



MAKAH TRIBAL COUNCIL

P.O. BOX 115 • NEAH BAY, WA 98357 • 360-645-2201

The Makah Tribe is an equal opportunity employer.



Marla Koberstein
Department of Ecology
Water Quality Program
Olympia, WA 98504-7696
(Submitted via Electronic Portal)

October 28, 2024

Re: Makah Indian Tribe's Comments and Government to Government communication on the proposed rulemaking for updates to Washington's Human Health Criteria, Chapter 173-201A

Dear Ms. Koberstein,

The Makah Tribal Council (MTC) supports the Washington Department of Ecology's proposed rulemaking to update the State's human health criteria in the water quality standards for surface waters of the State. Chapter 173-201A. MTC appreciates the ability to comment on this proposed rule and to engage in government-to-government communication with the State of Washington. The MTC asks that Ecology consider and incorporate comments the Tribe has made since 2016, which should be part of the administrative record for the federal rulemakings.

Below, we provide background information on the Makah Tribe and clarify the MTC's position on and support of the proposed rulemaking.

The Makah Tribe

The homeland of the Makah Tribe, the Q^widičča?a•tš or the "People of the Cape," is located at the Northwest point of the Olympic Peninsula in Washington State. The Makah Reservation is approximately 47 square miles, and our Usual and Accustomed Treaty Fishing Area (U&A) extends north to the Canadian border, approximately 40 nautical miles offshore to the west into the Pacific Ocean and east into the Strait of Juan De Fuca to Tongue Point, and south along the State of Washington Outer Coast south to the Norwegian Memorial, or 48° 02' 15" S, approximately 21 miles south of Cape Flattery, covering approximately 1,550 square miles of marine territory (Figure 1). However, Makah traditional use of the ocean extends throughout extensive areas of the Pacific Ocean, Strait of Juan De Fuca, and into Puget Sound. The overall health of our treaty resources depends upon the interconnected ecosystems of the California Current, Alaska Current, and the Strait of Juan de Fuca, which come to a confluence in our Treaty U&A.

The 1855 Treaty of Neah Bay reserves Makah's right to retain and exercise inherent sovereign authority over our treaty protected area and ownership of the resources therein. The 1855 Treaty of Neah Bay is the legal agreement between the Makah Tribe and the United States that recognizes the Makah Tribe's status as a sovereign nation and therefore as a resource trustee. It

reserves inherent sovereign rights to natural resources, cultural practices, and other services and benefits in exchange for the cession of 469 square miles of territory to the United States government. Explicitly, the Treaty reserves the Makah Tribe's rights to hunt, fish, whale, seal, and gather within our Treaty U&A and in waters on the Makah Reservation. These rights were later confirmed and interpreted through the federal court decisions.

The cultural and traditional existence and well-being of the Makah people have always been closely tied to our relationship with the natural environment, especially the ocean and inland waters. This relationship continues today, in part through our robust and valuable treaty fisheries, which directly support over 50% of our local economy, nutritional security via food sovereignty, cultural practices, and the overall health of our community. Our extensive treaty fisheries include harvest of salmon, halibut, whiting, sablefish, hake, rockfish, other groundfish, crabs, sea urchins, shellfish, and other aquatic life. Community surveys indicate that 99% of the Makah community rely on fishing, shellfish, or hunting for a portion of their diet. Therefore, the overall health of our treaty resources and our community is dependent on waters that are safe and unpolluted.

The Makah Tribe recently received a waiver under the Marine Mammal Protection Act, from the National Oceanic and Atmospheric Administration, to afford the Tribe the ability to carry out its ceremonial and subsistence practice of hunting gray whales.¹ These large mammals are transient and will encounter Washington's waters.

The overall health of our Treaty resources depends upon the health of Washington's waters and the interconnected ecosystems that reside within them. The physical exercise of our Treaty rights is place-based meaning that Makah fishermen, unlike non-Native fishermen, cannot simply fish elsewhere if changes to the health of the waters, such as from pollution, disrupt fishing or the safety to consume the harvest. To protect our treaty interests, we engage in regular consultation with the State and federal government to ensure our voice is heard and our treaty resources are protected for generations to come.

The MTC Supports the Proposed Rule

The Makah Tribe has been an active participant in developing the Tribal consumption rate and human health criteria for more than a decade. We pushed hard for standards like those that were eventually imposed by the United States in 2016.

We are pleased that since 2016, Ecology has moved to supporting and implementing more stringent criteria. Over the past years, the Tribe has worked with Ecology and the Attorney General's Office to fight attempted rollbacks of water quality standards and support reestablishing those standards. While this has been a successful effort, it is also a tremendous waste of resources and delay in moving toward lower pollution and less contaminated seafood.

¹ See, FR Doc. 2024-12669 (June 18, 2024).

We support adopting the standards in State law, so that State and Federal standards are consistent and there is less opportunity for wasteful process going back and forth between federal administrations.

As highlighted above, safe and healthy waters are vital to the livelihoods of our tribal members. We recognize that by implementing this rule the State will be in compliance with federal criteria. These standards are based on sound science and protect the designated uses of Washington's waters. Implementing more stringent water quality standards prioritizes the fishing communities in Washington and protects generations to come.

The State of Washington is bound to comply with the Treaty of Neah Bay as supreme federal law, has a government-to-government relationship with the Tribe, and has consultation obligations pursuant to the Centennial Accords and other commitments. However, we suggest that the rules be adopted solely based on the State's obligations under the Clean Water Act, without reliance on the Tribe's Treaty rights or other legal rights and privileges. The Clean Water Act independently requires protection of subsistence fishers, including Tribal members.

The MTC agrees with the SEPA determination of non-significance as this proposed rule reflects existing federal standards. Any purported economic impacts asserted by dischargers are not effects under SEPA, both because SEPA is focused on environmental impacts, and because there is no deviation from the baseline legal requirements imposed by the existing standards.

Thank you for the opportunity to provide the Tribe's comments on the proposed rulemaking. Please contact Chris Martinez, Makah Tribal Council Chief of Staff, (cos@makah.com or 360-645-2080), with any questions or for any additional information.

Sincerely,

A handwritten signature in blue ink, appearing to read "Timothy J. Greene, Sr.", is positioned above the typed name.

Timothy J. Greene, Sr.
Chairman
Makah Tribal Council