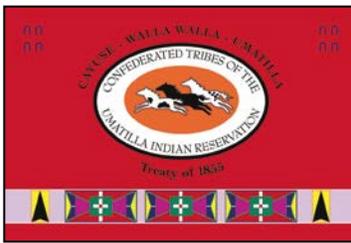


Confederated Tribes *of the*
Umatilla Indian Reservation

Department of Natural Resources
Administration



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January 20, 2015

Paula Wilson
Idaho Department of Environmental Quality State Office
1410 N. Hilton
Boise, ID 83706
paula.wilson@deq.idaho.gov

Dear Ms. Wilson:

Re: Idaho Water Quality Standards and Protecting Human Health (Docket No. 58-0102-1201)

Dear Ms. Wilson:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR) appreciates the opportunity to offer comments to the rulemaking process to revise human health water quality criteria for the State of Idaho. A key component of establishing (and revising) standards for allowable toxic discharges is understanding what levels of risk will be involved, including a forthright determination of what levels are “acceptable,” who will bear the risk, and what factors will appropriately come into play when making that determination. The minimum starting point for the overall process should be a firm grounding in scientific studies, data and evidence. The process should not be tainted by political agendas and economically-driven and predetermined outcomes.

These comments specifically address “Idaho Fish Consumption Rate and Human Health Water Quality Criteria—Discussion Paper #7, Risk Management and Protection of Human Health,” by the Idaho Department of Environmental Quality (IDEQ) (December 2014) (Risk Paper), and issues raised and discussed therein. The CTUIR DNR’s comments are relatively brief and highlight certain important points, many of which are the subject of much further refinement and elaboration in the comments submitted by Catherine A. O’Neill, Professor of Law at Seattle University. The CTUIR DNR supports those comments and incorporates them herein by reference.

The Risk Paper does contain some helpful explanatory material, but (as the O’Neill comments make clear) it also displays some serious shortcomings and deficiencies. The CTUIR DNR would encourage you to reconsider your approach. Choosing a weaker, less stringent cancer risk level, as Idaho appears to support, would be to accept—and authorize—an increased risk of cancer to Idaho citizens in calculating standards. This approach would not further public health. It would not even maintain the public health status quo. The CTUIR DNR would like to know whether any possible public health benefits would be gained by weakening the cancer risk level, and whether those benefits could be identified. *The CTUIR DNR urges you to reject any weakening of the cancer risk level that you will use to revise water quality standards for toxics.*

The one-in-one-million (10^{-6}) cancer risk level should be retained. Any weaker level would be inappropriate. This criteria has been in effect for more than 20 years in Idaho, and is widely used and commonly accepted nation-wide and around the world. No adequate scientific or technical arguments have been identified or advanced to question the merits of 10^{-6} or to justify discarding it.¹

Most CTUIR members live “downstream” from Idaho. They have the “right of taking fish” at all usual and accustomed places. This right is guaranteed by the Treaty of 1855 with the United States.² The Treaty is law—“the supreme Law of the Land,” in the words of the U. S. Constitution.³ Inherent in the right of taking fish is that there be fish to take, and—most significantly here—that those fish are *safe to eat*. The tribal “founding fathers” did *not* sign treaties securing the right to harvest and consume *contaminated* fish.

Weakening the cancer risk level from the current 10^{-6} would subject tribal members who consume more fish than the default national “average” to higher, unfair, disproportionate risks. It is offensive to suggest—as the Risk Paper does—that tribal members could simply avoid higher risk of illness and death by simply eating less fish—that eating more fish is “voluntary,” and the higher risk is assumed voluntarily. The ability to freely and fully exercise rights protected under the Constitution should not come at the cost of excessive danger to health and well-being. Cancer should not be the penalty for adhering to time-honored rights and traditions.

Tribes with treaty rights to harvest uncontaminated fish, and tribes that are owed a trust responsibility of protection of tribal trust assets, are not mere “sensitive sub-populations” as that phrase is used by the EPA in its guidance for establishing water quality criteria.⁴ The unique and well-established character of tribal treaty rights and the judicially-ratified doctrine of tribal trust responsibility render the tribes’ status as “above and beyond” that of those groups more broadly categorized by EPA. This may be the “somewhat different light” that the Risk Paper, at page 7, casually refers to and blithely dismisses by concluding that “fish consumption is a voluntary behavior.” Tribes are sovereign nations with distinctive rights.

¹ The Risk Paper seeks to raise doubts and questions about the legitimacy of the 10^{-6} cancer risk level, citing *inter alia* to a presentation from 1991: “It is surprisingly difficult to pin down the origin of 1×10^{-6} as a criterion of acceptable risk (Kelly and Cardon 1991).” However, Professor O’Neill’s comments in fact shed some light on this subject, and are helpful to “pin down” the origin. It is unclear to what extent the Kelly/Cardon paper, from “the 84th annual meeting of the Air and Waste Association” in Canada more than 20 years ago, was, or has been, peer-reviewed, or to what degree it has been accepted within the scientific community. Furthermore, the CTUIR DNR has some concerns that the paper is most easily found (<http://heartland.org/policy-documents/myth-10-6-definition-acceptable-risk>) via its promotion by a politically-driven organization not known for its unbiased technical or scientific expertise. *See generally*, http://www.sourcewatch.org/index.php?title=Heartland_Institute.

² Treaty of 1855, 12 Stat. 945, June 9, 1855 (Ratified March 8, 1959).

³ U.S. Constitution, Article VI.

⁴ Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health (2000); http://water.epa.gov/scitech/swguidance/standards/upload/2005_05_06_criteria_humanhealth_method_complete.pdf.

CTUIR DNR Letter to IDEQ

Subject: Water Quality Standards/Cancer Risk Level

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Thank you for your consideration of our comments. If you have any questions or wish to discuss any of these matters further, please feel free to contact Carl Merkle, DNR Policy Analyst, at (541) 429-7235.

Sincerely,



Eric Quaempts

Director, Department of Natural Resources

Cc: Dennis McLerran, Regional Administrator, EPA Region 10

EQ: cfm