



Seattle University School of Law
Center for Indian Law & Policy

Center for Indian Law and Policy
Comments on Ecology's Draft Sediment Management Standards Rule Proposed Amendments

Please accept these comments on the Washington State Department of Ecology's *Draft Sediment Management Standards (SMS) Rule Proposed Amendments* (August 15, 2012)(hereinafter "proposed SMS"), submitted on behalf of the Center for Indian Law & Policy, Seattle University School of Law. The Center for Indian Law & Policy was established in 2009. Under the Center are the classes, projects, programs and activities that focus on Indian law at Seattle University School of Law. The mission of the Center, beyond emphasizing learning opportunities for law school students, includes assisting Indian tribes and individuals to deal with the variety of unique laws that apply to them and making information about current legal issues available to Indian tribes and people. The Center does not represent any tribe in this process. Indeed, the Center wishes to underscore the importance of working directly with the individual tribes affected, within the context of a government-to-government relationship, as committed to under the terms of the *Centennial Accord between the Federally Recognized Indian Tribes in Washington State and the State of Washington*.¹ Rather, the Center offers these comments in the hope that they will be of value to Ecology as it considers its proposed SMS.

Introduction

Washington's environmental laws are intended to ensure that our land, air, and water sustain ordinary, necessary, and cherished human activities. They are meant to foster human and environmental health, for current and future generations. The environmental laws governing the waters and sediments that support fish,² indeed, were enacted with these ends in mind. At that time, it was recognized that we had permitted our resources to become depleted and our aquatic environments to become contaminated. So our foundational environmental laws aspired to a more healthful state. They envisioned fishable waters³ for all. And, because this was obviously not the case at the time, they called for cleanup and restoration of existing pollution; and they called for the reduction or prevention of new pollution.

¹ WASHINGTON GOVERNOR'S OFFICE OF INDIAN AFFAIRS, CENTENNIAL ACCORD BETWEEN THE FEDERALLY RECOGNIZED INDIAN TRIBES IN WASHINGTON STATE AND THE STATE OF WASHINGTON (1989), available at <http://www.goia.wa.gov/Government-to-Government/Data/CentennialAccord.htm>.

² Throughout this document, the term "fish" refers to all fish, including shellfish, unless the context suggests otherwise.

³ Throughout this document, the term "waters" refers to the sediments, water, and other constituents of our aquatic environments.

For example, the federal Clean Water Act's stated objective is:

to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, including, *inter alia*, the goal of:

water quality which provides for the protection and propagation of fish, shellfish, and wildlife.⁴

The state's Model Toxics Control Act declares:

Each person has a fundamental and inalienable right to a healthful environment and each person has a responsibility to preserve and enhance that right. The beneficial stewardship of the land, air, and waters of the state is a solemn obligation of the present generation for the benefit of future generations.⁵

The tribes fully anticipate restoration of our aquatic environments. Tribal rights to take fish, including rights secured by treaty, are a touchstone for tribes' vision for a restored future. As the Center outlined in its comments on what is now termed "Version 1.0" of Ecology's draft *Fish Consumption Rate Technical Support Document*, tribes comprise distinct *peoples* with inherent rights.⁶ Tribes' status as self-governing sovereign entities pre-dated contact with European settlers. Today, tribes are recognized to have a unique political and legal status – one that sets them apart from every other "subpopulation" or group that might warrant particular consideration in a risk assessment or in decisions about environmental standards more broadly. Tribes' rights and interests, moreover, are protected by a constellation of laws and commitments that are unique among groups affected by Ecology's decisions. These include protections secured by treaties, laws, and executive orders that speak to the rights of tribes and their members.⁷ These rights cannot be eviscerated or redefined by current depletion and contamination. So, tribes envision – and are entitled to – a future in which aquatic habitats are restored, the waters are again fishable in a robust sense of the term, and tribes' treaty-secured and other rights to fish can be exercised to their full extent. This is the appropriate baseline for cleanup and water quality standards (which two terms include the SMS),⁸ every step in the standard setting process should proceed from this restorative orientation.

⁴ Federal Water Pollution Control Act, 33 U.S.C. 1251(a). Washington's state Water Pollution Control Act similarly recognizes among its goals "the propagation of wild life, birds, fish, and other aquatic life," and contemplates that the Department of Ecology will seek delegation to administer the federal Clean Water Act within the state, and authorizes Ecology to "take all action necessary to secure to the state the benefits and to meet the requirements of that act." Washington State Water Pollution Control Act, RCW 90.48.010 and 90.48.260.

⁵ Washington State Model Toxics Control Act, RCW 70.105D.010.

⁶ Center for Indian Law and Policy, *Comments of the Center for Indian Law and Policy on the Washington State Department of Ecology's Draft Fish Consumption Rates Technical Support Document* (January, 2012) [hereinafter, CILP, Comments on FCR TSD 1.0]. This document is attached hereto, and resubmitted in its entirety as part of the Center's official comments on Ecology's proposed SMS rule. See also, Center for Indian Law and Policy, *Comments of the Center for Indian Law and Policy on the Washington State Department of Ecology's Draft Fish Consumption Rates Technical Support Document Version 2.0* (October, 2012). This document is also attached hereto, and submitted in its entirety as part of the Center's official comments on Ecology's proposed SMS rule.

⁷ See, *id.*, elaborating the legal basis of these rights.

⁸ The proposed SMS appear to seek to divorce themselves from the WQS of which they have been recognized to be a part. Although this constitutes a change from the previous agency position, Ecology does not provide any explanation for it. This issue is taken up below, in Part II.C of these Comments.

In contrast, Ecology's proposed SMS appear crafted to guarantee that cleanup and restoration of our aquatic environment never occurs. Although the purported aim of the SMS is "to reduce and ultimately eliminate adverse effects on biological resources and significant health threats to humans from surface sediment contamination," the proposed SMS would do little to rectify current contaminated conditions. Meanwhile, fish consumption advisories blanket the state warning people that our fish and shellfish are too contaminated to eat.⁹ Against this backdrop, Ecology's abrupt announcement, just weeks before publishing the proposed SMS rule, that it would retreat from specifying a protective default fish consumption rate (FCR) in this rule (while also declining to go on record with any recommendations for this and other crucial exposure parameters in its *Fish Consumption Rate Technical Support Document (Version 2.0)*), is distressing.¹⁰ Because the proposed SMS can only be understood in the context of Ecology's efforts to address the related issues of sediment cleanup and water quality – and because Ecology's approach has involved some shuffling between these two rulemakings – the Center's comments will speak first to this deeply troubling bigger picture. These comments will then address the SMS, in which Ecology proposes to employ an array of devices that would both redefine the goals for our aquatic environment and undermine efforts to protect human and environmental health.

I. The Sediment Management Standards in Context: Ecology's Arbitrary and Unsupportable Reversal of Course

On July 16, 2012, Ecology unexpectedly announced that it would reverse course and no longer specify a default FCR in its forthcoming proposed SMS rule. Additionally, Ecology announced that it would be backing away from recommendations regarding the FCR and related issues that had been set forth in September, 2011 and publicly vetted in its *Fish Consumption Rate Technical Support Document ("FCR TSD 1.0")* – importantly, that it would no longer be on record regarding what would constitute an appropriate range of FCRs for use as default values in the forthcoming SMS rule and water quality standards (WQS) rule.

Yet, as Ecology had recognized, its current FCRs were horribly dated, inaccurate as a matter of science, and utterly underprotective of tribes and their members and of Washingtonians in general. In its WQS, for example, the FCR is based on a survey taken of the general U.S. population in 1973-74. A steady stream of evidence from tribes and other groups in Washington showed this FCR to be grossly inaccurate, understating actual contemporary consumption in some cases by more than two orders of magnitude. Moreover, Ecology was bound, under the CWA, to examine its WQS every three years and update them to keep pace with developments in science and policy. Quantified evidence of contemporary tribal consumption became available as early as 1994, when CRITFC published its survey results.¹¹ And Ecology has always been obligated to uphold tribes' rights to take fish, among other things under the treaties and other agreements between the fishing tribes and the United States, to

⁹ Washington State Department of Health, *Fish Consumption Advisories*, available at <http://www.doh.wa.gov/CommunityandEnvironment/Food/Fish/Advisories.aspx>

¹⁰ Ted Sturdevant, Director, Washington State Department of Ecology, Open Letter to Interested Parties (July 16, 2012)[hereinafter Sturdevant, Change of Course Announcement], available at http://www.ecy.wa.gov/toxics/docs/20120716_FCR_SturdevantLetter.pdf.

¹¹ Quantified evidence of historical tribal consumption rates and practices was available earlier than this. See, e.g., Gordon W. Hewes, *Indian Fisheries Productivity in Pre-Contact Times in the Pacific Salmon Area*, 7 NORTHWEST ANTHROPOLOGICAL RESEARCH NOTES 133 (1973); U.S. v. Washington, 384 F. Supp. 312, 380 (W.D. Wash. 1974). The issue of historical fish consumption practices versus contemporary, "suppressed," practices and rates is discussed at greater length in CILP, Comments on FCR TSD 1.0.

which Washington is a successor-in-interest. In short, for at least eighteen years, Ecology had been aware that its current FCRs were neither scientifically defensible nor legally supportable.¹²

Although already overdue, Ecology finally committed to increase its FCR and to update its WQS and its SMS. Ecology, however, announced a curious sequencing for this work: it would update the SMS first, and then tackle the WQS; with respect to the latter, it would first address “implementation tools” (i.e., regulatory mechanisms for altering compliance measures and deadlines) and then address the substantive water quality standards. This further delay in the long-awaited update to the FCR and the WQS was salvaged by Ecology’s statement that it would include an increased default FCR in the SMS. Those seeking to rectify the lack of protection in the current WQS recognized that the SMS also affected the health of our waters, our fish, and our people – and that the SMS, indeed, were a part of the WQS. In addition, they recognized that the technical documentation Ecology believed it needed to support an increased FCR in the SMS would also support an increased FCR in the WQS. So, tribes and others engaged in good faith in the process as outlined by Ecology, on the assumption that a more protective default FCR would serve as linchpin for cleaning up and preventing further contamination to our aquatic environment.

Ecology’s announcement in July that it was “revising” its approach meant that a more protective default FCR, which was expected to be promulgated by rule before the end of 2012, would now be delayed – further – for months if not years (Ecology’s current projection is 2014). Ecology explained its change of course by citing the “concerns” it had heard that the FCR established in the SMS would set precedent for WQS, i.e., that Ecology “would necessarily adopt the same number” in the WQS. Ecology’s stated rationale is unsatisfactory and shows the arbitrariness of Ecology’s about-face. The SMS and the WQS are interrelated because the sediments and the surface waters are interrelated *in our aquatic environment*. Contaminants move between these two components of the aquatic environment. Inadequately cleaned up sediments have the potential to undermine attainment of the “uses” designated in the State’s water quality standards. Indeed, as elaborated below, the SMS are WQS within the meaning of the federal Clean Water Act and/or so affect water quality standards that they are part and parcel of the WQS. Where aspects of Ecology’s SMS rulemaking are relevant for its WQS rulemaking, it stands to reason that one will inform the other. However, where the different rulemaking contexts call for different approaches, then Ecology may opt for differences. For Ecology to rely on the notion that an FCR in the SMS would “necessarily” determine the FCR in the WQS as the justification for omitting an FCR from the SMS altogether is unsupportable and arbitrary.

¹² This is a generous accounting, given the fishing tribes’ historical practices and legally recognized rights to take fish; and given the longstanding insistence by tribes and other researchers that tribal people consume far greater quantities of fish than recognized by current regulatory assumptions based on the “average American.” See, e.g., Letter from Merle Jefferson, Executive Director, Lummi Nation Natural Resources Department, to Ted Sturdevant, Director, Department of Ecology (October, 2012); Letter from David Lopeman, Chairman, Squaxin Island Tribe, to Dennis McLerran, Regional Administrator, Environmental Protection Agency, Region X (September, 2012); Letter from Harry Smiskin, Chair, Yakama Nation Tribal Council, to Ted Sturdevant, Director, Department of Ecology (October, 2012); Letter from Terry Williams, Commissioner, Fisheries and Resources, The Tulalip Tribes, to Dennis McLerran, Regional Administrator, Environmental Protection Agency, Region X (September, 2012); and Letter from Michael Grayum, Northwest Indian Fisheries Commission, to Michael Bussell, Director, Office of Water and Watersheds, Environmental Protection Agency, Region X (September, 2012)(chronicling the delays in Ecology action to update its outmoded FCRs). See, generally, Catherine A. O’Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and “Acceptable” Risk to Native Peoples*, 19 STANFORD ENVIRONMENTAL LAW JOURNAL 3 (2000).

Ecology's announcement that it would retreat from specifying a default FCR in the SMS rule was coupled with a statement that it would be backing away from recommendations regarding the FCR and related issues that had been published in its FCR TSD in September, 2011 and had undergone public comment in the ensuing months. Importantly, Ecology announced that it would no longer be on record regarding what would constitute an appropriate range of FCRs for use as default values in the forthcoming SMS rule and WQS rule. Because the SMS would no longer contain a default FCR or other default exposure parameters (e.g., exposure duration, fish diet fraction), these crucial numbers would need to be determined anew at each cleanup site. Without an Ecology recommendation on an appropriate range of FCRs, the outcome of these site-specific determinations has been thrown up for grabs. Instead, Ecology issued guidance on the topic in the form of its *Draft Sediment Cleanup Users Manual II* (SCUM) – guidance on which it expressly stated it is *not* taking public comment.¹³ According to this guidance, Ecology will entertain numerous bases for eviscerating the protectiveness of an increased FCR by enlisting less protective numbers for the other parameters used to estimate exposure at each site. The result is a method for setting sediment cleanup standards that is certain to delay cleanups across the state, as these controversial determinations of science, law, and policy are rehashed over and over again at each site. Moreover, it is a method that is likely to sacrifice human and ecological health, with no protective default numbers in the SMS rule, yet a raft of end-runs in the rule and the SCUM guidance – and no mechanism to attend to the aggregate risks and impacts to tribes' resources and rights that are permitted to accrue, site by site.

Finally, Ecology's announcement included a statement that it would "begin the process" of updating the substantive WQS, which would include a more protective default FCR. Ecology stated that it would now undertake this rulemaking as a "separate – but concurrent" rulemaking process from the implementation tools. Although Ecology made much of the earlier *start* date it was announcing for the substantive WQS rulemaking, the timelines included in the letter reveal that Ecology will nonetheless work to *complete* the implementation tools rule first (by 2013), leaving the substantive WQS rule for last (as noted above, by 2014).

Throughout its July letter and in communications since,¹⁴ Ecology has assiduously downplayed its retreat from its earlier course, terming it a "revised approach," a "modification," or an "adjustment."¹⁵ In a similar vein, Ecology Director Ted Sturdevant recently celebrated the "accelerated" schedule for updating Washington's WQS.¹⁶ These attempts to portray Ecology's abrupt and dramatic change of course as the merest adjustment – an acceleration, even – are unavailing. They also evince a callous disregard for those tribal people whose health and lifeways are at stake, given the years of delay that they have already had to suffer while unacceptable standards remain in place.

¹³ WASHINGTON STATE DEPARTMENT OF ECOLOGY, DRAFT SEDIMENT CLEANUP USERS MANUAL II: GUIDANCE FOR IMPLEMENTING SEDIMENT MANAGEMENT STANDARDS, CHAPTER 173-204 WAC (August, 2012). See also Washington State Department of Ecology, *SMS Rulemaking* (August 15, 2012), available at <http://www.ecy.wa.gov/programs/tcp/regs/2011-SMS/2011-SMS-hp.html> (stating that the draft guidance "is not part of the public comment process").

¹⁴ See, e.g., Washington State Department of Ecology, *SMS Rulemaking*, "Ecology director announced revised approach to updating fish consumption rates," (July 17, 2012), available at <http://www.ecy.wa.gov/programs/tcp/regs/2011-SMS/2011-SMS-hp.html>.

¹⁵ Sturdevant, Change of Course Announcement, *supra* note 10.

¹⁶ Ted Sturdevant, Director, Washington State Department of Ecology, Letter to Denis McLerran, Regional Administrator, U.S. Environmental Protection Agency Region X (September 25, 2012)(on file with the Center).

II. The Proposed Sediment Management Standards Rule

A. Overview

The proposed SMS set forth a framework for sediment cleanups that will delay actual cleanups while the standards are debated anew at each site; decrease the protectiveness and scope of cleanups once they do occur; yet permit potentially liable parties (PLPs) to “resolve liability” and walk away from contaminants left in place, even where these pose threats to human and ecological health.

1. Delay

As noted above, Ecology’s move to a site-by-site approach for determining the FCR and other exposure parameters will necessarily build in a layer of delay that would not exist if default values were specified in the SMS rule. Ecology’s Draft Environmental Impact Statement (DEIS)¹⁷ imagines that cleanups will occur relatively quickly under the proposed SMS framework, and touts this as one of its virtues. However, the DEIS completely ignores the time required for determining anew the relevant exposure parameters for each site. In the meantime, actual cleanup will have yet to begin, and those who consume fish affected by the site will continue to be exposed to toxic contaminants.

2. Protectiveness and Scope

Ecology’s proposed SMS will decrease the protectiveness and scope of sediment cleanups once these take place, through an array of devices that work together to decrease the number and size of “sites” delineated for cleanup; to deem a site “clean” when contamination remains in concentrations that pose a risk to human and ecological health; to low-ball and undermine estimates of risk to human and ecological health; and to (re)define “natural” background and other key concepts so that toxic contaminants are considered part of our baseline aquatic environment forever.

Ecology’s DEIS presents a series of case studies that provide a basis for comparing the “area requiring cleanup” under a human health risk-based approach and under Ecology’s proposed approach. In every environment studied (e.g., non-urban shoreline, urban shoreline, urban environment, and freshwater river), for virtually every pollutant, Ecology’s proposed SMS would lead to fewer acres being designated for cleanup. For example: in a non-urban shoreline, a risk-based approach for dioxins/furans would require cleanup of 299.30 acres whereas Ecology’s approach would require cleanup of 0 acres; in an urban shoreline, a risk-based approach for arsenic would require cleanup of 46.48 acres whereas Ecology’s approach would require cleanup of only 28.84 acres; in an urban embayment, a risk-based approach for mercury would require cleanup of 6554 acres whereas Ecology’s approach would require cleanup of only 4612 acres; and in a freshwater river, a risk-based approach for PCBs would require cleanup of 25.05 acres whereas Ecology’s approach would require cleanup of only 12.83 acres.¹⁸ These narrowly defined “sites” under Ecology’s approach mean not only that fewer acres will be cleaned up, but also that the contaminants that are not addressed are left to pose a threat of future recontamination at the site. Further, a “site” defined to include fewer acres can work together with other exposure concepts, namely the fish diet fraction and the site use factor (discussed further below),

¹⁷ WASHINGTON STATE DEPARTMENT OF ECOLOGY, DRAFT SEDIMENT MANAGEMENT STANDARDS RULE REVISIONS CHAPTER 173-204 WAC ENVIRONMENTAL IMPACT STATEMENT (August, 2012) [hereinafter Ecology, DEIS], available at <https://fortress.wa.gov/ecy/publications/SummaryPages/1209054.html>.

¹⁸ Ecology, DEIS, at Tables E.3, E.6, E.9, and E.12.

to diminish the fish resources and the human dietary intake deemed to be affected by contamination at the site – with the result that less protective standards will be determined to be warranted. Put simply, Ecology intends to entertain the argument that the smaller the “site,” the smaller the quantity of fish affected by the site, and so the less protective need be the human health-based standards for that site.

Ecology’s DEIS also provides a comparison of the protectiveness of the standards that would result under a human health risk-based approach and under Ecology’s approach. Again, in every environment studied (e.g., non-urban shoreline, urban shoreline, urban environment, and freshwater river), for virtually every pollutant, Ecology’s proposed SMS would lead to cleanup standards at diminished levels of protection. Indeed, in several instances, the difference in protectiveness is an order of magnitude or more and in one instance, the difference may be as great as four orders of magnitude. For example: in a non-urban shoreline, a risk-based approach for dioxins/furans would result in a cleanup standard of 0.187 ng/kg whereas Ecology’s approach would result in a cleanup standard of 5.0 ng/kg; in an urban shoreline, a risk-based approach for arsenic would result in a cleanup standard of 0.0243 mg/kg whereas Ecology’s approach would result in a cleanup standard of 7.3 mg/kg; in an urban embayment, a risk-based approach for mercury would result in a cleanup standard of 0.016 mg/kg whereas Ecology’s approach would result in a cleanup standard of 0.104 mg/kg; in an urban embayment, a risk-based approach for dioxins/furans would result in a cleanup standard of 0.00921 ng/kg whereas Ecology’s approach would result in a cleanup standard between 5.0 ng/kg and 14.6 ng/kg; and in a freshwater river, a risk-based approach for PCBs would result in a cleanup standard of 1.2 µg/kg whereas Ecology’s approach would result in a cleanup approach of between 5.5 µg/kg and 12.0 µg/kg.¹⁹ In only one instance – an urban shoreline for PAHs – would it be the case that Ecology’s method might approach the protectiveness of a risk-based approach, inasmuch as a risk-based approach would result in a cleanup standard of 37.9 µg/kg whereas Ecology’s approach would result in a cleanup standard somewhere between 37.9 µg/kg and 42.59 µg/kg.²⁰

Ecology’s DEIS then presents Ecology’s evaluation of the alternative approaches based on various criteria, including three “threshold” criteria addressing protection of human and ecological health and compliance with ARARs. These threshold criteria are awarded either 4, 8, or 12 points for, respectively, “low,” “medium,” or “high” marks. The first of these criteria is “impacts to human health and the environment from residual contamination.” Remarkably, Ecology awards *low* marks to the human health risk-based approach for this criterion and *high* marks to Ecology’s approach (such that these receive, respectively, 4 and 12 points). Given that Ecology’s approach would lead to fewer acres being designated for cleanup (and so greater areas of unaddressed contamination) and markedly less protective standards for the areas that are cleaned up, Ecology’s evaluation in its DEIS can only be described as delusional.²¹

¹⁹ Ecology, DEIS, at Tables E.2, E.5, E.8, and E.11.

²⁰ Ecology, DEIS at Table E.5.

²¹ Indeed, the explanatory comments reveal the generous and self-serving assumptions that were invoked to support this ranking. For example, while a human health risk-based approach is recognized to require “lower,” i.e., more protective, cleanup levels, it is supposed that there will be “less capping and dredging because of cost, and more reliance on natural recovery;” further, it is assumed that there will be “higher residual contamination for a longer period.” Conversely, Ecology’s proposed approach is credited with having a “mechanism to immediately reduce high risk areas while allowing a longer period to achieved risk-based cleanup;” and, somehow, imagined to result in “overall lower residual contamination.” Ecology, DEIS at Table 5.5, p. 84. It should be noted, again, that Ecology’s DEIS ignores entirely the added delay occasioned by the need to set standards anew at each site; presumably, the failure to account for this delay is one reason for the DEIS’ rosy assumptions about the relative time that will be required for cleanups under Ecology’s approach. The purpose of the EIS requirement under

In total, the proposed SMS bend every effort toward allowing PLPs to “resolve liability” and walk away from contamination that will remain in place at concentrations above those that pose a threat to human and ecological health. It is appropriate for Ecology to work with PLPs to ensure that their contamination can be addressed and human and ecological health protected by the most cost-effective means. But it cannot do this at the expense of the resources and people that it is obligated to safeguard.

The next section discusses in more detail the devices included within the proposed SMS that work together to both redefine the goals for our aquatic environment and undermine efforts to protect human and environmental health.

B. The Dirty Dozen

Ecology’s proposed SMS establish a new framework for determining cleanup standards for sediments. In this framework, the cleanup standard would be set at a concentration somewhere between two bracketing levels: on the low (i.e., most protective) end, the Sediment Cleanup Objective (SCO), and, on the high (i.e., least protective) end, the Cleanup Screening Level (CSL). Each of these brackets is to be determined by reference to the highest (i.e., least protective) of three benchmarks. For the SCO, these three benchmarks are (a) “natural” background, (b) human or ecological risk (at 10^{-6}), or (c) a detection limit termed the “practical quantitation limit” (PQL). For the CSL, these three benchmarks are (a) regional background; (b) human or ecological risk (at 10^{-5}) and ARARs, or (c) the PQL. The proposed SMS anticipate that cleanup standards will be adjusted upward (i.e., become less protective) from the SCO on the basis of technical feasibility, adverse environmental impacts arising from the cleanup itself, and costs to PLPs, up to the point of the CSL. In addition, the CSL will serve as a screening mechanism for identifying sites to be cleaned up and for delineating the boundaries or size of each site. The proposed SMS define each of the concepts that make up this framework – often in ways that work to the detriment of human and ecological health. Indeed, as demonstrated by the case studies in Ecology’s DEIS, *under Ecology’s proposed approach, human and ecological health will rarely, if ever, turn out to drive actual cleanups* – rather, cleanup standards will be set at the less protective levels of PQLs or the currently contaminated “regional background.”²² The proposed SMS accomplish this by means of at least twelve devices that, together, work to undermine actual cleanup and restoration of our aquatic environments. These twelve devices discussed below can be thought of as the Dirty Dozen.

1. Default Fish Consumption Rate (FCR): The Linchpin that Got Removed

The proposed SMS retreat from establishing a default FCR, despite Ecology commitments to set a default FCR by rule. Similarly, the proposed SMS decline to establish key exposure parameters, for example, a default fish diet fraction (FDF) of 1. Instead, Ecology leaves these crucial numbers up for grabs, to be determined anew at each site. This “site-specific” approach guarantees that actual cleanup will be delayed, while PLPs maneuver to have low fish consumption rates and lenient interpretations of Ecology’s guidance applied to their respective sites. While PLPs enjoy the reprieve from actually having to clean up the contamination for which they are responsible, Washingtonians are left exposed for additional months and years. Moreover, scarce Ecology time and money must be devoted to rehashing

Washington’s SEPA, like the federal NEPA, is to provide a thorough, objective evaluation of the environmental impacts of a proposed action or rule; as such, courts have routinely rejected as inadequate EISs that present unsubstantiated or self-serving assessments.

²² Ecology, DEIS, at Tables E.2, E.5, E.8, and E.11.

the science and policy debates at every site – clearly a waste of taxpayer money. Smaller tribes and communities will bear the burden of fighting to secure protective standards for each site that impacts them, an effort that will likely outstrip their resources and so leave them less protected than they would be with default exposure parameters in place – an affront to environmental justice that Ecology should not perpetrate.

2. Reasonable Maximum Exposure (RME): Reasonable if it Protects Real People

The proposed SMS state that cleanups will be set to protect those Washingtonians who are most exposed, given present and future “uses” of a site and the resources impacted by a site. This level of protection is captured by the concept of Reasonable Maximum Exposure (RME). The proposed SMS correctly recognize that, because the fishing tribes have resided in this place and relied upon the fish resources here for thousands of years, tribal members are likely in fact to be the most exposed among us. So the proposed SMS appropriately define RME by reference to tribal exposures. Importantly, the proposed SMS instruct RME to be determined by reference to “historical, current, and future tribal use of fish and shellfish,” which appropriately recognizes the relevance of tribes’ historical practices and future aspirations for more robust consumption in a context of tribal health and well-being. But the proposed SMS then provide myriad ways to undermine protection for the actual people represented by this exposure scenario, and thus to depart from a true RME.

- First, the proposed SMS allow Ecology to substitute an “alternate” exposure scenario for the RME, by reference to a process that makes no mention of the word “tribal.” Again, this possibility leaves tribes to fight to secure their protection at each site.
- Second, Ecology’s SMS guidance undermines the intended protectiveness of the RME concept by suggesting that an RME scenario is reasonable *because* it is comprised of a mix of high-end and average or median values for the various exposure parameters. This formulation misstates the derivation and point of an RME. An RME scenario is reasonable when it reflects *actual* exposures of *real* people, under *realistic* present or future conditions; it is unreasonable if it reflects hypothetical or phantom exposures, likely not to be experienced by any actual people under present or future conditions. If people’s actual exposure is comprised of a mix of high-end and average values – for example, if the community exposed consumed large amounts of fish (so had a high-end FCR), but only did so for a short period of their lives (so had an average exposure duration) – then Ecology’s formulation would be apt. But, for tribes and their members, *actual* exposure is described by very high-end values for most exposure parameters. Actual tribal people live here and harvest and consume fish here – and do so for their entire lives. This is not a fanciful or “worst-case” scenario, but an actual one. Moreover, for tribes, *realistic* future conditions include restoration of the fish and shellfish resources on which they depend – such that tribal people will once again be able to consume fish at unsuppressed, historical or “heritage” rates, as they are legally entitled to do. (Consider, for example, the once-future “use” scenario associated with fisheries on an undammed Elwha River, a future that few but the tribes would have dreamed realistic even a short time ago.)
- Third, the proposed SMS go on to provide numerous tools for whittling away at those high-end values that are employed as part of the RME scenario. Thus, even if Ecology were to select a relatively protective FCR for a site, it could potentially slash this number by means of the FDF or the source use factor (SUF) – problematic concepts elaborated further below. Indeed, although the proposed SMS do not use either of these terms, they state these concepts “shall” be considered when selecting or approving exposure parameters used to represent RME.

Ultimately, by these means, the supposed protectiveness of the RME concept in theory stands to be undermined at each site in practice.

3. Sediment Cleanup Objective (SCO) Should Reflect Our Actual Objective: Cleaning Up Contaminated Aquatic Environments

The proposed SMS should set forth an approach in which the Sediment Cleanup Objective is what it says: our actual objective, i.e., cleaning up contamination in Washington's aquatic environments so that they no longer pose risks to human and ecological health. The proposed SMS use the term SCO and set this as the "lower bound" for contaminant concentrations permitted to remain in the sediments following cleanup. That is to say, the SCO is the cleanest that we will aim to get our sediments. Thus, a SCO would be expected to equal a level that is protective of human and ecological health – the ultimate aim, or objective, of our cleanup efforts. But the proposed SMS recalibrate this goal, by defining the SCO as the *highest* (i.e., least protective) of a risk-based level; "natural" background (which itself is redefined by Ecology to include contamination – an unacceptable move elaborated below); or the practical quantitation limit (PQL), i.e., the level of contaminants detectable with present technology (which is also determined by Ecology using a lenient and untenable method, as elaborated below). This slight-of-hand removes the goal from sight. As a consequence, not only will PLPs be able to walk away from the contamination they have caused without ever being asked fully to clean it up, but the citizens of Washington will be deprived of the means to discover that this is so, as a greater-than-healthful amount of contamination left in place will be deemed to be "clean." Such lack of transparency is poor governance. It bears emphasis that the PQL, in particular, has no business serving as the *objective* for sediment cleanup; yet, the PQL will in many cases drive the cleanup standards, given the proposed SMS framework's instruction that the *highest* of the three options be deemed the SCO. This is true for such potent carcinogens as dioxins.

4. So-Called "Natural" Background: The New Natural

The proposed SMS allow the Sediment Cleanup Objective to be set equal to "natural background," if this turns out to be the least protective among the options for SCO (see discussion above). Ecology then defines this term to incorporate contamination that is anything but natural, i.e., to include PCBs, potent carcinogens that are the result of human-caused pollution. The proposed SMS state that "'natural background' means the concentration of a hazardous substance consistently present in the environment that has not been influenced by localized human activities. For example, several metals and radionuclides, naturally occur in the bedrock, sediment, and soil of Washington state due solely to the geologic processes that formed these materials and the concentration of these hazardous substances would be considered natural background. Also low concentrations of some particularly persistent organic compounds such as polychlorinated biphenyls (PCBs) can be found in surficial soils and sediment throughout much of the state due to global distribution of these hazardous substances. These low concentrations would be considered natural background." Ditto for radionuclides. While it makes sense to refer to substances that "naturally occur" "due solely to the geologic processes that formed these materials" as natural background, the remainder of Ecology's definition warps the word "natural." Moreover, if Ecology is permitted to redefine natural background in this manner, it will alter our environmental baseline forever. If the "new natural" includes PCBs, all cleanups going forward will aim, at best, to reduce contamination to this new (contaminated) baseline. And, again, there are serious concerns for transparency and accountability: Washingtonians are likely to think – and surely should be able to think – that "natural" means "natural." The true natural, not the new natural.

5. Practical Quantitation Limit (PQL): Limiting Our Limitations

The proposed SMS recognize that, for some pollutants, concentrations that are protective of human health and the environment are at levels lower than the limits of current detection capabilities. Having recognized as much, Ecology inappropriately substitutes our current limitation in this respect for our ultimate cleanup objective (the SCO) – so that, as elaborated above, our cleanups aim not for what is healthful, but for what we can detect. Ecology compounds this unacceptable move by using a method to determine PQL that aims for mediocrity and fails to harness market forces to encourage improvements in detection technology. Ecology’s PQL guidance inappropriately equates PQL with levels detectable by the mid-performing labs, jettisoning the results of the best-performing labs.²³ Ecology also commits to reevaluate the PQL only every 3-5 years, removing incentives for more rapid improvements in detection technology by private labs.²⁴ While it is appropriate to recognize current limitations on our ability to detect contaminants in the environment, Ecology’s approach forsakes technological innovators and permits our cleanup standards to lag what is actually achievable – to the detriment of human and ecological health.

6. Fish Diet Fraction (FDF): Unsupportably Carving Up the Fish Consumption Rate I

The proposed SMS and the SMS guidance anticipate that the FCR reflecting a “tribal RME individual” may effectively be reduced by a regulatory concept called the fish diet fraction, which these define as the proportion of fish in this individual’s diet “that is obtained from the site or the general vicinity of the site.” Ecology’s guidance states that a FDF less than 1 can be used to reduce the FCR if the site is small; if the site does not or will not support certain species of fish; or if the habitat at the site does not or will not support sufficient overall quantities of fish. Consider this (simplified) example: a survey of contemporary tribal fish consumption practices might reveal that tribal members consumed 100 grams/day of finfish and shellfish, 80% of which was harvested within Bellingham Bay (comprised of 30 grams/day shellfish and 50 grams/day finfish). A diet fraction of 0.8 might be used to distinguish the portion of fish affected by a cleanup site in Bellingham Bay from the portion of fish obtained elsewhere. But note that a diet fraction of 0.5 might be used to further exclude shellfish consumption if the site within Bellingham Bay were judged not to be able to support growth and harvest of shellfish, now or in the future, in sufficient quantities (due, e.g., to built infrastructure that currently displaces quality intertidal habitat at the site, or to the presence of debris that would impede access to harvest at the site, or to evidence of predation and disease due to non-site related contaminants such as fecal coliform.) The diet fraction concept has generally been advanced by PLPs; its effect is to decrease the protectiveness of the resulting cleanup standards.

In general, there is no justification for applying a diet fraction when most or all of the fish and shellfish in an individual’s diet is obtained or has the potential in the future to be obtained from waters affected by a contaminated site. This is the case for tribal fish consumers.

- First, while tribes at present obtain most or all of their fish from local sources, it is crucial to note that at treaty time, Indian people obtained *all* of their fish from local waters. Importantly, tribes’ reserved rights under the treaties and other legal agreements entitle them to do so in

²³ Memorandum to File on Establishing PQLs for Dioxins, Joyce Mercuri & Teresa Michelsen, Washington State Department of Ecology Toxics Cleanup Program (April 12, 2012); Washington State Department of Ecology, Draft SMS Issue Paper on Use of PQLs (April 12, 2012).

²⁴ *Id.*

perpetuity. The survey in our example reflects contemporary, suppressed consumption practices. Even if the entire 20% of non-local fish currently consumed by survey respondents were assumed to come from open ocean sources (say, from tuna), it would not be appropriate to apply a diet fraction of 0.8 and thereby place a ceiling on future consumption at more robust levels. As the Suquamish, Swinomish, and Lummi surveys document, many tribal members *would like to consume more fish and shellfish*, were these resources not depleted or contaminated, were they better able to access and harvest the resources, etc. Tribes envision and have worked toward a future in which the ecosystems that support fish are restored to health, and the fish resource is returned to abundance. Thus, even if tribal members currently obtain less than 100% of their diet from waters affected by a contaminated site, they have “the potential in the future” to do so – indeed, they have not only the potential, but also the expressed desire, intention, and right to do so.

- Second, tribes’ rights are not limited to certain mixes of species consumed historically or at present: these rights encompass all species of fish. So, while a survey of contemporary tribal fish consumption practices may document a particular proportion of species consumed (e.g., in our example, from Bellingham Bay, 30 grams/day shellfish and 50 grams/day finfish), tribal members are not in any sense bound to consume this mix of species in the future. To use the language of the EPA Region X Framework, tribal members are free to undertake “resource switching.” Yet Ecology’s SMS guidance appears to anticipate slicing and dicing, even down to the level of species-specific fish consumption rates, based on contemporary consumption patterns. This approach is at odds with tribes’ rights to determine the mix of species that will comprise their dietary intake in the future. And, again, it bespeaks a vision for the future that doesn’t anticipate actually restoring high quality habitat, reducing fecal coliform and other causes of disease, returning the fishery resource to sustainable levels, and ensuring ample access for tribal harvest. This vision is not shared by the tribes.
- Third, even in cases where an individual’s fish intake can only partially be supported by productivity (current and future) of resources affected by a contaminated site, the application of a diet fraction is problematic. Again, consider a hypothetical individual whose total FCR is 100 grams/day. Assume that he obtains (or would obtain) all of his fish from local sources. Assume further that Site A is a small lake that, even if pristine, is only likely to support productivity of fish sufficient to supply 50 grams/day. Application of the diet fraction concept would result in a cleanup level that permitted fish at Site A to harbor twice the level of toxic contaminants, on the theory that this individual would only ever obtain half of his fish diet from the lake at Site A (i.e., because only 50 grams/day of this individual’s fish intake is likely to be supplied by fish caught in the lake, a site-specific cleanup standard should be set using an effective FCR of 50 grams/day ($FCR = 100 \text{ grams/day} \times DF = 0.5$), on the theory that such an individual is only going to be exposed to 50 grams/day of local fish). It is important to note that this argument does not consider the remaining 50 grams/day of fish comprising this individual’s diet. But suppose he obtained it from a nearby lake at Site B. The logic applied to Site A means either that Site B must be cleaned up to a level twice as protective as would otherwise be permissible (presumably, simply because Site B is batting second) or, if the same logic is applied to Site B, that our hypothetical individual is left exposed to *twice* the level of contaminants that would otherwise be healthful. It is telling that Ecology’s SMS guidance mentions only that the FDF may be “reduced” (as to Site A), but does not mention that it may be increased (as to Site B). (See the discussion of aggregate risk, below).
- Fourth, the SMS guidance too narrowly defines the sphere of influence of a contaminated site, referring to fish “from the site or the general vicinity of site.” But contamination at a site will often have impacts on fish resources beyond the site boundaries. The EPA Region X Framework

recognizes this point and refers variously to “fish and shellfish affected by a cleanup site,” and “site-impacted fish.” A diet fraction that is selected by reference to Ecology’s narrow definition will exclude fish that are adversely affected by contamination at the site at various points in their lifecycles but not currently present at or “from the site,” resulting in underprotective cleanup standards.

- Finally, this narrow conception of the sphere of influence of a site is rendered more problematic given that it is coupled with Ecology’s proposed basis for delineating the boundaries of a “site.” As noted above, Ecology’s DEIS illustrates the impact of Ecology’s approach on the number of acres requiring cleanup, i.e., the size of the site, demonstrating that it will lead to diminished site size in a variety of environments. When sites are drawn to include fewer acres, the projections for productivity for that site may be decreased, and PLPs can be expected to argue for a FDF less than 1 and, thus, for less protective standards.

7. Site Use Factor (SUF): Unsupportably Carving Up the Fish Consumption Rate II

In a similar vein, the SMS guidance anticipates that the FCR reflecting a “tribal RME individual” may effectively be reduced by a regulatory concept called the site use factor, which it defines as “the percentage of time that a fish/shellfish is in contact with contaminants at the site.” Ecology’s guidance again anticipates mechanisms for reducing the SUF below 1, namely, based on the size of the site and on species-specific estimates of how much time the species spends “at or in the vicinity of the site,” given its particular home range and migratory habits. The guidance gives the example of a FCR that is based on consumption of a high proportion of salmon: “in this case, the SUF may be reduced to reflect the fact that the concentrations of contaminants in the salmon’s tissue are primarily related to sources other than the site.” As with the diet fraction, the SUF concept has generally been advanced by PLPs; the effect of applying a SUF is to decrease the protectiveness of the resulting cleanup standards.

Ecology’s anticipated application of the SUF is generally not supportable where tribes’ rights and resources are affected.

- First, in the case of salmon, Ecology’s willingness to assert by way of example that the contaminants in the salmon’s tissue are due “primarily” to sources other than a contaminated site suggests a predisposition to answer the several science and policy questions at issue in a manner that favors PLPs and that disfavors protection of human and ecological health. As tribal and other commenters to Ecology’s FCR TSD 1.0 made clear, numerous studies show that all salmon in fact uptake contaminants during their periods of residency in areas affected by contaminated sites; that some salmon spend their entire lifecycles in such areas; and that the contaminants themselves may be dispersed, resuspended, or transported, such that they impact environments far afield from the narrowly drawn cleanup site. Additionally, to the extent that scientific uncertainties remain about the source of the contaminants in salmon tissue, a health-protective posture would counsel against reducing the FCR (i.e., a health-protective policy judgment would “keep salmon in” by not applying an SUF).
- Second, for all species, Ecology again too narrowly defines the sphere of influence of a contaminated site by speaking of the time that fish and shellfish are “in contact with contaminants at the site.” Contaminants originating from a PLP’s actions at what becomes a cleanup site may be dispersed, resuspended, or transported such that they have adverse impacts on species beyond a site’s boundaries. Moreover, different species will themselves uptake and bioaccumulate contaminants at different rates during different lifestages. The simplistic bases for calculating the SUF suggested by the guidance underscore the PLP-friendly –

and underprotective – assumptions in this respect (e.g., “divide the time that the fish spends at the site by the lifetime of the fish (migrating species);” “divide the area of the site by the size (area) of the home range of the fish/shellfish being consumed (non-migrating species)”).

- And note that, again, the impact of the SUF considered together with Ecology’s basis for delineating the boundaries of a “site,” as illustrated by the DEIS’s discussion of the “areas requiring cleanup.” When sites are drawn to include fewer acres, Ecology’s intention to “divide the area of the site by the size (area) of the home range of the fish/shellfish being consumed (non-migrating species),” will lead PLPs to argue for an SUF less than 1 and, thus, for less protective standards.

Additionally, it bears noting that application of the devices for whittling away at the FCR – the FDF and SUF – have a *multiplicative* effect on the risk assessment equation. Thus, even a comparatively protective FCR can be gutted, for example, if it is halved by application of a FDF of 0.5 and then halved again by application of a SUF of 0.5.

8. Acknowledging Other Governments’ Standards: Federal, State, Local, and Tribal Requirements Should be “Applicable”

The proposed SMS determine risk-based cleanup levels by looking to the most protective of (a) levels calculated by reference to marine and benthic health; (b) levels calculated by reference to human health; (c) levels calculated by reference to ecological bioaccumulative health; or (d) standards set by other government entities. The last of these are known as “applicable, relevant, and appropriate requirements,” (or “ARARs”). Both MTCA and the federal Superfund cleanup law similarly provide for recognition and incorporation of sister governments’ laws and requirements of general applicability, as relevant to a particular cleanup site. MTCA, however, departs from the federal Superfund law in failing to recognize the duly enacted requirements of tribal governments. The proposed SMS repeat this affront, by mentioning only “local, state, and federal laws” among those it deems “applicable,” and then cross-referencing MTCA’s process for determining when such laws constitute ARARs. While the inclusion of tribal laws among those afforded recognition as ARARs under the SMS will not necessarily result in more protective risk-based cleanup levels – tribes, like other governments, can and do enact standards of differing levels of protectiveness – the fact that many tribes are leaders in protecting human and ecological health suggests that their inclusion augers for greater, rather than lesser, protection. More importantly, however, to exclude tribal governments from the list of recognized governments is an affront to tribal sovereignty and an embarrassment to a state whose *Centennial Accord* with the tribes promised more. Washington’s SMS should provide for the recognition and incorporation of tribal governments’ laws and requirements of general applicability as ARARs.²⁵

9. Adjusting Upward from the Sediment Cleanup Objective (SCO): Ask “What is Possible?” Not “What is Practicable?”

The proposed SMS set up a scheme for determining the site-specific cleanup level by which greater concentrations of contaminants will be permitted than would be protective of human and ecological risk, by allowing “adjustments” upward from the Sediment Cleanup Objective. The SMS indicate that

²⁵ Note that Washington should not limit ARARs to those tribal laws and requirements that have been federally approved, for example, WQS approved under the CWA for those tribes who have sought “treatment in the same manner as a state;” rather, Washington should accord full recognition to duly enacted tribal standards, consonant with tribes’ status as sovereign governments.

the cleanup level be set “as close as practicable to the SCO based on technical possibility and adverse environmental impacts.” Adjustments upward will only be permitted to a level termed the Cleanup Screening Level, which is the *highest* (i.e., least protective) of a risk-based concentration (which is an order of magnitude less protective than the current MTCA target, i.e., $1 (10^{-5})$); regional background (which itself is defined in a manner that permits considerable contamination to remain in place – discussed further below); or the PQL (the infirmities of which have been discussed above). Much turns, then, on the definition of “practicable.” Although the word might ordinarily be thought to refer to the degree of contaminant cleanup we are able to achieve, given our best efforts and technology, Ecology’s definition asks considerably less of PLPs: “‘Practicable’ means able to be completed in consideration of environmental effects, technical feasibility and cost.” While it may be appropriate to recognize some bases for permitting contamination to remain at a cleanup site in amounts that exceed the SCO, at least on an interim basis (but see the discussion of periodic reviews and reopeners, below), the proposed SMS authorize inappropriate bases, such as cost, as well, with the result that human and ecological health can be sacrificed in the name of providing cheaper cleanups for PLPs. This is not to say that costs are never to be considered in the cleanup process; indeed, it is important to consider costs when comparing among alternative remedies that might be used to attain health-based cleanup standards. But “cost” shouldn’t provide a basis for scaling back from standards that will clean up our aquatic environments and protect human and ecological health.

10. Regional Background: Decline by Design

The proposed SMS, as noted above, will permit greater concentrations of contaminants to be left in place than would be protective of human health, by allowing adjustments upward from the SCO, up to the *highest* of three levels, one of which is the level of current contamination present in the area – a concept called “regional background.” “Regional background” is defined as “the concentration of a contaminant within a department-defined geographic area that is primarily attributable to diffuse nonpoint sources, such as atmospheric deposition or storm water, not attributable to a specific source or release.” This definition is unsettling for its indeterminacy, leaving the relevant geographic area to be defined by Ecology at some point and by some means it deems appropriate (the SMS guidance leaves considerable detail regarding this key concept to be filled in at a later date, containing, as it does, a “placeholder”). Unfortunately, experience suggests that Ecology is prepared to consider areas that harbor significant contamination to serve as reference points for determining this sort of regional “background.” Moreover, the remainder of the definition incorporates significant ongoing contamination (e.g., from nonpoint sources, from storm water), rather than assuming a future in which source control is taken seriously. Ecology’s approach ensures decline by design. Consider the following scenario: under Ecology’s approach, one or more sites in an urban embayment are required to be cleaned up to the level of current contaminated “regional background,” and so permitted to leave greater than healthful amounts of contamination in place. These residual contaminants migrate, contributing to elevated levels in the surrounding geographic area. Future sites in this area would be required to be cleaned up to only these elevated levels, which would now be considered “regional background” by Ecology. In the meantime, the Department of Health is compelled to issue Fish Consumption Advisories, given the elevated risk to those who consume fish affected by contamination in the relevant geographic area; in response, at least some people reduce their intake of fish. Subsequently, sources and PLPs argue that Water Quality Standards and site-specific cleanup levels should be less protective, because people are eating less fish and so are less exposed. Greater amounts of contamination would be permitted in these future regulatory rounds, and our aquatic environments would continue to decline. This scenario is troubling, given the reality that cleanup standards for some of the most harmful pollutants are likely to be set equal to regional background. PLPs and their

consultants have admitted (and applauded) the “paradigm shift” that this approach represents²⁶ – away from seriously pursuing restoration of our aquatic environments and toward embracing a steady decline in our environmental baseline.

11. Periodic Review: Perhaps ... Despite Leaving More Contamination in Our Waters

The proposed SMS make no effort to expand the current provision for so-called periodic review; rather, they simply cross-reference MTCA, which calls for review under certain circumstances “if resources permit” 5 years after the initiation of a cleanup action. The point of periodic reviews – which are akin to the “Five-Year Reviews” under federal Superfund cleanups – is to revisit sites post-cleanup to ensure that human and ecological health are being protected. Periodic reviews involve a number of considerations, including whether the remedy selected (including engineering or institutional controls) is actually intact and effective at limiting human exposure to any contaminants that have been permitted to remain in place; whether new scientific information (e.g., about the hazard posed by the contaminants of concern or about exposure assumptions – although the latter is not mentioned in MTCA); whether uses of the site and affected resources differ from those projected; whether new analytic technologies permit better detection of contaminants. While the proposed SMS include expanded avenues for allowing more contamination to be left in place than would be healthful (i.e., cleanup standards set by reference to PQL or regional background), this additional leniency on the front end is not coupled with any additional surveillance or accountability on the back end. The SMS guidance suggests that, where cleanup levels are determined by PQLs, Ecology “shall” undertake periodic reviews, but the language in MTCA quoted above appears to qualify this by the availability of resources to Ecology. To this end, experience on the ground suggests that Ecology often in fact lacks the resources to conduct meaningful periodic reviews. And neither the proposed SMS nor the SMS guidance provide for periodic review where cleanup levels are determined by reference to regional background, despite the fact that such sites will be permitted to harbor unhealthful concentrations of contaminants. Further, MTCA also appears to authorize Ecology to discontinue periodic reviews (except in cases where institutional controls have been relied upon) at its discretion. In all, the proposed SMS provide more opportunities for PLPs to leave unhealthful levels of contaminants unaddressed, but fail to address gaps and questions in Ecology’s authority to ensure that human and ecological health are nonetheless protected.

12. Aggregate Risk: The Question that Doesn’t Get Asked

In proceeding site by site, the proposed SMS nowhere ask questions about aggregate risk, i.e., the total risks suffered when people are exposed not only to Site A, but also to Site B, Site C, and so on – as is likely to be the case for many tribes, whose “usual and accustomed” or “U&A” areas include more than one potential cleanup site. While a default FCR and other exposure factors do not in themselves assure attention to the issue of aggregate risk, the use of defaults allows for coordinated judgments on questions of science, law, and policy that can address these sorts of big-picture issues and ensure that cleanups across the state are adequately protective. The proposed SMS and SMS guidance also permit use of a fish diet fraction in a manner that neglects to consider the fact that tribal members may be exposed to contamination affected by more than one site (see discussion of FDF above); rather, by

²⁶ See, e.g., Brad Helland, Hart Crowser, *Comments on Preliminary SMS Rule Language* (November, 2011), available at http://www.ecy.wa.gov/programs/tcp/regs/2011-SMS/adv-comm/SMS-comments/Jan-20,2012/Hart_Crowser.pdf.

proceeding site by site, Ecology will effectively apply the FDF in a vacuum, resulting in unhealthy exposures to those who rely on fish.

C. Sediment Management Standards Are Water Quality Standards

Ecology's proposed SMS appear to seek to divorce themselves from the WQS of which they have been recognized to be a part, no longer citing the relevant provisions of the federal Clean Water Act. Although this is a change in the agency's position,²⁷ Ecology offers no explanation for it. It is a change that is at odds with the real world, where sediment cleanup and surface water quality are intimately related. Contaminated sediments can undermine efforts to protect and attain the designated "uses" that are the touchstone for efforts to ensure water quality under the federal Clean Water Act. If rules addressing sediment cleanup permit contamination to remain at levels that fail to protect the health of humans or aquatic species, they can effectively modify the relevant water quality standards and/or undermine implementation of those standards. This relationship – and the consequent need to harmonize SMS and WQS – is ignored in Ecology's proposed SMS rule. And, given that the proposed SMS will indeed permit contamination to remain at levels that fail to protect human and ecological health for the large number of cleanups that will be PQL- or "regional background"-driven, WQS in Washington in fact stand to be undermined.

To the extent that this change is an attempt by Ecology to avoid the federal oversight that comes with WQS, it is troubling and inappropriate. It is also unavailing. Courts have recognized that the U.S. EPA's duty to review state water quality standards stems from Congress' directive in the federal Clean Water Act, and have uniformly rejected narrow readings of the term "water quality standard" in order to avoid triggering EPA's mandatory duty.²⁸ Importantly, courts have declined to take at face value states' and the EPA's assertions that particular measures are *not* water quality standards where, as a practical matter, the measures in question would negate or undercut the goals set in the state's water quality standards, in effect modifying the WQS or undermining their implementation. As the district court in Oregon recently observed, EPA is not free simply to parrot a state's label or to accept without question a state's decision not to submit regulatory provisions to EPA for review as water quality standards.²⁹ Rather, EPA needs to conduct a searching review of the provisions to ascertain their actual effect. Otherwise, a state could "modify its water quality standards, simply disavow that a change had taken place, and the EPA could rely on [the state's] disavowal to avoid its mandatory review of the modified

²⁷ Notably, the current SMS standards make explicit that a purpose of the SMS is "to protect existing beneficial uses and move toward attainment of designated beneficial uses as specified in section 101(a)(2) of the federal Clean Water Act (33 USC 1251, et seq.) and chapter 173-201 WAC, the Water quality standards for the surface waters of the state of Washington." WAC 173-204-120(2). Ecology's past practice with respect to compiling its list of "impaired" water bodies within the meaning of section 303(d) of the federal CWA and in developing TMDLs also indicates its understanding of the integral relationship between contaminated sediments, the SMS, and the CWA. See, e.g., Northwest Indian Fisheries Commission, *Comments on the Proposed Sediment Management Standards, Addendum: Relationship of SMS to Surface Water Quality Standards and the Need for Federal Review* (October, 2012)(describing examples of Ecology's past practice).

²⁸ See *Northwest Environmental Advocates v. U.S. Environmental Protection Agency*, 855 F. Supp.2d 1199 (D. Or. 2012); *Fla. Pub. Interest Research Group Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070 (11th Cir. 2004) ("*FPIRG*"); *Miccosukee Tribe of Indians of Florida v. EPA*, 105 F.3d 599 (11th Cir. 1997) ("*Miccosukee I*"); *Miccosukee Tribe of Indians of Florida v. U.S.*, No. 95-0533-CIV-DAVIS, 1998 WL 1805539 (S.D. Fla. Sept. 14, 1998) ("*Miccosukee II*"); *Miccosukee Tribe of Indians of Florida v. U.S.*, 2006 WL 648055 (S.D. Fla. February 16, 2006) ("*Miccosukee III*").

²⁹ *Northwest Environmental Advocates*, 855 F. Supp.2d at 1211.

standards.”³⁰ Ecology’s apparent attempt to distance the proposed SMS from its WQS is all the more surprising given EPA’s explicit statement in writing to Ecology that the bulk of its current SMS are, in EPA’s view, WQS.³¹

Ecology’s apparent attempt to avoid EPA involvement is also disturbing insofar as it sidelines a federal trustee with fiduciary obligations to protect tribal rights and resources. This effect of “de-federalizing” the proposed SMS cannot have escaped Ecology’s notice. It is, again, a move that runs counter to the spirit and promise of the *Centennial Accord*.

Conclusion

The end result is that Ecology’s proposed SMS unacceptably work to undermine tribal rights and to threaten tribal health and well-being, as well as the health and well-being of all Washingtonians, in the present and future generations. MTCA emphasizes *each person’s* “inalienable right” to a healthful environment. MTCA also recognizes *each person’s* “responsibility” to safeguard that right. Indeed, MTCA states that it is our “solemn obligation” to ensure the health of our land, air, and waters for our children and for the generations to come. And the federal Clean Water Act and its state counterpart envision a future in which our waters are truly fishable, and healthy enough to support birds, wildlife, and all manner of aquatic life. While our foundational environmental statutes reflect Washingtonians’ restorative aspirations, the proposed SMS bear the imprint of PLPs’ influence. The proposed SMS fall seriously short of upholding Ecology’s duties to protect Washington’s people and resources, and seriously short of upholding Ecology’s obligations to honor the treaties and other sources of rights held by tribes and their members.

Respectfully submitted,

Catherine A. O’Neill
Professor of Law, Seattle University School of Law
Faculty Fellow, Center for Indian Law & Policy

³⁰ *Id.* (citing FPIRG, 386 F.3d at 1089).

³¹ Letter from Randall F. Smith, Director, Office of Water, U.S. Environmental Protection Agency, Region X, to Megan White and Jim Pendowski, Washington State Department of Ecology (1999). As elaborated by the Northwest Indian Fisheries Commission, EPA’s past practice underscores its understanding that the management of Washington’s sediments is integrally related to the quality of its surface waters, and EPA guidance further suggests that SMS satisfy the criteria for being considered – and reviewed by EPA as – WQS. Northwest Indian Fisheries Commission, *Comments on the Proposed Sediment Management Standards, Addendum: Relationship of SMS to Surface Water Quality Standards and the Need for Federal Review* (October, 2012)