



Northwest Indian Fisheries Commission

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July 10, 2017

The Honorable Scott Pruitt
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Re: Request to Deny Petition for Reconsideration of EPA's Revision of Certain Federal Water Quality Criteria Applicable to Washington, Filed February 21, 2017, by Northwest Pulp & Paper Association, et al.

Dear Administrator Pruitt:

The Northwest Indian Fisheries Commission (NWIFC)¹ respectfully requests that EPA deny the above-referenced Petition to Reconsider its Partial Disapproval of Washington's Human Health Water Quality Criteria and Implementation Tools, and to repeal its Final Revision of Certain Federal Water Quality Criteria Applicable to Washington, 81 Fed. Reg. 85417 (Nov. 28, 2016) (Petition), submitted under 5 U.S.C. § 533(e).² EPA's rule was the culmination of years of extensive public process at the state and federal levels involving a broad array of stakeholders. The resulting human health criteria (HHC) for Washington are scientifically based and legally defensible. They are accompanied by a suite of implementation tools, which provide generous timelines for compliance and other mechanisms for flexibility in achieving the updated water quality standards (WQS). Notably, the State of Washington itself is not seeking to disturb the EPA rule. As Washington State Department of Ecology Director Maia Bellon explained, the state is not asking EPA to revisit its rule because reconsideration "didn't seem like a good use of our time ... we want to focus our time on

¹ The NWIFC member tribes are the Lummi, Nooksack, Swinomish, Upper Skagit, Sauk-Suiattle, Stillaguamish, Tulalip, Muckleshoot, Puyallup, Nisqually, Squaxin Island, Skokomish, Suquamish, Port Gamble S'Klallam, Jamestown S'Klallam, Lower Elwha Klallam, Makah, Quileute, Quinault, and Hoh, each of which holds fishing, hunting, and gathering rights in fresh and marine waters in western Washington, reserved in the 1854 and 1855 Stevens Treaties. NWIFC governing documents approved by each of the sovereign member tribes authorize NWIFC to prepare and submit these comments.

² Northwest Pulp & Paper Association, et al., Petition to Reconsider its Partial Disapproval of Washington's Human Health Water Quality Criteria and Implementation Tools, and to Repeal its Final Revision of Certain Federal Water Quality Criteria Applicable to Washington (Feb. 21, 2017) [hereinafter Petition].

making sure our ... NPDES permit holders ... are going to meet those standards into the future.”³ EPA, too, should devote its time and resources to more fruitful efforts.

The Petition, moreover, largely rehashes arguments that have already been thoroughly vetted in public processes and carefully considered by EPA. EPA provided its reasons for accepting or rejecting these arguments, as appropriate, and documented its analysis in a voluminous record. Neither the science nor the law has changed. There is thus no warrant for EPA to reconsider its rule, as any new rulemaking that is grounded in the science would produce the same outcome.

Instead of moving backward and revisiting the rule, the EPA should allow the state and its local partners here in Washington – including the tribes – to move forward, and focus on innovative and effective implementation.

I. The EPA Supported the State’s Effort to Update its Water Quality Standards, but Must Itself Uphold the Clean Water Act

Both the state and the EPA have legal obligations under the Clean Water Act (CWA) as they work together to achieve its objective “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁴ EPA provided technical and other support throughout the state of Washington’s effort to revise its outdated water quality standards, seeking to facilitate a state process that would result in approvable WQS. Contrary to the Petition’s characterization, the EPA’s relationship with the state has been one of support and deference, even as the state’s update was repeatedly delayed. However, the EPA could no longer ignore its own obligations under the CWA and was ultimately compelled by court order to act.

The CWA envisions frequent updates to state water quality standards, directing states at least every three years to review and, as appropriate, revise their WQS.⁵ The CWA sets forth the touchstone for state efforts to this end: “[s]uch standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter.”⁶ Among those purposes, the CWA sets forth a national goal of “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.”⁷

³ *Inside Olympia with Ecology Director Maia D. Bellon*, Inside Olympia (May 25, 2017) <https://www.tvw.org/watch/?clientID=9375922947&eventID=2017051094&eventID=2017051094&autoStartStream=true>.

⁴ Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251(a).

⁵ 33 U.S.C. § 1313(c)(1). The CWA authorizes both states and tribes to administer WQS for waters under their respective jurisdictions. However, because these comments address a state’s (Washington’s) failure to submit fully approvable WQS and EPA’s issuance of certain human health criteria for that state, they will refer throughout to the duties of “states” under the CWA.

⁶ 33 U.S.C. § 1313(c)(2).

⁷ 33 U.S.C. § 1251(a)(2).

The EPA has interpreted this goal of “fishable” uses to “include, at a minimum, designated uses providing for the protection of aquatic communities and human health related to consumption of fish and shellfish.”⁸ States may opt, however, to adopt more protective designated “uses” for their waters.

Under the CWA, water quality standards include HHC. These are health-based standards: at Congress’ direction, the touchstone for HHC is human health (rather than, for example, technological feasibility or cost-benefit balancing).⁹ Because fish are the primary route of human exposure to PCBs, mercury, dioxins, and a host of toxic chemicals that are harmful to human health, HHC are set to ensure that people can safely consume fish, without also being exposed to contaminants in harmful amounts.

Pursuant to EPA guidance, agencies enlist quantitative risk assessment methods to set standards for both threshold and non-threshold contaminants. For threshold contaminants, standards are set so that contaminants don’t exceed levels that are safe for humans. For non-threshold contaminants, including carcinogens, exposure to any non-zero amount has the potential to cause cancer; standards are set so that contaminants don’t exceed a risk level determined to be “acceptable.” In either case, agencies then work with a risk assessment equation to calculate the concentration of each chemical that will be permitted in the waters that support fish. Agency risk assessors consider the toxicity of each contaminant together with human characteristics and practices that expose people to the contaminant in their environment: how much fish will people eat, over how long a period, and at what bodyweight? The fish consumption rate (FCR) is a key variable in this equation. For carcinogens, the cancer risk level deemed “acceptable” is another key variable.

The CWA enlists both states and the EPA in furthering its goals, in a relationship of “cooperative federalism.” CWA §304(a) directs EPA to assist states by requiring EPA to develop, publish, and revise from time to time, “criteria for water quality accurately reflecting the latest scientific knowledge [] on the kind and extent of all identifiable effects on health and welfare.”¹⁰ For their part, states must “adopt criteria for all toxic pollutants ... for which [§304(a)] criteria have been published” by EPA whenever states review or revise their water quality standards or adopt new standards.¹¹ Importantly, the CWA gives EPA broad authority to oversee state efforts to this end, requiring states to submit WQS to EPA for approval or disapproval, and requiring EPA to issue WQS

⁸ Proposed Revision of Certain Federal Water Quality Criteria Applicable to Washington, 80 Fed. Reg. 55063, 55064 (Sept. 14, 2015); 40 C.F.R. § 131.2, § 131.4 (unless a state or tribe demonstrates that this use is not attainable, by means of a “use attainability analysis” pursuant to 40 C.F.R. § 131.10(j)).

⁹ See, e.g., Michael A. Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards* 89 N.Y.U. L. REV. 1184, 1190 (2014) (“The major U.S. environmental statutes contain three principal approaches for determining the stringency of environmental protection: cost-benefit standards, feasibility standards, and health-based standards”).

¹⁰ 33 U.S.C. § 1314(a)(1).

¹¹ 33 U.S.C. § 1313(c)(2)(B).

for a state if the state fails to make the necessary changes to obtain approval within the statutorily specified window.¹² In addition to working with states to develop water quality standards, the CWA independently directs EPA to issue water quality standards itself on states' behalf "in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of [the CWA]."¹³

Congress' impatience with the slow pace of states' work to control toxic contamination was well documented during the debate surrounding the 1987 amendments to the CWA; the resulting provisions for regular triennial revisions to state WQS reflect this concern.¹⁴ Nonetheless, Washington failed to produce state WQS in the wake of the 1987 amendments, necessitating that its waters obtain coverage under the National Toxics Rule (NTR), which EPA was forced to promulgate in 1992 for those states that were unable to issue timely WQS on their own.¹⁵ Although the State of Washington soon recognized the need to revise these NTR-based standards, its efforts stalled for years. All the while, Washington's waters were allowed to be contaminated up to the level permitted by its extant standards – a level that supported fish consumption at a mere 6.5 grams/day – just one fish meal per month. This estimate of fish intake was drawn from a survey of the general population in the United States conducted back in 1973-74.

Meanwhile, more recent local studies of fish intake by tribal and other populations in the Pacific Northwest became available in the 1990s. For example, the Columbia River Inter-Tribal Fish Commission (CRITFC) published a survey quantifying its four member tribes' contemporary fish consumption in 1994; and the Squaxin Island and Tulalip Tribes published a survey of their respective tribes' contemporary fish intake in 1996.¹⁶ These surveys documented contemporary fish intake at markedly higher rates than reflected in Washington's FCR, ranging as high as 972 grams/day.¹⁷ Shortly thereafter, Washington acknowledged the need to incorporate this new scientific data into state standards for water and cleanups. In fact, it published a draft analysis of these studies as early as 1999.¹⁸ Yet, it sat on its NTR-based standards for another decade,

¹² 33 U.S.C. § 1313(c)(2)-(4)(A).

¹³ 33 U.S.C. § 1313(c)(4)(B).

¹⁴ Congress' distaste for delay on the part of the states was made known during debate surrounding the 1987 amendments. *See, e.g.*, U.S. Environmental Protection Agency, Establishment of Numeric Criteria for Priority Toxic Pollutants; States' Compliance; Final Rule, 57 Fed. Reg. 60848, 60849 (Dec. 22, 1992) [hereinafter EPA, NTR] ("The critical importance of controlling toxic pollutants has been recognized by Congress and is reflected, in part, by the addition of section 303(c)(2)(B) to the Act. Congressional impatience with the pace of State toxics control programs is well documented in the legislative history of the 1987 amendments.").

¹⁵ *Id.*

¹⁶ COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, A FISH CONSUMPTION SURVEY OF THE UMATILLA, NEZ PERCE, YAKAMA AND WARM SPRINGS TRIBES OF THE COLUMBIA RIVER BASIN (1994); KELLY A. TOY, ET AL., A FISH CONSUMPTION SURVEY OF THE TULALIP AND SQUAXIN ISLAND TRIBES OF THE PUGET SOUND REGION (1996).

¹⁷ *Id.* 972 grams/day is the maximum value documented in the CRITFC survey.

¹⁸ In 1999 Ecology published a draft document, which it never finalized, that analyzed the CRITFC and Tulalip/Squaxin Island data as part of its review of the then-current science for use in its risk-based water quality

preferring to wait and “observe” while neighboring states and tribes updated their respective WQS to reflect the most recent science.¹⁹

The scientific evidence continued to mount showing higher fish intake by people affected by Washington’s standards. For example, a survey of ten Asian-American and Pacific Islander groups in King County was published in 1999; and a survey of the Suquamish Tribe was published in 2000.²⁰ It wasn’t until 2010 that Washington finally initiated the formal process to update its WQS. And then its rulemaking effort dragged on for years.

Throughout this time, EPA worked alongside Washington’s Department of Ecology (Ecology), seeking to facilitate a state process that would result in approvable WQS.²¹ Even as the state struggled through several missed deadlines, reversals of course, and other irregularities – and the months and then years ticked by – EPA did its utmost to defer to the state and allow the state’s process to unfold. Ultimately, more than two decades passed between the time the CRITFC data became available and the time Washington finally updated its water quality standards to reflect this scientific information. Washington’s egregious delay is summarized in NWIFC’s Comments on Ecology’s 2016 Draft Rule.²²

Washington’s recalcitrance is of great concern to NWIFC and its 20 member tribes. NWIFC’s member tribes have constitutionally protected, treaty-reserved rights to harvest, consume, and manage fish and shellfish in their usual and accustomed areas. These areas are directly or indirectly affected by the WQS established for waters over which the state claims jurisdiction.²³ NWIFC thus emphasizes the urgent need to ensure that WQS for Washington protect these reserved rights and resources, and protect the health, livelihoods, and well-being of tribal members. While Ecology’s process was allowed to drag on, Washington’s outdated standards forced anyone who would eat

and cleanup standards. LESLIE KEILL & LON KISSINGER, WASHINGTON STATE DEPARTMENT OF ECOLOGY, ANALYSIS AND SELECTION OF FISH CONSUMPTION RATES FOR WASHINGTON STATE RISK ASSESSMENTS AND RISK-BASED STANDARDS (Draft, 1999).

¹⁹ Catherine A. O’Neill, *Fishable Waters*, 1 AM. INDIAN L. J. 181, at 220-27 & n.209 (2013) [hereinafter O’Neill, *Fishable Waters*] (chronicling Washington’s lengthy delay in updating its WQS and documenting Ecology staff statements to this effect).

²⁰ Ruth Sechana, et al., ASIAN AND PACIFIC ISLANDER SEAFOOD CONSUMPTION SURVEY (1999); THE SUQUAMISH TRIBE, FISH CONSUMPTION SURVEY OF THE SUQUAMISH INDIAN TRIBE OF THE PORT MADISON INDIAN RESERVATION, PUGET SOUND REGION (2000) [hereinafter Suquamish Survey].

²¹ In fact, the state came under criticism for the numerous delays and reversals of course that marked its process; nonetheless, EPA worked assiduously to facilitate the state’s efforts to produce approvable WQS. See, e.g., O’Neill, *Fishable Waters*, at 232-40.

²² Northwest Indian Fisheries Commission, Comments on the Washington Department of Ecology’s 2016 Draft Rule for Human Health Criteria and Implementation Tools in Washington Water Quality Standards, Appendix A, “Detailed Chronology of Tribal Efforts to Establish Revised Human Health Criteria and State’s Responses” (April 20, 2016) [hereinafter NWIFC, Comments on Ecology’s Draft Rule].

²³ 90.48.030 Wash. Rev. Code (“The department [of Ecology] shall have the jurisdiction to control and prevent the pollution of streams, lakes, rivers, ponds, inland waters, salt waters, water courses, and other surface and underground waters of the state of Washington”).

fish more than once a month to do so at his or her peril. The affront to the NWIFC tribes – who are fishing peoples – is profound.

EPA, of course, has its own legal obligations under the CWA. It could no longer wait in the wings while the state permitted these unsupportable standards to operate as a *de facto* ceiling on the safe consumption of fish from Washington waters. Finally, in September of 2015, EPA stated that “[b]ecause Washington’s existing human health criteria, as promulgated by EPA in the NTR, are no longer protective of the applicable designated uses per the CWA ... EPA determines under CWA section 303(c)(4)(B) that new or revised WQS for the protection of human health are necessary to meet the requirements of the CWA for Washington.”²⁴ EPA noted that Washington had yet to update the 1992 NTR-based standards and emphasized that “the best available data now demonstrate that fish consumers in Washington, including tribes with treaty-protected rights, consume much more fish than 6.5 g/day. There are also new data and scientific information available to update the toxicity and exposure parameters used to calculate human health criteria.”²⁵ EPA’s determination triggered a non-discretionary duty under the CWA to propose water quality standards for Washington within ninety days.²⁶ Nonetheless, EPA held back, in hopes that the state would issue its own standards. Still, the state was unable to do so.

On February 26, 2016, Washington Waterkeepers sued the EPA in federal district court, and shortly thereafter sought an injunction requiring EPA to comply with the CWA by promulgating revised water quality standards within thirty days of a court order.²⁷ Even here, EPA sought to accommodate the state, requesting that the court permit additional time for the state to produce an approvable rule.²⁸ Specifically, it asked that any court-ordered deadline be postponed until September 15, 2016, but, if Ecology submitted its own water quality standards before that date, that the deadline be postponed further, until November 15, 2016, in order “to prevent unnecessary promulgation of federal criteria.”²⁹ The court was persuaded by EPA’s entreaty on the state’s behalf.

As even this summary account of the rulemaking timeline makes clear, *EPA’s relationship with the state has been one of support and deference* – quite the opposite of the picture the Petition attempts to paint of an EPA that “has sought to advanced [sic] its agenda with no basis in and in disregard of the Clean Water Act.” Rather, it was because of its obligations under the CWA that EPA

²⁴ 80 Fed. Reg. at 55066.

²⁵ *Id.* at 55063.

²⁶ 33 U.S.C. § 1313(c)(4). The deadline was December 14, 2015.

²⁷ *Puget Soundkeeper Alliance, et al. v. U.S. Environmental Protection Agency*, Case No. 2:16-cv-00293-BJR, Memorandum Opinion, 2 (W.D. Wash., Aug. 3, 2016).

²⁸ *Id.* at 4.

²⁹ *Id.* at 6.

could no longer legally decline to act. Indeed, as the federal district court put it, “when agency dereliction occurs, as it did here,” courts must compel their compliance with the CWA.³⁰

II. Washington Submitted Standards that Were Not Based on “Sound Scientific Rationale” and Were Not Fully Approvable by EPA

Ultimately, Washington submitted standards to EPA that, while approvable in some respects, fell short of this mark in others. EPA is tasked with ensuring that a state’s water quality criteria are “based on sound scientific rationale” and “contain sufficient parameters or constituents to protect the designated use.”³¹ However, Ecology’s criteria in numerous instances simply ignored the best available science. More importantly, this was the case for several priority contaminants and key variables. Contrary to the Petition’s contention, EPA could not permissibly have approved the standards submitted by Washington.

Ecology submitted a rule that, as a general matter, took a step forward with respect to some of the key variables used to calculate its standards. Faced with overwhelming scientific evidence that people affected by Washington’s standards consume fish at rates considerably greater than the agency had previously assumed, the state was persuaded that it could not defensibly use an FCR of less than 175 grams/day. While this FCR captures only contemporary fish intake that has been shown to be biased downward due to suppression, it is an improvement in terms of incorporating updated science.³² Ecology’s rule also continued to embrace the state’s longstanding judgment that people should not be subjected to an increased cancer risk greater than 1 in 1,000,000. For several of the contaminants that matter most for human health, however, Ecology’s rule included exceptions or alternative assumptions that resulted in less protective standards.

For example, Ecology’s final rule effectively did nothing to update its standards for either methylmercury or PCBs – leaving in place a status quo that was a quarter of a century old (these two examples are elaborated below). Worse, Ecology’s rule resulted in *more lenient* standards for dioxins, arsenic, and 5 of the 7 carcinogenic polycyclic aromatic hydrocarbons (PAHs) than those previously in force in the state. EPA appropriately found that it could only partially approve

³⁰ *Id.* at 7.

³¹ 40 C.F.R. § 131.11(a)(1).

³² As documented at length in comments by NWIFC to Ecology, while an FCR of 175 grams/day is an “improvement” over the woefully outdated and unsupportable FCR on which Washington’s WQS had previously been based, from NWIFC’s perspective this FCR reflects a “a minimum value that must be used in conjunction with other revised values” for the inputs to the equations used to derive human health criteria, including the acceptable risk level, bioaccumulation factors, and relative source contribution. Moreover, this FCR “is lower than documented contemporary or heritage rates in regional tribal communities, and does not account for the suppression of fish consumption resulting from the availability of fish and shellfish, habitat degradation, biological and chemical contamination, or access to fishing grounds.” NWIFC, Comments on Ecology’s Draft Rule, at 13-30, & App. C.

Washington's rule, where Ecology had circumvented, rather than grounded its standards in, an updated and "sound scientific rationale" and had thus submitted HHC that would fail to be protective of Washington's designated uses. The reasoning supporting EPA's finding was thoroughly explained in its final rule and its technical basis elaborated in EPA's 46-page Technical Support Document.³³

A. Methylmercury

Washington's approach to methylmercury is out of step with the current science. The adverse human health effects of methylmercury have long been documented, for example, in the EPA's *Mercury Study Report to Congress* in 1997, and in the National Research Council's *Toxicological Effects of Methylmercury* in 2000.³⁴ Despite broad scientific consensus regarding methylmercury's harms and despite EPA guidance on a methylmercury criterion dating from 2001, Washington, remarkably, *simply refused to update* its standard for methylmercury. Instead, it put off any revision of its mercury standard until some unspecified time in the future, stating that it had "decided to defer" the adoption of a methylmercury HHC until after the current rulemaking.³⁵ That is, Ecology took it upon itself to relegate to the back burner one of the state's *most pressing* contaminants.

Methylmercury is a potent neurodevelopmental toxin; exposure *in utero* or during childhood may result in irreversible neurological damage.³⁶ Methylmercury is an extremely bioavailable form of mercury, readily uptaken by fish, where it bioaccumulates in fish tissue.³⁷ In 2001, EPA issued its methylmercury water quality criterion, expressed as a fish and shellfish tissue value.³⁸ As it noted, "[t]his approach is a direct consequence of the scientific consensus that consumption of contaminated fish and shellfish is the primary human route of exposure to methylmercury."³⁹ In discussing methylmercury's human health risks, EPA stated bluntly that "methylmercury is highly toxic to mammalian species and causes a number of adverse effects."⁴⁰ EPA's methylmercury criterion was based on a reference dose (RfD) of 0.1 µg/kg/day that had been "established as the Agency consensus estimate in 1995," and its scientific basis "updated using the most current data

³³ U.S. Environmental Protection Agency, Technical Support Document, The EPA's Partial Approval/Partial Disapproval of Washington's Human Health Water Quality Criteria and Implementation Tools Submitted on August 1, 2016 (Nov. 15, 2016) [hereinafter EPA, TSD for Washington's HHC].

³⁴ U.S. ENVIRONMENTAL PROTECTION AGENCY, 1 MERCURY STUDY REPORT TO CONGRESS (1997); NATIONAL RESEARCH COUNCIL, TOXICOLOGICAL EFFECTS OF METHYLMERCURY (2000) [hereinafter NRC, METHYLMERCURY].

³⁵ Washington State Department of Ecology, Washington State Water Quality Standards: Human Health Criteria and Implementation Tools, Overview of Key Decisions in Rule Amendment 80 (Aug. 2016) [hereinafter Ecology, Key Decisions]

³⁶ NRC, METHYLMERCURY, at 17.

³⁷ *Id.* at 16.

³⁸ U.S. Environmental Protection Agency, Water Quality Criteria: Notice of Availability of Water Quality Criteria for the Protection of Human Health: Methyl Mercury, 66 Fed. Reg. 1344 (Jan. 8, 2001).

³⁹ *Id.*

⁴⁰ *Id.* at 1352.

and analyses.”⁴¹ As it issued the methylmercury water quality criterion in 2001, EPA reminded states of their obligations under the CWA, stating “once EPA publishes new or revised section 304(a) water quality criteria guidance,” it “expects the criterion recommendation to be used ... by states ... in establishing or updating water quality standards.”⁴² As of 2010, seven states, two territories, and the District of Columbia had already adopted the new methylmercury fish tissue criterion.⁴³ In 2010, EPA provided further assistance, publishing extensive implementation guidance for those states that had yet to incorporate the updated methylmercury criterion.⁴⁴ In issuing this additional guidance, EPA emphasized that it “expect[ed]” all remaining states to incorporate the 2001 methylmercury criterion during their next triennial review.⁴⁵ And states, such as Oregon, routinely did so, integrating the 2001 criterion with a fish consumption rate founded on local data, as recommended by the EPA guidance.⁴⁶

During this period, Washington increasingly recognized the threat posed by methylmercury contamination throughout the state. Its Department of Health issued a statewide fish consumption advisory for methylmercury, warning people to reduce or eliminate consumption of fish from its waters.⁴⁷ Its Department of Ecology identified methylmercury as a priority contaminant in Puget Sound.⁴⁸

Thus, by the time it finally sought to update its water quality standards, Ecology had had ample notice that its methylmercury standard would need to be updated to reflect the current science, and had been provided with technical guidance by EPA on how to do so. Yet, inexplicably, Ecology simply refused. Instead, it dubbed methylmercury a “challenging chemical,” and claimed that,

⁴¹ *Id.*

⁴² *Id.* at 1344; 1350. In fact, EPA has made clear to states since the 1980s the expectation that states would incorporate any EPA updates to criteria at their earliest opportunity, i.e., as part of the next triennial review. EPA informed states in guidance memoranda that “EPA expects each State to comply with [these] statutory requirements in any section 303(c) water quality standards review initiated after enactment of the Water Quality Act of 1987.” *See, e.g.*, U.S. Environmental Protection Agency, Guidance for State Implementation of Water Quality Standards for CWA Section 303(c)(2)(B) at 15 (Dec. 1988), <https://www.epa.gov/sites/production/files/2014-10/documents/cwa303c-hanmer-memo.pdf>.

⁴³ U.S. Environmental Protection Agency, Guidance for Implementing the January 2001 Methylmercury Water Quality Criterion (2010).

⁴⁴ *Id.*

⁴⁵ *Id.* at 17. (“EPA expects that with the publication of this guidance, states and authorized tribes will include new or revised criteria for methylmercury in their waters as part of the next three year review of standards required by section 303(c) of the Clean Water Act”).

⁴⁶ U.S. Environmental Protection Agency, Technical Support Document for EPA’s Action on Oregon’s New and Revised Human Health Water Quality Criteria for Toxics and Associated Implementation Provisions Submitted July 12 and 21, 2011 (Oct. 17, 2011).

⁴⁷ Washington Department of Health, “Fish Consumption Advisories” <http://www.doh.wa.gov/CommunityandEnvironment/Food/Fish/Advisories.aspx>.

⁴⁸ Washington Department of Ecology, *Control of Toxic Chemicals in Puget Sound 20* (2011), <https://fortress.wa.gov/ecy/publications/documents/1103024.pdf> (identifying methylmercury among 17 priority “contaminants of concern” given that they “harm or threaten to harm the Puget Sound ecosystem”).

therefore, it needed more time. It offered no scientific rationale for failing to update the HHC for this priority contaminant. Rather, Ecology claimed vaguely that it wished to develop an “integrated approach” to address methylmercury; noted that this would take time to do; and argued that “[t]aking time to develop an integrated approach now would slow the progress of the adoption of the other proposed HHC and implementation tools. Ecology thinks continued progress on the main rule adoption is important to maintain.”⁴⁹

Notably, although Ecology’s rulemaking work continued in earnest in the months and years immediately preceding the issuance of its water quality standards in 2016, Ecology declined to make use of this time to incorporate the federal methylmercury criterion into its rule. Ecology’s 2015 rule did not include a methylmercury criterion, but this rule was subsequently withdrawn at the Governor’s direction, and Ecology went back to the drawing board to alter key parameters. However, despite the additional time afforded by this withdrawal, Ecology’s final rule, submitted in 2016, did nothing to remedy the lack of a methylmercury standard. In fact, to the contrary, the record shows that, as early as 2013, Ecology had identified “postpone development” of a criterion as a “possible path” for handling the need to update its methylmercury standard.⁵⁰

In short, despite a longstanding scientific consensus on methylmercury’s harms, and despite the existence of a CWA 304(a) methylmercury criterion since 2001, Ecology – 15 years later – still declined to update its methylmercury standard by seeking more time. Ecology’s inaction on methylmercury flies in the face of the “sound scientific rationale” on which state standards must be based under the CWA, as EPA appropriately found. It is in precisely such circumstances of state recalcitrance that Congress directed EPA to step in and ensure that the CWA’s goals are not thwarted. EPA’s rule, accordingly, includes an updated criterion for methylmercury in fish tissue, thus addressing this contaminant of utmost concern for people who consume fish from Washington waters.

B. PCBs

Washington’s approach to PCBs is similarly not scientifically defensible. Ecology arrived at its criterion for PCBs in a circuitous manner that was clearly not driven by the science. Ecology didn’t accept the criterion that would have resulted by a straightforward calculation using its standard assumptions for its carcinogenic HHC – namely the updated FCR of 175 grams/day and its longstanding espousal of an acceptable cancer risk level of 1 in 1,000,000, that is, 1×10^{-6} . Instead, Ecology selected what it termed a “chemical-specific risk level” to be used “exclusively for PCBs”⁵¹ –

⁴⁹ Ecology, Key Decisions, at 83.

⁵⁰ Washington Department of Ecology, Surface Water Quality Standards: Human Health Criteria Policy – Information to Support Morning Discussion on Rule Alternatives (Nov. 6, 2013) <http://www.ecy.wa.gov/programs/wq/swqs/Nov6AfternoonPresentation.pdf#page=43>.

⁵¹ Ecology, Key Decisions, at 66.

one that was nearly an order of magnitude less protective, at 4×10^{-5} . Ecology plugged this number into its risk assessment equation, but the result was that the PCB criterion would be less stringent than Washington's current criterion for PCBs – which, as you may recall, supports fish intake at the mere 6.5 grams/day rate. So, Ecology decided to default to its current PCB criterion under the NTR. It then back-calculated to determine what risk level was necessary to make the math work out, given its updated FCR. Thus, Ecology arrived at a risk level that is unique to PCBs, 2.3×10^{-5} .⁵²

Ecology's machinations to avoid the mathematical result of the updated science on fish intake raised a flag EPA would have been remiss to neglect. Ecology's cancer risk level for PCBs is a constructed number, back-calculated to ensure no change from the status quo. Ecology offered no evidence that those exposed to this contaminant in fact view cancer attributable to PCBs to be different from – and somehow more acceptable than – cancer attributable to any other contaminant.⁵³ Ecology provided no account of how the citizens of Washington arrived at a nearly tenfold increase in risk from PCBs than they accepted from other carcinogens.⁵⁴ This lack of substantiation is the more problematic given that it is a clear departure from the 1×10^{-6} risk level that had been in effect for all toxic contaminants in Washington for more than two decades, and a clear departure from the 1×10^{-6} risk level that Ecology was persuaded to retain in general for the HHC it submitted – due to the public outcry over the 1×10^{-5} risk level contained in the rule that Ecology initially proposed but ultimately withdrew.

Moreover, Ecology's PCB-specific risk level is also a departure from the standard risk level assumed by EPA in issuing criteria for use by states nationwide. EPA has indicated that in reviewing states' water quality standards, it will consider the actual risk that results to those affected when all of a state's selected parameters are considered, and has stated that its scrutiny will increase as a state's target risk level becomes less protective or less conservative, e.g., if it moves from 1×10^{-6} to 1×10^{-5} .⁵⁵ EPA has emphasized that it will "carefully evaluate" a state's assumptions if the state chooses "to alter any one of the standard EPA assumption values."⁵⁶

⁵² *Id.* at 67.

⁵³ *Id.* at 62-67 (discussing derivation of HHC for PCBs but offering no evidence or references in the literature for PCB-specific judgments on the acceptability of cancer risk).

⁵⁴ *Id.*

⁵⁵ EPA, NTR, 57 Fed. Reg. at 60855 ("In submitting criteria for the protection of human health, States were not limited to a 1 in 1 million risk level (10^{-6})... If a State selects a criterion that represents an upper bound risk level less protective than 1 in 100,000 (i.e., 10^{-5}), however, the State needed to have substantial support in the record for this level.... [Among other things,] the record must include an analysis showing that the risk level selected, when combined with other risk assessment variables, is a balanced and reasonable estimate of actual risk posed, based on the best and most representative information available. The importance of the estimated actual risk increases as the degree of conservatism in the selected risk level diminishes. EPA carefully evaluated all assumptions used by a State if the State chose to alter any one of the standard EPA assumption values.").

⁵⁶ *Id.*

Again, EPA appropriately found Ecology's criterion not to be protective of Washington's designated uses and Washington's proffered justification to be unavailing, as it was untethered to a sound scientific rationale. EPA's rule, accordingly, includes a criterion for PCBs that is derived by a straightforward application of the updated FCR of 175 grams/day and Washington's longstanding cancer risk level of 1×10^{-6} .

These two examples of Ecology's maneuverings to avoid what sound science requires for methylmercury and PCB criteria are meant to be illustrative. This account does not exhaust the scientific infirmities of the WQS submitted by Ecology to EPA. It should, however, afford a sense of the deficiencies in Ecology's rule and of the appropriateness of EPA's partial disapproval as well as the appropriateness of EPA's issuance of several WQS for Washington – contrary to the Petition's portrayal. EPA analysis was undertaken and documented as part of a robust public process, as elaborated below in Part III.

III. The Petition Merely Rehashes Arguments that Have Already Been Thoroughly Vetted in Public Processes

The Petition merely rehashes arguments that have already been thoroughly vetted in lengthy public processes at the state and federal levels, throughout which industry was an active participant. These arguments have already been carefully considered by EPA through robust notice-and-comment rulemaking. EPA provided its reasons for accepting or rejecting these arguments, as appropriate, and documented its analysis in a voluminous record. There is no new science or law that would require a different result were EPA again to undertake this analysis. Any new rulemaking would likely produce the same outcome. As such, the reconsideration that the Petition requests would amount to an unproductive bureaucratic exercise, and thus an unnecessary waste of taxpayer money.

The Petition asks EPA to reconsider and approve the state's water quality criteria, and to repeal or withdraw the EPA water quality criteria for Washington, citing 5 U.S.C. § 553(e). But this provision of the Administrative Procedure Act (APA) does not confer on agencies unfettered authority to reevaluate and discard past rulemakings. Rather, under the APA, an agency may reconsider its earlier rules only to the extent permitted by law, and any revisions will be scrutinized to ensure they are supported by "a reasoned explanation."⁵⁷ Moreover, an agency may not disregard the science in order to effectuate a change in policy. As always, an agency must articulate a rational connection between the facts it finds and the conclusions it reaches.⁵⁸ And, as Justice Kennedy recently emphasized in concurrence in *FCC v. Fox Television Stations, Inc.*, "[a]n agency cannot simply

⁵⁷ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (stating that "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy").

⁵⁸ *Motor Vehicle Mfrs. Ass'n v State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

disregard contrary or inconvenient factual determinations that it made in the past.”⁵⁹ Yet the Petition offers no new scientific or legal support that would allow EPA permissibly to reach a different conclusion. It points to no new data, studies, evidence, or circumstances on which EPA could rationally base a reversal of course.

Instead, the Petition repeats the same arguments that industry had already urged during the years-long state and federal processes, throughout which industry was an active participant. Indeed, its arguments are often lifted verbatim from earlier comment letters they had submitted for consideration by the state and federal agencies over the years. In some instances, the Petition didn’t even bother to update its citations – for example, it references the national default FCR as being 17.5 grams/day;⁶⁰ however, this national default value was updated in 2015 to 22 grams/day. The Petition achieves its length by cutting and pasting from documents that had been made available to, and were thoroughly considered by, Ecology, EPA, and the public during the extensive state and federal processes chronicled above in Part I.

Under the Clean Water Act, EPA is authorized to approve a state’s submitted WQS only if “such standards meet the requirements of this chapter.”⁶¹ CWA § 303 provides:

Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.⁶²

EPA supported with a detailed, rigorous analysis its finding that many of the state’s water quality criteria were not “based on sound scientific rationale” and did not “contain sufficient parameters or constituents to protect the designated use.”⁶³ EPA similarly supported with a detailed, rigorous analysis the water quality criteria that it was required, under the CWA, to issue in the state’s stead.⁶⁴ The Petition raises no new information on which EPA might permissibly base an outcome that departs from these well-reasoned analyses. Reconsideration now would not reasonably sustain a different rule. The Petition’s request for reconsideration is thus a request for what can only be a pointless and wasteful bureaucratic exercise. As noted above, the State of Washington

⁵⁹ *FCC*, 556 U.S. at 537 (Kennedy, J., concurring in part and concurring in the judgment).

⁶⁰ Petition, at 46.

⁶¹ 33 U.S.C. § 1313(c)(3) and (4).

⁶² 33 U.S.C. § 1313(c)(2)(A).

⁶³ See generally EPA, TSD for Washington’s HHC.

⁶⁴ *Id.*

itself has indicated its desire to move on, and focus instead on working together with its regulated sources on implementation.

EPA's rule, moreover, is the result of years of public process at the state and federal levels, culminating in a robust notice-and-comment rulemaking process. Industry was an active participant throughout these processes. Industry's arguments, reiterated again in the Petition, have already been carefully and thoroughly considered by EPA. EPA provided notice of, and ample opportunity to comment on, its proposed rule; EPA provided its reasons for accepting or rejecting these and other arguments, as appropriate, and documented its analysis in a voluminous administrative record,⁶⁵ including a 419-page Response to Public Comments.⁶⁶ EPA then published a final rule that was supported by scientific and legal analysis that was consistent with its proposed rule, while reflecting changes where warranted in response to the input it had solicited and received during the public comment period.

The Petition, however, claims that the public was not afforded adequate notice of, and opportunity to comment on, the analysis that supported EPA's final rule, citing APA § 553(b) and (c). In particular, the Petition attempts to portray as "novel" those aspects of EPA's rationale that pertain to tribal treaty rights, asserting that this was "invent[ed]" in the final rule and "not put forth in the proposed rule."⁶⁷ For example, the Petition tries to make much of the fact that the proposed rule used the term "tribal reserved fishing right" and mentioned the word "subsistence" twice, whereas the final rule used the term "treaty-reserved subsistence right" and mentioned the word "subsistence" sixty times, claiming, therefore, that the EPA had "abandoned the treaty rights 'analysis' contained in the proposed rule" and "replaced" this in the final rule with a treaty rights analysis that it had just "discovered."⁶⁸

However, an unprejudiced inspection of the rulemaking record shows the Petition's claim to be unavailing. EPA set forth in its proposed rule its supporting scientific and legal analysis, including

⁶⁵ This record can be accessed via regulations.gov at Docket ID: EPA-HQ-OW-2015-0174.

⁶⁶ U.S. Environmental Protection Agency, Response to Comments: Revision of Certain Federal Water Quality Criteria Applicable to Washington, 40 CFR Part 131 (Nov. 10, 2016) [hereinafter EPA, Response to Comments].

⁶⁷ Petition, at 30.

⁶⁸ Petition, at 20; 24-26. The Petition then tries to parlay this characterization into a basis for additional OMB review, on the theory that EPA's final rule "raises a novel legal or policy issue" and is therefore a "significant regulatory action" within the meaning of EO 12866 § 3(f). Petition, at 66-67. As elaborated below in Part V, however, EPA's treaty rights analysis rests on longstanding legal obligations contained in the U.S. Constitution, treaties, and caselaw. The Petition also inaccurately portrays the overall determination that the proposed and final rules do not constitute significant regulatory action as having been made solely by EPA. Petition, at 63-67. EPA, however, consulted with OMB prior to publishing both rules. These consultations afforded OMB the occasion to have any questions addressed and ultimately to satisfy itself that it was unnecessary to conduct additional OMB review; OMB thus determined that it would "waive" further review, and communicated this decision to EPA. EPA documented this exchange in its Response to Comments, noting that "The Office of Management and Budget (OMB) concurred with EPA that this rule is not a significant regulatory action under the terms of 12866 and is, therefore, not subject to review under Executive Orders 12866 and 13563 (Improving Regulation and Regulatory Review)." EPA, Response to Comments, at 400-01.

the need to “effectuate and harmonize” standards set or approved under the CWA for Washington with the relevant tribal treaties.⁶⁹ EPA specifically pointed out that, “when setting criteria to support the most sensitive use in Washington, it is necessary to consider other applicable laws, including federal treaties” and that, “[i]n Washington, many tribes hold reserved rights to take fish for subsistence, ceremonial, religious, and commercial purposes, including treaty-reserved rights to fish at all usual and accustomed fishing grounds and stations in waters under state jurisdiction, which cover the majority of waters in the state.”⁷⁰

The APA requires an agency conducting notice-and-comment rulemaking to publish in its notice of proposed rulemaking “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”⁷¹ Courts have generally interpreted this to mean that the final rule the agency adopts must be a “logical outgrowth” of the rule proposed.⁷² Courts have explained that “the relevant inquiry is whether or not potential commentators would have known that an issue in which they were interested was ‘on the table’ and was to be addressed by a final rule,” noting, that “[w]hile an agency must explain and justify its departures from a proposed rule, it is not straitjacketed into the approach initially suggested on pain of triggering a further round of notice-and-comment.”⁷³

Industry and the public were afforded ample notice of and the opportunity to comment on EPA’s scientific and legal analysis, and did so, during the public comment period – a period that EPA extended, at industry’s request.⁷⁴ It is difficult to comprehend how the Petition can suggest that industry or the public were not aware that the matter of tribes’ treaty-secured subsistence fishing rights was “on the table” when the proposed rule explicitly stated that it was “necessary” to consider tribal treaties, that “[i]n Washington, many tribes hold reserved rights to take fish for subsistence, ceremonial, religious, and commercial purposes,” and that these “treaty-reserved rights to fish” “cover the majority of waters in the state.”⁷⁵ While EPA’s final rule thus incorporated semantic changes, included clarifications, and provided further explanation and support, as appropriate, its final rule was premised on substantially the same scientific and legal analysis as its proposed rule. The nature and extent of the changes from the proposed rule to the final rule were precisely those that would be expected as part of a notice-and-comment rulemaking process in

⁶⁹ 80 Fed. Reg. at 55067.

⁷⁰ 80 Fed. Reg. at 55066 (citation omitted).

⁷¹ 5 U.S.C. § 553(b)(3).

⁷² See, e.g., *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), cert. denied *sub nom. Lead Industries Assn., Inc. v. Donovan*, 453 U.S. 913 (1981).

⁷³ *Am. Med. Ass’n. v. United States*, 887 F.2d 760, 768-69 (7th Cir. 1989).

⁷⁴ Revision of Certain Federal Water Quality Criteria Applicable to Washington, 81 Fed. Reg. 85417, 85418 & n.3 (providing a 45-day extension at the request of the Association of Washington Business—Washington State’s Chamber of Commerce, Washington Public Ports Association (on behalf of the Association of Washington Cities and the Washington State Association of Counties), Western Wood Preservers Institute, ALCOA, American Forest and Paper Association, McFarland Cascade, Schnitzer Steel Industries, and Weyerhaeuser).

⁷⁵ 80 Fed. Reg. at 55066.

which EPA was open to industry and other public input. EPA's final rule was a "logical outgrowth" of the rule it proposed and its rulemaking was clearly adequate in view of the courts' understanding of the APA's notice-and-comment requirements.

Finally, to the extent that the Petition makes arguments related to implementation, it raises issues that are outside of those EPA is statutorily authorized to consider in setting HHC. Under the CWA, HHC are health-based standards, such that considerations of technical feasibility and cost are not properly part of the standard-setting exercise undertaken by states or the EPA.⁷⁶ Rather, Congress directed that these standards be set "to protect the public health or welfare," among other things by ensuring that the waters are "fishable" – i.e. that they support fish that may be safely harvested and consumed by humans. Thus, the Petition's allegations regarding the feasibility and cost of compliance, even if true, are not germane to the state's or EPA's HHC standard-setting inquiry. Because these issues fall outside those EPA may permissibly consider, it would be "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law"⁷⁷ to import these factors into the CWA where Congress saw fit to exclude them. EPA appropriately recognized as much. In its Response to Comments, EPA stated that "[w]ater quality criteria are scientifically derived, measurable properties of water that, when achieved, protect applicable designated uses. Thus water quality criteria are not derived on the basis of costs and benefits, nor does the CWA allow for their derivation in such a manner."⁷⁸ Rather, as discussed below in Part IV, these concerns are properly considered – and were in fact addressed – by means of implementation tools.

IV. EPA Largely Affirmed Washington's Use of Implementation Tools to Allow Industry a Reasonable Time to Comply with CWA Requirements

Ecology devoted considerable effort during the rulemaking process to expand its existing implementation tools and to develop new implementation tools – all with an eye toward accommodating industry's concerns with respect to feasibility and costs.⁷⁹ EPA assisted Ecology in this effort, working to fashion devices that responded to industry input and ideas. Some of these tools (e.g., intake credits) were newly created in this rulemaking – designed specifically to resolve issues that industry had presented to the agencies. EPA largely affirmed the enlarged menu of implementation tools, now available in Washington, in order to allow industry a reasonable time to

⁷⁶ See, e.g., Catherine A. O'Neill, *Exposed: Asking the Wrong Question in Risk Regulation*, 48 ARIZ. ST. L.J. 703, 712 (2016) (discussing health-based standards, which "seek to eliminate contaminants in excess of levels that are safe for humans or levels that pose an amount of risk deemed acceptable").

⁷⁷ 5 U.S.C. § 706(2)(A).

⁷⁸ EPA, Response to Comments, at 401.

⁷⁹ See, e.g., Northwest Pulp & Paper Association, Letter to Becka Conklin, Washington State Department of Ecology (Dec. 17, 2010) (responding to Ecology's initiation of triennial review process under the CWA, and urging Washington to expand its "implementation tools" as a pre-condition to updating its FCR and its WQS).

comply with the new WQS.⁸⁰ Regulated sources will now be able to avail themselves of variances, compliance schedules, and/or intake credits in order to help them achieve compliance.⁸¹

EPA deferred for the most part to the state's formulation of these tools, affirming that "[t]he state may use its approved implementation tools in concert with the approved new state criteria as well as the federal human health criteria applicable to Washington."⁸² In so doing, EPA emphasized that it "recognizes the importance of implementation tools in making progress toward improved water quality while allowing a reasonable time for industry to comply" with new requirements, and "remains committed to providing assistance to Ecology during implementation of the criteria."⁸³

In fact, it is in the realm of implementation where there *have* been new developments since Washington embarked on its rulemaking—contrary to the Petition's assumption of technological stasis.⁸⁴ Notably, there have already been innovations in the technologies available to address PCB contamination, even since the time of the 2013 HDR Engineering survey relied upon by industry in its comments to the administrative record, and cited again in the Petition for its claim that minimizing PCBs is "not technologically feasible." For example, in 2016 Virginia's Department of Environmental Quality (VDEQ) published a 71-page *Pollution Minimization Plan Technical Resource Guide* for PCBs, detailing the numerous technologies and systems (e.g., "treatment trains") for minimizing PCBs in various environmental media.⁸⁵ In the section devoted to "Remediation Methods for Industrial, Wastewater, and Stormwater Effluent," VDEQ identified several categories of available treatment methods for PCBs. *In fully 2/3 of these categories, VDEQ documented innovations in the treatment methods that had emerged since industry's 2013 compilation of then-available technologies.*⁸⁶

Moreover, as Virginia underscored, the conditions for continued innovation and entrepreneurship are ripe, given the certain market provided by the need to address the widespread threat that PCBs pose to human health. "Due to the widespread problem of PCB contamination, efficient and cost-

⁸⁰ EPA, TSD for Washington's HHC, at 35-46.

⁸¹ *Id.*

⁸² Letter from Daniel D. Opalski, EPA Region X, to Maia Bellon, Washington State Department of Ecology, Transmitting the EPA TSD for Washington's HHC at 4 (Nov. 15, 2016).

⁸³ *Id.*

⁸⁴ This is in contrast to the lack of new scientific developments that would warrant a different analysis in terms of *setting* the HHC, as discussed above in Part III.

⁸⁵ VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, POLLUTION MINIMIZATION PLAN TECHNICAL RESOURCE GUIDE 22-45 (Mar. 11, 2016) (compiling "a list of methods that have been shown to successfully remediate PCBs across different matrices, including an additional section addressing methods used to remediate PCB contamination in effluent and waste streams") [hereinafter VDEQ, PCB POLLUTION MINIMIZATION TECHNOLOGIES].

⁸⁶ Compare *id.* at 39-45; 50-55 (citing studies from 2013 to 2016 documenting recent developments in four of the six categories of PCB treatment technologies) with HDR ENGINEERING, INC. TREATMENT TECHNOLOGY REVIEW & ASSESSMENT, 11-12; 48-50 (Dec. 4, 2013) (not mentioning these studies of PCB treatment technologies dating from 2013 and beyond).

effective remediation methods are highly sought after. Therefore, new methods and technologies to treat PCB contamination continue to be developed.”⁸⁷

The State of Washington would like to get on with the business of implementation, as noted above. The tribes have also indicated their desire to move ahead and their willingness to work with the state toward implementing the new standards in innovative and effective ways. Reconsideration of these standards at the federal level should not now stand as an obstacle to this local effort. Rather, we should be permitted to join now to foster technological development and to ensure clean, fishable waters in Washington.

V. Water Quality Standards for Washington Must Comport with the Constitution, Treaties, and Other Relevant Laws

Water quality standards for Washington, whether set by the state or by EPA, must comport with the Constitution, treaties, and other relevant laws. In an attempt to avoid this legal reality, the Petition mischaracterizes the place of EPA guidance in the relevant legal hierarchy. The Petition also misrepresents the body of federal caselaw interpreting the fishing clause of the treaties between the U.S. and the tribes of the Pacific Northwest.

The Supremacy Clause of the U.S. Constitution plainly states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁸⁸

In 1832, the U.S. Supreme Court affirmed in the fountainhead Indian law case *Worcester v. Georgia* that treaties between the United States and Indian nations indeed partake of this constitutional supremacy.⁸⁹ In the 1850s, the Indian nations of the Pacific Northwest entered into treaties ceding lands to the United States, while reserving a suite of important pre-existing rights, including their

⁸⁷ VDEQ, PCB POLLUTION MINIMIZATION TECHNOLOGIES, at 45.

⁸⁸ U.S. Const. art. VI, clause 2 (emphasis added).

⁸⁹ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832) (“The constitution [declares] treaties already made, as well as those to be made, the supreme law of the land . . .”). As the *Worcester* Court elaborated, “[s]o long as ... treaties exist, having been formed within the sphere of federal powers, they must be respected and enforced by the appropriate organs of the federal government.” *Worcester*, 31 U.S. (6 Pet.) at 594. Congress reflects this fundamental point in the Clean Water Act, expressly providing that the Act “shall not be construed as ... affecting or impairing the provisions of any treaty of the United States.” 33 U.S.C. §1371.

aboriginal rights to fish, hunt, and gather.⁹⁰ The Treaty of Point Elliott, for example, provides that “[t]he right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory...”⁹¹ Although the precise language of the fishing clause varies somewhat in the different treaties with the tribes of the Pacific Northwest, U.S. courts have interpreted these provisions similarly to secure to the tribes a permanent, enforceable right to take fish throughout their fishing areas for ceremonial, subsistence and commercial purposes.⁹² Moreover, the U.S. Supreme Court has long affirmed that all of the rights not expressly relinquished by the tribes were retained.⁹³ As it stated in 1905, the treaties represent “not a grant of rights to the Indians, but a grant of rights *from* them – a reservation of those not granted.”⁹⁴ That is, the fishing rights of the Northwest Treaty Tribes not only pre-date the treaties, but are protected by the treaties that are the supreme law of the land. Accordingly, and in keeping with the unique Indian law canons that govern courts’ construction of the treaties,⁹⁵ for more than a century, the courts have regularly interpreted the fishing right as more than just a naked right to engage in the activity of fishing; it is “a reserved right ... which exists in part to provide a volume of fish which is sufficient to the fair needs of the tribes.”⁹⁶

EPA thus appropriately observed in its proposed rule:

In determining whether WQS comply with the CWA and EPA’s regulations, when setting criteria to support the most sensitive use in Washington, it is necessary to consider other applicable laws, including federal treaties. In Washington, many tribes hold reserved rights to take fish for subsistence, ceremonial, religious, and commercial purposes, including treaty reserved rights to fish at all usual and accustomed fishing grounds and stations in waters under state jurisdiction, which cover the majority of waters in the state. Such rights include not only a right to take those fish, but necessarily include an attendant right to not be exposed to unacceptable health risks by consuming those fish.⁹⁷

⁹⁰ FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 1154-56 (2012 ed.). The tribes’ rights have both on- and off-reservation components.

⁹¹ Treaty with the Duwamish, Jan. 22, 1855, U.S.-Duwamish, art. V, 12 Stat. 927 (1859).

⁹² See, e.g., *United States v. Washington*, 384 F. Supp. 312, 401 (W.D. Wash. 1974); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 674-85 (1979).

⁹³ See COHEN, at 1156-57 (discussing this longstanding and central tenet of federal Indian law).

⁹⁴ *United States v. Winans*, 198 U.S. 371, 381 (1905) (emphasis added).

⁹⁵ According to the canons, treaties should be construed liberally in favor of Indian tribes; they should be construed as the Indians would have understood them; and any ambiguities should be resolved in the tribes’ favor. COHEN, at 113-19, 1156. (“The canons have quasi-constitutional status; they provide an interpretive methodology for protecting fundamental constitutive, structural values against all but explicit congressional derogation.”); *id.* at 118-19.

⁹⁶ See, e.g., *United States v. Washington*, 384 F. Supp. at 401; accord *United States v. Washington*, 573 F.3d 701, 704 (9th Cir. 2009).

⁹⁷ 80 Fed. Reg. at 55066 (citation omitted).

EPA's rationale here echoes exactly that of the courts, which have long recognized that the tribes' continued ability to consume fish for their own subsistence or to earn a livelihood by selling fish to others for their consumption was an essential point of the treaty guarantees.⁹⁸ As the U.S. Supreme Court observed in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, "[i]t is perfectly clear that the Indians were vitally interested in protecting their right to take fish at usual and accustomed places whether on or off the reservations, and that they were invited by the white negotiators to rely, and did in fact rely, heavily on the good faith of the United States to protect that right."⁹⁹ The Court found, moreover, that "Governor [Stevens'] promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent."¹⁰⁰ Thus, as courts have emphasized, important among the myriad facets of tribes' reserved fishing rights is the role of fish as food for human consumption.¹⁰¹ Fish that has been rendered unsafe due to toxic contamination is, obviously, not fit for human consumption.

The Petition, remarkably, portrays EPA's recognition of the need to "effectuate and harmonize" standards under the CWA with tribes' treaty-reserved fishing rights¹⁰² as a "new" and "invented" "post-hoc rationalization."¹⁰³ Yet, the treaties have been in force since the 1850s. Federal caselaw upholding the treaties' status and import dates from the 19th and early 20th centuries. Both the state and EPA are bound by the Constitution and by the laws of the land, which include treaties with Indian nations. In administering the CWA, EPA cannot waive the Constitution, and cannot ignore the treaties and the body of federal caselaw interpreting the treaties. It simply does not have this authority.

In fact, the federal government has long acknowledged its obligation to work to further tribal self-determination and honor tribal treaty-secured and other rights. Every president since President Nixon has supported tribal self-determination and acknowledged the federal government's unique trust relationship with the tribes – a relationship that stems in part from the treaties and other sovereign compacts entered into by the U.S. and Indian nations.¹⁰⁴ Under President Reagan, EPA

⁹⁸ For a discussion of the supporting caselaw, see, e.g., Federal Indian Law Professors, Comments on the United States Environmental Protection Agency's Proposed Rule: Revision of Certain Water Quality Criteria Applicable to the State of Washington, at nn. 28-35 and accompanying text (Dec. 28, 2015), EPA-HQ-OW-2015-0174-0258.

⁹⁹ 443 U.S. at 667.

¹⁰⁰ *Id.* at 676.

¹⁰¹ *Accord Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 653 F. Supp. 1420, 1426 (W.D. Wis. 1987) (By dint of the 1837 and 1842 treaties, the Chippewa were "guaranteed the right to make a moderate living off the land and from the waters in and abutting the ceded territory and throughout that territory by engaging in hunting, fishing, and gathering as they had in the past and by consuming the fruits of that hunting, fishing, and gathering or by trading the fruits of that activity for goods they could use and consume in realizing that moderate living").

¹⁰² 81 Fed. Reg. at 85424.

¹⁰³ Petition, at 19.

¹⁰⁴ Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 363, 91st Cong., 2d. Sess. (1970); 116 Cong. Rec. 23258.

first set forth its *EPA Indian Policy* in 1984.¹⁰⁵ This policy has been reaffirmed in subsequent administrations, irrespective of political party.¹⁰⁶ Its contours have been elaborated and refined over time, evolving in line with executive directives and developments in federal court caselaw interpreting the treaties.¹⁰⁷

Against this backdrop, EPA correctly recognized that its general guidance is precisely that: general guidance. Yet the Petition repeatedly cites EPA's Ambient Water Quality Criteria Methodology (2000 AWQC Guidance) as purporting to give broad license to the state, and to authorize the state and EPA to take actions in contravention of the Constitution and tribal treaties. This turns the legal hierarchy on its head. Rather, the 2000 AWQC Guidance must be considered subsidiary to applicable sources of law, including the Constitution and tribal treaties. And it must be applied in accordance with the particular factual and legal circumstances pertaining to the water quality standards at issue – here, water quality standards for the state of Washington. EPA's 2000 AWQC Guidance acknowledges these points, expressly stating as much at the outset.¹⁰⁸

EPA's rulemaking appropriately comprehends the subsidiary and general nature of its guidance, and the need to consider Washington's particular factual and legal circumstances. In proposing its rule for Washington, EPA observed that "the EPA's 2000 Human Health Methodology did not consider how CWA decisions should account for applicable reserved fishing rights, including treaty-reserved rights."¹⁰⁹ Indeed, EPA specifically stated at the time the 2000 AWQC Guidance was being drafted that "[a]s stated in the 1998 draft Methodology revisions, 'risk levels and criteria need to be protective of tribal rights under federal law (e.g., fishing, hunting, or gathering rights) that are related to water quality.' We believe the best way to ensure that Tribal treaty and other rights under Federal law are met, consistent with the Federal trust responsibility, is to address these

¹⁰⁵ U.S. Environmental Protection Agency, EPA Policy for the Administration of Environmental Programs on Indian Reservations (November 8, 1984).

¹⁰⁶ See, e.g., U.S. Environmental Protection Agency, Commemorating the 30th Anniversary of the EPA's Indian Policy, Memorandum from Gina McCarthy to All EPA Employees, 1 (Dec. 1, 2014) (reiterating that "EPA must ensure that its actions do not conflict with tribal treaty rights" and stating that "EPA programs should be implemented to enhance the protection of tribal treaty rights and treaty-covered resources when we have the discretion to do so").

¹⁰⁷ See, e.g., U.S. Environmental Protection Agency, Working Effectively with Tribal Governments: Resource Guide at 49–52, 53 (Aug. 1998) (explaining the key principles underlying the application of tribal treaty rights, and noting that "[f]ederal, state, and local agencies need to refrain from taking actions that are not consistent with tribal rights wherever they exist").

¹⁰⁸ U.S. Environmental Protection Agency, Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health 1-2 (2000)[hereinafter EPA, AWQC Guidance], http://water.epa.gov/scitech/swguidance/standards/upload/2005_05_06_criteria_humanhealth_method_complete.pdf (making a disclaimer at the outset of its guidance to this effect: "This Methodology does not substitute for the CWA or EPA's regulations; nor is it a regulation itself. Thus, the 2000 Human Health Methodology cannot impose legally-binding requirements on EPA, States, Tribes or the regulated community, and may not apply to a particular situation based upon the circumstances.").

¹⁰⁹ 80 Fed. Reg. at 55068.

issues at the time EPA reviews water quality standards submissions.”¹¹⁰ This case-by-case approach enables EPA to take into account particular local factual and legal circumstances as well as developments in the science and the law since the 2000 AWQC Guidance was finalized.¹¹¹

In deriving human health criteria for Washington, EPA correctly stated that:

A majority of waters under Washington’s jurisdiction are covered by reserved rights, including tribal treaty-reserved rights. Many areas where reserved rights are exercised cannot be directly protected or regulated by the tribal governments and, therefore, the responsibility falls to the state and federal governments to ensure their protection. In order to effectuate and harmonize these reserved rights, including treaty rights, with the CWA, EPA determined that such rights appropriately must be considered when determining which criteria are necessary to adequately protect Washington’s fish and shellfish harvesting designated uses.¹¹²

EPA appropriately concluded that, as required by its implementing regulations, the HHC would need to support the most sensitive of Washington’s designated uses,¹¹³ and thus not impair tribes’ treaty-secured rights to take fish for subsistence purposes.¹¹⁴ As EPA noted, protecting this tribal population implements the 2000 AWQC Guidance recommendation “that priority be given to identifying and adequately protecting the most highly exposed population.”¹¹⁵

Notably, EPA’s application of its general guidance to Washington’s particular circumstances rests on findings that echo the state’s own. Washington itself has recognized that tribes’ adjudicated usual and accustomed areas cover virtually all of the waters over which the state claims jurisdiction under

¹¹⁰ 65 Fed. Reg. 66444, 66457 (Nov. 3, 2000).

¹¹¹ The Suquamish Tribe’s 2000 fish consumption survey, for example, post-dates studies cited in the 1998 Technical Support Document for the EPA’s 2000 AWQC Guidance. *Compare* Suquamish Survey *with* OFFICE OF SCIENCE AND TECHNOLOGY, U.S. ENVIRONMENTAL PROTECTION AGENCY, AMBIENT WATER QUALITY CRITERIA DERIVATION METHODOLOGY: HUMAN HEALTH, TECHNICAL SUPPORT DOCUMENT (1998). Both Ecology and EPA cited the Suquamish survey in deriving the FCR applicable for WQS in Washington.

¹¹² 80 Fed. Reg. at 55067 (citations and internal cross-references omitted).

¹¹³ 40 C.F.R. 131.11(a).

¹¹⁴ EPA has, at least since its 2000 AWQC Guidance, signaled that subsistence consumption needs to be protected in WQS for which the designated fish and shellfish harvesting uses encompass subsistence fishing. EPA, AWQC Guidance, at 1-12 & 1-13 (setting forth two national default fish consumption rates, one for the general population and one, at 142.4 grams/day, for “subsistence” consumers); *see also* U.S. Environmental Protection Agency Region X, Framework for Selecting and Using Tribal Fish and Shellfish Consumption Rates for Risk-Based Decision Making at CERCLA and RCRA Cleanup Sites for Puget Sound and the Strait of Georgia 1, 6-7 (Aug., 2007) (stating that “EPA believes that the rates developed from the [available Puget Sound Tribal studies] should be used in preference to an estimate of an average subsistence consumption rate, as recommended in the EPA AWQC methodology.”)

¹¹⁵ 81 Fed. Reg. at 85424.

the CWA.¹¹⁶ As Ecology stated in its final *Fish Consumption Rates Technical Support Document* prepared in support of its WQS rule, “Washington is home to 29 federally recognized and seven non-federally recognized Native American tribes (Governor’s Office of Indian Affairs, 2010). Traditional fishing areas for tribes cover essentially all of Washington.”¹¹⁷

Washington itself has recognized the need to manage its fisheries and undertake environmental regulation in a manner that is cognizant of tribes’ treaty-secured rights to harvest and consume fish and shellfish. Washington’s Department of Fish & Wildlife, for example, explains on its website that it co-manages salmon harvest and restoration with the tribes, in a relationship framed by Judge Boldt in *U.S. v. Washington* to uphold the tribes’ treaty-reserved rights.¹¹⁸ Washington’s Sediment Management Standards (SMS), for example, direct that the cleanup level for human health “shall be calculated using reasonable maximum exposure scenarios that reflect the highest exposure that is reasonably expected to occur under current and potential future site use conditions,” and set a statewide default exposure scenario of “tribal consumption of fish and shellfish.”¹¹⁹ The SMS further require Ecology to consider the “[h]istoric, current, and potential future tribal use of fish and shellfish from the general vicinity of the site” in selecting or approving exposure parameters used to calculate this scenario.¹²⁰ And Ecology’s final *Fish Consumption Rates Technical Support Document* introduced its scientific review of the available surveys of contemporary fish consumption in support of its revision to its WQS with the following “problem statement:”

Washington’s aquatic resources provide tremendous benefit to the people of the state. Large quantities of finfish and shellfish are caught each year, both recreationally and commercially, and many residents eat seafood harvested from our waters. *In addition, tribal populations enjoy treaty fishing rights, and harvesting and eating seafood plays a significant role in their cultures.* Finfish and shellfish are important parts of a healthy diet.

¹¹⁶ Insofar as the state asserts environmental regulatory authority over “the waters of Washington,” these waters are burdened by tribes’ pre-existing rights. For state recognition of this point, *see, e.g.*, Washington State Governor’s Office of Indian Affairs, “Map of Reservations and Ceded Lands,” *available at* http://www.goia.wa.gov/tribal_gov/documents/Tribal_Cedres.pdf; *see also*, Washington State Department of Transportation, Model Comprehensive Tribal Consultation Process for National Environmental Policy Act, Appendix B (July 2008) *available at* <http://www.wsdot.wa.gov/environment/tribal> (summarizing adjudicated “usual and accustomed” areas for western Washington tribes).

¹¹⁷ Washington Department of Ecology, Fish Consumption Rates Technical Support Document Version 2.0 (Final) 18 (Jan. 2013) <https://fortress.wa.gov/ecy/publications/publications/1209058.pdf> (emphasis added).

¹¹⁸ Washington Department of Fish & Wildlife, How Tribes and State Co-Manage Salmon and Steelhead <http://wdfw.wa.gov/conservation/salmon/co-management/index.html> (stating that “Washington’s salmon and steelhead fisheries are managed cooperatively in a unique government-to-government relationship ... A 1974 federal (*U.S. v. Washington*) court case (decided by U.S. District Court Judge George Boldt) re-affirmed the tribe’s [sic] rights to harvest salmon and steelhead and established them as co-managers of Washington fisheries”).

¹¹⁹ Sediment Management Standards, WAC 173-204-561(2)(b).

¹²⁰ *Id.*

Polychlorinated biphenyls (PCBs), dioxins, mercury, and other persistent chemicals can accumulate in fish tissue and harm the health of people who consume fish. Those who may be particularly vulnerable include adults who eat large amounts of finfish or shellfish, as well as children and other sensitive populations. Current fish consumption rates used by Ecology to make regulatory decisions are not consistent with data about fish consumption by Washington populations for which fish consumption survey information is available.¹²¹

Further, EPA's rule enlists "Washington-specific human health criteria inputs" that are identical to those selected by Washington for the two key parameters used to derive HHC – the fish consumption rate and the cancer risk level. EPA's FCR of 175 gram/day is based on the wealth of local and regional survey data documenting contemporary¹²² consumption rates for tribes and other higher-consuming populations. These data were analyzed by and relied upon by Ecology in deriving the HHC that it submitted, using a FCR of 175 grams/day. EPA's cancer risk level of 1 in 1,000,000, that is, 1×10^{-6} is based on the level long embraced by Washington. Specifically, for more than two decades, Washington's WQS required that criteria for carcinogens "shall be selected such that the upper-bound excess cancer risk is less than or equal to 1 in 1,000,000."¹²³ Ecology retained this cancer risk level generally in the HHC it submitted.¹²⁴

In sum, the Petition's request for reconsideration of EPA's decisions respecting WQS for Washington is premised on arguments that purport to elevate guidance over the Constitution, treaties, and other laws that are relevant to standard-setting under the CWA in this context, and on arguments that misrepresent the relevant federal caselaw regarding interpretation of the treaty fishing clause. These arguments are without merit, and do not provide a rational basis for reconsideration.

VI. Conclusion

NWIFC respectfully urges that EPA deny the Petition's request to undo the extensive work that has been done to update WQS for Washington. The state is not seeking to discard this work – it has not joined industry's attempt to rehash the arguments that have already been considered at length in robust state and federal processes. Rather than embark on yet another round of rulemaking, the

¹²¹ Washington Department of Ecology, Fish Consumption Rates Technical Support Document Version 2.0 Final xiii (Jan. 2013) <https://fortress.wa.gov/ecy/publications/publications/1209058.pdf> (emphasis added).

¹²² The Petition mistakenly characterizes this FCR as "unsuppressed." Petition, at 25. While EPA's rule appropriately recognizes the need to account for suppression effects, the 175 grams/day figure is drawn from the CRITFC survey of *contemporary* fish intake. See 81 Fed. Reg. at 85426 ("A FCR of 175 grams/day approximates the 95th percentile consumption rate of surveyed tribal members from the CRITFC study.") For a thorough discussion of the issue of suppression in this context, see NWIFC, Comments on Ecology's Draft Rule, at 13-30, & App. C.

¹²³ Wash. Admin. Code 173-201A-240(6) (2015).

¹²⁴ As discussed above, Ecology departed from its longstanding judgement regarding the "acceptable" cancer risk level for a few contaminants of concern, notably PCBs.

tribes, like Washington, would like to look toward the future. The EPA should not now introduce obstacles to progress at the local level by the state and its partners.¹²⁵ The Northwest Treaty Tribes are optimistic that, with our combined energies bent toward innovative and effective implementation, we can have “fishable” waters throughout Washington – waters that can support harvest and consumption not only by tribal people but by non-tribal people as well.

Our tribal leaders look forward to engaging you and your team to discuss this matter and the appropriate actions to protect our precious environment and resources.

Sincerely,



Lorraine Loomis
Chairperson

Enclosure: Northwest Indian Fisheries Commission, Comments on the Washington Department of Ecology’s 2016 Draft Rule for Human Health Criteria and Implementation Tools in Washington Water Quality Standards (April 20, 2016).

cc: Craig Alexander, U.S. Department of Justice
Paul Winters, Office of Management and Budget
Michelle Pirzadeh, U.S. Environmental Protection Agency, Region 10
Maia Bellon, Washington State Department of Ecology
Chairs of the NWIFC Member Tribes

¹²⁵ Indeed, this EPA has itself recently indicated its interest in moving on: in May, 2017, it relied upon having these updated HHC in force and cited their function in addressing toxic contamination in Washington waters among its reasons for denying an environmental group’s request for rulemaking on human health and aquatic life criteria. Letter from Michael H. Shapiro, Acting Assistant Administrator, U.S. Environmental Protection Agency, to Nina Bell, Executive Director, Northwest Environmental Advocates (May 31, 2017).