

Northwest Indian Fisheries Commission

Good afternoon,

Attached, please find a letter to Washington Department of Ecology Director Maia Bellon, from NWIFC Executive Director Justin Parker, regarding Streamflow Restoration Policy and Interpretive Statement - NWIFC Comments.

If you have any questions, please contact Michael Martinez, NWIFC Habitat Policy Analyst II at mmartinez@nwifc.org or (360) 438-1180.

Thank you.



Northwest Indian Fisheries Commission

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May 24, 2019

Maia Bellon, Director
Washington Department of Ecology
PO Box 47600
Olympia WA 98504-7600

Re: Streamflow Restoration Policy and Interpretive Statement – NWIFC Comments

Dear Ms. Bellon:

Please accept these comments on the above-referenced Streamflow Restoration Policy and Interpretive Statement on behalf of the Northwest Indian Fisheries Commission (NWIFC). The 20 member tribes of the NWIFC¹ are beneficiaries of a trust relationship with the United States, the Trustee,² with constitutionally protected, treaty-reserved rights to harvest, consume, and manage fish and shellfish in their usual and accustomed areas.³ These comments⁴ are submitted in view of the need to ensure protection and restoration of these and other reserved rights, resources, and habitats, and to safeguard the health, livelihoods, and well-being of tribal members.

Among the issues of concern to Commission member tribes, the Department of Ecology's (Ecology) Streamflow Restoration Policy and Interpretive Statement reaches legal conclusions without citations to the Revised Code of Washington, and without any legal analysis that could help persuade anyone that Ecology's legal interpretations are proper. Because Ecology's purported legal interpretations could affect treaty and water rights, it must cite to binding legal authorities and supportive reasoning commensurate with the rights at stake through these policy changes.

In addition, in order to help ensure protection of treaty rights, Ecology must make explicit in the Streamflow Restoration Policy and Interpretive Statement the requirement that affected tribes must be included as full participants in watershed planning committees.

¹ The NWIFC member tribes are the Lummi, Nooksack, Swinomish, Upper Skagit, Sauk-Suiattle, Stillaguamish, Tulalip, Muckleshoot, Puyallup, Nisqually, Squaxin Island, Skokomish, Suquamish, Port Gamble S'Klallam, Jamestown S'Klallam, Lower Elwha Klallam, Makah, Quileute, Quinault, and Hoh.

² *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

³ See *U.S. v. Wash.*, 853 F.3d 946, 967 (9th Cir. 2017), *aff'd*, *U.S. v. Wash.*, 138 S.Ct. 1832 (2018).

⁴ These general comments should not be construed as conflicting with any specific comments from NWIFC member tribes, which the Commission will acknowledge and consider with deference.

NWIFC Comments on the Draft Streamflow Restoration Policy and Interpretive Statement

P. 4 – Ecology misinterprets the legal scope of ESSB 6091. Ecology must clarify with precision which case law and statutes it claims Ch. 90.94 supersedes. Legislative intent to supersede established binding law must be explicit. Ecology may not interpret statutory enactments beyond the legislature’s express delegation of authority. An Ecology interpretation that exceeds the legislature’s express delegation of authority is not legally binding. In order to persuade, Ecology must cite legal authority and articulate reasoning for any legal conclusions in the Streamflow Restoration Policy and Interpretive Statement.

P. 5 – Local government obligations. We agree with Ecology’s interpretation that local jurisdictions have an obligation to record water use restrictions on the title of affected properties. Bullet three should make this reference to property title recording explicit.

P. 6 – Planning under RCW 90.94.020/90.94.030. Although Ecology claims it need not follow RCW 90.82.060(6) to reestablish a planning unit, no authority is cited which would allow Ecology to permit establishment/reestablishment of a planning unit, committee, or other planning body without full participation of all affected Indian tribes. Ecology needs to articulate reasoning that supports its conclusion that RCW 90.82.060(6) does not apply. Moreover, Ecology must clarify that affected tribes shall be full participants in these watershed planning processes.

P. 8 – Procedures for plan/plan update approval. Ecology should make clear that “the lead agency shall invite a representative from each federally recognized Indian tribe that has a usual and accustomed harvest area within the water resource inventory area to participate as part of the planning unit.” RCW 90.94.020(3).

P. 11 – Pilot Projects. Ecology points to no legal authority for disregarding requirements to perform an impairment and availability analysis for pilot mitigation projects. We agree that RCW 90.94.090(8) prescribes a specific sequence that requires avoidance and minimization of impacts prior to implementing compensatory mitigation. Ecology must still make a determination of no impairment and water availability in order to ensure that no water rights or mandated flows are affected by the pilot projects.

Conclusion

The member tribes of the NWIFC express real concerns regarding the lack of water sufficient for all life stages and ecosystem requirements of salmonids that the tribes have relied on for subsistence since time immemorial, a practice reserved in treaties with the United States which

are binding on the State of Washington and its inhabitants.⁵ Explicit references to these rights, and requirements for full tribal participation in watershed planning are warranted.

In the context of climate disruption and drought declarations,⁶ these tribal concerns in turn reflect a heightened need for Ecology to acknowledge and protect treaty-reserved rights and other senior water rights through its Streamflow Restoration Policy and Interpretive Statement. Margins-of-safety and enhanced mitigation ratios must be required in the Streamflow Restoration Policy and Interpretive Statement to protect water and treaty-reserved rights. Ecology must still validate a conclusion of net ecological benefits by the watershed planning committees.⁷

Finally, Ecology must be clear, with reference to binding authorities and correlative reasoning, when stating legal conclusions in the Streamflow Restoration Policy and Interpretive Statement, especially when interpreting purported changes to established water law doctrines.

Thanks for this opportunity to comment on the Streamflow Restoration Policy and Interpretive Statement. Please feel free to contact me, or Michael Martinez (mmartinez@nwifc.org) from my staff, with any comments or questions regarding this feedback submitted in furtherance of the common state and tribal interest in preservation of trust natural resource assets reserved by the tribes through treaties with the United States.

Sincerely,



Justin R. Parker
Executive Director

cc: Mary Verner, Ecology Water Resources Program Manager
Bennett Weinstein, Ecology Water Supply Program Manager
Kasey Cykler, Ecology Water Resources Program Watermaster

⁵ See *U.S. v. Wash.*, 853 F.3d 946, 966 (9th Cir. 2017), *aff'd*, *U.S. v. Wash.*, 138 S.Ct. 1832 (2018); *U.S. v. Winans*, 198 U.S. 371, 381-82 (1905).

⁶ See <https://ecology.wa.gov/About-us/Get-to-know-us/News/2019/May-20-Inslee-expands-drought-emergency>.

⁷ See RCW 90.94.030 ("Prior to adoption of the watershed restoration and enhancement plan, the department must determine that actions identified in the plan, after accounting for new projected uses of water over the subsequent twenty years, will result in a net ecological benefit to instream resources within the water resource inventory area").