



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

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October 28, 2021

*Sent via email only to: [brundage.jennifer@epa.gov](mailto:brundage.jennifer@epa.gov)*

Ms. Jennifer Brundage  
Office of Water, Standards and Health Protection Division  
U.S. Environmental Protection Agency Headquarters  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

**Re: EPA Rulemakings to Promulgate New Human Health Criteria for Washington State, Revise Water Quality Standard Regulations for Waters Subject to Tribal Treaty-Reserved Rights, and Enable EPA to Promulgate Baseline Water Quality Standards for Indian Reservations**

Dear Ms. Brundage:

Thank you for participating in the government-to-government consultation with the Nez Perce Tribe ("Tribe") on September 28, 2021. The consultation covered three separate Clean Water Act ("CWA") rulemakings that the Environmental Protection Agency ("EPA" or "agency") is currently undertaking to: (1) revise the Human Health Criteria for surface waters in the state of Washington; (2) establish minimum Water Quality Standards for waters subject to off-reservation, treaty-reserved rights; and (3) issue federal baseline Water Quality Standards for Indian reservations. The Tribe found EPA's presentations on these issues helpful and appreciates that EPA is renewing its commitment, through these rulemakings, to develop durable rules that uphold tribal rights and uses and to protect the health of tribal members.

As EPA is aware, the Tribe has been a national leader in advocating for cleaner, healthier waters that reflect tribal values, priorities, and lifeways. In particular, the Tribe has consistently emphasized the importance of fish to the Nez Perce people for vital ceremonial, subsistence, and commercial needs and the Tribe's desire for healthy, harvestable fish runs to support Nez Perce treaty-reserved rights and the Nez Perce fishing economy.

As EPA is also aware, the Tribe has worked with EPA for years to collect data and produce information on Nez Perce fish consumption, with the purpose of protecting and furthering that



consumption. In 1994, EPA completed a report (“1994 Fish Consumption Report”) containing fish consumption information from tribes with Treaty-reserved rights in the Columbia River Basin—the Nez Perce Tribe, Confederated Tribes and Bands of the Yakama Nation, Confederated Tribes of Warm Springs, and the Confederated Tribes of the Umatilla Indian Reservation.<sup>1</sup> The 1994 Fish Consumption Report served as supporting information for Oregon’s adoption in 2011 of a Fish Consumption Rate of 175 grams/day with an associated Cancer Risk Level of  $10^{-6}$ . Then, in 2016, EPA and the Tribe completed what is recognized as a ground-breaking survey that used the latest science to determine Nez Perce Tribal members’ true Fish Consumption Rate (“2016 Fish Consumption Report”).<sup>2</sup> This survey uniquely used both the food frequency questionnaire and the 24-hour recall methods to determine Nez Perce Tribal consumption of fish from waters in Idaho. Both methods were used to provide quantitative fish consumption estimates in the final report.<sup>3</sup> The survey demonstrated that Nez Perce consume fish at levels that exceed the general population by seven-fold and far exceed EPA’s default Fish Consumption Rate.

Unfortunately, water quality in waters subject to the Tribe’s treaty-reserved fishing rights is not currently sufficiently protective of Nez Perce uses and Tribal member health. For instance, in 2019 the state of Idaho recommended, and EPA approved, Human Health Criteria based on a Fish Consumption Rate of 66.5 grams/day at  $10^{-5}$ . As the agency is aware, this Fish Consumption Rate and associated Cancer Risk Level is the functional equivalent of just 6.65 grams/day at  $10^{-6}$ . The Tribe vigorously opposed Idaho’s proposed revised Human Health Criteria because it failed to protect high fish-consuming tribal members and to uphold the Tribe’s right to take up to half the harvestable fish that are destined to run through its Usual and Accustomed fishing places.

The Tribe, therefore, asks that EPA use these rulemakings as an opportunity to fulfill its treaty and trust obligations to the Nez Perce Tribe and other tribes, which include an obligation to ensure the habitat (i.e., water quality) necessary to support tribes’ legally-protected share of treaty-reserved resources.<sup>4</sup> The Tribe would like to take this opportunity to provide EPA with the following comments. The following comments are intended to supplement and not replace the comments the Tribe provided during government-to-government consultation with EPA on September 28, 2021.

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<sup>1</sup> “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, Technical Report 94-3. Portland, Oregon. 1994 (*available at* <https://www.critfc.org/wp-content/uploads/2015/06/94-3report.pdf>).

<sup>2</sup> “A Fish Consumption Survey of the Nez Perce Tribe: Final Report.” Environmental Protection Agency. Seattle, Washington, 2016 (*available at* <https://www.epa.gov/sites/default/files/2017-01/documents/fish-consumption-survey-nez-perce-dec2016.pdf>).

<sup>3</sup> No other tribal fish consumption study has included all of these elements.

<sup>4</sup> *United States v. Washington*, 853 F.3d 946, 959 (9th Cir. 2017), *aff’d*, *Washington v. United States*, 138 S. Ct. 1832 (2018).



### Overarching Comments

- The Tribe appreciates that through these rulemakings EPA is acknowledging its treaty and trust responsibilities to uphold tribal reserved rights by protecting the water resources upon which tribes and tribal members rely.
- Tribes signed treaties with the U.S. government. EPA's obligation, as a federal agency, is to ensure those treaties are honored in all contexts, including the implementation of federal statutes.
  - Respect for the hierarchy of laws is fundamental to the U.S. legal system. Under the U.S. legal system, the U.S. Constitution is the supreme law and may not be contradicted by federal statute or other lesser laws. Moreover, under the U.S. Constitution, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."<sup>5</sup>
- Under its 1855 Treaty,<sup>6</sup> the Tribe is legally entitled to take up to half the legally harvestable runs that pass through its usual and accustomed fishing places.<sup>7</sup> Since there is no plausible legal theory under which the United States could guarantee to tribes the right to fish and then purposefully undermine the conditions that make treaty-reserved fishing possible,<sup>8</sup> EPA must ensure Water Quality Standards for waters subject to the Tribe's treaty-reserved right to fish protect the Tribe's legal right to take up to half the legally harvestable runs.
- The Tribe urges EPA to make very clear in its rulemakings what, if any, role EPA's Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000) will have in guiding the development of Human Health Criteria for waters subject to treaty-reserved rights.

### Washington Human Health Criteria

In 2016, following years of research, data collection, and tribal consultation, EPA issued a rule ("2016 Rule") establishing Human Health Criteria for the state of Washington based in part on a Fish Consumption Rate of 175 grams/day with an associated Cancer Risk Level of  $10^{-6}$ . EPA's 2016 issuance occurred after the state of Washington failed to issue Water Quality Standards that EPA believed were sufficiently protective. EPA's 2016 Rule for the issuance of Human Health Criteria for the state of Washington helped ensure that Water Quality Standards in Oregon and Washington were regionally consistent (based on a Fish Consumption Rate of 175 grams/day with an associated Cancer Risk Level of  $10^{-6}$ ).

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<sup>5</sup> U.S. CONST. art. VI, cl. 2.

<sup>6</sup> Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957.

<sup>7</sup> *United States v. State of Wash.*, 520 F.2d 676, 689 (9th Cir. 1975); *Washington v. Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 685, modified sub nom. *Washington v. United States*, 444 U.S. 816 (1979).

<sup>8</sup> Upholding Tribal Treaties with the Clean Water Act. ©2020. Published in *The Business Lawyer*, Vol. 71, No. 4, Fall 2016, by the American Bar Association.



In 2019, EPA weakened their 2016 Rule for the state of Washington (“2019 Rule”). This was done despite vehement opposition from the Nez Perce Tribe, other tribes, and even the state of Washington. EPA is now considering reversing its 2019 Rule by reinstating the more protective 2016 Rule. The Tribe supports this effort and has the following comments:

- The Tribe cannot emphasize strongly enough just how legally and morally wrong it was for EPA at the request of regulated industries to roll back, in 2019, the Human Health Criteria it issued for Washington State in 2016, thereby weakening Washington’s Human Health Criteria.
  - The 2019 rollback was a violation of the Tribe’s treaty.
- The Tribe appreciates EPA is now taking a hard look at the 2019 Rule and requests that EPA reinstate its 2016 Rule as well as make necessary updates to its Human Health Criteria to reflect best available science, as required by CWA section 304(a).
  - For instance, the Tribe requests that EPA promulgate a Cancer Risk Level of  $10^{-6}$  for polychlorinated biphenyl environmental toxins in Washington State and that EPA apply updated Human Health Criteria for the pollutants the agency either did not act on in 2016 or which EPA approved in 2019, despite being inadequately protective or untethered to sound science.
- Reinstatement of the 2016 Rule is urgently needed, with appropriate science-based changes, to minimally safeguard the health of waters and aquatic resources in Washington State, to protect the health and wellbeing of tribal members and the general public, and to help ensure regionally consistent protections for tribal members throughout the Pacific Northwest.
- That said, EPA noted in a 2016 Technical Support Document,<sup>9</sup> “tribes within the state [of Washington] have generally viewed 175 g/day as a compromise minimum value for current criteria-setting purposes.” This statement reflects the Tribe’s position since Nez Perce fish consumers in the 95th percentile consume 234 grams/day of fish.
- The Tribe, therefore, expects that should EPA adopt a minimum Fish Consumption Rate of 175 grams/day with an associated Cancer Risk Level of  $10^{-6}$ , it will do so as a starting point with the intention of increasing this rate in the near future to fully uphold the Tribe’s treaty-reserved rights and protect all tribal fish consumers exercising that right.

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<sup>9</sup> “Technical Support Document: The EPA’s Partial Approval/Partial Disapproval of Washington’s Human Health Water Quality Criteria and Implementation Tools.” Environmental Protection Agency. Seattle, Washington, 2016 (*available at* <https://www.epa.gov/sites/default/files/2017-10/documents/wawqs-letter-11152016.pdf>).



### **Water Quality Standards for Waters Subject to Treaty-Reserved Fishing**

The Tribe understands that EPA is considering changing its Water Quality Standard regulations for off-reservation waters subject to treaty-reserved rights. The Tribe believes this proposal is a positive step toward upholding its off-reservation, treaty-reserved rights. In keeping with this support, the Tribe has the following comments:

- EPA, as a federal agency, is both a party to the Tribe's treaty and a trustee of the Tribe's reserved resources. EPA, therefore, has a duty to ensure that states do not contradict or undermine the Tribe's treaty-reserved rights, as enshrined in the U.S. Constitution, when implementing the CWA.
  - EPA's duty as a treaty signatory and trustee extends to off-reservation state waters. State discretion as to how to implement the CWA in those waters must, therefore, be limited by EPA to those actions fully consistent with upholding the treaty-reserved rights to which those waters are subject. EPA must give states clear requirements and distinctly articulate the range of actions permissible under the CWA to uphold treaty-reserved rights in off-reservation waters subject to treaty-reserved rights. EPA cannot permit states to promulgate Water Quality Standards that are anything less than fully protective of tribal members who exercise treaty-reserving rights in those waters.
- The Tribe supports EPA establishing a sustainable and transparent regulatory framework, in close consultation with tribes, to require the protection of treaty-reserved rights in future CWA actions, such as the establishment of Designated Uses, Water Quality Criteria, and Antidegradation Criteria to enshrine treaty-reserved uses in off-reservation waters and protect those uses.
  - EPA must require that states uphold treaty rights in off-reservation waters by calculating Human Health Criteria using a minimum Fish Consumption Rate and associated Cancer Risk Level that is protective of historical tribal consumption when calculating their Human Health Criteria. This means, the Fish Consultation Rate and associated Cancer Risk Level should:
    - Ensure that the historical suppression of tribal fish consumption is not baked into state-issued Water Quality Standards;
    - Protect the health of tribal members who exercise off-reservation, treaty-reserved rights; and
    - Protect tribes' right in the Pacific Northwest to take, and consume, up to half the legally harvestable runs.



- The Tribe asks that, at minimum, the Fish Consumption Rate for ceded waters in the Pacific Northwest be 175 grams/day with an associated Cancer Risk Level of  $10^{-6}$  and that the Fish Consumption Rate increase in the near future to fully uphold the Tribe's treaty-reserved rights and protect all tribal fish consumers exercising that right.

### **Baseline Water Quality Standards for Indian Reservations**

EPA is proposing regulations that would enable it to establish baseline Water Quality Standards (Designated Uses, Water Quality Criteria, and Antidegradation Requirements) for waters on Indian reservations where tribes have not issued their own Water Quality Standards under the CWA's "Treatment as States" provision.<sup>10</sup> As EPA is aware, the Tribe has previously expressed strong support for EPA issuing—in coordination and consultation with individual tribes—baseline Water Quality Standards for those Indian reservations without tribe-issued Water Quality Standards. The Tribe continues to support EPA promulgating Water Quality Standards for reservations to ensure the Water Quality Standards reflect the needs, uses, and priorities of individual tribes and their members. In keeping with this support, the Tribe has the following comments:

- This rulemaking will help empower tribes that have not been able to issue their own Water Quality Standards to manage reservation waters in accordance with their own priorities and the needs of their members. Specifically, the rulemaking will help ensure tribal participation and the realization of tribal goals in the management of on-reservation water quality.
- The Tribe also supports the development of a regulations through this rulemaking that set forth a framework through which EPA will work with individual tribes to implement EPA-promulgated Water Quality Standards for their respective reservations in a flexible manner that reflects the wishes and needs of the tribe (e.g., issuing on-reservation National Pollutant Discharge Elimination System permits).
- The United States retains responsibility to administer the CWA within Indian Reservations until such time as tribes choose to pursue Treatment as States. In exercising EPA's authority to promulgate the rule and promulgate Water Quality Standards for Indian Reservations under this rule, the Tribe understands and expects that the agency will fully honor tribal sovereignty and jurisdiction. Specifically, the Tribe expects that EPA will faithfully apply the CWA's definition of "Federal Indian reservation"<sup>11</sup> and controlling legal precedent, consistent with its treaty and trust responsibilities.

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<sup>10</sup> 33 U.S.C. § 1377(e).

<sup>11</sup> 33 U.S.C. § 1377(h)(1).



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Thank you again for consulting with the Tribe on September 28, 2021, and for considering these comments. If you have any questions, please contact Mike Lopez, Senior Staff Attorney, at (208) 843-7355 or [mlopez@nezperce.org](mailto:mlopez@nezperce.org).

Sincerely,

A handwritten signature in blue ink that reads "Samuel N. Penney". The signature is written in a cursive style with a large initial 'S'.

Samuel N. Penney  
Chairman