



UPPER SNAKE RIVER TRIBES FOUNDATION, INC.

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(208) 331-7880

January 20, 2015

Paula Wilson
IDEQ State Office
Attorney General's Office
1410 N. Hilton Street
Boise, ID 83706

Re: Docket No. 58-0102-1201 – Upper Snake River Tribes Foundation Comments Regarding Idaho Department of Environmental Quality Discussion #7: Risk Assessment/Level of Protection

Dear Ms. Wilson:

The Upper Snake River Tribes (USRT) Foundation is composed of four Indian tribes of the Upper Snake River region in Idaho, Nevada, and Oregon: the Burns Paiute Tribe, Fort McDermitt Paiute-Shoshone Tribe, Shoshone-Bannock Tribes of the Fort Hall Reservation, and Shoshone-Paiute Tribes of the Duck Valley Reservation. The four tribes have common vested interests to protect rights reserved through the United States Constitution, federal treaties, federal unratified treaties (e.g. Fort Boise Treaty of 1864, Bruneau Treaty of 1866, and Malheur Treaty of 1864), executive orders, inherent rights, and aboriginal title to the land, which has never been extinguished by USRT member tribes. USRT works to ensure the protection, enhancement, and preservation of the tribes' rights, resources, cultural properties, and practices and that they remain secured. These include but are not limited to hunting, fishing, gathering, and subsistence uses.

As the Idaho Department of Environmental Quality (IDEQ) discusses and ultimately determines the risk assessment level that ambient water quality criteria (AWQC) will be based upon, USRT staff and its member tribes would ask the agency to remember its mission statement: *To protect human health and preserve the quality of Idaho's air, land, and water for use and enjoyment today and in the future.* Human health and clean water should not be marginalized and deemed less important than the economic well-being of Idaho's business and industry sectors. Ultimately, without healthy citizens and clean water, business and industry in Idaho will suffer immeasurably. It appears, however, after reviewing Discussion Paper #7: Risk Assessment/Level of Protection, that IDEQ is considering raising the acceptable cancer risk rate from 10^{-6} to 10^{-5} . It seems reasonable to assume that this is an economic calculus, for it surely is

not meant to benefit human health or water quality. While all Idaho residents and downstream water consumers in adjoining states will be negatively affected if the acceptable risk rate is raised an order of magnitude, no one group of people will be more adversely injured than Idaho's Indian tribes. It will be a direct affront to the tribes' rights, resources, and lifeways.

In the discussion paper and during IDEQ's December 2, 2014, rulemaking meeting, agency staff referred to an acceptable risk rate of 10^{-6} as "essentially zero" or "*de minimus*."¹ This is factually incorrect. The World Health Organization, when discussing acceptable risk, has noted that "zero risk is completely unachievable" and that 10^{-6} is "something of a gold standard."² By claiming that 10^{-6} is "essentially zero" or "*de minimus*," IDEQ is inappropriately characterizing 10^{-6} as a risk rate level that is unachievable. Currently, Idaho's AWQC are based on 10^{-6} .³ To date, has Idaho found AWQC based on the risk rate of 10^{-6} as being unachievable? If not, which seems to be the case, why now is Idaho proposing to raise the risk rate to 10^{-5} to the detriment of tribal health and water quality? Is increasing the acceptable risk rate by an order of a magnitude, a ten-fold increase in the risk of cancer by the general population and significantly more than that for high fish-consuming tribal populations, in keeping with IDEQ's mission statement?

If IDEQ determines that it is acceptable to increase the risk of cancer in Idaho ten-fold (even more for tribal members and other high fish-consuming populations) it will have to revise all of its current AWQC, which is based on 10^{-6} , and submit them to the Environmental Protection Agency (EPA) for review and approval. This seems to be both an inappropriate use of financial resources and a fool's errand. EPA has already disapproved Idaho's proposed water quality standards once in 2012 for failing to consider relevant regional tribal fish consumption studies.⁴ In disapproving Idaho's proposed standards the EPA exhibited an explicit commitment to the tribes and their well-being. While the EPA has stated that a 10^{-5} risk level is acceptable for the general population it must ensure that highly exposed subgroups (e.g. tribes) does not exceed the 10^{-4} level. EPA also notes that AWQC based on the less protective 10^{-5} will be scrutinized for their impact on highly exposed subgroups.⁵ In the National Toxics Rule, the EPA states:

¹ Idaho Department of Environmental Quality. 2014. Idaho Fish Consumption Rate and Human Health Water Quality Criteria—Discussion Paper #7. <http://www.deq.idaho.gov/media/1118404/58-0102-1201-discussion-paper7.pdf>

² World Health Organization. 2001. Water Quality: Guidelines, Standards and Health. Edited by Loma Fewtrell and Jamie Bartram. IWA Publishing, London, UK. http://www.who.int/water_sanitation_health/dwq/iwachap10.pdf

³ U.S. Environmental Protection Agency, Region X, Technical Support Document: EPA's Disapproval of the State of Idaho's Revised Human Health Water Quality Criteria for Toxics Submitted on July 7, 2006 10 (May 10, 2012)[hereinafter EPA, Idaho Disapproval TSD].

⁴ Ibid.

⁵ EPA. 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health 1-8. http://water.epa.gov/scitech/swguidance/standards/upload/2005_05_06_criteria_humanhealth_method_complete.pdf

In submitting criteria for the protection of human health, States were not limited to a 1 in 1 million risk level (10^{-6})...If a State selects a criterion that represents an upper bound risk level less protective than 1 in 100,000 (i.e., 10^{-5}), however, the State needed to have substantial support in the record for this level...(Along with other elements) the record must include an analysis showing that the risk level selected, when combined with other risk assessment variables, is a balanced and reasonable estimate of actual risk posed, based on the best and most representative information available. The importance of the estimated actual risk increases as the degree of conservatism in the selected risk level diminishes. EPA carefully evaluated all assumptions used by a State if the State chose to alter any one of the standard EPA assumption values.⁶

IDEQ has failed once in proposing standards based on inadequate data that would unduly impact the tribes of Idaho. With the commitment that EPA has shown previously to the tribes in this process, IDEQ is charged with proving that their next proposed set of AWQC and fish consumption rate adequately protect Idaho's tribes and other high fish-consuming populations. Increasing the cancer risk rate does not meet that burden of proof.

The "Voluntary versus Involuntary Risk" section of IDEQ's Discussion Paper #7 is culturally insensitive and exhibits a startlingly deficient understanding of the relationship between tribal members and fish. Idaho's tribes and tribal consortia representing one or more Idaho tribes have submitted numerous comments during this process, provided their perspective during rulemaking meetings, as well as tribal members of the Nez Perce Tribe and Shoshone-Bannock Tribes giving presentations during the October 2, 2014, rulemaking meeting. In those comments and presentations tribal members and staff have repeatedly and resoundingly described the importance of fish to their people, not only for sustenance, but for their cultural identity and well-being. The process of harvesting, preparing, and consuming fish by tribal members is a spiritual experience not understood by non-tribal members. It should not and must not be cast into a discussion of voluntary and involuntary risk. While IDEQ does touch on this briefly in the discussion paper by stating, "Native American cultural identity with fish harvest and consumption also casts the voluntary nature of the risk in a somewhat different light."⁷ The very next sentence dismisses this pronouncement just as quickly by noting that "Still, fish consumption is a voluntary behavior."⁸ For a state agency to assert that the exercising of a spiritual rite is a voluntary risk is indefensible and has no place in a publicly-funded policy paper.

More generally, the premise that fish consumption, for any member of society, is a voluntary risk that may lead to cancerous or non-cancerous diseases is troubling and calls into question the adequacy of water quality standards and environmental standards as a whole. For far too long regulating agencies have allowed for the widespread polluting of the environment under the guise of economic growth and development, all to the detriment of human health and ecosystem-

⁶ EPA. 1992. National Toxics Rule, 57 Fed Reg 60848-01

⁷ See footnote 1

⁸ Ibid.

based function. The intent of IDEQ to propose an increased cancer risk rate of 10^{-5} will only exacerbate the problem and serve the interests of those who benefit economically from human health and environmental decline.

Idaho's tribes, through treaties and other legal protections, have a right to harvest fish. Those rights and protections are assailed when the waters that support anadromous and resident fish are allowed to be degraded. If Idaho proceeds down the path of implementing a less protective risk rate of 10^{-5} , tribal rights to harvest and consume fish will be impaired. Consistently the courts have found that if waters in which tribal members depend upon to harvest fish are allowed to be degraded their legally-protected fishing rights can be impacted. Thus, the very ability to increase the acceptable risk rate in Idaho may be legally prohibited. Further, as recently as November 2014, EPA Region 10 Administrator Dennis McLerran told the tribes of the Columbia Basin that his agency was in the process of developing guidelines that would work to ensure that tribal rights and resources would not be negatively impacted by inadequate environmental regulations and oversight.⁹

IDEQ notes in the discussion paper that for noncarcinogens a human health equation, termed relative source contribution (RSC), has been developed to account for non-surface water and/or fish contributions to chemical exposure. Given uncertainties and insufficient data on exposure contributions, regulators generally use a default value of 20 percent for all chemicals. EPA has developed RSC values for some, but not all noncarcinogenic chemicals. To fill the void left by EPA, the Florida Department of Environmental Protection (FDEP) developed RSC values for those noncarcinogenic chemicals not assigned values by EPA. IDEQ states that FDEP's work suggests that a default RSC of 20 percent may result in criteria more protective than necessary. USRT and its member tribes take exception with, and reject, the notion that RSC values may be too protective. Further, without significant tribal input and evaluation of data on the bioaccumulation of noncarcinogenic chemicals in Idaho fish tissue, USRT and its member tribes do not support IDEQ developing revised RSC values that would result in less protective standards than are derived from the 20 percent default.

USRT and its member tribes strongly support IDEQ retaining a risk assessment rate of 10^{-6} , as has been used in Idaho for decades. A less protective rate of 10^{-5} will be injurious to the health of tribal members and an assault on tribal rights to harvest and consume fish as bestowed by treaty and other legal protections. Increasing the allowable cancer risk rate by tenfold for the general population and even more for tribal members is not in keeping with the mission statement of the IDEQ and can in no way be construed as a move to protect and improve the health and well-being of all who call Idaho home. USRT and its member tribes have had an opportunity to review the comments of Catherine A. O'Neill, Professor of Law, Seattle

⁹ Meeting of the 15 Columbia Basin tribes and tribal staff with the EPA at the Columbia River Inter-tribal Fish Commission. Portland, Oregon. November 14, 2014.

University. Ms. O'Neill's comments and conclusions are fully supported by USRT and its member tribes.

USRT would like to thank the IDEQ for the opportunity to comment on the Idaho Fish Consumption Rate and Human Health Water Quality Criteria –Discussion Paper #7: Risk Assessment/Level of Protection. If you have questions or remarks following review of these comments, please contact Scott Hauser, USRT Environmental Program Director, at (208) 331-7880 (office) or (208) 995-4872 (cell) and/or by email at scott.hauser@usrtf.org.

Sincerely,



Scott Hauser
Environmental Program Director