



*Nez Perce*

**TRIBAL EXECUTIVE COMMITTEE**

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November 13, 2014

Paula Wilson  
Idaho Department of Environmental Quality State Office  
1410 N. Hilton  
Boise, Idaho 83706

**By Electronic mail ([paula.wilson@deq.idaho.gov](mailto:paula.wilson@deq.idaho.gov))**

Re: Docket No. 58-0102-1201 – Fish Consumption Rate and Human Health Water Quality  
Criteria - Discussion Issue: Suppression

Dear Ms. Wilson:

The Nez Perce Tribe (Tribe) appreciates the Idaho Department of Environmental Quality's (IDEQ) invitation to comment on the issue of fish suppression. For the reasons below, as well as the policy of the Environmental Protection Agency (EPA) concerning this topic, the Tribe strongly urges the Idaho Department of Water Quality to reconsider its preliminary determination not to evaluate the effects of fish suppression on high fish consuming populations and instead include such information as it develops a state-specific fish consumption rate (FCR) to derive water quality standards.

In its 2002 Fish Consumption and Environmental Justice document, EPA explains that fish consumption "suppression" occurs when a fish consumption rate (FCR) for a given population, group, or tribe reflects a current level of consumption that is artificially diminished from an appropriate baseline level of consumption for that population, group, or tribe. The more robust baseline level of consumption is suppressed, inasmuch as it does not get captured by the FCR." EPA goes on to describe that two circumstances can result in a suppression effect: (1) "it may arise when an aquatic environment and the fish it supports have become contaminated to the point that humans refrain from consuming fish caught from particular waters;" or (2) when "fish upon which humans rely are no longer available in historical quantities (and kinds), such that humans are unable to catch and consume as much fish as they had or would."

As IDEQ is aware, the Tribe, in cooperation with EPA, is currently doing a fish consumption survey to ascertain the type and amount of fish Nez Perce Tribal members consume. As part of this effort, the Tribe is also doing a heritage rate study that will develop a range of fish consumption rates for the Tribe based on an evaluation of historical and recent literature. The

Tribe believes that the Nez Perce Tribal members are currently catching and consuming fish (resident and anadromous kind) below our historic baseline. This is likely the case as well for other non-Indian fishing populations or groups that catch and eat resident and anadromous fish in state waters.

Given EPA's guidance on evaluating suppression, as well as the Tribe's efforts through the fish consumption survey to ascertain current and heritage fish consumption rates, the Tribe expects that EPA will work with IDEQ to ensure that its findings particularly on suppression are adequately considered and incorporated into the State's Water Quality rule-making process.

At a recent IDEQ rulemaking meeting the Tribe heard Barry Burnell announce to the participants that Idaho will not be considering suppression in developing revised fish consumption rates. This announcement is disappointing, and for the reasons below, appears to ignore EPA guidance and the Tribe's rights and interests in securing a healthy, harvestable fishery in waters within Idaho for its tribal membership.

The Tribe expects the EPA to follow EPA policy as it relates to determining what suppression effects are observed for Nez Perce fishing and consumption, and define or quantify an appropriate historical baseline for fish consumption for the Tribe. This will help address the issue that EPA set forth in its 2002 report with respect to the serious problem environmental agencies may create through the use of fish consumption rates that are artificially suppressed; that "[w]hen environmental agencies employ a FCR that does not capture fully consumption that is suppressed – under either scenario in which suppression effects occur – they set in motion a sort of downward spiral whereby the resulting environmental standards permit further and further contamination or depletion of the fish and so diminished health and safety of people consuming fish, shellfish, aquatic plants, and wildlife for subsistence, traditional, cultural, or religious purposes." This is a very real and disturbing issue that has potentially long-term implications that the Tribe finds unacceptable. Such a "downward spiral" would have significant impacts to the Nez Perce treaty-reserved fishing right and ability to harvest and eat fish for "subsistence, traditional, cultural and religious" purposes.

Nez Perce leaders could not have envisioned such an outcome when they negotiated the Treaty of 1855 to reserve unto themselves the continued right to harvest fish and their way of life; that the fish runs that they rely upon would be depleted to the extent that they have over time, or that a suppression in fish consumption would result from fish being contaminated with toxins making it unsafe or imparts serious health risks to our members. Our level of fish consumption has declined from historic levels to a recent period in time when harvest and consumption is at very low, suppressed levels.

Assume that 0.00 grams per day is the end point of a "downward spiral" with respect to a FCR. If this is so, it appears to the Tribe that we are, and have been, operating at the end phase or terminus of this downward spiral. The State of Idaho has proposed a fish consumption rate of 17.5 grams per day (this would replace or update the current 6.5 gpd standard). This is functionally no different from a 0.00 gpd in terms of fish consumption from the Tribe's view. Moreover, EPA has disapproved the State of Idaho's proposed standard of 17.5 grams per day in part because of the State's failure to consider available data and information on Tribal fish

consumption, such as the 1994 CRITFC study on Tribal fish consumption. The Tribe believes that the FCR must significantly increase if the State is to adequately protect those most dependent on a fish diet and lifestyle—and those most vulnerable to eating fish that are contaminated with pollutants. The starting point for the Nez Perce Tribe is the 176 grams per day from the CRITFC study.

Next, let us elaborate further on our position on fish suppression relative to the Nez Perce Tribe. The Tribe provided some general information relative to fish suppression to IDEQ at its October 2, 2014 rulemaking meeting. This information was provided to address agenda item concerning Policy Discussion #6 – Suppression of Fish Consumption. A Tribal representative delivered a PowerPoint presentation at this meeting on behalf of the Tribe. The presentation conveyed the following three points: (1) Tribal contemporary fish consumption is fraction of what it was historically, (2) that this is due in part to decline in fish abundance and productivity, and (3) that Tribal harvest activities have been affected by changes in fish abundance, changes in geographic area where fish return to, and wide range of challenges or conflicts that affect our ability to catch fish. To illustrate these points, the Tribe provided information concerning the changes in the numbers and status of key anadromous fish species using available historic and more recent values. Historic values reported were those developed by the Northwest Power and Conservation Council's (NPCC) in their 1986 Compilation of Information on Salmon and Steelhead Losses in Columbia River Basin. NPCC analysis concluded that aboriginal use of anadromous fish by the Nez Perce ranged from 300 – 646 pounds per capita consumption; when translated to numbers of fish harvested it is probably around 120,000 to nearly 260,000 fish annually (it is important to note that other examples of pounds per capita consumption for the Tribe are available which corroborate those found in the NPCC document).

The information showed that historic adult runs were estimated to be around 17 million fish and that number declined significantly from mid-1800s to the present time. Information suggests that of this 17 million, 500,000 to 2 million fish annually returned to the Snake River and its tributaries. It also showed a trend demonstrating that improved fish runs have resulted in increased harvest opportunities and more fish harvested by the Tribe in the Snake River Basin. This is the result of improved fish survival and the restoration efforts that the Tribe and other entities have done over the past three decades or longer. From the Tribe's perspective, the historic number of fish caught and the resulting per capita consumption could be used to develop baseline consumption level by which to evaluate a current (or even future) FCR for the Tribe. It is important from a Tribal perspective to understand that FCRs are not static and they have changed dramatically since the mid-1800s. For example, some runs of fish were extirpated, while others were depleted to such low levels that many Snake River fish were listed under the Endangered Species Act (ESA) in the 1990s. A Nez Perce Tribe FCR for the 1990s would likely reflect lower fish consumption rates as compared to the FCR for the past ten year period (2005-2014). In sum, available information on Nez Perce harvest provides evidence that Tribe's current FCR would be significantly lower than the historic range of 300 – 646 pounds per capita consumption.

But as the Tribe explains in its letter to IDEQ on Policy Issue #5, the Tribe is working to rebuild fish runs to its Treaty Territory and usual and accustomed fishing places with the intent of rebuilding harvest over time. The Tribe's approach and philosophy to harvest is illustrated by

the graph from the Fisheries Department's management plan. As returns increase, the Tribe expects to increase the relative magnitude of Tribal harvest and fishing effort and fish consumption. When restoration efforts result in sustainable returns, the Tribe anticipates that Tribal harvest will increase and fish consumption rates will rise when fish populations attain "sustainable abundance" and "ecological abundance" levels of adult escapement. Ultimately, the Tribe's goal is to rebuild Snake River fish to healthy, self-sustaining levels that will in turn support sustainable treaty fisheries. To relate this to WQS and fish consumption rate, the Tribe would like to have runs that support per capita fish consumption that is consistent with our historic baseline of 300-646 pounds per capita consumption (or higher depending upon what results from Nez Perce heritage rate study the Tribe and EPA are collaborating on).

The Tribe is currently engaged in its own fish consumption survey and will be working with the EPA on effects of fish suppression on the Tribe. The Tribe would find it unacceptable if the IDEQ uses artificially suppressed FCR for the Tribe. Such an outcome would perpetuate the "downward spiral" that EPA warns against. It would fail to protect Nez Perce Tribal members who arguably have been impacted the most by depleted fish runs. Moreover, under a low FCR scenario, these Tribal members will be the ones who will have to face the prospect of dealing with serious health risks when they catch and eat fish under a "suppressed scheme" wherein water quality standards allow for increased pollution into state waters and elevated contaminants in fish.

In summary, the Nez Perce Tribe concludes that incorporating information on suppression (from an appropriate baseline level of consumption) for the Tribe in the State of Idaho' fish consumption rate is necessary, given the Tribe's culture and sovereignty, given the Tribe's treaty-reserved rights which the EPA has an obligation to honor and protect, given EPA's existing policy, and given the Tribe's desire for a full evaluation of its historic, current, and vision for improved fish harvest and consumption in the future. Thank you for considering the Tribe's comments on this very important topic.

Sincerely,

A handwritten signature in black ink, appearing to read "Silas C. Whitman", with a large, stylized flourish underneath.

Silas C. Whitman  
Chairman