

A Fishy Default

Law360, New York (February 03, 2012) -- Washington State is considering whether to adopt the highest default fish consumption rate in the country, a decision that would significantly impact regulatory standards and cleanup costs for years to come. But Washington has yet to undertake the type of examination necessary to understand the rate of actual fish consumption within the state, let alone set a defensible default value.

Washington's Department of Ecology (DOE) recently recommended a default consumption rate within the range of 150 to 275 grams — roughly 5 to 10 ounces — per day. The DOE's recommendation is meant to represent a high-end, but still reasonable, estimate of daily fish consumption throughout Washington under both current and foreseeable conditions.

If adopted, it would represent a major increase from the current default rates of 6.5 grams/day for water quality standards and 54 grams/day for cleanup standards, in place since the early 1990s. The DOE's recommendation follows Oregon's adoption of a 175 grams/day default rate, a 10-fold increase from its old rate. Oregon's default rate is currently the highest in the country.

Fish consumption rates can have enormous impact on regulatory decisions. Oregon's revised default rate has already resulted in the adoption of more stringent water quality standards, praised by the U.S. Environmental Protection Agency "as a national and regional model."
(www.epa.gov/region10/pdf/water/or-hhwqs-approval-ltr-2011.pdf)

In Washington, the recommended rate, or rates, would likely become part of the state's Sediment Management Standards and Water Quality Standards, and will inform regulatory decisions under the Clean Water Act and the Model Toxics Control Act, among others.

Fish consumption rates can also have a significant impact on the cost of remediation. In application, the DOE's proposed range would likely result in much higher contaminant exposure scenarios, which could translate into remediation directives that are, in some cases, impossible to achieve.

In fact, the DOE recognizes this as a concern in its technical support document, stating that "for some chemicals, risk-based concentrations based on high fish consumption rates [may] fall below background concentrations." (www.ecy.wa.gov/pubs/1109050.pdf, page 102)

Even achieving a cleanup level at or near background concentration at a given site can be exceedingly difficult. At complex sediment sites in particular, seemingly minor discrepancies in consumption values can translate into tens of millions of dollars in cleanup costs. Because of the stakes, site-specific consumption studies are generally preferable to default values, as those default values might not reflect actual site use.

The DOE has yet to engage in the type of investigation that would allow a reasonable estimate of statewide fish consumption. Instead, the 150 to 275 grams/day estimate derives primarily from the DOE's review of fish consumption surveys of limited numbers of Native Americans and Asian and Pacific Islanders, "groups [that] consume especially large amounts of fish and shellfish as part of traditionally influenced diets." (www.ecy.wa.gov/pubs/1109050.pdf, page 26)

Conducted in 1994 and 2000, these studies were also geographically specific; those surveyed lived in Puget Sound, in and around the Columbia River basin, and King County. The DOE extrapolated from these studies to statewide fish consumption rate inclusive of the entire population.

There are other potential issues with the DOE's recommendation. For example, it appears that the DOE failed to adequately consider the percentage of fish consumed in-state that originate out of state, despite acknowledging that most residents purchase, rather than catch, fish. (<http://www.ecy.wa.gov/pubs/1109050.pdf>, page 24) It is questionable whether Washington waters could even support such consumption under current conditions.

Similarly, the DOE included salmon consumption in its default range despite the fact that salmon are generally migratory, spending the majority of their lives in the open ocean unexposed to localized conditions. The DOE's consumption values may therefore represent more of a worst-case scenario than a high yet reasonable estimation.

Significantly, the Comprehensive Environmental Response, Compensation and Liability Act and the Model Toxics Control Act direct remediation standards are reflective of reasonable exposure levels, not worst-case scenarios.

The DOE's proposal may very well fall in line with actual fish consumption throughout Washington. But the DOE should confirm that fact through robust investigation prior to recommending a default fish consumption value of indefinite application.

Ultimately, the DOE may find several default rates reflecting differences in geography and population more appropriate than a single, statewide consumption rate.

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