



August 8, 2013

***Via Certified Mail***  
***Return Receipt Requested***

Gina McCarthy  
Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Dennis McLerran  
Regional Administrator  
U.S. Environmental Protection Agency, Region X  
1200 Sixth Avenue, Suite 900  
Seattle, WA 98101

Re: Notice of Violation of Non-Discretionary Duty to Propound Washington State  
Fish Consumption Rate Under Section 303 of the Clean Water Act, 33 U.S.C.  
§ 1313

Dear Ms. McCarthy and Mr. McLerran:

On behalf of Pacific Coast Federation of Fishermen's Associations ("PCFFA") and the Institute for Fisheries Resources ("IFR"),<sup>1</sup> we ask that you take immediate action to remedy ongoing violations of a non-discretionary duty under the Clean Water Act ("CWA") by the United States Environmental Protection Agency ("EPA"). As described fully below, EPA is in violation of Clean Water Act section 303 (33 U.S.C. § 1313(c)(4)), due to its failure to promptly promulgate human health criteria water quality standards based upon a protective fish consumption rate for Washington State after having "determine[d] that a revised or new standard is necessary to meet the requirements of [CWA section 303]." This letter constitutes a 60-day notice of intent to file a citizen suit against EPA pursuant to Section 505 of the CWA, 33 U.S.C. § 1365.

Washington State lags far behind other states when it comes to stopping toxic pollution and protecting people who regularly eat locally caught fish. Studies across Washington State

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<sup>1</sup> This letter is a duplicate of and intended to supplement and not replace the letter dated July 23, 2013 on behalf of Waterkeepers Washington.

show serious problems with toxic pollution accumulating in fish and shellfish that people regularly eat. The large number of fish advisories (PCBs, DDT, mercury and lead)—advising people to limit or stop eating certain kinds of fish—reflects the severity of the problem.

Washington’s water quality standards—the amount of pollution a state deems tolerable—simply allow too much toxic pollution because the formula used to develop these standards assumes that people eat very little fish. Yet surveys of tribes in Washington show consumption rates of 200, 300 and even over 500 grams per day, even with the suppressed consumption due to severely reduced stocks of salmon, shellfish, and other fish relied upon by these tribes. Despite these facts, Washington has relied on one of the nation’s lowest fish consumption rates—6.5 grams per day—for nearly two decades. By using a low fish consumption rate, Washington’s human health criteria water quality standards, which are intended to protect public health and aquatic resources, fail to achieve these objectives. For the reasons explained below, EPA has violated its mandatory duty under the CWA, 33 U.S.C. § 1313(c)(4), by failing to promptly promulgate human health criteria based on an accurate fish consumption rate for Washington that adequately protects designated uses, including for subsistence populations in the state.

## I. BACKGROUND

The CWA requires states to set water quality standards that are protective of the “fishable and swimmable” goals of the Act. *See* 33 U.S.C. § 1313. In particular, water quality standards are required to ensure that designated uses of waters are achieved and maintained. EPA is directed to review and approve or disapprove states’ water quality standards, and if EPA disapproves a standard or determines a revised or new standard is necessary to meet the requirements of the CWA, EPA is required to step in and promptly promulgate the standards for the state. *See id* § 1313(c)(4). EPA has repeatedly emphasized the necessity of setting fish consumption rates that protect the ability of people to eat normal, healthy amounts of fish (a designated use) without taking on a burden of toxic chemicals.

Long-time EPA guidance directs states to move away from the outdated National Toxics Rule (“NTR”) for setting fish consumption rates for water quality, and instead to set updated fish consumption rates that are based upon the best available data, particularly local surveys, that reflect the levels of fish that local populations actually consume in order to fully-protect that designated use.

Despite EPA guidance and specific direction, Washington has never properly adopted a fish consumption rate as part of its state water quality standards and instead relies on the outdated NTR that provides for consumption of only 6.5 grams of fish or shellfish a day, about the amount that fits on a cracker, slightly less than ½ pound a month. In the Pacific Northwest, community surveys dating back a decade, repeatedly acknowledged and utilized by EPA in various guidance documents and directions to states, show that fish is consumed at a higher rate than many other parts of the nation, and certain populations consume fish at significantly higher

rates than the general population. Surveys of Native American tribes in Washington show consumption rates of 796 and 205-280 grams per day (“g/day”),<sup>2</sup> even with consumption suppressed due to severely reduced stocks and contamination of salmon, shellfish, and other fish relied upon by these tribes.<sup>3</sup> A survey of Pacific-Asian communities in the Puget Sound region reflect consumption rates of 170 g/day. *See, e.g.*, Nat’l Environmental Justice Advisory Council Meeting (a Federal Advisory Committee to the U.S. Environmental Protection Agency), *Fish Consumption and Environmental Justice* (Dec. 2001 (rev’d Nov. 2002)) (“Environmental Justice Report”); EPA, *Guidance for Assessing Chemical Contaminant Data for Use in Fish Advisories, Vol. 2 Risk Assessment and Fish Consumption Limits, 3d ed.*, at 1-6 through 1-9 (Nov. 2000) (“Fish Advisories Guidance”).

II. THE EPA ADMINISTRATOR IS IN VIOLATION OF A NON-DISCRETIONARY DUTY BY FAILING TO PROMPTLY PROMULGATE A FISH CONSUMPTION RATE FOR THE STATE OF WASHINGTON.

A. Legal Framework.

The CWA requires the development of water quality standards, which are narrative and/or numeric standards designed to protect designated uses of our nation’s waters. In short, water quality standards are required to protect the integrity of our nation’s waters for “fishing and swimming;” that is they are to protect the biological and human health needs associated with our waters. 33 U.S.C. §§ 1251 & 1313. The CWA provides for a dual state and federal effort in ensuring that those requirements of the law are timely and well met.

While a state is given the first opportunity to set water quality standards that meet those requirements, the law assigns EPA the critical role of oversight to ensure that the state acts promptly to develop and keep current protective water quality standards and to quickly step in if the state does not. *Id.* § 1313(a) through (c). Specific to the issues here, the CWA requires that where EPA has determined a state’s water quality standard does not meet the requirements of the CWA and that a new or revised standard is necessary to comply with the requirements of the CWA, EPA must promptly promulgate a new or revised standard and finalize that standard

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<sup>2</sup> In 2008, a fish consumption rate of 586 g/day was established for native subsistence consumers on the Lower Elwha, related to the Rayonier cleanup near Port Angeles, Washington.

<sup>3</sup> Failing to take into account suppression of consumption due to depletion and contamination factors also leads to a downward water- and fish-contamination spiral where consumers are not adequately protected so they eat less fish out of fear of the higher levels of contamination that have been allowed (based on suppressed instead of accurate consumption rates), which in turn affects future surveys. This is the polar opposite of the Clean Water Act’s direction to restore and maintain the chemical, physical, and biological integrity of our nation’s waters.

within 90 days of publishing the proposed standard unless the state steps in and corrects the problem. *See* 33 U.S.C. § 1313(c)(4). This provision makes clear that EPA has a duty to act.

B. EPA's Violation.

EPA has repeatedly informed the State of Washington, Department of Ecology that EPA has determined Washington's human health criteria water quality standards lack an accurate fish consumption rate related to water toxins that affect human health,<sup>4</sup> and that Washington's reliance on the NTR assumed consumption rate of 6.5 g/day is wholly inadequate to protect *any* fish consumers, much less tribes and other subsistence populations, and that a new standard is therefore necessary. EPA's communications to Washington are consistent with its repeated statements in guidance to *all* states over a decade ago that the NTR rate of 6.5 g/day is inaccurate and inadequate as a whole, and that it is especially not protective of fishing uses and consumption in various communities that rely heavily on fishing. *See* Fish Advisories Guidance, at 1-4 through 1-9 and Appendix B. *See also* Environmental Justice Report at 27-33. Interestingly, EPA's guidance and instruction to states to gather and rely on local data is based in large measure upon consumption surveys of tribes and Pacific-Asian populations *in Washington State*. *Id.*; *see also*, Environmental Justice Report at 30. Despite the fact that EPA has, for a decade, made plain that 6.5 g/day is not protective of any fish consumer, much less communities in Washington such as tribes, Washington has failed to adopt a protective standard and in so doing has failed to protect and maintain designated uses.

In addition to the plain statements in numerous guidance documents about the need and process for locally-accurate and protective fish consumption rates as an integral and necessary part of water quality standards, EPA has issued specific written communications on Washington's lack of a standard. On November 10, 2010, Jannine Jennings, Manager of the Water Quality Standards Unit for Region 10, sent an email to the Washington State Department of Ecology ("Ecology") noting that EPA would shortly send comments on Washington State's triennial review "stating EPA's desire for Washington to move forward with revisions to the human health criteria in order to incorporate a higher fish consumption rate."

On December 16, 2010, Ms. Jennings submitted comments on the Washington State triennial review, commenting on behalf of EPA. Ms. Jennings pointed out that federal regulation requires states to adopt criteria to protect all designated uses and that such criteria must be based on a sound scientific rationale and contain sufficient parameters to protect the use. She stated: "EPA urges Ecology to make the revision of Washington's human health criteria the most important priority in this Triennial Review." Ms. Jennings also pointed out that "this is a priority

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<sup>4</sup> It is important to note that while human health is a focus, it is also critical that EPA and the state recognize and protect uses that encompass social, cultural, and religious components of fish use and consumption among various subsistence populations, particularly Pacific Northwest tribes. *See* Environmental Justice Report, at 56-59.

for Region 10,” and “Washington’s human health criteria were issued by EPA in 1992 through the National Toxics Rule (NTR). The human health criteria are not in the State’s WQS and Washington is one of a handful of states remaining in the NTR for human health criteria.” Ms. Jennings pointed out that in 2000, EPA updated its methodology for deriving human health criteria, recommending that states use a fish consumption rate that accurately represents local populations to be protected wherever local information about fish consumption is available. She then stated, “*EPA believes that a fish consumption rate of 6.5 grams per day is not reflective of fish and shellfish consumers in the State of Washington,*” and that Ecology should examine EPA’s most recent criteria documents and other studies to determine an appropriate rate for criteria that will be protective of the state’s designated uses (emphasis added).

On November 17, 2012, Ms. Jennings sent a letter to Kelly Susewind (Washington State Department of Ecology Water Quality Program) and Jim Pendowski (Washington State Department of Ecology Toxics Cleanup Program) providing comments on Ecology’s draft Technical Support Document for the Sediment Standards. Ms. Jennings repeats statements from the 2010 letter that criteria must protect designated uses, must be scientifically based, and for human health criteria and fish consumption rates, Ecology should use local data as the preferred foundation. Ms. Jennings also repeats that Washington currently has a rate of 6.5 g/day and noted “as identified in your draft document, several studies of Northwest populations indicate that this rate is not reflective of the amount of fish and shellfish consumed by some in the state of Washington. Therefore, it is appropriate and consistent with EPA guidance for Ecology to examine the current science to determine an appropriate fish consumption rate . . . .” Shortly thereafter in the letter, Ms. Jennings stated “we encourage you to quickly incorporate this information [from tribal and other surveys] into your rulemaking process and move forward with adopting revised criteria.” Ms. Jennings summarized that “EPA believes the information is currently available to make decisions on these matters and requests Ecology to quickly move through the process necessary to do so.” She closed by repeating that this is a priority for EPA Region 10.<sup>5</sup>

Finally, most recently, EPA’s Regional Administrator Dennis McLerran wrote to Ecology’s Director Maia Bellon on June 13, 2013 stating: “The best available science includes evidence of consumption rates well above 6.5 grams per day among high fish consumers and shows that the human health criteria currently in effect for clean water purposes in Washington are not sufficiently protective.” Administrator McLerran also points out that “[t]he EPA believes there are scientifically sound regional and local data available in Washington that are sufficient

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<sup>5</sup> In related activity on Washington’s sediment standards, on October 17, 2011, Lon Kissinger, scientific and technical staff at EPA, noted that even the 54 g/day used by Washington in site cleanup work was inadequate given that “fish and shellfish consumption surveys from the Pacific Northwest indicate that there are groups of individuals, most notably tribes, which consume much more seafood than Ecology’s default rate.”

for Ecology to move forward in choosing a protective and accurate fish consumption rate at this time.”

EPA has determined and communicated to Washington that Washington’s current human health criteria and fish consumption rate are inadequate to protect designated uses under the Clean Water Act and that a revised or new fish consumption rate is necessary in order to protect Washington fish consumers and fishing designated uses under the Clean Water Act. EPA has violated its mandatory duty under the CWA, 33 U.S.C. § 1313(c)(4), by failing to promptly promulgate human health criteria based on an accurate fish consumption rate for Washington that adequately protects designated uses, including for subsistence populations in the state.

#### IDENTITY AND ADDRESSES OF PCFFA AND IFR

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#### CONCLUSION

EPA is in continuing violation of the CWA. PCFFA and IFR provide this Notice for the continuing violation outlined above, including if the violation continues subsequent to the date of this Notice. This Notice is given pursuant to 33 U.S.C. § 1365.

PCFFA and IFR send this notice only after years of unsuccessful attempts to persuade Washington State and EPA to protect people who eat fish by adopting accurate, protective human health criteria water quality standards. PCFFA and IFR continue to believe that this issue should be resolved without the initiation of litigation and without devoting resources to court proceedings. We stand ready to work with you in good faith to resolve EPA’s violations. However, unless this violation is cured within sixty days by the promulgation of a proposed rule incorporating an accurate fish consumption rate into new human health criteria, we reserve the

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right to take appropriate legal action to compel EPA to comply with the CWA and to protect consumers of fish and shellfish in Washington State.

Please contact the undersigned should you have any questions.

Sincerely,



Janette K. Brimmer  
Matthew R. Baca

cc: Maia Bellon, Director  
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