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Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
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Ted Sturdevant, Director
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ATTN: Toxic Cleanup Program

RE: Comments on proposed amendments to Sediment Management Standards

In order to meet the intent of the Model Toxics Control Act, the Clean Water Act, and other relevant environmental laws, the Sediment Management Standards (SMS) require a fundamental shift from how industry can meet the requirements to protecting the health of Washington State's citizens and natural resources. The proposed amendments would jeopardize Tribal Treaty-reserved fishing rights by promulgating inadequate standards for toxic discharge and cleanup. Our comments here echo comments by many other Tribes and can be categorized in the following manner: 1) failure to include a default fish consumption rate; 2) provisions that undermine protective standards in ways that pose an unacceptable risk to human health, particularly for Tribes; 3) definitions, objectives, and procedures that unacceptably lower cleanup requirements; and 4) inconsistency with other regulatory requirements, such as the Federal Clean Water Act.

1. Employ a Default Fish Consumption Rate at or above 175 gpd.

In comments submitted to the record in January 2012 and again on October 26, 2012, Swinomish stated that a state-wide default fish consumption rate (FCR) is necessary in order to protect the health and welfare of all Washington State citizens who eat fish. We recommended, and recommend here again, that Washington adopt 175 gpd, which covers all species of fish and shellfish, including salmon. The Affiliated Tribes of Northwest Indians passed Resolution #12-54 at the 2012 Annual Convention calling for a fish consumption rate of no less than 175 gpd for human health criteria rulemaking in the Pacific Northwest (www.atnitribes.org/sites/default/files/res_12_54.pdf). As a member Tribe of ATNI, we stand by this Resolution. Oregon has taken the lead and approved the 175 gpd rate. In addition, Tribal comments on the 2011 version of the Technical Support Document indicated that the proposed

range of 157-267 grams per day, which was recommended by Ecology's technical staff, represented a "step forward"-- even though it did not fully address the suppression of fish consumption from historical levels. Furthermore, Tribes supported the position, put forth by Ecology, that it was important to have a consistent fish consumption rate in the state's SMS and water quality standards for regulatory purposes.

Instead of the step forward, and despite previous commitments, Ecology has taken a leap backwards by retreating from the establishment of a default fish consumption rate in rule. Ecology leaves the FCR and other crucial parameters up for grabs, to be determined at each site. This site-specific approach guarantees that actual cleanup will be delayed while PLPs maneuver for lenient interpretations of the FCR and other exposure parameters.

Ecology will have the burden of rehashing the science and policy debate at every site, thereby wasting significant taxpayer resources, resources that would be more productively used for cleanup. Additionally, the site-by-site approach puts Tribes and small communities at a disadvantage, since they will bear the burden of fighting to secure protective standards for each site that impacts them. The effort is likely to outstrip resources available to the Tribes, leaving less protective requirements in place and perpetuating existing environmental injustice to the Tribes and other groups who consume large amounts of fish. **A state-wide default fish consumption rate of 175 gpd must be included in the SMS in order to adequately protect the health and welfare of all Washington citizens who eat fish, including salmon.**

2. Reasonable Maximum Exposure parameters must protect the health of Tribal fish consumers at historical, current and future levels.

The proposed SMS state that cleanup levels will be set to protect those Washingtonians who are most exposed, given "historical, current, and future tribal use of fish and shellfish." The proposed SMS protections thus incorporate the concept of Reasonable Maximum Exposure (RME). The RME concept in the SMS is correct in recognizing that Tribes have relied on natural resources here for thousands of years, and that Tribal members are likely to be among the most exposed to potential contaminants natural resources. However, the proposed SMS then provide tools to undermine protection of human health by: a) portions of the SMS do not reference Tribes; b) the standards fail to incorporate provisions that protect future users and high consuming Tribal members; c) the Fish Diet Fraction is used to whittle down the fish consumption rate by setting standards site by site; and, d) the Site Use Factor reduces protective requirements by establishing rates for individual species' use of individual sites. **Section 173-204-561 parts A through D must be revised to clearly reference Tribal consumption throughout, including future use, and to ensure that high consumption opportunities for all species throughout all Tribal treaty fishing areas are maintained.**

a. 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. **Any site in a Tribal usual and accustomed area must have an RME based on Tribal exposure scenarios.**

b. Reasonable Maximum Exposure is intended to reflect actual exposures of real people under realistic present or future conditions. Tribal dietary studies of fish consumption are neither hypothetical nor unrealistic—they are scientifically sound, peer-reviewed dietary studies of Tribal members who consume predominantly locally-harvested fish.

Ecology intends to establish exposure parameters based on a mix of high-end and average values. An RME for Tribes must reflect high-end fish consumers, as Tribes live here and harvest and consume fish for our entire lives. Moreover, Tribal exposure scenarios must include future, restored conditions of fish consumption at unsuppressed, historical or "heritage" rates, as Tribes are legally entitled to by Treaties with the United States Federal Government. **SMS section 173-204-561 must reference future consumption scenarios as well as current.**

c. Fish Diet Fraction: 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 (FDF). FDF is the portion of a person's diet that "is obtained from the site or the general vicinity of the site." A Fish Diet Fraction is applied to the applicable fish consumption rate; a FDF of 1.0 means no reduction to the FCR. However, Ecology includes provisions to reduce the FCR if the site is small or the habitat will not support sustainable quantities of the species at the determined FCR. Yet this fails to assess the Fish Diet Fraction factor in the context of harvest at multiple sites, exposing Tribal members to potential risk. **There is no justification for the application of a Fish Diet Fraction less than 1.0 in areas where Tribes historically, currently, or potentially harvest fish and shellfish without posing an unacceptable risk of exceeding safe levels of exposure.**

d. Site Use Factor: Another tool that is being used to reduce the protective level of SMS requirements is the Site Use Factor. The SUF refers to the percentage of time that a fish/shellfish is in contact with contaminants at the site based on the species' life history and home range. Ecology's proposed standards not only fail to look at consumption in the aggregate of contaminated sites, they attempt to further slice up the required level of site cleanup by separating by species, size of the site, and time of exposure. There is no scientific way to assess how much time a species has spent at a site or how much chemical burden a species has picked up in any specific geographic area, thus a SUF is subjective and variable. Additionally, bioaccumulation varies species to species, life-stage to life-stage, and within the array of life history strategies of a single species, which may or may not migrate beyond the vicinity of the contaminated site. The Site Use Factor also fails to account for situations where contaminants are dispersed, resuspended, or transported to areas beyond the boundaries of a specific site. **In summary, there is no justification for the application of a Site Use Factor less than 1.0 in areas where Tribes historically, currently, or potentially harvest fish and shellfish without posing an unacceptable risk of exceeding safe exposure levels. The concept of applying a Site Use Factor using the concept of a fraction of the home range or the estimated duration of contact with a site should be eliminated from the SMS.**

3. Sediment cleanup objectives, definitions, and standards should be structured toward actually cleaning up contaminated aquatic environments.

The proposed Sediment Management Standards include several provisions that serve to reduce the burden of cleanup for Potentially Liable Persons, through low Sediment Cleanup Objectives. The Sediment Cleanup Objectives are set at the **least** stringent of several potential tests: practicable cleanup levels, the use of "natural" background levels that reflect existing contamination, "regional" background levels, and Practical Quantitative Limits (PQLs) which represent the median level of contaminants detectable with present technology. The low bar set by these definitions and objectives will mean that PLP's can walk away from contaminated sites without fully cleaning them up, and Washington residents will live with contaminated sites

in perpetuity. The cleanup standards are particularly problematic when considering highly potent carcinogens such as dioxin, and high fish consuming people, such as Tribes.

a. Practicable versus possible cleanup levels: The SMS allows Ecology to establish a site-specific cleanup level which permits higher concentrations of contaminants than what would be protective of human and ecological risk. The SMS indicate that the cleanup level be set "as close as practicable to the Sediment Cleanup Objective (SCO) based on technical possibility and adverse environmental impacts." The definition of "practicable" is thus an essential element of cleanup requirements, and unfortunately is not defined in terms of best efforts and technology. " 'Practicable' means able to be completed in consideration of environmental effects, technical feasibility and cost." While it may be appropriate to recognize some basis for permitting contamination to remain at a cleanup site in amounts that exceed the SCO, at least on an interim basis, the proposed SMS authorize inappropriate factors, such as cost, as well, with the result that human and ecological health can be sacrificed in the name of providing cheaper cleanups. **Do not include language in the SMS that allows cleanups to be based on the least expensive option and regardless of the amount of contamination remaining.**

b. Natural Background: 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, as would 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. **Natural background definitions should be limited to natural, non-anthropogenic inputs, and not include widespread persistent contaminants introduced by human activities.**

c. "Regional Background" refers to the level of current contamination present in the area—a vague geographic definition that is particularly confusing in combination with the unnatural definition of natural background. "Regional background" is vaguely 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." Discretion in applying this definition is left to Ecology with little specific guidance. 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 such as storm water) and raises the possibility that cleanup requirements will spiral continually downward to less stringent levels as the regional background level deteriorates, similar to the definition of natural background. **The difference between natural background, area**

background, and regional background and the need for these distinctions should be clarified and guidance specified.

Former members of the SMS advisory group indicate that the concept of "Regional Background" was intended to offer incentive for cleanup in an area that has been polluted by multiple sources, instead of waiting until all parties can enact the cleanup at once. However, the regional background definition does not make sense in light of pollution from stormwater and in tidally influenced areas, and further compounds the inconsistencies between SMS and Surface Water Quality Standards. **The SMS should reject the regional background definition, or at least clarify that it is an interim standard to be used only in remediation.**

d. Practical Quantitative Limits: 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. **However, existing lab capabilities are not appropriate as a standard to use as a Sediment Cleanup Objective.** Ecology compounds this unacceptable use of lab techniques as standards, by determining PQLs as the median of current lab results, rather than the higher levels of detection. This strategy rewards mediocrity and fails to encourage improvements in detection technology, especially when used as a cleanup standard. Ecology also commits to reevaluate the PQL only every 3-5 years, removing incentives for more rapid improvements in detection technology by private labs. While it is appropriate to recognize current limitations on our ability to detect contaminants in the environment, Ecology's approach punishes technological innovation and improvement and permits our cleanup standards to lag behind what is actually achievable – to the detriment of human and ecological health. **PQL is not appropriate as a standard, and should be structured to provide incentive for better testing methodology.** More discussion of the PQL issue is included in the Addendum to this letter.

4. Regulatory requirements need to be consistent within the Sediment Management Standards, with State and Federal Surface Water Quality Standards, and with other local and Tribal governments' standards.

a. **The Sediment Management Standards must be reviewed under the provisions of the Clean Water Act**.
The separation of the sediment management standards from water quality standards is unprecedented. The standards are inconsistent and lead to arbitrary procedures and the lack of protection for human health in freshwater and marine environments. The SMS should be reviewed and cross-referenced to State water pollution control standards, and the applicability of both the Clean Water Act and Model Toxics Control Act should be specified. The proposed updates to the SMS constitute an update to water quality standards and as such must be reviewed by the Environmental Protection Agency. Tribes have already asked EPA to consider the SMS standards as WQ standards and that they be subject to EPA approval (letter to Bussell, 9/7/12).

b. **The Sediment Management Standards should specify provisions for applying water quality standards and requirements on a consistent basis.** The preamble of the SMS rule cites the State Water Pollution Control Act as generally applicable, but section 500 is split out as being relevant only to the Model Toxics Control Act. Rule language should add water quality requirements in section 500 or copy 500 to 300 to be consistent.

Another inconsistency in the SMS is the applicability of water quality standards between freshwater and marine/ estuarine environments. Freshwater tables in the SMS rule are not being promulgated as WQ standards, but marine and estuarine waters are. Consistency is needed between freshwater and marine/estuarine environments as WQ standards so that Ecology can add areas to the 303d list of impaired water bodies and take action as necessary. Additionally, given that rivers are sources of sediment for marine and estuarine areas, the freshwater numbers should apply as WQ standards. Unlike freshwater, marine/estuarine site cleanup standards are determined based on ecological risk. Under the proposed standards, freshwater environments are evaluated for aquatic life, but not for human health. This approach is inconsistent—if standards apply to insects and benthic organisms, they should apply to fish and human health. The differences in the applicability of standards put the burden of proof on those who are seeking to protect human health. It is inappropriate to leave it to the discretion of the site manager to choose which standards apply.

c. **Federal, State, local and Tribal requirements should be applicable.**
The proposed SMS refer to risk levels for marine and benthic organisms, human health, ecological bioaccumulative health, or standards set by other governmental entities. The last of these are known as "applicable, relevant, and appropriate requirements" or ARAR's. Both MTCA and the federal Superfund cleanup law provide for multiple governmental requirements, but MTCA fails to include the requirements of Tribal governments. This omission is repeated by the SMS, as it states that only local, state, and federal laws are considered applicable. **Tribes, like other governments, can and do enact standards for environmental and human health protection, which should be incorporated in keeping with the intent of the Centennial Accord between the state of Washington and Tribes.**

d. **Periodic review and Tribal consultation requirements should be specified in the SMS.**
The proposed SMS make no effort to expand existing provisions for periodic review, and allow for review "if resources permit" five years after the initiation of a cleanup action. The SMS should contain specific review requirements with timelines, consultation requirements, and evaluation of implementation and effectiveness. Periodic reviews should also incorporate review of new technologies and information. The proposed standards provide few assurances that review and implementation of findings will occur on a timely basis.

<u>Concluding Remarks</u>

Tribes are working toward a future with restored ecosystems that support fisheries resources in abundant levels, with a variety of species that are safe to eat. Tribes thus have the intent, potential, and legal right to consume a mix of species of fish in the future. Many Tribal members would consume more fish and shellfish than they do at present, were these resources not depleted or contaminated.

The proposed amendments to the Sediment Management Standards fail to fully incorporate consideration of high fish consumption among Tribal members, and impact Treaty-reserved resources and Tribal health at unacceptable levels of risk. The SMS are primarily directed at cleanup of existing contamination. This is an important goal, but the Tribes remain committed to the prevention of future pollution of fish and shellfish through water quality standards. The Tribes are prepared to work with the Department of Ecology on the completion of toxic cleanup

and water quality standards on a government-to-government basis to protect Tribal rights and the health of future generations.

Sincerely,

Brian Cladoosby, Chairman
Swinomish Indian Tribal Community