



Northwest Indian Fisheries Commission

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August 4, 2023

Casey Sixkiller, Regional Administrator
U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle, WA 98101

Re: 2022 Updates to Washington's Water Quality Management Plan to Control Nonpoint Source Pollution

Dear Mr. Sixkiller:

The recently declared drought emergency for Washington is a stark reminder of the pressing need to address ongoing violations of state water quality standards set to protect salmon, trout, and cold-water ecosystems. The good news is we know what measures are needed to address water pollution, restore climate resiliency to degraded watersheds, and protect treaty rights. The Environmental Protection Agency Region 10 (EPA R10) has a distinct, and important role to play in these efforts.

As you know from our June 5, 2023 correspondence, the Northwest Indian Fisheries Commission (NWIFC) requested that the EPA R10 use its authority under the Section 319 of the Clean Water Act (CWA) to disapprove the 2022 Updates to Washington's Water Quality Management Plan to Control Nonpoint Source Pollution (Plan). We wish to provide additional comments, which were discussed at the July 19 meeting the tribes had with staff from EPA R10 and the American Indian Environmental Office, and reiterate the previous requests from tribal leaders for a meeting with you prior to the August 14th court filing deadline.

1. Treaty Rights at Risk

Since 2011, through the Treaty Rights at Risk initiative, tribal leaders have sought increased federal oversight and accountability to Ecology's management of nonpoint sources of pollution under the Treaty Rights at Risk initiative. This initiative asks federal agencies to align their statutory authorities with their fiduciary obligations as a federal trustee to protect and restore treaty rights and resources. The decision before EPA regarding the sufficiency of Ecology's Plan to address the threat to treaty resources from nonpoint pollution falls squarely within the Treaty Rights at Risk rubric.

Restoration of streamside buffers is urgently needed to keep streams within the temperature standards and to prevent other pollutants from entering the water. Riparian buffers also provide important habitat for plants and wildlife. Unfortunately, the rate of streamside restoration on

agricultural lands is lacking, despite the Department of Ecology having the authority to require much more from polluters. The best available science, which EPA helped fund, tells us what is required. Therefore, we again ask for a clear statement from EPA of what the agency will do to protect treaty rights in the context of Ecology's Plan.

2. Authority to Disapprove Ecology's Plan Under CWA Section 319

As was detailed in our June 5 letter, we firmly believe the EPA has the authority to disapprove Ecology's Plan under Section 319(d)(2)(c) and 319(d)(2)(d) and should do so. Our stated reasons included that the Plan does not include an expeditious schedule for implementation of Best Management Practices (BMP's) in streams that are water quality impaired, nor measures (the BMP's for agriculture) that are adequate to reduce water temperature and other water quality impairments. EPA's position is that it does not possess the authority to disapprove the Plan because program updates are not statutorily required, they are merely encouraged by EPA and are tied to decisions regarding funding requests under Section 319. We see that approach as supporting a distinction that is not grounded in law or policy, and that renders EPA's discretionary approval authority meaningless at this juncture of the process. In fact, waiting until the 2025, 5-year review to require the long-known and necessary changes to the state's approach will unnecessarily add delay, in stark contrast with the urgency of our region's resources and impacted treaty rights.

The impact that nonpoint sources of pollution are having on treaty rights and resources requires immediate response, including implementation of Total Maximum Daily Loads (TMDL's), some of which are more than a decade old. We also believe that Ecology must make a clear commitment to utilize its regulatory authority to require landowners to address their contribution to water pollution. Attachment 1 to this letter identifies specific goals, objectives, and actions necessary for the success of Ecology's Nonpoint Pollution Plan update, and additions and clarifications that EPA should require Ecology to address prior to the utilization or implementation of the riparian habitat BMP's for agricultural lands. We strongly urge you to incorporate these actions, additions, and clarifications into EPA's response to Ecology regarding its 2022 Plan update.

3. EPA's Effects Analysis

As was noted in the July 19th meeting, we believe EPA's effects analysis is deficient because it improperly concludes that because EPA's proposed approval of the Plan does not fund Washington's Nonpoint Program, and therefore, the agency does not possess the discretion to influence an activity for a protected species. We disagree.

When a federal agency authorizes and funds an activity in which the agency has some discretion to change the activity for the benefit of a listed species, that agency-funded activity is subject to Endangered Species Act (ESA) Section 7 consultation requirements. By parsing out approval of updates to the Plan from a funding decision based on the sufficiency of the underlying Plan, EPA is

missing its obligations and potential alignment of authorities under Section 7 to address the protection of tribal rights and resources.

The ability of EPA to condition federal funding for Ecology's nonpoint program on the approval of Ecology's Plan indicates the requisite level of discretionary control to invoke consultation under the ESA. As such, EPA's review and approval of Ecology's Plan invokes the agency's discretionary powers to improve conditions for listed species and habitats. Even though EPA would not carry out the work to implement the state Plan, EPA remains the federal agency tasked with administering the funding program and financially incentivizing actions that may affect listed species or habitat, thus triggering Section 7 consultation requirements.

4. Implementation of Executive Order 13175 and EPA's Tribal Consultation Policy

We are concerned that EPA has not honored the commitments made under its own Tribal Consultation Policy and Executive Order 13175 during the decision-making process for Ecology's Plan. EPA provided only a limited window for tribal consultation and did not engage in meaningful consultation, including by not sharing its effects analysis with tribes until more than a month after the tribal consultation and comment period had closed, despite knowing what the effects analysis had concluded during the same period. Further, based on comments made by EPA, it was made clear the agency had already decided to approve Ecology's Plan. Fundamentally, for consultation to be meaningful, agencies must gather input from tribes prior to taking actions that would impact treaty rights. Other issues with participation, timing and agenda development were noted as areas in need of improvement.

In closing, we believe EPA has an important role in addressing nonpoint source pollution in Washington and that NWIFC and its member tribes are important partners in that effort. We look forward to working with you to strengthen EPA's actions and generate positive outcomes for the environment and treaty rights.

Should have any questions, please contact Greg Haller, NWIFC Environmental Protection Policy Analyst at ghaller@nwifc.org or (208) 790-4105.

Sincerely,



Ed Johnstone
Chairman

Attachment