



**UNITED STATES DEPARTMENT OF COMMERCE**  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
West Coast Region  
1201 NE Lloyd Boulevard, Suite 1100  
PORTLAND, OREGON 97232-1274

February 10, 2017

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

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

Dear Chair Loomis and Director Unsworth:

As you are well aware, the events leading to the co-managers' delayed agreement on Puget Sound fisheries in 2016 involved a significant commitment of time and resources by all of us. We are encouraged by the co-managers' recent efforts and progress to avoid a repeat of these events in 2017. These efforts demonstrate commitment and determination to reach a better outcome this year.

Success this year entails the state and tribes reaching a timely 2017 fisheries management agreement. Reaching that agreement will aid in crafting a new, long-term agreement that the co-managers can rely on for the foreseeable future. We are reassured by the co-managers' commitment to a substantive schedule that, if adhered to, will lead to a conclusion by mid-April. NOAA Fisheries will continue to work closely with the co-managers to avoid surprises and ensure the co-managers' plans are consistent with the requirements of our regulatory review.

Although these efforts give good reason for hope, there continues to be a measure of anxiety and skepticism about the upcoming season. To inform and encourage your efforts, we are taking this opportunity to reiterate and expand upon concerns described in NOAA Fisheries' letter of January 19, 2016, that remain relevant for the 2017 season-setting process.

In that letter, we identified potential consequences 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 by NOAA Fisheries under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) regarding the 2017 federal ocean salmon fisheries (i.e., those under the jurisdiction of the Pacific Fishery Management Council (PFMC)), as well as timely determinations under the Endangered Species Act (ESA) regarding Puget Sound fisheries.

This year, we are describing some potential scenarios below. However, we do not suggest that this information is inclusive of all considerations that may arise over time. We encourage you to share this information with others to promote a common understanding of the importance of our collective success. Please alert us to any additional potential outcomes you anticipate.



We also reiterate our offer to assist in any way we can to reach a successful outcome in 2017 and beyond.

### *Management Structure*

NOAA Fisheries and the PFMC have management authority under the MSA for ocean salmon fisheries occurring in the Exclusive Economic Zone off the U.S. West Coast. 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 the 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. 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 fundamental to achieving our sustainable management and shared conservation goals.

### *Affected Area*

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. NOAA Fisheries similarly believes that co-management agreements related to fisheries within the Columbia River would not be directly affected by the issues discussed here. Therefore, this letter considers only the context surrounding approval of PFMC fisheries north of Cape Falcon (*i.e.*, the "outside" fisheries) and federal determinations related to state and tribal fisheries in Puget Sound (*i.e.*, the "inside" fisheries), which, as you know, are unavoidably intertwined.

### *Federal Requirements for Approval*

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 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 PFMC'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, and 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); and

- allow for the 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, ESA, and PST is informed by the technical analyses and information developed through the PFMC's process and scientific advisors (Salmon Technical Team or STT). With respect to treaty rights, the PFMC and NOAA Fisheries normally rely on the state and tribes to affirm through joint agreement that the PFMC's final management measures *combined with* a complementary set of Puget Sound fisheries (determined through the North of Falcon process) 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. This consensus establishes confidence that that the agreed-to regime meets all the applicable laws. Lack of consensus within North of Falcon diminishes this confidence and increases NOAA Fisheries' expectation that any decisions made will be intensely scrutinized.

In addition, NOAA Fisheries' ability to approve the PFMC's recommendations prior to May 1 is always a challenge due to the limited time following PFMC's final action in April. Any ambiguity related to the required assurances would almost certainly delay NOAA Fisheries' approval of the regulations past the traditional May 1 season start date.

#### *Approval Requirement 1: Meet MSA Standards*

The MSA requires that Fishery Management Councils set science-based standards to guide management of the fishery for which they have a FMP. The Salmon FMP describes management reference points (*e.g.*, conservation objectives and Annual Catch Limits or ACLs) for each Chinook and coho stock. In order for NOAA Fisheries to approve the PFMC's recommended annual fishery management measures, they must be consistent with these standards.

Puget Sound Chinook salmon are listed under the ESA as threatened, so ESA "consultation standards" serve as the applicable reference points for these populations. Historically, these consultation standards 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. 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. NOAA Fisheries summarizes the conservation objectives in its annual "ESA Guidance Letter" sent to the PFMC prior to the annual March PFMC meeting.

For coho salmon, which are not listed under the ESA, the FMP describes allowable exploitation rates for each stock, but it notes that "annual natural escapement targets can vary from FMP conservation objectives if agreed to" by the co-managers. PFMC fisheries impacts on Puget

Sound coho stocks are relatively small and their exploitation rates rarely constrain PFMC fisheries. However, in 2016, both Washington coastal and Puget Sound coho stocks were expected to return in historically low numbers. Thus, these stocks constrained the ocean fisheries North of Cape Falcon such that ocean fisheries were extremely limited compared to prior years.

All of the requirements of the FMP for Puget Sound Chinook and coho 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 that even though PFMC fisheries have a relatively small impact on Puget Sound populations, Puget Sound fisheries may have a significant impact on NOAA Fisheries' ability to approve PFMC fisheries. In 2016, because of significant constraints on ocean fisheries to limit impacts on coastal and Puget Sound coho, the impacts of PFMC fisheries on Puget Sound populations were extremely low – much lower than in prior years and described as 'de minimus' in PFMC deliberations. As a result, the additive impacts of PFMC and Puget Sound fisheries were of lesser concern than usual in NOAA Fisheries' consideration of approval of the PFMC's fishery recommendations under the MSA. In a year when stock abundance is at normal levels and the co-managers could not reach agreement, it would be particularly important that the PFMC and co-managers provide the assurance needed for NOAA Fisheries to approve PFMC fisheries impacting Puget Sound populations.

*Approval Requirement 2: Consistent with 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 ESA-listed Puget Sound Chinook was most recently addressed in a NOAA Fisheries' 2004 biological opinion. The analysis in the opinion, which concluded that 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 be, low. In determining compliance of PFMC fisheries with the ESA, NOAA Fisheries must assess whether the proposed PFMC fisheries indeed have low impacts on ESA-listed Puget Sound Chinook. This assessment could occur without agreement on the Puget Sound fisheries. However, as noted above, this does not ensure that NOAA Fisheries could approve PFMC management measures without some form of assurance regarding the combined effect of PFMC and Puget Sound fisheries.

Separate from NMFS' approval of the ocean fisheries under the MSA, exemption from the ESA's prohibition on take of ESA-listed Puget Sound Chinook for the fisheries inside Puget Sound is also necessary. In recent years, NOAA Fisheries has addressed the effects of the fisheries through section 7 of the ESA, whereby consultation on a federal action can provide authorization for associated take of ESA-listed species. In 2016, the Bureau of Indian Affairs (BIA) was the federal action agency through its support 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 would likely lose its "interrelated and interdependent" relationship with the tribal

fishery. Without association with a federal action, the non-Indian Puget Sound fishery would not be eligible for a section 7 consultation and timely authorization under the ESA. This situation is what occurred in 2016 because NOAA Fisheries could not identify a federal nexus for non-treaty fisheries; there was no practical and timely alternative to exempt the take of ESA-listed species resulting from non-treaty fisheries until a co-manager agreement was ultimately reached. In addition, there was not time in 2016 to process an alternative mechanism for exempting take through other sections of the ESA in order to reach a determination before the end of the scheduled fishery<sup>1</sup>. We expect this situation would again be the case should the co-managers fail to reach agreement in 2017.

As noted above, NOAA Fisheries was able to address 2016 Treaty Indian fisheries through an ESA section 7 consultation in the absence of an agreement because of their connection with the BIA's action. However, Treaty fisheries were still delayed until the tribal fishing plan was finalized, the supporting analysis was provided, and the opinion was issued. There is greater uncertainty concerning the prospects of a timely authorization for a 2017 Treaty Indian fishery in the absence of an agreement. The supporting analysis for the 2016 Treaty Indian fisheries was less complex due to the constraining low coho returns. However, in 2017 we anticipate that fisheries will not be constrained by coho. As such, if the co-managers fail to reach agreement again in 2017, more complex analyses would be required and could result in more delay and disruption of tribal fisheries than occurred in 2016. Additionally, NEPA compliance would have to be addressed before completing any biological opinion on a joint or tribal-only fishery. Since ESA coverage for Puget Sound fisheries in 2016 was based on agreement on a single year fishing regime, the associated incidental take coverage will expire after April 31, 2017. Based upon current information, the only path that provides a reasonable prospect for completing a timely ESA review of state or tribal fisheries in 2017 is through a North of Falcon agreement.

### *Approval Requirement 3: Consistent with 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 (BC), and the west coast of Vancouver Island are managed based on overall Chinook abundance ('aggregate abundance based management' or AABM), and fisheries that occur in southern BC and Washington are managed based on individual Chinook stock abundance ('individual stock based management' or ISBM). The PST 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 PST obligations – in fact, the PST's ISBM limits for Puget Sound Chinook and Puget Sound coho have never limited southern U.S. fisheries.

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<sup>1</sup> While Sections 10 and 4(d) of the ESA provide mechanisms to review non-federal actions, they have additional procedural requirements, including a cycle of public comment. NOAA Fisheries has previously provided advice to the co-managers that a section 4(d) review of a new long-term state/tribal co-management fishing plan would take 18 months to complete.

However, the PST limits southern U.S. impacts on Interior Fraser River (*i.e.*, Thompson River) coho to 10% when the stock's status is designated as "low"-- as it has been since 2009. Because these coho 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 it is often the subject of substantive 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 River 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. In 2016, due to constraints on PFMC fisheries to limit impacts to coho, sharing of Thompson River coho between the PFMC and Puget Sound fisheries was not a significant issue. However, in a typical year, this sharing can be limiting and assurances regarding the combined impacts on Thompson River coho are necessary to support NOAA Fisheries' approval of the PFMC's recommended fisheries.

#### *Approval Requirement 4: Allows Full Exercise of Tribal Treaty Fishing Rights*

Treaty fishing rights in northwestern Washington are addressed in the long-running *U.S. v. Washington* litigation which guarantees 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 the court's 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 describes 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, and data and science have improved. In general, the conservation objectives that the co-managers present at the March PFMC 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.

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 the co-managers nor NOAA Fisheries has modern judicial guidance on how to proceed in the absence of 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 to determine the “harvestable surplus”, the treaty share, and whether a proposed non-Indian fishery would impair the treaty share without co-manager consensus. Under any circumstance, it is difficult to imagine a satisfactory judicial resolution if the co-managers are disputing the underlying scientific and legal standards.

In 2016, the co-managers agreed on conservation objectives in Puget Sound. The dispute that delayed co-manager agreement related to the allocation of impacts among the fisheries required to meet those objectives. In NOAA Fisheries’ January 19, 2016, letter, we stated that 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;” in this circumstance, with treaty rights. We stated that 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. However, making such a determination even with agreed conservation objectives would be difficult, given the lack of precedent and the short time between the PFMC’s April meeting and the start of the fisheries. Making a determination would likely be impossible without agreed conservation objectives.

More significant questions surround a proposal for a 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 has long been deferred, giving way to the Pacific Salmon Treaty and the North of Falcon process. Assuming such questions do not surface, it is conceivable that the harvestable surplus for each population affected could be inferred from the agreed-to conservation objectives – and factor in any PFMC fishery impacts – to determine if a harvestable share would be exceeded by fishing consistent with the proposal.

In NOAA Fisheries’ analysis of the past five years, the negotiated non-Indian catch impacts in Washington have exceeded 50% for at least two Puget Sound Chinook allocation units – Strait of Juan de Fuca and Nooksack/Samish in every year<sup>2</sup>. Treaty Indian catch impacts have exceeded 50% for at least three allocation units. The following table illustrates the balances across allocation units (the unit of sharing defined by the Puget Sound Salmon Management Plan) for 2016. The table also describes the fisheries with the greatest impacts for those units and where adjustments would most likely have to occur in order to bring impacts down to 50% or less.

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<sup>2</sup>Specifically in 2016, it appears to NOAA Fisheries, based on preseason estimates, that non-Indian fisheries in Washington exceeded 50% in three allocation units.

While unique in some respects, 2016 is representative of the overall pattern of general impact distribution and sharing among allocation units in recent years. Non-Indian impacts occur over broad areas, primarily in pre-terminal sport fisheries, while Treaty Indian impacts are more localized occurring primarily in the rivers or adjacent marine areas. This information helps illustrate the complexity and changes that would be required to achieve 50/50 sharing for each management unit. It also reminds us that one of the key advantages of co-manager agreement is the flexibility for the co-managers to reach accommodation on sharing principles that recognize the needs and interests of the state and tribal parties.

### Final 2016 Preseason Fishery Distribution of Adult Mortality for Puget Sound Chinook

Allocation Unit	Nontreaty				Treaty			
	Preterminal	Terminal	Total	% of mortality	Preterminal	Terminal	Total	% of mortality
Str. Juan de Fuca	430	1	431	65%	226	4	230	35%
Nooksack/Samish	5,311	14,904	20,215	57%	2,648	12,341	14,990	43%
Skagit	1,311	338	1,648	37%	542	2,263	2,805	63%
Stilly-Snoh	2,457	599	3,056	66%	564	980	1,544	34%
So. Puget Sound	10,160	1,605	11,765	41%	3,665	12,995	16,661	59%
Hood Canal	8,570	36	8,605	21%	2,649	30,134	32,783	79%
<b>Total</b>	<b>27,808</b>	<b>17,482</b>	<b>45,289</b>		<b>10,069</b>	<b>58,713</b>	<b>68,783</b>	

**Distribution of Adult Mortality Described in the Above Table Across Southern U.S. Fisheries for Each Allocation Unit**  
 Shaded cells = allocation units with Nontreaty mortalities > 50%. Unshaded cells = Treaty mortalities > 50%.  
 Highlighted cells = fisheries with the largest impacts for the fleet with the imbalance for that allocation unit.

Fisheries	Str. Juan de Fuca	Nooksack/Samish	Skagit	Stillaguamish-Snohomish	So. Puget Sound	Hood Canal
S. Of Falcon Ocean	0%	0%	0%	0%	0%	0%
N.Fic. Ocean Troll:						
Nontreaty	0%	1%	0%	1%	3%	1%
Treaty	2%	2%	2%	4%	5%	3%
N.Fic. Ocean & Buoy10 Spt						
Nontreaty	0%	1%	1%	0%	2%	1%
Pgt Snd Troll						
Treaty	10%	2%	0%	3%	4%	1%
Pgt Snd 6 Sport						
Nontreaty	15%	2%	1%	4%	5%	1%
Pgt Snd 5 Sport						
Nontreaty	28%	3%	1%	5%	7%	2%
Pgt Snd 7 Sport						
Nontreaty	6%	4%	13%	11%	4%	6%
Pgt Snd 8-13 Sport						
Nontreaty	13%	2%	7%	28%	16%	9%
Preterm. Pgt Snd or						
Nontreaty	3%	1%	5%	4%	0%	1%
Treaty	23%	3%	10%	5%	4%	2%
Terminal Pgt Snd or						
Nontreaty	0%	22%	0%	0%	4%	0%
Treaty	0%	31%	1%	21%	24%	15%
Freshwater Sport:						
Nontreaty	0%	20%	8%	13%	2%	0%
Freshwater Net:						
Treaty	1%	4%	50%	1%	22%	58%
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

Source: Data compiled from FRAM Chinook run 2916 – June 2016

### Conclusion

I reiterate NOAA Fisheries' confidence that a successful North of Falcon agreement will emerge in 2017 as a direct result of your work over these intervening months. I encourage you to stay focused on the hard work necessary to reach an agreement among the co-managers for the 2017 fishing season and a new long-term agreement that the co-managers could rely on for the foreseeable future. Ultimately, it is up to the state and tribes to find common ground and reach agreement. My staff and I will do all we can to support an outcome that is satisfactory to all.



I hope the information I provided is useful, and I am happy to address any questions you may have. As mentioned above, please feel free to share this information with anyone interested in our upcoming North of Falcon process.

Sincerely,



Barry A. Thom  
Regional Administrator

cc: Curt Melcher, Oregon Department of Fish and Wildlife  
Herb Pollard, Pacific Fishery Management Council  
Jeremy Wolf, Columbia River Inter-tribal Fish Commission