LOWER ELWHA KLALLAM TRIBE

ʔəʔɬx̣ʷə nəxʷsƛay̓əm "Strong People"

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September 15, 2014

Gina McCarthy, Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, D.C. 20460

Re: Request for prompt EPA promulgation of human health-based water quality standards for Washington State

Dear Administrator McCarthy:

I write on behalf of the Lower Elwha Klallam Tribe in western Washington State to urge EPA leadership to support the efforts of its Region X in initiating promulgation of a Fish Consumption Rate (FCR) of 175 grams/day and an associated cancer risk of 10^{-6} (one in a million) for the State of Washington. The scientific evidence has long supported the need for these basic standards, without which several distinct communities in Washington, including nearly two dozen Indian tribes with treaty fishing rights, will be disproportionately harmed. Repeated delays and false starts by the State of Washington and its cognizant agency, the Department of Ecology, have made it urgently necessary for EPA to follow through with the action that Region X is proposing. EPA has already approved these standards for the neighboring State of Oregon in 2011, and approval for Washington will have the added benefit of regional consistency, including with respect to shared major watersheds such as the Columbia River basin.

Over two years ago, in July, 2012—due to objections and threats from industry—the State abruptly suspended an ongoing rulemaking effort geared toward promulgating the 175 g/day FCR. Since then, the State has missed several self-imposed deadlines for issuing a *draft* rule, and as a result will now be unable to issue a *final* rule by the end of 2014, the timeframe

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previously called for by EPA Region X as necessary to avoid "undue delay." Recently, the Washington Governor's office at last announced its latest approach to this issue—it promises merely a *preliminary draft* rule by September 30, 2014, which will propose the 175 g/day FCR while at the same time *increasing* the cancer risk by a factor of 10, to 10^{-5} (one in one hundred thousand). The proposed increase in cancer risk would essentially cancel out the improved FCR, rendering it, in effect, the equivalent of 17.5 g/day under the present cancer risk factor of 10^{-6}. It is clear the State recognizes, as does EPA Region X, that the FCR needs to be raised to the 175 g/day level, but it is equally clear that the State lacks the will to implement it effectively. That is why EPA must assume responsibility.

Like most Washington tribes, Lower Elwha has a treaty right to harvest fish at all of its usual and accustomed grounds and stations, which was hard-won during the fishing rights struggles of the 1950s-70s, culminating in the 1974 Boldt Decision in federal district court and its affirmance by the Supreme Court. Since that time, Washington tribes have become leaders in fisheries management and restoration, experienced co-managers of this precious resource on which the entire region depends. Lower Elwha has done its part by, among other things, leading the effort to remove the dams on the Elwha River—the largest dam removal project to date in the United States—and restore its ecosystem and once-abundant salmon runs.

Because of our treaty rights and management capabilities, Lower Elwha has also been a key partner in several long-running toxic cleanup and restoration efforts, where we have learned many lessons about State-led cleanup efforts and about how State water quality standards and the FCR can affect cleanup or natural resource restoration levels. Our most notable and sustained involvement has been at Port Angeles Harbor (processes that involve at least seven major PRPs (Potentially Responsible Parties)). EPA, our Tribe, and the Washington Department of Ecology are all party to a Deferral Agreement, in which EPA has deferred its CERCLA responsibility for cleanup of the Harbor to Ecology, but subject to the Tribe's right to participate *and concur* in all major cleanup decisions. We take that responsibility very seriously and have been diligent in our involvement for over 15 years. We have also led the effort to organize a Natural Resources Damages (NRD) Trustee Council under CERCLA to pursue restoration projects to compensate for damage to resources in the Harbor caused by toxic contamination.

Because of this long history of detailed involvement, we understand the implications that major cleanup decisions may have on human health, recovery and restoration of natural resources, and the potential financial impacts on the PRPs. We are intimately aware of the relationship between persistent, bioaccumulative contaminants in aquatic systems and the risks to human receptors (consumers) of fish and shellfish. These risks are further magnified when high end subsistence consumers, including Native American and Asian/Pacific Islanders, receive a disproportionate body burden of these contaminants due to higher rates of fish consumption. This is also the case for many non-native subsistence consumers. We are also aware that water quality

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standards are among the best regulatory tools to prevent or reduce toxic pollutants from entering a state's waterways. These standards establish goals for surface waters, including protecting sources of drinking water and helping ensure that fish are safe to eat.

It has been well known for many years that the current Washington State FCR of 6.5 g/day, a mere nugget-sized portion, is grossly inadequate. Numerous peer-reviewed studies have shown that tribal communities consume fish and shellfish at levels that are orders of magnitude greater than this, often in excess of 500 g/day for Lower Elwha and other Puget Sound Tribes. Thus an FCR of 175 g/day already represents a serious compromise by the Tribes. The tenfold increase in cancer risk under the new State of Washington proposal effectively yields an FCR that is the functional equivalent of 17.5 g/day, a mere three nuggets.

The State's new, belated proposal has profound environmental justice implications. Its unacceptable cancer risk will fall most heavily on several distinct communities, including commercial fishermen, Pacific Islanders, and Indian tribes. In the case of the Tribes, the one factor that ensures they will continue to consume fish at a rate high enough to incur these disproportionate impacts is their treaty right. In 1855 the Tribes insisted on preserving this ancient right, so central to tribal culture and economy, in return for ceding title to so much real estate. This fundamental tribal right is seriously undercut by water quality standards that make it hazardous for tribal people to consume the fish they are entitled to harvest.

Accordingly we most strongly urge EPA to support the efforts of Region X to promulgate an FCR of 175 grams/day and an associated cancer risk of 10^{-6}. This sensible, scientifically supportable approach will ensure that the health of *all* consumers of fish and shellfish taken from Washington State waters will finally be adequately protected. If you have any questions or concerns, please feel free to contact me at 360-452-8471, ext. 7411, or our Environmental Coordinator Matt Beirne at 360-457-4012, ext. 7480, matt.beirne@elwha.org.

Sincerely,

Frances G. Charles, Chairperson
Lower Elwha Klallam Tribe

cc: Lisa Feldt, Acting Deputy Administrator, EPA
Ken Kopocis, Deputy Assistant Administrator of the Office of Water, EPA
Dennis McLerran, Regional Administrator, EPA Region 10
Northwest Indian Fisheries Commission

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