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**Adam Krantz**

September 13, 2016

Docket ID: EPA-HQ-OW-2016-0419

Water Docket

Environmental Protection Agency, Mailcode 28221T

1200 Pennsylvania Ave, NW

Washington, DC 20460

Via email: [ow-docket@epa.gov](mailto:ow-docket@epa.gov)

**RE: DRAFT GUIDANCE FOR CONDUCTING FISH CONSUMPTION  
SURVEYS (EPA 823-B-16-001, JUNE 2016)**

NACWA appreciates the opportunity to comment on the draft *Guidance for Conducting Fish Consumption Surveys* (EPA-823-B-16-001, June 2016) (*Draft Guidance*). NACWA's members, particularly in the Pacific Northwest, are facing the prospect of stringent permit limits to address toxic pollutants driven in part by EPA's growing pressure on state officials to align with federal policy preferences on fish consumption and acceptable risk level. To justify its actions, EPA is citing tribal treaties that the Agency argues mandate the more stringent policies with regard to setting human health criteria.

The *Draft Guidance* appears to reflect a major change in how EPA Headquarters believes fish consumption rates should be assessed. There is a substantial focus on evaluating the consumption rates of subpopulations (e.g., tribes), many of which are assumed to be consuming significantly more fish than the general population. Prior to this point, EPA guidance has focused on estimating the consumption rate for the general population and using that rate to set water quality standards. EPA is now taking the position that general standards be based on consumption levels of the high consuming subpopulations like tribes rather than on the general population. This will result in much more stringent standards that will make little, if any, difference in overall risk to the general population, but will carry substantially higher compliance costs to be borne by the public. EPA should not make such a dramatic change in its public health policies through guidance. If the Agency believes that its approach needs to change in such a major way, it should make that clear, state its reasons, and give the public ample opportunity to comment.

While EPA is seeking comment on the *Draft Guidance*, it is doing so in a very unconventional manner. The document and request for comments was

distributed via memorandum to a select group of stakeholders rather than through the *Federal Register*. NACWA only learned of the document more than a month after its release, through another stakeholder who had received the communication directly from EPA. Making major policy changes and introducing new concepts that will have broad, nationwide impacts should be done through a more formal rulemaking process.

## Suppression Effect Undermines Scientific Validity of Human Health Criteria

The *Draft Guidance* outlines the concept of suppression and how it should be considered when making fish consumption estimates. First articulated in 2013 in an EPA Frequently Asked Questions (FAQ) document – which was not subjected to notice and comment review – consideration of suppression has now been included by EPA in recent water quality standards actions, including in Washington State. EPA has relied on its own FAQ document to support the inclusion of suppression in these regional actions and now, presumably in response to comments that EPA never sought input on the concept, EPA is formally outlining its position in federal guidance.

The use of suppression in the water quality standards context – which should be based on factual determinations as to the levels of fish that people actually eat – raises concerns about the validity of the resulting standard. Consideration of suppression in this otherwise fact-based inquiry inappropriately introduces a series of conclusions based on hypothetical, speculative estimates of what amount of fish people might eat, if conditions were different – often based on people’s memories of what they were told about how much fish previous generations ate. The potential for arbitrary, subjective, and unsupported conclusions is obvious, and it runs directly contrary to the basic principles of reasoned and scientifically-valid decision making.

The concept of suppression assumes that a certain population is consuming less fish than in the past for some reason – fear of contamination, for example. EPA’s position in the *Draft Guidance*, and in its application of suppression in recent water quality standards actions, is that any fish consumption rate that is different than a particular historical level equates to a negative impact and therefore needs to be addressed. Similar to other documents EPA has released in recent months, this document and the concept of suppression are prefaced on the fact that nothing short of returning fish consumption to pre-industrial levels, or to levels reflective of a subsistence-based sub-population, will satisfy the requirements of the Clean Water Act (CWA).

This application of the suppression concept treats fish consumption rates (FCRs) as if they are in a vacuum, ignoring all of the other possible explanations as to why FCRs might not reflect historical values. Suppression assumptions ignore that there are competing regulations, costs and community needs that likely will preclude historical FCRs from ever being attained again. For example, what if a community chooses to eat less indigenous fish because they like variety? What if they eat less indigenous fish now because they want to preserve the fish population (despite the fact that the population is healthy, e.g., catch and release interests)? Suppression assumptions imply that a community must support FCRs at a level to support what a community may “wish to consume”, even if they do not or cannot fish locally. What if buying non-indigenous fish is simply less expensive than catching fish? Societal changes will play a role and EPA should not assume that a community can simply return to a life style existing 50 or 100 years ago.

In terms of application of the suppression topic in the CWA water quality standards context, the discussion in the *Draft Guidance* needs to focus only on health-based suppression of consumption, the first of the five bullets listed at the start of Section 2.3.5 – reduction or avoidance due to actual or perceived presence of chemical contaminants in the fish. Section 2.3.5 tries to encompass much more than the contamination the CWA

standards program seeks to address. All reasons, other than contamination, for FCRs being different than historical levels are not relevant to assessing human health exposure and risk.

Additional comments:

1. The definition of suppression should simply be “The reduction in desired intake or consumption due to environmental contaminant factors beyond the control of a population.” The intent of this document is clear from the “Summary of Intent” section – it is to provide information for surveys linked to the management of environmental contaminant issues (water quality standards, advisories, bans, assessing health risks and safety, chemical contamination) rather than other sociological issues like time available to fish.
2. The “Summary of Intent” section states that the guidance intends to support the conduct of surveys that provide “valid analytic results” and section 3.7 states that the guidance can provide “highly accurate” estimates of FCRs. What is “highly accurate”? Validity and accuracy are a function of data quality objectives (DQOs) and data quality indicators (DQIs). The document references an EPA DQO guidance document but only addresses a few DQIs like accuracy, precision and bias. The document should not only provide information on how to quantify these DQIs for the survey but also qualify the reliability of data in terms of other DQIs like sensitivity (ability to detect measurement), representativeness, comparability and completeness. This point is very important to section 7.2 on uncertainty. The text in section 7.2 dwells on bias and random variation in describing survey uncertainty, but uncertainty will also be driven by survey design if the issues of sensitivity, representativeness, comparability and completeness are not explicitly addressed. The guidance needs to help those constructing surveys and interpreting data understand how to quantitatively address these measures of information quality.
3. The suppression discussion should be balanced, including other types of bias like avidity and unlimited access to fisheries.

### Recent EPA Actions Underscore the Potential Impact of the *Draft Guidance*

The types of policy decisions involved in considering suppression and other elements of developing human health standards should be made at the community and/or state level. EPA should only act as a resource to provide states with the information they need to make an informed decision. While EPA may argue that giving guidance to the states is the primary driver for providing this information on suppression, the Agency’s actions in Region 10 over the past few years demonstrate that EPA is not interested in simply providing guidance to the states. EPA is outlining its policy preferences in this guidance – that suppression is real and must be addressed – and then imposing these positions on states as they seek to develop or revise their human health criteria.

NACWA is pleased that EPA is finally seeking input on the concept of suppression – though through unconventional means – and appreciates the Agency’s efforts to provide states with additional guidance on making tough policy decisions. But EPA’s actions have shown that the states have few if any options if they want EPA to approve their proposed standards. This strong-arming by EPA, where the Agency has been requiring that state standards be essentially identical to federal criteria, guidance and policy preference, has the effect of applying these federal “recommendations” as the law of the land. This raises important policy

Comments on Fish Consumption Survey Guidance

September 13, 2016

Page 4 of 4

questions on the appropriate balance between the states and EPA that NACWA has outlined in previous letters, but it also underscores the importance of seeking appropriate input and feedback on EPA's recommendations and guidance documents.

Please contact me at 202-833-9106 or [chornback@nacwa.org](mailto:chornback@nacwa.org) if you have any questions or wish to discuss further.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Hornback". The signature is fluid and cursive, with the first name "Chris" being the most prominent part.

Chris Hornback  
Chief Technical Officer