



CH 1J32
PO Box 9777
Federal Way, WA 98477-9777
Telephone: (253) 924-3426
Fax: (253) 924-2013
E-Mail: ken.johnson@weyerhaeuser.com

August 31, 2011

Susan Braley
Water Quality Program
Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Sent by electronic mail to subr461@ecy.wa.gov

Subject: Proposed Revisions to Policy 1-11

Dear Susan:

This letter provides the Weyerhaeuser Company comments on the draft changes to the agency policy statement guiding the assessment of water quality to support CWA section 303(d) and 305(b) list development.

Page 1 of the draft Policy – The Purpose statement refers to the assessment and categorization of waterbody segments according to “water quality status.” This seems somewhat ambiguous. As a practical matter, the application of this policy represents the mechanism to determine whether a waterbody attains or complies with WAC 173-201A and WAC 173-204 water quality standards. If the agency agrees, there might be some value in being very clear about the function of the Policy. The first sentence could be rewritten to say

“...will generally be assessed to determine attainment with WAC 173-201A and WAC 173-204 water quality standards and then placed in various categories based on this determination, according to water quality status and priority for further actions. These categories identify the status of the waterbody segment and denote future regulatory actions. This policy also provides specifications for data submittal, ...”

Page 3, fourth full paragraph – Use of consistent language. By this point in the Policy, the phrases “compliance with water quality standards,” “documentation of impairment,” “apparent exceedences of criteria,” and “meets tested criteria,” have been used to relate monitoring data to Washington water quality standards.¹ Are these terms/phrases synonymous or does Ecology intend different meaning? Perhaps Ecology could clarify the language choices and, if appropriate, select and use a single phrase throughout the Policy.²

¹ In addition, the term “excursions” is used later in the Policy.

² 40 CFR 130.7 seems to choose “violations of applicable water quality standards” as the relevant characterization.

Page 16, addition to Category 4b discussion – Ecology should add a paragraph in the Category 4b *Has an Approved Pollution Control Program* discussion to specifically recognize Washington’s unique regulatory response to addressing surface water quality protections on state and private forest lands subject to the Department of Natural Resources Forest Practices Rules. These Rules have been developed so as to achieve compliance with WAC 173-201A surface water quality standards and the federal Clean Water Act. The implementation evaluation report titled “2009 Clean Water Act Assurances Review of Washington’s Forest Practices Program”³ substantially responds to each of the programmatic criteria necessary to gain recognition as a Category 4b *Has a Pollution Control Program*.⁴

The regulatory status of the Forest Practices rules has matured since this WQP 1-11 was last revised in 2006. In 2009, the Department of Ecology reviewed the Forest Practices and Adaptive Management programs to determine if the forest practices rules and program have been effective in meeting water quality standards. The product from this review was the Clean Water Act Assurances Report (Hicks) issued in October 2009. Ecology conditionally extended the Clean Water Act Assurances, based on the forest practices pollution control program meeting a scheduled set of milestones addressing forest practices program improvement and research development within the Adaptive Management Program.

In response, the Adaptive Management Program’s Cooperative Monitoring, Evaluation, and Research (CMER) committee revised the CMER Work Plan, re-prioritizing projects to address the concerns identified in the Clean Water Act Assurances Report. The CMER Work Plan also was reformatted in order to make each rule group chapter more consistent in layout and presentation of information. The Adaptive Management Program also addressed other Work Plan gaps, issues of concern, and recommendations that were identified during the 2009 independent review of CMER committee work.

Ecology routinely provides the Forest Practice Board with updates on the progress being made to meet milestones established for retaining the Clean Water Act Assurances for the forest practice rules and associated programs. As other policy priorities arise, Ecology has made changes to specific milestones that reflect reprioritization decisions consistent with the intent of the original 2009 list of milestones. Ecology has also acknowledged that the economic recession has made it difficult to meet some milestones and the Agency has accommodated delays related to over-allocated staff due to state budget shortfalls.

In response, Ecology has worked with stakeholders to reduce the effort needed to meet milestones by proposing draft approaches, finding grant funding, moving milestone dates to match consensus decisions, and remaining open to alternatives to specific milestones where they meet their underlying purpose. While a number of individual milestones remain behind schedule,

³ Washington Department of Ecology, Mark Hicks, July 15, 2009

⁴ Listed on pages 16 and 17 in this draft WQP 1-11

progress on implementing and achieving water quality improvements associated with the forest practice rules and the adaptive management programs continue to occur.

In spite of the programmatic concerns noted above, Ecology has not taken any steps to remove or suspend its 2009 Clean Water Act Assurances determination that forest practices rules and adaptive management program will be effective in meeting water quality standards. The presumption has been that the forest practices pollution control program achieves the criteria associated with Category 4b.

A compelling position exists for Ecology to recognize that the Washington State Forest Practice Habitat Conservation Plan (HCP) approved by the U.S. Fish and Wildlife Service and NOAA fisheries in 2006, combined with Ecology's Clean Water Act Assurances determination in 2009, constitutes sufficient evidence to shift from current Category 5 listing to Category 4b for those impaired water bodies subject to Washington State Forest Practice Act and regulations and the Federal HCP noted above.

Weyerhaeuser and the Washington Forest Protection Association would extend an offer to meet with Ecology to demonstrate how each criterion to support Category 4b *Has a Pollution Control Program* is addressed.

There are at least three good reasons why this Category 4b acknowledgement should occur:

- The Washington Forest and Fish program, adaptive management process, government agency commitments, etc., etc., fully addresses the Category 4b criteria as a comprehensive and substantial Approved Pollution Control Program.
- Stating a policy intention in WQP 1-11 to rely on a 4b listing will signal that Ecology has no intention of developing classic TMDLs for those impaired waterbodies adjacent to state and private forest lands subject to the Forest Practices Act. We note that Ecology's 2008 Water Quality Assessment included 100's of forest land water bodies in a Category 5 purgatory; i.e., described as not meeting WQS but low priority for TMDL development while F&F is implemented.
- The U.S. Court of Appeals for the Ninth Circuit, *NEDC v. Brown*, No. 07-35266, court decision on the NPDES permitting requirement for stormwater discharges from forest roads creates additional regulatory uncertainty, complexity and potential liability if those roads/receiving waters are listed in Category 5. This can be avoided with a Category 4b listing.

Page 16, EPA approval of Category 5 downgrades – 40 CFR 130.7(b)(6) requires the Department of Ecology to “provide documentation,” “share methodology” and “data and information,” and provide a “rationale” and demonstrate “good cause” on listing decisions. It is not at all obvious how Ecology concludes that EPA has jurisdiction to approve or disapprove waterbodies Ecology chooses to place on the Category 4b list. We suggest Ecology is fully capable and best positioned to make this type of decision. The EPA can make whatever

comments it thinks appropriate on the proposed product from the 40 CFR 130.7 listing process, and Ecology should consider those comments.⁵

Page 19, Category 5 placement based on trend data – To announce an intention for a prospective Category 5 listing seems OK, but the merit of using a “303(d) Category 5 listing and TMDL development process” to address declining waterbody quality seems questionable. 303(d)/TMDL is a stuffy, resource-intensive 3-5 year process. More direct evaluation and remedial approaches probably exist and should be favored by the agency. For example, if the water quality deterioration is caused by an NPDES discharger then the agency could simply order a receiving water study be performed and/or review “reasonable potential” computations, and modify the NPDES permit as necessary. Provisions describing Anti-Degradation, beginning in WAC 173-201A-300, could be exercised with new/modified dischargers. Various non-point source Pollution Control Programs might be communicated and implemented.

Page 19, Assessment Methodology and reliance on 10 year old data -- This allowance is somewhat inconsistent with the policy choice presented on page 6 which qualifies data at a 5 year age.

Page 20, Listing based on use of instantaneous concentration data – Ecology should not conclude that an instantaneous parameter concentration has any compelling relationship to a chronic water quality criterion (typically a “A 4-day average concentration not to be exceeded more than once every three years on the average”). To assume otherwise is bad science and is a truly bad policy choice. At most, discrete and perhaps isolated instantaneous parameter concentrations should encourage placement of a waterbody on the Category 2 *Waters of Concern* or Category 3 *Lack of Sufficient Data*, which would then encourage a more rigorous data collection effort to properly categorize a waterbody segment.⁶

Page 20, Assessment Methodology – Ecology should accept a similar data sufficiency threshold to remove a segment/pollutant combination from the Category 5 list as was used to list the waterbody. This policy choice should be articulated in the Assessment Methodology section. For example, if two instantaneous concentration values are relied on to claim a violation of a chronic water quality criterion, and this results in a Category 5 listing, then two subsequent instantaneous concentration values below the criterion should be sufficient to assert WQS compliance and relisting to Category 1, 2, or 3. This supports the proposition that Ecology should be very judicious in listing parameter/segments on Category 5. The 303(d)/TMDL process is cost and time intensive. The agency should only list on Category 5 if there is definitive proof of a WQS violation and there is a conviction that other Clean Water Act programs cannot be implemented to more efficiently and effectively address the problem.

⁵ Same comment for page 48, **Category 4 Determination**; i.e., “when EPA approves use of a pollution control program for temperature.”

⁶ Same comment for page 54, “Measurements of instantaneous concentrations...”

Page 23, Listing Challenges, deleted paragraph – This paragraph should be retained. Interested parties should have the ability to approach Ecology with data-supported regulatory arguments to reassess a listing decision. There are (or could be) significant cost-implications for permittees discharging into a Category 5 listed waterbody, and for Ecology to fulfill the TMDL process. The agency should be open to additional information/data, or regulatory advocacy, to ensure a listing decision is appropriate.

Thank you for considering these comments. Feel free to contact me if some elaboration or other discussion would be helpful.

Sincerely,

Ken Johnson
Corporate Affairs Manager