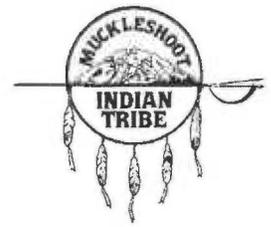




## MUCKLESHOOT INDIAN TRIBE

### Fisheries Division

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March 23, 2015

Ms. Cheryl Niemi  
Washington State Department of Ecology  
Water Quality Program  
P.O. Box 47600  
Olympia, WA 98504-7600

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

Dear Ms. Niemi:

The Muckleshoot Indian Tribe Fisheries Division (MITFD) is providing you with the following input on the proposed draft rule amendment for human health criteria and implementation tools in Washington State's surface water quality standards. The Muckleshoot Indian Tribe relies on many programs within the State of Washington to ensure that the waters and other natural resources within the State are sufficiently clean to support the ability of the Tribe to satisfy its Treaty Right to fish and to exercise other Treaty-supported cultural and harvest activities. The purpose of this letter is to address the Washington State Department of Ecology's (Ecology) proposed rule to revise sections of the state's surface water quality standards. These amendments to Chapter 173-201A WAC will include the adoption of new human health criteria, which are the basis for measures to protect human health from the discharge of toxic chemicals to surface waters. This rule-making will also revise parts of the rule on implementation tools for regulating the discharge of pollutants into surface waters. The purpose of this letter is to provide you with comments on Ecology's draft rule amendment.

We encourage you to develop rule revisions for human health criteria that incorporate tribal fish consumption and health data, include new scientific information, and maintain consistency with recent EPA-approved standards (see e.g. Oregon State's recently adopted standards). At a minimum, maintaining a cancer risk level of one in one million ( $10^{-6}$ ) and updating the fish consumption rate to no less than 175 grams per day would be a substantial improvement and consistent with recent EPA-approved standards in Oregon State. This would be a step forward in the protection of tribal health, the environment, the economy of tribal people, and all future fish-consumers and fish-distributors in Washington State.

As the draft rule will also propose revisions to how implementation tools may be used to regulate the discharge of pollutants into surface waters, we recommend rule revisions that develop clear pathways to meeting water quality standards. We are very concerned that the proposed revisions to implementation tools have the potential to further hinder progress toward meeting the water quality standards necessary to protect fish and other aquatic life. We encourage prescriptive rule language regarding compliance tools to specify how, when and under what circumstances each tool may be used. While we understand the need for dischargers to have flexibility to meet permit limits, we want to ensure that future use of these implementation tools will result in measurable progress to reduce pollutants, achieve the highest level of water quality as soon as possible, and protect tribal lands and waters.

We encourage you to finalize rule amendments to adequately protect human health, fish health, and the surface waters of the state. In order for standards to have effective, timely, and meaningful application, amendments to implementation tools should be prescribed under limited circumstances that will result in measurable progress and achieve the highest possible level of water quality as soon as possible. Please see attached, specific comments on Ecology's draft rule.

Thank you for the opportunity to comment on this important draft rule. We appreciate your careful consideration of these comments and concerns and look forward to working with you to develop standards that more adequately protect the surface waters of the State. Please feel free to contact me with any questions you may have at (253) 876-3130.

Sincerely,

A handwritten signature in blue ink, appearing to read "Glen R. St. Amant", with a long horizontal flourish extending to the right.

Glen R. St. Amant  
Habitat Program Manager

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

### I. Human Health Criteria

- A. Cancer Risk Level.** The proposed rules include a cancer risk level of  $10^{-5}$  for the calculation of human health criteria. As the current rule's criteria are based on a cancer risk level of  $10^{-6}$ , this represents a ten-fold increase in the acceptable cancer risk level and would essentially negate much of the protection that higher fish-consumers would receive with a higher proposed fish consumption rate. This change in cancer risk level is a significant deviation from current Washington State water quality standards, the Washington State cleanup program, EPA-recommended national human health criteria, and the recently adopted, EPA-approved water quality standards in Oregon. The proposed rules should retain a cancer risk level of  $10^{-6}$  for the calculation of human health criteria.
- B. Relative Source Contribution.** The proposed rules include a relative source contribution of 1 (100 %), which does not consider other routes of exposure in the equation for the human health criteria. As fish consumption is just one way people are exposed to toxic chemicals, it is important to consider the multiple pathways of exposure in the calculation of human health criteria for surface water quality standards. EPA direction for this consideration is to attribute 20-80% of exposure to toxic chemicals to water-borne sources, with other pathways including air, skin contact, other foods, etc. Ecology's proposal to use a relative source contribution of 100% of exposure assumed from water-borne sources is a deviation from EPA guidance. Following EPA guidance for this factor in human health criteria would be prudent and more representative of exposure pathways. The proposed rules should include a relative source contribution of 20 – 80 %, and, the percentage within that range should be selected consistent with EPA guidance. Otherwise, the proposed rules will underestimate people's exposure to contaminants by disregarding other relevant exposure pathways.
- C. Bioaccumulation.** 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 should account for the chemical bioaccumulation in aquatic organisms. Ecology's proposed approach, using a bioconcentration factor, only considers uptake from the water column. Using a bioaccumulation factor, versus a bioconcentration factor, is a more appropriate approach in assessing bioaccumulation impacts from pollutants.
- D. PCBs.** The variables used to calculate human health criteria for Polychlorinated Biphenyls (PCBs) should include the same fish consumption rate and cancer risk level as

for other toxic chemicals. The proposed rules use a different cancer risk level ( $4.0 \times 10^{-5}$ ) for calculating criteria for total PCBs and include no improvement over what is already in the current rule. Although regulatory issues present challenges for implementation considerations and actions of Clean Water Act programs, it is appropriate to separate implementation actions from the development of criteria. The calculation of human health criteria for total PCBs should be consistent with values used in formulas for the other criteria. Currently, fish consumption advisories exist for many fish species in Washington State, and impact species that are important to the Tribe. The proposed rule for developing criteria for total PCBs should utilize a cancer risk level of  $10^{-6}$  and the proposed fish consumption rate.

- E. **Arsenic.** We are very concerned that the State is actually proposing to weaken the water quality standard for arsenic. The criteria for arsenic should not be revised until an updated cancer potency factor for arsenic is finalized by EPA. Ecology's overview of key decisions in this rule amendment (Publication no. 14-10-058) states that arsenic is a challenging chemical to consider due to significant uncertainty with the cancer potency factor and high levels of natural arsenic in the environment. Once the cancer potency factor is finalized by EPA, it would then make sense to update the criteria for arsenic to also appropriately consider bioaccumulation and fish consumption. This would also allow more time to collect data on background levels. The proposed rules should revise the arsenic criteria at a later date once adequate information is available so that appropriate variables are utilized for the calculation.
- F. **Mercury.** Ecology's overview on key decisions in this rule amendment (Publication no. 14-10-058) states that implementation issues for mercury present challenges for Clean Water Act programs. Again, implementation challenges should be considered separately from the calculation of criteria. The calculation of human health criteria for methylmercury should be incorporated into this rule amendment, consistent with variables used for other chemicals.

## II. Implementation Tools

### Compliance Schedules

- A. Proposed regulations should include time limits for the application of compliance schedules for permits and orders issued by Ecology. The proposed rules delete the current ten-year limit for compliance schedules. Instead, compliance schedules will be authorized on a case-by-case basis, with no certainty on how long Ecology may allow a permittee to delay meeting water quality standards. This extends far beyond the authority conferred by RCW 90.48.605, which directs Ecology to amend the state water quality standards to authorize compliance schedules in excess of ten years for permit limits driven by total maximum daily load (TMDL) allocations and only under certain circumstances, including that compliance is achieved "as soon as possible." Instead, the proposed regulations delete the time limit for all compliance schedules, leaving the door open for a wide array of applicability timeframes and extended delays. This concern applies to both the human health based criteria and the aquatic life criteria.

We recommend retaining the ten-year time limit in the current state rule for compliance schedules for non-TMDL permit limits and, for permit limits driven by TMDL allocations in the circumstances specified in RCW 90.48.605, allowing longer time limits for compliance schedules on a case-by-case basis, for the shortest period possible, only up to fifteen years. In cases where more than ten years are needed to meet a TMDL-driven permit limit, not only should the four-part test (RCW 90.48.605) be required, but a regulated entity's demonstration that it meets the four-part test must be subject to public review.

- B. Proposed regulations should require interim numeric effluent limits with compliance schedules. The proposed rules do not require interim numeric effluent limits with the application of a compliance schedule in a permit. Instead either numeric or narrative (or both) will be required as interim measures of progress for the duration of a compliance schedule. While we understand that there are many instances when narrative limits would be appropriate during the implementation of a compliance schedule, such limits should be combined with numeric limits. This is necessary to ensure enforceability, accountability, and compliance with water quality standards by the end of the compliance schedule.
- C. Proposed regulations should require assurance that compliance schedules will achieve attainment with standards in the time allotted. The proposed rules should require permits with compliance schedules to include the final date when water quality standards must be met.

- D. Proposed regulations should not allow compliance schedules for the purpose of “completion of necessary water quality studies related to implementation of permit requirements to meet effluent limits”. These proposed rules set the stage for years of delay in meeting water quality standards while water quality studies are conducted. Compliance with standards should not be delayed in order for Ecology and/or permittees to conduct “studies”. This proposed change has the potential to significantly affect both human health and aquatic life based water quality standards.

### Variations

- A. Proposed regulations should limit the time period for variations. The proposed rules delete the current five-year limit for variations. Although the proposed definition of a variance states that variations are temporary, there is no clarification on the meaning of “temporary” in terms of length of time. This leaves the door open for the discharge of pollutants to occur over a sufficiently long period so as to permanently impact fish, habitat, and human health. We recommend that the definition of a variance in the proposed regulations should limit the duration to between three and ten years.
- B. Proposed regulations should only allow variations for individual dischargers. The proposed rules expand the scope of this implementation tool to include multidischarger and water body variations. By widening the geographic scope of variations, the proposed rule weakens the protection of designated uses across the state of Washington. Changing the applicable criteria for a waterbody or a reach of surface water effectively changes what uses will, and will not, be protected.
- C. Proposed regulations for variations should require numeric effluent limits that assure the highest attainable condition will occur during the specified time period. The proposed rules do not require numeric effluent limits that represent the highest achievable water quality closest to the standard. Instead, the proposed rule would allow variations that do not best protect the underlying use and do not come as close as possible to meeting previously established water quality standards.
- D. Proposed regulations should include variance eligibility requirements to ensure that variations do not violate other state and federal regulations or impair treaty rights. The proposed rules do not include eligibility requirements that are necessary to protect uses and treaty rights. At a minimum, eligibility should include the following requirements:
- Variations may not jeopardize ESA-listed species or critical habitat.

- Variances may not impair treaty-reserved rights and resources.
  - Variances may not result in unreasonable risk to human health or environment.
  - Variances may not impair an existing use.
  - Variances must comply with antidegradation requirements.
  - Variances may not impair downstream tribal waters.
- E. Variances rules should require that notice of the variance application and all subsequent actions are given to all affected tribes – not just tribes with water quality standards. The proposed rules require notice to only those tribes with water quality standards; however, tribes have a right to co-manage treaty-reserved resources regardless of whether they have adopted water quality standards.
- F. The proposed rules should prohibit variances from extending beyond the original time period allowed for each variance by EPA and Ecology. By not prohibiting variance renewals or administrative extensions of permits with variances, the proposed rules would allow extended periods when uses would not be protected.

### Intake Credits

- A. Intake credits should only be applied to surface water intakes from the same water body. The proposed rules allow intake credits to be applied to groundwater influents. This may result in an unintended impact to the ambient conditions of the receiving water.
- B. Intake credits should only be applied for discharges into Category 5 303(d) listed waters after a TMDL has been completed. When receiving waters are already impaired for a pollutant, further analysis is needed to assess background conditions, seasonal and daily patterns, and the assimilative capacity of the receiving water, prior to allowing intake credits for that pollutant.
- C. The proposed rules allow intake credits to be applied to a municipal water supply intake to that facility. These proposed rules may allow credit for a level of a pollutant that may be greater than the level in the receiving waters. This section of the proposed rule, 460(2)(c), should be deleted.