SQUAXIN ISLAND TRIBE

October 15, 2018

SENT BY REGULAR U.S. MAIL AND ELECTRONIC MAIL

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Re: Squaxin Island Tribe's concerns about Ecology's Interim Funding Guidelines for Streamflow Restoration Grants

Dear Director Bellon:

I am sending this letter because the Squaxin Island Tribe ("Tribe" or "Squaxin") has serious concerns about the legality and effectiveness of Ecology's approach to awarding grants under ESSB 6091 as described in its *Streamflow Restoration Grants FY 2019: Interim Funding Guidelines* (Pub. No. 18-11-010, June 2018) ("Interim Guidelines"). For reasons described below, Ecology's focus on shovel-ready projects to the virtual exclusion of data collection and analyses during this grant cycle is illogical and inconsistent with ESSB 6091. Its approach unreasonably and significantly prejudices the Tribe and its Treaty fishing rights.

Squaxin's usual and accustomed fishing area ("U&A") overlaps with most of the Water Resource Inventory Area ("WRIAs") in § 203, all of which lack adopted watershed plans.[1] While this letter focuses on WRIA 14, our concerns extend to the other WRIAs listed in § 203 that are within Squaxin's U&A – i.e., WRIAs 12, 13 and 15. We will also be sending comments on Ecology's draft Streamflow Restoration Funding rule, WAC Ch. 173-566. We respectfully urge Ecology to change course when evaluating and scoring upcoming project applications in § 203 basins during this critical period leading up to watershed plans.

[1] As you are aware, the Tribe has unadjudicated federal reserved water rights to instream flows throughout its U&A, flows that are both senior to state instream flows and often reserve more water. *See United States v. Adair*, 723 F.2d 1394, 1410, 1414 (9th Cir. 1983).

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I. Critical Data Gaps Exist in Section 203 WRIAs that must be Filled to Meet ESSB 6091's Requirements.

ESSB 6091 purports to allow development to impair instream flows and impact closed water bodies in WRIA 14 through compliance with § 203. Section 203, in turn, applies to specific WRIAs that lack adopted watershed plans under RCW Ch. 90.82. These WRIAs (12-15) cover most of Squaxin's U&A. For § 203 WRIAs, Ecology must prepare and adopt watershed restoration and enhancement plans ("plans") by June 30, 2021. These plans must contain, among other things, actions and projects needed to offset impacts on instream flows from permit-exempt wells. That deadline is less than three years away.

As noted, there is no adopted watershed plan for WRIA 14, that effort having failed in 2006. The unadopted plans identify basic data gaps that include:

- "Much more data must be collected before we can really quantify water availability and understand how pumping from WRIA 14's aquifers will affect streamflows and habitat." (p. 5)

- "However, no single database currently exists where planners can access monitoring data from a variety of sources. . . . The Planning Unit recommends that Mason County, Thurston County, and the State of Washington (Departments of Health and Ecology) support a comprehensive water-resource monitoring program for WRIA 14. This program will address data gaps in the areas of water quality and water quantity. . . . To facilitate the first task, the program should be organized by subbasin—that is, the drainage areas for major creeks and for Pickering Passage/Case Inlet and Chapman Cove. . . .Creeks should include, but not be limited to, Sherwood, Malaney, Deer, Cranberry, Johns, Goldsborough, Mill, Skookum, Kennedy, Schneider, and Perry." (p. 9 & n. 1)

- "Specific data-gathering and analysis tasks should include: . . .

  - Developing science-based sub-basin plans that specify management strategies for protecting and restoring natural flow regimes.

  - Developing a detailed current and historical water budget that accounts for precipitation, evapotranspiration, groundwater recharge, aquifer storage, creek flows, nearshore discharge, pumping, and surface-water diversions. In addition, historic trends should be identified in these parameters. Note that streamflow analyses should account for both the runoff component, which originates from precipitation, and the baseflow, which is fed by groundwater.

  - Assessing the impact of changes in streamflow on physical habitat and channel geomorphology; use information on historical climate trends, hydrostratigraphy, fish production, land use, and forestry practices to expand the analysis." (p. 11)

- "The Planning Unit recommends that Mason County, Thurston County, and the City of Shelton coordinate closely with the Planning Unit to develop and implement comprehensive water conservation plans for all water users. . . . These plans should also specify conservation measures that should be implemented before a municipality can exercise inchoate rights in closed basins." (p. 15)

- "The Planning Unit recommends that Mason and Thurston Counties and the City of Shelton estimate the anticipated demand for water and then reconcile discrepancies between water demand and availability, using a process consistent with GMA. The water-demand estimates should be based on land use designations, as well as on population projections and allocations in the comprehensive plans." (p. 20)

Again, the nonexistence of § 203 plans starkly contrasts with approved watersheds plans for the § 202 WRIAs, and requires different treatment for § 203 WRIAs. In WRIA 14 and the other § 203 WRIAs, the reality is that specific data must be collected and analyzed as a precursor to drafting meaningful watershed plans with scientifically-supported restoration and mitigation projects. The first funding cycle in a short three-year turnaround is certainly not the time to withhold funding to fill critical gaps in data and analyses in these watersheds.

II. Ecology's Interim Funding Guidelines Inappropriately Favor Shovel-Ready Projects.

As shown in the bullets below, Ecology's Interim Guidelines improperly favor shovel-ready projects to the near or complete exclusion of funding for data gathering and analysis that leads to shovel-ready projects:

- "Water right studies, assessments, and valuations, will **not** be eligible for funding in the 2018-2019 grant cycle." (p. 7, emphasis in original)

- The definitions exclude data collection and analyses. "Eligible projects" are defined as: (1) "Water projects category", which includes water acquisition, water storage and altered water management or infrastructure; and (2) "non-water projects category", which is riparian and fish habitat improvement. (p. 6)

- Applicants must "illustrate that the project is ready to go", and document that it has completed environmental review, obtained or applied for permits, and completed easements, property owner agreements or land acquisition. (pp. 12-13)

- While Ecology's guidance acknowledges that projects can be phased, it improperly limits phased projects to "large, expensive, or complex projects" particularly when "each phase can be shown to provide streamflow/fish benefits." (p. 13)

- Ecology's ranking process improperly weights shovel-ready projects by, among other things, granting higher scores to projects that are "permanen[t]", have a "clear linkage" between flow conditions and negative impacts on instream resources, and have designs and permits. (pp. 14-16).

Finally, the Tribe cautions Ecology against heavily weighting projects in and near waters that contain ESA-listed fish. (pp. 14-15) ESSB 6091 does not provide authority for such preference.

III. Ecology's Interim Guidelines are Inconsistent with ESSB 6091.

For the following reasons, the Interim Guidelines' preference for shovel-ready projects conflicts with the language and intent of ESSB 6091. ESSB 6091 directs Ecology to implement a program that restores and enhances streamflows. § 304. First, as described above, in many cases data collection and analyses are needed to develop the scientifically-supported mitigation actions and projects that are required in the plans. § 203(3). Without these plans, Ecology cannot carry out its overall mandate of implementing a program that restores and enhances streamflows to levels necessary to support healthy salmon populations. *See* § 203, § 304.

Second, the Legislature in ESSB 6091's bond funding provision clearly intended that Ecology would fund actions and projects that include data collection, assessments, and planning. It directed Ecology's grant money to the watershed restoration and enhancement bond account created in § 208.[2] Section 208(2) expressly anticipates and authorizes Ecology to fund data collection and assessments in advance of shovel-ready projects:

> Expenditures from the watershed restoration and enhancement bond account may be used to **assess, plan, and develop projects** that include acquiring senior water rights, water conservation, water reuse, stream gaging, groundwater monitoring, and developing natural and constructed infrastructure, which includes, but is not limited to, projects such as floodplain restoration, off-channel storage, and aquifer recharge, or other actions designed to provide access to new water supplies with priority given to projects in watersheds developing plans as directed by sections 202 and 203 of this act and watersheds participating in the pilot project in section 204 of this act. (Emphasis added.)

Third, the mandatory components of and requisite Ecology findings for § 203 watershed plans are unattainable without critical data such as: (1) the amount of water needed to restore depleted streamflows; (2) the amount needed to offset permit-exempt wells; (2) when and where that water is needed; and (3) inventories and assessments of sources of that water, including water rights that may be acquired and reclaimed water. *See* § 203(b).

To the extent that the interim funding guidance is a rule, it exceeds Ecology's statutory authority, was adopted without compliance with statutory rule-making procedures, and is arbitrary and capricious. *See* RCW 34.05.570(2)(c).

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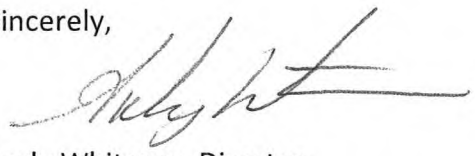
[2] Interim Guidance at p. 1 ("In passing this new law, the Legislature also authorized the sale of capital bonds for this purpose in the aggregate amount of $300 million over the next 15 years. Of this total, $20 million was made available to start projects in 2018-19."); Substitute SB 6090, Capital Budget, § 3027 (establishing "Watershed Restoration and Enhancement Bond Account – State") http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/Senate/6090-S.SL.pdf.

To conclude, the law does not support Ecology in this first, critical funding cycle discriminating against projects involving data collection, assessment and/or analyses that will inform as to shovel-ready projects. This information is in many, if not most cases, a prerequisite to obtaining meaningful, scientifically supported watershed restoration and enhancement plans for § 203 watersheds and thus to carrying out the Legislature's mandates in ESSB 6091.

Sincerely,



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