Main Office: 360.466.3163
Facsimile: 360.466.5309

Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
* 11404 Moorage Way * La Conner, Washington 98257 *

Via US Mail and Electronic Email

March 23, 2015

Maia Bellon, Director
Washington Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

ATTN: Water Quality Program
swqs@ecy.wa.gov
Cheryl Niemi

RE: Comments on the State's Draft Rule for Human Health Criteria and Implementation Tools in Washington State Water Quality Standards

Dear Director Bellon,

I am writing on behalf of the Swinomish Indian Tribal Community on Washington State's draft rule for human health criteria and implementation tools in the Water Quality Standards (WQS). We have worked side by side with our Washington Treaty Tribes with the State of Washington and the US Environmental Protection Agency for over 15 to 20 years to develop and adopt revised water quality standards that will protect the health of tribal people and respect our treaty-reserved rights to the harvest of fish and shellfish and the health of all of our fellow Washington citizens. After all of this time and effort, we are writing to express our disappointment with many of the provisions of the proposed draft rule for human health criteria and implementation tools in the Washington State water quality standards.

The Swinomish Indian Tribal Community also hereby, supports, adopts, and incorporates by reference the complete Northwest Indian Fisheries Commission comments regarding the draft rule for Washington water quality standards, which were prepared on behalf and at the behest of its member tribes, including all materials, references and records, submitted to the Washington Department of Ecology on March 23rd, 2015.

Undue delay in promulgating updated WQS. As you are aware, Tribes have been requesting that the WQS undergo the tri-annual review process to update the grossly inadequate human health criteria for the past fifteen years. Since 2000, there have been numerous fish consumption studies completed in Washington State, Tribal and otherwise, that have clearly and defensibly demonstrated that current human health criteria do not protect the many fish consumers who populate our State (c.f., CRITFC 1994; Lummi 2012; Sechena et al. 1999; Suquamish 2000; Toy et al. 1996). We agree with EPA's assessment of the situation that the Department of Ecology has failed in meeting too many deadlines and have we have lost confidence in the State and their process.

A compromise in the fish consumption rate. We applaud the inclusion of salmon in the determination of the fish consumption rate (FCR). And while we agree that a FCR of 175 grams per day (gpd) is much more protective than the current, meager 6.5 gpd (the lowest in the entire country), the Tribes have repeatedly stated that 175 gpd is a compromise and must be recognized as such. The point of including a fish consumption rate in the equation is to protect most of the population from being exposed to chemicals that may cause illness and even death; this is called "reasonable maximum exposure" (RME). The EPA Exposure Factors Handbook recommends an RME of 90%tile to 98%tile of the population at risk (EPA 2011). A FCR of 175gpd is not reflective of Tribal FCRs at 90%tile to 98%tile, and thus is not protective of many Tribal peoples. We cannot condone exposing many of our Tribal citizens to unsafe levels of chemicals while they practice their Treaty-protected rights.

Moreover, current FCR are suppressed (c.f., NEJAC 2002; Donatuto and Harper 2008; O'Neill 2007). Current rates are not representative of the FCR at the time of the signing of the Treaties, mainly due to environmental contamination that the Tribes did not and do not condone. Creating WQS that maintain suppressed rates creates a downward negative baseline wherein future efforts to clean up water for safe harvesting at increased rates will be impossible.

An unacceptable cancer risk rate. We are particularly disappointed in the state's decision to reduce the protective level of the cancer risk rate in state standards by ten times. This decision largely negates the benefit of setting a higher fish consumption rate, and leaves many cancer-causing and highly toxic chemicals at status quo, and sets a disturbing precedent for future rules, actions and expectation of standards. After 20 years of information that the fish consumption rate does not protect tribes and other people who consume high levels of fish, the state has now opted to cancel out the potential benefit to public health by reducing the protective level of other variables used to calculate the standards. For Swinomish we have to say while the FCR is a positive step forward, increasing the cancer risk rate from the current rate in the Washington water quality standard, WAC 173-201A-240(6), is most certainly a negative step

back. We are appalled at the proposed revision of a 10-5 cancer risk rate. As a result, we view the 10-5 cancer risk rate as an an attempt to negate any strengthening of the WQS, including raising the FCR, and essentially brings us back to our starting point –the current status of the WQS and of too many Washington residents being exposed to unsafe levels of toxics. Again, let Swinomish be clear, **we can only accept the 10-6 cancer risk rate**, the current risk rate in the WAC.

A body weight that carries increased risk burden for women and children. Of all of the possible factors to adopt from the latest EPA revised criteria recommendations, Ecology chose to increase the body weight from 70 kg to 80 kg – the only recommended criteria revision that would decrease the protectiveness of the WQS (the other EPA recommendations would have increased the protectiveness of the WQS). This is an inconsistent and inappropriate use of EPAs revised criteria recommendations. We cannot support placing women and children, who weight substantially less than 80 kg, at a higher risk of exposure to toxic contaminants. This is simply unacceptable and there is no justifiable reason to do so.

Outmoded use of bio-concentration factor. We feel that the comments in the Northwest Indian Fisheries Commission (NWIFC) letter, which cite EPA's Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health, sum it up succinctly:

> In order to prevent harmful exposures to waterborne chemicals through the consumption of contaminated fish and shellfish, water quality criteria for the protection of human health "must address the process of chemical bioaccumulation in aquatic organisms" (EPA, 2000). Accordingly, EPA's Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health recommends "the use of a bioaccumulation factor (BAF) to reflect the uptake of a contaminant from all sources (e.g., ingestion, sediment) by fish and shellfish, rather than just from the water column as reflected by the use of a bioconcentration factor (BCF)" (EPA 2000). The use of a BAF better represents the amount of a contaminant accumulating in an organism because it accounts not only for the organism's exposure to the pollutant in the water column, but also from the food chain and surrounding environment, as well as biotransformation of the pollutant in the organism due to metabolic processes (EPA 2014). For some chemicals (particularly those that are highly persistent and hydrophobic), the magnitude of bioaccumulation by aquatic organisms can be substantially greater than the magnitude of bioconcentration. Thus, an assessment of bioconcentration alone would underestimate the extent of accumulation in aquatic biota for these chemicals (EPA 2000).

We urge Ecology to use BAFs instead of BCFs.

Inaccurate Relative Source Contribution. EPA guidance recommends a 20% relative source contribution (RSC) in calculating criteria for State or Tribal water quality standards (EPA 2000) in order to reflect that there are multiple exposure pathways for toxics. For example, dioxins can be found in sediment and many other foods, such as dairy products, in addition to fish and shellfish (Jensen and Bolger 2001). Yet Ecology is proposing a 100% RSC, which assumes that there are no other sources for toxics such as dioxins. This incorrect assumption is both inaccurate and dangerous to the health of Washington citizens. We endorse following EPA's guidance of 20% RSC.

Unprotective of downstream users. Ecology's proposed WQS revisions are less protective than Oregon's WQS. The CWA and its implementing federal regulation require that new or revised WQS do not cause or contribute to violations of downstream standards (40 CFR 131.10(b)). Ecology's proposed WQS standards do not meet these requirements.

Compliance schedule rules overly delay permit compliance with water quality standards. The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard. As NWIFC points out in their comment letter, "Numeric interim limits are a necessary component of compliance schedules to ensure that they are in fact enforceable." Current delays are afforded for up to two permit cycles (10 years). Proposed changes would allow indefinite delays in compliance, effectively allowing permit holders to suspend permit compliance. This is an obvious and considerable step backward in protecting Washington's waters, natural resources, and the people who depend on them. We can only see a path forward, not backward; thus, we strongly recommend that rule language be amended to limit the ability to delay the compliance schedule to be to one permit cycle (5 years), providing Ecology, the permit holder, and the public a discrete timeline with which to better track progress toward compliance and identify issues that need to be addressed to reach compliance in a defined amount of time.

What we have listed above is by no means exhaustive.

Lastly, once more, let us say, Washington State is required to meet the provisions of the Clean Water Act to preserve the beneficial uses of water, including fishing. Everyone who calls the great state of Washington home and consumes resources, and like our tribal people who live by the teachings of the Salish Sea, "when the tide is out the table is set". The State's proposal puts all of our lives in danger with a 10-5 cancer risk rate. We have heard DOE tell us the FCR

Rate and WQS is a small issue compared to the bigger picture of toxics, however we disagree. DOE has a responsibility to protect our human health of all of our citizens and as co managers of the salmon, we would hope Washington State would want the cleanest water without all toxics. Swinomish Indian Tribal Community cannot support that State as we believe the ruling will impair the tribe's treaty-reserved rights to take and consume fish at all their usual and accustomed fishing grounds and stations and harm our tribal citizens. The proposed rules by the state of Washington is unacceptable.

Sincerely,

M. Brian Cladoosby
Chairman

Citations:

CRITFC (Columbia River Inter-Tribal Fish Commission), 1994. A fish consumption survey of the Umatilla, Nez Perce, Yakama and Warm Springs Tribes of the Columbia River Basin. Columbia River Inter-Tribal Fish Commission Report reference #94-03, Portland, Oregon.

Donatuto, J. and B.L. Harper, 2008. Issues in Evaluating Fish Consumption Rates in Native American Tribes. Risk Analysis 28(6): 1497-1506.

(EPA) U.S. Environmental Protection Agency. 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health. Office of Water, Office of Science and Technology. EPA-822-B-00-004. October.

(EPA) U.S. Environmental Protection Agency. 2011. Exposure Factor Handbook: 2011 Edition. National Center for Environmental Assessment, Office of Research and Development. Washington, DC. EPA/600/R-09/052F

(EPA) U.S. Environmental Protection Agency. 2014. Draft Update of Human Health Ambient Water Quality Criteria: Benzo(a)Pyrene. EPA 820-D-14-012. Office of Water, Office Science and Technology. May.

Jensen, E. and P.M. Bolger. 2001. Exposure assessment of dioxins/ furans consumed in dairy foods and fish. Food Addit Contam. 18(5): 395-403.

Lummi Natural Resources Department, Water Resources Division. 2012. Lummi Nation Seafood Consumption Study. (J. Freimund, M. Lange and C. Dolphin; August 31, 2012)

(NEJAC) National Environmental Justice Advisory Council, 2002. Fish Consumption and Environmental Justice: A Report Developed from the National Environmental Justice Advisory Committee Meeting of December 3-6, 2001.

O'Neill, C.A. 2007. Protecting the Tribal Harvest: the Right to Catch and Consume Fish. J Environmental Law Litigation 22: 131-151.

Sechena, R., C. Nakano, S. Liao, N. Polissar, R. Lorenzana, S. Truong, and R. Fenske. 1999. Asian and Pacific Islander Seafood Consumption Study in King County, Washington. EPA 910/R-99-003.

Suquamish Tribe, 2000. Fish Consumption Survey of the Suquamish Indian Tribe of the Port Madison Indian Reservation, Puget Sound Region.

Toy, K.A., Polissar, N.L., Liao, S., and Mittelstaedt, G.D. 1996. A Fish Consumption Survey of the Tulalip and Squaxin Island Tribes of the Puget Sound Region. Tulalip Tribes, Department of Environment.