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THE SUQUAMISH TRIBE

PO Box 498 Suquamish, WA 98392-0498

October 26, 2015

Dennis McLerran, Regional Administrator
U.S. EPA Region 10
1200 6th Avenue, Suite 900
Seattle, WA 98101

Re: EPA Review of Washington's Sediment Management Standards

Dear Regional Administrator McLerran,

In 2013, the Washington Department of Ecology issued a final rule for revised Sediment Management Standards and submitted the revisions to the Environmental Protection Agency for review. Washington tribes were invited to consult with EPA on this rule in 2013. The Suquamish Tribe would like to provide the following final comments regarding the provisions of the Washington Sediment Management Standards (SMS) and EPA's decision whether to continue to review portions of the SMS under the Clean Water Act (CWA).

For more than twenty years, EPA has repeatedly used Clean Water Act authorities to review and approve the SMS standards themselves, to review and approve§303(d) listings based upon the SMS, and to review and approve Total Maximum Daily Loads (including Waste Load Allocations), based in part upon the SMS. Additionally, Washington's NPDES permits, which EPA also reviews, contain permit conditions based on the SMS. These actions all serve to help ensure consistency between the management of the water column and management of the underlying sediments.

It is our understanding from working with your staff that EPA may grant Washington State's request1 to not review Part V of the SMS. The Suquamish Tribe disagrees with this decision.

Over the last two years, the Suquamish Tribe, other Washington treaty tribes and the Northwest Indian Fish Commission (NWIFC) have actively engaged in discussions with EPA and have provided extensive comment to demonstrate that the state's revised standards would sever the important regulatory linkages between sediment and water column clean up. Without assurances that SMS cleanup standards will be consistent with surface waters standards, we fear that uncoordinated regulatory actions will lead to a cycle of continued recontamination –

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1 See Letter from Maia Bellon, Director of the Washington State Department of Ecology to Dan Opalski, EPA Region 10 Director of the Office of Water, re: Revisions to Washington's Sediment Management Standards, Chapter 173-204 WAC, dated May 14, 2013. In that letter Ecology requested that EPA review and approval of the Part I though IV of the Sediment Management Standards, but asked EPA to not review Part V, as they had previously done.

improperly regulated sediments impairing surface water designated uses, and improperly regulated surface water discharges impeding sediment recovery.

In addition to reiterating the request to continue to review all parts of the SMS under the CWA, we also request EPA to assure that subsequent administrative actions related to surface water and sediment clean up coordination will not interfere with the implementation of water quality standards. More specifically, and in response to the issues that were raised in the letter from Director Bellon to you dated May 5, 2015, we recommend the following:

1. *EPA should disapprove modifications to part I of the SMS*

Both Ecology and EPA acknowledge that amendments to part I of the SMS require EPA's CWA approval. Ecology has amended part I and submitted those amendments to EPA for review. Included in those amendments is a new provision, which prevents the application of sediment based water quality standards known as Sediment Quality Criteria (found in Part III of the SMS) from being applied in course of setting cleanup standards for contaminated sites (found in part V of the SMS). Ecology new rule language states that:

> (5) The sediment quality standards of WAC 173-204-320 through 173-204-340 shall not apply…
> (e) To Part V of this chapter.2

This language establishes a rule that excludes vital technical standards designed to protect designated uses from the setting of sediment clean up levels. We fear that this provision will result in clean up standards not calibrated to protect designated uses, and would be inconsistent with the CWA.

In the May 5, 2015 letter to EPA, Ecology attempts to clarify that this language is not intended to exclude the sediment quality criteria from clean up, but in doing so underscores the concerns raised by stating "the intent of this language is to state that sediment quality criteria in part III are not included in the part V of the SMS rule."3 Ecology goes on to state, in contrast to the plain language of the rule, that sediment quality criteria can be "taken into account" as other applicable laws during the clean up process. Unfortunately, Ecology's attempts at clarification have only added additional confusion. Also, Ecology's letter cannot alter what is already in rule.

To remedy this issue, we recommend that EPA disapprove WAC 173-204-110(5)(e), and request that Ecology amend this rule to ensure that Sediment Quality Criteria are applied when developing cleanup standards for contaminated sediments.

2. *If EPA does not review or approve the SMS under the CWA, then EPA should ensure that Washington's 303(d) list removes all category 4(b) listings previously based on Part V of the SMS and places them into category 5.*

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2 WAC 173-204-110(5)(e)
3 Letter from Maia Bellon, Director Department of Ecology to Dennis McLerran, Regional Administrator, EPA Region 10, dated May 5 2015.

If the SMS are neither reviewed nor approved under the CWA then they should not be used to satisfy CWA requirements. Of particular concern are the numerous §303(d) listings4 based on Part V of the SMS, which have been placed into category 4(b) and considered as having a CWA approved alternative pollution plan in place. By placing these polluted segments into category 4(b), those listed segments are not required to develop a TMDL, thus acting as a shield from further cleanup requirements, including the development of both Load and Waste Load Allocations.

If EPA decides that part V of the SMS are not reviewable, or alternatively reviews and disapproves those standards, then EPA must require Ecology to change the listing status of the many category 4(b) listings based on Part V. EPA is requested to provide assurances that those 4(b) listings will not be completely removed from the 303(d) list, but instead should be placed into category 5 (impaired). Ecology should then be held accountable for the development of TMDLs for those polluted segments.

3. *Sediment quality criteria are needed for more parameters and freshwater*

EPA staff have suggested sediment quality criteria are more appropriately used for CWA purposes than the standards derived from Part V of the SMS. While we agree that the sediment quality criteria are more likely to protect designated uses, we do not agree that Part III criteria are comprehensive enough to cover the pollutant parameters and geographies previously, or proposed to be, addressed under Part V. For example, the SMS currently lacks sediment quality criteria for freshwater and has established only limited criteria for marine waters.

In the May 5, 2015 letter from Ecology to EPA, Ecology explained that they could not provide any assurances that the gaps in the sediment quality criteria would be addressed in a timely manner. This leaves a large gap in sediment-surface water management, because standards necessary for sediment-surface water coordination are not currently available – especially considering that Part V derived standards cannot be used as surrogates. Therefore, EPA should use its CWA authorities to the greatest extent possible, to ensure timely adoption of revised and amended sediment quality criteria.

The Suquamish Tribe requests that EPA condition any approvals on the basis that Ecology conducts a triennial review and modification5 of the SMS in 2016, and that the review and modification address the lack of sediment quality criteria. Alternatively, EPA should continue to work with Ecology through the CWA review process to ensure that part V derived standards will fully protect designated uses and be applied for CWA purposes, in lieu of relying upon sediment quality criteria to fulfill this role.

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4 According to the 2013 EPA approved Water Quality Assessment there are 1504 category 4(b) listings based on Part V of the SMS in Washington State.

5 Annual reviews and triennial modifications of the SMS are required under EPA reviewed and approved state law. See WAC 173-204-130(6) stating "The department shall conduct an annual review of this chapter, and modify its provisions every three years, or as necessary. Revision to this chapter shall be made pursuant to the procedures established within chapter 34.05 RCW, the Administrative Procedure Act."

The Suquamish Tribe appreciates the EPA's efforts to undertake consultation on this issue, and we note that other related issues are currently in consultation, such as the Washington Human Health Criteria. The segmentation of standards relating to water quality, human health, and aquatic resources remains one of our primary concerns, and we look forward to working with you to alleviate the gaps and deficiencies in the Washington State standards for both the cleanup of contaminated sediments and the assurance of future water quality.

Respectfully,

Leonard Forsman
Chairman, Suquamish Tribe

cc
Dan Opalski, EPA Region 10
Angela Chung, EPA Region 10
Matt Szelag, EPA Region 10
Jill Fulgar, EPA Region 10