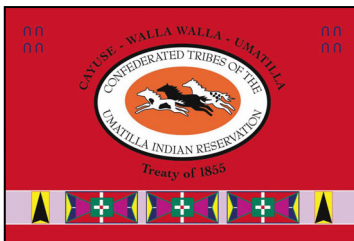


Anonymous Anonymous

Attached are the comments of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR) on the Washington Department of Ecology's (WDOE) proposal to adopt existing Federal Human Health Criteria (HHC) in establishing State Water Quality Standards (WQS). Thank you.

**Confederated Tribes *of the*
Umatilla Indian Reservation**

Department of Natural Resources



46411 Timine Way
Pendleton, OR 97801

www.ctuir.org ericquaempts@ctuir.org
Phone: 541-276-3165 Fax: 541-276-3095

October 25, 2024

Marla Koberstein
Water Quality Standards Project Manager
Water Quality Program
Washington Department of Ecology
P.O. Box 47696
Olympia, WA 98504-7696
marla.koberstein@ecy.wa.gov

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RE: CTUIR DNR Comments on WDOE Adoption of Existing Federal Human Health Criteria

Dear Ms. Koberstein:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR) provides the following comments on the Washington Department of Ecology's (WDOE) proposal to adopt existing Federal Human Health Criteria (HHC) in establishing State Water Quality Standards (WQS).¹ The CTUIR retains lands, rights, and interests in Washington State pursuant to our Treaty of 1855 with the United States and various other laws and statutes (see below). Protecting and preserving them requires, among other things, that State waters and their quality be protected, maintained, and restored. Washington's adoption of the existing Federal HHC would be a positive step toward achieving these goals.

The CTUIR is a federally recognized Indian tribe, with a reservation in Northeast Oregon and ceded, aboriginal, usual and accustomed, and traditional use areas in Oregon, Washington, Idaho, and other Northwest states. In 1855, predecessors to the CTUIR—ancestors with the Cayuse, Umatilla, and Walla Walla Tribes—negotiated and signed the Treaty of 1855 with the United States.² The Treaty is a contract between sovereigns, and *law*—indeed, “the supreme Law of the

¹ Proposed updates are to human health criteria in Table 240 of WAC 173-201A-240, Toxic substances, to: (1) replace 143 state-adopted human health criteria for 73 pollutants that EPA disapproved with the human health criteria and associated footnotes that EPA put into effect for Washington; (2) adopt as state law three human health criteria and associated footnotes for two pollutants that EPA put into effect for Washington that Ecology did not previously adopt state human health criteria for; and (3) correct typographical errors in Table 240. <https://ecology.wa.gov/regulations-permits/laws-rules-rulemaking/rulemaking/wac-173-201a-hhc>. See also Letter/E-Mail (Sept. 17/18, respectively) from Heather Bartlett, WDOE Deputy Director, to Eric Quaempts, CTUIR DNR Director (“Ecology is proposing amendments to Chapter 173-201A WAC, Water Quality Standards for Surface Waters of the State of Washington. We propose to remove certain human health criteria in WAC 173-201A-240 that the U.S. Environmental Protection Agency (EPA) previously disapproved and replace the disapproved criteria with the limits and associated footnotes that EPA put in place for Washington's waters. These federally promulgated criteria were adopted in 2022 and are already in effect.”).

² 12 Stat. 945.

Land” under the United States Constitution. The Treaty’s provisions are applicable to the United States, its departments and agencies, and to the subordinate states.³

In the Treaty of 1855 the CTUIR ceded millions of acres of land to the federal government, and in exchange received assurances that our sovereignty would be recognized and respected, our various pre-existing tribal rights would be honored, and our interests would always be considered and safeguarded, in perpetuity. A paramount objective and intent of our Treaty signers was to protect and maintain our tribal First Foods—water, fish, big game, roots, berries, and other plants—and the habitats and environmental conditions that support and sustain them, then, now, and forever. This remains an overriding objective of the CTUIR. Protecting and maintaining our tribal First Foods is essential to safeguarding our Treaty Rights and the traditions, culture, and way of life those Rights were meant to uphold and perpetuate.

Among other things, the Treaty of 1855 explicitly guarantees to the CTUIR and its members the right of “taking fish.” With that right is the implicit, concurrent, assurance that there will be fish to take—that they will exist. *There is also the assurance—without which the Treaty fishing right would be no more than a hollow promise—that those fish will not be contaminated with human toxins, and that they will be safe for us to eat.*

The CTUIR DNR supports the formal adoption by Washington of the existing Federal Human Health Criteria for State Water Quality Standards. WDOE’s proposed criteria and standards to protect human health would use a Fish Consumption Rate (FCR) of 175 grams/day, based on tribal fish consumption patterns and studies, and a cancer risk level of one-in-one-million (10^{-6}), both of which would be consistent with Oregon’s criteria and standards.

As we have noted for decades, throughout this process and that in Oregon and other states, 175 grams/day is a compromise figure—the bare-minimum that should be considered for purposes of standard-setting. In reality there are significant numbers of tribal people who may consume substantially more than that amount. Furthermore, and more broadly, for the CTUIR and its members, toxic contaminants in fish from human-generated toxic substances in water profoundly endanger tribal members and tribal communities and represent an unacceptable, critical infringement of our rights under the Treaty of 1855.

³ Pursuant to the Constitution’s Supremacy Clause, treaties and statutes also bind states. *Antoine v. Washington*, 420 U.S. 194, 205 (1975) (like a treaty, when Congress by statute ratifies an agreement that reserves Tribal rights, “State qualification of the rights is precluded by force of the Supremacy Clause, and neither an express provision precluding state qualification nor the consent of the State [is] required”); *U.S. v. Washington*, 853 F.3d 946, 966 (9th Cir. 2017) (Holding that “in building and maintaining barrier culverts within the Case Area, Washington has violated, and is continuing to violate, its obligation to the Tribes under the Treaties.”) aff’d, 138 S.Ct. 1832 (per curiam); *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 512 (9th Cir. 2005) (Treaties “constitute the ‘supreme law of the land’” and have “been found to provide rights of action for equitable relief against non-contracting parties,” and such equitable relief “ensures compliance with a treaty; that is, it forces state governmental entities and their officers to conform their conduct to federal law.”); see also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (noting that “[a]lthough States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making,” and accordingly, the treaty in that case gave the Chippewa Tribe “the right to hunt, fish, and gather in the ceded territory free of . . . state, regulation.”).

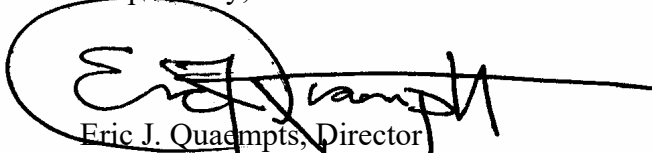
As water recognizes no artificial state boundaries, it is important to promote consistency, as much as possible, among the states within the region in adopting criteria and setting standards. Tribal people of the Columbia River Basin, including CTUIR members, consume fish and other aquatic biota from throughout the watershed, and they do so to a much greater extent than do non-Indian people. Adequate, consistent, and effective standards and criteria are essential to better protect our tribal fish consumers' health, well-being, and ways of life and the waters and fish on which they are based—and will indeed benefit all those who value and enjoy those resources.

The CTUIR DNR appreciates the many benefits obtained under the federal Clean Water Act. We understand that the Act does not actually prohibit water pollution per se, but in fact allows it under certain specified limits and conditions under a regulatory system of permits and authorizations. We maintain now, as we have always done, that the Treaty-secured fishing rights of the CTUIR and its members are for fish that are healthy and safe to eat and free from dangerous human-sourced contaminants.

Finally, the CTUIR DNR appreciates that WDOE is “starting this rulemaking at the rule proposal phase, which opens the formal public comment period . . . because this proposed rule adopts, without change, federal regulations.”⁴ Litigation has stalled and complicated efforts to better protect State water quality through improved, more rigorous standards, and adopting this rule as soon as possible is appropriate.

The CTUIR DNR thanks you for your consideration of our comments on the Washington Department of Ecology's proposal to adopt existing Federal Human Health Criteria in establishing State Water Quality Standards. We look forward to continuing to work effectively and collaboratively with the WDOE and the State of Washington to protect, recover, and restore our waters and waterways and all of our shared natural and environmental resources for the benefit of all people.

Respectfully,



Eric J. Quaeempts, Director
Department of Natural Resources
Confederated Tribes of the Umatilla Indian Reservation

Cc: Heather Bartlett, Deputy Director, WDOE, heather.bartlett@ecy.wa.gov
CTUIR Tribal Water Commission
CTUIR Fish and Wildlife Commission

⁴ <https://ecology.wa.gov/regulations-permits/laws-rules-rulemaking/rulemaking/wac-173-201a-hhc>.