of treaty Indian fishing rights under *U.S. v. Oregon*.



While this letter discusses the decisions of NOAA Fisheries, we respect the management entities responsible for regulating each fishery and the cooperation among them that is so fundamental to conservation. Ocean salmon fisheries occur in the Exclusive Economic Zone off the U.S. West Coast, and are managed by the Pacific Fishery Management Council and NOAA Fisheries under the MSA. The State of Washington manages salmon fisheries in state ocean waters, and the coastal treaty tribes manage treaty fisheries in the ocean. "Puget Sound fisheries" occur in the Strait of Juan de Fuca, Puget Sound, and rivers and tributaries entering Puget Sound and the Strait of Juan de Fuca. These fisheries are managed by the State of Washington and the Indian tribes with treaty fishing rights in these waters. In that regard, it is important that you have confidence that NOAA Fisheries will always "stay in its lane." Please let me know at any time if you have concerns that our actions may be extending beyond our appropriate authorities.

Requirements for federal determinations

Under the authority of the MSA, the PFMC's Pacific Coast Salmon Fishery Management Plan (FMP) governs the salmon fisheries off Washington, Oregon and California. Consistent with the FMP, the PFMC develops its annual salmon management measures through a two-meeting process conducted in March and April of each year. At its April meeting, the PFMC adopts a final set of management measures which it then recommends to NOAA Fisheries for approval and implementation.

To approve the Council's final management measures, NOAA Fisheries must make a determination that the measures are consistent with the MSA. The MSA has procedural and biological requirements for approval which are captured in the FMP, but also requires that the fishery be consistent with "other applicable law." "Other applicable law" with respect to Puget Sound stocks means that NOAA Fisheries must determine that the management measures:

- Are consistent with the ESA.
- Are consistent with the Pacific Salmon Treaty (PST).
- Allow for full exercise of treaty rights by affected treaty fishing tribes, consistent with court orders in *U.S. v. Washington*, *U.S. v. Oregon*, *Hoh v. Baldrige* and other cases.

NOAA Fisheries' determination of compliance with the MSA, the ESA, and the PST is informed by the technical analysis and information developed through the Council process. The Council's scientific advisors (Salmon Technical Team or STT) provide analysis periodically through the season-setting process of whether the alternative sets of management measures under consideration meet quantitative standards or limits described in the FMP, or identified through ESA or PST processes². The Council considers these analyses as it considers potential modifications to the alternatives, moving to final recommendations that the STT confirms meet all quantitative requirements. As to the fourth requirement, treaty right implementation, the PFMC and NOAA Fisheries normally rely on the state and tribes through the North of Falcon process to arrive at a

² These requirements are discussed below.

determination that they have agreed that the PFMC's final recommendations *as well as* a complementary set of Puget Sound fisheries assure implementation of the treaty right.

Under usual circumstances, a broad technical and policy consensus develops around the co-managers' recommended fishing regimes emanating from the North of Falcon process. A good deal of confidence is established about the legal defensibility of the agree-to regime under all the applicable laws. Obviously, should there be something short of consensus within North of Falcon, confidence about the defensibility of related decisions is eroded and NOAA Fisheries expects its decisions and the nature of any dispute to be scrutinized intensely by interested parties.

The Magnuson/Stevens Act

Of the four major bodies of law that apply to the fishery, the MSA is unique in its requirement that the fishery also comply with the three "other applicable law(s)." But in addition, the MSA requires that Councils set biological standards to guide management of the fishery for which they have an FMP. The Salmon FMP describes management reference points (conservation objectives and Annual Catch Limits (ACLs), for example) for each Chinook and coho stock. The annual management measures must be consistent with these standards in order for NOAA Fisheries to approve PFMC fishery management measures.

For ESA listed species including Puget Sound Chinook, ESA "consultation standards" serve as the applicable reference points. Historically the consultation standards for Puget Sound Chinook have been linked to the co-managers' "conservation objectives" for Puget Sound Chinook populations and thus address impacts from both Puget Sound and the PFMC fisheries. In arriving at ESA consultation standards on an annual basis, NOAA Fisheries contributes to discussions among co-managers directed at updating and maintaining conservation objectives to help ensure that, once agreed-upon, they are also likely to meet ESA requirements. Ultimately, NOAA Fisheries captures the conservation objectives in the annual "ESA Guidance Letter" sent to the Council prior to the March meeting, and the co-managers present them to the Council as their management objectives for Puget Sound and coastal populations.

For coho salmon, the standards applied by the PFMC reflect agreement among the co-managers found in the Puget Sound Comprehensive Coho Management Plan. The FMP describes allowable exploitation rates for each stock, but notes that "annual natural escapement targets can vary from FMP conservation objectives if agreed to" by the co-managers. The five Puget Sound coho stocks are managed for stepped exploitation rates based on three predefined stock-status categories. PFMC impacts on Puget Sound coho stocks are relatively small and the stepped rates rarely constrain PFMC fisheries.

All of the requirements of the FMP for Puget Sound stocks are described in terms of total or southern U.S. impacts rather than PFMC-specific impacts, regardless of the relatively small impact of PFMC fisheries on those stocks. It is important to note – and some find it counter-intuitive – that

even though PFMC fisheries have a relatively small impact on Puget Sound populations, Puget Sound fisheries have a significant impact on the ability to approve PFMC fisheries.

Endangered Species Act

The second legal requirement for approval of the annual fishery management measures is compliance with the ESA. The impact of the PFMC fisheries on threatened Puget Sound Chinook has most recently been addressed in a 2004 biological opinion. The analysis in the opinion, which concludes the PFMC fisheries are not likely to jeopardize Puget Sound Chinook, relies on the expectation that the impact of PFMC fisheries on Puget Sound Chinook has been and will continue to remain low. In determining if the PFMC fisheries comply with the ESA, NOAA Fisheries would need to assess whether the proposed PFMC fisheries have similarly low impacts on Puget Sound Chinook stocks. It could do this without agreement on the Puget Sound fisheries.³ However, this does not by itself ensure that NOAA Fisheries could approve PFMC management measures without some form of assurance regarding Puget Sound fisheries. As noted above, the FMP describes standards that account for combined fishery impacts. In addition, NOAA Fisheries would need to ensure that the effects of the PFMC fisheries are consistent with the biological opinion addressing those effects on Southern Resident Killer Whales.

As discussed above, ESA authorization for the fisheries *in Puget Sound* also is necessary. In recent years, NOAA Fisheries has addressed the effects of the fisheries through Section 7 of the ESA whereby a “consultation” on a federal action can receive a determination. In this instance, the federal action upon which NOAA Fisheries has consulted is the funding by the Bureau of Indian Affairs (BIA) of tribal fisheries management activities. Non-Indian fisheries are included within the consultation because, under a North of Falcon agreement, they are interrelated and interdependent with the tribal fisheries.

If there is no co-manager agreement on Puget Sound fisheries, any non-Indian fishery in Puget Sound likely would lose its “interrelated and interdependent” relationship with the tribal fishery, may no longer be associated with a “federal action” and if so, would not be eligible for a section 7 consultation. In that case, a proposed non-Indian fishery could only be determined to comply through sections of the ESA that take much longer to put in place – longer than the fishery itself. The section 7 consultation provides a more timely mechanism for the ESA determination on a North of Falcon agreement because it has fewer procedural requirements and can be completed more quickly than alternative ESA review processes⁴.

Treaty Indian fisheries, on the other hand, could be addressed through section 7 consultation in the absence of an agreement and regardless of whether non-Indian fisheries were proposed because of

³ Puget Sound coho are not ESA-listed and NOAA Fisheries has no ESA-related decision related to fisheries harvesting them.

⁴ Specifically application for approval under the applicable ESA section 4(d) rule or an Incidental Take Permit under ESA section 10.

their connection with the federal action of BIA funding. However, these circumstances would be unprecedented and require development of completely new documents and analyses. NOAA Fisheries' ability to proceed with a biological opinion would depend first on the tribes providing a clear and comprehensive plan in a timely manner; second, a biological opinion on tribal fisheries that would differ significantly from prior opinions on Puget Sound fisheries; and third, a "new" biological opinion that would likely be subject to the usual, but in this case heightened, legal and policy review sensitized to the unique circumstances. In addition, a separate tribal plan could require a new NEPA assessment by the BIA. While NOAA Fisheries believes proposals for tribal-only fisheries could receive ESA approval so long as conservation objectives were being met, it is likely that the analysis and review of the newly-structured proposals would be time-consuming, and might not be completed before the proposed fisheries would be over.

In summary, a biological opinion currently covers PFMC fisheries when their impact on Puget Sound chinook populations remains low, but no ESA coverage will exist for Puget Sound fisheries after May of 2016. Based upon what NOAA Fisheries knows now, the only potentially timely mechanism for ESA coverage of Puget Sound fisheries, at least non-Indian fisheries, requires agreement under North of Falcon. Section 7 is available to tribal fisheries, even without an agreement. However, given the unprecedented nature of a consultation under these circumstances, it is not clear that coverage could be provided in time for fisheries.

Pacific Salmon Treaty

The management of fisheries that impact salmon stocks originating in Washington and Oregon (southern U.S.) and migrating north through Canadian or Alaskan waters is governed by the PST. Fisheries in Southeast Alaska, northern British Columbia and the west coast of Vancouver Island are managed on overall Chinook abundance (aggregate abundance based management or AABM), as opposed to individual Chinook stock abundance (individual stock based management or ISBM) that occurs in southern BC and Washington. The treaty limits overall impacts in the ISBM fisheries to a set percentage of impacts that occurred during a base period of 1979-1982. For Puget Sound Chinook and coho stocks, domestic conservation objectives are generally more conservative than Treaty obligations – in fact, the Treaty's ISBM limits for Puget Sound Chinook and Puget Sound coho have never limited southern U.S. fisheries.

However, the PST limits southern U.S. impacts on Interior Fraser River (Thompson River) coho to 10% when the stock's status is designated as "low" as it has been since 2009. Because these fish are found in significant numbers in both ocean and Puget Sound fisheries, the 10% exploitation rate has constrained *both* PFMC and Puget Sound fisheries every year since 2009 and is often the subject of sensitive negotiations in North of Falcon discussions.

Implementation of the PST in the United States is governed by the Pacific Salmon Treaty Act (PSTA). The PSTA governs the makeup and conduct of the U.S. Section of the Pacific Salmon Commission and provides for enforcement of the PST in the U.S. The PSTA authorizes NOAA

Fisheries to preempt “any action . . . the results of which place the United States in jeopardy of not fulfilling its international obligations under the Treaty . . .”

All co-managers are well aware that Thompson coho has been problematic in North of Falcon discussions. In the absence of a North of Falcon agreement, it will be important to develop an alternative mechanism that gives NOAA Fisheries assurance that the 10% limit on Thompson River coho will not be exceeded. This would be necessary to comply with the MSA’s “other applicable law” provision and to ensure that the enforcement provision of the PSTA not become an issue.

Tribal Treaty Fishing Rights

Treaty fishing rights in northwestern Washington are addressed in the long-running *U.S. v. Washington* litigation which guarantee treaty tribes the continued right to take 50% of the harvestable fish passing through their usual and accustomed fishing grounds. In practice today, the state and tribes co-manage the resource and use the North of Falcon process to annually negotiate the division of harvest, being mindful of myriad court decisions but seeking mutually-beneficial flexibility. The formal results of the North of Falcon negotiations are documented in the “final model run” and the “List of Agreed Fisheries” (LOAF) which describe in detail the current-year’s fisheries. The co-managers typically provide a fishery plan, which in combination with the final model run and LOAF, reflects their agreement, and describes the proposed action and the basis for NOAA Fisheries’ ESA review of Puget Sound fisheries.

The North of Falcon process evolved within the court-approved 1985 Puget Sound Salmon Management Plan, negotiated and agreed-to among the state and the tribes. While this Plan remains the foundation of co-management, many practices have evolved since 1985. Stock designations have changed. Exploitation rates have replaced numeric escapement goals for many stocks. Data and science have improved. In general, the conservation objectives that the co-managers present at the March Council meeting are a modern, more sophisticated version of the agreed-to escapement goals envisioned in 1985. Today, co-managers focus intently on an optimum distribution of available impacts to ESA-listed populations as well as traditional Indian/non-Indian allocation requirements.

Process, like the development of the LOAF, too has evolved. The 1985 Plan includes a schedule for pre-season agreement and information exchange which is not current practice. Its dispute resolution processes are time-consuming, and would not likely lead to resolution of issues in time for today’s decision process.

For decades the state and tribes have reached agreement on how to share the catch in a manner that has not required major judicial involvement. As a result, neither co-managers nor NOAA Fisheries has modern judicial guidance on how to proceed in today’s environment when there is not an agreement. Would the court review exploitation rates or be solely concerned with fixed escapement goals? How would the court treat biological risk to ESA-listed populations? Would the court look at the allocation of the management units analyzed by co-managers today, or would it

revert to the original allocation units the court used 30 years ago? It may be difficult in today's environment to determine without co-manager consensus what the "harvestable surplus" is, and what the treaty share is and, conversely, whether a proposed non-Indian fishery would impair the treaty share. Under any circumstance, it is difficult to imagine a judicial review of a manager's unilateral decision about such matters being resolved in a satisfactory manner if the co-managers are disputing the underlying science and legal standards.

Candidly, NOAA Fisheries believes that a dispute among co-managers about conservation objectives in Puget Sound is possible, but unlikely. Far more likely is a dispute about the allocation of impacts among the fisheries required to meet those objectives. In a circumstance where the conservation objectives are agreed-to but the fisheries are not, NOAA Fisheries could potentially review a proposed fishery submitted unilaterally by one manager or another for its compliance with "other applicable law," particularly treaty rights. PFMC fisheries, which are predominantly (but not exclusively) non-Indian, could be evaluated to ensure that they are designed to harvest less than 50% of the harvestable share – a more significant issue for PFMC fisheries for Washington north coastal populations than Puget Sound. However, such a determination would be difficult even with agreed conservation objectives, given the lack of precedent and the short time between the Council's April meeting and the start of the fisheries. Such a determination would likely be impossible without agreed conservation objectives.

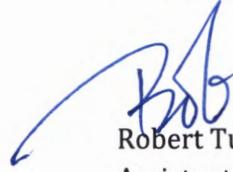
More significant would be questions surrounding a proposal for a pre-terminal non-Indian fishery in Puget Sound that has not been agreed-to by tribal co-managers. NOAA Fisheries notes that during the era of co-management, litigation about what harvest counts in the non-Indian share long has been deferred, giving way to the Pacific Salmon Treaty and the North of Falcon process. Assuming such questions do not again surface, it is conceivable that NOAA Fisheries could infer the harvestable surplus for each population affected from the agree-to conservation objectives – and factor in any PFMC fishery's impacts – to determine if a harvestable share would be exceeded from the proposal. Yet issues about compliance with the other requirements immediately surface – ESA approval of non-Indian fisheries in Puget Sound in the absence of an agreement, in particular.

NOAA Fisheries is aware that a level of controversy surrounded the 2015 non-Indian fisheries in Puget Sound. Assuming allocation of impacts was a factor in that controversy, NOAA Fisheries notes its belief that in the most recent five years, the negotiated non-Indian catch in Washington has exceeded 50% on average for at least two Puget Sound Chinook allocation units – specifically in 2015, it appears to NOAA Fisheries that non-Indians fisheries in Washington exceeded 50% in three allocation units. It is unclear what a non-Indian fishery would look like if it was proposed without agreement and complied strictly with allocation requirements – assuming those requirements themselves did not again become the focus of the dispute.

I reiterate NOAA Fisheries' belief that a North of Falcon agreement will emerge in 2016. In that regard, please let me know if there is anything I can do to advance your deliberations. At a minimum, I want to ensure all interested parties have the same level of understanding of the thinking of NOAA Fisheries about the benefit of an agreement as we move into the 2016 season-

setting process. I hope the information I have provided is of interest and will do what I can to address any questions you may have. As mentioned above, please feel free to share this information with anyone interested in our up-coming North of Falcon process.

Sincerely,



Robert Turner
Assistant Regional Administrator
Sustainable Fisheries Division

Cc: Curt Melcher, ODFW
Dorothy Lowman, PFMC
Jeremy Wolf, CRITFC