Additional WAC 173-201A Concepts or Guidance/Policy Needs
September 2014

Background

1) Governor Inslee has announced directional/conceptual elements of a) intended revisions to WAC 173-201A, and b) a toxic pollutant reduction package. A preliminary water quality standards regulation will be shared by September 30. Details on the broad toxic reduction package will be available in January 2015.

2) This presentation of additional ideas offers no endorsement or critique of the Governors package as presented on July 9th.

3) The Inslee/Bellon/Susewind presentations on elements of the WAC 173-201A revisions did not mention or gave sparse details on several important and beneficial regulatory concepts necessary for successful, long-term Clean Water Act program implementation.

4) WDOE Water Quality Program staff has invited continued discussion on water quality standards revisions and implementation practices.

Topics for Consideration -- WAC 173-201A

Issue	Why	How
The state risk policy for carcinogens needs to be revised to reflect the Governor's policy direction.	To avoid a potential rejection of the HHWQC on the same terms that EPA did with its initial rejection of the Oregon criteria at 17.5 gr/day at a 10e-6 risk policy. EPA has already indicated that it thinks the governor's policy direction is contrary to existing state policy at WAC 173-201A-240(6).	Replace WAC 173-201A-240(6) with the following language: "The human health risk-based policy for carcinogenic substances used to develop human health toxics criteria in the state water quality standards shall be such that the incremental excess cancer risk is less than or equal to one in one hundred thousand. This policy does not apply to polychlorinated biphenyls."

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There must be concurrent EPA approval of revised HHWQC and the full set of implementation policies promulgated in WAC 173-201A. EPA disapproval of any aspect of the implementation policies promulgated in WAC 173-201A will 1) delay the effective date of revised numeric HHWQC, and 2) reopen the public involvement process on whatever remedy Ecology proposes to overcome EPA disapproval.	Selective EPA disapproval of the added /modified implementation policies, while concurrently approving more stringent HHWQC, could result in unintended and unattainable outcomes in NPDES permitting actions.	Insert language following the HHWQC table (presumably the revised Table 240(3) in WAC 173-201A-240) which states: "The numeric criteria in Table 240(3) become effective when the water quality standards implementation policies in **(need to list the WAC 173-201A sections which describe revised/new: compliance schedules, variances, intake credits, maybe more)** are approved by EPA."
Pollutant Intake Credit - Ecology should exercise discretion afforded through 40 CFR 131.13 to provide broad "net-out" credit for pollutants in intake waters. Policy support should be provided for the application and implementation of human health criteria that address the compliance burden on pulp and paper recycling facilities for PCBs.	The implementation policies should be based on the principle that an NPDES permittee should not be held accountable for pollutants in intake waters or recyclable paper products (PCB only) over which they have no practical responsibility, and which will inevitably "pass-through" from a wastewater treatment system that meets AKART. Paper recycling is supported as an important environment and public policy. Many jurisdictions have ordinances specifying minimum post-consumer recycle fiber content for certain paper grades. There is recognition that printed recycled papers contain trace concentrations of legally-derived PCBs. The deinking of these recycled papers contributes minute but regulatorily-significant quantities of PCBs to the wastewater system. Treatment systems	Insert language in WAC 173-201A, Part IV *Tools for Application of Criteria*, which articulates the Pollutant Intake Credit policy and general decision criteria. The regulatory language should broadly include these features: • Crediting of pollutants in all source waters (upstream, groundwater, purchased water). Intake credit should be expressly available where a groundwater source is in hydraulic continuity with surface water receiving water. • Credit PCBs present in purchased recycled fiber where that fiber is subsequently processed into paper products. • Accounting on a mass or concentration basis, at point of compliance; i.e., edge-of-mixing zone, if applicable • Accepted pollutant increases will be limited to "Any detectable increase in concentration..." (WAC 173-

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	satisfying AKART are not designed for or capable of removing PCBs below regulatory standards.	201A-320 *Antidegradation* definition of "measurable change"), and with consideration of "the precision and accuracy of the sampling and analytical methods used" (WAC 173-201A-260(3)(g)). • Provide a variance for PCB criteria for pulp and paper recycling mills. Pollutant Intake Credits are considered for all NPDES permitting determinations: "reasonable potential analysis," WQBELs, TMDL Waste Load Allocation Add discussion in the State of Washington *Permit Writers Manual* which articulates data requirements, an accounting methodology, essential monitoring, etc., to apply the Pollution Intake Credit concept. A "good science" approach is used to quantify PCBs introduced with the recycled paper furnish.
Updates to Analytical Test Methodologies – WAC 173-201A-260(3)(h) pre-commits Ecology to utilize EPA analytical methodologies promulgated in 40 CFR 136, "or superseding methods published."	Improving methodologies which provide a new ability to detect toxic pollutants at lower concentrations can have profound regulatory impacts. Pollutant concentrations in ambient receiving waters could suddenly be revealed as exceeding human health-based water quality criteria (and thus trigger the administrative and permittee costs related to a 303(d) listing, TMDL, WLA, and enhanced wastewater treatment). Pollutant concentrations in NPDES permittee treated effluent could reveal a toxic pollutant presence and jeopardize a "reasonable potential analysis" (thus triggering a WQBEL	Three Washington Supreme Court decisions have held that the adoption of future federal rules, regulations or statutes would be an unconstitutional delegation of legislative power. (State of Washington, Kirschner v. Urquhart, 50 Wash.2d 131. April 1957; Yelle v. Bishop, 55 Wash 2d 131. December 1959; State of Washington v. Readers Digest Association, 81 Wash 2d 259. September 1972.) Amend WAC 173-201A-240(h) to read "....must be in accordance with the 'Guidelines Establishing Test Procedures for the Analysis of Pollutants' (40 CFR 136) or superseding methods

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	and possible need for additional treatment capability). The costs and benefits associated with the application of Clean Water Act programs to achieve more stringent numeric water quality criteria will only fully materialize when an analytical ability to detect a toxic pollutant at/below the water quality criterion is developed and approved by EPA. (Note: the best current example will be with EPA's eventual approval of proposed method 1668 for PCBs. The best information indicates the regulatory and cost implications associated with that approval will be enormous.)	published. The department may also approve other methods following consultation with adjacent states and with the approval of the USEPA. Any superseding methods or other methods not published in 40 CFR 136 will become effective when adopted in WAC 173-201A." A regulatory adoption process could trigger a RCW 34.05.328 *Significant Legislative Rule* obligation. This evaluation (and the SEPA and Small Business Impact review) would allow for consideration of regulatory implications of the water quality criterion/analytical methodology relationship.

Topics for Consideration with Ecology Water Quality Program Policies or Permit Writers Manual Guidance

Issue	Why	How
Reliance on fish tissue pollutant concentrations for Category 5 Clean Water Act section 303(d) listing.	A 303(d) Category 5 waterbody/pollutant listing has very significant, inescapable and long-term regulatory implications. States have some discretion in establishing listing criteria. Most states do not Category 5 list pollutant/waterbody segments solely on the basis of fish tissue concentrations. There are complex and intractable regulation, regulatory policy and science issues which diminish the utility of fish tissue pollutant concentration as a basis for 303(d) listing:	Water Quality Program *Policy 1-11* should be reviewed/modified to eliminate fish tissue pollutant concentrations as the sole basis for Category 5 listing. Evidence of elevated fish tissue pollutant concentrations should support listing as a Category 2 *Segment is a Water of Concern*, Category 3 *Segment lacks sufficient data*, or Category 4 *Impaired but does not require a TMDL*. Parking a pollutant/waterbody segment in one of these Category's allows time for further assessment of water column pollutant concentrations, pollutant sources, and consideration of the most efficient

	• WAC 173-201A HHWQC (NTR) are based on water column pollutant concentrations, not fish tissue pollutant concentrations • The translation between fish tissue and water column pollutant concentrations includes many spatial-, temporal-, species-, pollutant-, consumption-specific considerations. • The data quantity requirements specified for Category 5 listing are very modest and not commensurate with the significance of the regulatory action.	regulatory remedy. The Washington Department of Health fish advisory process is the primary mechanism for shorter-term health protection. Amendment of the WQP *Policy 1-11* should be completed and utilized in developing the 2014 303(d) Freshwater Assessment.
Existing WAC 173-201A-400(12) *Mixing Zones* states: "Exceedances from the numeric size criteria ... may be considered...: (d) where ...clearly necessary to accommodate important economic or social development in the area..."	The combination of much more stringent HHWQC and higher resolution analytical methodologies could jeopardize the ability of an NPDES permittee to satisfy a "reasonable potential analysis" evaluation. An ability to request/support/receive a larger mixing zone may be critical for demonstrating that a discharge is not "causing or contributing to a water quality standards violation." Ecology permit writers lack guidance on how this rule section would be applied.	States have discretion to design mixing zone policies and implementation practices per 40 CFR 131.13. Ecology should supplement the Permit Writers Manual to explain this provision, confirm its availability, and to identify necessary information and decision criteria to employ it.
Existing WAC 173-201A-400(15) *Mixing Zones* states: "The department may establish permit limits	The existing methodology for establishing mixing zones is directed primarily at protection of aquatic life. The quoted provision allows Ecology flexibility to set	States have discretion to design mixing zone policies and implementation practices per 40 CFR 131.13. Ecology should supplement the Permit Writers Manual

and measures of compliance for human health criteria (based on lifetime exposure levels), independent of this section."	mixing zones independent of these considerations in WAC 173-201A-400. Ecology lacks guidance on how to implement WAC 173-201A-400(15)	to explain this provision, confirm its availability, and to identify necessary information and decision criteria to employ it. Because of the conservative basis of the human health criteria Ecology should allow mixing zones for human health criteria that are larger than mixing zones for aquatic life criteria when human health risk is minimal due to factors such as: - Inaccessibility of receiving stream to human or general lack of human use (e.g., no drinking water intakes, public beaches, boat ramps, or shellfish harvesting areas). - Other considerations identified by the department - Allowing mixing zones for human health criteria since the criteria are based on fish consumption.