Northwest Indian Fisheries Commission

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October 26, 2012

Ted Sturdevant, Director
Washington Department of Ecology
PO Box 47600
Olympia, WA 98504-7600
ATTN: Toxic Cleanup Program
fishconsumption@ecy.wa.gov

RE: Comments on Fish Consumption Rate Technical Support Document version 2.0

Dear Director Sturdevant,

On behalf of the Northwest Indian Fisheries Commission (NWIFC) and its member tribes, we submit these comments on the Fish Consumption Rate - Technical Support Document Version 2.0 (v.2). In a letter to you from Billy Frank, Jr. dated August 16, 2012, the NWIFC wrote to, "express our deep dissatisfaction over the Department of Ecology's proposed changes to the adoption of revised fish consumption rates (FCR) in Washington state" (attached). In the case of the technical support document, the tribes are opposed to Ecology's decision to remove quantitative recommendations for a default FCR, launch yet another round of review, and the continuing delay in the adoption of protective standards. Ecology's actions ignore tribal treaty rights and expose the people of Washington to prolonged and additional health risk.

NWIFC submitted comments on the first version of the technical support document in January, 2012 (also attached). We summarize and repeat key tribal concerns from that review round as follows:

- Tribes commented that the proposed FCR default range of 157 to 267 grams per day (gpd) would represent a step forward from existing state standards in protecting human health and the environment. Existing standards in Washington are widely acknowledged to be inadequate by health experts, even by the state's own Department of Health, particularly in protecting the most exposed and vulnerable populations. Washington's FCR should be at least as protective as Oregon's approved rate of 175 gpd. However, tribes noted that the recommended range did not fully reflect the suppression of tribal harvest resulting from habitat loss, existing contamination, and lack of access to harvest, and did not reflect traditional harvest and consumption levels.

- Tribes also commented previously that all fish and shellfish species, including salmon, must be included in the application of a fish consumption rate. Tribes have harvested salmon and other species in the rivers and estuaries that are now part of Washington State

for millennia, and continue to consume locally-produced and harvested seafood at high levels. Tribes rely on the commercial harvest of clean seafood for their economies as well as subsistence. Salmon are an essential part of the tribes' nutritional, economic, and cultural needs, and represent a major portion of tribal consumption. There is clear evidence that salmon obtain portions of their body burden of contaminants in Washington waters, and a protective standard for consumption is needed. Instead of using subjectively-derived site use factors and other parameters to reduce the protections within state standards (thereby lowering the responsibility of polluters to cleanup or prevent contamination), the state ought to be operating from the perspective of protecting public health.

Ecology has characterized the recommended default range that was in the Technical Support Document v.1 as a "policy decision" and removed it from the Technical Support Document v.2. The range specified in v.1 was based on expert peer review and statistical analysis, and tribes disagree that the default recommendation constituted a "policy decision." Tribes will be submitting comments on the proposed amendments to the Sediment Management Standards in the next few days. By removing expert recommendations and a default range for the FCR from the Technical Support Document and the proposed standards, Ecology has left the tribes, other communities, and their own staff in a position whereby extensive resources will be spent to slug out decisions over fish consumption rates at each contaminated site. As a result, cleanups will have expensive delays, and inadequate protection for human health and the environment will continue.

It is time for Ecology to stop delaying the FCR revision and to update the FCR to a level that has been scientifically proven to be protective of tribal fish consumers. The dietary surveys have existed for decades and have been duplicated with similar results in other tribal communities, among Asian and Pacific Islanders, and for non-tribal sports fishers. It is also time to stop endless rounds of stakeholder meetings and get on with the business of adopting and implementing protective standards. Serious discussions should be underway on how to change the standards and how to implement these new standards so that they can be protective of consumers in the 95th percentile, which is considered reasonable maximum exposure.

The revised Technical Support Document also fails to provide clarity on other related regulatory concepts, including the Fish Diet Fraction (FDF) and a Site Use Factor (SUF). These factors have the potential to drastically reduce any site specific or default fish consumption rate, even if a reasonable FCR has been selected based on tribal exposure scenarios. Guidance of the application of the FDF and SUF is left to the draft Sediment Cleanup Users Manual II (SCUM), which does not appropriately consider the impact on tribal consumption. Application of these factors will further weaken public health protection and environmental quality associated with aquatic resources.

The tribes have indicated previously that the attacks by commenters on tribal scientific studies represent unfounded and discriminatory perspectives. Tribal studies were approved by the Environmental Protection Agency and went through appropriate peer review. We agree with Ecology's assessment that the tribal dietary studies are valid, and expect Ecology to act

accordingly, without additional delay via unnecessary technical review and analysis or raising inappropriate doubt.

In summary, the Technical Support Document has been stripped of important technical recommendations, in particular the recommended default range, which should be re-inserted. The comments that were submitted on the first version of the TSD by tribes, tribal consortiums, and experts on tribal law and environmental justice remain applicable. Ecology's decision to issue another version of the document, and establish another round of review constitute unnecessary delay and harms high fish-consuming populations, including tribes. In addition to the harm to public health and the perpetuation of environmental injustice, tribes have treaty rights to harvest *and consume* fisheries resources that are being damaged by Ecology's actions on an ongoing basis. Technical recommendations for an appropriate fish consumption rate, based on tribal consumption throughout their usual and accustomed areas and for all consumed species, should be adopted immediately.

Sincerely,

Michael Grayum
Executive Director

Cc: NWIFC Commissioners
EPA Region X: Dennis McLerran, Dan Opalski, Jim Woods, Angela Chung, Matt Szelag, ,

Attachments:

Letter from NWIFC Chairman Billy Frank, Jr. to Ecology Director Ted Sturdevant dated January 3, 2012 regarding the FCR Technical Support Document v. 1

Letter from Billy Frank, Jr. to Ted Sturdevant dated August 16, 2012 regarding Ecology's proposed changes to the Fish Consumption Rate

Northwest Indian Fisheries Commission

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August 16, 2012

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

Re: Ecology's proposed changes to the Fish Consumption Rate

Dear Director Sturdevant,

On behalf of the Northwest Indian Fisheries Commission (NWIFC) and its member tribes, we write to express our deep dissatisfaction over the Department of Ecology's (Ecology) proposed changes to the adoption of revised fish consumption rates (FCR) in Washington state. Although we strongly support your decision to begin development of human health-based criteria in the surface water quality standards, we are gravely concerned about the changes to the technical support document and sediment management standards.

The ultimate purpose of fish consumption rates is to protect human health. However, as your agency acknowledges, and your website declares: "Washington's current fish consumption rate is not accurate."[1] To rectify this inaccuracy and failure to protect the beneficial uses, your agency set out a pathway to accomplish three essential tasks:

1) develop a technical document that evaluates scientific studies, resolves technical issues, and subsequently recommends a range of FCRs;
2) amend sediment management standards to include an accurate, quantitative default FCR; and
3) adopt human health-based criteria, including a revised FCR, in the state's surface water quality standards.[2]

The tribes were repeatedly assured by Ecology that at a minimum, this pathway would result in revised FCRs in the technical document and the sediment management standards <u>before</u> the

[1] See e.g. http://www.ecy.wa.gov/toxics/fish.html
[2] This position was clearly articulated in the document Washington Water Quality Standards 2010 Triennial Review – Response to Comments, August 2011, pg 14.

completion of the current state administration's term.[3] Unfortunately, Ecology's new approach nullifies these assurances, because Ecology is no longer proposing to establish a default rate in the sediment management standards. It is also our understanding that publication of a revised technical document will be further delayed, and important agency recommendations that support adoption of an accurate, quantitative fish consumption rate will be removed. Moreover, we recognize that adoption of the human health-based criteria will be a long process and it is not likely that it will yield a revised FCR soon. The net result is that Ecology will not establish a default fish consumption rate in either the technical document or rule by the end of the term. The continued delay leaves the residents of Washington exposed indefinitely to inadequate and inaccurate standards for the protection of human health, with tribes at particularly high levels of risk. This delay also leaves Washington's water quality standards noncompliant with the basic mandates of the Clean Water Act, which require water quality standards to be set at levels protective of human health.[4]

The proposed changes to the FCR process will also inhibit regulatory certainty, further contributing to extended delays in cleaning up contaminated sites. As Ecology has stated, "the current [sediment] rule requires case-by-case decisions that cause lengthy cleanup delays, inefficient use of available funds, and continued exposure to unhealthy levels of hazardous substances."[5] Setting a default FCR in the sediment management standards is a straightforward way to address some of these redundant decision-making issues. Ecology has clearly stated that revisions to the sediment management standards were intended to "expedite the removal or capping of contaminated sediments by providing *clear, workable, and predictable requirements* for sediment cleanup actions."[6] However, by discarding the proposal for a default FCR, and instead relying upon a standard which sets FCRs site-by-site, Ecology is reverting to the inefficiencies and delays it has already spent years of precious staff time and funding to rectify.

Ecology's recent proposed changes to the sediment management standards and technical document may also impact the process for establishing a revised FCR in the surface water quality standards. As you are aware, parts of the sediment management standards are Clean Water Act-approved water quality standards.[7] Adoption of the narrative FCR in the sediment standards sets a bad precedent for the development of human health based criteria in the surface water quality standards, because it promotes setting site-by-site FCRs in the water quality standards. Also, if the sediment FCR remains narrative when Ecology adopts a default rate into

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[3] See e.g. the time table included in the open Letter from Ted Sturdevant to Interested Parties, re: Ecology's Response to Comments –Draft Fish Consumption Rates, February 2, 2012.

[4] See 33 U.S.C. § 1313(C)(2); see also 40 CFR § 131.11

[5] Focus on Reducing Toxics: Reducing Toxics in Fish Sediments and Water, December 2011, Publications Number 11-10-090.

[6] Id *emphasis added*

[7] See Washington Water Quality Standards 2010 Triennial Review – Response to Comments, August 2011, pg 14. See also Letter from Randall F. Smith, Director of Office of Water EPA R10 to Megan White and Jim Pendowski, Ecology, in which EPA discusses exactly which standards are applicable under the CWA, 1999.

the surface water quality standards, then the narrative criteria will cause a regulatory inconsistency. This is unworkable, as was recognized in Ecology's earlier approach to create a single FCR to use agency-wide.

Ecology, tribes, and others have invested years of work to develop an accurate and scientifically sound default FCR, with the goal of revising rates by the end of the current administration's term. The tribes thought that this goal was supported by your verbal commitments (as well as the previous director's). We are cognizant of the strong opposition to creating a more accurate FCR in Washington state. Nonetheless, we are disappointed in the abrupt change in course that Ecology has taken, and the lack of tribal consultation in making these decisions. We therefore respectfully request that you uphold your previous commitments by restoring the technical document, as embodied by the September 2011 draft released to the public, and by completing the sediment management standards with an accurate, quantitative default FCR by the end of this year.

Finally, it is important to note that the tribes remain steadfast in their commitment to revise fish consumption rates in the state's water quality standards, and will work diligently to accomplish this in the near future. Should you have any questions regarding this request, or wish to further discuss this matter, please do not hesitate to call Michael Grayum or Fran Wilshusen at 360-438-1180 directly.

Sincerely,

Billy Frank, Jr.
Chairman

cc:
Tribal Chairs
NWIFC Commissioners
Dennis McLerran, EPA

Northwest Indian Fisheries Commission

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January 3, 2012

Ted Sturdevant, Director
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fishconsumption@ecy.wa.gov

RE: Comments on Fish Consumption Rate Technical Support Document

Thank you for providing the Northwest Indian Fisheries Commission with the opportunity to comment on Publication no. 11-09-050: "Fish Consumption Rates Technical Support Document: A Review of Data and Information about Fish Consumption in Washington" dated September 2011. The tribes appreciate the serious effort that Ecology staff members have made to meet with tribes throughout Washington on this important issue. Many tribes will also be providing specific comments about the document.

The tribes would like to emphasize the difference between tribal fish consumption rates and the default rates which will be established by the state of Washington.
Tribal governments have the ability to set their own fish consumption rates based on data they collect about the dietary habits of their tribal people. Tribal fish consumption rates are used for establishing standards on the lands and waters that the tribes govern. Tribes with water quality standards are responsible for monitoring, enforcement, and cleanup duties according to the standards they adopt.

Similarly, the state of Washington establishes fish consumption rates for Washington residents. Dietary surveys cited in the Technical Support Document indicate that Washington residents consume fish and shellfish at rates that are likely higher than national averages. Specific groups of Washington residents, such as tribes and Asian/Pacific Islanders, consume fish and shellfish at even higher rates. The state must consider these fish consumption rates in determining standards for water quality and toxic cleanup that are sufficiently protective of all people in Washington. We would like to emphasize that the proposed rates will be state standards, and tribes will continue to set their own standards based on their own fish consumption and availability.

Existing fish consumption rates have been suppressed.
Historical tribal fish consumption rates cited in the Technical Support Document include estimates of approximately 1,000 grams per day prior to dams and other habitat alterations (p 87). The availability of abundant and uncontaminated fish and shellfish is a major concern to tribes, since habitat loss and degradation and other factors have significantly reduced the amount and type of fish that is available for tribes to safely harvest and consume. As noted in the recent workshop on fish consumption rates, tribal consumption has been suppressed by several factors including declining abundance of fish resources, lack of opportunity to go fishing and loss of access to fishing grounds, prohibition of fishing and gathering due to known contamination, and avoidance of seafood consumption due to perceived contamination and risk warnings. In the 1970s, tribes struggled with legal suppression of fishing opportunity, leading to the affirmation of

treaty fishing rights in *U.S. v. Washington* 384 F. Supp. 213 (1974). In recent years, tribal harvest of Chinook and coho salmon has dropped below pre-Boldt levels, and the trend continues downward. The recent report by the Northwest Indian Fisheries Commission, "Treaty Rights at Risk," describes the loss and degradation of habitat throughout western Washington, and the resulting loss of tribal opportunity to fish for subsistence and livelihood. Historical habitat loss for salmon and the pollution of shellfish harvest areas in Puget Sound are further described in the Puget Sound Salmon Recovery Plan and the 2009 State of the Sound Report.

Tribes are constantly working to restore fish and shellfish populations above status quo levels and want to ensure that, once restoration is successful, they can safely consume these traditional and nutritious food sources. Contemporary tribal fish consumption rates of approximately 500 grams per day have been estimated by researchers who have investigated suppression effects. This research is acknowledged in the Technical Support Document (p 96). The state should align fish consumption rates with restoration objectives, and provide a clear path forward and commitment to re-address and adjust the default rate as habitat is restored and improvements to water quality are made. Individual tribal studies already indicate that fish consumption rates are likely to rise in the future as resource availability improves.

Fish consumption rates in Washington apply across many tribal usual and accustomed areas.
Tribal usual and accustomed fishing and harvesting areas were established by treaty; degradation of these areas prevents the full exercise of treaty and trust protected rights. Tribes are unable to adjust the location of fish and shellfish harvest if areas are contaminated or otherwise degraded. The Technical Support Document contains a section about the possibility of site-specific fish consumption rates (p 92) but does not specify criteria or how this option would be applied. Tribes assume that site-specific rates would be more protective than default rates throughout tribal usual and accustomed areas.

Salmon are essential to tribal cultures, economies, and diets and must be included in default fish consumption rates.
The Technical Support Document raises the question of whether salmon should be considered in fish consumption rates because they transit through contaminated and uncontaminated areas during their life cycle. Salmon must be included in fish consumption rates as they accumulate toxins within natal streams, local estuaries, and Puget Sound waters that are within the jurisdiction of Washington State. Salmon are the predominant seafood in tribal and non-tribal communities in the Pacific Northwest and exclusion of salmon from protective standards would create a substantial risk to public health and environmental quality.

Tribes assume that an increase in the fish consumption rate that is protective of human health will not coincide with a reduction of other protective factors affecting the standards.
For example, the target cancer risk level should not be relaxed as a condition of a more protective fish consumption rate. Fish consumption rates are part of a complex formula to address the potential risk from toxic chemicals that is used for toxic cleanup and water quality standards. A statement of assumptions about other relevant risk factors should be included in the document along with the basis for these assumptions.

Tribes support standards that are more protective of the fish-consuming population in Washington.
Existing default rates for fish consumption used in cleanup, sediment management, and water quality standards in Washington State are clearly inadequate to protect public health from persistent toxic contaminants. The proposed range offered in the Technical Support Document

for a range of 157 to 267 grams per day as a default fish consumption rate represents a substantial improvement over existing rates and is thus a step forward. However, many tribes have already documented higher fish consumption rates among tribal citizens and thus support revised state rates that are at or above the high end of the range. The higher end of the range reflects a more protective level, particularly since the proposed range does not account for the suppression factors described above, or the increasing trend of seafood consumption in the state and nation.

The proposed range of 157 to 267 grams per day is based on real consumption in Washington, not an imaginary or artificial standard. The range represents a statistical composite of locally-derived fish consumption data, set at the 80th to 95th percentile of fish-consuming populations. Some of our individual tribes and tribal citizens clearly consume more on a regular basis. The low end of the range (157 gpd) is less than the mean fish consumption rate derived in one Puget Sound tribe's dietary survey. Washington State is required to use local data, establish a high level of protection for populations throughout the state, and protect high-risk populations including tribes. Washington State standards should be at least as protective as the fish consumption rate of 175 grams per day that was recently approved by the EPA for the state of Oregon. In addition to establishing a more protective rate, the key to keeping fish safe for consumption will be a rigorous program of implementation as the standards are applied in the future.

Eating seafood in the Pacific Northwest is a lifestyle choice for most people, but for tribes the consumption of fish and shellfish is their life and legacy. Fish is a first food for tribal children and the foundation for the healthy hearts of the elders. Tribal communities are asking how to reduce the input of toxic chemicals into the environment in order to keep these essential food sources safe. A fish consumption rate that is more realistic and hence more protective of Washington residents will be an important step in protecting this healthy choice in the future.

Sincerely,

Billy Frank, Jr.
Chairman

cc: NWIFC Commissioners
Tribal Fish Consumption Workgroup
Jannine Jennings, EPA
Jim Woods, EPA