



**PORT GAMBLE S'KLALLAM TRIBE**  
**NATURAL RESOURCES DEPARTMENT**  
31912 Little Boston Rd. NE – Kingston, WA 98346

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May 7, 2024

Marla Koberstein  
Department of Ecology  
Water Quality Program  
PO Box 47696  
Olympia, WA 98504-7696

RE: Comments on Rulemaking - Aquatic Life Toxics Criteria, Chapter 173-201A WAC

Dear Ms. Koberstein:

The Port Gamble S'Klallam Tribe (PGST or Tribe) submits the following comments regarding the proposed “Rulemaking - Aquatic Life Toxics Criteria, Chapter 173-201A WAC” for freshwater and marine environments. PGST is a federally recognized Tribe with reserved off-reservation fishing rights and adjudicated Usual and Accustomed fishing areas (U&A) in waters in western Washington over which the State of Washington has delegated authority under the Clean Water Act to promulgate water quality standards (WQS), including the aquatic life criteria proposed in this rulemaking. PGST is also a member of the Northwest Indian Fish Commission and incorporates by reference the comments submitted by the Commission dated May 7, 2024, including the Ridolfi Environmental Memorandum Re Focused Review of Selected Contaminants in Washington State’s Proposed Updates to Aquatic Life Toxics Criteria (May 3, 2024) that is also attached to these comments.

The Tribe commends the Washington State Department of Ecology (Ecology) for a proposed rule that would significantly improve the protectiveness of Washington’s aquatic life criteria and, in large part, bring them in line with more recent science since the criteria were last overhauled in 1992, with only minor updates in 1993, 1998, and 2007. In many respects, PGST supports the proposed rule, but the Tribe requests that Ecology reconsider and strengthen the proposed criteria for the handful of pollutants discussed below (and in the attachment) that do not reflect the current science or establish the level of protectiveness required in Washington waters. Moreover, the Tribe reiterates its longstanding request that Ecology swiftly take action either to remove the disapproved human health criteria in WAC 173-201A-240 (Table 240) or, better, to formally adopt the federally promulgated human health criteria, which Ecology has proposed only to reference by a new footnote to Table 240 through this rulemaking.

**I. The Importance of Clean Water and Protective Aquatic Life Criteria to the Port Gamble S'Klallam Tribe**

The Port Gamble S'Klallam Tribe is a fishing tribe. Since time immemorial, fishing has been the foundation on which the Port Gamble S'Klallam Tribe’s culture, economy, and ceremonial life was based. In 1855, when the Tribe entered the Treaty of Point No Point, 12 Stat. 933, with the United States, sacred promises were made between sovereign nations that bind the State of Washington to this day. The Port Gamble S'Klallam Tribe and others ceded hundreds of thousands of acres of their homelands, while reserving certain rights to themselves. Chief among the rights reserved—and persistently defended by the Tribe—is the right to continue taking fish and shellfish as they always had throughout their usual and accustomed fishing grounds. Article 4 of the Treaty of Point No Point states:



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The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands.

With this treaty language, the Port Gamble S'Klallam Tribe, like other Treaty Tribes in Western Washington, reserved fundamental rights that they had exercised since time immemorial. The Treaty was intended to allow the Tribe and its citizens to continue their way of life in the face of white settlement, both at that time and in perpetuity, in large part by continuing robust tribal harvest of fish in off-reservation marine waters and freshwater rivers and lakes. In addition to extinguishing tribal land claims to pave the way for orderly non-native settlement, the treaty-makers' recognition of these reserved rights secured for the United States, as instructed by their superiors in Washington, D.C., the crucial practical benefit of not having to pay for the Indians' perpetual subsistence.

Fish and fishing remain of central importance to the Port Gamble S'Klallam Tribe's culture, economy, ceremonies, and diets. More than 150 Port Gamble tribal members continue to earn all or a portion of their livelihood working as commercial salmon and shellfish fishers, and a 2020 survey shows 300 subsistence tribal fishers continuing to provide food for themselves and their families. In addition, the Tribe conducts fisheries throughout the shared U&A to obtain fish for ceremonial use (including funerals, weddings, and honoring and gifting observances, as well as other ceremonies and practices), and subsistence harvests from the U&A are a key element of the diet of many tribal members. However, despite the promises made by treaty, the Tribe's way of life is now severely threatened. Rivers, streams, bays, straits, lakes, and wetlands throughout the Tribe's off-reservation usual and accustomed fishing grounds have been modified in manners detrimental to the fish and shellfish species upon which the Tribe depends, including through the discharge of toxic pollutants into waterways. Contaminated stormwater runoff and end-of-pipe discharges of dangerous chemicals flow into the freshwater and marine environments and represent a pervasive threat to treaty resources and the tribal communities that rely on them. Fish populations, including salmonids and forage fish, are in a precarious position, and individual fish are imperiled by their exposure to this pollution. In waters in which the Port Gamble S'Klallam Tribe reserved, through treaty, their right to continue fishing as they had since time immemorial, tribal members should not be subjected to shortages and unhealthy fish that result from toxic discharges.

The United States Supreme Court has recognized the central importance of fishing for tribes: it is "not much less necessary to the existence of the Indians than the air they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). And the reserved right to take fish impliedly reserved the habitat necessary to fulfill that purpose, that is, sufficient to keep waterways suitable for fish reproduction and tribal harvest. *E.g.*, *United States v. Washington ("Culverts")*, 853 F.3d 946, 966 (9th Cir. 2017), *aff'd*, 584 U.S. 837 (2018) (per curiam). The United States and its agencies must keep these bedrock principles in mind when administering statutes affecting Treaty-protected resources, and the U.S. Environmental Protection Agency (EPA) has made clear that States must ensure that reserved rights like the Tribe's fishing rights are protected when promulgating water quality standards when a Tribe has notified the State of reserved rights that should be considered. EPA, *Water Quality Standards Regulatory Revisions to*



*Protect Tribal Reserved Rights*, 89 Fed. Reg. 35,717 (May 2, 2024) (effective date June 3, 2024).<sup>1</sup>

## **II. General Comments on Proposed Aquatic Life Toxics Criteria, Chapter 173-201A WAC**

By and large, the Tribe supports Ecology's proposed aquatic life criteria and appreciates Ecology's general commitment to using up-to-date science and learning from the Endangered Species Act (ESA) Section 7 consultations for Idaho and Oregon in this rulemaking. The Tribe hopes and expects that Ecology will have a smoother EPA approval process and swifter Section 7 consultation by the National Marine Fisheries Service and U.S. Fish and Wildlife Service as a result of these efforts.

In most cases, the proposed rule either keeps criteria as is for those pollutants for which EPA has not updated its 304(a) national recommendations since Ecology's last update; updates the criteria to be in line with updated 304(a) national recommendations; makes the criteria more protective than the 304(a) national recommendations based on new science and/or ESA concerns; or develops new state-specific criteria for pollutants of special importance to Washington and for which EPA has not yet adopted 304(a) recommendations. The Tribe agrees with the approach taken by Ecology with respect to the pollutants covered by these four categories and urges the agency not to weaken these criteria in the final rule. As noted above, the aquatic life criteria are essential to maintaining the health and populations of Treaty-protected resources upon which the Tribe depends for the exercise of its reserved fishing rights, and the criteria are either in line with 304(a) national recommendations or grounded in sound science that supports more protective criteria for certain pollutants in Washington waters.

With respect to the pollutants and criteria that do not fall into the above-described categories, including those pollutants for which Ecology is proposing not to adopt criteria when EPA has already established 304(a) national recommendations, the Tribe urges Ecology to reconsider. The Tribe provides specific comments on those criteria below and refers Ecology to the Ridolfi memo attached to these comments. These pollutants impair CWA-protected aquatic and aquatic-dependent resources to which the Tribe has fishing rights reserved by Treaty, and they should be regulated through numeric criteria.

## **III. Comments on Specific Pollutants**

### **A. Iron**

Ecology chose not to adopt the 1986 EPA national recommended 304(a) freshwater chronic criteria for iron in this rulemaking. The Tribe appreciates the reasons for which Ecology might choose not to adopt the federal recommendation, especially due to the impact on listed species (e.g., steelhead, Chinook salmon, bull trout) and likelihood that State adoption of it would not survive ESA Section 7 consultation. *See, e.g.*, Biological Evaluation of EPA's Proposed Approval Action on the Swinomish Tribe's Water Quality Standards Aquatic Life Criteria at 5-86 to 5-87 (2022). However, in the absence of useful federal recommendations, we believe that Ecology should instead have endeavored to determine what appropriate iron criteria would be that would protect vulnerable aquatic species in the State—species that are important both to the Tribe and the State of Washington and its citizens. We adopt the Ridolfi recommendation (page 1):

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<sup>1</sup> The Tribe provides this information to provide background regarding the significance of the proposed rule to the Tribe's interests and the need for protective criteria in its U&A but does not require a specific response to this section of the comments.



We recommended that additional detail be added to the technical support document (TSD) detailing whether new aquatic studies available in the EcoTox database were reviewed and why the LAA determination for iron did not trigger a review of alternative approaches for the development of criteria.

The Tribe does not request that Ecology hold off on finalization of the proposed rule to develop its own alternative approaches for the establishment of criteria *if* Ecology determines that the CCME 2019 and Cadmus 2018 cited in the Ridolfi memorandum (or other available literature) cannot be employed. However, if this is the case, the Tribe urges Ecology to develop such approaches and adopt iron aquatic life criteria in the next triennial review rather than rely solely on narrative criteria. The presence of iron particles can irritate gill tissue in salmonids, leading to gill damage and bacterial infection. Exposure to iron has been shown to reduce the immune response of salmonids. Consequently, regulation of this contaminant is important to protect Treaty-protected resources.

### **B. Hydrogen Sulfide**

Similarly, Ecology chose not to adopt the 1986 EPA national recommended 304(a) freshwater and saltwater chronic criteria for hydrogen sulfide in this rulemaking. Here, too, the Tribe appreciates the reasons for which Ecology might have chosen not to adopt the federal recommendation, especially due to the impact on listed species (e.g., steelhead, Chinook salmon, chum salmon, bull trout) and critical habitat (Chinook salmon, bull trout, bocaccio and yelloweye rockfish). *See, e.g.*, Biological Evaluation of EPA's Proposed Approval Action on the Swinomish Tribe's Water Quality Standards Aquatic Life Criteria at 1-7, 1-10, 1-13, 5-84 to 5-5-85 (2022). However, in the absence of useful federal recommendations, we believe that Ecology should instead have endeavored to determine what appropriate hydrogen sulfide criteria would be that would protect vulnerable aquatic species in the State—species that are, again, important both to the Tribe and the State of Washington. Moreover, hydrogen sulfide exceeds the Washington Sediment Management Standards, *id.* at 4-71, which is another reason for Ecology to prioritize setting numeric water quality criteria. We adopt the Ridolfi recommendation (page 2):

The TSD should explain why the LAA determination for hydrogen sulfide did not trigger a review of alternative approaches for the development of criteria.

While the Tribe does not request that Ecology hold off on finalization of the proposed rule to develop its own alternative approaches for the establishment of criteria *if* Ecology cannot find an existing alternative approach, the Tribe would like further clarification as to why the approach used by the North Carolina Division of Water Resources (which, in 2007, set an aquatic life criterion for hydrogen sulfide nearly ten times lower than EPA's 1986 recommendation) cannot be used in this rulemaking. If it cannot be used for scientifically credible reasons, the Tribe urges Ecology to develop the necessary approaches and adopt hydrogen sulfide aquatic life criteria in the next triennial review rather than continue to rely solely on narrative criteria. Hydrogen sulfide can have lethal effects on fish, and sublethal effects include reduced appetite and erratic swim behavior. Consequently, regulation of this contaminant is important to protect Treaty-protected resources.

### **C. Heptachlor Epoxide**

PGST opposes Ecology's proposal not to adopt the 304(a) recommendation for heptachlor epoxide, which is a priority pollutant and is highly toxic to finfish, shellfish, waterfowl, and aquatic



plants. Please review the Ridolfi memorandum at pages 2 and 4 for the reasons for which Ecology's explanation of why it chose not to adopt the 304(a) national recommendation or any other numeric criteria for heptachlor epoxide is unsupportable. The Tribe urges Ecology in the strongest of terms to adopt each of the federally recommended criteria for this extremely hazardous pollutant: 0.52 µg/L (freshwater acute); 0.0038 µg/L (freshwater chronic); 0.053 µg/L (saltwater acute); 0.0036 µg/L (saltwater chronic). We note that Oregon submitted these same proposed criteria to EPA in 2004. The Oregon Biological Opinion stated: "Based on the direct mortality population modeling results, juvenile salmon and steelhead exposed to . . . heptachlor epoxide . . . is predicted to result in mortality at the population level—relative to the baseline population model." The Tribe fails to see any conceivable basis for not regulating this lethal toxic pollutant through numeric criteria, particularly when EPA has a 304(a) recommendation in place. Failure to so regulate will harm Treaty-protected resources, and the Tribe highly recommends that the State at least adopt the current 304(a) nationally recommended criteria.

#### **D. PFOS and PFOA**

EPA published draft recommendations for freshwater acute and chronic perfluorooctane sulfonic acid (PFOS) and perfluorooctane acid (PFOA) criteria and saltwater acute benchmarks in 2022 but has not yet finalized the 304(a) recommendations. Although other states have, Washington has not yet adopted its own aquatic life criteria for PFOS and PFOA. Ecology states that it will adopt EPA's draft PFOS and PFOA recommendations in this rule, but only if EPA finalizes them before Ecology's rulemaking concludes. We urge Ecology to reconsider this position or consider alternative ways to adopt PFOS/PFOA numeric criteria prior to finalizing the rule and submitting it to EPA. For instance, Ecology could establish a trigger to adopt EPA's recommendations if they are finalized while EPA review or Section 7 consultation is still pending or else Ecology could employ an alternative approach used by another state to adopt PFOS/PFOA criteria prior to finalizing the rule and submitting it to EPA. PFOA and PFOS are highly problematic chemical compounds that are ubiquitous in the aquatic environment and do not easily break down. Studies have determined that most freshwater fish have high levels of these compounds in their tissue. Human health effects include suppression of the immune system, reduced vaccine efficacy, increased risk of certain cancers, and reproductive and developmental problems. As such, it is imperative that Ecology adopt criteria for these toxic compounds as soon as possible, including through its current update to the aquatic life criteria.

#### **E. 6PPD-Quinone**

The Tribe raises its hands in appreciation of Ecology's decision to begin to address the menace that is 6PPD-quinone to our shared salmonid resources through this rulemaking. 6PPD-quinone is lethal to juvenile and adult Coho salmon in tiny doses. Studies have shown that steelhead and other trout are also susceptible to this chemical. Ecology's criterion is based on a species sensitivity distribution for Coho salmon (rather than EPA's genus sensitivity distribution) in order to capture the high degree of sensitivity Coho have to low levels of exposure. We support the species sensitivity distribution basis for developing the 6PPD-quinone criterion. Not only is regulating 6PPD-quinone through the proposed freshwater acute criterion scientifically defensible, it is the necessary and right thing to do. We look forward to continuing to work with the State to do all we can to eliminate this lethal pollutant from waters throughout our U&A. The Coho and other salmonids require it. At this point, given what we know, any set of aquatic life criteria that did not adopt 6PPD-quinone numeric criteria for Washington waters would be at



extreme risk of litigation due to the effects on listed species. The Tribe is grateful that Ecology recognizes the peril of 6PPD-quinone and is taking steps to address it through this rulemaking.

#### **IV. Comments on Footnote Regarding Federally-Promulgated Human Health Criteria (HHC)**

Ecology proposes to add the following footnote H to Table 240 at WAC 173-201A-240: “Human health criteria applicable for Clean Water Act purposes in the state of Washington are contained in 40 C.F.R. 131.45 and effective as of December 19, 2022 (87 FR 69183).” In its materials, the agency describes the footnote as a “[m]inor, non-substantive edit[] to rule language in WAC 173-201A-240 . . . to cite federal regulations for human health criteria where they apply for Clean Water Act purposes,” and indicates “[w]e are adding a footnote in the surface water quality standards that cite the federal regulations for EPA promulgated human health criteria where they are the applicable criteria for Clean Water Act programs in Washington.” The Tribe appreciates this minor, ministerial effort to alert the public that some of the human health criteria in Table 240 in the Washington Administrative Code (WAC) are not actually in force for Clean Water Act purposes and pointing them to the HHC that are in effect. However, as the Tribe has explained to Ecology on multiple occasions since the federally promulgated human health criteria were reinstated in November 2022, Ecology must engage in a rulemaking to increase the durability of the effective human health criteria by removing the disapproved human health criteria from Table 240 altogether. The State of Washington has already invested significant resources in its efforts to defend the federally promulgated human health criteria in *two* separate lawsuits, and what is needed now is a rulemaking to ensure that the old disapproved HHC are no longer in the WAC, and so are no longer available as a possible fallback in the face of industry opposition to the federally promulgated HHC, which are necessary to ensure Washingtonians can safely eat fish from Washington waters. While serving as useful notice to the public, footnote H simply does not go far enough to guard the HHC that have been in force since 2022 (and which were in force from 2016 to 2020). We exhort Ecology either to remove the disapproved HHC from Table 240 entirely (such that all that appears for those pollutants in the HHC columns of the table is the footnote and *not* the disapproved numeric criteria) through an expedited rulemaking or, even better, to formally adopt the federally approved HHC and update Table 240 with these criteria, which were based on sound science, including the 2015 304(a) national recommendations.

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In conclusion, the Port Gamble S'Klallam Tribe supports Ecology's proposed rule in most respects and applauds the agency for an overall more protective set of criteria that will help improve the health and resiliency of our shared natural resources. With regard to the specific pollutants discussed in these comments, the Tribe requests that Ecology reconsider and strengthen those criteria, or, if so indicated above, commit to developing numeric criteria for those pollutants in the next triennial review. With regard to proposed footnote H to Table 240, the Tribe requests that in addition to providing the proposed notice to the public of where the applicable federally-promulgated human health criteria can be found, that Ecology begin rulemaking early this summer to either remove the disapproved human health criteria from Table 240 or, better, formally adopt the federal criteria located at 40 C.F.R. § 131.45 and effective as of December 19, 2022 (87 Fed. Reg. 69,183). Thank you for taking the Tribe's comments into consideration, and please contact me (romac@pgst.nsn.us) if you have any questions regarding any of the issues raised in these comments.



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Sincerely,

Roma Call  
Natural Resources Director  
Port Gamble S'Klallam Tribe