



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

October 29, 2012

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

Re: Sediment Management Standards

Dear Mr. Sturdevant,

Thank you for the opportunity to provide comments on Washington State's Sediment Management Standards (SMS). Attached are Yakama Nation's comments regarding the SMS rule update. Additionally, we are incorporating by reference comments from the Center of Indian Law and Policy written by Catherine O'neill's regarding the SMS.

If you have any questions regarding the comments please direct them to McClure Tosch. Mr. Tosch can be reached at 509-865-5121 ext. 6413 or tosm@yakamafish-nsn.gov.

Sincerely,

Phil Rigdon, DNR Deputy Director
Yakama Nation

Attachment: Yakama Nation's Technical Comments on The SMS

COMMENTS FROM THE YAKAMA NATION REGARDING REVISED SEDIMENT
MANAGEMENT STANDARDS PROPOSED BY WASHINGTON DEPARTMENT OF ECOLOGY

The State of Washington is currently in the process of revising Sediment Management Standards [SMS (WAC 173-204)], which are the state's regulations for identifying and cleaning up contaminated marine and freshwater sediments. The Yakama Nation has participated in the Sediment Cleanup Advisory Committee, public meetings, and communicated directly with Ecology staff. Based on our review of the draft revisions, meeting materials and communication with Ecology, we have identified the concerns itemized below. Additionally, we support and incorporate by reference the comments submitted on this matter by Catherine O'Neill at the Center for Indian Law and Policy (October 2012).

1. **Default Fish Consumption Rate:** When Ecology decided to drop the fish consumption rate from the SMS in mid-July, it was ignoring its responsibility to protect the health of the people of Washington State. As expressed in our previous correspondence, Yakama Nation is very concerned with the inadequacy of the state's current fish consumption rate. The disparity between Washington's rule and the actual consumption rates of Yakama people subject them to undue health risks. Ecology must address this issue now and adopt a default fish consumption rate that is protective of all people, not just a percentage of them.
2. **Fish Diet Fraction:** The Fish Diet Fraction (FDF) is the portion of a person's diet that "is obtained from the site or the general vicinity of the site." Theoretically, a person's FDF varies from 0-1, but Ecology should assume for the Yakama Nation a FDF of 1. Our tribal members have been gathering fish from the Columbia River Basin since time immemorial, and the state should not adjust standards based on an assumption that some fraction of consumed fish was harvested from waters outside the reach of this rulemaking.
3. **Site Use Factor:** The Site Use Factor (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. This seems to be a barely-disguised attempt to exclude salmonids and other migratory staple food fish from the rulemaking process, and thereby justify establishing inadequate, unprotective cleanup standards because Ecology assumes that anadromous or migratory species take on little to none of their contaminant body burden at a particular site. These species must be included in a Fish Consumption Rate, without exception, for the following reasons:
 - a. Salmon and lamprey are a crucial part of Yakama tribal members' diet and culture. The right to these fish was reserved in the Treaty of 1855 and has been upheld in numerous court decisions. Under the U. S. Constitution, Yakama's treaty with the United States is the supreme law of the land (O'Neill 2011). If salmon are excluded from SUF, Washington will be ignoring contaminant issues that affect Yakama Nation's way of life and our rights to clean, healthy fish.
 - b. Salmon are encountering and acquiring contaminants at all stages of their life histories, particularly in fresh and estuarine waters that are under Washington State Jurisdiction (O'Neill, 2011). While we recognize that salmon acquire contaminants in the ocean, science shows that juvenile salmon also pick up contaminants during freshwater rearing, on their journey through the Columbia River basin to the Pacific Ocean (LCREP 2007), and in the Columbia River estuary. In fact, some studies suggest that the more time a juvenile salmon spends in the estuary, the higher its probability of injury or mortality (Loge et al.

2005). Washington can't ignore its responsibilities to ensure these fish are safe for everyone to eat.

- c. Washington State has made a commitment to salmon recovery, as expressed and confirmed by Governor Gregoire. Excluding salmon as part of the fish consumption rate is inconsistent with that commitment. Without setting appropriate water quality and cleanup standards, the salmon will not have the toxic free environment they require for recovery.
4. **Natural Background:** We understand that certain elements and compounds that are considered contaminants may occur naturally in the environment. However, Ecology's definition of Natural Background includes widespread, persistent substances like PCBs even though these are synthesized compounds that continue to damage our people and our resources. A Natural Background should only include substances that are naturally occurring without anthropogenic influences.
5. **Regional Background:** Ecology's new term to describe a geographic area with contamination primarily attributable to diffuse non-point sources has the potential to ruin cleanup and restoration efforts across the state. A "regional background" could allow existing widespread contamination to persist in perpetuity with no chance of remedy. For example, DDT reduction in the Yakima River is primarily attributable to BMPs implemented to reduce sediment loading from agricultural areas where DDT has sorbed to soil particles. If a "regional background" standard had been set for this area, it is likely that DDT would have been deemed "wide spread and diffuse" for purposes of defining the problem. Ecology should remove this term from the rule language.
6. **Two-Tier Cleanup Approach:** Ecology's two-tier cleanup approach selects a cleanup standard somewhere between the Sediment Cleanup Objective (SCO) and Sediment Cleanup Level (SCL) that is not as protective as it should be. The SCO is the least protective standard from among Natural Background, Risk Based Concentration, and Practical Quantitation Limit alternatives. Additionally the SCL will allow widespread pollution that is only causing "minor" adverse effects to the environment to become the new baseline. The proposed approach allows for inadequate site cleanups that completely miss the mark. Instead, a cleanup standard should achieve a natural level that does not contain any contamination from anthropogenic activity. The selection cleanup standard should be revised and the SCL should be completely removed from the SMS.
7. **Freshwater Sediment Standards:** Having default Freshwater Sediment Management standards is imperative to ensure site assessments and cleanups are conducted effectively and efficiently. However, default standards must be set at a level that is protective of the resources. Yakama Nation still has concerns with the methods and data used to derive the Freshwater Sediment Standards. Ecology should invest sufficient resources to understand what protective Freshwater Sediment Standards should be for the east side of the state.
8. **Coordination with Tribes as Co-Managers:** Yakama Nation is a co-manager of the fishery and aquatic resources at all usual and accustomed areas in Washington and elsewhere. The August 2007 ruling in the *U.S. v. Washington* "culverts" sub-proceeding supports the principle that the Treaty promised the Yakama Nation the reserved right to take fish, not merely the right to fish. The state of Washington thus has an obligation to work with us to preserve and protect the habitat needed by these resources to provide the benefits retained by the Yakama Nation in its Treaty of 1855 with the federal government. Washington has a responsibility to adopt standards that adequately protect

these shared resources or risk forcing the tribe to consider other ways to protect its owner interest in those resources. The proposed rule should include clear language clarifying the state's commitment to work with Yakama Nation Columbia River Basin sediment cleanup.

References

Catherine A. O' Neill. Comments on Ecology's Sediment Management Standards. Seattle University Center for Indian Law & Policy. October, 2012.

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

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

Frank J. Loge, Mary R. Arkoosh, Timothy R. Ginn, Lyndal L. Johnson, and Tracy K. Collier. Impact of Environmental Stressors on the Dynamics of Disease Transmission. *Environmental Science & Technology* 2005.39 (18), 7329-7336