Northwest Indian Fisheries Commission
6730 Martin Way E., Olympia, Washington 98516-5540
Phone (360) 438-1180 www.nwifc.org FAX # 753-8659

April 30, 2020

Susan Braley, Policy Lead
Washington State Department of Ecology
Water Quality Program
P.O. Box 47600
Olympia, WA 98504-7600

Re: Water Quality Policy 1-11 Revisions for Bacteria Criteria

Dear Ms. Braley:

Please accept these comments on the above-referenced Water Quality Policy 1-11 Revisions for Bacteria Criteria on behalf of the Northwest Indian Fisheries Commission (NWIFC). The 20 member tribes of the NWIFC[1] are beneficiaries of a trust relationship with the United States, the Trustee, with constitutionally protected, treaty-reserved rights to harvest, consume, and manage fish and shellfish in their usual and accustomed areas. The following comments are submitted in view of the need to ensure protection and restoration of these and other reserved rights, resources, and habitats, and to safeguard the health, livelihoods, and well-being of tribal members.

I. Introduction

We appreciate Ecology's outreach to the tribes and NWIFC regarding this policy revision during the February 2020 meeting of the Coordinated Tribal Water Quality Program, and subsequent tele-video conferences with staff from one or more tribes and NWIFC. We also appreciate the clarifying revisions that Ecology adopted in response to tribal feedback. In response to the public comment request for Ecology's proposed Water Quality Policy 1-11 Revisions for Bacteria, NWIFC member tribes provide a few overarching policy comments as follows.

II. Proposed Policy Revisions

For this policy revision, Ecology produced a helpful document with answers to frequently asked questions. Dept. of Ecology, FAQs - Bacteria Methodology Update in the Water Quality Program Policy (WQP Policy 1-11) (April 2020). This document helps explain the overall consequences of the department's proposed policy revision, including:

[1] The NWIFC member tribes are the Lummi, Nooksack, Swinomish, Upper Skagit, Sauk-Suiattle, Stillaguamish, Tulalip, Muckleshoot, Puyallup, Nisqually, Squaxin Island, Skokomish, Suquamish, Port Gamble S'Klallam, Jamestown S'Klallam, Lower Elwha Klallam, Makah, Quileute, Quinault, and Hoh. These general comments should not be construed as conflicting with any specific comments from NWIFC member tribes, which the Commission will acknowledge with deference.

- "[T]hese changes will not impact current or future shellfish harvesting use impairment determinations."
- "Since fecal coliform remains the bacteria indicator for determining shellfish use impairment in marine waters, any new fecal coliform data will be assessed in accordance with the shellfish harvesting use."
- "Category 4A & 4B fresh waters that were approved by EPA to meet both freshwater recreational uses and downstream shellfish harvesting uses may continue to use fecal coliform to determine compliance with the TMDL."

Because these concise statements are missing from the proposed policy revision itself, these same three statements should be added to the final policy document, in addition to an explanation regarding how the revised policy achieves these important outcomes.

Consistent with these intended policy outcomes, tribes expect no loss of shellfish harvest opportunities as a result of this policy revision. To help avert future closures of shellfish beds, Ecology should continue its fecal coliform monitoring and assessment of freshwaters upstream of marine waters with a designated use for shellfish. Ecology should not wait for Washington Department of Health (WDOH) shellfish bed closures, impaired waters listings under Clean Water Act Sec. 303(d), or Total Maximum Daily Load (TMDL) or TMDL alternative approval before commencing fecal coliform assessment. Ecology's assessment program should be proactive and prevent impaired waters classifications and shellfish bed closures by continuing its assessment and remediation for fecal coliform in freshwaters upstream of marine waters designated for shellfish use.

Discussion between tribal staff and Ecology recognized the benefits of using all available tools, including monitoring by pollution identification and correction (PIC) programs, tribes, local jurisdictions, WDOH, U.S. Environmental Protection Agency (EPA), non-point source (NPS) pollution reduction programs, TMDL programs, and Ecology. Another appropriate tool is a water quality standard to protect Washington's shellfish uses. Ecology, consistent with its policies, should not reduce its fecal coliform monitoring or assessment activities in freshwater if there is a possibility that "these changes [might] impact current or future shellfish harvesting use impairment determinations." *Id.*

Moreover, tribes expect that Ecology will be aggressive in implementing policies and actions to advance a net gain in shellfish habitat and harvest through water quality improvements pursuant to its authorities, thereby helping to restore treaty rights that have been diminished over recent decades because of water pollution and habitat loss. Thus, Ecology should maintain any existing fecal coliform monitoring and assessments in freshwaters upstream of marine waters designated for shellfish use. In addition, Ecology should undertake these fecal coliform assessments for freshwater and marine water, both, biennially consistent with 33 U.S.C. § 1315 in order to protect waters designated for shellfish use.

We agree with the draft policy's recognition that, "[a]s allowed by the surface water quality standards, shellfish growing areas approved for unconditional shellfish harvest using the WDOH

assessment methods, may be considered fully supporting the shellfish harvesting use. In accordance with this provision, Ecology will consult with WDOH on [water quality assessment (WQA)] determinations that use WDOH shellfish program sampling data. In the event of a discrepancy between the WQA impairment status and WDOH shellfish sanitation classification for an AU, Ecology will defer to WDOH and administratively modify the WQA as necessary to align with WDOH classifications." Ecology, Water Quality Policy 1-11 Revisions for Bacteria, Draft Revisions without Track Changes Public Review 5 (April 1, 2020). Maintaining this provision will promote the use of all available tools, and help protect existing and potential designated shellfish harvest use. In summary, Ecology should continue to utilize all existing monitoring and assessment tools for fecal coliform in both marine waters, and upstream freshwater with a potential to deliver fecal loads to waters designated for shellfish use.

III. Policy Implementation

To help implement Ecology's proposed policy revisions, the department should expand its FAQs document into a "how-to guide" for implementing these policy revisions. Doing so can help support the all available tools approach by helping to align fecal coliform monitoring and methods among PIC programs, tribes, local jurisdictions, EPA, NPS programs, TMDL programs, WDOH and Ecology. Among state and federal agencies, consistent approaches to creating and protecting riparian buffers can help protect marine and freshwater instream resources. NWIFC is available to support tribes and Ecology with implementation of policies that protect and expand shellfish resources, designated use areas, and harvest opportunities in furtherance of the tribes' treaty rights.

IV. Conclusion

We appreciate Ecology's outreach to tribes and NWIFC on this proposed policy revision. The draft policy will be more complete by including the outcomes explained in Ecology's FAQs document, and ensuring that shellfish harvest opportunities will not be lost due to reduced fecal coliform monitoring or assessment by Ecology in freshwaters upstream from marine shellfish use areas. Please feel free to contact Michael Martinez, NWIFC Habitat Policy Analyst, at mmartinez@nwifc.org, with any comments or questions regarding this feedback.

Sincerely,

Justin R. Parker
Executive Director