



Northwest Indian Fisheries Commission

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September 25, 2013

Dennis McLerran, Regional Administrator
U.S. EPA, Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

Re: EPA's federal Clean Water Act Review of the Washington State Department of Ecology's Revised Sediment Management Standards

Dear Dennis,

The Northwest Indian Fisheries Commission (NWIFC) would like to thank EPA for taking the time on July 25th, 2013 to meet with our member tribes – Swinomish, Lower Elwha Klallam, and Port Gamble S'Klallam – to discuss EPA's important role in reviewing all parts of the recently revised Washington State Sediment Management Standards (SMS) under the Clean Water Act (CWA). As you are aware, toxic contamination of treaty-reserved resources may prevent exercising tribal treaty rights. Therefore, it is no surprise that the tribes are keenly interested in the prevention, reduction, and control of toxics, of which the SMS play a significant role. The NWIFC would like to take this opportunity to underscore previous tribal comments relevant to the upcoming EPA review of these important regulations.

1. Without justification, the Department of Ecology has requested EPA to overlook major changes to the SMS that reduce protection of designated uses

In a short letter to the EPA, the Department of Ecology requested only limited CWA review of the newly revised SMS. Despite the fact that the bulk of the SMS revisions altered Part V of the rules, Ecology requested CWA review of only parts one through four. This new approach would dodge EPA review of the most significant changes to the SMS, which reduce protections for designated uses. Those significant changes include:

- a. The revised Part V governs how sediment cleanup levels will be set, and therefore has the most pronounced on-the-ground effect on resource protection. The new changes to Part V emphasize that cleanup standards will mostly default to quantitation limits and polluted or anthropogenically influenced "background" levels, and will not be based on human health risk or aquatic receptor adverse effect thresholds. This significant restructuring results in

cleanups calibrated not to designated use protection, but instead to factors favorable to the liable parties.

- b. Ecology has decided not to include a default Fish Consumption Rate (FCR) into the newly adopted sediment management standards (SMS) to calculate human health based cleanup standards. Instead the SMS will rely upon an undefined site-specific process, known as Reasonable Maximum Exposure (RME) standard. This process burdens individual tribes to continually define and redefine exposure parameters – a process that is both time consuming and resource exhaustive. Also, the RME standard authorizes Ecology to establish desired site conditions based in part upon their determination of localized habitat productivity and subsequent fish consumption rates. This is particularly disconcerting because it empowers an Ecology site manager to effectively dictate a tribe's present and future ability to exercise treaty rights - an act that the federal court has expressly prohibited the state from undertaking.¹

In summary, by circumventing EPA oversight of Part V, Ecology dodges review of the most crucial regulatory elements which ultimately determine the level of designated use protection.

2. EPA has repeatedly reviewed and approved the SMS as a matter of policy for over 22 years

To underscore the long institutional history of treating the SMS as water quality standards, we would like to remind EPA of the following significant actions taken over the course of the last 22 years:

1991 - EPA approves Washington State SMS as water quality standards (WQS) under the CWA

1996 - EPA partially disapproves Ecology's 303(d) list on grounds that the list did not use the SMS for basis of listing numerous segments

1999 - EPA sends docket letter to Ecology notifying agency of rules that EPA considered to be WQS. That letter included the SMS Part V

2001 - EPA approves Bellingham Bay Contaminated Sediments Total Maximum Daily Load, based in part on the SMS

2010/2011 - Ecology suggests using updating of the SMS as a means to establish precedent for human health criteria in surface WQS and create consistency between clean up approaches

Summer of 2012 - Ecology redacts default FCR from proposed SMS, and replaces with Reasonable Maximum Exposure (RME) standard

¹ Both WAC 173-204-561 and the SCUM II provide that a fish diet fraction may be employed to reduce a fish consumption rate by in part determining a "value [that] depends on the ability of the aquatic habitat within the general vicinity of the site to support a department approved fish and shellfish consumption rate under current and potential future site use conditions". see subsection 561(c)

September 7th 2012 - the Northwest Indian Fisheries Commission (NWIFC) wrote to EPA Region 10 Director of the Office of Water (then Mike Bussell and now Dan Opalski) requesting continued CWA oversight of the SMS, because of changes that weakened rules

October 29, 2012 - NWIFC and tribes comment on the SMS to Department of Ecology, which included request for better coordination between water quality and clean up regulations through continued EPA oversight

December 21, 2012 - EPA reviews and approves the state's 303(d) list, which includes SMS-based listings

3. The Tribes have repeatedly requested continued EPA compliance with the Clean Water Act

The Clean Water Act requires EPA to review a state's water quality standards within no more than 90 days after state promulgation. In requesting continued EPA compliance with the CWA, the tribes have consistently made the following points:

a. Sediment and water cannot be separated – regulation of one affects the other

Sediment and water are interrelated and inseparable. One affects the other. To effectively protect waters, regulations for cleanup (the SMS) and regulations for pollution control (discharge permits) need to be consistent and coordinated. If they are not, polluted discharges will re-contaminate cleanups, or cleanups will contaminate surface waters. Therefore, both sediment and surface water programs should be closely coordinated to ensure regulatory consistency, and effective toxic control.

b. The CWA requires EPA to review the effect of new or revised rules on water quality standards

Part V of the SMS are the primary mechanism to control sediment-borne toxics, and implement both sediment and surface water quality standards. In essence, they have an effect on whether or not water quality standards are achieved. Section 303 of the CWA *requires* EPA to review the effect of any new or revised regulation on water quality standards. EPA should continue to uphold their responsibility by reviewing the standards of Part V.

c. The SMS are water quality standards, and should continue to be treated so by EPA

The SMS, including Part V, have been treated as water quality standards by EPA for 22 years. The SMS are used for multiple Clean Water Act purposes including, § 303 review and approval authority, to list polluted water bodies for toxics on the state's 303(d)list, to craft NPDES permits, to develop TMDLs, and to ensure coordinated water quality protection between cleanups and discharges. Moreover, sediment cleanups can affect whether or not surface waters meet both human health risk-based and aquatic receptor-based criteria. Also, Part V addresses designated uses such as shellfish and bottom fish through sediment cleanup standards that would affect the health and quality of these resources. Therefore, it is logical that sediment standards would continue to be treated as water quality standards under the CWA.

d. Neither the state nor EPA has provided adequate justification for changing a 22-year-old policy

Federal water quality standard regulations require states to submit justifications for changes in water quality standards. Washington State has not submitted any justification whatsoever.

e. EPA oversight of the SMS is needed:

The tribes have provided numerous written and verbal comments to the Department of Ecology in the course of the development of the SMS over a period of years. Unfortunately, almost all of those comments and concerns were unavailing, and the newly revised SMS are now less protective of human health and the other designated uses.

Federal trustee oversight of the SMS is an important function to ensure both protection of treaty-reserved rights and compliance with the Federal CWA. Without adequate EPA oversight, the tribes have no other responsive outlet to their concerns.

f. Point source dischargers will have a higher burden for toxic regulation if cleanups are less protective

With the new, less stringent standards in place for aquatic cleanups, greater emphasis will be placed on NPDES permits to reduce toxics. According to presentations by Ecology's Toxic Cleanup Program, natural attenuation has been held out as a solution to many cleanups, and for that to occur enhanced NPDES protection will be necessary to prevent recontamination. Conversely, in the course of developing human health criteria for the state of Washington, many NPDES holders have vocally expressed concern over more protective permit conditions. This leaves the tribes with the central question – who, if anybody, will then be responsible for residual toxic control at a given site or waterbody?

4. There are numerous impacts to effectively regulating toxics if Part V will no longer be considered Water Quality Standards under the Clean Water Act

Changing course in the 22-year-old policy of treating Part V of the SMS as WQS will have real and immediate impacts to resource protection:

a. State law-based cleanups will not achieve compliance with water quality standards

The cleanup process is largely contained in Part V of the SMS. The rule revisions in Part V will result in cleanups that can be "completed," i.e. there is no additional regulatory requirement for the PLP, at levels that are not consistent with CWA.

b. Delinking the SMS from the CWA process may affect how NPDES permits are written in the future

Ecology's permit writers manual has pages on how the SMS are supposed to be linked with permits. However, the assumptions used to develop the permit process are now outdated and potentially incorrect, because the function of the SMS has fundamentally changed.

c. Previous EPA CWA-based approvals – must they now be revoked?

EPA’s 1991 approval of Washington State’s Water Quality standards included review and approval of all parts of the SMS. EPA also based numerous water quality assessments/303(d) approvals on Part V, and even approved a TMDL in part on its ability to achieve compliance with the SMS. If EPA’s policy is reversed - what becomes of these important federal agency actions?

d. Water Quality Assessment/303(d) list of polluted waters will be greatly altered, but it is not clear how

Ecology currently uses the SMS as the basis for listing waterbodies as polluted (category 5), of concern (category 2), or not needing a TMDL (category 4b).

According to the 2013 EPA approved Water Quality Assessment	Number of listings based on Part V	Listing based on Part III	Listing based on “other” (But relying upon Part V According to Policy 1-11)
Category 2	1074	169	0
Category 5	103	10	374
Category 4B	1504		

However, if Part V is no longer treated as water quality standards, then these listings may become moot. How, if at all, listings will be treated without using Part V has never been explicated by either Ecology or EPA.

e. The loss of category 5 listings will preclude significant CWA driven toxic reduction efforts

As you are likely aware, the 303(d) list is the starting point for significant CWA-based cleanup efforts, including TMDLs, allocations, and NPDES effluent limitation reductions. However, if polluted sediments/waters are precluded and/or removed from 303(d) listing, then Washington State’s ability to provide pollution load allocations could be greatly diminished.

5. EPA is requested to uphold longstanding policies in order to preserve continued compliance with the Clean Water Act and coordinated protection of treaty-reserved resources from toxic contaminants

We respectfully request that EPA undertake the following actions to ensure continued CWA compliance, and the further development of state SMS that are protective of designated uses, human health, and tribal treaty-reserved resources:

- a. Review all parts of SMS under the Clean Water Act;
- b. Disapprove those parts of the SMS that fail to protect designated uses and human health for subsistence tribal consumers;
- c. Provide Ecology with a written determination that the SMS do not protect designated uses, including human health under the Clean Water Act; and
- d. Require Ecology to develop human health and fresh water criteria in part three of SMS.

Again, we thank you for the opportunity to meet, discuss, and further comment on this important matter. Should you have any questions please do not hesitate to contact me or Fran Wilshusen directly at (360)438-1180.

Sincerely,



Mike Grayum, Executive Director

Northwest Indian Fisheries Commission

cc

Russ Hepfer, Vice Chair, Lower Elwha Klallam

Jeromy Sullivan, Chairman, Port Gamble S'Klallam Tribe

Brian Cladoosby, Chairman, Swinomish Indian Tribal Community

NWIFC Commissioners