Northwest Indian Fisheries Commission

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August 16, 2012

Ted Sturdevant, Director
Washington State Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Re: Ecology's proposed changes to the Fish Consumption Rate

Dear Director Sturdevant,

On behalf of the Northwest Indian Fisheries Commission (NWIFC) and its member tribes, we write to express our deep dissatisfaction over the Department of Ecology's (Ecology) proposed changes to the adoption of revised fish consumption rates (FCR) in Washington state. Although we strongly support your decision to begin development of human health-based criteria in the surface water quality standards, we are gravely concerned about the changes to the technical support document and sediment management standards.

The ultimate purpose of fish consumption rates is to protect human health. However, as your agency acknowledges, and your website declares: "Washington's current fish consumption rate is not accurate."[1] To rectify this inaccuracy and failure to protect the beneficial uses, your agency set out a pathway to accomplish three essential tasks:

1) develop a technical document that evaluates scientific studies, resolves technical issues, and subsequently recommends a range of FCRs;
2) amend sediment management standards to include an accurate, quantitative default FCR; and
3) adopt human health-based criteria, including a revised FCR, in the state's surface water quality standards.[2]

The tribes were repeatedly assured by Ecology that at a minimum, this pathway would result in revised FCRs in the technical document and the sediment management standards before the

[1] See e.g. http://www.ecy.wa.gov/toxics/fish.html
[2] This position was clearly articulated in the document Washington Water Quality Standards 2010 Triennial Review – Response to Comments, August 2011, pg 14.

completion of the current state administration's term.[3] Unfortunately, Ecology's new approach nullifies these assurances, because Ecology is no longer proposing to establish a default rate in the sediment management standards. It is also our understanding that publication of a revised technical document will be further delayed, and important agency recommendations that support adoption of an accurate, quantitative fish consumption rate will be removed. Moreover, we recognize that adoption of the human health-based criteria will be a long process and it is not likely that it will yield a revised FCR soon. The net result is that Ecology will not establish a default fish consumption rate in either the technical document or rule by the end of the term. The continued delay leaves the residents of Washington exposed indefinitely to inadequate and inaccurate standards for the protection of human health, with tribes at particularly high levels of risk. This delay also leaves Washington's water quality standards noncompliant with the basic mandates of the Clean Water Act, which require water quality standards to be set at levels protective of human health.[4]

The proposed changes to the FCR process will also inhibit regulatory certainty, further contributing to extended delays in cleaning up contaminated sites. As Ecology has stated, "the current [sediment] rule requires case-by-case decisions that cause lengthy cleanup delays, inefficient use of available funds, and continued exposure to unhealthy levels of hazardous substances."[5] Setting a default FCR in the sediment management standards is a straightforward way to address some of these redundant decision-making issues. Ecology has clearly stated that revisions to the sediment management standards were intended to "expedite the removal or capping of contaminated sediments by providing *clear, workable, and predictable requirements* for sediment cleanup actions."[6] However, by discarding the proposal for a default FCR, and instead relying upon a standard which sets FCRs site-by-site, Ecology is reverting to the inefficiencies and delays it has already spent years of precious staff time and funding to rectify.

Ecology's recent proposed changes to the sediment management standards and technical document may also impact the process for establishing a revised FCR in the surface water quality standards. As you are aware, parts of the sediment management standards are Clean Water Act-approved water quality standards.[7] Adoption of the narrative FCR in the sediment standards sets a bad precedent for the development of human health based criteria in the surface water quality standards, because it promotes setting site-by-site FCRs in the water quality standards. Also, if the sediment FCR remains narrative when Ecology adopts a default rate into

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[3] See e.g. the time table included in the open Letter from Ted Sturdevant to Interested Parties, re: Ecology's Response to Comments –Draft Fish Consumption Rates, February 2, 2012.

[4] See 33 U.S.C. § 1313(C)(2); see also 40 CFR § 131.11

[5] Focus on Reducing Toxics: Reducing Toxics in Fish Sediments and Water, December 2011, Publications Number 11-10-090.

[6] Id *emphasis added*

[7] See Washington Water Quality Standards 2010 Triennial Review – Response to Comments, August 2011, pg 14. See also Letter from Randall F. Smith, Director of Office of Water EPA R10 to Megan White and Jim Pendowski, Ecology, in which EPA discusses exactly which standards are applicable under the CWA, 1999.

the surface water quality standards, then the narrative criteria will cause a regulatory inconsistency. This is unworkable, as was recognized in Ecology's earlier approach to create a single FCR to use agency-wide.

Ecology, tribes, and others have invested years of work to develop an accurate and scientifically sound default FCR, with the goal of revising rates by the end of the current administration's term. The tribes thought that this goal was supported by your verbal commitments (as well as the previous director's). We are cognizant of the strong opposition to creating a more accurate FCR in Washington state. Nonetheless, we are disappointed in the abrupt change in course that Ecology has taken, and the lack of tribal consultation in making these decisions. We therefore respectfully request that you uphold your previous commitments by restoring the technical document, as embodied by the September 2011 draft released to the public, and by completing the sediment management standards with an accurate, quantitative default FCR by the end of this year.

Finally, it is important to note that the tribes remain steadfast in their commitment to revise fish consumption rates in the state's water quality standards, and will work diligently to accomplish this in the near future. Should you have any questions regarding this request, or wish to further discuss this matter, please do not hesitate to call Michael Grayum or Fran Wilshusen at 360-438-1180 directly.

Sincerely,

Billy Frank, Jr.
Chairman

cc:
Tribal Chairs
NWIFC Commissioners
Dennis McLerran, EPA