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RE: Draft Sediment Management Standards (SMS) Rule Proposed Amendments
Chapter 173-204 WAC
August 15, 2012

The Suquamish Tribe ("Tribe") has reserved treaty rights and resources under the 1855 Treaty of Point Elliott that protect the right to safely access and harvest treaty and natural resources throughout the Tribe's federally adjudicated Usual and Accustomed fishing area. Because tribal health and well-being are inextricably linked to the land, air, water and all forms of life within the natural system, the Tribe has an enduring commitment to future generations to preserve, restore, and protect treaty rights and resources that have been degraded or put at risk due to environmental contamination. The Tribe and other treaty tribes devote significant effort to co-managing Washington's finfish and shellfish harvests for conservation and human health concerns, and to supporting the development of environmental rules and standards that are protective of tribal people and resources.

Washington's environmental laws are meant to protect human health and the environment for all citizens, tribal and non-tribal. These laws, however, are not purely state issues and have a direct connection to tribal and federal interests that are focused to improve the protection of human health and the environment. The SMS amendments proposed by the Department of Ecology (Ecology) do not appear to moving in the direction to accomplish these objectives. Instead, they support a back-sliding approach that appears to focus on the status quo and to favor parties who are potentially liable for cleaning up environmental contamination of sediments. Back-sliding of regulatory protection arising from changes in environmental rules and regulations is a form of degradation that erodes the Tribe's treaty rights.

As a participating member tribe of the Northwest Indian Fish Commission (NWIFC), the Tribe fully supports the comments submitted by the NWIFC related to the proposed amendments to the Sediment Management Standards (SMS) and incorporates those comments by this reference. The Tribe is providing additional detailed comments on key issues related to the protection of human health that must be addressed before the rule is finalized:[1]

- inconsistencies between the SMS and federal water quality regulations and rules;
- the failure to fully and effectively address human health concerns in the rule, including the failure to adopt a more protective fish consumption rate and the inclusion of exposure parameters that do not protect high fish consumers; and
- the use of inappropriate baselines and metrics such as regional background and analytical quantitation limits to define protectiveness

1. SMS must be consistent with federal rules regulation and policies

Ecology decided to promulgate Part V of the SMS under MTCA authority only, creating inconsistency both within the rule itself (only Part V is promulgated under MTCA authority only) and with federal water quality regulations. Although the management and quality of sediments, as embodied in the entire SMS rule, are recognized as directly linked to the health of aquatic ecosystems and the protection of designated uses, Ecology's decision separates sediment cleanup standards from the rest of the SMS rule, divorces sediment standards from water quality criteria, and seeks to avoid the federal review and approval process. This is not a purely state issue.

Changes in the SMS propose metrics and baselines for establishing cleanup standards that are not protective of human health and the environment. Rather they are based on background areas that have received some impacts from chemical contamination and quantitation limits that are subject to technical and cost constraints. These proposed metrics may have a negative modifying effect on water quality standards. Under the CWA, EPA is obligated to review those laws and standards which have the effect of modifying water quality standards or undermining implementation of those standards.

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1 This letter, however, does not address all of the Tribe's concerns

The SMS, in its entirety, must be harmonized with Washington's Surface Water Quality Standards and receive federal EPA approval in order to ensure that proposed rules protect designated uses and do not undermine the water quality standards or the federal Clean Water Act.

2. SMS must address human health concerns related to fish consumption

Ecology has known for years that the current fish consumption rates (fcr) used as the basis for the SMS, and WQS, do not protect Washington residents – and that tribal communities are at particular risk of toxic exposure because of their traditionally high consumption rates. Despite this awareness, and in spite of a commitment to tribes to revise the current rates, Ecology did not recommend a default rate or range of rates and has instead proposed that fish consumption rates be determined on a site-by-site basis, using a Reasonable Maximum Exposure (RME) approach.

Failure to adopt a default rate or range of rates has resulted in proposed amendments that specify numeric standards that are only protective of benthic organisms; they do not include numeric standards related to human health or bioaccumulative contaminants. Without a way to develop even screening level human health criteria, there is no simple method to identify contaminated sites, provide preliminary public health information, screen remedial alternatives, evaluate the need for sediment impact and recovery zones, and monitor progress towards long-term compliance based on human health concerns.

By providing only for a site-by-site approach, the proposed amendments ensure that all sites are complex, and expensive. As with the federal Superfund process, the path from site identification to recovery may take decades. By having to reinvent the wheel for every site, the limited resources of tribes and other communities, as well as the Department of Ecology, will be severely strained. Critical decisions regarding cleanup objectives and remediation levels may be decided according to who has the most time and money to spend, rather than what should be done to protect human health and the environment.

An RME approach is appropriate for establishing risk-based levels for complex sites. While the proposed amendments recognize that tribal members are likely to have higher rates of exposure via seafood consumption, and incorporate tribal exposure in the RME approach, they do not go far enough in specifying consultation with impacted tribes to determine risk assessment assumptions and parameters. Numerous studies and surveys, including the August 2000 *Fish Consumption Survey of the Suquamish Indian Tribe Of The Port Madison Indian*

Reservation, Puget Sound Region and the dietary survey recently completed by the Lummi Tribe, document that site-specific rates may be considerably higher than any default rate or range of rates proposed to date. It must also be recognized that current tribal consumption rates are likely to be suppressed. According to the Suquamish survey, some tribal members have reduced or changed their consumption practices due to pollution and related restrictions and regulations concerning harvesting. As tribes focus efforts to improve sediment and water quality and to restore habitats, it is reasonable and prudent that tribes expect their members to increase fish consumption rates consistent with traditional practices. The RME approach must provide protection for these future as well as current uses and must specify tribal consultation in developing RME scenarios

Although an RME approach incorporating tribal exposures has the stated intent of protecting high end fish consumers, it is undermined by a series of additional considerations and parameter adjustments that can be used to modify the exposure scenarios, resulting in risk calculations that seem less risky. Ecology justifies these modifications as a way to estimate the portion of cumulative risk attributable to a specific site. Given that sediment sites, and the organisms impacted by contamination, are not usually physically separated from the surrounding environment, such modifications seem unwarranted in an RME approach. They serve only to limit the liability of potentially responsible parties. These modifications are not protective of tribal populations who obtain or would like to obtain, most or all of their fish and shellfish from local sources and who have reserved the legal right to do so in perpetuity.

The Suquamish Tribe has submitted two formal letters commenting on human health concerns related to fish consumption. The Tribe again recommends that Ecology establish a default fish consumption rate, or range of rates, based on current data, as a significant step forward in developing human health criteria that are protective of all Washington residents.

Furthermore, the Tribe recommends that the proposed RME approach be revised to explicitly state that site-specific consumption rates will be determined in consultation with impacted tribe(s) and will be based on tribal surveys that are determined by the tribe(s) to be most representative of current and/or future tribal uses. Other risk assessment parameters and assumptions, such as exposure duration, fraction ingested, site use factors, or exclusion of salmon or other species, should not be used to undermine tribal exposure scenarios within an RME approach. These parameters should be established to be protective of treaty rights and should promote consistent site management decisions. Treaty-reserved rights to safely access and harvest seafood are legal obligations and tribes reasonably expect that harvest will increase as water quality and habitats improve.

3. SMS must be protective of human health and the environment

The stated purpose of the SMS rule is to "reduce and ultimately eliminate adverse effects on biological resources and significant health threats to humans from surface sediment contamination". A sediment cleanup level (SCL) is then defined as the concentration or level of biological effects for a contaminant in sediment that is determined by the department to be protective of human health and the environment. Consequently, how the department defines protectiveness related to SCLs becomes central to the effectiveness of the rule itself.

Unfortunately, although protectiveness may begin as actual risk-based or effect-based standards, the proposed amendments quickly move to "adjust" SCLs upward, if natural background concentrations or the practical quantitation limits (PQLs) are higher. SCLs may be further adjusted upward if the department determines that regional background concentrations are to be considered rather than natural background concentrations. All of these adjustments move away from protectiveness, as defined by a reduction or elimination of adverse biological effects or human health risk.

The use of natural background to condition SCLs may appear logical when applied to naturally occurring substances such as metals and radionuclides that naturally occur in the bedrock, sediment and soil of Washington State due solely to the geological processes that formed these materials. The proposed amendments, however, re-define natural to include low concentrations of some particularly persistent organic compounds such as polychlorinated biphenyls (PCBs) that can be found in surficial soils and sediments throughout much of the state due to global distribution of these hazardous substances. By considering current concentrations of contaminants such as PCBs to be "natural", the baseline for remedial decisions shifts upward permanently. In addition, it is important to acknowledge that Ecology does not have an adequate data base to establish current conditions as reflected in sediment or tissue. Given the lack of resources to fund new state projects, it is difficult to imagine that this data will be collected or adequately developed for programmatic use when the revised rule is implemented. This data base will be crucial to the regulatory decision-making process. It must be scientifically sound, comprehensive and regularly updated and validated. It cannot be left to potentially responsible parties as a piecemeal effort.

The use of PQLs and the regional background concept as applied to SCLs are even more troublesome. PQLs have nothing to do with environmental conditions; they relate only to the limitations of analytical equipment and methods. It is also worth noting that Ecology's guidance for determining PQLs does not insist that the most accurate methods or the best technologies be used. While it is important to recognize the limitations of our technology, PQLs are not a true metric of protectiveness.

Similarly, regional background is not a true baseline for measuring protectiveness. As defined within the SMS rule, regional background is the concentration of a contaminant within a department-defined geographical area that is primarily attributable to atmospheric deposition or diffuse nonpoint sources. Regional background concentrations are assumed to be higher than natural background concentrations and include substances known to produce harm. Regional background incorporates impaired conditions that may already represent a threat to human health or the environment. Re-setting the baseline does not reduce or eliminate adverse biological effects or human health risks, it obscures them.

The proposed rule language states that sediment cleanup actions that achieve the sediment cleanup levels at the applicable points of compliance are presumed to be protective of human health and the environment. It does not differentiate between sediment cleanup levels that are risk- or effect-based and those that have been "adjusted". The proposed rule language also states that final liability settlements will be made if sediment cleanup levels are attained, whether or not those levels are truly protective of human health and the environment. This back-sliding approach will affect any gains that have been made to restore and improve both sediment and water quality conditions in Puget Sound and other impacted areas that affect not only state interests, but disproportionately affect tribal interests.

The SMS rule language needs to be clarified to distinguish between cleanup levels that are protective, those that are technically achievable or practicable, and those that may be simply expeditious. Natural background needs to be defined as naturally occurring, non-anthropogenically influenced conditions. PQLs and regional background cannot be considered metrics of protectiveness and final liability settlements that meet cleanup levels based on impaired background conditions or analytical limitations cannot be presumed to be protective. Rather than adjusting cleanup levels upward, Ecology needs to demonstrate to the citizens of Washington how it will meet the objective of reducing and ultimately eliminating adverse effects on biological resources and significant health threats to humans from surface sediment contamination.

As a co-manager of natural resources with the State of Washington, the issues raised above are not taken lightly. The Tribe will continue to engage with Ecology on a government-to-government basis to provide additional input as revisions to the SMS rule are made. From a government-to-government perspective, it is the Tribe's expectation that Ecology will give meaningful consideration to these comments, as well as comments submitted by NWIFC and other tribes. If you have any questions, please contact me at 360-394-8449 at your convenience.

Respectfully,

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