AN OPPORTUNITY TO PROTECT— ANALYZING FISH CONSUMPTION, ENVIRONMENTAL JUSTICE, AND WATER QUALITY STANDARDS RULEMAKING IN WASHINGTON STATE

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INTRODUCTION

"We're talking about people's health here, not some theoretical environmental protection for one sensitive species. In this case, the sensitive species is people." — Chris Wilke, Puget Soundkeeper[1]

It is well known that fishing plays an important role in Pacific Northwest Native culture, both individually and as a people.[2] For many, it provides the means to feed oneself and their families, and provides a fundamental subsistence framework—economically, spiritually, socially, and physically—yielding "a way to be Yakama, or to be Tulalip."[3]

What may be lesser known, however, is that toxic contaminants from permitted industrial discharges build up in the tissues of this essential food resource.[4] The accumulation of a slough of toxic chemicals in the fish people ultimately eat significantly threatens the health and safety of fish consumers across the region.[5] In fact, "fish consumption is the primary route of exposure for many toxic contaminants . . . [a]ll else being equal, the higher the level of fish one consumes, the greater one's exposure to any contaminants in the environment that the fish uptake, and the greater one's risk of adverse health effects."[6] Despite these recognized facts,

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1. Wendee Nicole, *Meeting the Needs of the People: Fish Consumption Rates in the Pacific Northwest*, 121 ENV'T HEALTH PERSP. A334, A338 (2013), *available at* http://ehp.niehs.nih.gov/wp-content/uploads/121/11-12/ehp.121-A334.pdf.

2. Catherine O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L. J. 3, 5 (2000) [hereinafter *Variable Justice*].

3. *Id.*

4. DEP'T OF ECOLOGY, STATE OF WASH., FISH CONSUMPTION RATES TECHNICAL SUPPORT DOCUMENT: A REVIEW OF DATA AND INFORMATION ABOUT FISH CONSUMPTION IN WASHINGTON, VERSION 2.0 xiii (2013), *available at* https://fortress.wa.gov/ecy/publications/publications/1209058.pdf [hereinafter ECOLOGY TECHNICAL SUPPORT DOCUMENT].

5. *Id.*

6. NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, ENVTL. PROT. AGENCY, FISH CONSUMPTION AND ENVIRONMENTAL JUSTICE 24 (2002), *available at* http://www.epa.gov/environmentaljustice/resources/publications/nejac/fish-consump-report_1102.pdf [hereinafter NEJAC FISH CONSUMPTION & ENVIRONMENTAL JUSTICE] (describing Tribal fish consumption as it relates to water quality standards in the United States).

Washington's current water quality standards do not take into account the excess toxic exposure rates its Native peoples face because of their fundamental consumption of high quantities of fish.[7] The State can remedy this dilemma, however, and ensure that all of the people within its borders can safely consume fish without unfairly being exposed to excessive contamination, by taking the opportunity to protect during water quality rulemaking currently underway.

Washington began updating its water quality standards to establish human health criteria and new implementation and compliance rules for industrial dischargers in 2011.[8] With this rulemaking, the State has the opportunity to become a leader in water pollution prevention and to remedy environmental injustices suffered by tribal peoples who consume high amounts of fish and shellfish from the many waters of the State.[9] However, implementation of stricter water quality standards would necessarily result in reducing the amounts of toxins permitted in the discharges of industrial users. As such, industry opposition has proved effective at achieving further delay, and subsequent weakening, of the already decades overdue process.[10]

This article presents the argument that Washington State and the U.S. Environmental Protection Agency ("EPA") have a duty to protect *all* people—and especially disproportionately impacted tribal populations—from toxic water pollution on a variety of fronts. Duties arising under the Clean Water Act, tribal treaty rights to fish, the Public Trust Doctrine, Title VI of the Civil Rights Act, and the Equal Protection Clause of the United States Constitution arguably require the federal and/or state government to protect Washington citizens from the harmful effects of toxic water pollution. Accordingly, the State and EPA must establish strict human health criteria in the form of a relevant and protective fish consumption rate during the water quality standard rulemaking process currently underway.

This Note analyzes the interrelated principles of fish consumption, environmental justice, and water pollution control. Part One describes the regulation of water pollution in Washington State generally by analyzing the background of the State's water quality standards ("WQS"). Part Two focuses on the human health criteria rulemaking, which is determined by establishing a relevant fish consumption rate ("FCR") for the State. Part

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7. *Id.*

8. *Current Rule Activities*, DEP'T OF ECOLOGY, STATE OF WASH. (last visited Nov. 6, 2014) http://www.ecy.wa.gov/programs/wq/swqs/rulemkgtimeline.html (noting that form CR-101 initiating the water quality standards update and rulemaking was filed on October 25, 2011).

9. *See generally* NEJAC FISH CONSUMPTION & ENVIRONMENTAL JUSTICE, *supra* note 6 (describing Tribal fish consumption as it relates to water quality standards in the United States).

10. Robert McClure, *Water Pollution Limits Stalled: Boeing, Others Challenge State on Tighter Rules*, SPOKESMAN REV., Mar. 30, 2013, at B1 [hereinafter *Water Pollution*].

Three turns to consideration of fish consumption as a serious environmental justice issue. Part Four examines industry's efforts to protect their bottom-lines, revealing a seeming desire to further continue the environmental injustices faced by Washington's tribal population by employing efforts to both delay and weaken Washington's revised FCR. Part Five presents the argument that both Washington State and EPA have the duty to implement a stringent FCR protective of tribal fish consumption habits based on a variety of legal mandates. This Note concludes by recommending that Washington State take the opportunity to protect all of the people within its borders, including its tribal populations, by adopting a stringent FCR that will be protective of all people who consume fish in the State.

I. AN OVERVIEW OF WATER POLLUTION CONTROL IN WASHINGTON STATE

Washington's water resources are immense. The State manages over 2,500 miles of coastline along the shorelines of the Pacific Ocean, Puget Sound, Strait of Juan de Fuca, San Juan Islands, and Hood Canal.[11] Over 4,000 rivers and streams meander through 50,000 miles of the State.[12] The State is home to over 9,700 lakes, alpine lakes, and reservoirs.[13] As such, it is no wonder why fishing is an essential pastime for many of the State's residents. Washington has an estimated 1.4 million fisher-people and 3.8 million fish consumers,[14] 104,000 of which are American Indians and Alaska natives.[15] With such treasured water resources, the State's regulatory scheme of water pollution control is both essential to the protection of its many waterways and vital to the health of the millions of people who enjoy fishing and eating fish caught in Washington's waterways.

A. Water Pollution Control in Washington State

Like many states, Washington's waterways face an onslaught of pollution from a variety of sources. Industrial discharges, stormwater runoff, and agriculture, among others, all contribute to the denigration of Washington's waters. Under the delegated authority of EPA and the Federal Water Pollution Control Act (commonly known as the Clean Water Act, or "CWA"), Washington's Department of Ecology ("Ecology") implements its

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11. ECOLOGY TECHNICAL SUPPORT DOCUMENT, *supra* note 4, at 7–8.
12. *Id.*
13. *Id.*
14. *Id.* at 12 (referencing an Ecology estimate resulting from 2010 demographic data).
15. *Id.* at 18.

own water pollution control program incorporating federal goals and requirements.[16]

The main objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[17] The Act states as its national goals that "the discharge of pollutants into navigable waters be eliminated by 1985;" "an interim 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 be achieved by July 1, 1983;" and that "the discharge of toxic pollutants in toxic amounts be prohibited."[18] Forty years later, these ambitious goals have yet to be achieved.

Washington works toward these goals under the State's Water Pollution Control Act.[19] Adopted in 1945, initial efforts to curb water pollution within the State pre-date even the original CWA of 1948.[20] In its original version, the state law declared the broad policy goal of attaining "the 'highest possible standards' of water quality consistent with the various water uses of the state."[21] The original Washington law gave the Pollution Control Commission the right to "promulgate rules and regulations, to determine the conditions of the waters of the state, and to issue orders."[22] In its current form, the State law maintains its original goals of ensuring high water quality while protecting water uses. Public policy under the law is to protect "the purity of all waters of the state" consistent with both the "protection of . . . fish" and "the industrial development of the state."[23]

Analogous to the CWA, Washington's Water Pollution Control Act prohibits the discharge of any pollutants into the State's waterways.[24] Permits can be acquired for discharges.[25] Permits are allocated to

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16. 33 U.S.C. § 1251 (2012); Water Pollution Control, WASH. REV. CODE § 90 (2013).

17. 33 U.S.C. § 1251(a).

18. *Id.* §§ 1251(a)(1)–(3).

19. WASH. REV. CODE § 90.48.010 (stating that it is "the public policy . . . to maintain the highest possible standards to insure the purity of all waters of the state be consistent with public health . . . the propagation and protection of . . . fish, and other aquatic life, and the industrial development of the state, and to that end require use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state").

20. L.A. Powe, Jr., Comment, *Water Pollution Control in Washington*, 43 WASH. L. REV. 425, 428 (1967).

21. *Id.*

22. *Id.* at 427–28 (describing that the Pollution Control Commission was created in 1937 and comprised of the "directors of the Departments of Health, Fish and Game, and Conservation").

23. WASH. REV. CODE § 90.48.010.

24. WASH. REV. CODE § 90.48.080 (stating "It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any waters of this state.").

25. WASH. REV. CODE § 90.48.160 (stating "[a]ny person who conducts a commercial or industrial operation of any type which results in the disposal of solid or liquid waste material into the waters of the state, including commercial or industrial operators discharging solid or liquid waste

dischargers based upon compliance with the State's Water Quality Standards for Surface Waters ("WQS").[26] The State's WQS require: (1) that "[a]ll surface waters are protected by numeric and narrative criteria, designated uses, and an antidegradation policy;" (2) that "[b]ased on the use designations, numeric and narrative criteria are assigned to a water body to protect the existing and designated uses;" and (3) that "[w]here multiple criteria for the same water quality parameter are assigned to a water body to protect different uses, the most stringent criteria for each parameter is . . . applied."[27] WQS are applied to all surface waters of the State, including "lakes, rivers, ponds, streams, inland waters, saltwaters, wetlands, and all other surface waters and water courses within the jurisdiction of the state."[28] In sum, each waterway in the State is assigned a designated use and associated criteria to meet that use, the combination of which constitutes a WQS. Together, these uses and criteria form the WQS that permit-holders must comply with.

The designated use of concern to this Note is fishing, and the criteria to achieve such use are human health criteria in the form of a fish consumption rate. Washington's current human health criteria, or FCR, are based on the outdated 1992 National Toxics Rule's FCR of 6.5 grams/day.[29]

B. Revising Washington's Water Quality Standards

Though the CWA requires that states review and update their WQS every three years,[30] Washington's WQS for the designated use of fishing and the associated criteria of a FCR, have not been updated since the adoption of the 1992 National Toxics Rule standard.[31] Accordingly, at the

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material into sewerage systems operated by municipalities or public entities which discharge into public waters of the state, shall procure a permit from . . . the department").

26. Water Quality Standards for Surface Waters of the State of Washington, WASH. ADMIN. CODE § 173-201A-510(1) (2011), *available at* http://apps.leg.wa.gov/WAC/default.aspx?cite=173-201A&full=true.

27. *Id.* at §§ 173-201A-010(1)(a)–(c).

28. *Id.* at § 173-201A-010(2).

29. ECOLOGY TECHNICAL SUPPORT DOCUMENT, *supra* note 4, at xiii.

30. 33 U.S.C. § 1313(c)(1) (2012) (stating "[t]he [State] shall from time to time (but at least once every three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards").

31. DEP'T OF ECOLOGY, STATE OF WASH., FOCUS ON WATER QUALITY STANDARDS, WATER QUALITY PROGRAM, UPDATES TO WATER QUALITY STANDARDS (WAC 173-201A), Pub. No. 13-10-009, 1 (revised July 2013)), *available at* https://fortress.wa.gov/ecy/ecy/publications/publications/1310009.pdf.

request of EPA, Ecology has embarked on the rulemaking process to adopt new human health criteria and revise its WQS.[32]

The rulemaking adopting new human health criteria for WQS in Washington "will take into account factors used to calculate each chemical criterion, including risk, duration of exposure, and more accurate data about how much fish and shellfish people eat in Washington."[33] The purpose of the rulemaking is "to protect public health, safety, and welfare."[34] Ecology acknowledges that "[u]ntil new human health criteria are adopted . . . Washington will continue using outdated federal standards that do not reflect current science on protection from toxic chemicals."[35] And further, Ecology states that "[w]ith the adoption of this new rule, our state will have water quality standards for toxics that more accurately reflect the amount of fish and shellfish people eat in Washington."[36] The rulemaking is currently ongoing, with adoption of a final rule tentatively expected in 2014 or later.[37]

II. FISH CONSUMPTION HABITS AND RATES

A. Fish Consumption as it Relates to Water Pollution Control

The "linchpin" of Washington's human health criteria rulemaking is the establishment of a relevant FCR protective of all people who consume fish in the state.[38] The CWA sets a national goal for water quality that "provides for the protection and propagation of fish."[39] Accordingly, a baseline designated use of most waterways is that they are "fishable," and the criterion to protect such use is in the form of human health criteria—an

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32. *Id.*

33. STATE OF WASH., WSR 12-19-056, PREPROPOSAL STATEMENT OF INQUIRY, CR-101 (Sept. 13, 2012), *available at* http://www.ecy.wa.gov/laws-rules/wac173201a/d1203.pdf.

34. *Id.*

35. *Id.*

36. *Id.*

37. Open Letter from Ted Sturdevant, Dir., Dep't of Ecology, State of Wash., to Interested Parties, (July 16, 2012), *available at* http://www.ecy.wa.gov/toxics/docs/20120716_FCR_SturdevantLetter.pdf (describing Ecology's approach to fish consumption standards in Washington State). As of the date of this publication in December 2014, Ecology has yet to adopt a final rule. Ecology released a preliminary draft rule package on September 30, 2014 and expects a formal draft to be released in 2015. The agency no longer provides a date for the expected adoption of a final rule. *Chapter 173-201A WAC, Water Quality Standards for Surface Waters of the State of Washington, Overview of Rule Making*, DEP'T OF ECOLOGY, STATE OF WASH. (last visited Dec. 7, 2014) http://www.ecy.wa.gov/programs/wq/ruledev/wac173201A/1203ov.html.

38. Catherine O'Neill, *Protecting the Tribal Harvest: The Right to Catch and Consume Fish*, 22 J. ENVTL. L. LITIG. 131, 140 (2007) [hereinafter *Protecting the Tribal Harvest*].

39. 33 U.S.C. § 1251(a)(2) (2012).

FCR.[40] The FCR is a number that "represents the amount of fish humans eat per unit time . . . often expressed in grams per day."[41]

A relevant FCR based on the amount of fish people consume is important to water pollution control because it is through the consumption of fish that toxins from permitted discharges—such as PCBs, mercury, dioxins, etc.—primarily enter the human body.[42] Fish bioaccumulate chemical toxins in their fatty tissues, and the people who consume those fish ingest those toxins.[43] The toxins are hazardous to human health, causing increased risks of "cancer, neurological damage, endocrine disruption, birth defects, and developmental problems."[44] Accordingly, establishing an FCR based on the amount of fish people consume should directly relate to the amount of toxic chemicals people are exposed to from permitted discharges under the CWA.

B. National and Regional Fish Consumption Rates

Unfortunately, FCRs, both in the Pacific Northwest and on the national level, do not reflect tribal fish consumption habits. Accordingly, this allows tribal peoples to be exposed to disproportionately higher amounts of toxics from permitted discharges under the CWA.[45] State and federal agencies have recognized that the default National Toxics Rule standard of 6.5 grams/day is inadequate.[46] This standard amounts to approximately "one 8-ounce fish serving per month—an amount that is outdated and inaccurate even for the general population."[47] In 2000, EPA issued a revised national default rate in its updated *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health* agency guidance.[48] EPA now recommends an FCR of 17.5 grams/day for the general population and recreational fishers and 142.4 grams/day for subsistence fishers.[49]

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40. Catherine A. O'Neill, *Fishable Waters*, 1 AM. INDIAN L. J. 181, 224 (2013).
41. O'Neill, *Variable Justice*, *supra* note 2, at 43.
42. NEJAC FISH CONSUMPTION & ENVIRONMENTAL JUSTICE, *supra* note 6, at 13.
43. O'Neill, *Variable Justice*, *supra* note 2, at 43.
44. Mary Christina Wood, Speech, *EPA's Protection of Tribal Harvests: Braiding the Agency's Mission*, 34 ECOLOGY L. Q. 175, 176 (2007) [hereinafter *EPA* Speech].
45. *See, e.g.*, NEJAC FISH CONSUMPTION & ENVIRONMENTAL JUSTICE, *supra* note 6 (discussing how tribal fish consumption increases the risk of exposure to toxins because of inadequate water quality standards in the United States); ECOLOGY TECHNICAL SUPPORT DOCUMENT, *supra* note 4, at 34; O'Neill, *Fishable Waters*, *supra* note 40.
46. STATE OF WASH., WSR 12-19-056, PREPROPOSAL STATEMENT OF INQUIRY, *supra* note 33; *see also* NEJAC FISH CONSUMPTION & ENVIRONMENTAL JUSTICE, *supra* note 6, at 29 (acknowledging that the current FCR grossly underestimates consumption rates of tribes).
47. NEJAC FISH CONSUMPTION & ENVIRONMENTAL JUSTICE, *supra* note 6, at 29.
48. *Id.* at 30.
49. *Id.*

Though EPA has established that the 6.5 grams/day value is no longer applicable, many states in the Pacific Northwest, including Washington, Idaho, and Alaska still rely on this outdated standard.[50] Oregon is the only exception in the region, implementing an FCR of 175 grams/day in 2011.[51] Though Oregon now has the most stringent FCR in the nation, the rulemaking process took over a decade to complete, and Oregon's FCR may still not be protective enough for its Native peoples.[52]

Professor Mary Christina Wood puts these numbers into context, explaining that 17.5 grams of fish per day:

> is about the amount that fits on one cracker. A six-ounce can of tuna holds 142 grams of fish, so according to EPA, there are about eight servings in one can. Officials in the State of Washington have an even lighter appetite. Their water quality standards are still tiered to EPA's old assumption of 6.5 grams of fish consumption per day. So, if you are eating a can of tuna in the State of Washington, you would figure that it holds twenty-two servings. Or at least water quality standards will not provide protection for you if you eat any more than that per day.[53]

Sharing a can of tuna amongst twenty-two people would clearly be absurd to any reasonable person, let alone upon consideration of tribal fishing diets so essential to many people in Washington.

C. Fish Consumption in Washington State

The State of Washington currently has an FCR of only 6.5 grams/day.[54] Washington itself acknowledged that the standard of 6.5 grams/day was inadequate "as early as 1999."[55] In 2010, upon its CWA-mandated triennial review, the state began the formal process for revising its FCR.[56] In September 2011, the State released its first *Fish Consumption Rate Technical Support Document* in which it recommended the new default FCR be established within the range of 157 to 267 grams/day.[57] However,

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50. O'Neill, *Fishable Waters*, *supra* note 40, at 232.
51. *Id.* at 232–33.
52. *Id.* at 232; *see also* ECOLOGY TECHNICAL SUPPORT DOCUMENT, *supra* note 4, at xiv (referencing the Columbia River Intertribal Fish Commission's 1994 survey, which shows local Oregon/Washington tribal member adults consume 389 grams/day at the 99th percentile).
53. Wood, *EPA* Speech, *supra* note 44, at 185–86.
54. ECOLOGY TECHNICAL SUPPORT DOCUMENT, *supra* note 4, at 1.
55. O'Neill, *Fishable Waters*, *supra* note 40, at 234–35.
56. *Id.* at 235.
57. *Id.* at 236.

in 2012, the State retracted the document and instead released its *Fish Consumption Rate Technical Support Document, Version 2.0*, in which the State no longer recommended a default FCR.[58] As of May 2014, this *Version 2.0* document is guiding the human health criteria rulemaking process underway.

The revised technical support document states clearly that tribal people within the State consume fish at much higher levels than the general public, and therefore face much higher exposure rates to discharged water contaminants.[59] The document details a variety of studies, including the 1994 Columbia River Inter-Tribal Fish Commission ("CRITFC") survey of the Umatilla, Nez Perce, Yakama, and Warm Springs Tribes of the Columbia River Basin.[60] The CRITFC study established a mean FCR for tribal adults of 389 grams/day and higher.[61] Additionally, a survey of the Squaxin Island Tribe of Puget Sound shows tribal members at the "higher central tendency" consume between 130 to 215 grams/day.[62] When one considers historical fish consumption rates amongst Washington's tribal populations, the numbers are much higher—"620 grams/day, 650 grams/day, and 1,000 grams/day," as evidenced by some historic accounts.[63]

Washington's FCR of 6.5 grams/day falls far short of reality. Furthermore, based upon the studies the State itself has included in its technical support document (such as the CRITFIC and Squaxin Tribal surveys), EPA default value of 17.5 grams/day fails to protect all of Washington's people. Consequently, at the current 6.5 gram/day standard, it can be said that Natives in Washington are exposed to "an excess cancer risk between 1 in 100 and 1 in 1,000," and women are "exposed to methyl-mercury at a level nearly ten times EPA's reference dose."[64] Many consider these excessive exposure amounts a serious environmental justice issue.[65]

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58. *Id.*

59. ECOLOGY TECHNICAL SUPPORT DOCUMENT, *supra* note 4, at 14 (stating "Pacific Northwest fish dietary information shows that certain populations—Native American tribes, Asian Pacific Islanders, and recreational fishers—consume fish at much higher rates than the average U.S. consumer and at higher rates than those used to establish surface water cleanup standards. Because these populations consume fish at much higher rates than the national rates used in Ecology's regulations, their exposure to contaminants in fish may be underestimated and these populations may therefore be at higher risk.").

60. *Id.* at 47.

61. *Id.* at 48.

62. *Id.* at 76.

63. O'Neill, *Protecting the Tribal Harvest*, *supra* note 38, at 135.

64. O'Neill, *Fishable Waters*, *supra* note 40, at 210–11.

65. *See generally, e.g.*, O'Neill, *Protecting the Tribal Harvest*, *supra* note 38; O'Neill, *Variable Justice*, *supra* note 2; Wood, *EPA* Speech, *supra* note 44 (all describing fish consumption as an environmental justice issue).

III. FISH CONSUMPTION AND ENVIRONMENTAL JUSTICE

A. Environmental Justice Generally

The establishment of a relevant FCR accounting for tribal fish consumption habits is a serious environmental justice issue.[66] "Environmental Justice" is defined by EPA as "the achievement of equal protection from environmental health hazards for *all people* regardless of race, income, culture, or social class."[67] Unfortunately, environmental justice theories have yet to be implemented into law, and are therefore difficult to legally enforce.

The 1982 protests in Warren, North Carolina regarding the siting of a polychlorinated biphenyl ("PCB") disposal site brought national attention to the issue of environmental justice.[68] In response, the U.S. Government Accountability Office issued a report examining the siting of hazardous waste landfills and how their location relates to the racial composition and economic status of host communities in the Southeast.[69] It was not until 1987, with the publication of the nationwide United Church of Christ Commission for Racial Justice report entitled *Toxic Wastes and Race in the United States* that the environmental justice movement was initially brought to the forefront as a theory deserving of true consideration.[70] "The UCC Report concluded that the racial composition of a community is the most significant variable in determining where to site hazardous waste treatment, storage, and disposal facilities."[71] The UCC Report was revisited in 2007 with a finding reaffirming that "[r]ace continues to be an independent

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66. *See generally, e.g.*, O'Neill, *Protecting the Tribal Harvest*, *supra* note 38; O'Neill, *Variable Justice*, *supra* note 2; Wood, *EPA* Speech, *supra* note 44 (all describing fish consumption as an environmental justice issue).

67. BARRY E. HILL, ENVIRONMENTAL JUSTICE: LEGAL THEORY AND PRACTICE 14 (2d ed. 2012) (emphasis added).

68. *Id.* at 16.

69. *Id.*

70. *Id.* at 19 (*Toxic Wastes and Race in the United States* hereinafter referred to as the "UCC Report").

71. HILL, ENVIRONMENTAL JUSTICE: LEGAL THEORY AND PRACTICE, *supra* note 67, at 19.

predictor of where hazardous wastes are located, and [that] it is a stronger predictor than income, education, or other socioeconomic indicators."[72]

In 1994, President Clinton passed Executive Order No. 12,898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.[73] The presidential proclamation is among the first major actions taken by the United States government acknowledging the environmental justice issue.[74] The Executive Order stated:

> [E]ach Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States.[75]

Notably, section 4-4 of the Executive Order acknowledges the importance of understanding fish consumption in the context of environmental justice, stating:

> In order to assist in identifying the need for ensuring protection of populations with differential patterns of subsistence consumption of fish and wildlife, Federal agencies, whenever practicable and appropriate, shall collect, maintain, and analyze information on the consumption patterns of populations who principally rely on fish and/or wildlife for subsistence. Federal agencies shall communicate to the public the risks of those consumption patterns.[76]

In response to the environmental justice movement's early beginnings, EPA established the National Environmental Justice Advisory Council ("NEJAC") in 1993.[77] NEJAC was established "in order to obtain independent, consensus advice and recommendations from a broad spectrum of stakeholders involved in environmental justice."[78] It provides

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72. *Id.* at 33 (quoting ROBERT BULLARD ET AL., TOXIC WASTES AND RACE AT TWENTY: 1987-2007—GRASSROOTS STRUGGLES TO DISMANTLE ENVIRONMENTAL RACISM IN THE UNITED STATES (Mar. 2007) (a report prepared for the United Church of Christ Justice and Witness Ministries)).

73. *Id.* at 196.

74. *Id.*

75. Exec. Order No. 12,898, 59 Fed. Reg. 32 (Feb. 16, 1994).

76. *Id.*

77. U.S. ENVTL. PROT. AGENCY, NAT'L ENVTL. JUSTICE ADVISORY COUNCIL FACTSHEET, PUB. NO. 300F12003, 1 (July 2012), *available at* http://www.epa.gov/environmentaljustice/resources/publications/factsheets/fact-sheet-nejac.pdf.

78. *Id.*

the EPA "Administrator with advice and recommendations on integrating environmental justice considerations into the agency's programs, policies, and day-to-day activities."[79] NEJAC has specifically addressed fish consumption as a serious environmental justice issue and has made many recommendations concerning FCRs for EPA and states to consider.[80]

B. Fish Consumption as an Injustice against Washington Tribal Peoples

The presence of an inadequate FCR that is not protective of Native fish consumption habits has been recognized as a serious environmental justice issue for tribal peoples of Washington. First, a weak FCR invokes an injustice against Native culture and ways of living, as fishing and eating fish is a vital component of Native society, tradition, and religion. Second, an inadequate FCR presents an injustice against the health of tribal peoples who consume high amounts of fish, and subsequently high amounts of the toxic contaminants that have built up in the fish themselves.

1. Cultural Injustice

Fish have played an essential role in Washington's Tribal societies—culturally, religiously, and commercially—since time immemorial.[81] The adverse impacts of a weak FCR are not only an affront to physiological health, "but also to the tribes' social, economic, political, cultural, and spiritual health—indeed, to their very identity as fishing peoples."[82] Fishing is a vital component of the Pacific Northwest Native lifestyle and culture. The local fishery resource provides a staple dietary element, but even more importantly, it is deeply rooted in Native culture and religion among the most essentially important food resources. As Horace Axtell of the Nez Perce Tribe (which is located within the bounds of Washington State), explains:

> According to our religion, everything is based on nature. Anything that grows or lives, like plants and animals, is part of our religion. The most important element we have in our religion is water. At all of the Nez Perce ceremonial feasts the people drink water before and after they eat. The water is a purification of our bodies before

79. *Id.*

80. *See generally* NEJAC FISH CONSUMPTION & ENVIRONMENTAL JUSTICE, *supra* note 6 (addressing fish consumption as an environmental justice issue).

81. Mary Christina Wood, *Restoring the Abundant Trust: Tribal Litigation in Pacific Northwest Salmon Recovery*, 36 E.L.R. 10163, 10177 (2006).

82. O'Neill, *Protecting the Tribal Harvest*, *supra* note 38, at 139.

> we accept the gifts from the Creator. After the feast we drink water to purify all the food we have consumed. The next most important element in our religion is the fish because fish comes from water. It doesn't matter what kind of fish. If we have suckers or eels or steelhead or salmon, we honor it next after we drink the water. Then we name whatever fish we have, and then everyone takes a small bit before we eat the rest of the food. The next element is the game meat like deer, elk, and moose. That's how we honor the food we eat, especially the fish, because it is the next element after the water. The Chinook Salmon is more favored because it is the strongest fish and the most tasty. Chinook Salmon is the fish we try to bring to the long house.[83]

In addition to utilizing fish as a key dietary supplement, the act of fishing and eating fish is an essential tradition passed down from generation upon generation. For some tribal fishing peoples, not eating fish is simply "unimaginable for cultural, traditional, [and/or] religious reasons . . . to fish is to *be* Nez Perce," as stated by one Nez Perce tribal member.[84] Fishing is an essential aspect of the flourishment and self-determination of entire Native cultures in the Pacific Northwest.[85] For example, as explained by Don Samson of the Umatilla Tribe, former Executive Director of CRITFC:

> The reason I've been fishing is more for my own subsistence, to bring fish home. But maybe more importantly now these days is to maintain the tradition of fishing—of going up to the mountains where my father, my elders fished before me. So it's something that we've got to carry on—that's really why I fish. We've got to pass it on to our children. We have to have that for them in order to be Indians—in order to survive and carry on the things that were placed here for us, and carry on what our elders tell us and teach us.[86]

And further, as explained by Billy Frank Jr. of Puget Sound's Nisqually Tribe, former Chairman of the Northwest Indian Fisheries Commission:

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83. NEJAC FISH CONSUMPTION & ENVIRONMENTAL JUSTICE, *supra* note 6, at 4–5 (quoting DAN LANDEED & ALLEN PINKHAM, SALMON AND HIS PEOPLE: FISH AND FISHING IN NEZ PERCE CULTURE 55 (1999)).

84. *Id.* at 8.

85. *Id.*

86. *Id.* (quoting Videotape: My Strength is from the Fish (Columbia River Inter-Tribal Fish Commission 1994)).

> Fishing defines the tribes as a people. It was the one thing above all else that the tribes wished to retain during treaty negotiations with the federal government 150 years ago. Nothing was more vital to the tribal way of life then, and nothing is more important now . . . The tribes have fought too hard for too long to let the salmon and their treaty rights to harvest salmon go extinct. This summer and fall you will see tribal fishermen doing what they have always done—fish.[87]

As evidenced by these select tribal accounts, fishing and fish consumption play an essential role in Washington Natives' culture and religion. The presence of a weak FCR, allowing high levels of pollution to contaminate the vital fishery resource, is an injustice to the traditional and cultural viability of these peoples.

2. Injustice to Health

The fish consumption environmental justice issue can be viewed in light of the disproportionate, harmful health impacts a weak FCR imposes on high fish consumers as well. It is well documented that Native populations who readily rely on fish for sustenance, religious, and cultural reasons, are often exposed to dangerously high levels of toxic chemical contamination due to the above-average amount of fish they consume.[88] The sad fact remains that due to inadequate pollution control schemes, "[t]he rivers, streams, bayous, bays, lakes, wetlands, and estuaries that support the fish, aquatic plants, and wildlife on which communities and tribes depend have been allowed to become contaminated and . . . have become vectors of toxins."[89] This contamination has caused Natives' daily practices "to serve as a source of exposure to a host of substances toxic to humans and other living things."[90] As described by NEJAC, our aquatic ecosystems are tainted with a host of toxins—from DDT and pesticides, to PCBs, mercury, dioxins, fecal coliform, lead and heavy metals, and other viral and bacterial pollutants.[91] Many of these contaminants are especially disconcerting because they both "persist in the environment for great lengths of time and because they bioaccumulate in the tissues of fish,

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87. *Id.*

88. *E.g.* ECOLOGY TECHNICAL SUPPORT DOCUMENT, *supra* note 4, at 88; NEJAC FISH CONSUMPTION & ENVIRONMENTAL JUSTICE, *supra* note 6; O'Neill, *Variable Justice*, *supra* note 2, at 78 (describing excess toxic exposure rates faced by Native populations).

89. NEJAC FISH CONSUMPTION & ENVIRONMENTAL JUSTICE, *supra* note 6, at 10.

90. *Id.* at v.

91. *Id.*

aquatic plants, and wildlife, existing in greater quantities higher up the food chain."[92]

The resulting human health impacts of chemical contamination are wide-ranging depending on the contaminant.[93] Some chemicals are carcinogenic, some affect reproductive organs, and others serve as dangerous endocrine disrupters.[94] In fact, "tribal members who consume 48 fish meals per month have cancer risks up to 50 times higher than those present in members of the general public, who consume fish about once per month."[95] The Columbia River Basin Contaminant Survey showed the immense disparity in cancer risks between the general population and Native Americans.[96] Whereas someone consuming fish at a rate of 7.5 grams/day faces an excess cancer risk ranging from 1 in 10,000 to 1 in 100,000, Native Americans consuming at traditional consumption rates of 540 grams/day face a risk of almost 1 in 100.[97] This "disparity is stark, with tribal members facing risks perhaps 100 times that of the general population."[98] Additionally, the methyl-mercury exposure risks to tribal women (consuming at the CRITFC average rate of 389 grams/day) compared to women in the general population (consuming at EPA's default rate of 17.5 grams/day) are shocking, evidencing that women consuming at the tribal consumption rate are "exposed to methyl-mercury at levels nine to thirteen times the EPA's reference dose."[99]

One must consider the synergistic impacts of multiple contaminants combined, as well. Stuart Harris, Confederated Tribes of the Umatilla Indian Reservation, and Barbara Harper, Fourteen Confederated Tribes and Bands of the Yakama Nation, describe the situation on the Columbia River system, in which over 100 toxins have been identified in fish tissues.[100] Though "only a few might be at concentrations that trigger action in any given fish, the combined risk for one fish or for the many species which comprise the native diet can be quite high."[101] Further, it is important to understand that other routes of exposure exist, such as from the water or

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92. *Id.*
93. *Id.* at 8.
94. *Id.*
95. Nina Bell, Symposium, *Environmental Injustice Posed by Oregon's Water Quality Standards: Considering Fish Consumption Rates When Setting Toxics Criteria*, 20 J. ENVTL. L. & LITIG. 85, 86 (2005) [hereinafter *Environmental Injustice Posed by Oregon's Water Quality Standards*].
96. O'Neill, *Protecting the Tribal Harvest*, *supra* note 38, at 137.
97. *Id.*
98. *Id.*
99. *Id.* at 137–38.
100. NEJAC FISH CONSUMPTION & ENVIRONMENTAL JUSTICE, *supra* note 6, at 41.
101. *Id.*

sediment itself, and in the end, "[t]he toxicity of a mixture of dozens of carcinogens plus dozens of non-carcinogens . . . needs to be examined."[102]

Tribal people are affected even when they choose not to consume their traditional fishery resource due to the associated health risks resulting from contamination.[103] Studies have shown that the "loss of traditional food sources is now recognized as being directly responsible for a host of diet-related illnesses among Native Americans including diabetes, obesity, heart disease, tuberculosis, hypertension, kidney troubles and strokes."[104] Upon consideration of these myriad health impacts, the continued presence of an inadequate FCR in Washington presents an immense injustice to the well being of the State's tribal population on a variety of fronts.

IV. INDUSTRY INFLUENCE FURTHERING ENVIRONMENTAL INJUSTICE

A. Industry's Influence on Pollution Control in Washington State

Though recognized as a serious environmental justice issue in the state, Washington's industrial leaders seem content to further continue this injustice against Washington's Native peoples by pushing for leaner WQS during the rulemaking currently underway. Washington is a favored state in the Pacific Northwest for industrial operations. For example, the State is home to a number of large industrial players within the aerospace and the forest products industries. However, alongside the robust economies these industries provide are the associated industrial wastes discharged into the State's many waterways. As noted previously, the State's CWA program mandates that every industrial facility operating in the state must obtain a permit in order to discharge its wastewaters.[105] Those permits, in turn, demand compliance with the State's WQS.[106] As the State's implementation of a more protective FCR would necessarily result in more stringent WQS, and therefore, more stringent discharge permit requirements, industries responsible for meeting such requirements are fighting against the implementation of a protective FCR.[107] As such, these

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102. *Id.*
103. O'Neill, *Protecting the Tribal Harvest*, *supra* note 38, at 138.
104. *Id.*
105. WASH. REV. CODE § 90.48.010 (2013).
106. *Id.*
107. *See, e.g.*, Robert McClure, *Business Interests Trump Health Concerns in Fish Consumption Fight*, INVESTIGATE WEST (Mar. 30, 2013), http://www.invw.org/article/business-interests-trump-1344; Robert McClure & Olivia Henry, *How Boeing, Allies Torpedoed State's Rules on Toxic Fish*, INVESTIGATE WEST (Apr. 23, 2013), http://www.invw.org/article/how-boeing-allies-torpedo-1353; Olivia Henry, *Timeline: Fish Consumption Rate*, INVESTIGATE WEST (Apr. 23, 2013), http://www.invw.org/article/timeline-fish-consumption-1351; Jason Alcorn, *The Emails and Reports*

industrial players appear content to continue the immense environmental injustice caused by toxic contaminants that end up in fish, which disproportionally affect tribal peoples of the State.

Among the groups actively working against Washington's adoption of a FCR protective of tribal fish consumption habits are the aerospace industry giant Boeing, the forest products industry's Northwest Pulp and Paper Association, and the Association of Washington Business, among others.[108] The industries' main arguments are that more stringent WQS would be both too costly and technologically impossible to achieve.[109] Chris McCabe, Executive Director of the Northwest Pulp and Paper Association, stated that a study commissioned by the trade group showed "Oregon paper mills' likely costs under the new rates [Oregon's revised FCR of 175 grams/day] . . . would cost that industry $500 million to make the switchover, plus $30 million to $90 million annually in operating costs."[110] And Gary Chandler, chief lobbyist for the Association of Washington Business, sent the clear message in his meetings with former Washington Governor Christine Gregoire and former Ecology Director Ted Sturdevant, that WQS should not be tightened until the technology to meet new standards is available.[111] It is clear Ecology has listened to industrial concerns. In commenting on a Forbes article identifying "Washington as one of the top states likely to boom over the next five years," Sturdevant wrote: "Not if we pass new fish consumption rates! At least according to industry."[112]

Boeing's voice has been the loudest. Boeing's significant role within the state, employing 85,000 workers, gives it substantial influence over Washington's political climate.[113] In June 2012, "Boeing said if Ecology went ahead with plans to make fish safer to eat, it would 'cost the company hundreds of millions of dollars and severely hamper its ability to increase production in [Renton, Washington] and make future expansion elsewhere in the state cost-prohibitive,' according to a Gregoire aide's reconstruction of a conversation with a Boeing executive."[114] It was only one month later, in July 2012, that Washington put a stop to its rulemaking process, delaying

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Behind Washington's Fish Consumption Debate, INVESTIGATE WEST (Mar. 30, 2013), http://www.invw.org/article/the-emails-and-reports-be-1346 (all describing industry's influence on Washington's fish consumption rulemaking).

108. McClure & Henry, *How Boeing, Allies Torpedoed State's Rules on Toxic Fish*, *supra* note 107.

109. McClure, *Water Pollution*, *supra* note 10.

110. *Id.*

111. *Id.*

112. *Id.*

113. McClure & Henry, *How Boeing, Allies Torpedoed State's Rules on Toxic Fish*, *supra* note 107.

114. McClure, *Water Pollution*, *supra* note 10.

its expected completion until Spring 2014 (a deadline yet to be achieved as of the date of this publication), in order to launch a "stakeholder process" many tribal people and environmentalists see as unnecessary as having already been done.[115] It is clear that the impacts of these industries' political pull have been felt throughout the Washington FCR rulemaking process.[116]

B. Industry's Tactics for Delaying and Weakening Washington's Revised Fish Consumption Rate

As noted, the minimum FCR established by EPA is a mere 17.5 grams/day for the general population, and industry advocates appear content to comply with just the status quo.[117] Thus far, industry has achieved success in its efforts to weaken and delay the new FCR. Though Washington is decades overdue in updating its WQS as mandated under the CWA,[118] the State has further delayed the process currently underway and is not expected to have a revised FCR until 2014 or later.[119] This delay is largely in response to industry pressures, which include tactics such as challenging the data used by the State to develop the FCR—the same data approved by EPA and used in Oregon's recent FCR rulemaking establishing a FCR of 175 grams/day[120]—and absurdly requesting salmon, a keystone cultural species, be removed from consideration of the FCR entirely.[121] Unfortunately, industry has been largely successful in its efforts due to the long history of agency capture it has exercised within the State.

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115. *Id.* Note that as of the date of this publication in December 2014, Ecology has yet to adopt a final rule. *See supra* text accompanying note 37.

116. *See generally* McClure, *Business Interests Trump Health Concerns in Fish Consumption Fight*, *supra* note 107; McClure & Henry, *How Boeing, Allies Torpedoed State's Rules on Toxic Fish*, *supra* note 107; Henry, *Timeline: Fish Consumption Rate*, *supra* note 107; Alcorn, *The Emails and Reports Behind Washington's Fish Consumption Debate*, *supra* note 107 (all describing industry's influence on Washington's fish consumption rulemaking).

117. *See* Erik Smith, *Fish-Consumption Issue Surfaces as Major Issue as Lawmakers Hammer Out Budget Deal*, WASHINGTON STATE WIRE (June 26, 2013), http://washingtonstatewire.com/blog/fish-consumption-issue-is-hangup-as-lawmakers-hammer-out-budget-deal/ (describing industry's staunch opposition to new rulemaking); *see also* McClure, *Water Pollution*, *supra* note 10 (describing industry's stance on a revised FCR).

118. Washington State still relies on an FCR based on the 1992 National Toxics Rule even though the CWA requires states to review and, as necessary, revise their WQS every three years. As such, Washington is more than two-decades overdue in updating its WQS to account for a protective FCR. *See* ECOLOGY TECHNICAL SUPPORT DOCUMENT, *supra* note 4, at 1 (noting Washington's reliance on an outdated standard); *see also* 33 U.S.C. § 1313(c)(1) (requiring regular updates to a state's WQS).

119. O'Neill, *Fishable Waters*, *supra* note 40, at 236. Note that as of the date of this publication in December 2014, Ecology has yet to adopt a final rule. *See supra* text accompanying note 37.

120. *Id.* at 232 (stating that Oregon's FCR is 175 grams/day).

121. *Id.* at 250 (stating "[a]ll participants in the process have recognized that a FCR that excludes salmon would be greatly reduced . . . However, given salmon's anadromous habitat, and given

1. Challenge the Data

Industry representatives are using multiple routes to challenge the data Washington is using to determine its revised FCR, including requesting more data[122] and alleging flaws in existing data.[123] Though Washington initially began the FCR development process utilizing the same data Oregon used during its FCR revision (*i.e.* the 1994 CRITFC study referenced in Washington's Technical Support document[124]), which was approved as sufficiently adequate by EPA, industry leaders are insisting that more data is necessary.[125] In fact, industry has consistently pushed the Washington legislature to fund and require that a new study of fish consumption habits in the state be developed and utilized before adoption of a revised FCR.[126] A new study would be both costly and could take years to complete.[127]

In addition to more data, industrial players are asking for irrelevant data as well.[128] For example, though WQS under the CWA are "based solely on an assessment of the risks posed by toxic contaminants to be regulated and don't permit the statutory concern for human health to be 'balanced' against costs or countervailing risks[,] . . . industry has argued that data on risk-tradeoffs or cost-benefit analysis ought to be included in the FCR [Technical Support document]."[129]

Industrial opposition is also asserting flaws in tribal studies included in Washington's Technical Support document, questioning the scientific defensibility of the studies.[130] These insulting allegations come despite the fact that Ecology has already upheld the scientific defensibility of these studies, and further, "each of the tribal studies had previously been considered and affirmed in various assessments by EPA and by sister states."[131] Professor O'Neill plainly summarizes the industrial stance on Washington's data:

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that a portion of many salmon life histories is spent outside of the waters over which Washington asserts regulatory jurisdiction . . . it has been argued that salmon ought to be excluded from the tally of fish intake, because their contaminant body burden comes from 'elsewhere.'").

122. *Id.* at 237–38.

123. *Id.* at 242.

124. ECOLOGY TECHNICAL SUPPORT DOCUMENT, *supra* note 4, at 47–48.

125. O'Neill, *Fishable Waters*, *supra* note 40, at 237–38.

126. Smith, *Fish-Consumption Issue Surfaces as Major Issue as Lawmakers Hammer Out Budget Deal*, *supra* note 117.

127. *Id.*

128. O'Neill, *Fishable Waters*, *supra* note 40, at 237–38.

129. *Id.* at 238.

130. *Id.* at 242.

131. *Id.* at 241.

> Industry . . . arguments . . . require us to deny what we know about the facts on the ground in Washington. These arguments require us to deny that we know there are actual people who consume fish at the greatest rates, from the same local places, for their entire lives, and to deny that we know precisely *who* these people are—namely, tribal people.[132]

Industry arguments to demand additional and unnecessary data are unwarranted, and accordingly, the State should dismiss them as such.

2. Remove Salmon from the FCR

Alongside data challenges, those opposing more stringent WQS are asserting that whatever FCR is eventually derived from the studies, it should be diluted to account for such factors as "diet fraction" and "site use factors."[133] These concepts argue that "although contemporary fish consumption has been documented at X grams/day, (1) only a fraction of the fish captured by this rate is obtained from regulated waters, and (2) only a fraction of even this locally-obtained fish is comprised by species whose known contaminants are attributable to regulated waters."[134] The first situation is referred to as a "diet fraction" and the second as a "site use factor."[135]

In regards to the "diet fraction" argument, opponents argue that fish coming from waters outside of Washington's regulatory jurisdiction should not be counted in the FCR because decreasing pollutants within Washington's waters would not impact the toxic contamination of these fish living outside of the state.[136] The "diet fraction" argument has little merit when considering tribal fish consumption habits in Washington, however. It is well documented that "tribal members currently *do* obtain most or all of their fish from local waters . . . [They] are fishers who bring home their catch . . . harvesters who obtain shellfish from local beaches—and the fruits of these efforts are shared with others in the tribe, including elders and children."[137]

The "site use factor" argument is equally absurd, especially as applied to the essential salmon resource in Washington. The argument contends that

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132. *Id.* at 255.
133. O'Neill, *Fishable Waters*, *supra* note 40, at 245.
134. *Id.*
135. *Id.*
136. *Id.* at 245–46.
137. *Id.* at 247.

"although locally caught fish may be contaminated, depending on the life histories of the various species . . . some portion of their contaminant body burdens may be attributable to sources and sites outside of the relevant state's . . . jurisdiction."[138] Accordingly, they argue, the state's control of pollution within its waters would not impact those contaminants that build up in the fish while outside of the state's waters.[139] This argument has been advocated to remove the consumption of salmon, an anadromous species oftentimes travelling many thousands of miles and across multiple jurisdictions from its spawning streams to the ocean and back, from consideration within the FCR entirely.[140] This argument has been pursued despite the fact that "[a]ll participants in the process have recognized that an FCR that excludes salmon would be greatly reduced."[141] As described by Professor O'Neill, ample data exists showing that salmon contain toxins at levels that threaten human health and many fish consumption advisories warn that salmon consumption should be lessened or eliminated altogether.[142] But, considering salmon's anadromous lifestyle and the fact that a portion of their lives are spent outside Washington's jurisdictional waters, some argue that salmon should be "excluded from the tally of fish intake, because their contaminant body burden comes from 'elsewhere.'"[143] Professor O'Neill recognizes that "[t]he stakes are not small," estimating a reduced FCR "by 25% to over 50%" would result if salmon were omitted from Washington's FCR analysis.[144]

These attempts by industry to dilute and weaken the revised FCR could be disastrous to the health and culture of Washington's tribal populations. Salmon, especially, are a keystone species for Pacific Northwest Native culture. Their removal from the FCR via the "site use factor" argument, combined with a "diet fraction" removal factor, could effectively "gut" the FCR upon consideration of the multiplicative effect of these arguments combined.[145] For example, "[a]n FCR of 200 [grams/day] . . . would effectively become just 50 [grams/day]," if it were halved by a "site use factor of 0.5."[146]

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138. O'Neill, *Fishable Waters*, *supra* note 40, at 248.
139. *Id.*
140. *Id.* at 250.
141. *Id.*
142. *Id.*
143. O'Neill, *Fishable Waters*, *supra* note 40, at 250.
144. *Id.*
145. *Id.* at 249.
146. *Id.*

3. Capture the Agency

Unfortunately, industry efforts to weaken and delay Washington's FCR rulemaking have proved successful, largely due to the long history of industry capture of both Washington politics and EPA in general.[147] Investigate West, an acclaimed non-profit investigative journalism organization,[148] conducted an eye-opening investigation of public records from the Washington Governor's office and Ecology senior staff.[149] Their investigation clearly documents the interplay between Washington officials and local industrial leaders regarding the fish consumption rulemaking issue in Washington State.[150] It is true Ecology staff may have begun the process with proper intentions to protect public health. This is evidenced by former Ecology Director Ted Sturdevant's statement in September 2011, when the initial Technical Support document was released: "The state knows that industry will push back but we should not worry about the political winds because we know it's the right thing to do."[151] But by February 2012, Sturdevant was clearly feeling the heat of industry pressure and opposition to the fish consumption rulemaking process, stating in an email to a Governor's aide that "he felt 'breathless' given the strong Republican reactions to fish consumption."[152] By June 2012 it was clear that the industry pressure would prevail, as the Governor's Chief of Staff met with representatives from Boeing on June 29, and by July 12, Sturdevant informed tribal stakeholders that the FCR rulemaking timeline

147. *See* McClure & Henry, *How Boeing, Allies Torpedoed State's Rules on Toxic Fish*, *supra* note 107 (describing industry efforts to delay rulemaking); *see also* McClure, *Water Pollution*, *supra* note 10 (describing intense lobbying campaigns and subsequent agency rulemaking delays); Wood, *EPA* Speech, *supra* note 43 (describing industry capture of Washington politics and the EPA generally).

148. INVESTIGATE WEST, http://www.invw.org/about (last visited Nov. 8, 2013).

149. *See generally* McClure, *Business Interests Trump Health Concerns in Fish Consumption Fight*, *supra* note 107; McClure & Henry, *How Boeing, Allies Torpedoed State's Rules on Toxic Fish*, *supra* note 107; Henry, *Timeline: Fish Consumption Rate*, *supra* note 107; Alcorn, *The Emails and Reports Behind Washington's Fish Consumption Debate*, *supra* note 107 (all articles from a series investigating Washington's fish consumption rulemaking).

150. *See generally* McClure, *Business Interests Trump Health Concerns in Fish Consumption Fight*, *supra* note 107; McClure & Henry, *How Boeing, Allies Torpedoed State's Rules on Toxic Fish*, *supra* note 107; Henry, *Timeline: Fish Consumption Rate*, *supra* note 107; Alcorn, *The Emails and Reports Behind Washington's Fish Consumption Debate*, *supra* note 107 (all articles from a series investigating Washington's fish consumption rulemaking).

151. Henry, *Timeline: Fish Consumption Rate*, *supra* note 107.

152. *Id.*

would be revised (and subsequently delayed).[153] Ecology officially released the new, delayed timeline in an open letter to interested parties on July 16, 2012.[154] In less than one year, industry had prevailed in achieving delay of Washington's FCR rulemaking process.[155]

The outcome in Washington is of little surprise when considered against the backdrop of industry capture of EPA generally.[156] When the CWA was passed in 1972, it stated that it was "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985."[157] Alongside this ambitious goal, however, came the permit system regulating such discharges. It is with the permitting of toxic discharges that "EPA took the permit system off course early on and never steered it back on course . . . Rather than phasing out permits, EPA has enshrined them."[158] As described by Professor Wood in a speech to EPA staff:

> The permits have become the end-all of regulation. When tribes have asked businesses to stop dumping toxic effluent where they fish, the businesses simply say, "We have a permit to discharge." And if tribes go to state officials or EPA, they hear, "Oh that business is in compliance because they have a permit." As one tribal analyst [explained], "It's like a regulatory merry-go-round and you can't get off."[159]

And, unfortunately, EPA "cannot say no to business."[160] Accordingly, permits continue to be issued, and "the pollution keeps mounting," when in all reality, "EPA should be, quite simply, business neutral."[161] As so well-described by Professor Wood, "it is certainly not government's job to insulate businesses from their true costs of operation," and when businesses "cannot operate without damaging the commons, they should be replaced by innovative green businesses."[162] In fact, that is part of the reasoning

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153. *Id.* Note that as of the date of this publication in December 2014, Ecology has yet to adopt a final rule. Thus, Sturdevant's July 2012 delayed timeline has, again, been subsequently delayed. *See supra* text accompanying note 37.

154. Henry, *Timeline: Fish Consumption Rate*, *supra* note 107; *see also supra* text accompanying note 37 (describing the current status of the even further delayed rulemaking timeline).

155. Henry, *Timeline: Fish Consumption Rate*, *supra* note 107.

156. Wood, *EPA* Speech, *supra* note 44, at 180.

157. 33 U.S.C. § 1251(a)(1) (2012); Wood, *EPA* Speech, *supra* note 44, at 181.

158. Wood, *EPA* Speech, *supra* note 44, at 181.

159. *Id.* at 181–82.

160. *Id.* at 196.

161. *Id.*

162. *Id.* at 196–97.

underlying the fact that CWA "permits were to be issued for only five-year terms."[163]

This obvious perpetuation of industry capture of EPA and state environmental departments, as evidenced by the CWA permit system, must succumb to public health and welfare at some point. EPA and states implementing CWA programs must begin to stand up to the industry pressure. It is clear that "[t]he costs of cleaning up pollution are exponentially greater than the costs of prevention[;] the chemicals EPA permitted yesterday are the legacy chemicals of today, and those allowed by permits today will be the legacy chemicals of tomorrow."[164] As such, Washington and EPA must take the opportunity now, with the FCR rulemaking underway, to reject industrial opposition and stand up for the health and welfare of *all* citizens, tribal members included, as their duties in the public role mandate.

V. REMEDYING THE INJUSTICE: AN ANALYSIS OF THE GOVERNMENT'S DUTY TO PROTECT NATIVE AMERICANS VIA ESTABLISHMENT OF A PROTECTIVE FISH CONSUMPTION RATE

Though the industry pressure on the State is immense, Washington and EPA have the duty and obligation to remedy the injustice faced by Native Americans through a variety of legal mandates arguably requiring an adequate FCR be established.

First, the CWA and Washington's own mandated revision of its WQS to establish an adequate FCR can, and rightfully should, be used to ensure the creation of a protective FCR, which remedies the environmental injustice faced by the State's tribal peoples. A second approach stems from Native treaty rights, which have the force of "the supreme law of the land."[165] Washington's Native people have established treaty rights to catch and consume fish, and it follows that such fish must be fit for human consumption. EPA, acting as federal trustee, must consider these treaty rights upon its approval of Washington's revised WQS. EPA should ensure that the State's decision complies with the time-honored treaty rights as its federal trust responsibility to Native peoples mandates these rights be protected. Third, the age-old Public Trust Doctrine places an obligation on the State to protect public natural resources, including water and fish, in trust for future generations. The State should consider its public trust responsibilities and ensure its revised FCR is protective of *all* current and

163. Wood, *EPA* Speech, *supra* note 44, at 197
164. *Id.* at 199.
165. O'Neill, *Fishable Waters*, *supra* note 40, at 194.

future inhabitants of the State. Fourth, Title VI of the Civil Rights Act of 1964 may be invoked to ensure the State does not discriminate against its tribal peoples, and accordingly, establishes a relevant and protective FCR during the human health criteria rulemaking underway. Both EPA and the State arguably have obligations under Title VI and EPA's Title VI implementing regulations to ensure the revised FCR is non-discriminatorily protective of all citizens regardless of race, color, or national origin. And finally, the Equal Protection Clause of the 14th Amendment of the United States Constitution may arguably be used to ensure the State does not discriminate against its Native population by adopting a weak FCR. Though discriminatory intent is required to invoke this Constitutional challenge, such intent is arguably present upon consideration of the data the State has ample access to.

Each of these approaches may arguably be implemented to force the State to establish a FCR protective of Native Americans during its human health criteria rulemaking. In turn, the establishment of a protective FCR will help to remedy the fish consumption environmental justice issue faced by many tribal peoples of the State.

A. CWA Mandates

Environmental justice issues are difficult to heal without a separate legal mandate to enforce against discrimination,[166] but the CWA itself provides the legal mandate here to remedy the fish consumption environmental justice issue. Both EPA and the State have the obligation—and duty—to push against negative industry tactics to weaken and delay its development of a revised FCR, and to remedy the environmental justice issue in Washington by implementing a FCR reflective of tribal fish consumption habits under the mandates of the CWA. First, the State has a duty to promulgate a FCR reflective of tribal fish consumption habits during the long-overdue WQS revision underway.[167] Second, EPA has a duty to step-in and promulgate a WQS protective of human health upon the

166. *See* HILL, *supra* note 67 (explaining that environmental justice issues are difficult to remedy for a variety of reasons, including the difficulty of proving a "discriminatory intent" to enforce against discrimination under the Equal Protection Clause of the 14th Amendment, and the lack of a personal cause of action to enforce against discrimination under Title VI of the Civil Rights Act).

167. 33 U.S.C. § 1313(c)(1) (2012) (requiring triennial review of state WQS); *see also* O'Neill, *Fishable Waters*, *supra* note 40, at 228 (stating that the state must follow EPA revised guidance in which the FCR should be based "first, on local data regarding fish consumption practices; second, on data reflecting similar geography or population groups; third, on states' or tribes' own analysis of national data; and last, on the EPA's national default values"). As such, the state should stick to its initially proposed range based on local data, rather than succumb to industry pressure to adopt EPA's minimal FCR value.

State's continued failure to do so.[168] As such, the CWA both can, and rightfully should, be used as a viable means to remedy environmental injustices against Native Americans.

1. The State's Obligations under the CWA

Section 1313(c) of the CWA requires states revise their WQS every three years and submit them to EPA for approval.[169] The current human health criteria rulemaking underway in Washington, though long overdue, is working towards compliance with this requirement. Although EPA has set the default FCR for the general population at 17.5 grams/day, it has issued guidance stating that this value is merely the floor and individual states should base their FCRs upon local data and local fish consumption habits where available.[170]

EPA's 2000 guidance recommends the following process, in order of preference, for determining an adequate FCR for a particular state: (1) states should first base their criteria on local data regarding fish consumption habits in the state; (2) if local data is lacking, states should base their criteria on "data reflecting similar geography or population groups;" (3) states should base their criteria on their own analysis of national data next; and (4) finally, states may base their criteria on EPA's default values as a last resort.[171] EPA strongly urges states "to use a fish intake level derived from local data on fish consumption in place of [the] default value . . . ensuring that the fish intake level chosen is protective of highly exposed individuals in the population."[172]

Washington State has clear evidence of local fish consumption habits within its own technical report.[173] Accordingly, the State should use this local data to develop a FCR "protective of highly exposed individuals in the population," such as the State's tribal peoples.[174] Therefore, the State should adopt a FCR, at minimum, in-line with its initially proposed FCR within the range of 157–267 grams/day, as noted in the State's original

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168. 33 U.S.C. § 1313(c)(4) (requiring EPA promulgation of revised WQS when the state fails to do so or the state's revision is inadequate to meet the requirements of the CWA).

169. *Id.* § 1313(c).

170. U.S. ENVTL. PROTECTION AGENCY, METHODOLOGY FOR DERIVING AMBIENT WATER QUALITY CRITERIA FOR THE PROTECTION OF HUMAN HEALTH, EPA 822-B-004, 1-12–1-13 (Oct. 2000), *available at* http://water.epa.gov/scitech/swguidance/standards/upload/2005_05_06_criteria_humanhealth_method_complete.pdf [hereinafter EPA METHODOLOGY].

171. O'Neill, *Protecting the Tribal Harvest*, *supra* note 38, at 140–41.

172. EPA METHODOLOGY, *supra* note 170, at 1-12–1-13.

173. ECOLOGY TECHNICAL SUPPORT DOCUMENT, *supra* note 4, at 47–48.

174. EPA METHODOLOGY, *supra* note 170, at 1-12–1-13.

technical support document.[175] The rate should arguably be even higher, considering the data available within the local CRITFC and Squaxin tribal studies. Regardless, Washington must use this local data in order to accord with the CWA and EPA guidance and to thus receive EPA approval of its revised WQS.

2. EPA's Obligations under the CWA

Section 1313(c)(4) of the CWA requires EPA to promulgate revised WQS when a state fails to do so or the state's revision is inadequate to meet the requirements of the CWA.[176] Arguably, EPA rightfully could have stepped in long ago to mandate a FCR in Washington that is at least in accordance with EPA's minimum default value under this statutory requirement. Unfortunately, EPA has not exercised the "hammer of its own [1313](c)(4) authority" to require Washington's compliance with the CWA.[177] And the agency faced a viable legal challenge as a result.

In October 2013, a coalition of environmental organizations filed suit against EPA for the agency's failure "to promulgate standards necessary to meet the requirements of the [CWA] and to protect designated uses including the consumption of fish."[178] The suit alleged that "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 the fishable and swimmable uses required by the [CWA]."[179] Considering the plain facts at issue—that Washington had not revised its WQS in accordance with the mandates of the CWA, and that EPA had failed to step in and promulgate appropriate WQS in the State's absence to do so—plaintiffs presented a seemingly plausible challenge against the agency. Although the court ended up deciding against plaintiffs in this particular case because the EPA Administrator had not explicitly determined that the State's WQS were inadequate—which would have thereby triggered a mandatory duty on behalf of the EPA to act under § 1313(c)(4)—this legal route remains

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175. O'Neill, *Fishable Waters*, *supra* note 40, at 236.

176. 33 U.S.C. § 1313(c)(4).

177. O'Neill, *Fishable Waters*, *supra* note 40, at 277.

178. Complaint at 2 ¶ 1, Puget Soundkeeper Alliance v. U.S. Envtl. Prot. Agency, No. 2:13-cv-01839, 2013 WL 5589817 (W.D. Wash. Sept. 18, 2014), *available at* http://columbiariverkeeper.org/wp-content/uploads/2013/10/2013.10.11.complaint.pdf.

179. Complaint at 3 ¶ 6, Puget Soundkeeper Alliance v. U.S. Envtl. Prot. Agency, No. 2:13-cv-01839, 2013 WL 5589817 (W.D. Wash. Sept. 18, 2014), *available at* http://columbiariverkeeper.org/wp-content/uploads/2013/10/2013.10.11.complaint.pdf.

potentially viable for other cases so long as the EPA Administrator first makes the requisite determination that the state's WQS are inadequate.[180]

Accordingly, the CWA itself seems to place a viable legal obligation upon both the State and EPA to require the implementation of an adequate FCR in Washington, and subsequently, to indirectly remedy the fish consumption environmental justice issue faced by the State's Native population.

B. Treaty Rights & the Federal Trust Responsibility

An additional approach to force the State and EPA to establish a relevant FCR protective of the State's tribal population—and arguably an even more powerful approach than the CWA route—stems from the overarching treaty rights afforded to tribal people within the State. Tribes are sovereign nations, recognized by the United States Supreme Court as "the undisputed possessors of the soil, from time immemorial," which now reside as "independent political communities" within the bounds of the United States.[181] As such, tribes have a "government-to-government relationship" with states and the federal government.[182] "The cornerstone of the government-to-government relationship is the federal government's trust responsibility to federally recognized Indian tribes."[183] Built upon "treaties, statutes, executive orders, and the historical relations between the federal government and tribes" the federal trust responsibility places strict fiduciary standards upon federal agencies.[184] The United States Supreme Court has gone so far as to state "that federal officials are 'bound by every moral and equitable consideration to discharge the federal government's trust with good faith and fairness when dealing with tribes."[185]

Treaties "have the status under the Constitution of 'the supreme law of the land.'"[186] Accordingly, tribal treaty rights in existence throughout the

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180. Puget Soundkeeper Alliance v. U.S. Envtl. Prot. Agency, No. C13-1839-JCC, 2014 WL 4674393, *4–6 (W.D. Wash. Sept. 18, 2014). Just before this Note went to print, the court decided against plaintiff environmental organizations in this suit. *Id.* The court reasoned that since EPA did not make an explicit determination under § 1313(c)(4) that the State's WQS were inadequate—which would thereby trigger a mandatory duty for the EPA to act under § 1313(c)(4)—the court did not have jurisdiction because EPA has not yet failed to perform a non-discretionary act or duty. *Id.* at *4. Thus, in order to challenge the EPA under § 1313(c)(4), the agency administrator must first explicitly declare the state's WQS are inadequate. *Id.* at *4–6.

181. Worcester v. Virginia, 31 U.S. 515, 559–60 (1832).

182. NEJAC FISH CONSUMPTION & ENVIRONMENTAL JUSTICE, *supra* note 6, at 128.

183. *Id.* at 129.

184. *Id.* (citing Nance v. Envtl. Prot. Agency, 645 F.2d 701, 710 (9th Cir. 1981); United States v. Payne, 264 U.S. 446, 448 (1924)).

185. *Id.*

186. O'Neill, *Fishable Waters*, *supra* note 40, at 194 (citing *Worcester*, 31 U.S. at 519).

State of Washington must be appropriately considered by EPA, as the federal agency "bound . . . to discharge the federal government's trust,"[187] when it approves Washington's revised WQS. EPA must ensure the revised standards accord with the long-standing rights of Native Americans affirmed by legally binding treaties. Similar "right to fish" treaty provisions are found throughout the treaties rendered between the United States and the Native American Tribes of the Pacific Northwest in the mid-1800s.[188] For example, the "Treaty of Point Elliott provides that 'the 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.'"[189] Courts have since "interpreted these provisions to secure to the tribes a permanent, enforceable right to take fish throughout their fishing areas for ceremonial, subsistence and commercial purposes."[190]

Tribal reservation of the right to fish was at the heart of treaty negotiations from the start. In fact, maintenance of the essential right and fish resources was considered of the utmost importance. "[W]hile the tribes ceded vast expanses of their homelands through treaties with the United States, they nonetheless took pains to reserve their right to fish—that is, to continue to be fishing peoples, to take care of and be cared for by the fish as they always had."[191] Historical evidence clearly demonstrates that "protections for the Pacific Northwest tribes' pre-existing fishing rights were crucial to obtaining tribes' assent to the treaties."[192]

Washington courts have taken this recognized tribal treaty right to fish even farther.[193] In the 1980 case of *United States v. Washington*, the Federal District Court for the Western District of Washington "held that 'implicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made despoliation . . . The most fundamental prerequisite to exercising the right to fish is the existence of fish to be taken.'"[194] Though the case was later vacated by the Ninth Circuit on jurisdictional grounds, a second case was brought in 2001—the "Culverts case."[195] In 2007 the District Court again ruled in favor of upholding the

187. NEJAC FISH CONSUMPTION & ENVIRONMENTAL JUSTICE, *supra* note 6, at 129 (citing *Nance*, 645 F.2d at 710; *Payne*, 264 U.S. at 448).

188. O'Neill, *Fishable Waters*, *supra* note 40, at 193–94.

189. *Id.* at 194.

190. *Id.*

191. *Id.* at 193.

192. *Id.* at 195.

193. O'Neill, *Fishable Waters*, *supra* note 40, at 197 (citing United States v. Washington, 506 F.Supp. 187, 203 (W.D. Wash. 1980) (Phase II), *vacated on jurisdictional grounds by* United States v. Washington, 759 F.2d 1353 (9th Cir. 1985)).

194. *Id.*

195. *Id.*; United States v. Washington, 2007 WL 2437166 (W.D. Wash. Aug. 22, 2007).

tribal right to fish in the Culverts case.[196] The Court also held that it was the State's duty to prevent diminishing the salmon runs so essential to that right.[197] The Court's order stated "[t]he Treaties were negotiated and signed by the parties on the understanding and expectation that the salmon runs were inexhaustible and that salmon would remain abundant forever."[198]

The reasoning of the Culverts case can logically be applied to obligate a duty upon EPA and the State to ensure that salmon and other fishery resources are not only in existence, but that they are also fit for human consumption (*i.e.* not contaminated at unsafe levels due to toxic pollution from inadequate WQS).[199] As described by Professor O'Neill:

> The point of securing a "robust" fishery, from the tribes' perspectives, is not to have salmon runs to marvel at from a distance. Thus, while the Culverts case dealt with facts presenting impairment of the tribes' rights via depletion of the fish resource, its rationale applies equally to impairment of the tribes' rights via contamination that renders the fish resource unfit as a source of food for tribal fishers, their families, and others to whom they might sell their catch.[200]

The government's trust responsibility toward Indian tribes and the protection of treaty rights can arguably be used to "shield" the government from challenges from polluters.[201] In fact, courts have recently upheld the government's obligation to protect tribal interests and treaty-protected rights to catch and consume fish in multiple cases.[202] For example, in *Paravano v. Babbitt*, in 1995, the Ninth Circuit upheld a federal regulation under the Magnuson-Stevens Act (regulating fishery resources) to protect tribal rights to fish and fish resources based upon the government's trust responsibility to protect tribal treaty rights.[203] Additionally, in 1996, in *Northwest Sea Farms v. U.S. Army Corps of Engineers*, the District Court for the Western District of Washington upheld the Corps' rejection of a fish farming permit due to its potential interference with tribal fisheries that

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196. O'Neill, *Fishable Waters*, *supra* note 40, at 198.
197. *Id.*
198. *Id.* at 201.
199. *Id.* at 265.
200. *Id.* at 265.
201. Wood, *EPA* Speech, *supra* note 44, at 198.
202. *Id.* at 197.
203. Parravano v. Babbitt, 70 F.3d 539, 547 (9th Cir. 1995); Wood, *EPA* Speech, *supra* note 44, at 197.

were protected by treaty rights and the government's trust responsibility to protect such rights.[204]

Accordingly, EPA and the State of Washington must consider the long-standing tribal treaty rights to catch and consume fish—fish that are fit for human consumption—as they develop a FCR protective of *all* citizens within the State, including the 104,000 tribal members of the State's 29 federally recognized sovereign tribal nations.[205] EPA has a strong obligation to ensure tribal treaty rights to fish—and to eat fish without being subjected to unsafe levels of contaminants—as the agency itself must uphold the due federal trust responsibility on behalf of the United States to protect these tribal rights. As summarized by Professor O'Neill, a relevant FCR, from the tribal perspective, is not simply a matter of policy.[206] "Tribes reserved a right to take fish—fish fit for human consumption—not a right to be faced with a false "choice" of consuming fish with a stiff dose of carcinogens or curtailing their fish consumption and all that this would mean."[207] Tribal treaty rights, therefore, mandate that Washington and EPA ensure a protective FCR is established.

C. The Public Trust Doctrine

Yet another approach that may arguably be utilized to force Washington's adoption of a protective FCR has its roots in the ancient concept of the state's responsibility to hold and protect natural resources, such as water and fish, in public trust for the benefit of both current and future generations. As the "first and oldest environmental principle of this nation," the Public Trust Doctrine ("PTD") "is such a fundamental doctrine of government that it precedes this country, reaching back, literally, to Justinian times."[208] The doctrine has been traced to "the ancient societies of Europe, the Orients, Africa, Muslim countries, and Native America."[209] As described by Charles Wilkinson, "[t]he real headwaters of the [PTD] . . . arise in rivulets from all reaches of the basin that holds the societies of the world."[210] Professor Wood states: "as the world has understood since time

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204. Northwest Sea Farms v. U.S. Army Corps of Eng'rs, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996); Wood, *EPA* Speech, *supra* note 44, at 197.

205. ECOLOGY TECHNICAL SUPPORT DOCUMENT, *supra* note 4, at 18.

206. O'Neill, *Fishable Waters*, *supra* note 40, at 269.

207. *Id.*

208. Wood, *EPA* Speech, *supra* note 44, at 180 (citing Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source of the Traditional Doctrine*, 19 ENVTL. L. 425, 429 (1989)).

209. *Id.*

210. *Id.*

immemorial, a government that fails to protect its natural resources sentences its people to misery."[211]

As "the only enduring institution with control over human actions that affect natural resources," courts characterize the state government as the "trustee of these resources."[212] This means that the state "government holds the corpus—the waters and wildlife—as its property that it must manage for the citizens, the beneficiaries."[213]

The PTD "has always existed in the State of Washington."[214] Washington courts first formally acknowledged the PTD in 1901 and used it as the basis for protecting the public's rights to use the State's navigable waterways and to fish the State's waters.[215] PTD principles are recognized in Washington's Constitution, as well as in a variety of statutory provisions.[216] For example, Washington's Water Code states: "'It is the policy of the state to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from . . . the retention of waters within streams and lakes in sufficient quantity and *quality* to protect instream and natural values and rights.' . . . 'Subject to existing rights all waters within the state belong to the public.'"[217]

Washington case law is minimal regarding the application of the PTD to a situation such as we have here—an instance in which the state is not attempting to alienate the public trust resource at issue.[218] Three cases are particularly helpful in understanding the application of Washington's PTD to a situation involving State regulatory control of a public trust resource.[219]

First, in *Weden v. San Juan County*, the Washington Supreme Court used a "heightened degree of judicial scrutiny" to analyze a case involving a county ordinance prohibiting motorized-watercraft use on a public waterway in order to protect resources held within the public trust (*e.g.*

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211. *Id.*

212. *Id.* at 178.

213. Wood, *EPA* Speech, *supra* note 44, at 178.

214. Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 192 (2010) [hereinafter *Comparative Guide*].

215. Patrick Redmond, *The Public Trust in Wildlife: Two Steps Forward, Two Steps Back*, 49 NAT. RESOURCES J. 249, 295 (2009) (citing New Whatcom v. Fairhaven Land Co., 64 P. 735 (Wash. 1901)).

216. Craig, *Comparative Guide*, *supra* note 214, at 188–91.

217. *Id.* at 190 (citing WASH. REV. CODE §§ 90.03.005–90.03.611) (emphasis added).

218. *See generally* Ivan M. Stoner, Comment, *Leading a Judge to Water: In Search of a More Fully Formed Washington Public Trust Doctrine*, 85 WASH. L. REV. 391 (2010) [hereinafter *Leading a Judge to Water*] (analyzing the question of what limits Washington's PTD imposes on the State's conduct when that conduct does not transfer control of public trust land to private parties but still impacts the *jus publicum*).

219. *Id.* at 407.

endangered and threatened wildlife, the public's right to access and use navigable waters, etc.).[220] The court upheld the county ordinance at issue, holding that it did not violate the PTD.[221] By balancing the benefits against the consequences of the ordinance, the court found that the conservation and wildlife protection benefits, as well as increased public access benefits—both of which are also PTD-protected rights—justified the ban, even though the ordinance negatively impacted the PTD-protected right of recreational use by motorized watercraft users.[222] Importantly, "[t]he court concluded that it would stretch the [PTD] too far to protect an activity that 'actually harms and damages' the jus publicum," or public resources.[223]

Second, in *Washington State Geoduck Harvest Association v. Washington State Department of Natural Resources*, a State appellate court upheld the Department's regulation of the harvesting of commercial geoducks—a PTD-protected resource living within the beds and shorelines of the State's public trust lands—because it "promoted sustainable use and natural regeneration of the resource."[224] The court found these results to be directly aligned with the values traditionally protected by the PTD—fishing, commerce, and recreation—and therefore, the regulation at issue was a valid exercise of the State's regulatory power, fitting well within the confines of the doctrine.[225]

Finally, in *Citizens for Responsible Wildlife Management v. State*, a Washington appellate court ruled against citizens in a suit challenging state hunting regulations under the PTD.[226] Although the court did not find the citizens' PTD challenge viable, Chief Judge Christine Quinn-Brintnall issued a remarkable concurrence, arguing "that no weighing of interests could sufficiently represent the enduring nature of the public trust, and that courts should strike down any law that would result in 'unacceptably high' damage to a public trust resource."[227] In sum, these cases recognize that the courts will at least analyze the validity of State and agency actions involving the regulation of public trust resources under the PTD.[228]

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220. *Id.* at 408 (quoting Weden v. San Juan Cnty., 958 P.2d 273, 283 (Wash. 1998)).
221. *Id.* (referencing *Weden*, 958 P.2d at 283–84).
222. *Id.* at 409 (referencing *Weden*, 958 P.2d at 283–84).
223. Stoner, *Leading a Judge to Water*, *supra* note 218, at 409 (referencing *Weden*, 958 P.2d at 284).
224. *Id.* at 410 (referencing Wash. State Geoduck Harvest Ass'n v. Dep't of Natural Res., 101 P.3d 891 (Wash. Ct. App. 2004)).
225. *Id.*
226. *Id.* at 410–11 (referencing Citizens for Responsible Wildlife Mgmt. v. State, 103 P.3d 203 (Wash. Ct. App. 2004)).
227. *Id.* at 411 (quoting *Citizens for Responsible Wildlife*, 103 P.3d at 209).
228. Stoner, *Leading a Judge to Water*, *supra* note 218, at 411–12.

Whether this approach can be utilized to force the State to adopt a protective FCR is an open question.

The PTD is widely recognized as a flexible and ever-changing doctrine—in fact, the doctrine has been expanded over the years in Washington to include not only the traditional protections for navigation, commerce, and fishing, but also to include public rights to "boating, swimming, water skiing . . . bathing . . . skating, cutting ice . . . and skin diving."[229] Courts have described the doctrine as retaining its "undiminished vitality," stating "[t]he doctrine is not fixed or static, but one to be molded and extended to meet changing conditions and needs of the public it was created to benefit."[230] It has been further described by courts that "the very purposes of the trust have evolved in tandem with the changing public perception of the values and uses of waterways."[231]

Despite the PTD's general flexibility to adapt to changing needs and times, however, Washington courts have limited its applicability.[232] In *Rettkowski v. Department of Ecology*, the Washington Supreme Court stated that the doctrine is not transferable to State agencies and agencies cannot "assume the State's public trust duties and regulate in order to protect the public trust."[233] Accordingly, *Rettkowski* stands for the proposition that the PTD is not directly applicable to Ecology's implementation of the State's water laws.[234] As such, though an argument may be made to expand the public's right to fish under the PTD—and thereby the public's right to consume fish that are safe to eat—an expansion of the PTD's applicability to Ecology's regulatory scheme would necessarily be required to force the State to adopt a fully protective FCR utilizing this approach. That said, however, considering the State's precedence for analyzing state regulatory schemes under the PTD—as evidenced by *Weden, Washington Geoduck*, and the *Citizens* case—a novel argument may be made for using the State's obligations under the PTD to ensure its fishery resources are safe for consumption. Ecology could achieve this duty via the establishment of a protective FCR.

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229. Craig, *Comparative Guide*, *supra* note 214, at 193; *see also* Stoner, *Leading a Judge to Water*, *supra* note 218, at 397 (describing the expansion of Washington's PTD to protect additional uses and public rights).

230. Stoner, *Leading a Judge to Water*, *supra* note 218, at 397 (quoting State v. Cent. Vt. Ry., Inc., 571 A.2d 1128, 1130 (Vt. 1989)).

231. *Id.*

232. Craig, *Comparative Guide*, *supra* note 214, at 193.

233. *Id.* (citing Rettkowski v. Dep't of Ecology, 858 P.2d 232, 239 (Wash. 1993) (en banc)).

234. *Id.*

D. Title VI of the Civil Rights Act

Another obligation upon the State to force its establishment of a relevant FCR protective of tribal populations during the human health criteria rulemaking underway stems from Title VI of the 1964 Civil Rights Act. Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[235] Though no private right of action exists to force implementation of Title VI,[236] EPA, as a federal agency providing financial assistance, and the State, as a recipient of federal funds, may justifiably be held liable under the statute and implementing regulations.[237] Generally, the argument is that state agencies receiving federal funds from EPA, "are the governmental bodies responsible for much of the nation's environmental policy—[*e.g.*] the enforcement of pollution standards."[238] If those "federally-funded state agencies create a racially discriminatory distribution of pollution, then a violation of Title VI has occurred and a civil rights lawsuit is warranted."[239]

Unlike constitutional discrimination claims that require discriminatory intent be shown, claims brought under Title VI can be brought based on a showing of "disparate racial impact."[240] Supreme Court precedence, including the holdings of *Guardians Association v. Civil Service Commission of New York* and *Alexander v. Choate*, has established that "'actions having an unjustifiable, disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI.'"[241] EPA developed its regulations to implement Title VI in 1973, and has since revised them in 1984 and 2000.[242] In relevant part, Section 7.35(a) of EPA's regulations provide:

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235. HILL, ENVIRONMENTAL JUSTICE: LEGAL THEORY AND PRACTICE, *supra* note 67, at 342.

236. Bell, *Environmental Injustice Posed by Oregon's Water Quality Standards*, *supra* note 95, at 99 (citing Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (holding no private right of action is available to enforce Title VI of the Civil Rights Act disparate-impact regulations)).

237. Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 317 (1995) [hereinafter *Environmental Racism*].

238. *Id.* at 287.

239. *Id.*

240. *Id.* at 291.

241. *Id.* at 319 (referencing Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983); citing Alexander v. Choate, 469 U.S. 287, 293 (1985)).

242. Tseming Yang, *The Form and Substance of Environmental Justice: The Challenge of Title VI of the Civil Rights Act of 1964 for Environmental Regulation*, 29 B.C. ENVTL. AFF. L. REV. 143, 164 (2002).

> As to any program or activity receiving EPA assistance, a recipient shall not . . . on the basis of race, color, national origin . . . (2) Provide a person any service, aid or other benefit that is different, or is provided differently from that provided to others under the program . . . [and] (7) In administering a program or activity receiving Federal financial assistance in which the recipient has previously discriminated on the basis of race, color, sex, or national origin, the recipient shall take affirmative action to provide remedies to those who have been injured by the discrimination.[243]

In fact, EPA "specifically incorporate[d] section [1313] of the CWA, which includes the development of [WQS]" into its agency Title VI regulations.[244] EPA's Title VI regulations are applicable to "all applicants for, and recipients of, EPA assistance in the operation of programs or activities receiving such assistance."[245]

As applied here—the State's development of a non-discriminatory and equally protective FCR—a challenge under EPA's Title VI regulations is plausible. As noted previously, the CWA is a form of cooperative federalism, in which the State runs an approved CWA program, but gains assistance and oversight from EPA. This assistance derives in the form of "financial assistance," through grants that have historically been given to the State from the federal government for construction and maintenance of sewage treatment systems, and today through funds in the state-revolving fund program.[246] Thus, the State is arguably subject to compliance with EPA's Title VI regulations and EPA arguably has a duty to ensure that the State does not discriminate against its Native peoples under Title VI because the State receives "financial assistance" from the federal agency to implement its CWA program.[247] The State's establishment of an FCR within its WQS revision is clearly part of its federally approved CWA program. As such, EPA should force the State to adopt a FCR during the human health criteria rulemaking that ensures the State's tribal populations, based "on the ground of race, color, or national origin," are not "subjected to discrimination" under the state-administered CWA "program . . . receiving Federal financial assistance."[248]

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243. Nondiscrimination in Programs Receiving Federal Assistance from the Environmental Protection Agency, 40 C.F.R. 7.35 (1984), *available at* http://www.epa.gov/ocr/docs/40p0007.pdf.

244. *Id.* at 3.

245. *Id.* at 1.

246. 33 U.S.C. § 1381 (2012).

247. HILL, ENVIRONMENTAL JUSTICE: LEGAL THEORY AND PRACTICE, *supra* note 67, at 342.

248. *Id.*

Additionally, EPA's Title VI regulations mandate that the State cannot provide a benefit that affects some people—based on race, color, or national origin—differently than others.[249] Considering the fact that the State's FCR provides a different benefit to members of the general population than to Native Americans who face disproportionately higher cancer risks, such a prohibited "different benefit" is arguably being provided by the State. Further, as the State has known its FCR has disproportionately subjected its Native population to increased cancer since at least 1999, the State should justifiably be forced to implement affirmative action to remedy the history of injustices its Native peoples have faced due to an inadequate FCR under Section 7.35(a)(7).[250] Accordingly, the Title VI approach may prove a viable means to force the State to adopt a FCR protective of *all* of the State's inhabitants—tribal diets included.

E. The Equal Protection Clause of the 14th Amendment

A final approach for ensuring the State adopts a protective FCR, and therefore does not discriminate against its Native peoples, utilizes the Equal Protection Clause ("EPC") of the United States Constitution. This anti-discriminatory law approach utilizes the EPC of the 14th Amendment to hold persons liable for environmental justice discrimination. The EPC states "no state shall 'deny to any person within its jurisdiction the equal protection of the laws,'" and requires that any classification based on race be narrowly tailored to meet a compelling government interest.[251] The EPC approach is difficult to argue, however, as the law requires proof of intent to discriminate.[252]

As the Supreme Court held in *Washington v. Davis*, plaintiffs bringing an EPC challenge must prove the necessary element of intentional discrimination by the government actor.[253] Though the Court later held in *Village of Arlington Heights v. Metropolitan Housing Development Corporation* that such discriminatory intent could be proven by circumstantial evidence, reviewing courts have demanded a high burden of

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249. Nondiscrimination in Programs Receiving Federal Assistance from the Environmental Protection Agency, *supra* note 242, at 11.

250. O'Neill, *Fishable Waters*, *supra* note 40, at 234–35 (stating Ecology knew that the State's FCR of 6.5 grams/day was inadequate to protect tribal peoples as early as 1999).

251. HILL, ENVIRONMENTAL JUSTICE: LEGAL THEORY AND PRACTICE, *supra* note 67, at 269.

252. Fisher, *Environmental Racism*, *supra* note 237, at 303–04.

253. *Id.* at 303 (referencing Washington v. Davis, 426 U.S. 229 (1976)).

proof, and as a result, no environmental challenge under the EPC has yet prevailed.[254]

As applied here, however, an argument may justifiably be made that the discriminatory intent required under an EPC violation is readily apparent. Considering that the State has ample data and information evidencing that its Native American population is disproportionately impacted by an inadequate FCR, the intent to discriminate against this subpopulation may, potentially, be proven. Accordingly, the State will need to prove its decision to disproportionately expose a race and culture of its population is "narrowly tailored to meet a compelling government interest."[255] As this is a high hurdle to achieve, if the State chooses to adopt a weak FCR not protective of its tribal peoples, the State must consider the possibility that an EPC allegation may justifiably be brought against those involved, as its action may plausibly constitute the prohibited intentional discrimination forbidden by the 14th Amendment. Accordingly, though difficult, the EPC of the 14th Amendment may also provide a successful mechanism to force the State to adopt a FCR protective of all citizens, tribal peoples included.

CONCLUSION

People need to understand that the salmon is part of who the Nez Perce people are. It is just like a hand that is part of your body.
—Del White, Nez Perce [256]

Catching and eating fish is vital to Washington's Native peoples. Accordingly, Washington must take the opportunity to protect this essential resource, and the culture and way of life of its Native peoples. To do this, Washington should adopt a protective FCR during the human health criteria rulemaking currently underway. Though industry pressure is seemingly impossible to overcome, the legal mandates and obligations placed upon the State and EPA are strong enough to overcome the high hurdles weighing against such progress. The State must consider that "[e]very day that federal and state agencies permit a 6.5 grams/day-driven standard to remain in force, they leave in place a *de facto* ceiling on safe fish consumption."[257] These agencies are thus conditioning native peoples' "right to take fish . . .

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254. *Id.* at 303–04 (referencing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977)).

255. *Id.*

256. O'Neill, *Fishable Waters*, *supra* note 40, at 212 (quoting DAN LANDEED & ALLEN PINKHAM, SALMON AND HIS PEOPLE: FISH AND FISHING IN NEZ PERCE CULTURE 156 (1999)).

257. *Id.* at 269.

in excess of this amount on their 'willingness' to also take in toxicants at levels that have been deemed hazardous and unacceptable by these agencies."[258] Namely, "once tribal members eat more than twelve fish meals a year, they do so at their own peril."[259]

The importance of a protective outcome is clear and the real consequences of maintaining an inadequate FCR are apparent:

> *It is regulatory allowance to poison a people.* That choice may be deeply hidden in all sorts of technical jargon, terms that are simply meaningless to the average American. In real human terms, however, it means you are consigning tribal people to ingesting poisons such as mercury and DDT and PCBs and 89 other toxins and pollutants that are now present in the fish they eat.[260]

With this rulemaking, Washington has not only the opportunity to become a national leader in protecting its water and fishery resources, and in showing the country and the world that it cares for all of its citizens—tribal populations included—but it also has the legal obligation to do so. EPA must not let Washington bow to industry desires, but must force the State to consider the environmental justice issue it is directly faced with by approving a revised FCR protective of all of the State's citizens or establishing such upon the State's failure to do so. In sum, Washington must take this opportunity it has before it to protect its peoples and adopt a FCR protective of human health and cultural ways of living during the human health criteria rulemaking underway.

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258. *Id.*
259. *Id.*
260. Wood, *EPA* Speech, *supra* note 44, at 189 (emphasis added).

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