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January 18, 2012

Via E-mail (fishconsumption@ecy.wa.gov)

Mr. Ted Sturdevant
Director
Department of Ecology
State of Washington
P.O. Box
Olympia, WA 98504-

Re: Comments on Fish Consumption Rate Technical Support Document

Dear Director Sturdevant:

Please accept these comments on behalf of Inland Empire Paper Company (IEP) on the Fish Consumption Rate Technical Support Document (TSD) published by the Department of Ecology in September 2011.

IEP urges Ecology to suspend development of default statewide fish consumption rates (FCRs) until a more thorough scientific evaluation can be performed to assess any public health benefits. The TSD document provides a superficial analysis of complex scientific issues and a number of policy determinations that are not appropriate for a technical guidance document. The TSD cites to a difference between assumptions used in cleanup standards under the Model Toxics Control Act (MTCA) and human health criteria in the state Water Quality Standards. There is no explanation, however, why the assumptions in MTCA cleanup standards and Water Quality Standards have to be the same. The standards regulate different media and presumably different risk exposures. Furthermore, there is no explanation as to why new FCRs are necessary to protect human health. Ecology appears to assume that the human health criteria in our Water Quality Standards are not protective but there is no discussion in the TSD as to how Ecology reached that determination, and specifically whether new FCRs will provide any meaningful difference in protecting human health. The document itself was also adopted in clear violation of the Administrative Procedure Act (APA). Absent compliance with the procedural rulemaking requirements, including the requirements for significant legislative rules, the TSD cannot be legally relied on in any future standard setting and any standards relying on the TSD would be considered arbitrary and capricious.

1. The Adoption of FCRs Must Comply with APA Rulemaking Requirements for Notice and Public Comment

Default FCRs cannot be lawfully established without compliance with the APA rulemaking procedures. Ecology must provide notice and an opportunity to comment on any proposed rule pursuant to RCW 34.05.320 and 325. A central requirement for rulemaking is the opportunity for meaningful participation by parties who will be impacted by the rule. Laws of 1995, ch. 403, §(2)(d). Ecology cannot provide an adequate opportunity to comment on the basis for the recommended FCRs until they are subject to consideration in the context of actual standard setting.

The importance of these considerations is documented in the January 11, 2012, comment letter from the National Council of Air Stream Improvement, Inc. The TSD document fails to provide an assessment of relative human health risks associated with the existing FCRs and the default FCRs in the TSD or to what degree health risk would be reduced by changing the FCR. There is no analysis of the health risks associated with the general population, no consideration (or at least disclosure) of the data and methodology in several of the fish consumption studies and weak statistical assumptions are used to weigh the data.

Ecology must accordingly defer any FCR determination to full rulemaking under the APA with adequate public notice and an opportunity to comment on these and other aspects of the FCRs.

2. The Adoption of Default FCRs is Subject to APA Rulemaking Requirements for Significant Legislative Rules

Statewide default FCRs must be adopted as significant legislative rules as defined in RCW 34.05.328. The APA requires Ecology to prepare a statement of the goals and specific objectives for the default FCRs. Ecology is also required to provide, at the time it issues public notice of rulemaking, a cost benefit analysis that documents the alternatives considered by the department, including a determination that the selected standard is the least burdensome alternative. There must be substantial evidence in the record that explains how the rule meets the goals and specific objectives of the department. This documentation must be sufficient to persuade a reasonable person that the determinations are justified. Finally, RCW 34.05.328 requires Ecology to include an implementation plan with the notice of rulemaking.

It is not reasonably possible to comment on the merits of the recommended FCRs in the TSD document without the required disclosure for significant legislative rules. Nor would it be appropriate for Ecology to adopt statewide default FCRs without a cost benefit analysis and implementation plan for the resulting standards.

Additionally, the goals and objectives of the TSD FCRs may be considered arbitrary and capricious unless there is an evaluation of what additional level of human health risk is protected by use of the TSD default FCRs compared to the current FCR assumptions in the MTCA and Water Quality Standards.

Ecology should not pursue default FCRs until it has articulated a coherent goal and specific objective for protection of human health based on rigorous, peer reviewed science and the specific criteria on what science will be used in the assessment. It is also inappropriate for Ecology to embark on this effort without first assessing the costs and benefits of the proposal together with a detailed implementation plan.

3. Ecology may not Lawfully use a Guidance Document to Circumvent APA Rulemaking Requirements

Ecology should recognize that it cannot bypass rulemaking requirements by adopting default FCRs in a guidance document. Washington Courts have been clear that adoption of a substantive rule requires compliance with APA rulemaking requirements. In *Simpson Tacoma Kraft Co. v. Ecology*, 119 Wn.2d 640, 835 P.2d 1030 (1992), the Court invalidated Ecology's promulgation of dioxin numeric water quality standards because Ecology did not utilize APA rule-making procedures. The Court emphasized the important purpose of rule-making procedures in providing the public with notice and an opportunity to comment. *See also Hillis v. Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997)(internal agency procedure for processing water rights had to be adopted by rule).

Federal courts have similarly held that EPA cannot bypass public participation requirements through the use of "guidance" documents. *See National Mining Assoc. v. Jackson*, No. 10-1220, 2011 WL 124194 (D. D.C. Jan. 14, 2011). The Court held: "If an agency adopts a new position inconsistent with an existing regulation, or effects a substantive change in the regulation, notice and comment are required." *Id.* at *8. The Court found that because EPA was treating the Guidance Memorandum as binding, and it had a practical impact on permit applicants, the memorandum was a legislative rule—an "agency action that has 'the force and effect of law'", and thus public notice and comment was required. *Id.* at *5, 6, 8.¹ *See also Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000); *CropLife America v. EPA*, 329 F.3d 876 (D.C. Cir. 2003);

Conclusion

Ecology should commit to respond to all comments received on the TSD document and agree to further suspend development of default FCRs until a proper and thorough scientific assessment can be performed to validate any public health benefits. Ecology should further commit to subjecting any default FCRs to rulemaking as significant legislative rules.

¹ EPA objections or modifications to permits are generally regarded as final agency action. *See Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196, 100 S.Ct. 1093, 63 L.Ed.2d 312 (1980).

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I appreciate your consideration of these comments.

Sincerely,

TUPPER MACK WELLS PLLC

A handwritten signature in black ink, appearing to read "James A. Tupper, Jr.", written in a cursive style.

JAMES A. TUPPER, JR.