Northwest Indian Fisheries Commission (Justin Parker)

Good afternoon,

Attached is a letter from Ed Johnstone, NWIFC Chairman, to Casey Sixkiller, Washington Department of Ecology Director, regarding Comments on Draft Washington State Nonpoint Source Pollution Management Plan.

If you have any questions, please contact Nick Tealer, NWIFC Environmental Protection Policy Analyst, at ntealer@nwifc.org or (360) 438-1180 ext. 333.

Thank you.

Northwest Indian Fisheries Commission
6730 Martin Way E., Olympia, Washington 98516-5540
Phone (360) 438-1180 www.nwifc.org FAX # 753-8659

August 29, 2025

Casey Sixkiller, Director
Washington Department of Ecology
300 Desmond Drive SE
Lacey, WA 98503

Re: Comments on Draft Washington State Nonpoint Source Pollution Management Plan

Dear Mr. Sixkiller:

The Northwest Indian Fisheries Commission (NWIFC) would like to offer the following comments on the proposed Plan to Control Nonpoint Sources of Pollution for Washington. These comments are provided to be additive to individual tribal comments. Non-point sources of pollution are a priority for the NWIFC member tribes and it is paramount that the Department of Ecology's Plan reflects these concerns into the overall strategy for restoring water quality necessary to protect tribal treaty-reserved resources, the health of tribal citizens and for all citizens in Washington.

The NWIFC is comprised of the 20 treaty Indian tribes in western Washington,[1] each of which retain constitutionally protected, treaty-reserved rights to harvest, consume, and otherwise manage fish, shellfish, and other treaty-reserved resources within their usual and accustomed areas. As natural resource co-managers, tribes have a vested interest and role in all policies that affect treaty-reserved resources, such as fish and shellfish, and the protection and restoration of habitat critical to their recovery and long-term sustainability.

Healthy water is the foundation of salmon and shellfish 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 an environmental concern – 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.

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[1] The NWIFC member tribes are the Hoh, Jamestown S'Klallam, Lower Elwha Klallam, Lummi, Makah, Muckleshoot, Nisqually, Nooksack, Port Gamble S'Klallam, Puyallup, Quileute, Quinault, Sauk-Suiattle, Skokomish, Squaxin Island, Stillaguamish, Suquamish, Swinomish, Tulalip, and Upper Skagit.

[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/.

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 Department of Ecology's proposed plan to Control Nonpoint Sources of Pollution for Washington (NPS Plan) makes important strides, key gaps remain, particularly in its failure to prioritize tribal watersheds and critical coastal areas. Too often, the area's most vital to treaty-reserved resources like salmon-bearing streams, shellfish beds, and culturally significant estuaries, remain impaired despite decades of recovery efforts. When non-tribal entities seek to establish a shellfish farm, they are able to select from the best locations in Puget Sound. Tribes, however, are limited by their Usual and Accustomed (U&A) areas and beaches. For example, on the eastern shore of Puget Sound from Everett down to the Tacoma Narrows Bridge, waters are considered too polluted to harvest the oysters and clams there. 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

In 2011, our member tribes launched the Treaty Rights at Risk initiative to call attention to the chronic under-implementation of federal statutes and respondent environmental programs that affect tribal rights. Many of the tools needed to protect salmon habitat, such as non-point source 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 the National Oceanic and Atmospheric Administration (NOAA) and Environmental Protection Agency (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 Department 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 2019. 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 NPS Plan.

This plan we are commenting on – 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. Essential Actions to Uphold Treaty Rights and Water Quality

Treaty rights are not aspirational policy goals – they are binding federal law. The member tribes of the NWIFC expect a final, enforceable Nonpoint Source Pollution Management Plan that protects water quality and upholds treaty-reserved rights to fish and shellfish in our U&A areas. We appreciate the work to date, but Ecology must go further. The state's NPS Plan to control nonpoint sources of pollution must center treaty rights, salmon recovery, and shellfish protection as foundational requirements that drive priorities, funding and enforcement.

Accordingly, we expect the final NPS Plan to:

- Make riparian protection non-negotiable across land-uses, with enforceable buffers that sustain temperature control, filtration, bank stability, and large-wood recruitment, consistent with the best available science (e.g., WDFW's Priority Habitat and Species Guidance).
- Use enforcement authority when voluntary measures fail, with clear triggers, timelines, penalties, and a public dashboard – paired site-specific implementation options with co-manager and tribal data integration.
- Prioritize and resource tribal watersheds and coastal areas for monitoring, funding, and restoration, with treaty resource protection as a core prioritization criterion.
- Track and publish results including: BMP locations, costs, maintenance status, and water-quality outcomes for state and federally funded projects.

These commitments are the minimum necessary to meet state and federal obligations. The future of our waters, communities, and treaty rights depends on decisive action now. We are ready to work with Ecology to implement this direction.

C. Major Areas of Concern and Recommendations

In the following sections, we outline key issues with the proposed NPS Plan as well as specific, actionable recommendations for improvement. Many of the concerns we raise are not new — they have been highlighted in previous planning processes, formal comment letters, and through the Treaty Rights at Risk initiative. 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 tribes remain committed to working with Ecology to strengthen the NPS 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 acknowledge Ecology's integration of climate change into the NPS Plan, improved interagency coordination, and opportunities for tribal engagement throughout plan development. The watershed-scale approach, coupled with tools like TMDLs, Shellfish Protection Districts, and NPS effectiveness monitoring, has potential – if directed to watersheds critical to treaty-reserved resources. The NPS Plan's recognition of disproportionate impacts on tribal communities is an important first step toward aligning implementation with treaty obligations.

2. Missed Opportunity: Weak Riparian Protections where They're Needed Most

One of the most critical gaps in the draft NPS Plan is the lack of a clear, enforceable approach to protecting riparian habitat across all land use types. While the NPS Plan emphasizes voluntary and incentive-based programs, these measures alone have failed to deliver the scale of restoration needed—particularly in agricultural areas, where riparian loss continues and restoration rates remain unacceptably low.

In contrast, riparian areas within forested landscapes are subject to a more defined regulatory framework. Through the Forest and Fish Report and associated Habitat Conservation Plan, the state has established riparian buffer requirements to protect water quality on private and state forestlands. Ecology has taken a notable leadership role in recent years by advancing stronger protections for Type Np (non-fish bearing) streams—despite intense opposition from some of the regulated community. Ecology's willingness to stand firm in that context deserves recognition.

That makes the lack of comparable action in the agricultural landscape all the more concerning. Despite having clear authority under the Clean Water Act, Ecology has not yet established or enforced baseline expectations for riparian protection in many agricultural areas—effectively relying on voluntary measures that have not delivered meaningful progress.

Although the NPS Plan is not a regulatory document, it plays a key role in setting statewide priorities and guiding how funding, programs, and partnerships are deployed. The absence of a strong commitment to riparian protection—especially in landscapes where state authority is underutilized—sends the wrong signal at a time when degraded streamside habitat remains 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. If the state is serious about addressing nonpoint source pollution and meeting water quality standards, it must treat riparian restoration as a core strategy—not an optional best practice.

We recommend the final NPS 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.
- Strengthen the outcomes of the Governor's Riparian Roundtable, while also prioritizing immediate restoration actions in impaired tribal U&A fishing areas.

Riparian restoration is essential for achieving temperature standards, reducing nonpoint pollution, and upholding the state's obligations to protect treaty-reserved resources. The final NPS Plan must reflect that urgency and obligation.

3. Over-Reliance on Voluntary Measures and Weak Enforcement

The draft NPS Plan continues to rely heavily on voluntary Best Management Practices (BMPs). While voluntary programs have value, they are insufficient in watersheds where pollution persists, restoration lags, and compliance depends on landowner willingness. Without clear accountability and credible enforcement, the state will not meet water quality standards or restore salmon habitat at the scale and pace required.

Ecology has clear authority under RCW 90.48[3] but fails to define when or how it will be used. This uncertainty undermines public trust and allows chronic impairments—especially in tribal U&A areas—to persist. Enforcement is further weakened by barriers to property access, inconsistent agency practices, and a patchwork of jurisdictions with different rules and priorities.

Transparency is also lacking. Ecology's Environmental Reporting and Tracking System (ERTS) is cumbersome and incomplete, leaving tribes and the public unable to reliably track complaints, enforcement actions, or compliance. Likewise, there is no public record of where BMPs have been installed with state or federal funds, their cost, or whether they meet performance goals. Public dollars should not support ineffective or undocumented projects.

[3] 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).

We recommend that the final NPS Plan:

- Commit to using RCW 90.48 enforcement when voluntary measures fail, with clear triggers and timelines.
- Create a public enforcement dashboard showing complaints, resolution times, and actions taken.
- Standardize enforcement expectations across agencies and jurisdictions.
- Require outcome reporting for publicly funded BMPs, including location, cost, and water quality results.

Greater transparency, consistent enforcement, and follow-up are essential to meet state and federal obligations and to protect treaty-reserved resources.

4. Inadequate Monitoring and BMP Tracking

Nonpoint source pollution control requires not just installing BMPs, but knowing where they are, how they're maintained, and whether they work. The Draft NPS Plan lacks a clear, enforceable framework for tracking BMPs or evaluating effectiveness. Without this, the state cannot measure progress, identify gaps, or hold programs accountable.

Ecology's commitments to improve BMP monitoring are still aspirational—there's no mechanism for follow-through, mandatory reporting, or clear federal/state coordination. The absence of a transparent, statewide tracking system is especially concerning in tribal U&A areas, where watersheds face rapid change. Tribes often collect detailed monitoring data, but it remains siloed because there are no sovereignty-respecting pathways for integration. This exclusion weakens state planning and delays action where treaty-reserved resources are at risk.

The current system forces tribes and the public to navigate multiple agencies with inconsistent standards. Ecology's ERTS is cumbersome, opaque, and insufficient for timely follow-up. Without consistent criteria for what constitutes a violation or when cases escalate to enforcement, BMP compliance remains voluntary and unverified.

State and federal dollars fund many BMPs, yet the public has no reliable way to see where funds are spent or what results they produce.

We recommend that the final NPS Plan:

- Develop a GIS-based, public BMP tracking system showing location, type, status, and outcomes of state and federally funded projects.
- Establish tribal data-sharing agreements that integrate monitoring results while protecting sovereignty.
- Define clear enforcement thresholds and escalation criteria.

- Regularly evaluate BMP performance to guide funding and strategy.
- Improve coordination across state, local, and tribal entities to reduce duplication and close gaps.

Transparency is a prerequisite for trust. If BMPs remain a cornerstone of Washington's NPS strategy, the state must invest in tools to measure their effectiveness and act when they fail.

5. Insufficient Protection for Tribal Watersheds and Coastal Areas

The draft NPS Plan does not clearly prioritize or coordinate protection of tribal watersheds and critical coastal areas—places essential for salmon, shellfish, and treaty-reserved resources. While some watersheds are listed as impaired under the Clean Water Act, those designations represent only a fraction of the real need. Major monitoring gaps—data exists for just 13% of rivers, 10% of lakes, and 21% of marine waters—limit the State's ability to target restoration, especially in tribal usual and accustomed areas.[4]

Tribes often lead consistent, place-based monitoring, but without reliable state data integration, their work is underutilized and critical problems remain unaddressed. Shoreline communities along the Tulalip Reservation illustrate the consequences despite the importance to treaty harvest, they continue to face shellfish closures and impaired water quality without adequate state action or resources.[5]

From a tribal perspective, few—if any—watersheds are expendable. Each is tied to culture, food security, and treaty rights. "Leaving some behind" is incompatible with legal obligations and stewardship values.

Ecology can strengthen prioritization by aligning the NPS Plan with existing Watershed Recovery Plans under RCW 90.82 and 90.94, which already incorporate tribal science, consultation, and habitat priorities. Leveraging these vetted frameworks avoids duplication and accelerates action.

We recommend that the final NPS Plan:

- Acknowledge that most tribal watersheds require long-term protection, while identifying areas needing urgent action due to acute impairments or treaty access impacts.

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[4] 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).

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

- Develop clear, transparent prioritization criteria grounded in both scientific and tribal knowledge, guiding enforcement, monitoring, and funding.
- Make treaty resource protection a core criterion, reflecting the irreplaceable role of these watersheds in sustaining salmon and shellfish populations.

A clear, public commitment—paired with transparent processes and follow-through—is essential to ensure tribal watersheds are not left behind in an under-resourced, uncoordinated system. Failure to act not only jeopardizes ecosystem health but violates the state's enforceable obligations under federal law to protect treaty-reserved resources.

D. Conclusion

We stand ready to work with Ecology to fulfill these commitments and protect the waters, salmon, and shellfish that our treaty rights guarantee. Strong, enforceable action is essential – and overdue.

Should you have any questions about this correspondence, please do not hesitate to contact Nick Tealer, NWIFC Environmental Protection Policy Analyst at ntealer@nwifc.org or (360) 438-1180 ext. 333.

Sincerely,

Ed Johnstone
Chairman

cc: Emma Pokon, Regional Administrator, EPA Region 10
Jennifer Quan, Regional Administrator, NOAA West Coast Region

Attachments (4)

Northwest Indian Fisheries Commission

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July 1, 2016

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

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[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 identity 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 compliance[12] 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

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[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 it 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 reinitiate 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 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 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

Lorraine Loomis
Chairperson

cc: NWIFC Commissioners
Dan Opalski, Environmental Protection Agency, Region 10
Dave Croxton, Environmental Protection Agency, Region 10
Peter Murchie, Environmental Protection Agency, Region 10
Maia Bellon, Department of Ecology
Heather Bartlett, Department of Ecology
Kelly Susewind, Department of Ecology
Ben Rau, Department of Ecology
Kris Wall, National Oceanic and Atmospheric Administration - OCM
Elizabeth Babcock, National Oceanic and Atmospheric Administration - Fisheries
Kim Kratz, National Oceanic and Atmospheric Administration - Fisheries
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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

Ed Johnstone
Chairman

Attachment

Northwest Indian Fisheries Commission
6730 Martin Way E., Olympia, Washington 98516-5540
Phone (360) 438-1180 www.nwifc.org FAX # 753-8659

December 22, 2022

Laura Watson, Director
Washington State Department of Ecology
P.O. Box 47696
Olympia, WA 98504-7696

Re: Ecology's 2022 Draft Voluntary Clean Water Guidance for Agriculture Chapter 12, Riparian Areas & Surface Water Protection as part of Washington's Water Quality Management Plan to Control Nonpoint Source Pollution.

Dear Director Watson:

The Northwest Indian Fisheries Commission (NWIFC) would like to offer the following comments on the proposed revisions to "Washington's Water Quality Management Plan to Control Nonpoint Source Pollution." Due to the short timeframe for review we have limited our comments to concerns on the guidance provided to riparian areas and surface water protection as part of Ecology's voluntary agricultural best management practices (BMPs) recommendations for protecting water quality. These comments are provided to be additive to individual tribal comments. Decreasing pollution from agricultural lands is a focused and urgent priority for the NWIFC member tribes and it is paramount that Ecology's guidance reflects the best available science, including the recommendations within the Washington Department of Fish and Wildlife Priority Habitats and Species Document.[1]

The NWIFC is comprised of the 20 treaty Indian tribes in western Washington, each of which retain constitutionally protected, treaty-reserved rights to harvest, consume, and otherwise manage fish, shellfish, and other treaty reserved resources within their usual and accustomed areas. As natural resource co-managers, tribes have a vested interest and role to play in all policies that affect treaty-reserved resources, such as fish and shellfish, and the protection and restoration of habitat critical to their recovery and long-term sustainability.

The state's efforts at addressing nonpoint sources of pollution under the Coastal Zone Act Reauthorization Amendments (CZARA) are important to protecting and restoring tribal treaty resources. That awareness, and related threshold of expectation is documented in the April 23, 2013, letter from the federal approving agencies to Ecology (attached herein). This letter highlights the need for Ecology to ensure revisions to its Nonpoint Source Pollution Program

[1] Quinn, T., G.F. Wilhere, and K.L. Krueger, technical editors. 2020. Riparian Ecosystems, Volume 1: Science Synthesis and Management Implications. Habitat Program, Washington Department of Fish and Wildlife, Olympia.

includes the necessary protections for salmon and salmon habitat to better protect treaty-reserved fish populations.

The NWIFC considers Ecology's guidance on riparian areas and surface water protection an important opportunity to advance protection and restoration of water quality and help producers in Washington meet their obligations under the Clean Water Act (CWA). Importantly, the publication of this guidance will provide an initial expression of Governor Inslee's commitment to protect riparian areas based on site potential tree height comprehensively across state agencies and land uses. As such, it is critical that the guidance honors both the intent and substance of the governor's commitment. While there are elements in the current draft that mark progress, the current guidance is not protective enough and should be revised in several key ways. These revisions are important if the guidance is to be meaningful towards the protection of tribal treaty resources and begin reversing decades of damage done to water quality and treaty-reserved fish in streams adjacent to agricultural lands.

Ecology's recommendation to extend the Riparian Management Zone (RMZ) to 215' on the westside and 150' on the eastside is a good start at developing management strategies that will protect and restore water quality in the state. We also support Ecology's recommendation to restore the forested landscape to the full RMZ and retain forest cover in places where an existing RMZ already consists of forest. Finally, we support Ecology's recommendation to adhere to WDFW's guidance regarding controlling or limiting activities that may occur in a RMZ. However, we recognize the WDFW guidance was written to cover a range of land uses, including the developed landscape, so tailoring and refining this guidance specifically to activities that occur on a farm would make the guidance more applicable and useful to agricultural land-uses. Critically, we think it is important to emphasize activities that may hinder or prevent the eventual full reforestation of a site potential RMZ not be allowed and should be avoided.

Specific Recommendations

We have identified three key issues that need to be addressed to ensure the guidance is consistent with the governor's policy direction to establish a uniform protection standard for riparian areas across Washington.

1. Clearly state that one site potential tree height buffers consisting of "minimally-managed" "site potential plant communities" are the protection standard Ecology has adopted to determine the adequacy of RMZs to protect water quality, provide sufficient shading for thermal protection, protect streambanks from accelerated erosion, provide an ongoing source of large wood to streams (i.e., where applicable) and provide maintenance of at least the strongest portion of stream/riparian microclimate gradient.

The draft guidance states that fully forested RMZs is Ecology's recommendation, but given the inclusion of alternative RMZ configurations as part of the guidance, it is unclear whether Ecology actually supports this RMZ configuration as the protection standard. Instead, the guidance only states that Ecology's preferred management option of fully forested RMZs is consistent with the recommendations made by WDFW.[2] Significantly, in forested regions the draft guidance allows agricultural practitioners to adopt RMZ configurations that require vegetated buffers that are considerably less than a fully forested RMZ. The guidance allows any practitioner under any circumstance (other than in riparian areas that are already currently forested) to select those alternative RMZ configurations. Realistically, farmers will adopt RMZs with the narrowest possible buffer requirement, which can be as small as 65' wide along fish bearing streams. As such, inclusion of these alternative RMZ options with no guidance on when and where it is acceptable to install them, represent a substantial exemption to the one site potential tree height resource protection standard committed to by the governor and tribal leadership. Instead of moving toward supporting a riparian protection framework that is consistent across Washington, these alternative RMZ configurations, as currently structured, reinforce the status quo of riparian protection standards varying by jurisdiction, land use and agency prerogative, resulting in continued inconsistent protection of water quality and fish and wildlife habitat across Washington.

2. Describe under what specific conditions it is acceptable for minimally managed vegetated buffers not to meet the full site potential tree height protection width standard.

Allowing practitioners to adopt buffer configurations that are significantly less than the full site potential tree height standard without any meaningful guidance on when and where that is acceptable or appropriate undercuts accomplishing a consistent SPTH standard. We recognize that as a practical matter, voluntary guidance protecting natural resources needs to be flexible in how it is implemented. Specific site conditions can and do influence how buffers can be designed and the level of protection they provide. To maintain the integrity of the site potential tree height standard, the conditions and circumstances in which it is acceptable to adopt an RMZ configuration with vegetated buffers less than that standard need to be carefully described. As written, the current draft guidance defers to the landowner to determine the feasibility of meeting the full buffer protection standard, except in circumstances when the RMZ is currently already fully vegetated. The guidance should emphasize that the buffer widths (core zones) in the alternative RMZs are absolute minimums and that these widths are only acceptable under clearly identified conditions and circumstances and only with approval by Ecology. Examples of such conditions that Ecology could provide include:

[2] WDFW's Riparian Ecosystems, Volume I: Science Synthesis and Management Implications and Riparian Ecosystems, Volume 2: Management Recommendations (Quinn et al, 2020; Windrope et al, 2020)

- The presence of a structure
- Property lines
- Infrastructure (e.g., roads, railways, pipelines, powerlines or other utilities)
- Topography that impedes the ability to meet or achieve the preferred option
- The property is a small parcel in which a vegetated buffer would cover more than 50 percent of the parcel

There may be others, but the point is that without clear guidance on where and when it is not feasible to meet the recommended fully forested RMZ, the likely outcome is that practitioners will install the smallest buffers possible without any justification and the SPTH standard loses its meaning.

3. Where site-specific limitations exist (as described above), require a minimum 100' buffer width along fish-bearing streams on the alternative RMZ configuration options.

In 2013 the National Marine Fisheries Service (NMFS) advanced to the Environmental Protection Agency (EPA) and Natural Resources Conservation Service a minimum buffer width of 100' along fish bearing streams for conservation programs those agencies funded.[3] While not published science, this minimum buffer guidance was developed to support transition to guidance developed by WDFW. The minimum buffer widths in the draft guidance do not meet this minimum standard. By recommending buffers as narrow as 65' along fish bearing streams, the current draft guidance represents a step backwards from the NMFS 2013 guidance. As currently written, the riparian area protection guidance does not distinguish between fish vs non-fish streams when making buffer recommendations. This guidance framework reflects Ecology's reluctance to develop riparian buffer BMPs that fully recognize that protection and restoration of fish habitat is a critical element of the SPTH standard. The 2013 letter from the EPA and National Oceanic and Atmospheric Administration cited above emphasizes the state's responsibility includes protecting salmon and steelhead habitat. In site-specific situations where installing SPTH buffers along fish streams is not feasible, 100' minimally managed vegetated buffers represent an absolute minimum interim width until the standard of full SPTH buffers can be installed. Given projections of global warming and the continued decline of treaty-protected fish stocks, we cannot afford a step backwards.

We appreciate Ecology's hard work and persistence in developing agricultural BMP recommendations to help protect and restore water quality in Washington. Because EPA has final approval of the Nonpoint Plan, it is imperative that Ecology develop riparian protection

[3] Interim Riparian Buffer Recommendations for Streams in Puget Sound Agricultural Landscapes (Originally proposed as federal Option 3 for the Agriculture Fish and Water (AFW) Process, March 2002) Guidance, October 28, 2013 Final

guidance that does not conflict with EPA's trust responsibility to the tribes to protect and restore treaty-reserved resources and their habitats.

The most consequential practice we can adopt to begin reversing decades of destructive riparian management practices is also one of the most difficult - installing healthy and functioning riparian buffers. Successful adoption of site potential tree height as a workable riparian buffer standard is a vital first step to that goal. Recognizing the many challenges to implementing such a standard, it is critical we maintain SPTH as both a long and short-term goal, even as we allow flexibility through site-specific implementation. Where we no longer have flexibility is in protecting salmon and other treaty-protected resources. There is no more compromise to give when protecting our region's dwindling salmon population. Predicted global warming and population growth patterns will only exacerbate the issue, and the need for bold leadership in riparian protection is more important today than it has ever been.

We appreciate Ecology's continued leadership in protecting water resources in Washington and look forward to continuing to work with the agency when addressing many of the issues affecting our shared natural resources. If you have any questions, please contact Ash Roorbach, Forest Practices Coordinator, at (360) 754-3792 or aroorbach@nwific.org; or Jim Peters, Habitat Policy Coordinator at (360) 485-2352 or jpeters@nwifc.org.

Sincerely,

Justin R. Parker
Executive Director

cc: Heather Bartlett, Deputy Director, Washington State Department of Ecology
Ben Rau, Watershed Planning Unit Supervisor, Washington State Department of Ecology
Tyson Oreiro, Executive Advisor for Tribal Affairs, Washington State Department of Ecology

Attachment

A REPORT FROM THE
TREATY INDIAN TRIBES IN WESTERN WASHINGTON

Treaty Rights At Risk

Ongoing Habitat Loss, the Decline of the Salmon Resource, and Recommendations for Change

July 14, 2011

Executive Summary

This paper examines how the rights of western Washington treaty tribes to harvest treaty fish and shellfish, and the federal government's salmon and orca protection efforts, are at grave risk. This is being caused by a lack of coordinated federal leadership, a failure to exercise authorities and the disparate application of salmon conservation measures. The U.S. government must step up and provide the leadership needed to resolve these issues if salmon are to be successfully recovered and protected.

Stopping habitat degradation is the cornerstone of salmon recovery, but habitat is still declining.

According to the Puget Sound Chinook Salmon Recovery Plan developed by the state and tribal salmon co-managers and adopted by the National Marine Fisheries Service (NMFS), protecting existing habitat is *the most important action needed in the short term.* Despite this commitment, NMFS' 2010 assessment of the Puget Sound Chinook Salmon Recovery Plan declared that habitat is still declining and protection efforts need improvement.

Tribal harvest is accountable and tribes are doing their share to promote recovery.

In 1974, the federal court decision in *United States v. Washington* – known as the Boldt decision – affirmed the tribes' treaty right to half of the harvestable salmon, and established the tribes as co-managers of Washington fisheries. Initially, this recognition of the tribes' rights led to a significant increase in treaty harvest because the tribes finally were able to catch their share. However, harvest has been and continues to be constrained dramatically by degraded habitat. As a direct result, treaty harvest has been diminished to levels not seen since before the Boldt decision.

Tribal co-management of harvest is governed by the tribes' commitment to support salmon rebuilding efforts. NMFS' own analysis of recovery plan implementation indicates that harvest is doing its share to support salmon recovery. NMFS also concedes that salmon populations in many watersheds cannot recover even if harvest were completely eliminated. Yet, while harvest is accountable for recovery, habitat degradation continues steadily, destroying the salmon resource and along with it, the cultures and communities of the treaty Indian tribes in western Washington.

NMFS is applying disparate conservation standards to harvest actions versus habitat actions, thereby threatening treaty rights and impeding salmon recovery.

NMFS holds the tribes to a different standard than all others by applying more stringent standards to tribal salmon harvest than to actions that degrade salmon habitat. In reviewing harvest decisions, NMFS expects tribal harvest plans to

contribute to salmon recovery over time. In contrast, when reviewing actions affecting Puget Sound habitat, NMFS seeks merely to maintain existing habitat productivity and quantity – regardless of whether it is adequate to support recovery.

NMFS' Biological Opinion and Reasonable and Prudent Alternative (RPA) for the Federal Emergency Management Agency (FEMA) National Flood Insurance Program is a key example of this disparate treatment. This flood insurance program sets the minimum requirements for floodplain management throughout most of Puget Sound. However, NMFS does not require an increase in habitat productivity and quantity, even in watersheds where NMFS concedes that habitat conditions are the key obstacle to salmon recovery. Another example of disparate treatment is NMFS' approach to southern resident killer whales (orca). NMFS claims orca are not recovering because there are too few large chinook salmon for them to eat. But instead of addressing all activities that affect chinook abundance, NMFS looks only to harvest reductions to address the problem.

This overemphasis on harvest restricts the tribes' treaty rights, while ignoring the science that indicates that habitat loss and degradation account for an even greater take of salmon and orca. These discriminatory actions contravene the federal government's trust responsibility to the western Washington treaty Indian tribes and undermine accomplishment of federal fish and wildlife management objectives.

The federal government is not fully implementing its obligation to protect treaty rights.

Salmon recovery is based on the crucial premise that we can protect what habitat remains while we restore previously degraded habitat conditions. Unfortunately, significant investments in recovery may not be realized because the rate of habitat loss continues to outpace restoration. The resulting net decline in habitat demonstrates the federal government's failure to protect the tribes' treaty-reserved rights.

The federal government has existing tools that it could employ to better protect habitat and support salmon recovery, but in many cases those tools are either misapplied or not being implemented adequately. For example, the U.S. Army Corps of Engineers' § 404 permitting authorizes the very same structures that salmon recovery actions seek to remove. Also, the federal government has approved and continues to fund state programs under the guise of coastal zone management that actually impede salmon recovery. For instance, the state's Shoreline Management Act also permits shoreline development for single-family residences, including bulkheads and docks that degrade habitat.

Instream flows also are under assault and need protection from excessive withdrawals. The tribes have pursued a number of approaches to define and

establish the instream flows necessary to protect and restore salmon resources. Unfortunately, each of these efforts has been undermined by flawed state policies that failed to institute a comprehensive effort to establish instream flows. Therefore, federal intervention is needed to adjudicate instream flows that are protective of fish habitat, and consistent with treaty-reserved rights.

Finally, federal agencies such as NMFS have failed to use their authority to prosecute those who degrade salmon habitat. In July 2000, NMFS formally published its policy governing enforcement of the Endangered Species Act (ESA) prohibition against take, and included a series of habitat impacts that would receive "heightened scrutiny." Although shoreline armoring and riparian vegetation removal were on NMFS' priority list, there appears to be only one instance of NMFS exercising its enforcement authority over these activities during the past decade.

Salmon recovery crosses many jurisdictions, and leadership is needed to implement recovery consistently across those jurisdictional lines.

The government's piecemeal approach to recovery has resulted in a lack of agency consistency and ultimately the implementation of federal programs that serve neither to recover salmon nor protect treaty rights. For example, many federally funded environmental and conservation grant programs are not required to protect salmon. Instead, in many cases those programs rely on a planning process that ultimately lets the landowner decide what is best for salmon, even if those choices are contrary to federally approved total maximum daily loads (TMDLs) or federally-approved salmon recovery plans.

Moreover, despite ESA listing, and declining harvest and habitat, basic federal obligations remain unfulfilled. For example, the National Oceanic and Atmospheric Administration (NOAA) and U.S. Environmental Protection Agency (EPA) have failed to use their authority under the Coastal Zone Management Act (CZMA) to protect salmon and treaty rights**.** The CZMA obligates EPA and NOAA to assure that state nonpoint source coastal protection plans are consistent with applicable federal law, including the Clean Water Act, ESA, and federally secured treaty rights. These plans were supposed to be developed by 1995, but 17 years later, the federal agencies have failed to obtain the state of Washington's compliance.

Given the critical importance of protecting habitat, it is essential that leadership is exercised to ensure that these basic federal obligations are met, including protection of treaty rights.

The federal government can remedy this erosion of treaty-reserved rights by taking action:

I. Stop the disparate treatment of Indian tribes when applying salmon conservation measures.

- Apply at least as stringent a conservation standard to actions affecting salmon habitat as is applied to salmon harvest.
- Assure that all federal actions affecting habitat contribute to recovery of salmon and orca.
- Develop a comprehensive and timely plan for addressing orca prey consumption needs that does not result in disparate treatment of treaty fishing and addresses all identified factors for decline.

II. Protect and restore western Washington treaty rights by better protecting habitat.

- Require federal funding that supports state programs and pass-through grants to be conditioned so that all funded efforts are designed to achieve consistency with state water quality standards and salmon recovery plan habitat objectives.
- Direct federal agencies to increase enforcement of federal obligations to protect habitat including the ESA and Clean Water Act.
- Direct NMFS and EPA to assure that state Shoreline Master Program updates are consistent with all federal obligations involving treaty rights.
- Direct the Department of Justice to initiate limited water rights adjudications to identify treaty-reserved rights for instream flows in selected watersheds.

III. Establish federal oversight and coordination to align environmental and conservation programs to achieve salmon recovery and protect treaty-reserved rights.

- Oversee and align funding programs to ensure achievement of recovery objectives.
- Unify federal agencies and resolve inter-agency conflicts to support salmon recovery.
- Hold federal agencies accountable for acts or omissions that lead to disparate treatment of tribes and failure to protect treaty-reserved rights.
- Harmonize federal actions to ensure consistency and compliance with federal obligations and treaty rights.

Introduction

> *"Through the treaties we reserved that which is most important to us as a people: The right to harvest salmon in our traditional fishing areas. But today the salmon is disappearing because the federal government is failing to protect salmon habitat. Without the salmon there is no treaty right. We kept our word when we ceded all of western Washington to the United States, and we expect the United States to keep its word."* – BILLY FRANK JR., CHAIRMAN OF THE NORTHWEST INDIAN FISHERIES COMMISSION

As sovereign nations, 20 treaty Indian tribes in western Washington signed treaties with the United States, ceding most of the land that is now western Washington, but reserving our rights to harvest salmon and other natural resources. For those rights to have meaning there must be salmon available for us to harvest.

Today our fishing rights have been rendered almost meaningless because the federal and state governments are allowing salmon habitat to be damaged and destroyed faster than it can be restored. Salmon populations have declined sharply because of the loss of spawning and rearing habitat. Tribal harvest levels have been reduced to levels not seen since before the 1974 *U.S. v. Washington* ruling that reaffirmed our treaty-reserved rights and status as co-managers with the right to half of the harvestable salmon returning to Washington waters.

As the salmon disappear, our tribal cultures, communities and economies are threatened as never before. Some tribes have lost even their most basic ceremonial and subsistence fisheries – the cornerstone of tribal life.

The Northwest tribes are heartened by millions of dollars and years of focused cooperative work that have been spent on salmon recovery in the region during the past two decades. We have been at the center of most of these efforts. While we have made progress in some areas, the overall quality and quantity of salmon habitat continues to decline. Four species of salmon in western Washington are listed as "threatened" under the Endangered Species Act, some for more than a decade.

Our considerable investment in habitat restoration has not been able to turn the powerful tide of loss and degradation. We are steadily losing habitat throughout the region, and that trend shows no sign of improvement.

The reason is not a lack of effort or a lack of desire to recover salmon. The reason is a lack of federal and state government leadership, policy, commitment and coordination toward a set of salmon recovery goals and objectives.

We know that we cannot stop the massive population growth anticipated in this region over the coming decades, but we can ensure that the associated development is designed and implemented in ways that will better protect salmon and its habitat.

Habitat loss and degradation are the biggest contributors to the decline of the salmon resource, yet the federal government's primary response is to restrict harvest. Tribes are required to prove that our fishing and hatchery plans will lead to increased salmon populations and will not harm ongoing wild salmon recovery efforts. But we have observed that those who damage and destroy salmon habitat aren't held to the same standard.

Instead, the U.S. government continues to approve federal actions and federally funded state actions that either do not contribute to, or actually impede recovery of salmon habitat. The result is the continued slow degradation of habitat that already has suffered from years of pollution, poor land use practices, and other factors. This situation sets the bar higher and higher for tribes to continue our way of life, while setting it lower and lower for those who would destroy the salmon's home. This uncoordinated approach solidifies habitat losses and ultimately fails to protect our huge investment of funding, time, and effort.

The federal government's over-reliance on restricting harvest as the primary means to protect salmon is unfair, ineffective, and contrary to established principles of Indian law. In the end, this policy undermines the recovery of salmon and other listed species in western Washington. Like harvest and hatchery operations, habitat quality and quantity must be calibrated across the spectrum of agencies and jurisdictions involved in salmon recovery.

Salmon recovery begins and ends with habitat. No amount of fishery restrictions can restore the resource unless salmon have good spawning and rearing habitat.

An example is the Nisqually River, with its headwaters in a national park and its mouth in a national wildlife refuge. It is one watershed in Puget Sound where we have made significant habitat gains in recent years. More than 85 percent of lower river estuary habitat has been reclaimed through cooperative federal, tribal, and state work to remove dikes; nearly 75 percent of mainstem river habitat is in permanent stewardship.

Despite this massive cooperative effort, research shows that young ESA-listed salmon and steelhead from the Nisqually River are dying before they can reach Seattle, just 30 miles away. The main cause is believed to be a lack of good nearshore habitat caused by ongoing development practices.

If salmon are to survive, we must begin to achieve real gains in habitat protection and restoration. The path we are on leads to the extinction of the salmon resource and our treaty-reserved rights.

The federal courts have recognized four basic values associated with the treaty-reserved rights of the tribes: (1) conservation value of the resource, (2) ceremonial, religious, and spiritual values, (3) subsistence, and (4) commercial value. The treaty right to fish is a property right of the tribes and is protected under the Fifth Amendment of the U.S. Constitution, our treaties and the U.S. Supreme Court affirmation of this right.

In failing to protect salmon habitat, the federal government is failing in its trust responsibility to honor its treaties with the tribes. We are left with few choices other than the courts to protect our treaty-reserved rights and the salmon that are so essential to our culture.

We are at a legal and biological crossroads in our efforts to recover the salmon and preserve our tribal cultures, subsistence, spirituality, and economies. Not since the darkest days of the fishing rights struggle before Judge Boldt's decision in *U.S. v. Washington* have we feared so deeply for the future of our treaty rights.

This document discusses specific federal government actions that are impeding salmon habitat recovery and restoration, including:

- The application of disparate standards to harvest and habitat.
- Failure to protect treaty rights and financial investments by fully implementing existing federal authority.
- A general lack of alignment by the federal government of its actions with salmon recovery efforts.

This document also recommends specific solutions that will help the federal government meet its trust responsibilities to the treaty Indian tribes in western Washington as we rebuild the salmon resource. Broadly, those actions encompass:

- An urgent call for the federal government to hold the degradation of habitat to the same standards applied to tribal harvest.
- A demand that federal government begin to protect treaty-reserved rights by better protecting habitat.
- Urging federal leadership to provide leadership and oversight to ensure alignment and harmonization of federal programs with salmon recovery efforts.

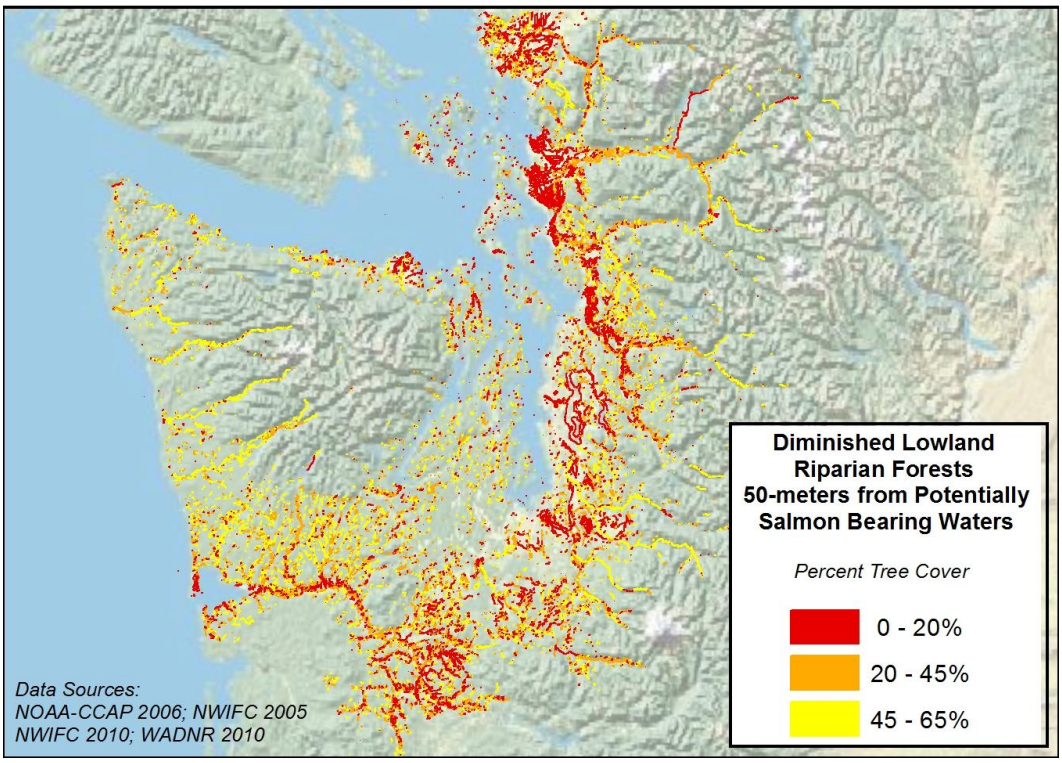
These actions are critical to reverse the trend toward extinction, and ultimately to recover salmon and restore treaty-reserved harvest rights.

Salmon Habitat Still Declining Despite Recovery Efforts

"We have worked for decades to restore habitat in the Elwha River system, and we are still not fishing on the salmon stocks we have been working to protect. We had to push for an act of Congress to remove two fish-blocking dams on the river, but the way it's going now, we still may never be able to fish for chinook again."

– RUSS HEPFER, LOWER ELWHA KLALLAM VICE CHAIRMAN

Diminished riparian forests in the lowlands of Western Washington continue to impair habitats critical to the recovery of the region's anadromous salmon.



Wild salmon are naturally productive and have just a few basic needs for their survival: access to and from the sea, good spawning and rearing habitat, and the opportunity to reproduce.

Salmon harvest already has been eliminated to the point that further cuts can no longer contribute significantly to the recovery of wild salmon stocks. Yet habitat loss and degradation continue steadily destroying the salmon resource and along with it, the cultures and communities of the treaty Indian tribes in western Washington.

Protecting existing salmon habitat from further decline is the key to recovering endangered salmon populations. According to the 2007 Puget Sound Chinook

Salmon Recovery Plan adopted by NOAA Fisheries and developed by the state and tribal salmon co-managers, and numerous watershed entities:

> Protecting existing habitat and the ecological processes that create it is *the most important action needed in the short term* to increase the certainty of achieving plan outcomes. Protection must occur in both urban and rural areas if we are to ensure the long-term persistence of salmon in Puget Sound.[1]

In the final supplement to the recovery plan, NMFS concurs with the imperative of immediate habitat protection, stating that "protecting functioning habitat is one of the top priorities and first steps for achieving a viable ESU (evolutionarily significant unit)."[2]

However, despite ESA listing of Puget Sound chinook in 1999 and the subsequent call for enhanced protections of remaining habitat, NMFS' 2010 assessment of the Puget Sound Chinook Salmon Recovery Plan declared:

- Habitat is still declining; and
- Habitat protection needs improvement.[3]

The status and trend data summarized in the NMFS report revealed extensive habitat losses across key indicators such as intertidal wetlands and forest cover. The report identified declining trends in habitat by comparing both historical data and trends since the ESA listing of Puget Sound chinook salmon.[4] For example:

- After ESA listing, from 2001 to 2006, about 10,700 acres of forest and 4,300 acres of agricultural land were converted to impervious surfaces.[5]
- Washington has lost an estimated 70 percent of its estuarine wetlands, and 90 percent of its old-growth forest. Together, these native habitat types have been considered among the most diverse and productive in the state.[6]

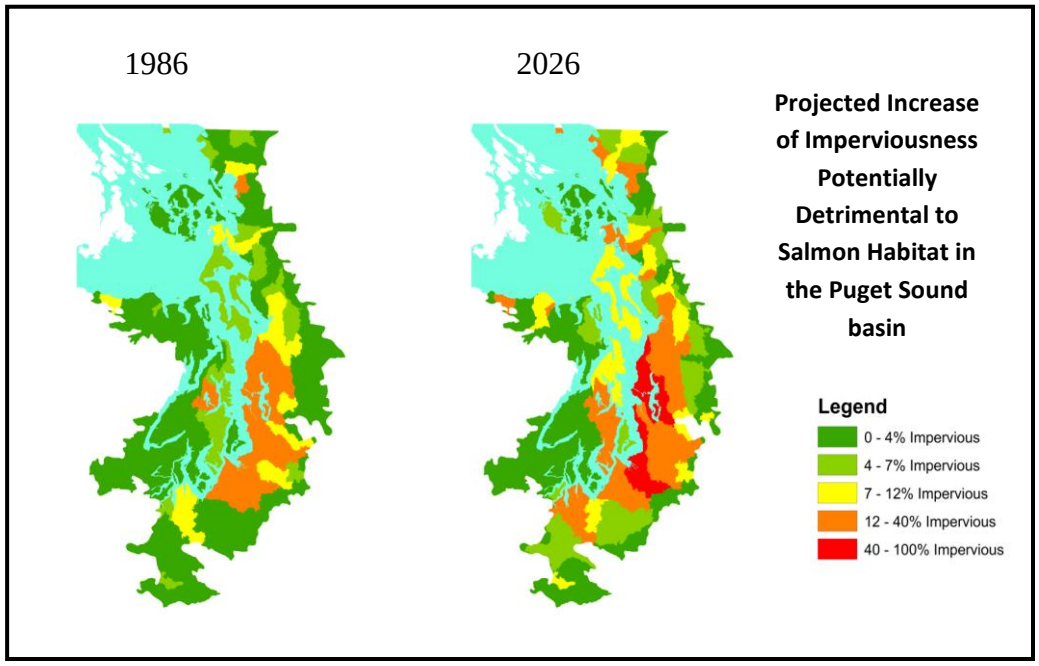
Other studies and analyses echo the NMFS report findings. Key indicators of a declining trend in salmon habitat include:

- Since the ESA listing of Puget Sound fall chinook in 1999, loss of shoreline habitat and function through shoreline armoring continues at a rate of 1.5 miles per year.[7]
- 83 percent of waters sampled to compile the state's 305(b) and 303(d) Clean Water Act lists violate state water quality standards and are polluted.[8]
- About half of critical low gradient riparian forest habitat has insufficient forest cover to support salmon.[9]

- A Puget Sound Nearshore Ecosystem Restoration Project study revealed dramatic losses of habitat in all but one place in the sound during the last 150 years.[10]

- Hood Canal is highly impaired by a lack of dissolved oxygen, and the resultant hypoxia causes fish kills.[11]

- Eelgrass beds, essential to the intricate food web for salmon, are in overall decline.[12]



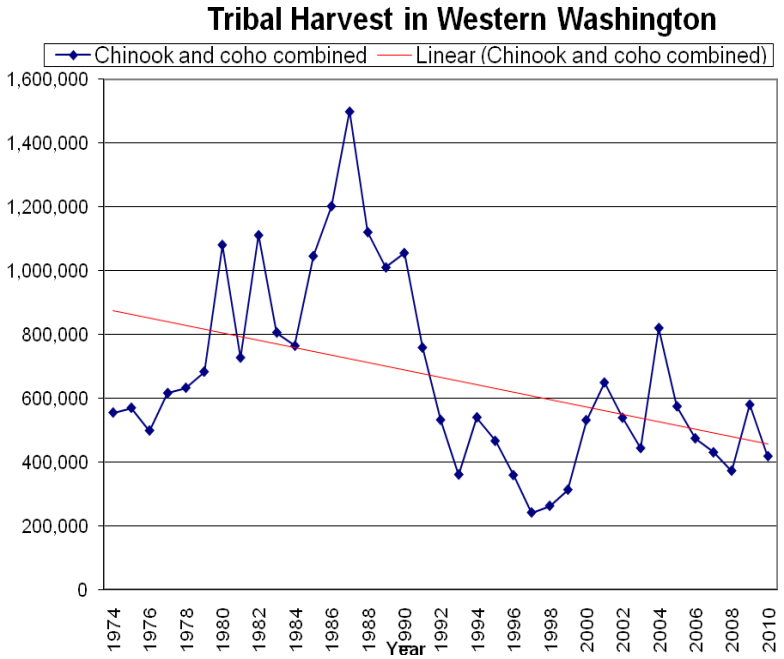
In a recent geographic information system (GIS) analysis of Puget Sound land cover data and population growth rates,[13] existing and projected trends demonstrate dramatic increases in the conversion of vegetated areas to concrete. These increases in impervious surfaces impact salmon habitat by removing essential vegetation and biota, increasing runoff, conveying pollutants, and altering hydrology. Without appropriate planning, placement, and mitigation, these actions will continue to imperil salmon.

Trends at the watershed scale in western Washington also provide a bleak outlook:

- Within the Stillaguamish watershed, during the time period of 1996 through 2006, there was a decrease of 41 percent in forest cover within the Urban Growth Area and a 22 percent decrease of forest cover inside rural residential areas. Now, only 23 percent of the 1,777 acres of riparian area within the floodplain have any forest cover.[14]
- In the Hoh watershed, approximately 31 percent of private forestlands were harvested between 1998-2010 (post ESA listing).[15]
- In the Snohomish watershed, dikes, levees, and flow devices have resulted in the loss of 55 percent of critical mainstem salmon habitat.[16]
- In the Port Gamble S'Klallam Tribe's usual and accustomed grounds, places such as Port Gamble Bay have had 74 percent of the shoreline armored or modified.[17]
- In the Skokomish basin, the watershed has experienced a 51 percent increase in impervious surfaces, with a third of that paving occurring just one mile from Hood Canal.[18]
- In the Muckleshoot Indian Tribe's area of concern, NOAA models predict that more than half of the stream miles of known coho salmon habitat will experience pre-spawn mortality rates greater than the average, and that 141 of those miles will experience mortality rates greater than 35 percent, when under normal conditions these rates are generally less than 1 percent.[19]

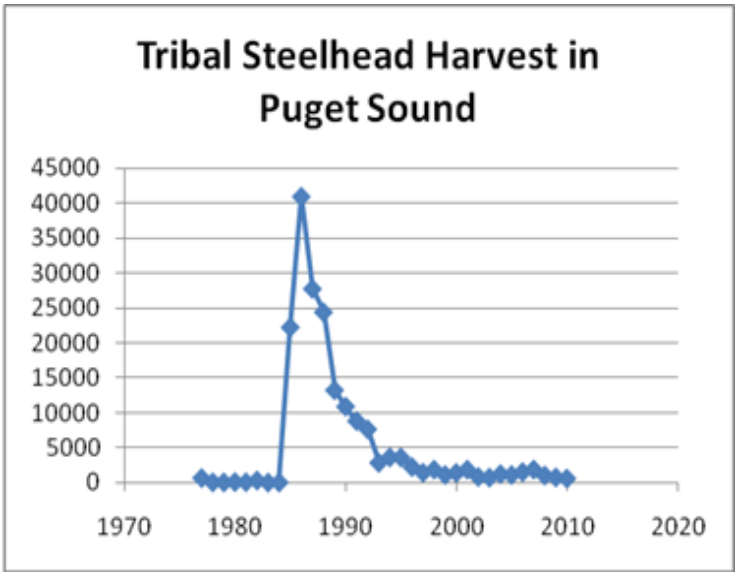
Loss of Harvest and Catch Opportunity

"We volunteered not to fish for chinook and to focus on the recovery of our salmon. But even with the nets out of the river, our fish numbers are not increasing. We work hard to restore habitat and recover Stillaguamish chinook, but in the meantime, our culture faces extinction. We are a living culture and we must have salmon to harvest." –SHAWN YANITY, STILLAGUAMISH CHAIRMAN



Western Washington tribes pursued recognition of their treaty-reserved salmon fishing rights in *U.S. v. Washington* 384 F. Supp. 312 (1974) because their fisheries were being pre-empted by the state of Washington. The state was allowing its ocean and Puget Sound fisheries to overharvest returning adult chinook and coho salmon, but was denying the tribes' their treaty rights to fish in their traditional waters. Tribes were left with little or no fishing opportunity.

U.S. v. Washington – known as the Boldt decision – affirmed the tribes' treaty fishing rights and established the tribes as co-managers of the resource with the right to half of the harvestable salmon returning to Washington waters. [20]



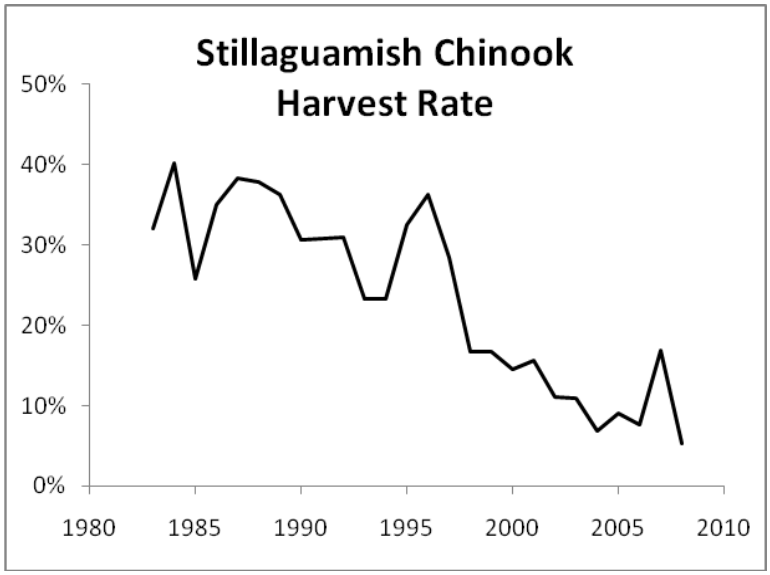
The years following the 1974 ruling witnessed the growth of harvest opportunity and catch, as tribal fisheries accessed 50 percent of the harvestable run. A

joint management framework developed by the state of Washington and the treaty tribes led to better balancing of harvest opportunity across all salmon fisheries.

Despite highly conservative fisheries and the prudent use of hatcheries, ongoing salmon habitat loss and degradation have led to pre-*U.S. v. Washington* tribal harvest levels. This habitat loss has continued even after the establishment of Puget Sound coho as a species of concern (1995), and the listing of Puget Sound chinook (1999) and steelhead (2007) as threatened under the Endangered Species Act.

For more than two decades, harvest rates in all fisheries have been sharply reduced to compensate for the precipitous decline of salmon abundance in Washington state waters, but today harvest cuts can no longer compensate for losses in salmon spawning and rearing habitat.[21]

Analysis of total U.S. harvest rates and run sizes for North Fork Stillaguamish River chinook illustrates this point. Washington harvest rates have been sharply and steadily reduced in reaction to declining returns. While this harvest action maintained spawning at targeted levels, it did not result in more fish returning to spawn, clearly indicating that factors other than harvest are responsible for the stock's decline.[22]



As a result, the Stillaguamish Tribe's treaty-protected river fishery was effectively eliminated and with it, an essential element of tribal culture and source of traditional food. Although the action was not matched by other managers, the tribe gave up even its most basic treaty-reserved ceremonial and subsistence harvest for more than 25 years in an effort to ensure the conservation of this run. In recent years, the Stillaguamish people had to purchase fish from outside their river system to conduct the traditional first salmon ceremony that welcomes and honors the salmon that are the foundation of their culture.

Request for Federal Action

I. Stop the disparate treatment of Indian tribes when applying salmon conservation measures.

The Problem

Currently, NMFS holds the tribes to a different standard than all others by applying more stringent standards to tribal salmon harvest than to actions that degrade salmon habitat. NMFS requires salmon harvest to be managed to contribute to salmon recovery, but fails to apply a corresponding obligation to activities affecting salmon habitat. Similarly, NMFS claims that southern resident killer whales (orca) are not recovering because there are too few large chinook salmon for them to eat. But instead of addressing all activities that affect chinook abundance, NMFS looks only to harvest reductions to address the problem. The federal government continues to focus on restricting the tribes' treaty rights even though the science indicates that salmon will not recover or survive unless the government reduces the even greater take of salmon and orca caused by habitat loss and degradation. The federal government's disparate treatment contravenes its trust responsibility to the western Washington treaty Indian tribes and undermines accomplishment of federal fish and wildlife management objectives.

The Remedy

To eliminate these discriminatory practices, NMFS must hold habitat actions to no less a standard than harvest. Specifically**,** NMFS should be directed to:

- Apply at least as stringent a conservation standard to actions affecting salmon habitat as is applied to salmon harvest.[23]

- Ensure that all federal actions affecting habitat contribute to recovery of salmon and orca.

- Develop a comprehensive and timely plan for addressing orca prey consumption needs that does not result in disparate treatment of treaty fishing.

- In areas where NMFS has declined to designate critical habitat, adopt commensurate harvest management policies.

How the federal government is failing in its trust responsibility:

NMFS applies disparate standards under the ESA, by treating harvest management requirements differently than habitat management requirements.

The Endangered Species Act (ESA) created a responsibility for federal actions affecting listed species to provide an adequate potential for recovery, not just maintain the degraded status quo. For example, as a consequence of the Ninth Circuit's decision in *NWF v. NMFS*,[24] the federal operating agencies and NMFS now recognize that the dams comprising the Federal Columbia River Power System are obligated to contribute to the recovery of salmon. In response to the decision, NMFS and the federal action agencies (in consultation with state and tribal co-managers) assessed the proposed operation of the dams and determined that it would jeopardize ESA-listed salmon. They also determined what improvements were necessary to assure salmon survival and "provide an adequate potential for recovery." Generally, any level of population growth greater than 1 to 1 replacement meets NMFS' interpretation of providing an adequate potential for recovery with respect to the Columbia River dams.[25] While there are differences of opinion among states, tribes, and federal agencies as to whether this interpretation adequately addresses recovery, no one questions that there is a recovery obligation on the Columbia River.

The western Washington treaty tribes' harvest plans are designed to contribute to recovery. NMFS has developed an elaborate procedure for determining whether the impacts of tribal harvest will interfere with recovery of Puget Sound chinook. This includes modeling the likely effects of harvest on 22 individual populations that make up the Puget Sound chinook evolutionarily significant unit (ESU). This analysis looks at the current productivity of existing habitat and assesses the likelihood of a given population falling below a certain critical level or rising above a rebuilding level. Using this approach, harvest is managed to assure both survival *and* eventual recovery.[26]

In analyzing the tribes' harvest plan, NMFS also has stated that poor habitat productivity, not harvest, is the factor preventing chinook rebuilding in river systems such as the Nooksack, Puyallup, Sammamish, Skokomish, Dungeness, and Stillaguamish.[27] NMFS' own federal assessment of recovery plan implementation states that harvest has been managed consistently with this obligation to support recovery, while habitat continues to be the limiting factor to recovery.[28]

In stark contrast to the standards applied to the harvest of listed salmon, NMFS' review of the Federal Emergency Management Agency (FEMA) floodplain insurance program does not address Puget Sound salmon recovery. Instead NMFS applies a no net loss standard that attempts, at best, to maintain existing degraded

habitat conditions. In September 2008, NMFS determined that the continued implementation of the National Flood Insurance Program in Puget Sound (and the land use practices that go along with it) jeopardizes the continued existence of chinook, steelhead, summer chum, and orca. FEMA's flood insurance program subsidizes the alteration and destruction of salmon habitat by providing inexpensive insurance coverage for property and structures that are built in the floodplain.[29] As required by the ESA when it finds jeopardy, NMFS designed a "reasonable and prudent alternative" (RPA) as part of its biological opinion (BiOp), to allow the flood insurance program to go forward. NMFS' RPA is intended explicitly to result in no net loss of floodplain habitat and no adverse impact to "protected areas" (riparian areas, floodways, and channel migration zones).[30] In other words, NMFS' RPA is intended to maintain current degraded habitat conditions.

In crafting its RPA, NMFS did not identify management practices intended to address the gap between current productivity of salmon habitat, and what is needed to provide an "adequate potential for recovery," as it did in the Columbia basin. In contrast, NMFS' analysis of the tribes' Chinook Harvest Plan includes harvest rate ceilings which insure that populations will achieve escapement levels consistent with rebuilding abundance, as needed to foster recovery.[31] Essentially, NMFS fails to apply the same escapement and rebuilding levels required of tribes to its habitat protection decision in the FEMA BiOp.

The problem gets worse. Whereas the RPA calls for no adverse impacts in floodways, channel migration zones, and riparian areas, FEMA's response promises more habitat degradation and allows for local governments to permit development in these areas, with mitigation. NMFS is supporting this response.[32] However, the initial failure of mitigation to alleviate the impacts of development in these areas is one of the reasons why treaty rights aren't being met and salmon became subject to the ESA.[33] Moreover, this is bad flood policy because this development impairs watershed flood capacity and exacerbates flood damages.

Along with allowing more habitat degradation, FEMA and NMFS are delegating to local governments the responsibility for deciding what riparian/floodplain salmon habitat still retains value and what habitat can be written off as undeserving of protection.[34] The federal agencies provide no watershed and salmon population context for how these decisions ought to be made. Nor do NMFS and FEMA explain how writing off salmon habitat is consistent with their obligations to support salmon (and orca) recovery and comply with treaty rights. Moreover, local governments have neither the expertise nor the interest in meeting these obligations.

Despite NMFS' findings regarding the crucial need for increased habitat quantity and productivity to reverse declining population trends, the FEMA BiOp and RPA lack specific provisions for improving habitat to assure the survival and eventual

recovery of these populations. By failing to hold FEMA's flood insurance program to the same standard that it holds harvest, NMFS both applies disparate treatment of treaty harvest and fails to apply conservation measures necessary to assure the survival and recovery of salmon (and the orca that depend on them). If Columbia River dams and Puget Sound treaty fisheries had been managed this way, ESA compliance could have been achieved by simply freezing salmon mortality levels to those occurring at the time salmon were listed. Obviously, this has not occurred.[35] To the contrary, exercise of treaty rights has been restricted and millions of dollars have been spent changing both the configuration and the operation of the dams, as needed to assure an adequate potential for recovery.

In "protecting" orca, NMFS focuses on chinook harvest while ignoring other more damaging impacts.

Southern resident killer whales (orca) were listed as "endangered" under the ESA in November 2005. Prior to December 2010, NMFS indicated that harvest did not significantly affect the availability of prey for orca. Since then, NMFS has gathered additional information regarding orca prey requirements, and concluded that further reduction of chinook harvest may be necessary for orca recovery.

The treaty tribes and states of Alaska and Washington have significant concerns regarding the quality of the new data and the assumptions underlying NMFS' analysis. However, should the data withstand rigorous scientific review, they underscore the need to protect and increase overall chinook abundance, not simply reallocate harvest from humans to orcas. Unfortunately, NMFS's current focus on the reallocation of harvest does not address important factors causing orcas' decline, including toxic contaminants, vessel disturbance, noise, and the continued loss and fragmentation of salmon spawning and rearing habitat.

NMFS, in cooperation with the Canadian Department of Fisheries and Oceans, is convening an expert panel and a series of workshops to evaluate the effects of salmon fisheries on orca. The workshops are being focused narrowly on just one factor that affects chinook abundance – harvest. They will not address key factors such as habitat, even though habitat decline is the critical factor limiting chinook abundance.[36] NMFS has declared that it will start identifying alternative harvest regimes in response to the workshop before the process is even complete. Essentially, NMFS is proposing to preempt their scientific process by acting on conclusions yet to be established. By any standard, this is not an objective approach.

If prey availability (i.e. chinook abundance) is an important problem affecting orca, then the federal government needs to address all the key factors. Other actions and policies affecting chinook abundance include land management, such as FEMA's National Flood Insurance Program, pesticide management, evaluation of Puget Sound hatchery programs, and NMFS' recently issued "Population Recovery Approach."

For example, NMFS is consulting with the EPA about the impacts of a number of pesticides on ESA-listed salmon. Despite the evidence that orca are harmed by the toxic chemicals in the fish they eat[37], NMFS has yet to assess the impacts on orca from ingesting chinook exposed to pesticides and other toxic compounds. Given NMFS' findings that several of these chemicals pose jeopardy to Puget Sound chinook,[38] it would logically follow that NMFS should promptly assess the effects of these pesticides on orca, prior to altering harvest regimes and impacting treaty rights. However, NMFS continues to focus on harvest and ignore the impacts of pesticides on chinook, orca, and the tribes' treaty rights, even though action on toxic chemicals would provide benefits for chinook and orca, as well as improve the overall health of Puget Sound and all the people that reside within the region.

In the case of FEMA's flood insurance program, NMFS found that the program jeopardizes both chinook and orca. Since that 2008 finding was made, NMFS has modified its views regarding orca consumption of chinook. As a result, the impacts stemming from the flood insurance program pose even greater jeopardy to orca. Despite this, NMFS maintains its position that the flood insurance program is obligated only to preserve existing habitat conditions. Worse yet, as discussed above, FEMA's plan allows continued degradation of salmon habitat even though NMFS insists that more chinook are necessary for orca to survive and recover.

Again, the federal government imposes one standard on the treaty tribes and a less stringent standard on activities that jeopardize salmon. As a consequence, treaty rights are impaired and the species these rights depend upon will not recover. The federal government needs to address *all* the sources of the problem in a manner that is consistent with the salmon conservation necessity principles established in treaty case law.[39]

Request for Federal Action

II. Protect and restore western Washington treaty rights by better protecting habitat.

The Problem

Although the federal government makes significant investments in restoring degraded habitat, it does not fully exercise its authority to protect the essential habitat that remains. Without these protections, overall habitat will continue to decline. This progressive habitat degradation will make recovery impossible and threatens the ability of tribes to protect, restore and exercise their treaty-reserved rights to fish.

The lack of habitat protection does not stem from an absence of authority – it is caused by the federal agencies' inability to align environmental and conservation programs with recovery efforts, and to effectively implement and enforce existing laws. For example, federal funding from a number of agencies continues to support state environmental and conservation programs that are inconsistent with salmon recovery and do not achieve compliance with state water quality standards. Moreover, federal agencies have not enforced key environmental statutes such as the ESA, which could serve to protect salmon habitat.

The Remedy

Protecting salmon habitat is an essential element of the fiduciary duty to ensure that the tribes can exercise treaty-reserved rights. In implementing this duty, the federal government must employ *all* authorities and tools to leverage better habitat protection. Specifically, we ask the Administration to:

- Require federal funding supporting state programs and pass-through grants to be conditioned so that all funded efforts achieve consistency with state water quality standards and salmon recovery plan habitat objectives. Examples include:
    - Clean Water Act funds, National Estuary Program funds and Coastal Zone Management Act funds should implement actions designed to achieve state water quality standards, total maximum daily loads (TMDLs), and salmon recovery plan habitat objectives.
    - USDA funds, including Farm Service Agency (FSA) and National Resource Conservation Services (NRCS) programs should implement riparian buffers comparable to those that NMFS has called for in its RPA for FEMA's National Flood Insurance

Program, and implement all other practices consistent with TMDLs, water quality standards, and salmon recovery objectives.

- Direct federal agencies to increase enforcement of their obligations to protect habitat, including the Endangered Species Act and Clean Water Act.

- Direct NOAA and EPA to ensure that state shoreline master program updates are consistent with all federal obligations, including treaty rights.

- Direct the Department of Justice to initiate limited water rights adjudication to identify treaty-reserved rights for instream flows in selected watersheds.

How the federal government is failing in its trust responsibility:

Habitat continues to decline despite investments in habitat enhancement.

Salmon recovery is based on the crucial premise that we can protect what habitat remains while we restore degraded habitat conditions. In the effort to restore salmon, many millions have been spent to protect and restore salmon habitat:

- The Salmon Funding Recovery Board has administered approximately **$788 million** in federal, state, and local funds since 1999.[40]

- The USDA's Farm Service Agency Conservation Reserve and Enhancement Program – developed to rebuild salmon habitat on agricultural lands – has allocated approximately **$71 million** since 1998 (80 percent is federal).[41]

- Since 1987, the Department of Ecology has administered approximately **$60 million** in federal clean water funds to protect beneficial uses – namely salmon.[42]

Unfortunately, these and other significant investments in recovery may not be realized because the rate of habitat loss continues to outpace restoration.[43] This decline can be attributed to the fact that current habitat protection is contingent upon the same programs that existed prior to the ESA listing of Puget Sound salmon. Moreover, since ESA listing, these programs have yet to be recalibrated to protect salmon habitat. The result, as the NMFS report explains, is that the current habitat protection system is based on the very same programs that failed to prevent ESA listing.[44] Nonetheless, many of these outmoded tools continue to be funded by federal dollars and authorized by federal agencies without conditions to require recalibration and alignment with recovery objectives.

The federal government approves funding for state programs that should protect salmon habitat, but do not.

The federal government financially supports the development and implementation of Washington's Shoreline Management Act (SMA), because it is the cornerstone of the state's Coastal Zone Management Program (CZMP).[45] As a result, extensive coastal zone management funds have been given to local governments to develop local plans for their shorelines, and to the state government to subsequently approve them. Since these programs relate to the shorelines, they also govern a large portion of critical salmon habitat.

The SMA was adopted prior to the ESA listing of salmon and has never been calibrated to protect the species, habitat, or the financial investments to rebuild habitat. In fact, in some instances, the SMA has been used to undermine it. For example, Washington state's highest court struck down the City of Bainbridge Island's moratorium on shoreline development, passed in part to prevent potential impacts to endangered salmon.[46] The court rejected the city's protective efforts because its moratorium prohibited what the SMA permits – shoreline development for single family residences, including bulkheads, and docks.[47]

Essentially, although the SMA is funded under the guise of coastal protection, it does not serve to protect coastal species such as ESA-listed chinook salmon and its habitat. In fact, as determined by the programmatic biological assessment for the Shoreline Master Program Guidelines:

> Many project types specifically regulated by *and allowed* under the guidelines are likely to adversely affect proposed critical habitat for Puget Sound chinook salmon.[48]

Another problem with the federally funded SMA program is that it employs a standard that is neither quantifiable nor specific enough to provide concrete performance standards to protect salmon habitat. For example, development of new SMA rules, which amended the state's CZMP, prompted NMFS to declare that the rules were so broad that they could not assess the effects of the rules on salmon.[49] Moreover, even the implementing state agency agreed that the SMA contains an incalculable performance standard, which the state then defers to local governments to quantify. [50]

The nationwide permit system is streamlining habitat modification and inhibiting treaty rights.

The U.S. Army Corps of Engineers is responsible for permitting actions that discharge dredge and fill material into waters of the state. These actions commonly include shoreline armoring, stream modifications, and the attending maintenance of those structures. The Corps' nationwide permit process provides a streamlined system for this work. In the Seattle District, approximately 1,000 permits are obtained each year.[51] The resulting cumulative armoring of waterways is a key cause for Puget Sound decline and habitat loss, in part because it affects nearshore fish abundance, distribution, and behavior patterns.[52] Ironically, the Corps' streamlined system helps build the very structures in which we are investing federal funds to remove as part of habitat improvement projects.

State policies are not protecting instream flows necessary for salmon, and federal protection is needed.

For more than four decades, the western Washington treaty Indian tribes have pursued a number of administrative, cooperative, voluntary, and inter-governmental approaches to define and establish the instream flows necessary to protect and restore salmon resources. Unfortunately, each of these efforts has failed to institute a comprehensive effort to establish instream flows to protect and restore fish habitat consistent with the treaty-reserved rights of the tribes.

Tribes are left with few options, because of a combination of the state-based priority date for instream flows (which is junior to most appropriations); municipal water purveyors' ability to dewater streams; the state's broad use of a vague "public interest" exception to override habitat protection; and the unwillingness of the state to enforce its own laws or control the cumulative impacts from permit-exempt wells. Based on the policies of state law, it will be impossible to truly restore or, at best, protect instream flows. The federal government needs to aggressively secure the protection of tribal rights to instream flows and resources through initiation of litigation or limited adjudications.

Enforcement is necessary to implement salmon recovery, yet federal agencies fail to take action.

On July 10, 2000, NMFS published its take guidance for Puget Sound. It listed a range of activities most likely to cause harm to endangered salmon habitat, which therefore violate the ESA. Implementing this guidance is critical to supporting salmon recovery. There appears to be only one instance of NMFS exercising its enforcement authority over these activities during the past decade. [53] Aside from this anomaly, we know of no further instances of NMFS exercising its enforcement authority to protect habitat.

The first item on NMFS' list of harmful activities is constructing or maintaining barriers to fish passage, e.g., fish-blocking culverts.[54] The Washington Department of Fish and Wildlife recently disclosed that 30 percent of randomly sampled culverts, despite receiving a state permit in the last 10 years, still resulted in blocked fish passage.[55] A state report also noted that increased regulatory presence and subsequent enforcement were necessary to ensure that landowners complied with the ESA. However, NMFS has not instituted ESA enforcement to help remedy this.

Another example of an action known to harm salmon is shoreline armoring. Washington's Shoreline Management Act provides an exemption from state regulation for shoreline homeowners who armor their shoreline.[56] Between 2004 and 2008 alone, the Washington Department of Fish and Wildlife granted 456 permits for new bulkheads in Puget Sound. This doesn't include replacement of old bulkheads.[57] However, NMFS has not used its authority to address any of these harmful habitat modifications.

Request for Federal Action

III. Establish federal oversight and coordination to align environmental and conservation programs to achieve salmon recovery and protect treaty-reserved rights.

The Problem

The federal government has a fiduciary responsibility to exercise its authority so that the tribes receive the benefit of the rights they reserved in their treaties. In western Washington, the government's fiduciary responsibility includes the protection and restoration of salmon and the habitat needed to ensure their survival and recovery. However, the process of salmon recovery crosses many jurisdictions, and there is a lack of leadership to ensure that programs are implemented consistently across those jurisdictional lines. This piecemeal approach to recovery has resulted in a lack of agency consistency and the implementation of federal programs that serve neither to recover salmon nor protect treaty rights. For example, NMFS threatens significant changes in approaches to salmon harvest because of orca concerns. However, EPA and NOAA remain complacent about the state of Washington's 17 years of non-compliance with the Coastal Zone Management Act – a key salmon and orca recovery component. In the meantime, federally funded salmon restoration actions are undermined by state and federal permitting processes that degrade salmon habitat.

The Remedy

The tribes seek stronger federal leadership to oversee the salmon recovery process and ensure successful implementation of recovery actions across jurisdictional lines. This leadership must serve to:

- Align funding programs to ensure achievement of recovery objectives.
- Unify federal agencies and resolve inter-agency conflicts to support salmon recovery.
- Hold federal agencies accountable for acts or omissions that lead to disparate treatment of treaty tribes or failing to protect treaty-reserved rights.
- Harmonize federal actions to ensure consistency and compliance with federal obligations and treaty rights.

How the federal government is failing in its trust responsibility:

Federal funding lacks alignment with salmon recovery efforts.

Many state and federal grant programs, while intending to make improvements, lack mechanisms to ensure that projects are consistent with recovery and protect treaty-reserved rights. For example, water temperature is a limiting factor for salmon survival, and many western Washington watersheds are temperature-impaired. To address this type of water pollution, the state, with significant federal funding, follows the federal Clean Water Act process and develops temperature total maximum daily loads, or TMDLs. Temperature TMDLs develop site-specific prescriptions to reduce stream temperatures, which ultimately are approved by EPA.

However, there are no assurances or accountability mechanisms that ensure that these pollution control prescriptions get implemented through relevant federal programs. For example, despite the fact that grants are the only tool used to implement TMDLs, neither the state nor EPA require that grant recipients actually follow the specific requirements of the TMDL. Instead, in an effort to provide assurances of implementation efficacy, the state requires riparian buffers be a mere 35 feet wide, which under most circumstances does not satisfy the requirements of their own TMDLs,[58] let alone the needs of salmon.[59]

Other state and federal conservation programs, such as the Natural Resources Conservation Service and Washington State Conservation Commission grants, also do not require their grant programs to implement these Clean Water Act prescriptions. Instead those programs rely on a planning process that ultimately lets the landowner decide what is best for salmon and water quality, even if those choices are contrary to federally approved TMDLs or salmon recovery plans.

Federal funding is not conditioned to ensure protection of treaty rights.

The tribes have called for state and federal action to better prevent pervasive pollution problems impacting treaty-reserved rights,[60] with little response or change. However, when non-Indian commercial shellfish interests recently cried for relief from fecal pollution problems, the EPA promptly provided $1 million to a local county for a pollution identification and correction program.

Unfortunately, the granting of funds did not include conditions that required the program to be consistent with water quality standards. After funds were turned over to the county, a governor-led inquiry into the process revealed that even the most basic of pollution controls, such as keeping cows out of streams, were not implemented.[61] Despite the EPA funding, a recent downgrading of 4,000 acres of shellfish beds occurred in this area, impairing treaty-reserved rights and prompting the governor to declare the overall effort a "failure."[62]

Federal approval of coastal protection plans has been unlawfully delayed for 17 years.

The Coastal Zone Act Reauthorization Amendments (CZARA), a component of the Coastal Zone Management Act, requires coastal states to develop and implement nonpoint pollution control programs that "restore and protect coastal waters."[63] To receive approval, a state program must meet both statutory and administrative criteria. If a state fails to submit an approvable program, up to 30 percent of coastal management assistance and 30 percent of the Clean Water Act nonpoint source pollution funding is to be withheld.

These programs were supposed to be developed by 1995, but 17 years later, the federal agencies have failed to approve the state's program. Final approval was withheld because of numerous deficiencies in the state's program, including a lack of communication between the involved agencies.[64]

With ESA listing of salmon and orca, the need for coastal protection is now more pressing than ever. Nonetheless, NOAA and EPA continue their complacency with the state's noncompliance, and have failed to rescind funding in accordance with the law. In Oregon, this institutional lethargy resulted in a recent lawsuit filed against NOAA and EPA to compel final agency action under the Administrative Procedure Act. The subsequent settlement ought to result in enforcement of TMDLs along the Oregon coast. Given the critical importance of protecting habitat, it is essential that leadership is exercised to ensure that basic federal obligations in Washington are met, and in a way that better protects salmon and treaty rights.

Leadership and oversight are needed to align salmon protection programs.

The tribes have worked hard to foster salmon recovery while other federally supported programs undermine this progress. Examples include:

- The federal government significantly invests in habitat enhancement, while federally supported programs such as the state Shoreline Management Act and Corps of Engineers permitting processes continue to degrade habitat.

- NMFS requires tribal harvest to foster salmon and orca recovery, while FEMA is allowed to administer its flood insurance program in a manner that results in continued degradation of salmon habitat and fewer orca.

- The federal government prepares to alter treaty harvest requirements because of orca prey needs, but continues a 17-year streak of not

pressuring the state to finalize its coastal nonpoint pollution plan – a key salmon and orca recovery component.

- Funding secured for conservation and environmental protections are handed out without basic conditions and assurances to require that those actions be consistent with recovery efforts.

Leadership and oversight of salmon recovery is critical to ensure that the myriad federal programs relied upon to implement salmon recovery are in fact working together to accomplish this fundamental goal. Federal leadership must be provided to synchronize actions and ensure protection of the tribes' treaty-reserved rights.

Afterword

This paper is an immediate request for action. Faced with waning salmon populations and declining habitat, the tribes fear for the loss of their cultures and treaty rights. For the tribes, fish and fishing are as essential to life as water and air.

Our requests are simple: Stop the disparate treatment of tribes. Start protecting our treaty rights. Provide leadership to ensure that this is done.

We ask you to act now, before it is too late for the salmon and the treaty Indian tribes in western Washington.

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[1] Puget Sound Chinook Salmon Recovery Plan at p. 354

[2] NFMS Northwest Region, Final Supplement to the Shared Strategy's Puget Sound Salmon Recovery Plan, November 17, 2006.

[3] NMFS, Puget Sound Chinook Salmon Recovery Plan – 2011 Implementation Status Assessment Final Report, 2011, at p. 6.

[4] Id at 20.

[5] Id at 15

[6] NMFS, Puget Sound Chinook Salmon Recovery Plan – 2011 Implementation Status Assessment Final Report, 2011, at 6.

[7] Carman, Taylor, and Skowlund, 2010, Regulating Shoreline Armoring in Puget Sound, in Shipman, Dethier, Gelfenbaum, Fresh and Dinicola eds, 2010 Puget Sound Shorelines and the impacts of Armoring – proceedings of a state of the science workshop, May 2009: U.S. Geological Survey Scientific Investigations Report 2010-5254. P. 49-54.

[8] SSHIAP analysis of Washington's 2008 Water Quality Assessment Data.

[9] SSHIAP analysis of data sources: *NOAA-CCAP 2006; NWIFC 2005; NWIFC 2010; WADNR 2010* . Conservatively, riparian forest cover with less than 65% cover has been determined to be insufficient for anadromous salmon and corroborated. However, NOAA has indicated in guidance that 80% cover was properly functioning, and <70% as not functioning. See National Oceanic and Atmospheric Administration, Coastal Salmon Conservation: Working Guidance for Comprehensive Salmon Restoration Initiatives on the Pacific Coast. Washington, D.C., (1996).

[10] Puget Sound Partnership, State of the Sound Report, Ecosystem Status and Trends at pp 80-82 (2009).

[11] Further information about Hood canal D.O. is available at http://www.hoodcanal.washington.edu/

[12] Further information is available in the annual monitoring report: http://www.dnr.wa.gov/ResearchScience/Topics/AquaticHabitats/Pages/aqr_nrsh_eelgrass_monitoring.aspx

[13] The following datasets were used to generate the Impervious Surface analysis and forecast for the Puget Sound region: Washington State Department of Natural Resources (DNR) Watershed Administrative Unit (WAU); NOAA CCAP. Coastal Change Analysis Project: Washington State Impervious Surface Polygons 1986 and 2006. NOAA Coastal Services Center. Charleston, S.C.; WA OFM. 2007. Projections of the Total Resident Population for the Growth Management Act (2000 to 2030, Low to High) Washington State Office of Financial Management. Olympia, WA; WA OFM. 2010. April 1 Population Determinations Official Change from April 1, 2000 to April 1, 2010. Washington State Office of Financial Management. Olympia, WA. WA OFM. 2011. WA OFM web site search to determine 1986 population by county. Using ArcGIS Desktop 9.3.1 Zonal Mean

function, the mean impervious surface value was calculated for each WAU draining to Puget Sound for both the 1986 and 2006 years. The 1986 and 2006 population totals were calculated for the counties containing the WAUs. The 2026 low, medium and high population estimates were also totaled for the same counties. Change values were calculated for population (2006-1986 & 2026 forecast - 2006) and impervious surface (2006-1986). A ratio analysis was performed comparing the change in population to the change in impervious surface to forecast the 2026 impervious surface change. The regional percentage increase in impervious surface was calculated for each WAU to generate the final thematic map using OFM's "High" 2026 county population estimate. The impervious surface categories are based upon the analysis by Tyson Waldo in the 2010/2011 Tulalip State of the Watershed report.

[14] SSHIAP, State of Our Watersheds Report - Principle Findings, 2011, p. 1.

[15] Id at p. 1

[16] Haas, A and Collins B., A Historical Analysis of Habitat Alterations in the Snohomish River Valley, Washington since the Mid-19th Century: Implications for Chinook and Coho Salmon. Report Funded by the Tulalip Tribes with some additional funding from Snohomish County, 2001.

[17] SSHIAP, State of Our Watersheds Report - Principle Findings, 2011, p. 3.

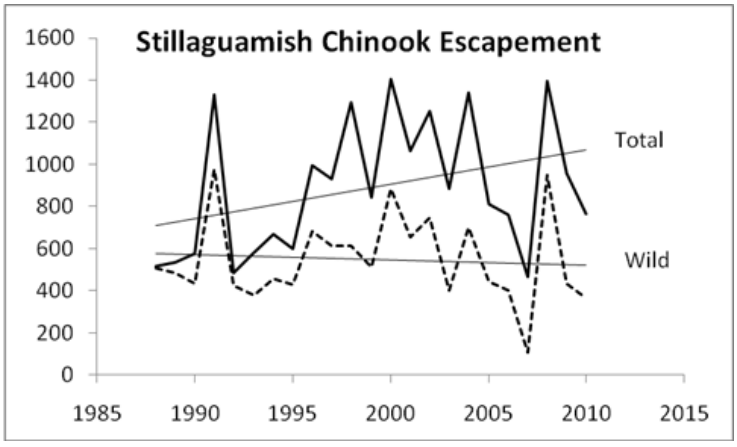
[18] Id. at p. 4.

[19] Id at 5.

[20] The Boldt decision was largely affirmed by the United States Supreme Court in *Washington V. Fishing Vessel Assn.*, 443 U.S. 658 (1979)

[21] Harvest Rates and Graphs in this section are based upon the following: NWIFC, Analysis of Harvest Data from Tribal Online Catch Accounting System (TOCAS), 2011

[22] Despite dramatic reduction in the harvest rate of Stillaguamish Chinook, which has resulted in an increasing trend in the total number of spawners (escapement), the number of wild fish returning has not increased. Wild productivity is constrained by degraded habitat.



[23] To the extent that conservation-based restrictions on treaty fisheries are necessary, these are governed by the conservation necessity principles established in federal case law and reflected in Secretarial Order 3206.

[24] *See National Wildlife Federation v. NMFS*, 524 F.3d 917, 931 (9th Cir. 2008) (amended opinion) where the court held that NMFS read the species recovery requirement out of the ESA.

[25] *See* NMFS, Supplemental Comprehensive Analysis (May 5, 2008) at 7-5.

[26] *See* NMFS, Proposed Evaluation and Determination on Chinook Plan (12/14/10) (E&D) at 38-39.

[27] *Id*. at 69.

[28] *See* NMFS, Puget Sound Chinook Salmon Recovery Plan – 2011 Implementation Status Assessment Final Report, 2011, at 45 (Harvest plans have been implemented as anticipated. Harvest being managed to meet or exceed established thresholds); *see id*. at 43 (Habitat quality continuing to decline. Current habitat protection tools generally the same as those that failed to forestall ESA listing).

[29] *See* NMFS, ESA Section 7 Consultation Final Biological Opinion: Implementation of the National Flood Insurance Program in the State of Washington, Phase One Document – Puget Sound Region, NMFS Tracking No. 2006-00472) (September 22, 2008) at 3. *See also National Wildlife Federation v. FEMA*, 345 F. Supp. 2d 1151, 1163-65 (W.D. Wash. 2004).

[30] *See* NMFS, ESA Section 7 Consultation Final Biological Opinion: Implementation of the National Flood Insurance Program in the State of Washington, Phase One Document – Puget Sound Region, NMFS Tracking No. 2006-00472) (September 22, 2008) Appendix 4 at 222-223.

[31] NMFS requires that harvest management contribute to recovery by assuring that sufficient escapement occurs to make optimal use of current habitat conditions. Further harvest constraint, to produce higher escapement, would not result in higher productivity beyond the capacity of habitat. In concluding this is sufficient constraint of harvest NMFS, has stated that rebuilding to higher abundance, en route to recovery goals, is contingent on alleviating the habitat constraints, but federal consultations on actions affecting habitat are failing to require that habitat conditions improve.

[32] Public statements by NMFS staff at May 2, 2011 workshop instructing local governments how to comply with the RPA and flood insurance requirements. *See also* Letter from Dan Siemann, National Wildlife Federation, to Will Stelle, NMFS, and Ken Murphy, FEMA (May 17, 2011).

[33] As recently conceded by the Washington Department of Ecology: "Estimates of mitigation success vary, but local, regional, and national studies show that most mitigation projects fail to fully achieve their intended goals and are not effectively replacing lost or damaged resources, habitats, and functions. We are not even close to achieving the goal of no net loss for wetlands and other aquatic habitats." *See* WDOE, Making Mitigation Work: Report of the Mitigation that Works Forum (December 2008) at 1. This report is available at: www.ecy.wa.gov/biblio/0806018.html

[34] FEMA's Model Ordinance, and apparently NMFS' interpretation of its RPA, allows local governments to decide (regardless of expertise): (a) whether a given piece of floodplain or riparian habitat retains any fish habitat functions (*See* FEMA Revised Model Ordinance at 46 (commentary)); (b) whether a proposed action may affect any of these habitat functions (*Id*. at 52, §7.7(d)); and (c) how those impacts should be mitigated (*Id*. at 52-53, §7.8).

[35] While it is not yet fully recognized in the land management realm, harvest managers have long understood that they have a duty to manage salmon as needed to perpetuate harvestable runs. *See e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 684 (1979).

[36] See NMFS, Puget Sound Chinook Salmon Recovery Plan – 2011 Implementation Status Assessment Final Report, 2011

[37] *See* NMFS, Recovery Plan for Southern Resident Killer Whales (Orca) (2008) at II-87-96.

[38] *See e.g*., NMFS, ESA Section 7 Biological Opinion on the Effects of EPA Registration of Pesticides Containing Carbaryl, Carbofuran, and Methomyl (April 20, 2009) (finding that registration of such pesticides would result in both jeopardy and adverse habitat modification to Puget Sound Chinook); *see also* NMFS, DRAFT ESA Section 7 Biological Opinion on the Effects of EPA Registration of Pesticides Containing 2,4-D, Triclopyr BEE, Diuron, Linuron, Captan, and Chlorothalonil (May 2011 DRAFT) (finding that registration of pesticides containing 2,4-D jeopardizes Puget Sound Chinook and that adverse modification of habitat results from use of pesticides containing diuron, and chlorothalonil).

[39] The Departments of the Interior and Commerce have some familiarity with the conservation necessity principles. They are referenced in Principle 3 of Department of the Interior Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997).

[40] Governors Salmon Recovery Office, State of Salmon in the Watersheds Report, 2010, at p. 20.

[41] Based upon correspondence with Washington State's CREP coordinator

[42] Based upon correspondence with Department of Ecology's nonpoint source pollution (CWA § 319) coordinator

[43] NMFS, Puget Sound Chinook Salmon Recovery Plan – 2011 Implementation Status Assessment Final Report, 2011, at 43.

[44] *Id*.

[45] Department of Ecology, *Managing Washington's Coast, Washington's Coastal Zone Management Program*, Publication 00-06-029, February 2001, at p. 98.

[46] *Biggers v. City of Bainbridge Island*, 162 Wash.2d 683 (2007).

[47] *Id* at 698.

[48] National Oceanic and Atmospheric Administration - Ocean and Coastal Resource Management, Washington State Shoreline Master Program Guidelines Programmatic Biological Assessment, March 15, 2005.Page 7-12, emphasis added

[49] Letter From Steven W. Landino, Washington State Director for Habitat Conservation Division of the National Marine Fisheries Service to John King, Chief Coastal Programs Division NOAA Office of Ocean and Coastal Resource Management, re: Endangered Species Act Section 7 Informal Consultation and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for NOAA's proposed approval of the Washington State Shoreline Master Program guidelines promulgated by the Washington State Department of Ecology, April 23, 2009.

[50] In Washington State Department of Ecology's response to comments on Coastal Zone Management Section 309 Program Assessment and Strategy 2011-2015, the agency stated the following: "The [shoreline master program] SMP process involves conducting a cumulative impact analysis to determine whether or not the SMP will result in no net loss of ecological functions…However, at this time there are no broad tools available to quantitatively measure cumulative impacts, and jurisdictions are responsible for developing their own analysis."

[51] According to a recent meeting with the Corps in the Seattle district regarding renewal of nationwide permits

[52] Toft, J.D., Cordell, J.R. Simenstad, C.A. and stamatiou, L.A. 2007 fish distribution, abundance, and behavior along city shoreline types in Puget Sound: North American Journal of Fisheries Management, v. 27, p 465-480.

[53] On June 15, 2011, Darigold, Inc., pleaded guilty to dumping ammonia from its milk-processing plant into an adjacent creek, which resulted in the death of several ESA-listed Puget Sound chinook salmon. The corporation signed an agreement to pay a $10,000 fine and to donate $60,000 to a non-profit foundation to pay for habitat restoration work. In addition, the corporation committed to develop an environmental compliance plan to address risks at the half dozen plants it operates in five western states. EPA agents involved in the enforcement action noted that Darigold has a history of spills over the last decade in Washington streams. Seattle Times, Darigold Pleads Guilty to Federal Polluting Charges (June 16, 2011), http://seattletimes.nwsource.com/html/localnews/2015331678_darigold16m.html (accessed June 16, 2011).

[54] 65 Fed Reg 42472 (July 10, 2000) (NMFS Take Guidance).

[55] *See* Price, D., Quinn, T., and Barnard, J. Fish Passage Effectiveness of Recently Constructed Road Crossing Culverts in the Puget Sound Region of Washington State, North American Journal of Fisheries Management 30:1110–1125 (2010).

[56] *See* RCW 90.58.030(3)(e)(ii) (Shoreline Management Act exempts from regulation "construction of the normal protective bulkhead common to single family residences").

[57] *See* Seattle Times "Beaches Suffer as Walls Go Up" by Warren Cornwall and Justin Mayo (May 13, 2008) found at http://seattletimes.nwsource.com/html/localnews/2004409777_growth_shorelines15m1.html.

[58] *See e.g.* Washington State Department of Ecology, Stillaguamish River Watershed Temperature Total Maximum Daily Load Study, March 2004, Publication No. 04-03-010, at p. 71 *stating* that the load allocation for effective shade for all perennial streams in the Stillaguamish River watershed is the maximum potential effective shade that would occur from mature riparian vegetation.

[59] Washington State Department of Ecology, SFY 2012-2013 Water Quality Financial Assistance Guidelines, August 2010.

[60] *See e.g.* Lummi Nation letter to EPA, or Upper Skagit Tribe letter to Governor Gregoire.

[61]Government Management Accountability & Performance regarding Puget Sound, April 06, 2011 8:30am available at

http://www.tvw.org/media/mediaplayer.cfm?EvID=2011041010&CFID=4788631&CFTOKEN=15725173&bhcp=1

[62] *Id.*

[63] 16 USC § 1455b (a)(1)

[64] NOAA and EPA's Findings For The Washington Coastal Nonpoint Program