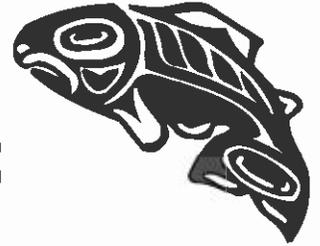




# Puyallup Tribe of Indians



April 9, 2014

Governor Jay Inslee  
Office of the Governor  
PO Box 40002  
Olympia, WA 98504-0002

Dear Governor Inslee,

The Puyallup Tribe of Indians would like to thank you and your staff for the extraordinary time and effort put toward developing effective solutions to reduce toxics in state waters for the protection of human health and the environment while providing business and industry a clear path toward achieving compliance with these standards. Unfortunately, the Tribe was not given the opportunity to participate in the Creative Solutions Group process or your advisory group process. The Tribe does, however, appreciate the time spent with your staff on February 21, 2014 to discuss key issues associated with development of the water quality standards. At the heart of the water quality standards is the development of a fish consumption rate that will protect all our members and a risk level that does not increase the likelihood of any of our members from getting cancer. Protective standards are only as effective as their implementation. As our staff and Council Member Sylvia Miller expressed during that meeting, we must insist that meaningful and protective human health criteria be developed during this rulemaking process to protect the health of all of our tribal members, the citizens of Washington state, and the economic interests of the tribe and all who depend on healthy waters of the state of Washington.

Based on our experience developing and implementing water quality standards successfully in the lower Puyallup River, we are writing to you to both urge the development of protective standards and rules for their timely, effective implementation. At the heart of this matter for the Puyallup Tribe is the protection of our people, our culture and our fishery. As co-managers of the fishery and water quality in the Puyallup River basin, we expect to be able to eat and sell fish that are not contaminated. We have worked over the last 25 years to clean up both Commencement Bay and the rivers that flow into the bay. We are concerned this rulemaking process will compromise those efforts.

A *quid pro quo* approach, trading off more protective standards with greater flexibility in implementation will likely not result in improvements in water quality nor meet the

requirements of the Clean Water Act. There are different rules for each of these processes and, although they are parallel, the rules and their processes are distinct. Standards that don't diminish the protections for carcinogens can be developed and promulgated *along* with an implementation rule that dictates clearly the expectations of dischargers so that compliance can be attained. The two are not mutually exclusive.

#### 1. Developing the Water Quality Standards

Water quality standards of the state must protect the health of all citizens, including tribes. At the heart of the debate in making revisions to human health criteria is the fish consumption rate and cancer risk level. Although a fish consumption rate of 175 g/day is far short of tribal fish consumption levels, Washington Tribes reluctantly agreed on the lower threshold number in order for the state's rulemaking process to go forward. A 175 g/day (i.e. over 6 ounces per day) fish consumption rate is certainly more protective than the existing rate of ¼ of an ounce of fish per day, which we all agree is woefully under protective. However, even this rate for the Puyallup Tribe is not sufficiently protective as it does not protect all Puyallup members. For this reason, we will be revising our water quality standards that includes a fish consumption rate that is protective of all of the tribe's members. We expect these waters not to be degraded by upstream pollution.

Also at the heart of this debate is the consideration of changing the cancer risk level, making the risk level less stringent by an order of magnitude or factor of ten. This would result in less stringent standards for most carcinogenic substances. This action would increase the likelihood of cancer for all of Washington's citizens and disproportionately affect tribes. It also would mark a major deviation from over 20 years of policy in Washington State and would more than negate the additional health protections gained in using a higher fish consumption rate. We spent the equivalent of about 10% of the state budget or \$3.27 billion dollars in 2010 on cancer-care treatment in the State of Washington (Trogon et al 2012). This estimate is projected to increase by 86% by 2020. In 2020, the estimate of cancer-related care in Washington is expected to climb to \$6.1 billion dollars. This estimate does not include other cancer-related costs including loss in work days and all other supportive needs associated with catastrophic family illness.

While state managers often equate both cancer risk levels under consideration of  $1 \times 10^{-6}$  and  $1 \times 10^{-5}$  as *de minimus* or close to zero, and by extension equivalent in terms of effect, this simply is inaccurate. Only the excess cancer lifetime risk of  $10^{-6}$ , currently used in the state's water quality standards, is considered as the "safe dose" that is "negligible" in effect ("essentially zero"). This is considered "acceptable" risk – we agree. It is this cancer risk level that is used in EPA's nationally recommended criteria, and by our neighboring western states, including California and Oregon. With the highest cancer incidence rate in the west (Washington State), changing the cancer risk rate to a less protective level would be reckless and certainly not in the interest of the

the Puyallup Tribe or the citizens of Washington state. . We expect the state to make risk management decisions in ways that prevent increased risk of harm to all of us, but mostly to those who simply eat a lot more fish or are at increased risk to be impacted, including our kids and elderly. This simply is the right thing to do, especially in light of the fact that one in every two men and one in every three women can expect cancer some time in their lifetimes.

## 2. Meaningful and Timely Compliance

The Puyallup Tribe has regulated water quality in the lower seven miles of the Puyallup River since 1994. We have demonstrated that both protective water quality standards and compliance with permits can be achieved, and in many cases, quickly. As one of the first tribes in the country to develop EPA-approved water quality standards, we have over 20 years experience in implementation and have been successful on the ground working with major dischargers including POTWs, industry and business in reducing toxic pollutant loads cost-effectively, while achieving water quality standards and complying with permits. We have demonstrated that both standards and compliance with permits can be achieved, and in many cases, quickly, and a balancing scheme trading-off more protective water quality standards with more flexibility in meeting these standards is unnecessary. Flexibility is already built into compliance tools.

A key frustration to this rulemaking process is that we hear often and loudly what industry or business can't do and not what can be accomplished cost-effectively in the near term. We understand what can be accomplished in the near term because we have been working collaboratively with municipalities and industry for a long time in helping them comply with permits. We have helped businesses remove arsenic from their wastewater processes through simple product substitutions, worked with a local municipality to remove  $\frac{3}{4}$  of the copper from its waste stream for about \$100,000 per year by using short-term compliance schedules, and helped a wood treatment facility used best management practices to prevent chromium +6 from getting in the stretch of the lower Puyallup River which the tribe owns and regulates water quality. This speciation of chromium is the same chemical at issue in the famous movie "Erin Brockavich".

We not only have the experience and expertise implementing permits and reducing toxics successfully in an ultra-urbanized watershed but also were one of three lead authors on behalf of the Northwest Indian Fisheries Commission on development of the compliance tool recommendations the NWIFC recently submitted to you and Director Bellon. In that paper, we made recommendations setting a clear path forward both procedurally and substantively for dischargers to comply with their permits. We believe if these provisions that we have recommended are implemented, improvements to water quality in state waters will result in the near term.

In addition to drafting the compliance tool paper, we also had long working sessions with technical staff at the Department of Ecology to develop expanded opportunities for dischargers to meet their permit obligations, and enhance opportunities to improve water quality from status quo conditions so that our treaty resources and people can be protected. The working sessions were productive for all of us at the table, and pushed us all to think “outside the box”.

To achieve compliance with standards as soon as possible, we recommended reducing pollutants at their source and before entry into treatment plants (i.e. source control and pre-treatment); developing pollutant minimization with clear milestones and commitments for implementation; and implementing cost-effective and reasonable best management practices for reducing nonpoint pollutant pollution. Interim numeric limits in permits that reflect the highest achievable water quality possible to protect the uses in the river are a crucial part of making compliance tools work – they offer both flexibility and accountability. Narrative limits in permits also can be useful, but they should only be used *in addition to, not in lieu of*, numeric, limits in permits. Numeric limits are essential in evaluating monitoring data and ensuring compliance. Chemical action plans are only useful if they are enforceable and within the authority of WDOE to mandate. If there are specific actions within the purview of Ecology’s authority, we recommend they be included in permits.

The Clean Water Act and implementing regulations make clear compliance tools are to be “temporary”, with underlying standards to be achieved by dischargers “as soon as possible”. To this end, it is essential to incorporate clear, comprehensive definitions of each of the compliance tools used in rule-making. Defining terms is essential for applying the right compliance tool for the situation. After much discussion with state technical staff, we agree that the duration of compliance tools should be case-specific depending on the particular facts of a given situation as well as the type of compliance tool used. However, we also suggest upper bounds should be incorporated into rule language as the Clean Water Act makes clear regardless the tool used, each must be “temporary” with standard’s compliance achieved “as soon as possible”.

Most states define “temporary” to mean 3-5 years for the duration of a compliance tool in a permit with a possibility to renew the permit if all the terms and conditions of the compliance tool and permit are achieved. This timeline is consistent with permitting horizons. We generally agree with these timelines for waters that are not impaired. For waters that are impaired, we acknowledge making progress will take longer; however streamlining water quality cleanup plans and implementing them will be more important than ever before. Our recommendations already provided to you and Director Bellon allow more flexibility in the way of longer timelines for meeting water quality standards as we recognize the important work needed to make real improvements to the state’s waters.

Monitoring will be the lynchpin in determining success of these compliance tools. Verifying improvements in water quality both at the end of pipe and in the receiving water is fundamental to measuring progress on a watershed scale. Comprehensive monitoring for toxics in state waters has been largely absent to date. The absence of toxics data is glaring in the State of Washington. Under the state's water assessment process required by 305(b) and 303(d) of the Clean Water Act, just under 2,000 of over 70,000 miles (or less than 3%) of streams were assessed across the state in 2008. Of these, 1,590 or 80% of the assessed stream miles were impaired. Many of these impairments were for toxics – leading the list were carcinogens like PCBs. To address these gaps, we recommend the Department of Ecology turn to the Minnesota model. They fund a comprehensive monitoring program across state waters with gas tax money. Using this information, Minnesota has been successful in showing that the money spent on treatment controls has been paying off. This success translates into compliance with permits and measurable improvements in water quality.

### 3. Dangers of a *quid pro quo* approach

Viewing the development of the water quality standards and implementation rule making processes, which are clearly distinct, as a *quid pro quo* or as a balancing scheme will lead to unintended consequences. The unintended consequences of polluting downstream waters that the Puyallup Tribe regulates through the delegation from the EPA, polluting fish that we can't sell, and making kids, the elderly, and people who consume fish sick.

Furthermore, we are very concerned that the effects of these rule-makings will be to compromise the efficacy of cleanups that have occurred in Commencement Bay under the Superfund program over the last three decades and degrade habitat restoration projects constructed in the Puyallup River estuary. Preventing degradation of these restored sites is key to the survival of juvenile salmon so they can use these sites as intended: to overwinter, find shelter from high waters, and osmoregulate in preparation for their transition to salt water. Not only is consistency needed across programs, but if there is a discrepancy between sediment cleanup targets and water quality standards, the more protective standards should be controlling or have primacy.

For achieving "a pathway to compliance" that leads to measurable improvements to waters of the state and protection of public health, we hope you and Director Bellon will consider and implement our recommendations in the rulemaking process. In our recommendations, we have articulated how, when, where, and which tools apply for a given circumstance. Articulating procedural requirements as well as timelines provides dischargers with a clear pathway to compliance with permits; holds them accountable; and provides transparency, clarity, and consistency in application.

If you would like to discuss the issues raised in this letter further, we would be happy to meet with you on a government-to-government basis or at the staff level prior to

making key policy decisions in the rulemaking process that may lead to unintended consequences. Thank you for all the time and dedication you and your staff have put into this effort.

Sincerely,

A handwritten signature in black ink, appearing to read "Herman Dillon, Sr.", written in a cursive style.

Herman Dillon, Sr., Chairman  
Puyallup Tribe of Indians