



Submitted via <https://wq.ecology.commentinput.com?id=PYcJ7i5sk>

October 24, 2024

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

RE: Comments on Washington State Department of Ecology Proposed Rulemaking on Human Health Criteria

Dear Director Watson,

These comments are submitted on behalf of the Lower Elwha Klallam Tribe, Port Gamble S'Klallam Tribe, and Puyallup Tribe of Indians, collectively “the Tribes,” in response to the Washington State Department of Ecology (“Ecology”) proposed rulemaking regarding updates to the State of Washington’s human health criteria (“HHC”) and associated footnotes in Table 240 of WAC 173-201A-240, Toxic Substances. Specifically, Ecology proposes to remove from Table 240 the 143 state-adopted HHC for 73 pollutants that were twice disapproved by the Environmental Protection Agency (“EPA”) and replace them with the federal human health criteria that EPA promulgated for those pollutants for Washington waters, as well as adopt a handful of federal criteria for pollutants for which Ecology had not submitted criteria for approval. Ecology would leave in place the 45 state human health criteria that were previously approved by EPA in 2016, which already appear in Table 240. The Tribes support Ecology’s proposed rule, which would ensure that all the currently in force HHC for Washington are formally adopted into state law and enshrined in the Washington Administrative Code (“WAC”).

Protective toxics criteria are essential to the health of our Tribes’ members and their ability to safely engage in Treaty-protected fishing activities of the utmost cultural, spiritual, and economic importance. As Ecology is aware, the Tribes fought for protective HHC for Washington waters for decades, and for many years, Ecology and the Tribes were at odds over the HHC. In recent years, however, the Tribes have been heartened by Ecology’s persistent commitment to implement and defend the more protective federal HHC, including its efforts to uphold the federal HHC in two separate federal court lawsuits. At this point though, the Tribes believe that the best approach is for the State to adopt the federal standards into its own administrative code, which will allow the State to continue to protect the health and safety of Washingtonians now and in the future. As Ecology indicates in its notice of proposed rulemaking, adopting the current federal human health criteria into state law will “provide durability and regulatory certainty.” The Tribes support these goals. The back and forth of litigation and the political whims of changing administrations is disruptive to the agency and its efforts to implement the HHC, harmful to Washington’s citizenry which benefits from protective water quality standards, and resource-intensive for the State and the Tribes. The Tribes appreciate Ecology’s efforts to bring certainty and finality to this long chapter.

As Ecology indicates, “[t]he state-adopted human health criteria that were disapproved by EPA are not being implemented in state regulatory programs” and instead Ecology has been implementing the federally promulgated criteria, so there will be no changes to what is currently occurring in terms of

regulation as a result of this rule and no environmental or economic impacts from the proposed rule. Nonetheless, it is confusing for the disapproved state standards to still be in the WAC and for the applicable standards to exist only in federal regulations at 40 C.F.R. § 131.45. The proposed rule will improve transparency and reduce uncertainty for members of the public attempting to understand what HHC apply in Washington waters. It will also make clear once and for all that the State of Washington will not go back to the less protective 2016 state human health criteria that EPA disapproved.

Ecology is completing this rulemaking under RCW 34.05.328(5)(b)(iii), which allows for more streamlined procedures for “[r]ules adopting . . . without material change federal statutes or regulations, . . . if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule.” Here, the State seeks to adopt, without change, the federal HHC that it has been implementing for years, and the Tribes believe this is the appropriate procedure to accomplish that adoption. Ecology already has the entirety of the federal administrative record supporting the federal HHC available to it, so the Tribes will not resubmit every comment or supporting document or study they submitted over the multiple notice and comment periods EPA held in regard to the federal HHC. Instead, the Tribes attach and incorporate by reference only a handful of their previously submitted materials, which discuss the legal and technical reasons for which EPA’s disapproval of the 2016 state HHC and promulgation of the federal HHC was required under the Clean Water Act. The Tribes will only briefly summarize some of those issues here but refer Ecology to those documents for the Tribe’s more specific comments on technical aspects of the HHC.

The Tribes appreciate Ecology’s proposal to adopt the federal HHC, which are grounded in sound science, directly into the WAC. When developing human health criteria for toxic pollutants, states are required to “adopt those water quality criteria that protect the designated use.” 40 C.F.R. § 131.11(a)(1). Those “criteria must be based on *sound scientific rationale* and must contain *sufficient parameters or constituents to protect the designated use.*” *Id.* (emphasis added). The most sensitive designated use must be protected, and even where not formally designated by a state, existing uses must be protected. *See, e.g.*, 40 C.F.R. § 131.11(a)(1) (“For waters with multiple use designations, the criteria shall support the most sensitive use.”); *id.* § 131.12(a)(1) (“Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.”); *id.* § 131.3(e) (defining “existing use”). In establishing criteria, states must base such criteria on EPA’s 304(a) guidance, 304(a) guidance modified to reflect site-specific conditions, or other scientifically defensible methods. *Id.* § 131.11(b)(1). While the disapproved state criteria did not meet these requirements, the federal criteria that EPA promulgated and that Ecology has been implementing—and now proposes to adopt—do.

The Tribes, of course, continue to believe that the federal standards that Ecology proposes to adopt into state law are not as stringent as could be supported by EPA’s administrative record and studies contained therein. Specifically, numerous tribal and other fish consumption surveys show much higher levels of fish consumption than the 175 g/day fish consumption rate (FCR) that both Ecology and EPA have used for all HHC since 2016. Tribal members in Washington routinely eat large amounts of fish and shellfish. *Washington State Dep’t of Ecology Fish Consumption Rate Technical Support Document* (DOE FCR TSD) at 46-63, available at <https://www.regulations.gov/document/EPA-HQ-OW-2015-0174-0194>. (summarizing surveys of contemporary tribal fish consumption). For instance, the survey completed by the Suquamish Tribe reflects a FCR of 284 grams/day (g/day) (or 10 ounces/day) for the 75th percentile, 489 g/day (or 17 ounces/day) for the 90th percentile, and 797 g/day (or 28 ounces/day) for the 95th percentile tribal member. *Id.* at 59-62 (WSDOE’s statistical analysis of Suquamish survey); *Fish Consumption Survey of the Suquamish Indian Tribe of the Port Madison Indian Reservation, Puget Sound Region* (August 2000), available at <https://www.regulations.gov/document/EPA-HQ-OW-2015-0174-0410>. Not accounting for salmon or other finfish consumption, the Port Gamble S’Klallam Tribe’s members consume 499 g/day (or 17.6 ounces/day) of shellfish (i.e., geoduck, littleneck clams, oysters, and crab). DOE FCR TSD at B-7. This is consistent with the Tribes’ historical practices. For instance,

Judge Boldt found that Indians party to the Yakima Treaty “annually consumed [salmon] ... in the neighborhood of 500 pounds per capita.” *United States v. Washington*, 384 F. Supp. 312, 380 (W.D. Wash. 1974), *aff’d and remanded*, 520 F.2d 676 (9th Cir. 1975) (Finding of Fact 151). In HHC terms, if divided evenly across the year, that amounts to a FCR of 621 g/day (or 22 ounces/day) for salmon alone. EPA Response to Comments at 155, 204, available at <https://www.regulations.gov/document/EPA-HQ-OW-2015-0174-0427>. However, the Tribes recognize the federal HHC (and the state HHC that EPA has approved) were a significant step forward in improving the protectiveness of the HHC applicable in Washington waters, which benefits all Washingtonians, including highly exposed populations like Tribes. Consequently, the Tribes support Ecology’s proposed rule.¹

In promulgating federal standards for Washington, EPA made several critical changes to the disapproved state standards that ensured they comported with sound science and protected designated uses, such that the Tribes are able to support their formal adoption in the WACs. In particular, EPA employed the EPA-recommended relative source contributions (RSCs) and EPA-recommended bioaccumulation factors (BAFs). In the disapproved state HHC, Ecology used an RSC of 1 to derive its criteria, but this was “based on the flawed assumption that 100% of human exposure to a pollutant is from fish and drinking water from waters that are subject to the State’s WQS” when “humans are exposed to pollutants through other sources of exposure.” *Restoring Protective Human Health Criteria in Washington*, 87 Fed. Reg. 19,046, 19,051 (Apr. 1, 2022); *Restoring Protective Human Health Criteria in Washington*, 87 Fed. Reg. 69,183, 69,186-87 (Nov. 18, 2022). The Tribes support the use of an RSC of 0.8 or lower for all non-carcinogens and nonlinear carcinogens. As described in our October 2019 comments to EPA (Attachment D, pages 23-24), the Tribes’ members engage in subsistence harvesting and traditional practices, such that they are regularly exposed to toxic pollutants through additional mechanisms, such as dermal exposure during clam digging in their U&A. It is essential that HHC for Washington waters capture other exposure paths like this, which an RSC of 1 necessarily did not allow. Human health criteria must consider the totality of exposure which can contribute to adverse health effects, even if the Clean Water Act does not allow a state to fully protect against every possible path of exposure. 87 Fed. Reg. at 19,051 (“While states can and do make risk management choices in developing criteria, using an RSC value that allocates the entirety of exposure to a subset of specific pathways directly addressed in criteria derivation inappropriately disregards the risks from other exposure routes.”). The Tribes agreed with EPA’s conclusion that:

Regarding RSC, the guidance recognizes the indisputable fact that exposure to pollutants through routes other than fish consumption can contribute to adverse impacts on human health and therefore need to be considered to ensure that criteria are scientifically sound and protect designated uses, as required by EPA’s regulations. EPA’s determination in this respect rests on the fact that the State’s RSC ignores entirely those other routes of exposure.

¹ The Tribes also note that many populations of Washingtonians consume fish at high levels. As Ecology itself indicated in its rulemaking for the approved state standards that are already in Table 240, WAC 173-201A-240: “Since Washington has a strong tradition of fish and shellfish harvest and consumption from local waters, and within-state survey information indicates that different groups of people harvest fish both recreationally and for subsistence (Ecology, 2013), [WSDOE] has made the risk management decision to base the fish consumption rate used in the HHC equation on “highly exposed populations,” which include, among other groups, the following: tribes, Asian Pacific Islanders (API), recreational and subsistence fishers, immigrant populations.” Ecology 2016 Washington State Water Quality Standards – Human Health Criteria and Implementation Tools at 28, available at <https://www.regulations.gov/document/EPA-HQ-OW-2015-0174-0357>; see also Wash. Standards RTC, at 25, available at <https://www.regulations.gov/document/EPA-HQ-OW-2015-0174-0424>. See generally DOE FCR TSD.

Id. at 19,052. The Tribes strongly believe that this is the correct—indeed, only lawful—approach to this issue, and therefore endorsed EPA’s analysis and conclusion in 2022, as well as Ecology’s implementation and formal adoption of federal HHC that account for it now.

The Tribes also support Ecology’s adoption of the federal HHC into state law because the federal HHC addressed the problem caused by Ecology’s prior use of bioconcentration factors (BCFs) instead of EPA’s default recommended bioaccumulation factors (BAFs) or state-specific BAFs to calculate the HHC, which was “inconsistent with sound scientific rationale on the bioaccumulation of pollutants.” 87 Fed. Reg. at 19,052-53; 87 Fed. Reg. at 69,186. While we appreciate that in some cases the use of BCFs may be necessary to provide an approximation of pollutant uptake in aquatic organisms, Ecology had the data needed to develop State-specific BAFs (if it chose to do so) and EPA’s updated national recommended default BAFs available to it. Instead, in 2016, Ecology chose outdated, unprotective BCFs developed prior to the national recommended BAFs. The result was HHC that would allow pollutant concentrations in fish at levels that would be far from protective of fish consumers’ health, even the health of those who consume extremely small amounts of fish. *See, e.g.*, Attachment D at 22-23. The Tribes agreed with EPA that Washington’s justifications for its use of BCFs were not “risk management” decisions, and that while states have latitude to make risk management decisions in developing WQS, that discretion does not allow states to make decisions that are not consistent with EPA’s regulations, including the requirement that criteria be based on sound scientific rationale. *See also* Attachment D at 20-21; Attachment E. Because the federal HHC address these serious concerns, the Tribes support Ecology’s proposed rule to remove the problematic disapproved state standards and adopt the federal HHC in their place.

Finally, the Tribes support Ecology’s rule because it will formally adopt the federal HHC for PCBs into state code. In 2016, all the HHC that Ecology submitted to EPA for approval employed a cancer risk level (CRL) of one in a million (1×10^{-6}), except for the criteria for PCBs. For that single pollutant, Ecology used a CRL of 2.3×10^{-5} (approximately 1 in 43,478). The Tribes will not mince words on this. It was obvious that Ecology took pains to ensure the final PCB criteria it adopted was no more stringent than the earlier National Toxic Rule’s PCB criteria of 0.00017 $\mu\text{g/L}$. *See* 87 Fed. Reg. at 19,054. To accomplish this (and still apply the 175 g/day FCR and other required inputs), rather than treat the CRL as an *input* to the HHC equation, the State instead *calculated* the CRL *after* selecting the final result it—or industrial dischargers—wanted (i.e., 0.00017 $\mu\text{g/L}$). *Id.* at 19,053-54. This is how the State arrived at the previously unheard of CRL of 2.3×10^{-5} . *Id.* In other words, the State reverse-engineered the CRL, and the State’s PCB criteria therefore lacked scientific integrity. EPA’s rejection of that results-oriented approach and determination that new PCB criteria were necessary was compelled by the Clean Water Act. 33 U.S.C. § 1313(c)(4)(B); 40 C.F.R. §§ 131.11(a), 131.22(b); Final Rule RTC, AR-1112, 25-26, 49, 50. The Tribes therefore support Ecology’s proposal to adopt the federal criteria for PCBs, which rely on a CRL of one in a million, into state code.²

To conclude, the Tribes thank Ecology for recognizing the need to adopt the federal HHC into the Washington Administrative Code, and we encourage the agency to quickly finalize the rulemaking. We are happy to answer any questions you may have about these comments, and you may contact Jane Steadman at jsteadman@kanjikatzen.com or 206-344-8100 to coordinate further discussion. Thank you

² As Ecology is aware, most of Washington’s waters have fish advisories for PCBs, which means Washingtonians cannot freely and safely eat certain species of fish or certain amounts of fish. This is highly problematic for all populations with high fish consumption, but for Tribes the problem is existential because it interferes with our ability to safely exercise our Treaty fishing rights. Ecology should be setting its WQS to address the problems that its citizens and Tribes face as a result of the pollutant discharges that Ecology regulates, not locking dangerous levels of pollution into place.

for considering these comments, and the Tribes look forward to our continued cooperative efforts to protect water quality in the State of Washington.

Sincerely,

/s/ Frances G. Charles

Chairwoman
Lower Elwha Klallam Tribe

/s/ Amber Caldera

Chairwoman
Port Gamble S'Klallam Tribe

/s/ Bill Sterud

Chairman
Puyallup Tribe of Indians

cc

Vince McGowan, Water Quality Program Manager, Washington State Department of Ecology
Marla Koberstein, Water Quality Standards Project Manager, Washington State Department of Ecology
Adam Levitan, Assistant Attorney General, Washington State Attorney General's Office

List of Attachments

- **Attachment A:** Letter from the State of Washington, Lower Elwha Klallam Tribe, Makah Tribe, Port Gamble S’Klallam Tribe, Sauk-Suiattle Tribe, Stillaguamish Tribe of Indians, and the Suquamish Tribe to EPA Acting Administrator Jane Nishida re State of Washington’s and Indian Tribes’ Joint Request to Reinstate EPA’s 2016 Rule for Water Quality Standards and Human Health Criteria (January 29, 2021), <https://www.regulations.gov/comment/EPA-HQ-OW-2015-0174-1023>
- **Attachment B:** Letter from Lower Elwha Klallam Tribe re Development of HHC/WQS for the State of Washington; Lower Elwha Klallam Tribe’s Comments after October 6, 2021 Consultation (October 15, 2021), <https://www.regulations.gov/document/EPA-HQ-OW-2015-0174-1065>
- **Attachment C:** Letter from the Port Gamble S’Klallam Tribe and the Suquamish Tribe re Government-to-Government Consultation and Coordination on EPA’s Proposed Federal Rulemaking to Restore Protective Human Health Criteria for Washington (October 15, 2021), <https://www.regulations.gov/document/EPA-HQ-OW-2015-0174-1062>
- **Attachment D:** Letter from Lower Elwha Klallam Tribe, Port Gamble S’Klallam Tribe, Stillaguamish Tribe of Indians, and Suquamish Tribe re Comments on Environmental Protection Agency Docket ID No. EPA-HQ-OW-2015-0174 – Withdrawal of Certain Federal Water Quality Criteria Applicable to Washington (October 7, 2019), <https://www.regulations.gov/comment/EPA-HQ-OW-2015-0174-0975>³
- **Attachment E:** Northwest Indian Fish Commission Comment Letter re Opposition to EPA’s 2019 Actions to Roll Back Washington’s Human Health Water Quality Criteria, Docket No. EPA-HQ-OW-2015-0174 (October 7, 2019), <https://www.regulations.gov/comment/EPA-HQ-OW-2015-0174-0975> (Attachment A)
- **Attachment F:** Ridolfi Environmental Report – Technical Review of EPA Proposal to Withdraw Federally Promulgated Human Health Water Quality Criteria for the State of Washington (October 1, 2019), <https://www.regulations.gov/comment/EPA-HQ-OW-2015-0174-0975> (Attachment B)
- **Attachment G:** Letter from Lower Elwha Klallam Tribe, Port Gamble S’Klallam Tribe, and Suquamish Tribe to EPA Administrator Michael Regan re Comments on Environmental Protection Agency Docket ID No. EPA-HQ-OW-2015-0174 –Restoring Protective Human Health Criteria in Washington Proposed Rule (May 31, 2022), <https://www.regulations.gov/comment/EPA-HQ-OW-2015-0174-1098>
- **Attachment H:** Letter from David Z. Bean, Chairman, Puyallup Tribal Council to Erica Fleisig, EPA Off. of Water Standards and Health Prot. Div. (Oct. 7, 2019), <https://www.regulations.gov/comment/EPA-HQ-OW-2015-0174-0955>

³ Note that Appendices to our October 7, 2019 comments, along with 59 technical articles, submitted with those comments are not being resubmitted with this comment letter as they are already part of Docket EPA-HQ-OW-2015-0174 and available to Ecology. The same is true of the attachments to all of the other letters listed above. If you do not have any of those materials, please let us know if you need us to resubmit them to Ecology for the record.