

## **THE FAILURE OF WASHINGTON'S FISH CONSUMPTION RATE: HOW IT AFFECTS RESIDENTS, THE ECONOMY, AND THE ENVIRONMENTAL PROTECTION AGENCY**

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ABSTRACT: Washington's fish consumption rate has remained unchanged since the 1980s, and now environmental groups are calling foul. While abiding by the State's current rate, which is one of the lowest consumption rates in the nation, Washington industries are able to dump higher levels of carcinogenic materials into local waterways. However, the health risks that these toxic chemicals pose to Washington residents may pose liability issues for the state if the rate is not effectively changed. Washington has begun looking towards neighboring Oregon as a model for reframing the fish consumption rate discussion, but their proposal does not go far enough.

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## I. INTRODUCTION

The contamination level is too high—at least that is what Washington State ecology groups like Waterkeepers Washington say.<sup>1</sup> Several groups have banded together and filed suit against the Environmental Protection Agency (“EPA”) in response to what they call an “excessively low” fish consumption rate.<sup>2</sup>

Current fish consumption rates, set by the Washington State Department of Ecology (“Ecology”), demonstrate that Washington residents eat about six-and-one-half grams of fish monthly, or about one generous serving.<sup>3</sup> The fish consumption rate is used to establish the contamination threshold permitted in Washington waterways.<sup>4</sup> Any change in the consumption rate will impact the contamination threshold, affecting sewer system discharges, regulations on storm water, and the number of wastewater-treatment plants.<sup>5</sup>

Waterkeepers Washington, which is composed of groups including Puget Soundkeeper Alliance, EarthJustice, the Pacific Coast Federation of Fishermen’s Associations, and

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1. Gene Johnson, *EPA Sued over Washington Fish-Consumption Estimates*, SEATTLE TIMES, Oct. 11, 2013, [http://seattletimes.com/html/localnews/2022022795\\_fish\\_consumptionxml.html](http://seattletimes.com/html/localnews/2022022795_fish_consumptionxml.html).

2. *Id.*

3. Washington’s Water Quality Standards for Surface Waters currently rely on the 1992 National Toxics Rule, which includes Water Quality standards for human health protection based on a fish consumption rate of six-and-one-half grams per day. See WASH. DEPT OF ECOLOGY, FISH CONSUMPTION RATES TECHNICAL SUPPORT DOCUMENT: A REVIEW OF DATA AND INFORMATION ABOUT FISH CONSUMPTION IN WASHINGTON 1 (2013), available at <https://fortress.wa.gov/ecy/publications/publications/1209058.pdf> [hereinafter FISH CONSUMPTION RATES].

4. Jenette Brimmer, et al., *Clean Water Advocates Push EPA on Washington State’s Toxic Fish Consumption Rules*, EARTHJUSTICE (July 23, 2013), <http://earthjustice.org/news/press/2013/clean-water-advocates-push-epa-on-washington-state-s-toxic-fish-consumption-rules>.

5. Erik Smith, *Fish Consumption Battle Heats Up—Papermakers, Seattle Manufacturers Go to Court to Intervene in Water-Quality Lawsuit*, WASH. STATE WIRE (Dec. 23, 2013), <http://washingtonstatewire.com/blog/fish-consumption-battle-heats-up-papermakers-seattle-manufacturers-go-to-court-to-intervene-in-water-quality-lawsuit/>.

several Riverkeeper groups, argue the EPA must require the State of Washington to amend its fish consumption rate.<sup>6</sup> Studies across Washington State show high levels of toxins in certain types of locally caught fish and shellfish.<sup>7</sup> According to Waterkeepers Washington, the EPA is violating its duty under federal law to protect public health by allowing Ecology to grossly underestimate the State's fish consumption rate.<sup>8</sup>

Economists fear that an increase in the fish consumption rate would force industries to restructure their wastewater plans, adding millions in expenses to major Washington industries, such as the aerospace industry represented by Boeing.<sup>9</sup> The fish consumption rate was one of the major issues that led to the near shutdown of state government in early 2013 when Boeing and other industries lobbied to add years of delay to new toxic pollution laws.<sup>10</sup>

The current suit, *Puget Soundkeeper Alliance v. Environmental Protection Agency* ("Puget Soundkeeper v. EPA"), was filed in the U.S. District Court for the Western District of Washington in Seattle on October 11, 2013.<sup>11</sup> In response to the suit, Ecology unveiled several proposals in September 2014 for updating the fish consumption rates, with the intent to reduce cancer risks and exposure to toxins.<sup>12</sup> The highest consumption rate being considered is a daily eight-ounce fish meal.<sup>13</sup> The state is also considering Oregon's standard, equivalent to about twenty-four eight-ounce fillets per month, and another with a sixteen fillet monthly

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6. Johnson, *supra* note 1.

7. *Fish Consumption Advisories*, WASH. STATE DEPT OF HEALTH, <http://www.doh.wa.gov/CommunityandEnvironment/Food/Fish/Advisories.aspx> (last visited Feb. 28, 2014).

8. Johnson, *supra* note 1.

9. Robert McClure, *Business Interests Trump Health Concerns in Fish Consumption Fight*, INVESTIGATE W. (March 30, 2013), <http://www.invw.org/article/business-interests-trump-1344>.

10. *Id.*

11. Complaint at 1, *Puget Soundkeeper Alliance v. EPA*, No. 2:13-cv-01839-JCC (W.D. Wash. 2013).

12. Phuong Le, *Washington Aims to Raise Rate of Fish Consumption*, COLUMBIAN, Sept. 30, 2014, <http://www.columbian.com/news/2014/sep/30/washington-aims-to-raise-rate-of-fish-consumption/>.

13. Kate Pregelman, *Ecology Wants in Fish Consumption Rate Lawsuit*, YAKIMA-HERALD REPUBLIC, Dec. 5, 2013, <http://www.yakimaherald.com/news/yhr/thursday/1725653-8/ecology-wants-in-fish-consumption-rate-lawsuit>.

consumption rate.<sup>14</sup> These standards would require reducing the allowable industry pollution discharge into lakes, rivers, and bays by fifty percent to ninety-seven percent.<sup>15</sup>

While Ecology was not named a defendant in the current complaint, it petitioned to become a defendant in the lawsuit in order to ensure that it could “protect the state’s significant interest in continuing the process Ecology has already initiated to revise Washington’s fish consumption rate and human health quality standards.”<sup>16</sup> Puget Soundkeeper Alliance opposed Ecology’s request, stating that the lawsuit “seeks an order setting deadlines for EPA to promulgate accurate protective standards,”<sup>17</sup> and that there is “no scenario in which this lawsuit would force Ecology to end or abort its development of a standard.”<sup>18</sup>

Governor Jay Inslee plans on introducing legislation in 2015 tied to this draft rule.<sup>19</sup> The proposed statute would attempt to cut down on toxic chemical emissions.<sup>20</sup> However, the proposed legislation seems to satisfy no one.<sup>21</sup> Businesses worry that the rules will be too strict and damage Washington’s economy, while environmental groups have criticized the proposal as not protective enough.<sup>22</sup>

Puget Soundkeepers will likely succeed in their suit against the EPA and establish a deadline for new fish consumption rates based on three factors: (I) the history and intent of water pollution control legislation; (II) the failure breach of duty to Washington residents based on (A) the Toxics Rule and (B) the health risks of eating contaminated fish and shellfish; and (III) the liability of the EPA.

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14. *Id.*

15. Becky Kramer, *State’s Fish Consumption Rates to be Updated*, SPOKESMAN-REV., Nov. 7, 2013, <http://www.spokesman.com/stories/2013/nov/07/states-fish-consumption-rates-to-be-updated/>.

16. Motion to Intervene at 1, Puget Soundkeeper Alliance. EPA, No. 2:13-cv-01839-JCC (W.D. Wash. 2013).

17. Plaintiff’s Opposition to Washington State Department of Ecology’s Motion to Intervene as Defendant at 3, Puget Soundkeeper Alliance v. EPA, No. 2:13-cv-01839-JCC (W.D. Wash. 2013).

18. *Id.* at 6.

19. *Le, supra* note 12.

20. *Id.*

21. *Id.*

22. *Id.*

## II. THE DEVELOPMENT OF WATER QUALITY STANDARDS

Puget Soundkeepers will likely succeed in their quest to force the EPA to set a deadline for the fish consumption rate due to (A) the legislative intent of the Clean Water Act and (B) the standards set forth by water quality standards and Ambient Criteria.

### A. *Legislative Intent of the Clean Water Act*

The United States' history with water pollution control legislation pre-dates the modern Clean Water Act. The original 1948 statute, called the Water Pollution Control Act, was the first major U.S. law to address water pollution.<sup>23</sup> It authorized "the Surgeon General of the Public Health Service, in cooperation with other federal, state, and local entities, to prepare comprehensive programs for eliminating or reducing the pollution of interstate waters and tributaries and improving the sanitary condition of surface and underground waters."<sup>24</sup> Enforcement was limited to interstate waters while the Public Health Service provided financial and technical assistance.<sup>25</sup>

The Water Pollution Control Act was drastically overhauled in 1972, following a growing public awareness of water pollution.<sup>26</sup> The 1972 amendments, entitled the Clean Water Act ("CWA"), accomplished the following:

- established the basic structure for regulating pollutants discharges into the waters of the United States;

- gave the EPA the authority to implement pollution control programs such as setting wastewater standards for the industry;

- maintained existing requirements to set water quality

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23. Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251–1376 (2012)).

24. *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service*, FISH & WILDLIFE SERV., U.S. DEPT OF THE INTERIOR, <http://www.fws.gov/laws/lawsdigest/fwatrp.html> (last visited Jan. 10, 2014).

25. Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (codified as amended at 33 U.S.C. §§ 1251–1376).

26. *History of the Clean Water Act*, ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/laws-regulations/history-clean-water-act> (last visited Jan. 10, 2014).

standards for all contaminants in surface waters;

made it unlawful for any person to discharge any pollutant from a point source into navigable waters, unless a permit was obtained under its provisions;

funded the construction of sewage treatment plants under the construction grants program; and

recognized the need for planning to address the critical problems posed by nonpoint source pollution.<sup>27</sup>

In 1987, Congress authorized the CWA to address pollution caused by urbanization.<sup>28</sup> The new provisions required municipalities to cut down on urban waste by providing residents with appropriate sites for discarding such pollution.<sup>29</sup> Municipalities were also given new enforcement powers.<sup>30</sup> The new provisions were called the National Pollutant Discharge Elimination System (“NPDES”).<sup>31</sup> The NPDES included a requirement for research on the dangerous impacts of pollutants on human health, to be conducted by the EPA, in conjunction with the U.S. Fish and Wildlife Service (“Fish and Wildlife”), and the National Oceanic and Atmospheric Administration (“NOAA”).<sup>32</sup>

#### B. *Water Quality Standards and Ambient Criteria*

The research Fish and Wildlife and NOAA conducted eventually produced water quality standards (“WQS”), which are the current basis for the CWA’s water quality-based pollution control program.<sup>33</sup> WQS “define the parameters for a body of water by designating its uses, setting criteria to protect those uses, and establishing provisions such as anti-degradation policies to protect the bodies of water from pollutants.”<sup>34</sup> Water quality standards contain four basic

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27. *Id.*

28. *History of the Clean Water Act*, ALAMEDA CNTY. PUB.WORKS AGENCY, [http://www.acgov.org/pwa/programs/water\\_history.htm](http://www.acgov.org/pwa/programs/water_history.htm) (last visited Jan. 10, 2014).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service*, FISH & WILDLIFE SERV., U.S. DEPT OF THE INTERIOR, <http://www.fws.gov/laws/lawsdigest/fwatrpo.html> (last visited Jan. 10, 2014).

33. *Water Quality Standards for Surface Waters*, ENVTL. PROTECTION AGENCY, <http://water.epa.gov/scitech/swguidance/standards/> (last visited Jan. 10, 2014).

34. *Id.*

elements: (1) Designated uses of the water body (e.g., recreation, water supply, aquatic life, agriculture), (2) Water quality criteria designed to protect designated uses (allowable numeric pollutant concentrations and narrative requirements<sup>35</sup>), (3) an anti-degradation policy to maintain and protect existing uses and high quality waters, and (4) general policies addressing implementation issues (e.g., low flows, variances, mixing zones).<sup>36</sup>

CWA § 303(c)(2)(A) requires that WQS protect “public health or welfare, enhance the quality of the water, and serve the purposes of [the Act].”<sup>37</sup> CWA § 101(a)(2) establishes as a national goal “water quality which provides for protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water, wherever attainable.”<sup>38</sup> The goal of the 1972 iteration of the CWA was to have fishable and swimmable waters by 1983.<sup>39</sup>

The EPA has interpreted the “fishable” language in section 101(a)(2) to refer to protecting water quality “so that fish and shellfish thrive, and to protecting human health in consuming fish and shellfish.”<sup>40</sup> Thus, to be consistent with section 101(a)(2), the applicable criteria for using the designated “fishable” use requires not only safeguarding aquatic organisms themselves, but their human consumers.<sup>41</sup>

This criteria was quantified in the 1980 Ambient Water Quality Criteria (“Ambient Criteria”) using fish tissue biological concentration.<sup>42</sup> Human Health Ambient Criteria are

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35. When pollutants cannot be precisely measured in numeric or quantitative form, narrative criteria are used to express a parameter in qualitative form. *See Basic Course: Key Concepts (Module 3.e)*, ENVTL. PROTECTION AGENCY, <http://water.epa.gov/learn/training/standardsacademy/mod3/page6.cfm> (last visited Jan. 6, 2015).

36. *What are Water Quality Standards?*, ENVTL. PROTECTION AGENCY, [http://water.epa.gov/scitech/swguidance/standards/about\\_index.cfm](http://water.epa.gov/scitech/swguidance/standards/about_index.cfm) (last visited Jan. 10, 2014).

37. Clean Water Act of 1972 § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A) (2012).

38. *Id.* § 101(a)(2).

39. ROBERT W. ADLER ET AL., *THE CLEAN WATER ACT 20 YEARS LATER* 9 (1993).

40. *Human Health Ambient Water Quality Criteria and Fish Consumption Rates: Frequently Asked Questions*, ENVTL. PROTECTION AGENCY 1–2 (Jan. 18 2013), <http://water.epa.gov/scitech/swguidance/standards/criteria/health/methodology/upload/hhfaqs.pdf> [hereinafter FAQs].

41. *Id.*

42. *National Recommended Water Quality Criteria*, ENVTL. PROTECTION AGENCY, <http://water.epa.gov/scitech/swguidance/standards/criteria/current/index.cfm> (last

based on both cancer and non-cancer health effects and are meant to shield from negative effects that “could be reasonably expected due to elevated acute or short-term exposures.”<sup>43</sup> Ambient Criteria are determined on a state-by-state basis.<sup>44</sup> They should provide protection not only for the general populous based on the exposure accumulated over a lifetime, but also for those subpopulations who, because of elevated water or fish consumption rates, or because of biological sensitivities, have a higher risk of receiving exposure that would cause health issues.<sup>45</sup>

A state’s Ambient Criteria is developed in part by a calculation of the state’s fish consumption rate.<sup>46</sup> The fish consumption rate indicates the average amount of fish and shellfish in kilograms consumed by a person each day.<sup>47</sup> The fish consumption rate includes fish and shellfish from local, commercial, aquaculture, interstate, and international sources. The overall goal of the criteria is to allow a consumer to safely consume from local waters.<sup>48</sup> Based upon the fish consumption rate, a state determines the allowable contaminant rate from local industry.<sup>49</sup> Contaminant rates are set by determining the level of contaminants in water at which no adverse health effects are likely to occur.<sup>50</sup> In setting human health water quality criteria, a state must set the level of toxic pollutants low enough that fish remain safe to eat.<sup>51</sup> If a state fails to set the foundational water quality standard high enough, the corresponding health criteria will be too lax and fish consumers will ingest levels of toxins that can put their well-

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visited Jan. 10, 2014).

43. FAQs, *supra* note 40, at 2.

44. *Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants; States’ Compliances*, ENVTL. PROTECTION AGENCY, <http://water.epa.gov/lawsregs/rulesregs/ntr/> (last visited Jan. 6, 2015).

45. FAQs, *supra* note 40, at 2.

46. *Id.*

47. *Id.*

48. *Id.*

49. Complaint at 1, *Puget Soundkeeper Alliance v. EPA*, No. 2:13-cv-01839 (W.D. Wash. 2013).

50. *Drinking Water Contaminants*, ENVTL. PROTECTION AGENCY, <http://water.epa.gov/drink/contaminants/> (last visited Feb. 28, 2014).

51. Complaint at 1, *Puget Soundkeeper Alliance v. EPA*, No. 2:13-cv-01839 (W.D. Wash. 2013).

being at risk.<sup>52</sup>

In 1992, the EPA issued the National Toxics Rule, which set standards for water quality for states that had failed to establish their own EPA-approved criteria.<sup>53</sup> All but twelve states (Alaska, Arkansas, California, Florida, Idaho, Kansas, Michigan, Nevada, New Jersey, Rhode Island, Vermont, and Washington), Puerto Rico, and Washington, D.C., had adopted EPA-approved human health criteria for water quality standards by the time the Toxics Rule completed public review.<sup>54</sup>

### III. POTENTIAL LIABILITIES OF THE EPA AND CONTAMINANT PRODUCERS

The EPA will face criticism from the court system for not doing more to develop an accurate fish consumption rate in Washington based on (A) their duty to protect public health. However when it comes to potential future cases from private citizens who have suffered health detriments due to their exposure to toxins in fish and shellfish, (B) contaminant producers will be the ones on the hook.

#### A. *The EPA has a responsibility to provide for public health*

The CWA requires states (or the EPA if the states fail to do so) to develop water quality standards necessary to meet its requirements, including the requirement that states protect the designated uses of their water bodies.<sup>55</sup> Subsection four of the CWA is the issue of contention in Washington State. This subsection requires the EPA to promptly prepare and publish proposed regulations setting revised or new water quality standards for navigable waters if a water quality standard submitted by a state is not consistent with the requirements of the CWA.<sup>56</sup> The EPA may also publish such new standards if it determines that a revised or new standard is necessary to meet

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52. *Id.*

53. Wendee Nicole, *Meeting the Needs of the People: Fish Consumption Rates in the Pacific Northwest*, 121 ENVTL. HEALTH PERSP., Nov.–Dec. 2013, at A334, A335, available at <http://ehp.niehs.nih.gov/wp-content/uploads/121/11-12/ehp.121-A334.pdf>.

54. *Id.*

55. 33 U.S.C. § 1313 (2012).

56. *Id.*

the requirements.<sup>57</sup>

In *Puget Soundkeeper v. EPA*, environmental groups allege that the EPA has failed to promulgate standards necessary to meet the requirements of the CWA and to protect designated uses including the consumption of fish.<sup>58</sup>

The lower the fish consumption rate in Washington, the more pollution Ecology can legally allow.<sup>59</sup> Washington residents regularly consume dangerous amounts of toxic chemicals in fish from local waterways because of these minimal regulations.<sup>60</sup> *Puget Soundkeeper* Plaintiffs believe that if the fish consumption rate was more realistic, Washington policy makers would be forced to more strictly control mercury, lead, and copper emissions.<sup>61</sup> Current studies of adult salmon indicate that Puget Sound Chinook salmon have higher concentrations of legacy contaminants,<sup>62</sup> such as polychlorinated biphenyls (“PCBs”), than salmon from other parts of the Northwest.<sup>63</sup> PCBs, dioxins, mercury, and other chemicals can accumulate in fish tissue and harm the health of people who consume fish.<sup>64</sup> Exposing humans to these chemicals can compromise immune function, cause cancer, and adversely affect reproduction, human development, and endocrine functions.<sup>65</sup> Children, adults who eat large amounts of finfish or shellfish, and other sensitive populations, may be particularly vulnerable to these negative health effects.<sup>66</sup>

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57. *Id.*

58. Complaint at 2, *Puget Soundkeeper Alliance v. EPA*, No. 2:13-cv-01839 (W.D. Wash. 2013).

59. McClure, *supra* note 9.

60. Robert McClure & Olivia Henry, *How Boeing, Allies Torpedoed State’s Rules on Toxic Fish*, INVESTIGATE W. (April 23, 2013), <http://www.invw.org/article/how-boeing-allies-torpedo-1353>.

61. Johnson, *supra* note 1.

62. Legacy contaminant refers to substances whose use have been banned or severely restricted by government agencies for many years. See *Organochlorine Legacy Compounds*, AXYS ANALYTICAL SERVS., LTD., [http://www.axysanalytical.com/services/organochlorine\\_legacy\\_compounds/](http://www.axysanalytical.com/services/organochlorine_legacy_compounds/) (last visited Jan. 6, 2015).

63. Terri Hansen, *Toxic Waters: Consumption Advisories on Life-Giving Year-Round Fish Threaten Health*, INDIAN COUNTRY (Jan. 10, 2014), <http://indiancountrytodaymedianetwork.com/2014/01/10/toxic-salmon-consumption-advisories-life-giving-fish-threatens-health-153048>.

64. FISH CONSUMPTION RATES, *supra* note 3, at 17.

65. Hansen, *supra* note 63.

66. FISH CONSUMPTION RATES, *supra* note 3, at 17.

PCBs, mercury, and dioxins, build up in the human body over time and may harm the nervous system.<sup>67</sup> The Washington State Department of Health (“Department of Health”) toxicologist David McBride spoke at a meeting to members of Ecology regarding national studies which tested mercury in women.<sup>68</sup> McBride said that Washington women are taking in too much mercury, an element primarily found in seafood.<sup>69</sup> Mercury is known to cause learning disabilities, affecting the brain and nervous system of fetuses and children.<sup>70</sup> The first symptoms of adult mercury poisoning include “lack of coordination and burning or tingling sensation in the fingers and toes.”<sup>71</sup> As mercury levels increase, they can impact the ability to walk, speak, see, and hear.<sup>72</sup> Mothers who were exposed to PCBs before becoming pregnant may give birth to children with infant development problems.<sup>73</sup> PCBs can also cause change in human blood, liver, and immune functions in adults.<sup>74</sup> PCBs cause cancer in laboratory animals and may cause cancer in humans.<sup>75</sup> Other dioxins found in Washington fish have been associated with an increased prevalence of chloracne,<sup>76</sup> hyperpigmentation of the skin, liver toxicity, and changes in male reproductive hormones.<sup>77</sup> High levels of dioxins over many years also increase the risk of developing cancer.<sup>78</sup>

Originally, under the Toxics Rule, the EPA assumed a fish consumption rate of six-and-one-half grams per day—or one seven-ounce meal per month—but in 2000, the agency revised

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67. *Minnesota Fish: Benefits and Risks*, MINN. DEPT OF HEALTH, <http://www.health.state.mn.us/divs/eh/fish/faq.html> (last visited Jan. 10, 2014).

68. McClure, *supra* note 9.

69. *Id.*

70. *Id.*

71. *Minnesota Fish: Benefits and Risks*, *supra* note 67.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. Chloracne is an acne-like eruption of blackheads, cysts, and pustules associated with over-exposure to certain aromatic compounds such as chlorinated dioxins and dibenzofurans. See Qiang Ju et al., *Environmental Pollution and Acne: Chloracne*, 1 *DERMATO-ENDOCRINOLOGY* 123, 125–28 (2009).

77. *Facts About Dioxins*, MINN. DEPT OF HEALTH, <http://www.health.state.mn.us/divs/eh/risk/chemhazards/dioxins.html> (last visited Jan. 10, 2014).

78. *Id.*

its recommendation, advising states to use a default value of seventeen-and-one-half grams per day, a rate that protects up to the ninetieth percentile of people in the United States.<sup>79</sup> EPA guidelines also state that individual states where more fish is eaten should have water quality standards that reflect the higher fish consumption.<sup>80</sup>

Washington's fish consumption rate currently reflects the 1992 Toxics Rule; it is set at six-and-one-half grams per day,<sup>81</sup> one of the lowest fish consumption rates seen in the country. In 2012, Ecology published a document detailing how much fish Washingtonians actually eat.<sup>82</sup> The report found that the general population of Washington averages nineteen to fifty-six grams per day, while tribal members can eat up to 797 grams per day.<sup>83</sup> There are an estimated 192,114 American Indians in Washington, which accounts for 2.9 percent of the total state population and 3.9 percent of the total American Indian population of the United States.<sup>84</sup> Washington has the sixth largest American Indian population, although over half of those identifying as American Indian live in urban areas and not in tribal communities.<sup>85</sup> Of those living in tribal communities, Puget Soundkeeper's complaint alleges that this report may even underrepresent the consumption rate. The complaint cites surveys of various communities in Washington that show consumption rates of 200, 300, and even over 500 grams per day.<sup>86</sup> The EPA has also indicated that Washington's fish consumption rate is inaccurate, and stated its desire for Washington to move forward with revisions to the human health criteria in order to incorporate a higher fish

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79. Nicole, *supra* note 53, at A335.

80. *Id.*

81. *Id.*

82. FISH CONSUMPTION RATES, *supra* note 3.

83. *Id.*

84. TINA NORIS ET AL., U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 7 (2012), *available at* <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>.

85. AM. INDIAN HEALTH COMM'N FOR WASH. STATE, TRIBAL ANALYSIS FOR WASHINGTON STATE HEALTH BENEFIT EXCHANGE AND HEALTH CARE AUTHORITY 2, (2012), *available at* [http://www.edfoxphd.com/AIHC\\_Tribal\\_Preliminary\\_Analysis\\_for\\_HBEB\\_Version\\_2.pdf](http://www.edfoxphd.com/AIHC_Tribal_Preliminary_Analysis_for_HBEB_Version_2.pdf).

86. Complaint at 3, Puget Soundkeeper Alliance v. EPA, No. 2:13-cv-01839 (W.D. Wash. 2013).

consumption rate.<sup>87</sup> In an email to Ecology dated November 10, 2010, Jannine Jennings, Manager of the Water Quality Standards Unit for EPA Region 10 (of which Washington is a part) stated the “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.”<sup>88</sup> In addition, EPA’s Region 10 Regional Administrator Dennis McLerran wrote to Ecology’s director 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 show that the human health criteria currently in effect for clean water purposes in Washington are not sufficiently protective.”<sup>89</sup>

The plaintiffs in *Puget Soundkeepers* argue that the EPA has violated its mandatory duty under the CWA by failing to promptly promulgate human health criteria based on an accurate fish consumption rate for Washington that adequately protects designated uses.<sup>90</sup> The EPA has authority under the CWA to step in and set revised water quality standards, but has indicated it will not likely intervene if Washington follows its proposed timeline for revising the standard.<sup>91</sup> Plaintiffs in *Puget Soundkeeper* claim that the EPA’s failure to intervene has caused and will continue to cause direct and immediate harm to fish consumers in Washington, injuring the health, recreational, environmental, aesthetic, commercial, and other interests of the plaintiffs and their members.<sup>92</sup>

There are a few cases that shed light on how a court would rule both in *Puget Soundkeeper* and in any possible future negligence cases. For instance, *American Lung Association v. EPA* bears a striking resemblance to the current controversy, as it involved environmental and health organizations seeking review of an EPA order refusing to promulgate more stringent national ambient air quality standards (“Ambient Air

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87. *Id.* at 11.

88. *Id.*

89. *Id.* at 12.

90. *Id.* at 13.

91. Nicole, *supra* note 53, at A337.

92. Complaint at 13, *Puget Soundkeeper Alliance v. EPA*, No. 2:13-cv-01839 (W.D. Wash. 2013).

Standards”) for sulfur dioxide.<sup>93</sup> Sulfur dioxide, a highly reactive colorless gas, is produced primarily from fossil fuel combustion.<sup>94</sup> It directly affects human health, especially those suffering from asthma. Sulfur dioxide<sup>95</sup> impacts non-asthmatic individuals at concentrations above two parts per million (“ppm”) and affects those with asthma below two ppm.<sup>96</sup> In *American Lung Association*, petitioners had urged the EPA to issue new Ambient Air Standards limiting short-term sulfur dioxide bursts, defined as emissions of .50 ppm or more lasting at least five minutes.<sup>97</sup> Rejecting petitioners’ arguments, the EPA concluded not only that the annual and twenty-four-hour primary standards need no revision, but also that an additional five-minute standard was unnecessary to protect asthmatics.<sup>98</sup> Petitioners argued that the EPA had violated its statutory responsibility to protect the public health.<sup>99</sup> In their review of the challenge, the D.C. Circuit stated, “[w]e will not second-guess EPA in its area of special expertise.”<sup>100</sup> However, the Court went on to hold that the EPA administrator could not fulfill her responsibility under the Clean Air Act to establish Ambient Air Standards protecting public health without answering whether asthmatic reaction to sulfur dioxide bursts amounts to an adverse health effect, and so it ultimately remanded the case.<sup>101</sup>

In applying *American Lung Association* to *Puget Soundkeepers*, there is one critical difference: in *American Lung Association*, the EPA disagreed with petitioners’ assertion that the Ambient Air Standards needed to be revised. In *Puget Soundkeepers*, the EPA stated several times that Washington’s fish consumption rate must be revised, but it has done nothing to enforce this assertion. It is far more likely that the court would side with petitioners in *Puget Soundkeepers* because it would not be disagreeing with the expert opinion set

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93. 134 F.3d 388 (D.C. Cir. 1999).

94. *Id.* at 389.

95. *Id.*

96. *Id.*

97. *Id.* at 390.

98. *Id.*

99. *Id.* at 391.

100. *Id.*

101. *Id.* at 392.

forth by the EPA as it would have had to do in *American Lung*. In fact, by siding with petitioners, the court would be supporting the EPA's own assertion that Washington's fish consumption rate must be adjusted.

The EPA's inaction in determining a new fish consumption rate for Washington could be seen by the court as a denial to consider the need for a new fish consumption rate. Inaction on an issue has long been considered equivalent to a denial, as seen in *Environmental Defense Fund, Inc., v. Ruckelshaus*.<sup>102</sup> In *Ruckelshaus*, petitioners filed for review of an order issued by the Secretary of Agriculture refusing to suspend federal registration of pesticides or to commence formal administrative procedures that could terminate that registration, after chemical pesticides containing dichlorodiphenyltrichloroethane ("DDT") were found to be harmful to human health.<sup>103</sup> The court concluded that the Secretary's silence on the request for suspension was equivalent to a denial of that request, and that the denial was reviewable because of its immediate impact on the parties.<sup>104</sup> The court also found that the EPA's power to suspend the registration of products stems from a legislative desire to prevent an "imminent hazard to the public."<sup>105</sup>

Puget Soundkeepers will likely argue that the artificially low fish consumption rate poses an imminent hazard to the public. The most important element of an imminent hazard to the public is a serious threat to public health.<sup>106</sup> A hazard may be imminent even if its impact will not be apparent for many years, and the class protected by the suspension provision not only includes people but also fish and wildlife.<sup>107</sup> Based on this logic, it seems evident that the court will rule against EPA because there is an imminent hazard to the public, including a serious threat to public health. The underestimation of Washington's fish consumption rate threatens the well-being of fish and wildlife, and the wellbeing of humans, both of which are considered by the court system when evaluating whether a

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102. 439 F.2d 584 (D.C. Cir. 1971).

103. *Id.*

104. *Id.* at 589.

105. *Id.* at 596.

106. *Id.*

107. *Id.* at 597.

situation causes an imminent hazard to the public.<sup>108</sup>

Currently, plaintiffs' prayer for relief encompasses the following: (1) A declaration that the EPA is in violation of the Clean Water Act by failing to propose and adopt a revised fish consumption rate for Washington after determining that a revision of Washington's current fish consumption rate is necessary to comply with the Clean Water Act; (2) A declaration that EPA is in violation of the Clean Water Act by failing to propose and adopt human health criteria for toxic pollutants based on a revised consumption rate for Washington after determining that a revision of Washington's current fish consumption rate is necessary to comply with the Clean Water Act; (3) An injunction requiring EPA to comply with the Clean Water Act by preparing and publishing proposed regulations in the Federal Register setting forth a revised fish consumption rate for Washington within sixty days of the Court's order and promulgating the revised standard no later than ninety days after the date of publication of the revised standard in the Federal Register pursuant to 33 U.S.C. § 1313(c)(4); (4) An award of Plaintiff's costs and reasonable attorneys' fees pursuant to 33 U.S.C. § 1365; and (5) Such further relief as the Court deems just and equitable.<sup>109</sup>

It is likely that the courts will hold the EPA accountable for failing to maintain a realistic fish consumption rate in Washington. However, private citizens with civil suits regarding medical expenses for illnesses caused by over consumption of toxic fish would stand a better chance of suing the producers of the chemicals who polluted the waterways in the first place.

*B. Plaintiffs who have suffered a detriment to their health due to the consumption of toxic seafood have several possible avenues with which to seek compensatory damages*

Those who have suffered medical issues due to the toxins in the seafood they were eating could sue the EPA based on the theories of negligence or toxic torts, but would be more likely to succeed if they sued chemical producers under the theory of

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108. *Id.*

109. Complaint at 14, Puget Soundkeeper Alliance v. EPA, No. 2:13-cv-01839 (W.D. Wash. 2013).

proximate cause.

1. *Private plaintiffs could sue the EPA on the basis of negligence*

Municipal water providers have been exposed to civil actions brought by consumers since the time of the typhoid outbreaks of the 1800s.<sup>110</sup> A number of claims are encompassed by these civil actions including negligence, nuisance, trespass, product liability, and even strict liability suits based on the theory that “water providers are engaged in an abnormally dangerous activity.”<sup>111</sup> As technology has advanced and the ability to track “contaminants of concern” to a specific drinking water supply has increased, these suits have become easier to assert, as claimants can overcome the difficult burden of establishing causation.<sup>112</sup> It follows that a similar theory could be applied to those suffering from mercury, PCB, or dioxin poisoning due to the lack of restrictions on pollutants in Washington’s water supply. It is therefore possible that those suffering from health concerns due to exposure to toxins within Washington’s fish supply could sue the state and the EPA for negligence.

With respect to the standard of care instruction in Washington, the jury instruction on negligence reads as follows:

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonable careful person would have done under the same or similar circumstances.<sup>113</sup>

Thus in a trial involving Ecology, one could expect to hear evidence of such customs and practices as standard operating procedures and expert testimony on the accepted customs and practices in other states as a whole. As Washington ranks in the very lowest tier of current fish consumption rates and the toxicity level of the fish involved is significantly higher than in other states, it seems likely that Washington’s operating

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110. James G. Derouin and David R. Nelson, *Developments in Toxic Tort Liability for the Quality of Groundwater Served*, 49 ARIZ. L. REV. 469, 469 (2007).

111. *Id.* at 470.

112. *Id.*

113. WASHINGTON PATTERN JURY INSTRUCTIONS—CIVIL § 10.01 (6th ed. 2012).

procedures are below the accepted standard of care. Because of the proliferation of the studies discussing the health risks of mercury, PCBs, and dioxins, and the knowledge by both Ecology and EPA of the inaccurate fish consumption rate, any plaintiffs suing due to health problems traceable to fish consumption would be able to easily assert that these agencies were aware of the risk of exposure to Washington residents and did not act.

A negligence claim requires showing that some duty was breached and that the breach proximately caused the injury.<sup>114</sup> Defending against a negligence claim, therefore, the EPA and Ecology could try to show that it did not cause the injury, or that it did not breach any duty owed to the plaintiffs.<sup>115</sup> It is possible that the second prong of this would fail, as the EPA states that its mission is “to protect human health and the environment.”<sup>116</sup>

2. *Private plaintiffs could rely on the breach of the EPA’s duty to Washington residents based on the theory of toxic torts, but this argument would fail*

In toxic torts, causation is key.<sup>117</sup> Plaintiffs suing the EPA or Ecology in a toxic tort claim must be able to tell the court what toxins caused which specific illnesses in the plaintiffs and demonstrate a causal nexus.<sup>118</sup> Plaintiffs must prove that there is a poisonous substance, which was very toxic when introduced into tissues.<sup>119</sup> They must then demonstrate that the substance belonged to a particular company whose regulation was the responsibility of the EPA and that the substance leached by that company caused their injury.<sup>120</sup> This will be the more difficult portion for the plaintiffs, as they will have to demonstrate that any PCB, mercury or lead poisoning

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114. *Id.*

115. *Id.* at 495.

116. *About EPA*, ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/aboutepa> (last visited Jan. 10, 2014).

117. N. Kathleen Strickland, *Toxic Torts: An Overview*, AM. BAR ASSN. (May 2005), [http://www.americanbar.org/newsletter/publications/law\\_trends\\_news\\_practice\\_area\\_e\\_newsletter\\_home/toxictorts.html](http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/toxictorts.html).

118. *Id.*

119. *Id.*

120. *Id.*

was introduced into their system solely through fish consumption. As these elements are also present in smaller quantities throughout the environment, this will likely be where a litigant's case is weakest.

3. *Private plaintiffs in Washington have a higher chance of recovering damages if they name toxic substance producers as defendants*

It is likely that the courts will rule in favor of Puget Soundkeepers and issue an injunction to raise the fish consumption rate. However, the probability of plaintiff's success in future negligence cases based on health issues acquired due to the consumption of toxic seafood is not as certain. It will be more difficult in other states for plaintiffs to recover damages for past exposure to toxic seafood and shellfish than it will be for plaintiffs in Washington.

In other states, plaintiffs suing for toxic tort offenses must show causation through the following: (1) Plaintiff must allege that he was exposed to each of the toxic materials he claimed to have caused a specific illness. An allegation that he was exposed to "most and perhaps all" of the substances listed is inadequate. (2) Plaintiff must identify each product that allegedly caused the injury. It is insufficient to allege that the toxins in defendants' products caused it. (3) Plaintiff must allege that as a result of the exposure, the toxins entered his body. (4) Plaintiff must allege that he suffers from a specific illness, and that each toxin that entered his body was a substantial factor in bringing about, prolonging or aggravating that illness. (5) Finally, except in a case governed by the principle of liability based on market share for a uniform product, Plaintiff must allege that each toxin he absorbed was manufactured or supplied by a named defendant.

However, Washington has set forth a different standard, which may make it easier on plaintiffs to be compensated for exposure to toxic chemicals. Plaintiffs in toxic tort cases do not need to identify the manufacturers of the products that they were exposed to in order to recover from those manufacturers. Instead, such plaintiffs can rely on the testimony of witnesses who identify manufacturers of the toxic products to which he or she was exposed. Washington has established a long precedent of not requiring distinct identification of manufacturers of toxic substances in cases regarding asbestos. Because in other states, the identity of the product causing

contamination in the waterways must be identified with specificity, plaintiffs in negligence suits against the EPA would fare better if they named specific industries known for dumping the disease-causing contaminants into bodies of water as defendants. However, in Washington, this level of specificity is not required. It is enough to have experts testify that these industries are known to dump chemicals that cause the disease the plaintiff has mentioned in their complaint, and thusly it will be easier for a Washington plaintiff to succeed in a state negligence claim if they acquire a fish consumption related illness. It is these industries, after all, that played an important role in postponing the adjustment of the fish contamination rate through their influence in the legislature.

#### IV. INDUSTRIAL AND ECONOMIC CONCERNS

Economic concerns have been a large reason why updates to the fish consumption rate keep becoming stalled because of (A) the studies analyzing the costs of Oregon's higher fish consumption rate and (B) the influence of Washington industry on policymakers.

##### *A. Oregon's transition to a higher fish consumption rate came with large costs*

Fears regarding massive surges in costs if the fish consumption rate increases may not be unfounded. The Northwest Pulp and Paper Association commissioned a study of Oregon paper mills' likely costs after Oregon switched over to a higher fish consumption rate.<sup>121</sup> Based on Oregon's costs, the study estimated that it would cost Washington industry \$500 million to make the switch, plus \$30 million to \$90 million annually in operation costs.<sup>122</sup> Business interests are pushing the idea of waiting until technology is available to meet new standards before making upgrades.<sup>123</sup>

In 2004, abiding by the EPA's nationwide suggested standards, Oregon's Environmental Quality Commission adopted a seventeen-and-one-half grams per day fish

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121. McClure, *supra* note 9.

122. *Id.*

123. *Id.*

consumption rate.<sup>124</sup> However, based on concerns that seventeen-and-one-half grams per day did not accurately represent what many tribal communities consume, Oregon's Department of Environmental Quality worked closely with tribes and the EPA to set up the new fish consumption rate of 175 grams per day, which protects up to the ninety-fifth percentile of Oregonians who consume the most fish.<sup>125</sup> The state also worked on implementation processes with local tribes and industries in order to assist them in compliance with the tighter standards.<sup>126</sup> The result was the nation's most protective state water quality standards, which went into effect in 2011.<sup>127</sup>

Other states in the EPA Region 10 have tried to do the same. Idaho upped its standards in 2006 using the same seventeen-and-one-half gram per day consumption rate that Oregon did.<sup>128</sup> However, the EPA did not act to approve or disapprove the standards until 2012, when a lawsuit from environmental groups forced them to act.<sup>129</sup> However, the EPA disapproved Idaho's new rate, stating that Idaho "hadn't done an adequate review of existing fish consumption data."<sup>130</sup>

*B. Industry powerhouses fear that an increased fish consumption rate will raise production costs*

In 2012, Ecology had pushed to strengthen pollution limits on waterways.<sup>131</sup> However, Washington's aerospace industry, led by Boeing, requested a postponement of the process to allow more discussion due to the worry that it would result in pollution restrictions that were overly expensive and unworkable.<sup>132</sup>

At that time, Terry Mutter, Boeing's director of environmental strategy said in an interview, "We were looking for a much more balanced approach in rulemaking. This was

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124. Nicole, *supra* note 53, at A337.

125. *Id.*

126. *Id.* at A338.

127. *Id.* at A335.

128. *Id.* at A338.

129. *Id.*

130. *Id.*

131. McClure & Henry, *supra* note 60.

132. *Id.*

moving along extremely fast and it's very complex. We want to make sure that not only the environment is protected but also that the economy is viable for aerospace."<sup>133</sup> In reference to the potential for new rules based on an increased fish consumption rate, Mutter has stated, "[T]here is no evidence as to what those [rules] would be, and [no] certainty that those things are economically viable and are going to allow us to stay competitive in this state."<sup>134</sup>

Washington's economy includes 128,000 jobs tied to aerospace, according to the Aerospace Pipeline Advisory Committee.<sup>135</sup> Boeing, with 85,000 employees, tops the list of employers, and its various suppliers employ thousands more.<sup>136</sup> An email from former Governor Christine Gregoire's office made note of a Boeing executive expressing concern that raising the fish consumption rate would "cost the company hundreds of millions of dollars and severely hamper its ability to increase production in Renton and make future expansion elsewhere in the state cost-prohibitive."<sup>137</sup>

The Association of Washington Business sent a formal complaint letter sent to Governor Gregoire on April 19, 2012, voicing Boeing's concerns.<sup>138</sup> In the letter, businesses, including Boeing, argued that they do not have the technology required to meet what they expect to be the limits.<sup>139</sup> In response to pressure from the business community, in July 2012, Ecology announced that it would not go forward with a new rule to adjust the fish-eating estimate as planned.<sup>140</sup> Instead, the agency launched a "stakeholder process" that would delay any new rules for at least two years.<sup>141</sup>

The Ecology manager overseeing the stakeholder process said that she had hoped to estimate a more accurate fish consumption rule as part of a process to update rules on how toxic sediments can be managed during 2012.<sup>142</sup> However, due

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133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. McClure & Henry, *supra* note 60.

138. *Id.*

139. *Id.*

140. McClure, *supra* note 9.

141. *Id.*

142. *Id.*

to mass protests from industry and local government officials who operate sewage-treatment plants, the sediment rules went into effect without changing the fish consumption estimate.<sup>143</sup> In order to gain the cooperation of Boeing and other business interests, Ecology has been attempting to come up with implementation rules that would make it easier for industries to comply with the new pollution limits.<sup>144</sup> Some of the proposed rules would allow industries up to fifty years to cut back on their toxic pollution output.<sup>145</sup>

Ecology's September 2014 draft comes with a set of standards that appear to be meant to appease those worried about the economic impact of a higher fish consumption rate. Under the proposal, industries and local governments would not be required to clean up pollution they did not cause.<sup>146</sup> It also provides that the compliance schedules or variances could allow them to meet the new standards over a specific period of time if they are demonstrating measurable progress and are on a path to meet the standards as soon as possible.<sup>147</sup>

While some industries fear higher fish consumption rates will negatively impact their businesses, some believe that lower water contamination will provide its own set of economic benefits.<sup>148</sup> If the waters become cleaner and fish populations rebound, commercial fishing and fishing canneries, once some of Washington's strongest industries, could make a comeback.<sup>149</sup> In addition, the plaintiffs state that the amount of money saved in avoiding health costs due to toxic pollutants in the water provides a boon to the state.<sup>150</sup>

## V. ECOLOGY'S NEWEST PROPOSAL

The Department of Ecology's September 2014 proposal raises the fish consumption rate significantly to 175 grams per day from the current six-and-one-half grams, and changes the

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143. *Id.*

144. *Id.*

145. *Id.*

146. Sandy Howard, *Details of Ecology's Draft Fish Consumption Rule Released*, WASH. DEPT OF ECOLOGY (Sept. 30, 2014), <http://www.ecy.wa.gov/news/2014/153.html>.

147. *Id.*

148. Nicole, *supra* note 53, at A336.

149. *Id.* at A339.

150. *Id.*

measurement of the cancer-risk rate used to a chemical-by-chemical analysis.<sup>151</sup> While this represents an improvement, it still falls well below estimated rates for high consumption communities, such as tribal populations, which have consumption rates between 193 grams per day and 214 grams per day.<sup>152</sup> In addition, it fails to account for the Korean and Japanese populations of Washington, whose upper percentiles consume between 188 and 230 grams per day.<sup>153</sup> The portion that has most environmental groups calling foul, however, is that the “preliminary proposal would offset potential water quality gains by simultaneously raising the cancer risk rate for fish and water consumers from one-in-one-million to one-in-one-hundred-thousand.”<sup>154</sup> While Governor Inslee has asserted that this new proposal mirrors that implemented in Oregon, which kept a one-in-one-million cancer risk rate,<sup>155</sup> Inslee’s new proposal allows for carcinogenic pollutants at levels ten times higher.<sup>156</sup> So, while the fish consumption rate increases under this proposal, so do the permissible carcinogenic levels in Washington’s waterways, which drastically undercuts the effectiveness of such a proposal to reduce or eliminate cancer risks to Washington residents.

The proposed higher cancer risk came after lobbying on the issue by some of the state’s major industries, such as Boeing, Weyerhaeuser, the Packaging Corporation of America, and Schnitzer Steel, and municipalities such as Renton and Everett.<sup>157</sup> Permitting higher cancer rates in calculation of water quality threatens the integrity of the measurement process. Degraded water quality also undermines environmental justice when communities of color, like the Asian, tribal, and Pacific Islander communities, are

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151. Jerry Cornfield, *New Water Quality Standards Won’t Hurt Boeing, State Says*, HERALD OF EVERETT, Oct. 2, 2014, <http://www.heraldnet.com/article/20141002/NEWS01/141009817>.

152. Charles Tanner, Jr., *Washington Department of Ecology Caters to Big Business*, INST. FOR RES. & EDUC. ON HUM. RTS. (Oct. 4, 2014), <http://www.irehr.org/issue-areas/treaty-rights-and-tribal-sovereignty/583-washington-department-of-ecology-caters-to-big-business>.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

disproportionately affected by fish contamination because they consumer higher quantities of fish.<sup>158</sup> The proposal itself provides plenty of time for businesses to meet the standards and removes a time limit on compliance standards.<sup>159</sup> While Ecology states that the rules are more protective for seventy percent of the ninety-six chemicals regulated by the CWA, it completely ignores other chemicals, such as cancer-causing PCBs and mercury.<sup>160</sup> Ecology conducted an analysis in which it examined the potential effects of the proposal on 415 different facilities operating today with a permit restricting their discharges. They concluded that there would be “no impact” and “zero incremental cost” to existing facilities.<sup>161</sup>

The Washington Environmental Council sharply critiqued the proposal's higher cancer risk, stating that “[a]sking Washingtonians to assume a higher level of cancer risk is not an acceptable trade-off.”<sup>162</sup> The proposal, which is expected to be proposed in legislative form during the 2015 session, has also been rebuked by the tribal populations of Washington who have expressed major concerns with the higher cancer risks and lack of impact on pollution standards for Washington's industries.

## VI. CONCLUSION

The road to a higher and more accurate fish consumption rate in Washington is not an uncontroversial one. Economists fear that the cost to industry of improving waste water disposal would cause businesses to flee Washington for states where it costs less to operate.<sup>163</sup> However, the threat that a grossly underestimated fish consumption rate poses to Washington residents' health is a very real one. PCBs, mercury, lead, and arsenic are all present in the fish that Washington residents consume, and currently the fish consumption rate is allowing Washingtonians to consume far

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158. *Id.*

159. *Draft of Water Rules Released Tied to Fish Consumption*, HERALD OF EVERETT, Sept. 30, 2014, <http://www.heraldnet.com/article/20140930/NEWS01/141009960/Draft-of-water-rules-released-tied-to-fish-consumption#>.

160. *Id.*

161. *Id.*

162. *Id.*

163. McClure, *supra* note 9.

too much of these toxicants.<sup>164</sup> Because of the lack of action on the part of the EPA to encourage the enforcement of a revamped fish consumption rate standard, it is likely that Puget Soundkeepers will win their case, and secure an injunction to see the new fish consumption rate promulgated. It would benefit Washington industry to begin developing a plan for this new enforcement, so that when the court ruling is handed down there are technologies and systems in place to cope commercially.

Ultimately, the fish consumption rate comes down to a balancing act. Washington lawmakers must weigh the potential economic price tag against the detriment to residents' health. If they do nothing, ultimately the legal expenses of those whose health and welfare is negatively impacted by the toxicants found in consumable fish may outweigh the cost savings if the higher fish consumption rate is not enacted. The EPA and Ecology have a duty to protect the health and welfare of Washington residents under the CWA. When they fail in that duty, they can and will be held liable by the justice system.

The current proposal by Governor Inslee and the Department of Ecology is not a solution to the cancer risks posed to Washington citizens. While it raises the fish consumption rate, it also correspondingly raises the risk of cancer-causing chemicals permitted in Washington waterways. Raising the fish consumption rate is ineffectual if the allowable risk of cancer also increases ten-fold. While Governor Inslee has asserted that the proposal raises the standards in Washington to those in Oregon, the loopholes and omissions in the policy make it a far less restrictive policy in terms of allowable pollution and health risks. The new policy allows for industry in Washington to continue as usual, and ignores completely the risks posed by mercury and PCBs. Such a policy is not nearly protective enough to absolve Ecology and Washington from liability based on the failure to safeguard their residents. Before this proposal reaches the legislative phase, it must be reworked to lower the cancer rate, account for mercury and PCBs, and set higher standards for the allowable pollution by local industries. If the Washington government cows to industrial interests, it could find itself

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164. *Id.*

held accountable at a federal level, which could result in much more costly reforms. Ecology has the chance to mitigate these concerns now, but without setting higher standards, it exposes itself, the state, and its residents to grave risks.