



COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION

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November 4, 2015

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RE: Docket No. 58-0102-1201 – Idaho’s Proposed Water Quality Standards

Dear Ms. Wilson:

The Columbia River Inter-Tribal Fish Commission (CRITFC) and its member tribes – the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakama Nation, and the Nez Perce Tribe appreciate the opportunity to provide comments on the Idaho Department of Environmental Quality’s (DEQ) proposed water quality standards. Throughout the negotiated rulemaking process, CRITFC and Idaho’s tribes have clearly and consistently communicated the need to protect tribal members that have treaty rights to fishable waters. Written comments delivered to DEQ from tribes were unambiguous - if Idaho’s water quality standards are not specifically calculated to protect the health of the majority of tribal members, the standards have the potential to limit the amount of fish that may safely be eaten by tribes. Despite knowing this, DEQ has proposed water quality standards for Idaho’s waters that were calculated using substantially reduced levels of protection for tribal people as compared to the general population. Idaho’s choice to limit the protection levels for tribal populations in Idaho threatens treaty guaranteed fishable waters and has resulted in weaker water quality standards than proposed by all other states and tribal governments in the region.

Idaho’s proposed water quality standards were derived following a state policy decision that excludes market fish and anadromous fish except for steelhead from its analysis of general and tribal fish consumption. Excluding anadromous fish from the state’s fish consumption rate has had the effect of significantly decreasing the protectiveness of the state’s water quality standards. This exclusion ignores the fact that treaties with the federal government have guaranteed the right of tribal members “to take fish” and does not limit in any way the particular mix or species of fish. Tribal people are free to determine what species they wish to harvest and consume and the state must not undermine this treaty-protected right.

While it is encouraging that Idaho's proposed standards are consistent with EPA's 2015 Updated Water Quality Criteria for the Protection of Human Health¹ and incorporate the latest scientific information on toxicity values and suggested relative source contributions, but the state has fallen far short of setting regulatory controls that will protect the people that consume Idaho's fish and water. Idaho should amend its proposed water quality standards and along with other states and tribes in the region accept an equal share of the responsibility for clean water and healthy fisheries in the Columbia Basin.

Detailed comments that address specific concerns regarding the proposed rule follow:

Unequal Protections for Tribal Populations

Idaho's calculation of its water quality criteria is based on a policy that sets the cancer and non-cancer protection levels for the general population at the 95th percentile, but only at the mean for tribal populations. Public health standards are not typically set on an average or median value when considering risk to a population. Regulatory standards are based on the goal of protecting most of the population, not just the average person (mean) or only half of the population (median).

The policy position that Idaho has taken to set a less protective, acceptable cancer risk level and hazard quotient for tribal people is troubling and counter to federal laws and mandates that were developed with the sole purpose of preventing exactly this type of disparate impact. Examples include: Title VI of the 1964 Civil Rights Act², 1994's Executive Order 12898³, and EPA's Plan EJ 2014 strategy⁴.

Title VI of the 1964 Civil Rights Act prohibits discrimination based on race, color, or national origin under any program or activity of a recipient of federal financial assistance. Under Section 601 of Title VI:

*No 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.*⁵

The breadth of Title VI includes those federal programs delegated to states, such as the Clean Water Act (CWA). When CWA programs are developed and fully implemented, they are fundamental to protecting overly exposed communities.

Executive Order 12898 directs federal agencies to identify and address the disproportionately high and adverse human health or environmental effects of their actions on minority and low-

¹ USEPA, 2015. Final 2015 Updated National Recommended Human Health Criteria. see <http://water.epa.gov/scitech/swguidance/standards/criteria/current/hhfinal.cfm>

² 42 U.S.C. §§ 2000d to 2000d-7.

³ Executive Order "Federal Actions To address Environmental Justice in Minority Populations and Low-Income Populations" available at <http://www.archives.gov/federal-register/executive-orders/pdf/12898.pdf>

⁴ EPA (2014) Plan EJ 2014, available at <http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-overview.pdf>

⁵ 42 U.S.C. § 2000d.

income populations, to the greatest extent practicable and permitted by law. The authorities delegated by EPA to states, including the development (and approval) of human health criteria, fall squarely within the scope of this order, and therefore should receive additional attention as to how they can better be aligned with the Order's overarching goals.

EPA's EJ 2014 plan for implementing the Agency's environmental justice mandates makes clear that EPA rules and presumably the review and approval of those rules must address issues of environmental justice.

Plan EJ 2014 calls upon EPA to develop and implement guidance to incorporate environmental justice into the fabric of its rulemaking process. EPA's authority to create and enforce regulations that put our nation's environmental laws into effect is one of the Agency's most important and powerful tools for protecting our environment and the health of our people.⁶

Under environmental justice principles, it is the duty of state and federal agencies to utilize their Federally delegated authorities to minimize the inherent risk that tribal communities face. The primary charge of environmental justice mandates is to avoid disparate harm to specific populations, who are often overly exposed to pollution due in part to their geographic locations or cultural practices. In the case of tribes, their cultural, spiritual, economic and sustenance practices create opportunity for greater exposure to toxic chemicals that are discharged to water and subsequently reside in fish tissues that are later consumed. It is important to note, that this is not a mere choice or individual lifestyle, but in fact a long standing cultural expression backed by constitutional protections.

The policy choice of using the average consumption rate for tribal populations is not acceptable. Tribal populations, as the most sensitive members of the target population should be protected to no less than the level that is proposed for the general population.

Treaty Rights and Designated Uses

It has been more than a century since the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakama Nation, and the Nez Perce Tribe signed the treaties with the United States that created their reservations and reserved their rights to fish at all usual and accustomed fishing places. A century's worth of federal court decisions has established beyond dispute that these treaty fishing rights are permanent in nature, and that they secure for the tribes the right to take all species of fish found throughout their reserved fishing areas for subsistence, ceremonial and commercial purposes. Tribal treaties are the supreme law of the land, and federal agencies including EPA must interpret the state's designated uses to include subsistence fishing.

The CWA sets a single threshold for setting water quality standards – protection of the designated uses. EPA cannot authorize water quality standards that fail to protect fishable waters.

⁶ EPA (2014) Plan EJ 2014, available at <http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-overview.pdf>

Tribal fish consumers as evidenced by EPA's recent disapproval of Maine's human health criteria⁷ should be considered as part of the target population in state human health criteria and their right to exercise their treaty-reserved rights must be adequately protected.

*EPA concludes that to protect the function of these waters to preserve the Tribes' unique culture and to provide for the safe exercise of their sustenance practices, EPA must interpret the fishing use to include sustenance fishing... if the State does submit a new or revised WQS that would **interfere** with the Tribes' reserved fishing right, EPA has authority under the CWA to ensure that the Tribes' fishing right is protected.*⁸

If a state's human health criteria do not protect both the right to safe harvest and the tribes that consume it, then EPA has indicated that they have the authority, and the duty to disapprove standards that do not protect tribal rights. Idaho must make appropriate policy choices that will result in a level of water quality that is adequate to allow the tribes to safely consume fish taken pursuant to their treaty-reserved rights.

Exclusion of Anadromous Fish

DEQ's rationale for excluding anadromous fish from the consumption rate is based on the belief that state regulations would have little impact on the quality of water outside of the state's control. This position ignores the fact that Idaho's waters move across jurisdictional boundaries and the state has the authority and the obligation to limit the release of toxic chemicals to downstream waters. EPA also requested that the state address downstream impacts in their May 2012 disapproval action.

DEQ is aware of the level of fish consumption reported in CRITFC's 1994 survey report⁹ and EPA's 2014-15 fish consumption survey of Idaho tribes. The latest survey report documents the preference by tribal people to consume fish and indicates that the level of consumption can be more than 700 grams per day. EPA specifically states in its Frequently Asked Questions on the 2000 Human Health Methodology that "EPA expects that the standards will be set to enable residents to safely consume from local waters the amount of fish they would normally consume from all fresh and estuarine waters (including estuarine species harvested in near coastal waters)." According to the EPA this "is consistent with a principle that every State does its share to protect people who consume fish and shellfish that originate from multiple jurisdictions". The state of Idaho shares this obligation to protect all people who consume fish that are impacted by contaminants released by Idaho dischargers into the Columbia River watershed. If Idaho excludes anadromous fish or ignore its obligation to protect downstream waters, the contaminants that could be regulated by Idaho will be permitted to remain in the environment, unaddressed by control measures that could have removed them. This is unacceptable.

⁷ For additional information see letter from Hilary C. Tompkins, Solicitor Department of Interior to Avi S. Garbow, EPA Office of General Counsel re: Maine's WQS and Tribal Fishing Rights of Maine, January 30 2015.

⁸ Letter from Curtis Spalding EPA Regional Administrator to Patricia W.Aho, Commissioner February 2 2015 Appendix A, page 35.

⁹ CRITFC, 1994. *A Fish Consumption Survey of the Umatilla, Nez Perce, Yakama, and Warm Springs of the Columbia River Basin*. Columbia River Inter-Tribal Fish Commission, Portland, Oregon. Technical Report 94-3. Available at : <http://www.critfc.org/tech/94-3report.pdf>

Idaho must do its fair share along with other states and tribes in the region to limit the additional release of contaminants into common waters. Instead, DEQ has adopted the argument set forth Hope (2012)¹⁰ that no single state's regulatory efforts, in isolation, will result in a large reduction in persistent organic pollutants in fall chinook and thus no single state should bother to regulate because singular efforts would not solve the problem. This false argument at the failure to exercise the state's authority to control contaminants at the source gives rise to additional contamination that could have been reduced, but will not be. Congress rejected this fractured regulatory approach in 1972 when it enacted the Clean Water Act. Idaho should work in concert with other states and tribes in the region to limit the impact of pollutants to the maximum extent possible. The inclusion of anadromous fish in Idaho's fish consumption rate would be consistent with the approach taken by both Oregon and Washington in setting statewide fish consumption rates. Inclusion of anadromous fish in Idaho's fish consumption rate will provide regional continuity in managing water quality and preventing downstream impacts from dischargers in Idaho.

Idaho-specific Tribal Bioaccumulation Factors (BAFs)

While CRITFC supports DEQ's use of BAFs consistent with EPA's 2015 human health criteria recommendations, Idaho has again chosen to use less protective parameters for tribal populations as compared to the general population in developing their Idaho-specific BAFs. DEQ used a value of fish intake for the general population of 14.3 grams per day which represents the 95th percentile of the general population to determine an Idaho general population BAF. DEQ used a value of fish intake for tribal populations of 23 grams per day which represents only the average consumption rate of tribal members¹¹. In addition, consumption of market and anadromous fish except for steelhead wrongfully excluded from DEQ's evaluation of fish intake.

DEQ recognizes in its criteria development reports that fish intake drives water quality criteria when contaminants have BAF's above approximately 300 L/kg¹². About 40 chemical criteria have BAF/BCFs above this value using DEQ's method of calculating Idaho-specific BAFs. For all of the reasons described in the previous section entitled "**Unequal Protections for Tribal Populations**" appropriate calculation of tribal specific BAFs at the same level of protection as the general populations is needed to fully account for the health effects of permitted discharges of bioaccumulative toxic chemicals.

Probabilistic Risk Assessment – Additive Toxicity

Idaho calculated the state's water quality criteria using a probabilistic risk assessment (PRA) approach supplied by ARCADIS¹³. PRA is an alternative to a traditional deterministic method where high-end or maximum values are typically used to calculate

¹⁰ Hope, B.K., 2012, Acquisition of polychlorinated biphenyls (PCBs) by Pacific Chinook Salmon: An exploration of various exposure scenarios, Integrated Environmental Assessment and Management, Vol. 8, No. 3, pp. 553-562.

¹¹ Idaho Human Health Criteria Technical Support Document, October 2015.

¹² Development of Human Health Water Quality Criteria for the State of Idaho, DRAFT, October 5, 2015.

¹³ ARCADIS, 2014. Probabilistic ambient water quality criteria calculator (PAWQCC). Arcadis. Available from: <http://www.deq.idaho.gov/media/1117234/58-0102-1201-probabilistic-ambient-wq-criteria-calculator-presentation-040214.pdf>.

criteria. The method has been suggested as an alternative by dischargers because they believe that the deterministic approach can lead to overestimates of risk known as “compounded conservatism”.¹⁴ The PRA approach can lead to less stringent standards since variables in the criteria calculations are no longer maximum values. If the PRA approach allows a larger fraction of high-fish consuming individuals to exceed acceptable doses of noncarcinogens or exceed risks of 1×10^{-6} for carcinogens, then it must be fully evaluated for its use in setting human health criteria before it can be the basis for EPA approval of standards.

In the National Toxics Rule, the EPA states:

The importance of the estimated actual risk increases as the degree of conservatism in the selected risk level diminishes.”¹⁵

Stated differently, analyzing and understanding actual risk should be emphasized when a state seeks to make standards less protective. Before the PRA approach should be accepted by EPA for calculating human health criteria, additional review of the actual risks from both the additive and synergistic effects of toxic compounds that have similar modes of action need to be understood and incorporated into the criteria formulation.

When multiple chemicals induce the same effect by similar modes of action, EPA guidance is to assume that the chemicals contribute additively to risk.¹⁶ Evaluating cumulative risks from exposures to multiple chemicals “is especially important in cases where the resulting toxic effect from the mixture has been demonstrated to be greater than the sum of the individual effects”.¹⁷ EPA notes that “[c]ertain categories of contaminants, in particular, persistent organic pollutants that share a common mode of action and/or target tissue, are of elevated concern when they co-occur in the fish and drinking water.”¹⁸

These risks may be increased further still due to waterborne exposures to carcinogenic chemicals not addressed by the draft criteria, including chemicals in pharmaceuticals, flame retardants, and personal care products. Some flame retardant such as PBDE’s are considered possible human carcinogens,¹⁹ although there are no state human health water quality criteria for these chemicals.²⁰ Diet is a source of the PBDE body burden in humans, and fish have the highest PBDE levels among different types of food.”²¹

¹⁴ ARCADIS, 2014. Derivation of Alternative Human Health Risk-Based Ambient Water Quality Criteria Using Probabilistic Methods for the State of Washington, report to Northwest Pulp & Paper Association, February 4, 2014. Available from: <http://www.ecy.wa.gov/programs/wq/swqs/NWPPA-ProbabilisticAWQC02042014-3FINAL.pdf>.

¹⁵ EPA. 1992. National Toxics Rule, 57 Fed Reg 60848-01

¹⁶ U.S. Environmental Protection Agency (EPA). 2000c *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health, Technical Support Document Volume I: Risk Assessment*. Office of Water, Office of Science and Technology. EPA-822-B-00-005. October.

¹⁷ Id

¹⁸ Id

¹⁹ Agency for Toxic Substances and Disease Registry (ATSDR). 2004. *Polybrominated Diphenyl Ethers (PBDEs) ToxFAQs*. September.

²⁰ Johnson, Art; Keith Seiders; Casey Deligeannis; Kristin Kinney; Patti Sandvik; Brandee Era-Miller; and Darren Alkire. 2006. *PBDE Flame Retardants in Washington Rivers and Lakes: Concentrations in Fish and Water, 2005-*

DEQ should balance its PRA approach to countering “compounded conservatism” and fully consider the effects the health effects (both carcinogenic and non-carcinogenic) of exposure to multiple toxic chemicals. Since recommendations from a Scientific Advisory Board will not be available, EPA should also consider these issues before approving the use of PRA for setting human health criteria.

Backsliding

DEQ dropped its draft “no backsliding” provision which would have maintained current standards if the calculation of criteria by the PRA methodology was less stringent. The National Discharge Elimination System (NPDES) is designed to ratchet down on pollution discharges overtime, with the goal of eliminating pollution and restoring the nations’ waters.²² Under the NPDES program, pollution effluent limits should be reduced as the regulated facility moves through multiple five-year permit cycles. The CWA expressly prohibits the development of NPDES permit effluent limitations that authorize an *increase* in the discharge of pollutants, stating, “a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.”²³ This prohibition is known as “anti-backsliding.” Although the anti-backsliding provisions of the CWA are subject to some exceptions, such as availability of new data, nothing in the law expressly provides for changes in regulation that result simply from a different calculation methodology.

Regional and National Support for Protective Human Health Criteria

The Affiliated Tribes of Northwest Indians and the National Congress of American Indians through unanimous resolutions^{24,25} also reject Idaho’s proposed water quality standards and ask that EPA uphold its trust responsibility and disapprove criteria that are not protective of tribal members. In addition, CRITFC and its member tribes also fully support the comments submitted by the Nez Perce Tribe on Idaho’s proposed water quality standards and incorporates their comments herein by reference.

CRITFC believes that Idaho shares a responsibility with tribes to future generations to improve the quality of shared waters as best it can today and should make policy choices to protect its citizens from the adverse health impacts of pollution. By establishing water quality standards that are designed to protect the health of tribal members, all citizens of Idaho will benefit from cleaner water. CRITFC believes in a future where the Columbia River fishery is once again free of harmful contaminants and is willing to work with Idaho to achieve this goal.

06. Publication No. 06-03-027. Washington State Department of Ecology, Watershed Ecology Section, Environmental Assessment Program. August.

²¹ Schechter et al., 2004, as cited in Johnson et al. 2006, supra

²² See 33 USC § 1251 et seq

²³ See 33 USC §1342(o)(1)

²⁴ ATNI Resolution #15-51, 2015. Opposing Idaho’s Proposed Water Quality Standards and Fish Consumption Rate. Available at: <http://www.atnitrines.org/sites/default/files/Res-15-51.pdf>.

²⁵ NCAI Resolution SD-15-034, 2015. Opposing Idaho’s Proposed Water Quality Standards and Fish Consumption Rate. Available at: http://www.ncai.org/attachments/Resolution_bkMgYvdzypEMGjHmDMHGhpCJzdUApkzTcuvIqcXuolGrkONfZnI_SD-15-034.pdf

Thank you for considering our comments during this rulemaking. If you have any further questions please contact me or Dianne Barton, Water Quality Coordinator at 503-238-0667.

Sincerely,

A handwritten signature in blue ink, appearing to read "Babtist P. Lumley". The signature is fluid and cursive, with the first name "Babtist" being the most prominent.

Babtist Paul Lumley
Executive Director

Cc: Dennis McLerran, Administrator, EPA Region 10