

Region 10 EPA Tribal Consortium (RTOC)
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October 7, 2019

U.S. Environmental Protection Agency
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

SUBMITTED VIA REGULATIONS.COM

RE: Comments on Docket ID No. EPA-HQ-OW-2015-0174

Dear Madam or Sir:

This letter is sent on behalf of the Tribal Caucus members of EPA Region 10's Tribal Operations Committee ("RTOC"). This letter is not sent on behalf of EPA Region 10 or any employees of EPA, but solely tribal government representatives of the RTOC. This letter is in regard to the proposed changes to Washington's water quality standards.

First, the RTOC joins with the request of Washington tribes that the comment period on this proposal be extended. Clean water is essential to many Tribes, not just as a source of sustenance, but also for cultural, medicinal, and spiritual reasons. The protection of water quality is vital to the survival of Tribes. As EPA is aware, no consultation occurred on the proposal to withdraw the EPA standards for Washington. The RTOC strongly believes that EPA must engage in consultation on a government-to-government basis with tribal governments to fully understand the impact of the proposed changes to Washington's water quality standards on treaty rights, tribal communities, and tribal resources. Webinars, comment letter, and phone calls are not consultation. EPA officials must meet face-to-face with tribal elected officials to comply with their obligations to consult. Accordingly, we request again that EPA extend the period for consultation and conduct more vigorous outreach with Tribes about this proposal.

Second, for the reasons set for the below, the RTOC is opposed to any changes to the Washington water quality standards:

- 1. Lack of Consultation:** In a "Letter of Reversal" dated May 10, 2019 and without giving notice and consultation to Tribes or Washington State officials, EPA announced that it is revoking protective water quality standards for Washington State. The letter officially withdraws support of extremely protective water quality and seafood safety standards from the EPA, approved on Nov. 15, 2016. There was no consultation with Tribe that EPA had planned to revoke the standards. Neither was there any justification of need to

weaken water quality protection. EPA has engaged in after-the-fact consultation, but officials from Washington D.C., who are making the decision, are not involved and it is pointless to have after-the-fact consultation on a decision already made.

EPA's action is clearly inconsistent with its 2011 *Policy on Consultation and Coordination with Indian Tribes*, which states, "Consultation should occur early enough to allow tribes the opportunity to provide meaningful input that can be considered prior to EPA deciding whether, how, or when to act on the matter under consideration. As proposals and options are developed, consultation and coordination should be continued, to ensure that the overall range of options and decisions is shared and deliberated by all concerned parties, including additions or amendments that occur later in the process."

Tribes have strongly supported the previous water quality standards. For example, both the Affiliated Tribes of Northwest Indians and the National Congress of American Indians have passed resolutions supporting stronger water quality standards based upon a higher fish consumption rate.¹

- 2. Protecting Treaty Rights and Subsistence:** Tribal communities, for whom fishing is critical not only for subsistence, but for cultural and commercial purposes will be most affected by this proposal. Sharing and eating fish is an integral part of Tribal culture, religion and social fabric here in the Northwest, and it is well-documented that Tribal communities consume fish at a higher-than-average rate. Many Washington Tribes have treaty-protected rights to fish both on and off their reservation that preserve for all time the right to engage in commercial, subsistence, and ceremonial fishing. This proposal fails to consider the impacts to tribal members, their treaty-reserved rights, and presents an issue of environmental justice, but ignoring the disproportionate impact this proposal will have on tribal people. Tribes that rely on locally caught fish for subsistence are already exposed to more toxics and will experience greater harm as a result of this proposal.

Moreover, EPA is ignoring its own policy, in its *EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights*, the agency states:

EPA is committed to both protecting treaty rights and improving our consultations with tribes on treaty rights.

...

¹ See <http://www.atntribes.org/sites/default/files/res-14-56.pdf> and http://www.ncai.org/attachments/Resolution_vVKoodAshijSphcyukvUnAtWSVVIPxQmWyQtspElWRxXQHIYX_Y_ATL-14-031.pdf.

EPA will subsequently consider all relevant information obtained to help ensure that EPA's actions do not conflict with treaty rights, and to help ensure that EPA is fully informed when it seeks to implement its programs and to further protect treaty rights and resources when it has discretion to do so.

...

Certain types of EPA actions, namely those that are focused on a specific geographic area, are more likely than others to have potential implications for treaty-protected natural resources. For example, EPA review of tribal or state water quality standards as a basis for National Pollutant Discharge Elimination System permits typically focuses on a specific water body. If a treaty reserves to tribes a right to fish in the water body, then EPA should consult with tribes on treaty rights, since protecting fish may involve protection of water quality in the watershed.

- 3. No Articulated Scientific or Legal Justification for Proposal:** There is no new science or law that justifies EPA's reconsideration of Washington's water quality standards. Unfortunately, politics, not science, is the only factor that would lead to this result.

The proposal is inadequate with regards to toxics, particularly mercury, PCBs, and other toxics. Toxic chemicals like PCBs, dioxin, and DDT harm human health and can cause cancer. The EPA's proposal will allow for more incidences of cancer in Washington and more toxic chemicals in our water and fish

The current water quality standards are the result of years of extensive public processes at the state and federal levels, involving tribal governments as well as industry representatives, environmental groups and other stakeholders. The standards are based on science that accurately reflects what happens when tribal members are exposed to pollution in State waters. They also include a wide range of implementation tools and generous timelines for industry to comply.

Before 2016, Washington's water quality standards were based on 40 year-old-data, relied on the weakest fish consumption standards in the country (6.5 grams of fish per day), and did not meet the mandate of the Clean Water Act to ensure that all waters are fishable and swimmable. In 2012, the Washington Department of Ecology's research on fish consumption revealed that many tribal members eat over 700 grams of fish per day, and up to 380,000 Washington adults eat over 250 grams per day. More than 29,000 children, who have greater sensitivity to many toxins, were found to eat over 190 grams of fish per day. In 2016, EPA strengthened Washington's water quality standards to reflect the amount of fish people actually eat by increasing the fish consumption rate to 175 grams per day – the equivalent of about one fish meal per day – and adequately accounting for other ways that people are exposed to toxins.

EPA should not roll back its science-based standards, and has no data to support instituting weaker, less health protective water quality standards. By reversing course, EPA threatens the health of anyone who fishes for subsistence in Washington State, many of whom are from tribal communities. In numerous guidance documents, EPA has made clear that states must use locally-accurate and protective fish consumption rates to set water quality standards. This rollback is contrary to EPA's own policy, and contradicts scientific findings, the law, and the rationale relied upon by EPA when establishing the standards in 2016.

Moreover, Washington already has a much more stringent PCB limit on the Spokane River, where dischargers will be expected to meet a PCB limit based upon the Spokane Tribe's fish consumption rate of over 700 grams/day.

Getting these standards correct is an important environmental justice issue. All of these toxics bio-accumulate and bio-magnify in the food chain in such a way that makes fish problematic to consume. The standards for PCBs are still exceeded in some fish and statewide mercury advisory remains in place making their consumption extremely problematic for pregnant women, children, and tribal members who for cultural and economic reasons consume far more than the recommended allowance.

- 4. Bad for Public Health and the Economy:** Prior to proposing these water-quality rollbacks, EPA stated its intent to protect people from cancer and other harmful effects that can arise from consuming polluted fish, shellfish, and drinking water. As recently as March 20, 2019, EPA Administrator Andrew Wheeler spoke of global water issues ahead of the U.N.-sanctioned World Water Day: "Right now, up to 2.5 billion people around the world lack access to safe drinking water, and, as a result, proper sanitation. This fact leads to anywhere from one to three million deaths every year." This proposal is inconsistent with the intent to protect public health.

One major change proposed by EPA with this rollback will weaken the standards for PCBs. PCBs are carcinogenic, build up in fatty tissue, and are still being discharged in waste streams in Washington. PCBs commonly cause fish consumption advisories for most major waterways in Washington and orca whales are some of the most toxic animals on the planet due to PCB contamination.

High levels of toxic PCBs in its mother's milk were a major contributor to the death of the baby orca that died shortly after birth and was carried around Puget Sound by its grieving mother, Tahlequah, for 17 days last summer. PCBs were used for many years in coolants, flame retardants and many other industrial products. Most countries banned their use several decades ago because of their toxicity, but PCBs are persistent pollutants that become concentrated in the food chain.

This is also bad for the economy. The natural systems of Puget Sound, the Columbia River, and other Washington waters contribute tens of billions of dollars per year in recreational and outdoor opportunities, including fishing and shell fishing. This does not include the economic and cultural benefits to tribal communities.

- 5. EPA is catering to Polluters:** EPA should not cater to polluters. EPA has agreed to a petition filed by industrial polluters that want to weaken protections against toxic pollutants and known carcinogens, yet EPA's core responsibility is to protect the environment and human health from pollution. This is contrary to the Clean Water Act's goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," for the elimination of all pollution discharges into navigable waterways, and contrary to EPA's treaty and trust obligations to Tribe.

The February 2017 Petition was extremely ignorant of Tribal treaty rights, stating:

In its Final Rule, EPA invents a new and non-existent "treaty-reserved subsistence fishing right" as support for its interpretation. In fact, the federal courts have never interpreted the treaty reserved fishing right as a right to take and consume fish at a subsistence rate, and there is no legal support for EPA's attempt to use the treaty fishing right as a rationale for imposing its preferred human health criteria on the State of Washington.

February 21, 2017 Petition. In May, EPA announced that it caved to this request adopting this baseless approach to treaty right – which was unprecedented. EPA has never rolled back water quality standards based upon a petition of industry. We believe EPA should take its treaty and trust obligations seriously and withdraw this proposal.

We agree with the words of Billy Frank, Jr. in 2013, "If the food we put in our mouths should not be used as a standard to protect water quality and human health, what should we use? Industry standards?" For this reason, those set forth above, and those set forth by the Tribes of Washington State, the RTOC opposes any changes to the Washington water quality standards and requests that EPA take the time and effort to engage in meaningful consultation of this proposal. The RTOC appreciates your consideration of these comments.

Sincerely,



Raymond Paddock

Region 10 RTOC, Tribal Caucus Co-chair
