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Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
* 11404 Moorage Way * La Conner, Washington 98257 *

December 20, 2022

Ms. Laura Watson, Director
Washington Department of Ecology
Via email: lawa461@ecy.wa.gov

Re: Ecology's 2022 Draft Water Quality Management Plan to Control Nonpoint Sources of Pollution and 2022 Draft Voluntary Clean Water Guidance for Agriculture Chapter 12, Riparian Areas & Surface Water Protection.

Dear Director Watson,

The Swinomish Indian Tribal Community ("Swinomish" or the "Tribe") submits the following comments on the Washington Department of Ecology's 2022 Draft Water Quality Management Plan to Control Nonpoint Sources of Pollution (the "2022 Plan") and 2022 Draft Voluntary Clean Water Guidance for Agriculture Chapter 12, Riparian Areas & Surface Water Protection ("Riparian Guidance"). As you are aware, there is a widespread temperature pollution crisis, with over *2,000 miles* of salmon streams across Puget Sound, and 112 miles just in the Lower Skagit River basin, that are listed under §303(d) of the Clean Water Act for temperature impairment.[1] Climate warming is already exacerbating this temperature pollution crisis in salmon streams.[2] Swinomish has been calling for urgent, bold action to remedy this threat to salmon recovery for years. We believe the State's sole reliance on open-ended, sporadic, and geographically diffuse voluntary incentive programs has been, and will continue to be, insufficient to meet water quality standards within sufficient time for the biological needs of ESA-listed Chinook and Steelhead.[3]

The natural condition of the Lower Skagit River is forested riparian habitat, but development and agriculture have removed the majority of that functioning habitat. As a Treaty Tribe, Swinomish has incurred ongoing harm to its federally protected property rights from the

[1] 2021. Skagit River System Cooperative Riparian Planting Plan.
[2] Yoder, J., and Raymond, C., et al. Climate Change and Streamflow: Barriers and Opportunities (2022).
[3] *See* Endangered Species Act Section 7 Formal Consultation and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for the Washington State Water Quality Standards – Environmental Protection Agency's Proposed Approval of Revised Washington Water Quality Standards for Temperature, Intergravel Dissolved Oxygen, and Antidegradation Statewide consultation (Feb. 2008).

EPA's and State's inaction to address the need for riparian habitat restoration. Endangered Species Act-listed salmon have not received the water quality protection and recovery actions that have been called for since 1999.[4] Ecology's Riparian Guidance makes little mention of this, nor the fact that it has been nearly twenty-five (25) years since Ecology was supposed to create riparian habitat guidance for agricultural lands.[5] The cumulative lack of action has brought us to a terrible trifecta of a climate, endangered species and Treaty fishery emergency. Yet, Ecology's documents indicate that no such an emergency exists, and from the Tribe's perspective, Ecology still has no actual plan to achieve water quality standards for salmon streams and remedy the ongoing harms to Swinomish's Treaty rights.

I. Executive Summary

The 2022 Plan and the Riparian guidance together comprise key components of Washington's Coastal Nonpoint Pollution Control Program ("Nonpoint Program") under the Coastal Zone Act Reauthorization Amendments of 1990 ("CZARA"). Taken individually and collectively, the 2022 Plan and the Riparian Guidance do not correct the many deficiencies that Swinomish pointed out in our September 14, 2020 CZARA comments to EPA and NOAA about the Nonpoint Program.[6]

The 2022 Plan does not set out a timeline to achieve water quality standards for designated uses in salmon-bearing streams, nor does it set out a schedule for achieving implementation of management measures to remedy nonpoint sources of pollution. In short, the 2022 Plan lacks any accountability measures, including goals or objectives with metrics, to reduce widespread and harmful temperature pollution that threatens the recovery of ESA-listed species and meaningful Treaty fishing rights. That is, **the 2022 Plan is *not an actual plan* to implement measures that will remedy temperature pollution**. As a result, the Swinomish Tribe is left with no choice but to recommend that EPA Region 10 disapprove the 2022 Plan and the State's coastal nonpoint source pollution program. Ecology's continued reliance on voluntary measures maintains the status quo of ineffectual complacency that is failing our salmon.

The Riparian Guidance is similarly deficient because it fails to provide a cohesive path to achieving water quality standards, despite being over twenty years in the making. The Riparian Guidance fails to adhere to the 2021 Stipulated Order wherein the State's Riparian Guidance is *required to establish necessary widths to meet water quality standards* to the extent possible. The "preferred alternative" of implementing riparian habitat at 1 site potential tree height in width adheres to best science for meeting water quality standards and follows Governor Inslee's 2019 Centennial Accord directive to state agencies. However, the Riparian Guidance opens the door to any landowner self-declaring that the scientifically necessary riparian habitat standard is not "feasible" – an allowance that has no established metrics or process - at which time the landowner can proceed to implement a 3-zone approach where significant industrial uses – also undefined in the Riparian Guidance – are allowed. These are problematic loopholes in the

[4] *See* Governor Gary Locke's 1999 Extinction is Not An Option, Statewide Salmon Recovery Strategy.
[5] *See* 1998 Conditional Approval for Washington's Coastal Nonpoint Pollution Program under CZARA.
[6] Docket No. NOAA-NOS-2019-0135.

Riparian Guidance, and are a source of serious concern about the efficacy of this policy to achieve the intended purpose of achieving water quality standards. As a result, the Swinomish Tribe is left with no choice but to recommend that EPA Region 10 reject the Riparian Guidance until these and other concerns noted below are remedied.

II. Background on the Swinomish Tribal Community

The Swinomish Indian Tribal Community is a federally recognized Indian tribe and political successor in interest to certain tribes and bands that signed the 1855 Treaty of Point Elliott, which among other things reserved fishing rights at "usual and accustomed" areas ("U&As") and established the Swinomish Reservation on Fidalgo Island in Skagit County, Washington. Since time immemorial, the Swinomish and its predecessors have occupied and utilized vast areas of land and water in northern Puget Sound to support the Swinomish way of life. Fish and fish habitat are crucial to the cultural, spiritual, subsistence and commercial activities of the Tribe. The Tribe exercises Treaty-reserved fishing rights in its U&A fishing areas, which include an extensive portion of marine waters of the Salish Sea in the northern Puget Sound, the entirety of the Skagit River watershed including all its tributaries, and the Samish River system. Traditional foods including salmon, other marine fishes, and shellfish, are a vital contribution to the cultural, spiritual, and social life of Tribal members. The Swinomish Reservation sits between Skagit Bay and the mouth of the Skagit River, the largest river system draining to Puget Sound, and the only river in the continental U.S. that still has all species of wild Pacific salmon spawning in its waters. Swinomish have been the primary stewards of the Skagit River watershed, working tirelessly for decades to restore the water quality and habitat needed to recover salmon.

III. Disapproval of the State's Coastal Nonpoint Pollution Program is Warranted.

On September 14, 2020, Swinomish submitted a 41-page comment letter where we detailed the general water quality problems in the lower Skagit River, and how the recovery of ESA-listed species and the Tribe's treaty rights are harmed by the State's failure to meet the basic obligations of CZARA. That letter is fully incorporated herein by this reference. The Tribe's September 2020 CZARA comment letter highlighted the Tribe's long history of requesting and imploring the State to take meaningful action to remedy the temperature pollution in the Lower Skagit Temperature TMDL.

To date, little meaningful progress, and no enforcement action of any kind, has occurred. SRSC? recently completed a technical analysis of the non-forested stream reaches along the nine (9) §303(d) temperature impaired salmon streams in the lower Skagit basin.[7] The analysis concluded that there are 112 stream miles in need of riparian habitat to remedy temperature impairment, and 98% of the stream miles are on private property.[8]

[7] *See* Supra, note 1.
[8] Swinomish provided a copy of this technical analysis and riparian planting plan to Ecology in Summer 2021.

1. The 2022 Plan Fails to Include Required Measurable Implementation Goals.

As Ecology is aware, CZARA is a federal Clean Water Act program meant to incentivize states to achieve water quality standards, including for designated uses like salmon foraging and rearing.[9] The CZARA Flexibility Guidance noted that **for a state relying on voluntary and incentive-based programs, the states had to "establish measurable implementation goals, e.g., a schedule for meeting increasing levels of management measure implementation**." For Western Washington temperature pollution issues, Ecology has relied, with rare exception, on voluntary and incentive-based programs. To date, despite a direct requirement to do so in the 1998 CZARA conditional approval, the State still has not provided a schedule of how and when it will meet increasing levels of management measure implementation.

The 2022 Plan does not include this requisite schedule or timeline for when management measures and additional management measures will be fully implemented. Nor does the 2022 Plan even mention a proposed schedule or timeline for when Washington will achieve water quality standards for salmon stream designated uses. The 2022 Plan acknowledges that the State's 2018 Water Quality Assessment results showed that temperature pollution remained the largest source of nonpoint source pollution, though bacteria pollution and dissolved oxygen impairment are very close behind. Despite this, the 2022 Plan does not include any strategies, objectives, or goals specific to the largest source of coastal nonpoint source pollution – temperature.

CZARA's clear mandates include that there must be a *schedule* to actually *achieve* water quality compliance for designated uses, including designated uses for salmon habitat, within a reasonable acceptable timeframe. The "additional management measures" that the 1998 conditional approval required and which the 2022 Plan points to are completely ineffectual and unrelated to meeting water quality standards. *CZARA requires evidence* that State actions will achieve numeric water quality standards and designated uses, but that evidence is wholly lacking in the 2022 Plan.

The Chapter 9, Goals and Strategies, states at page 153 that Table 8, pages 154-167, "provides measurable outputs that could be used to track progress and specific measurable milestones that will be used over the next five years." Yet, a reading of Table 8 leaves one wondering if some pages are missing – it simply does not contain 5-year measurable metrics for remedying temperature pollution. It is unclear how Ecology expects to making meaningful progress to remedy widespread nonpoint source pollution based on it.

Simply put, the 2022 Plan lacks any meaningful metrics or accountability measures. It is not a document with a strategy or a plan to remedy serious, long-standing problems that adversely affect ESA-listed species and the Tribe's Treaty rights. Instead, it's more of the status quo that has allowed the proliferation of temperature polluted salmon streams across Puget Sound, and left the 2004 Lower Skagit Temperature TMDL with the majority of stream reaches unplanted. Repeated calls by tribal governments for over two decades for the State to initiate

[9] *See* WAC 173-201A-200.

regulatory action to address widespread temperature pollution and its effects on salmon and Treaty rights have been largely ignored.

2. The 2022 Plan Lacks a Program to Actually Recover and Protect the Designated Uses in Western Washington Salmon Streams.

The State's CZARA program, as evidenced by the 2022 Plan, continues to rely on the passive approach that has failed salmon and Treaty rights for over two decades. The 2022 Plan points to a patchwork of voluntary incentive programs that are essentially the whole of its approach to nonpoint source pollution. Yet, the 2022 Plan fails to acknowledge that this status quo approach, in being effectively solely reliant on the willingness of landowners, is insufficient to put the State on a path to achieving water quality standards for nonpoint sources of pollution. This passive approach fails to present any discernable path or timeline to achieve water quality standards or restoring and protecting the designated uses for salmon habitat, particularly as the devastating impacts of climate change intensify.

In addition, some of the additional programs that the 2022 Plan relies upon as supporting Ecology's statutory duty to protect and recover water quality have serious flaws. For example, in September 2021, the Lummi Nation experienced a devastating die-off of 2,500 ESA-listed Chinook salmon that were attempting to spawn. A lethal warm-water bacteria killed the fish, in part due to the lack of riparian habitat. When the Lummi Nation attempted to secure funding through Puget Sound Partnership funding processes in the spring and summer of 2022, the proposal was rejected because it was not considered a high enough priority.

The Skagit River System Cooperative prepared an analysis of the Skagit County Voluntary Stewardship Program (VSP) based on the 2017-2021 5-year report. Some of the key findings included that:

1) Based on the SRSC (2021) estimate that there are approximately 112 miles of salmon stream segments needing riparian habitat planting in the Lower Skagit basin, it would take 883 years to plant the temperature impaired salmon streams at the Skagit VSP enhancement benchmark rate.
2) The 2017 Skagit VSP only included 68 percent of Ecology's 303(d) listed temperature polluted streams. The other 32% were excluded because the VSP focus area omits incorporated areas (within city limits), rural reserves (RRv), and industrial forests (IF-NRL).
3) There is no minimum riparian habitat buffer width standard included in the Skagit VSP.
4) The remaining 98 percent of the 112 miles of unforested riparian areas along the temperature polluted streams are on unprotected, private lands.

We readily acknowledge that some good progress has been made on specific water nonpoint pollution quality parameters, like the establishment of the no-discharge zone after environmental organizations petitioned Ecology for the rule adoption. However, the 2022 Plan relies upon programs that are not focused on achieving water quality standards, like VSP. In the end, we believe that the 2022 Plan provides no discernible information and does not demonstrate when, or by what steps, Ecology will achieve water quality standards. As a result, we believe that

EPA Region 10 should disapprove the State's Nonpoint Program until such time as there is an actual plan that includes meaningful measures to remedy the widespread temperature pollution crisis.

IV. The State's Voluntary Guidance for Riparian Areas Does Not Follow Best Science, Has Fatal Loopholes and Should Be Rejected.

The Riparian Guidance is moving forward due to a lawsuit filed against the EPA and Department of Commerce by Northwest Environmental Advocates. That resulted in a 2021 Stipulated Order that requires the EPA to ensure that the State completes the development of agricultural Best Management Practice ("BMPs") guidance by agreed upon deadlines and agreed upon standards. Pursuant to the Stipulated Order, the State's BMPs for riparian areas are due by December 31, 2022 and require that the State -

> "shall establish necessary widths, and base riparian buffer composition guidance on mature vegetation communities composed of native species and consistent with ecological site potential, to meet water quality standards to the extent possible." Order at §2.a.iv.

Unfortunately the Riparian Guidance falls far short of meeting this agreed upon standard. The Tribe is concerned that most of the July 6, 2022 comments submitted on the Draft Riparian Guidance this past summer by Swinomish and the staff at the Northwest Indian Fisheries Commission have not been addressed in the final Riparian Guidance. Those comments are incorporated herein by this reference. As a result the Riparian Guidance recommends minimum buffer widths that are too small to remedy widespread temperature pollution and achieve a riparian microclimate. The minimum buffer widths are contradicted by the best available science, including the scientific literature cited in Riparian Guidance Bibliography.[10]

For over twenty years, best science has clarified what salmon need in the very thorough, rigorous analysis included in WDFW's Priority Habitats & Species for Riparian Habitat Volumes I ("PHS"). The Riparian Guidance relies on its own less rigorous and non-peer reviewed collection of literature to then recommend riparian buffer widths that are much narrower and not supported by science. Of concern, the Riparian Guidance contradicts the 2004 Lower Skagit Temperature TMDL (Skagit TMDL). It established 75% of 1 site potential tree height as the minimum riparian habitat width necessary to remedy temperature pollution and achieve and maintain a riparian microclimate.

The 2022 Plan, discussed above, notes on page 160, that an objective is to "identify BMPs and measures that are designed to comply with the Water Quality Standards . . . and ensure compliance with state and federal law." Conversely, the goal of the Riparian Guidance is to "develop guidelines for riparian management zones that, when implemented will

[10] *See* Quinn, T. et all (2018). "The authors conclude that in areas with riparian forest potential, a buffer width equal to one site-potential tree height will fully protect riparian functions (including WQ protection) and associated contribution to aquatic habitat. In areas without riparian forest potential, the authors conclude that a buffer width of 100ft should protect riparian functions and aquatic habitat."

help restore and protect Washington State waters from agricultural pollution and facilitate the achievement of water quality standards." These are two very different standards. The Riparian Guidance 3-zone approach readily admits that "future modifications may be needed in order to achieve water quality and habitat protection goals."[11] Over two decades have passed since Ecology was supposed to have put these recommendations in place. It unreasonable to recommend riparian habitat that will now provide the shade and microclimate restoration that salmon desperately need.

Ecology notably recommends restoring forest to one site potential tree height at 200 years across the agricultural landscape. Unfortunately, the Riparian Guidance immediately pivots to allow, whenever a landowner determines it is not "feasible" to restore full riparian habitat functions, a three-zone Riparian Management Zone (RMZ). There is no definition of "feasible" beyond "not practicable to have a fully forested RMZ due to natural or anthropogenic factors," and there is no process for who decides what qualifies as natural or anthropogenic factor and what the process is for making that determination including the ability to appeal. Because of these key missing definitions, the pivot toward the 3-zone RMZ creates a large loophole that renders the Riparian Guidance ineffectual. The 3-zone approach is taken from forest practices that apply to mature stands of trees or managed forests with rapid replanting program, not denuded low-lying agricultural lands and areas of development.

The Riparian Guidance purports to be based on the best science related to temperature pollution: WDFW's Priority Habitats & Species for Riparian Habitat Volume I ("PHS"). **However, the Riparian Guidance recommendation for minimum buffers is 20% smaller than best science recommends for <u>non</u>-fish bearing streams**. These buffer recommendations for water quality standards in fish-bearing streams are not based on site potential tree heights, or science. Given the commitment by Ecology to base the riparian BMPs on the site potential tree height standard, the actual buffer widths being recommended continue to be unexpectedly narrow and insufficient to meet water quality standards.

Overall, the buffer recommendations in the Riparian Guidance appear to be as narrow as possible. The recommended widths assume the buffers will by default function at peak efficiency with little to no margins of error – any failure in the buffer performance given their narrow widths will directly translate to degradation of water quality and fish habitat degradation. We need to do more, and do it more quickly, before our fish lose any more habitat.

Thank you for your consideration of our concerns.

Sincerely,

Steve Edwards, Chairman
Swinomish Indian Tribal Community

[11] Riparian Guidance, p. 29b.