

Fran,

I request that Ecology consider an amendment to WAC 197-11-845 which I believe is necessary to update and clarify that WAC 197-11-845 was not intended to give a categorical exemption to water purveyors taking a project decision to fluoridate their public water supplies. The existing language in WAC 197-11-845 is copied at the bottom of this email with the proposed clarification underlined. The intent of the specific agency exemptions in WAC 197-11-820 to -875 was to give the identified specific agencies categorical exemptions for the identified agencies' identified actions. The purpose was not to give to unidentified agencies categorical exemptions for project actions that were simply regulated, in part, by the identified agencies. The legislative history of WAC 197-11-820 to -875 supports this interpretation.

However, the Court of Appeals in *Clallam County Citizens for Safe Drinking Water v. City of Port Angeles*, 137 Wn.App. 214, 220, 151 P.3d 1079 (2007) found that a city's decision to fluoridate is an action under a program that DSHS administered on December 12, 1975 and that therefore the City action was categorically exempt. If this Court interpretation stands, then the full categorical exemption for DSHS is at risk because Ecology regulations implementing categorical exemptions cannot allow major actions without violation of RCW 43.21C.110(1)(a) and a decision to fluoridate is such a major action.

In the Federal Register for January 13, 2011 U.S. Health and Human Services ("HHS") reported that 41% of children in the United States born between 1984 and 1992 were getting dental fluorosis from too much ingestion of fluoride. See Federal Register, Jan. 13, 2011, page 2385 attached hereto. Fluoride ingestion and incidence of dental fluorosis have been increasing over time as community fluoridation has increased. Id. Dental Fluorosis in the mild stages results in discoloring or mottling of teeth, and in the moderate and severe stages causes pitting and crumbling of teeth. Id. HHS found that 3.6% of children (one out of twenty-eight) born in the U.S. between 1984 and 1992 has moderate or severe stages of dental fluorosis. I attach a photo of dental fluorosis for mild, moderate and severe stages. While there is a consensus that dental fluorosis is caused by ingestion of fluoride by children 0 to 8 years old, there is also a consensus that any benefits of fluoride in the prevention of tooth decay do not come from ingestion but instead are from topical application (fluoride applied to tooth surfaces such as by brushing with fluoridated toothpaste). Any decision to fluoridate is also a decision to cause massive dental fluorosis and this should be found to be a probable significant adverse impact on the environment that is prohibited from being a categorical exemption by RCW 43.21C.110(1)(a). Dental fluorosis lasts for a lifetime unless very expensive cosmetic dental procedures are employed.

Another way to address this issue is to amend WAC 197-11-810 to clarify that the only actions categorically exempted by WAC 197-11-820 to -875 are actions taken by the named agencies. I provide this clarifying amendment in underlined format below:

197-11-810

Exemptions and nonexemptions applicable to specific state agencies.

The exemptions in WAC 197-11-820 through 197-11-875 relate only to the specific activities identified within the named agencies. Exempt actions are limited to actions of the named agencies and do not include actions of other agencies. These exemptions are in addition to the preceding sections of this part and are subject to the rules and limitations of WAC 197-11-305. The categorical exemptions in WAC 197-11-800 apply to all agencies, including those named in WAC 197-11-820 through 197-11-875 unless the general exemptions are specifically made inapplicable by one of the following exemptions.

WAC 197-11-845 (with proposed addition underlined) states:

Department of social and health services.

All actions under programs administered by the department of social and health services as of December 12, 1975, are exempted, except the following:

(1) The adoption or amendment by the department of any regulations incorporating general standards for issuance of licenses authorizing the possession, use and transfer of radioactive source material under RCW [70.98.080](#), except that the issuance, revocation or suspension of individual licenses thereto shall be exempt. However, licenses to operate low level burial facilities or licenses to operate or expand beyond design capacity, mineral processing facilities or their tailings areas whose products or byproducts have concentrations of naturally occurring radioactive materials in excess of exempt concentrations, as specified in WAC [402-20-250](#), shall not be exempt.

(2) The approval of a comprehensive plan for public water supply systems servicing one thousand or more units under WAC [248-54-065](#).

(3) The approval of engineering reports or plans and specifications under WAC [248-54-085](#) and [248-54-095](#), for all surface water source development, all water system storage facilities greater than one-half million gallons, new transmission lines longer than one thousand feet located in new rights of way and major extensions to existing water distribution systems.

(4) The approval of an application for a certificate of need under RCW [70.38.120](#) for construction of a new hospital or medical facility or for major additions to existing service capacity of such institutions.

(5) The approval of an application for any system of sewerage and/or water general plan or amendments under RCW [36.94.100](#).

(6) The approval of any plans and specifications for new sewage treatment works or major extensions to existing sewer treatment works submitted to the department under WAC [248-92-040](#).

(7) The construction of any building, facility or other installation not exempt by WAC [197-11-800](#) for the purpose of housing department personnel, or fulfilling statutorily directed or authorized functions (e.g., prisons).

(8) The approval of any final plans for construction of a nursing home pursuant to WAC [248-14-100](#), construction of a private psychiatric hospital pursuant to WAC [248-22-005](#) or construction of an alcoholism treatment center pursuant to WAC [248-22-510](#).

(9) The decision by a water purveyor to fluoridate public water supplies

Gerald Steel PE
Attorney at Law
7303 Young Road NW
Olympia WA 98502
Tel/Fax (360) 867-1166

