



THE SUQUAMISH TRIBE

NATURAL RESOURCES DEPARTMENT
PO Box 498 Suquamish, WA 98392-0498

July 15, 2022

Joshua Grice
Department of Ecology
Air Quality Program
P.O. Box 47600
Olympia, WA 98504-7600

RE: Department of Ecology's new rule Chapter 173-446 WAC, Climate Commitment Act Program

Dear Mr. Grice:

This letter transmits the Suquamish Tribe's comments concerning the Department of Ecology's new rule Chapter 173-446 WAC, Climate Commitment Act (CCA) Program.

The Suquamish Tribe (Tribe) is a federally-recognized Indian Tribe and a signatory to the Treaty of Point Elliott. Since time immemorial, the Suquamish ("people of the clear salt water") have lived, fished, hunted, and gathered in and around the Puget Sound. In exchange for ceding most of its aboriginal homeland, the Tribe reserved the Port Madison Indian Reservation on the Kitsap Peninsula and fishing, hunting, and gathering rights. Article 5 of the Point Elliott Treaty secures the Tribe's "right of taking fish at usual and accustomed fishing grounds and stations. . . together with the privilege of hunting and gathering roots and berries on open and unclaimed lands." 12 Stat. 927 (1855); *see United States v. Winans*, 198 U.S. 371 (1905). The United States Constitution provides that all treaties made under the authority of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby..." *U.S. Const.* Art. VI, cl. 2; *see also United States v. Washington (Boldt I)*, 384 F. Supp. 312, 330 (W.D. Wash. 1974); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 674-76 (1979) (*Fishing Vessel*). The Tribe's treaty-reserved fishing right is exercised in its adjudicated Usual and Accustomed fishing area (U&A), where the Tribe can legally harvest treaty-reserved fish and other resources. *United States v. Washington*, 459 F. Supp. 1020, 1049 (W.D. Wash. 1975) (*Boldt decision*).

The Tribe's treaty-reserved fishing right includes the right to access its treaty reserved fishing and the right to a viable harvest. *United States v. Washington*, No. 13-35474, order and amended op. at 58 (9th Cir. Mar. 2, 2017). Fish habitats must be protected so that the Tribe's right to viable fish harvest

is sustained in its U&A. *See United States v. Washington*, 70-9213, 01-1, 20 F. Supp. 3d 986, 1024 (W.D. Wash. 2013).

The Tribe and its citizens depend on access to healthy and abundant fishery resources in Puget Sound and on the availability healthy deer and elk herds as well as other animal populations throughout the region. These resources support the health, economic, cultural, and spiritual wellbeing of the Tribe and its citizens. When the abundance of these resources or access to them are threatened by water quality and

sediment contamination, other pollution, habitat destruction and modification, water quality impairment, or numerous other avoidable and preventable anthropogenic pressures, the Tribe and each of its citizens are harmed. Climate change threatens the Tribe's cultural, economic, and territorial integrity, and the subsistence of the Tribe's citizens. It is a present-day crisis with devastating current and future impacts.

The Tribe values the Department of Ecology's investment in the Climate Change Act Program and the adoption of the cap-and-invest program to achieve Washington's goal of net zero greenhouse gas emissions by 2050. The Tribe has serious reservations regarding the proposed rule (Chapter 173-446 WAC) and its impact on treaty-rights and tribal sovereignty.

The Tribe recommends the following changes to the proposed rule (Chapter 173-446 WAC):

1. The CCA and the Proposed Rule must provide for effective Government-to-Government consultation with Tribes.

The State of Washington and its agencies are bound by the Centennial Accord of 1989 and its ongoing commitment to respect tribal sovereignty and strengthen the Government-to-Government relationship between the State and the tribes. *See* RCW 43.376. Government-to-Government consultation with tribes whose treaty-reserved resources and lands are impacted by the CCA is essential to ensure tribal sovereignty is respected.

While the CCA aims to reduce the rate of climate change and its impacts to the habitats that support treaty right resources in the long term, it is critical to prevent immediate impacts to habitats from activities taken to implement the CCA. Effective consultation with tribes can prevent negative impacts to the habitats

and resources we are all trying to protect. The CCA has a provision for tribal consultation (RCW 70A.65.305 (2)) and the proposed rule should include a provision and reference to tribal consultation as well.

The CCA's "Tribal Consultation" provisions provide that project proponents "shall engage in a preapplication process with all affected federally recognized tribes the project area." RCW 70A.65.305 (2). The phrase "tribes within the project area" is somewhat ambiguous. We suggest inserting the phrase: "*with treaty rights to resources whose habitats lie within*" into the sentence so that it reads: "... participants shall engage in a preapplication process with all affected federally recognized tribes *with treaty rights to resources whose habitats lie within* the project area." This will ensure impacted treaty tribes have notice of a proposed project early on and will have an opportunity to object before the project is underway. Otherwise, tribes may not receive notice and discover harm once the project is underway, which increases project costs and negatively impacts habitats and tribal resources.

2. The definition of forest owners should explicitly include tribal lands in trust.

WAC-173-446-020 definition of "Forest owner" only includes fee land owners. This definition should explicitly include tribal lands held in trust to provide for the representation and participation of tribal interests in the CCA.

3. The CCA should allow offset projects in aggregations of forest holdings.

Under the General Allotment Act of 1887, and its historical implications through the years since, tribes have lost significant portions of their reservations. Many tribal reservations in Washington State are checkerboard patterns of fee simple and trust land ownership. Facilitating aggregation of small holdings into offset projects would enable more tribes to participate and also provide protection for pocket forests. It could also provide an incentive for other groups of landowners to protect habitats by participating in an offset project.

4. The Proposed Rule infringes on tribal sovereignty.

WAC-173-055(3)(b) requires "General Market Participants" as defined in WAC 173-446-020, to "consent to regulation by ecology and the jurisdiction of the courts and administrative tribunals of the state of Washington with respect to any judicial or administrative enforcement action commenced by

ecology to ensure compliance with the requirements of chapter 70A.65 RCW and this chapter.”

The requirement that tribal participants in offset programs consent to Washington State jurisdiction amounts to a blanket waiver of sovereign immunity by tribes and infringes on tribal sovereignty. The proposed rule with the consent is unnecessary and creates a barrier for tribal engagement in the offset development process. This blanket waiver of sovereign immunity has never been part of negotiations around the CCA and is an unacceptable overreach by the Department of Ecology. Waiving sovereign immunity, even on a limited basis, is a case specific determination that each tribe must make based on the facts and issues presented. The requirement for a waiver to participate amounts to excluding many tribes from the offset programs in the CCA.

Instead, the Tribe proposes that the Department of Ecology include language stating that it will consult with each tribal applicant on a Government-to-Government basis to address an appropriate enforcement mechanism.

The Suquamish Tribe, as a co-manager with the State of Washington that manage and protect treaty-reserved resources within the State and the Tribe’s U&A, urges the Department of Ecology to consider the Tribe’s comments in a meaningful manner.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul Williams", with a long horizontal flourish extending to the right.

Paul Williams,
Policy Coordinator
Natural Resources Department
Suquamish Tribe

cc: Tom Ostrom
Kendra Martinez