



Association
of Washington
Business

Washington State's Chamber of Commerce

March 23, 2015

Ms. Cheryl Niemi
Water Quality Program
Washington Department of Ecology

RE: Comments on proposed rule changes to Chapter 173-201A WAC – Water Quality Standards for Surface Water

Dear Ms. Niemi:

Thank you for the opportunity to comment on the rule revisions to the state's Water Quality Standards for Surface Water, Chapter 173-201A WAC proposed by the Department of Ecology (Department).

I am writing to you on behalf of the Association of Washington Business (AWB), the state's oldest and largest statewide business association, which includes more than 8,200 employers representing 700,000 employees. AWB serves as both the state's chamber of commerce and the manufacturing and technology association.

AWB represents many of the private employers in the state regulated by permit under the National Pollutant Discharge Elimination System (NPDES). These NPDES permittees include a variety of business types, including small and large manufacturers, processors, refiners, industrial and commercial activities and land resource industries. The employers also represent wastewater and stormwater permitted entities.

Participation in Rule Development: As you are aware, AWB has been an active participant, representing our member companies, throughout the state's update of Chapter 173-201A WAC. These efforts include working through the state-lead science and policy discussion, as well as with the Environmental Protection Agency (EPA), Region 10 office. Our activities and participation has included, but has not been limited to:

- Delegates' Table – AWB was a formal participant designated at the Delegates' Table to provide advice and perspective to the Department in addressing the science and public policy discussion;

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- Policy Forums – AWB attended and participated in the year-long process to update broad stakeholder groups, and the public, on the process to update the surface water quality rules;
- Governor Inslee’s “kitchen table” – AWB was invited to, and participated in the stakeholder discussions led by the Department in the Governor’s office. These discussions included stakeholders directly impacted by the update to Chapter 173-201A WAC, including permittees, tribal community and environmental non-governmental organizations.

In addition to our robust participation through the state-level process, AWB has provided a series of comments, questions and feedback on specific policies considered by the state. For instance, in November of 2013, AWB along with other stakeholders prepared and submitted to the Department a review of candidate technologies possibly capable of treating toxic pollutants to achieve ultralow water quality standards under consideration.¹

The Clean Water Act (CWA) and federal regulation specify that states have the primary responsibility to adopt water quality standards that protect designated uses, are based on appropriate technical and scientific data and analysis, and conform to the administrative requirements presented in 40 CFR 131. States have some discretion in establishing water quality standards and the administrative procedures to implement those standards. The focus of the current rule-revision process, of course, is to update toxic pollutant water quality criteria to protect public health.

Based on the AWB’s review of the proposed water quality standards revision and as informed by our long-term participation in the public involvement process, we believe:

- the proposed toxic pollutant water quality criteria will be protective of human health
- the 40 CFR 131 regulatory criteria for approving water quality standards has been met, and we therefore believe the EPA is required to approve the state’s submittal.

Nevertheless, AWB believes there are opportunities to improve the rule. AWB interests include a regulation which:

- is based on best available science and rational risk management considerations,

¹ HDR, November 7, 2013, *Treatment Technology Review and Assessment*, Association of Washington Business, Association of Washington Cities, Washington State Association of Counties.

- takes the “long-view” in assessing the effect of CWA programs on future state economic development. Unattainable water quality criteria, which drive 303(d) listings and subsequent NPDES permitting challenges will not be good for the state,
- the Department can deliver the Implementation Tools with certainty and reasonable transaction costs,
- the Department will aggressively defend should legal challenges materialize

The Department has policy and decision discretion to better achieve these outcomes in a final adopted regulation. AWB believes the proposed regulation could be improved. The remainder of this letter identifies requested changes being advanced by AWB and its member companies and associations. We would ask the Department to reflect in the public record our support for those comments made by our represented member companies and organizations, including but not limited to, Northwest Pulp & Paper, The Weyerhaeuser Company and Inland Empire Paper Company.

APA Requirements / Economic Review: Under the Administrative Procedure Act (APA), RCW 34.05.328, the Department has obligation to conduct a cost-benefit analysis, taking into consideration probable benefits and costs, as a result of the undertaken revisions to the proposed rule in Chapter 137-201A WAC. The Department is also required to adopt the least burdensome alternative that meets the stated objectives and goals for the proposed rule.

As Ecology chose to scope this analysis, the probable benefits may exceed probable costs. That analysis assumes only the use of 2014 information (water quality and wastewater discharge data, analytical methodologies, etc.) This static analysis may fall short of the APA policy objective to assess benefits/costs over the 20-year “life” of the proposed regulation.

Based on requirements of the APA, the Department might consider a more dynamic cost-benefit analysis. As such, the final cost-benefit analysis due when the regulation is promulgated should anticipate and consider the regulatory events which will likely define the actual rule implications over that time period. This could include; improving pollutant analytical methodologies, enhanced interest on toxic pollutants in stormwater, a significant increase in ambient water quality impairment determinations and a better understanding of how the Pinto Creek decision impacts on state discretion, all of which will be impacted by the implementation of the underlying rule revisions.

Fish Consumption Rate: AWB supports the use of best available science in developing the proposed rules. While we appreciate the work done by the Department in the overall rule, the general approach taken by the Department uses an overly conservative assessment to establish a fish consumption rate under the proposed rule. As written, the rate represents a consumption value of nearly the 95th percentile of the highest consumers in the state. The result is proposed water quality criteria which are more stringent than necessary to protect the health of Washington residents per EPA guidance.

Furthermore, the Department has made the policy decision to include all fish and shellfish consumed in the state, which goes beyond the standards or guidance established by EPA for basing human health water quality only on pollutants acquired by fish/shellfish in state waters. The Department has no ability/authority to regulate pollutants in fish products originating from the open ocean or imported into the state.

Incremental Excess Cancer Risk Rate Policy: As previously mentioned, the CWA provides great deference to states in the development of their policy choices for protecting human health through water quality standards. The development of the incremental excess cancer risk rate policy in the derivation of water quality criteria is a policy choice with which states have some discretion.

In this case, AWB believes the Department appropriately followed guidance provided by EPA to develop a risk rate of 10^{-5} . The adoption of a risk rate of either 10^{-6} or 10^{-5} is acceptable for the protection of general populations, while 10^{-4} is appropriate for highly exposed communities or individuals based on EPA's guidance, and therefore is scientifically supported.

The Department should note that the selection of the state's risk rate, coupled with the fish consumption rate, results in derived numeric criteria that are generally two-and-a-half times more stringent than the current National Toxic Rule criteria.

Implementation Tools: AWB supports the use of implementation tools as pathways for compliance with the proposed rule package. While there are other opportunities to improve compliance the Department's recognition that immediate compliance with much more stringent water quality standards will be impossible and willingness to consider more robust compliance mechanisms is encouraging. Specific suggested changes or additional tools are available in comments put forward by the Weyerhaeuser Company. The Department would be well served to adopt the additional suggestions as

effective tools to ensure the goals of the proposed rule are achieved. The Department should require the final approval of any and all implementation tools prior to final adoption and enactment of the underlying rule proposal.

Finally, it is imperative that the entire rule package be viewed as an interconnected package. The individual building blocks of the proposed changes to Chapter 173-201A WAC are dependent; in that change to any one part has the potential of a rippling impact on other policy choices. Should the Department, or the EPA, modify or deny any key provision of the rule, the Department has an obligation to provide an additional comment period to consider the consequences or impacts.

In closing, AWB believes the state of Washington has had success with an adaptive management approach in other regulatory programs. A smaller-step, incremental approach which anticipates and intentionally minimizes the risk of adverse and predictable consequences and leaves space for non-CWA toxic pollutant reduction efforts, would best serve the state at this time. The Department will always have authority to propose regulation changes which respond to new science, water quality trends, implementation experience, etc. Locking in ultra-low numeric criteria which will return scant environmental/health benefits, predictable economic turmoil, as well as growth and development uncertainty is not a good policy choice for Washington state.

To this end, it should not be lost on the Department, or EPA, during their review of the revisions to Chapter 173-201A WAC, that the proposed criteria for most chemicals addressed in the rulemaking are significantly more stringent than the criteria currently applicable in Washington.

Thank you again for the Department's time and work on the proposed update. AWB remains committed to helping the state accomplish its goals of protecting human health while encouraging economic development. If we can help provide any additional resources or answer any questions, please don't hesitate to contact us.

Sincerely,



Kris Johnson
President