Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

January 17, 2011

Ted Sturdevant, Director
Washington State Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

Re: Washington's Fish Consumption Rate

Dear Mr. Sturdevant,

I am writing on behalf of the Yakama Nation in response to your request for input on the new fish consumption rate that Ecology will use to determine water quality and cleanup standards. While we appreciate the opportunity to comment, we are concerned that the rate proposed in the Fish Consumption Rate Technical Support Document will subject Yakama tribal members to serious health risks because they consume a healthy, traditional, and Treaty protected diet. Detailed technical comments are provided in the attached document.

A century ago, when the United States Supreme Court first confirmed the Yakama Nation's Treaty Rights to take fish in all "Usual and Accustomed Places", the Court observed that for the Indians who signed the Treaty, the right to take fish from the river was "not much less necessary to the existence of the Indians than the atmosphere they breathed." That is as true today as it was then. Just as we have a basic right to breathe clean air, we have a basic human right, guaranteed by the Treaty of 1855, which the U. S. Constitution identifies as the Supreme Law of the Land, to harvest fish, which are the lifeblood of our culture, that will not make us sick when we eat them. And, just as we should not be asked to breathe unhealthy air in order to promote economic or industrial development, we do not believe that it is appropriate for Washington state to trade industry's costs for pollution prevention against the health and well-being of the Yakama People.

While much has changed in the last century, not all of it for the better, the unifying thread running through our culture is our reliance on and reverence for the native foods and medicines that have sustained our people since time immemorial. Tragically, much of that sacred resource has been destroyed in the past century and much of what remains is in a degraded condition. It is a sad irony that, while modern science has extolled the health benefits of eating salmon, pollution has rendered this staple potentially toxic. We are faced with trading decreased risk of heart disease against increased risk of cancer and other serious diseases.

We support Ecology in its effort to upgrade the indefensible fish consumption rate it currently uses. We have seen the studies showing realistic fish consumption rates nearly 100 times the

current 6.5 grams/day. We have read Ecology's recommendation that only five to ten percent of the population should be subjected to high levels of health risk. While that improvement may seem like a good compromise to some, please consider it from our point of view. Asking us to accept health risk at the 90th percentile is the same as asking us to accept that over 1000 Yakama tribal members will be subjected to increased health risk because they choose to eat a traditional diet. Even at the 99th percentile, the lives and health of over 100 Yakama people would be treated as an acceptable risk in the name of externalizing the costs of pollution control from the industry to the resource users. Paradoxically, the healthier they eat, the greater the risk to their health. If I were to name all the Yakama tribal members who have died of cancer after spending their lives harvesting and eating salmon, this would be a much longer letter.

We point out that the 1994 Environmental Protection Agency's survey of Columbia River Tribal Members describes unusually low fish consumption numbers as a reflection of the extreme depression of fish runs at that time. Current numbers would be higher, and as we continue our comprehensive efforts to restore resident and anadromous fish including Lamprey, tribal fish consumption will rise accordingly.

Tribal Council members are not elected to decide how many Yakama people should be subjected to increased health risks to allow for industrial and agricultural development. I cannot explain to the people I represent why some of them or their children should be asked to sacrifice their health for the economic benefit of others. The Yakama Tribal Council has a solemn obligation to protect the health and welfare of each and every tribal member, including those yet unborn.

While we truly appreciate Ecology's efforts to upgrade the existing deficient standard, we cannot accept a standard that continues to subject our people to elevated risks of cancers and other diseases. Whatever number Ecology eventually lands on, we reserve all rights and remedies to protect the health and welfare of our people from the ravages of water pollution and soil contamination. If you have any questions or wish to discuss this important matter further, please contact Philip Rigdon, Department of Natural Resources Deputy Director at (509) 865-5121 extension 4655.

Sincerely,

Athena Sanchey

Harry Smiskin, Chairman
Yakama Tribal Council

cc: Craig McCormack, WADOE
Paul Lumley, CRITFC

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DETAILED COMMENTS FROM THE YAKAMA NATION REGARDING WASHINGTON DEPT OF ECOLOGY'S FISH CONSUMPTION RATE TECHNICAL SUPPORT DOCUMENT

Thank you for the opportunity to review and comment on the Fish Consumption Rate Technical Support Document. It is our understanding that Ecology will consider the comments of tribal co-managers and the public to determine an appropriate fish consumption rate for the state of Washington. As reflected in the cover letter from Chairman Smiskin, the Yakama Treaty of 1855 with the United States reserved to the Yakama Nation the right to harvest 50 percent of harvestable fish, the right to have fish present to catch and, by extension, the right to have fish present in a condition that is safe to eat. After careful review and consideration, the Yakama Nation submits the following comments. These comments are supplemental to those in the cover letter accompanying this document.

A new fish consumption rate should protect all Yakama tribal members.

The fish consumption rate Washington currently uses does not reflect fish consumption rates for Yakama tribal members and therefore does not adequately protect the health of those who consume many times that amount. Ecology's proposed rate range of 157 – 267 grams of fish per day is based on percentiles (80th – 95th percentile) of a model that represents "high fish consumption" populations of the state. While certainly a more defensible proposal than the status quo, this protocol ensures that a significant portion of the tribal population most in need of protection will still be exposed to health risk. It is unclear how WDOE reconciles its choice to knowingly allow a portion of a population to be subjected to risk with its stated mission "…to protect, preserve and enhance Washington's environment, and promote the wise management of our air, land and water for the benefit of current and future generations." Ecology needs to select a fish consumption rate that is protective of all Yakama tribal members, not just a portion of them.

The 1994 EPA study is no longer accurate

Ecology references a 1994 study of fish consumption patterns among Columbia River tribes by the Environmental Protection Agency (EPA) to determine a tribal fish consumption rate. This study was conducted during a period when fish returns and tribal fisheries were among the lowest on record. Small runs and reduced tribal harvests consequently limited the amount of fish consumed by tribal members at the time of the study. There is little doubt that recent increases in fish abundance due to improved environmental conditions and extensive rebuilding efforts throughout the Pacific Northwest have allowed significant increases in fish consumption rates among tribal members . If EPA conducted a survey today, the rate would be much higher because of the increased availability of relatively abundant fish. Even without a new survey we are confident that a rate based on the 1994 study would not be protective of all Yakama members. Accordingly, the conclusions of the 1994 EPA study, if considered at all, should be viewed as minimum estimates of tribal fish consumption.

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Salmon must be included.
Ecology currently includes salmon in its fish consumption rate calculation. However, the Technical Support Document dedicates an entire appendix to a discussion of excluding salmon in Washington's fish consumption rate calculations based on the supposition that salmon are transient in state jurisdictional waters and pick up most contaminants in the ocean. There are several reasons salmon must be included in the calculation of a fish consumption rate:

a. Salmon are a crucial part of Yakama tribal members' diet, culture, and way of life. The right to these fish was reserved in the Treaty of 1855 and has been upheld in numerous court decisions. Under the U. S. Constitution, Yakama's treaty with the United States is the supreme law of the land (O'Neill 2011). If salmon are excluded, Washington will be ignoring contaminant issues that affect Yakama Nation's way of life and our rights to clean healthy fish.

b. Salmon are encountering and acquiring contaminants in waters that are under Washington State Jurisdiction (O'Neill, 2011). While we recognize that salmon acquire contaminates in the ocean, science shows that juvenile salmon also pick up contaminates on their journey through the Columbia River basin to the Pacific Ocean (LCREP 2007). In fact some studies suggest that the more time a juvenile salmon spends in the estuary the higher its probability of injury or mortality (Loge et al. 2005). Washington can't ignore its responsibilities to ensure these fish are safe for everyone to eat.

c. Washington State has made a commitment to salmon recovery, as expressed and confirmed by Governor Gregoire. Excluding salmon as part of the fish consumption rate is in direct opposition to that commitment. Without setting appropriate water quality and cleanup standards, the salmon will not have the toxic free environment they require for recovery.

Additional considerations are necessary.
We understand that the fish diet fraction (FDF) is "the percentage of the total fish and/or shellfish in an individual's diet that is obtained or has the potential to be obtained from the site (WAC 173-340-200)." Currently, Ecology arbitrarily chooses a default FDF of 50% in the formula incorporating fish consumption rate and exposure duration used to calculate cleanup standards at a contaminated site. In order for cleanups to be adequately protective of tribal members, Ecology must use a FDF of 100% because tribal people generally get 100% of their fish from "usual and accustomed fishing places" within state jurisdictional waters. Failure by Ecology to adjust its FDF to 100% effectively reduces by half the health protection value of any selected fish consumption rate.

Additionally, we understand that the exposure duration is the factor that determines how long a person would be theoretically subjected to the risk associated with eating contaminated fish. The state currently uses an exposure duration of 30 years, based on information that indicates 90 percent of Americans live in a particular residence for less than 30 years. This assumption is not valid for tribal populations who may move around within a region but who still rely on fish from their usual and accustomed fishing areas. For tribal fish consumers, a lifetime exposure duration is most appropriate.

We are also voicing our support of the technical comments from Catherine O'Neill titled, "Comments on Ecology's Fish Consumption Rate Technical Support Document (December, 2011)". This document supports and expands upon several of the comments included in this letter.

References

Catherine A. O'Neill. Comments on Ecology's Fish Consumption Rate Technical Support Document. Seattle University Center for Indian Law & Policy. December, 2011.

Lower Columbia River Estuary Partnership (LCREP). 2007. Lower Columbia River and Estuary Ecosystem Monitoring: Water Quality and Salmon Sampling Report.

Frank J. Loge, Mary R. Arkoosh, Timothy R. Ginn, Lyndal L. Johnson, and Tracy K. Collier. Impact of Environmental Stressors on the Dynamics of Disease Transmission. Environmental Science & Technology 2005. 39 (18), 7329-7336