COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION
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May 21, 2015

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

RE: DEQ Policy Recommendations for Human Health Criteria Calculation

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, thank you for the opportunity to provide comments on the Idaho Department of Environmental Quality's (DEQ) April 21, 2015 policy recommendations on criteria calculation for the revised state water quality standards. CRITFC and its member tribes also fully support the comments submitted by the Nez Perce Tribe on these policy choices and incorporates them herein by reference. In brief, DEQ's policy recommendations 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. In the disapproval letter, EPA requested that Idaho give priority to identifying and adequately protecting the most highly exposed target population in determining whether its statewide criteria are protective of designated uses.

DEQ's decision to exclude anadromous fish from the state's fish consumption rate is not consistent with this requirement or with local information on fish consumption by tribal populations. 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. Indeed, EPA also requested that the state address downstream impacts in their May 2012 disapproval action.

DEQ has long been aware of the level of fish consumption reported in CRITFC's 1994 survey report[1] and is now reviewing preliminary data from EPA's 2014-15 fish consumption survey of Idaho tribes. The latest survey report documents the preference by tribal people to consume fish

[1] 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

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 in an attempt to limit 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.

DEQ's Human Health Water Quality Criteria – Discussion Paper #5 on Anadromous Fish questions the need to include anadromous fish because the majority of their contaminant body burden is attained in the ocean. However, the anadromous fish that populate Idaho's waters are impacted by contaminants derived from sources that the state has an obligation to limit. As juveniles, salmon are exposed to and accumulate the contaminants allowed by Idaho standards during the time spent in freshwater.[2] Certain salmon species from Idaho such as fall chinook and coho can reside in or interact with the food web of coastal waters that under the jurisdiction of the Clean Water Act. Other returning adult salmon will continue to feed in fresh waters[3] and can also acquire contaminants via gill update in fresh waters[4]. The complex history of all of Idaho's anadromous fish and their interaction with contaminants that are under the control of the state must be more fully considered. The portion of the body burden of anadromous fish that is derived from fresh waters when considered in light of the high level of fish consumption by tribal members living in Idaho, should be reason enough for DEQ to reconsider their policy choice.

Idaho must do its fair share along with other states in the region to limit the additional release of contaminants into common waters. Instead, DEQ has adopted the argument given in Hope (2012)[5] 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 failure to exercise the state's authority to control contaminants at the source gives rise to an increment of contamination that could have been reduced, but will not be. Congress rejected this fractured regulatory approach

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[2] Johnson, L.L. et. al., 2007, Contaminant exposure in outmigrant juvenile salmon from Pacific Northwest estuaries of the United States, Environmental Monitoring and Assessment, 124:167-104; Sloan, C.A. et. al, 2010, Polybrominated diphenyl ether in outmigrant juvenile chinook salmon from the Lower Columbia River and estuary and Puget Sound, Washington. Arch. Environ. Contam. Toxicol, 58:403-414.

[3] Garner, S.R., Heath, J.W., and Neff, B.D., 2009, Eggg consumption in mature Pacific salmon (Oncorhynchus spp.). Canadian Journal of Fisheries and Aquatic Sciences 66: 1546-1553.

[4] Qiao, P., Gobas, F.A.P.C., and Farrell, A.P., 2000, Relative contributions of aqueous and dietary uptake of hydrophobic chemicals to the body burden in juvenile rainbow trout. Arch. Environ. Contam. Toxicol., 39(3):369-77.

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

in 1972 when they enacted the Clean Water Act. Instead, Idaho should work in concert with other states in the region to limit the impact of terrestrial 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. Oregon followed the direction of the Human Health Focus Group[6] and included Pacific salmon and other migratory species in their consumption rate to adequately account for pollutants. Among other reasons, Oregon justified this choice because data are not available to calculate accurate relative source value corrections for the wide diversity of anadromous species and life histories. Also, the relative source contribution process does not account for carcinogenic risk. Inclusion of anadromous fish in Idaho's fish consumption rate will provide regional continuity in managing water quality in the river and preventing downstream impacts from dischargers in Idaho.

Excluding anadromous fish from Idaho's fish consumption rate would have the effect of significantly decreasing the protectiveness of the state's environmental water quality standards. Tribal people that consume fish from the Columbia River watershed are the target population that will be most affected if anadromous fish are omitted from the fish consumption criteria. 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 that created their reservations and reserved the right to fish at all usual and accustomed fishing stations. 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. Idaho must make appropriate policy choices that will result in a level of water quality that is necessary to allow the tribes to safely consume fish in light of their treaty-reserved rights.

Idaho has also proposed that criteria be set to achieve a 10^{-6} incremental increase in cancer at the mean consumption rate for high consuming subpopulations. The policy choice of using the mean 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 95% level that is proposed for the overall population. Tribal fish consumers as evidenced by EPA's recent disapproval of Maine's human health criteria[7] 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. 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:

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[6] Oregon Department of Environmental Quality, 2008, Human Health Focus Group Report – Oregon Fish and Shellfish Consumption Rate Project, 69 pp.

[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.

> *… 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]

CRITFC believes that state governments in common with tribal governments share a responsibility to future generations to improve the quality of shared waters as best they can today and should make policy choices to protect their citizens from the adverse health impacts of pollution. CRITFC believes in a future where the Columbia River fishery is once again free of harmful contaminants and is willing to work with states in the region to achieve this goal. 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,

Babtist Paul Lumley
Executive Director

Cc: Dennis McLerran, Administrator, EPA Region 10

[8] Ibid at page 12