



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

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April 22, 2025

Marla Koberstein
Water Quality Standards Project Manager
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RE: Ecology WQS Triennial Review

Dear Ms. Koberstein,

Thank you for the opportunity to provide comments for Ecology's Triennial Review of its Water Quality Standards. Members of the Port Gamble S'Klallam Tribe depend upon having clean and healthy waters to perform subsistence, cultural, and economic activities, and it is vital that their waters remain protected and as free from pollutants as possible. We have provided several comments below that we hope will be helpful in informing the review process.

The Importance of Clean Water and Protective Water Quality Standards to the Port Gamble S'Klallam Tribe

The Port Gamble S'Klallam Tribe ("PGST") appreciates that the Washington State Department of Ecology ("Ecology") specifically requested in its draft work plan additional information regarding "Tribal reserved rights applicable to Washington waters that [Ecology] should consider when updating [its] water quality standards, as required under the federal Tribal reserved rights rule adopted in 2024." 2025 Triennial Review Draft Workplan (Publication 25-10-002), at 7 (Feb. 2025), *available at* <https://apps.ecology.wa.gov/publications/documents/2510002.pdf>. For decades, even though the Clean Water Act itself requires such consideration, the Tribes struggled to convince the State of Washington to account for and protect Treaty-protected fish and fishing when setting water quality standards (WQS). After much hard work between the sovereigns, PGST is heartened to see Ecology affirmatively seeking this information today and committing to the protection of Tribal reserved rights and resources, as required by the Clean Water Act, its implementing regulations (including the Tribal reserved rights rule), and the Treaties themselves.

The Port Gamble S'Klallam Tribe is a fishing tribe. Since time immemorial, fishing has been the foundation on which the Tribe's culture, economy, and ceremonial life was based. In 1855, when the Tribe entered the Treaty of Point No Point, 12 Stat. 933, with the United States, sacred promises were made between sovereign nations that bind the State of Washington to this day. The Port Gamble S'Klallam Tribe and others ceded hundreds of thousands of acres of their homelands, while reserving certain rights to themselves. Chief among the rights reserved—and persistently defended by the Tribe—is



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the right to continue taking fish and shellfish as it always had throughout its usual and accustomed fishing grounds (“U&A”). Article 4 of the Treaty of Point No Point states:

The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands.

With this treaty language, the Port Gamble S’Klallam Tribe, like other Treaty Tribes in Western Washington, reserved fundamental rights that they had exercised since time immemorial. The Treaty was intended to allow the Tribe and its citizens to continue their way of life in the face of white settlement, both at that time and in perpetuity, in large part by continuing robust tribal harvest of fish in off-reservation marine waters and freshwater rivers and lakes. In addition to extinguishing tribal land claims to pave the way for orderly non-native settlement, the treaty-makers’ recognition of these reserved rights secured for the United States, as instructed by their superiors in Washington, D.C., the crucial practical benefit of not having to pay for the Indians’ perpetual subsistence.

Fish and fishing remain of central importance to the Port Gamble S’Klallam Tribe’s culture, economy, ceremonies, and diet. More than 150 Port Gamble tribal members continue to earn all or a portion of their livelihood working as commercial salmon and shellfish fishers, and a 2020 survey shows 300 subsistence tribal fishers continuing to provide food for themselves and their families. In addition, the Tribe conducts fisheries throughout the shared U&A to obtain fish for ceremonial use (including funerals, weddings, and honoring and gifting observances, as well as other ceremonies and practices), and subsistence harvests from the U&A are a key element of the diet of many tribal members.

Despite the promises made by treaty, the Tribe’s way of life has been severely threatened by actions permitted by the State of Washington. Rivers, streams, bays, straits, lakes, and wetlands throughout the Tribe’s off-reservation usual and accustomed fishing grounds have been modified in manners detrimental to the fish and shellfish species upon which the Tribe depends, including through the discharge of toxic and other detrimental pollutants into waterways. Contaminated stormwater runoff and end-of-pipe discharges of dangerous chemicals flow into the freshwater and marine environments and represent a pervasive threat to treaty resources and the tribal communities that rely on them. Improperly treated sewage overflows and agricultural runoff also adversely affect shellfish beds and fish habitat of critical importance to PGST and other Tribes in the Puget Sound region. Fish populations, including salmonids and forage fish, are in a precarious position, and individual fish are imperiled by their exposure to this pollution and the adverse impacts on their habitat. In waters in which the Port Gamble S’Klallam Tribe reserved, through treaty, their right to continue fishing as they had since time immemorial, tribal members should not be subjected to shortages and unhealthy fish that result from pollutant discharges.

The United States Supreme Court has recognized the central importance of fishing for tribes: it is “not much less necessary to the existence of the Indians than the air they breathed.” *United States v Winans*, 198 U.S. 371, 381 (1905). And the reserved right to take fish impliedly reserved the habitat necessary to fulfill that purpose, that is, sufficient to keep waterways suitable for fish reproduction and



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tribal harvest. *E.g.*, *United States v. Washington* (“*Culverts*”), 853 F.3d 946, 966 (9th Cir. 2017), *aff’d*, 584 U.S. 837 (2018) (*per curiam*). The United States and its agencies must keep these bedrock principles in mind when administering statutes affecting Treaty-protected resources, and the Congress and the U.S. Environmental Protection Agency (EPA) have made clear that States must ensure that Tribal reserved rights like the Tribe’s fishing rights are protected when promulgating water quality standards when a Tribe has notified the State of reserved rights that should be considered. *E.g.*, Clean Water Act, 33 U.S.C. §§ 1251(a), 1313(c)(2)(A); 40 C.F.R. §§ 131.9, 131.3(e), (r), 131.20, 131.2, 131.5(a)(9)-(b), 131.6, 131.10, 131.11; EPA, *Water Quality Standards Regulatory Revisions to Protect Tribal Reserved Rights*, 89 Fed. Reg. 35,717 (May 2, 2024) (effective date June 3, 2024).

In order to fulfill these mandates, the Tribe recommends that Ecology begin by updating its designated uses statewide to explicitly include Tribal fishing, shellfishing, and other aquatic-dependent resources and practices reserved by Tribal right holders. *See, e.g.*, 40 C.F.R. §§ 131.9(a), 131.10(i), 131.3(e), (r). Through this action, Ecology will eliminate any confusion, feigned or otherwise, as to whether the State must set its criteria to be protective of Tribal existing uses that have persisted since time immemorial and that were reserved to the Tribes by treaty. With specific respect to the Stevens Treaties entered into by Tribes in what is now western Washington, PGST recommends that Ecology update its designated uses throughout what is known as the “Case Area” of *United States v. Washington*. The Tribe suggests that Ecology refer to court decisions in that proceeding in order to understand the scope of Tribal reserved rights, including commercial, cultural, and subsistence uses, that must be protected in fresh and marine waters throughout Tribal U&A. In 2017, the Ninth Circuit described the “Case Area” as follows: “Under the Stevens Treaties (“Treaties”) at issue in this case, the tribes relinquished large swaths of land west of the Cascade Mountains and north of the Columbia River drainage area, including the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas (collectively, the “Case Area”), in what is now the State of Washington.” *United States v. Washington*, 853 F.3d 946, 954 (9th Cir. 2017).¹ The Tribe believes this description of the area in which Tribes forever reserved their rights to fish in their usual and accustomed grounds and stations is useful for Ecology to understand the broad geographic scope of Tribal reserved rights as it sets water quality standards in western Washington. All of these waters are tribal U&A and thus the WQS for all such waters must be set to be protective of tribal fishing and shellfishing, tribal member health, and fish populations necessary for Tribes to meaningfully exercise their reserved commercial, ceremonial, and subsistence fishing rights.

Comments on Specific Project Groups

Group 1

¹ For additional court decisions describing the Case Area as all of western Washington west of the Cascade Mountains and north of the Columbia River watershed, see: *Washington v. Wash. State Comm’l Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 670 n.15 (1979); *United States v. Washington*, 384 F. Supp. 312, 328 (W.D. Wash. 1974); *United States v. Washington*, 459 F. Supp. 7020, 1039-42, 1048-49, 1059 (W.D. Wash. 1978); *United States v. Washington*, 626 F. Supp. 7405, 7441-43, 1467 (W.D. Wash. 1985).



We largely approve of Ecology's direction with the Group 1 projects. In the case of freshwater temperature we believe criteria should be developed to reflect the fact that climate change induced temperature rises are *not* natural conditions. This would provide the impetus to mitigate the effects of climate change on freshwater systems, giving species precious extra time to adapt to our warming environment.

Group 2

We largely approve of Ecology's direction with the Group 2 projects. Ecology intends to review modern data for pollutants, which we would like to see done with every Triennial Review. Particularly given EPA's recent abrogation of its mission, Ecology *must* use the best available science when crafting water quality standards.

We ask that Ecology be very careful in determining when variances are appropriate for a water body: they should only be approved when *absolutely necessary*. Cost-saving and convenience are not appropriate reasons to approve of any kind of degradation of a water body, even if temporary, and we are concerned that variances may be granted in these situations.

Ecology's plan to evaluate whether its PFOS/PFAS and related compound standards are protective is laudable. Regulations for these chemicals are crucial in ensuring waters are safe for humans and wildlife, but it's important to regulate these chemicals as a class versus on a chemical-by-chemical basis; historically manufacturers have taken advantage of regulators by simply switching from compounds with proven health effects to similar compounds that may have similar health effects, but lack the research to show them.

Group 3

We approve of Ecology's approach to explore chemical interactions that may impact Water Quality Standards. WQS all too often only consider pollutants in isolation and not the interactions between them that can magnify the toxicity many times over than each pollutant possesses on its own.

However, we would like to see this as a higher priority project, as it applies to virtually every polluted system. Given the PFAS/PFOS and 6PPD-q crises, it seems prudent to study to how these and other pollutants interact with one another and affect the organisms living in these systems. There are already many known chemicals that possess this "synergy of evil,"² and it is crucial for both human and

² Block et. al. Basic concepts of mixture toxicity and relevance for risk evaluation and regulation. *Arch Toxicology*, Nov 2023. doi: 10.1007/s00204-023-03565-6



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environmental health that these interactions be explored as more and more chemicals are developed and discharged into Washington's waters.

Thank you again for the opportunity to comment.

Sincerely,

Roma Call

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