

# THE LAW OFFICES OF M. PATRICK WILLIAMS, PLLC

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September 8, 2019

Washington State Department of Ecology  
Water Resources Program  
P.O. Box 47600  
Olympia, WA 98504-6872

### **Re: Comment letter for Streamflow Restoration Grants Guidelines**

Submitted online

Ms. Inman:

This letter is submitted on behalf of the Tulalip Tribes.

The Tulalip Tribes reserved the right to take fish in their usual and accustomed fishing places pursuant to the Treaty of Point Elliot of January 22, 1855 (12 Stat. 927). These usual and accustomed treaty fishing areas include the freshwater areas of the Snohomish-Snoqualmie-Skykomish river basins and certain marine waters of the Puget Sound through which fish propagated in such basins pass. *U.S. v. Washington*, 459 F. Supp. 1020, 1038 (W.D. Wash. 1978); *U.S. v. Washington*, 626 F. Supp. 1405, 1527 (W.D. Wash. 1985), *Aff'd*, 841 F.2d 317 (9<sup>th</sup> Cir. 1988). The Tulalip Tribes are co-managers of fisheries and fish habitat with the federal government and Washington State.

Water rights of appropriate quality and quantity to support habitat for continuation and enhancement of fish runs is essential to the Tribes' treaty fishing rights.

This letter incorporates by reference the comments submitted by the Tulalip Tribes on October 29, 2018 and March 19, 2019 regarding the Interim Funding Guidelines.

### **Critical Grant Funding Considerations**

Of course the grant funding should be statewide, however Ecology could perhaps create tiers or subsections of the state by order of critical importance and need for streamflow enhancement and restoration. This could help Ecology sort by relevance the multitude of

applications it receives and therefore quickly begin review of priority projects in critical areas.

In the Section Titled, “Priority Considerations” there is a statement that projects that neither enhance streamflows nor benefit instream resources are unlikely to receive funding unless they are a “critical component or phase of a broader project”. Under what scenario can this occur? The Guidelines also state that phased projects are not guaranteed to receive further funding in the future. Can Ecology further detail how projects that are not enhancing instream flows or instream resources might still receive funding? Ecology should not fund any project that does not meet the requirements of RCW 90.94 and if a project will indeed enhance streamflow but part of the project does not, Ecology should make a commitment that the remainder of the project will be funded. It will be a waste of money for viable projects to begin only to be orphaned and abandoned in the next funding cycle.

The Tulalips appreciate that Ecology agrees that climate change and drought must be considered in the funding of projects and that it will prioritize those projects that are climate change and drought “resistant.” Are there examples that could help guide the applicants?

### **Water Right Acquisition**

Since Ecology elected not to update POL 1200 related to water right changes or transfers, will the version of POL 1200 last updated in 1999 be used in making water rights acquisition determinations? The proposed changes to POL 1200 (that Ecology did not move forward with) provided clarity and assurance that water rights acquired via the funding cycle were valid rights that had neither been relinquished nor rescinded. The reliance on the policy version from 1999 does not provide the clarity and there is concern that some water rights that are not valid and available for transfer to permanent instream flow purposes.

Additionally, the required documentation for the pre-application meeting does not include any evidence of recent use records of the water right in question, including amount put to beneficial use or whether there were periods of non-use. More information regarding the actual water right in question should be a requirement for the pre-application meeting.

### **Water Storage**

If a surface storage project is unlined and designed to recharge a shallow aquifer or an infiltration gallery or pond is proposed why wouldn’t Ecology require a more thorough study as it does for Managed Aquifer Recharge (MAR) projects? At the very least any infiltration project should include:

- Assess aquifer capacity
- Determine if soils and underlying geology have suitable hydraulic properties

- Assess that sufficient infiltration water will be discharged to the stream during periods of low flow
- Ensure the location is available for permanent use
- Ensure that the water source is legally available

Water infiltration in order to create storage for discharge at a time it is needed requires a detailed study regardless if it's a MAR project or more passive like an unlined pond or infiltration gallery. The requirements to determine the efficacy of a MAR project should be applied to any infiltration project.

### **Altered Water Management or Infrastructure**

Ecology needs to make it clear that re-timing water instream via water storage is demonstrably different than altered water management. Altered water management is clearly defined as improvements in conveyance and infrastructure and not just changing water management, which Ecology has a duty to do and is explicit in several regulations including RCW 90.94. This definition makes a difference. Changing the efficiency or reducing loss in an irrigation system may not result in “finding” more water for the system. Ecology must ensure that any water found via altered water management is not the result of a applicant’s previous failure to implement best practices or waste of water. If instances of water waste or failure to comply with water use efficiency practices are brought

The Guidelines state that water management projects can either create permanent streamflow improvement or are part of a watershed plan that provides “access to new water supplies.” While it might not be necessary for applicants to meet both of these criteria it is required that all new supplies of water result in permanent streamflow improvement. There is also an unanswered question as to what happens if Ecology and the Salmon Recovery Board have to finalize the watershed plan. What will Ecology do in this instance?

### **Watershed function, riparian and fish habitat improvement**

Many of the projects listed as examples will likely not provide permanent offsets to new exempt well use. The Tulalips acknowledge that there are areas and opportunity for riparian habitat restoration, but due to many variables that remain outside the control of planning units or Ecology, funding for these projects must meet very high standards. It is sensible for Ecology to provide these projects a lower priority status.

Also, it is likely that these types of projects will not be resistant to climate change or changes in water timing. In fact, many of them will be negatively impacted by climate change. Habitat restoration while laudable is not a replacement for keeping water instream.

## **Environmental Monitoring**

Funding for data to gather environmental monitoring is vital to the overall understanding of the hydraulic system and whether proposed projects will have a beneficial impact. The Guidance document states that environmental monitoring “provides the most benefit when it is used to develop or trigger actions that restore, maintain, or enhance streamflows and instream resources.” While this is true data is important for baseline and historic context and provide context for what is actually occurring on the ground and what is optimal for the system.

Environmental monitoring is obviously a component of adaptive management and should be a component of any project funded by Ecology, but those basins with little or outdated data should receive priority for funding for monitoring.

## **Conclusion**

It is encouraging that Ecology is prioritizing funding projects that seriously consider climate change and are resilient to drought. The Tulalip Tribes have repeatedly asked that Ecology ensure that climate change considerations be a part of not only funding guidelines, but for all new or amended Watershed Plans and any rules regulating water use going forward. The best method for ensuring that water is kept instream and available during drought and low water years is not to remove it in the first place. Therefore any mitigation plan to offset consumptive use must be robust enough to maintain the flows now and in the future, must be in time and in place, and should over-protect the resource.

Thank you for your time and consideration.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Patrick Williams', is written over a horizontal line.

Patrick Williams  
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206-724-2282

Cc: Tim Brewer  
Anne Savery  
Daryl Williams