



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10**

1200 Sixth Avenue, Suite 900  
Seattle, Washington 98101-3140

30 SEP 2008

Reply to  
Attn Of: OWW-131

Merle Jefferson  
Executive Director  
Lummi Natural Resources Department  
Lummi Nation  
2616 Kwina Road  
Bellingham WA 98226

Re: Approval of the Lummi Nation Water Quality Standards

Dear Mr. Jefferson:

The U.S. Environmental Protection Agency (EPA) has completed its review of the Lummi Nation's Water Quality Standards (WQS). I am pleased to inform you that EPA is approving the Water Quality Standards for Surface Waters of the Lummi Indian Reservation submitted (WQS) to EPA on August 23, 2007 and received by EPA on September 4, 2007.

**BACKGROUND**

On June 1, 1999 the Lummi Nation submitted an application to EPA for "treatment in the same manner as a State" (TAS) under Section 518 of the Clean Water Act (CWA) for the purpose of administering WQS and certifying that discharges authorized by Federal permits and licenses comply with those water quality standards. On March 5, 2007, EPA approved the Tribe's TAS application, authorizing the Tribe to administer WQS under Section 303(c) of the CWA and to provide water quality certifications pursuant to Section 401 of the CWA for all surface waters within the boundaries of the Lummi Indian Reservation. TAS approval was required in order for EPA to officially review and take federal action on the Tribe's WQS, pursuant to Section 303(c) of the Clean Water Act (CWA) and the water quality standards regulation (40 CFR Part 131).

On September 4, 2007 the Lummi Nation submitted WQS to EPA for review. The letter was signed by Merle Jefferson, Director of the Lummi Natural Resources Department. The WQS were adopted by the Lummi Indian Business Council by Resolution 2007-105112-06 on August 20, 2007. The September 4, 2007, submittal package includes:

- the Lummi Indian Business Council Resolution adopting the WQS;
- certification from the Reservation Attorney that the WQS have been duly adopted in accordance with Tribal law;
- the adopted WQS;
- an overview of the regulation adoption process;
- documentation showing that the Tribe conducted a public review and that a public hearing was held;
- response to comments received from the public; and
- copies of the thirteen comment letters received during the comment period.

Prior to submittal of the standards, the Lummi Nation conducted a public review of draft WQS, consistent with the public participation required by EPA [40 CFR 131.20(b)]. On April 2, 2007 the Lummi Nation initiated a public comment period which closed on June 1, 2007. On May 23, 2007, the Lummi Nation held a public hearing. The public hearing notification followed posting and publication of the required notices. The hearing was attended by several members of the local community and tribal members. Concerns were voiced by the participants at the hearing. Written comments were sent by EPA and the Washington Department of Ecology.

#### **EPA'S DETERMINATION**

CWA Section 303(c)(2) requires authorized Indian Tribes to submit new or revised water quality standards to EPA for review. Under Section 303(c) of the CWA and as explained in 40 CFR 131.5, the EPA is to review the Tribe's WQS to ensure they have adopted water uses which are consistent with the CWA, adopted criteria to protect the designated water uses and have followed their own procedures for adopting such standards. This review provides the basis for EPA's action to approve or disapprove the Lummi Nation's WQS.

Our review has determined that the Water Quality Standards for Surface Waters of the Lummi Indian Reservation meet the requirements of the CWA and EPA's implementing regulations at 40 CFR Part 131. There are three categories of action: (1) provisions approved, not subject to Endangered Species Act (ESA) consultation; (2) provisions approved, subject to completion of ESA consultation; and (3) provisions which do not constitute water quality standards under Section 303(c) of CWA. A summary list of the provisions that are approved, approved subject to ESA consultation, and those that are outside the scope of our 303(c) authorities is enclosed. Also, a detailed discussion of the basis for EPA's action is enclosed.

#### **ENDANGERED SPECIES ACT CONSULTATION**

Section 7(a)(2) of the ESA requires that federal agencies, in consultation with the U.S. Fish and Wildlife Service (USFWS) and the National Oceanic and Atmospheric Administration Fisheries (NOAA Fisheries) (both agencies are referred to as the Services), ensure that their actions are not likely to jeopardize the existence of federally listed species or result in the adverse modification of designated critical habitat of such species. On September 22, 2008, EPA discussed with the U.S. Fish and Wildlife Service (FWS) the threatened and endangered species found on or in the vicinity of the Lummi

Indian Reservations. On September 19, 2008 EPA confirmed, by phone, the listed species found on or in the vicinity of the Lummi Indian Reservation under the jurisdiction of the U.S. Fish and Wildlife. On September 26, 2008 EPA confirmed, by phone, the listed species found on or in the vicinity of the Lummi Indian Reservation under the jurisdiction of NOAA Fisheries.

EPA is currently engaged with the Services on three Section 7 consultations which relate to this action today: 1) EPA Region 10's consultation on Oregon's revised aquatic life numeric toxic criteria, 2) EPA Region 10's consultation on Idaho's aquatic life numeric toxic criteria, and 3) the EPA National consultation on all aquatic life criteria. Therefore, we are deferring to these three ESA consultations for all of the numeric aquatic life criteria for toxic substances. EPA will consult with the FWS and NOAA Fisheries regionally on the standards provisions, other than the toxics criteria, identified in the enclosed list of provisions approved subject to ESA consultation.

As these consultations have not been completed, EPA's approval of a portion of the Tribe's WQS is subject to the results of consultation. By approving the WQS subject to the results of consultation, EPA retains the full range of options available under Section 303(c) for ensuring that WQS are environmentally protective. It may be necessary to reassess our approval decision once the ESA consultation is completed.

#### **ESSENTIAL FISH HABITAT CONSULTATION**

Similarly, the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires federal agencies to consult with NOAA Fisheries on any actions authorized, funded, or undertaken by the agency that may adversely affect essential fish habitat (EFH) identified by Regional Fishery Management Councils. EPA prepared an evaluation of the effects of the Lummi Nation WQS on EFH and determined that approval of the Lummi Nation WQS would not likely have an adverse effect on EFH. Therefore, EPA has determined that no further EFH consultation is required.

#### **WATER QUALITY STANDARDS IN EFFECT FOR CLEAN WATER ACT PURPOSES**

The "Alaska Rule" (65 FR 24641), which came into effect in May 2000 specifies that new and revised WQS adopted by States and authorized Tribes become "applicable standards for CWA purposes" only after they are approved by EPA. With today's action the Water Quality Standards for Surface Waters of the Lummi Indian Reservation approved by EPA, are now in effect for CWA purposes.

#### **CONCLUSION**

EPA Region 10 congratulates the Lummi Nation for your success in developing and adopting this set of WQS. We appreciate the Lummi Nation's considerable investment in reaching this milestone, and we look forward to our continued work with the Lummi Nation as you implement these WQS. We believe the adopted standards will be useful in protecting surface water quality on the Reservation.

We will be in contact with the Lummi Nation as we proceed through the ESA consultations, and will consult with you regarding measures that may be recommended

by the Services to address any concerns for protection of listed threatened or endangered species.

If you have questions concerning this letter, please call me at (206) 553-7151 or Jannine Jennings, Manager, Water Quality Standards Unit at (206) 553-2724, or Sally Brough, Tribal Water Quality Standards Coordinator at (206) 553-1295.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Gearheard", written in a cursive style.

Michael F. Gearheard, Director  
Office of Water and Watersheds

Enclosures (2)

cc: Leroy Deardorff, Environmental Program Director  
Jeremy Freimund, Water Resources Manager  
Judith K. Bush, Reservation Attorney  
Melissa Gildersleeve, Washington Department of Ecology  
Tom Laurie, Washington Department of Ecology