



State of Idaho  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
BOARD OF ENVIRONMENTAL QUALITY

1410 North Hilton, Boise, ID 83706-1255, (208) 373-0502

C. L. "Butch" Otter, Governor  
John H. Tippetts, Director

**MEMBERS OF THE BOARD**

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Coeur d'Alene, ID 83814

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Dr. John R. MacMillan  
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Buhl, ID 83316

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Ponderay, ID 83852

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**LEGAL COUNSEL**

Douglas M. Conde

**BOARD ASSISTANT**

Rosie Alonzo  
(208) 373-0240

**IDAHO BOARD OF ENVIRONMENTAL QUALITY**

**MINUTES**

**December 10, 2015**

The Board of Environmental Quality convened on December 10, 2015, at 9:00 a.m. at:

**Department of Environmental Quality  
Conference Center  
1410 N. Hilton  
Boise, Idaho**

**BOARD MEMBERS PRESENT**

John McCreedy, Chairman  
Kevin Boling, Vice-Chairman  
Beth Elroy, Secretary  
Nick Purdy, Member  
Dr. John R. "Randy" MacMillan, Member  
Kermit Kiebert, Member  
Carol Mascareñas, Member

**DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT**

John H. Tippetts, Director  
Douglas Conde, Senior Deputy Attorney General-DEQ, Legal Counsel to the Board  
Paula Wilson, Rules Coordinator  
Rosie Alonzo, Management Assistant, Assistant to the Board  
Jess Byrne, Deputy Director  
Barry Burnell, Administrator, Water Quality Division  
Kari Kostka, Policy Analyst  
Dr. Jeff Fromm, Toxicologist  
Jason Pappani, Water Quality Standards Scientist  
Mary Anne Nelson, IPDES Program Manager  
Don Essig, Water Quality Standards Lead  
John Cardwell, Regional Administrator, Lewiston Regional Office

**OTHERS PRESENT:**

Jack Lyman, Idaho Mining Association  
Craig Jones, Idaho Power  
Devan Boyer, Shoshone Bannock Tribes  
Marcus Coby, Shoshone Bannock Tribes  
Jane Wittmeyer, Wittmeyer and Associates/CLW  
Justin Hayes, Idaho Conservation League

Austin Hopkins, Idaho Conservation League  
Alan Prouty, Idaho Association of Commerce and Industry/Simplot  
Pat Barclay, Idaho Council on Industry and the Environment  
Brenda Tominaga, Idaho Water Policy Group  
Michael Morse, US Fish and Wildlife Service  
Zach Hauge, Idaho Association of Commerce and Industry  
Charlotte Rodrigue, Upper Snake River Tribes Foundation  
Benn Brocksome, Office of the Governor  
Robbin Finch, Association of Idaho Cities/City of Boise  
Phil Bandy, Forsgren Associates  
Shelley Davis, Barker, Rosholt, & Simmons, LLP  
Dan Adams, JUB Engineers  
Angela Chung, Environmental Protection Agency, Region 10  
Lon Kissinger, Environmental Protection Agency, Region 10  
Scott Hauser, Upper Snake River Tribes Foundation  
Jim Werntz, Environmental Protection Agency, Idaho Operations Office  
Kevin Beaton, Stoel Rives  
Cherese McLain, Moore, Smith, Buxton, & Turcke  
Leigh Woodruff, Environmental Protection Agency, Idaho Operations Office  
Jim Zokan, Environmental Protection Agency, Region 10  
Sam Penney, Nez Perce Tribe  
Brent Olmstead, Milk Producers of Idaho

- ❖ All attachments referenced in these minutes are permanent attachments to the minutes on file at the Idaho Department of Environmental Quality.

### **CALL TO ORDER AND ROLL CALL**

Chairman John McCreedy called the meeting of the Idaho Board of Environmental Quality (Board) to order at 9:00 a.m. Roll call was taken with all members present.

Chairman McCreedy opened the floor for the public to address the Board on topics not specifically on the agenda. No topics were raised.

### **AGENDA ITEM NO. 1: CONSIDERATION OF HEARING OFFICER APPLICATION**

Ms. Paula Wilson introduced Mr. Chris Bromley to the Board. Mr. Bromley had earlier expressed interest in serving as a hearing officer for DEQ and Mr. Doug Conde provided comments in his favor. Board members asked Mr. Bromley questions regarding his background as a water and administrative law attorney and asked about his environmental law knowledge. Chairman McCreedy disclosed that Mr. Bromley had done work for Amalgamated Sugar Company in the past, but that he did not view it as a conflict of interest in accepting Mr. Bromley as a hearing officer. Chairman McCreedy acknowledged that in the event Mr. Bromley was assigned to represent Amalgamated Sugar Company in the future, the Board would have to look at the conflict. Mr. Conde concurred.

- **MOTION:** Mr. Nick Purdy moved that the Idaho Board of Environmental Quality approve the addition of Mr. Chris M. Bromley to the hearing officer list.
- **SECOND:** Mr. Kevin Boling.
- VOICE VOTE:** Motion carried unanimously.

**AGENDA ITEM NO. 2: PRESENTATION ON PROCESS FOR APPOINTMENT OF HEARING OFFICERS**

Mr. Conde recounted that at the May Board meeting there was a discussion on the method DEQ uses to solicit attorneys as hearing officers and on the process for selecting hearing officers for contested cases from the Board's approved list. One issue discussed at that time is there is no Board-approved process recorded for these practices. In response, Mr. Conde prepared a December 4, 2015, memorandum outlining the process for appointing hearing officers. Dr. Randy MacMillan asked if the Board were to approve the process outlined, how it would be memorialized and made public. Mr. Conde proposed that the process be posted to the Board website. In addition, he noted that once a hearing officer is appointed to an individual case, all parties receive notice and an opportunity for objection.

- **MOTION:** Ms. Carol Mascareñas moved that the Idaho Board of Environmental Quality approve the process for appointment of hearing officers as set out in the December 4, 2015, memorandum from Mr. Doug Conde.
- **SECOND:** Dr. MacMillan.
- VOICE VOTE:** Motion carried unanimously.

Chairman McCreedy commented on the seemingly low compensation rate for hearing officers and encouraged Director Tippetts to monitor the rate and the quality of services received.

**AGENDA ITEM NO. 3: WATER QUALITY STANDARDS, DOCKET NO. 58-0102-1201**

*RULEMAKING INITIATED TO EVALUATE LOCAL AND REGIONAL FISH CONSUMPTION INFORMATION AND TO UPDATE IDAHO HUMAN HEALTH CRITERIA*

Mr. Barry Burnell, Water Quality Division Administrator, introduced Mr. Don Essig, Water Quality Standards Lead, and in the audience, Dr. Jeff Fromm, Toxicologist. Mr. Burnell then gave a PowerPoint presentation on Idaho's Water Quality Standards, Docket No. 58-0102-1201, which addressed the Idaho Human Health Criteria rule history and rulemaking schedule, development and implementation of the fish consumption survey and policy discussion papers, and reviewed the final proposed rule. During the presentation Mr. Burnell and Mr. Essig responded to questions from the Board. Mr. Conde also provided comments during the presentation.

A correction was requested on page 12 of the final proposed rule in Section 05.b.ii. where it states, "...representative of the population to be protected, a mean adult weight, and adult 90<sup>th</sup> percentile..." The word "and" should read "an." Mr. Burnell indicated the correction would be made.

Chairman McCreedy opened the floor to members of the public who signed up to make comments or give testimony. The Board heard from: Jack Lyman, Idaho Mining Association (*in favor*); Devan Boyer, Shoshone Bannock Tribes (*opposed*); Scott Hauser, Upper Snake River Tribes Foundation (*opposed*) who joined Mr. Boyer, Shoshone Bannock Tribes (*opposed—written testimony also submitted for the record*) at the end of his testimony.

The Board broke for lunch at 12:30 p.m.

The Board reconvened at 1:00 p.m. with Chairman McCreedy calling the meeting back to order.

Public comment and testimony continued on the final proposed rule: Justin Hayes, Idaho Conservation League (*opposed*); Jane Wittmeyer, Wittmeyer & Associates/CLW Association on

behalf of Clearwater Paper Corporation (*in favor—written testimony also submitted for the record*); Zach Hauge, Idaho Association of Commerce and Industry (*in favor*); Charlotte Rodrique, Upper Snake River Tribes Foundation/ Burns Paiute Tribe (*opposed*), along with additional comments from Scott Hauser, Upper Snake River Tribes Foundation (*opposed*); Robbin Finch, City of Boise, Boise Public Works/Association of Idaho Cities (*in favor*); Angela Chung, Lon Kissinger, and Jim Werntz, Environmental Protection Agency (*provided views on the state process and responded to questions*); Sam Penney, Nez Perce Tribe, (*opposed—written testimony also submitted for the record*); and, Brent Olmstead, Milk Producers of Idaho/Idahoans for Sensible Water Regulation (*in favor*).

The Board asked DEQ staff additional questions following public comment and testimony.

- **MOTION:** Mr. Kevin Boling moved that the Idaho Board of Environmental Quality approve as pending rules the Water Quality Standards as presented in the final proposal under Docket No. 58-0102-1201, with the pending rules becoming final and effective upon the adjournment *sine die* of the Second Regular Session of the Sixty-third Idaho Legislature if approved by the Legislature.
- **SECOND:** Mr. Kermit Kiebert.  
**ROLL CALL VOTE:** Chairman John McCreedy (*Aye*); Mr. Kevin Boling (*Aye*); Ms. Beth Elroy (*Aye*); Mr. Nick Purdy (*Aye*); Dr. Randy MacMillan (*Aye*); Mr. Kermit Kiebert (*Aye*); and Ms. Carol Mascareñas (*Aye*). Motion carried unanimously.

**THE MEETING ADJOURNED AT 4:54 P.M.**

  
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John McCreedy, Chairman

  
\_\_\_\_\_  
Beth Elroy, Secretary

  
\_\_\_\_\_  
Rosie Alonzo, Assistant to the Board and Recorder

## MEMORANDUM

DATE: December 4, 2015  
TO: Members of the Board of Environmental Quality  
FROM: Doug Conde  
RE: Process for the Appointment of Hearing Officers

On November 18, 2015, I presented to you the process DEQ currently uses to solicit and present hearing officer applicants for Board approval and the process used to select a hearing officer from the Board's approved list to preside over a specific contested case. We also discussed ways of improving on that process, by giving the Board an opportunity to review and object to the selection of a hearing officer for a specific contested case. During that discussion, you requested that I set out the process in writing for your review prior to the December 10, 2015 Board meeting. This memorandum set forth the process to be used going forward for the appointment of hearing officers.

### Process for Soliciting and Presenting Hearing Officers for Board Approval

The hearing coordinator maintains a list of board approved hearing officers. The list includes the location of the hearing officers, the types of cases they have each presided over, and the case names and docket numbers. The case names and docket numbers provide information regarding the year the petition was filed and the subject matter of the case. A copy of the list is attached. The current list of Board approved hearing officers, and the towns in which they reside, is posted on the Board of Environmental Quality web page.

When DEQ feels the need to add Hearing Officers to the list, for example when DEQ no longer has sufficient hearing officers available in Boise where most contested cases are heard, DEQ will run an advertisement in the Advocate (the Idaho State Bar Journal) or other appropriate publication. DEQ may choose to use another appropriate form of advertisement, such as the internet. Often, however, DEQ may receive unsolicited requests from lawyers to act as hearing officers.

Minimum qualifications for hearing officers include current license to practice law in the state of Idaho, at least five years legal experience, and civil or administrative trial experience. Experience in environmental law is preferable. These minimum qualifications were determined by the Board.

Attorneys interested in becoming a hearing officer contact the hearing coordinator. Prior to board consideration of a hearing officer applicant, the applicant is asked to provide a resume with references, a letter of recommendation, and a short writing sample. Board consideration of the application is set for the next available Board meeting. The applicant is asked to attend the Board meeting. The attorney general's office may provide a recommendation to the Board regarding the hearing officer.

## Process for Appointment of Hearing Officers to Preside Over Contested Cases

Once a petition for a contested case is filed, a hearing officer must be chosen from the Board approved list. (The contested case rules provide that the appointment is administered by the hearing coordinator.) Criteria for choosing a hearing officer from the Board approved list:

### 1) Location

The hearing coordinator will choose a hearing officer nearest the location of the facility that is the subject matter of the petition unless all parties agree that it would be more convenient to hold the contested case hearing in Boise. In that case, a Boise hearing officer is chosen for appointment.

### 2) Subject Matter of the Petition

The hearing coordinator will choose a hearing officer that is most familiar with the subject matter of the petition.

### 3) Public Hearing on the Permit that is the Subject of the Petition

If a public hearing was held regarding the issuance of a permit and conducted by a Board approved hearing officer, and that permit once issued is appealed through a contested case, the hearing coordinator will choose the hearing officer who handled the public hearing, unless he or she is in a location that is not the most convenient for the contested case hearing.

### 4) List Rotation

In the event that criteria 1 through 3 do not apply, the hearing coordinator will choose the hearing officer that is up next in the rotation.

## Opportunity for Board Members to Reject the Hearing Coordinator's Selection of Hearing Officer

Upon receipt of a petition for a contested case, the hearing coordinator will forward to each Board member a copy of the petition along with a cover letter. The letter will inform the Board that the petition has been filed and will include the name of the hearing officer selected for appointment, and the criteria under which the selection was made. The letter will also request that the Board inform the hearing coordinator by a certain date whether a Board member would like to set a meeting to discuss the appointment of the hearing officer or to discuss whether the Board, or one or more members of the Board, would like to hear the contested case. If the hearing coordinator does not hear from the Board by the date specified in the letter, the hearing coordinator will proceed with the appointment of the hearing officer named in the letter. A copy of the letter is attached.

**DEQ Hearing Officers  
December 2015**

<u>Cases Assigned</u>	<u>Hearing Officer</u>	<u>Status</u>
0115-03-17 (Young's Septic Service)  0117-04-03 (Simplot Aberdeen WLAP)  0103-07-02 (Sunnyside Park Utilities)	Frederick F. Belzer Attorney at Law 850 East Center P.O. Box 4947 Pocatello, ID 83205 (208) 234-7118 Fax: (208) 234-7139 <a href="mailto:belzerlaw@aol.com">belzerlaw@aol.com</a>	Contract K093 Contract start date 8/1/15 Renew 6/16 (expires 7/31/16) \$135/hour
Cache Valley Idaho PM2.5 Nonattainment Area SIP hearing - 11/29/12  Portneuf Valley SIP hearing – 3/11/14  Cache Valley SIP for PM2.5 – 12/10/14 Preston	Mark R. Petersen Snake River Law PLLC 168 N. Main P.O. Box 4984 Pocatello, ID 83205-4984 Facsimile to 888-560-8785 (208)406-9885 <a href="mailto:mark@snakeriverlaw.com">mark@snakeriverlaw.com</a>	Contract expires 12/31/15 renewal in progress
0108-99-01,02,03 (Harbor View Estates/Gerlitz)  0101-02-01 (Potlatch)	Heidi Fisher Child & Fisher 212 S. 11 <sup>th</sup> Street, Ste. #1 Coeur d'Alene, ID 83814 (208) 667-4571 Fax: (208) 664-6648 <a href="mailto:mailbox@childandfisher.com">mailbox@childandfisher.com</a>	Contract K076 Contract start date 5/18/15 Renew 2/16 (expires 3/31/16) \$135/hour
	Richard P. Wallace Attorney at Law 2370 N. Merritt Creek Loup #1 Coeur d'Alene, ID 83814 (208) 292-2691 Fax: (208)292-2693 <a href="mailto:rich@wallacelegal.com">rich@wallacelegal.com</a>	Contract expires 12/31/15 renewal in progress
	Edwin L. Litteneker Attorney at Law P.O. Box 321 Lewiston, ID 83501-0321 Facsimile to (208)798-8387 (208)746-0344 <a href="mailto:ed@littenekerlaw.com">ed@littenekerlaw.com</a>	Contract K075 contract start date 5/18/15 Renew 2/16 (expires 3/31/16) \$135 per hour

<u>Cases Assigned</u>	<u>Hearing Officer</u>	<u>Status</u>
0102-07-06 (Pristine Springs 401 certification)  0102-08-02 (Micron Technology, Inc.)  0101-12-05 (Freeman v DEQ)	Elaine Eberharter-Maki Moore Smith Buxton & Turke 950 W. Bannock St., Ste 520 Boise, ID 83702 Facsimile to: 331-1202 331-1800 eem@msbtlaw.com	Contract K086 contract start date 7/3/15 Renew 5/16 (expires 6/30/16) \$135 per hour
0112-10-01 (city of Bliss FONSI)  0102-12-03 (401 water quality certification of Army Corps of Engineers 404 Nationwide Permits)  0101-14-01 (ConAgra/ Magnida intervenor)	Michael J. Kane Michael Kane & Associates, PLLC P.O. Box 2865 Boise, ID 83701-2865 Facsimile to 342-2323 342-4545 <a href="mailto:mkane@ktlaw.net">mkane@ktlaw.net</a> Tracey Presler <a href="mailto:tpresler@ktlaw.net">tpresler@ktlaw.net</a>	Contract expires 12/31/15 renewal in progress
0117-09-02 (Centers/Meridian Heights Water and Sewer Assoc.)  0101-10-03 (McClaran v DEQ)  0101-11-02 (Canyon County v DEQ)  0101-11-04 (Freeman v DEQ)	Trent Marcus Marcus, Christian & Hardee 737 N. 7 <sup>th</sup> Street Boise, ID 83702-5504 Facsimile to 342-3580 342-3563 <a href="mailto:tmlaw@qwestoffice.net">tmlaw@qwestoffice.net</a>	Contract K078 contract start date 5/18/15 Renew 2/16 (expires 3/31/16) \$135 per hour
0101-12-02 (Hidden Hollow Energy LLC) 0101-12-04 (Hidden Hollow Energy LLC)	John C. Lynn Attorney at Law 776 E. Riverside Dr., Ste. 240 Eagle, ID 83616-6964 Facsimile to 258-8416 685-2333 860-5258 cell phone <a href="mailto:johnlynn@fiberpipe.net">johnlynn@fiberpipe.net</a> <a href="http://john@johnlynnlaw.com">john@johnlynnlaw.com</a>	Contract K103 contract start date 9/1/15 Renew 7/16 (expires 8/31/16) \$135 per hour
	David E. Wynkoop Sherer & Wynkoop 730 N. Main Street P.O. Box 31 Meridian, ID 83680-2604 887-4800 Facsimile to 887-4865 <a href="mailto:Dwynkooplaw@gmail.com">Dwynkooplaw@gmail.com</a>	Contract K087 Contract start date 7/1/15 Renew 5/15 Expires 6/30/16

## EXAMPLE COVER LETTER

July 30, 2012

Board of Environmental Quality  
1410 N. Hilton  
Boise, ID 83706-1255

Hidden Hollow Energy LLC v DEQ, Docket No. 58-0101-12-02

Dear Members of the Board of Environmental Quality:

Enclosed is a copy of a Petition Initiating a Contested Case filed on July 24, 2012 and the Notice of Filing and Service of Petition. IDAPA 58.01.23.047 requires that the Board publish a legal notice upon receipt of a petition for contested case. Enclosed is a copy of the legal notice for newspaper publication.

*By August 13, 2015 (10 days from mailing of this letter), I will appoint David Wynkoop as the hearing officer for this case if I have not received notice that a member of the Board requests the scheduling of a Board meeting to discuss the appointment of a different hearing officer or to discuss whether the Board, or one or more members of the Board, wish to hear the contested case in lieu of the proposed hearing officer.*

*I selected David Wynkoop to preside over this contested case because he is located in Boise, which is the location of the facility that is the subject matter of this petition, and he has not been appointed since his approval by the Board on May 20, 2015. The other criteria do not apply.*

If you have any questions, or if I can be of any further assistance, you can contact me at (208)373-0418.

Sincerely,

Paula J. Wilson  
Hearing Coordinator

# Idaho Board Of Environmental Quality

## Idaho Human Health Criteria for Toxic Pollutants

**Barry N. Burnell**

**Don Essig**

**Dr. Jeff Fromm**

**December 10, 2015**



# Overview

- **Human Health Criteria Rule History**
- **Rulemaking Schedule**
- **Fish Consumption Survey**
- **Policy Development**
- **Rule Review**



# History

- 2004 – Oregon DEQ submits their Rule to EPA (17.5 g/day)
- 2005 – April 5<sup>th</sup> Idaho DEQ Announces Rulemaking
- 2005 – IDEQ Holds Negotiated Rulemaking Meetings and publishes proposed rule.
  - Rule shifts from 6.5 to 17.5 g/day the EPA Nationally recommended fish consumption rate
  - EPA applauds IDEQ rulemaking
- 2005 – November IDEQ Board of Environmental Quality Adopts the Rule

# History

- 2006 – Idaho Legislature Approves the Rule
- 2006 – July 7 IDEQ Submits Rule to EPA

## Time Elapses

- 2010 – EPA Disapproves Oregon Rule
  - (17.5 g/day)
- 2011 EPA Approves ODEQ Revised HH Criteria
  - Based on a fish consumption rate of 175 g/day
- 2012 May 10 – EPA Disapproves Idaho DEQ Human Health Toxics Criteria
  - Based on a fish consumption rate of 17.5 g/day



# Consequences of EPA's Disapproval

1. EPA must Promulgate a Rule for Idaho, If DEQ fails to take actions EPA identified to remedy the disapproval
2. EPA identified what DEQ must do:  
“To address this disapproval action, Idaho must evaluate local and regional fish consumption information to determine whether its statewide criteria are protective of designated uses.”



# Human Health Criteria for Toxic Pollutants

Docket No 58-0102-1201

- DEQ Started rulemaking August 2012
- Evaluated Existing Data
  - Found to be limited in scope for Idaho residents, old and of questionable quality



# HHC Rulemaking Schedule

- ✓ FCR Survey Development - 2012 - 2013
- ✓ FCR Survey Implementation - 2014 - 2015
- ✓ Policy Discussions – 2013 - 2015
- ✓ Data Analysis – August 2015
- ✓ Proposed Rule – October 2015
- Board Review – December 2015
- Legislative Review – January 2016



# HHC Rulemaking Actions

## Meetings

- Fish Consumption Survey Design (2012-13)
  - 8 meetings
  - BSU Public Policy Center
  - Public Comment



# HHC Rulemaking Actions

## Fish Consumption Surveys (2014-2015)

- General Population
- Idaho Resident Anglers

## EPA Efforts

- Tribal Member Survey – EPA Sponsored
  - FCRs, Nez Perce and Shoshone-Bannock
  - Heritage Rates, Kootenai, Coeur d'Alene, Shoshone-Paiute, Nez Perce and Shoshone-Bannock



# FISH CONSUMPTION RATE



# Dietary Recall – NCI Results

Estimated Usual Fish Consumption Rates, g/day

## All Fish

Survey/Population	50%	Mean	75%	90%	95%	99%
Idaho Total	14.2	22.0	29.7	51.1	67.7	118
Idaho Angler	15.9	26.5	36.9	64.6	86.4	146
Nez Perce	49.5	75.0	---	173	232	---
Shoshone Bannock	14.9	34.9	---	94.5	141	---
EPA 2014***	17.6	---	32.8	52.8	68.1	105

# Tribal Fish Groups

**Table 1. Food Frequency Questionnaire Species Groups**

Species Group	Description	Species and Groups Included
Group 2	Near coastal, estuarine, freshwater and anadromous	All species in Groups 3, 4 and 5 as well as lobster, crab, shrimp, marine clams or mussels, octopus* and scallops
Group 3	Salmon or steelhead	Chinook, coho, sockeye, kokanee, steelhead, other salmon and any <u>unspecified salmon species</u>
Group 4	Resident trout	Rainbow, cutthroat, cutbow, bull, brook, lake, brown, other trout and any unspecified trout species.
Group 5	Other freshwater finfish or shellfish	Lamprey, sturgeon, whitefish, sucker, bass, bluegill, carp, catfish, crappie, sunfish, tilapia, walleye, yellow perch, crayfish, freshwater clams or mussels, other freshwater finfish and any unspecified freshwater species

# Dietary Recall – NCI Results

Estimated Usual Fish Consumption Rates, g/day

## Idaho All Fish / Tribal Group 2 / non-Marine Fish

Survey/Population	50%	Mean	75%	90%	95%	99%
Idaho Total	14.2	22.0	29.7	51.1	67.7	118
Idaho Angler	15.9	26.5	36.9	64.6	86.4	146
Nez Perce	36.0	<b>66.5</b>	81.7	159	234	---
Shoshone Bannock	6.5	18.6	20.0	48.9	80	---
EPA 2014	5.0	---	11.4	22.0	31.8	61.1

# Various Consumption Rates

6.5 g/day = ~7 ounce meal once a month

17.5 g/day = 4.3 ounce meal once a week

66.5 g/day = 4.7 ounce meal every other day

175 g/day = ~6 ounce meal every day



# HHC Rulemaking Actions

## Meetings

- Policy Decisions/Papers (2013-15)
  - 9 Meetings
  - White Papers
  - Public Comment



# HHC Policy Decisions/Papers

- 1) Fish Consumer or Non-consumers (Oct 2013)
- 2) General Population or Targeted Subpopulation (Dec 2013)
- 3) Probabilistic Risk Assessment or Deterministic Assessment (April 2014)
- 4) Market Fish or Local Fish & Relative Source Contribution (May 2014)
- 5) Anadromous Fish (July 2014)
- 6) Suppression (October 2014)
- 7) Risk Management & Protection of Public Health (Dec 2014)
- 8) Implementation Strategies (March 2015)



# HHC Rulemaking Actions

## Data Analysis (2015)

- National Cancer Institute (NCI) Method
- Probabilistic Risk Assessment (PRA) Method
- Deterministic Calculations



# Summary of Comments

## 25 Categories of Public Comments

- 7 Tribes
- 2 Environmental Groups
- 11 Trade or Industry Groups
- 76 Citizen Letters + 1 Citizen Email
- AIC and NACWA
- EPA



# Summary of Comments

- Response to Comments prepared
- Comments are Summarized
- DEQ Response provided
  
- Comments Requested Changes to Rule or Advocated for Particular Positions
- AIC Supportive



# Non-Carcinogen Formula

$$AWQC = RfD \times RSC \times \left( \frac{BW}{DI + (FI \times BAF)} \right)$$

# Carcinogen Formula

$$AWQC = RSD \times \left( \frac{BW}{DI + (FI \times BAF)} \right)$$

$$RSD = \frac{\text{Target Incremental Cancer Risk}}{\text{Cancer Potency Factor}}$$

# Idaho Rulemaking

- Fish Intake (FI) – Nez Perce Tribe  
Group 2 Fish  
66.5 g/day mean (~70<sup>th</sup> percentile)
- Deterministic Criteria Calculation
- Bioaccumulation Factors (BAF)  
Bioconcentration Factors when BAF  
not available



# Idaho Rulemaking

- Relative Source Contribution (RSC)  
Use Default Values –
- Body Weight (BW) –  
Idaho Survey 80Kg Mean
- Drinking Water Intake –  
EPA 2.4L 90<sup>th</sup> %tile



# Idaho Rulemaking

Risk for Carcinogens use  $10^{-5}$

- EPA guidance allows states to choose from a range of  $10^{-5}$  to  $10^{-6}$  for the incremental increase in cancer risk used in calculating criteria for the general population
- Higher Consumers should be protected at  $10^{-4}$  or lower



# Idaho Rulemaking

## Risk for Carcinogens

- Idaho has chosen to use an incremental increase in cancer risk level of  $10^{-5}$
- General Population – generally at a lower risk
- 665 g/day would be at a risk level of  $10^{-4}$
- Risk can never be made the same for everyone



# Regional Comparisons

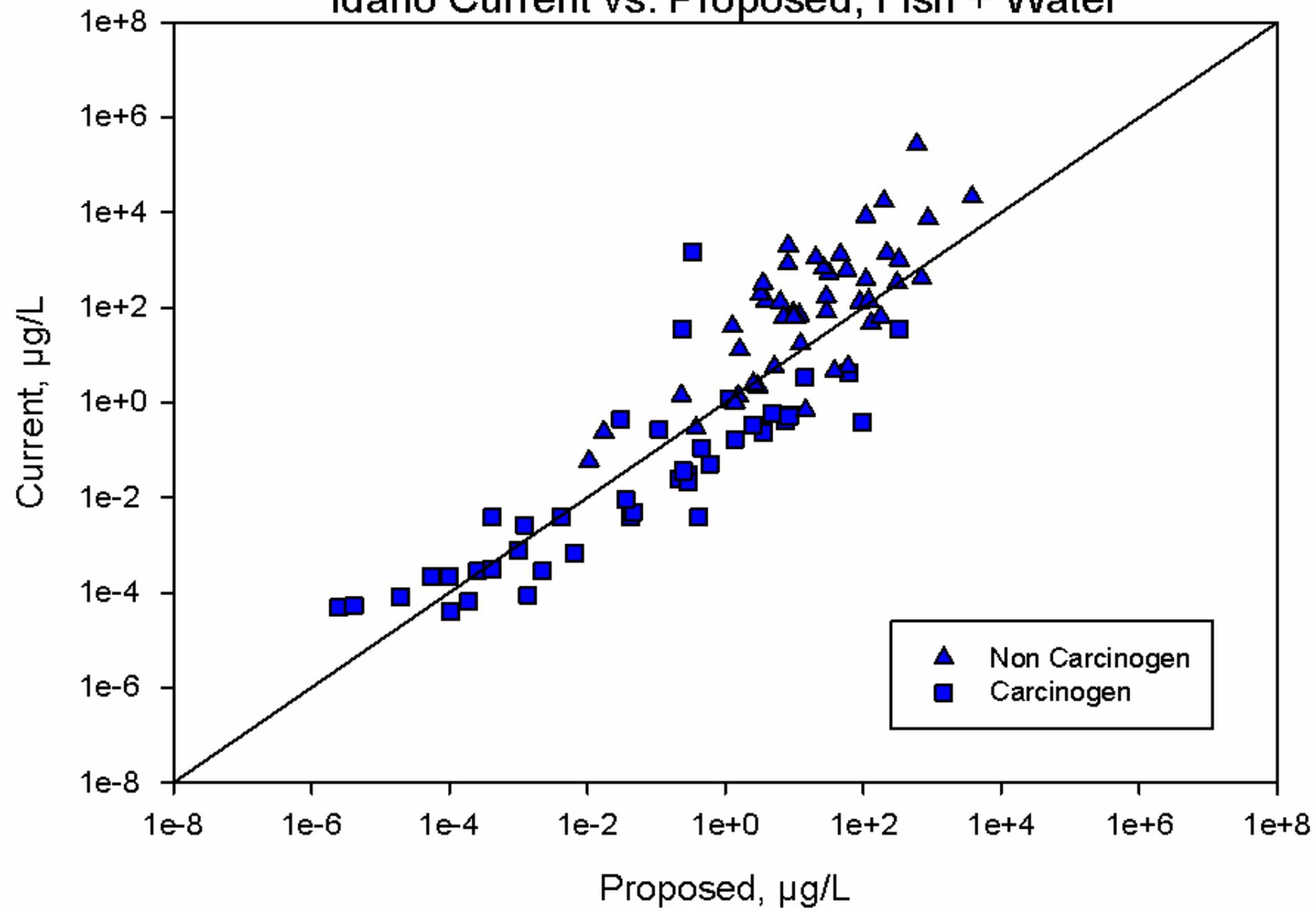
State	Fish Consumption Rate (g/day)
Oregon	175
Idaho	(Disapproved 17.5) 66.5
Washington	6.5 (EPA at 175 and risk of 10-6)
Alaska	6.5
Utah	17.5
Montana	17.5
Nevada	6.5
Wyoming	17.5

# What Criteria are at Issue?

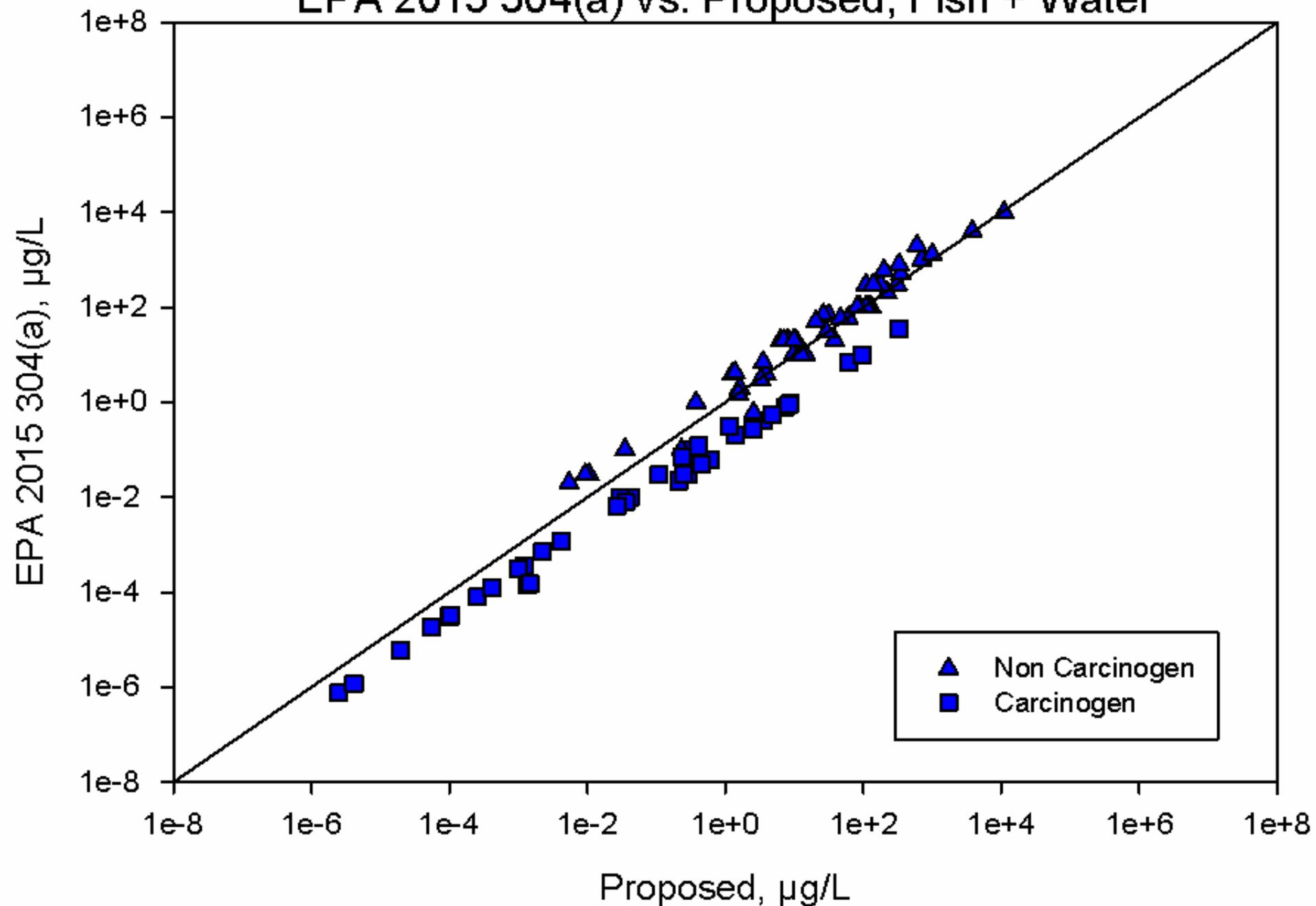
- 105 Toxic Substances
- 209 Revised or New Criteria
  - 94 revised substances
  - 11 additional substances
    - based on EPA's 2015 recommendations
    - Change in understanding of toxicity
    - No criteria currently in Idaho WQS
    - Copper



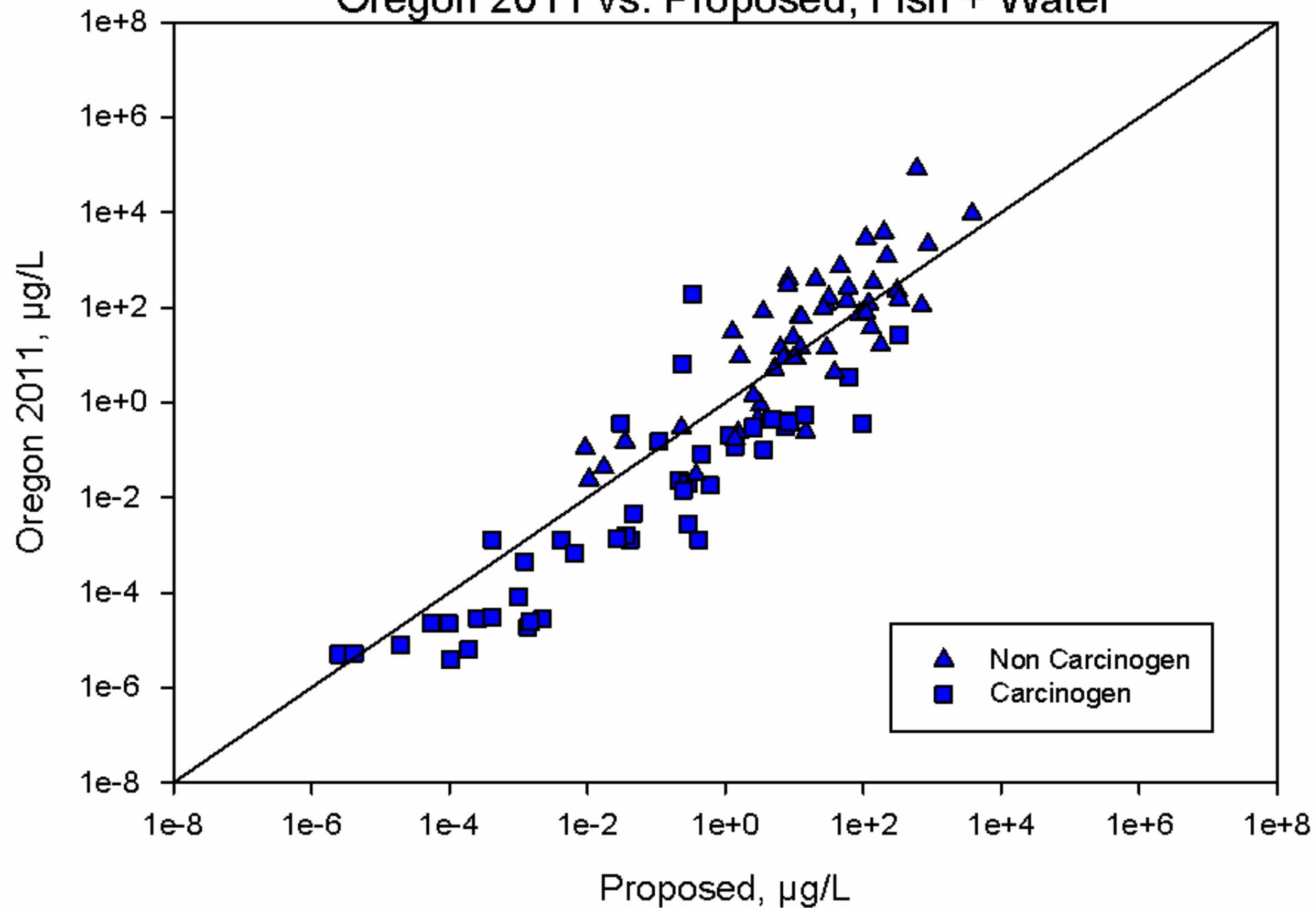
# Idaho Current vs. Proposed, Fish + Water



# EPA 2015 304(a) vs. Proposed, Fish + Water



# Oregon 2011 vs. Proposed, Fish + Water



# Some Notable Criteria Shifts

- 6 compounds have switched from cariogenic effect to non-cariogenic effect driving the criteria:
  - Benzene
  - Methylene Chloride
  - Tetrachloroethylene (Perchloroethylene)
  - Trichloroethylene
  - 2,4,6-Trichlorophenol
  - Hexachloroethane
- Technical Support Document 2015



# **HUMAN HEALTH CRITERIA RULE REVIEW**



# Questions



# The SHOSHONE-BANNOCK TRIBES

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FORT HALL BUSINESS COUNCIL  
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December 10, 2015

Idaho Board of Environmental Quality  
Meeting regarding Water Quality Standards  
Docket No. 58-0102-1201 (Pending Rule)

**Re: Testimony of the Shoshone-Bannock Tribes regarding the final submission of the 'Fish Consumption' rule for Idaho waters.**

*Tsaangu Beachiku*, Good Morning members of Idaho's Board of Environmental Quality. My name is Devon Boyer and as a member of the Fort Hall Business Council I have been asked to deliver our testimony regarding IDEQ's submission of the final draft rule that will set fish consumption rates in Idaho waters and impact water decisions for human health. The Fort Hall Business Council, which is the governing body of the Shoshone-Bannock Tribes, is here today to speak on behalf of our Tribal membership and our Tribal lands located on the Fort Hall Reservation in southeast Idaho. On behalf of the Tribes I would like to express our appreciation for allowing time to hear this testimony on behalf of our most sacred resource, our water; that one thing tying us all together here today. Our people believe strongly that water is life, everything living owes its very existence to the presence of water, and Idaho has a problem today with the water flowing through our lands, across our mother earth. I am here on behalf of my people to say clearly that we will never stop fighting to protect our water, those who swim in it, and our membership who continue living on those gifts as our ancestors did for thousands of years.

The Tribes are very concerned with the final draft rule presented here today for your approval, we are concerned that it doesn't protect water resources in Idaho and it doesn't protect our membership. The Tribes entered into the Fort Bridger Treaty, a solemn agreement with the United States in 1868, long before Idaho was even a State, that our people would be able to 'hunt on the unoccupied lands of the United States' so long as game was found there. Your decision here today represents an opportunity for each of you to honor that obligation to Idaho citizens, members of the Shoshone-Bannock Tribes, and to honor that agreement our ancestors forged over a century ago.

Before I go into the specifics, I want to point out that two major decisions were made by IDEQ behind closed doors after the rulemaking process was over. During numerous meetings with the Tribes you presented two guiding principles for this process, first that we would not increase our cancer risks and second that this new rule would not allow for water quality standards to slip

backward. Somewhere along the way, a choice was made to reduce the acceptable cancer risk rate from one in a million to one in one-hundred thousand, you increased the risk by an entire order of magnitude in spite of these earlier promises, not to mention that the rule here in front of you today did not keep strong protections against contaminants in place. Listen to me carefully now, the most valued people in our community are our elders and our children; they are the ones responsible for passing our traditional cultural practices from generation to generation. These are the most vulnerable people in our community to the health risks related to fish consumption and they will be impacted the most by the choice you make here today. Based on acceptable cancer risk rate in front of you, this proposed rule amounts to a fish consumption rate for carcinogens of only 6.65 grams per day; less than what you can fit on a cracker. You've proposed a set of standards that imperils the existence of my people.

This rule is clearly less stringent than what you've proposed for water quality criteria in the previous drafts for carcinogens. There is a disproportionate impact on the members of the Shoshone-Bannock Tribes, a protected class; and, as the highest fish consuming population in Idaho we are outraged to see our membership protected at a lower rate than the general population. As Idaho's original citizens, we deserve the same protections afforded to the general population and it speaks volumes that we would be considered as less worthy of consideration than anyone else. In fact, if you would just set consumption rates that would be protective of our current rates, then the entire population of Idaho would be better off; the water would be cleaner, the fish would be safer, and we could rest easy knowing that each of our children are living in a better world. But the rule in front of you puts us at an unacceptable high risk.

To ensure our rights and interests were addressed by IDEQ, the Tribes participated throughout the rule making process...providing comments on policy choices, the draft rule, and even making a formal presentation at a rule making meeting on current issues that suppress our consumption of fish. Our efforts then went a step further by providing IDEQ with a peer-reviewed study titled the "Idaho Tribes' Fish Consumption Study" and then produced a defined "Tribal Heritage Rate" based on our past consumption. We submitted these studies for your consideration, along with all of the scientific methodologies used to develop these reports and consumption rates. We didn't go through all this effort because we thought our work would be disregarded in the end, we didn't go through all of this process because we wanted to see a rule that didn't protect our membership... We went through all of this work because we wanted to demonstrate, in a manner that you would understand, the challenges that we are facing in today's world. You can imagine how discouraging it was to read this final rule and learn that once again Tribal comments were dismissed out of hand. What we see now is a drastically different proposal from the original rule and doesn't consider our current or historic consumption rates. We expect the Board to send this proposal back to your staff based on the unacceptable health risks it carries to Tribal members and its direct impact on our subsistence lifestyle and Treaty reserved rights.

I'm going to shift gears here a bit and talk about something you may not have considered in this rule, even though we've raised this issue numerous times. The Fort Hall Reservation, located in Southeast Idaho, is the permanent homeland of the Tribes and we have Treatment as a State for the purposes of implementing the Clean Water Act. The Fort Hall Reservation is surrounded by impaired waters from the Portneuf, Blackfoot, and Snake River basins. According to your own

reports, 27.9% of the IDEQ sampled stream miles were classified as in poor condition, not fully supporting cold water aquatic life, with some of the worst water conditions found in the Pocatello Region. Along with being listed on the 303(d) list, the Portneuf River is constant reminder to our Tribal membership of the real health risks that come with the consumption of fish from our own reservation. The Portneuf River leaves the Reservation without any known environmental contaminates, then it meanders through private lands, past industrial sites and municipalities until it finally returns back onto the Reservation. After its journey through Southeast Idaho, the water quality is so bad that we have to put out signage advising our own members that there is a risk to their family if they eat fish caught from our own reservation. The Tribes are now in the process of drafting and approving water quality standards that will be more stringent than the criteria found in this final draft rule, thereby increasing the likelihood that we will find our respective entities unnecessarily in an adversarial relationship over water.

We also implore you to have a broader focus upon other forms of aquatic life. As the proposed rulemaking now reads, it focuses upon Water & Fish. It does not provide any water quality criteria for other forms of aquatic life. For example, aquatic plants are gathered by Tribal members for subsistence and cultural use. Plants gathered for cultural uses are likely bioaccumulating environmental pollution via water sources. Another example could occur with aquatic insects, as biomagnification could occur through predator-prey associations and dietary accumulation ultimately impacting Tribal members who make subsistence upon natural foods. This situation is especially likely to occur along the Snake River as it travels through the Fort Hall Bottoms of the Reservation where there is a high number of Tribal members making subsistence upon a diversity of natural foods. Combined the effects of environmental pollution puts the Tribes at-risks of exposure from not only fish, but other forms of aquatic life.

The Tribes also wanted comment on the assumptions of the Ambient Water Quality Criterion equation and lack of transparency of metrics used. For example, the TSD reference the “NWRG 2015” for body weight (BW) assumptions, but this reference is not listed in the References nor could we find this document anywhere. The BW calculation is an important metric and we feel it should be based upon the BW of children, a demographic that is highly sensitive to environmental pollution. The revisions to the proposed rule also do not clearly identify the Bioaccumulation Factor (BAF), or if the value of 66.5 g/day was used for the Fish Intake in the Idaho’s Technical Support Document for Human Health Criteria Calculations – 2015 (TSD). It is of utmost importance to clearly identify assumptions used in the calculations, and this has not been provided by the IDEQ. A lack of transparency on assumptions and values used in the calculations is likely a reflection hasty planning, and it is critically important to the Tribes that this rule making process be transparent on assumptions.

In addition to being at risks through fish consumption, we are now concerned with drinking water from streams after our sacred ceremonies. We drink our sacred water after recovering from arduous ceremonial events that require our abstinence of food and water for four days during the hottest time of the year. Our spiritual leaders are worried now that ingesting polluted waters after these types of ceremonies could have life threatening consequences. I know that most of us in this room can still remember the time when any of us could drink cold, clean water right out of the stream on a hot day; but the rule in front of you doesn’t bring us back to those days, it makes it a distant memory we won’t be able to pass on to our children and grandchildren.

Because here is the truth ladies and gentlemen, the Snake River and most other rivers in Idaho have set new records over the past few years for low flows and high temperatures. This rule isn't taking into consideration the impacts climate change will have on water quality and quantity, or how that will affect aquatic life in our State. The science is clear, increasing air temperatures and water diversions will result in high instream temperatures in Idaho; water quality will be far worse in the years to come due to climate change and unsustainable resource management. Both of these effects will have major consequences for the aquatic ecosystem that we have made our subsistence upon since time immemorial. We need a rule that provides innovative direction for water allocation, protects water quality, preserves our cold water ecosystem, and implements a framework to improve our water resources; sadly, the rule in front of you today doesn't do any of those things.

Esteemed members of the Board, you may disagree with me about the reasons we need to relax regulations in Idaho; you may be thinking about financial impacts to industry or the hard choice to weigh the external costs of pollution to promote clean water. You may disagree with me about the Tribes perspective on this rule, but you cannot disagree with the facts. Water quality and the aquatic ecosystem are in peril throughout our State, my people who consume high amounts of fish from these waters are at a higher risk than ever before, and we have high hopes that you will be making the hard choices to set it right. The science is all there, you've gotten all of our documents throughout this process; as well as countless others that back up everything I've told you today.

You have a choice before you right now...send this rule back to your staff, have them bring back a new document that places a higher value not only upon human life, but the function and health of our freshwater ecosystems. Have your staff bring back a document that protects our waters and the aquatic systems that rely upon cold, clean water; now and forever, *esto perpetua* like your motto reads. Ladies and gentlemen, you have a choice in this moment to protect our waters, preserve our traditions, and promote a restoration of an aquatic ecosystem we've degraded over time. The Shoshone-Bannock Tribes encourages you; I encourage you, to take this opportunity to send this rule back to the drawing board and bring back one that protects us all. Thank you for your time today.

Sincerely,

A handwritten signature in black ink, appearing to read "Devon Boyer", written in a cursive style.

Devon Boyer, Fort Hall Business Council  
Shoshone-Bannock Tribes

December 10, 2015

Members of the Board of the Idaho Department of Environmental Quality (IDEQ), my name is Jane Wittmeyer and I am here today on behalf of Clearwater Paper Corporation as regards to Docket No. 58-0102-1201.

Clearwater Paper has been actively involved on this issue as the State of Idaho DEQ has worked through the process of determining how best to develop a balance between protection human health and maintaining a strong economy.

It has been a long journey and the IDEQ staff is to be commended for its work on this important matter. Over the past three years IDEQ staff worked diligently and fairly to ensure all voices were heard and delivered to Idaho a final rule unique to Idaho. While no rule is ever perfect, Clearwater Paper believes that the final rule before you today should be approved and implemented.

The following actions, taken by IDEQ, has persuaded us to take a position of supporting this rule because of the following reasons:

- ✦ **The revised criteria utilized on Idaho specific fish consumption studies.** The State of Idaho conducted a state-wide fish consumption survey; this survey included residents of Idaho including those subpopulations (such as anglers and Native Americans) who consume higher rates of fish than the average Idahoan. This study has includes data from EPA that conducted a separate study of fish consumption by tribes in Idaho. Idaho is the only state in the Northwest that has had a state-wide fish consumption study done and also has accompanying studies for Native American residents of Idaho. These studies provide an Idaho specific, sound foundation for understanding fish consumption by all Idaho residents and the use of such information in the calculation of water quality criteria. Idaho's Legislature approved an appropriation of \$300,000 to conduct the survey.
- ✦ **The fish consumption rate chosen by Idaho for use in calculating water quality criteria is 66.6 grams per day. This rate is the mean of the Nez Perce Tribe fish consumption rate.** This rate is 2.5 times the rate for the general population of Idaho; the mean fish consumption rate for all Idaho residents is 26.5 grams per day. EPA, in 2014, calculated that the national 90<sup>th</sup> percentile fish consumption rate is 22 grams/day. **Idaho, has chosen a more restrictive fish consumption rate to use in calculating water quality criteria.**
- ✦ **The proposed rule is protective of human health for the residents of Idaho.** The State of Idaho, as part of setting water quality criteria, has policy decisions to make, such as what incremental target cancer rate to use in the calculations. EPA guidance provides that states can use a range from  $1 \times 10^{-4}$  to  $1 \times 10^{-6}$  incremental target cancer rate. The Department has chosen an incremental target cancer rate of  $1 \times 10^{-5}$  in

calculating water quality criteria. This value is very protective and “in the middle” of the EPA’s own target cancer rates which means it is consistent with EPA guidance.

✦ **Risk Assessment**- While Clearwater Paper Corporation prefers the use of the Probabilistic Risk Assessment process, we can support the DEQ position to use the Deterministic Risk Assessment. In future discussions, the Probabilistic Risk Assessment process should be utilized, as it is more reflective of the population and is reflective of the Idaho state requirement that IDEQ use the “best available standards” in setting policy. There is no significant difference in protection of the public health by utilizing the less conservative standard, while there is significant difference in the cost of compliance by both industry and the taxpaying public.

On behalf of Clearwater Paper, I thank you for your time and work on this issue and ask that you approve this rule as it comes before you today.

**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 95<sup>th</sup> Percentile and at cancer risk level of  $10^{-6}$ .<sup>1</sup> 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.

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<sup>1</sup> The Tribe’s NCI “Group 2” FCR at the 95<sup>th</sup> Percentile is 233.9 g/day (this is supported by FFQ “Group 2” FCR at the 95<sup>th</sup> Percentile which is 327.9 g/day). Moreover, the fisher values for NCI “Group 2” FCR at the 95<sup>th</sup> Percentile which is 345.0 g/day (this is supported by FFQ “Group 2” FCR at the 95<sup>th</sup> 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)