

**NOAA AND EPA RESPONSE TO COMMENTS REGARDING THE AGENCIES' PROPOSED FINDING THAT  
WASHINGTON HAS SATISFIED ALL CONDITIONS OF APPROVAL ON ITS COASTAL NONPOINT PROGRAM**

January 2024

**Contents**

<b>I.</b>	<b>Background .....</b>	<b>3</b>
<b>II.</b>	<b>General Comments .....</b>	<b>4</b>
	A. NOAA and EPA Should be Soliciting Public Comment on More than Whether Washington Has Addressed the Conditions on its Coastal Nonpoint Program .....	4
	B. Washington Lacks a Cohesive Program to Address Nonpoint Source Pollution .....	4
	C. Washington Needs Additional Time to Revise Its Coastal Nonpoint Program .....	5
	D. The CZARA Guidance is Lacking .....	6
	E. Washington Needs to Establish More Specific BMPs .....	6
	F. Washington's Coastal Nonpoint Program Needs to Address Climate Change .....	8
	G. CZARA Does Not Provide NOAA and EPA the Authority to Grant Conditional Approval.....	8
	H. Washington Needs a Science-based Coastal Nonpoint Program .....	9
	I. Washington Needs to Improve its Nonpoint Source Management Program.....	10
	J. Washington Does Not Require Protection of Drinking Water from Logging and Farming.....	11
<b>III.</b>	<b>Achieving Water Quality Standards and Protecting Designated Uses .....</b>	<b>11</b>
	A. Washington's Coastal Nonpoint Program Will Not Ensure Compliance with Water Quality Standards .....	11
	B. Washington's Coastal Nonpoint Program Does Not Provide Adequate Protection of Salmon and Salmon Habitat and Other Endangered, Threatened, and Important Coastal Species .....	14
	C. Washington's Coastal Nonpoint Program Lacks a Strategy to Address Pesticides and Other Toxics.....	14
<b>IV.</b>	<b>Implementation and Enforcement of Washington's Coastal Nonpoint Program .....</b>	<b>15</b>
	A. NOAA and EPA's Decision Must Consider Washington's Progress on Implementing the CZARA Management Measures .....	15
	B. There is No Set Timeline for Implementing CZARA Management Measures, Additional Management Measures and Achieving Water Quality Standards.....	15
	C. Voluntary-based Approaches to Address CZARA Management Measures are Inadequate.....	17
	D. Washington Lacks Necessary Backup Authorities and Commitment to Use Those Authorities When Needed .....	19
	E. Proposed Decision Does Not Address Section XIII of Washington's 1998 Approval Conditions .....	21
<b>V.</b>	<b>Federal Treaty Rights Responsibilities.....</b>	<b>23</b>
	A. Treaty Rights Have Not Been Addressed .....	23
	B. State Has Not Addressed Actions NOAA and EPA Recommended in the 2013 Letter to the Washington Department of Ecology .....	25
<b>VI.</b>	<b>Agriculture .....</b>	<b>31</b>
	A. Washington Has Not Articulated Agriculture BMPs Consistent with the CZARA 6217(g) Agricultural Management Measures .....	31
	B. Washington Lacks Riparian Buffers for Agriculture .....	36
	C. The <i>Voluntary Clean Water Guidance for Agriculture</i> Cannot Be a Basis for Finding that Washington has Satisfied the CZARA Agriculture Management Measures.....	37

	D. Washington Lacks Adequate Mechanisms for Enforcing and Tracking Implementation of CZARA Agriculture Management Measures .....	40
	E. Washington Has Not Identified or Implemented Additional Management Measures for Agriculture Needed to Meet Water Quality Standards and Protect Designated Uses .....	40
<b>VII.</b>	<b>Forestry .....</b>	<b>41</b>
	A. Washington Has Not Adopted Additional Management Measures for Forestry .....	41
	B. Greater Protection of Riparian Areas Needed Around Forestry Activities .....	43
	C. Washington’s Forestry Adaptive Management Program Is Slow and Not Effective .....	45
	D. Gaps and Inadequacies in Washington’s Forestry Program .....	46
<b>VIII.</b>	<b>Urban Development .....</b>	<b>46</b>
	A. Stormwater Management Approaches Not Effective .....	46
	B. Nitrogen from On-site Sewage Disposal Systems Not Adequately Controlled.....	48
<b>IX.</b>	<b>Marinas and Recreational Boating .....</b>	<b>51</b>
	A. Fish Waste Education Material is a Low Bar .....	51
	B. The State’s Hydraulic Code Does Not Provide Sufficient Protections .....	51
<b>X.</b>	<b>Hydromodification.....</b>	<b>51</b>
	A. Washington’s Regulations, Programs, and Guidance are Unlikely to Achieve Water Quality Standards .....	51
	B. Washington has not Coordinated its Strategy for Addressing Culverts that Block Fish Passage .....	53
	C. Inadequate Processes for Controlling Impacts from Dams .....	55
<b>XI.</b>	<b>Wetlands and Riparian Areas.....</b>	<b>56</b>
	A. Washington’s Coastal Nonpoint Program Lacks Adequate Protection for Riparian Areas.....	56
	B. Pace of Riparian Restoration is Too Slow.....	57
<b>XII.</b>	<b>Critical Coastal Areas and Additional Management Measures.....</b>	<b>59</b>
	A. Washington’s Process for Identifying Critical Coastal Areas and Additional Management Measures is Not Effective .....	59
	B. Washington Cannot Rely on TMDL Process to Identify Additional Management Measures ...	63
	C. Washington’s Process for Identifying Critical Coastal Areas and Additional Management Measures Is Not Consistent with CZARA Requirements.....	66
<b>XIII.</b>	<b>Monitoring and Tracking.....</b>	<b>68</b>
	A. Washington Needs Improved Water Quality Monitoring.....	68
	B. Washington Needs Improved BMP Tracking and Effectiveness Monitoring .....	68
<b>XIV.</b>	<b>List of Acronyms and Abbreviations.....</b>	<b>74</b>

## I. BACKGROUND

On June 15, 2020, the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Environmental Protection Agency (EPA) (federal agencies) announced a 60-day public comment period in the Federal Register (85 FR 36186), with regard to the federal agencies' intent to find that Washington has satisfied all conditions of approvability placed on its coastal nonpoint pollution control program (coastal nonpoint program) pursuant to Section 6217 of the Coastal Zone Act Reauthorization Amendments (CZARA). The 2020 Proposed Decision Document explained the federal agencies' rationale for this Proposed Decision.<sup>1</sup> On August 12, 2020, the federal agencies announced in the Federal Register an extension of the public comment period until September 14, 2020 (85 FR 48674).

Section 6217(a) of the CZARA, 16 United States Code (U.S.C.) § 1455b(a), requires that each state (or territory) with a coastal zone management program previously approved under section 306 of the Coastal Zone Management Act (CZMA) must prepare and submit to the federal agencies a coastal nonpoint pollution control program. For states with coastal zone management programs that were approved by NOAA prior to 1991, coastal nonpoint programs were to be submitted for approval by July 1995. Washington submitted its coastal nonpoint program to the federal agencies for approval at that time. The federal agencies provided public notice of and invited public comment on their proposal to approve, with conditions, Washington's coastal nonpoint program (63 FR 27055, May 15, 1998). The federal agencies approved the program by letter dated June 28, 1998, subject to the conditions specified in the letter; this decision was announced in the Federal Register (63 FR 37094, July 9, 1998).

In the years following the June 30, 1998, approval of Washington's coastal nonpoint program, the State has worked to address the requisite conditions.

On June 15, 2020, NOAA and EPA invited public comment on their proposed decision that describes how the federal agencies believed Washington had satisfied the conditions that were placed on its coastal nonpoint program in 1998. The conditions are related to the following aspects of Washington's program:

- Program boundary
- Agriculture
- Urban development
- Marinas and recreational boating
- Hydromodification
- Wetlands and riparian areas
- Technical assistance
- Critical coastal areas
- Additional management measures
- Monitoring

NOAA and EPA received 1,293 comment letters during the public comment period.<sup>2</sup> (85 FR 36186). There were 14 unique comment letters and 1,278 form comment letters that were compiled and submitted by Friends of the Earth that were relevant to the proposed decision. One comment letter did

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<sup>1</sup> NOAA and EPA. 2020. *NOAA/EPA Proposed Decisions on Conditions for the Washington Coastal Nonpoint Program*. June 14, 2020. Accessed 11/8/2023.

<https://coast.noaa.gov/data/czm/pollutioncontrol/media/washingtondocket/wa-proposed-decision-doc.pdf>.

<sup>2</sup> See <https://www.regulations.gov/docket?D=NOAA-NOS-2019-0135> to view all comments received.

not address the proposed decision, and therefore it is not reflected in this Response to Comments Document. Of the relevant comments received, all opposed the proposed decision. Commenters raised specific concerns about Washington's coastal nonpoint program and commented on various aspects of coastal nonpoint source pollution management in Washington. The commenters were generally in agreement that the State needs to do more to protect coastal water quality. All comments received and the Proposed Decision document can be found on *regulations.gov* by entering "NOAA-NOS-2019-0135" in the search bar.

This document provides a summary of the public comments received and NOAA and EPA's response to those comments. After considering comments received, NOAA and EPA find that Washington has satisfied all conditions of approvability on its coastal nonpoint program.<sup>3</sup> The federal agencies revised language in the Proposed Decision Document to address some of the comments received as noted in the responses to comments below.

## II. GENERAL COMMENTS

### A. NOAA and EPA Should be Soliciting Public Comment on More than Whether Washington Has Addressed the Conditions on its Coastal Nonpoint Program

**II.A Comment:** One commenter disagreed that NOAA and EPA's request for comments should be limited to comments on whether Washington has satisfied the conditions that were a part of its 1998 conditional approval. The commenter noted that the rationales supporting those approvals are now 22 years old and could be outdated. Therefore, the commenter believed that NOAA and EPA should accept comments regarding all aspects of Washington's coastal nonpoint program, even the parts of the program that were not conditioned in 1998.

**Response:** NOAA and EPA disagree with the suggestion that the federal agencies should have solicited comments on all aspects of Washington's coastal nonpoint program as part of their June 2020 request for comments. In 1998, NOAA and EPA solicited public comment both on aspects of Washington's program that the federal agencies proposed to approve as well as the conditions that the federal agencies would include in the program approval (63 FR 27055, May 15, 1998). The federal agencies are not reconsidering the 1998 program approval and therefore did not solicit comment on all aspects of Washington's coastal nonpoint program. Instead, for the 2020 proposed decision, NOAA and EPA reasonably assessed only whether Washington satisfied the approval conditions identified in 1998. In this response to comments, NOAA and EPA provided responses to the comments as pertinent to the current decision before the federal agencies. Any discussion of Washington's approved program is provided to describe the federal agencies' previous findings that Washington satisfied the 1998 approval conditions for the purpose of background. If the comment was not relevant to the current decision, NOAA and EPA noted that and explained why in the response.

### B. Washington Lacks a Cohesive Program to Address Nonpoint Source Pollution

**II.B Comment:** One commenter quoted a statement Ecology made in its response to comments on the 2015 NPS Management Plan Update.<sup>4</sup> Ecology's response stated: "This set of comments points out that

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<sup>3</sup> NOAA and EPA. 2024. NOAA/EPA Decisions on Conditions for the Washington Coastal Nonpoint Program. January 2024. Accessed 2/9/2024. <http://coast.noaa.gov/czm/pollutioncontrol/#Washington>.

<sup>4</sup> Washington Department of Ecology. 2015. *Washington's Water Quality Management Plan to Control Nonpoint Sources of Pollution Response to Comments*. July 2015. Publication no. 15-10-015 Part 1. Accessed 11/8/2023 <https://apps.ecology.wa.gov/publications/parts/1510015part1.pdf>.

Washington has a variety of programs designed to address some pollution problem, but that for the most part, these are uncoordinated, focus only on small geographic areas or on one kind of problem, and are not joined together into a coherent state program designed to address nonpoint pollution statewide and to protect threatened and endangered species as well as public health. Ecology agrees that this is indeed the situation...and we admit that Ecology has been unable to create a coherent program because all of the disparate programs have their own separate goals and interest groups that have so far been unwilling to work cooperatively together. As we have said earlier in these comments, as long as this situation continues, there is little hope that Washington will be able to successfully solve nonpoint pollution problems.” The commenter noted that NOAA and EPA’s proposed decision does not explain how Ecology or the State of Washington has resolved the problem of a lack of a "coherent state program.”

**Response:** Under CZARA, states are expected to have processes in place to implement management measures in conformity with the 6217(g) guidance to protect coastal waters and provide for the implementation and continued revision of additional management measures applicable to land uses and areas identified pursuant to section 6217(b)(1) and (2). NOAA and EPA applied this standard when evaluating Washington’s coastal nonpoint program, including determining whether it satisfied approval conditions. Statements by a state regarding the “coherence” of a state’s coastal nonpoint program, as well as the State’s 2015 statement about uncooperative interest groups, does not factor into federal review under CZARA and the State program has developed substantially in the eight years since the Ecology statement.

Regarding a state’s nonpoint source management plan, the plan relies on key partnerships, organizations and entities to also contribute to and collaborate on accomplishing the plan’s outputs and outcomes. This is one of the key components of an effective state nonpoint source management program.<sup>5</sup> Specifically, Goal 3 of Washington’s NPS Management Plan is to “Develop and Strengthen Partnerships.” Ecology acknowledges the need for strong partnerships and stakeholder engagement and reports on sustained work efforts to strengthen these partnerships, such as the Agriculture and Water Quality Advisory Committee, in their annual 319 progress report submittals to EPA.<sup>6,7</sup>

### **C. Washington Needs Additional Time to Revise Its Coastal Nonpoint Program**

**II.C Comment:** A few commenters requested that NOAA and EPA provide Washington with an additional two years to make improvements to its coastal nonpoint program. Commenters specifically requested that Washington update its NPS Management Plan to address treaty rights, temperature, climate change, and integration of critical habitat for species listed under the Endangered Species Act (ESA) into watershed evaluations and for other salmon recovery needs. They also noted that to ensure compliance with water quality standards and protect designated uses, during this two-year period Ecology will need to enact backup enforcement measures for thermal nonpoint source pollution and adopt riparian agriculture best management practices (BMPs) consistent with other state programs, such as Washington Department of Fish and Wildlife’s (WDFW) Priority Habitats and Species. If, at the end of

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<sup>5</sup> EPA. 2012. *Section 319 Program Guidance: Key Components of an Effective State Nonpoint Source Management Program*. November 2012. Accessed 10/23/2022. [https://www.epa.gov/sites/default/files/2015-09/documents/key\\_components\\_2012.pdf](https://www.epa.gov/sites/default/files/2015-09/documents/key_components_2012.pdf)

<sup>6</sup> Washington Department of Ecology. 2018. *2017 Report on Activities to Implement Washington State’s Water Quality Plan to Control Nonpoint Source Pollution*. March 2018.

<sup>7</sup> Washington Department of Ecology. 2021. *Year 2020 Report on Activities to Implement Washington State’s Water Quality Plan to Control Nonpoint Source Pollution*. May 2021

the two-year period, Washington has not made the requested changes, the commenters believe that NOAA and EPA should disapprove Washington's coastal nonpoint program.

**Response:** NOAA and EPA appreciate the commenters' support for the State's continuing improvements to its coastal nonpoint program. Coastal nonpoint programs are designed to be adaptive with adjustments over time to manage polluted runoff to restore and protect coastal waters. CZARA itself recognizes the importance of "continuing revision from time to time" of additional management measures as necessary (16 U.S.C. § 1455b(b)(3)). NOAA and EPA are committed to continuing to work with Washington through CZARA and other programs under other authorities. For example, EPA provided technical support to Ecology for its 2022 NPS Management Plan update and will continue to work with Ecology on the next NPS Management Plan update, anticipated in 2025. Further delay, however, on a decision on Washington's coastal nonpoint program is unwarranted given the accomplishments of the State in addressing the program approval conditions identified more than 20 years ago. The federal agencies' charge under CZARA is to evaluate whether Washington has processes in place, backed by enforceable authorities, to implement the 6217(g) management measures. In this determination, the federal agencies specifically determine that Washington has satisfied the approval conditions identified in 1998. As discussed in the Decision Document and elsewhere in this Response to Comments Document, Washington has adequately addressed its 1998 conditions placed on its coastal nonpoint program. Regardless, NOAA and EPA's decision today postdates the proposed decision and invitation for public comment by three years.

#### **D. The CZARA Guidance is Lacking**

**II.D Comment:** EPA's 1993 *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters* (also referred to as "CZARA section 6217(g) guidance")<sup>8</sup> contains systemic weakness in achieving reductions in coastal nonpoint source pollution. First, the guidance calls for the implementation of management measures but does not "prescribe" how a state must address this. Second, other than the threat of being ineligible for CZMA section 306 and CWA section 319 funding, the management measures in the guidance document are not enforceable.

**Response:** The commenter's statement that the section 6217(g) guidance contains weaknesses is outside the scope of this action, which does not concern the adequacy of final agency guidance, but rather was limited to NOAA and EPA's proposed decision that Washington has met the conditions placed on its coastal nonpoint program. CZARA provides the statutory requirements for the 6217(g) guidance. The statute says that the 6217(g) guidance shall contain, "a description of a range of methods, measures, or practices, including structural and nonstructural controls and operation and maintenance procedures, that constitute each measure." The statute requires that states submit programs that provide for the implementation of management measures "in conformity with the" 6217(g) guidance. Failure to submit an approvable program is the partial withholding of funding provided pursuant to CZMA section 306 and CWA section 319, as set forth in 6217(c)(3) and (4).

With regard to state enforceability of management measures, see the response to comment IV.C.1, which discusses how CZARA allows for voluntary-based approaches that are backed by enforceable authorities.

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<sup>8</sup> EPA. 1993. *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*. January 1993. Accessed 11/8/2023. <https://water.epa.gov/polwaste/nps/czara/index.cfm>.

## E. Washington Needs to Establish More Specific BMPs

*Note: This section includes general comments about the need for Washington to identify more specific BMPs to address nonpoint source pollution. For additional comments about BMPs to address specific sources of nonpoint source pollution, such as agriculture, forestry, and urban development, please see those topical subsections.*

**II.E Comment:** The commenter quoted a statement Ecology made in its response to comments on its 2015 NPS Management Plan Update: “[T]he requirement [is] for Ecology to identify suites of recommended BMPs that will be used to control nonpoint sources of pollution. This requirement is found in the federal CWA and CZARA, and it is reinforced by EPA guidance and our state water quality standards. BMP guidance is required for each category of nonpoint pollution. Ecology recognizes the importance of having clear BMP guidance and understands the frustration of many commenters that this requirement still has not been adequately addressed by our state.” The commenter concluded that NOAA and EPA cannot find that Washington’s coastal nonpoint program is approvable because Ecology has not identified these specific BMPs that the State acknowledges is a CZARA requirement.

**Response:** A state’s interpretation of what federal law requires does not bind the federal agencies that administer the federal statutes. Regardless, Ecology’s statement here refers to “suites” of recommended BMPs rather than “specific” BMPs. CZARA requires state coastal nonpoint programs to provide for the implementation of management measures in conformity with EPA’s 1993 *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*, developed pursuant to section 6217(g), to protect coastal waters.<sup>9</sup> The concept of a management measure is not the same as a BMP. Management measures are established in EPA’s 6217(g) guidance and are economically achievable measures for the greatest degree of pollution reduction through the best available nonpoint control practices, technologies, processes, siting criteria, operating methods, or similar alternatives. The 6217(g) guidance provides a description of a range of methods, measures, or practices a state could use to implement these measures. Neither CZARA nor the 6217(g) guidance document anticipate a federal role to require a state to take any *specific* action or rely on any *specific* BMPs to implement a relevant management measure. By its nature, CZARA affords states significant flexibility to develop state programs that are consistent with the broad national 6217(g) management measure requirements and are tailored to meet a state’s specific circumstances. NOAA and EPA assist each participating coastal state to find the best approach and may recommend certain approaches to address the management measures and to control coastal nonpoint pollution. However, the decisions about which approaches to develop, adopt, and implement rest with the state.

NOAA and EPA assessed whether Washington satisfied program approval conditions identified in 1998. Ecology’s 2015 statement — its own observation that it should provide clearer BMP guidance for addressing nonpoint source pollution — does not bind the federal agencies from determining that Washington met the approval conditions on its coastal nonpoint program. Notably, Ecology’s 2015 statement concerning the importance of having clear BMP guidance does not mean that the State lacked BMPs consistent with the 6217(g) guidance to address a specific management measure. For instance, related to agriculture BMPs, Washington’s 1989 CWA section 319 program submission identified BMPs for agricultural practices. The 2015 statement reflected Ecology’s recognition of the importance of maintaining current and updated guidance and acknowledged the value in updating BMP guidance for agriculture. Ecology is currently engaged in a process to complete this update (see the [response to comments VI.A.1, VI.B, VI.C.1, VI.C.2, VI.E](#)).

<sup>9</sup> EPA. 1993. *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*. January 1993. Accessed 11/8/2023. <https://water.epa.gov/polwaste/nps/czara/index.cfm>.

## **F. Washington's Coastal Nonpoint Program Needs to Address Climate Change**

**II.F Comment:** Many commenters expressed that Washington's coastal nonpoint program needs to address climate change and that NOAA and EPA should not approve the program until it includes a comprehensive program to address climate change. They discussed how climate change will exacerbate many nonpoint source problems, such as the State's ability to achieve water quality standards, especially the temperature and dissolved oxygen standards, and protect designated uses, including aquatic life uses such as salmonid habitat and salmonid spawning, rearing, and migration, etc., that are sensitive to temperature.

**Response:** NOAA and EPA agree that climate change is an important issue facing coastal states that may exacerbate existing water quality problems and otherwise adversely affect uses within the coastal nonpoint program management area. CZARA calls on states to have processes in place to implement specific management measures to reduce nonpoint pollution from specific land uses. In CZARA, Congress did not direct state programs to address climate change specifically. While there is no CZARA 6217(g) management measure focused specifically on climate change, CZARA management measure implementation directly benefits coastal water quality but also may result in secondary benefits that mitigate the adverse effects of climate change attributable to increased precipitation and warmer temperatures in the Pacific Northwest. In addition, coastal nonpoint programs are adaptive. As the climate changes, nonpoint source management needs likely will change; coastal nonpoint programs are designed to adapt to those changing needs by requiring state to have processes in place to develop additional management measures as necessary to achieve and maintain water quality standards.

## **G. CZARA Does Not Provide NOAA and EPA the Authority to Grant Conditional Approval**

**II.G Comment:** One commenter stated that CZARA does not allow for "conditional approval" and therefore asserts that NOAA and EPA have violated the law by failing to withhold CWA and CZMA grant funds from Washington since 1998 pursuant to 16 U.S.C. § 1455b(c)(3) and (4). They claim that continuing full CZARA-related grant funding to Washington also separately violates the CWA and the CZMA.

**Response:** After public notice and comment, NOAA and EPA issued joint Program Development and Approval guidance in 1993,<sup>10</sup> which provided the federal agencies the option to approve the states' programs with conditions (56 FR 51882, October 16, 1991, and 58 FR 5182, January 19, 1993). The federal agencies subsequently revised the guidance in 1995 and, after public notice and comment, again in 1998 (63 FR 12078, March 12, 1998, and 63 FR 56146, October 21, 1998, respectively).<sup>11,12</sup> The 1998 approval of the Washington program, with conditions, is beyond the scope of the proposed determination that Washington has met those conditions.

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<sup>10</sup> NOAA and EPA. 1993. *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance*. January 1993. Accessed 11/8/2023.

<https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217progguidance.pdf>.

<sup>11</sup> NOAA and EPA. 1995. *Flexibility for State Coastal Nonpoint Programs*. March 16, 1995. Accessed 11/7/2023.

<https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217flexibilityguidance.pdf>.

<sup>12</sup> NOAA and EPA. 1998. *Final Administrative Changes to the Coastal Nonpoint Program Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA)*. October 16, 1998. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217adminchanges.pdf>.



## H. Washington Needs a Science-based Coastal Nonpoint Program

**II.H Comment:** One commenter asked EPA and NOAA to require Washington to develop a science-based coastal nonpoint program with a tight timeline to meet objectives and goals, including regulatory and enforcement strategies to:

- Control nonpoint pollution runoff from roads, highways, and bridges.
- Require failing on-site septic systems be repaired or replaced and provide for nitrogen and septic pollution removal where needed.
- Protect streamside and shoreline habitat through consistent science-based regulations.
- Identify critical coastal areas where land uses violate water quality standards and require the change to the appropriate land use designation.
- Revise the State's Growth Management Act, Shoreline Management Act, and other resource protection guidelines from one of No Net Loss to one of Net Gain.
- Implement a statewide permit tracking system to create transparency, accountability, and efficiency in understanding the cumulative effects of our collective land use decisions.
- Reduce toxic contamination of water and salmon through improved and regulatory water quality standards, source control, and stormwater management requirements.

**Response:** Regarding the comment that state coastal nonpoint programs be "science-based," the CZARA statute specifically defines the 6217(g) management measures as "economically achievable measures for the control of ... nonpoint sources of pollution, which reflect the greatest degree of pollutant reduction achievable through the application of the best available nonpoint pollution reduction practices...."

With regard to specifically controlling nonpoint pollution from roads, highways, and bridges, the 6217(g) guidance includes several management measures for roads, highways, and bridges that, among other things, call on states to: (1) plan, site, and develop roads and highways to protect areas that provide important water quality benefits or are susceptible to erosion and sediment loss, limit land disturbance to reduce sediment loss, and limit disturbance of natural drainage features; (2) incorporate pollution prevention procedures into the operation and maintenance of roads, highways, and bridges to reduce pollutant loadings to surface waters; and (3) develop and implement runoff management systems for existing roads, highways, and bridges to reduce polluted runoff entering surface waters. NOAA and EPA find that Washington has programs and processes in place consistent with CZARA and the 6217(g) guidance to implement the roads, highways, and bridges management measures and satisfy the conditions related to roads, highways, and bridges that were placed on its program (see pages 25–28 of the Decision Document).

With regard to the specific comment related to septic systems, one of the 6217(g) management measures for onsite disposal systems (OSDS) calls on states to "establish and implement policies that require an OSDS to be repaired, replaced or modified where the OSDS fails, or threatens or impairs surface waters." NOAA and EPA found that Washington had adequately addressed this element in 1998 when the federal agencies issued their Approval Findings for the State's coastal nonpoint program.<sup>13</sup> More on the CZARA requirements for denitrifying onsite disposal systems and how Washington has satisfied those elements can be found in responses to comments VIII.B.1, VIII.B.2, and VIII.B.3.

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<sup>13</sup> NOAA and EPA. 1998. *Findings for the Washington Coastal Nonpoint Program*. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/findwa.pdf>.

For more on the 6217(g) management measure for the protection of streamside and shoreline habitat and how Washington's coastal nonpoint program addresses the riparian protection management measure, see the responses to comments XI.A.1 and XI.A.2 and pages 37–40 of the Decision Document.

For more on Washington's water quality improvement process, including the development and implementation of total maximum daily loads (TMDLs) for impaired waters, as another mechanism the State uses to identify and address nonpoint source problems within critical coastal areas, see pages 40–44 of the Decision Document. As part of the water quality improvement planning process, the State typically evaluates the entire watershed that influences the impaired waterbody and can identify critical coastal areas that need to be targeted to protect or restore water quality.

With regard to a statewide permit tracking system, there is no requirement in CZARA or the 6217(g) guidance that states develop a statewide permit tracking system. State coastal nonpoint programs need to describe the monitoring techniques that will be used to assess over time the success of the management measures in reducing pollution loads and improving water quality (section 6217(g)(2)(F)). However, states have the flexibility to employ a variety of monitoring mechanisms. NOAA and EPA find that Washington has satisfied the CZARA requirements for having processes in place to monitor and assess the coastal nonpoint program over time (pages 48–53 of the Decision Document). (See also the response to comment XIII.A, XIII.B.1)

With regard to the specific comments regarding the Growth Management Act, Shoreline Management Act, water quality standards, and stormwater requirements, as noted above, CZARA does not provide NOAA and EPA the authority to require a state to take any particular action to meet its CZARA requirements.

## **I. Washington Needs to Improve its Nonpoint Source Management Program**

**II.I Comment:** One commenter asserted that NOAA and EPA's Proposed Decision Document on Washington's coastal nonpoint program erroneously relied on the "substantively incomplete and legally inadequate" 2015 Ecology NPS Management Plan as basis for their proposed approval. The commenter disagreed with the Proposed Decision's statement that "The State updated its Nonpoint Source Management Plan in 2015 to include: better articulation regarding the State's regulatory authorities; strategies for addressing nonpoint source pollution with a focus on implementing BMPs to ensure compliance with water quality standards; and using more proactive approaches to finding and addressing pollution sources" (pg. 4 of the Proposed Decision). The commenter acknowledged that the 2015 NPS Management Plan generally describes Washington's regulatory approach but asserted that the plan does not discuss the criteria for invoking regulatory authority, or the specific administrative process that Ecology would use to address outstanding water quality impairments, including for temperature. The commenter further noted that the 2015 NPS Management Plan does not include "a description beyond this blanket statement of how Ecology evaluates and determines when voluntary measures are no longer making sufficient progress so as to warrant regulatory action."

**Response:** In section 6217(c), CZARA stipulates the role of NOAA and EPA is to either approve a state's coastal nonpoint program or determine that it has failed to submit an approvable program. Once the federal agencies have acted to approve a state's coastal nonpoint program, the state is to implement the program through changes to its NPS Management Plan developed under CWA section 319 as well as to its coastal management program developed under CZMA section 306. In the "Additional Information About Washington's Program" section of the 2020 Proposed Decision Document, the federal agencies highlighted that Washington has made progress addressing nonpoint source pollution generally, and

coastal nonpoint specifically, as reflected in the 2015 update to the NPS Management Plan. Specifically, NOAA and EPA stated, as the commenter noted that: “[t]he State updated its Nonpoint Source Management Plan in 2015 to include: better articulation regarding the State’s regulatory authorities; strategies for addressing nonpoint source pollution with a focus on implementing BMPs to ensure compliance with water quality standards; and using more proactive approaches to finding and addressing pollution sources.” NOAA and EPA stand by this statement from the 2020 Proposed Decision.<sup>14</sup>

The 2015 NPS Management Plan Update articulated the State’s regulatory authorities (see Chapter 2: Washington State’s Regulatory Framework), and it included strategies for addressing nonpoint source pollution and described proactive approaches to finding and addressing pollution sources (e.g., see Chapter 3: Strategies for Addressing Nonpoint Source Pollution and Chapter 5: Financial Incentive Programs, respectively).<sup>15</sup> As noted in Section II.I, except as relevant to the federal agencies’ CZARA decision, comments on the specifics of Washington’s NPS Management Plan are beyond the scope of this federal action.

See the federal agencies’ response to comment V.B.1, which describes how NOAA and EPA have revised the “Additional Information About Washington’s Program” section in the Decision Document.

See Section IV.C.1 and IV.D for NOAA and EPA’s detailed response to comments on backup authorities for voluntary measures. See also the responses to comments II.D and IV.B.

#### **J. Washington Does Not Require Protection of Drinking Water from Logging and Farming**

**II.J Comment:** One commenter asserted that Washington does not require protection of drinking water from logging and farming.

**Response:** The commenter’s concern over protection of drinking water from logging and farming is outside the scope of any condition placed on Washington’s coastal nonpoint program. CZARA requires implementation of management measures for forestry and agricultural activities to reduce nonpoint source discharges. The 1998 approval conditions did not require specific management measure requirements directed at protection of drinking water.

### **III. ACHIEVING WATER QUALITY STANDARDS AND PROTECTING DESIGNATED USES**

#### **A. Washington’s Coastal Nonpoint Program Will Not Ensure Compliance with Water Quality Standards**

**III.A.1 Comment:** One commenter offered four reasons for why Washington temperature TMDLs do not deliver nonpoint source pollution controls, and therefore cannot be relied on for CZARA purposes as a way to achieve water quality standards for temperature. Specifically: (1) load allocations to nonpoint sources are set out as effective shade curves that have not been translated into BMPs by Ecology or other Washington agencies; (2) temperature TMDLs apply only to specific waterbodies, not entire watersheds; (3) although TMDL analyses show that multiple nonpoint source influences (e.g., loss of

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<sup>14</sup> As explained in the response to comment V.B.1, the discussion of the specific actions Washington has taken has been removed from the “Additional Information About Washington’s Program” section of the Decision Document. An updated version of this discussion is now part of the response to comment V.B.1.

<sup>15</sup> Washington Department of Ecology. 2015. *Washington’s Water Quality Management Plan to Control Nonpoint Sources of Pollution*. July 2015. Publication No. 15-10-015. Accessed 11/8/2023. <https://apps.ecology.wa.gov/publications/documents/1510015.pdf>.

shade, microclimate, stream flow, channel width:depth ratio, tributary temperatures) can cause substantial temperature increases, load allocations and BMPs are not matched to each substantial cause of temperature increase; and (4) TMDL implementation actions do not specify concrete actions but rather general statements about the need for nonpoint source controls. The commenter discussed the two temperature TMDLs that were developed since 2013 for the Deschutes River and the South Fork Nooksack River as examples.

**Response:** As explained in the Decision Document, Washington relies on TMDLs as one of several tools to address its conditions related to existing development, channelization and channel modification, dams, and critical coastal areas. TMDL implementation plans are also discussed among the tracking mechanisms for voluntary components of the agriculture and roads, highways, and bridges management measures. As there is no 6217(g) management measure for temperature, NOAA and EPA assume the commenter was raising their concerns about using TMDLs to achieve water quality standards for temperature, in relationship to TMDLs being one of several processes the State relies on to identify critical coastal areas. In this instance, the federal agencies' consideration of Washington's TMDLs to support identification of critical coastal areas focused on whether the TMDL process, combined with other approaches discussed in the Decision Document, provided the State with an overall "process for the continuing identification of critical coastal areas adjacent to impaired and threatened coastal waters," as the critical areas condition states. The speed of Ecology's implementation of its TMDL program is not within the scope of NOAA and EPA's review nor are the details of individual TMDLs and associated implementation plans.

Multiple state-administered programs, in combination and iteratively over time, support the achievement and maintenance of water quality standards. The Proposed Decision Document discussed the TMDL program only in the context of TMDL effectiveness monitoring. TMDL effectiveness monitoring is a component of Washington's overall process for identifying additional management measures because it supports determining whether adjustments in restoration approaches are needed, including the need for additional management measures. NOAA and EPA find that TMDL effectiveness monitoring, in combination with other programs such as the Puget Sound Partnership's Action Agenda, Comprehensive Monitoring Strategy and Action Plan for Watershed Health and Salmon Recovery (CMS), and the forest practices Adaptive Management Program, establish a sufficient process for developing and revising management measures where necessary to attain and maintain water quality standards.

**III.A.2 Comment:** A few commenters expressed concern that Washington's coastal nonpoint program will not achieve water quality standards as required by CZARA. One commenter specifically asserted that CZARA requires evidence that state actions will achieve numeric water quality standards and designated uses and noted that NOAA and EPA's Proposed Decision does not provide evidence of that. Commenters especially noted concern about the ability of the program to achieve temperature standards given the adverse impact temperature can have on salmon and Southern Resident killer whales, which depend on salmon for food. For example, commenters asserted that Ecology has not taken adequate steps to develop or implement a program of voluntary and regulatory measures to address temperature pollution, and they claimed Ecology's inaction was a significant factor contributing to temperature pollution becoming the largest source of nonpoint pollution in the State. One commenter asserted that without a regulatory framework to provide a systematic approach to addressing temperature pollution, NOAA and EPA's Proposed Decision is based on arbitrary and capricious information.

**Response:** Achieving water quality standards and protecting designated uses, such as salmon habitat, is important to NOAA and EPA. CZARA requires that state coastal nonpoint programs provide for the

“implementation and continuing revision from time to time of additional management measures ... necessary to achieve and maintain applicable water quality standards,” rather than evidence that implementation of the management measures have, in fact, accomplished the endpoint. Development of management measures is necessarily forward-looking and oriented towards achieving water quality standards over time. CZARA does not require that applicable water quality standards are attained, and designated uses are fully protected at the time of federal approval. Rather, CZARA envisions an iterative process to attain water quality standards established for various nonpoint source pollutants such as temperature.

CZARA requires states to have processes in place to implement the 6217(g) management measures and to identify and implement additional management measures over time. As part of the federal agencies’ review of whether these processes are in place, the federal agencies may look to examples of how the state has implemented the measures in practice, but the federal agencies do not analyze the state’s speed or degree of success in program implementation for each of the elements for federal approval.

In a floor statement explaining the Coastal Nonpoint Program when CZARA was first introduced, Representative Gerry Studds stated that “the requirements that States develop and implement [the CZARA 6217(g)] management measures have been intentionally divorced from identified water quality problems because of the enormous difficulty of establishing cause and effect linkages between land use and water quality” (136 Cong. Rec. E3724-02 (1990)). The same applies to the approval condition for the additional management measures for the Washington program. The federal agencies do not expect a state to conclusively demonstrate that implementing a specific management measure or additional management measure will attain water quality standards and it would be unreasonable for the federal agencies to do so. The process to achieve and maintain water quality standards is necessarily iterative and additional measures are to be revised “from time to time.”

**III.A.3 Comment:** One commenter noted that although NOAA and EPA state that Ecology has emphasized bacteria in its TMDLs (e.g., pg. 4 of Proposed Decision), the federal agencies do not acknowledge that temperature is a greater issue than bacteria. The commenter states temperature is an “existential issue for cold-water salmonids whereas human pathogens, while impairing water quality and closing recreational and commercial shellfish beds, are not poised to wipe species off the planet” and believes that because restoring temperature requires a longer time horizon than addressing bacterial degradation, Ecology should be prioritizing temperature rather than bacterial TMDLs.

**Response:** The purpose of CZARA is to encourage states to develop and implement land use management measures designed to reduce numerous sources of nonpoint pollution; it is not limited to specific water quality issues, like temperature. The 6217(g) management measures, therefore, do not prioritize one form of nonpoint pollution over another.

See response to comment V.B.1 for information on updates to the section of the final Decision Document, “Additional Information About Washington’s Program.”

**III.A.4 Comment:** One commenter disagreed with NOAA and EPA’s assessment that Washington’s coastal nonpoint program “is one of the ‘tools’ in the toolbox that helps to improve water quality, protect coastal habitat, promote sustainable salmon fisheries and support all salmonid life stages. This program, used in concert with other approaches at the federal and state level, *can help to reduce* polluted runoff and protect salmon” (pg. 4 of the Proposed Decision). The commenter noted that after 22 years of “conditional approval” and the growing expansion of water quality impairment in the

State's coastal waters, actions that merely "help" to reduce water pollution fall far short of the CZARA requirement to "ensure compliance with water quality standards."

**Response:** The purpose of CZARA is to encourage states to develop and implement management measures for nonpoint source pollution to restore and protect coastal waters. Of course, CZARA "helps" to improve water quality. The CZARA statute does not purport to eliminate coastal nonpoint source pollution and achieve water quality standards in and of itself. Instead, it provides guidance and support for states to do so. Recognizing the important role that other federal, state, and local water quality programs play alongside CZARA, section 6217(a)(2) calls for state coastal nonpoint programs to be "coordinated closely with State and local water quality plans and programs developed pursuant to sections 208, 303, and 320 of the Federal Water Pollution Control Act (33 U.S.C. 1288, 1313, 1329, and 1330) and with State plans developed pursuant to the Coastal Zone Management Act of 1972, as amended by this Act." As Representative Studds explained in his floor statement on CZARA, "...the new program will not and ought not bear the full burden of restoring and maintaining coastal water quality, but will operate instead in conjunction with controls on point sources established under the Clean Water Act and associated State programs" (136 Cong. Rec. E3724-02 (1990)).

#### **B. Washington's Coastal Nonpoint Program Does Not Provide Adequate Protection of Salmon and Salmon Habitat and Other Endangered, Threatened, and Important Coastal Species**

**III.B Comment:** Many commenters asserted that Washington's coastal nonpoint program does not provide adequate protection to threatened and endangered species such as salmon, bull trout, Southern Resident killer whales, Oregon spotted frogs, and the Western ridged mussel (under petition). The commenters note that these species are adversely affected by poor water quality, high temperatures, and loss of food. A few commenters specifically identified agricultural and forest practices as inadequate to protect salmon and salmon habitat. Commenters opined that specific agriculture BMPs are needed to adequately protect species listed as endangered or threatened under the ESA from agricultural runoff, and that Washington's approach to funding voluntary agriculture BMPs will not be sufficient to protect and restore threatened and endangered species. Commenters also questioned why NOAA and EPA would approve Washington's program when it has not achieved meaningful advances in restoring and protecting salmon habitat, given the pervasive temperature pollution of salmon streams. One commenter also noted that Washington's program fails to protect other species, such as beavers, that play important roles in the coastal aquatic ecosystems, including supporting listed species.

**Response:** The federal agencies recognize the importance of water quality for aquatic life, including endangered or threatened species. The purpose of CZARA is to encourage states to develop coastal nonpoint programs that implement management measures to reduce sources of coastal nonpoint pollution in general, not to benefit specific species. A state's implementation of management measures would indirectly benefit species that may be adversely affected by coastal nonpoint pollution. For instance, Washington has a process in place to identify additional management measures, and it has developed additional management measures to address the impacts of nonpoint source pollution from forestry activities in critical areas containing salmon habitat. In addition, the State is in the process of further enhancing its program components with regard to agricultural nonpoint source pollution.

#### **C. Washington's Coastal Nonpoint Program Lacks a Strategy to Address Pesticides and Other Toxics**

**III.C Comment:** A few commenters expressed concern that Washington's program lacks a strategy to address pesticides and other toxics. These commenters noted that few TMDLs for toxic chemicals have

been developed within the CZARA boundary since 1992. Commenters also noted that a TMDL developed in 2005 does not allocate nonpoint loads for mercury or include BMPs to address mercury loading reductions called for in the TMDL.

**Response:** The commenter's concerns about TMDLs for toxic chemicals do not have a bearing on NOAA and EPA's CZARA action. The federal agencies' charge under CZARA is to determine if Washington has processes in place to implement the 6217(g) management measures and specifically, for purposes of this decision, to determine if Washington has satisfied the 1998 approval conditions. The 6217(g) management measures neither single out toxic pollutants as nonpoint source action priorities, nor require states to have established TMDLs to address toxic substances in nonpoint source pollution by the time of the federal agencies' determination. In addition, Washington's toxics TMDLs are not a basis for addressing any of the conditions on the State's coastal nonpoint program.

#### **IV. IMPLEMENTATION AND ENFORCEMENT OF WASHINGTON'S COASTAL NONPOINT PROGRAM**

##### **A. NOAA and EPA's Decision Must Consider Washington's Progress on Implementing the CZARA Management Measures**

**IV.A Comment:** A few commenters asserted that NOAA and EPA must consider the progress Washington has made on implementing the 6217(g) management measures and additional management measures. They stated that NOAA and EPA should not find that Washington has satisfied all conditions of approvability on its coastal nonpoint program because they believe that implementation has been slow and ineffective. Commenters specifically expressed concern about the slow pace of riparian habitat restoration and protection, noting that at the current pace, they believed it would take Washington decades or generations to complete the riparian restoration that is needed to achieve water quality standards and protect designated uses, such as salmon habitat.

**Response:** CZARA calls on states to "provide for implementation" of management measures in conformity with the section 6217(g) guidance. Implementation here means that the state has processes in place that it will use to implement management measures that are consistent with the section 6217(g) guidance. For instance, the state must describe the scope, structure, and coverage of the processes (e.g., a permitting program, design manuals) and describe the state or local agency authorities that have responsibility for administering the program. These processes and mechanisms are the means by which third parties would be required or encouraged to implement a suite of management measures while undertaking certain land activities (e.g., forestry, agriculture, road maintenance). NOAA and EPA may look to examples of how the state has implemented the management measures in practice but do not analyze the pace at which the program is implementing each of the elements for approval. NOAA and EPA support Washington in implementation of its coastal nonpoint program to address nonpoint source pollution problems through various authorities the federal agencies can bring to bear, specifically the CZMA and CWA, respectively.

##### **B. There is No Set Timeline for Implementing CZARA Management Measures, Additional Management Measures and Achieving Water Quality Standards**

**IV.B Comment:** A few commenters asserted that the CZARA statute and guidance documents expressly provide that implementation of both the management measures and additional management measures will occur within a reasonable period of time. Commenters raised concerns that Washington has not provided a timeline for full management measure implementation. Specifically, one commenter notes

that the 1993 CZARA Program Guidance directs that states must “[i]nclude a schedule for each nonpoint source category or subcategory with milestones for achieving full implementation of the management measures within three years.”<sup>16</sup> Although the commenter acknowledges that CZARA does not require that water quality standards are fully achieved prior to program approval, the commenter asserted the statute does require that in a reasonable time period, states “develop and implement management measures for nonpoint source pollution to restore and protect coastal waters,” and implement additional management measures “that are necessary to achieve and maintain applicable water quality standards ... and protect designated uses.” One commenter also asserted that NOAA and EPA’s 1995 guidance, “Flexibility for State Coastal Nonpoint Programs,” established the expectation that by 2009, “[s]tates and territories complete implementation of additional management measures where necessary to meet water quality standards.”<sup>17</sup> The commenter concluded that Washington has failed to meet the CZARA requirements for implementation of management measures and additional management measures within a reasonable time period.

**Response:** Please see the response to comment IV.A for a description of what “implementation” means in the context of the federal agencies’ review. Contrary to the commenters’ assertions, there is no requirement in the CZARA statute and guidance that states must fully implement their coastal nonpoint programs and additional management measures within a set time period. Although the original 1993 CZARA Program Guidance notes that states must include a schedule for achieving full implementation of the management measures within three years, NOAA and EPA subsequently recognized that states needed additional time and flexibility in developing and implementing their coastal nonpoint programs.<sup>18</sup> While the 1995 “Flexibility Guidance” noted that states would have until 2009 to fully implement their coastal nonpoint programs,<sup>19</sup> this guidance was later modified by the 1998 “Final Administrative Changes to the Coastal Nonpoint Program Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA),” which provides greater flexibility to states in meeting the CZARA requirements.<sup>20</sup> The 1998 guidance states that “NOAA and EPA expect that all individually and cumulatively significantly nonpoint source categories and all watersheds within the §6217 management area will be addressed within 15 years” of the date of conditional approval. In addition, the 1998 guidance did not establish a set timeline for completing the implementation of additional management measures, noting that additional management measures will be implemented through “an iterative process for implementing [6217](g) management measures, assessing their effectiveness in achieving water quality goals and determining the need for additional management measures.”

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<sup>16</sup> NOAA and EPA. 1993. *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance*. January 1993. Accessed 11/8/2023.

<https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217progguidance.pdf>.

<sup>17</sup> NOAA and EPA. 1995. *Flexibility for State Coastal Nonpoint Programs*. March 16, 1995. Accessed 11/8/2023.

<https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217flexibilityguidance.pdf>.

<sup>18</sup> NOAA and EPA. 1993. *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance*. January 1993. Accessed 11/8/2023.

<https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217progguidance.pdf>.

<sup>19</sup> NOAA and EPA. 1995. *Flexibility for State Coastal Nonpoint Programs*. March 16, 1995. Accessed 11/8/2023.

<https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217flexibilityguidance.pdf>.

<sup>20</sup> NOAA and EPA. 1998. *Final Administrative Changes to the Coastal Nonpoint Program Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA)*. October 16, 1998. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217adminchanges.pdf>.



## C. Voluntary-based Approaches to Address CZARA Management Measures are Inadequate

**IV.C.1 Comment:** Several commenters stated that Washington’s voluntary programs are inadequate to meet CZARA requirements of achieving water quality standards and protecting designated uses. Commenters assert that voluntary programs fail by design because they are weak and not effective. In particular, one commenter believed that the State’s reliance on voluntary efforts is not sufficient for meeting riparian requirements and achieving water quality standards. A few commenters raised concerns about the lack of regulations governing polluted runoff from agricultural lands due to erosion, pesticide and nutrient application, and the destruction of riparian areas from livestock grazing.

**Response:** CZARA allows for voluntary approaches to implementing the 6217(g) management measures, provided that the voluntary measures are backed up by enforcement authorities. Per NOAA and EPA’s 1998 “Final Administrative Changes to the Coastal Nonpoint Pollution Control Guidance” memorandum, states can use voluntary-based approaches, if the state provides:

- a legal opinion from the attorney general or an attorney representing the agency with jurisdiction for enforcement that such authorities can be used to prevent nonpoint pollution and require management measure implementation, as necessary;
- a description of the voluntary or incentive-based programs, including the methods for tracking and evaluating those programs, the states will use to encourage implementation of the management measures;
- a description of the mechanism or process that links the implementing agency with the enforcement agency; and
- a commitment to use the existing enforcement authorities where necessary.<sup>21</sup>

As explained in more detail in the Decision Document, NOAA and EPA find that Washington has satisfied these requirements for the program components for which Ecology relies on voluntary-based approaches, in whole or in part, to meet the CZARA management measures. Also, while commenters expressed concern about various voluntary efforts not achieving water quality standards, as discussed more thoroughly in response to comment III.A.2, above, CZARA does not require that applicable water quality standards are attained as a condition of federal approval. Rather, CZARA relies on an adaptive management process to achieve water quality standards.

**IV.C.2 Comment:** One commenter asserted that Washington does not have adequate processes in place to track and evaluate voluntary implementation of BMPs, as CZARA requires when voluntary-based approaches are used. They cited a statement Ecology made in its response to comments on the 2015 NPS Management Plan Update as the State’s admission that it does not have adequate tracking programs in place: “We agree that good project implementation data tracking and fund source tracking are important. Ecology has identified this as a gap in our nonpoint program and is working to conduct better BMP implementation tracking and coordination with our TMDL and STI [straight-to-implementation] programs, and to make this data available to the public and watershed partners.”<sup>22</sup>

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<sup>21</sup> NOAA and EPA. 1998. *Final Administrative Changes to the Coastal Nonpoint Program Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA)*. October 16, 1998. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217adminchanges.pdf>.

<sup>22</sup> Washington Department of Ecology. 2015. *Washington’s Water Quality Management Plan to Control Nonpoint Sources of Pollution*. July 2015. Accessed 03/29/2022. <https://apps.ecology.wa.gov/publications/documents/1510015.pdf>.

**Response:** NOAA and EPA disagree and find that Washington has suitable tracking and evaluation programs in place. As noted above in the response to comment IV.C.1, where voluntary-based programs are used, states need to provide “a description of the voluntary or incentive-based programs, including the methods for tracking and evaluating those programs, the states will use to encourage implementation of the management measures.”<sup>23</sup> For each management measure where the State relies on voluntary-based approaches, there is an “Enforceable Policies and Mechanisms” section that discusses how the State tracks implementation of the associated voluntary program. Depending on the management measure, tracking may include Ecology’s Administration of Grants and Loans system, the Washington Recreation and Conservation Office’s Project Information System (PRISM), CWA section 319 annual reports, TMDL effectiveness monitoring studies, the Puget Sound Partnership’s report card, Washington State Department of Transportation’s (WSDOT’s) State Transportation Improvement Program, and clean marina certifications, among others.

The Ecology response to comment is over eight years old and does not mean that the State’s current tracking efforts are insufficient to meet CZARA requirements. Further, even if the State identified gaps, CZARA requires only “continuing revision from time to time” to adapt to challenges arising with the programs that a state relies on to manage nonpoint source pollution, including the mechanisms a state uses to track and evaluate voluntary implementation (CZARA section 6217(b)(3)). That is reflected in CZARA’s adaptive management component. Washington continues to improve nonpoint source data tracking. For example, Ecology has developed the “Collector App” to better collect, store, and track nonpoint source data in a consistent and streamlined manner and manage data in a way that can be integrated with other water quality efforts. Staff are trained and using this tool in the field, and future enhancements are planned.<sup>24</sup> NOAA and EPA have updated the Decision Document to reflect this updated information.

**IV.C.3 Comment:** One commentor submitted a report prepared by the Environmental Policy Director for the Swinomish Tribe. The report discusses temperature restoration efforts in the Skagit River watershed and asserts that Ecology set a target to achieve riparian buffers on 80-100 percent of streams by 2020, but as of 2018 had only planted buffers on 50 percent of streams. The report concludes that Ecology’s use of voluntary-based approaches to achieve implementation of nonpoint source reductions is ineffective at protecting and restoring water quality.

**Response:** CZARA allows for voluntary approaches to implement management measures provided that such measures are backed by enforceable authorities. Ecology has provided a legal opinion that it has adequate enforcement authorities to back voluntary-based approaches and has provided a commitment to use such authorities when necessary. (See also response to comment IV.D.) NOAA and EPA acknowledge that implementation of management measures takes time (see also response to comment IV.B) and commends Ecology for setting a target date to complete riparian buffers in the Skagit River watershed. Although the report states that Ecology has not met its target date to complete riparian plantings, it notes that buffers have been planted on 50 percent of stream miles. This demonstrates that

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<sup>23</sup> NOAA and EPA. 1998. *Final Administrative Changes to the Coastal Nonpoint Program Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA)*. October 16, 1998. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217adminchanges.pdf>.

<sup>24</sup> Washington Department of Ecology. 2021. *Year 2020 Report on Activities to Implement Washington State’s Water Quality Plan to Control Nonpoint Source Pollution*. May 2021.

Ecology's voluntary-based approach is making progress toward achieving the 80-100 percent riparian buffer target.

**D. Washington Lacks Necessary Backup Authorities and Commitment to Use Those Authorities When Needed**

**IV.D Comment:** Several commenters questioned whether NOAA and EPA could find that Washington has satisfied all CZARA requirements for using voluntary-based approaches. First, commenters asserted that Ecology does not have adequate backup authority to ensure implementation of the 6217(g) management measures and the achievement of water quality standards and designated uses, as it claims in its 2004 legal opinion<sup>25</sup> and the 2019 memorandum the Washington attorney general provided to Ecology.<sup>26</sup> The commenters said that in other forums, Ecology has admitted it does not believe that it has the regulatory authority over temperature nonpoint source pollution, including the authority to require the implementation of riparian habitat to remedy temperature pollution from nonpoint sources. One commenter further noted that the 2019 memorandum the Washington attorney general's office provided to Ecology does not specify whether it considered temperature a "discharge" of "organic or inorganic matter" which would allow the state to take enforcement action under the Washington Pollution Control Act. Second, commenters also believed that the State has not made full use of its statutory authorities, which has resulted in weak programs and a lack of progress on controlling nonpoint source pollution. Commenters believed that Ecology has not demonstrated a commitment to use its backup authorities to ensure implementation of the 6217(g) management measures when needed. Several commenters stated that although *Lemire v. Dep't of Ecology* showed that the State can use its backup authority to address nonpoint source pollution, Ecology has been unwilling to use its authority to take enforcement action since that case. The commenters believed that this lack of action demonstrates the State is not committed to using its backup authorities when needed. Finally, one commenter asserted that Ecology has not described the administrative process it has established or would utilize if it were to rely on its backup regulatory authorities to implement the 6217(g) management measures.

**Response:** Ecology has established that it has adequate backup authority to ensure implementation of the 6217(g) management measures as described in its 2004 legal opinion and 2019 memo from the Washington attorney general. NOAA and EPA's 1998 "Final Administrative Changes to the Coastal Nonpoint Pollution Control Program Guidance" states that "NOAA and EPA will approve those program elements for which states have proposed voluntary or incentive-based programs, backed by existing state enforcement authorities if the following is provided:

- a legal opinion from the attorney general or an attorney representing the agency with jurisdiction for enforcement that such authorities can be used to prevent nonpoint pollution and require management measure implementation, as necessary;

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<sup>25</sup> Washington Department of Ecology. 2004. Memo from Ronald L. Lavigne, Assistant Attorney General, to Helen Bressler, Water Quality Program, RE: Ecology's Authority to Prevent Non-Point Source Pollution and Require Implementation of Management Measures. July 14, 2004. Accessed 11/23/2023.

<https://coast.noaa.gov/data/czm/pollutioncontrol/media/washingtondocket/C-2.pdf>

<sup>26</sup> Washington Attorney General. 2019. Memo from Ronald L. Lavigne, Senior Counsel, to Ben Rau, Watershed Planning Unit Supervisor, RE: Ecology's Authority to Prevent Non-point Source Pollution and Require Implementation of Management Measures. July 12, 2019. Accessed 11/23/2023.

<https://coast.noaa.gov/data/czm/pollutioncontrol/media/washingtondocket/C-1.pdf>

- a description of the voluntary or incentive-based programs, including the methods for tracking and evaluating those programs, the states will use to encourage implementation of the management measures;
- a description of the mechanism or process that links the implementing agency with the enforcement agency and a commitment to use the existing enforcement authorities where necessary.”<sup>27</sup>

NOAA and EPA find that Washington provided the necessary components. NOAA and EPA’s 2001 memo, “Enforceable Policies and Mechanisms for State Coastal Nonpoint Source Programs,” provides flexibility for a state to demonstrate it has sufficient backup authorities.<sup>28</sup> This guidance allows the states to meet the backup authority requirement by providing examples of enforcement actions; however, the state may also meet this requirement by identifying the legal authority and providing a commitment to use it where necessary. In 2004, Washington provided NOAA and EPA with a legal opinion from the assistant attorney general that stated that the Revised Code of Washington (RCW) 90.48 “provides Ecology with statutory authority to both prevent non-point source pollution and require implementation of Section 6217 management measures pursuant to the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA).”<sup>29</sup> In July 2019, the Washington attorney general’s office provided an updated memo affirming that the State continues to have authority under RCW 90.48 to prevent nonpoint source pollution and require implementation of the 6217(g) management measures and noted that the Washington State Supreme Court also affirmed this authority in *Lemire v. Dep’t of Ecology*.<sup>30</sup> NOAA and EPA reviewed both legal memos and the State’s underlying authority and agree with the State’s assessment that it has backup authorities in place to prevent nonpoint pollution and require implementation of the 6217(g) management measures, when needed, per CZARA guidance.

As referenced in the Decision Document, in August 2019 Gordon White and Heather Bartlett, the managers of Ecology’s Shorelands and Environmental Assistance Program and Water Quality Program at the time, respectively, sent NOAA and EPA a memo that was consistent with this guidance.<sup>31</sup> The memo stated: “Ecology remains committed, demonstrated through past practices which offer examples of how the authority [RCW 90.48] could be used in the future, to using our state authority if necessary as a regulatory backstop to our other implementation actions... While Ecology’s preferred approach is to

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<sup>27</sup> NOAA and EPA. 1998. *Final Administrative Changes to the Coastal Nonpoint Program Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA)*. October 16, 1998. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217adminchanges.pdf>.

<sup>28</sup> NOAA and EPA. 2001. *Enforceable Policies and Mechanisms for State Coastal Nonpoint Source Programs*. January 23, 2001. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/epmmemo.pdf>.

<sup>29</sup> Washington Department of Ecology. 2004. Memo from Ronald L. Lavigne, Assistant Attorney General, to Helen Bressler, Water Quality Program, RE: Ecology’s Authority to Prevent Non-Point Source Pollution and Require Implementation of Management Measures. July 14, 2004. Accessed 11/23/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/washingtondocket/C-2.pdf>

<sup>30</sup> Washington Attorney General. 2019. Memo from Ronald L. Lavigne, Senior Counsel, to Ben Rau, Watershed Planning Unit Supervisor, RE: Ecology’s Authority to Prevent Non-point Source Pollution and Require Implementation of Management Measures. July 12, 2019. Accessed 11/23/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/washingtondocket/C-1.pdf>

<sup>31</sup> Washington Department of Ecology. 2019. Memo from Gordon White, Shorelands and Environmental Assistance Program Manager and Heather Bartlett, Water Quality Program Manager, to Joelle Gore (NOAA), Lynda Hall (EPA) and Dan Opalski (EPA), RE: Ecology’s Authority and Commitment to Prevent Non-Point Source Pollution. August 1, 2019. Accessed 11/23/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/washingtondocket/C-3.pdf>

work with partners to gain voluntary compliance, we exercise our authority when needed to ensure that section 6217 and CZARA management measures are implemented.”

NOAA and EPA recognize that some commenters have expressed concern about whether Ecology has the regulatory authority over temperature nonpoint source pollution and that a commenter also noted that the supporting July 2019 legal memo does not clearly state that Washington considers temperature a “discharge” that could be regulated under RCW 90.48.080. As noted above, Ecology provided a legal memo demonstrating to NOAA and EPA that it does have the authority, including under RCW 90.48, to prevent nonpoint pollution and require implementation of the 6217(g) management measures, which is what CZARA guidance requires. The specific question of whether the state’s backup legal authority extends to temperature was put directly to Ecology. In a letter from the Washington Department of Ecology director to the Swinomish Indian Tribal Community, dated August 13, 2020, Ecology maintains that it has the authority to require implementation of BMPs to prevent and control nonpoint source pollution and that nonpoint source pollution includes temperature pollution.<sup>32</sup>

Finally, regarding the comment that Ecology has not described the administrative process it would use to rely on the backup regulatory authority to implement the 6217(g) management measures, NOAA and EPA find that the State has sufficiently described administrative processes that satisfy the guidance. NOAA and EPA describe the enforceable policies and mechanisms for each management measure as discussed in more detail in the Decision Document, including describing partnerships and memoranda of understanding between Ecology and other state agencies that are implementing voluntary measures to address nonpoint source pollution, such as WSDOT and the Washington State Department of Agriculture. These memoranda further describe how state agencies work together to ensure the state’s water quality laws are upheld.

#### **E. Proposed Decision Does Not Address Section XIII of Washington’s 1998 Approval Conditions**

**IV.E Comment:** Several commenters asserted that Washington has not fulfilled its obligations under Section XIII of the 1998 Findings for its coastal nonpoint program. Commenters noted that although several conditions referenced in the 1998 Findings require Washington to develop a “strategy” consistent with Section XIII to implement various 6217(g) management measures, such as the agriculture management measures, NOAA and EPA do not discuss how the State has specifically satisfied these “strategy” conditions in their Proposed Decision Document. Specifically, commenters noted that the federal agencies have not explained how Washington has “demonstrated the ability of the authority to ensure implementation” or provided a “description and schedule for specific steps” it will take to ensure implementation of needed BMPs per Section XIII. One commenter also emphasized that the 1995 “Flexibility Guidance” noted that if a state relied on voluntary and incentive-based programs to address the 6217(g) management measures, the state had to “establish measurable implementation goals, e.g., a schedule for meeting increasing levels of management measure implementation.” In addition, one commenter noted that the Proposed Decision Document does not address Section XIII’s requirement that a “strategy ... be developed and evaluated in the context of and coordinated with the development and actions of the State with regard to the Clean Water Act and Endangered Species Act.” Another commenter opined that Washington does not have survey tools beyond the Puget Sound

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<sup>32</sup> Washington Department of Ecology. 2020. Letter from Laura Watson, Director, to Amy Trainer, Environmental Policy Director, Swinomish Indian Tribal Community, Re: July 21, 2020 Swinomish Letter on the Department of Ecology’s Authority to Regulate Temperature, August 13, 2020.

Partnership's Vital Signs to evaluate whether Washington's approach is working, including determining when voluntary programs are not working and when backup authorities are needed per Section XIII.

Commenters noted that the Proposed Decision Document points to Washington's 2015 NPS Management Plan as justification for meeting some of these strategy elements but does not explicitly describe how the NPS Management Plan satisfied the specific requirements of Section XIII. The commenters asserted the 2015 NPS Management Plan and subsequent NPS Management Plan annual reports do not include information consistent with Section XIII. One commenter specifically stated the 2015 NPS Management Plan does not include a "schedule with goals, objectives, and annual milestones for implementation at the earliest practicable date" to achieve the riparian protection goals needed to achieve water quality standards and protect designated uses per Section XIII. One commenter further asserted that Ecology acknowledged in its response to comments on its 2015 NPS Management Plan that the plan lacked benchmarks and timelines to establish accountability and that Ecology stated they "plan to address [the benchmarks and timelines] as [they] move forward to develop BMPs as part of the requirements that the state must meet to comply with CWA and CZARA."<sup>33</sup> The commenter noted that despite these statements, Ecology added few timelines for developing specific nonpoint source BMPs in its 2015 NPS Management Plan and that most timelines that were included are not being met.

**Response:** Washington no longer needs to address Section XIII. Section XIII (Strategy and Evaluation of Back-Up Authorities) was included in Washington's June 1998 Approval Findings consistent with then-current guidance, which called for the states to include "a schedule for each nonpoint source category or subcategory with milestones for achieving full implementation of the management measures" (1993 Program Guidance and 1995 "Flexibility for State Coastal Nonpoint Programs").<sup>34,35</sup> The original purpose of Section XIII was for the State to describe its implementation mechanisms and schedules. Section XIII, and the 1995 "Flexibility Guidance" referenced by one of the commenters, has been replaced by the 1998 "Final Administrative Changes to the Coastal Nonpoint Program Guidance."<sup>36</sup> Consistent with the 1998 guidance, Washington has been using and will continue to use a variety of mechanisms and tools to establish goals, objectives, and milestones to track and implement the CZARA management measures. These mechanisms include Washington's NPS Management Plan and biennial section 319 grant workplans. Monitoring and tracking tools that are used to assess implementation of actions and progress towards water quality goals include Ecology's Administration of Grants and Loans system, CWA section 303(d) water quality assessments, CWA section 319 annual reports, TMDL effectiveness monitoring studies, State Conservation Commission's Conservation Practice Data System, Washington Recreation and Conservation Office's PRISM, WSDOT's State Transportation Improvement Program, and Puget Sound Partnership's report card.

NOAA and EPA do not interpret Ecology's statement that additional benchmarks and timelines would necessarily be included in the 2015 NPS Management Plan or subsequent updates to address the

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<sup>33</sup> Washington Department of Ecology. 2015. *Response to Comments on Washington's Nonpoint Plan*. July 2015. Accessed 11/8/2023. <https://apps.ecology.wa.gov/publications/parts/1510015part1.pdf>.

<sup>34</sup> NOAA and EPA. 1993. *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance*. January 1993. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217progguidance.pdf>.

<sup>35</sup> NOAA and EPA. 1995. *Flexibility for State Coastal Nonpoint Programs*. March 16, 1995. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217flexibilityguidance.pdf>.

<sup>36</sup> NOAA and EPA. 1998. *Final Administrative Changes for the Coastal Nonpoint Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA)*. October 16, 1998. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217adminchanges.pdf>.

comment, but rather that Ecology would address BMP timelines through other mechanisms, such as the biennial section 319 grant workplans. Washington uses the section 319-funded biennial workplans to further refine its NPS Management Plan. The State's biennial workplans identify specific NPS program work to be initiated and/or completed, including TMDL development, BMP implementation, effectiveness monitoring, NPS technical assistance and compliance efforts, and NPS education and outreach efforts. Collectively, Washington's NPS Management Plans and section 319 biennial workplans provide an iterative process through which the State can identify and refine NPS priorities, establish schedules and milestones, and track implementation.

Though no longer applicable, Section XIII in the 1998 Washington approval also stated that Washington's "strategy will be developed and evaluated in the context of, and coordinated with, the development and actions of the State with regard to the Clean Water Act and Endangered Species Act," and Washington has a strategy that does so. Washington's strategy is integrated into its NPS Management Plan—developed pursuant to section 319 of the CWA—demonstrating its coordination of CWA programs. How Washington's strategy coordinates with the State's CWA actions with protection of federally listed species and designated habitat is described throughout the Decision Document. The rationales for each condition discuss how various CWA programs (TMDLs, section 319, National Estuary Programs, etc.) and ESA actions (e.g., WSDOT's *Environmental Procedures Manual* and *Regional Road Maintenance Endangered Species Act Program Guidelines*) contribute to the State's overall strategy for meeting the CZARA management measures, as appropriate.

To the extent that Section XIII called for the State to demonstrate a strategy for implementing the specified management measures that rely on voluntary-based approaches, the federal agencies' October 1998 guidance established specific information that states must provide along with a description of their voluntary-based programs (see also the response to comment IV.C.1). Since issuance of the October 1998 guidance, NOAA and EPA have applied the 1998 guidance, rather than conditions similar to Section XIII that were based on earlier guidance, in approving state programs. In determining that Washington has met the approval conditions, the federal agencies are treating the Washington program like other state programs. The "Enforceable Policies and Mechanisms" sections in the Decision Document, which are found at the end of each category of management measure, discuss how Washington has satisfied the clarified 1998 requirements for using voluntary-based programs.

## **V. FEDERAL TREATY RIGHTS RESPONSIBILITIES**

### **A. Treaty Rights Have Not Been Addressed**

**V.A.1 Comment:** Several commenters raised concerns that NOAA and EPA are neglecting their roles as federal trustees to the treaty tribes. For example, one commenter cited the United Nations "Declaration on the Rights of Indigenous Peoples" (2007), which says that countries shall consult and cooperate in good faith to obtain free, prior, and informed consent prior to approval of any project affecting indigenous lands or territories. Another commenter noted that any action that indirectly or directly adversely affects clean water will affect and diminish treaty-protected natural resources and is a violation of the federal government's fiduciary trust responsibility. Another commenter asserted the State's NPS Management Plan is incomplete because it does not have a section on tribal treaty rights.

**Response:** NOAA and EPA have provided informal and formal tribal consultation opportunities throughout the process of reviewing Washington's coastal nonpoint program, consistent with each agency's policies on consultation and coordination with Indian Tribes and Executive Order 13175. The federal agencies heard from several tribes regarding concerns about the effects of coastal nonpoint

pollution on tribal interests, including salmon. The federal agencies believe that Washington's coastal nonpoint program provides mechanisms for the State to address many sources of nonpoint pollution, and EPA and NOAA's finding that the State has satisfied all conditions of approvability on the program will allow the State to continue to receive important grant funds it can use to address nonpoint source problems. The overall success of Washington's coastal nonpoint program in addressing water quality impairments and salmon habitat will require a concerted and ongoing effort that depends on the successful implementation of a matrix of federal, state, and local regulatory efforts. Many of the tribal treaty rights concerns cannot be fully addressed through the authorities of any one program, state or federal, such as the coastal nonpoint program. Additionally, the continued implementation and adaptive management of Washington's coastal nonpoint program is an ongoing process. NOAA and EPA are committed to continuing to work with tribes and using our suite of authorities and forums to protect treaty rights, improve water quality, and protect and restore listed species.

EPA and NOAA participate in a Tribal-Federal Forum that grew out of the Treaty Rights at Risk Initiative. This initiative refers to the July 2011 report from the treaty tribes of western Washington.<sup>37</sup> In response, in September 2011, the White House Council on Environmental Quality (CEQ) directed regional leaders for NOAA, EPA, and the U.S. Department of Agriculture to co-lead an effort to improve agency coordination and outcomes for salmon and their habitat. In May 2012, regional leaders provided CEQ the first Puget Sound Federal Action Plan and created a Tribal-Federal Forum to resolve local habitat problems of concern to treaty tribes in the Puget Sound region and along the Washington coast. In 2015, a subset of Puget Sound Federal Task Force agencies committed to address six priority tribal treaty rights issues raised by western Washington treaty tribes. Some of these issues, or approaches to address these issues, are listed within the 2017-2021 Puget Sound Federal Action Plan<sup>38</sup> which includes a treaty rights at risk section and lists six priority tribal treaty rights issues raised by Western Washington Treaty Tribes.

Since this comment was received, the Puget Sound Federal Task Force has issued its 2022–2026 Action Plan. The plan includes information about the Western Washington Treaty Rights at Risk Initiative and explains that, “meetings between regional federal leaders ... and Western Washington Tribal leaders in late 2021 and early 2022 updated agencies’ understanding of tribal priorities and established federal and tribal working groups to focus efforts on five areas of work: Water Quality, Toxics and Stormwater; Nearshore and Estuary Protection; Riparian Habitat; and Recreational Impacts.”<sup>39</sup> In addition, Congress in 2022 mandated that the Puget Sound Federal Leadership Task Force coordinate the federal government’s efforts to restore Puget Sound and address tribal treaty rights and create a Puget Sound Recovery National Program Office in Washington state, through an amendment to the Clean Water Act.<sup>40</sup> For more information regarding Puget Sound Federal Leadership Task Force activities and progress

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<sup>37</sup> Western Washington Treaty Tribes. 2011. *Treaty Rights at Risk: Ongoing Habitat Loss, the Decline of the Salmon Resource and Recommendations for Change*. July 14, 2011. Accessed 11/8/2023.

<http://nwifc.org/downloads/treaty-rights-at-risk/>.

<sup>38</sup> Puget Sound Federal Task Force. 2017. *Puget Sound Federal Task Force Action Plan – Interim Draft 2017–2021*. Accessed 03/29/2022. <https://www.epa.gov/sites/default/files/2017-01/documents/puget-sound-federal-task-force-action-plan-interim-draft-2017-2021.pdf>.

<sup>39</sup> Puget Sound Federal Task Force. May 2022. *Puget Sound Federal Task Force Action Plan 2022–2026*. Accessed 01/12/2024. <https://www.epa.gov/system/files/documents/2022-06/puget-sound-federal-task-force-action-plan-2022-2026.pdf>

<sup>40</sup> EPA News Release. May 4, 2023. Accessed 01/12/2024. <https://www.epa.gov/newsreleases/federal-tribal-and-state-leaders-launch-puget-sound-federal-leadership-task-force>



on addressing tribal treaty rights, please see their website at <https://www.epa.gov/puget-sound/puget-sound-federal-leadership-task-force>.

The comment about Washington's NPS Management Plan being incomplete because it does not have a section on treaty rights is not relevant to this action on whether the State has satisfied all conditions of approvability on its coastal nonpoint program (see the response to comment V.B.5).

**B. State Has Not Addressed Actions NOAA and EPA Recommended in the 2013 Letter to the Washington Department of Ecology**

**Background:** NOAA and EPA sent a letter to Ecology in April 2013,<sup>41</sup> informing the State that the federal agencies were deferring further action on its coastal nonpoint program so that they could further explore how the many federal programs and authorities identified in the Western Washington Tribes' 2011 Treaty Rights at Risk white paper<sup>42</sup> could be applied to improve water quality and conserve habitat and salmon. The letter also recommended several actions the state could take to improve how nonpoint source pollution was managed.

Several commenters disagreed with NOAA and EPA's assessment in the "Additional Information about Washington's Program" section of Washington's Proposed Decision that Washington has made progress on addressing the three actions that NOAA and EPA included in the April 2013 letter. The specific comments they raised follow:

**V.B.1 Comment:** One commenter asserted that the federal agency "recommendations" in the 2013 letter were the basis for the federal agencies delaying a decision on Washington's coastal nonpoint program and therefore, they must be considered "additional conditions" on the State's program that must be satisfied before NOAA and EPA can find that Washington has satisfied all conditions on its coastal nonpoint program. The commenter further asserted that because, in their belief, there has been no improvement in water quality, species populations such as salmon, or how the state manages nonpoint source pollution since 2013, it is illogical for EPA and NOAA to have concluded that the "added conditions" of the 2013 letter have been met.

**Response:** Contrary to the commenter's suggestion, the April 2013 letter did not add conditions to the 1998 program approval. The "Additional Information About Washington's Program" section of the Proposed Decision (pgs. 3–4) discusses the progress the State has made since 2013 in addressing the recommendations in the 2013 letter and how that progress factored into the federal agencies' decision to resume consideration of the approval conditions and Washington's coastal nonpoint program, specifically:

*"NOAA and EPA continue to work with the tribes and the State to further protect tribal treaty rights and to make improvements to salmon habitat and water quality in Washington. NOAA and EPA, however, acknowledge that Washington has made changes to its water quality programs since 2013 that respond to the recommendations NOAA and EPA made in 2013 and*

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<sup>41</sup> NOAA and EPA. 2013. Letter from Margaret Davidson, Acting Director NOAA's Office of Ocean and Coastal Resource Management, and Dennis McLerran, Regional Administrator, Environmental Protection Agency, Region 10 to Maia Bellon, Director, Washington Department of Ecology, RE: Washington's Coastal Nonpoint Pollution Control Program, Nonpoint Source Management Program, and Federal Trust Obligations to Tribes. April 23, 2013.

<sup>42</sup> Western Washington Treaty Tribes. 2014. *Treaty Rights at Risk: Ongoing Habitat Loss, the Decline of the Salmon Resource and Recommendations for Change*. July 14, 2011. Accessed 11/8/2023. <http://nwifc.org/downloads/treaty-rights-at-risk/>.

*reflect the State's commitment to improve water quality and to protect salmon and habitat. Therefore, NOAA and EPA are resuming the decision-making process regarding the conditions on approval of Washington's Coastal Nonpoint Program."*

Though no specific determination is being made with respect to the 2013 recommendations, the federal agencies acknowledge that Washington has made progress addressing the 2013 recommendations. Therefore, NOAA and EPA resumed the decision-making process regarding the conditions of approval of the State's program while the State continues its progress on the 2013 recommendations.

Unlike the federal agencies' earlier invitation of public comment on approval, including the conditions, of Washington's program, NOAA and EPA did not conduct any public process with respect to the federal agencies' recommendations in the 2013 letter. Nor did the federal agencies suggest that the 2013 recommendations represented additional approval conditions. The letter states:

*"NOAA and EPA, along with other federal agencies, are actively responding to the tribal treaty rights concerns [raised in the 2011 Treaty Rights at Risk white paper]. Through a multi-faceted and coordinated effort, we are examining how the many federal programs and authorities can be applied to improve water quality and conserve habitat and salmon more efficiently and effectively within the Puget Sound region and the coast. These ongoing discussions will likely affect how the federal government, and in turn the state, manages polluted runoff and habitat, through greater emphasis on conservation and water quality protection objectives including the following:*

- *Ensuring the state's process for identifying, revising and implementing additional management measures under its Coastal Nonpoint Pollution Control Program (CNPCP) responds to tribal concerns around sustainable salmon fisheries and supports all salmonid life stages;*
- *Ensuring the state's update to its nonpoint source management program, due in 2014, includes necessary protections for salmon and salmon habitat (with a recognition that CNPCPs are required by statute to be implemented through updates to a state's nonpoint source management program, as well as through a state's Coastal Zone Management Program);*
- *Conditioning federal nonpoint source pollution and Puget Sound grant monies utilized for riparian protection to follow National Marine Fisheries guidance for establishing buffer widths<sup>[1]</sup>.*

*Given these circumstances, NOAA and EPA are not prepared to approve Washington's CNPCP."*

<sup>[1]</sup> *Interim Riparian Buffer Recommendations for Streams in Puget Sound Agricultural Landscapes, National Marine Fisheries Service, November 2012*

The "Additional Information on Washington's Program" section in the Proposed Decision provided examples of improvements in how Washington addressed coastal nonpoint source pollution and the specific concerns NOAA and EPA raised in their 2013 letter to Ecology. At the time of the Proposed Decision, NOAA and EPA wanted to acknowledge the tribal concerns raised in the 2011 Treaty Rights and Risk white paper as they related to the coastal nonpoint program, to explain that the federal agencies "paused" the CZARA decision-making in order to further discuss these concerns with the tribes, to explore potential actions the State could take in response to the concerns, and to acknowledge the actions that the State has taken since this pause. In light of these comments expressing confusion about the purpose of the "Additional Information on Washington's Program" section in the Proposed Decision, and to provide further clarity that the State was not required to address these recommendations and

NOAA and EPA are not making a determination as part of this coastal nonpoint program decision, the federal agencies have moved this discussion to the Response to Comments document. An updated discussion of how the State responded to the 2013 recommendations, including actions that occurred after the 2020 Proposed Decision follows:

- Washington has demonstrated it has processes in place for identifying and revising additional management measures under its coastal nonpoint program that consider tribal concerns regarding salmon. These processes include better alignment between the State's nonpoint and total maximum daily load (TMDL) programs to allow quicker on-the-ground implementation and to prioritize best management practices (BMPs) that reduce temperature and/or fecal coliform impairments, which will help address impacts on shellfish and salmon. (See p. 50 of the Decision Document for more information.)
- Ecology is developing the *Voluntary Clean Water Guidance for Agriculture*, a technical resource to help the agricultural community implement practices in a way that ensures protection of water quality.<sup>43</sup> As of July 2023, Ecology has released five chapters and the remaining eight chapters are scheduled to be completed by 2025.
- Ecology's 2015 and 2022 updates to the State's Nonpoint Source Management Plan better articulate the State's regulatory authorities; strategies for addressing nonpoint source pollution with a focus on implementing BMPs to achieve compliance with water quality standards and using proactive approaches to finding and addressing pollution sources.<sup>44,45</sup> Additional updates in the 2022 plan include: work accomplished since the plan's last update – an explanation of the No Discharge Zone; expansion of the onsite sewage system loan program; updates to the grants program, monitoring programs, Water Quality Assessment, and the list of water clean-up projects; addition of information on climate change and environmental justice; addition of four chapters of the *Voluntary Clean Water Guidance for Agriculture*; and incorporation of recent updates to the Clean Water Act Assurances for forestry. Ecology intends to submit another update to the State's Nonpoint Source Management Program to EPA by December 31, 2025.
- From July 2014 through August 2023, Ecology incorporated the National Marine Fisheries Service's (NMFS) interim riparian buffer guidance into its Water Quality Financial Assistance Funding Guidelines. In August 2023, Ecology released updated Water Quality Financial Assistance Guidelines, replacing the NMFS's interim buffer guidance with Ecology's new *Voluntary Water Quality Guidance for Agriculture* riparian buffer recommendations. (See comment VI.C.1 for a discussion on how Ecology's new riparian buffer guidance for agriculture lands differ from its previous guidance based on NMFS's riparian buffer widths.)

**V.B.2 Comment:** One commenter disagreed with NOAA and EPA's statement that the efforts Washington has made to better align its TMDL and nonpoint programs to achieve more on-the-ground implementation show how the State has demonstrated it has processes in place for identifying and revising additional management measures that consider tribal concerns regarding salmon (the first

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<sup>43</sup> Washington Department of Ecology. Undated. *Voluntary Clean Water Guidance for Agriculture* (website). Accessed 9/6/2023. <https://ecology.wa.gov/About-us/Accountability-transparency/Partnerships-committees/Voluntary-Clean-Water-Guidance-for-Agriculture-Adv>

<sup>44</sup> Washington Department of Ecology. *Washington's Water Quality Management Plan to Control Nonpoint Sources of Pollution*. July 2015. Publication No. 15-10-015, Accessed 9/6/2023. <https://apps.ecology.wa.gov/publications/SummaryPages/1510015.html>

<sup>45</sup> Washington Department of Ecology. 2023. *Washington's Water Quality Management Plan to Control Nonpoint Source Pollution*. Publication Number 22-10-025. Accessed 9/6/2023. <https://apps.ecology.wa.gov/publications/SummaryPages/2210025.html>

recommendation of NOAA and EPA’s 2013 letter to Ecology). The commenter asserted that Washington’s TMDLs do not demonstrate the State has processes in place for identifying and revising additional management measures, noting that the TMDLs do not include BMPs and that the TMDL implementation plans that are incorporated into the TMDLs do not identify BMPs to meet load allocations. The commenter further noted that there is no evidence that any of the load allocations or BMPs purportedly identified in the 2015 Deschutes TMDL have been implemented. The commenter also cited the 2014 Clarks Creek, 2020 South Fork, and 2013 Liberty Bay TMDLs as examples to support their assertion.

**Response:** While the recommendations to the State in 2013 are not requirements for this action to find that Washington has satisfied the conditions on its program, NOAA and EPA maintain that Washington’s efforts to better align its TMDL and nonpoint programs are an example of how the State has processes in place for identifying and revising additional management measures that may be used to consider tribal concerns regarding salmon. As discussed more fully in the response to comment III.A.1, states use TMDLs and associated implementation plans to identify sources of water quality impairment and the pollutant reductions needed to achieve water quality standards. TMDLs are informational tools that Ecology uses to guide implementation, and they can help inform whether existing management measures are suitable or whether additional management measures are necessary. Washington’s efforts to better align TMDLs with nonpoint source reduction implementation activities such as grant and loan programs and education, outreach, and voluntary programs demonstrate refinements and improvements that help the State identify additional management measures pursuant to section 6217(b)(3). For example, in recent annual progress reports for the NPS Management Plan, Ecology has placed a high priority on developing TMDLs and other informational tools to implement BMPs that address temperature and fecal coliform impairments, which are of particular concern because of their impacts on shellfish and salmon. Ecology further notes that implementation of BMPs that target temperature and fecal coliform help address tribal treaty rights at risk.<sup>46</sup>

With regard to the concerns the commenter raised about specific TMDLs, see the response to comment III.A.

**V.B.3 Comment:** One commenter questioned what NOAA and EPA mean by Ecology “better aligning” its TMDL and nonpoint source programs as the federal agencies did not explain this in the Proposed Decision Document. The commenter asserted that there is no evidence of Ecology “better aligning” its TMDL and nonpoint source programs and that the TMDL program has deteriorated since 2013. The commenter noted that Ecology has made only five submissions covering 38 individual TMDLs (based on 1996 segments) in the eight years since 2013. At that rate, not considering the new segment-parameters that are likely to be added, the commenter asserted that it would take more than 950 years to complete all of Washington’s currently listed waters that require TMDLs or nearly 600 years if Washington addresses only the TMDLs within the coastal nonpoint program management area—far below the milestone Ecology established in its 2015 NPS Management Plan Update of completing 265 TMDLs or TMDL alternatives between 2015 and 2020.

**Response:** To be clear, the mention of “better aligning” between the TMDL and nonpoint source programs is found in a section of the Proposed Decision (p. 4) describing actions taken subsequent to the 2013 letter to Ecology. The 2013 letter did not recommend “better alignment” of the TMDL and

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<sup>46</sup> Washington Department of Ecology. 2018. *2017 Report on Activities to Implement Washington State’s Water Quality Plan to Control Nonpoint Source Pollution*. March 2018.

nonpoint source programs. As discussed further in the response to comment VI.B.1, nowhere in the 2013 letter do NOAA and EPA refer to the actions identified in that letter as “conditions” that must be met prior to finding that the State has satisfied all conditions of approval on its coastal nonpoint program. Additionally, what NOAA and EPA mean by Ecology “better aligning” its TMDL and nonpoint source programs is that Ecology has been making efforts to speed up the implementation of existing TMDLs by better leveraging nonpoint source staff resources and skills and evaluating which tools—nonpoint watershed-based plans versus TMDL or some combination of both—are better at getting the job done. Ecology reports on such efforts in its CWA section 319 annual progress report to EPA. For an example, see Chapter 3 in Ecology’s 2017 report<sup>47</sup> as well as other recent annual progress reports for more details regarding efforts to speed up TMDL implementation using nonpoint source program resources.

**V.B.4 Comment:** One commenter disagreed with NOAA and EPA’s conclusion that Washington’s 2015 NPS Management Plan Update includes protections for salmon and salmon habitat. Specifically, the commenter noted that this update did not sufficiently address riparian buffers. The commenter noted that Ecology says only that it “hopes to do an analysis of buffer requirements for different types of land uses as part of the development of specific suites of BMPs necessary” to achieve water quality standards in its 2015 NPS Management Plan Update. The commenter concluded that NOAA and EPA cannot find that the State has adequately addressed the actions the federal agencies included in their 2013 letter to Ecology. The commenter also points to statements that Ecology made in its response to comments on the 2015 NPS Management Plan Update that they believe conflict with NOAA and EPA’s conclusion that Washington has adequately addressed the actions in the 2013 letter. For example, the commenter noted that Ecology stated, “We understand that [the NPS Management Plan] does not satisfy all requirements of CZARA,” and that Ecology agreed that regulatory tools and enforcement, not just nonregulatory tools, are needed to achieve water quality standards. The commenter further noted that Ecology’s response to comments acknowledged that historically, implementation of TMDL load allocations had been poor and that many nonpoint sources had not implemented the BMPs necessary to comply with water quality standards. The commenter also asserted that although Ecology stated in its response to comments that it was working to provide more-detailed BMP recommendations in TMDLs to improve TMDL implementation, the TMDLs that have been developed since Ecology’s Response to Comments Document was written do not reflect this.

**Response:** As discussed further in the response to comment V.B.1, nowhere in the 2013 letter do NOAA and EPA refer to the actions as “conditions” that must be met prior to finding that the State has satisfied all conditions of approval on its coastal nonpoint program. Nonetheless, the federal agencies’ Proposed Decision did explain how Washington has made progress toward addressing the recommendations in the 2013 letter, including revisions to its NPS Management Plan. NOAA and EPA moved this discussion to the federal agencies’ response to comment V.B.1 as explained further in that response. The discussion of the actions Washington has taken to address the recommendations in the 2013 letter was also updated to reflect additional actions the State has taken since the Proposed Decision was published.

Washington’s NPS Management Plan is one key component to its coastal nonpoint program, but it alone is not intended to satisfy all CZARA requirements. Rather, it is a strategic statewide work plan with goals and milestones that is meant to be updated and revised on a regular basis. As part of its 2015 NPS

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<sup>47</sup> Washington Department of Ecology. 2018. *2017 Report on Activities to Implement Washington State’s Water Quality Plan to Control Nonpoint Source Pollution*. March 2018.

update, Ecology committed to update Chapter 3, *Strategies for Addressing Nonpoint Source Pollution*, to support the implementation of suites of BMPs per the recommendations in the 2013 letter.<sup>48</sup> Ecology included the first four completed chapters of its *Voluntary Clean Water Guidance for Agriculture* to update the State's agricultural BMPs, as appendices to the State's 2022 NPS Management Plan update and released a fifth chapter in July 2023. Additionally, in the section 319 annual progress reports to EPA, Ecology documents activities and accomplishments, including listing the BMPs, achieved over the past year to meet and make progress on the nonpoint pollution reduction goals and milestones stated in its NPS Management Plan.<sup>49</sup> Washington places a high priority on implementing many BMP projects that are intended to reduce temperature and/or fecal coliform, impairments of particular concern because of their impacts on shellfish and salmon. On August 14, 2023, EPA approved Washington's 2022 NPS Management Plan update because it addresses the key components of an effective nonpoint source management program.

The overall success of Washington's coastal nonpoint program in addressing water quality impairments and salmon habitat will require a concerted and ongoing effort that depends on the successful implementation of a matrix of federal, state, and local regulatory and voluntary efforts. Many of the tribal treaty rights concerns cannot be fully addressed through the authorities of any one program, state or federal, such as the coastal nonpoint program. The federal Bipartisan Infrastructure Law and Inflation Reduction Act funding provide a unique opportunity for NOAA and EPA to work with Washington state agencies, tribal and local governments and other partners in the region to implement on-the-ground projects that benefit salmon and water quality. NOAA announced over \$87.6 million in the first year of the Bipartisan Infrastructure Law funding, with additional funds leveraged from the Inflation Reduction Act, to support fish passage, habitat restoration, and coastal resilience projects throughout Washington. EPA will provide up to \$30 million in Puget Sound Climate Resilient Riparian Systems Lead funding over the next four years to protect and restore riparian areas important for providing ecosystem services, including those supporting salmon recovery, while successfully implementing approaches to promote climate resiliency. EPA will also provide up to \$50 million to implement tribal priorities within the Puget Sound Action Agenda through a subaward program managed by the Tribal Implementation Lead entity over five years. To help ensure federal agencies are embracing the federal government's trust responsibilities, President Biden signed an executive order on December 6, 2023 requiring federal agencies to reform federal funding programs that support tribes.

For responses to other comments regarding the pace of TMDL BMP implementation, see V.B.3, XII.B1 and XIII.B.1; for riparian buffers, see the response to comments VI.B and VI.C.1.

**V.B.5 Comment:** A few commenters pointed out that Ecology's 2015 NPS Management Plan lacked a section on treaty rights and that Ecology must update its plan to explain how the State is preventing the diminishment of treaty rights of tribes to harvest fish and shellfish.<sup>50</sup> One commenter specifically cited a federal court decision to support their position: "[b]ecause the right of each treaty tribe to take

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<sup>48</sup> Washington Department of Ecology. 2015. *Washington's Water Quality Management Plan to Control Nonpoint Sources of Pollution*. July 2015. Publication No. 15-10-015. Accessed 11/8/2023. <https://apps.ecology.wa.gov/publications/documents/1510015.pdf>.

<sup>49</sup> Washington Department of Ecology. 2023. *2022 Report on Activities to Implement Washington State's Water Quality Plan to Control Nonpoint Source Pollution*. May 2023.

<sup>50</sup> Washington Department of Ecology. 2015. *Washington's Water Quality Management Plan to Control Nonpoint Sources of Pollution*. July 2015. Publication No. 15-10-015. Accessed 11/8/2023. <https://apps.ecology.wa.gov/publications/documents/1510015.pdf>.

anadromous fish arises from a treaty with the United States, that right is reserved and protected under the supreme law of the land, does not depend on state law, is distinct from rights or privileges held by others, and may not be qualified by any action of the state” (*U.S. v. Wash.*, 384 F. Supp. 312, 402 (W.D. Wash. 1974)).

**Response:** NOAA and EPA are committed to meaningful government-to-government consultation with federally recognized tribal governments and will continue to ensure protection of the tribal resources protected by the treaties between the United States and the tribes. However, these comments are outside the scope of this federal action, which is regarding the coastal nonpoint program, not the 2015 NPS Management Plan.

## VI. AGRICULTURE

### A. Washington Has Not Articulated Agriculture BMPs Consistent with the CZARA 6217(g) Agricultural Management Measures

**VI.A.1 Comment:** A few commenters asserted that Washington does not have management measures in place to meet the 6217(g) requirements for agriculture. For example, commenters specifically noted that because Ecology has not identified agricultural BMPs to address temperature pollution, even voluntary ones, it is not compliant with the requirements of CZARA or CWA section 319. In addition, one commenter questioned how NOAA and EPA can cite Ecology’s reliance on Natural Resources Conservation Service (NRCS) Field Operating Technical Guides (FOTGs) as a “starting point for identifying individual BMPs ... that could achieve compliance with the State’s water quality standard (pg. 7 of the Proposed Decision,) when Ecology stated in its response to comments for the 2015 NPS Management Plan Update, that, “We have been quite clear that use of NRCS field office technical guides and the NRCS planning process is not sufficient to ensure compliance with state water quality law and the water quality standards.”<sup>51</sup> The commenter further questioned FOTG 590 (Nutrient Management) as a basis for meeting the 6217(g) agriculture management measure for nutrient management because Ecology stated explicitly that FOTG 590 is not sufficient for meeting water quality standards in its response to comments for its 2015 NPS Management Plan Update. The commenter also noted that because Ecology acknowledged it “has and will continue to struggle with [how to address improper manure management and application, implement temperature standards, and address sediment loadings] and that “[The NPS Management Plan Update] does not contain specific solutions” in its Response to Comments Document, the State does not have an approvable coastal nonpoint program until it can explain how it will address these issues.

**Response:** CZARA does not require states to develop agricultural BMPs to address temperature pollution specifically. Rather, CZARA calls on states to have processes in place to implement the 6217(g) management measures for agriculture and to identify and implement additional management measures when needed to achieve and maintain applicable water quality standards and protect designated uses. In the 1998 Findings, NOAA and EPA did not require that Washington establish an additional management measure for agriculture. As described in the Decision Document, NOAA and EPA find that Washington has such processes in place to identify additional management measures. For example, in the 2015 NPS Management Plan Update, Washington identified the need to update BMP guidance for agricultural sources. Ecology formed an agriculture advisory group to inform the development of the *Voluntary Clean Water Guidance for Agriculture* and to identify recommended BMPs that protect water

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<sup>51</sup> Washington Department of Ecology. 2015. *Response to Comments on Washington’s Nonpoint Plan*. July 2015. Accessed 11/8/2023. <https://apps.ecology.wa.gov/publications/parts/1510015part1.pdf>.

quality. The State appended the first four completed chapters of its *Voluntary Clean Water Guidance for Agriculture*, including one for riparian protection, to its 2022 NPS Management Plan update and released another chapter of livestock management addressing animal confinement, manure handling and storage in July 2023.<sup>52</sup> The establishment of this advisory group to develop *Voluntary Clean Water Guidance for Agriculture* demonstrates that the State has processes in place for identifying, implementing, and revising from time to time additional management measures for agriculture.

With regard to the commenter's concerns about Washington's reliance on NRCS FOTGs to address the 6217(g) agriculture management measures, NOAA and EPA note on page 7 of the Proposed Decision Document, "When working with landowners, Ecology considers, among other guidance documents, its funding guidelines, and the Natural Resource Conservation Service's (NRCS) Field Operating Technical Guide (FOTG) to provide a *starting point* for identifying individual BMPs or suites of BMPs that could achieve compliance with the State's water quality standards and 6217(g) management measures on a case-by-case basis" (emphasis added). The NRCS FOTGs are just one of *several* sources of agricultural BMPs, such as BMPs listed in Ecology's Water Quality Financial Assistance Program<sup>53</sup> to address erosion and *Washington Pesticide Laws and Safety: A Guide to Safe Use and Handling of Applicators and Dealers*<sup>54</sup> the State uses as a "starting point" for identifying the appropriate BMPs on a case-by-case basis, given the specific issues and local site conditions. EPA's 6217(g) guidance recognizes that NRCS FOTGs are acceptable practices for meeting the 6217(g) management measures; see the text on pages 2–3, which states, "The agricultural management measures [for CZARA] ... are, for the most part, systems that are commonly used and recommended by the U.S. Department of Agriculture (USDA) as components of Resource Management Systems, Water Quality Management Plans, and Agriculture Waste Management Systems."<sup>55</sup> In addition, the 6217(g) management measures for erosion and sediment control, facility wastewater and runoff from confined animal facility management (large and small units), pesticide management, grazing management, and irrigation specifically list NRCS FOTGs as examples of how a state could satisfy the management measures requirements. Therefore, NOAA and EPA find that Washington's use of NRCS FOTGs, along with other approaches discussed in the Decision Document, is consistent with the 6217(g) management measures.

Finally, regarding the commenter's concern about FOTG 590 (Nutrient Management), NOAA and EPA are aware that Ecology expressed doubts about the ability of FOTG 590 alone to meet water quality standards and that Ecology reached out to NRCS to suggest enhancements to that FOTG. FOTG 590 is not, however, the only approach Washington relies on to address the nutrient management measure. The State's Dairy Nutrient Management Act and the State's discretionary use of a combined National Pollutant Discharge and Elimination System (NPDES) and State waste discharge permit (for facilities with animals below federal NPDES thresholds for concentrated animal feeding operations) provide the State with direct regulatory authorities consistent with the 6217(g) nutrient management measure for

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<sup>52</sup> Washington Department of Ecology. 2022. *Voluntary Clean Water Guidance for Agriculture*. Revised August 2023. Publication number 20-10-008. Accessed 10/4/2023. <https://ecology.wa.gov/About-us/Accountability-transparency/Partnerships-committees/Voluntary-Clean-Water-Guidance-for-Agriculture-Adv>

<sup>53</sup> Washington Department of Ecology. State Fiscal Year 2025 Funding Guidelines: Water Quality Combined Funding Guidelines. Publication 23-10-020. July 2023. Accessed 9/7/2023. <https://apps.ecology.wa.gov/publications/SummaryPages/2310020.html>.

<sup>54</sup> Black, C., C. Foss and R. Maguire. 2017. *Washington Pesticide Laws and Safety: A Guide to Safe Use and Handling for Applicators and Dealers*. Washington State University Extension. H-1055.

<sup>55</sup> EPA. 1993. *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*. January 1993. Accessed 11/8/2023. <https://water.epa.gov/polwaste/nps/czara/index.cfm>.



managing nutrients from manure. Washington relies in part on FOTG 590 to address the application of nutrients from nutrient sources other than manure. NOAA and EPA's role under CZARA is to determine if Washington has processes in place, backed by enforceable authorities, to implement the 6217(g) management measures, including the nutrient management measure. FOTG 590 is consistent with the 6217(g) nutrient management measure, and the State has provided examples of enforcement actions that demonstrates that it uses its backup authority under RCW 90.48, when needed, to ensure implementation of the nutrient management measure.

As Representative Studds explained in his floor statement discussing the drafter's intent when developing CZARA, "the requirements that States develop and implement these management measures has been intentionally divorced from identified water quality problems because of the enormous difficulty of establishing cause-and-effect linkages between land use and water quality" (136 Cong. Rec. E3724-02 (1990)). CZARA employs an adaptive approach by ensuring that states not only develop and implement management measures but also have processes in place for identifying and implementing additional management measures, when needed, to achieve and maintain applicable water quality standards and protect designated uses. Therefore, whether Ecology believed (in 2015) that FOTG 590 may not meet the State's needs for attainment of water quality standards does not undermine the State's use of it as a tool in the State's coastal nonpoint program. Through Washington's ongoing efforts to develop *Voluntary Clean Water Guidance for Agriculture*, which it has indicated will include a chapter on nutrient management, Washington has demonstrated it has processes in place to identify additional management measures for agriculture.

**VI.A.2 Comment:** One commenter disagreed with NOAA and EPA's discussion of the technical assistance Ecology provides to grazers in the federal agencies' rationale for how Washington has satisfied the grazing management measure. The commenter claimed that Ecology cannot provide adequate technical assistance to grazers on riparian buffers because the State has not identified the buffers that are required.

**Response:** NOAA and EPA disagree with the commenter's assessment that Ecology is unable to provide technical assistance to grazers on riparian buffers unless the State identifies a minimum required riparian buffer width. The 6217(g) grazing management measure calls on states to implement one or more of the following to protect sensitive areas (such as riparian zones): (1) exclude livestock; (2) provide stream crossings or hardened watering access for drinking; (3) provide alternative drinking water locations; (4) locate salt and additional shade, if needed, away from sensitive areas; or (5) use improved grazing management (e.g., herding).<sup>56</sup> This is the standard against which NOAA and EPA evaluated Washington's program. The 6217(g) management measure does not presume that a state will identify required riparian buffer widths.

As discussed in the Proposed Decision Document (see pgs. 13-14), the federal agencies found that Washington identified and was promoting grazing BMPs that are consistent with the 6217(g) management measure for grazing through various outreach materials and direct technical assistance.

Beyond this, Ecology is undertaking a process to identify water quality-based BMPs for agriculture. While not used as a basis for the federal agencies' finding that Washington has programs and processes in place to address the 6217(g) grazing management measure in the Proposed Decision, since NOAA and

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<sup>56</sup> EPA. 1993. *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*. January 1993. Accessed 11/8/2023. <https://water.epa.gov/polwaste/nps/czara/index.cfm>.

EPA's Proposed Decision, Ecology has completed the first five chapters of its *Voluntary Clean Water Guidance for Agriculture*, including chapters on pasture and range land grazing and riparian areas.<sup>57</sup> The grazing chapter, consistent with the 6217(g) grazing management measure, further supports that Washington has fully addressed the condition on its coastal nonpoint program related to the grazing management measure. The chapter recommends BMPs such as permanent streamside exclusion fence, off-stream watering systems, stream crossings, and grazing management.<sup>58</sup> NOAA and EPA revised the Decision Document to reflect Ecology's release of this new guidance for grazing management that supports implementation of the 6217(g) grazing management measure.

**VI.A.3 Comment:** One commenter found fault with NOAA and EPA's statement on page 4 of the Proposed Decision that Ecology has "plac[ed] a high priority on implementing BMP projects intended to reduce temperature and/or fecal coliform impairments to address impacts to shellfish and salmon" because NOAA and EPA do not discuss temperature within their evaluation of how Washington addresses the agriculture management measures (pgs. 5-16 of the Proposed Decision).

**Response:** The comment interpreted the statement out of context. The full statement that the commenter quoted from page 4 of the Proposed Decision Document reads:

*"Washington has demonstrated it has processes in place for identifying and revising additional management measures under its coastal nonpoint program that consider tribal concerns around salmon such as better alignment between the State's nonpoint and TMDL programs to achieve more implementation on the ground and, placing a high priority on implementing BMP projects intended to reduce temperature and/or fecal coliform impairments to address impacts on shellfish and salmon."*

NOAA and EPA made this statement simply to explain how Washington has made changes to its water quality programs since the federal agencies made recommendations in the 2013 letter relating to concerns expressed by Washington tribes, as well as to explain why the federal agencies were prepared to make determinations about the State's approval conditions.<sup>59</sup> Washington does indeed "place high priority on implementing BMP projects intended to reduce temperature and/or fecal coliform impairments..." as explained in Ecology's CWA section 319 annual reports since 2015: "Washington State implements many BMP projects that ... are intended to reduce temperature and/or fecal coliform... Temperature and fecal coliform impairments are of particular concern because of their impacts on shellfish and salmon. Ecology has therefore placed a high priority on implementing BMPs that address these pollutants."<sup>60</sup>

NOAA and EPA's rationale explaining how Washington has addressed its conditions related to the 6217(g) agriculture management measures does not explicitly discuss temperature because neither the

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<sup>57</sup> Washington Department of Ecology. 2022. *Voluntary Clean Water Guidance for Agriculture*. Publication number 20-10-008. Accessed 10/5/2023. <https://apps.ecology.wa.gov/publications/SummaryPages/2010008.html>

<sup>58</sup> Washington Department of Ecology. 2022. *Voluntary Clean Water Guidance for Agriculture*, Chapter 10 - Livestock Management: Pasture & Rangeland Grazing. December 2022. Publication number 20-10-008. Accessed 10/4/2023. <https://apps.ecology.wa.gov/publications/parts/2010008part4.pdf>

<sup>59</sup> NOAA and EPA. 2013. Letter from Margaret Davidson, Acting Director NOAA's Office of Ocean and Coastal Resource Management, and Dennis McLerran, Regional Administrator, Environmental Protection Agency, Region 10 to Maia Bellon, Director, Washington Department of Ecology, RE: Washington's Coastal Nonpoint Pollution Control Program, Nonpoint Source Management Program, and Federal Trust Obligations to Tribes. April 23, 2013.

<sup>60</sup> Washington Department of Ecology. 2016. *2015 Report on Activities to Implement Washington State's Water Quality Plan to Control Nonpoint Source Pollution*. June 2016.

agriculture management measures nor Washington's specific agriculture conditions expressly single out temperature pollution. Management measures are, by definition, focused on methods to reduce particular major sources of nonpoint source pollution (e.g., forestry, agriculture), rather than targeting particular pollutants or water quality standards. NOAA and EPA's charge is to determine if a state has processes in place to implement the 6217(g) management measures and has satisfied program approval conditions. The condition applicable to Washington's program related to the agriculture management measures called on the State to "include in its program agriculture management measures in conformity with the 6217(g) guidance," and "to develop a strategy ... to implement the agricultural management measures throughout the coastal nonpoint management area."<sup>61</sup> NOAA and EPA's agriculture rationale explains how Washington had satisfied this approval condition.

**VI.A.4 Comment:** One commenter found fault with the approach Ecology described in its 2015 NPS Management Plan Update to prioritize implementation of agriculture BMPs in impaired watersheds. The commenter noted that "a program for all waters in the CZARA boundary area or all critical areas in the boundary area cannot be the same as a program that only addresses impaired watersheds." The commenter also noted that Ecology's focus on impaired watersheds is "nonsensical" because all watersheds in the CZARA boundary have impairments. In addition, the commenter asserted that there is no evidence that Ecology has prioritized implementation actions for any watershed.

**Response:** As NOAA and EPA describe in the Decision Document, the "impaired" status of the watershed is one of several factors that Ecology uses to prioritize watersheds for assessment and implementation of agricultural BMPs (pg. 6 of the Decision Document). Other factors include the proximity to critical habitats and relative community willingness within the watershed to engage in restoration efforts.

Under CZARA and the 6217(g) guidance, a state has substantial discretion in how and where to focus its nonpoint source control efforts. NOAA and EPA's 1998 "Final Administrative Changes to the Coastal Nonpoint Pollution Control Program" allows states to target resources on preventing and controlling significant impacts of nonpoint source pollution and notes that, in establishing priorities and developing priorities for its coastal nonpoint program, states *should* consider the development of TMDLs under section 303(d) of the CWA and other programs.<sup>62</sup> Although Ecology employs a targeted approach for implementing its voluntary-based agricultural programs that is consistent with the 6217(g) guidance, Ecology's voluntary-based efforts are not the sole basis for the federal agencies' determination that Washington has satisfied the conditions of approval related to agriculture. Washington relies on both directly enforceable authorities (such as the Dairy Nutrient Management Act, the Pesticides Control Act, Pesticide Regulations, the NPDES/State waste discharge permits for concentrated animal feeding operations), as well as other voluntary-based approaches such as technical and financial assistance provided through Soil and Water Conservation Districts (RCW 90.48) to ensure implementation of the 6217(g) agriculture management measures, when needed.

Finally, regarding the commenter's concern about a lack of evidence that Ecology prioritized implementation actions in any particular watershed, the federal agencies do not assess the speed or degree of success of implementation in determining whether a state has satisfied approval conditions

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<sup>61</sup> NOAA and EPA. 1998. *Findings for the Washington Coastal Nonpoint Program*. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/findwa.pdf>.

<sup>62</sup> NOAA and EPA. 1998. *Final Administrative Changes to the Coastal Nonpoint Program Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA)*. October 16, 1998. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217adminchanges.pdf>.

under CZARA. CZARA calls on states to have processes in place to implement the 6217(g) management measures. Part of the federal agencies' review to determine whether identification and revision processes for additional management measures are in fact in place often involves consideration of examples of the state's past implementation of measures. The federal agencies do not, however, analyze the state's degree of success in program implementation for each of the elements for approval.

## **B. Washington Lacks Riparian Buffers for Agriculture**

**VI.B Comment:** A few commenters raised concern about Ecology relying on NOAA's NMFS buffer table to establish buffer width requirements for projects they fund.<sup>63</sup> They noted that the NMFS buffer table is still considered "interim" guidance and it is unknown how the riparian buffers developed through the *Voluntary Clean Water Guidance for Agriculture* process will change the buffer width requirements in the future. For example, one commenter asserted that Washington was considering reducing the buffers required for those funds.

**Response:** The Proposed Decision Document discussed how Ecology had updated its *Funding Guidelines for Water Quality Financial Assistance* in 2014 to require that any Ecology-funded riparian restoration or protection project would result in agriculture buffers consistent with the NMFS interim buffer tables. Ecology made this update in response to a 2013 letter NOAA and EPA sent to Ecology explaining that, given the broader discussions that were occurring in response to the 2011 Treaty Rights at Risk white paper, the federal agencies were not prepared to make a decision on Washington's coastal nonpoint program at that time. In the 2013 letter, NOAA and EPA recommended Ecology condition federal nonpoint source and Puget Sound grant monies used for riparian protection to follow the NMFS interim buffer guidance. (See Section V.B for additional discussion of the 2023 letter.)

Although still under development at the time this comment was made, Ecology has since released its riparian buffer chapter of the *Voluntary Clean Water Guidance for Agriculture* as an appendix to its 2022 NPS Management Plan update.<sup>64</sup> In addition, Ecology updated its comprehensive water quality funding guidelines in August 2023, replacing its reference to the NMFS interim buffer tables with its new riparian buffer guidance.<sup>65</sup> NOAA and EPA have updated the Decision Document to reflect the recent update to Ecology's comprehensive water quality funding guidelines and the completion of the riparian chapter of the *Voluntary Clean Water Guidance for Agriculture*.

Washington relies on riparian buffer guidance, combined with NRCS FOTGs, to satisfy the erosion and sediment controls agriculture management measure. Specifically, Washington provides financial assistance through the Water Quality Financial Assistance Program to install riparian buffers. Ecology updated the Water Quality Financial Assistance Program guidance in July 2023 so that funded buffers needed to be consistent with the new *Voluntary Clean Water Guidance for Agriculture* riparian buffer chapter. The application of the new buffer guidance remains consistent with the 6217(g) management measure for erosion and sediment control. See pages 4-15 of the Decision Document for a full discussion

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<sup>63</sup> National Marine Fisheries Service. 2012. *Interim Riparian Buffer Recommendations for Streams in Puget Sound Agricultural Landscapes*. November 2012. Accessed 11/8/2023.

<https://coast.noaa.gov/data/czm/pollutioncontrol/media/washingtondocket/B-32.pdf>

<sup>64</sup> Washington Department of Ecology. 2022. *Voluntary Water Quality Guidance for Agriculture*. Publication number 20-10-008. Accessed 10/4/2023. <https://apps.ecology.wa.gov/publications/parts/2010008part6.pdf>.

<sup>65</sup> Washington Department of Ecology. 2023. State Fiscal Year 2025 Funding Guidelines Water Quality Combined Funding Program. August 2023, Publication 23-10-020. Accessed 10/2/2023. <https://apps.ecology.wa.gov/publications/UIPages/documents/2310020.pdf>

on how Washington satisfies the agriculture management measures. (See also responses to comments V.B.4, VI.A.1, VI.A.2, and VI.C.1).

**C. The *Voluntary Clean Water Guidance for Agriculture* Cannot Be a Basis for Finding that Washington has Satisfied the CZARA Agriculture Management Measures**

**VI.C.1 Comment:** One commenter noted the pace at which Washington is developing its *Voluntary Clean Water Guidance for Agriculture* is significantly slower than the timelines Ecology laid out in its 2015 NPS Management Plan Update. The commenter stated the State has not developed any BMPs beyond a tillage BMP. The commenter asserted that this demonstrates that Washington’s 2015 NPS Management Plan Update does not include adequate protections for salmon and salmon habitat consistent with NOAA and EPA’s request in their April 2013 letter to Ecology and does not adequately address tribal concerns regarding salmon. In addition, because the process to identify agriculture BMPs is not complete and it is not yet known what BMPs will be developed through the process, the commenter did not believe NOAA and EPA should cite it as an example of an acceptable process for identifying and revising additional management measures under its coastal nonpoint program.

**Response:** First, the action before NOAA and EPA is whether Washington has satisfied the conditions of approvability on its coastal nonpoint program. As explained further in the response to comment V.B.1, the recommendations NOAA and EPA included in their April 2013 letter to Ecology are not CZARA “conditions” that must be satisfied before the federal agencies can find that the State has met its CZARA requirements. Second, Washington is not relying on the riparian chapter to satisfy the outstanding conditions on its coastal nonpoint program pertaining to the agriculture management measures, other than providing financial assistance for buffers to control erosion. (See also response to comment VI.B.)

As discussed in the Decision Document, NOAA and EPA consider the development of the *Voluntary Clean Water Guidance for Agriculture* an example of a process for identifying and revising additional management measures. While development of the *Voluntary Clean Water Guidance for Agriculture* remains an ongoing process, Ecology released four chapters addressing tillage, livestock grazing, soil stabilization and sediment capture, and riparian areas as appendices to its December 2022 NPS Management Plan update. Ecology subsequently released the chapter for livestock management in July 2023. The completion of these five chapters demonstrates that Washington has a process to identify and revise additional management measures as required under CZARA.

While the adequacy of the 2015 NPS Management Plan in addressing NOAA and EPA’s 2013 recommendations for Ecology is not relevant to the federal agencies’ findings on Washington’s coastal nonpoint program, NOAA and EPA disagree with the commenter’s assertions that the pace of developing Ecology’s *Voluntary Clean Water Guidance for Agriculture* demonstrates that Washington did not sufficiently update its 2015 NPS Management Plan to include adequate protections for salmon and salmon habitat. As noted in the Proposed Decision Document, Ecology included various updates in its 2015 NPS Management Plan to provide protections for salmon and salmon habitat as NOAA and EPA had recommended in the April 2013 letter to Ecology.<sup>66,67</sup> (The discussion of actions Ecology has taken

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<sup>66</sup> Washington Department of Ecology. 2015. *Washington’s Water Quality Management Plan to Control Nonpoint Sources of Pollution*. July 2015. Publication No. 15-10-015. Accessed 11/8/2023. <https://apps.ecology.wa.gov/publications/documents/1510015.pdf>.

<sup>67</sup> NOAA and EPA. 2013. Letter from Margaret Davidson, Acting Director NOAA’s Office of Ocean and Coastal Resource Management, and Dennis McLerran, Regional Administrator, Environmental Protection Agency, Region

to respond to recommendations in the April 2013 letter has been moved to the response to comment V.B.1.) The 2015 NPS Management Plan better articulates the State's regulatory authorities, includes strategies for addressing nonpoint source pollution with a focus on implementing specific BMPs designed to ensure compliance with water quality standards, and uses more proactive approaches to find and address pollution sources. Furthermore, the schedule that Ecology described in the 2015 NPS Management Plan was to engage various stakeholders for the purpose of receiving input on a process for developing the guidance. With that input received, Ecology has been working to develop the *Voluntary Clean Water Guidance for Agriculture* according to a category-by-category schedule. The State's process and timing for development of the guidance is acknowledged in a judicially enforceable order that settled litigation related to Washington's nonpoint source program under the CWA.<sup>68</sup> Although completion of the guidance will take time, that does not change the fact that Ecology's 2015 NPS Management Plan, as well as the 2022 revisions to the plan, included this effort to improve water quality and protect salmon and salmon habitat.

Finally, while the commenter asserts that the ongoing *Voluntary Clean Water Guidance for Agriculture* process does not adequately address tribal concerns regarding salmon, Ecology embarked on the process, in part, to address concerns tribes raised about nonpoint source pollution from agriculture generally. NOAA and EPA are aware that some tribes have raised concerns about Ecology's new riparian buffer chapter recommendations compared to the NMFS interim buffer guidelines. Ecology's new riparian buffer recommendations differ from the NMFS interim buffer recommendations that were incorporated in its funding guidelines from 2014-2023. Ecology now recommends a preferred default forested (no-cut) buffer of 215 feet for Western Washington streams. In its earlier funding guidelines based on the NMFS interim buffer guidelines, Ecology recommended a 100-foot no-cut buffer for perennial, intermittent, and ephemeral salmon streams or streams that were historically accessed by salmon. In certain circumstances, the new guidance provides for an alternative three-zone riparian management approach when a full-forested buffer has been documented as infeasible. The three zones must have a minimum combined width of 215 feet and the widest feasible no-cut core zone (zone closest to the stream-bed), light intensity agricultural use of the inner zone, and agricultural use, with additional BMPs, in the outer zone. In this three-zone approach, the no-cut zone, in some circumstances, may be smaller than NMFS's minimum no cut buffer recommendation. For example, in Western Washington, in certain instances when larger no-cut zones are infeasible for streams less than five feet wide, application of this alternative approach could result in a 65-foot no-cut zone, although the total managed buffer must be a minimum of 215 feet.<sup>69</sup>

NOAA and EPA are committed to continue to work with Ecology to ensure riparian buffers protect and restore water quality and salmon and salmon habitat. EPA, in coordination with NOAA, added language in its August 14, 2023, approval of Ecology's updates to Washington's NPS Management Plan (2022-2025) requested that Ecology maintain a reference the NMFS's minimum buffer widths-to protect threatened and endangered salmonids in both the *Voluntary Clean Water Guidance* and the Water Quality Combined Funding Guidelines. In its August 2023 letter, EPA also stated that it expects

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10 to Maia Bellon, Director, Washington Department of Ecology, RE: Washington's Coastal Nonpoint Pollution Control Program, Nonpoint Source Management Program, and Federal Trust Obligations to Tribes. April 23, 2013.

<sup>68</sup> Settlement Case 2:16-cv-01866-JCC, Document 175, Filed 01/08/21.

<sup>69</sup> Washington Department of Ecology. 2022. *Voluntary Clean Water Guidance for Agriculture*, Chapter 12 – Riparian Areas and Surface Water Protection. See pp. 18b, footnote 7. Publication 20-10-008. Accessed 12/13/2023. <https://apps.ecology.wa.gov/publications/parts/2010008part6.pdf>

Washington to have project proponents that choose to deviate from the presumptive default 215 foot no-cut riparian buffer width on agricultural lands to document in the required feasibility assessment: 1) how the alternative buffer protects water quality and ESA listed species, where present; 2) how the buffer is consistent with best available science; and 3) how the buffer still supports the local plan (e.g., Total Maximum Daily Load, watershed, or salmon recovery plan) being implemented.

**VI.C.2 Comment:** One commenter noted that in Ecology’s response to comments on the 2015 NPS Management Plan Update, Ecology acknowledged that “several categories of nonpoint sources do not have well-defined BMPs, including agriculture activities.”<sup>70</sup> The commenter argued that Ecology’s statement affirms it lacks adequate BMPs to meet CZARA goals of achieving water quality standards, and the State’s five-year-old promise to develop agricultural BMPs should not be a basis for NOAA and EPA’s approval of Washington’s coastal nonpoint program. The commenter further asserted that the BMP process is not consistent with state law and therefore cannot be used to ensure that water quality standards are met; thus, the State’s plan to develop agriculture BMPs is inconsistent with the CWA and CZARA. The commenter also raised concerns about the riparian BMPs that Ecology will identify through the agricultural BMP process, noting that Ecology has not adopted any of the WDFW findings regarding needed riparian protections to help meet water quality standards and protect designated uses, despite Ecology affirming that it would use WDFW’s guidance “when we develop recommended BMPs to satisfy our section 319 and CZARA requirements,” in its Response to Comments Document for the 2015 NPS Management Plan Update. Furthermore, the commenter believed that the *Voluntary Clean Water Guidance for Agriculture* is not intended to address aquatic habitat concerns such as channel morphology and large woody debris that are needed to protect designated uses because Ecology does not consider these issues to be water quality concerns. The commenter also requested that NOAA and EPA review what the commenter characterized as Ecology’s attempt to rewrite the meaning of Washington’s water quality standards as it develops its agricultural BMPs guidance.

**Response:** As the commenter is aware, as of January 8, 2021, Washington is now party to a settlement agreement with the commenter in which the State has committed to a schedule for completing *Voluntary Clean Water Guidance for Agriculture* chapters.<sup>71</sup> NOAA and EPA disagree with the commenter’s assertions that the *Voluntary Clean Water Guidance for Agriculture* cannot be relied upon for NOAA and EPA’s decision that the State has met the conditions placed on its coastal nonpoint program. The process for development of the *Voluntary Clean Water Guidance for Agriculture* was discussed under the Agriculture rationale in the Proposed Decision Document, not as a rationale for how the State has addressed its agriculture condition, but to acknowledge the State’s ongoing process for identifying additional management measures for agriculture. Until Ecology finalizes the *Voluntary Clean Water Guidance for Agriculture*, the State continues to use the NRCS FOTGs and other guidance documents as a source for developing best management practice strategies for individual farmers to satisfy, in part, the condition placed on its coastal nonpoint program related to agriculture. Ecology unilaterally identified the need to develop updated BMP recommendations for agriculture and has committed to completing the guidance chapters. As of July 2023, five of the 13 planned chapters of the *Voluntary Clean Water Guidance for Agriculture* have been completed. This is precisely the type of continuing management measure revision envisioned by CZARA. Washington applies a mix of direct regulatory authorities and voluntary programs, backed by enforcement authorities, to implement the

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<sup>70</sup> Washington Department of Ecology. 2015. *Response to Comments on Washington’s Nonpoint Plan*. July 2015. Accessed 11/8/2023. <https://apps.ecology.wa.gov/publications/parts/1510015part1.pdf>.

<sup>71</sup> Settlement Case 2:16-cv-01866-JCC, Document 175, Filed 01/08/21.

6217(g) management measures for agriculture. CZARA does not require that a state demonstrate that applicable water quality standards are attained, and designated uses are fully protected, as conditions of federal approval (see the response to comment III.A.2). Rather, states need to have programs and processes in place, backed by enforceable authorities, to implement the 6217(g) management measures. NOAA and EPA have revised the Decision Document to move the discussion of the *Voluntary Clean Water Guidance for Agriculture* process from the Agriculture rationale to the Additional Management Measures rationale to avoid confusion.

The 6217(g) guidance does not require the State implement agriculture management measures that address channel morphology and large woody debris. (See also responses to comments VI.B and VI.C.1 for additional discussion on the *Voluntary Clean Water Guidance for Agriculture*'s role in meeting the 6217(g) management measures for agriculture.)

**D. Washington Lacks Adequate Mechanisms for Enforcing and Tracking Implementation of CZARA Agriculture Management Measures**

**VI.D Comment:** One commenter raised concerns about the Nonpoint Source and TMDL Tracking System that Ecology is developing to which NOAA and EPA refer in the Agriculture section (pg. 16 of the Proposed Decision Document) and again in the Monitoring section (pg. 54 of the Proposed Decision). The commenter noted that the tracking system is still “upcoming” and that having a tracking system does not provide assurances that the State will use it to evaluate when management measures are inadequate to result in the attainment of water quality standards and when the regulatory backstop is needed.

**Response:** NOAA and EPA did not rely on the new tracking system as a basis to determine that Washington had existing methods for tracking and evaluating its voluntary-based agriculture programs. The federal agencies merely noted that Ecology was developing a new tracking system for TMDL and nonpoint source implementation (including BMPs implemented) for readers' information. This new tool was devised to improve the granularity and usability of data collected in the field. Identifying and completing tasks, such as this one, is an example of the State continuing to refine how it implements its NPS Management Plan. Pre-existing tracking systems such as Ecology's Administration of Grants and Loans system, Washington Conservation Commission's Conservation Practice Data System, and Washington Recreation and Conservation Office's PRISM allow the State to track and evaluate voluntary implementation of the agriculture BMPs in a manner consistent with 6217(g) program guidance for voluntary-based approaches.

**E. Washington Has Not Identified or Implemented Additional Management Measures for Agriculture Needed to Meet Water Quality Standards and Protect Designated Uses**

**VI.E Comment:** One commenter noted that Washington needs to identify and implement additional management measures for agriculture to achieve water quality standards and protect designated uses. The commenter believed that because NOAA and EPA concluded in the 1998 Findings that Washington “does not provide for the identification of additional management measures” (Section XI), the condition pertaining to developing a strategy to implement the agriculture management measures must include additional management measures as well as the 6217(g) management measures.<sup>72</sup> The commenter further noted three programs that NOAA and EPA discuss as comprising Washington's process for

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<sup>72</sup> NOAA and EPA. 1998. *Findings for the Washington Coastal Nonpoint Program*. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/findwa.pdf>.



identifying additional management measures—the Puget Sound Partnership, the TMDL program, and the CMS—do not identify additional management measures for agriculture.

**Response:** NOAA and EPA agree that a state program must provide for implementation and continuing revision from time to time of additional management measures to meet water quality standards and protect designated uses, but, unlike the condition for forestry, NOAA and EPA did not require that Washington identify and implement additional management measures specifically for agriculture. Washington currently has processes in place for identifying additional management measures in order to meet water quality standards and protect designated uses. The Puget Sound Partnership, TMDL program, and CMS each represent the importance and inclusion of public input for identifying and continuing revision of additional management measures. In addition, Ecology is in the process of identifying additional management measures through its *Voluntary Clean Water Guidance for Agriculture*, further demonstrating that the State has processes for identifying additional management measures for agriculture and is applying them. In a settlement agreement resolving federal litigation, Ecology committed to complete this process by December 31, 2025.<sup>73</sup> Ecology released the first four completed chapters as appendices to its December 2022 update to Washington’s NPS Management Plan and another chapter in July 2023.<sup>74</sup>

## VII. FORESTRY

### A. Washington Has Not Adopted Additional Management Measures for Forestry

**VII.A.1 Comment:** One commenter asserted that Ecology does not have a process in place to adopt additional management measures where “water quality impairments or degradation of beneficial uses attributable to forestry exist despite implementation of the 6217(g) measures,” one of the conditions that NOAA and EPA placed on Washington’s program in 1998. The commenter did not believe the adaptive management process is currently functioning at a level that justifies EPA and NOAA’s assumption that it will make the changes needed to meet water quality standards in Washington’s coastal nonpoint program boundary. The commenter argued that because the State has yet to identify and implement additional management measures for forestry riparian buffers that are needed to meet water quality standards, NOAA and EPA cannot conclude that the slow Forestry Adaptive Management process will result in sufficient protection of Type N (non-fish bearing) streams within the CZARA boundary.

**Response:** In 1998, NOAA and EPA approved Washington’s coastal nonpoint program subject to a condition directing the State “to adopt additional management measures where water quality impairment or degradation of beneficial uses attributable to forestry exist despite implementation of the CZARA forestry measures.”<sup>75</sup>

NOAA and EPA find the State now has regulations, policies, and programs in place to adequately address its additional management measures for forestry condition consistent with CZARA guidance, including changes in 2001 to Chapter 222-16 of the Washington Administrative Code (WAC) that established several additional management measures to provide greater protections for water quality and habitat,

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<sup>73</sup> Settlement Case 2:16-cv-01866-JCC, Document 175, Filed 01/08/21.

<sup>74</sup> Washington Department of Ecology. 2022. *Voluntary Clean Water Guidance for Agriculture*. Publication number 20-10-008. Accessed 10/5/2023. <https://apps.ecology.wa.gov/publications/SummaryPages/2010008.html>

<sup>75</sup> NOAA and EPA. 1998. *Findings for the Washington Coastal Nonpoint Program*. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/findwa.pdf>.

acceptance of Washington's Forest Practices Habitat Conservation Plan by NOAA's NMFS and the U.S. Fish and Wildlife Service in 2006,<sup>76</sup> and revisions in 2005 and 2013 to the Forest Practices Rules to emphasize and improve the adaptive management process and outcomes.

The State has taken additional steps to improve the AMP process following a 2020 performance audit by the Washington State Auditor's Office. This review resulted in a report, titled *Adaptive Management Program: Improving Decision-Making and Accountability - Office of the Washington State Auditor* that identified procedural problems with the AMP that were contributing to significant decision making delays, and offered recommendations for improvement.<sup>77</sup> DNR and the AMP have committed to addressing many of these recommendations.<sup>78</sup> In November 9, 2022, the Board made substantial progress by following some of the process recommendations when it voted to move forward with a rule that was recommended by a majority of the Board for updated prescriptions on buffers for Type Np waters (perennial waters not known to be used by fish).<sup>79</sup>

Ecology uses the Clean Water Assurances agreement to ensure that the AMP continues to make progress. Clean Water Assurances were originally established as part of a 1999 forestry stakeholder agreement and the Forestry Fish Report (FFR). In exchange for a commitment from the stakeholders to comply with the FFR, EPA and Ecology agreed that the State's forest practices rules and programs, as updated through the AMP, would be used as the primary mechanism for bringing and maintaining forested watersheds into compliance with the State's water quality standards. To give the FFR time to meet state water quality standards, EPA and Ecology agreed to deprioritize the development of TMDLs for waters impaired by sediment, habitat degradation, flow, turbidity or temperature by forest practices. In 2009, Ecology extended the CWA assurances for an additional 10 years. In 2019 and again in 2021, Ecology granted short-term extensions conditioned on the Board providing a recommendation on rulemaking for Type Np waters, which the Board satisfied in 2022. In its November 30, 2022 letter, Ecology agreed to extend the Assurances again, but emphasized that the Assurances are not intended to exist in perpetuity and that Ecology would consider withdrawing the Assurances if progress on the Type Np waters rulemaking stalls or the parties abandon a continued commitment to the AMP.

In addition, the 1998 Final Administrative Changes Guidance notes that additional management measures will be implemented through an iterative process of assessing their effectiveness and

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<sup>76</sup> U.S. Fish and Wildlife Service and National Marine Fisheries Service. 2006. *Record of Decision. Proposed Issuance of Multiple Species Incidental Take Permits or 4(d) Rules for the Washington State Forest Practices Habitat Conservation Plan*. Lacey, WA. Accessed 11/8/2023.

[https://www.dnr.wa.gov/publications/fp\\_hcp\\_record\\_of\\_decision.pdf](https://www.dnr.wa.gov/publications/fp_hcp_record_of_decision.pdf).

<sup>77</sup> Office of the Washington State Auditor. 2021. *Adaptive Management Program: Improving Decision-Making and Accountability*. February 23, 2021. Report Number: 1027818. Accessed 11/8/2023.

[https://sao.wa.gov/performance\\_audit/adaptive-management-program-improving-decision-making-and-accountability/](https://sao.wa.gov/performance_audit/adaptive-management-program-improving-decision-making-and-accountability/)

<sup>78</sup> Washington Department of Ecology. 2022. *Washington's Water Quality Management Plan to Control Nonpoint Sources of Pollution*. Publication 22-10-025. Accessed 11/8/2023.

<https://apps.ecology.wa.gov/publications/documents/2210025.pdf>

<sup>79</sup> In an effort to respond to concerns about compliance with open public meeting requirements, the Board rescinded and then reaffirmed their November 9, 2022 vote on August 9, 2023.

determining the need for additional management measures.<sup>80</sup> As articulated in the Proposed Decision Document, NOAA and EPA find that Washington's process meets this threshold.

Regarding forestry riparian buffers, see the responses to comments VII.B.1 and VII.B.2.

**VII.A.2 Comment:** One commenter stated that Washington's coastal nonpoint program needs to identify and implement additional management measures for forestry related to forested wetlands to fully protect water quality and beneficial uses on the State's coastal private forestlands. The commenter expressed concern that harvest and forest road restrictions are focused on "typed waters" and nonforested wetlands associated with these waters and do not extend to forested wetlands. The commenter stated that the Forest Practices Habitat Conservation Plan does not protect forested wetlands from clear-cut harvest and asserted that Washington has not protected against the effects of timber harvest, including associated new road construction and the application of silvicultural chemicals, on the function of forested wetlands. The commenter also noted that neither NOAA and EPA's conditional 1998 Approval Findings or Proposed Decision on Washington's coastal nonpoint program mentions whether wetlands on private forestlands are being adequately protected from a water quality perspective.

**Response:** The action before the federal agencies is to determine whether the approval condition regarding additional management measures for forestry has been met, specifically, "... the State will adopt additional management measures where water quality impairments or degradation of beneficial uses attributable to forestry exist despite implementation of the 6217(g) measures."<sup>81</sup> The federal agencies did not specify a condition regarding forested wetlands. In 1998, NOAA and EPA specifically found that Washington had fully satisfied all the 6217(g) forestry management measures, including the wetlands forest management measure that calls on states to "plan, operate, and manage normal, ongoing forestry activities (including harvesting, road design and construction, site preparation and regeneration, and chemical management) to adequately protect the aquatic functions of forested wetlands."<sup>82</sup> Regarding the comment on private forestlands, the wetlands forestry management measure does not explicitly differentiate between landownership types. The State has in place the authority and processes to identify and implement additional management measures as may be warranted to continue to improve certain aspects of its coastal nonpoint program. For example, as a result of the adaptive management process, studies are moving forward in the State's forestry program to further refine road management practices to examine the impacts of forestry practices on wetlands, prevent sediment from entering streams, and further refine the rules designed to prevent unstable slope failures. See also the response to comment VII.B.1.

## **B. Greater Protection of Riparian Areas Needed Around Forestry Activities**

**VII.B.1 Comment:** One commenter asserted that Washington has failed to implement a habitat-based stream typing method as necessary to properly provide for riparian buffer protection; therefore, NOAA and EPA should not find that Washington has an approvable coastal nonpoint program until the State

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<sup>80</sup> NOAA and EPA. 1998. *Final Administrative Changes to the Coastal Nonpoint Program Pollution Control Program Guidance for Section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA)*. October 16, 1998. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217adminchanges.pdf>.

<sup>81</sup> NOAA and EPA. 1998. *Findings for the Washington Coastal Nonpoint Program*. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/findwa.pdf>.

<sup>82</sup> EPA. 1993. *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*. January 1993. pg. 3-97. Accessed 11/8/2023. <https://water.epa.gov/polwaste/nps/czara/index.cfm>.

adopts additional management measures to improve its stream classification. The commenter claimed that Washington's current stream typing method results in streams that are accessible to fish being classified as "non-fish" streams (Type N) and, therefore, they are subject to riparian buffers half as wide as that of designated fish-bearing streams (Type F). The commenter noted that the issue of stream typing has come up at Forestry Practices Board meetings frequently and has been identified as a "priority" by the Washington Department of Natural Resources and the Policy Committee of the Adaptive Management Program on multiple occasions, but the Board has yet to change the stream typing methods.

**Response:** The ongoing adaptive management process that the Forestry Practices Board is using to develop an effective stream classification scheme demonstrates that Washington has processes in place to identify and revise additional management measures as required under CZARA. By statute, management measures are meant to be descriptive, not prescriptive. Revising the forest practices rules to meet water quality objectives was the precursor for the establishment of the Adaptive Management Program. NOAA and EPA find this to be an example that the State has regulations, policies, and programs in place to adequately address its additional management measures for forestry condition consistent with CZARA guidance and satisfying the remaining condition that "[w]ithin three years, the State will adopt additional management measures where water quality impairments or degradation of beneficial uses attributable to forestry exist despite implementation of the 6217(g) measures."<sup>83</sup> Also, see the response to comment VII.B.2.

**VII.B.2 Comment:** One commenter stated that Washington's coastal nonpoint program needs to identify and implement additional management measures for forestry related to Type N stream buffers to fully protect water quality and beneficial uses on the State's coastal private forestlands. The commenter asserted that regulatory requirements on private forestlands for non-fish bearing perennial streams (Type Np) do not protect against logging-associated shade removal that causes stream warming in violation of Washington's water quality standards for temperature and that conservation advocates have consistently claimed that the Type Np buffer prescriptions do not meet ESA standards, are highly risky, and not based on the best available science. The commenter also noted that Washington Department of Natural Resources' compliance monitoring reports from 2011 and 2018 indicate that landowners are incorrectly leaving non-fish Type Np buffers on fish habitat Type F streams and that some Type Np waters had Type F physical characteristics.

**Response:** The commenter's concerns about the adequacy of protections in place for Type Np streams and the potential misclassification of these streams are outside the scope of any of the federal agencies' approval conditions on Washington's coastal nonpoint program. The decision before NOAA and EPA is whether the State has processes in place to identify and revise additional management measures for timber harvesting activities where water quality impairments or degradation of beneficial uses attributed to forestry exist despite implementation of the 6217(g) management measures. Washington satisfied this condition (see the response to comment VII.A.1). The drafters of CZARA recognized that not all water quality impairments need to be addressed at the time of approval and that adaptive management is an iterative process. In addition, NOAA and EPA analyze programs and processes for adaptive management rather than pass judgment on a state's target setting or expected

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<sup>83</sup> NOAA and EPA. 1998. *Findings for the Washington Coastal Nonpoint Program*. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/findwa.pdf>.

implementation outcomes, such as the details of stream classifications. See also the responses to comments III.A.2 and VII.A.1.

### **C. Washington's Forestry Adaptive Management Program Is Slow and Not Effective**

**VII.C.1 Comment:** One commenter asserted that EPA and NOAA must evaluate the effectiveness of Washington's Forestry Adaptive Management Program to ensure the program functions as designed to identify and implement additional management measures that will achieve water quality standards. The commenter also urged NOAA and EPA to evaluate whether Ecology's lead oversight role for attainment of water quality standards has been compromised or subordinated to its collaborative role on the Forestry Adaptive Management Program. The commenter asserted that NOAA and EPA's proposed Decision Document fails to critically evaluate the history and status of the 10-year "Clean Water Act Assurances" that Ecology provided to the Washington DNR's forest practices in 1999.<sup>84</sup> The commenter believed that NOAA and EPA cannot approve Washington's coastal nonpoint program until the State adopts additional management measures to improve its adaptive management process, including the benchmarks for the program's "Clean Water Assurances." The commenter noted that NOAA and EPA's proposed Decision Document makes no reference to the problems the State has identified through its extensive evaluation of the Forestry Adaptive Management Program. The commenter further noted that in 2009, Ecology established specific milestones that needed to be met for continued water quality assurances; however, many of these milestones have not been met or are years overdue. The commenter added that Ecology's most recent extension of assurances in 2019 was explicitly tied to achievement of improved Type Np riparian buffers to meet water quality standards, largely in response to the Cooperative Monitoring, Evaluation, and Research Committee's studies indicating standards are not being met under current forest practices rules. Another commenter pointed out that forestry rules may not be promulgated in time to ensure compliance with water quality standards, thus questioning the existence of a functional adaptive management and regulatory process.

**Response:** NOAA and EPA continue to conclude that Washington's regulations, policies, and programs are sufficient to address the 1998 condition on additional management measures for forestry consistent with CZARA guidance. These regulations, policies, and programs include changes in 2001 to Chapter 222-16 WAC that established several additional management measures to provide greater protections for water quality and habitat, acceptance of Washington's Forest Practices Habitat Conservation Plan by NOAA's National Marine Fisheries Service and the U.S. Fish and Wildlife Service in 2006,<sup>85</sup> and revisions in 2005 and 2013 to the Forest Practices Rules to emphasize and improve the adaptive management process and outcomes. Washington is continuing to make progress and has continued to adopt additional measures for forestry as a result of the adaptive management process. See Ecology's 2022 Clean Water Act Milestone Update memo to the Board for additional information.<sup>86</sup> Also, on November 9, 2022, the Washington Forest Practices Board voted to move forward with a rule recommended by a majority of the Board for updated prescriptions on buffers for Type Np waters (perennial waters not

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<sup>84</sup> USFWS et al. 1999. *Forests and Fish Report*. April 1999. Accessed 11/8/2023. [https://www.dnr.wa.gov/publications/fp\\_rules\\_forestsandfish.pdf](https://www.dnr.wa.gov/publications/fp_rules_forestsandfish.pdf).

<sup>85</sup> U.S. Fish and Wildlife Service and National Marine Fisheries Service. 2006. *Record of Decision. Proposed Issuance of Multiple Species Incidental Take Permits or 4(d) Rules for the Washington State Forest Practices Habitat Conservation Plan*. Lacey, WA. Accessed 11/8/2023. [https://www.dnr.wa.gov/publications/fp\\_hcp\\_record\\_of\\_decision.pdf](https://www.dnr.wa.gov/publications/fp_hcp_record_of_decision.pdf).

<sup>86</sup> Washington Department of Ecology. 2022. Clean Water Act Milestone Update: Memorandum to the Forest Practices Board. Accessed 11/8/2023. [https://www.dnr.wa.gov/publications/bc\\_fpb\\_cwaupdate\\_20220511.pdf](https://www.dnr.wa.gov/publications/bc_fpb_cwaupdate_20220511.pdf).

known to be used by fish).<sup>87</sup> Recognizing this progress, Ecology extended the Clean Water Assurances in a letter dated November 30, 2022.<sup>88</sup> In the letter, Ecology agreed to extend the Assurances again, but emphasized that the Assurances are not intended to exist in perpetuity and that Ecology would consider withdrawing the Assurances if progress on the Type Np waters rulemaking stalls or the parties abandon a continued commitment to the AMP. This is sufficient to demonstrate that the State has processes in place for the continuing revision from time to time of additional management measures necessary to achieve and maintain applicable water quality standards and designated uses.

#### **D. Gaps and Inadequacies in Washington's Forestry Program**

**VII.D Comment:** A few commenters stated that Washington has not reformed forestry practices on steep slopes where logging occurs, which has altered riparian vegetation, negatively affecting functions of shading, bank stabilization, sediment delivery, groundwater recharge, and increasing landslides. The commenters expressed concern that logging operations on steep slopes contribute to water quality problems such as flooding, erosion, high turbidity, temperature, and dissolved oxygen.

**Response:** The commenter's concerns about the adequacy of protections for steep slopes is outside the scope of any of the federal agencies' approval conditions on Washington's coastal nonpoint program. The condition states that Washington needs to adopt additional management measures for forestry where water quality impairments or degradation of beneficial uses attributed to forestry exist despite implementation of the 6217(g) management measures. Washington satisfied this condition. The drafters of CZARA recognized that not all water quality impairments need to be addressed at the time of approval and that adaptive management is an iterative process. See also the response to comment VII.A.1.

### **VIII. URBAN DEVELOPMENT**

#### **A. Stormwater Management Approaches Not Effective**

**VIII.A.1 Comment:** One commenter objected to statements NOAA and EPA made regarding how Washington uses its TMDL program to help satisfy the 6217(g) management measure for existing development. The commenter specifically called out the following two statements from the Proposed Decision Document: "Ecology's TMDL process ensures that completed water quality improvement reports and Water Quality Implementation Plans (WQIPs) will address stormwater runoff from existing development as needed... In urbanizing areas, Ecology staff consult existing guidance documents, including the state stormwater manuals, to select BMPs that would be appropriate to address the pollutants of concern in developed areas," (pgs. 20–21) and "Ecology has revised its TMDL guidance to specifically reference the 6217(g) guidance and other relevant material" (pg. 21). The commenter expressed concern that Washington would have to complete a TMDL before it applies the 6217(g) management measures to sources of urbanizing stormwater—something the commenter stated would occur far into the future, if at all, given the slow pace of TMDL development. The commenter also asserted that integrating the 6217(g) management measures into Washington's TMDL guidance means that TMDLs will not necessarily identify additional management measures but will simply include the technology-based 6217(g) management measures instead, which, in the commenter's opinion, would negate the purpose of doing a TMDL to identify actions needed to meet water quality standards.

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<sup>87</sup> In an effort to respond to concerns about compliance with open public meeting requirements, the Board rescinded and then reaffirmed their November 9, 2022 vote on August 9, 2023.

<sup>88</sup> Letter from the Washington Department of Ecology to the Forest Practices Board. November 30, 2022.

**Response:** Washington’s TMDL program is one method that helps Washington address the condition on its coastal nonpoint program related to existing development. In addition, this management measure applies to very few areas in the coastal nonpoint management boundaries since NOAA and EPA found in 1998 that Washington had met this within the Puget Sound planning area.<sup>89</sup> NOAA and EPA’s 2002 “Policy Clarification on Overlap of 6217 Coastal Nonpoint Programs with Phase I and II Storm Water Regulations,” clarifies that coastal nonpoint programs no longer need to address the existing development management measures in Phase I and II NPDES municipal separate storm sewer systems (MS4) communities.<sup>90</sup> Most of the existing development within Washington’s coastal nonpoint management area is found within designated MS4s or the Puget Sound planning area. Therefore, the 1998 condition only applies to a smaller subset of existing development within Washington’s coastal nonpoint management area that is located outside of both the Puget Sound planning area and MS4 communities.

NOAA and EPA’s 2020 Proposed Decision cited Ecology’s TMDL process as just one of several tools that Washington uses to address the condition related to satisfying the remaining conditions on the existing development management measure outside of Puget Sound and MS4 communities. The existing development management measure has four components. The federal agencies cited the TMDL process as helpful for addressing the first two components—namely, identifying priority watershed pollutant reduction opportunities and providing a schedule for implementing appropriate controls to reduce polluted runoff from existing development. The State manages TMDL development by relying on a targeted approach that is informed by public input. Beyond the prioritized nature of the TMDL process, NOAA and EPA cite other planning initiatives, such as straight-to-implementation projects (where sources of pollution and their remedies are readily known and cleanup can occur more quickly than with a TMDL) or watershed plans developed pursuant to Washington’s Watershed Planning Act as additional programs that identify opportunities to reduce polluted runoff from existing development and establish schedules for implementing priority controls. For the purposes of CZARA, the State need only demonstrate that it has processes in place to implement the management measures and it has done so through either development of a TMDL or via a straight-to-implementation approach. The Proposed Decision rationale includes references to watershed plans that were developed primarily for the purposes of water resource management and development, but that may also include a water quality component (RCW 90.82.090), under the Watershed Planning Act and for which the State has provided dedicated funds for implementation. Washington continues to fund, or finance through loans, implementation of prioritized urban stormwater retrofits and low impact development through its combined Water Quality Financial Assistance Program, which includes, among other funding sources, a dedicated Stormwater Financial Assistance Program.

**VIII.A.2 Comment:** Ecology’s *Stormwater Management Manual for Western Washington* (SWMMWW) is neither enforceable nor applicable outside Puget Sound. Thus, this aspect of the State’s coastal nonpoint program is incomplete.

**Response:** Washington relies on a combination of regulatory programs (e.g., Shoreline Management Act, Growth Management Act) and nonregulatory programs (e.g., SWMMWW, watershed planning

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<sup>89</sup> NOAA and EPA. 1998. Findings for the Washington Coastal Nonpoint Program. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/findwa.pdf>.

<sup>90</sup> NOAA and EPA. 2002. “Policy Clarification on Overlap of 6217 Coastal Nonpoint Programs with Phase I and II Storm Water Regulations.” Accessed 11/8/2023. [https://coast.noaa.gov/data/czm/pollutioncontrol/media/NPDES\\_CZARA\\_Policy\\_Memo.pdf](https://coast.noaa.gov/data/czm/pollutioncontrol/media/NPDES_CZARA_Policy_Memo.pdf).

efforts) backed by enforceable authorities to meet the new development, site development, watershed protection, and existing development measures. Outside of MS4 communities, Washington meets the new development management measure through implementation of its SWMMWW,<sup>91</sup> which applies to all counties in Washington's coastal nonpoint management area, including areas outside of Puget Sound. The SWMMWW, targeted to local municipalities, land developers, and businesses, establishes nine "minimum requirements" to control stormwater from new and redevelopment activities. Although the SWMMWW itself is not a regulation, its requirements and BMPs become enforceable through permits and authorizations issued by local and state authorities.

**VIII.A.3 Comment:** Shellfish bed shutdowns often occur in the central Grays Harbor area during flood conditions. The shutdowns are sometimes attributed to bacteria pollution from the Cosmo Specialty Fibers facility (temporarily closed). These shutdowns are an economic hardship as well as a health hazard. Not enough is being done to prevent nonpoint pollution or point source pollution from Cosmo Specialty Fibers.

**Response:** The Cosmo Specialty Fibers facility in Cosmopolis, Washington, is a pulp mill that discharges wastewater under a state water discharge permit through the NPDES program. As such, it is a point source regulated by Ecology, not a nonpoint source. This issue is therefore outside the scope of Washington's coastal nonpoint program.

## **B. Nitrogen from On-site Sewage Disposal Systems Not Adequately Controlled**

**VIII.B.1 Comment:** One commenter believed that NOAA and EPA made an error in the OSDS condition statement regarding nitrogen-reducing systems in their 1998 Findings on Washington's program. The commenter noted that while the condition requires Washington to "provide for denitrification where nitrogen-limited surface waters may be adversely affected by excess nitrogen loadings from new OSDS," there is nothing in the rationale that supports limiting this provision to only new OSDS.<sup>92</sup> In the rationale from the 1998 Findings, NOAA and EPA stated that "[n]or does the State have provisions for the installation and upgrade of denitrifying OSDS adjacent to nitrogen-limited surface waters." The commenter concluded that because NOAA and EPA refer to the "upgrade" of denitrifying OSDS, they must have intended the condition to apply to both new and operating OSDS. Therefore, the commenter asserted that NOAA and EPA's Proposed Decision must also provide a rationale for how Washington addresses the denitrifying element of the operating OSDS management measure as well. The commenter also noted that WAC 246-272A-230(2)(e)(i)(D), which NOAA and EPA cite for how Washington has satisfied this condition for new OSDS, does not apply to existing systems.

**Response:** The commenter argued NOAA and EPA's approval condition regarding denitrifying systems should apply to *operating* OSDS as well as providing for *new* OSDS, and the State has not met the approval condition for existing systems. The federal agencies disagree. As written, the 1998 condition statement expressly applies to providing for denitrifying systems for "new" OSDS only. While denitrifying systems are not required for operating systems, the federal agencies' 2020 Proposed Decision rationale notes how Washington is encouraging upgrades to operating systems. Washington

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<sup>91</sup> Washington Department of Ecology. 2019. *Stormwater Management Manual for Western Washington*. Publication Number 19-10-021. Updated July 2019. Accessed 11/8/2023. <https://fortress.wa.gov/ecy/ezshare/wq/Permits/Flare/2019SWMMWW/Content/Resources/DocsForDownload/2019SWMMWW.pdf>.

<sup>92</sup> NOAA and EPA. 1998. Findings for the Washington Coastal Nonpoint Program. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/findwa.pdf>.



has targeted upgrades to operating OSDS near shellfish beds and other sensitive marine habitats around the Puget Sound by identifying and providing funding to carry out these upgrades. Washington has approved for use publicly available and innovative denitrifying systems, making such upgrades and new installations of these technologies more affordable for homeowners. However, to eliminate this confusion, NOAA and EPA have revised the final Decision Document by removing this discussion in the rationale for the new OSDS management measure.

**VIII.B.2 Comment:** Several commenters raised concerns about Washington's efforts to control nitrogen pollution from OSDS. One commenter noted that although Washington has improved its inventory, inspection, and repair of OSDS, the State does not control nitrogen pollution from OSDS. As evidence, the commenter and others noted that counties have not adopted Marine Recovery Area (MRA) plans that include nitrogen controls for surface water protection even though NOAA and EPA discuss in their proposed approval of Washington's program the requirement that an MRA plan would be prepared if a local health jurisdiction identified any areas where nitrogen has been identified as a contaminant of concern. Several commenters raised concerns about Washington's efforts to require the installation of new OSDS that reduce nitrogen loads and promote the replacement or upgrade of existing OSDS with systems that reduce nitrogen loads. One commenter quoted the Washington Department of Health's (DOH's) Septic Best Management Practices Manual: "Concerns about nitrogen inputs in Hood Canal, South Sound, and other reaches of the Sound have raised the profile of this issue but have not yet led to widespread use of nitrogen reducing systems around these waters." Another commenter stated that no progress has been made to achieve the goal that human contributions of nitrogen, including wastewater treatment plants and OSDS, do not result in more than 0.2 milligrams per liter (mg/L) reductions in dissolved oxygen levels in sensitive areas of Puget Sound that was established in the Puget Sound Partnership's draft April 7, 2011, technical memo. Another commenter noted that failing septic systems continue to keep certain shorelines closed to recreational shellfish harvest and swimming. Another noted that OSDS upgrades and enforcement are lacking, and there is a lack of notification to residential septic owners.

**Response:** The 1998 approval condition explains that Washington's coastal nonpoint program is to provide for denitrification where nitrogen-limited surface waters may be adversely affected by excess nitrogen loadings from new OSDS. Washington has met this condition, principally through the direct authority of Washington's On-site Sewage System rules (WAC 246-272A). The On-site Sewage System rules direct the 12 Puget Sound counties to identify areas where nitrogen has been identified as a contaminant of concern (WAC 246-272A-0015 and RCW 70.118A). Pursuant to WAC 246-272A-0230 (2)(e)(i)(D), where nitrogen has been identified as a contaminant of concern in the local health management plan, nitrogen contributions must be addressed in the OSDS design by employing treatment systems to reduce nitrogen or ensuring the lot is large enough to adequately disperse nitrogen loadings before they impact water quality. Although DOH has discretion to recommend MRAs, the statute places the responsibility directly on the counties to adopt MRAs based on the judgments of those local officials. According to the State's MRA guidance for OSDS management, DOH is required to review the OSDS strategy of all MRA plans for completeness and to either approve these plans or provide in writing the reasons for not approving the strategy and recommend changes. Should DOH not approve the OSDS strategy, the local health authority then amends and resubmits the plan for State approval. The fact that few, if any, counties have yet designated nitrogen-restricted MRAs does not mean that Washington has not met this condition. Collectively, the Puget Sound counties have designated a number of MRAs with customized OSDS strategies, and these MRA-specific strategies are updated as more information about OSDS impacts becomes known. Additionally, NOAA and EPA's

Decision Document highlights Washington's success in reducing excess nitrogen by replacing OSDS with central sewage collection and treatment in other targeted areas such as around Hood Canal and by providing tens of millions of dollars to identify and repair septic system problems that had contributed to contamination of shellfish beds and other sensitive marine areas.

**VIII.B.3 Comment:** A few commenters expressed concerns about the adequacy of the 20 mg/L total nitrogen standard for new OSDS established in WAC 246-272A-0110. One commenter noted that although that standard may meet the objective of the 6217(g) management measure to reduce total nitrogen loadings in effluent by 50 percent, there is no indication that it is sufficient to meet water quality standards. The commenter noted that NOAA and EPA provided no analysis to suggest that the 20 mg/L standard applicable to new OSDS would control the nitrogen inputs sufficiently to meet water quality standards and that no additional management measures would be needed. In addition, the commenters noted that Washington lacked a similar nitrogen reduction standard for existing systems.

**Response:** There is no requirement that the CZARA management measures must be shown to achieve water quality standards. The 6217(g) management measure standard of reducing nitrogen loadings by 50 percent where nitrogen-limited waters may be adversely affected by excess nitrogen loadings from groundwater has been in place since January 1993. On June 14, 1991, EPA published this guidance in draft and notified the public of a four-month public comment period, which closed on October 15, 1991 (56 FR 27618). This guidance identifies management measures as defined by the CZARA statute to be "economically achievable measures for the control of ...pollutants..." During this time period, EPA undertook a detailed economic analysis of all proposed and final management measures. EPA concluded based on this process that requiring OSDS that reduce nitrogen loadings beyond 50 percent of conventional septic tank-plus-drainfield treatment was cost-prohibitive and therefore not economically achievable.

There are separate standards for reducing nitrogen loadings from OSDS where nitrogen-limited waters may be adversely affected by excess nitrogen loadings from groundwater for both new OSDS and for existing (operating) OSDS. The main difference between these two management measure elements is that the one for new OSDS requires the 50 percent nitrogen reduction from conventional OSDS system loads (i.e., advanced wastewater treatment), while the one for operating OSDS specifies that conventional or inadequate systems merely be considered for replacement or upgrade to advanced treatment to reach the target standard. As noted in the federal agencies' response to comment VIII.B.1, with regard to advanced treatment for nitrogen, the federal agencies placed a condition on the new OSDS measure, not the operating OSDS measure.

**VIII.B.4 Comment:** At least two commenters found fault with NOAA and EPA's discussion of funding programs for septic "repairs and upgrades." The commenters note that NOAA and EPA did not provide any data that these repairs or upgrades are covered under the regulations that require new systems to control nitrogen.

**Response:** In NOAA and EPA's 2020 Proposed Decision, the federal agencies did not intend to suggest that Washington's funding programs for repairs and upgrades are aspects of state regulations for reducing nitrogen loads for new OSDS. As noted in the response to comment VIII.B.1, the federal agencies did not place a condition to encourage upgrades to denitrifying systems for operating OSDS. Rather, page 25 of the federal agencies' Proposed Decision mentions the State's funding programs in the context of enhanced implementation of the management measure to further protect sensitive areas and

shellfish beds from excess nitrogen from OSDS. To eliminate this confusion, NOAA and EPA have revised the final Decision Document to remove this discussion.

## **IX. MARINAS AND RECREATIONAL BOATING**

### **A. Fish Waste Education Material is a Low Bar**

**IX.A Comment:** One commenter questioned NOAA and EPA’s inclusion of Washington’s “The Nuts of Guts” brochure as a basis for how the State has satisfied the fish waste management measure. The commenter asked if NOAA and EPA asked Ecology if they had printed and distributed copies of the brochure, and if so, if people who fish at marinas received copies. The commenter noted that using this brochure as a basis of approval is an example of the very low bar NOAA and EPA use in determining if a State has an approvable coastal nonpoint program.

**Response:** The fish waste management measure calls for states to “promote sound fish waste management through a combination of fish-cleaning restrictions, public education, and proper disposal of fish waste.” NOAA and EPA’s 2020 Proposed Decision Document described how current regulations restrict fish waste from entering water bodies, and how the State uses an old brochure titled “The Nuts of the Guts” for promoting sound fish waste management practices. Since NOAA and EPA issued the 2020 Proposed Decision Document, Washington has expanded its efforts at fish waste education and outreach. In June 2022, Ecology published a fish waste education blog.<sup>93</sup> Ecology has also committed to issuing regular reminders of these messages in coming years and is working with WDFW to include these messages into its annual sport fishing rules publication.<sup>94</sup> These messages align with all the educational components of the fish waste management measure to promote sound fish waste management. NOAA and EPA have included this additional information into our Final Decision Document and removed reference to the “The Nuts of the Guts” brochure, which the state is no longer using.

### **B. The State’s Hydraulic Code Does Not Provide Sufficient Protections**

**IX.B Comment:** One commenter asserted that the Hydraulic Code that NOAA and EPA discuss as supporting several marina management measures does not provide sufficient protection to achieve water quality standards and protect designated uses.

**Response:** Please see the response to a similar comment on the Hydraulic Code in the Hydromodification section (comment X.A.1).

## **X. HYDROMODIFICATION**

### **A. Washington’s Regulations, Programs, and Guidance are Unlikely to Achieve Water Quality Standards**

**X.A.1 Comment:** One commenter raised concerns that Washington’s Hydraulic Code and Hydraulic Project Approval (HPA) Program are unlikely to protect or improve water quality to the extent needed to ensure compliance with water quality standards and fully protect beneficial uses, including salmon and shellfish, and is therefore inadequate for meeting CZARA requirements. The commenter asserted that

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<sup>93</sup> Washington Department of Ecology. 2022. Proper fish waste disposal matters for marinas (blog). June 14, 2022. Accessed 11/8/2023. <https://ecology.wa.gov/Blog/Posts/June-2022/The-crucial-last-step-of-fish-cleaning-proper-wast>

<sup>94</sup> Washington Department of Fish and Wildlife. *Washington Sport Fishing Rules*. Accessed 11/8/2023. <https://www.eregulations.com/washington/fishing>.

there is no evidence that WDFW has resolved the problems in the HPA Program to ensure that Hydraulic Code permits are sufficiently conditioned to meet water quality standards and protect designated uses and said that NOAA and EPA tacitly acknowledge this in determining that WDFW conditions permits “consistent with the 6217(g) measures, to minimize water quality impacts” (pg. 32 of the Proposed Decision). The commenter argued that CZARA requires meeting water quality standards and protecting designated uses, not just minimizing pollution and meeting the 6217(g) management measures.

**Response:** The ultimate goal of CZARA is to protect and restore coastal water quality over time. Meeting water quality standards or having assurances that a specific approach or BMP will achieve water quality standards is not a requirement for finding that a state has satisfied all conditions of approvability on its coastal nonpoint program. See also the response to comment III.A.2.

Washington’s Hydraulic Code and HPA Program, along with several other authorities, programs, and guidance manuals, enable Washington to satisfy the condition that NOAA and EPA placed on its coastal nonpoint program related to the hydromodification management measures, which is to: “include management measures in its program that are in conformity with the 6217(g) guidance for channelization, dams, and streambanks and shorelines....[and] include enforceable policies and mechanisms to implement the management measures throughout the coastal nonpoint management area.”<sup>95</sup> Specifically, the 6217(g) channelization management measures call for states to evaluate the potential effects of proposed channelization and channel modification on surface waters and instream and riparian habitat and to “plan and design channelization and channel modification to reduce undesirable impacts.”<sup>96</sup> Similarly, the 6217(g) streambank and shoreline erosion management measure calls on states to “protect streambank and shoreline features with the potential to reduce [nonpoint source] pollution” and “protect streambanks and shorelines from erosion due to uses of either the shorelands or adjacent surface waters.”<sup>97</sup>

As noted in NOAA and EPA’s Proposed Decision Document from 2020, Washington’s Hydraulic Code (Chapter 77.55 RCW) regulates hydraulic projects to ensure that construction or performance of work is done in a manner that protects fish life. Through the HPA process, hydraulic projects are “only to be approved where the application can demonstrate the benefits or lack of adverse impacts to fish life” (WAC 220-110-080). Therefore, the potential effects of the proposed project must be evaluated, and the project must be planned and designed to minimize undesirable impacts on water quality, instream and riparian habitat, and streambank and shoreline features on which fish are dependent. The HPA brochure lists several key elements that WDFW staff look for when reviewing applications that are consistent with the 6217(g) management measures: preserving vegetation along streambanks to filter stormwater runoff, maintaining instream habitat complexity, and maintaining existing water quality during construction. As such, while the primary purpose of the Hydraulic Code is the protection of fish life, implementation reduces nonpoint source pollution in ways that closely align with the objectives of the hydromodification management measures.

**X.A.2 Comment:** One commenter disagreed with NOAA and EPA’s reliance on WDFW’s Riparian Habitat Guidance as a basis for the Proposed Decision that Washington has met the hydromodification

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<sup>95</sup> NOAA and EPA. 1998. *Findings for the Washington Coastal Nonpoint Program*. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/findwa.pdf>.

<sup>96</sup> EPA. 1993. *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*. January 1993. pgs. 6-8 and 6-19. Accessed 11/8/2023. <https://water.epa.gov/polwaste/nps/czara/index.cfm>.

<sup>97</sup> EPA. 1993. *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*. January 1993. pgs. 6-5. Accessed 11/8/2023. <https://water.epa.gov/polwaste/nps/czara/index.cfm>.

management measures. The commenter noted that Ecology has expressed that the guidance is not sufficient to meet water quality standards and that volume two of the guidance, which contains the BMPs, is still in draft form. The commenter expressed concerns with WDFW's site-specific approach to establishing riparian buffers, especially with regard to using 100 feet as the minimum width for riparian buffers, deeming that width inadequate for pollution removal. The commenter did not believe the guidance's assertions about the sufficiency of its recommendations for meeting water quality standards.

**Response:** Washington does not rely on WDFW's Riparian Habitat Guidance to meet the condition NOAA and EPA placed on its program to fully satisfy the hydromodification management measures. The guidance that Washington relies on to address its hydromodification condition are WDFW's 2003 *Integrated Streambank Protection Guidelines*, Ecology's Shoreline Master Program (SMP) Guidelines (WAC 173-26-231), and Ecology's SMP Handbook (pgs. 34–38 of the Proposed Decision). Additionally, as noted in the response to comment X.A.1, above, meeting water quality standards or having assurances that a specific guidance manual, such as WDFW's Riparian Habitat Guidance, will lead to attainment of water quality standards is not a requirement for finding that a state has satisfied all conditions of approvability on its coastal nonpoint program. See also the response to comment III.A.2.

**X.A.3 Comment:** One commenter objected to NOAA and EPA's statement on page 36 of the Proposed Decision that lists the TMDL program and implementation plans among additional "watershed-scale restoration plans" that the State uses to address the channelization and channel modification management measures. They are concerned that watershed restoration plans under the auspices of TMDLs are plans that do not identify or implement additional management measures.

**Response:** Washington's TMDL program and implementation plans, combined with other planning and restoration programs, help the State address the condition that was placed on its coastal nonpoint program pertaining to channelization. Specifically, TMDLs and TMDL implementation plans support the third element of the 6217(g) channelization and channel modification management measures—to identify and implement opportunities to improve physical and chemical characteristics of surface waters and instream and riparian habitat within channel modifications.<sup>98</sup> As explained more thoroughly in the response to comment III.A.1, TMDLs are informational tools that help guide implementation activities to address water quality issues; these include actions to address nonpoint source pollution from channelization activities.

The statement on page 36 of NOAA and EPA's Proposed Decision explains how TMDLs and TMDL implementation plans contributed to addressing the hydromodification condition. That condition had no requirement for identifying or implementing additional management measures. Additionally, see the responses to comments III.A.1 and V.B.2 for the role of Washington's TMDL program with regard to addressing the condition on Washington's program related to additional management measures.

## **B. Washington has not Coordinated its Strategy for Addressing Culverts that Block Fish Passage**

**X.B Comment:** Several commenters raised concerns that Washington does not have a strategy to inventory and correct culverts that pollute or create barriers owned by other jurisdictions or private parties, beyond the injunction in place governing correction of state-owned barrier culverts, that resulted from the tribes' 2018 lawsuit (*Wash v. U.S.*, 138 S. Ct. 1832). Commenters believed that the federal agencies should not grant approval of Washington's coastal nonpoint program conditionally for

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<sup>98</sup> EPA. 1993. *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*. January 1993. pgs. 6-8 and 6-19. Accessed 11/8/2023. <https://water.epa.gov/polwaste/nps/czara/index.cfm>.

two years while Ecology develops such a strategy that coordinates with CWA and ESA obligations consistent with Section XIII of the 1998 Findings document.

**Response:** There is not a CZARA 6217(g) management measure specific to culverts, and the purpose of CZARA is to address nonpoint pollution, not barriers to fish passage. However, Washington implements several management measures that address problems pertaining to culverts that can increase flow velocities and exacerbate pollution impacts; these may, in turn, also result in a reduction of barriers to fish passage. These are the management measures for operation and maintenance of roads, highways, and bridges; road, highway, and bridge runoff systems; and hydromodification channelization and channel modifications. The management measure for operation and maintenance of roads, highways, and bridges calls for states to “incorporate pollution prevention procedures into the operation and maintenance of roads, highways, and bridges to reduce pollutant loadings to surface waters.”<sup>99</sup> The measure for roads, highways, and bridges runoff systems calls on states “to develop and implement runoff management systems for existing roads, highways, and bridges to reduce runoff pollutant concentrations and volumes entering surface waters”<sup>100</sup> and the channelization management measures call on states to “develop an operation and maintenance program of existing modified channels”<sup>101</sup> that include identification and implementation of opportunities to improve surface waters and instream and riparian habitat in those channels. The State addresses this element of the channelization management measures through its SMP, salmon recovery plans, watershed plans, TMDL program, and Floodplains by Design program, whereas the State Transportation Improvement Program also supports improvements to road runoff systems.

With regard to the specific concern on the need to develop a strategy that coordinates with CWA and ESA obligations consistent with Section XIII of the 1998 Findings document, please see the federal agencies’ response to comment IV.B. Additionally, the State has begun to prioritize removal of barriers to fish passage. Per Washington’s most recent biennial report on the development of a statewide fish passage barrier removal strategy, “The Washington Department of Fish and Wildlife (WDFW), the Washington State Department of Transportation (WSDOT), and the Brian Abbott Fish Barrier Removal Board (FBRB) were tasked in 2020 ...[RCW 77.95.180]... to develop a comprehensive statewide strategy, focusing the efforts of all culvert correction programs into a single strategic approach to maximize the salmon and orca recovery benefits from the public investment. The comprehensive strategy is to guide the funding recommendations of the FBRB, as well as other state fish passage barrier correction programs.”<sup>102</sup> As discussed in an October 2023 progress report, work on this effort continues,<sup>103</sup>

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<sup>99</sup> EPA. 1993. *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*. January 1993. pg. 4-148. Accessed 11/8/2023. <https://water.epa.gov/polwaste/nps/czara/index.cfm>.

<sup>100</sup> EPA. 1993. *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*. January 1993. pg. 4-154. Accessed 11/8/2023. <https://water.epa.gov/polwaste/nps/czara/index.cfm>.

<sup>101</sup> EPA. 1993. *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*. January 1993. pgs. 6-8 and 6-19. Accessed 11/8/2023. <https://water.epa.gov/polwaste/nps/czara/index.cfm>.

<sup>102</sup> Washington Department of Fish and Wildlife, Washington State Department of Transportation, and Brian Abbott Fish Barrier Removal Board. 2021. *Biennial Report on the Development of a Statewide Fish Passage Barrier Removal Strategy*. June 30, 2021. Accessed 11/8/2023. [https://wdfw.wa.gov/sites/default/files/2021-08/fish\\_passage\\_biennial\\_report\\_wdfw\\_22\\_jul\\_21.pdf](https://wdfw.wa.gov/sites/default/files/2021-08/fish_passage_biennial_report_wdfw_22_jul_21.pdf).

<sup>103</sup> Washington Department of Fish and Wildlife, Washington State Department of Transportation, and Brian Abbott Fish Barrier Removal Board. 2023. *Progress Report on the Development of a Statewide Fish Passage Barrier Removal Strategy*. Accessed 10/29/23. <https://wdfw.wa.gov/sites/default/files/2023-10/progress-report-statewide-fp-strategy-oct26.pdf>.

The State offers regulatory assistance programs to help landowners address culverts. These programs include the Forest Stewardship program and financial assistance programs such as the FBRB and the Family Forest Fish Passage Program (FFFP). The State legislature established the FBRB grant program in 2014. Local agencies, tribes, nonprofit organizations, private landowners, regional fisheries enhancement organizations, special purpose districts, and state agencies are eligible to apply.

The FFFP program assists private forestland owners in removing culverts and other stream crossing structures that keep trout, salmon, and other fish from reaching upstream habitat. The program funds the replacement of eligible barriers with new structures. Since 2003, over 315 landowners have taken advantage of the program to remove more than 420 barriers and opened more than 1,099 miles of stream habitat statewide.<sup>104</sup>

### **C. Inadequate Processes for Controlling Impacts from Dams**

**X.C.1 Comment:** One commenter objected to NOAA and EPA using the TMDL program as a basis for how Washington satisfies the dam management measures. The commenter asserted that there is no evidence that load allocations to dams in TMDLs have identified actual measures nor that any measures to address nonpoint source pollution from dams have been implemented through the TMDL process.

**Response:** NOAA and EPA evaluated whether Washington has processes in place to implement the 6217(g) management measures, including those for dams. The TMDL program, in combination with other programs and authorities, provide the State with such processes. The TMDL program specifically helps the State to “manage the operation of dams in coastal areas that includes an assessment of: (1) surface water quality and instream and riparian habitat and potential for improvement and (2) significant nonpoint source pollution problems that result from excessive surface water withdrawals” as called for by the dam management measure for protection of surface water quality and instream and riparian habitat. As explained more thoroughly in the response to comment III.A.1, TMDLs are informational tools that help guide implementation activities to address water quality issues, including actions to address both point and nonpoint source pollution from existing dams. It is outside the scope of this action to evaluate the effectiveness of a particular TMDL or how quickly the State is implementing TMDL wasteload or load allocations to address nonpoint source pollution from dams. Regardless, the State has used the TMDL process in conjunction with its CWA section 401 certification authority to address nonpoint source pollution impacts from dams. Specifically, Ecology has used this authority to include permit conditions requiring eight dams along the lower Snake and Columbia rivers to meet temperature allocations established in the Columbia River Temperature TMDL. Please also see the *Pend Oreille River Temperature TMDL: Water Quality Improvement Report* as an example of how Ecology has used the TMDL process to address impacts from dams.

**X.C.2 Comment:** One commenter noted that NOAA and EPA’s Proposed Decision does not discuss how/if Washington has a program in place to mitigate the adverse effects of nonpoint source pollution from hydroelectric dams on steelhead and other salmonids, despite the NMFS’s 1996 report that found modification of natural flow regimes by dams has resulted in increased water temperatures, changes in fish community structure, and increased travel time by migrating adult and juvenile salmonids.

**Response:** The 6217(g) dam management measure for protection of surface water quality and instream and riparian habitat calls on states to assess: (1) the impacts of dam operation on surface water quality

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<sup>104</sup> Washington Department of Natural Resources. Undated. Family Forest Fish Passage Program (website). Accessed 11/8/2023. <https://www.dnr.wa.gov/fffpp>.

and instream and riparian habitat and the potential for improvement and (2) the significant nonpoint source pollution problems that result from excessive surface water withdrawals. Page 37 of NOAA and EPA's Proposed Decision discusses how Washington has programs and authorities in place, such as CWA section 401 certifications, Minimum Water Flows and Levels (Chapter 90.22 RCW), Water Resources Act (Chapter 90.54 RCW), Watershed Planning Act (Chapter 90.82 RCW), and the TMDL program to address these requirements. In addition, it is worth noting that a growing number of dams in Washington's coastal nonpoint management area have been decommissioned and removed since 1996, including several hydroelectric dams. These dam removals have been spurred by weighing the costs and benefits of maintaining these structures, including the environmental and tribal cultural benefits of removing dams and restoring salmon habitat. As a result of this comment, the federal agencies have revised language in the final Decision Document to reflect the recent trend to decommission and remove dams, including the Elwha Dam and the Glines Canyon Dam, the largest dam removal projects in the nation and both within Washington's coastal nonpoint management area, and three other dams from the State's management area in 2020.

## **XI. WETLANDS AND RIPARIAN AREAS**

### **A. Washington's Coastal Nonpoint Program Lacks Adequate Protection for Riparian Areas**

**XI.A.1 Comment:** Several commenters asserted that Ecology is unable to put together a program to adequately protect and restore riparian areas, which the commenters view as Washington's most critical nonpoint source issue. One commenter cited Ecology's statement from the agency's response to comments on the 2015 NPS Management Plan Update where it acknowledged that "Ecology working alone cannot overcome the resistance to establishing the riparian buffers necessary to achieve compliance with state temperature standards," as testament that Ecology has not satisfied the CZARA management measures for protecting and restoring riparian areas. Other commenters raised concerns about the specific programs that NOAA and EPA discuss in the Proposed Decision that Washington relies on to satisfy the riparian protection and restoration management measures. For example, a few commenters maintained that programs that only monitor water quality and habitat or provide funding to restoration projects are not enough to provide assurance of the healthy riparian areas that are needed to provide clean and cold waters for salmon. Another commented that during the 2019 Centennial Accord, Governor Inslee's acknowledgment of the validity of the site potential tree height buffer width standard contradicts the adequacy of Ecology's approach to riparian buffers. A few commenters stated that mandatory riparian buffers and protections are needed.

**Response:** CZARA does not require that a state demonstrate that applicable water quality standards are attained and designated uses are fully protected as a condition of federal approval (see the response to comment II.A.2). Rather, states need to have programs and processes in place, backed by enforceable authorities, to implement the 6217(g) management measures. Washington has demonstrated that it protects wetlands and riparian areas that significantly abate nonpoint source pollution and promotes the restoration of wetlands and riparian areas and the use of vegetative treatment systems, consistent with the 6217(g) guidance management measures.

Regarding the comment about "Ecology working alone," the State, not just Ecology, relies on a multitude of existing State authorities, programs, and agency efforts, such as the Shoreline Management Act, Water Pollution Control Act, Growth Management Act, the Puget Sound Partnership, WDFW, the Governor's Salmon Recovery Office, the Washington Recreation and Conservation Office, implementation of Washington's stormwater manual, and others, to address the wetlands and riparian areas 6217(g) management measures.



Washington also promotes wetland and riparian area protection and restoration through various planning and financial assistance programs. State financial assistance has provided significant resources for riparian restoration projects that implement the 6217(g) riparian management measures. For example, these funds supported the establishment of a 1,007-acre Natural Resources Conservation Area (NRCA) along the entire Kennedy Creek stream corridor.<sup>88</sup> The creek is one of the most productive chum salmon spawning streams in Washington, and the NRCA designation provides important riparian protection along the waterway.

NOAA and EPA agree with Ecology that working with partners is important for establishing riparian buffers. Depending on regulatory authorities, agency mandates, and land ownership boundaries, riparian buffers may be managed differently. Thus, Ecology works to coordinate regularly with a variety of partners, such as state, federal, local, tribal, and private landowners, to establish appropriate riparian buffers based on site conditions.

The fact that the State was exploring establishing a statewide standard method for incorporating tree height into setting forested riparian zones does not mean that the State's current practice for developing riparian buffers (which does consider tree height) is inadequate for meeting the 6217(g) management measure requirements. Also, see the response to comments VI.B and VII.B.1 for more information regarding the riparian protection and restoration management measures. See also the response to comment IV.D regarding programs not being adequate or providing enough assurances.

**XI.A.2 Comment:** One commenter quoted a statement Ecology made in its 2015 NPS Management Plan Update: "Ecology has no systematic way to track implementation and effectiveness of riparian restorations.... Our focus has been on animal waste issues because these are generally the most egregious pollution problems and are ones the public can readily see and understand." The commenter opined that Ecology's focus on animal waste issues in the 2015 NPS Management Plan Update highlights its failure to identify and implement riparian buffers and demonstrates that Washington's coastal nonpoint program is not approvable.

**Response:** NOAA and EPA disagree that a statement regarding Ecology's focus on animal waste issues means that the State has not adequately addressed the approval conditions related to riparian protection and restoration. The 1998 approval conditions called on the State to include management measures (consistent with the 6217(g) guidance) to protect wetlands and riparian areas and to *promote* the restoration of wetlands and riparian areas (emphasis added). In addition, the condition noted that the State is to develop a strategy to implement the wetlands and riparian area management measures throughout the coastal nonpoint program management area.

The 6217(g) management measure for restoration of wetlands and riparian areas and the related restoration condition that NOAA and EPA placed on Washington's program do not require the State to achieve on-the-ground riparian restoration or systematically track the effectiveness of on-the-ground restoration activities. NOAA and EPA find that Washington has satisfied the conditions regarding the protection of wetlands and riparian areas and the promotion of restoration of wetlands and riparian areas. Through the NPS Management Plan and Puget Sound Action Plan and other programs discussed in the Decision Document, the State has identified how it will promote the restoration of wetlands and riparian areas and track implementation.

Also, see the response to comment XIII.B.1.

## **B. Pace of Riparian Restoration is Too Slow**

**XI.B.1 Comment:** Several commenters raised concerns about the pace of riparian restoration in Washington and the State's reliance on voluntary-based approaches. They noted that the Proposed Decision does not discuss the speed or degree of success of programs to address the riparian restoration needs, given competing BMP needs. The commenters stressed extensive implementation of riparian protection and restoration projects is needed urgently, given the threatened and endangered status of the salmonids and the threat of climate change—especially given the time it takes for trees in reforested riparian buffers to grow. They stated that there is no evidence in the record that the speed with which Washington is conducting its voluntary riparian restoration efforts is adequate to protect listed species such as salmon.

**Response:** NOAA and EPA recognize that threatened and endangered species face a number of challenges, including climate change, and that riparian buffers are an important measure for protecting salmon habitat. The federal agencies' charge under CZARA is to determine if Washington has processes in place to implement the riparian management measures. As part of the federal agencies' review of whether these processes are in place, the federal agencies may look to examples of how the state has implemented the measures in practice but do not analyze the speed or pace of implementation. Nonetheless, the State has made important progress implementing riparian restoration projects. For example, State funds supported the establishment of a 1,007-acre NRCA along the entire Kennedy Creek stream corridor. The creek is one of the most productive chum salmon spawning streams in Washington, and the NRCA designation provides important riparian protection along the waterway. CZARA allows for voluntary-based approaches, backed by enforceable authorities, to implement the 6217(g) management measures (see also the response to comment IV.C.1). NOAA and EPA determine that the State has satisfied the conditions on its program related to riparian areas (see the response to comment XI.A.1).

With the recent influx in Bipartisan Infrastructure Law and Inflation Reduction Act funding, NOAA and EPA have a unique opportunity to continue to work with Washington, Tribes and other partners in the region to implement on-the-ground projects to protect and restore wetlands and riparian areas to protect water quality and salmon habitat. For example, NOAA announced over \$87.6 million in the first year of the Bipartisan Infrastructure Law funding, with additional funds leveraged from the Inflation Reduction Act, to support fish passage, habitat restoration and coastal resilience projects throughout Washington. Additionally, EPA has provided around \$3 million in CWA section 319 funding annually and will provide up to \$30 million in Puget Sound Climate Resilient Riparian Systems Lead funding over the next four years to protect and restore waterbodies.

**XI.B.2 Comment:** One commenter noted that before NOAA and EPA could approve Washington's coastal nonpoint program, Ecology needs to answer several specific questions as part of its NPS Management Plan Update:

- *"If 1,772 miles of salmon streams are temperature impaired in Washington's coastal waters as of 2014, how many acres of riparian habitat are needed when utilizing the science-based 1 Site Potential Tree Height riparian buffer width standard?"*
- *How many acres of riparian habitat are planted each year under Ecology's 2015 Plan, and the various voluntary incentives programs the State's CZARA program relies upon? How many acres are targeted at temperature-impaired salmon streams?*
- *What is the total acreage needing riparian habitat to be planted along just the 1,772 miles of currently known temperature-impaired salmon streams?*
- *At the current pace of planting riparian habitat through implementation measures, how many years (decades or generations), will it take to complete implementation of the basic CZARA*

*management measures and additional management measures so that water quality standards can ultimately be achieved?”*

**Response:** While the monitoring chapters (Chapter 7) of Ecology’s 2015 *Water Quality Management Program to Control Nonpoint Source Pollution* and 2022 update describe the State’s overall monitoring strategy for nonpoint source pollution, and the State relies on this same monitoring strategy for its coastal nonpoint monitoring program, CZARA does not require the NPS Management Plan or the CZARA monitoring plan to have any particular or specific tracking data or meet any particular milestones for implementing the management measure for wetland and riparian restoration or any other management measure. CZARA calls on states to have processes in place to implement management measures consistent with the 6217(g) guidance and processes to “assess over time the extent to which implementation of management measures is reducing pollution loads and improving water quality.” In addition, see the responses to comments XI.B.1 (regarding the pace of riparian restoration) and XIII.B.1 (regarding monitoring and implementation).

## **XII. CRITICAL COASTAL AREAS AND ADDITIONAL MANAGEMENT MEASURES**

*Readers should note that any comments directly related to Washington needing to develop additional management measures to address a specific nonpoint source (e.g., forestry) are found under the section for that topic. In addition, comments received regarding whether Washington had satisfied the condition on its coastal nonpoint program related to developing additional management measures for forestry are found in section VII of this document.*

### **A. Washington’s Process for Identifying Critical Coastal Areas and Additional Management Measures is Not Effective**

**XII.A.1 Comment:** One commenter disagreed with NOAA and EPA holding up the CMS as an example of a process that Washington has in place to identify and implement additional management measures. The commenter contended that the CMS “action plan” is for monitoring, not for implementing BMPs or management measures, and nothing in the CMS pertains to identifying and implementing additional management measures. Also, the commenter noted that the CMS that NOAA and EPA cite on page 47 of the Proposed Decision is 18 years old and that its action plan and implementation schedule applied only to the 2003–2005 and 2005–2007 biennia.

**Response:** The CMS focuses on monitoring salmon recovery regions and water resource inventory areas.<sup>105</sup> The effectiveness of various BMPs to control polluted runoff are routinely assessed as part of the CMS process. These assessments result in recommendations for how BMP implementation can be modified, which informs natural resource managers as they make management decisions to improve salmon recovery and water quality in the State. This process provides another mechanism for developing and revising additional management measures, as needed, to improve impaired coastal waters.

Although the CMS is over 20 years old (it was 18 years old when the commenter commented) and its action plan only directly applied to the 2003–2005 and 2005–2007 biennia, the foundational work that the CMS created is still influencing salmon habitat actions and policies today. Therefore, it is appropriate

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<sup>105</sup> Monitoring Oversight Committee. 2002. *The Washington Comprehensive Monitoring Strategy and Action Plan for Watershed Health and Salmon Recovery*. December 2002. Accessed 11/8/2023. <https://rco.wa.gov/wp-content/uploads/2019/07/MonitoringStrategy02.pdf>.

for NOAA and EPA to cite in the Decision Document. Looking back at the history of the CMS, a comprehensive Statewide Strategy to Recover Salmon was completed in 1999; the Salmon Recovery Funding Board was created in 1999; the CMS was published in 2002; and The Governor’s Forum on Monitoring Salmon Recovery and Watershed Health (Forum) was created, consistent with the CMS, in 2004. The purpose of the Forum was to provide a multi-agency venue for coordinating technical and policy issues and actions related to monitoring salmon recovery and watershed health; make recommendations on biennial reporting of monitoring results and progress in watershed health and salmon recovery; foster integrated analysis and reporting of monitoring information; and provide monitoring recommendations to the Salmon Recovery Funding Board, the Governor’s Salmon Recovery Office, and appropriate State agencies.

The CMS is still referenced as a foundational component of ongoing adaptive management work, as stated in Governor Inslee’s 2021 Salmon Strategy Update, “The 2021 [salmon recovery] strategy relies on a commitment to monitor progress and adaptively manage programs and agencies to achieve recovery. This requires a robust monitoring and adaptive management program that is aligned with the regional salmon recovery plans and tied to actions and activities of state agencies to ensure our progress. Basically, we [the Governor’s Salmon Recovery Office] will use science to inform our management decisions so that we know what’s really happening to salmon. The state operates under guidance provided by the Statewide CMS (2002); The Washington State Forum on Monitoring Salmon Recovery and Watershed Health (2011); and NOAA Northwest Region Research, Monitoring, and Evaluation Guidance for ESA Listed Species (2011). These documents form the foundation for statewide salmon recovery monitoring in Washington.”<sup>106</sup> NOAA and EPA have amended the Decision Document to more clearly describe how the CMS is still an integral component of today’s current monitoring and adaptive management program.

**XII.A.2 Comment:** One commenter claimed that the Puget Sound Partnership’s Action Agenda does not identify and implement additional management measures or BMPs to address nonpoint source pollution, in general or specifically, to meet water quality standards. Therefore, NOAA and EPA should not use it as a basis for finding that Washington has processes in place to identify and implement additional management measures. The commenter cited several Puget Sound Partnership documents, including the 2019 *State of the Sound: Call to Action*, that do not reference developing BMPs. The commenter noted that the only BMPs the Puget Sound Partnership Science Panel’s 2016–2018 Biennial Science Work Plan mentioned are for addressing stormwater, which the commenter noted is likely related to point sources of stormwater runoff rather than nonpoint sources. Furthermore, the commenter noted that the current Action Agenda demonstrates that indicators of water quality and species protection are getting worse, meaning that Washington has failed to protect critical areas.

**Response:** The Puget Sound Partnership’s Action Agenda is part of a suite of programs Washington uses to identify additional management measures and identify priority projects that implement management measures. The Action Agenda is an overarching shared strategy, developed through iterative collaborative efforts with input from a multitude of partners. It identifies and prioritizes both short- and long-term actions needed to protect and restore the Puget Sound. Many entities operating within Puget Sound use this shared strategy as a guide to direct funding and resources to implement prioritized activities, many of which implement important management measures. For example, “each year the

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<sup>106</sup> Office of the Governor. 2021. *Governor’s Salmon Strategy Update: Securing a future for people and salmon in Washington*. 2021. Accessed 11/8/2023. <https://rco.wa.gov/wp-content/uploads/2021/12/GSRO-GovSalmonStrategy-2021.pdf>.

Partnership provides the Governor, the Office of Financial Management, and the legislative fiscal committees with a ranked list of state agency budget proposals that would affect Puget Sound recovery. The ranking process objectively assesses the extent to which a funding proposal is consistent with the priorities of the Action Agenda. Through this process, the Partnership strongly advocates for funding proposals that are the most closely linked to Action Agenda priorities, Near Term Actions, Science Work Plan priorities, and relevant ongoing programs.”<sup>107</sup>

Also, in 2016, EPA developed a funding model that targets areas of high priority in Puget Sound around three Strategic Initiatives in the Action Agenda: Habitat, Shellfish, and Stormwater. The Strategic Initiatives are led by State agencies, which convene advisory groups of policy and technical experts to determine which projects are the best fit for sub-awards that most closely align with the Action Agenda and prioritize near-term recovery. These advisory groups develop implementation strategies and use adaptive management approaches. Sub-awards are then granted to local, tribal, state, county, nongovernmental organizations, and academic institutions to carry out a wide variety of management measure implementation projects, assessments, and monitoring.

Because the implementation plan portion of the Action Agenda is revised regularly, this revision process, by definition, allows for adjustments and the inclusion of additional management measures as warranted. As envisioned by the legislature, advice from the Science Panel would provide support to the Partnership to “revise the implementation strategies every two years using an adaptive management process.”<sup>108</sup> A specific example of this was in the Partnership’s 2016-2018 Science Work Plan as Science Work Action # SWA 2016-57, *Investigate Pesticides in Urban Streams During Rainstorms and Relations to Retail Sales of Pesticides in King County, in order to change behavior around pesticide use in the region*. The 2016–2018 Biennial Science Work Plan states that the “IEA- [integrated ecosystem assessment-] related motivation for this action is to monitor ecosystem conditions to support implementation and adaptation of stormwater management.”<sup>109</sup> This action was also identified as a near-term action (NTA 2016-0235) in the Partnership’s 2016 Action Agenda.<sup>110</sup> More recently, the Partnership’s 2020-2024 Science Work Plan specifically lists, in table format, science work actions related to best management practices and adaptive management, “Areas where scientific knowledge supports articulated policy issues, but where innovation is needed to address important or urgent issues.”<sup>111</sup>

**XII.A.3 Comment:** One commenter found fault with NOAA and EPA referencing the Governor’s Salmon Recovery Office’s salmon recovery efforts, including the 1999 Salmon Recovery Strategy,<sup>112</sup> the 2002

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<sup>107</sup> Puget Sound Partnership. 2018. *The 2018–2022 Action Agenda for Puget Sound, Chapter 6 – Funding Recovery*. December 2018. Accessed 11/8/2023. <https://pspwa.app.box.com/s/osxaeqg19fevXu5n3k8xnjytzkwo1512>. For an example of funded actions, see <https://www.psp.wa.gov/strategic-initiatives-leads.php>.

<sup>108</sup> RCW 90.71.310(4).

<sup>109</sup> Puget Sound Partnership. 2016. *2016–2018 Biennial Science Work Plan*. Accessed 11/8/2023. <https://pspwa.app.box.com/s/hy1hnhjdnmgr97nswosy0vsuypsngkv>.

<sup>110</sup> Puget Sound Partnership. 2016. *The 2016 Action Agenda for Puget Sound*. Accessed 11/8/2023. <https://pspwa.app.box.com/shared/static/h2ysd0bz8a1yxagtgdaiqr1czl0owz.pdf>.

<sup>111</sup> Puget Sound Partnership. 2020. *Priority Science to Support Puget Sound Recovery – A Science Work Plan For 2020-2024*. Accessed 01/11/2024. <https://pspwa.app.box.com/s/e81y0ap941ntik8o0me8o1lo6v12act1>

<sup>112</sup> Joint Natural Resources Cabinet. 1999. *Statewide Strategy to Recover Salmon: Extinction is Not an Option*. November 1999. Accessed 11/8/2023. <https://rco.wa.gov/wp-content/uploads/2019/07/GSRO-ExtinctionNotOption-1999.pdf>.

*Roadmap for Salmon Habitat Conservation at the Watershed Level* (roadmap),<sup>113</sup> and the specific Salmon Recovery Plans as examples of processes for identifying critical coastal areas and additional management measures. Specifically, the commenter noted that the 1999 Strategy stated that “a package of BMPs will be agreed upon for different land uses” and that “watershed assessment tools (such as TMDL studies) will be agreed to as the means to tailor those BMPs for specific watersheds.” However, the commenter believed that because the State has not achieved these actions after over 20 years (i.e., Ecology has not identified statewide BMPs for agriculture nor did the commenter believe it identified any BMPs within the TMDLs that address nonpoint source pollution needed for salmon recovery, including from logging and agriculture activities), the 1999 Salmon Recovery Strategy and subsequent updates are ineffectual in meeting the requirements of CZARA. The commenter further noted that the specific Salmon Recovery Plans are 15 years old and asserted that the roadmap, specific recovery plans, or subsequent reports or plans from the Governor’s Salmon Recovery Office do not identify additional management measures nor define a process for establishing them. For example, the commenter noted that plans, such as the plan for Puget Sound Chinook, only include general actions such as the need for “habitat protection.” The commenter further noted that although the 1999 Strategy placed a significant emphasis on identifying environmental outcomes based on meeting water quality standards and restoring other forms of salmon habitat, NOAA and EPA have not identified any location where necessary additional management measures have been identified to meet water quality standards that support salmon. Finally, the commenter raised concern about apparent circular logic within the roadmap because the roadmap calls on Washington to implement its coastal nonpoint program, but Washington’s coastal nonpoint program relies on the State to implement the roadmap.

**Response:** Washington does not rely on (and NOAAs and EPA’s Proposed Decision does not cite) the 1999 Salmon Recovery Strategy, 2002 roadmap, or the individual Salmon Recovery Plans to satisfy the condition that Washington has adequate processes in place for identifying additional management measures (pgs. 46–48 of the Proposed Decision). The specific condition on Washington’s coastal nonpoint program related to additional management measures required the State to include in its coastal nonpoint program a “process for developing and revising management measures to be applied in critical coastal areas and in areas where necessary to attain and maintain water quality standards.”

NOAA and EPA cite the Salmon Recovery Plans as an appropriate example of the State’s demonstration of a continuing process for identifying critical coastal areas, not identifying additional management measures. The 1998 approval condition required Washington to “include in its program a process for the identification of critical coastal areas adjacent to impaired and threatened coastal waters” (pg. 48 of the Proposed Decision). The State identifies the salmon recovery planning areas as critical coastal areas. The fact that the Salmon Recovery Plans are more than 15 years old does not diminish the fact that the recovery planning areas were identified through a continuing process for identification of “critical coastal areas.”

**XII.A.4 Comment:** One commenter raised concerns with Washington relying on the Growth Management Act and Shoreline Management Program as mechanisms for identifying additional management measures. The commenter noted that local SMPs do not satisfactorily identify additional management measures to address water quality concerns. The commenter cited Skagit County’s recent

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<sup>113</sup> Joint Natural Resources Cabinet. 2002. *Roadmap for Salmon Habitat Conservation at the Watershed Level*. Governor’s Salmon Recovery Office, Olympia, WA. February 2002. Accessed 11/8/2023. <https://rco.wa.gov/wp-content/uploads/2019/07/GSRO-RoadmapSalmonHabConWatershed-2002.pdf>.

draft SMP update as an example. The commenter asserted the SMP does not identify specific BMPs and cites other weaknesses in the plan that do not satisfactorily address water quality concerns.

**Response:** NOAA and EPA did not identify either the Growth Management Act or SMPs as examples of Washington processes for continuing revision of additional management measures but rather as continuing processes for identification of critical coastal areas (pgs. 42–44 and 46–48 of the Proposed Decision).

**XII.A.5 Comment:** One commenter asserted that NOAA and EPA need to evaluate whether the additional management measures that Washington identifies and implements will achieve the State’s anti-degradation policy to “ensure that all human activities that are likely to contribute to a lowering of water quality, at a minimum, apply all known, available, and reasonable methods of prevention, control, and treatment.”

**Response:** CZARA requires states to have processes in place to identify and implement additional management measures, when needed, to achieve and maintain applicable water quality standards (section 6217(b)(3)). Washington’s approved water quality standards include anti-degradation policies and implementation procedures that the State applies to evaluate activities that may impact water quality. It is unclear what anti-degradation analysis would be necessary for hypothetical future additional management measures, the purpose of which are to improve water quality to achieve applicable criteria and protect beneficial uses, but any such analysis would be conducted by the State consistent with its anti-degradation policies and procedures. See also the response to comment III.A.2.

**XII.A.6 Comment:** One commenter disagreed with NOAA and EPA’s description of the Pollution Identification and Correction (PIC) program as having any impact on “fixing nonpoint sources of pollution [including] ... nutrients.” The commenter cited several state publications about the PIC program that do not discuss the program’s role at addressing nutrients.

**Response:** PIC programs work to identify, correct, and resolve a variety of bacterial sources of pollution. PIC was originally designed to address fecal pollution sources. However, because of the PIC methods and its adaptive management methodology—linking identification of pollution sources through monitoring to technical assistance and corrective action—PIC can be used to address other nonpoint pollutant source types such as nutrients and sediment. Also, in situations where pollutants are co-located, a single corrective action may help to reduce multiple pollutants. For example, planting a riparian buffer to keep livestock and their associated waste from entering an adjacent waterway may reduce fecal bacteria, nutrients, and sediment from entering that waterway.

## **B. Washington Cannot Rely on TMDL Process to Identify Additional Management Measures**

**XII.B.1 Comment:** One commenter argued that NOAA and EPA are incorrect in finding that Washington’s TMDL program provides a process for the State to identify and implement additional management measures to achieve water quality standards and protect designated uses. The commenter cited the slow pace of TMDL development and noted that few TMDLs and implementation plans identify specific actions (management measures) to meet load allocations for nonpoint sources, especially with regard to temperature. The commenter specifically disputed NOAA and EPA’s statement on page 44 of the Proposed Decision that Washington’s TMDL program results in a “watershed restoration plan ... [that] includes actions to protect or restore these critical coastal areas.” The commenter asserted that no TMDL includes the identification of any additional management measures that correspond to meeting load allocations or water quality standards, and only the Deschutes TMDL includes anything resembling

an additional management measure. The commenter also noted that few TMDLs address temperature, a key pollutant of concern for salmonids, and the State has almost no nutrient TMDLs in Puget Sound waters although there is a need to address nutrient problems in the sound.

**Response:** Washington relies on several processes for identifying and implementing additional management measures when needed, such as through the Puget Sound Partnership, the CMS, and the Forestry Board’s adaptative management process; however, the State’s TMDL process is not one of the processes that NOAA and EPA cite as a basis for the proposed decision (pgs. 46–48 of the Proposed Decision). TMDLs are mentioned only briefly in this section as an example of how Washington’s effectiveness monitoring “enables the State to gauge how well projects are working to reduce pollution and evaluate whether the goals of a water quality improvement plan, such as a TMDL, have been achieved” (pg. 48 of Proposed Decision). See also the response to comment III.A.1.

The specific quote the commenter referenced on page 44 of the Proposed Decision comes from NOAA and EPA’s rationale explaining how Washington has satisfied the condition on its program related to critical coastal areas, not the condition related to additional management measures. The condition for critical coastal areas stated that Washington is to “include in its program a process for the identification of critical coastal areas adjacent to impaired and threatened coastal waters.” The full quote reads as follows: “As part of the water quality improvement planning process, the State typically evaluates the entire watershed that influences the impaired waterbody and can identify critical coastal areas that need to be targeted to protect or restore water quality. The watershed restoration plan developed under the TMDL program then includes actions to protect or restore these critical coastal areas.” The 1993 *Coastal Nonpoint Pollution Control Program Development and Approval Guidance* (CZARA Program Guidance) notes that states must, at a minimum, identify “coastal waters listed by a state in accordance with the requirements of section 303(d)(1)(a) of the CWA requiring Total Maximum Daily Load calculations if listing is due at least in part of nonpoint source pollution” as threatened or impaired waters.<sup>114</sup> It is within this context that Washington’s TMDL (and water quality assessment) process and associated implementation plans are discussed in the critical coastal areas section of the Proposed Decision Document. More information about the process Ecology uses to develop TMDLs can be found on their website.<sup>115</sup>

With regard to the commenter’s concern about Washington having few temperature and nutrient TMDLs, see the response to comment III.A.1.

**XII.B.2 Comment:** One commenter disagreed with NOAA and Ecology’s statement on page 4 of the Proposed Decision that Ecology has “placed a high priority on implementing BMP projects intended to reduce temperature and/or fecal coliform impairments....” The commenter claimed that if this statement were true, efforts to address temperature would be discussed throughout the Proposed Decision. They noted that the only discussion of temperature is in the additional management measures section of the Proposed Decision pertaining to logging practices (pg. 53 of the Proposed Decision) and

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<sup>114</sup> NOAA and EPA. 1993. *Coastal Nonpoint Pollution Control Program Development and Approval Guidance*. January 1993. pg. 23. Accessed 11/8/2023.

<https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217progguidance.pdf>.

<sup>115</sup> Washington Department of Ecology. Undated. Total Maximum Daily Load Process (website). Accessed 11/8/2023. <https://ecology.wa.gov/Water-Shorelines/Water-quality/Water-improvement/Total-Maximum-Daily-Load-process>



the agriculture section does not discuss temperature at all. The commenter cited this as evidence for their belief that Washington is not compliant with CZARA requirements.

**Response:** Please see the response to comment VI.A.3.

**XII.B.3 Comment:** One commenter stated that NOAA and EPA have not identified any locations where Washington needs to identify and implement additional management measures to address known water quality impairments despite the implementation of the 6217(g) management measures, including where the State needs to use its backup enforcement authority where voluntary approaches have not been effective to meet water quality standards and support salmon. The commenter asserted that because monitoring does not show that progress has been made to meet water quality standards or designated uses, additional management measures are needed, per the 1993 CZARA Program Guidance, before NOAA and EPA can approve Washington's coastal nonpoint program. Given that NOAA and EPA's CZARA Program Guidance recognizes that some additional management measures need "immediate implementation" (pg. 22),<sup>116</sup> the commenter noted that Washington needs to immediately identify and implement additional management measures to address nonpoint source pollution from temperature. The commenter stated that the temperature of Washington's streams poses an emergency situation for salmonids, particularly given existing and future climate change impacts, necessitating immediate action.

**Response:** Section 6217 of CZARA requires states to identify critical coastal areas in which new or substantially expanding land uses may cause or contribute to the impairment of coastal water quality. Please see the Proposed Decision beginning at page 41 for how Washington identifies critical coastal areas.

CZARA also calls on states to have processes in place to identify and implement additional management measures for land uses and critical coastal areas when needed to achieve and maintain applicable water quality standards and protect designated uses. This requirement is unrelated to the separate requirement to have backup enforcement authorities for voluntary measures (regarding backup enforcement authority, see the response to comment IV.D). The 1993 CZARA Program Guidance does recognize that it "may be necessary for a state to provide for the implementation of some additional management measures immediately and others only if implementation of the 6217(g) management measures<sup>117</sup> are shown to be insufficient to protect and restore water quality" (emphasis added). As described in the Proposed Decision, the State has fulfilled this requirement by establishing an adaptive management process for forestry, which includes current efforts to develop riparian buffer guidance to address temperature issues. NOAA and EPA also conditioned Washington's program to adopt additional management measures where water quality impairments or degradation of beneficial uses attributable to forestry exist despite implementation of the 6217(g) management measures. As explained in the Proposed Decision Document, Washington has also met this requirement.

Outside of the condition requiring additional management measures for forestry that NOAA and EPA placed on Washington's program in 1998, the federal agencies believe that requiring specific additional

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<sup>116</sup> NOAA and EPA. 1993. *Coastal Nonpoint Pollution Control Program Development and Approval Guidance*. January 1993. Accessed 11/8/2023.

<https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217progguidance.pdf>.

<sup>117</sup> NOAA and EPA. 1993. *Coastal Nonpoint Pollution Control Program Development and Approval Guidance*. January 1993. pg. 27. Accessed 11/8/2023.

<https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217progguidance.pdf>.

management measures to address other land uses or critical coastal areas are not needed. Further, additional management measures are developed and implemented for certain land uses or critical coastal areas, not specific pollutants or water quality effects like temperature. As described in the Decision Document, Washington relies on several processes, such as the Puget Sound Partnership, Growth Management Act, Shoreline Management Act, TMDL/water quality improvement program, and Salmon Recovery Planning for identifying and adjusting its critical coastal areas over time. NOAA and EPA continue to maintain that Washington has sufficient processes in place for identifying and implementing additional management measures when needed, such as the Puget Sound Partnership, TMDL process, and the CMS.

The drafters of CZARA recognized that it takes time to realize improvements in water quality, and it is challenging to establish cause and effect linkages between land uses and water quality. Therefore, the federal agencies do not expect a state to conclusively determine that implementing a specific management measure or additional management measure will or will not lead to the attainment of water quality standards (see also the response to comment III.A.2). Identifying and implementing additional management measures is an iterative process that occurs over time to achieve water quality standards.

### **C. Washington's Process for Identifying Critical Coastal Areas and Additional Management Measures Is Not Consistent with CZARA Requirements**

**XII.C.1 Comment:** One commenter argued that Washington's process for identifying critical coastal areas is not consistent with NOAA and EPA's CZARA Program Guidance. Specifically, the commenter raised a concern with NOAA and EPA's statement that Washington claims "all watersheds of the coastal nonpoint program area [are] potentially critical" (pg. 43 of the Proposed Decision) as that is not consistent with the intent of NOAA and EPA's Program Guidance for identifying critical coastal areas that represent a subset of the coastal nonpoint program management area. The commenter further asserted that Washington cannot "identify those land uses that individually or cumulatively cause or contribute to coastal water quality impairments" (CZARA Program Guidance),<sup>118</sup> because it has not identified threatened and impaired coastal waters based on current data and information (i.e., the State has not updated its 303(d) listings in nearly 10 years despite EPA regulations that say they are to be updated every two years). The commenter asserted that Washington has disregarded available technical information to help it identify land uses that consistently cause or contribute to violations of water quality standards in coastal watersheds and harm designated uses, such as the ESA-listed species and their habitat, despite the 1993 CZARA Program Guidance that "states should consider more specific land use characteristics to help determine whether current or future uses are likely to cause or contribute to water quality impairments" and consider "the biological and physical impacts of these land uses within the watershed adjacent to the impaired or threatened waterbody or segment," as well as "habitat and other biological impacts that may be caused by specific land uses."<sup>119</sup> The commenter listed ESA initial listing reports, five-year reviews, and critical habitat designations as examples of technical materials that Washington does not use to identify land uses that require additional management measures despite information in these technical resources that point to land uses that cause or contribute to violations of

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<sup>118</sup> NOAA and EPA. 1993. *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance*. January 1993. pg. 20. Accessed 11/8/2023.  
<https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217progguidance.pdf>.

<sup>119</sup> NOAA and EPA. 1993. *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance*. January 1993. pg. 20. Accessed 11/8/2023.  
<https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217progguidance.pdf>.

water quality standards, including failure to fully support designated uses. The commenter asserted that although EPA regulation requires a state's 303(d) list to be based on "all existing and readily available water quality-related data and information," Washington's lists are based on a very limited definition of data and information.

**Response:** Washington's process for identifying land uses and critical coastal areas is consistent with CZARA requirements. First, the commenter refers to the requirement under Section 6217(b)(1) to identify land uses individually or cumulatively causing or threatening coastal water quality impairments. The land uses must include those land categories identified in the [6217](g) guidance, and may include additional uses, such as landfills. Washington fulfilled this requirement in 1998 when it identified all land use categories in the [6217](g) guidance (such as OSDS, forestry, agriculture). Second, Section 6217(b)(2) calls on state coastal nonpoint programs to include "the identification of, and continuing process for identifying, critical coastal areas adjacent to coastal waters referred to in paragraph (1)(A) and (B)" (section 6217(b)(2)). Section 6217(b)(1)(A) refers to "coastal waters where land uses may cause or contribute significantly to the degradation of those coastal waters where there is a failure to attain or maintain applicable water quality standards or protect designated uses, *as determined by the State pursuant to its water quality planning processes*" (emphasis added). CZARA provides states with flexibility in establishing critical coastal areas. The 1993 CZARA Program Guidance explains that states must, at a minimum, identify as threatened or impaired waters "coastal waters listed by a state in accordance with the requirements of section 303(d)(1)(a) of the CWA requiring Total Maximum Daily Load calculations if listing is due at least in part to nonpoint source pollution."<sup>120</sup>

The fact that Washington considers all watersheds within the coastal nonpoint program area as "potentially critical" is acceptable and not inconsistent with CZARA requirements. The text of section 6217(b)(2) demonstrates that critical coastal areas are not fixed but can evolve over time through "continuing processes" for identifying critical coastal areas. Therefore, without knowing what the future may bring for any particular coastal watershed, the state may choose to consider its entire coastal nonpoint program area as "potentially critical."

The Puget Sound Partnership, Growth Management Act, Shoreline Management Act, TMDL/water quality improvement program, and Salmon Recovery Planning are included among Washington's continuing processes for identifying and adjusting its critical coastal areas over time. These processes allow the State to identify land uses that individually or cumulatively cause or contribute to coastal water quality impairments. For example, under the Growth Management Act, counties and cities are required to use the best available science in developing policies and development codes or ordinances to protect the functions and values of the critical areas they identify (RCW 36.70A.172). Through the TMDL process, Washington typically evaluates the entire watershed that influences an impaired waterbody and can identify critical coastal areas that need to be targeted to protect or restore water quality.

The CZARA Program Guidance does not prescribe what data and information states must consider when identifying land uses or critical coastal areas under 6217(b)(1) and (2). Rather, it recommends that "states *should* consider" various factors, as the commenter noted above, such as the biological and physical impacts of these land uses within the watershed (emphasis added). Although there are no

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<sup>120</sup> NOAA and EPA. 1993. *Coastal Nonpoint Pollution Control Program: Program Development and Approval Guidance*. January 1993. pg. 23. Accessed 11/8/2023.  
<https://coast.noaa.gov/data/czm/pollutioncontrol/media/6217proguidance.pdf>.

specific requirements for considering these factors, and specifically what data sources a state must use to evaluate these factors, NOAA and EPA find that Washington's processes for identifying critical coastal areas do consider biological and physical impacts, including habitat impacts caused by these land uses. Lastly, specific comments about the data and information that Washington uses to inform its CWA section 303(d) listings are outside the scope of this CZARA decision.

Finally, NOAA and EPA would like to note that since the commenter expressed concern that Washington had not updated its 303(d) list in over 10 years, Ecology submitted an updated list through 2018 to EPA in September 2021. On June 8, 2022, EPA acted to partially approve and partially disapprove Ecology's 303(d) list for 2014 to 2018, and, following public notice and comment, completed its action to revise the partial disapproval and transmitted the final list to Ecology on August 26, 2022.<sup>121</sup>

### **XIII. MONITORING AND TRACKING**

#### **A. Washington Needs Improved Water Quality Monitoring**

**XII.A Comment:** A couple of commenters stated that Ecology must specify a monitoring regime that can establish temperature baselines, account for water quality improvements from BMPs, and recommend additional measures in order to achieve compliance with water quality standards and protect designated uses.

**Response:** In implementing CZARA, neither the 6217(g) guidance nor the federal agencies' 1998 approval condition required a specific plan for monitoring a particular pollutant. The basic monitoring objective of section 6217 is to assess over time the success of the measures in reducing pollution loads and improving water quality. This includes collecting monitoring data on water quality standards for surface water, including temperature. As the 6217(g) guidance acknowledges, "...due to the prohibitive expense of monitoring the effectiveness of every management measure applied in the coastal zone, States will need to develop a strategy for using limited monitoring information to address broad questions regarding the effectiveness of section 6217 implementation."<sup>122</sup> NOAA and EPA find that Washington has satisfied its monitoring condition to "develop a plan that enables the State to assess over time the extent to which implementation of management measures is reducing pollution loads and improving water quality" (pg. 49-52 of the Decision Document).

#### **B. Washington Needs Improved BMP Tracking and Effectiveness Monitoring**

**XIII.B.1 Comment:** Several commenters asserted that Washington does not have effective tracking and evaluation programs in place for adequately evaluating the extent to which implementation of management measures and additional management measures are reducing pollutant loads to achieve water quality standards and protect designated uses, including when voluntary-based approaches are not sufficient. Therefore, the commenters believed that the State has not satisfied the monitoring condition that was placed on its coastal nonpoint program.

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<sup>121</sup> Letter from Dan Opalski, Director, Water Division, U.S. Environmental Protection Agency Region 10 to Vince McGowan, Water Quality Program Manager, Washington Department of Ecology dated August 26, 2022, re: Transmittal of Washington's 2014-2018 Section 303(d) List. Accessed 11/8/2023. <https://www.epa.gov/system/files/documents/2022-08/washington-2014-2018-303d-pa-pd-transmittal-letter-08262022.pdf>.

<sup>122</sup> EPA. 1993. *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters*. January 1993. pgs. 8-3 and 8-4. Accessed 01/14/2022. <https://water.epa.gov/polwaste/nps/czara/index.cfm>.

The commenters cited specific concerns about the adequacy of Washington's NPS Management Plan Update, 303(d) listings, TMDL program, and TMDL effectiveness studies, the CMS, and the Puget Sound Plan's Report Card. For example, one commenter asserted that Washington's NPS Management Plan Update is not an effective monitoring and tracking mechanism because there is nothing in the plan about the actions Washington has taken to address its CZARA monitoring condition or to track and evaluate implementation of other CZARA requirements.

Commenters noted that because the State does not have up-to-date 303(d) lists, the 303(d) lists cannot be part of NOAA and EPA's rationale for how the State has satisfied its monitoring condition. In addition, commenters believed that relying on the TMDL program to track voluntary implementation of the agriculture and roads, highways, and bridges management measures (citing pgs. 22 and 30, respectively, of the Proposed Decision Document) would not be effective given the slow pace of TMDL development and implementation. Commenters also expressed concern with the State's reliance on TMDL effectiveness monitoring studies to track and evaluate voluntary implementation of the management measures and assess the effectiveness of Washington's overall approach to addressing nonpoint source pollution (pgs. 22, 47, 51, and 52 of the Proposed Decision Document). Commenters asserted there is no evidence that TMDL effectiveness monitoring occurs or is used for adaptive management purposes.

One commenter also asserted the CMS program is not a useful monitoring and tracking program because it has done little to identify and implement additional management measures for forestry that are needed.

Finally, commenters noted that the Puget Sound Partnership report card largely tracks restoration and education projects. Therefore, the commenters believed that a report card is not a suitable monitoring mechanism for CZARA because it does not allow Washington to evaluate the extent to which implementation of the CZARA management measures and additional management measures are reducing pollutant loads and improving water quality.

**Response:** Washington has sufficient tracking and evaluation programs in place to satisfy the condition on its coastal nonpoint program related to monitoring. Specifically, the approval condition directs that the State's program "develop a plan that enables the State to assess over time the extent to which implementation of management measures is reducing pollution loads and improving water quality."<sup>123</sup> CZARA recognizes the inherent limitations of what could be expected of the monitoring programs that states develop as part of their coastal nonpoint programs. As explained in his floor statement on CZARA, Representative Studds acknowledged, "...with few exceptions, neither States nor EPA have the money or the time to create the complex monitoring programs that would be required to document a causal link between specific land use activities and specific water quality problems" (136 Cong. Rec. E3724-02 (1990)).

Chapter 7 of Ecology's 2015 NPS Management Plan and 2022 update describe the State's overall monitoring strategy for nonpoint source pollution, which the federal agencies determine meets the approval condition. Washington's monitoring plan relies on a combination of programs, whether that be the predicate monitoring (assessment of waters for impairment) for the State's TMDL program, the Puget Sound Partnership report card, or the CMS, or another program. These programs, as a whole enable the State to assess the effectiveness of implementing CZARA management measures. Therefore,

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<sup>123</sup> NOAA and EPA. 1998. *Findings for the Washington Coastal Nonpoint Program*. Accessed 11/8/2023. <https://coast.noaa.gov/data/czm/pollutioncontrol/media/findwa.pdf>.

NOAA and EPA considered the monitoring strategy presented in the NPS Management Plan as a whole and found that the combination of Washington’s ambient monitoring programs, BMP tracking, and effectiveness studies enables the State to assess, over time, the extent to which implementation of management measures is reducing pollution loads and improving water quality. (See also the responses to comments IV.C.2 and IV.E, which raised concerns about tracking and evaluation mechanisms.)

While some commenters expressed concern about the delay of certain reports issued by Washington’s monitoring program, for example the timing of the most recent CWA section 303(d) list (which has now been updated through 2018), and the pace of TMDL development and TMDL effectiveness monitoring, the federal agencies’ decision is focused on whether the State has monitoring processes in place that enable the State to assess the implementation of the management measures. The monitoring program overall continues to collect and analyze monitoring data to inform management measure implementation. As to the comment on the 303(d) list, Washington recently proposed a further update to its 303(d) list<sup>124</sup> and requested public comment. See also the response to comment XIII.B.1 about TMDL effectiveness monitoring.

Notwithstanding the commenter’s critique of the State’s implementation of the CMS, the CMS is nonetheless an active monitoring and tracking program that, when combined with Washington’s other monitoring and tracking efforts, allows the State to “assess over time the extent to which implementation of management measures is reducing pollution loads and improving water quality.” For example, as discussed in the Proposed Decision, the Reach-Effectiveness Monitoring progress report, carried out through the CMS, assessed the effectiveness of a variety of BMPs, including in-stream habitat creation, riparian planting, livestock exclusion, and habitat preservation, and presented recommendations for how BMP implementation could be modified based on the Proposed Decision Document.<sup>125</sup>

**XIII.B.2 Comment:** One commenter noted that Ecology’s most recent monitoring report on the Puget Sound, *Status of Puget Sound Tributaries 2009*, drew no conclusions whether the monitoring data showed whether stream health was improving, declining, or staying the same, nor did it evaluate the effectiveness of any BMPs at restoring water quality.

**Response:** NOAA and EPA’s Proposed Decision Document for Washington’s coastal nonpoint program does not cite this report. The relevancy to this CZARA action is unclear. States produce many reports related to water quality data and BMP implementation for a variety of purposes. Not every such publication needs to address the coastal nonpoint program’s monitoring goals.

**XIII.B.3 Comment:** One commenter raised concerns about Ecology’s Nonpoint Source and TMDL Tracking System that is under development. The commenter noted that the tracking system is still “upcoming” and that having a tracking system does not provide assurances that the Washington will use it to evaluate when management measures are inadequate to result in the attainment of water quality standards and when the regulatory backstop is needed. Therefore, the commenter believed that NOAA

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<sup>124</sup> Washington Department of Ecology. 2021. *Focus On: Draft Water Quality Assessment*. April 2021. Publication No. 21-10-015. Accessed 11/8/2023. <https://apps.ecology.wa.gov/publications/documents/2110015.pdf>.

<sup>125</sup> Washington Salmon Recovery Planning Board. 2018 *Reach-Scale Project Effectiveness Monitoring Program 2017 Annual Report*. Cramer Fish Sciences. February 2018. Accessed 11/8/2023. <https://rco.wa.gov/wp-content/uploads/2019/07/MonitoringReport17.pdf>.

and EPA should not rely on it as a basis for their rationale that Washington has satisfied BMP tracking requirements (pgs. 16 and 54 of the Proposed Decision).

**Response:** See the response to comment VI.D.1.

**XIII.B.4 Comment:** One commenter raised concern about NOAA and EPA’s inclusion of the Henderson Inlet fecal coliform TMDL study as an example of an effectiveness study to assess nonpoint source controls (pg. 53 of the Proposed Decision Document). The commenter asserted that the Henderson Inlet study focused on controlling point source pollution and land acquisition.

**Response:** The Henderson Inlet fecal coliform TMDL study<sup>126</sup> includes a variety of cleanup actions that address nonpoint sources, such as improved management of stormwater discharges; implementation of the Henderson Inlet On-site Septic System Operations and Maintenance Program; source investigation, including septic surveys and visual surveys of land use and management practices; technical assistance and, where possible, financial assistance to landowners; and informational workshops and other outreach aimed at encouraging landowners to improve land use practices and management of septic systems, all of which have relevance for nonpoint source effectiveness monitoring.

**XIII.B.5 Comment:** One commenter cited NOAA and EPA’s reliance on the Washington Salmon Recovery Funding Board’s monitoring efforts as evidence that Washington’s monitoring program is inadequate. The commenter stated that although that program was originally intended to evaluate riparian planting, along with other BMP categories, there is no indication that any monitoring has been done to assess riparian planting. The 2017 Annual Report for the Reach-Scale Project Effectiveness Monitoring Program does not report on riparian planting, nor is it listed as being underway. Therefore, the commenter concluded that NOAA and EPA cannot rely on this monitoring program for their finding that Washington has satisfied the monitoring condition on its coastal nonpoint program. The commenter argued that the federal agencies cannot approve Washington’s program until it has a program in place for monitoring riparian restoration projects to better understand the adequacy of the State’s management measures and additional management measures that are required by CZARA.

**Response:** The Washington Salmon Recovery Funding Board’s monitoring efforts are an acceptable component of the broader monitoring program for Washington’s coastal nonpoint program. Combined with the other elements of the State’s monitoring program, the State has a program in place to assess the extent to which implementation of management measures is reducing pollution loads and improving water quality, including tracking of riparian restoration. For more information on how the combination of Washington’s monitoring efforts address the condition on Washington’s program related to monitoring, see the response to comment XIII.B.1.

With regard to the Salmon Recovery Funding Board’s monitoring efforts, every two years the Board presents a *State of the Salmon Report* to the governor and legislature that assesses the overall progress of salmon recovery in Washington. The 2020 and more recent 2022 *State of the Salmon Report* includes a variety of metrics and indexes to assess salmon recovery, such as habitat quality, water quality, water quality temperature violations, and the number of habitat projects implemented, including the number

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<sup>126</sup> Washington Department of Ecology. 2017. *Henderson Inlet Fecal Coliform Total Maximum Daily Load: Water Quality Effectiveness Monitoring Report*. Publication Number 17-03-001. January 2017. Accessed 11/8/2023. <https://fortress.wa.gov/ecy/publications/documents/1703001.pdf>.

of riparian acres treated with BMPs.<sup>127</sup> The commenter was correct that the 2017 Annual Report did not report on riparian planting.<sup>128</sup> The updated Decision Document has been revised to explain that the 2017 report focused only on in-stream habitat measures (placement of rock or wood in the active channel), riparian livestock exclusion (livestock exclusion to protect riparian zone and reduce erosion), and floodplain enhancement—the three parameters that were actively monitored and sampled in 2017.

**XIII.B.6 Comment:** One commenter found fault with NOAA and EPA’s discussion of the Puget Sound Ecosystem Monitoring Program (PSEMP) as a suitable component of Washington’s monitoring efforts for CZARA. The commenter asserted that the program does not evaluate implementation of management measures or additional management measures to identify those that are sufficient to meet water quality standards and protect designated uses, and the most recent strategic plan for the program does not contain anything related to BMP tracking or monitoring (the 2018–2022 PSEMP strategic plan does not mention BMP tracking). The commenter also asserted that the Marine Water Quality Implementation Strategy, a component of the program, holds no promise for identifying or evaluating, through monitoring, any additional management measures to control nonpoint sources of pollution to meet water quality standards. The commenter noted that the strategy is not relevant to a CZARA determination because the strategy helps to set regional priorities for the 2022 Puget Sound Action Agenda, and the commenter believed the Action Agenda does not include management measures.

**Response:** NOAA and EPA disagree; the PSEMP is a suitable component of Washington’s multi-faceted CZARA monitoring efforts. Washington’s broader monitoring program is comprised of a variety of ambient monitoring, BMP tracking, and effectiveness monitoring components. Washington’s monitoring plan relies on a combination of programs that, as a whole, enable the State to assess the effectiveness of implementing CZARA management measures. No single component of the State’s monitoring strategy must assess how well the State’s implementation of the 6217(g) management measures reduce pollution loads and improve water quality. The aggregation of measures and methods from the component programs do so. For more information on how the combination of Washington’s monitoring efforts address the condition on Washington’s program related to monitoring, see the response to comment XIII.B.1.

The PSEMP is a collaboration of state, federal, tribal, and local government agencies; nongovernmental organizations; watershed groups; businesses; academic researchers; local integrating organizations; and other private and volunteer groups and organizations dedicated to monitoring environmental conditions in Puget Sound with the goal of assessing progress toward the recovery of the health of Puget Sound. As the 2018–2022 PSEMP strategic plan notes, “scientific evidence and syntheses vetted through PSEMP are used broadly to guide decisions and inform policies about Puget Sound recovery at local and regional scales.”<sup>129</sup> Although the strategic plan does not specifically focus on BMP effectiveness tracking, it does talk about “prioritiz[ing] activities that are most effective,” “assess[ing] effectiveness of projects and

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<sup>127</sup> Governor’s Salmon Recovery Office. 2020. *2020 State of Salmon in Watersheds Executive Summary*. December 2020. Accessed 11/8/2023. <https://stateofsalmon.wa.gov/wp-content/uploads/2020/12/StateofSalmonExecSummary2020.pdf>.

<sup>128</sup> Washington Salmon Recovery Planning Board. 2018. *Reach-Scale Project Effectiveness Monitoring Program 2017 Annual Report*. Cramer Fish Sciences. February 2018. Accessed 11/8/2023. <https://rco.wa.gov/wp-content/uploads/2019/07/MonitoringReport17.pdf>.

<sup>129</sup> The Puget Sound Partnership. 2018. *Puget Sound Ecosystem Monitoring Program Strategic Plan 2018–2022*. November 2018. Accessed 05/02/2022. <https://pspwa.app.box.com/s/hjfgnvf7v8qvf66pbejz9wby71uqsoi/file/318447530875>.



strategies,” and “assess[ing] the progress toward recovery.”<sup>130</sup> These activities, projects, and strategies include restoration or other implementation of BMPs. Therefore, the PSEMP adds value to Washington’s cumulative evaluation of CZARA implementation actions and understanding of when additional management measures may be needed.

Washington does not rely on the Marine Water Quality Implementation Strategy as a basis of the federal agencies’ finding that Washington has satisfied the monitoring condition on its coastal nonpoint program.

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<sup>130</sup> For an example of effectiveness projects, see <https://www.psp.wa.gov/evaluating-effective-action.php>. Accessed 11/8/2023.

#### XIV. LIST OF ACRONYMS AND ABBREVIATIONS

6217(g)	Section 6217(g) of the Coastal Zone Act Reauthorization Amendments
BMP	best management practice
CEQ	White House Council on Environmental Quality
CMS	Comprehensive Monitoring Strategy and Action Plan for Watershed Health and Salmon Recovery
CNCP	Coastal Nonpoint Pollution Control Program
CWA	Clean Water Act
CZARA	Coastal Zone Act Reauthorization Amendments
CZMA	Coastal Zone Management Act
DOH	Washington Department of Health
Ecology	Washington State Department of Ecology
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FBRB	Brian Abbott Fish Barrier Removal Board
FFFPP	Family Forest Fish Passage Program
FOTG	Field Operating Technical Guide
FR	Federal Register
HPA	Hydraulic Project Approval
mg/L	milligrams per liter
MRA	Marine Recovery Area
MS4	municipal separate storm sewer systems
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
NPDES	National Pollutant Discharge Elimination System
NRCA	Natural Resource Conservation Area
NRCS	Natural Resources Conservation Service
OSDS	on-site disposal systems
PIC	Pollution Identification and Correction
PRISM	Project Information System
PSEMP	Puget Sound Ecosystem Monitoring Program
RCW	Revised Code of Washington
SMP	Shoreline Master Program
STI	straight to implementation
SWMMWW	<i>Stormwater Management Manual for Western Washington</i>
TMDL	Total maximum daily load
USDA	U.S. Department of Agriculture
WAC	Washington Administrative Code
WDFW	Washington Department of Fish and Wildlife
WSDOT	Washington State Department of Transportation