



Puyallup Tribe of Indians

February 10, 2016

**Via Certified Mail
Return Receipt Requested**

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Dennis McLerran
Regional Administrator
US Environmental Protection Agency, Region 10
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RE: Notice of Violation of Non-Discretionary Duty to Promulgate Human Health Criteria Applicable to Washington State in Accordance with the Clean Water Act § 303.

Dear Ms. McCarthy and Mr. McLerran:

On behalf of the Puyallup Tribe of Indians, we request that you take immediate action to remedy ongoing violations of a non-discretionary duty under the Clean Water Act (“CWA”). As articulated below, the United States Environmental Protection Agency (“EPA”) is in violation of CWA due to its failure to promulgate human health criteria water quality standards within 90 days of publication of the proposed rule after making a determination of necessity under CWA section 303(c)(4)(B).¹ On September 14, 2015, EPA published both revised human health criteria

¹ 33 U.S.C. § 1313(c)(4)(B)

and a determination of necessity that “Existing Criteria Are Not Protective of Designated Uses of Waters in the State of Washington.”² The 90-day period to promulgate water quality standards has expired and EPA has not completed the rulemaking. This letter constitutes both a request for EPA to immediately correct this violation by promulgating the proposed human health criteria as published in the federal register and a 60-day notice of intent to take legal action pursuant to Section 505 of the CWA³, if EPA fails to do so.

Washington has yet to adopt its own criteria for the protection of human health. In 1992, EPA promulgated the Nation Toxics Rule (NTR) *for Washington State*, establishing chemical specific numeric criteria for 85 priority toxic pollutants.⁴ EPA took this action because Washington State was not in compliance with the requirements of CWA section 303(c)(2)(B).⁵ These human health criteria remain in effect today, and have not been revised since EPA promulgated them in 1992.

As EPA has long recognized, Washington’s human health criteria do not protect citizens of Washington State adequately from exposure to toxic pollutants. In large part, this is due to the fact that the formula used to derive the standards wrongly assumes that people eat very little fish, a mere 6.5 grams, which is equivalent to 0.23 ounces or roughly a thimble full of fish per day, and therefore underestimates an individual’s exposure to water and tissue-borne toxics. Yet surveys of tribes in Washington show current fish consumption rates upwards of 800 grams per day.^{6,7} These levels are achieved, despite suppressed consumption⁸ due to severely reduced

² 80 Fed. Reg. 55063, 55066 (Sept. 14, 2015)

³ 33 U.S.C. §1365

⁴ See 40 CFR 131.36

⁵ 33 U.S.C. §1313(c)(2)(B)

⁶ *Fish Consumption Rates Technical Support Document: A Review of Data and Information about Fish Consumption in Washington*, Washington Department of Ecology... Version 2.0, Final., Lacey, WA. Publication No.12-09-058 (2013).

⁷ See e.g. Lummi Natural Resources Department, Water Resources Division. 2012. Lummi Nation Seafood Consumption Study. (J. Freimund, M. Lange and C. Dolphin; August 31, 2012); See Also Suquamish Tribe, 2000. Fish Consumption Survey of the Suquamish Indian Tribe of the Port Madison Indian Reservation, Puget Sound Region. August 2000.

stocks of salmon, shellfish, and other fish relied upon by many people in Washington. Before the stocks were depleted, historic rates *averaging* 1,000 grams per day are documented.⁹ Despite these known facts, EPA and Washington have continued to use under-protective human health criteria that are based on a fish consumption rate that isn't representative of consumption patterns of the citizens of Washington State. By using a low, non-representative fish consumption rate, Washington's human health criteria fail to protect public health and aquatic resources throughout waters of the state.

Finally, after two decades of woefully under-protective human health standards, EPA determined that Washington's water quality standards were not adequately protective on September 14, 2015. EPA memorialized this finding by publishing both a determination and a proposed rule.¹⁰ This action triggered EPA's non-discretionary duty to finalize a protective rule within ninety days.¹¹ EPA has not yet finalized a rule. For the reasons explained below, EPA has violated its mandatory duty under the CWA by failing to promulgate human health criteria that adequately protects designated uses, and that are "set at levels that will adequately protect Washington residents, including tribes with treaty protected rights, from exposure to toxic pollutants."¹² Essential to setting water quality standards at protective levels includes utilizing an accurate fish consumption rate, that reflects consumption patterns for all high-consuming populations in the state including members of tribes, Asian-Pacific Islanders, and subsistence individuals.

⁸ Failing to take into account suppression of consumption due to depletion and contamination factors also leads to a downward water- and fish-contamination spiral where consumers are not adequately protected so they eat less fish out of fear of the higher levels of contamination that have been allowed (based on suppressed instead of accurate consumption rates), which in turn affects future surveys. EPA recognized the importance of considering unsuppressed fish consumption rates in its proposed rule and considered those rates in Washington 80 Fed. Reg. 55066, 55068 (Sept. 14, 2015)

⁹ Letter from Baptist Paul Lumley to Maia Bellon, Director of the Washington Department of Ecology, dated March 23, 2015, "Comments on Washington State's Human Health Criteria and Implementation."

¹⁰ 80 Fed. Reg. 55063-55077 (Sept. 14, 2015)

¹¹ See 3 U.S.C. §1313(c)(4)

¹² 80 Fed. Reg. 55063 (Sept. 14, 2015)

I. BACKGROUND OF THE PUYALLUP TRIBE AND TRIBAL RESERVED FISHING RIGHTS

The Puyallup Tribe, a sovereign nation, signed the Treaty of Medicine Creek, with the United States reserving rights to harvest fish and other natural resources both within and outside of its reservation boundaries.¹³ The Treaty Right of the Puyallup Tribe to harvest fish both within and outside reservation boundaries was re-affirmed in the 1974 decision in *U.S. v. Washington*.¹⁴ Since time immemorial, the Puyallup Tribe has fished the waters both within and outside its current reservation boundaries for subsistence, ceremonial, and economic purposes, with the salmon being a traditional food source and cultural mainstay. The full protection of the Treaty Right to take fish necessitates adequate stocks of anadromous fish and shellfish to consume that are not poisoned with toxic pollutants. An inability to safely consume these resources would otherwise render the Treaty Right inconsequential.

Under the Clean Water Act, the fishing use includes the ability of people to harvest fish and shellfish that are safe to use in the amounts those people would normally consume.¹⁵

As EPA acknowledges, this requirement coexists with the Puyallup Tribe's Treaty right to harvest fish and shellfish that are safe for consumption at the rate at which the Puyallup Tribe has historically consumed those fish and shellfish.¹⁶

¹³ Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132 (1855)

¹⁴ *U.S. v. Washington*, 384 F.Supp. 312 (W.D. Wash., 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

¹⁵ See *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 (2000), available at: <http://www.epa.gov/waterscience/criteria/humanhealth/method/complete.pdf> ("2000 Methodology").

¹⁶ See 80 Fed. Reg. 55066 (Sept. 14, 2015) wherein EPA's analysis of the proposed human health criteria applicable to Washington provides the following: "...the criteria must support the most sensitive use. In determining whether WQS comply with the CWA and EPA's regulations, when setting criteria to support the most sensitive use in

II. STATUTORY BACKGROUND

The objective of the Clean Water Act (CWA) is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁷ In accomplishing this objective the CWA set goals of eliminating the discharge of pollutants into the navigable waters by 1985, and an interim goal of achieving water quality, which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.¹⁸ In achieving the CWA’s overarching objectives, the Act also established a national policy that the discharge of toxic pollutants in toxic amounts be prohibited.¹⁹

The CWA’s framework for the management of water pollution is centered around the development of water quality standards, which are then used to evaluate watershed health,²⁰ develop permits to regulate dischargers of pollutants,²¹ develop best management practices,²² and provides the basis for watershed clean up plans when pollution problems persist despite these other efforts.²³ Without a doubt water quality standards are the lynch pin of the CWA’s regulatory system.

The CWA requires that the development and revision of water quality standards ensure protection of the designated uses, as well as serve the purposes of the Act (discussed above).²⁴ The CWA also provides that water quality standards protect the “public health or welfare, and

Washington, it is necessary to consider other applicable laws, including federal treaties. In Washington, many tribes hold reserved rights to take fish for subsistence, ceremonial, religious, and commercial purposes...Such rights include not only a right to take those fish, but necessarily include an attendant right to not be exposed to unacceptable health risks by consuming those fish.”

¹⁷ 33 U.S.C. § 1251(a)

¹⁸ 33 U.S.C. §1251(a)(2)

¹⁹ 33 U.S.C. §1251(a)(3)

²⁰ 33 U.S.C. §1313(d)

²¹ 33 U.S.C. §1342

²² 33 U.S.C. §1319

²³ 33 U.S.C. §1313(d)(4)

²⁴ 40 CFR 131.2 & 131.6(f) & *see generally* 40 CFR 131 et seq.

enhance the quality of water”.²⁵ EPA has further interpreted the setting of standards to include consideration and harmonization with the protection of treaty-reserved rights. As EPA acknowledges in the development of revised human health criteria applicable to Washington:

In order to effectuate and harmonize these reserved rights, including treaty rights, with the CWA, EPA determined that such rights appropriately must be considered when determining which criteria are necessary to adequately protect Washington's fish and shellfish harvesting designated uses...Such rights include not only a right to take those fish, but necessarily include an attendant right to not be exposed to unacceptable health risks by consuming those fish.²⁶

Therefore, in deriving human health criteria, perpetuation of the safe take of treaty-reserved fish and shellfish is part and parcel with protecting the designated and the beneficial uses of fishable, drinkable waters, and the protection of human health. This approach harmonizes the CWA with EPA’s fiduciary obligations, thus allowing both water quality standards and CWA implementation to support treaty right protection and not undermine it.

It is well known, and agreed upon by EPA,²⁷ tribes,²⁸ and environmental and community interests²⁹ that existing human health criteria do not meet the requirements of the CWA, because

²⁵ §1313(c)(2)(A)

²⁶ 80 Fed. Reg. 55066 (Sept. 14, 2015)

²⁷ See e.g. See Letter from Dennis McLerran, EPA Region 10 Regional Administrator to Senator Doug Eriksen. April 24, 2014. See Also Letter from Dennis McLerran, EPA Region 10 Regional Administrator to Senator Doug Eriksen. July 1, 2014

²⁸ See e.g. Letter from Michael Grayum, Executive Director of NWIFC to Mike Bussell, then Director of EPA Region X Office of Water, re: EPA engagement in Washington’s development of water quality standards and attending fish consumption rates, September 7, 2012.

²⁹ See e.g. Letter from Janette Brimmer, Earthjustice on Behalf of Puget Soundkeeper Alliance, et al to Gina McCarthy, Administrator and Dennis McLerran Regional Administrator EPA, re: Notice of violation of non-discretionary duty to propose Washington State Fish Consumption Rate Under 33 USC § 1313, (Dec. 21, 2015). See also Letter from Nina Bell Executive Director of NWEA to EPA Administrator McCarthy, re: Petition for

they underestimate exposure of toxics and thus do not protect the ability of tribes to eat normal, healthy amounts of fish, which is both a designated use and a treaty- reserved right.

Despite EPA guidance and specific direction, Washington State has never adopted human health criteria and instead relies on the inadequate NTR for Washington that utilized a consumption rate of only 6.5 grams of fish or shellfish per day, about the amount that fits on a cracker, in the derivation of criteria. In the Pacific Northwest, tribal and community surveys, repeatedly acknowledged and utilized by EPA in various guidance documents and directions to states, show that fish is consumed at a higher rate than many other parts of the nation, and tribes consume fish at significantly higher rates than the general population.^{30 31 32 33}

Rulemaking on Water Quality Criteria for Toxics in the State Washington, October 28, 2013 and Petition for Rulemaking from NWEA to EPA submitted the 28th of October, 2013.

³⁰ See, e.g., Nat'l Environmental Justice Advisory Council Meeting (a Federal Advisory Committee to the U.S. Environmental Protection Agency), *Fish Consumption and Environmental Justice* (Dec. 2001 (rev'd Nov. 2002)); See also "); EPA, *Guidance for Assessing Chemical Contaminant Data for Use in Fish Advisories, Vol. 2 Risk Assessment and Fish Consumption Limits, 3d ed.*, at 1-6 through 1-9 (Nov. 2000) ("Fish Advisories Guidance")

³¹ In 2008, a fish consumption rate of 586 g/day was established for native subsistence consumers on the Lower Elwha, related to the Rayonier cleanup near Port Angeles, Washington. EPA also approved a fish consumption rate in 2013 for the Spokane Tribe of 865 grams per day. Letter from EPA to Chairman Rudy Peone RE: EPA's Action on the Spokane Tribe of Indians 2010 Revision to their Surface Water Quality Standards, dated December 19, 2013. Region X EPA, Seattle, Washington.

³² U.S. Environmental Protection Agency (EPA). (2013) Reanalysis of fish and shellfish consumption data for the Tulalip and Squaxin Island Tribes of the Puget Sound Region: Consumption Rates for Consumers Only. National Center for Environmental Assessment, Washington, DC; EPA/600/R-06/080F

³³ See CRITFC (Columbia River Inter-Tribal Fish Commission), 1994. 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 Report reference #94-03, Portland, Oregon; Toy, K.A., Polissar, N.L., Liao, S., and Mittelstaedt, G.D. 1996. A Fish Consumption Survey of the Tulalip and Squaxin Island Tribes of the Puget Sound Region. Tulalip Tribes, Department of Environment.

II. **THE EPA ADMINISTRATOR IS IN VIOLATION OF A NON-DISCRETIONARY DUTY BY FAILING TO PROMULGATE HUMAN HEALTH CRITERIA FOR THE STATE OF WASHINGTON WITHIN NINETY DAYS OF ISSUING ITS PROPOSED RULE.**

A. Legal Framework.

The federal CWA creates a legal duty for the EPA to promptly develop water quality standards after it has made a formal determination that such standards are necessary to protect designated uses. The CWA further provides that the Administrator has a duty to promulgate those new or revised standards within 90 days after publishing them in the federal register.

The Administrator shall promulgate any revised or new standard under this paragraph *not later than ninety days after he publishes such proposed standards*, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.³⁴

EPA regulations also require that such a determination be signed by the EPA Administrator and published in the federal register.³⁵

The requirement for EPA to promulgate standards is a mandatory, non-discretionary duty under the CWA, and therefore is subject to the citizen suit provisions under § 505(a)(2). Federal Courts have provided clear direction that both the duty to promulgate and to do so within 90 days of publication are non-discretionary, mandatory duties of the Administrator when the EPA makes a formal determination by the Administrator.³⁶ Because the duty to promulgate published

³⁴ 33 U.S.C. § 131(c)(4)(B) (*emphasis added*)

³⁵ 40 CFR §131.22(b)

³⁶ See *Northwest Environmental Advocates v EPA*, 268 F.Supp.2d 1255 (D. Or, 2003) in which § 303(c)(4)(B) requirements were discussed “Thus, although the initial decision to review a state's existing standard is discretionary, the duty to promulgate new standards becomes nondiscretionary upon the agency's determination that

rules in non-discretionary, there are only limited circumstances when EPA can either delay or avoid this requirement. Specifically, the CWA explicitly provides that the administrator can only delay if, and only if, prior to expiration of the 90 days time period, a state formally adopts new standards and the EPA approves them. In applying this standard to Washington, EPA can only delay its rulemaking if Washington has promulgated (not merely proposed) its own criteria prior to the expiration of CWA's 90-day period, and EPA subsequently approves Washington's Criteria.

Furthermore, EPA's trust responsibility to the Tribe, without question, includes the duty to carry out protection of treaty-reserved resources in a timely manner. In discharging this duty, EPA must, at a minimum, comply with the CWA's mandatory statutory requirements and deadlines.

B. EPA's Violation

On September 14, 2015, EPA made a formal determination that existing human health criteria applicable to Washington were not protective of the designated uses:

[b]ecause Washington's existing human health criteria, as promulgated by EPA in the NTR, are no longer protective of the applicable designated uses per the CWA and EPA's regulations at 40 CFR 131.11, EPA determines under CWA section 303(c)(4)(B) that new or revised WQS for the protection of human health are necessary to meet the requirements of the CWA for Washington.³⁷

the existing standards are inadequate." See also *Our Children's Earth Foundation v EPA*, 527 F.3d 842 (9th Cir 2008) stating "in determining ... non-discretionary obligations under the Act, our point of reference is the statute itself. ... When Congress specifies an obligation and uses the word "shall," this denomination usually connotes a mandatory command." citing *Alabama v. Bozeman*, 533 U.S. 146, 153, 121 S.Ct. 2079, 150 L.Ed.2d 188 (2001).

³⁷ 80 Fed. Reg. 55066 (Sept. 14, 2015)

The determination was made explicitly pursuant to §303(c)(4)(B) of the CWA, and meets all criteria newly established under federal regulations governing this matter.³⁸ As a result, EPA is statutorily mandated to complete their rulemaking by December 13, 2015.

EPA initially set the comment deadline for its proposed rule as November 13, 2015, allowing EPA adequate time to finalize the rule within the time period dictated by the CWA.³⁹ However, EPA moved that deadline to December 28, 2015, and has not indicated when it will finalize the rule.⁴⁰

On October 30th the Northwest Indian Fishers Commission at the behest of its member tribes, including the Puyallup Tribe, notified EPA of their impending violation as a result of extending the deadline of the comment period beyond the time limit allowed by the CWA. The NWIFC further requested that EPA take immediate action to ensure timely promulgation consistent with the CWA, and EPA's trust responsibilities to the treaty tribes. The Puyallup Tribe and the NWIFC again requested timely rule completion consistent with the requirements of the Clean Water Act upon submission of comments on December 3 and December 21st, respectively.⁴¹

At no time prior to the expiration of the CWA deadline for promulgation on December 13th, has Washington State "adopted" human health criteria nor has EPA approved any "adopted" criteria. Therefore EPA has not been alleviated of their mandatory duty to finalize the proposed rule under the CWA.

³⁸ 40 CFR § 131.22(b)

³⁹ 80 Fed. Reg. 55063 (Sept. 14, 2015)

⁴⁰ See 80 Fed. Reg. 65980 (Oct. 28, 2015)

⁴¹ See Comments from Bill Sullivan, Director Puyallup Tribe Natural Resources to Erica Fleisig, EPA, December 3, 2013. Available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2015-0174-0237>

There is a long history of delaying and avoiding the revision of human health criteria in Washington.⁴² Since at least 1994, Washington specific studies have indicated that the NTR for Washington adopted in 1992 utilized a grossly inaccurate fish consumption rate in the derivation of human health criteria.⁴³ After over twenty years of knowledge that the NTR failed to ensure protection of the designated uses in Washington, EPA has published a formal determination of necessity and revised human health criteria. However, in order to effectuate protection the designated uses and fulfill trust responsibilities, EPA must actually promulgate those standards and do so in accordance with the mandates of the CWA.

The timing of issuance of the new rule is not discretionary; EPA must finalize the rule within ninety days of its issuance of a proposed rule, which occurred on September 14, 2015. It has not done so. Ninety days from September 14, 2015 was December 13, 2015. By failing to promulgate human health criteria based on an accurate fish consumption rate for Washington that adequately protects designated uses, , EPA is in violation of the Clean Water Act.

CONCLUSION

EPA is in continuing violation of the Clean Water Act section 303(c)(4).⁴⁴ The Puyallup Tribe of Indians provides this Notice for the continuing violation outlined above, including if the violation continues subsequent to the date of this Notice. This Notice is given pursuant to section 505 of the Clean Water Act.⁴⁵

⁴² See Appendix A of the Northwest Indian Fisheries Commission comments to EPA regarding Proposed Rule for Revision of Certain Water Quality Criteria Applicable to Washington for a detailed chronology of delay and avoidance of human health criteria promulgation. Submitted on December 21, 2015 to Docket EPA-HQ-OW-2015, and available at <http://www.regulations.gov/#!docketBrowser;rpp=50;po=0;dct=PS;D=EPA-HQ-OW-2015-0174>

⁴³ CRITFC (Columbia River Inter-Tribal Fish Commission), 1994. 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 Report reference #94-03, Portland, Oregon

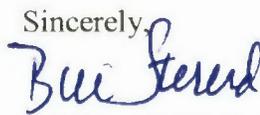
⁴⁴ 33 U.S.C. §1313(c)(4)

⁴⁵ 33 U.S.C. § 1365

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Dennis McLerran
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The Puyallup Tribe sends this notice after years of good faith efforts to persuade Washington State and EPA to protect all people including elders and children who eat fish by adopting accurate, protective human health water quality standards. EPA's proposed rule uses local data, and up-to-date best available science. As such, it is defensible and would represent a tremendous step forward for tribal and all consumers of fish in Washington State. The Puyallup Tribe, once the rule is finalized, looks forward to building on this effort. The Tribe continues to believe that this issue should be resolved outside of litigation. We are ready to work with you in good faith to resolve EPA's violations. However, unless this violation is remedied within sixty days by the promulgation of a final rule incorporating an accurate fish consumption rate into more protective human health water quality standards, we reserve the right to take appropriate legal action to compel EPA to comply with the CWA and to protect all consumers of fish and shellfish in Washington State.

Please contact me if you have any questions at (253) 573-7838.

Sincerely,

Bill Sterud, Chairman
Puyallup Tribe of Indians

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