Northwest Indian Fisheries Commission

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September 7, 2012

Michael Bussell, Director
Office of Water and Watersheds
U.S. EPA, Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101

Re: EPA engagement in Washington's development of water quality standards and attending fish consumption rates.

Dear Director Bussell,

The Northwest Indian Fisheries Commission and its member tribes would like to draw your attention to the delays and lack of progress by the state of Washington in adopting revised water quality standards[1] that adequately protect the health of the people of Washington with respect to toxic chemicals in sediment, water, and fish. The recent approach to water quality standard rulemaking and the subsequent adoption of revised fish consumption rates (FCR) outlined by the Director of the Washington State Department of Ecology[2] (Ecology) will continue to put tribal people in Washington at a greater risk of exposure to toxic chemicals. As stated in the August 24, 2012 letter from NWIFC Chairman Billy Frank, Jr. to Regional Administrator Dennis McLerran, the tribes have requested that the EPA exercise its critical role as federal trustee of treaty-reserved resources and steward of the Clean Water Act in the review of Ecology's actions and proposals, and consult with tribes throughout the process. Furthermore, the tribes requested that EPA exercise its authority to assure that protective water quality standards and attending fish consumption rates will be adopted as soon as possible. The purpose of this letter is to underscore the tribes' call for EPA action, and to provide more detail on the recent history of the fish consumption rate issue.

The Relationship of Treaty Rights, Water Quality Standards, and Fish Consumption Rates

The Northwest Indian Fisheries Commission is composed of the 20 treaty-tribes in western Washington who have treaty-reserved rights to harvest various natural resources in their usual and accustomed areas. These rights have been upheld numerous times by federal courts, and pertain to resources, such

[1] In this letter "water quality standards" refers to both the sediment and surface water quality standards found in Washington's Administrative Code.
[2] Open Letter from Ted Sturdevant, July 16, 2012

as salmon and shellfish – the cornerstone of tribal cultures, economies, and way of life. Although these rights are secured by the U.S. Constitution as the supreme law of the land, they are nonetheless, susceptible to the dangers of historical and modern industrial practices. Toxic sediments and effluents contribute to both the subtle and sometimes overt degradation of aquatic resources. Moreover, many of these pollutants enter the food chain and expose both tribal and non-tribal communities to chemicals that cause a wide variety of serious health problems, including but not limited to, cancer, neurological disorders, and endocrine disruption.

As you are aware, Washington's water quality standards play a critical role in protecting treaty-reserved aquatic resources and the communities who depend on them. By setting limits for pollutants, the water quality standards serve as the primary accountability mechanism to ensure that polluting activities and toxic cleanups are complying with goals of the Clean Water Act and protecting the beneficial uses of state and tribal waters. Unfortunately, the fish consumption rates (FCR) found in Washington's existing water quality standards are not accurate, and therefore lead to under-protective regulations that govern the discharge and cleanup of toxic contaminants. These FCRs are found in both the Department of Ecology's sediment management standards and surface water quality standards.

The Clean Water Act reserves the role of review and approval of the water quality standards to the EPA in an effort to maintain accountability and ensure accurate pollution limits. This federal role is significant to the member tribes, because EPA – as a federal trustee of treaty-reserved resources – is responsible for the protection and stewardship of tribal aquatic resources as well as ensuring implementation of the Clean Water Act. The EPA has previously exercised this role in reviewing and approving both the sediment management and surface water quality standards, because the review and approval of both of these elements falls directly within the scope of EPA's authorities.[3] At this juncture, it is important that EPA continue to exercise these roles in the context of Washington's development of fish consumption rates for the water quality standards.

History of Efforts to Adopt Accurate Fish Consumption Rates in Washington

EPA and Ecology have long been aware that existing FCRs in Washington do not reflect accurate exposure levels. Since at least 1994, the state and federal agencies were in receipt of the Columbia River Inter-Tribal Fish Commission (CRITFC) report detailing tribal FCRs. In 1999, Ecology released a report[4] synthesizing fish consumption data, and formally acknowledging the existing inaccuracies. The emergence of these reports and the subsequent state and federal government's acknowledgement of the FCR deficiencies prompted some observers to believe the state would soon address these

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[3] See Letter from Randall F Smith, Director of Office of Water EPA R10 to Megan White and Jim Pendowski, Ecology, in which EPA discusses which standards are applicable under the CWA in 1999. See also *Nw. Envtl. Advocates v. EPA*, 3:05-CV-01876-AC, 2012 WL 653757 (D. Or. Feb. 28, 2012) clarifying the scope of EPA review and approval of state programs and standards affecting implementation of water quality standards.

[4] Leslie Keill & Lon Kissinger, Washington State Department of Ecology, *Analysis and Selection of Fish Consumption Rates for Washington State Risk Assessments and Risk-Based Standards* (Draft, 1999).

shortcomings. In an article published in 2000, the author noted that the "[t]he Washington State Department of Ecology, at least, *is well along in the process* of revising its standards' assumptions regarding fish consumption in light of the studies produced by the Puget Sound and Columbia River Basin tribes."[5]

Tribal health issues related to fish consumption were raised during the review of revisions to the state's surface water quality standards in 2002-2003. In a letter from the Confederated Tribes of the Umatilla Reservation to then Ecology Director Tom Fitzsimmons[6] the Tribes stated that, "Standards for the water quality of fish habitat must be protective of both aquatic life and of the health of tribal members consuming the fish in accordance with treaty reserved rights."

Over the last few years, the tribes have been working directly with the Department of Ecology in another attempt to finally rectify the inaccurate FCRs, and ensure adoption of the revisions. Tribes were initially encouraged when Ecology Director Jay Manning made a commitment to complete human health criteria in water quality standards within the term of the current administration. Ecology Director Ted Sturdevant reaffirmed this commitment, and an Executive Oversight Committee was formed composed of tribal leaders, Ecology, and EPA to ensure progress. Ecology had proposed, and the tribes reluctantly agreed, to review and adopt fish consumption rates as part of the sediment management standards before proceeding to human health criteria in the surface water quality standards. This pathway to revise FCRs included several important deliverables to be completed by the end of the current administration's term:

- The development of a guidance document that clarifies important technical issues and a recommended range of consumption rates based on locally available scientific data; and
- The promulgatión of a default FCR in the sediment management standards.

However, as the July 16, 2012 open letter from Ted Sturdevant indicates, the Department of Ecology is again changing its approach to revising FCRs. This is presumably because Ecology has been receiving a lot of pushback from industries and municipalities who vehemently oppose raising the FCR due to increased costs associated with meeting the stricter standards. Without consulting, let alone receiving support from the tribes, Ecology has delayed publication of their technical support document (guidance) and stripped the document of important technical clarifications. Even more significantly, Ecology is no longer proposing to promulgate a default FCR in the standards. Instead, Ecology is proposing to use a site-specific rate-setting process based on a narrative FCR, which will further contribute to cleanup delay.

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[5] O'Neill, Catherine A, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 Stanford Environmental Law Journal 3 (2000). footnote 174, emphasis added

[6] See letter from Michael Farrow to Tom Fitzsimmons, March 14, 2003.

The total effect of the latest approach by Ecology is that Washington will continue delaying the protection of human health, and will not develop standards (or even guidance) that results in the protection of the beneficial uses as required by the Clean Water Act. Nor will Ecology meet its previous commitment to the tribes to begin rectifying these issues by, at a minimum, promulgating a revised default FCR before the end of the current state administration's term. Eighteen years after the CRITFC study scientifically documented the gross inaccuracy of the current FCR, the state still has not completed an update, nor is this likely to change in the near future.

Tribal Concerns with the Sediment Management Elements of Washington's Water Quality Standards

The tribes are particularly concerned about Ecology's proposal to utilize a narrative FCR in the sediment management standards, because of the inefficiencies and lack of certainty created by a site-by-site rate setting process. This approach also fails to utilize an accurate default FCR as a backstop and accountability measure, if a FCR is not correctly developed at the site level. Without the assurances of an accurate numeric default FCR, protection of human health will be subject to political pressures and procedural errors during the establishment of FCRs at each and every site. The lack of a numeric default FCR also places additional burden of setting water quality criteria onto the tribes and local communities who must repeatedly advance, and defend, their site-specific FCRs.

As evidenced by the September 2011 Draft Fish Consumption Rate – Technical Support Document released to the public, Ecology has at its disposal ample local scientific information to establish a default FCR in the sediment management standards.[7] Nonetheless, Ecology appears to be ignoring this available and locally relevant scientific information in favor of creating a complex process that puts the burden of ensuring accurate FCRs on each tribe at each site. It is worth noting that a similar eschewing of available and relevant local data in establishing a FCR was largely the basis for EPA's disapproval of Idaho's proposed human health criteria.[8]

Equally troubling are Ecology's recent indications that they may not re-submit the sediment management standards, which will newly include standards for fresh water sediments, to the EPA for review and approval. At an August 28th, 2012 public workshop, management staff from the Toxics Cleanup Program of Ecology remarked that the sediment management standards were not promulgated under the state's Water Pollution Control Act (WPCA), but instead were developed under the state's Model Toxics Control Act (MTCA); and therefore EPA review and approval would not be necessary. Ecology's interpretation of EPA's federal authorities is both inappropriate, and legally incorrect.

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[7] See e.g. Fish Consumption Rates – Technical Support Document, September 2011 draft, page 103, recommending a range of FCR from 157 to 267 grams per day.

[8] See Letter from Michael Bussell to Barry Burnell Water Quality Program Administrator for IDEQ, re: EPA Disapproval of New and Revised Human Health Water Quality Criteria for Toxics, Idaho Docket 58-0102-0503, May 10, 2012. See also Letter from Barry Burnell, IDEQ to Michael Bussell, August 6, 2012, stating "EPA's disapproval is based upon the assertion that DEQ did not consider several sources of information regarding local and regional fish consumption before using the national default fish consumption rate to set criteria."

The purpose of the Clean Water Act is ultimately to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." [9] Certainly restoring the contaminated sediments which underlie those waters and affect the biological integrity of the aquatic inhabitants is a necessary element of achieving these primary goals of the Act. Without clean river bottoms and estuarine floors, shellfish which reside in the sediment or other aquatic species that rely upon interaction with those elements of the ecosystem, will not be protected. Essentially, sediment cleanup is intertwined with the restoration and maintenance of Washington's waters, and is a necessary component of the protection of the beneficial uses of the water quality standards. Therefore, it is necessary for EPA to closely review Ecology's revisions and amendments, including the proposed narrative FCR of the sediment management standards, regardless of whether they are promulgated under MTCA or the WPCA. This point has been clearly underscored by a recent Oregon federal district court opinion stating:

> The EPA cannot choose to review and approve water quality standards while ignoring separate provisions which have the potential to cripple the application of those standards. If the EPA is required to determine whether proposed water quality criteria are "sufficient to protect the designated uses" it would undermine the purposes of the Act to not require a review of provisions promulgated that may enable or disable the attainment of that criteria.[10]

Elements of Ecology's Proposal are an Environmental Injustice

For the treaty tribes of western Washington, the consumption of fish and shellfish is a spiritual and cultural act, as well as an important nutritional and subsistence undertaking. It is therefore no surprise that the tribes reserved the right to harvest various aquatic resources in exchange for ceding much of what is now western Washington.

The longstanding inaccuracies found in the FCRs have left tribal communities who rely upon fish and shellfish unduly exposed to toxic chemicals. This type of environmental policy making, which provides less protection for a population of people and subsequently leads to the unequal exposure of pollutants, is undoubtedly an environmental injustice.[11] Unfortunately, even when the state attempts to address these problems, they continue to create environmental policies which cause tribes to bear an undue burden. For example, Ecology's proposal to ignore data available for the development of a numeric default FCR, and instead create narrative site specific FCRs places the burden of resource protection on the local tribe, not on the agency responsible for setting the regulations. The tribes who already have

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[9] 33 U.S .C. § 1251(a).

[10] *Nw. Envtl. Advocates v. EPA*, 2012 WL 653757 (D. Or. Feb. 28, 2012) at 8

[11] EPA defines Environmental Justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." EPA, EPA's Action Development Process, Interim Guidance on Considering Environmental Justice During Development of an Action, July 2010, available at http://www.epa.gov/environmentaljustice/resources/policy/considering-ej-in-rulemaking-guide-07-2010.pdf .

limited resources will be responsible for finding scientific and policy staff to advance a FCR for each and every cleanup site that will ensure that their health and rights are being protected. This resource burden is further compounded by the need for the tribes to direct technical and policy staff to participate in a plethora of pre-rulemaking process, which the state deems necessary to promulgate revised FCRs and calculate scientifically sound human health criteria. Essentially, when the state finally begins to address one environmental justice – the disproportionate exposure of toxics via under-regulation – the state creates additional environmental policies which continue to unduly burden the tribes. This continued drain on tribal resources expended in an attempt to protect their treaty-reserved rights and community health, merely perpetuates the previous disparate treatment of the tribes instead of rectifying it. Therefore, these state responses provide neither the "fair treatment"[12] nor the "meaningful involvement"[13] envisioned by EPA's environmental justice policies.

Requested EPA Action

In the context of Ecology's abruptly proposed changes to the FCR process and the subsequent continuation of environmental justice issues, the tribes wish to underscore the importance of EPA's role in reviewing and approving modifications to Washington's water quality standards and EPA's role as a federal trustee. Ecology's recent decision making clearly appears to be driven by considerations other than protecting human health and achieving compliance with the Clean Water Act—such as pressure from specific businesses. For this reason, EPA's review and approval serves as an important backstop – to ultimately ensure that water quality standards protect beneficial uses, not political and financial interests. Accordingly, the tribes respectfully request that the EPA exercise these responsibilities through the following actions:

1. Require Ecology to submit sediment management standard modifications to the EPA for full review and approval;

2. Undertake consultation with the tribes when reviewing the state's sediment management standards and all other aspects of the water quality standards;

3. Disapprove those standards that include narrative or inaccurate FCRs, and do not utilize the well vetted technical information previously released to the public by Ecology in the September 2011 draft of the Fish Consumption Rates – Technical Support Document; and

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[12] EPA defines "Fair Treatment" as "no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies." Id at 3

[13] EPA defines "Meaningful Involvement" as 1) potentially affected community members have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; 2) the public's contribution can influence the regulatory agency's decision; 3) the concerns of all participants involved will be considered in the decision-making process; and 4) the decision-makers seek out and facilitate the involvement of those potentially affected. Id.

4. Take immediate action to begin promulgation of state-wide or regional fish consumption rates, at or above the approved Oregon standards

Finally, we would like to note that despite all that has transpired, the tribes remain committed to ensuring the revision and ultimate adoption of accurate numeric default fish consumption rates in Washington. The tribes also look forward to working closely with EPA, their trustee, to accomplish this. Should you or your office need assistance in setting up consultation, or support of any kind on this matter, please do not hesitate to contact me or Fran Wilshusen at the Northwest Indian Fisheries Commission at (360) 438-1180. Thank you for your attention to this important matter.

Sincerely,

Michael Grayum

cc

NWIFC Commissioners

Dennis McLerran, EPA Regional Administrator, Region 10

Bob Perciasepe, EPA Deputy Administrator

Dan Opalski, Director, Office of Environmental Cleanup, EPA Region 10