

June 5, 2015

Heather Bartlett  
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Subject: Water Quality Program Policy 1-11

Dear Ms. Bartlett:

The Department of Ecology has produced Water Quality Program Policy 1-11 to direct development of the 303(d) Category 5 list. While the necessary regulatory components of the list submitted to the Environmental Protection Agency are defined in 40 CFR 130.7(b), states do have some discretion on science and policy choices comprising the listing methodology.

We are requesting that Ecology initiate a review of the Policy. The current WQP Policy 1-11 results in many, many hundreds of new Category 5 listings with each update, but this outcome seems unlinked to actual water quality improvement and to mostly dilute the ability of the agency to respond to the regulatory process.<sup>1</sup> We feel the listing policy and process should be strategic, utilize more robust and current data, and allow for early water quality improvement efforts in order to keep waterbodies from being listed as impaired in the first place.

Below are some science and regulatory policy topics which deserve consideration during a review:

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<sup>1</sup> Assignment of a waterbody/pollutant combination to the Category 5 list triggers an inescapable multi-year regulatory response requiring significant public resources, imparts jeopardy to point and non-point discharges, and has a tempering effect on state economic viability. For example, application of Friends of Pinto Creek/Carlota Copper v. USEPA (2007) decision for new/expanded discharges into impaired waters; uncertainty of outcomes from the required regulatory and legal processes; the stigmatization of Washington waters and water derived uses and products as unhealthy or "toxic."

<b>Current Policy</b>	<b>Needed Discussion/Questions</b>
<p>Reliance on water quality data &gt;10 years old to support a Category 5 listing (pages 7 and 19 in WQP Policy 1-11)</p>	<p>What confidence is there that &gt;10 year old data is representative of current water quality conditions?</p> <p>Is it reasonable that &gt;10 year old data should be the sole basis supporting a Category 5 listing?</p> <p>Given the regulatory significance of a Category 5 listing, is it reasonable that Ecology should commit to completion of a TMDL within 10 years. If no TMDL in 10 years, should the waterbody be reassigned to Category 2 or 3 (uncertain/inadequate data)</p>
<p>Data QA/QC requirements do not apply to data submitted for assessments prior to the 2006 Assessment (page 10 of Policy)</p>	<p>Is it reasonable that all Category 5 listings be based on data collected in accordance with the Water Quality Data Act (RCW 90.48.570-585)?</p> <p>Should current Category 5 listings based on data not achieving the Water Quality Data Act QA/QC be reassigned to Category 2 or 3 (uncertain/insufficient data)?</p>
<p>“Other Pollution Control Program” and Category 4b listing (page 15 of Policy)</p>	<p>Should Ecology more broadly consider government-developed environmental control programs as meeting the essential elements of an Other Pollution Control Program and supporting waterbody/pollutant listing in Category 4b?</p>
<p>Reliance of grab sample/instantaneous measurements to represent averaging periods in the WQS (including 1-hour, 1-day, 4-day) (page 20 of Policy)</p>	<p>Is it reasonable to assume water quality data from a grab sample is representative of water quality over a 1-hour, 1-day, 4-day period in a dynamic waterbody?</p> <p>Given the regulatory significance of a Category 5 listing, is it reasonable that the basis for listing should be substantial and incontrovertible information directly matching the structure of the water quality standard?</p>
<p>Consideration of Natural Conditions element in temperature and dissolved oxygen water quality criteria (pages 37 and 43 of the Policy)</p>	<p>A regulatory determination on achievement of the temperature or dissolved oxygen numeric criteria requires an assessment of natural conditions. The structure of these criteria in WAC 173-201A implies a need to consider, in sequence:</p> <ul style="list-style-type: none"> <li>- the natural condition of the waterbody,</li> <li>- comparison against the numeric criteria, and finally</li> <li>- whether human actions result in temperature increases or dissolved oxygen decreases outside the allowed increments.</li> </ul> <p>In the absence of a contemporaneous determination on natural conditions, should waterbodies with evidence of temperature/dissolved oxygen impairment be placed on the Category 2 or 3 lists?</p>

<p>Data quantity thresholds supporting Category 5 listing (pages 37-53 of Policy)</p>	<p>The data quantity thresholds supporting a Category 5 determination are very minimal. For some pollutants, a single data value would support a listing. Given the significant regulatory importance of Category 5, should a listing be dependent on a minimum number of samples and appropriate statistical analysis of exceedance frequency and specified confidence level to support a listing decision?</p> <p>Should Ecology consider a two step listing process ala Florida? An initial Category 2/3 listing based on preliminary or limited data (the “planning” list), and then advancing to Category 5 if additional water quality data provides higher confidence of true impairment (the “verified” list)?</p>
<p>De-listing criteria</p>	<p>Should WQP Policy 1-11 include specific narrative and numeric criteria defining “attainment” of water quality standards and thus supporting “delisting” (or recategorization from Category 5 to Category 1, 2, 3 or 4)?</p>
<p>Category 5 listings based on fish tissue concentrations and bioassay results (pages 47-51 of the Policy)</p>	<p>Given relevant legal and science issues should a very few data values on a surrogate parameter be the sole basis for a Category 5 listing? These issues include:</p> <ul style="list-style-type: none"> <li>- Is a fish tissue equivalent concentration (FTEC) a water quality standard (40 CFR 130.7(b)(3))?</li> <li>- Is a FTEC rationally connected to the derivation basis of the water quality criteria; i.e., do people eat 6.5 gr/day - 175 gr/day of any resident fish species?</li> <li>- Is there a confident nexus between catch location, resident fish FTEC, and pollutant discharges into the implicated waterbody segment?</li> <li>- Is the EPA assumption for use of BAFs correct that steady state tissue concentration can be accurately predicted from a constant ration of tissue to water concentration?</li> <li>- Can grab sample fish tissue samples reasonably support a regulatory determination reflecting a water quality criterion based on a 70 year exposure?</li> </ul> <p>Is it reasonable that FTEC data would be sufficient to support Category 2 or 3 listing, or placement on a “planning” list, with a requirement for water column data to directly assess attainment/impairment of a water quality standard and possible Category 5 listing?</p>
<p>Waterbody segmentation (page 5 of the Policy)</p>	<p>Should there be an exception process to waterbody segmentation if the transition to the National Hydrography Dataset (NHD) creates regulatory vulnerability to an NPDES permittee?</p>

Consideration of RCW 34.05.272 -- Identification and categorization of sources of information used	Does this statute require more information and transparency on agency policy choices relating to the statistical test for exceedance frequency or reliance on pre-2006 water quality data, in support of Category 5 listing.
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There are important reasons for Ecology to initiate a review at this time and then to thoughtfully improve the effectiveness of WQP Policy 1-11. These include:

- 1) Express water quality improvement priorities through development of the 303(d) list – The sheer number of Category 5 listings implies an inventory and workload the agency will have great difficulty managing<sup>2</sup>. A prime reason for this predicament traces to the liberal listing criteria characterizing “impairment.” Exercising available discretion to shape the WQP Policy 1-11 listing criteria to require a more substantial and data-driven demonstration of water quality impairment would (over time) yield a narrowed list of TMDL-candidate priorities.
- 2) Category 5 listing imparts immediate adverse regulatory and economic consequences - A Category 5 listing creates the possibility of unintended consequences for existing and new dischargers, limits or stigmatizes various economic uses of the waters, etc. It is a bad public policy choice to balloon the Category 5 list with the full knowledge that agency resource limitations and sheer TMDL complexity will keep those waterbodies (and NPDES permittees) in regulatory vulnerability for many, many years, and without any improvement in water quality.
- 3) New science and regulatory judgments – Discussion topics can include: data quantity/quality and statistical evaluation to support an impairment determination, natural conditions consideration, consideration of staged lists – planning/verified, reliance on limited fish tissue concentrations in resident fish, Category 4b “Other Regulatory Programs,” innovative mercury and PCB TMDL-like approaches, etc.
- 4) Timing Considerations – This request to reconsider WQP Policy 1-11 is admittedly out-of-synch with the on-going 2014/15 freshwater list development. If Ecology concedes the merit of a Policy re-evaluation, the 303(d) list finalization might be paused to include consideration of any changes. If that is not feasible, then a Policy reassessment should certainly occur prior to the 2016 fresh/marine water 303(d) list development.

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<sup>2</sup> Ecology proposes to add nearly 1,100 more Category 5 listings in the spring 2015 freshwater 303(d) process, for a total of 3,847 Category 5 waterbody/pollutant combinations. In background information Ecology reveals that a relatively small fraction of river mile segments, lakes and marine estuaries have actually been assessed. If the WQP Policy 1-11 listing procedure is not modified it could be surmised the 2016-17 marine/freshwater list development will add another 1000 +/- Category 5 listings given revised toxic water quality numeric criteria and more ambient water quality data.

Ecology has the ability to reshape the 303(d) listing policy to accomplish a more thoughtful and strategic management tool. An opportunity for an advisory committee to participate in discussions on science and policy issues would provide value to the agency. Adjustments to the listing process and decision criteria should then yield what amounts to a prioritized work plan detailing where Ecology resources will be applied. Category 2 and 3 listing should be more prominent; this to provide time for the collection of more data to confirm water quality condition and early implementation of water quality improvement efforts.

We look forward to being productive partners in assisting the agency toward these objectives.

Sincerely,



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