



October 29, 2015

Via electronic mail and U.S. Mail

Erica Fleisig
Office of Water, Standards, and Health
Protection Division
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Dan Opalski
Office of Water
U.S. Environmental Protection Agency, Region 10
1200 - 6th Avenue, Suite 900
Seattle, WA 98101

**RE: Extension of Comment Period on Revision of Water Quality Criteria
Applicable to Washington State
Docket ID No. EPA-HQ-OW-2015-0174**

Dear Ms. Fleisig and Mr. Opalski:

I am writing to you on behalf of Puget Soundkeeper Alliance, Columbia Riverkeeper, Spokane Riverkeeper, North Sound Baykeeper, Pacific Coast Federation of Fishermen's Associations and Institute for Fisheries Resources (collectively "Waterkeepers Washington"), regarding the U.S. Environmental Protection Agency's ("EPA") extension of the comment period (80 Fed. Reg. 65,980 (Oct. 28, 2015)), for EPA's proposed Revision to Water Quality Criteria for Washington State, 80 Fed. Reg. 55,063 (Sept. 14, 2015) (hereinafter referred to as the Fish Consumption Standards). Waterkeepers Washington is strongly opposed to this additional (and any further) delay in finalization of the Fish Consumption Standards as such delay is contrary to both sound public policy and legal requirements.

The Clean Water Act requires states to develop water quality standards necessary to meet the requirements of the Clean Water Act, including protecting designated uses of water. 33 U.S.C. § 1313. Those designated uses encompass the "fishable and swimmable" protections of the Clean Water Act: protecting and cleaning up our nation's waters so that they are clean enough for drinking, for direct human contact for fishing and recreation, for healthy aquatic

resources, and for catching and consuming fish and shellfish. Water Quality Standards include criteria, often numeric, sometimes narrative, and are necessary to ensure that the designated uses are attained and protected. When states fail to develop adequate standards, the EPA must step in and do so within specified time deadlines. 33 U.S.C. § 1313. “Fishability” encompasses the ability of people to harvest fish and shellfish and to safely eat the harvested fish and shellfish in quantities that those individuals would normally consume. In Washington, harvesting and eating fish, including for subsistence (sustenance) by tribes and other groups is the designated use of the water body that the Clean Water Act requires be protected.

Many toxic pollutants accumulate in fish tissue, biomagnifying up the food chain. EPA, Water Quality Standards Handbook § 3.1.3 (“EPA WQS Handbook”) (“The consumption of contaminated fish tissue is of serious concern because the presence of even extremely low ambient concentrations of bioaccumulative pollutants (sublethal to aquatic life) in surface waters can result in residue concentrations in fish tissue that can pose a human health risk.”). Because state and federal regulators have an obligation to set water quality standards to allow individuals and communities to harvest and eat shellfish safely in the quantities they would normally eat, it is incumbent upon the regulators to determine the amount of fish people actually consume when setting the human health water quality criteria for toxic pollutants. In numerous guidance documents, EPA has made clear that states must use locally-accurate and protective fish consumption rates to set water quality standards. *See, e.g.*, EPA, Methodology for Deriving Ambient, Water Quality Criteria for the Protection of Human Health at 2-13 (Oct. 2000) (“EPA 2000 Guidance”).

Accurately determining the fish consumption rate is integral to regulators’ ability to set protective human health water quality standards such that the level of toxic pollutants are low enough that fish remain safe to eat, even for people who eat greater amounts of fish than others. *Id.* Similarly, not long after EPA issued its 2000 guidance on fish consumption and human health criteria, a Federal Advisory Committee to EPA issued a report regarding the need for states to ensure that all populations are protected, including those that have particularly high fish consumption rates for cultural, religious, social and/or economic reasons. National Environmental Justice Advisory Committee, *Fish Consumption and Environmental Justice* (2002) (“Environmental Justice Report”). The Environmental Justice Report also emphasized the need to consider that some consumption rates may currently be suppressed due to reduced fish availability and other factors. *Id.* at 43-49. Failure to adopt human health water quality standards based on an accurate fish consumption rate, including a rate adequate to protect sustenance fishing by tribes and other groups, is a failure to promulgate water quality standards that meet the requirements of the Clean Water Act.

For the last *five years*, since 2010, *on at least seven occasions*, EPA has repeatedly informed Washington that Washington’s fish consumption rate of 6.5 g/day is not accurate and that the human health water quality criteria based on that rate is not sufficiently protective of human health and designated uses. *See* Correspondence from EPA to Washington Department of Ecology from Nov. 10, 2010; Dec. 16, 2010; Jan. 17, 2012; Sept. 6, 2012; June 21, 2013; Apr. 8,

2014; and Dec. 18, 2014,¹ copies attached. Because of Washington State's intransigence in failing to correct that failure and the continuing inaccurate and under-protective rate, on December 18, 2014, EPA announced that it had initiated an internal rulemaking process to amend the National Toxics Rule for Washington's human health water quality criteria. Industry and the Department of Ecology ("Ecology") have been involved and informed every step of the way for years.

On March 23, 2015, EPA filed public comments with Ecology critical of Ecology's substandard efforts (after a years-long process) at developing new fish human health criteria and components of that criteria including the fish consumption rate proposed to be utilized by Ecology. EPA pointed out to Ecology that Ecology should use a rate of not less than 175 g/day, that Ecology should retain the 10^{-6} cancer risk rate, and that Ecology should follow EPA guidance regarding factors such as bioaccumulation and relative source contribution. EPA also criticized Ecology's exemption of the most widespread and problematic water pollutants from Ecology's rule: arsenic, PCBs and mercury.

When Ecology failed yet again to promulgate proper and protective standards under the Clean Water Act, withdrawing its proposed rule on July 31, 2015 with no replacement, EPA proposed Fish Consumption Standards for Washington, as it is required to do under the Clean Water Act in order to protect all Washington consumers, including tribal members. 80 Fed. Reg. 55,063 (Sept. 14, 2015). EPA has done so (and done so reluctantly) because the state of Washington has failed repeatedly and for many, many years to follow the requirements of the Clean Water Act and protect people's health. Further delay of any length is unwarranted, unneeded, contrary to the law, and contrary to the protection of treaty rights and human health from toxic pollutants such as mercury and PCBs.

Specifically, in proposing an adequate and protective standard, EPA determined pursuant to 33 U.S.C. § 1313(c)(4)(B) that Washington's existing standard, based upon 6.5 g/day of fish consumption, is inaccurate, unsupported by science and evidence of actual consumption, and as such a revised standard is necessary to meet the requirements of the Clean Water Act to set standards protective of all designated uses. The designated use at issue here is consumption of fish and shellfish. 80 Fed. Reg. at 55,066-67. This formal finding was anticipated and consistent with EPA's clear and numerous previous communications on the issue. The Clean Water Act further provides that upon EPA making such determination, EPA must promptly prepare and publish a proposed regulation and EPA must finally promulgate any revised or new standard *not later than 90 days after the proposed regulation is published*. 33 U.S.C. § 1313(c)(4)(B) (emphasis added). That date is December 14, 2015. With the extension of the comment period to December 28, 2015, EPA will be in violation of the Clean Water Act because, presumably, EPA will not finalize the proposed standard prior to the end of the comment period.

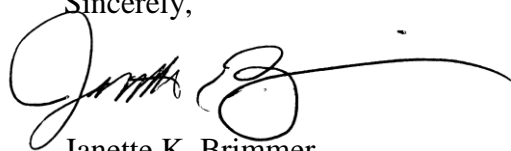
¹ Also, on January 20, 2015, the EPA Region 10 Administrator responded to questions by State Senator Ericksen regarding EPA's proposal to commence rulemaking due to the state's failure to act. (Copy attached.)

Waterkeepers Washington is aware of press statements (but no actual regulatory proposal) by the state of Washington's Governor on October 8, 2015, that he has directed Ecology to work on yet another attempt at Fish Consumption Standards. (Press release attached). No actual rule proposal has been forthcoming. Moreover, even the information made available in the press release demonstrates that once again, Ecology will stop short of actually producing a Fish Consumption Standard that protects designated uses. Ecology will propose no action on two of the most toxic and prevalent pollutants in Washington waters, PCBs and mercury. As EPA is very much aware, both of these pollutants bioaccumulate in fish and shellfish and are of serious concern for human health, especially for high consumers such as tribal members. That possible rulemaking would be, yet again, too little, too late and no reason to delay EPA's more robust process.

While the State may, at any time, propose a replacement standard for EPA to review, EPA cannot continue to wait for the state to take substandard action. The Clean Water Act is plain; EPA must finalize an adequately protective standard by December 14, 2015. The State may proceed to work on a substitute for later submission to EPA and EPA may review and approve or disapprove it depending on whether it meets the requirements of the Act, but at this juncture, that is simply a parallel, not a substitute, track for Washington. The state of Washington has had years to develop its own standard. The State and industry have been on notice for years that the current standard does not protect human health and must be replaced. Any further delay at their request is unconscionable, contrary to protecting human health, and contrary to law.

Waterkeepers Washington urges EPA to reconsider the extension of the comment period as unwarranted and in violation of the Act. Waterkeepers Washington urges EPA to finalize its proposed standards, as proposed, no later than December 14, 2015, consistent with the requirements of the law and sound public policy.

Sincerely,

A handwritten signature in black ink, appearing to read 'Janette K. Brimmer', with a long horizontal flourish extending to the right.

Janette K. Brimmer
Matt R. Baca

cc: Chris Wilke, Puget Soundkeeper Alliance
Brett VandenHuevel, Columbia Riverkeeper
Jerry White, Spokane Riverkeeper
Wendy Steffenson, North Sound Baykeeper
Glen Spain, Pacific Coast Federation of Fishermen's Assoc.
Northwest Indian Fisheries Commission
Columbia River Intertribal Fisheries Commission
Endre Szalay, EPA Region 10



Jannine
Jennings/R10/USEPA/US
11/10/2010 08:02 AM

To "Braley, Susan (ECY)" <SUBR461@ECY.WA.GOV>,
cc Matthew Szelag/R10/USEPA/US@EPA
bcc
Subject Triennial review comments

Susan

I wanted to let you know that we will be sending a letter as part of your triennial review request stating EPA's desire for WA to move forward with revisions to the human health criteria in order to incorporate a higher fish consumption rate. I doubt this is a surprise but wanted to let you know in advance. Also, if there are other things which you would find helpful to hear from EPA during this time, please let us know.

We met with Oregon yesterday regarding their criteria revisions. They will be going out to public comment in early January and hope to take the criteria to their Commission for adoption next June. One of the issues they are currently hearing quite a bit of is the inequity that this change will cause between the WA and OR criteria, thus putting OR at a competitive disadvantage when business is looking to locate along the Columbia. There may be several representatives from various Oregon stakeholder groups at your Vancouver meeting, coming to relay this message to you. Mary Lou Soscia from our Portland office will also be attending that meeting, although probably just to listen to the conversation and support you.

Jannine



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

DEC 16 2010

OFFICE OF
WATER AND WATERSHEDS

Becca Conklin
Washington Department of Ecology
Surface Water Quality Standards
P.O. Box 47600
Olympia, WA 98504-7600

Dear Ms. Conklin:

Thank you for the opportunity to comment on Washington's Surface Water Quality Standards Triennial Review contained at WAC 173-201A. The Washington State Department of Ecology (Ecology) initiated the Triennial Review process in November 2010, through a series of public meetings. EPA Region 10 staff attended the meetings on November 4, 2010 in Lacey and November 15, 2010 in Vancouver. Ecology describes the Triennial Review as an opportunity for the public to review the water quality standards (WQS) and provide feedback on the priorities and commitments the agency makes regarding the standards. It is also an opportunity for an open dialogue between Ecology, other government agencies, tribes, and the public on how to improve the standards and how Ecology implements the program.

Our comments highlight requirements and considerations relevant to Triennial Reviews of WQS. Section 303(c)(1) of the Clean Water Act (CWA) and its implementing regulations at 40 C.F.R. 131 require that states shall, from time to time, but at least once every three years, hold public hearings to review applicable water quality standards and as appropriate, modify and adopt standards. EPA's *Water Quality Standards Handbook* (Handbook) provides guidance as to how states should conduct their Triennial Reviews. The Handbook explains that states should identify additions or revisions necessary to existing standards based on their 305(b) reports, other available water quality monitoring data, previous WQS reviews, or requests from industry, environmental groups, or the public. The Handbook further indicates that states should review the general provisions of their WQS for adequacy taking into consideration new federal or State statutes, regulations, or guidance; legal decisions involving applications of standards; or other necessary clarifications or revisions. WQS reviews and revisions may take many forms, including additions to and modifications in uses, in criteria, in the antidegradation policy, or in other general policies. We understand that this review has been initiated pursuant to this requirement.

The WQS regulation at 40 C.F.R. 131.11(a) requires states to adopt water quality criteria to protect all designated uses. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. EPA urges Ecology to make the revision of Washington's human health criteria the most important priority in this Triennial Review. We are aware that you have been following the work previously underway in Oregon to make such revisions. The State of Oregon plans to adopt final criteria and implementation provisions in the summer of 2011. To avoid duplication of efforts, we recommend that you consult with the State of Oregon as you move forward. Since this is a priority for EPA Region 10, we are available and willing to work closely with you throughout your human health criteria update process.

Washington's human health criteria were issued by EPA in 1992 through the National Toxics Rule (NTR). The human health criteria are not in the State's WQS and Washington is one of a handful of states remaining in the NTR for human health criteria. In 2000, EPA updated its methodology for deriving human health criteria.¹ In that document, instead of using a fish consumption rate of 6.5 grams per day in deriving criteria, EPA recommended that states and tribes either (1) use a fish consumption rate that accurately represents the population to be protected by the criteria if state/site-specific data is available or (2) use a fish consumption rate of 17.5 grams per day if no state/site-specific information is available. EPA believes that a fish consumption rate of 6.5 grams per day is not reflective of fish and shellfish consumers in the State of Washington. Ecology should examine the most recent EPA criteria documents as well as other technical developments and studies to determine an appropriate fish consumption rate that would result in criteria protective of the State's designated uses.

In addition, EPA recommends that Ecology use this Triennial Review to determine if regulatory revisions to the State's freshwater dissolved oxygen criteria are needed. As part of the Endangered Species Act consultation on EPA's 2006 approval of Washington's WQS revisions, Ecology agreed to review the State's freshwater dissolved oxygen criteria. In September 2009, Ecology published *A Review and Discussion of Freshwater Intergravel Criteria Development*.² EPA suggests that Ecology identify whether they will pursue a criteria change pursuant to the findings in this report as well as any other scientific information or comments received. If Ecology decides to make a regulatory revision, EPA is willing to work with the State and provide technical assistance.

Again, thank you for the opportunity to comment on Washington's current Triennial Review. We look forward to engaging with you throughout the continuation of this process. If you have any questions or wish to discuss this matter further, please call me at (206) 553-2724 or Matthew Szelag at (206) 553-5171.

Sincerely,



Jannine Jennings
Water Quality Standards, Unit Manager
Office of Water & Watersheds

cc: Susan Braley, Chad Brown, Melissa Gildersleeve, Cheryl Niemi, Ecology
Jennifer Wigal, ODEQ

¹ EPA. 2000. *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health*. U.S. Environmental Protection Agency, Office of Water, Washington, D.C. EPA-822-B-00-004. Available at: <http://www.epa.gov/waterscience/criteria/humanhealth/method/complete.pdf>.

² Department of Ecology. September 2009. *Washington State Dissolved Oxygen Standard: A Review and Discussion of Freshwater Intergravel Criteria Development*. Publication No. 09-03-039. Available at: <http://www.ecy.wa.gov/pubs/0903039.pdf>.



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

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OFFICE OF
WATER AND WATERSHEDS

January 17, 2012

Mr. Kelly Susewind
Washington Department of Ecology
Water Quality Program Manager

Mr. Jim Pendowski
Washington Department of Ecology
Toxics Cleanup Program Manager

Comments submitted electronically to fishconsumption@ecy.wa.gov

Re: Comments on Ecology's *Fish Consumption Rates Technical Support Document*

Dear Mr. Susewind & Mr. Pendowski:

This letter provides the Environmental Protection Agency's (EPA's) general comments on the Washington Department of Ecology's (Ecology's) process to undergo revisions to the state's fish consumption rate. Ecology has initiated this evaluation through the release of a draft report titled, *Fish Consumption Rates Technical Support Document: A Review of Data and Information About Fish Consumption in Washington* dated September 2011 and a request for public comments by January 18, 2012 on the draft document.

EPA would like to thank Ecology for the opportunity to provide comments on the draft document. This document provides a strong framework for your upcoming process to choose a fish consumption rate that more accurately reflects the fish and shellfish consumed by people in Washington. In turn, this rate may be used to adopt criteria that protect the health of those consumers. You and your staff should be commended for the quality, substance and readability of the document.

Defining appropriate fish consumption rates are critical to adopting water quality standards that ensure adequate human health protection. In Washington, this analysis affects future revisions to the state's Surface Water Quality Standards (WQS) at WAC 173-201A and Sediment Management Standards (SMS) at WAC 173-204 since both will involve protection of human health from toxic substances through criteria derived using a fish consumption rate. We look forward to our continued work with you throughout your revision processes to ensure that the criteria can be approved under the Clean Water Act.

Ecology currently recognizes two separate default fish consumption rates used to establish regulatory requirements:

- For cleanup actions, the Model Toxics Control Act (MTCA) Cleanup Regulations includes a default fish consumption rate of 54 grams per day. The SMS currently do not have numeric human health criteria, but instead rely on a narrative statement. (Ecology expects that upcoming revisions to the SMS will utilize a fish consumption rate to calculate numeric human health criteria.)
- For water quality standards, the Surface Water Quality Standards are based on the National Toxics Rule (NTR) which sets water quality standards for human health criteria based on a fish consumption rate of 6.5 grams per day.

The water quality standards regulation at 40 C.F.R. 131.11(a) requires states to adopt water quality criteria to protect all designated uses. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. In 2000, EPA updated its methodology for deriving human health criteria (2000 Methodology).¹ In that document EPA urges states and tribes to use a fish intake level derived from local or regional data. Consideration of local data is important to ensure protection of the local populations, especially when that population includes subpopulations that eat larger quantities of fish and shellfish. A four preference hierarchy concerning the use of fish consumption rate data is set forth: (1) use of local data; (2) use of data reflecting similar geography/population groups; (3) use of data from national surveys; and (4) use of EPA's default intake rate of 17.5 grams per day if no state/site-specific information is available.

Washington's human health criteria were issued by EPA in 1992 and derived using a fish consumption rate of 6.5 grams per day. As identified in your draft document, several studies of Northwest populations indicate that this rate is not reflective of the amount of fish and shellfish consumed by some in the state of Washington. Therefore, it is appropriate and consistent with EPA guidance for Ecology to examine the current science to determine an appropriate fish consumption rate to use for deriving criteria protective of the state's designated uses. EPA recognizes that Ecology has begun this process in the draft *Fish Consumption Rates Technical Support Document* and believes it is important for you to use the recommendations presented in this document along with the comments received to determine an appropriate rate to use in deriving the human health criteria in your SMS and WQS.

In the draft *Fish Consumption Rates Technical Support Document* a preliminary recommendation for a revised fish consumption rate in the range of 157 to 267 grams per day is proposed for use in the state's regulations. This range is primarily based on Ecology's evaluation of four studies:

- *A Fish Consumption Survey of the Umatilla, Nez Perce, Yakama, and Warm Springs Tribes of the Columbia River Basin* (Columbia River Inter-Tribal Fish Commission, 1994).
- *A Fish Consumption Survey of the Tulalip and Squaxin Island Tribes of the Puget Sound Region* (Toy et al., 1996).

¹ EPA. 2000. *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health*. U.S. Environmental Protection Agency, Office of Water, Washington, D.C. EPA-822-B-00-004. Available at: <http://www.epa.gov/waterscience/criteria/humanhealth/method-complete.pdf>.

- *Fish Consumption Survey of the Suquamish Indian Tribe of the Port Madison Indian Reservations, Puget Sound Region* (Suquamish Tribe, 2000).
- *Asian and Pacific Islander Seafood Consumption Study* (Sechena et al., 1999).

To reiterate, EPA believes the approach for developing a revised fish consumption rate should be based on current scientific information and local/regional data. The initial approach put forth in the draft report is aligned with this thinking. While we understand the need for continued coordination with your stakeholders and the Tribes, we encourage you to quickly incorporate this information into your rulemaking process and move forward with adopting revised criteria.

EPA is aware that Ecology has been following the work previously completed in Oregon to make similar revisions to their WQS involving a revised fish consumption rate based on 175 grams per day and associated new and revised implementation tools. The revisions to Oregon's WQS were approved by EPA on October 17, 2011. To avoid duplication of efforts, we recommend that you continue to consult with the state of Oregon as you move forward.

EPA urges Ecology to continue the process of revising Washington's human health criteria in a timely manner. However, EPA recognizes that several key questions still need to be decided. For example, Ecology will need to decide on implementation tools in order to put into practice revised human health criteria and Ecology will need to decide if a consistent number will be chosen for the state's SMS and WQS. Nonetheless, EPA believes the information is currently available to make decisions on these matters and requests Ecology to quickly move through the process necessary to do so. EPA remains committed to working with Ecology, the Tribes and Washington's stakeholders to facilitate the adoption of water quality criteria that reflect appropriate fish consumption rates for Washington's waters and are protective of human health.

Since this is a priority for EPA Region 10, we are available and willing to work closely with you throughout your human health criteria update process. EPA greatly appreciates your engagement on this significant topic. Please feel free to contact me at (206) 553-2724 or have your staff contact Matthew Szelag at (206) 553-5171 as we continue to move forward on this important effort.

Sincerely,



Jannine Jennings
Manager, WQS Unit
Office of Water and Watersheds



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

1200 Sixth Avenue, Suite 900
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OFFICE OF THE
REGIONAL
ADMINISTRATOR

SEP 06 2012

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

Dear Mr. Sturdevant:

I am writing today to provide some additional clarity from the United States Environmental Protection Agency, Region 10, regarding the State's process for revising water quality standards for toxic pollution to protect human health in Washington State. We strongly support adoption of human health criteria that are derived using scientifically sound data, including applicable regional and local fish consumption surveys. The surveys demonstrate that tribal and other high fish consuming residents are eating fish at rates significantly higher than the current default rates.

The EPA's recent actions in Idaho and Oregon provide strong precedent for the current process in Washington. In the case of Idaho, we recently disapproved human health criteria that were not reflective of consumption rates identified in the fish consumption surveys conducted by the Columbia River Inter-Tribal Fish Commission. In Oregon, after an initial disapproval, we strongly supported adoption of new standards based on a fish consumption rate of 175 grams per day.

Further, it is important to note that the EPA supported flexible implementation mechanisms in the Oregon rule making and would support implementation flexibility in other states. It was clear in Oregon that implementation flexibility was needed to address issues presented for some sources that discharge these toxic pollutants. I understand that the State and the EPA have been having productive conversations regarding flexibility mechanisms and while each state is unique, we expect such mechanisms will be appropriate and necessary in Washington. It is crucial that the Department of Ecology continue to make progress in adopting human health criteria that incorporate scientifically sound data, including current information regarding realistic fish consumption rates.

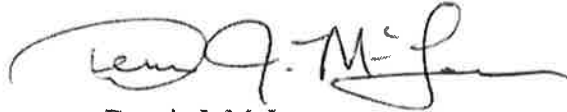
Our understanding is that Ecology is committed to updating water quality standards based on the best available science. The best available science now in-hand demonstrates that current standards are not based on realistic consumption rates for high fish consumers. If and when there is regional or local data showing higher fish consumption rates, it needs to be utilized for derivation of the State's human health criteria.

Your July 16 letter indicates a commitment to commencing the rule making process for surface water quality standards this month. We will be monitoring that process closely and are supportive of its timely completion. The EPA will continue to support Ecology in adopting a revised set of standards. We can continue to help in keeping key stakeholders engaged, providing technical support on the best available science, and developing implementation flexibility that maintains the integrity of the standards but

recognizes challenges for certain key sectors. I look forward to working together on this critically important issue.

Please feel free to call me if you have any questions at (206) 553-1234 or you may contact Matthew Szelag of my staff at (206) 553-5171.

Sincerely,

A handwritten signature in black ink, appearing to read "Dennis J. McLerran". The signature is fluid and cursive, with a large initial "D" and "M".

Dennis J. McLerran
Regional Administrator

cc: Billy Frank, Jr, Chairman
Northwest Indian Fisheries Commission

Brian Cladoosby, Tribal Chairman
Swinomish Tribe



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

1200 Sixth Avenue, Suite 900
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OFFICE OF THE
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JUN 21 2013

Ms. Maia Bellon, Director
Department of Ecology
P.O. Box 47600
Olympia, Washington 98504-7600

Dear Director Bellon:

The U.S. Environmental Protection Agency appreciates your continued efforts to adopt human health water quality criteria to better ensure health protection for Washington residents. The EPA's understanding is that the Department of Ecology (Ecology) is on pace to propose a draft rule this winter. However, most recently, a number of stakeholders in the process have asked for our technical views on the budget proviso in Washington State Senate Bill 5034. The proviso, if enacted, would have significant impacts on Ecology's process and progress. Therefore, I would like to reiterate our perspectives on several technical issues that are relevant to your work.

As you are aware, the EPA has been asked on several occasions to share its perspectives on the water quality criteria revisions underway in Washington and Idaho and how we view these efforts in relation to Oregon's revised human health criteria that were derived using a fish consumption rate of 175 grams per day, which the EPA approved in 2011. There has been much discussion in the current state processes about appropriate fish consumption rates, which are used to derive the human health criteria. The EPA also has been asked by the tribes and environmental groups, in particular, to intervene in the Washington and Idaho rulemaking processes and to exercise available authorities under the Clean Water Act.

When the EPA reviews state and tribal water quality standards for approval or disapproval, the EPA must ensure that criteria are based on a sound scientific rationale consistent with 40 CFR § 131.11(a). The EPA believes there are scientifically sound regional and local data available in Washington that are sufficient for Ecology to move forward in choosing a protective and accurate fish consumption rate at this time. These data were thoroughly analyzed in Ecology's *Fish Consumption Rates Technical Support Document*, which was recently finalized. The best available science includes evidence of consumption rates well above 6.5 grams per day among high fish consumers and shows that the human health criteria currently in effect for Clean Water Act purposes in Washington are not sufficiently protective. In Oregon's case, the EPA disapproved human health criteria similar to the currently applicable human health criteria for Washington under the National Toxics Rule (NTR). Oregon subsequently submitted, and the EPA approved, new human health criteria derived using a fish consumption rate of 175 grams per day, supported by sound scientific data.

As noted previously, choosing a fish consumption rate for deriving human health water quality criteria is a current discussion topic in both Washington and Idaho. As you are aware, the EPA disapproved Idaho's human health criteria derived using a fish consumption rate of 17.5 grams per day because Idaho did not consider the available information relevant to fish consumption when calculating their human health criteria. The EPA believes that there are sufficient regional and local fish consumption data available to revise human health criteria in both Washington and Idaho, although the EPA has acknowledged that there are less state-specific data in Idaho on higher consumers. In Washington, in

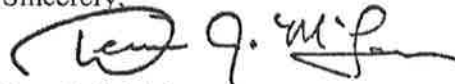
contrast with Idaho, the EPA believes that there are a number of scientifically sound data results specific to surveys conducted in the State for several population groups, including tribes, Asian Pacific Islanders, and recreational anglers.

We recognize the immense amount of work that Ecology has done to host a number of public meetings as part of the state rulemaking process, and we have appreciated participating in those discussions. We also acknowledge the challenges still to come in making final decisions about the rule revisions, including implementation tools. The EPA is committed to working with Washington as they move forward on their rulemaking, and to helping ensure the rulemaking proceeds in a timely manner, with sound scientific data supporting decision-making. The EPA's commitment to support Washington State's process is consistent with the EPA's strong preference to support states in their development of water quality standards that are protective of designated uses rather than to develop standards at the national level.

However, should Washington's process be unnecessarily delayed, the EPA has the authority to amend the NTR human health criteria for Washington, which the EPA originally promulgated in 1992. Pursuant to Clean Water Act Section 303(c)(4)(B) and 40 CFR § 131.22(b), the EPA promulgated the NTR for states not complying with Section 303(c)(2)(B) of the Clean Water Act, which states, "...State[s] shall adopt criteria for all toxic pollutants listed pursuant to section 307(a)(1) of this Act for which criteria have been published under section 304(a), the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses." As previously noted, since 1992, several national, regional, and local surveys have been conducted that provide scientifically sound information that fish consumption levels are considerably higher than 6.5 grams per day in Washington. In discussing this federal authority, the EPA has noted that a federal rulemaking would likely focus on human health criteria and not include the implementation tools currently being evaluated in the state rulemaking process.

I look forward to our continued work together on this very important issue for the health and protection of all Washington citizens. If you would like to discuss further the topics I've addressed, please contact me directly or Dan Opalski, our Director for the Office of Water and Watersheds, at (206) 553-1855.

Sincerely,



Dennis J. McLerran
Regional Administrator

cc: The Honorable Billy Frank, Jr., Chairman
Northwest Indian Fisheries Commission

The Honorable Brian Cladoosby, Tribal Chairman
Swinomish Tribe



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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APR 08 2014

Maia Bellon, Director
Department of Ecology
P.O. Box 47600
Olympia, Washington 98504-7600

Dear Director Bellon:

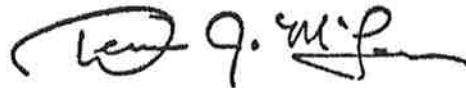
I am writing in regards to your February 14, 2014 letter to Michael Grayum, Executive Director of the Northwest Indian Fisheries Commission and more recent conversations we have had with you and your staff. The U.S. Environmental Protection Agency was strongly encouraged by the Department of Ecology's timeline to adopt human health criteria with a draft rule by the end of March 2014 and a final rule submitted to the EPA by December 31, 2014. Although the EPA was disappointed to hear that Ecology will no longer be able to meet the commitment to issue a draft rule in March, we understand that Ecology remains committed to adopting a final rule by the end of 2014.

The EPA supports Ecology's use of the scientifically sound regional and local fish consumption data available in Washington as it develops its human health criteria. As I have previously stated, the best available science includes evidence of fish consumption rates well above 6.5 grams per day among high fish consumers in Washington, which raises concerns that the human health criteria currently in effect for Clean Water Act purposes in Washington are not sufficiently protective. In addition, as we have also discussed, another important element of a final rule is choosing a cancer risk level that provides risk protection for all Washington citizens, including communities that eat higher amounts of fish. The EPA remains committed to supporting Ecology as it moves forward with a rulemaking based on sound scientific data. This will help facilitate the EPA's review of Ecology's new or revised water quality standards, which requires EPA to ensure that criteria are protective of applicable designated uses and based on a sound scientific rationale, consistent with 40 CFR § 131.11(a).

If Ecology does not follow through with its stated timeframe for final rule adoption, the EPA intends to take the steps necessary to allow for a proposal of federally revised human health criteria for Washington, via amendment of the National Toxics Rule human health criteria for Washington, by May 31, 2015. For the sake of clarity, I note that this letter does not constitute, and is not intended as, an Administrator determination under CWA § 303(c)(4)(B).

The EPA is very appreciative of the challenging work that Ecology has undertaken thus far to adopt human health water quality criteria. I look forward to continuing our partnership to support state adoption of human health criteria to better ensure health protection for all Washington citizens. If you would like to discuss these topics further, please contact me directly or Dan Opalski, our Director for the Office of Water and Watersheds, at (206) 553-1855.

Sincerely,

A handwritten signature in black ink, appearing to read "Dennis J. McLerran". The signature is fluid and cursive, with a large initial "D" and "J".

Dennis J. McLerran
Regional Administrator

cc: Michael Grayum, Executive Director
Northwest Indian Fisheries Commission

Brian Cladoosby, Tribal Chairman
Swinomish Tribe



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

OFFICE OF THE
REGIONAL
ADMINISTRATOR

DEC 18 2014

Maia Bellon, Director
Department of Ecology
P.O. Box 47600
Olympia, Washington 98504-7600

Dear Director Bellon:

I am writing in follow up to my letter dated April 8, 2014, in which I described the U.S. Environmental Protection Agency's intention to amend the National Toxics Rule for the State of Washington's human health water quality criteria should the Washington Department of Ecology not finalize its human health water quality criteria by the end of 2014. Consistent with that letter, I am informing you that the EPA has initiated its internal federal rulemaking process to amend the NTR for Washington's human health water quality criteria and plans to publicly announce the initiation of the process on the EPA's Website in mid-January 2015 via a monthly notice that summarizes upcoming EPA regulatory actions (known as the Action Initiation List).

At the same time, as you know, the EPA remains interested and committed to supporting the State's process to complete a water quality standards submission for the EPA to review. I am encouraged by Ecology's timeline to issue a draft rule for public comment in January 2015, and appreciate the Governor's personal investment in moving the State's efforts forward. I continue to strongly encourage the State to fully consider the issues that the EPA has raised during the State's rulemaking process, particularly regarding the need for the State to base its decision on sound science and the best available data, which provide evidence of fish consumption rates well above 6.5 grams per day in Washington, and to explain why a change in the State's long-standing cancer risk protection level is necessary and how it is consistent with its strategy for protecting higher fish consumers in Washington. I am hopeful that Washington's submission to the EPA fully addresses these issues, protects human health and the environment, and is consistent with the Clean Water Act.

The EPA recognizes that its federal rulemaking activities, specifically the timeframe for developing draft federal water quality criteria for Washington, would overlap with Washington's potential timeline for finalizing its rule. Therefore, it is important to note that, if Washington were to submit a final rule to the EPA for Clean Water Act review and action, the EPA would likely pause its federal rulemaking activities to fulfill its required duty to review and act on the submittal under the Clean Water Act (to either approve the submittal within 60 days or disapprove within 90 days). However, initiating the EPA's internal rulemaking process now, preserves the EPA's ability to propose a rule in a timely manner should action on our part become necessary.

Consistent with the input we have provided the State, the EPA will ensure that its federal rulemaking process fully considers the best available science, including local and regional information, and applicable EPA policies, guidance, and legal requirements. These policy and legal considerations would include an assessment of downstream waters protection, environmental justice, federal trust responsibility, and tribal treaty rights and how those issues should inform the EPA's analysis of the

protectiveness of the water quality criteria. At this time, the EPA believes it would be able to complete a proposed federal rule within approximately 9-12 months unless, as previously noted, it pauses its process to review a final State submittal. The EPA acknowledges that this would mean the earliest timeline for a federal proposal would likely be August 2015, which is later than the May 2015 timeframe I noted in my April 2014 letter. I believe the August timeframe strikes a balance by providing time for Washington to potentially complete its rulemaking process and submit a final rule to the EPA for Clean Water Act review while at the same time allowing the EPA to prepare to move forward with updating the federal rule should that action become necessary.

Finally, the EPA recognizes that industry and local governments have raised concerns about implementation flexibility and being provided time to meet new, more stringent water quality standards. The EPA supports Ecology's efforts to regularly engage a broad range of stakeholders about these concerns during its rulemaking process, and several of those concerns have been addressed in the State's analysis on the potential economic costs and benefits of the preliminary draft rule. The EPA intends to continue working with the State on its development and use of appropriate implementation mechanisms that are consistent with the Clean Water Act, including variances and compliance schedules.

We are keenly aware of the need to implement water quality standards in ways that make reasonable progress in improving water quality while protecting the economic viability of state industries and communities. To that end, the EPA is available to meet jointly with Ecology and key stakeholders to discuss how implementation mechanisms can and should work to make progress toward improved water quality while accounting for the needs of the regulated community. We look forward to continuing to work with the State on a successful path forward.

The EPA remains very appreciative of the challenging work that Ecology has undertaken thus far to adopt human health water quality criteria and we look forward to reviewing a rule proposal in January. Developing water quality standards that protect public health remains a high priority issue for the EPA, especially in Region 10. Please note that, as with my April 8, 2014 letter, this letter does not constitute and is not intended as an Administrator determination under CWA section 303(c)(4)(B). If you would like to discuss these topics further, please contact me directly or have your staff contact Dan Opalski, our Director for the Office of Water and Watersheds, at (206) 553-1855.

Sincerely,

A handwritten signature in black ink, appearing to read "Dennis J. McLerran", with a long horizontal flourish extending to the right.

Dennis J. McLerran
Regional Administrator

cc: Michael Grayum, Executive Director
Northwest Indian Fisheries Commission

Brian Cladoosby, Tribal Chairman
Swinomish Tribe

Matt Steuerwalt, Policy Advisor
Washington State Governor's Office



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

OFFICE OF THE
REGIONAL
ADMINISTRATOR

JAN 20 2015

The Honorable Senator Doug Ericksen, Chair
Washington Senate Energy, Environment, and Telecommunications Committee
Post Office Box 40442
Olympia, Washington 98504-0442

Dear Senator Ericksen:

Thank you for your letter dated December 23, 2014. I appreciate you taking the time to write to me again about Washington's water quality standards to protect human health. As you noted, the U.S. Environmental Protection Agency has initiated its internal federal rulemaking process to amend the human health water quality criteria for Washington in the National Toxics Rule.

In general, the EPA prefers that states and tribes update their water quality standards and submit final rules to the EPA that are consistent with the Clean Water Act and EPA's policies, guidance, and legal requirements. Therefore, I recognize that there is concern about the dual processes involving both the state and federal government in the development of human health criteria for Washington. However, as I stated in my December 18, 2014, letter to Ecology Director Bellon, it is not the EPA's intent to detract from the State's rulemaking process. The EPA strongly supports Washington's efforts to finalize a State rule that is protective of human health to replace the human health criteria that were federally promulgated for Washington in the 1992 NTR. At the same time, we continue to believe it is prudent for EPA to prepare for a potential federal rule proposal should action on our part become necessary. With that background in mind, I have outlined specific answers to your six questions below.

(1) Is EPA currently developing water quality rules for other states in Region 10? If so, what rules are being developed, and for which states?

The EPA is not currently developing federal water quality rules for other states in Region 10. However, in a December 2014 settlement agreement with the Idaho Conservation League, the EPA committed to either approve revised human health criteria submitted by Idaho or to propose federal human health water quality criteria for Idaho. The general deadline to fulfill this commitment is December 2016, subject to extension under certain circumstances. This settlement agreement was in response to a Notice of Intent to Sue alleging EPA's failure to promptly promulgate criteria for Idaho following the EPA's disapproval of Idaho's revised human health criteria in May 2012. According to its current rulemaking schedule, the State of Idaho plans to submit a revised final rule to EPA in 2016.

(2) Is EPA currently developing water quality rules for states in other EPA Regions? If so, what rules are being developed, and where do those rules apply?

In August 2014, EPA entered into a consent decree with Our Children's Earth and Ecological Rights Foundation that obligates EPA to propose selenium and mercury criteria to protect aquatic life and aquatic-dependent wildlife for certain areas of California, unless California adopts (and EPA approves)

such criteria first. EPA is working with California to fulfill the obligations under the consent decree, and to ensure workable implementation of any new water quality standards.

(3) In the last six years, has EPA proposed to take control of the water quality rule development process in other states? If so, in which states, and has EPA followed through on any such proposals?

Under the CWA, states have primary responsibility for developing and adopting water quality standards for their navigable waters. On certain occasions, consistent with CWA section 303(c)(4), the EPA Administrator (or his/her duly authorized delegate) has determined that to meet the requirements of the CWA, federal promulgation of one or more new or revised water quality standards was necessary. In these instances, the affected state(s) retained the option to adopt and submit to EPA water quality standards consistent with CWA section 303(c) and the EPA's implementing regulations at 40 CFR part 131. On several occasions, once a state has submitted new or revised water quality standards that the EPA approved as fully meeting CWA requirements, the EPA has withdrawn or ceased work on (as appropriate) its federally promulgated standards. In the last six years, EPA finalized two such withdrawals via federal rulemaking (certain aquatic life criteria applicable to Wisconsin originally promulgated in 40 CFR part 132 for the Great Lakes system (see 76 FR 57646), and certain criteria applicable to California, New Jersey, and Puerto Rico originally promulgated in the NTR (see 78 FR 20252).

Additionally, in the last six years, EPA promulgated numeric nutrient criteria for Florida's lakes, springs and certain flowing waters, and proposed numeric nutrient criteria for Florida's estuaries, and coastal waters. Ultimately, once Florida submitted and EPA approved state-adopted nutrient criteria for these waters, EPA withdrew its federal promulgation and ceased work on its proposals.

(4) What, specifically, will EPA do to ensure ample public participation in its development of water quality standards for Washington, and how can the public participate in the process?

As stated above, the EPA's preference is for Ecology to proceed with its rulemaking in a timely manner, which would include the State following their own public participation process. If EPA proceeds with proposing a federal rule, the EPA conducts a public participation process similar to the State's where it provides a formal public comment period that commences when a federal rule is proposed. In addition, EPA offers government-to-government consultation with tribal governments consistent with its federal trust responsibilities. The EPA would also consider meeting with other stakeholders who are interested in providing input before or during the formal public comment period. It is important to note the EPA's deliberative process limits the information that the EPA can share about a federal proposal prior to the public comment period.

(5) Who, specifically, within EPA is authorized to make a final determination to adopt human health criteria for Washington's water quality standards?

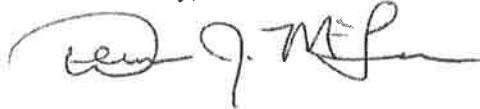
Consistent with CWA section 303(c)(4)(B), the EPA Administrator (or his/her duly authorized delegate) is authorized to determine that one or more new or revised water quality standards is (are) necessary to meet CWA requirements.

(6) What is the particular basis for EPA's view that Washington's current water quality standards are deficient?

The best available science includes evidence of fish consumption rates well above 6.5 grams per day among high fish consumers in Washington, which raises concerns that the human health criteria currently in effect for Clean Water Act purposes in Washington are not sufficiently protective.

Again, thank you for contacting the EPA. If you have any questions, please feel free to contact me or have your staff contact Dan Opalski, the Director of the Office of Water and Watersheds. You can reach Dan by phone at (206) 553-1855 or by email at opalski.dan@epa.gov.

Sincerely,

A handwritten signature in dark ink, appearing to read "Dennis J. McLerran", with a stylized flourish at the end.

Dennis J. McLerran
Regional Administrator

cc: Ms. Maia Bellon, Director, Washington Department of Ecology

JAY INSLEE
Governor



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OFFICE OF THE GOVERNOR

P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 902-4111 • www.governor.wa.gov

Oct. 8, 2015

Contacts:

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[Sandi Peck](#), Department of Ecology | 360.407.7004

Inslee announces new path on water quality rule, continues work on broader toxics reduction efforts

Gov. Jay Inslee today announced he's directing the state Department of Ecology to draft a new clean water rule that will preserve the state's decision-making control over how to meet federal requirements. The Clean Water Act requires states to establish standards for how clean our waters need to be and to control pollution limits for businesses and municipalities that are permitted to discharge wastewater.

The Environmental Protection Agency is requiring Washington state to update its clean water rule. In July 2014, Inslee proposed an innovative solution that paired a water quality rule with toxics reduction legislation and funding to reduce everyday pollutants at their source. This approach would have made meaningful progress in ways the rule alone can't address. Legislators failed to pass the toxics package this year, so Inslee directed Ecology to evaluate other options likely to win EPA approval.

"My goal all along has been to update Washington's clean water rule with one that assures the health of Washington's people, fish and economy," Inslee said. "The number one thing I hear over and over when talking with people is how critical it is that we maintain control over creation of this rule to ensure that we're protecting human health while providing businesses and local governments sensible tools to comply with the stricter standards."

The EPA last month released its own draft rule and said it will adopt the new standards if Washington state does not proceed with a new proposal. EPA has indicated that if the state submits a new proposal, it will pause the process on its rule.

The clean water standard involves a complex equation of numerous factors.

One key factor upon which the state, EPA and most stakeholders agree is updating the fish consumption rate from 6.5 grams a day per person – equivalent to one bite of fish – to 175 grams a day per person, equivalent to one small filet.

The factor most central to recent discussions has been the proposed cancer risk rate. Ecology's earlier rule proposed a rate of 10^{-5} . The new rule will propose 10^{-6} . A theoretical cancer risk rate of 10^{-6} means that if a person were to eat 175 grams of fish from Washington waters every day for 70 years, he or she would have a 1 in a million chance of developing cancer. While both 10^{-5} and 10^{-6} are within EPA's protection guidance, EPA has said it prefers 10^{-6} and made it their formal position in the rule they put forth.

But Inslee said the other factors beyond fish consumption and cancer risk rate make a big difference in ensuring businesses and municipalities can comply.

For example, Ecology's proposed rule addresses the unique nature of PCBs, mercury and arsenic. Mercury and arsenic come from human-caused and naturally occurring sources. The sources of PCBs are widespread and globally transported. The state proposes keeping the current level of protection for PCBs and mercury. The limit for arsenic would be set at the federal drinking water standard. This approach, Inslee says, recognizes that dischargers can't reasonably be held accountable for chemical levels beyond their control.

In addition, implementation tools and timelines will provide more flexibility for businesses to comply. EPA's proposed rule doesn't include implementation tools.

Inslee said his original concerns about the ability of the Clean Water Act and the clean water rule to solve today's pollution challenges remain.

"The proposed rule only regulates 96 chemicals, yet there are hundreds of toxics that come from everyday products," Inslee said. "The toxics package we sent to the Legislature would have helped us take a hard run at those to make a much more meaningful difference in making our water safer and healthier."

Inslee is directing Ecology to continue its collaborative approach at finding the key sources of toxic chemicals before they end up in our water and our bodies. Ecology and the state Department of Health have successfully used a tool called chemical action plans that brings stakeholders together to find the best ways to reduce the impacts of toxics on human health and the environment. The governor wants to use these action plans to identify where these chemicals are coming from and provide solutions to reduce their impact.

Ecology will begin drafting the rule immediately and make it available for public comment in early 2016.