AWB Association of Washington Business
Washington State's Chamber of Commerce

April 19, 2012

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

Re: Implications of Fish Consumption Rates in Environmental Regulation Development

Dear Director Sturdevant:

The Association of Washington Business (AWB) wants to thank you and your staff for the ongoing opportunities to meet with the Department of Ecology (Department) on various issues emerging from the development and expected use of the *Fish Consumption Rates Technical Support Document* (TSD). As you are well aware, selecting an appropriate fish consumption rate(s) is a complex matter that involves many disciplines, including science, regulatory policy, and economics.

While we support the Department's primary objective of protecting the health of Washington's fish consumers, we believe the Department must take the time necessary to develop fish consumption rates that are both technically defensible and based on credible science. Selecting a fish consumption rate (FCR) that yields human health-based water quality criteria or sediment management standards to levels below natural background concentrations creates uncertainty for the regulated community to achieve compliance.

AWB is committed to supporting Washington's businesses and maintaining a competitive business climate. Based on the best information available to us now, we believe the Department's decisions on FCRs and subsequent rule making on sediment management standards and surface water quality standards will have the unintended consequence of compelling unreasonably expensive investments in wastewater treatment and contaminated sediment cleanups for both public and private entities without demonstrable benefits to human health. Additionally, new water quality standards will foreclose future growth and development opportunities for industries that rely on National Pollutant Discharge Elimination System (NPDES) permits to do business in Washington.

The Department's decision to review and update fish consumption rates for Washington residents is a decision that will result in significant policy and regulatory implications for the regulated community. Given the significance of the Department's decision to move

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forward with selecting a new FCR, AWB feels the need to set forth several of our concerns and questions in writing. It is our intention to continue to work with you and your staff on the TSD, implementation tools, and rule-making activities related to sediment management standards and surface water quality standards. We would appreciate a written response to our questions as soon as possible.

Fish Consumption Rates Technical Support Document

In our comments to the TSD dated January 18, 2012, AWB asked the Department to respond in writing to all the substantive science/technical and risk management issues raised in the comments to the TSD prior to moving forward on any related rule-making activities. At that time, you and your staff indicated a willingness to respond in writing to these individual comments before commencing formal rule making on sediment management standards.

- Will the Department commit to honoring our request to respond in writing to the science and technical comments it received on the TSD? If yes, can we expect to see the Department's written responses prior to the filing of the CR-102 for sediment management standards?

Further, we understand the Department is in the process of developing a revised TSD. We request that the Department allow for a 60-day public comment period on the revised TSD once it is released. While the TSD is characterized by the Department as a "guidance document," our concern is that the TSD will be used to determine subsequent regulatory outcomes for both sediment management standards and human health-based water quality criteria with a limited opportunity for public comment.

- Is it still true that the Department views the guidance document as merely guidance and not a rule or final agency action?
- If the TSD is a guidance document, how does the Department intend to use the TSD to inform rule making?
- Is the Department willing to consider providing a 60-day public comment period on the revised TSD when it is released? If no, why not?

Sediment Management Standards

It is our understanding that the Department plans on filing the CR-102 for sediment management standards (SMS) this summer. The Department has signaled its intent to include a default FCR in the SMS rule. AWB believes the regulatory value of a default FCR in the SMS is marginal. Accordingly, AWB requests that a default FCR not be incorporated in the SMS rule.

Contaminated sediment sites have unique, site-specific characteristics. Cleanup action plans are developed by the Department's project managers and potentially liable parties taking into consideration the unique traits of each site, including local FCR for exposed populations. In short, the absence of a default FCR has no effect on the Department's authority to compel sediment cleanups and the current FCR under the Model Toxics Control Act remains as a backstop.

Agreeing to our request to remove a default FCR from the SMS rule would allow the SMS rule making to move forward on schedule. It also provides additional time to allow vetting of the revised TSD, which is necessary to educate and pursue public acceptance on its conclusions.

- Is the Department willing to move forward on the SMS rule making without incorporating a default FCR? If no, why not?

Implementation Tools

The Department has acknowledged the need to develop implementation tools for very stringent water quality criteria that results from the range of FCRs established in the TSD. AWB appreciates the Department's commitment to evaluating implementation tools before developing new human health-based water quality criteria using a new FCR; however, it is unclear how the Department will address this concern with respect to SMS, which are both cleanup standards under the Model Toxics Control Act and water quality standards under the Clean Water Act.

The Department has indicated that it intends to submit the revised SMS to the U.S. Environmental Protection Agency (EPA) for approval as state water quality standards. Once adopted, these standards will be the primary basis for source control to prevent recontamination of sediments. The SMS will also be implemented as the basis for numeric effluent limitations in NPDES permits. This is already the case in the industrial stormwater general permit, which has a numeric limit for discharges to water bodies on the section 303(d) list of impaired water bodies based on sediment contamination.

- Assuming the Department moves forward on the SMS rule and incorporates a default FCR, is the Department willing to delay the issuance of the SMS rule until it has a full opportunity to develop appropriate implementation tools approved by the EPA?
- Is the Department committed to identifying mechanisms/tools that will facilitate the implementation of water quality standards in a manner that allows a NPDES permittee to be confident in Clean Water Act compliance?

Human Health-Based Water Quality Criteria

AWB is familiar with 40 C.F.R. 131.20(a) which requires a triennial review of water quality standards. The Department has indicated that updating the FCR is not required under triennial review of water quality standards. Further, Washington is entitled as a matter of law to rely on the National Toxics Rule to set human health criteria for state water quality standards. This is accepted under the Clean Water Act, section 303(c), 33 U.S.C. 1313(c), and in EPA regulations, 40 C.F.R. 131.36, the National Toxics Rule. Washington currently adopts and incorporates the National Toxics Rule by reference in WAC 173-201A-240(5).

AWB is particularly concerned as to what legal obligations, if any, the Department believes it is subject to in undertaking the development of independent state human health-based water quality criteria.

- Is Washington required by the Clean Water Act to amend human health-based water quality criteria at this time? If so, what statutes or regulations require the Department to undertake this rule making?
- Does the Department acknowledge that EPA guidance identifies human health-based water quality criteria based on a risk level range of $1x10^{-6}$ to $1x10^{-5}$ is an appropriate risk management goal for the general population as long as states and authorized tribes ensure that a risk to a more highly exposed subgroup (sports fishers or subsistence fishers) does not exceed the $1x10^{-4}$ risk level? *See* Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health, EPA-822-B-00-004, October 2000.

Significant Legislative Rule Evaluation

As the Department prepares to amend both SMS and human health-based water quality criteria, the Department must comply with all of the requirements of RCW 34.05.328 (significant legislative rule evaluation). An analysis under RCW 34.05.328 requires the Department, among other things, to consider alternatives to rule making, and the costs and benefits of implementation.

- Does the Department consider the significant legislative rule evaluation to be a final agency action?
- Will the Department commit to providing the significant legislative rule evaluation coincident with the CR-102 to facilitate public review and comment?
- Would the Department entertain a request to allow the public to contribute or participate in the development of the Department's significant legislative rule evaluation? As one example, the public may have ideas concerning alternatives to

rule making that could accomplish the general goals and specific objectives of the statute, as required by the evaluation under RCW 34.05.328.

- How will the Department incorporate the comments it receives from the public concerning the analysis of the costs and benefits of implementing new SMS and human health-based water quality criteria?
- How can the public provide the Department with credible alternative versions of the rule that would result in less burdensome outcomes for those required to comply with the rule?

We thank you for the opportunity to work with the Department on this issue. AWB will continue to closely monitor the efforts of the Department in updating the FCR and related regulations. We appreciate your thoughtful consideration of all the comments and questions contained in this letter and look forward to reading your response.

Sincerely,

Gary Chandler
Vice President, Government Affairs

cc: Governor Christine Gregoire
Keith Phillips, Governor's Policy Office
Senator Lisa Brown
Senator Mike Hewitt
Representative Frank Chopp
Representative Richard DeBolt