



PUBLIC WORKS

May 14, 2015

Mr. Patrick Lizon
Water Quality Assessment Coordinator
Washington State Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

RE: City of Everett Comments for *2015 Proposed Water Quality Assessment and 303(d) List for Washington State Using Fresh Water Data*

Dear Mr. Lizon:

The City of Everett appreciates the opportunity to comment on the proposed list of impaired waterbodies. We understand the effort required to compile and evaluate data on a state-wide level. There are improvements that can be made to the listings to improve understanding, ensure consistency with recent court cases and EPA actions, and clarify segment listings that impact other jurisdictions.

Tissue based listings.

Ecology has used fish tissue concentrations as a basis for Category 5 listings. The City believes such listings are inappropriate. The City is not aware of other states using fish tissue as a basis for 303(d) listings. The City is unaware of any requirement in the Clean Water Act Section 303(d) to use fish tissue concentrations for listing purposes.

The state has never proposed or adopted numeric tissue concentration "water quality" criteria. Ecology needs to go through rule-making to adopt tissue based criteria and/or to adopt a means for establishing narrative criteria based on tissue concentrations before using them in the 303(d) program. Tissue concentrations greater than fish tissue equivalent values calculated by Ecology cannot be used to demonstrate that numeric water quality criteria are exceeded.

The City recognizes that for some pollutants, the Clean Water Act tools, with their focus on point source discharges, are not well suited to deal with the concerns. The City recognizes that in some cases, Chemical Action Plans are much more appropriate than TMDLs. Category 5 listings pretty much force the use of TMDLs.

Bioassessment Listings

First, a specific comment on the new Category 5 bioassessment listing for North Creek. Samples taken by Snohomish County in Snohomish County have been extended by segment up into the City of Everett all the way to the headwaters of the creek. This is problematic. The area above 128th street would go completely dry in the summer if not for supplementation by the North Creek pump station operated by the City. The City has a temporary water rights permit from Ecology to pump water for non-consumptive use into the creek from May 1-Nov. 15 each year. If we don't pump, there are no fish or macroinvertebrates in the creek during most of this time period. Because this is an artificial condition, but one that is supported by another section of Ecology (Water Rights), Washington Department of Fish and Wildlife, the public, and Adopt-a-Stream (located just over the City-County line), we do not think it reasonable to list this as a Category 5. We have no requirement to do this pumping, and can discontinue it at any time. This would be a detriment to the native fish, wildlife and macroinvertebrates that have been documented in this segment as benefitting from the pumping regime(we have provided reports to the Ecology Water Rights section, and can provide them to you), even if it is not nor will it ever be optimal habitat. It is inappropriate to hold this segment to the same standard when it is really an ephemeral creek.

The second comment relates to listing bioassessment as Category 5. Bioassessments are not pollutants, therefore they cannot be listed as Category 5 requiring TMDLs. They should be listed in Category 2 (Segment is a Water of Concern) until such time as the causal agent of the biological impairment has been identified. Once monitoring has occurred, and the cause of impairment is identified, it can them be moved to either 4c or 5 of the 303(d) list as appropriate, and actions can be developed.

Use of pollutant surrogates

It has become widely known in the NPDES community that Ecology is attempting to use pollutant surrogates in establishing targets for loads in Water Quality Improvement Implementation Plans as a result of the TMDL process. This is not consistent with federal court findings that restrict EPA to issuing TMDLs for actual pollutants, and EPA's subsequent updating of its 2002 memo *Establishing TMDL Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs*, and throwing out a previous 2010 update memo. Language related to using surrogates for pollutants when establishing targets for loading have been removed, and it would be advisable for Ecology to also abandon the use of surrogates to avoid potential litigation and concentrate on other possible avenues to address the real pollutants as specified in the Clean Water Act.

Use of old data for listing

Everett has a specific issue with a new Category 5 listing for bacteria in Silver Lake, Listing ID 6322. This listing appears to contradict itself in two parts of the text. It says the basis for the listing is 2004 data, and yet there were fewer than 5 samples so a geomean could not be done. In the remarks, it says that "Impairment was determined by exceedance of the geometric mean criterion in water year 2004, and the percent criterion in water year 2004. This is contradictory of the calculation of a geomean, which is needed to determine compliance. Also, this biological data is over 10 years old. We are all aware that bacterial data can vary widely in a single hour, so limited samples from a targeted study (swimming beach sampling, which the Snohomish Health District indicates is just a snapshot) in one site truly does

not reflect the status of a lake the size of Silver Lake. As mentioned in the listing, Everett did intensive sampling in a number of lake locations when Silver Lake was listed in 1998, and had the listing removed as a result of more representative sampling (sampling plan was approved by Ecology). Why would Ecology now reach back 10 years to list? This data would be unrepresentative of current conditions. Why was it not listed in the 2008 or 2010 listings if all that is being used is insufficient data from 2004? This should be listed as a Category 2, with more distributed sampling occurring. We already sample in-lake on a quarterly basis, and could potentially expand that for better fecal coliform data is much more representative of lake conditions. We are also planning an update to the Silver Lake Study done by the University of Washington in 1988, so again could also use this process for better information. Moving this listing to Category 2 makes the most sense based on age and incompleteness of data used, limited scope of the data, the fact that it is biological data which is "flashy" to begin with, and pending further studies.

The same sort of argument applies to a new Category 5 pH listing on North Creek. Data from 2004 is being used for a listing, when, since then, there have been 70 samples taken, and a single one has shown exceedance. Again, biological parameters can change rapidly, and this is again sampling done in Snohomish County and extrapolated back up into the section of the creek that would be dry in the summer except for the pumping done by Everett. This pumping has encouraged the reestablishment of beavers, which the Water Rights section of Ecology, and consultants reviewing our actions, view as a good indication of function. The beavers have backed up water and made our flow gauges useless, and this also might have an effect on DO, pH and bacteria where the water passes into the County. This listing should be Category 2, for lack of recent evidence of a problem (one sample in 70 over 5 years is not a problem, it is a single anomaly!).

Possible problems with listing of parameters that are less than method reporting values

Under separate cover, you will receive another letter from Everett commenting on a Category 2 listing for the Sultan River. We provide it separately to emphasize the importance of our drinking water source, and that letter speaks well to the erroneous use of an outfall study well away from the river. What we want to emphasize here is that, whatever method is being used to select data from the EIM to be utilized in the development of ALL listings throughout the state, it has some problems. The data used to place the Sultan at Category 2 were all non-detects, and therefore should not be utilized at all. This problem may exist for the rest of the Snohomish County Study that generated outfall data, and should be checked to avoid erroneous listing. There is nothing to indicate that the same problem does not exist for other listings, so the methodology (automated, manual, etc.) should be verified as valid for all other data for all categories in the 303(d) assessment.

Thank you for the opportunity to comment, and if you have any questions, please contact me at 425-257-8889, or hkibbey@everettwa.gov before June 30.

Sincerely,



Heather Kibbey
Surface Water Manager

CC Julie Sklare, Everett (email)
Lincoln Loehr (email)
Roy Harris (email)