



Northwest Indian Fisheries Commission

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Dennis McLerran, Regional Administrator
U.S. EPA Region 10
1200 6th Avenue, Suite 900
Seattle, WA 98101

William Stelle, Regional Administrator
NOAA-Fisheries, West Coast Region
7600 Sand Point Way Northeast
Seattle, WA 98115

Re: Request for a compliance schedule and additional accountability for Washington's development of BMPs and subsequent program approval under CZARA and § 319.

Dear Regional Administrator McLerran and Regional Administrator Stelle:

The western Washington tribes' Treaty Rights at Risk initiative is a call for the renewal of federal fiduciary obligations to protect treaty-reserved resources. The trust responsibility requires, at a minimum, federal agencies to zealously implement their statutory obligations in protection of those resources stewarded by the federal government. Treaties are part of the Supreme law of the land under the constitution and thus have a stature at least equal to other federal laws, including the Clean Water Act and the Coastal Zone Management Act. Federal agencies owe a trust responsibility to implement treaty rights as well as their other statutory responsibilities.¹ Since 2011, the tribes have called attention to many environmental programs – some delegated to the state, some supported by federal funding, and others administered by the federal agencies themselves – that are under-implemented, out of compliance, or inconsistent with the protection of treaty-reserved rights and resources. One such program highlighted by *Treaty Rights at Risk* in 2011 was Washington's Coastal Nonpoint Pollution Control Program (CNPCP), authorized under the Coastal Zone Act's Reauthorization Amendments (CZARA). Today, we write to request additional accountability in the long delayed development, approval, and implementation of this program in Washington State. Specifically, we are seeking a written schedule for best management practice (BMP) identification, timely completion of the process, and clear consequences if those deadlines are not met (see below for more information).

¹ See e.g., *Northwest Sea Farms v. Corps of Engineers*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996) (Corps of Engineers' trust responsibility to the Lummi Nation imposes a fiduciary duty to consider and protect the Tribe's treaty-reserved rights when the Corps exercises its CWA Sec. 404 permitting authority, even if no specific regulatory provision so requires).

Washington's CNPCP has never received full approval since EPA and NOAA's determination in 1998, which provided that additional work was necessary to meet the requirements of CZARA.² That work includes at a minimum, ensuring enforceable mechanisms to implement the identified management measures,^{3 4} identification of agricultural BMPs,⁵ and generally programs "necessary to achieve and maintain applicable water quality standards... and protect designated uses."⁶

In 2013, EPA and NOAA wrote to the Washington State Department of Ecology (Ecology) notifying it of the need to complete the program approval process, and in doing so to ensure the program was protective of treaty-reserved resources.⁷ Since that time, Ecology sought re-approval of its Clean Water Act § 319 programs and plan, which, per federal requirements, should be fully coordinated with implementation of the CNPCP under CZARA.⁸ Although the § 319 plan is intended to implement the CNPCP,⁹ it contains none of the updates necessary to achieve compliance with CZARA, let alone programs necessary to implement CNPCP to protect designated uses or treaty-reserved rights. Neither did the plan "identify best management practices and measures to control each category and subcategory of nonpoint sources," as required by the Clean Water Act.¹⁰ Instead, the plan called for a process to identify BMPs for

² EPA and NOAA "conditionally approved" Washington's CNPCP in June 30, 1998 noting several deficiencies, including a lack of enforceable mechanisms to implement identified management measures. Full approval was withheld until such deficiencies could be rectified. No such subsequent full approval or denial has occurred. Moreover, EPA and NOAA cannot suspend agency decision making for decades under the auspices of a "conditional approval," which is neither explicitly authorized under CZARA nor the Administrative Procedures Act. Such a delay clearly constitutes "agency action unlawfully withheld and unreasonably delayed" per 5 USC § 706.

³ See 1998 Findings for the Washington Coastal Nonpoint Program, available at <https://coast.noaa.gov/czm/pollutioncontrol/media/findwa.txt>

⁴ See 16 USC 1455(d)(16). The Coastal Zone Management Act requires that approval for a state CZMP include a completed a coastal nonpoint pollution control program and enforceable policies and mechanisms to implement applicable requirements of CZARA Section 6217.

⁵ See Department of Ecology. 2015. Washington's State's Management Plan to Control Nonpoint Sources of Pollution. Page 83-85.

⁶ 16 USC § 1455b(b)(3)

⁷ See Letter from Margaret Davidson, Acting Director NOAA-OCRM and Dennis McLerran, Administrator EPA-Region 10 to Maia Bellon, Director, Department of Ecology, re: Washington's Coastal Nonpoint Pollution Control Program, Nonpoint Source Management Program, and Federal Trust Obligations to Tribes, dated April 23, 2013.

⁸ See 16 USC § 1455b(a)(2) providing that "The [CNPCP] program shall serve as an update and expansion of the State nonpoint source management program developed under section 1329" (Section 319).

⁹ See EPA. 2012, Section 319 Program Guidance: Key Components of an Effective State Nonpoint Source Management Program. "In addition, the state incorporates existing baseline requirements established by other applicable federal or state laws to the extent that they are relevant. For example, a coastal state or territory with an approved coastal zone management program incorporates its approved state coastal nonpoint pollution control programs required by section 6217 of the Coastal Zone Act Reauthorization Amendments (CZARA) of 1990, into its NPS management program since CZARA requires implementation through the state's NPS management program. In this manner, the state ensures that this program and other relevant baseline programs are integrated into, and consistent with, Section 319 programs.

¹⁰ See 33 USC § 1329(2)(a)

agriculture, and committed to finalize the process for identification by June 15, 2016.¹¹ When the BMP identification would be completed, however, was never made clear.

EPA approved Washington's §319 plan and program on August 2, 2015 (despite clearly identified failures to meet statutory requirements and EPA guidance) on the premise that Ecology's process to identify BMPs would occur in a timely manner and result in practices consistent with federal requirements. Unfortunately, only a few months after federal approval, Ecology has already notified EPA, NOAA, and tribes of lengthy delays in the process to identify BMPs.

Given the 20-plus year delay in developing BMPs and achieving compliance¹² with CZARA, the tribes remain very concerned about the continued postponement of BMP identification to achieve compliance with water quality standards and designated use protection. It has been over five years since the tribes raised the issue of CZARA noncompliance through Treaty Rights at Risk, and we have seen little overall progress. Although Ecology appears to be headed in the right direction with the recent commitments in their §319 plan, there is no real accountability that the outcomes will be achieved or that federal agencies will undertake the necessary actions to ensure that state commitments are completed without further delay.

BMP identification, already 20 years overdue, need not take several more years to complete. Nor does Ecology need to take over a year to develop a process to identify BMPs. Ecology could expedite BMP identification by identifying a list of those practices that, when applied in combination, have been shown, in a scientifically sound process, to result in a particular agricultural land use's compliance with water quality standards. The list should include setback distances, and buffer widths, but need not provide all the details of construction or implementation. Instead, Ecology could simply reference other documents for additional information.¹³ Also, much like Ecology's stormwater manual, Ecology need not be concerned with every detail of BMP design, and may leave some of the nuances of construction or placement up to other processes (e.g. SWPPP development). If, at a later date, Ecology chooses to package and polish these materials for education and outreach, they could pursue those avenues after initial identification of BMPs.

The identification process should also focus first on those agricultural land uses within the jurisdiction of the CNPCP (western Washington) to ensure more timely compliance. CZARA

¹¹ See Ecology. 2015. Washington State Nonpoint Source Pollution Control Plan at page 85. Available at <https://fortress.wa.gov/ecy/publications/documents/1510015.pdf>

¹² Although we understand that state participation in CZARA is not mandatory, there are financial penalties for disapproval, including a 30% reduction in federal funding for both §319 and CZMA programs. Washington has continued to receive full funding despite not receiving full approval. Additionally, Washington's Coastal Zone Program lacks elements necessary for approval: a CNPCP and enforceable policies and mechanisms to implement it. See 16 U.S.C. Sec. 1455(d)(16).

¹³ E.g. Washington State Department of Fish and Wildlife will be revising its Riparian Management Recommendations for Priority Habitats, which should support the BMP identification process.

compliance need not be delayed while Ecology develops BMPs for eastern Washington agriculture.

In order to help Ecology identify BMPs in a timely manner, we also request that EPA and NOAA utilize their technical assistance authorities pursuant to 16 USC § 1455b(d)(3) to develop BMPs for agricultural land uses that will result in compliance with water quality standards and designated use protections specifically for western Washington. Should Ecology not complete identification of BMPs, this federal guidance should be available to support programs to protect treaty-reserved resources in Washington in the absence of Ecology-identified BMPs. NOAA and EPA should begin compiling this information now in order to support Ecology's BMP identification process.

In summary, and in addition to the above, we recommend the following sequence of actions by EPA and NOAA to ensure an orderly process to bring Washington's nonpoint source plans into compliance with both §319 and CZARA:

1. Require Ecology to provide a written schedule for the identification of BMPs for agricultural land uses.
2. Ecology must prioritize BMP identification for western Washington to ensure timely compliance with CZARA, and complete identification of those BMPs by July 1, 2017.
3. EPA and NOAA should exercise their technical assistance authorities pursuant to 16 USC § 1455b(d)(3) and immediately identify BMPs for agricultural land uses that will result in compliance with water quality standards and designated use protection in western Washington. These BMPs could be submitted to Ecology's BMPs process, and serve as guidance for Washington agricultural land uses should Ecology not meet the deadlines above.
4. If Ecology fails to meet the July 1, 2017 deadline, EPA and NOAA should exercise their authorities under 16 USC § 1455b(c)(3) and withhold the requisite program funding.
5. If Ecology fails to identify the necessary BMPs for program implementation in accordance with the written schedule, EPA and NOAA's guidance for western Washington should provide direction to state and local programs. Once developed, Washington State can then implement the federal guidance for western Washington for the purposes of achieving protection of designated uses, and restoring 319 and CZARA compliance and accompanying funding.
6. Should federal or state BMPs identification not occur under request number 1 or 2, NOAA and EPA should reinstate ESA §7 consultation on Washington's Temperature and Dissolved Oxygen Water Quality standards and re-evaluate its analysis in light of the state's failure to address nonpoint source pollution in a manner designed to meet water quality standards and protect beneficial uses. Additionally, EPA and NOAA should fully disapprove both 319 and CZARA programs and cease applicable funding.

7. Additionally, EPA and NOAA must consult with NMFS pursuant to § 7 of the ESA on both §319 and CZARA program approvals.

We understand the above schedule includes an escalation of sanctions, but without strict accountability, history demonstrates that continued noncompliance is likely. Additionally, the tribes' treaty-reserved resources are declining at an increased rate as evidenced by this year's meager salmon harvest opportunities, closure of some tribes' ceremonial and subsistence salmon fisheries, and the continued closure of shellfish beds within tribes' usual and accustomed areas. The tribes can no longer afford further delays in habitat protection. We therefore request that EPA and NOAA take swift action and hold Washington accountable for long overdue BMP identification and implementation as required by federal law.

We thank you for your assistance in this manner and look forward to your prompt reply in ensuring forward progress. Should you have any questions about this correspondence please do not hesitate to contact my staff or I, at 360 438-1180.

Sincerely



Lorraine Loomis
Chairperson

cc: NWIFC Commissioners

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