

NORTHWEST ENVIRONMENTAL ADVOCATES



September 1, 2011

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Via E-mail: Susan.Braley@ecy.wa.gov

Re: 2011 Proposed Revisions to Water Quality Policy 1-11, Assessment of Water Quality for the Clean Water Act Sections 303(d) and 305(b) Integrated Report

Dear Susan:

The following comments are submitted on behalf of Northwest Environmental Advocates (“NWEA”) on Washington Department of Ecology’s proposed revisions to Water Quality Policy 1-11, Assessment of Water Quality for the Clean Water Act Sections 303(d) and 305(b) Integrated Report (hereinafter “Policy”).

We have attached, and incorporate hereto, our comments on the Policy, without its proposed revisions, in our 2008 comments on the proposed 303(d) list. These comments address revisions that NWEA believes Ecology should have made, but did not make, in these proposed 2011 revisions. One significant failing we explained then, and which continues to the proposed revisions, is Ecology’s failure to give full meaning to its water quality standards, including how it plans to assess full support of designated and existing uses. It also fails to address some major parameters such as nutrients (outside of total phosphorus in lakes) which presumably are covered under narrative provisions or beneficial use support in addition to related parameters such as dissolved oxygen. Within the parameter-specific discussions the Policy does not address either beneficial uses or narrative criteria in many instances, sometimes failing entirely to acknowledge their existence. Now, in addition, quite a number of proposed edits include changing “standards” to “criteria” which has the effect of shifting Ecology’s assessment even more to evaluating its data against numeric criteria alone. Finally, Ecology ignores the requirement to use information when data are not available or to supplement data, despite the clarity of EPA regulations requiring the use of both.

Our comments on the proposed revisions use and refer to the pages of the “tracked changes” version of the Policy that Ecology has made available to the public for review.

Page 3

Ecology proposes to add the word “sampled” in stating that all waters will be placed into one of the five EPA categories. We strongly object to this approach. We understand that many waters have no sampling data but that does not relieve Ecology from making a determination or assumption of their water quality. After all, in a regulatory context, Ecology must make an assumption of water quality. It is necessary to make this determination in order that Ecology can properly apply various regulatory requirements of the Clean Water Act (“CWA”) such as

antidegradation and limitations on discharges to water quality limited streams. At a minimum, Ecology should place such waters into Category 3, "Lack of Sufficient Data" because there is very little difference between no data and inadequate data and because lack of sufficient data describes a situation where there are no data just as much as it describes a situation where there are some but not many data.

Page 3

Ecology states that waters "showing apparent exceedances of criteria due to documented natural background conditions, and with no significant human contribution" will be listed in Category 1. We disagree that Ecology can do this. The fact that there are natural sources of a pollutant is allowed to change the water quality standard in some situations. Impacts to human health are not among those instances. Therefore, Ecology may not use this Policy to override accepted EPA policies on water quality standards, in effect changing the applicable water quality standards through a Policy that is not subject to EPA action under Section 303(c) of the CWA. Where Ecology's water quality standards allow for changes to water quality criteria due to natural conditions, such policies do not override the otherwise equally applicable aspects of the standards, namely the protection of existing and designated uses unless Ecology has removed the designated uses that are not existing through the Use Attainability Analysis process. Therefore, Ecology is not allowed by law to simply consider all natural conditions as nonexceedances of its water quality standards. Finally, Ecology does not explain the meaning of "significant" in this context. If Ecology's standards allow for natural conditions to become replacement criteria, any additional anthropogenic contribution of a pollutant or parameter is itself an exceedance unless a specific criterion allows for an increment of anthropogenic impact. Ecology is not free to determine that this exceedance is not significant merely because the acceptable level of the pollutant or parameter is already exceeded by the natural sources.

Page 4

The chart appears to suggest that EPA does not review Ecology's proposed 4(b) determinations. We do not believe this is correct.

Page 4

Ecology states that EPA has authority only to add and remove waters from Ecology's list "based on the information available to Ecology during the drafting of the assessment." 40 C.F.R. § 130.7(b)(5). This is incorrect. EPA is not bound by whatever limited or nonexistent efforts made by Ecology to obtain "all existing and readily available water quality-related data and information" as required by EPA regulations. Moreover, if Ecology creates huge lags between its call for data and its publication of a list, EPA is certainly free to use data that Ecology could have obtained during that period of time. This statement should be removed.

Page 4-5

We welcome Ecology's change in segmentation.

Page 6

We agree with Ecology's statement that the public can submit water quality data "any any time" as well as during the period of "call for data." However, this should be expanded to include both data *and information* to reflect EPA regulations and Ecology's own water quality standards. In addition, it does little good to have this statement buried in a guidance document if, at a minimum, Ecology's website does not openly invite such submittals on an ongoing basis. Finally, Ecology should put into every NPDES permit, 401 certification, and administrative order

that sources of pollution or disturbance that are required to collect data on receiving streams are required to submit those data to Ecology at specific times to correspond to the development of the 303(d) list. In other words, Ecology staff should not have to prowl through record files looking for data that otherwise could be provided directly to the staff in charge of this evaluation.

Page 11

Ecology states that “[w]ater and sediment testing should be by an approved method with a quantitation limit that yields reliable results at concentrations that are less than the criterion.” This is an absurd statement. There are many toxic pollutants where there is no technology that can achieve a quantitation limit less than criteria. For example, in Oregon where new toxic criteria are based on 175 grams of fish consumption per day, a full 48 percent of the criteria do not have quantitation limits that can achieve this goal. Under Ecology’s Policy, all data on such pollutants would be excluded. Given that Ecology is considering adopting human health criteria for toxics using a higher fish consumption level, this is not only inadvisable but will put Ecology at odds with the law because it has the effect of negating otherwise applicable criteria. Moreover, regardless of Ecology’s adoption of new toxic criteria, Ecology has narrative criteria and beneficial use support requirements, both of which would cause this Policy to exclude data that Ecology has no legal or technical basis to exclude. While we agree that testing should be done using the lowest possible quantitation limits, it does not follow that results based on higher quantitation limits are invalid as a matter of policy, in particular because the levels of pollutants detected may be so much higher than the criterion and the quantitation limit as to leave no doubt as to the validity of the results to demonstrate an exceedance. Finally, given changes in methodology that in some cases move swiftly, this policy could result in the rejection of data upon which Ecology needs to rely in order to put subsequent data into context. An example would be the use of EPA Methods 608 and 1668A for PCBs.

Page 15

The statement concerning waterbodies with no data appears to be inconsistent with the statement commented on above in which Ecology indicates that were there are no data, Ecology will not place the waterbody segment in a category. Under this description, it appears that Ecology will although it will not show up on the database. NWEA supports this position.

Page 15

We disagree with EPA’s characterization of Category 4c. NWEA believes that the statute is clear that such waters must be placed on the 303(d) list. Likewise, while we believe that as a matter of convenience listing waters with approved TMDLs in a separate list from Category 5 is appropriate, we do not agree that such waters are not “part of the 303(d) list” as stated in the Policy revisions.

Page 16

We support the changes proposed in the description of Category 4b. However, in the text and the bullets, Ecology proposes to substitute the word “criteria” for “standard” or “standards” and we disagree that this is consistent with the law. This very substitution suggests that Ecology can have no listing based on failure to support designated or existing uses, thereby negating fully applicable aspects of its own water quality standards. If the intent is to keep the focus on the basis or bases for what would otherwise be a Category 5 listing, this can be done while still maintaining policies that are consistent with the law. In addition, the sentence concerning EPA approval of Category 4b placements contradicts the table upon which we commented above, in which Ecology indicates that there is no EPA review of 4b placements.

Page 18

Ecology should not change “standard” to “criteria,” here and elsewhere, for the reasons stated above.

Page 21

This description of natural conditions is an improvement over the more simplistic explanation commented on above. However, it retains the phrase “significant impacts” from human causes as if, in addition to the increment for anthropogenic activities incorporated into two specific numeric criteria the standards have a built-in significance test for human sources where natural sources would or might cause the exceedance alone. Of the utmost importance is that Ecology refrain from making standards changes through the 303(d) listing and assessment process and that where it makes allowable applications of its existing and approved standards and policies that it is extensively documented.

Page 22

We agree with Ecology’s description of the applicability of TMDLs to waterbodies both listed and unlisted. We agree that Ecology is required to use the data it collects during the TMDL process in its subsequent assessments. It is not entirely clear that this is what Ecology intends to do as it plans to place all of those waters into Category 4a upon EPA approval of the TMDL. It is essential that the data underlying the TMDL be added to the dataset for many reasons among them to ensure that subsequent failure to attain water quality standards may require upstream listing, data focused on certain criteria may be applicable to findings regarding other criteria and overall attainment or failure to attain water quality standards.

Page 23

We agree that Ecology should strike the paragraph inviting parties to request reassessment in interim periods. We also believe that Ecology should focus its resources on maintaining the every-two-year assessment as required by EPA.

Page 24-26

Please see our comments in the attached document from 2008. In addition, requiring a 30-day minimum per year swimming closure is arbitrary. If the closure is from a one-time event, Ecology could ignore say 25 days of closure in a year. If the closures are from on-going sources and water quality problems the fact that a closure is less than 30 days out of the year is not a sufficient basis to conclude that the designated use has been met. It is incorrect to state that no narrative criteria apply to bacteria. *See* WAC 173-201A-260(2)(a) (“[D]eleterious material concentrations must be below those which have the potential, either singularly or cumulatively, to adversely affect characteristic water uses, cause acute or chronic conditions to the most sensitive biota dependent upon those waters, or adversely affect public health[.]”).

Page 34

It is incorrect to say that no narrative criteria apply to contaminated sediments. *See, e.g.,* WAC 173-201A-260(2)(a) (“Toxic, radioactive, or deleterious material concentrations must be below those which have the potential, either singularly or cumulatively, to adversely affect characteristic water uses, cause acute or chronic conditions to the most sensitive biota dependent upon those waters, or adversely affect public health[.]”).

Page 39

Again, Ecology is mistaken in stating that there are no narrative criteria applicable to dissolved

oxygen (“DO”). For example, Ecology’s water quality standards include the requirement that “all indigenous fish and nonfish aquatic species be protected in waters of the state in addition to the key species described below.” WAC 173-201A-200(1). Likewise, “deleterious material concentrations must be below those which have the potential, either singularly or cumulatively, to adversely affect characteristic water uses, cause acute or chronic conditions to the most sensitive biota dependent upon those waters, or adversely affect public health[.]” WAC 173-201A-260(2)(a).

Page 40

We agree with Ecology’s insertion of the word “typically” in discussing the critical season. This might be an appropriate location for Ecology to mention some atypical circumstances.

Page 42

Again, we disagree that there are no narrative criteria that apply to the parameter pH. See comments regarding DO.

Page 47

As with DO, it would be helpful for Ecology to note some of the atypical circumstances that lead to excursions of criteria outside the critical season.

Page 54

Ecology’s proposed additions appear to place the burden for obtaining data and site specific information on other agencies rather than on Ecology itself. This is an incorrect reading of the burden EPA’s regulations place on Ecology. If Ecology has reason to believe that such data and information exist, Ecology must seek them not wait passively to see if they are “provided.”

Page 55

Ecology misconstrues the role of its narrative criteria because it limits its analysis of data to application of the numeric criteria, including the National Toxics Rule (“NTR”) for human health concerns. In other words it seems to not understand the role of narrative criteria to *supplement* existing numeric criteria to ensure full protection of existing and designated uses despite the plain language of the narratives that direct Ecology to do so: “Toxic, radioactive, or deleterious material concentrations must be below those which have the potential, either singularly or cumulatively, to adversely affect characteristic water uses, cause acute or chronic conditions to the most sensitive biota dependent upon those waters, or adversely affect public health[.]” WAC 173-201A-260(2)(a). There is no reference, for example, to the evaluation of cumulative impacts in the Policy and there is no legal rationale for Ecology to ignore this clear aspect of its own water quality standards.

In the matter of narrative criteria *supplanting* numeric criteria, Ecology is incorrect that it may make a “Natural Conditions evaluation” for arsenic based on presumed natural elevations. EPA policy precludes natural conditions overrides of criteria for the protection of human health. Moreover, Ecology does not have human health criteria for toxics and the NTR does not include a “Natural Conditions evaluation” of which Washington can avail itself.

Susan Braley
September 1, 2011
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Thank you for providing this opportunity to comment.

Sincerely,

Nina Bell
Executive Director

Attachment: NWEA comments on Ecology's 2008 Draft Assessment of Water Quality for the Clean Water Act Sections 303(d) and 305(b) Integrated Report, April 30, 2008.