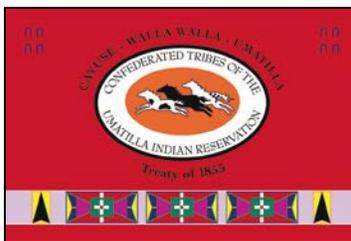


**Confederated Tribes of the  
Umatilla Indian Reservation**



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January 18, 2012  
Via email and U.S. Mail

Dr. Craig McCormack  
Toxics Cleanup Program  
Washington Department of Ecology  
P.O. Box 47600  
Olympia WA 98504-7600  
[fishconsumption@ecy.wa.gov](mailto:fishconsumption@ecy.wa.gov)

RE: "Fish Consumption Rates Technical Support Document," Washington Department of Ecology, September 2011,  
Publication no. 11-09-050

Dear Dr. McCormack:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) offers the following comments on the "Fish Consumption Rates Technical Support Document" (Document) by the Washington Department of Ecology (WDOE). We recognize and appreciate the substantial effort that you and others have devoted to developing the Document. The CTUIR believes that overall it is a very sound and thorough review and we compliment WDOE on its thoughtful presentation.

As you may know, the CTUIR has worked for two decades on the issue of toxics in water and fish, beginning in the early 1990s. Water and fish are among our First Foods—they are the first of our First Foods served at our ceremonies and in our longhouses. CTUIR members have Treaty Rights to fish that are free from toxic contaminants and that do not pose undue risks when consumed at levels secured by the Treaty of 1855. This includes treaty reserved interests in and beyond the greater Columbia Basin, and ranges across the Columbia River waters and its tributaries managed by Washington State.

Tribal people eat much more fish than "average" as part of our tradition, culture and way of life. Water quality and other standards in the past have utterly failed to incorporate this fact. Thank you for revisiting this issue in the Document and in the standards revision process.

The CTUIR has embraced three formally-approved fish consumption rates (FCRs): 175 grams per day (gpd) (Oregon state-wide standards; Portland Harbor), 389 gpd (on-reservation water quality standards), and 620 gpd (Treaty-based rate or Heritage rate; Hanford site). Our specific comments on the Document are provided below.

Many of the CTUIR interests in minimizing exposure to pollutants through fish consumption are impacted by both the proposed rulemaking for sediment management standards for MTCA and the surface water quality rulemaking. Where applicable the comments should be noted as concerns applicable to both processes, and protecting the treaty right to consume fish and other treaty resources without continued exposure to contaminated and dangerous fish.

P.3 (footnote). The Documents states that "Ecology has the ability to make site-specific decisions and use site-specific information, including fish consumption rates protective of tribal populations." Please clarify which discretionary and mandatory requirements obligate Washington to protect safe consumption rates for fish harvested from treaty reserved usual and accustomed fishing areas. The clarification should also address whether protections at tribal consumption rates are treated as site-specific, or to local waters rather than state-wide.

P.5 (Purpose, second bullet). In addition to the question, "where do current people fish and how much are they eating," please address the issue of whether people follow existing fish advisories. The same comment would apply on P.9, next-to-last bullet ("recent scientific data . . .").

P.6 The section on contemporary surveys should be preceded by an expanded discussion of the fact that there are depressed fish populations based on ESA listed species and suppressed consumption due to federal and state advisories that recommended limiting consumption at the time that the surveys were done. The studies listed on P.6 are worthwhile, but it should be noted that they represent suppressed rates. The Heritage rate should be explicitly recognized even if a lower rate is used for specific applications. Reliance on contemporary rates should mention fish advisories and the presence of contaminants in every major water body as reasons why people may eat less fish than they would if there was less contamination. Inserting a map of those Washington water bodies listed on the Clean Water 303 (d) list for those not meeting sediment management standards, and well those subject to MTCA or CERCLA sites not consistent with the requirements under 40 CFR §430.7 should each accompany that discussion.

The Document is unclear as to identifying how many high-consumers there are, and the adverse risk of exposure for high-consuming population if Washington chooses a less-protective FCR. For example, a large fraction of tribal children, pregnant women and elders would be disparately and adversely affected regardless of their absolute numbers.

P.7. Regarding the preliminary recommendation (157-275 gpd), please clarify what positions are discretionary from those that are required by law or other authorities. Also please clarify what percentile of the populations Washington proposes to protect, and what population of consumers will not be adequately protected (children, tribal members, non-Indian anglers, subsistence fish consumers).

As a stand-alone section, we suggest that more explicitly identifying applicable WDOE and EPA policies and regulations, those who comprise “all people” and those who are not likely to be adequately protected under various proposed rates. In the draft document, there are references to four surveys:

- “consistent with Ecology’s current policies regarding the protection . . .”;
- “... should be protective of all people in Washington who eat fish”;
- “...we think that these rates . . .”; and
- “Ecology’s current policies regarding the protection of both the general population and high exposure groups . . .”

P.9 (next-to-last bullet and elsewhere), referring to “recent scientific data[.]” Large statistical surveys are not necessarily “good science”; small tribal surveys may be more accurate because they are more inclusive of traditional lifestyles and for other reasons.

P.4 (current laws) and P.9 (second bullet). Current EPA water quality standards guidance recommends 142.4 gpd for subsistence populations when site-specific or tribe-specific data are not available. We recommend citing the guidance (EPA-822-B-00-004).

P.10 (4<sup>th</sup> bullet). Treaty Rights are mentioned without much elaboration. Throughout the Document tribes are referred to as population subgroups rather than sovereign nations. This is improper and disingenuous. While the focus of these comments here is more on technical issues and aspects, appropriate consideration of tribes, our rights and interests, and acknowledgement of the state and federal obligations and responsibilities to protect tribal treaty rights is warranted. Regarding these matters, the comments on the Document by the Center for Indian Law and Policy are useful and informative, and we incorporate them herein by reference.

P.10 (Intended Audience) and P.11 (6th bullet). Cleanup actions are a general application, but having a single FCR for MTCA purposes might help some sites (result in more protective cleanups) and hurt others. For example, the CTUIR is already using a higher FCR at Hanford, and other sites have a wide variety of rates. It will be important to involve a wider group of tribes during MTCA revisions. At present there may not be any tribal technical representation on the MTCA Science Panel (P.11, footnote).

P.11 (3rd bullet). The CTUIR Treaty-based rate (620 gpd) is as defensible, if not more so, than the CRITFC-derived rate, so the term “scientifically defensible” should be used with caution. Statistics are “scientific” only if they are applied to data sets that are properly collected and based on the right questions.

P.15 (Washington’s fish resources). Harvest data from 2006 may reflect current resources, but are a fraction of the historic rates that tribal, state and federal governments are working to restore. As Puget Sound is restored, more shellfish beds may be available for safe harvest and consumption by the public. The same can be said for the Columbia River and its tributaries in the Basin. The Document includes sections on commercial (non-Indian) and recreational fisheries but not on tribal fisheries. This creates a potential “mismatch” of using tribal fish consumption rates but only commercial and recreational harvest data. Washington needs to ensure consistency among the figures for total Washington population, total consumption and state harvest.

P.24 and Chapter 4. The lower estimate of Washington fish consumers is that only 28% of residents eat any fish at all (about 1.8 million people), which is same as the national percentage of fish consumers. The Department of Health (DOH) survey indicates that many more adults eat fish in WA (77% or about 4.8 million people) than nationally. We recommend using the DOH estimate, since it is based on an actual state-specific evaluation.

Pp.24-25, P.29. It is assumed that 10% of the Washington and national populations are high consumers, defined as eating greater than 250 gpd, because the top 10% of national fish consumers eat at this rate. This may be a reasonable assumption. However, together with the previous assumption, it might also imply that not only more do Washingtonians eat fish than the national average, but that they also eat more fish on average (i.e., that the top 10% of Washington consumers eats more fish than the top 10% of national consumers). This is likely since more fish availability likely results in larger portion sizes, or more fish meals per week.

P.27. The term “traditional fishing areas” does not convey the same weight of authority as does “Usual and Accustomed Areas,” which is a legal term of art. It may be that most, if not all, water bodies in Washington are a legally protected and adjudicated Usual and Accustomed Area of one or more tribes. For the CTUIR those rights span up and down the Columbia River and its tributaries.

P.28 (Subsistence fishers). The goal of cleaning waterways, restoring fish, and increasing harvests and consumption rates was not discussed, but should be considered in terms of potential future increases in rates. While the Document mentions future growth and future increased consumption rates, those statements could be strengthened with statements about goals for cleaner and restored waterways.

The Document says that the number of subsistence fishers in Washington is not known. Please address how many people in Washington have the right to be subsistence fishers. Many traditional tribally harvested fish populations are depressed. Current levels of tribal harvest are far under subsistence levels. For many years, tribal fish harvests are closely regulated and often impacted by ESA harvesting constraints and other factors. The adverse impact to tribal treaty rights to fish is compounded where in addition to depressed harvestable populations, those rights are suppressed where fish consumption exposes tribal people to fish unfit for safe consumption.

Rates are currently suppressed due to existing fish advisories, reduced fish numbers, and other reasons. This is a reason why current consumption rates are underestimated. In addition, recreational anglers, commercial fishermen, tribal members, and local fish market consumers can have extremely high seasonal consumption rates, so that acute exposures need to be considered.

As referred to in multiple parts throughout the Document, the two-hundred-fifty gpd falls far short of the treaty based consumption rates. Based on our research, high tribal consumption is a pound or more (454 gpd). This means that all of the subsistence fishers and most of the tribal population falls within this upper 10%. If Washington selects the 90th

percentile as the target, it has already estimated this as 250 gpd. This is roughly supported by the five contemporary studies cited, although there is quite a bit of variation and several statistical problems with those data sets. Again, the Heritage or Treaty-based rate is much higher.

The Document should identify the basis (regulatory or otherwise) for selecting what percentile of the population to protect. Washington should select a single ingestion rate within the top 10% of fish consumers which includes human health criteria that protects the usual and accustomed fishing areas of all tribes, including the CTUIR.

The Document recommends a range of 157 gpd (i.e., the 80th percentile of current statewide consumers and approximately 50% to 93% of the tribal studies) to 267 gpd (i.e., approximately 95%). This comparison suggests that the 90th percentile of national and contemporary tribal consumption is similar, and that contemporary tribal consumption is actually quite similar to national data. On the one hand, this means that Washington can avoid the argument that “special protection” is being provided to tribes, but on the other hand entire tribes (e.g., the CTUIR treaty based rate, or Suquamish) may be inadequately protected because they hold treaty reserved rights to eat much more fish than is protected under the selected rate.

Please clarify if farmed fish be factored into FCR calculations, and if so the nature of tissue concentrations to be tested.

Please confirm Washington’s consideration of ethnographic methods as valid for cross-cultural estimates (P.42, Cultural Factors)? Ethnographic methods are required for adequately capturing accurate and defensible results from tribal populations (P.43). Equating “questionnaire” with “defensible” and “ethnographic” with “non-defensible” is incorrect and invalid. Both categories provide numerical and statistical data. “Statistical” refers to precision, not necessarily to accuracy. Some interests may argue and seek to discredit ethnographic methods, traditional environmental knowledge, and Heritage rate data. Those arguments fail to consistently account for the higher fish consumption rates that Washington must protect.

Washington needs to include contextually accurate information about Heritage rates. Washington needs to include methods that are not only computer-based statistical surveys of contemporary rates. It is standard in the public health field to over-sample the population you want specific information about. The State should be explicit that it does not include information about Heritage or subsistence rates in its calculation of FCR (P.28, Tables 24, 25). This also requires Washington to specific any policy determination made concerning whether or not to expressly protect such sub-populations.

The CRITFC consumption survey did not capture data concerning subsistence fishers. We do not know the outcome of the Colville study, but we anticipate that Lake Roosevelt fish consumption rates (kokanee and other species) may not be applicable when considering salmon harvests in the lower Columbia River.

The proper citation for the article discussing problems with tribal fish surveys is: J Donatuto and B Harper (2008). Issues in Evaluating Fish Consumption Rates for Native American Tribes. Risk Analysis 26(6): 1497-1506.

Washington needs to explain its rationale for excluding any life stage of salmon and anadromous species from these efforts. Those rationales should address the issue of salmon in standards such as site-specific cleanup requirements and consider use of tribal fish consumption information to inform an approach for anadromous fish in the Columbia River basin.

P. 41 (Survey issues). Please clarify the anticipated implementation activities that would impact fish consumption rates to the Columbia River Basin and its tributaries in reference to surveyed water bodies and other attributes.

P.89 (Table 24). The 620 gpd figure (based on the *Boldt* decision) should be referred to as the traditional, Treaty, or subsistence rate, not the “historical” rate. The term “historic” implies that the rate is no longer applicable or relevant.

Thank you for your consideration of our comments. If you have any questions, please contact Barbara Harper with our Department of Science and Engineering at (541) 429-7435 or Carl Merkle with our Department of Natural Resources at (541) 429-7235.

Sincerely,

/s/

Naomi Stacy  
Lead Attorney  
Office of Legal Counsel