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Submitted via <https://wq.ecology.commentinput.com/>

February 28, 2022

Laura Watson
Director, Washington State Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Dear Director Watson,

These comments are submitted on behalf of the Lower Elwha Klallam Tribe, the Port Gamble S'Klallam Tribe, and the Suquamish Tribe (collectively, "the Tribes") in response to the Kaiser Aluminum Washington Public Notice of Draft Permit (NPDES Permit WA0000892) and the City of Spokane-Riverside Park Water Reclamation Facility (RPWRF) and Pretreatment Program Washington Public Notice of Draft Permit (NPDES Permit WA0024473). While the Tribes do not comment on the entire permits and defer to the views of tribes that may be directly affected by permits discharging into the Spokane River, the Tribes write today to express their concern regarding the reopener provisions in both draft permits, which do not contain clear language requiring that the permit, including its effluent limits, be updated as water quality standards are strengthened in Washington. In turn, the lack of automatic reopener language does not assure adequate protection over the life of the permit for tribal fishers and others who rely heavily on locally caught fish. The Tribes request that the Washington State Department of Ecology ("Ecology") revisit and strengthen the language of the reopener provisions in these permits, as well as any new NPDES permits or permit renewals that Ecology may issue.

The Tribes have greatly appreciated your willingness to collaborate and your continued commitment regarding reinstatement of the more protective 2016 human health criteria (HHC), which the Environmental Protection Agency ("EPA") promulgated for Washington State in November 2016. 81 Fed. Reg. 85,417 (Nov. 28, 2016). The State and Tribal sovereigns have been united on the importance of water quality standards designed to protect the health of the many Washingtonians who consume large amounts of freshwater and marine fish from the harmful effects of toxic pollutants, including members of over twenty Indian tribes who rely on treaty-protected fishing for their daily sustenance. Together, the State and Tribal sovereigns made clear to EPA that they would not accept cynical actions that undermined the health and wellbeing of Washingtonians, including those who consume fish and seafood harvested by tribal fishers exercising their treaty right. *See* Attachment A (Jan. 29, 2021 Letter from Washington State Department of Ecology Director Laura Watson et al. to EPA Acting Administrator Jane Nishida). And our unified voice convinced EPA that it must take swift action to restore

protective, scientifically sound HHC for Washington, including for PCBs. We expect that EPA's proposed rule will be published in the Federal Register no later than March 2022, public comment will be accepted from March to May 2022, and a final rule will be published by January 2023.

Given how soon more protective HHC are likely to be finalized for Washington and given the importance of the HHC to ensuring the protection of Treaty fishing rights and tribal member health, any permits that rely on the HHC currently in place should have mandatory reopeners to account for the more stringent federal HHC that will come into effect within less than a year. Vexingly, despite the fact that both the Kaiser Aluminum and City of Spokane-RPWRP permits have effluent limits for PCBs (a highly toxic pollutant that can cause severe developmental and neurological impacts to fetuses, babies, children, and adults), the permits' fact sheets and reopener provisions are equivocal regarding whether the new PCB effluent limits will be updated prior to the expiration of the permits. With regard to permit modifications, the fact sheet for both permits states: "Ecology *may* also modify this permit to comply with new or amended state or federal regulations." Kaiser Permit Fact Sheet at 57 (emphasis added); City of Spokane-RPWRP Permit Fact Sheet at 68 (emphasis added). In the section of the fact sheets describing EPA's imminent promulgation of more stringent federal human health criteria for Washington, Ecology states only:

General condition G3 of the permit allows Ecology to modify, revoke, reissue or terminate a permit under certain conditions. One of the conditions includes the promulgation of new or amended standards or regulations having a direct bearing upon permit conditions, or requiring permit revision. When EPA finalizes its new rule, Ecology will evaluate the impact to the permit resulting from any changes to the criteria. Ecology will then take appropriate actions, which *could* include *modifying* the current permit *or* including *new requirements in the next permit issuance*.

Kaiser Permit Fact Sheet at 24-25 (emphasis added); City of Spokane-RPWRP Permit Fact Sheet at 28-29 (emphasis added). And the permit language itself is no better. General Condition G3 of both permits states only that the permit "*may* be modified, revoked and reissued, or terminated" for "the reasons specified in 40 CFR 122.62, 40 CFR 122.64 or WAC 173-220-150 according to the procedures of 40 CFR 124.5." Kaiser Permit at 43-44 (emphasis added); City of Spokane-RPWRP Permit at 57-58 (emphasis added). Listed causes for termination include a "determination that the permitted activity endangers human health or the environment, or contributes to water quality standards violations and can only be regulated to acceptable levels by permit modification or termination." Kaiser Permit at 43; City of Spokane-RPWRP Permit at 58. Listed causes for modification but not revocation and reissuance include "[p]romulgation of new or amended standards or regulations having a direct bearing upon permit conditions, or requiring permit revision." Kaiser Permit at 44; City of Spokane-RPWRP Permit at 58. This is far from the mandatory reopener language that circumstances on the ground demand.

The Tribes recognize that Ecology has referenced 40 C.F.R. § 122.62 ("Modification or revocation and reissuance of permits (applicable to State programs, see § 123.25)") in the permit. However, the Tribes urge Ecology to be more explicit regarding the requirements of that

provision and the provisions referenced therein. PCBs are on the list of toxic pollutants designated pursuant to section 307(a)(1) of the Clean Water Act at 40 C.F.R. § 401.15. New human health criteria, including for PCBs, are anticipated to be promulgated by EPA in the very near future. Therefore, the agency should specifically reference the provisions of the federal regulations that require mandatory reopener and modification in order to conform a permit's toxic effluent limits to new, more stringent water quality standards for toxics. Specifically, the permit should reference the following three provisions: 40 C.F.R. § 122.62(a)(6) (“The following are causes for modification . . . **307(a) toxics**. When required to incorporate an applicable 307(a) toxic effluent standard or prohibition (see § 122.44(b))”); 40 C.F.R. § 122.62(a)(7) (“The following are causes for modification . . . **Reopener**. When required by the “reopener” conditions in a permit, which are established in the permit under § 122.44(b) (for CWA toxic effluent limitations and Standards for sewage sludge use or disposal. . . .”); and 40 C.F.R. § 122.44(b)(1) (“[I]f any applicable toxic effluent standard or prohibition . . . is promulgated under section 307(a) of CWA for a toxic pollutant *and that standard or prohibition is more stringent than any limitation on the pollutant in the permit*, the Director *shall* institute proceedings under these regulations *to modify or revoke and reissue the permit to conform to the toxic effluent standard or prohibition.*” (emphasis added)). The reopener and modification provisions for the draft Kaiser Aluminum and City of Spokane-RPWRF permits should more expressly reflect the mandatory requirements of the federal Clean Water Act and its regulations, and should eliminate any question as to Ecology's commitment to ensuring over the lifetime of the permit the protection of those who are vulnerable to the ingestion of toxics through their reliance on sustenance fishing.

Without Ecology's express commitment to reopening and modifying these permits following federal promulgation of new, more stringent human health criteria, which commitment would be evidenced by more prescriptive, mandatory reopener provisions, Washingtonians who come into contact with or rely on the Spokane River for food could be forced to endure four or more years of elevated PCB pollution levels that would not be permitted if Ecology were to wait to renew these permits until the HHC were final in January 2023. Even worse, given that Ecology frequently extends permits beyond their original five-year expiration dates, these individuals may be subjected to many more years of exposure to toxics. The Tribes understand that the permits may be an improvement over the status quo in some ways, including that there are PCB effluent limits at all, but the way to balance the benefits of re-issuing permits now against the harm that will come from less stringent PCB effluent limits is to ensure that the reissued permits will be reopened once the new HHC are finalized.

The Tribes strongly encourage Ecology to include mandatory reopener language in each permit to eliminate any question as to whether the permit will be reopened and modified in order to account for the more stringent human health criteria that can be reasonably anticipated within less than a year of the permit's issuance. Further, if Ecology is considering issuing or renewing any permits incorporating effluent limits for toxics within the Tribes' usual and accustomed fishing areas in the Puget Sound and Strait of Juan de Fuca area prior to EPA's reinstatement of more stringent HHC, it is critically important that we receive, and the Tribes hereby request, advance written notice of these deliberations and government-to-government consultation. Thank you for considering these comments, and the Tribes look forward to our continued cooperative efforts to protect water quality in the State of Washington.

Sincerely,

A handwritten signature in black ink that reads "Jane Steadman". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Jane Steadman

Counsel for the Lower Elwha Klallam Tribe, Port Gamble S'Klallam Tribe, and Suquamish Tribe

cc:

Frances Charles, Lower Elwha Klallam Chairwoman
Jeromy Sullivan, Port Gamble S'Klallam Chairman
Leonard Forsman, Suquamish Chairman
Steve Suagee, Lower Elwha Klallam Tribal Attorney
Steven Moe, Port Gamble S'Klallam Tribal Attorney
Melody Allen, Suquamish Tribal Attorney