The Confederated Tribes of the Colville Reservation
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January 18, 2012

Ted Sturdevant, Director
Washington Department of Ecology
PO Box 47600
Olympia, WA 98504-7600
RuleUpdate@ecy.wa.gov

RE: Comments on the November 2011 Draft Sediment Management Standards Rule.

Dear Sir:

The Confederated Tribes of the Colville Reservation (CTCR) represent over 9,000 citizens of the State residing within the boundaries of the Colville Reservation and over 4,500 tribal members living off-reservation. Our current reservation encompasses 1.4 million acres of land and the ceded lands in north central Washington where we retain affirmed hunting and fishing rights encompass another 1.5 million acres. Major regional rivers (the Columbia and Okanogan) essentially define our current reservation boundaries on three sides. Beneath the waters of the Colville Reservation lay several sites potentially affected by the SMS Rule, including the Upper Columbia River (Lake Roosevelt), the largest contaminated sediment site in Washington State.

The CTCR and the State of Washington, Department of Ecology have an impressive track record spanning over two decades of working collaboratively to compel Canadian industry to curtail discharges to the Upper Columbia River and investigate contamination in Lake Roosevelt. Washington State and CTCR are presently partners in legal action that seeks to hold Teck Cominco Ltd. responsible for contaminant sediments that have come to be located in the Upper Columbia River (Lake Roosevelt) site.

It is within this context of our shared intense and vested interest in state-wide freshwater sediment quality standards that CTCR provides the attached comments on the November 2011 Draft Sediment Management Standards (SMS) Rule WAC 173-204.

In that CTCR's attached comments primarily focus on just four particular aspects of the proposed SMS Rule, it is correct to infer that we support the substantive balance of the proposed rule. A key reason for our general concurrence with the proposed rule has been the active participation (at Ecology's invitation) of a CTCR representative on the SMS Advisory Group (SMSAG) since late 2009. In general, Ecology staff working on revisions to the SMS Rule have done a commendable job in identifying the key issues upon which they seek SMSAG input, providing SMSAG members with appropriate background materials, and enabling frank debate of outstanding technical and policy matters in an open forum.

However, from the first meeting and over the course of CTCR's subsequent involvement in the SMSAG it became agonizingly clear that the rule making process is handicapped to a much greater extent by the glaring absence of an east-side-of-the-Cascades perspective on predominantly metals sediment sites than it is by a paucity of Tribal representation. Nowhere in the proposed SMS rule is that gap in perspective any greater than in development and application of the freshwater benthic sediment quality values (WAC 173-204-573 Table VII), a critical cornerstone of the two-tiered framework for sediment cleanup inherent to the SMS Rule.

The technical basis for deriving the benthic SQVs in WAC 173-204-573 Table VII is explained in *Development of Benthic SQVs for Freshwater Sediments in Washington, Oregon, and Idaho* (Avocet, 2011). Section 1.2 of the referenced document lists numerous technical forums in which the Floating Percentile Method (FPM) was presented as the statistical foundation of the proposed SQVs. CTCR representatives attended several of the listed presentations where the methodology was described including a SMSAG meeting in June 2010 and an advanced sediment conference in April of 2011. However, it was the method not the numerical results of the method that were presented to attendees. In that every draft version of the proposed SMS Rule provided to the SMSAG from inception to November 2011 had a blank page at 173-204-573 for Table VII (Freshwater SQVs), SMSAG purview and comment on the real meat of the matter was culled from the process. It was not until preparatory materials for the final SMSAG meeting on December 9, 2011 that the numerical SQVs were first revealed to participants – an unacceptably short time frame for SMSAG members in which to troubleshoot FPM output.

Section 1.3 of the *Development of Benthic SQVs for Freshwater Sediments in Washington, Oregon, and Idaho* (Avocet, 2011) also emphasizes that Ecology solicited and received technical and policy comments on the FPM from the MTCA/SMS Science Panel and four national-level scientific peer reviewers in 2010. In what the CTCR interprets as a major omission of due process, none of the comments - some highly critical of the FPM process and skeptical of the resultant SQVs - were made available to the SMSAG members nor were SMSAG members even made aware that significant criticism of the FPM and the resultant SQVs existed. To date, Ecology has still not daylighted any comments critical of the FPM although favorable comments in support of the method were excerpted and provided to SMSAG members. Table VII SQVs were dropped on the SMSAG at the 11th hour of a two-year plus process with no disclosure by Ecology staff of any of the substantive criticisms that had been raised by experts regarding the derivation of Table VII or specific SQVs therein. To expect SMSAG members to offer meaningful input to Ecology on highly complex and technical issues on a very short fuse and without the benefit of the expert critiques that were available but withheld is disingenuous and opaque. In essence, the SMSAG was prevented from open and informed discussion of one of the most important aspects of the emergent SMS Rule.

The preceding discussion is foundational to CTCR's principal comments (see attachment) on the proposed SMS rule because the FPM generated obvious SQV outliers for key metals present at virtually every metals-affected site in eastern Washington, Oregon and Idaho. The specific SQV outliers are a dataset-sourced artifact of FPM that have carried through the SMS rule-making process as a consequence of the powerful but subtle east-of-the-mountains bias that permeates Ecology policy.

Specifically, Table VII SQVs for Cu, Pb, and Zn (and to a lesser extent, As) are problematic because:

- the numerical values conflict with the existing body of knowledge regarding benthic dose-response relationship to metals,
- are demonstrably underprotective of benthic organisms in metals-affected sediment sites,
- are biased at least an order of magnitude high by the predominance of data from a single site (Lake Roosevelt) that is uncharacteristic of any other metals-affected sediment site east of the Cascade Range, and
- are perilously inapplicable to any other metals sites east of the Cascade Mountains.

Ironically, Ecology's current position is that the SQVs for metals are inapplicable even at the metal-affected site that drove their numeration. If one were to accept that the SQS and CSL generated by the FPM are representative of statewide freshwater benthic toxicity as a function of sediment chemistry, then the inescapable conclusion is that benthic communities in Lake Roosevelt are composed of contaminant resistant superbugs. Obviously, that is not the case. It is not the presence of superbugs in Lake Roosevelt but the influence of slag on the bioavailability of Cu, Pb, and Zn in sediment that creates the outliers for Cu, Pb, and Zn in the FPM-derived SQS and CSL. Ecology's proposed "Biological Over-ride" of SQVs at metals-affected sites east of the mountains is a convenient but inadequate substitute for going back to the drawing board and getting it right with regards to these key contaminants.

The CTCR recommends a simple solution: **Replace the FPM-derived SQVs (SQS and CSL) for Cu, Pb, and Zn in WAC 173-204-573 Table VII with more appropriate values derived by way of the Apparent Effects Threshold (AET) methodology (TEC and PEC) of MacDonald et al (2000).** There is ample precedent for doing so in both a regulatory and technical context. In fact, the Colville Confederated Tribes and the Spokane Tribe of Indians have independently promulgated sediment cleanup values based upon the AET methodology of MacDonald. CTCR strongly recommends that our proposal to replace specific SQVs with AET-derived values be implemented before the incipient SMS Rule is released to the public for review and comment.

Sincerely,

Gary W. Passmore, Director
Office of Environmental Trust
Confederated Tribes of the Colville Reservation

Attachments: Washington State Department of Ecology Sediment Management Standards Rule Review and Comment Form

Washington State Department of Ecology

Sediment Management Standards Rule

Review/Comment Form

Reviewer Name: Confederated Tribes of the Colville Reservation

Sections of Document Reviewed: SMS Rule Chapter 173-204 WAC

Document Version/Date: November 2011

1) WAC 173-204-573 Freshwater Sediment Quality Values (SQV); Cleanup screening levels (CSL) and sediment quality standards (SQS) based on benthic community toxicity in freshwater sediment.

The SQS and CSL chemical criteria for Cu, Pb, and Zn (and to a lesser extent, As) derived using the Floating Percentile Method (FPM) are demonstrably high compared to similar chemical criteria derived using other established methods that utilize Apparent Effects Thresholds (AETs) to predict toxicity (See Figure 1). Figure 1 also demonstrates that SQS and CSL chemical criteria for other metals (As, Cd, Cr, Hg, Ni) derived using FPM do <u>not</u> differ significantly from chemical criteria based upon AETs such as Threshold Effects Concentrations (TECs) and Probable Effects Concentrations (PECs). Both the Colville Confederated Tribes (CCT) and the Spokane Tribe of Indians (STI) have adopted SQVs based on AETs from MacDonald et al (2000). Comparison of the CCT and STI sediment quality values with the SQVs proposed by Ecology show reasonable agreement for all metals listed except Cu, Pb, and Zn (and to a lesser extent, As). The degree of difference between Ecology-proposed SQVs and SQVs adopted by CCT and STI is significant. For example, the Ecology SQV SQS for each of Cu, Pb, and Zn are at least one full order of magnitude greater than the TEC for each of those same metals as adopted in the Colville Tribes sediment cleanup standards. For Zn, the difference between the Ecology SQV SQS is 26 times greater than the TEC for Zn adopted by the Colville Tribes. This disparity is symptomatic of a contaminant-specific disconnect between FPM generated SQVs and the established body of science that associates concentration of metals in sediment with benthic toxicity.

The same metal-specific disconnect between the proposed FPM-derived freshwater SQVs in predicting toxicity in Lake Roosevelt sediments compared to AET-derived SQVs is apparent in Figure 2, which plots the number of false negatives generated by applying the Ecology-proposed SQVs to metals in Lake Roosevelt sediment stations identified by bioassay as being toxic (MESL, 2011). Figure 2 also plots the number of false negatives generated by applying TEC and PEC values to the same Lake Roosevelt dataset. The graphic clearly demonstrates that SQVs generated by both FPM and AET methods appear to demonstrate similar predictability to generate false negatives for the majority of metals included in the statistical analysis: As, Cd, Cr, Hg and Zn. In significant contrast, the FPM generates SQVs with significantly lower reliability/predictability of toxicity from Cu, Pb, and Zn in Lake Roosevelt than SQVs generated by the AET method.

The reason for the difference in predictability between FPM and AET applied to Lake Roosevelt may not be so much a function of either method's inherent superiority but an artifact of the skewed dataset input to the FPM blackbox. Organic contaminants are the predominant drivers of toxicity at the vast majority of sediment sites in Washington (Oregon and Idaho) that constitutes the final database used to drive the FPM. In contrast, metals are the predominant drivers of toxicity at a comparatively small number of sites, all of which are located east of the Cascades. As is recognized by the authors of the *Development of Benthic SQVs for Freshwater Sediments in Washington, Oregon, and Idaho* (Dept. of Ecology 2011), only ~ 10% of the stations (65 out of 648) represented in FPM final dataset used to derive SQS and CSL values for metals influenced freshwater sediments come from sites located east of the Cascades. Of the 65 stations from sites east of the Cascades that met study criteria for inclusion in the final FPM dataset, ~75% (50 out of 65) are from a single site - Lake Roosevelt. When processed through the FPM a relatively small subset of data can effect a relatively large bias if the subset of data is diverse, i.e. the site-specific data demonstrates a poor relationship between sediment chemistry and benthic toxicity.

Such is the situation regarding Cu, Pb, and Zn (and to a lesser extent, As) in Lake Roosevelt as a subset of the total dataset considered in the FPM. Although toxicity is evident in Lake Roosevelt sediments as shown in Figure 3, identification of a consistent dose-response relationship has not been established. As concluded in the *Evaluation and Interpretation of the Sediment Chemistry and Sediment Toxicity Data for the Upper Columbia River Site* (MESL, 2011), slag content is an important determinant of sediment toxicity for slag affected sediment samples in Lake Roosevelt sediment. The MESL report also concludes that slag-influenced data from Lake Roosevelt site does <u>not</u> provide a consistently accurate basis to predict the presence and absence of toxicity. Furthermore, the MESL report concludes that sediment chemistry and toxicity data from Lake Roosevelt does <u>not</u> support the development of robust concentration-response relationships applicable throughout the Upper Columbia River region. Much more work is necessary to better understand slag's effect on benthic toxicity but the existing body of science makes exceedingly clear that slag's influence produces significant variability compared to the same COCs in non-slag bearing sediment, such as sediment data reported from the Spokane River (the only other "metals site" in eastern Washington, Oregon or Idaho input to the FPM) .

Lake Roosevelt is the only slag dominated sediment site in eastern Washington (Oregon or Idaho). Because the number of Lake Roosevelt stations compared to stations at other metals influenced sites located east of the Cascades is so disparate, the Lake Roosevelt dataset is a profound determinant on statistics generated from the combined dataset from east of the Cascade sites. However, Lake Roosevelt is far from a typical metals site from which to determine SQVs based on associations between sediment chemistry and benthic toxicity. Slag is present in depositional environments throughout Lake Roosevelt at concentrations ranging from non-detect to ~90%. Slag grain size demonstrates extreme variability as well, ranging from clay size to coarse sand size fragments. The major COCs in Teck Cominco smelter slag are Cu, Pb, and Zn (and to a lesser extent, As). The statistical association between Cu, Pb, and Zn chemistry and benthic toxicity that is well established in AET metrics of TEC and PEC in other freshwater environments is confounded in Lake Roosevelt due to the influence of slag. While multiple studies (Cox, 2002; Paulson, 2006; Ryan, 2011; MESL, 2011) observe that metals in Lake Roosevelt slag grains leach to

pore water, data suggests that the bioavailability of Cu, Pb, and Zn from slag can vary widely from bioavailability of those same metals in more typical fine grained sediment.

In recognition that proposed SQVs for metals derived using the FPM are problematic and demonstrate a systematic bias as a function of the final dataset, in Section 173-204-573 (2)(l) of the SMS rule, the department states there are freshwater sediment environments where the chemical criteria in Table VII (the SQVs) are not predictive of benthic toxicity, such as metals, milling or smelting sites. Ironically, it is the Lake Roosevelt site and the "unique" geochemical conditions therein which are largely responsible for Ecology's position that the unreasonably high SQVs for Cu, Pb, and Zn are not applicable to metals influenced sites east of the Cascades. In these situations, the department proposes that alternative methods be employed for characterizing benthic toxicity (referenced in the SMS rule as a "biological over-ride"). Rather than using the results of individual toxicity tests to counter SQVs, that are shown to be problematic at mining-related sites (such as SQVs for Cu, Pb, and Zn), sediment contamination should be assessed using a "weight of evidence" approach that considers empirical SQVs, sediment toxicity tests, and other factors exerting potentially significant effects on toxicity such as grain size and slag content .

Section 173-204-573 (2)(k) states that at sediment sites that demonstrate levels above the CSL (such as mining, milling or smelting sites) , bioassays shall be conducted to evaluate benthic toxicity. This position is particularly egregious with regards to Pb and Zn, metals at which the FPM-predicted minor adverse effects level are unknown but above the CSL. Applying the synthetically elevated SQVs for Cu, Pb, and Zn as screening values to determine which sites warrant bioassays to determine cleanup screening levels is critically flawed because the FPM SQVs are biased high by the influence of slag unique to Lake Roosevelt. Many (most?) sites east of the Cascades with no slag influenced sediments may not meet screening criteria for additional investigation by way of bioassays because concentrations of Cu, Pb, or Zn are low compared to the ultra-liberal SQVs so heavily influenced by slag dominated sediments from Lake Roosevelt. Using the synthetically elevated SQVs for Cu, Pb, and Zn as defacto default values are neither protective of benthic organisms nor is the regulatory philosophy inherent in using them in that manner consistent with a conservative approach to managing the risk to human health and the environment at contaminated sediment sites.

<u>The solution: replace the SQS and CSL for Cu, Pb, and Zn in Table VII of Section 173-204-573 with TEC and PEC values respectively, from MacDonald et al (2000).</u>

2) WAC 173-204-571, Sediment cleanup standards based on human health risks derived through application of Fish Consumption Rates to exposure scenarios.

Section 173-204-571(4) Human health risk assessment methods and policies states, ***"For sites located within a tribal usual and accustomed fishing area, the reasonable maximum exposure scenario shall be based on tribal fish consumption rates. The department has developed a statewide default fish consumption rate of XXX g/day."*** The CCT comments herein focus on the linkage between the proposed SMS Rule language and the fish consumption rates in development. The CCT is providing separate

comments on the development of the default fish consumption rate as described in the Fish Consumption Rates Technical Support Document (Ecology, 2011).

The definition of a "tribal usual and accustomed fishing area" is not provided in the proposed SMS Rule. The glossary in the Draft Fish Consumption Rates Technical Support Document defines U&A areas only in reference to the 1854 and 1855 negotiated treaties between Pacific Northwest Native Americans and Washington State. Many Tribes in Washington State were not party to the 1854 or 1855 Treaties negotiated by Governor Stevens, rather they were recognized by the Federal government by way of Congressional statute or Presidential Executive Order. Furthermore, for the purpose of implementing the default fish consumption rate, U&A and non U&A areas have not been formally delineated in Washington state, nor is a basis for doing so in the near future proposed in either the proposed SMS Rule or the FCR Technical Support Document.

On behalf of Ecology, Craig McCormack provided Don Hurst of CTCR with the following e-mail response to this concern on November 17, 2011: ***"The definition of tribal usual and accustomed fishing areas used in the glossary of the fish consumption rate document was adapted from a variety of sources of information. Since the information I used reflects the language of the 1854 and 1855 negotiated treaties between the tribes and Washington State the definition in the glossary similarly reflects that language. This definition is NOT intended to be exclusionary and should be clarified to include those tribes that are federally recognized by Congressional statute or Presidential Executive Order. Ecology's practice has been to work with tribes in the area where we are conducting a sediment cleanup to determine the U and A's. Ecology has no intention of subdividing Washington State into tribal U&A and non-U&A areas. Also, Ecology does not believe that there is any basis to fragment the Pacific Northwest or more specifically Washington State into tribal U & A and non-U & A areas. To the contrary, based on available information (WSDOT Model Comprehensive Tribal Consultation Process for the National Environmental Policy Act and U & A Summary from the Attorney General's Office) tribal U & A areas and treaty reserved rights may be associated with all watersheds throughout Washington State. Indeed, if one were to use a GIS map and U & A areas obtained from the information from the Attorney General's Office in combination with tribal consultations, it appears that there are no watersheds in WA State that do not have some sort of treaty reserved right or other tribal reserved right to harvest and fish throughout WA State. The fish consumption rate range and selection of a fish consumption rate default from that range is to reflect all fish consuming populations in WA State regardless of where these fish consumers reside in WA State."***

The CTCR accepts Mr. McCormack's response as reasonable and appropriate. However, we strongly recommend that the relevant aspects of Mr. McCormack's informal response will be memorialized in either the SMS Rule, the final version of the Fish Consumption Rate Technical support document, or both to avoid confusion and potential legal challenge.

Also in Section 173-204-571(4) Human health risk assessment methods and policies states, ***"The department may approve a site-specific fish consumption rate."*** Given that the fish consumption rate under development by the department is to be a statewide default rate and in conjunction with Mr. McCormack's response on behalf of Ecology that the AG's office indicates "***…there are no watersheds in***

WA state that do not have some sort of treaty reserved right or other tribal reserved right to harvest and fish throughout WA State.", any site-specific revision to the state-wide default FCR must be towards a higher (more protective) rate of consumption, not a lower rate. Such is the case under MTCA, in which exposure parameters, specifically the default fish consumption rate, cannot be revised downward. MTCA has a defined process that allows changing selected exposure parameters only when those changes provide a higher level of protection. WAC 173-340-708 (b) states: "***The default values for these exposure parameters shall not be changed when calculating cleanup levels except when necessary to establish a more stringent cleanup level to protect human health***." While not strictly applicable to the SMS Rule, the basis for a single-sided default rate that can be adjusted on a site-specific basis to be more but not less protective of human health is rooted in solid risk management principles and represents good public policy that CCT recommends will be incorporated into Section 173-204-571 of the SMS Rule.

3) WAC 173-204-200 Definition of "Biologically Active Zone", and WAC 173-204-560 Remedial investigation and feasibility study

The proposed SMS Rule utilizes the concept of a "Biologically active zone" to determine the vertical extent of investigation necessary in a SMS Rule-compliant Remedial Investigation and Feasibility Study performed for the purpose of developing cleanup action alternatives. In essence, the "Biologically active zone" defines the vertical component of cleanup in the two-tiered framework utilized in the proposed SMS Rule. In 173-204-200 ***"Biologically active zone" means the area within the sediment in which a majority of benthic invertebrates are generally found. By default this is the uppermost 10 centimeters in marine sediment. Where the department determines the default criteria are not applicable, a site-specific biologically active zone shall be determined. Information such as the vertical distribution of benthic macroinvertebrates can be gathered to delimit the site specific biologically active zone."***

Defining the sediment depth in which a **"majority of benthic invertebrates are generally found"** is vague and subject to self-serving interpretation by parties responsible for providing the Remedial Investigation and Feasibility Study and subsequent cleanup. The buttress to ambiguity in the definition of biologically active zone is use of a minimum default value. However, 10 centimeters is unacceptably shallow as a default value to delimit a biologically active zone because it significantly underrepresents the burrowing depth typically associated with important marker species in marine and freshwater environments such as geoducks and mussels. CTCR recommends 40 centimeters (Ingersoll, Personal Communication, 2011) as a more appropriate default value. In situations where the department determines default criteria are not applicable, determining the vertical distribution of benthic invertebrates in site sediment may not be a reliable indicator of the a biologically active zone if benthic organisms do not thrive, or are avoiding the sediment due to the presence of contamination.

4) WAC 173-204-200 Definition of "Regional Background", and WAC 173-204-571 Sediment cleanup standards based on human health risks.

Under certain circumstances, the contaminant-specific values established for "Regional Background" will define the maximum allowable level for cleanup under the two-tiered framework utilized in the

proposed SMS Rule. ***"That portion of an embayment or watershed outside the areas with contamination attributable to one or more specific sources"*** are cited in the proposed SMS rule as examples of a geographic area appropriate to determine Regional Background. It is essential that the proper relative scale be employed when considering Regional Background. The context of "watershed" implies freshwater by convention whereas regional background in a context delineated by the boundaries of an "embayment" or "baywide" implies a saltwater hydrologic context. While clarification of both saltwater and freshwater terminology is warranted, the need to define freshwater watershed on a regional scale is most pressing and has the greatest potential for misapplication. In the context of the proposed SMS rule, "watershed" is synonymous with a hydrologic drainage basin of regional scale. Watersheds in the United States have been delineated by the U.S. Geologic Survey (USGS) using a national standard hierarchical system based on surface hydrologic features into four levels of successively smaller drainage basins (hydrologic units). Each hydrologic unit is identified by a unique hydrologic unit code (HUC) consisting of two to twelve digits based on the six levels of classification. All drainages within Washington State are wholly encompassed within the (first level) Pacific Northwest Water Resource Region (2-digit HUC = 17). For purposes of applying SMS regional background within Washington State, the second level (4-digit HUC) or sub-region classification is most appropriate. Please see comments submitted from CTCR to Ecology dated 1/4/2011 and 4/18/2011 for further discussion of Regional Background and its application within the SMS Rule.

Defining contaminant-specific sediment values representative of Regional Background is a responsibility more appropriately borne by Ecology rather than Responsible Parties at a given sediment site. Ecology-derived values for Regional Background should be based on the best regional sediment data sets available at the time of the determination as well as provide for incorporation into the regional calculation of more and better data sets that may be collected in the future. As an underlying principle of determining regional background, Ecology should develop and apply minimum threshold tests for sediment data extent and quality within an ecologically conservative context to be consistent with policy that provides for a cleanup process that tends to being more rather than less protective. SMS Rule guidance should also have provisions for Responsible Parties to propose alternative contaminant-specific values or geographic scale for consideration by the department.

CTCR recommends that Ecology consider samples obtained during the National Uranium Resource Evaluation (NURE) program during 1976-1979 as a reasonable starting point for determining regional background for Upper Columbia Region of Washington. Since the original study, USGS and independent researchers (Church, 2007) have applied improved analytical methods to archived subsets of NURE samples that have significantly improved the focus and watershed level applicability of the NURE data set. Assessment of geochemical background from NURE sediment data will provide a strong basis for determining regional background at metals contaminated sediment sites in the Upper Columbia River watershed of northeast Washington.

Figure 1. Comparison of Washington Department of Ecology Recommended Benthic SQVs (SQS, CSL) with Consensus-Based SQVs (TEC, PEC) for Freshwater Ecosystems

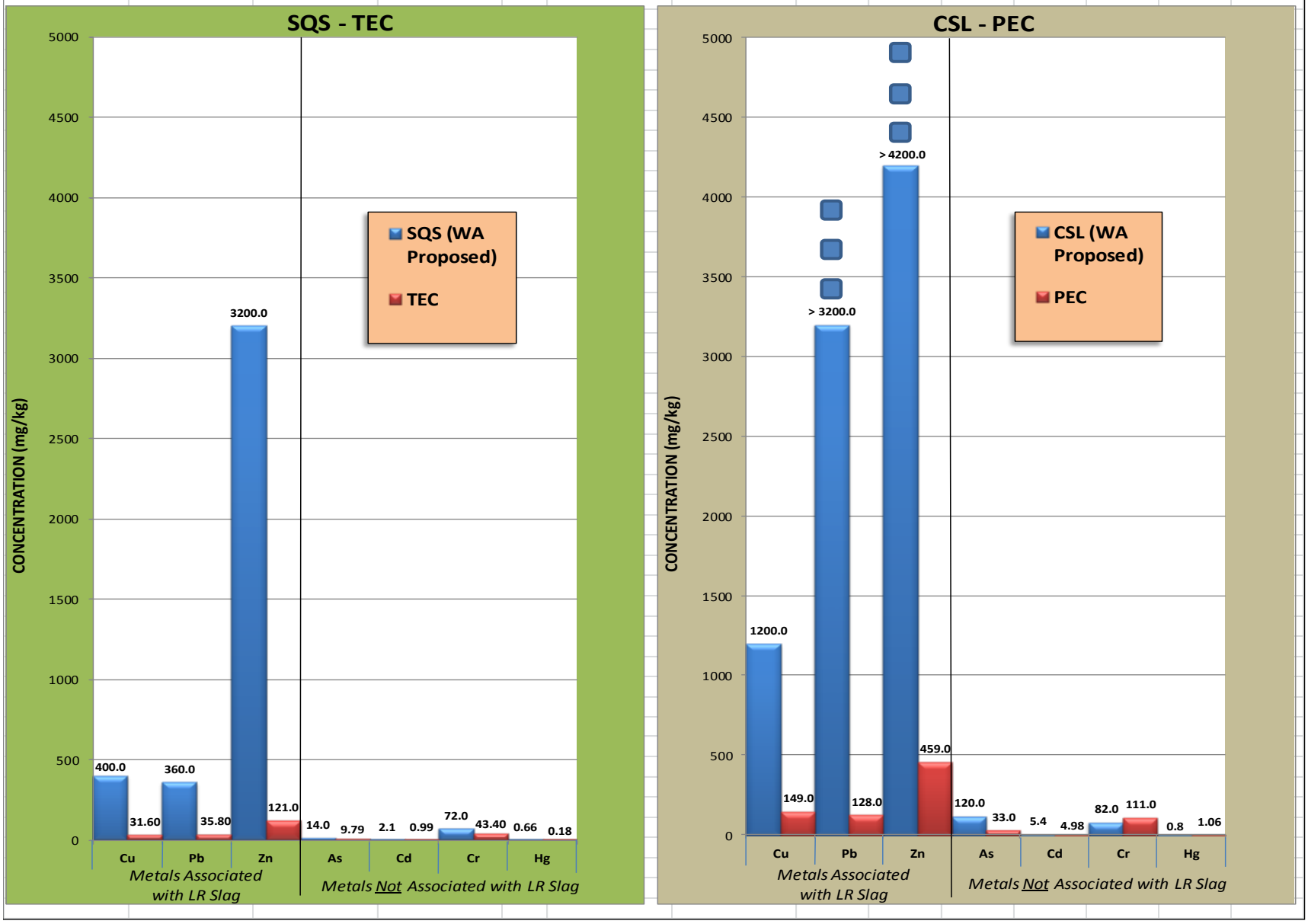


Figure 2. Comparison of False Negative Frequencies Applying Floating Percentile Method SQVs (SQS & CSL) and Apparent Effects Threshold (TEL & PEC) SQVs to Lake Roosevelt Stations Identified as Toxic in MESL (2011) Report

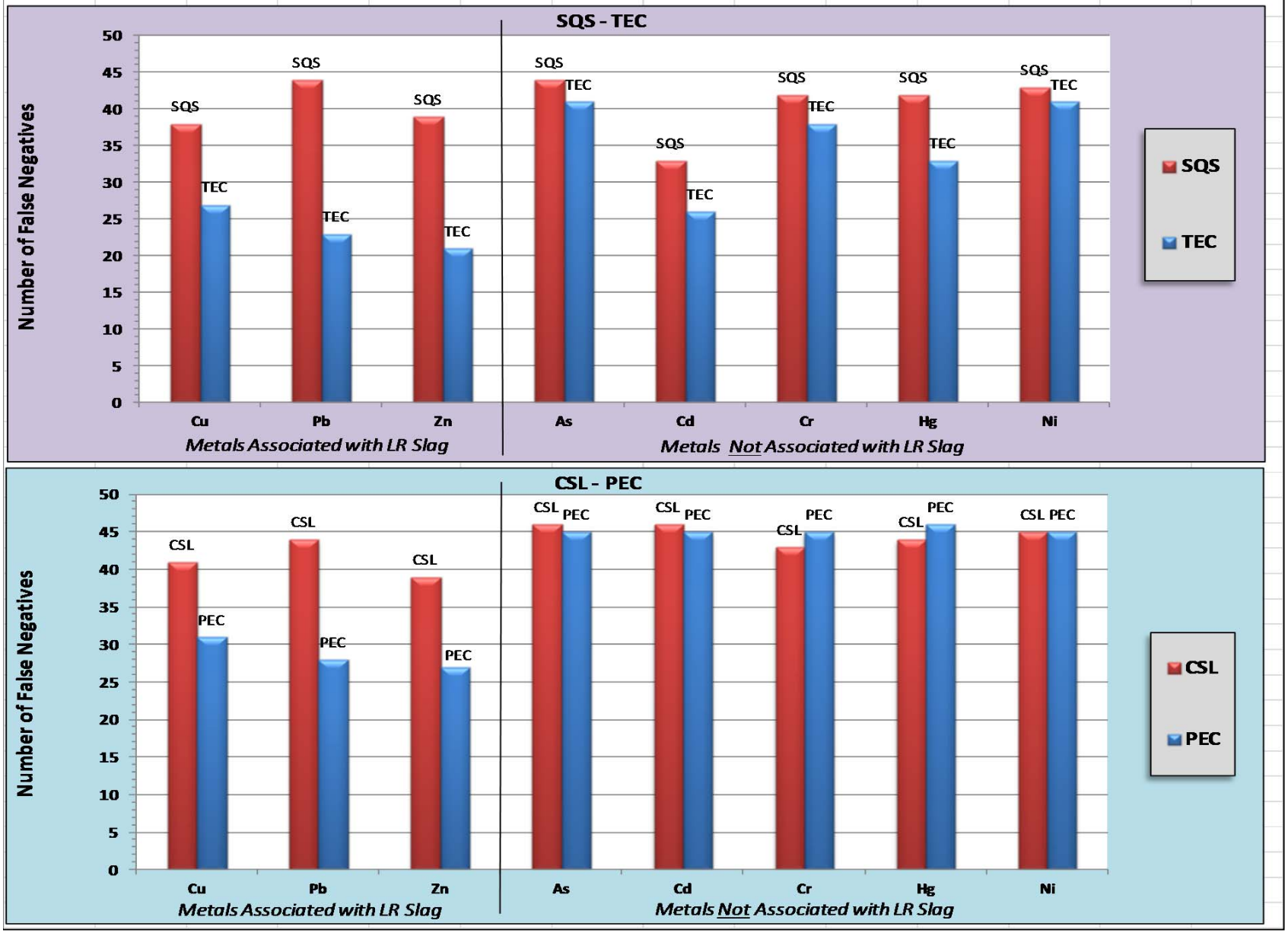
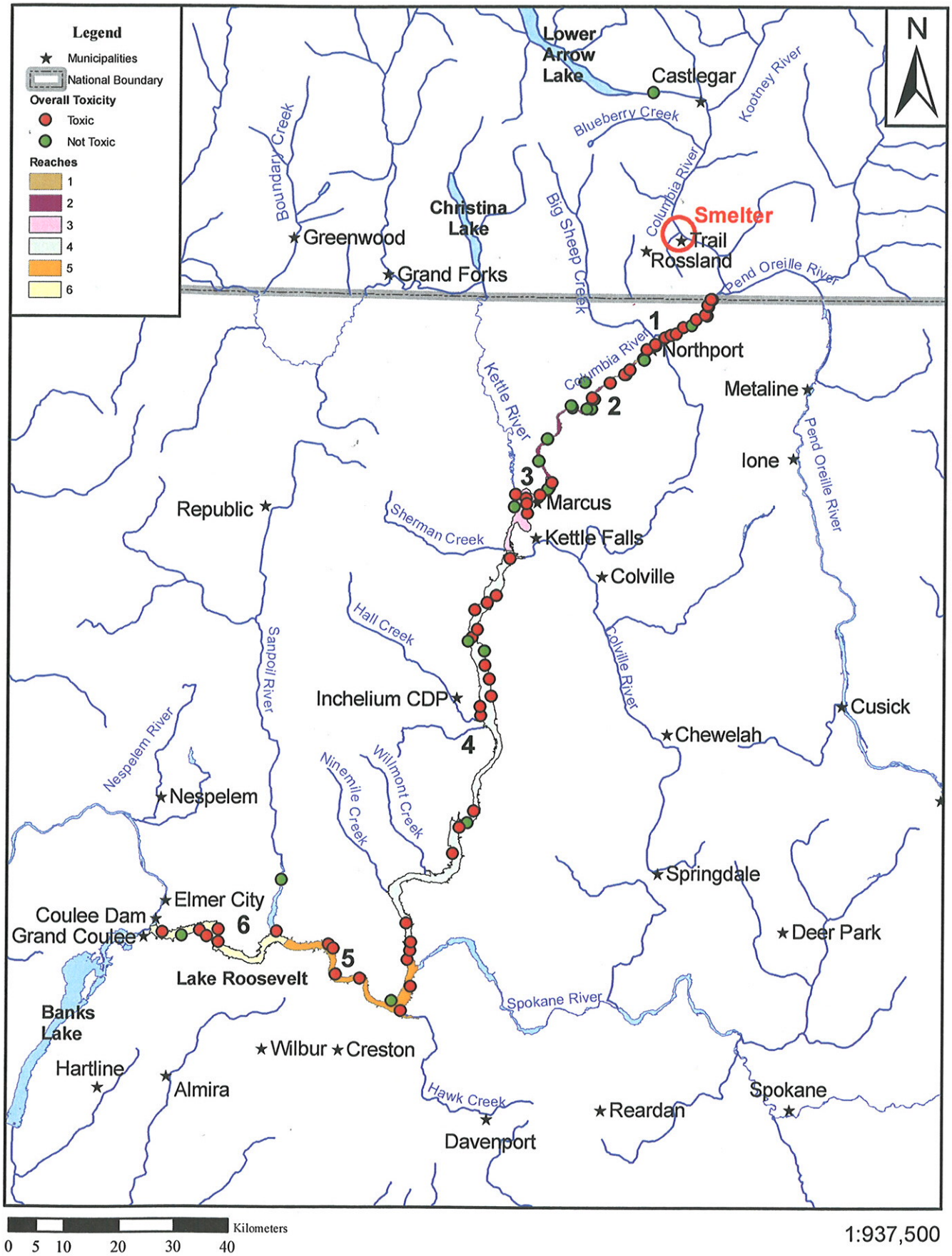


Figure 6.10. Map showing toxic and not toxic stations for toxicity of all species inclusive of all endpoints.



Source: Evaluation and Interpretation of the Sediment Chemistry and Sediment Toxicity Data for the Upper Columbia River Site, MESL, 2011