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NORTHWEST PULP & PAPER ASSOCIATION
1300 114TH AVENUE SOUTHEAST, SUITE 200
BELLEVUE, WASHINGTON 98004
(425) 455-1323 FAX (425) 451-1349

December 17, 2004

Ken Koch
Water Quality Program
Department of Ecology
PO Box 47600
Olympia, WA 98504

RE: Washington State Water Quality Assessment — proposed 303(d) List of Impaired Waters

Dear Mr. Koch:

This letter constitutes NWPPA's comments on the proposed Washington Water Quality Assessment for Section 303(d) of the CWA, also referred to as the 303(d) List /List of impaired Waters or simply "the list." Ecology has conducted a multiyear process leading to this proposal, with four opportunities for public involvement, including an earlier version of the proposed list in March of this year. NWPPA has commented and provided data at each juncture.¹

NWPPA's experience with comments through the preceding three steps has been both fruitful and disappointing. The new data base for the 303(d) List of Impaired Waters is a marvelous tool. NWPPA appreciates that Ecology reflected some of our concerns raised in our March letter regarding temperature listings for the river segments where mills are located on the Columbia and White/Stuck rivers and reflected the two-year Parametrix temperature study sponsored by the mills.²

In terms of concerns, however, the process and the substantive content of the rule continue to suffer from both overall legal and specific technical problems. NWPPA

These include: (a) Ecology's WQ Policy 1-1 1 for placing waters in various water quality categories in September 2002 (NWPPA letter dated July 8, 2002); (b) the public data call in the fall of 2002 (NWPPA letter dated December 16, 2002); (c) the preliminary results of the assessment in early 2004 which included a new call for data not previously submitted (NWPPA letter dated March 15, 2004) ; and (d) the second public review of the assessment which includes revisions reflecting new data received and changes to the draft water quality assessment (current letter).

² The results of the two-year study were submitted in two reports in order to match Ecology's two data calls described in footnote 1 above and were titled: "*Temperature Study Results for Critical Period, June 15 to September 2002 for Columbia River and White/Stuck (December 2002)*"; and "*Supplemental Report — Temperature Study Results for Critical Period, June 15 to September 15, 2003 for Columbia River and White/Stuck (March 2004)*."

In terms of concerns, however, the process and the substantive content of the rule continue to suffer from both overall legal and specific technical problems. NWPPA believes 57 proposed temperature listings for the Columbia, Snake, Spokane, Pend O'reille rivers are improperly listed. Namely these segments have been listed (a) without evaluation of the data in terms of all three elements of the temperature water quality standard; and (b) without reference to how the data meets the criteria for listing pursuant to Water Quality Policy 1-11. NWPPA commented on the failure to provide analysis of all three elements of the water quality standard in our March 2004 letter; and comments further that Ecology's approach may be legally deficient. NWPPA's comments with respect to WQP 1-11 is new. It is NWPPA's understanding that the appropriate analysis may have been performed and may exist somewhere at Ecology; however, the WQP 1-11 analysis is not part of this proceeding and cannot be evaluated.

Should Ecology finalize the list as proposed, NWPPA and its members will adversely affected in the following ways.

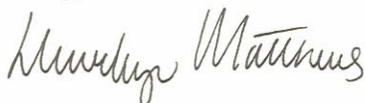
First, NWPPA members will be adversely affected by Ecology's proposal to change the status of 41 of the 57 segments of the above-named rivers from "not impaired/not listed" in 1998 to "impaired." Eight of these segments are where mills are located that participated in the two-year Parametrix temperature study. The remainder of the 41 proposed changes are in the vicinity of, or are up river from, one or more pulp and paper mills. NWPPA underscores its concerns relative to segments in the vicinity or upstream as Ecology has indicated the status of these segments is relevant to the listing determinations for the segments where the mills are actually located.

Second, NWPPA itself is adversely affected in that NWPPA cannot evaluate and provide meaningful comment on these segments because Ecology's analysis of the data that informed the listing basis has not been made available as part of this proceeding.

NWPPA is commenting for the record based on the proposal as issued for public comment. However, we request Ecology to delay finalizing the proposed 303(d) list so that there can be constructive opportunity to discuss and identify positive solutions to the issues identified; and to allow parties to review analyses that have not been made available as part of this proceeding. Our specific recommendations and detailed comments are attached.

I look forward to the opportunity to discuss this further with you.

Sincerely,



Llewellyn Matthews,
Executive Director

Part I: General Recommendations

1. Ecology should delay finalizing the proposed list in order to consider an overall approach to expanded numbers of listings of waterbodies as impaired for temperature.
2. Ecology should create a new category for all temperature listings (possibly a subdivision within Category 2 - "Waters of Concern." This category is for waters that show some evidence of a problem, but short of impairment. The new category would be for waters exceeding the numeric temperature criterion, but where: (a) Ecology has not evaluated whether natural conditions exceed the criteria; or, (b) Ecology has not evaluated whether the applicable temperature increment has been exceeded.
3. Water bodies listed for temperature do not need a TMDL and should not be in Category 5. The temperature standard is self-implementing. Ecology only needs to determine which of the two increments apply (human-caused temperature increases are limited to 0.3°C if ambient water temperature exceeds the numeric criteria; or 0.1°C for collective sources). The available increments can be effectively addressed through the NPDES permitting process as they are currently.
4. Ecology should include in the listing basis for each data set the applicable criteria from Water Quality Policy 1-11 that triggered the listing.

Part II: Comments on Overall Issues

1. Ecology has inappropriately applied the state temperature water quality standards as a basis of the proposed Category 5 Listings for temperature impairment.

NWPPA applauds the improved data base for the 303(d) List of impaired Waters and appreciates that Ecology did include information derived from a two-year study of ambient river temperatures that Ecology required the pulp and paper industry to conduct pursuant to Ecology QA/QC procedures.³

NWPPA is disappointed, however, that through this multi-year process, Ecology has not been able to come to terms with the problem that hundreds of water body segments may be improperly listed as impaired for exceeding the temperature water quality standard. The fundamental problem stems from the fact that Ecology has not conducted an analysis of *all* components of the state water quality standard for temperature. Instead, Ecology appears to look only to whether some data set shows values above the numeric criteria.

The state temperature water quality standard contains several components including:
(a)

a numeric criteria (which differs for various water bodies, generally 18° or 20°C for mainstem rivers); (b) a recognition that natural conditions may exceed the numeric criteria; and (c) a limitation on the incremental increase allowable due to human activities. The incremental allowable increase is 0.3°C if ambient temperatures are less than the numeric criteria and 0.1°C if the ambient conditions are over the criteria.

The currently proposed 303(d) List of Impaired Waters includes hundreds of water body segments listed as impaired for temperature as “Category 5.” Category 5 is the traditional list of impaired water bodies and are identified as needing TMDLs.

For the vast majority of temperature listings, perhaps all, Ecology has not made an effort to determine if natural conditions are typically warmer than the numeric criteria and then if so, are natural conditions exceeded. Instead Ecology appears to look only to whether some temperature data exceeds the numeric criteria – typically the number of days or percentage of readings over the numeric criteria. This is effectively a revision of the state water quality standard by failing to apply all the components of the standard.

During the first comment period (NWPPA letter March 15, 2004), NWPPA commented on approximately 60 river segments in the vicinity of pulp and paper mills located on the Columbia, White/Stuck, Snake, Spokane, and Pend Oreille rivers. NWPPA believes all these segments may be improperly listed without consideration of all three elements of

The results of the two-year study were submitted in two reports in order to match Ecology's two data calls described in footnote I above and were titled: "*Temperature Study Result~for Critical Period, June 15 to September 2002 for Columbia River and White/Stuck (December 2002)*"; and "*Supplemental Report —Temperature Study Results for Critical Period, June 15 to September 15, 2003 for Columbia River and White/Stuck (March 2004)*". The Quality Assurance/Sampling and Analysis Plan was prepared in December 2001 and approved by Ecology on January 22, 2002.

the temperature standard. These river segments are listed in the attachment titled "Part III Detailed Comments on Specific Listings."

NWPPA has also commented to this effect in the proceedings to revise the state water quality standard for temperature. In addition, NWPPA and the larger business community have taken every effort in the meetings of the Water Quality Partnership to explain to Ecology the ramifications of an overly broad approach to listing of water bodies as impaired.

2. Ecology's proposed temperature listing actions are not consistent with Ecology Guidance for Listing of Impaired Waters WQP 1-11

Ecology Water Quality Program Policy 1-11 (WQP 1-11) "Assessment of Water Quality for the Section 303(d) List (revised September 2002)" states its purpose is:

"This policy describes a series of categories to be used in the upcoming assess process, including one for the 303(d) list itself and others that more broadly assess water quality conditions throughout the state. This policy also provides guidance for data submittal, data quality assurance and requirements, and criteria for assignment of specific waters to each category. This policy .. .constitutes the "Listing Methodology" for the Section 303(d) list as required by the Environmental Protection Agency....

This policy applies to Ecology staff when conducting assessments for the 303(d) list."

For temperature, WQP 1-11 (P. 24) states:

"When continuous monitoring data are available, Ecology will assess the seven-day average of the daily maximum (for temperature). ... When continuous monitoring data are not available, but data are available from at least seven days in any 30-day period, Ecology will assess the average of the highest (for temperature) measurement on seven consecutive days on which measurements were taken... a waterbody segment will be place on the 303(d) list for temperature... when at least one seven-day average shows a violation of the water quality standard."

NWPPA reiterates its prior concern that the state water quality standard consists of several components, not just a numeric criteria. NWPPA raised this concern also during the public comment process for WQP 1-11.”

The proposed list does not show how Ecology conducted the specified evaluations for the 41 segments of the Columbia, Snake, Spokane, Pend O’reille and White/Stuck River that

NWPPA Letter July 8, 2002, see footnote I

will change from “not listed” in the 1998 list to “impaired for temperature” in the proposed list.

WQP 1-11 also contains Ecology’s explanation regarding how data newer than 10 years old will be handled. For the Columbia River, many of the temperature listings are based on data that would have been made available during or after the time WQP 1-11 was adopted and should have been evaluated according to WQP 1-11. If older data is reinterpreted, that should be explained as well.

3. Ecology’s inappropriate interpretation of the state temperature water quality standard is effectively a revision to the state water quality standard without going through rulemaking.

The recent case of *Florida Public Interest Research Group Citizen Lobby Inc. v EPA* (October 4, 2004, 11 Circuit Court of Appeals), stands for the proposition that a state’s listing methodology should not become an alternative means to revise state water quality standards. This challenge involved a question of whether the state of Florida effectively established a new rule, changed or added to the state’s existing water quality standards by the manner in which waterbodies were included on the state’s 303(d) list of impaired waters. Florida had adopted an “Impaired Waters Rule” setting forth methodology for listing water bodies exceeding water quality standards that appeared to make several revisions to Florida’s Surface Water Quality Standards. The District court relied on declarations of the state and EPA that there were no modifications of the existing standards. The Court of Appeals found undue reliance on these declarations, that the District Court had an obligation to examine the practical effect of the rule, and remanded the case for further determinations. The Court of Appeals also noted the process the states and EPA respectively must engage in to revise and review water quality standards.

NWPPA believes Ecology is making an error of the type found in the *Florida* ruling. By disregarding the components of the temperature water quality standard and only looking at one aspect, Ecology is effectively changing the state water quality standard

without conducting proper rulemaking. *Simpson Tacoma Kraft v. Ecology (1992)* stands for the proposition that agency action of general applicability is invalid if proper rulemaking is not conducted.

Part III: Detailed Comments on Specific Listings

Comment 1: River segments subject to the NWPPA temperature studies

(A) NWPPA appreciates Ecology's effort to acknowledge the NWPPA temperature studies (footnote I) and that the pulp and paper mills appear to have no measurable effect on these river segments.

(B) NWPPA reiterates its concern that these segments should not be included in "Category 5" because Ecology has not made a determination of natural conditions. These segments include:

Columbia River

Longview segments (Id # 21537, 21538, 21303)
Camas/Washougal segments (Id #21539,21540)
Wallula segments (Id #21541, and 21542)

White/Stuck River

Sumner segment (Id# 21301)

Comment 2: Other river segments in the vicinity of pulp and paper mills are not properly listed as Category 5

NWPPA also commented (March 2004 letter) on the basis of Ecology's proposed listing decisions for other river segments in the near vicinity of the above segments. These segments were not part of the NWPPA study but appear to have been listed as impaired based on data from the Army Corps of Engineer or the Tanner study. Generally, the listing basis merely cites the number of days or readings where the ambient temperatures exceed the numeric criterion. For a few, Ecology cites the

percentage of readings over the criteria.

Compliance with the water quality standard is not based on number of days or percent exceedances of the numeric criteria.

Ecology should:

Provide analysis of data pursuant to WQPI-1 I for all new data that formed the basis of the proposed listing changing status from “not impaired” to “impaired.” Provide an analysis of the other components of the water quality standard (natural conditions clause and allowable increment) or include the following language:

7

“Ecology notes these excursions but has not evaluated this information in light of the water quality standard for temperature that allows natural conditions to become the criteria if natural conditions exceed the numeric criteria. Ecology has also not evaluated whether the allowable 0.3°C/0. 1°C incremental increase allowance for human influences was exceeded.”

NWPPA requests these revisions for the following segments:

Columbia River

Listing ID #

5892

5893

5894

6292

6293

6294

6295

6299

6300

6310

6296

6309

6299
7876
7877
7964
8429
8580
11094
11169
11253
21303
21537
21538
21539
21540
21541
21542
40944
40945
40946
40947
40948

8

40949
40950
40951
40952

Snake River

Listing ID#s

6302
6303
6304
6305
6306
6307
8096
11123
16905
16911
16929
16887
16896

Spokane River

Listing ID#
3737

Pend Oreille River

Listing ID#
6388
11452

White/Stuck River

Listing ID#
21301