

Brendan Keenan, Jr.

The Confederated Tribes and Bands of the Yakama Nation submit the attached comments regarding the proposed amendments to Chapter 173-185 WAC.



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

October 28, 2020

Sent via Electronic Filing

Kim Morley
Spills Program Rule and Process Coordinator
Spill Prevention, Preparedness, and Response Program
Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Re: AMENDMENTS TO CHAPTER 173-185 WAC, OIL MOVEMENT BY RAIL AND PIPELINE
NOTIFICATION

Dear Ms. Morley:

I write on behalf of the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) in response to the Department of Ecology’s (“Ecology”) invitation for comments on proposed amendments to Chapter 173-185 WAC, Oil Movement by Rail and Pipeline Notification. The Yakama Nation supports Ecology’s proposal to expand reporting requirements for crude oil shipments, but recommends additional changes to further improve emergency preparedness.

The Yakama Nation is a sovereign and original Native Nation federally-recognized under the Treaty with the Yakamas, U.S. – Yakama Nation, June 9, 1855 (“Treaty of 1855”).¹ In Article III of the Treaty of 1855, the Yakama Nation expressly reserved the right to take fish “in all the streams, where running through or bordering [the Yakama Reservation]” and at “usual and accustomed places” outside of the Yakama Reservation.²

Rail lines run parallel to two rivers in which the Yakama Nation has Treaty-reserved fishing rights: the Yakima River, which passes through the Yakama Reservation, and the Columbia River, where many of the Yakama Nation’s most significant “usual and accustomed places” are located.³ Derailment of a train carrying crude oil on these lines would potentially be catastrophic for fish populations in the Yakama Nation’s Treaty fishing areas. For example, “permanent structural and functional changes to the fish heart” occur when salmon embryos are exposed to even “very low, environmentally

¹ 12 Stat. 951 (June 9, 1855, ratified March 8, 1859, proclaimed April 18, 1859).

² *Id.* at 953.

³ See *United States v. Washington*, 384 F. Supp. at 382 (finding that the Yakama Nation’s “usual and accustomed” fishing areas include the “Columbia River area”).

relevant levels of crude oil.”⁴ However, different types of oil and petroleum products may affect fish uniquely.⁵ First responders, including those from the Yakama Nation, must therefore be appropriately informed regarding the nature of crude oil involved in a derailment to effectively prevent or mitigate harm to fish and habitat.

The transport of crude oil by rail also poses a threat to the safety of Yakama members and their property. Fires or explosions caused by a derailment within the boundaries of the Yakama Reservation or near a Treaty fishing access area could result in significant damage to homes, businesses, and other infrastructure. This is particularly true during late summer months where wildfire risks are high. Again, the Yakama Nation’s emergency responders must be equipped with accurate and complete information to properly protect our communities in the event of a derailment or other accident.

The Yakama Nation supports Ecology’s proposal to expand the advance notice requirements to include type and vapor pressure of crude oil. The Yakama Nation also appreciates the fact that the current text of WAC 173-185-090 allows Ecology to share advance notice information regarding oil by rail shipments with Native Nations. However, the current rule requires Native Nations to affirmatively request the information from Ecology. Furthermore, the current rule is unclear as to whether Ecology will share information with Native Nations on a shipment-by-shipment basis (responsive to individual requests about specific shipments) or for all shipments subsequent to a request.

The Yakama Nation recommends that Ecology correct these deficiencies by revising the text of WAC 173-185-090 as follows:⁶

WAC 173-185-090 Disclosures—Emergency management division, utilities and transportation commission, and county, city, tribal, port, and local government emergency response agencies.

(1) Ecology will share the advance notice information collected from facilities under WAC 173-185-070 with the state emergency management division and any county, city, ~~tribal~~, port, or local government emergency response agency upon request. Requests to access this information must be submitted to Ecology by email.

(2) Ecology will share the advance notice information collected from facilities under WAC 173-185-070 with the utilities and transportation commission.

(3) Ecology will share the advance notice information collected from facilities under WAC 173-185-070 with tribal government emergency response agencies.

⁴ John P. Incardona, et al., *Very low embryonic crude oil exposures cause lasting cardiac defects in salmon and herring*, 5 SCI. REP. 13499, 7 (Sept. 8, 2015), <https://www.nature.com/articles/srep13499>.

⁵ NAT’L OCEANIC & ATMOSPHERIC ADMIN., HOW OIL SPILLS AFFECT FISH AND WHALES (last updated Feb. 13, 2020) <https://response.restoration.noaa.gov/oil-and-chemical-spills/oil-spills/how-oil-spills-affect-fish-and-whales.html>.

⁶ Consistent with Ecology’s draft proposed rule language, text with underline represents recommended additions and text with strike through represents recommended deletions.

The proposed change would remove the existing burden on Native Nations to affirmatively request the advance notice information. This change is reasonable given the fact that, pursuant to WAC 173-185-070, Ecology will have advanced knowledge of scheduled crude oil deliveries. Native Nations, on the other hand, will not, and therefore cannot know when to request the information from Ecology. An automatic sharing requirement also clarifies that Native Nations will receive information pertaining to all shipments, rather than on a shipment-by-shipment basis.

The Yakama Nation's proposed change is consistent with Ecology's justification for amending Chapter 173-185 WAC, which includes "help[ing] Ecology and other emergency response agencies determine the need for additional prevention and preparedness measures."⁷ The change would ensure that Native Nations are properly informed when responding to derailments and other emergencies involving trains. Properly informed first responders, regardless of government affiliation, will make all communities safer and more effectively protect natural resources. For these reasons, the Yakama Nation encourages Ecology to adopt its recommended revision.

The Yakama Nation is grateful for the opportunity to participate in this rulemaking process. Chapter 173-185 WAC has the potential to affect Treaty-reserved resources and the safety of Yakama Nation communities. As such, this matter is of great importance to the Yakama Nation. If you have any questions or concerns regarding this comment, please contact Mr. Ethan Jones, Lead Attorney for the Yakama Nation Office of Legal Counsel, at (509) 865-7269, ext. 6014.⁸

Sincerely,



DELANO SALUSKIN, CHAIRMAN
YAKAMA NATION TRIBAL COUNCIL

⁷ Preproposal Statement of Inquiry, WSR 20-03-022, 2 (Jan. 6, 2020).

⁸ In submitting this comment, the Yakama Nation does not waive its sovereign immunity from suit, nor does it waive, alter, or otherwise diminish its sovereign rights, privileges, or remedies guaranteed by the Treaty of 1855. Furthermore, submission of this comment does not substitute for formal government-to-government consultation on this matter.