



Nez Perce

TRIBAL EXECUTIVE COMMITTEE

P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

August 21, 2015

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

By Electronic mail (paula.wilson@deq.idaho.gov)

Re: Docket No. 58-0102-1201 – Nez Perce Tribe Response to IDEQ Draft Negotiated Rule

Dear Ms. Wilson:

The Nez Perce Tribe (Tribe) appreciates the Idaho Department of Environmental Quality's (IDEQ) invitation to comment on the agency's Draft Rule for human health criteria that will be used to derive water quality standards. For the reasons below, as well as for the reasons set forth in the May 22, 2015 comment letter the Tribe submitted to IDEQ on human health criteria recommendations that the Tribe incorporates by reference, the Tribe is very concerned about the Idaho Department of Water Quality's Draft negotiated rule and whether it will protect the health of the Nez Perce Tribe.

As best as we can tell, IDEQ has not ensured protection of Treaty-reserved resources and rights of the Nez Perce Tribe in its decisions on human health criteria, rather, their choices serve to undermine our treaty-reserved resources and rights. Given this, the Tribe expects that EPA will comply with its treaty and trust obligations to the Tribe at the review and approval/disapproval phase once IDEQ submits its final application.

The Tribe continues to participate in IDEQ's water quality rulemaking process given that the outcome of this process can impact or affect the Tribe, its people, and its natural resources. The Tribe is not going to comment on each human health criteria or the draft rule itself at this point. We will focus our comments on use of Nez Perce Tribe fish consumption data, what an appropriate FCR would be to the Tribe, and our view and understanding of fish suppression.

Human Health Criteria Associated with IDEQ Draft Negotiated Rule

The Tribe supported the Environmental Protection Agency (EPA) providing the data from the Tribe's quantitative fish consumption survey to the IDEQ for their negotiated rulemaking process (this survey and data consists of two components: a food frequency questionnaire (FFQ)

and the National Cancer Institutes (NCI) method). In doing so the Tribe has been clear about how this data are to be used.

This Tribal survey data enables calculation of Nez Perce fish consumption rates and therefore helps provide key science information to this process. The Tribe's final report will provide credible, statistically valid and defensible estimations of our fish consumption rates that are representative of our Tribal members and of fish resources available to Tribal members for harvest and consumption.

The final Nez Perce Tribe report will provide fish consumption rates for two groups of fish: "Group 1" (All finfish and shellfish) and "Group 2" (Near coastal, estuarine, freshwater and anadromous), including other fish species groups for informational purposes. The NPT Fish consumption survey provides data on the range of species types and amounts of those fish tribal members eat. "Group 1" and "Group 2" therefore are the best representation of the fish we eat. As part of its treaty-reserved fishing rights, Tribal members are not limited in the types of fish species it can eat. Additionally, a FCR for the NPT should include all of the fish species currently consumed by its tribal members, and should not be limited to what IDEQ considers the scope of species as "Idaho fish." What combination of fish species represents NPT's total fish intake is a matter for the Tribe to decide. This is consistent with EPA's position on "market basket" preferences and the principle that "every state does its share to protect people who consume fish and shellfish that originate from multiple jurisdictions."

The Tribe does not agree to, and in turn, objects to IDEQ using NPT fish consumption data in the way they are.¹ With respect to what data is used in the calculation of the fish consumption rate, the Tribe objects to IDEQ selecting data on certain species and then discarding all other data from other key species that we eat, such as anadromous fish (specifically salmon) and market fish.² At the August 8, 2015 negotiated rule-making meeting, IDEQ described the method they used to translate fish groups. The Tribe does not support IDEQ using and "translating" NPT data

¹ The disclaimer language as reflected in the data file titled "NPT fish consumption survey 2014-2015-1.xlsx." is as follows:

"The Nez Perce Tribe and the U.S. Environmental Protection Agency (U.S. EPA) developed and approved a fish consumption survey for the Tribe through EPA Contract EP-W09-011. The design of the fish consumption survey is set forth in a report, "Design of a Survey on Fish Consumption by the Nez Perce Tribe", prepared for the Nez Perce Tribe, U.S. EPA, and SRA International, Inc.. This Survey Design Report is the foundation for all the information and data collected, evaluated, or reported as part of the Tribal fish consumption survey.

The purpose of the fish consumption survey is to obtain data necessary for determining fish consumption rates for the Nez Perce Tribe. This information and data is useful for developing water quality standards that are protective of the current and future health of the Nez Perce Tribal members. This information and data also helps the Tribe build capacity for measuring fish consumption rates (FCRs,) informs tribal fisheries management, and documents the importance of fish in tribal culture and lifeways.

The Tribe does not authorize the use of this information and data for any purpose other than the purpose set forth in the Survey Design Report."

² In its May 29, 2015 letter on IDEQ's proposed human health criteria, EPA stated that "Government-to-government consultation with affected tribes is important in deciding which fish consumption data should be used." While government-to-government consultation with the Nez Perce Tribe has not occurred, it is the Tribe's position that fish consumption data from "Group 1" and "Group 2" are the appropriate and relevant data to use.

to fit their “Idaho/Group 2/non-Marine Fish” grouping. This translation essentially amounts to matching certain species from NPT species groups to the “Idaho/Group 2/non-Marine fish” grouping that Idaho has elected to compute the FCR for; in our view, this translation is inaccurate and represents a misuse of the NPT data.

The Tribe objects to IDEQ using the mean value from Idaho is choosing to only set risk under a 10^{-6} incremental increase in cancer risk at mean consumption rate for high fish consuming groups, which equates to protecting a smaller percentage of Tribal members than if the State were to set the risk level at the 95th percentile. IDEQ calculated a cancer risk level for the NPT that appears to be 10 times greater than the Idaho general population as demonstrated in the meeting materials on this (NPT 1E-06 as compared to Idaho population of 1E-07). IDEQ couples this with using the NPT mean FCR of 16.1 for “Idaho/Group 2/non-Marine Fish”, which we think equates to a very low percentile from either the NCI or FFQ calculated percentiles (Table 14 and Table 8 from Joint Tribal Report on current survey provide range of fish consumption rates for NCI and FFQ results respectively). Given these differences between NPT NCI “Group 2” and Idaho’s “Idaho/Group 2/non-Marine Fish” values, it is difficult to determine what percentile of the NPT population would be protected.

Targeting only the mean of NPT consumption will leave higher-consuming tribal members (especially Tribal fishers) under-protected to a greater degree than higher-consuming members of the general Idaho population would be, if protection were targeted at the general population mean. Only a FCR that reflects unsuppressed tribal fish consumption practices would support the NPT’s Treaty-reserved resources and rights. Recognizing that any FCR lower than this is not adequate to ensure the treaty guarantees are met, the Tribe nonetheless cannot support a FCR for Idaho that is lower than one using the Tribe’s NCI “Group 2” FCR at the 95th Percentile.³

Suppression Issue

The Nez Perce Tribe’s treaty-reserved fishing rights and fisheries in the Snake Basin continue to be critically important to the Tribe in maintaining and practicing its culture and ways of life. Implementation of treaty fisheries is consistent with the Nez Perce Tribe’s legally enforceable treaty-reserved fishing rights and resources and with the United States’ treaty and trust obligations and responsibilities to the Nez Perce Tribe.

The Tribe fully expects that the EPA will ensure suppression is considered appropriately and accounted for in the development of water quality standards. IDEQ’s interpretation of suppression and its two main causes seem inconsistent with EPA policy on the matter.

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.” Related to this, EPA expressed in a recent letter to State of Washington concerning fish consumption rate for Washington tribes, that the rate should “represent tribal subsistence consumer’s practices unsuppressed by fish availability or concerns about the safety

³ The Tribe’s NCI “Group 2” FCR at the 95th Percentile is 233.9 g/day (this is supported by FFQ “Group 2” FCR at the 95th Percentile which is 327.9 g/day). Moreover, the fisher values for NCI “Group 2” FCR at the 95th Percentile which is 345.0 g/day (this is supported by FFQ “Group 2” FCR at the 95th Percentile which is 543.5 g/day).

of the fish available for them to consume.” From the Tribe’s perspective, this same position should be applied here to the Nez Perce Tribe and its fish consumption rate.

The narrative under the section “Fish Consumption has Increased” and Figure 4 from IDEQ’s August Policy issue paper, titled “Considerations in which fish to include in Idaho’s fish consumption rate”, are misleading. In this paper IDEQ asserts that “the broader view is that fish consumption has increased and the trend has been toward higher consumption.... So, while localized suppression is occurring, overall fish consumption has been rising, and so has the level of consumption accounted for in the water quality criteria. Thus, concerns that suppressed fish consumption is causing a downward spiral in fish quality is not evident.” This is simply not an accurate or true statement with respect to the Tribe and its consumption. IDEQ continues to miss this fundamental point, and therefore continues to mischaracterize the matter of suppression.

As the NPT pointed out in our November 11, 2014 letter on suppression, “[a]ssume 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.”

Figure 4 is far from a broader view of fish consumption in that at best it is a limited snapshot from 1980 to 2014, and while that snapshot illustrates an increasing trend in EPA recommended FCR, it does not reflect the historical baseline FCR for the NPT by which to determine what an unsuppressed rate should be. Moreover, this limited time series illustrates to the NPT that the step-up from 6.5 to 22 g/day is an insignificant change, and certainly not “more stringent” than IDEQ asserts. It represents a “suppressed scheme” whereby IDEQ is proposing a FCR that is considerably less than the FCR values at the 95th percentile from either Table 14 or Table 8 from the current NPT survey. It also fails to acknowledge the 175 g/day that is authorized in State of Oregon and what State of Washington had proposed as an appropriate FCR. We also point out that the current survey of NPT consumption indicates an increase in fish consumption from early 1990s when the CRITFC study was completed.

Conclusion

The Nez Perce Tribe re-emphasizes that the Tribe must be treated as the target general population for purpose of establishing human health criteria and water quality standards under the Clean Water Act. The Nez Perce Tribe continues to stress that incorporating information on both the heritage rates and suppression 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.

As we pointed out previously, salmon know no political boundaries, and our Tribal members exercise treaty-reserved fishing rights to fish in Oregon, Washington, and Idaho. We continue to urge EPA to ensure that water quality standards are protective of tribal fish consumption levels and needs throughout the Northwest where its treaty rights apply (or where its usual and accustomed fishing areas are located). The Tribe requires that IDEQ use Group 1 (All finfish and shellfish) and Group 2 (Near coastal, estuarine, freshwater and anadromous) as species

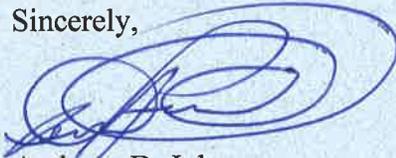
groups to use in calculation of the regulatory fish consumption rate for the Tribe at the 95th percentile and at risk level of 10⁻⁶. The Tribe objects to IDEQ using and “translating” NPT data to fit their “Idaho/Group 2/non-Marine Fish” grouping and then using the mean value. The Tribe does not authorize the use of this information and data as IDEQ is attempting to do. IDEQ’s approach and methods are not consistent with, and therefore does not conform to, the purpose of such data and information as set forth in the final Nez Perce Tribe Survey Design Report.

Additionally, the Tribe would continue to find it unacceptable if the IDEQ uses artificially suppressed FCR for the Tribe. Such an outcome would continue to perpetuate the “downward spiral” that we have been in.

In summary, the Tribe concludes that IDEQ’s human health criteria and the draft rule in its present form do not remedy the key findings in EPA’s May 2012 disapproval of the state’s July 2006 water quality standards and should be reevaluated.

Thank you for considering the Tribe’s comments on IDEQ’s policy recommendations and related aspects.

Sincerely,



Anthony D. Johnson
Chairman

