Duncan Greene

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Subject: Comments from Duncan Greene and Jamie Grifo on Triennial Review of Washington Surface Water Quality Standards, Chapter 173-201A WAC

Dear Ms. Koberstein,

We are writing to provide our joint comments on the Triennial Review of Water Quality Standards (WQS) by the Washington State Department of Ecology (Ecology). Thank you for sharing these comments with staff in the Water Quality Program. Because these comments relate in part to Ecology's regulation of wetlands, we ask that you also share them with staff in the Shorelands & Environmental Assistance Program.

We are land use attorneys with decades of experience representing a wide range of private and public clients impacted by Ecology's regulation of wetlands and other "waters of the State." However, we submit these comments in our individual, personal capacities. As citizens of Washington State and members of the regulated community, we are concerned by what we've seen in experiences representing individuals, businesses, and government agencies, across all sectors, including: individual homeowners, small landowners, farmers, ranchers, developers of residential, commercial, industrial, and energy projects, port districts, marinas and boatyards, mitigation bankers, and local governments. As explained below, the consistent message from these clients and others in the regulated community has been that "something is fundamentally broken" at Ecology—particularly when it comes to wetlands.

Ecology should use this Triennial Review process to start fixing its broken wetlands/waters program. We believe this Triennial Review process and current circumstances represent a unique opportunity for Ecology to launch a comprehensive regulatory reform effort that will foster a more transparent, predictable, and fair regulatory process, while also improving the effectiveness of Washington's environmental protections. These wetlands/waters issues have been left unresolved for too long, and this is precisely the kind of regulatory reform that Governor Ferguson required agencies to pursue when he issued Executive Orders 25-02 (regulatory efficiency) and 25-03 (permitting).

These comments address key concerns related to the current regulatory framework, including the lack of fairness and predictability for regulated parties, the need for clearer definitions, and the need for improved regulatory procedures and training on wetlands/waters issues.

1. Clarification of "Waters of the State"

We urge Ecology to clarify the definition of "waters of the State," at least as applied to wetlands. This will require Ecology to pursue rulemaking and may also require legislation. A key area of concern is the scope and extent of Ecology's jurisdiction over isolated wetlands and other isolated waters, particularly in areas that are dry for most of the year. As currently interpreted, the reach of Ecology's jurisdiction is unclear, leading to inconsistent application of regulations and significant uncertainty for landowners, developers, and other stakeholders.
Washington's current regulatory framework for wetlands and other "waters of the State" developed in a piecemeal fashion over several decades. A key milestone was Ecology's decision to include wetlands as a type of "surface water" in the Water Quality Standards (WQS) under Chapter 173-201A WAC. This decision, and other related decisions made by Ecology since then, were not accompanied by appropriate public engagement on fundamental questions about the ultimate scope of the wetlands program, such as: What types and sizes of wetlands are covered? (Ecology's answer is "all of them, even 0.01-acre wetlands.") Are isolated wetlands—completely unconnected to streams, rivers, or other jurisdictional features—"waters of the state"? (Ecology says "yes, in all cases.") What kinds of landowner activities should be regulated, and under what process? Should any activities be expressly exempted from regulation? (So far, Ecology says "no.") And most importantly, how will Ecology harmonize the protection of wetland functions and values with other beneficial uses of water, such as agriculture, stock watering, and forestry? (In many cases, Ecology does not.)

Public input should have informed the agency's approach to regulating wetlands, including the geographic scope of regulated wetlands and other "waters," the types of activities that should require authorization, and the exemptions and other procedures that should apply. Because the public was never asked, these questions were effectively answered through "gap-filling" by Ecology staff, who make new policy through case-by-case determinations and sometimes by issuing internal agency guidance.

As a result, the current regulatory framework has become a disjointed and confusing patchwork of rules, informal policies, staff interpretations, and ad hoc enforcement actions. This patchwork fails to provide meaningful clarity for landowners, and it falls short of Ecology's statutory duty to develop a "comprehensive" water quality protection program that coordinates and integrates its responsibilities with land use planning, water resource management programs, and state and local government requirements and programs (RCW 90.48.260). It also fails to fulfill Ecology's broader legislative mandate to "coordinate and integrate" environmental protection with "economic and social development" (RCW 43.21A.010(10)), and to carry out water quality responsibilities in a manner that protects the full range of "beneficial" and designated uses of water—including productive uses like agriculture and stock-watering—not just ecological values (RCW 90.48.010).

In short, the current system is fragmented, difficult to navigate, and often internally inconsistent. It neither respects the rights and responsibilities of property owners and communities in working lands, nor supports long-term ecological health. Landowners often have no way of knowing whether their property contains regulated wetlands until they are subject to an enforcement action. In the absence of a formal state permitting program, Ecology has relied on informal tools such as "Administrative Orders" (AOs) to compel compliance—often without providing notice, clear standards, or an opportunity for meaningful review. This approach undermines public trust in the agency and is incompatible with the transparency, predictability, and fairness that our administrative laws require. Moreover, as explained below, Ecology's implementation of wetland protection has frequently ignored or undervalued other designated and beneficial uses of water,

including stock watering and agricultural production.

The opportunity before Ecology today is not just about restoring balance and fairness—it is about laying the groundwork for a scientifically credible, legally defensible, and publicly supported framework that protects wetlands as part of Washington's surface waters, while maintaining respect for the rights and practical needs of landowners. The path forward must clarify the definition of "waters of the state," create an accessible and predictable permitting pathway, and explicitly recognize the full range of beneficial uses protected by law.

The U.S. Supreme Court has emphasized that ambiguous wetlands regulations are uniquely harmful, from both a practical and legal perspective: "Even if a property appears dry, application of the guidance in a complicated manual ultimately decides whether it contains wetlands. This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property . . . And because the [law] can sweep broadly enough to criminalize mundane activities like moving dirt, this unchecked definition . . . means that a staggering array of landowners are at risk of criminal prosecution or onerous civil penalties. . . ."

Given the potential impact of regulatory jurisdiction on development, agriculture, and other industries, it is critical that this definition be clarified through a formal rulemaking process and, if necessary, through legislation. This process must include robust stakeholder involvement to ensure that the resulting regulations reflect the policy decisions of Washington's citizens and legislators, not the shifting preferences of unelected Ecology staff. They should also reflect the ecological realities of Washington's diverse landscapes, balancing the need for environmental protection with the practicalities of land use and development.

2. Reform of Regulatory Procedures and Staff Training

Another critical area for reform is Ecology's regulatory procedures and staff training programs.

Currently, there are significant concerns about fairness, predictability, and the consistency of decision-making. Regulated parties often face a lack of certainty, even when they follow all prescribed procedures. This is exacerbated by the fact that Ecology staff often assert the right to re-open decisions at any time, for any reason, without clear standards or guidelines to govern their discretion.

Ecology should take the following steps to reform its procedures and provide greater predictability and transparency to landowners and applicants:

Creation of a State Wetland/Waters Permitting Program: Ecology should pursue rulemaking and legislation as needed to establish a state permitting program for wetlands and waters, with appropriate exemptions and clear guidelines. Such a program should be informed by a robust stakeholder process to ensure it meets the needs of the regulatory community. The current "permitting" process used by Ecology for impacts to non-federally regulated wetlands and other waters, which involves issuing an "Administrative Order" (AO), is ambiguous, inefficient, unfair, and probably illegal.

Ecology itself has recognized the need for a state wetland permitting program. In a 2019 comment letter addressing the relationship between federal and state regulations, Ecology's Director stated

that, without federal coverage over isolated waters, innocent landowners would be caught in an enforcement trap because Washington State has no permitting program for wetlands: "Increased costs can result from the potential for increases in violations, which will increase costs in enforcement for the state and for landowners who inadvertently violate state law where no program to authorize impacts currently [exists]."

When Ecology proposed a state-level dredge and fill program in 2023 and 2024, the agency said "[a] new approach is needed" because the AO process "is less efficient and transparent than a traditional permitting program," lacks "transparency and predictability," and lacks any exemptions that could "provide a pathway for authorizing specific types of actions or projects under certain thresholds."
In designing a wetland/waters permitting program for Washington State, Ecology can and should learn from the federal Section 404 dredge and fill permitting process established under the federal Clean Water Act, where statutory and regulatory exemptions were created after vigorous stakeholder engagement and public debate, and from other states that have established permitting programs. For example, Oregon's longstanding Removal-Fill Law (ORS 196.800 et seq.) provides a formal permitting process for impacts to wetlands and waters, including exemptions for agriculture, forestry, and other activities. Colorado, responding to the Sackett decision, recently enacted new state legislation (SB23-270) establishing a state dredge and fill permitting program with express statutory exemptions and procedural safeguards. Both states engaged stakeholders and the public during the rulemaking process, providing clear policy direction that reflects the public interest.

The current status of Ecology's proposed dredge and fill program is unclear. As part of this Triennial Review process, Ecology should take the opportunity to document its commitment to creating a state-level permit program, with appropriate exemptions informed by stakeholder input. Agricultural exemptions adopted by Ecology should be coordinated with local critical areas exemptions and the Voluntary Stewardship Program. State exemptions should also be harmonized with other state and federal laws, regulations, and procedures, particularly the federal Section 404 dredge and fill permitting program. Incorporating express agricultural exemptions into the WQS could help to ensure that the very designated/beneficial uses that the WQS are designed to protect are not effectively prohibited as a result of Ecology's interpretation and application of the Water Pollution Control Act (WPCA) and the WQS. For example, Ecology has recently pursued enforcement actions against ranchers for stock watering activities that are clearly exempt under the federal Section 404 permitting program, claiming that those activities violate the Water Pollution Control Act and the WQS. Ecology should incorporate clear exemptions for agricultural and other activities into the WQS to ensure that the primary aims of protecting and preserving designated and beneficial uses will not be prohibited as a consequence of Ecology's interpretation and application of the WQS.

For activities that are not exempt, Ecology's Water Quality Guidance for agriculture should be updated to address a critical fairness issue: how landowners and agricultural operators should determine whether an area might be a wetland or other "water of the State." Current guidance fails to resolve this issue, especially as to small and isolated wetlands, which Ecology admits can be difficult or impossible for a lay person without hiring an expert consultant. Current guidance and regulations also fail to provide any clear safe harbor for agricultural owners and operators. Ecology should adopt regulations that provide an explicit safe harbor for non-exempt activities that comply with guidance. As explained above, Ecology should also adopt "good-faith" enforcement exceptions for owners and operators who engaged in a prohibited activity but did so in good faith, without

reason to believe it would result in a violation.

State-Level Jurisdictional Determinations: Ecology should develop and implement a state-level jurisdictional determination (JD) tool, similar to those used by the federal Army Corps of Engineers and regulators in other states like Oregon. Adding a state-level JD tool would provide clarity and certainty to many landowners and applicants, ensuring that they can make informed decisions about the need for permitting and the scope of regulations that apply to their land. However, a JD process would not help in situations where a landowner has no reason to suspect an area might be regulated, raising significant questions about fairness and due process. Ecology has a moral and legal obligation to confront this issue head-on by adopting policies and procedures that require staff to resolve such situations fairly and consistent with due process, such as "good-faith" enforcement exceptions.

Training for Ecology Staff: Ecology's staff must be trained not only in the technical aspects of water quality protection, but also in understanding the full range of beneficial uses of water. This includes recognizing the importance of productive designated and beneficial uses, like agriculture and stock watering. Staff training should emphasize the need to protect not just the environmental qualities of water but also these designated and productive uses, in line with Ecology's own guidance and policies.

Ecology staff often fail to follow the "Procedures for applying water quality criteria" in WAC 173-201A-260(3), which requires Ecology to evaluate water quality in wetlands by applying specific criteria. The water quality criteria for wetlands state that "[w]ater quality in wetlands is maintained and protected by maintaining the hydrologic conditions, hydrophytic vegetation, and substrate characteristics necessary to support existing and designated uses." Rather than applying these factors to each project on a site-specific basis, however, Ecology staff often skip that step—disregarding existing and designated beneficial uses, and assuming the existence of beneficial wetland values that must be protected at all costs, often to the detriment of a productive use.

To take just one example, Ecology staff have failed to protect stock watering, a designated use that must be protected under the WQS, even when a stock watering use is clearly "existing" on a particular site. This approach is illegal and contrary to Ecology's own guidance, which recognizes that wetlands are often used for stock watering, and that, despite "considerable debate concerning the use of wetlands for stock watering," the law still requires that stock watering "must" be "protected." The guidance recommends that Ecology find a balance between protecting stock watering and preventing the activity from "significantly degrad[ing] a waterbody's ability to perform other beneficial uses (e.g., fish and wildlife habitat)," and that Ecology do so "through BMPs and other regulatory and nonregulatory efforts is essential to ensuring wetlands and other waterbodies can support all legitimate beneficial uses possible." See Water Quality Guidelines for Wetlands: Using the Surface Water Quality Standard for Activities Involving Wetlands, Washington Department of Ecology, Publication #9606 (April 1996). Instead of following this kind of balanced approach for stock watering and other productive uses, Ecology staff have misinterpreted our state's Water Pollution Control Act as effectively prohibiting these designated uses. Legally, morally, and as a policy matter, that approach is wrong.

Coordination with Other State Laws

A persistent issue with the current regulatory framework is the lack of coordination between

Ecology's approach and other state laws and regulations. For example, Ecology staff dealing with wetland issues have not consistently followed RCW 90.48.450, which requires Ecology's enforcement actions to consider and minimize the possibility of conversion of agricultural land, or RCW 90.48.422, which prohibits Ecology's enforcement actions from impairing stock water rights. To take another example, Ecology's approach to wetland and water quality standards has not been harmonized with the laws and regulations that govern how state trust lands are managed by the Department of Natural Resources (DNR). Complicating the issue further, many current DNR staff members lack information and context about how trust lands have historically been managed, and they fail to follow the laws and regulations that govern their land management practices. DNR is required, for instance, to work cooperatively with lessees of state-owned land to address ecological issues over time, through adaptive management, but DNR sometimes ignores these duties and allows Ecology staff to dictate the process and the outcome. See, e.g., RCW 79.13.610-.620 (requiring DNR to work cooperatively with tenants towards "desired ecological conditions" and apply "appropriate land management practices" over time, not prescribe agricultural practices). This approach is inefficient, unfair, and likely illegal.

Conclusion

Like many others in the regulated community, we have deep concerns about the fairness, clarity, and effectiveness of Washington's current wetlands/waters framework. Critical steps toward achieving a more balanced and transparent regulatory process include: clarifying the definition of "waters of the State"; establishing a state permitting program, with appropriate exemptions informed by stakeholder input; providing for state-level jurisdictional determinations; and improving staff training.

Our comments are consistent with Ecology's obligations under state law. In addition to the statutory duties noted above, Ecology has the duty to "plan, coordinate, restore and regulate the utilization of our natural resources in a manner that will protect and conserve our clean air, our pure and abundant waters, and the natural beauty of the state," which the legislature recognized will increase "as the population of our state grows," and as "the need to provide for our increasing industrial, agricultural, residential, social, recreational, economic, and other needs" also grows. RCW 43.21A.010.

We urge Ecology to take these concerns into account during the Triennial Review process (and other planning processes) and to take meaningful action to address them.

We appreciate the opportunity to provide these comments, and we look forward to continued dialogue on these important issues as part of the Triennial Review process and beyond.

Sincerely,

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