



UPPER SNAKE RIVER TRIBES FOUNDATION, INC.

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(208) 331-7880

August 21, 2015

Paula Wilson
IDEQ State Office
Attorney General's Office
1410 N. Hilton Street
Boise, ID 83706

Re: Docket No. 58-0102-1201 – Upper Snake River Tribes Foundation Comments Regarding Fish Consumption Rates in Idaho Water Quality Criteria for Human Health Negotiated Rulemaking Meeting: Preliminary Draft Rule

Dear Ms. Wilson:

The Upper Snake River Tribes (USRT) Foundation is composed of four Indian tribes of the Upper Snake River region in Idaho, Nevada, and Oregon: the Burns Paiute Tribe, Fort McDermitt Paiute-Shoshone Tribe, Shoshone-Bannock Tribes (SBT) of the Fort Hall Reservation, and Shoshone-Paiute Tribes of the Duck Valley Reservation. The four tribes have common vested interests to protect rights reserved through the United States Constitution, federal treaties, federal unratified treaties (including but not limited to the Fort Boise Treaty of 1864, Malheur Treaty of 1864, Bruneau Treaty of 1866, and Long Tom Creek Treaty of 1867), executive orders, inherent rights, and aboriginal title to the land, which has never been extinguished by USRT member tribes. USRT works to ensure the protection, enhancement, and preservation of the tribes' rights, resources, cultural properties, and practices and that they remain secured. These include, but are not limited, to hunting, fishing, gathering, and subsistence uses.

USRT appreciates the opportunity to comment on the elements of the draft rule that were discussed by the Idaho Department of Environmental Quality (IDEQ) at the August 6, 2015, rulemaking meeting. While USRT seriously disagrees with many of the components of the draft rule advanced by IDEQ, we do, in general, support the following elements of the draft rule:

- IDEQ moving away from using bioconcentration factors (BCFs) and instead using bioaccumulation factors (BAFs). Moving to the use of BAFs will reflect the uptake of contaminants from all sources by fish and shellfish, not just the water column as is the case when using BCFs. However, USRT is concerned that IDEQ is intending to use the national

fish consumption rate (FCR) for trophic levels 2, 3, and 4 to develop FCR-weighted BAFs. This is likely not appropriate, as Idahoans eat more higher-trophic level organisms than does the general U.S. population.

- IDEQ's decision to use the Environmental Protection Agency (EPA) default relative source contribution value of 20 percent for establishing the state's water quality standards (WQS).
- IDEQ staying true to their word that moving forward none of the WQS criteria would be less protective. However, USRT would encourage IDEQ to update all of their WQS during this process and not just those 88 standards that EPA disapproved in May of 2012.

Unfortunately, USRT can find little else to support in IDEQ's draft rule, as the agency has shown almost no consideration and incorporation of tribal comments in the draft rule. While IDEQ has defined the rulemaking process as one of negotiation, this is an inaccuracy. USRT, its member tribes, and other involved tribes and tribal consortia have conveyed a plethora of comments and recommendations to IDEQ over the course of nearly three years, only to find them ignored. The outcome is that WQS will be insignificantly improved and the FCR increased by a paltry 9.6 grams per day (1.4 grams less than the FCR that EPA disapproved in 2012). This is business as usual in Idaho. The health of Idaho citizens suffer at the expense of business and industry profits. Anachronistic standards and agency practices will be the death knell of Idaho's environment and the health of its citizens. IDEQ is charged with protecting public health and the environment, not profits. The draft rule as it stands is a gift to business and industry and a slap in the face to tribal and non-tribal communities in Idaho.

Idaho's Proposed FCR of 16.1 Grams per Day

Following manipulation of tribal data (see below), determining to protect tribal members at the mean percentile (see below), deriving an FCR via the National Cancer Institute (NCI) method with marginal Idaho angler/non-angler data, and exclusion of anadromous and market fish (see below), IDEQ is proposing a 16.1 grams per day FCR. A state's FCR should work to protect and improve surface waters and human health. It should be aspirational, as is the Clean Water Act (CWA). IDEQ's proposed 16.1 grams per day FCR is the opposite of aspirational. Based on its construct, it cannot even be viewed as a baseline number. USRT rejects a 16.1 grams per day FCR for Idaho. If it stands as the proposed FCR and is passed by the Idaho Legislature in 2016, USRT is confident that EPA will do the same.

Revision of Tribal Fish Consumption Rates

When the Nez Perce Tribe (NPT) and SBT undertook a fish consumption survey of tribal members they constructed an agreement with EPA on how the tribal data could be used and evaluated. The NPT and SBT determined that they would compute and report the NCI method for Group 1 (all finfish and shellfish) and Group 2 (near coastal, estuarine, freshwater, and anadromous). Not now, and at no time in the past, did the two tribes agree that it would be allowable for IDEQ to take tribal FCR data and subtract those fish species that IDEQ did not

want to evaluate and construct a “new” tribal FCR. This back of the envelope calculation by IDEQ is completely inappropriate and a misuse of tribal data. In EPA’s disapproval letter dated May 10, 2012, IDEQ was scolded for not using local and regional fish consumption data. Following disapproval, the tribes undertook an arduous process of compiling local tribal fish consumption data to inform IDEQ’s revised FCR. The manner in which tribal data has been manipulated is unacceptable to the tribes and not in keeping with EPA’s instruction to IDEQ to use local and regional data.

Protecting Tribal Members at the Mean Consumption Rate

The callousness of IDEQ to proclaim that protecting tribal members at the mean consumption rate but the general population at the 95th percentile “is an appropriate balance of protectiveness for both high consumers and the general population” is shocking. Rather, IDEQ has chosen to put tribal members and other high fish-consuming populations at considerable risk to the benefit of the regulated community. Tribal members must also be protected at the 95th percentile of the tribal FCR survey results and not the manipulated FCR manufactured by IDEQ.

Exclusion of Anadromous and Market Fish

IDEQ derived a proposed FCR of 16.1 grams per day in a manner with which USRT strongly disagrees for several reasons. The proposed FCR is based on consumption of Idaho-caught fish only. Yet, excludes anadromous fish (except steelhead) that originate and reside in Idaho for a portion of their life history. To conclude that anadromous species do not accrue a portion of their toxic body burden from waters regulated under the CWA is ludicrous. USRT has consistently commented on the fact that anadromous fish are an incredibly important fish for tribal members for cultural, spiritual, and subsistence purposes. Further, anadromous fish are consumed by non-tribal members throughout Idaho. Finally, the downstream states of Oregon and Washington include anadromous fish in their FCR calculation. As such, they should be factored into Idaho’s proposed FCR. The exclusion of anadromous fish ensures that tribal treaty rights and human health for all citizens in Idaho will not be protected.

The position of USRT continues to be that market fish should also be factored into Idaho’s FCR. Given the loss or reduction of local fish runs, both anadromous and resident, which impact the amount of locally-caught fish that can be reasonably eaten, Idaho’s FCR should reflect the total amount of fish Idahoans consume and not just from local waters. As EPA recommended in their May, 29, 2015 letter to IDEQ:

EPA recommends that DEQ include market fish in the FCR used to derive human health criteria. This approach is consistent with a national water quality program principle that every state does its share to protect people who consume fish and shellfish that originate from multiple jurisdictions. In addition, the goal of water quality criteria for human health is to protect people from exposure to pollutants through fish and water over a lifetime, and the goal of a state’s designated use should be that the waters are safe to fish in the context of the total consumption pattern of its residents.

The EPA's most current national default FCR includes market fish in their calculation. The downstream states of Oregon and Washington also factor market fish into their FCR. IDEQ's rationale for excluding market fish because "Idaho water quality standards only apply to discharges into Idaho waters" is patently false. All states share a responsibility to protect and preserve the waters of the U.S. Water does not know state boundaries, but under IDEQ's rationale, you would be under the impression that they do.

Downstream Waters Protection

IDEQ apparently believes that it can do a fill-in-the-blank exercise with EPA's inadequate downstream waters protection templates and be confident that will suffice as protecting downstream waters. Yet, given the more protective standards of downstream states and tribes, the inadequate FCR and WQS proposed by IDEQ clearly will not be protective of downstream waters in multiple jurisdictions. IDEQ's final draft rule needs additional language describing how it can possibly protect downstream waters when it will be discharging water more polluted than the jurisdictions those waters will be entering into. If IDEQ's proposed draft rule stands as is, it will force downstream jurisdictions to take action against Idaho, putting the state right back in the place it found itself in May of 2012 when EPA disapproved its standards.

Probabilistic Risk Assessment

USRT continues to have concerns about the use of the probabilistic risk assessment (PRA) approach in determining criteria selection. EPA at the regional and national level echoes those same concerns. In fact, EPA is in the process of beginning a multi-year review of the PRA method to assess its validity. USRT cannot support the use of PRA for determining water quality criteria given its uncertainty and also does not believe that IDEQ has enough quality data to construct distributions.

Suppression

The approach of IDEQ to the suppressed consumption of fish has been one of consistency. Ignore it and maybe it will go away. Unfortunately, due to many regulatory agencies failing to recognize suppressed consumption it has not gone away, and at least for tribal members, has gotten far worse. It borders on the ridiculous for IDEQ to state that WQS cannot affect the availability of fish. Poor water quality is a fundamental limiting factor of fish reproduction, growth, and survival. Does IDEQ really believe that if water quality was improved it could potentially not lead to greater fish availability? Tribal members have seen their fish consumption reduced by orders of magnitude, yet IDEQ decides that it is not important and beyond their purview to assess and incorporate suppression into their FCR. Water quality has been one of several factors that have led to reduced fish consumption.

In IDEQ's Policy Summary discussion paper for the August 6th rulemaking meeting it reads on page 7: "We believe requiring dischargers to meet criteria based on historical or future availability is unreasonable." In essence, the preceding encapsulates the rulemaking process and

the draft rule. Any and all measures that would affect dischargers, yet benefit the environment and citizens of Idaho, is unreasonable. In future rulemaking proceedings, IDEQ should be upfront from the beginning that all decisions will favor dischargers so the rest of the parties will know where they stand from the get-go.

IDEQ cites as success that fish consumption in the U.S. has increased by an insignificant 2.6 pounds/year over the course of more than 30 years, but fails to mention that 91% of the seafood that Americans eat comes from abroad. Inadequate WQS have and will continue to contribute to suppressed fish consumption and force consumers to eat imported fish (of which IDEQ will not factor in subsequent FCR updates, further exacerbating the problem). A 16.1 grams per day FCR will do nothing to turn the tide of suppression and will in fact make it worse for those high fish-consuming populations EPA charged Idaho with protecting.

Tribal Treaty Rights

Tribal treaty rights are considered to be the supreme law of the land. The Fort Bridger Treaty of 1868, entered into by the SBT and the U.S., was ratified in 1869. Article 4 of the Fort Bridger Treaty states that the SBT “shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.” At the time of treaty signing and subsequent ratification, anadromous and resident fish were plentiful in Idaho and consumption among the SBT was as high as 995 grams per day. Indian treaties are to be construed as they were understood by the tribal members who participated in their negotiation and signing and are to be liberally interpreted to accomplish their protective commitments, with ambiguities to be resolved in the favor of tribes. The proposal of 16.1 grams per day by IDEQ is a direct affront to tribal treaty rights. As the supreme law of the land, IDEQ has a legal responsibility to protect those rights, not chip away at them by proposing an FCR and WQS that will make the exercise of treaty rights difficult to impossible.

Peer Review of Idaho Survey

Currently underway is a rigorous peer-review process of the Idaho tribal fish consumption survey process and results. The tribes and EPA are committed to this peer review process as it will ensure the accuracy and veracity of the tribal survey methodology, analysis, and results. For whatever reason, IDEQ is not engaging in the peer review process. Given that IDEQ is using the angler/non-angler survey results as partial basis for their proposed FCR, it is fundamental that it be peer reviewed. Without rigorous peer review, the survey results should be invalidated and not be allowed to be used to develop an Idaho FCR and WQS.

Revision of Water Quality Criteria

USRT opines, and EPA encourages, that IDEQ revise their whole suite of water quality criteria and not just those 88 that EPA disapproved in 2012. Given that IDEQ just completed their

triennial review in 2014, it would make sense to revise them now instead of waiting until after the 2017 triennial review.

Most Protective Criteria

During the August 6th rulemaking meeting it was noted that IDEQ does not intend to always choose the most protective criteria. This is noted in the following scenario: if PRA > current criteria and deterministic < current criteria, IDEQ will stick with current criteria. USRT disagrees and believes that IDEQ should always choose the most protective criteria. For the scenario above, given that PRA will likely be found invalid by EPA, IDEQ would be expected to choose the deterministic outcome.

USRT has been an active participant in this rulemaking process for nearly three years. It was our expectation, as it was our member tribes, that IDEQ would consider and incorporate both our written and verbal comments when and where appropriate. In reality, the voice of the tribes and tribal consortia have been muted by business and industry, which are reflected in the inadequate FCR/WQS draft rule. While it is late in the rulemaking process, USRT and its member tribes hold hope that IDEQ will make significant revisions to the draft rule between now and October that will be protective of tribal and non-tribal members. The draft rule is clearly inadequate in protecting tribal members, their lifeways, and their treaty rights. It also will not protect downstream WQS for jurisdictions within and outside of Idaho.

USRT appreciates the opportunity to comment on IDEQ's water quality criteria for human health draft rule. If you have questions or remarks following review of these comments, please contact Scott Hauser, USRT Environmental Program Director, at (208) 331-7880 (office) or (208) 995-4872 (cell) and/or by email at scott.hauser@usrf.org.

Sincerely,

s:/ *Scott Hauser*

Scott Hauser
Environmental Program Director