



Idaho Association of
Commerce & Industry
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November 17, 2014

Paula Wilson
Idaho Dept. of Environmental Quality
Attorney General's Office
1410 North Hilton
Boise, ID 83706

Re: IACI - Fish Consumption Comments Extension Reg 101514.pdf

Dear Ms. Wilson:

At the last negotiated rule-making meeting on October 2, 2014 representatives of the Shoshone Bannock Tribe and the Nez Perce Tribe gave presentations on the suppression of fish consumption by tribal members as well as heritage or historical rates of fish consumed by tribal members in the first part of the 20th century and earlier. Apparently IDEQ is considering use of suppression of fish consumption rates (and possibly heritage rates) in setting Idaho's human health criteria for surface waters. Although IDEQ did not publish any type of "white paper" on these topics, it has nevertheless requested public comment on these issues.

IACI opposes the use of information or "data" related to suppression of fish consumption rates (suppression rates) and heritage fish consumption rates ("heritage rates") in development of human health criteria in Idaho's water quality standards for several reasons. Use of such data or information that has not gone through a rigorous scientific validation process (similar to the process that current fish consumption rate studies go through) is too speculative and unreliable in setting water quality standards. Moreover, use of suppression rates or heritage rates to set water quality standards is beyond the minimum requirements of the Clean Water Act and as such is prohibited under Idaho law. Finally, we do not believe it is appropriate to use speculative conditions predating the Clean Water Act or perhaps even pre-dating statehood to set water quality standards for today.

1. **Suppression Rates are Too Speculative and Unreliable.**

There was no presentation or information provided on how IDEQ (or EPA) would insure that suppression rate information is reliable and unbiased. Absent scientifically and statistically defensible protocols to collect and rely on suppression rate data, IACI believes it should not be utilized by IDEQ in setting human health criteria. By way of an example, a person might not consume as much fish from an Idaho water because they fear local fish may be too contaminated. Whether that fear is even accurate will often depend on comprehensive water quality studies and fish testing in the watershed; such testing has been done on a number of Idaho rivers, reservoirs and lakes. Even when a fish advisory is in place (for example for certain populations such as

young children or pregnant women) to limit fish consumption from an Idaho water, there is no reliable method to accurately quantify whether a person would consume less fish overall because of such an advisory. Injecting hypothetical information or data in quantifying fish consumption in Idaho is too speculative and unreliable.

We note that EPA has published protocols for conducting fish surveys and for quantifying fish consumption rates around the United States. *See e.g. Estimated Fish Consumption Rates for the U.S. Population and Sub-Population* (NHANES 2003-2010) (EPA 2014); *Guidance for Conducting Fish and Wildlife Consumption Survey* (EPA 1998). These studies represent the most current and best available methods for quantifying fish consumption rates in setting human health criteria. The focus of these studies and methodologies is on obtaining objectively defensible fish consumption rates based on current and actual fish consumption. Hypothetical fish consumption rates are not considered and therefore none of these studies rely upon suppression rates in quantifying fish consumption rates. Absent scientifically and statistically defensible methodologies for using suppression rates in setting human health criteria, IACI believes it is inappropriate for IDEQ to consider such information.

Also it appears that use of suppression rates in setting human health criteria would be contrary to Idaho law. *The Idaho Environmental Protection and Health Act* at Idaho Code Section 107D(2) specifies that whenever IDEQ promulgates a rule based on science, IDEQ shall “utilize the best available peer reviewed science and supporting studies conducted in accordance with sound and objective scientific objectives and data collected by accepted methods or best available methods...” *Id.* IACI is unaware of any peer reviewed science and studies that support the use of suppression rates in setting human health criteria. Similarly we are unaware of any accepted or best available methods to collect suppression rates that would warrant using such “data” in setting human health criteria. Accordingly IACI believes that IDEQ is precluded from relying on suppression rates in setting human health criteria pursuant to Idaho Code 39-107D.

For similar reasons, we believe that IDEQ cannot rely on suppression rates in setting human health criteria because Idaho law stipulates that IDEQ promulgated water quality rules “not impose requirements beyond [the requirements] of the federal clean water act.” Idaho Code 39-3601. IACI is unaware of any requirement under the Clean Water Act which requires that states must rely upon suppression rates in setting human health criteria. On the contrary, EPA has published national recommended human health criteria as well as methodologies for states to follow in quantifying fish consumption. None of these documents specify that suppression rates should be considered in setting human health criteria. Consideration of suppression rates in setting human health criteria is not a requirement of the Clean Water Act, and accordingly should not be utilized by IDEQ in setting human health criteria under Idaho’s stringency statutes.

Finally, it is clear that federal rules require that state human health criteria be based on “sound scientific rationale” before they can be approved by EPA. 40 CFR 131.11(a)(1). As noted above use of suppression rates in setting human health criteria is not scientifically defensible and there are no peer reviewed methodologies that support reliance upon this type of information. Accordingly we believe that reliance upon suppression rates in setting human health criteria would not be based on “sound scientific rationale” and as such do not meet the requirements of the Clean Water Act.

2. Use of Heritage Rates is not Appropriate.

A related concept to suppression rates is whether IDEQ should rely upon heritage rates in setting human health criteria. For the reasons noted above, we believe that heritage rates suffer from the same shortcomings as suppression rates. There are no established methodologies to quantify heritage rates, EPA guidance does not specify that states must rely upon heritage rates in setting human health criteria and reliance upon heritage rates in setting human health criteria would be contrary to state and federal law.

Even assuming *arguendo* that some type peer reviewed methodology could be devised to insure that an objective and scientifically defensible heritage rate could be quantified (presumably based on well-documented historical information), reliance upon heritage rates to set human health criteria is still not appropriate. IACI does not believe Idaho water quality standards should be established based on historical conditions pre-dating the Clean Water Act (indeed even pre-dating Idaho's statehood). We do not believe the Clean Water Act envisions such an approach. Rather the Clean Water Act directs states to establish "attainable" designated uses taking into consideration various uses and values. 33 U.S.C. §§ 1251(a)(2) and 1313(c)(2)(A). The Clean Water Act does not direct states (or Tribes) to establish water quality goals based on pre-industrial conditions.

There is a process under the Clean Water Act to revise standards based on changed conditions as each state is required to review and update its standards every three (3) years. 33 USC 1313(c)(1). Similarly under Idaho law IDEQ is required to review designated uses and revise such uses when "physical, chemical or biological measures indicate the need to do so." Idaho Code 39-3604. As conditions change in Idaho waters and Idaho fish consumption rates (for example, if fish consumption rates increase), then Idaho can (and must) revise its standards at that time. However until those conditions occur, Idaho is not required to base its human health criteria on conditions that may have existed a long time ago. As noted above, such considerations would be contrary to Idaho's stringency laws.

Moreover, we believe that reliance upon historical or heritage rates to set human health criteria constitutes a *de facto* change in Idaho's current designated uses. Currently Idaho's recreational uses (and the associated human health criteria to protect those uses) are based on current and actual fish consumption rates (similar to the approach required by EPA national recommended criteria). Injecting heritage rates or historic fish consumption rates into setting recreational uses creates a new use or at the very least a substantially revised recreational use. Under Idaho law, whenever IDEQ revises a designated use, IDEQ is required to consider the economic impact of the revision and the economic costs required to fully support the revised designated beneficial use. Idaho Code 39-3604." IACI believes that if IDEQ were to consider heritage rates in setting human health criteria, the agency would be first required to evaluate the economic costs of achieving heritage rates. IACI opposes the adoption of unattainable water quality standards as they potentially place an inordinate burden on the regulated community.

3. Risk Management Decisions.

IACI recognizes that certain sub-populations in Idaho (including tribal members) may consume higher levels of fish from Idaho waters than the general population. Our comments in this letter should not be construed as opposing the use of reliable data that demonstrate higher fish consumption rates in sub-populations. IACI encourages IDEQ to take into consideration (as does EPA) higher fish consumption rates in smaller sub-populations in setting human health criteria. How IDEQ considers higher fish consumption rates in certain segments of the population in setting human health criteria is ultimately a risk management decision which is left to the discretion of each state under the Clean Water Act so long as all population segments are adequately protected within certain risk levels. IACI supports the use of scientifically defensible risk management decisions. Earlier this year, Arcadis made a presentation at an IDEQ negotiated rule-making meeting describing a well-established risk management methodology known as “probabilistic risk assessment” (PRA). IACI believes PRA is an appropriate methodology to inform risk management decisions in setting human health criteria, particularly in accounting for varied fish consumption rates around the state. Therefore IACI supports use of PRA by IDEQ in establishing human health criteria in Idaho once all objectively quantified fish consumption data in Idaho is compiled by IDEQ.

Thank you considering these comments.

Sincerely,



Alex Labeau
President

cc: Alan Prouty, Chair
IACI Environment Committee