

**Nez Perce Tribe Comment to Idaho Board of Environmental Quality
Regarding the State's Final Proposal and Water Quality Standards
(Docket No. 58-0102-1201)**

December 10, 2015

Samuel N. Penney

The Nez Perce Tribe (Tribe) appreciates the opportunity to provide the Idaho Board of Environmental Quality's the Tribe's comment on the IDEQ water quality standards. For the reasons below, as well as for the reasons set forth in previous comment letters the Tribe submitted as part of this docket that the Tribe incorporates by reference, the Tribe is very concerned about the consideration the Idaho Board of Environmental Quality is poised to make regarding water quality standards in the final proposal. The Tribe does not believe the final proposal will protect the health of the Nez Perce Tribe.

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.

As best as we can tell, IDEQ has not ensured protection of Treaty-reserved resources and rights of the Nez Perce Tribe in its final proposal on human health criteria and water quality standards, rather, their choices as reflected in the final proposal will undermine our treaty-reserved resources and rights. As IDEQ states in their response to questions, "DEQ does not agree that the treaty reserved fishing rights require DEQ to adjust the fish consumption rate or increase the protectiveness of criteria beyond that required by the CWA." This is not consistent with the guidance that the EPA has provided to the State regarding federal treaties, as an applicable law, that the State must consider when setting criteria to support the most sensitive fishing designated use in Idaho. 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 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). This Tribal survey data enables calculation of Nez Perce fish consumption rates (FCRs) 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 contemporary fish consumption rates that are representative of our Tribal members and of fish resources available to Tribal members for harvest and consumption. Contemporary FCRs are different from—and not a reflection of—unsuppressed, heritage fish consumption rates that have been documented for the Tribe in its Heritage Rate report.

The final Nez Perce Tribe report will provide fish consumption rates for two groups of fish, among others, these are as follows: "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. 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 appreciates that the IDEQ has altered its course somewhat in the final proposal. But the Tribe hasn't had sufficient time to evaluate these changes to the final rule or associated documents in the detail we would prefer. Our understanding is that the State is now including market fish and anadromous fish and will be using the Tribe's NCI "Group 2" fish. This is a positive sign that the State was willing to make this change so close to the presentation of its final proposal to this Board. However, the Tribe does not believe that these changes fully address our concerns and issues.

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 and at cancer risk level of 10^{-6} .¹ Thus, while this FCR, at 233.9 g/day reflects a compromise, it is a regulatory FCR that the Tribe could support for this rulemaking.

The Tribe expressly objects to a cancer risk level of 10^{-5} as we think this will result in an increase in risk to our tribal members that consume large quantities of fish, or at levels significantly higher than the regulatory FCR the IDEQ is contemplating in its final proposal. IDEQ is proposing to use the *mean* FCR of 66.5 g/d from the Nez Perce NCI "Group 2" fish coupled with a cancer risk level of 10^{-5} . This would equate to a 6.65 g/d FCR at a cancer risk level of 10^{-6} . If this is indeed the case then what IDEQ is proposing is in this final proposal is functionally no different from the 6.5 g/d FCR that the agency attempted to originally update. Under the current proposal, the cancer risk level increases but we understand that non-cancer risks will be decreased and become more stringent. Idaho has not provided any rationale for reducing the level of cancer risk protection that was previously used by the State. The potential reduction in cancer risk protection will increase the risk to the Nez Perce and other tribes.

The Tribe does not agree to, and in turn, objects to IDEQ using NPT fish consumption data in the way that they have. As we pointed out previously, salmon and other fish know no political boundaries, and our Tribal members exercise treaty-reserved fishing rights to fish in Oregon, Washington, and Idaho. To this end, we will 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.

¹ 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).

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 a government-to-government consultation has not occurred between the State of Idaho and the Nez Perce Tribe, we continue to emphasize that fish consumption data from NCI "Group 2" at 95% Percentile is the appropriate data to use, and that the Tribe must be treated as the target general population.

In summary, The Tribe has provided input to IDEQ throughout the rulemaking process. The Tribe concludes that IDEQ's human health criteria and the final proposed 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 re-evaluated, especially as it relates to the selected FCR and cancer risk level.

Thank you for considering the Tribe's comments on IDEQ's final proposal and this concludes my testimony today.

Sincerely,



Samuel N. Penney

Nez Perce Tribal Executive Committee (NPTEC)