Nooksack Indian Tribe (RoseMary LaClair)

Please see attached letter.

Nooksack Tribal Council

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Casey Sixkiller, Executive Director
Washington Department of Ecology
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Re: Comments on Draft Washington State Nonpoint Source Pollution Management Plan

Dear Mr. Sixkiller:

Since time immemorial, the Nooksack Indian Tribe has served as steward of the lands and the waters that sustain us. Our deep connection to salmon is cultural, spiritual, and legal – rooted in the treaty that reserved the right to harvest these fish in our usual and accustomed places.[1] Today, salmon populations are in alarming decline, due in no small part to the ongoing degradation and insufficient protection of their habitat.

This relationship is especially evident in the Nooksack River watershed. As the fourth largest river in Puget Sound, the Nooksack River watershed spans over 830 square miles and includes more than 915 miles of salmonid-bearing rivers and streams, a complex and dynamic estuary, and adjacent nearshore marine habitats. For millennia, the Nooksack Indian Tribe has lived along these waters, sustaining their communities through fishing, hunting, gathering, and cultural practices deeply tied to the landscape. At the heart of this connection is salmon, a primary food source, a spiritual touchstone, and a symbol of resilience. However, the habitat salmon need to survive is disappearing rapidly. The quality and quantity of habitat in the very watershed where salmon begin and end their lives has become one of the primary limiting factors in their recovery.

Healthy water is the foundation of salmon recovery. Cold, clean, well-shaded streams are essential for spawning, rearing, and migration.[2] When water is too warm, too shallow, or too polluted, salmon cannot survive. The same is true for shellfish, which are highly sensitive to bacterial contamination, warmer water temperatures, and toxic runoff. For tribal communities, the loss of access to these resources is not just environmental – it is a violation of our rights, our cultures, and our economies. Protecting and restoring water quality is central to upholding treaty obligations and rebuilding the ecosystems we all depend on.

While the causes of salmon decline are many, one of the most persistent and unaddressed is nonpoint source (NPS) pollution. Its impacts – elevated temperatures, sediment runoff, bacterial contamination, and toxic chemicals – are felt acutely in the streams, rivers, estuaries, and shellfish beds that tribal communities depend on. Although the Draft Plan makes important strides, key gaps remain,

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[1] *See Treaty of Point Elliott*, Jan. 22, 1885, 12 Stat. 927 (1855)

[2] Christopher Dunagan, *Understanding the Cold-Water Needs of Salmon and Helping Them to Survive*, Puget Sound Inst. (Feb. 1, 2021), https://www.pugetsoundinstitute.org/understanding-the-cold-water-needs-of-salmon-and-helping-them-to-survive/.

particularly in its failure to prioritize tribal watersheds and critical coastal areas. Too often, the areas most vital to treaty-reserved resources like salmon-bearing streams, shellfish beds, and culturally significant estuaries, remain impaired despite decades of recovery efforts. Climate change only deepens these threats, bringing warmer waters, lower summer flows, and destabilized stream systems.

Meeting these challenges requires more than broad intentions; it demands concrete, accountable commitments. One critical step is adopting enforceable riparian protections to keep water cool, filter pollutants, and rebuild habitat. It also requires more meaningful coordination with the tribes, who have managed and monitored these waters for generations. Any serious effort to protect water quality and restore salmon populations must center tribal governments as full partners – not after the fact, but from the beginning.

A. Background

The federal government has a trust responsibility to uphold tribal treaty rights,[3] including the right to harvest fish, shellfish, and other resources in our usual and accustomed (U&A) areas. These rights are not symbolic—they are binding legal commitments, affirmed by the U.S. Constitution and the courts, and they depend on the availability of clean, functioning habitat. For salmon, that means not only water quality but also sufficient flows, access to spawning areas, and the physical conditions necessary to complete their life cycle.

In 2011, the Treaty Tribes of Western Washington launched the Treaty Rights at Risk initiative to call attention to the chronic under-implementation of environmental programs that affect these rights. Many of the tools needed to protect salmon habitat, such as NPS Pollution control, already exist in state and federal law. However, these tools are often inconsistently enforced or applied without adequate consideration of treaty obligations.

One example of this trend is The Coastal Nonpoint Pollution Control Program, created under the Coastal Zone Act Reauthorization Amendments (CZARA). In 1998, Washington's program was conditionally approved by NOAA and EPA, contingent on meeting specific conditions related to agriculture, forestry, urban development, and critical coastal areas. For more than two decades, those conditions remained unmet.

In 2013, NOAA and EPA formally urged the State, through the Dept. of Ecology (Ecology) to complete the program in a way that would uphold protections for treaty-reserved resources. After years of work and internal coordination, Washington submitted a final proposal in late 2023. When the federal agencies approved the Washington State CZARA program, they acknowledged that many outstanding concerns — especially those raised by tribes — were expected to be addressed through Washington's updated Nonpoint Source Pollution Plan.

This Plan, then, is not just a policy document. It represents a long-overdue opportunity to align state efforts with federal trust responsibilities, tribal priorities, and the ecological realities facing salmon and shellfish today.

B. Major Areas of Concern and Recommendations

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[3] *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).

With this context in mind, we offer the following comments on the current Draft Plan. Nooksack Indian Tribe recognizes and appreciates the work Ecology has put into developing the Plan and the commitment it reflects to addressing nonpoint source pollution across Washington. We also value the opportunities that have been provided for engagement and input thus far.

At the same time, we must be clear: there are critical areas where the Plan falls short. The current draft does not yet go far enough to protect treaty-reserved resources or to meet the scale of the challenges facing our watershed, fisheries, and community. Many of the concerns we raise are not new — they have been highlighted in previous planning processes, formal comment letters, and in the Treaty Rights at Risk initiative. The continued lack of progress in these areas not only jeopardizes salmon recovery and shellfish viability, but also undermines the State's legal obligations to tribes.

In the following sections, we outline key issues with the Draft Plan as well as specific, actionable recommendations for improvement. These areas represent both long-standing structural challenges and urgent opportunities for Ecology to align its work with treaty rights and ecological realities.

We offer these comments in the spirit of partnership and progress. The Nooksack Indian Tribe remains committed to working with Ecology to strengthen the Nonpoint Source Pollution Plan and to ensure that it delivers lasting benefits for the environment and for the protection of tribal treaty rights.

1. Positive Elements of the Plan

We want to acknowledge and commend the progress reflected in the Draft Plan. In particular, we appreciate Ecology's efforts to integrate climate change more directly into nonpoint source pollution planning, to improve interagency coordination, and to provide opportunities for tribal engagement throughout the Plan's development. These are essential steps toward a more responsive, science-based, and inclusive approach to watershed health.

We also recognize the Plan's emphasis on watershed-scale planning and coordination, which, if implemented thoughtfully and in collaboration with tribes, can support more targeted and efficient restoration. The prioritization of investments through tools like TMDLs, Shellfish Protection Districts, and NPS effectiveness monitoring holds promise—especially if efforts are directed to the areas most critical for treaty-reserved resources.

We were encouraged to see that the Plan acknowledges the disproportionate impact of water quality degradation on tribal communities, including the ongoing impairment of watersheds that support shellfish harvest and salmon runs. This recognition is a necessary first step toward addressing environmental inequities and aligning implementation with tribal priorities.

The Plan also outlines a number of important source-specific strategies to address pollutants from on-site septic systems, livestock and animal waste, forest practices, and stormwater runoff—all of which are significant contributors to nonpoint source pollution in many of our watersheds. Strengthening and aligning these efforts across jurisdictions will be key.

We appreciate that Ecology has created space for tribal involvement early in this process—not just during formal consultation, but during Plan development itself. We urge Ecology to continue deepening this approach, moving from consultation toward true collaboration and shared responsibility in implementation. The Plan also creates opportunities to prioritize tribal projects through existing grant programs such as the Section 319 Grant Program and the Centennial Clean Water Fund, which could be further leveraged to support treaty-reserved resource protection.

While many of the Plan's tools and frameworks are already in place, the key will be implementation. With stronger commitments, clearer accountability measures, and greater alignment with treaty

obligations, the Plan has the potential to serve as a meaningful foundation for restoring and protecting the waters that salmon and shellfish depend on—and that tribal communities have stewarded for generations.

2. Lack of Enforceable Riparian Protections

One of the most critical gaps in the Draft Plan is the lack of a clear, enforceable approach to protecting riparian habitat. This is especially apparent in the agricultural landscape, where voluntary measures have failed to deliver the scale of restoration needed. This lackluster approach to protection is in stark contrast to the robust framework of regulations for the forested environment, where clear guidelines set forth in the HCP include enforceable requirements for land managers. Although we recognize that the NPS Plan is not a regulatory instrument in itself, it plays a critical role in establishing statewide priorities and guiding the use of non-regulatory tools, funding, and program development. As such, the absence of any meaningful commitment to riparian protection sends the wrong signal, particularly when degraded streamside habitat continues to be one of the top limiting factors for salmon recovery.

Riparian buffers are foundational to water quality and watershed function. They keep water cool, stabilize banks, filter pollutants, and support the vegetation and woody debris that salmon and other species depend on. Even so, riparian habitat is degraded across the lower watershed, particularly in agricultural areas. In WRIA 1, the critical temperature impaired mainstem and South Fork Nooksack River are not currently meeting riparian restoration targets and stream temperatures continue to exceed water quality standards. The Dept. of Ecology has the authority to do more, but the Plan does not reflect the urgency or direction needed to course-correct.

We recommend the final Plan:

- **Include a clear policy commitment** to only support riparian buffer configurations that sustain all key riparian functions, including providing ongoing sources of large wood to streams, consistent with WDFW's Priority Habitat and Species (PHS) Guidelines.
- **Align with and help implement** the outcomes of the Governor's Riparian Round Table, while also prioritizing immediate restoration actions in impaired tribal usual and accustomed fishing areas.

Riparian restoration is not just a best practice—it is essential for meeting temperature standards, reducing nonpoint pollution, and upholding the State's obligations to protect treaty-reserved resources. The NPS Plan must reflect that reality.

3. Over-Reliance on Voluntary Measures and Weak Enforcement

The Draft Plan continues a longstanding pattern of over-reliance on voluntary best management practices (BMPs) to address nonpoint source pollution. While voluntary programs can be an important part of the solution, they are not sufficient on their own, particularly in landscapes where water quality violations persist and restoration efforts lag. Nooksack Indian Tribe, Whatcom Conservation District, and other restoration-focused agencies spend an enormous amount of staff time in public outreach as a means to generate landowner willingness to implement voluntary measures. However, there are inevitably holdouts that will not assent to voluntary BMPs, regardless of outreach and education efforts. Even if all of the willing landowners implement extensive BMPs, the resulting patchwork of measures not only creates an inequitable burden on willing landowners, it also is likely insufficient to meet water quality goals.

Specifically, in WRIA 1, the draft Drayton Harbor Bacteria TMDL determined that a 99% decrease in bacterial non-point source pollution is required to meet water quality standards and adequately protect

downstream shellfish beds important for tribal subsistence harvest. Given the extensive outreach already in place, it is unreasonable to argue that level of reduction can be achieved solely through voluntary measures. The low-hanging fruit have already been picked. Without accountability mechanisms or the credible threat of enforcement, voluntary measures alone will not meet the State's water quality standards or restore salmon habitat at the scale and pace required.

The Dept. of Ecology has clear enforcement authority under RCW 90.48,[4] but the Draft Plan fails to articulate how, when, or under what conditions that authority will be used. This lack of clarity undermines both accountability and public confidence. It also contributes to uneven implementation across watersheds and land use sectors, allowing chronic impairments to persist in tribal U&A areas despite decades of attention and investment.

To strengthen the Plan and improve accountability, we recommend:

- **Clearly stating Ecology's commitment** to exercising its enforcement authority under RCW 90.48 when voluntary measures are ineffective or when violations occur.
- **Providing greater transparency around enforcement actions**, including how complaints are prioritized, the rate of complaint response, the number and types of enforcement actions taken, and the methods used to verify compliance or follow-up.

Greater transparency and consistent enforcement are essential for ensuring that state water quality standards, and treaty obligations, are met. When pollution goes unaddressed, the burden of habitat degradation continues to fall on tribal communities in addition to the fish and shellfish they depend on.

4. Inadequate Monitoring and BMP Tracking

Effective nonpoint source pollution management depends not just on implementing Best Management Practices (BMPs), but on knowing where, how, and whether those practices are making a difference. Unfortunately, the Draft Plan lacks a clear framework for tracking BMP implementation or evaluating their effectiveness over time. Without this information, there is no way to assess progress, identify gaps, or hold programs accountable.

Although Ecology has made promising commitments in the Plan to improve BMP monitoring, those commitments remain aspirational. There is no mechanism to ensure outcomes will be achieved, nor any clarity about how federal or state agencies will follow through. This lack of accountability undermines the credibility of the Plan and makes it difficult for tribes and other stakeholders to engage meaningfully in its implementation. The county-led Volunteer Stewardship Program places this burden on local entities to track the effectiveness of BMP implementation. However, with little guidance and no statewide framework with comparable metrics, this becomes simply another grant deliverable rather than a quantitative tool for evaluating effectiveness.

Further, in order to increase landowner willingness, much of BMP implementation is delegated to local Conservation Districts, particular in the agricultural sector. However, due to confidentiality in farm plans, cases adopted by Conservation Districts have little to no transparency and no enforcement authority. At a local level, the Whatcom Clean Water Program, an interagency collaborative focused on improving water quality in Whatcom County, will often discover potential sources of pollution and will refer cases for investigation. If the Whatcom Conservation District (WCD) has a relationship with the landowner, then WCD will take the lead in working with the landowner to minimize

[4] Wash. Rev. Code § 90.48 (2023) (authorizing the Washington State Department of Ecology to control and prevent water pollution, including the power to issue permits, enforce water quality standards, and take corrective action against noncompliant dischargers).

pollution impacts and implement BMPs. However, because the WCD, and other CDs, value confidentiality above all else, there is no way to determine (a) whether a source of pollution was detected, (b) whether any BMPs were implemented to mitigate pollution reaching waterways, or (c) if farm plans are actually being implemented. Any reporting from the farm plan "black box" of the CDs occurs at best at the small drainage (HUC12) level, making it impractical for assessment of impact on specific water bodies. While we value the work and the relationships fostered by WCD, we also see a clear delegation of duties by the Department of Ecology without the associated regulatory backstop. In other words, the carrot is delegated and Ecology is unable to determine when or if it is necessary to use the stick.

To address this, we recommend that the final Plan:

- Commit to the development of a **GIS-based, publicly accessible BMP tracking system** that can show the location, type, and status of nonpoint source interventions statewide. See WRIA 1 example in the paragraph above.
- Include **tribal data-sharing options** to ensure that tribal monitoring efforts are recognized, protected, and integrated on equitable terms.
- Establish a process for **adaptive evaluation**, in which BMP performance is regularly assessed, and the results used to adjust state strategies, funding priorities, and program delivery.

Transparency is a prerequisite for trust. If BMPs are to remain a cornerstone of Washington's approach to nonpoint pollution, the State must invest in the tools needed to evaluate their performance and ensure that restoration efforts are truly making an impact where it matters most. Additionally, without a strong adaptive management approach that uses monitoring data to regularly assess and adjust strategies, the State risks continuing to invest in measures that may be poorly suited to site conditions, climate impacts, or local priorities—especially in watersheds within tribal U&A, where conditions are changing rapidly.

5. Failure to Prioritize Tribal Watersheds and Critical Coastal Areas

The Draft Plan does not explicitly prioritize or explain how the State will coordinate restoration and protection efforts for tribal watersheds and critical coastal areas that are essential for salmon, shellfish, and treaty resources. While some watersheds are designated as impaired under the 303(d) program, significant data gaps limit the State's ability to fully understand and address water quality challenges in many tribal U&A areas. For instance, the most recent water quality assessment for Washington State indicates that water quality data is only available for approximately 13% of all rivers and streams, 10% of state lakes, and 21% of marine waters. This highlights the fact that there are substantial data gaps that impede effective prioritization and targeted action of water quality restoration and protection.[5]

Portage Bay is a great example of this issue in real time. It is an established fact that this area supports significant tribal treaty resource use; and, while conditions have improved, the bay continues to experience persistent shellfish harvest closures due, in part, to ongoing water quality impairments.[6] A persistent low oxygen zone within Portage Bay has been recently highlighted by Lummi Natural Resources staff of an example of a persistent Category 5 303(d) listing in waters important for tribal

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[5] Washington State Department of Ecology, *Washington Water Quality Assessment: Rivers, Lakes, and Marine Waters Monitoring Coverage* (2021) (showing monitoring data coverage of approximately 13 % of stream miles, 10 % of lakes, and 21 % of marine waters), https://www.pugetsoundinstitute.org/washingtons-water-quality-assessment-offers-insights-into-status-of-pollution/; Northwest Indian Fisheries Commission SSHIAP Program, *2020 State of Our Watersheds: A Report by the Treaty Tribes in Western Washington* 10 (Oct. 2021).

[6] WA DoH Tool: https://fortress.wa.gov/doh/biotoxin/biotoxin.html

use (adjacent to Approved and Conditionally Approved shellfish beds) that has received little to no follow-up action from the State. As a result, tribes and partners face challenges fully assessing impairments or holding polluters accountable.

We urge Ecology to:

- Develop clear criteria for prioritizing watersheds and coastal areas to target enforcement, monitoring, and funding efforts.
- Explicitly include **treaty resource protection** as a core prioritization criterion, recognizing the unique and legally protected role tribal watersheds play in supporting healthy salmon and shellfish populations.

A clear, public commitment (and demonstrated follow-through) from Ecology on how it will uphold treaty rights through this Plan is essential. Without it, the waters and resources critical to tribal communities will remain insufficiently protected.

6. Insufficient Tribal Engagement

Given the profound impact that nonpoint source pollution has on treaty resources, tribal governments must be more than stakeholders or consulted partners—they need to be more involved in the State's administration of water quality programs in watersheds that affect tribal treaty rights. It is well-established that many watersheds affected by nonpoint pollution flow through or connect directly with tribal lands and usual and accustomed fishing areas. These connections demand that tribes have formal, meaningful decision-making authority in the development and implementation of pollution control strategies.

Ecology has acknowledged that tribal treaty rights are a key strategy for addressing nonpoint source pollution; however, the Draft NPS Pollution Plan only briefly references tribal partnerships, primarily in Chapter 4, without detailing how these partnerships will function in practice or how tribes will share leadership responsibilities. The absence of a clear strategy for actively collaborating with Tribes undermines tribal sovereignty and diminishes the effectiveness of pollution reduction efforts.

To correct this, we recommend that the Plan:

- Include a coordination plan in watershed prioritization, funding allocation, and adaptive management processes.
- Establish formal decision-making and coordination roles for tribes in NPS pollution control planning and implementation to ensure that tribal expertise and treaty rights are centered from the outset.
- Support **capacity building and funding** for tribes to participate fully in co-management, recognizing that effective collaboration requires adequate resources, technical support, and staffing.

True coordination with tribes is essential not only to uphold treaty obligations but to leverage tribal knowledge and authority for more effective, culturally appropriate, and durable environmental outcomes.

7. Climate Change and Treaty Resources

We appreciate the inclusion of climate adaptation provisions in the Draft Plan, recognizing the crucial role climate change plays in the health of tribal treaty resources. The Plan rightly highlights the interconnected nature of climate impacts across watersheds, aquatic species, and coastal ecosystems, reflecting the broad and lasting challenges tribes face.

However, many of the strategies presented, such as "encouraging integrated watershed management,"[7] lack sufficient detail on how these approaches will be implemented or measured. Without clear actions, these broad goals risk remaining aspirational rather than actionable.

We recommend the final Plan include:

- Defining specific protections for **climate-vulnerable habitats**, particularly those critical for salmon and shellfish survival.
- **Establishing temperature pollution controls** that directly address warming stream and marine environments.
- **Integrating recommendations** with the 2024 State Plan for Climate Resiliency and related Ecology initiatives to align strategies and leverage existing climate science and commitments.

Tribal treaty resources are already declining at alarming rates, as shown by recent salmon harvest reductions, ceremonial fishery closures, and ongoing shellfish bed closures within tribal U&A areas. Nooksack salmonids increasingly suffer lethal and sublethal effects due to diseases exacerbated by high temperatures and low streamflows. In the summer of 2021, approximately 2500 Chinook salmon died prior to spawning as a result of *columnaris* bacteria that depends on high stream temperatures to proliferate. While hatcheries play an important role in providing fishing opportunities, the proportion of natural origin (non-hatchery) salmon consistently dropping. A spring Chinook fishery in June 2025 yielded only ___ natural origin fish compared to ___ hatchery fish. This is a strong indication that existing habitat and water quality are too degraded to support natural salmon spawning. This represents just one example of how Tribal communities, who have stewarded these lands and waters since time immemorial, are disproportionately impacted by the climate crisis, which compounds ongoing ecological degradation.

Even more so, in the Pacific Northwest specifically, scientists predict that this region will see warmer temperatures, reduced snowpack and streamflows, higher stream and ocean temperatures, altered water chemistry, and more frequent wildfires, which all pose severe threats to salmon, shellfish, and the ecosystems that support them. In addition, these changes increase risks such as disease, habitat loss, altered food availability, and competition from non-native species.

Addressing these multifaceted impacts requires detailed, enforceable climate adaptation measures embedded within the Draft NPS Pollution Plan. Tribal communities stand on the front lines of these changes, and meaningful action is urgently needed to sustain treaty resources and traditional practices.

C. Conclusion

The Tribes of the Northwest Indian Fisheries Commission support the development of a strong, enforceable Nonpoint Source Pollution Management Plan that meaningfully protects water quality and upholds tribal treaty rights. We recognize and appreciate the work Ecology has done to advance this effort and the opportunity for tribal input.

However, Ecology must go further. The final Plan must fully integrate treaty rights, salmon recovery, and shellfish protection into its core framework—not as peripheral considerations, but as foundational commitments. The future of our waters, our communities, and our treaty-reserved resources depend on it.

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[7] Washington State Department of Ecology, *Washington State Nonpoint Source Pollution Management Plan* 83 (Pub. No. 22-10-025, Dec. 2022), https://apps.ecology.wa.gov/publications/documents/2210025.pdf.

Ecology 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 the State of Washington's NPS Pollution Plan and generate meaningful outcomes for both the environment and treaty rights.

We thank you for your attention to these concerns and look forward to your prompt reply and continued progress.

Should you have any questions about this correspondence, please do not hesitate to contact Margaret Taylor, Water Resources Manager, Nooksack Natural Resources, mtaylor@nooksack-nsn.gov, (360) 592-5140 ext. 3142.

Respectfully,

RoseMary LaClair, Chairwoman
Nooksack Indian Tribe