



PHONE (360) 598-3311
Fax (360) 598-6295
<http://www.suquamish.nsn.us>

THE SUQUAMISH TRIBE

PO Box 498 Suquamish, WA 98392-0498

March 23, 2015

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

ATTN: Cheryl Niemi
Washington State Department of Ecology
Water Quality Program
swqs@ecy.wa.gov

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

Dear Director Bellon,

The Suquamish Tribe ("Tribe") has reserved treaty rights and resources under the 1855 Treaty of Point Elliott that protect the right to safely access and harvest treaty and natural resources throughout the Tribe's federally adjudicated Usual and Accustomed fishing area. Because tribal health and well-being are inextricably linked to the land, air, water and all forms of life within the natural system, the Tribe has an enduring commitment to future generations to preserve, restore, and protect treaty rights and resources that have been degraded or put at risk due to environmental contamination. The Tribe devotes significant effort to co-manage Washington's finfish and shellfish harvests for conservation and human health concerns, and to support the development of environmental rules and standards that are protective of tribal people and resources.

Washington's environmental laws are meant to protect human health and the environment for all citizens, tribal and non-tribal. These laws, however, are not purely state issues and have a direct nexus to tribal and federal interests. Washington State is required to meet the provisions of the Federal Clean Water Act and to adopt water quality standards that preserve the beneficial uses of surface waters, including aquatic life habitat and fishing. The public health issues that are determined by these standards affect everyone in Washington who eats fish. However, because tribal health and well-being rely on traditional lifeways that include the harvest and consumption of large quantities of local fish and shellfish across a lifetime, the failure to adopt protective criteria disproportionately and involuntarily harms tribal communities.

We have been working with the state of Washington and the US Environmental Protection Agency for many years to develop and adopt revised water quality standards that will protect the health of tribal people and respect our treaty-reserved rights. This process has spanned two governors and three directors of the Washington Department of Ecology. Throughout this long and convoluted process, the

Suquamish Tribe and other treaty tribes have consistently supported the adoption of protective standards, as well as a reasonable pathway for compliance for businesses and municipalities.

After all of this time and effort, the human health criteria and compliance tools proposed by the Department of Ecology do not appear to be moving in a direction that will accomplish these objectives. Instead, policy decisions regarding human health criteria calculations and the acceptable level of protection place the health of tribal people at continued risk. In fact, for the most toxic, bioaccumulative contaminants, the proposed criteria actually support the status quo, which is in effect back-sliding. In addition, the proposed compliance tools do not ensure accountability and do not focus on measureable progress to achieve water quality standards as soon as possible. Again, this appears to focus only on maintaining the status quo. Back-sliding of regulatory protection arising from changes in environmental rules degrades and erodes the Tribe's treaty rights.

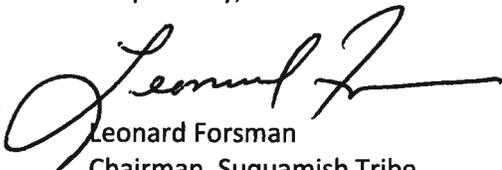
The State has failed in its responsibility to propose human health criteria and compliance tools to protect water quality for fish consumption and other beneficial uses as mandated by the Federal Clean Water Act. From the perspectives of environmental justice and tribal treaty rights, the State has also failed in its responsibility to ensure that tribal members may safely harvest and consume fish and shellfish as part of their traditional culture and lifeways.

As a co-manager of natural resources with the State of Washington, the Suquamish Tribe urges the State to revise the proposed human health water quality criteria and implementation tools to meet the intent of the CWA for all designated uses, to respect and uphold treaty-reserved rights and resources, and to protect the health of tribal members and all Washington citizens who eat fish. The Tribe again requests that the State develop human health criteria that incorporate a fish consumption rate (fcr) of at least 175 g/day (inclusive of anadromous fish) and a cancer risk rate of 1×10^{-6} . Other input variables should be revised to follow the most recent EPA guidance. For compliance tools, the language of the rule should be revised to clearly specify and limit the application, scope and duration of the actions, and to ensure that water quality criteria are achieved as soon as possible by including enforceable metrics and endpoints.

The Tribe supports the comments submitted by the Northwest Indian Fish Commission (NWIFC) related to the proposed criteria and compliance tools. NWIFC's comments are incorporated herein by this reference. Key concerns have also been summarized.

The Tribe will continue to engage with Ecology on a government-to-government basis to provide additional input as this rule is finalized. It is the Tribe's expectation that Ecology will give meaningful consideration to these concerns, as well as to comments submitted by NWIFC and other tribes.

Respectfully,



Leonard Forsman
Chairman, Suquamish Tribe

Human Health Criteria

The Suquamish Tribe agrees that human health criteria should reflect data demonstrating that a significant number of Washington residents consume fish and shellfish at higher rates than those currently used for regulatory purposes. The State's current fcr of 6.5 g/day is grossly under representative for most Washington residents. The proposed criteria are based on a fish consumption rate (fcr) of 175 g/day, which Ecology has characterized as an "endorsed" and "negotiated" value.

Given that tribal U&A areas encompass the majority of waters within the State, tribes are included in the general target population that must be protected under the CWA. As recognized by both EPA and Ecology, the comprehensive tribal surveys that have been regionally available since 1994 are technically defensible studies representing actual tribal consumption patterns. Contemporary and historical rates of fish consumption in excess of 500 g/day have been documented and described at length in many of the surveys, including the Fish Consumption Survey of the Suquamish Indian Tribe of the Port Madison Indian Reservation, published in August 2000.

The Suquamish survey was conducted with the expectation that the reported rates would be used to support environmental programs and rules that would be protective of tribal health and would benefit the natural resources upon which tribal members continue to depend. The reported mean fcr for Suquamish tribal members is 214 g/day; the 95th percentile fcr is 797g/day. As with many of the tribal surveys, the Suquamish survey also documents that the reported consumption rates are suppressed. According to the survey, about 50% of respondents said that they already eat less seafood now due to various sources of pollution and related restrictions concerning harvesting. As efforts to improve water quality and habitat continue, the Tribe expects that consumption rates will increase.

The State's proposed fcr of 175 g/day is less than most tribal subsistence rates, and is less than the mean fcr for Suquamish tribal members. The Suquamish Tribe and many of the other treaty tribes, agreed, however, that an fcr of 175 g/day (inclusive of anadromous fish) would be a step in the right direction, significantly reducing the potential for toxic chemicals to be discharged to state water bodies and allowing the State's rulemaking to proceed expeditiously. The tribes were clear that this was a compromise position that would benefit public health state-wide. The tribes were also clear that this compromise was based on the assumption that the State would not alter other exposure parameters to be less protective. Unfortunately, the State has chosen to invalidate that compromise and the potential incremental benefits of raising the fcr to 175 g/day by altering other parameters, including the acceptable cancer risk rate, to be less protective.

Human Health Criteria (cont'd)

The State currently uses a cancer risk rate of 1×10^{-6} to calculate allowable limits for carcinogenic priority pollutants. Under the proposed rule, Ecology would change the cancer risk rate to 1×10^{-5} , a ten-fold increase that would largely negate any protective increase in the fcr. Ecology has presented this as a policy and risk management decision, not as a science or data driven public health determination. The Clean Water Act and other health-based environmental standards that govern the sources or clean-up of pollution generally express goals to reduce the risk of exposure to harmful byproducts to zero. EPA has consistently used a level of 1×10^{-6} in national standards and criteria and has encouraged the State to continue to do the same.

The State has also chosen to establish values for other exposure variables, such as the relative source contribution, and criteria for the most pervasive and bioaccumulative contaminants, such as PCBs, mercury and arsenic, that do not adhere to federal guidance and do not provide an adequate level of protection. At best the State's policy decisions maintain the status quo. At worst they permit the continued impairment of aquatic resources and disregard potential impacts to human health. Neither is acceptable.

The proposed human health criteria will subject all Washington residents to harm. For tribes, however, the right to safely harvest and consume fish is a treaty-reserved right. It is a designated use that must be protected under the Clean Water Act. Fish consumption has been internationally recognized as part of the basic right of indigenous people to be secure in their means of subsistence. Safe fish consumption is a cultural, nutritional and economic necessity for tribal communities. In the Pacific Northwest, tribal lifeways are culturally synonymous with fish consumption. Under the proposed rule, tribes will bear a disproportionately higher risk burden as a result of simply being tribal people practicing traditional culture.

The Tribe again requests that the State develop human health criteria that incorporate an fcr of at least 175 g/day (inclusive of anadromous fish) and a cancer risk rate of 1×10^{-6} . Other input variables should be revised to follow the most recent EPA guidance.

Compliance Tools

Through participation in Governor Inslee's advisory group and recommendations submitted by the NWIFC, the Suquamish Tribe has provided input regarding the development of compliance and implementation tools. The Tribe has repeatedly expressed support for reasonable and responsible tools as the key to providing businesses and municipalities the flexibility needed to meet the economic and technical challenges of achieving water quality criteria. The Tribe, however, has also been clear that compliance or implementation tools do not take precedence, and cannot be used in lieu of, protective human health criteria.

Compliance Tools (cont'd)

The three types of compliance tools that are the subject of the proposed rule are compliance schedules, variances, and intake credits. In general, compliance tools, specifically compliance schedules and variances, which provide dischargers with enhanced flexibility in meeting federal regulations need to incorporate the following elements:

- Documentation that the action(s) will not degrade or change an existing designated use; will not contribute to a lowering of water quality; will protect downstream tribal resources; and will not pose an increased risk to human health or the environment.
- A specified time frame for achieving water quality standards or compliance as soon as possible. Although EPA has not specifically defined “as soon as possible”, the intent of the CWA generally expects compliance to be coordinated with the NPDES permit cycle of 5 years. Extensions beyond 5 years must be justified, subject to review, and should not be used to avoid meeting criteria.
- An enforceable sequence of actions or operations that lead to compliance with water quality criteria or effluent limitations.
- Clear and enforceable benchmarks and metrics for monitoring progress, including interim numeric limits where possible.
- Consultation with and review by tribes whose U&A may be impacted by the action.

In the proposed rule, the State has also expanded the definition and use of intake credits in a manner that is overly broad and has the potential to be misused. Intake credits should apply only to intake water that comes from the same surface body of water in the immediate vicinity of the discharge. Intake credits should be limited to facilities that do not add the intake pollutant of concern and do not alter the intake pollutant chemically or physically. Intake credits should not be used when intake water is taken from groundwater and discharged to surface water, when intake water is mixed with waters other than those from the same body of water, or when intake water supplied by a municipality is treated to remove an intake water pollutant prior to distribution.

The Tribe believes that it is possible to improve water quality by establishing protective human health criteria and to assist dischargers in maintaining economic health by establishing responsible compliance tools. We support revising the compliance tool language to clearly define their use and application, to define time frames, and to ensure measurable progress in achieving the highest level of water quality as soon as possible.