UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668

February 19, 2004

Colonel Timothy J. Gallagher
District Engineer
U.S. Army Corps of Engineers
P.O. Box 898
Anchorage, Alaska 99506-0898

Re: Revision 2-2003-0999
Tongass Narrows 560

Attn: Randal P. Vigil

Dear Colonel Gallagher:

The National Marine Fisheries Service (NMFS) has reviewed the revision to application 2-2003-0999. The original application by Mr. Eric Tyson proposed to 1) construct a dock consisting of a 160 foot by 8 foot wood/steel pile supported float connected to a 60 foot by 8 foot aluminum gangway connected to shore by a 60 foot by 12 foot wood/steel approach dock; and 2) discharge 432 cubic yards of riprap, 1850 cubic yards of shot rock, and 1250 yards of organic overburden into .26 acre of waters of the U.S. below the high tide line for construction of a boat launch ramp, yard/parking area, house and wastewater outfall. The revised application includes the discharge of an additional 3600 cubic yards of rock/gravel into .74 acre of forested wetland, and changes the definition of the height of the high tide line from +19.7 feet MLLW to +19.7 feet above the 0.0 foot contour.

Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act requires Federal agencies to consult with NMFS on all actions that may adversely affect Essential Fish Habitat (EFH). NMFS is required to make conservation recommendations which may include measures to avoid, minimize, mitigate or otherwise offset adverse effects. The Alaska Department of Fish and Game has cataloged several anadromous fish streams in the vicinity of the project area. The nearshore area is used by juvenile salmonids during spring migration for feeding, resting, and predator avoidance. The inshore area of the project location also provides important habitat for several marine species including arrowtooth flounder, Pacific cod, sablefish, sculpins, walleye pollock, yellow rockfish, and Pacific ocean perch.

The project would permanently remove intertidal habitat for living resources. In our October 3, 2003 comments on the original application, NMFS recommended denial of the permit based on the fact that the proposed intertidal fill is primarily for construction of the house and yard and

therefore not a water dependent use under Section 404(b) of the Clean Water Act. The applicant's property contains approximately 2.09 acres (91,040 sq. ft) of uplands, and NMFS recommended that Corps request the applicant to evaluate upland alternatives to the proposed fill.

The Corps' response to NMFS' recommendation stated that "the Corps has asked the applicant to address why alternatives, such as other sites, particularly upland sites, are not practicable for those portions of the proposal that do not require siting within the aquatic environment to achieve the basic project purpose." On February 5, 2004 the Corps faxed NMFS a copy of a letter it had received from Mr. Tyson. In this letter, Mr. Tyson claims that filling of tidelands will have less impact than filling of the uplands which are also classified as wetlands. Mr. Tyson alleges that NMFS' October 2003 letter was a generic form letter that was not based on a review of his property or his proposed project. In his response to the Corps, Mr. Tyson included several pictures of his property showing the area that is proposed to be filled.

While NMFS did not visit Mr. Tyson's property during review of the permit application, NMFS staff is familiar with the general area in which Mr. Tyson's property is located, and we utilized available data on habitat in that area. NMFS also thoroughly reviewed his project plans and application. The pictures Mr. Tyson included with his revised application support NMFS' earlier findings that the area that is proposed for fill is composed of gently sloping cobble-boulder substrate. Contrary to Mr. Tyson's assertion that "there is nothing growing on the beach," the photos show that the proposed fill area has an abundance of vegetation. Pentec Environmental conducted intertidal and subtidal surveys adjacent to Mr. Tyson's property in April 2000. The biota on the rocks and boulders in this area was described as "rich and typical for the elevations" (Pentec, 2000). A list of the plant and animal species encountered during these surveys is enclosed.

Among the plant species common in the proposed fill area is F*ucus gardneri.* This species is commonly used by Pacific herring as a spawning substrate. Herring spawn throughout Tongass Narrows during March and April. Rocky intertidal habitats and kelp habitats also are important for a number of other commercial species such as Dungeness crabs (*Cancer magister*), pollock, juvenile rockfish, and flatfish.

Based on our review of Mr. Tyson's original and revised permit applications, the pictures that he provided of the project site, and other information available to NMFS on the nature of the substrate and biota in the project area, NMFS disagrees with the Corps' conclusion that the proposed fill will not adversely affect EFH. The project would permanently remove rocky intertidal habitat that is used by commercially important fish species. NMFS also disagrees with Mr. Tyson's assertion that filling of the tidelands will have less impact than filling the uplands. The project area includes significantly more forested wetland habitat than intertidal habitat. The proposed amount of fill represents only approximately 12% of Mr. Tyson's upland property but 100% of the intertidal area between Mean High Water and the High Tide Line adjacent to Mr.

Tyson's property. Therefore, the impact of losing intertidal habitat is proportionately greater than the impact of losing a similar amount of scrub shrub habitat would be.

As we stated in our October 2003 letter, the Clean Water Act Section 404(b)(1) guidelines at 40 CFR 230.10(a) prohibit the discharge of fill material into waters of the U.S. if a practicable alternative exists that would have less impact on the aquatic environment. An alternative is considered practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. Additionally, the guidelines direct the Corps to consider the need and water dependency of a proposed action, establishing a rebuttable presumption that upland alternatives are available unless clearly demonstrated otherwise. Section 404(A)(23.1)(c) states: "Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probably impacts of other activities affecting the ecosystems of concern."

Mr. Tyson has not demonstrated that he has evaluated practical alternatives to the proposed tideland fill. In addition, Mr. Tyson has not demonstrated that he has attempted to minimize the amount of fill or to mitigate adverse impacts. Therefore, NMFS makes the following EFH Conservation Recommendation:

1) NMFS recommends that the Corps deny the portion of this permit that would authorize intertidal fill for the house and yard/parking area based on 1) the availability of less damaging alternatives to the proposed fill, 2) the lack of water dependency of the project, and 3) failure to demonstrate proper sequencing (avoidance, minimization, mitigation) in developing project alternatives.

Under section 305(b)(4) of the Magnuson-Stevens Act, the Corps is required to respond to NMFS EFH recommendations in writing within 30 days. If the Corps will not make a decision within 30 days of receiving NMFS EFH Conservation Recommendations, the Corps should provide NMFS with a letter within 30 days to that effect, and indicate when a full response will be provided.

If you have any further questions, please contact Katharine Miller at 907-586-7643.

Sincerely,

James W. Balsiger
For Administrator, Alaska Region

Attachment

cc: Applicant
EPA Juneau, Chris Meade
ADEC, ADF&G, AADGC, ADNR, USFWS, Juneau

Reference:

Pentec Environmental. 2000. Gravina Access Project Phase I Marine Reconnaissance Technical Memorandum. Prepared for Alaska Department of Transportation and Public Facilities under project Number: 67698. April 2000.

Table 1 Intertidal flora and fauna identified at Station GRV-1, January 2000.
Table 1 (continued).

Habitat	Rock	Boulders/Bedrock		Mixed Gravel
Zone	Upper	Low/Mid	Low	Low
Approximate elevation (ft MLLW)		0 to +4	- 2	0 to -1
Plants (% cover)				
Agarum sp.			P	
Black crust				P
Chaetomorpha brachygona		P		
Corallina frondescens				P
Encrusting coralline algae			P	P
Endocladia muricata		P		
Fucus gardneri	45	11.5		P
Gloiopeltis furcata		P		
Hildenbrandia rubra	P	C		P
Laminaria groenlandica			P	P
Mastocarpus papillatus		P		P
Neorhodomela larix			P	P
Neorhodomela oregona and/or *Cryptosiphonia woodii*		P		
Odonthalia floccosa				P
Petrocelis and/or *Gloiopeltis* base		C		C
Pleonosporium vancouverianum			P	
Plocamium cartilagineum				P
Plocamium tenue		P		
Polyneura latissima			P	P
Pterocladia caloglossoides			P	P
Ptilota tenuis			P	P
Ralfsia fungiformis				P
Sparlingia pertusa				P
Ulva fenestrata		R	P	
Animals (% cover)				
Aplidium californicum		P		
Balanus/Semibalanus sp. (flat)			R	
Balanus glandula	A			
Chthamalus dalli (set)		C		
Chthamalus dalli	A	P		
Encrusting bryozoan		P		
Spirorbidae, unid.		C	A	

continued

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Table 1 (continued).

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Zone	Upper	Low/Mid	Low	Low
Approximate elevation (ft MLLW)		0 to +4	- 2	0 to -1
Animals (number)				
Amphissa spp.			C	
Anthopleura elegantissima	R			
Bittium sp.	P			
Cnemidocarpa finmarkiensis		R		
Cryptochiton stelleri			R	R
Doridacea, unid. White		R		
Gammaridea, unid.		P		
Lacuna spp. (probably *L. variegata*)			C	
Littorina scutulata	10			
Littorina sitkana	A			
Lophopanopeus bellus			P	
Lottiidae, unid.	C			
Lottiidae, unid. (juv.)	A	C		
Margarites pupillus		P		
Margarites helcinus		P		
Mopalia lignosa			P	
Nucella lamellosa	C			
Nucella lamellosa (juv.)		C		
Onchidoris bilamellata		C		
Ophiuroidea			R	
Oregonia gracilis			R	
Pagurus granosimanus	P			
Pagurus hirsutiusculus		P		
Petrolisthes				C
Phascolosoma agassizii				P
Pisaster ochraceus		P		
Pododesmus macroschismata			C	
Pseudochitinopoma occidentalis		C	C	
Searlesia dira	R			
Serpula vermicularis		C	C	
Strongylocentrotus droebachiensis			R	
Tectura persona	P			
Tectura scutum	P	P		
Tonicella lineata	P	P		
Orange digitate tunicate			R	
Small chiton			R	