0281

Washington PEER
PO Box 2618
Olympia, Washington 98507
(360) 528-2110 * wapeer@peer.org

Ken Koch, Water Quality Assessment Coordinator
Ron McBride, Water Quality Program
Washington Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

December 17, 2004 – via electronic mail

RE: 2002/2004 Water Quality Assessment and 303(d) List for Washington State

To Ken Koch:

Thank you for the opportunity to comment on Ecology's final draft of the proposed Water Quality Assessment and 303(d) list for Washington State for 2002/2004.

Washington PEER is a state chapter of Public Employees for Environmental Responsibility (PEER). We work to hold governments accountable to their environmental mandates, ethics, and scientific integrity in decision-making.

The stated mission of Ecology's water quality program is "*To Protect and Restore Washington's Waters.*" Although Ecology's final draft 303(d) Assessment makes great strides towards this mission and is based on a much larger data set than in the past, the list is a retreat from Ecology's mandate to protect and restore Washington's waters. In general it provides in-adequate justification for de-listings, in-adequate information for thorough public review and relies heavily on numeric data sets to the exclusion of narrative standards. Our specific comments are attached. In addition to these comments, we re-submit and incorporate by reference our comments on the prior draft.

Thank you in advance for your full consideration of Washington PEER's comments and your efforts to ensure that Washington State has an accurate list of impaired waters.

Sincerely,

Lea Mitchell, Director
Washington PEER

I. Call for Data, Data Management, and Data Analysis Methods

1. The data set contains minimal data from industry and is not reflective of all "existing and readily available data" as required the Clean Water Act (CFR 130.7 (b)(5). Eliminating this data likely results in a list that does not accurately reflect the conditions of some of Washington's waterbodies and sediments. Ecology needs to more actively solicit – and require - data from industrial and municipal permittees, grantees, universities, and other entities with viable data to contribute to the assessment.

The Alphabetical List of Data Submitters for the 2002/2004 Assessment lists eighty-one data submitters. Of the 81 listed, only one submitter is an industry – Port Blakely Farms. Through dredging studies, due diligence reports associated with property transfers, consultant studies, monitoring, and other actions, industries throughout the state generate and collect data that did not appear to be actively solicited or considered for this list.

2. In addition to active solicitation from industry and public interest groups that goes beyond sending them a letter, the state needs to require that water, sediment, and bioassay data collected by industry , public interest groups or others via state or federal permitting, lease, grants, or other requirements, be sent to Ecology for assessment as part of the 303(d) list and that it be collected in accordance with the required QA/QC, SEDQUAL and associated data requirements.

It is not acceptable to have a high data standard on the one hand and on the other to have a low level of effort to generate and acquire the data.

3. Ecology needs to ensure that data from the EIM database (Ecology monitoring data) SEDQUAL (sediments data), and other agency databases is examined as part of the 303(d) assessment. The lack of an integrated database means that some viable data has not been examined as part of this assessment if, for example, the data was in EIM but not SEDQUAL.

5. The assessment should be ongoing rather than a huge crunch of a project that is done every two years. Although EPA reviews the 303(d) list every two years, states can update their assessments routinely and several of them do. Ecology needs to create a process wherein the 303(d) Assessment Database is routinely updated.

II. Public Involvement in the 303(d) Process

6. The information provided to the public is insufficient to thoroughly assess the proposed list and Ecology's basis for making various listing decisions. Ecology's workshops, willingness to meet with the public, and web information were all very useful items but they were compromised by the difficulty in accessing information regarding trends, specific reasons for de-listings, or citations of specific studies that contributed to the determinations that Ecology made.

Examples include the following

- It is not possible to define the number of listings that are proposed to be taken off 303(d) as a result of segmentation;
- It is not possible to readily define the location and nature of sites that are proposed to be de-listed – not because contaminants have been addressed – but because Ecology's proposal to use a binomial approach to assessing monitoring data. Ecology should provide the public with a clearer understanding of these sites and the basis for assuming that the binomial approach is appropriate for areas were minimal sampling and data is available. As stated further in our comments we do not believe the binomial approach is viable for sites with small data sets. The presentation of the data makes it very difficult to define how many sites got de-listed (likely dumped into Category 2) due to a small sampling size;
- There is no field or search option for "narrative criteria" and thus it is difficult to assess how many sites were listed due to the application of Washington State's narrative criteria for water quality. A quick review indicates very few.

III. Narrative Standards

7. A review of Ecology's 303(d) list contains very few sites that mention or apply the state's narrative standards or assess their ability to support beneficial uses. Adverse affects on fish or their habitat, impacts on other beneficial uses such as fishing or swimming, or low instream flows that contribute to high water (temperature?) -kk are all examples of violations of narrative standards that should have been considered for this list.

For example, it does not appear that Ecology solicited or accessed data from federal governments (NOAA, USFW, EPA) or public interest groups (Washington Toxics Coalition) currently working on an ESA consultation of pesticides. This effort has assembled numerous studies that contain credible data illustrating violations of narrative standards in Washington's waters as evidence by adverse affects on fish. Similarly, it does not appear from the record that Ecology actively solicited data from toxicologists at the federal agencies.

8. In cases where the narrative standards were applied, it appears that many sites got dumped into Category 2 - waters of concern instead of Category 5, threatened or impaired, even though the narrative criteria may have been violated. This is not acceptable.

IV. Waters Listed in Category 2 – Waters of Concern

9. Category 2 waters need to be re-evaluated to ensure that they are not *threatened* waters that got dumped into this category. Category 2 is not supposed to include waters that are threatened. Ecology has not clearly defined the "threatened waters."

10. The list does an end run around the state's sediment standards by assuming that the sediments are not impaired unless the site is on Ecology's Contaminated Sediment Site list (CSL). The Category 2 list needs to be revisited to assess which sediments more appropriately belong in Category 5 because they are threatened or impaired.

Ecology's listing approach for sediments ignores the state's sediment management standards and is directly contrary the determinations that EPA made regarding Ecology's 1998 303(d) list. In their January 28, 2000 303(d) comment letter to Ecology EPA found that "*under the plain language of the sediment management standards, non-attainment of the sediment quality standards requires listing the water body as impaired under section 303(d) of the Clean Water Act.*" Ecology's shuffling of the sediment sites sets up a condition where permittees are shielded from more aggressive source control through sediment TMDLs, additional permit conditions, or other appropriate actions that could stop or stem the impairment.

V. Waters Listed in Category 4b

11. Until the data shows otherwise, these waters are impaired and should be included on the list of impaired waters.

Category 4b is currently a "trust us" category as there is no written documentation available that defines how Ecology decided that these sites meet the criteria to be listed in 4b. Ecology needs to create and make this information available to the public for review along with the associated plans that have allowed the site to qualify under 4b.

In their response to comments on their revised 303(d) listing methodology Ecology defended categories 4a and 4b by stating that these categories "*require a determination that the TMDL or the pollution control plan is successful in improving water quality, including actual showing of cleaner water; if the TMDL is found to be unsuccessful, the water is returned to the 303(d) list.*"

12. Washington's current Forest Practice standards are not adequate to protect water quality and should not be used to put waters into Category 4b and shield them from a TMDL. We support and agree with Ecology's determination that the Forest Practice Rules are not a Pollution Control Plan and that it would be premature to list all forested lands in Category 4B.

V. Waters Listed in Category 5

13. The threatened waters need to be clearly defined and place in Category 5. It appears that instead of being placed on the Category 5 list – as required by the Clean Water Act – threatened waters got dumped onto the Waters of Concern, Category 2 list. The state needs to more clearly define the "threatened waters" and ensure that all threatened waters are listed in Category 5.

EPA's final 2004 Guidance provides that states should include threatened waters in Category 5 and that their assessment should define how the state identified threatened waters. In general, threatened waters are considered to be waters that may not be impaired now but are likely to be impaired by the next listing cycle (ie within the next two years). Waters that are likely to be impaired by the next listing cycle would likely include waters with small data sets that are impaired but got dropped from the Category 5 list due to Ecology's reliance on the binomial distribution method to assess data. Other examples of waters that are likely threatened –or impaired waters, and not waters of concern, include sediments that may be below the CSL threshold but 1-2 samples exceed the sediment quality standards.

14. Ecology's Category 5 list is incomplete because it does not include sites that violate the state's sediment quality standards. Instead, Ecology has chosen to assume that the only impaired sites are those that are on the Sediment Clean-up List (SCL). This, in effect, skirts around the state's sediment quality standards. Ecology has failed to provide adequate justification for why sites that violate the sediment standards are not impaired or threatened. It appears that the listing is being driven not by science and the state's adopted water quality standards – but by fears that there are not enough resources to do sediment TMDLS, that sediment TMDLs won't help because the contamination is historic and not current, or that Ecology must apply the sediment clean-up standard ---and not the sediment quality standard --- because the clean-up standard is lower and easier for industry to meet. All of these considerations are understandable but they should not drive the process. Instead, they should be used to help prioritize –but not direct— appropriate source control and/or clean-up actions for sediments.

15. Ecology's Category 5 list is incomplete because it is based on the use of the binomial approach to determine impairment. If used at all, the binomial method should be limited to sites that have a sufficient data set associated with them.

By using the binomial approach, Ecology is lopping off sites that have a small data set associated with them. As a result, waters with exceedences – but small data sets – were dropped from the impaired list and dumped into Category 2. This is not acceptable. In their July 9, 2002 comment letter on Ecology's proposed listing policy and their March 15, 2004 comment letter on Ecology's proposed list EPA stated that they did not agree with the use of binomial distribution to determine whether or not a waterbody is impaired unless the sample size was very large. We concur.

16. Along with re-evaluating the waters that got lopped off the impaired list due to small sample size, Ecology should assess the water's ability to meet the state's narrative criteria. For example, if there are limited turbidity samples but turbidity is known to be a limiting factor for salmon, the waters are likely impaired or threatened and should be listed as such.

VI. Impaired and Water Quality Limited Waters

17. For purposes of defining the state's impaired waters for permitting, monitoring, grant funding or other reasons all waters listed in 4a, 4b, 4c,or 5 should be considered the impaired waters – not just Category 5. Ecology needs to ensure that references to impaired waters include the full list of impaired waters – not just the waters that need a TMDL.

In their Response to Public Comments on Draft Water Quality Program Policy 1-11: Assessment of Water Quality for the Section 303(d) List Ecology stated that "*Waters in Category 4 are still considered impaired and still will receive appropriate attention to water quality.....*" We concur.

All references to Washington's impaired waters should include waters listed in 4a,4b,4c, and 5. For example, in the new CAFO permit or stormwater general permits when Ecology refers to facilities that discharge into impaired waters it should refer to those listed in 4a, 4b, 4c, or 5 of the 303(d) assessment.

2001 unpublished study of data collected at River Mile 60.9 and the proposed listing states that the data shows "excursions" beyond the water quality criteria based on the 7 day average. We have not reviewed either of these unpublished studies to determine whether they meet Ecology's own quality control requirements. Ecology requires that all data used to support a listing assessment be submitted according to QA/QC procedures. Data must also be of sufficient quantity and taken at the appropriate collection locations in order to be relied upon by the agency. Please provide us with copies of these 2 studies so we can provide meaningful comment on these proposed listings.

CDA as a municipality upstream of the Washington state listed water segments addressed in these comments, has a major interest in insuring that Ecology has followed the appropriate state and federal requirements for preparing and submitting a list of impaired waterbodies prior to initiating the TMDL preparation process. The listing and prioritization processes are an important part of the public process and should be followed to ensure that time and money are spent appropriately.

Thank you for your consideration.

Sincerely,

H. Sid Fredrickson
Wastewater Superintendent

C: Mayor and Council
Kris Holm, Attorney
Dave Clark, HDR Engineering
Brian Nickel, Region 10 – EPA
Mike Gridley, City Attorney
Dave Shults, Capital Program Manager