

NORTHWEST ENVIRONMENTAL ADVOCATES



March 23, 2015

Cheryl Niemi
Water Quality Program
Washington State Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

via email only: swqs@ecy.wa.gov

Re: **Chapter 173-201A WAC, Water Quality Standards for Surface Waters of the State of Washington**

Dear Ms. Niemi:

Washington's proposed changes to its water quality standards are a huge disappointment and represent an overall decrease in protection for public health and protection of the environment due to the emphasis on so-called "implementation tools," which are not tools for implementing but, rather, tools for *not* implementing Washington's new toxic criteria. Ecology's use of this doublespeak—copied from Oregon—makes a mockery of the agency's huge emphasis on the public process behind this proposal.

I. New Human Health Numeric Criteria

It has been and remains disheartening in the extreme to see Ecology increase the fish consumption rate and increase the cancer risk rate at the same time so as to placate polluters. That is the long and short of what Ecology has done. In this context it is difficult to stand up and cheer because Ecology managed to move the state into the *last century*, namely from 6.5 grams per day of fish consumption to 17.5 grams/day, once one takes the change in cancer risk rate into account. There is no justification for this increase in cancer risk rate; instead, it is a blatant give-away to those who pollute, at the cost of protecting those who do not pollute but merely seek to use the public waters that Ecology is charged with protecting.

A. Narrative Revisions

Proposed WAC 173-201A-240(4) is unclear. Is this language the equivalent of saying that where Washington has not explicitly adopted numeric criteria consistent with EPA's recommended 302(a) criteria that it does so by reference, along with "other relevant information as appropriate"? If so, it would improve the rule to make that explicit. "Concentrations ... shall be determined" is unclear. Likewise, subsection (3) is not entirely clear. Does it mean that where EPA has revised a 304(a) recommended criterion that the new revision "shall be used in the use and interpretation of the [numeric] values" in these standards? Or does it pertain to only those criteria documents that exist at the time Ecology adopts the numeric criteria?

We believe that the units of measurement would be more appropriately located with the tables

rather than in WAC 173-201A-240(5). The language in WAC 173-201A-240(5)(a) is inconsistent with the Clean Water Act. The Act requires that “[w]henver a State reviews water quality standards, ... such State *shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published* under section 1314(a) of this title[.]” CWA § 303(c)(2)(B). Ecology’s rule states that the department “may revise ... as needed,” which is contrary to the clear language of the statute. “As needed” should be defined by, *inter alia*, EPA’s revisions of recommended criteria, in which case the correct word would be “shall,” not “may.” In addition, there is a tension between the language of subsection (5)(a), “[t]he department shall formally adopt any appropriate revised criteria as part of this chapter” and the language in subsection (4), which states that Ecology’s toxic criteria are “determined in consideration of USEPA Quality Criteria for Water,” a determination that takes place outside the formal adoption of numeric criteria through rulemaking. In fact, it is not the least bit obvious why a procedural rule about adopting criteria has been placed within the standards and criteria section itself, particularly when it is not consistent with the Clean Water Act.

Proposed WAC 173-201A-240(5)(b) is consistent with the requirements of 40 C.F.R. § 131.10(b) that requires protection of downstream waters. It is not, however, as clear as it could be. In June 2014, EPA issued guidance on how states could clarify the downstream protection afforded by their standards. *See* EPA, Protection of Downstream Waters in Water Quality Standards: Frequently Asked Questions, EPA-820-F-14-001 (June 2014). In this guidance, EPA urges states to take a number of actions whilst revising their standards in order to clarify how downstream protection provisions will work. Without reiterating the content of that guidance, suffice it to say that Ecology has ignored it completely. One improvement that is obvious is making more explicit the proposed language in subsection (5)(b) that Washington’s numeric criteria “shall maintain a level of water quality when entering downstream waters that provides for the attainment and maintenance of the water quality standards of those downstream waters, including the waters of another state.” Specifically, the waters of another state are Oregon’s, which has far more stringent criteria for the protection of human health from pollutants, many of which are bioaccumulative and persistent. The rule should state which waters in Washington must meet Oregon’s more stringent human health criteria.

In addition, this language has been added to the human health narrative but does not currently exist in the aquatic life criteria narrative, which could suggest to many readers that the distinction is intended. Presumably it is not, as that would be contrary to the federal statute and regulations. It is true that WAC 173-201A-260(3)(b) states that “[u]pstream actions must be conducted in manners that meet downstream water body criteria,” and that that language applies to all criteria. However, that language is limited, among other ways, to criteria rather than standards. Federal regulations require protection of downstream standards, including designated uses, criteria, and antidegradation requirements. Because this provision is wholly inadequate, subsection (5)(a) should be amended to include protection for downstream standards for the protection of aquatic life. In addition, as discussed immediately above, Ecology should make explicit that Oregon’s far more up-to-date aquatic life criteria must be met by pollution sources upstream in Washington State and should clarify specifically which waters.

Bizarrely, Ecology includes a statement in subsection (5)(b) that the human health criteria are calculated on the basis of 175 grams/day of fish consumption but fails to state that these new criteria are also based on a cancer risk rate of one in 100,000. If basic information is going to be included in the rules, Ecology should include all of it, not just the parts that make it look as if it’s being protective of the human health of its citizens. Instead current subsection (6) that

establishes that fact has been deleted, not moved. While this piece of information may reside in a small-print footnote, it is not clear why Ecology would bury that, whilst including the fish consumption rate in the text.

B. Numeric Criteria for the Protection of Human Health

Ecology has chosen to use variables in deriving its human health criteria that are intended to the maximum extent possible to keep toxic levels in Washington's waters high. One key example is its use of the relative source contribution (RSC), where Ecology proposes to continue to use a RSC of 1 despite EPA's recommendation that states should take into account the fact that toxic contamination ingested by the public comes from more than just fish or fish and water. Ecology discusses EPA's recommendations, summarized as follows:

In the simplest terms, EPA's latest RSC guidance recommends two conservative default approaches:

- If sources of exposure to a chemical are not known, then a default RSC of 0.2 is included in the equation.
- If sources of exposure to a chemical are well known and documented, then a calculated RSC is included in the equation. This calculated RSC gives the HHC the remainder of the reference dose or allowable daily exposure that is not accounted for by other non-CWA sources. EPA guidance suggests that the RSC value cannot be greater than 0.8.

Ecology, Washington State Water Quality Standards: Human health criteria and implementation tools: Overview of key decisions in rule amendment (Jan. 2015) at 22. Nonetheless, Ecology explains how its criteria would be more protective of public health if it followed EPA's recommendations and then proceeds to state that it is a "prudent decision" to reject the federal view. *Id.* at 23. It justifies this entirely arbitrary and important decision in literally one sentence: "Because the geographic and regulatory scope of the CWA addresses contaminant discharge directly to waters of the state (not other sources or areas), Ecology is making a risk management decision that this draft rule continue to use a relative source contribution of one (RSC = 1)." In other words it does not explain its decision but merely tags it a "risk management decision," as if that alone insulates its choice from the need to provide a "sound scientific rationale." 40 C.F.R. § 131.11(a)(1). Instead its rationale is a muddle of such observations that the Safe Drinking Water act allows cost considerations to provide less protection.

C. Arsenic

Washington's proposed arsenic criteria of 10 µg/l is based on the maximum contaminant level (MCL) developed pursuant to the Safe Drinking Water Act. The SDWA allows for the consideration of treatment costs in establishing MCLs. In contrast, the CWA does not. Federal regulations do not mention that cost may be a factor in setting water quality criteria. Instead, water quality criteria "must be based on sound scientific rationale" and "support the most sensitive use." 40 C.F.R. § 131.11(a)(1). Criteria for toxic pollutants must be "sufficient to protect the designated use." *Id.* at 131.11(2). Ecology's proposed use of the SDWA MCL does not meet requirements of the Clean Water Act. Moreover, Ecology's choice to use such an unprotective criterion flies in the face of EPA studies demonstrating that arsenic is a major contributor to the human health risk of tribal fish consumers.

We are pleased to see that Ecology has proposed language to address arsenic discharges from industrial sources, both direct and indirect, as Northwest Environmental Advocates was instrumental in obtaining some similar, albeit not entirely useful, language in the Oregon rules. We are concerned, however, that the way that Ecology has drafted this language will be treated by EPA as not a water quality standard because it is written as a rule that affects dischargers. In addition, while Oregon's rule focused exclusively on waters used for domestic water supply that was *because Oregon had up to that point publicly and incorrectly* claimed that arsenic was only a human health concern when consumed as drinking water, not as contaminated fish, Ecology has no such justification. Specifically, Ecology has not misled the public into thinking that only drinking water is a concern so why is Ecology restricting the discharge of arsenic from direct and indirect industrial sources to only waters because of that designated use. This is nonsensical. If Ecology is going to copy Oregon, it should at least understand what it's doing.

D. Methylmercury

Washington also copied Oregon in not acting to revise its water quality criteria for the protection of human health from mercury. While Oregon did that when it revised its aquatic life criteria but explicitly left out mercury so as to avoid promulgating standards for a pollutant known to have effects on species protected under the Endangered Species Act, Washington is now proposing to do that for mercury and human health. Ecology takes this approach notwithstanding the fact that EPA has provided significant guidance to states on adopting its new 304(a) recommended methylmercury criterion and that states have managed to revise their standards based on EPA's recommended criteria. As with arsenic and PCBs, discussed immediately below, mercury is a driver in the public health risk associated with consuming fish which apparently is a rationale for Ecology's inaction. Not only is this illogical unless Ecology is seeking to protect polluters but it is contrary to the Clean Water Act, as discussed below.

E. PCBs

Washington copied Oregon once again in its proposal for PCBs by using pollutant-specific random numbers to get the results it wanted. While applying its "policy overlay" rule of thumb to ensure that many pollutants' criteria would not become less protective than the NTR to pollutants that are likely not often found to impair waters and therefore unlikely to be controlled in NPDES permits, for PCBs, which are a known problem for dischargers, Ecology cooked up a different method to set its criteria. This is precisely what Oregon did when it used a higher cancer risk rate solely for arsenic. This approach is very obviously just monkeying around with the equations to get the results the states want so that regulation of those pollutants will be at a minimum. Here, Ecology created a cancer risk rate of 4 in 100,000 in order to establish a standard that was no change from the current unprotective PCB criteria for Washington.

II. So-Called Implementation Tools

As stated above, none of these so-called implementation tools has anything to do with implementing Washington's new and revised criteria; to the contrary, it's all about not implementing them. In our opinion, these provisions are poorly written and provide very little assurance that the regulatory relief they will provide polluters will be as minimal as possible, which should be their goal.

A. Variances

It is unclear why Ecology cannot manage to revise certain key criteria— e.g., for the major drivers of public health impacts of pollution—nor can it manage to update its ancient aquatic life criteria—see discussion below—but it can manage to revise its variance rules to apply to all pollutants and all criteria. Not only does it do that but it asserts that in some cases Ecology may adopt the variances itself, “on its own initiative,” without application by specific pollution sources. In other words, Ecology is rushing to embrace the idea that after all of its efforts it is willing to go even further out of its way to ensure that the Clean Water Act doesn’t stop any polluters from contributing to Washington’s toxic waters. This it calls an “implementation tool.”

The variance procedure outlined in the proposed rule is extremely thin on both content and process. There are, for example, quite a few key concepts, such as “reasonable progress,” that are completely undefined. After all these years working on this proposed rule, there is nothing in the rule that defines the specific findings that Ecology will make. There is nothing that will help the public or Ecology determine when a variance is more appropriate than a compliance schedule or when a variance should be used to lead up to a compliance schedule. In our opinion, this effort is just slipshod.

Proposed WAC 173-201A-420(1)(a) says that a variance may be considered where the “attainable use cannot be reliably determined.” It is unclear what Ecology means by this statement. Why does the rule not explain what that means? And why does it not establish that the only issue is not attainability but whether the use is an existing use protected under Tier I of the antidegradation policy? Where will Ecology draw the line between an attainable use that can be or cannot be “reliably determined”? With any use there are always a myriad questions about precisely what, when, where. As a matter of policy, Ecology should establish that its use designations mean something. Yet this language opens the door for variances based on questions about science that plague every undertaking and implies that Ecology will be handing variances out like cookies.

Given that the federal regulations do not specifically cite to variances, although we agree they pertain to variances, merely citing the federal regulations is not particularly helpful. Worse, the basis for maintaining a variance and obtaining a variance renewal is “reasonable progress” which is not defined anywhere. If, in fact, reasonable progress must be made during the variance period, as required by proposed subsection (1)(d), that implies that if reasonable progress is not being made, Ecology will withdraw the variance. The only problem is that the rules do not contemplate such an action. While Ecology has included a “mandatory interim review” every five years in proposed subsection (8), there is no requirement to obtain data to ensure that the review has enough information with which to make findings and specifically whether it will have any information to determine whether the polluters covered by the variance will have made any reasonable progress. Without requiring the collection of data, both aspects of this rule will fail to be anything than an empty and meaningless exercise in bureaucracy. Will the variance itself establish how to measure “reasonable progress,” so that the polluters and the public know what to hold polluters to at the time of the interim review? If not, how is anybody to determine that variances are not merely methods of maintaining the status quo of unsafe pollution levels? How will Ecology make a determination that a variance can be renewed under subsection (8)(e) that is other than an entirely arbitrary, and likely political, finding?

Proposed WAC 173-201A-420 is unclear on what a variance is varying from. It starts in

subsection (1) discussing criteria, notes that it applies to specific parameters in subsection (1)(b), but talks about variances to “standards” in subsection (2) and “uses and parameters-specific change[s] to the standard(s).” Changing the criteria on a purportedly temporary basis is one thing but in subsection (2) Ecology is talking about changing the designated uses as well. Yet Ecology makes no mention of the requirements of 40 C.F.R. §§ 131.10(g) and (h)(1) which prohibit the removal of a designated use that is an existing use. Not only should this prohibition be made explicit if Ecology is going to include language in its variance rule about removing designated uses, it must provide a meaningful process by which existing uses will be identified. The rest of the rule, including for example subsection (6) regarding the required contents of a variance, is completely silent on the matter of existing uses. There is no discussion in the rules about how Ecology will determine existing uses considering that it requires looking backwards in time to 1975. There are certainly no assurances that Ecology will take this federal requirement seriously. There are multiple references to designated uses in the variance section; we have not cited them all but our comments apply to all of them.

Subsection (3)(b) refers to the feasibility of attainment without establishing how Ecology will make that determination. This rule merely states that “one or more of the conditions found in 10 C.F.R. 131.10” can be the basis, presumably in reference to 40 C.F.R. § 131.10(g)(1)-(6). But that statement does not illuminate Washington citizenry with regard to how Ecology will make feasibility findings. For example, with regard to attainability, 40 C.F.R. 131.10(d) states that uses are attainable if they can be achieved through effluent limits issued pursuant to CWA § 301(b) and “reasonable best management practices for nonpoint source control.” This does not explain how Ecology will determine what nonpoint BMPs are “reasonable” and which ones are not reasonable. The rules do not explain how long variances can continue on the basis of purported infeasibility when uses are, actually, attainable. At what point in time does the exception become the rule? There is no guidance established in Ecology’s variance rule on how it will determine the length of time for variances. There is no guidance on how Ecology will determine that treatment options are not economically feasible or to what degree Ecology will check the assertions made by polluters that treatment options are not technically feasible.

Subsection (3)(d) refers to “[s]ufficient water quality data and analyses to characterize receiving water and discharge water pollutant concentrations,” but leaves much—too much—to the imagination. What is “sufficient” other than in the mind of beholder? How will Ecology determine what is sufficient? How does this sufficiency finding pertain to the designated and existing uses, the criteria, the quality of the discharge, seasonal variability, other sources of the same pollutant, the effect of multiple pollutants, downstream effects, downstream uses affected by sources found far upstream, bioaccumulation that can only be measured in tissue or lipid bags, sediment deposition, quantitation limits, etc.? There are a myriad of issues that relate to the sufficiency of gathered data and nothing in these rules gives the least bit of a hint as to how Ecology will address any of them. In addition, it is wholly unclear what Ecology means by the sufficiency of “analyses” that are required in this proposed rule. Or what it means by “receiving water” and if that is incorrectly limited to the immediate area of a given discharge. And how sufficiency is or is not tied to determinations of reasonable potential.

Proposed subsection (3)(e) refers to the submission of “a schedule for the development and implementation of a pollutant minimization plan,” which itself is a multi-part process: (1) a schedule (2) to develop a plan and (3) to implement a plan. Why is the plan development not part of the submission of the variance proposal? Why is there a delay in offering up what little a polluter is going to do during the variance if approved? Why does the public not get to see that

plan when it is commenting on the variance proposal and why does EPA not see it when it is determining whether the variance should be approved as a temporary change to standards? Why is the schedule of implementation of the plan not before both the public and EPA?

Proposed subsection (4)(a) does not explain how its consultation process with downstream states will ensure that the result of a variance is consistent with the requirements of 40 C.F.R. 131.10(b), which requires that a state's standards "provide for the attainment and maintenance of the water quality standards of downstream waters." Simply consulting is not the same as compliance with basic standards-setting rules.

Proposed subsection (5) purports to establish the period during which the variance would be in effect but instead, says nothing other than it is "temporary," and that it will be for the "minimum time estimated to meet the original standard." This says nothing about how Ecology will determine what this minimum time will be or even whether Ecology, rather than the polluters, will propose the minimum time period. For example, if the basis is the economic difficulties associated with using treatment to meet the standard, on what basis will Ecology determine those economic difficulties will cease? Providing no cap whatsoever on the length of a variance is inconsistent with the statute and EPA regulations and guidance.

EPA has consistently defined variances as lasting for three years, sometimes up to five.¹ Where it has allowed variances to exceed three years, EPA has not allowed them to be longer than five years.² Where a variance is allowed to go beyond three years, a three-year review from the date of the last triennial review submission to EPA is required.³ The reason for this is simple; it

¹ See, e.g., EPA, Guidance: Coordinating CSO Long Term Planning with Water Quality Standards Reviews, EPA-833-R-01-002, July 31, 2001 [hereinafter "CSO Guidance"] at 34; EPA, Guidance for State Implementation of Water Quality Standards for CWA Section 303(C)(2)(B), December 1988 [hereinafter "Guidance for Implementation"] at 6; EPA, Memorandum from Kenneth M. MacKenthun, EPA Re: Definition of Water Quality Standards Terms, July 3, 1979 [hereinafter "Definition"] at 1; EPA, National Assessment of State Variance Procedures, November 1990 [hereinafter "National Assessment"] at 1; EPA NPDES Permit Writers' Manual, EPA-833-B-96-003, December 1996 at 177. In its Guidance for Implementation, EPA noted that "[w]ithout a short term variance procedure, there is a danger that permits may contain excessively long compliance dates which don't force the attainment of water quality standards." *Id.* at 6. Here EPA is speaking specifically about attainment of standards for toxic contaminants and expressing concern that use of compliance schedules – which are perceived by permittees as more onerous than variances – will allow the passage of too much time before point sources comply with toxic criteria.

² See e.g., Great Lakes Initiative [hereinafter "GLI"] Pt. 132, App F, Procedure 2 §B; CSO Guidance at 34.

³ 40 C.F.R. § 131.20(a); GLI Pt. 132, App F, Procedure 2 §B; CSO Guidance at 34; EPA Water Quality Standards Handbook, 1985 [hereinafter "Handbook"] at 5.3; GLI Supplementary Information Document, EPA-820-B-95-001, March 1995 [hereinafter "GLI SID"] Sec. VIII.B.2.c; Water Quality Standards Regulation Proposed Rule, Advance Notice of Proposed Rulemaking, 63 Fed. Reg. 36741, July 7, 1998 [hereinafter "ANPRM"] at 36759; EPA Memorandum from Patrick Tobin, EPA, to Regional Water Division Directors Re: Three-Year

corresponds to EPA's requirement that water quality standards that do not support the Act's uses must be reviewed every three years.⁴ Where five year variances have been allowed, such as the Great Lakes Initiative (GLI) rules, EPA has additionally required a re-opener clause in associated NPDES permits to ensure that the triennial review is meaningful.⁵ Likewise, for the same reason, the variance holder should be required to obtain information that can be used in that review, as discussed further in the "reasonable progress" discussion below. So, for example, EPA's policy on conditions of a variance for CSO-affected waters emphasizes the importance of obtaining new information.⁶ In a similar vein, the GLI also explicitly notes that a renewal of a variance is subject to all of the same findings and procedures as an original variance.⁷ In this way, the GLI rules ensure that more, rather than less, information is the basis upon which any extensions to variances will be allowed.

Here, Ecology proposes no cap, let alone three or five years. It does include a five year review, which it refers to as "mandatory," but as there are no consequences for Ecology's failure to conduct a five-year review, there is nothing mandatory about it. (Clearly the consequences of a failure to conduct such a review should be the automatic sunseting of the variance.) The review focuses on whether a permittee has been in compliance with the conditions of a variance and also "to evaluate whether the variance is still necessary." How will Ecology define "necessary." This ambiguity should be removed to ensure that the findings—also missing from the review—are consistent with federal regulations and the original premise of the variance.

Ecology also fails to ensure through its proposed rule language that this review will be meaningful. There is nothing to ensure that sufficient data are collected and analyzed to determine if pollutant loads have increased or decreased, any changes in the status and population health of designated uses, nothing at all with regard to threatened and endangered species or candidate or sensitive species, nothing to account for any changes in EPA's recommended criteria for the pollutants at issue that could cast doubt on assumptions made in the issuance of the original variance, etc. In short there is no reason to believe that this review will be anything but an exercise in paperwork, intended to preserve the status quo of pollution in Washington's waters rather than to ensure that new criteria for toxics are met.

Water Quality Standards Reviews, September 6, 1983 [hereinafter "Three-year Reviews"] at 1; EPA Memorandum from Catherine A. Winer to Dale Vodehnal Re: Request for Views on Allowable Duration of Water Quality Standards Variances, January 24, 1992, [hereinafter "Request for Views"] at 2.

⁴ "The State shall from time to time, but at least once every three years, hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. *Any water body segment with water quality standards that do not include the uses specified in 101(a)(2) of the Act shall be re-examined every three years to determine if any new information has become available.*" 40 C.F.R. § 131.20(a) (emphasis added).

⁵ GLI Pt. 132, App F, Procedure 2 §F.4, GLI SID" Sec. VIII.B.2.c.

⁶ CSO Guidance at 34.

⁷ GLI Pt. 132, App F, Procedure 2 §H; ANPRM at 36759.

Subsection (8)(a)(i) states that the review “shall be coordinated” with the public process for issuing an NPDES permit. It does not clearly state that the process will also be separate so that members of the public not interested in reviewing the permit, realize that the interim review of the variance is contemplated. It does not address how the timing of the review may not coordinate with the issuance of a new NPDES permit, rendering the word “mandatory” with regard to the review and “shall” with regard to the coordination in conflict.

Subsection (8)(a)(i) does not explain why any variance would be issued that is not being “implemented in a permit.” Likewise, the contents of the variance, as subsection(6)(c) includes a “description of the permitted and unpermitted dischargers covered by the variance.” Why would Ecology be issuing a variance for an unpermitted discharge? And how is this consistent with the language in subsection (2)(a) and (b), which refer to permitted dischargers? Why does the review process for a waterbody variance include a review of information that would suggest the timeframe for the variance could be shortened but a review of a variance for an individual discharger is not subject to the same evaluation? If there is no review of the timeframe for the variance, what is the point of the review? If in fact the terms of the variance have been made into enforceable permit conditions, those should be directly enforceable and the review of such a variance is rather pointless. Ecology has not articulated a rationale for its curtailed view of the review for an individual discharger variance. Moreover, subsection (8)(c)(ii), which calls for shortening the term of a variance after a review, is not the logical outcome of the process in (8)(a) because that process does not even consider the issue.

Rather than the proposed subsection (7)(c) provision that “allow[s]” Ecology to reopen and modify permits on the basis of the interim review, the rule should include a provision that *requires* Ecology to reopen such permits on this basis. *See, e.g.*, GLI Pt. 132, App F, Procedure 2 §F.4. What is the point of having a mandatory review but no mandatory reopener? Subsection (2)(a) refers to a variance as applying “at the point(s) of compliance for the individual facility.” We suggest that this point of compliance should be the end-of-pipe, without a mixing zone. As the variance will be tailor-made for the specific discharger, no mixing zone is needed, and dispensing with the concept of mixing will allow much more clear evaluation of the impacts of the discharge, the pollution reduction results over time, and any revision to the variance over time.

Subsection (3) contains the requirements for submission to obtain a variance. The rule does not, however, contain any requirements pertaining to how Ecology will make a decision whether to issue a variance and what conditions will be included. There is no requirement, for example, for Ecology to make findings, based on the required submissions. Taking one point at random, while the applicant must show that treatment is not technically, economically or otherwise feasible, Ecology is not required to find that treatment is not technically, economically or otherwise feasible in order to issue a variance. This makes no sense at all and leaves the issuance of variances more at the whim of the agency than not. There is no indication of the level of protection that Ecology will seek to provide even when it issues a variance that will allow a level of protection nor normally allowed or desirable for permanent standards. We suggest that the proposed variance rules should include a requirement that the permittee characterize the extent of any increased risk to human health and the environment from granting the variance compared to the underlying water quality standards, *see* GLI Pt. 132, App F, Procedure 2 §C.2.b), and a requirement that the State conclude that such an increased risk is consistent with protection of public health, safety, and welfare, *see* GLI Pt. 132, App F, Procedure 2§C.2.b. These provisions will ensure against the granting of variances that undo

what little Ecology has managed to accomplish in these new proposed criteria.

Subsection (6) describes what a variance will include. What it will not include under Ecology's proposal is a replacement criterion, rendering this rule inconsistent with requirements that apply to the establishment of water quality standards. Because a variance is a change to water quality standards, it follows that a criterion cannot simply be removed but must be replaced. In fact, it is contrary to the requirements of sections 301(b)(1)(C) and 402(a)(1) of the CWA to issue a variance to an effluent limit, necessitating the change to the criteria. This is true of both the individual and multiple source variances. For example, in Michigan, EPA settled a lawsuit challenging EPA's approval of a multi-source variance for mercury with an agreement the state would establish the waste load allocations for permit holders on an individual basis. *See Nat'l Wildlife Fed'n v. Johnson*, No. 06-12423 (E.D. Mi. Nov. 30, 2007) (consent decree). Ecology must not only provide for a replacement criterion, it must explain how it will derive replacement criteria where there are multiple polluters covered by one variance and how it will evaluate those criteria during the review process (all sources may not have the same outcome).

Subsection (6) is inconsistent with subsection (2). The first states that variances can pertain to "geographic area[s]" whereas the latter states that variances can pertain to individual sources discharging to individual waters, multiple dischargers to "any water body," and a "stretch of water." It is unclear why the variance need only specify a geographic area. Subsection (6) hints at the notion that there might be "measurable milestones" but does not require any measurable milestones by the use of the word "any," thereby eliminating any assurance that a variance will, in fact, lead to any change in the status quo. A failure to ensure change renders the idea that a variance is a "temporary" change to water quality standards null and void.

This section of the rules is also extremely unclear. It states that "[d]ischargers are required to use adaptive management to fine tune and update actions, schedules, and milestones[.]" First, the milestones may or may not be required, as discussed above, so how can a discharger be required to fine tune and update them? Second, if the variance is not defined to include required steps that constitute "fine tun[ing] and updat[ing]," how can the discharger be "required" to do so? Likewise, the variance does not make mandatory the inclusion of such requirements in any permits that are written to meet a variance. There is no outside body of law that establishes these so-called requirements of subsection (6)(d). Third, what does "adaptive management" mean in this context? Generally, effective adaptive management requires the gathering of information, its analysis, and a decision-making process that is based on the data and analysis. If these steps are not required as part of an NPDES permit that is aimed at meeting a variance, a discharger will not, in fact, be "required to use adaptive management," as this rule claims. Instead, another section of rules must be written to explain what is required in an NPDES permit written to meet a variance and placed in Ecology's permitting rules and cited here. Fourth, the words "fine tune and update" are ambiguous language. Fifth, it is unclear what precise "actions" must be fine tuned and updated. Sixth, what precisely is a discharger's requirement to update "actions, schedules, and milestones," if these items are established by Ecology in the contents of a variance? It is Ecology's job to change a variance, not a discharger's. If a discharger is required to "fine tune and update" some of the provisions of a variance, what is Ecology's job to respond to those fine tunings and updatings? Seventh, what is intended by "required actions and a schedule"? How will Ecology determine what actions to include and what schedule to put them on? The rule provides no guidance to determine how Ecology will establish variances.

We urge that Ecology include a requirement that all conditions related to an approved variance

be incorporated into the permit of the applicant seeking the variance. *See, e.g.*, GLI Pt. 132, App F, Procedure 2 §G. Subsection (7) of the proposed rules states that Ecology must include “all conditions necessary to implement and enforce an approved variance” but that is inconsistent with its proposed subsection (3)(e) for the reasons explained in the discussion, namely that it allows for the creation of a pollutant minimization plan and a schedule for its implementation to be postponed to an indefinite time. Rendering expectations into requirements is always a good idea and even more so when a permittee is being allowed to discharge pollution at levels that Ecology has already deemed are not protective. Since the subsections of (7) do not include anything related to implementation of that plan it is quite clear that Ecology is poised to consider the plan as outside the permit requirements. Instead, subsection (7) requires only that effluent limits that represent the status quo are required, without any requirement to do anything else on any schedule. That means that the rules will not support public comments on draft permits that propose to ignore the purported requirements of a variance.

Subsection (7) is troubling for other reasons. It allows “effluent limits that are sufficient to meet the original water quality standard upon expiration of the variance” but fails to explain why the establishment of such an effluent condition would not instead be subject to a compliance schedule, the correct tool for any circumstance where a permittee know precisely how and when it can meet the standards. It also states that Ecology may use “achievable effluent conditions” without any explanation of what findings Ecology must make to determine this outcome. Without requiring such findings and simply stating that Ecology may use something that requires work or something that represents the status quo, the likely outcome will be the result that requires no work: the status quo versus the more stringent reductions that are achievable. There is no reason that the rules should avoid setting a hierarchy of outcomes in terms of permit conditions. We agree that monitoring and reporting requirements must be included in the permit conditions but in the absence of anything specific about what level of monitoring is required, this will likely be subject to huge abuse in the negotiated dance engaged in by permit writers and permittees.

We are pleased to see references to nonpoint sources, to the extent that these are included in the phrase “unpermitted dischargers,” namely that a variance is defined to include Ecology’s revision to “BMP requirements for unpermitted dsichargers” at subsection (6)(e). However, it is unclear to what Ecology refers. Likewise the submission of a request for a variance requires that the entity provide information on both “[a]ll cost-effective and reasonable best management practices for permitted sources that address the pollutant the variance is based upon,” and “[b]est management practices for nonpermitted sources that meet the requirements of chapter 90.48 RCW,” at proposed subsection (3)(f)(ii) and (iii). If Ecology takes provision (3)(f)(iii) seriously, it will make the variance process significantly more meaningful. However, there is nothing that follows on from subsection (3)(f)(iii) in subsection (6) regarding the actual contents of a variance. There is, instead, merely a “description of ... unpermitted dischargers,” and a reference to Ecology’s authority to “revise BMP requirements for unpermitted dischargers” as a result of the mandatory review. There is no statement that an initial variance will include BMP requirements for unpermitted dischargers or even a statement of what BMPs Ecology is expecting nonpoint sources to use when it issues the variance and makes assumptions about the impacts of the point sources covered by the variance. There is no clarity that the “nonpermitted sources” described in the application are the same as the “unpermitted dischargers” in the variance itself and, if they are not the same, what an “unpermitted discharge” actually is. In addition, in the mandatory review, the proposed rules state that the review will “be focused” on the discharger’s compliance with the variance and there is no reference whatsoever to any other

polluters' contributions to the pollution problem. This missing piece seems to suggest that the discussions of unpermitted and nonpermitted sources are merely window dressing and that Ecology intends to take no actions to ensure that pollution sources together negate the ongoing need for a variance.

Ecology has not proposed a rule that is consistent with federal regulations. As temporary changes to water quality standards, variances are issued pursuant to the provisions in EPA's rules that apply to removing or altering use designations. 40 C.F.R. § 131.10. While these designated use removal provisions require the use of "all cost-effective and reasonable nonpoint source controls," *id.* at § 131.10(h)(2), Ecology's rules do not. Yet, EPA has stated repeatedly that variances are subject to the "same substantive and procedural requirements as removing a designated use." Handbook at 5.3; 14 EPA Interim Economic Guidance Workbook, EPA-823-B-95-002; March 1995 [hereinafter "Economic Guidance"] at 1-3; *see also* CSO Guidance at 34. This use provision applies to issuance of a variance as a temporary removal of designated uses governed by the same EPA regulations. ANPRM at 36760. The BMP requirements of 40 C.F.R. §131.10(h)(2) apply to all nonpoint sources in the consideration of a variance application. EPA has supported this position by noting that in issuing variances, the economic impacts that can be considered are only those that result from treatment beyond that required by technology-based regulations. This includes both technology-based limits on point source discharges *as well as BMPs to nonpoint sources*.⁸

In addition, as mentioned above, the proposed Ecology rules do not ensure protection of existing uses, as required. We urge Ecology to note that EPA has written quite a bit about the need to ensure protection of existing uses in the issuance of variances. The requirement to protect existing uses in the issuance of variances derives from several sources. First, existing use protection is the "floor" of water quality, below which State standards may not go. *See* Handbook; EPA Questions & Answers on Antidegradation, August 1985 [hereinafter "Questions and Answers"]; 48 Fed. Reg. 51402 (November 8, 1983). Because variances are changes to water quality standards they too may not go below that floor. This is encoded in the requirement to classify existing uses, 40 C.F.R. § 131.10, as well as the antidegradation provisions to protect those uses, 40 C.F.R. § 131.12, which must be read together. *See* ANPRM at 36752. Existing use protection is specifically noted – twice – in EPA regulations concerning the removal of designated uses, the same provision that is used for variances. 40 C.F.R. §§ 131.10(g) & (h)(1). EPA notes that the protection of existing uses is a site-specific exercise, which is wholly consistent with the issuance of variances. ANPRM at 36752. EPA considers protection of existing uses as essential in issuing variances. *See* CSO Guidance at 34, citing 40 C.F.R. §

⁸ Economic Guidance at 1-1. ("This workbook provides guidance for those seeking to . . . obtain a variance based on economic considerations, or to lower water quality in a high-quality water. In addition, it provides guidance to States and EPA regions responsible for reviewing requests for variances and modifications to designated uses, and for approval of antidegradation analyses.

...

The economic impacts considered are those that result from treatment beyond that required by technology-based regulations. Since water quality cannot be lower than that resulting from technology-based limits applied to direct and indirect point source discharges and reasonable Best Management Practices (BMP) applied to nonpoint sources, these are considered to be the baseline.")

131.10(h)(1); ANPRM at 36759, 36760. EPA notes that it is the necessity of preserving existing uses, as well as making reasonable progress towards ultimate attainment, that requires the conditions of a variance to be set as close as possible to the designated uses and "always retained at the level needed to preserve the existing use." CSO Guidance at 34. These conditions include various prohibitions, control requirements, monitoring, and evaluation. *Id.* at 35. The requirement to protect existing uses pursuant to the antidegradation policy applies during triennial reviews and water quality standards revisions, of which a variance is one, see Questions and Answers, as well as the issuance of NPDES permits, see Handbook. Last, the six factors of 40 C.F.R. § 131.10(g) cannot be read outside the context of the text of 40 C.F.R. § 131.10(g), of § 131.10(h), and of the antidegradation policy, all of which specify the protection of existing uses. Similarly, the GLI rules explicitly require that in addition to the six factors governing use attainability, the variance seeker show the antidegradation requirements have been met. *See* GLI Pt. 132, App F, Procedure 2 §C.2.a; GLI SID Sec. VIII.B.3.c. Consistent with these policies, EPA has also held that permits issued pursuant to variances must still comply with antidegradation requirements, including existing use protection. Guidance for Implementation at 6. A variance applies to the applicable criterion and does not modify the application of the existing use and designated use provisions of the water quality standard. *See* EPA Memorandum, from Kenneth Mackenthun to Regional WQS Coordinators, Re: Definition of WQS Terms, July 3 1979 at 1.

B. Compliance Schedules

This section is very messy and it is unclear what Ecology is attempting to accomplish with its proposed language. The starting point of compliance schedule rules in state standards should be consistency with the federal regulations yet Ecology's proposal hints at some federal requirements, adopts some portions of the requirements, and ignores some. This simply leaves everybody in the dark as to how Ecology views the intersection between its own proposed rules and binding federal regulations. It also raises questions about what distinctions Ecology is attempting to draw.

The proposed rule includes a definition of "compliance schedule" as follows:

a schedule of remedial measures included in a permit or an order, including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with an effluent limit, other prohibition, or standard.

Proposed WAC 173-201A-020. This definition is not consistent with federal regulations and therefore it is not adequate to support the use of compliance schedules for NPDES permits. *See* 40 C.F.R. § 122.47. We suggest that Ecology not attempt to reinvent the definition of compliance schedules and, instead, follow the federal regulations. For example, a compliance schedule must be a part of an NPDES permit, *id.* at § 122.47(a), and cannot be in an unenforceable "order" (or an order enforceable only by Ecology). (The error is repeated in proposed WAC 173-201A-510(4)(a).) Federal regulations contain specific requirements related to the "sequence of interim requirements," namely that a compliance schedule in excess of one year must include interim requirements and dates for their achievement, *id.* at § 122.47(a)(3), and that the time between interim dates shall not exceed one year, with exceptions, *id.* at 12247(a)(3)(i).

Proposed WAC 173-201A-510(4)(a) introduces unnecessary detail with its addition of (i) and (ii) unless there is something in the universe of aquatic life and everything other than aquatic life that Ecology has in mind to not make subject to compliance schedules.

Proposed WAC 173-201A-510(b)(iv), related to completion of “necessary water quality studies related to implementation of permit requirements,” is unclear. If the studies are part of a compliance schedule that leads to compliance with effluent limits it would be consistent with the requirements of WAC 173-201A-510(a) and 40 C.F.R. § 122.47(a). This example, however, does not clearly establish that the compliance schedule for studies will have that result. It appears possible that Ecology might issue a compliance schedule for a study that does not result in compliance with a related effluent limit. In addition, it is unclear how Ecology will identify an effluent limit and a compliance schedule to meet such an effluent limit in the absence of completed studies.

Proposed WAC 173-201A-510(d) implies an extra step in the development of compliance schedules that is not included in federal requirements: “Prior to establishing a schedule of compliance, the department shall require the discharger to evaluate the possibility of achieving water quality standards via nonconstruction changes (e.g., facility operation, pollution prevention).” The rule should be amended to require that Ecology make a finding that is based on that requirement for dischargers and to provide those findings in the required fact sheet for NPDES renewal. Likewise, Ecology’s determination that a period longer than the permit term is needed should be in the required fact sheet.

It is unclear why Ecology uses the phrase “as soon as practicable” in subsection (d) as opposed to “as soon as possible” found in subsection (e) and in 40 C.F.R. § 122.47(a)(1). If the word is intended to suggest something less stringent than federal regulations, it is inconsistent and should be changed. If it has no separate meaning, the language should be consistent so as to not imply there is a difference.

The intent of WAC 173-201A-510(e) is unclear. First, what does it mean by “a longer period of time”? The word “longer” must modify something but it is unclear what it is modifying unless it means longer than the day after a revised permit is issued. Second, why are there additional rules that pertain to dischargers discharging to waters subject to a TMDL? And is there something embedded in this subsection that establishes policy differences between compliance schedules to implement effluent limits consistent with wasteload allocations versus other water quality-based effluent limits? Third, what is the purpose of the distinction between WAC 173-201A-510(e)(i) and (e)(iv), the first of which refers to wasteload allocations and the second of which refers to achieving water quality standards. Fourth, is the intent of this to address an NPDES permit prior to renewal when the TMDL is approved prior to that point? If so, it is not clear. Fifth, is there a distinction between subsection (d)’s requirement that a permittee first demonstrate it cannot meet effluent limits (standards) without construction and subsection (e)(i)’s requirement that a permittee cannot meet its wasteload allocation without construction? And why is the demonstration made by the permittee in subsection (d) but made by Ecology in subsection (e)(i)?

Sixth, why is a permittee only entitled to seek a compliance schedule if it has “made significant progress to reduce pollutant loading during the term of the permit”? If the permit in question has no requirements to reduce pollutant loading and the wasteload allocation was not yet in place, it is unclear why a permittee would be penalized for not making reductions. Likewise, it is unclear

what Ecology means by stating that a compliance schedule may be authorized if a permittee is “meeting all of its requirements under the TMDL as soon as possible.” Proposed WAC 173-201A-510(e)(iii). Generally speaking, the requirements of a TMDL as they apply to point sources are wasteload allocations. If this rule language is intended to ensure that wasteload allocations that are being met pursuant to a compliance schedule are met as soon as possible, it presumably is redundant to the requirement in subsection (d), which requires compliance as soon as practicable. The word “EPA-” should precede the word “approved” to eliminate ambiguity.

As this section is a mess, we urge Ecology to make explicit reference to the federal regulations on the issuance of compliance schedules for NPDES permits.

III. Clean Water Section 303(d) and NPDES Permits

In its narrative, Rule Implementation Plan Water Quality Standards for Surface Waters of the State of Washington; Amendments to Chapter 173-201A WAC (Draft Jan. 2015), Ecology sets out some internal rules for when it will use its new criteria. Some of these observations are simply unlawful. For example, once EPA has formally approved a TMDL to achieve an outdated and less stringent standard, Ecology cannot retain the waterbody in category 4a for completed TMDLs. Instead, those waters must be relisted. In addition, while the chart is silent on the relationship between completed TMDLs’ wasteload allocations and new or revised permits, permit writers may not continue to rely on wasteload allocations without reference to the new criteria, once EPA has approved them. In addition, NPDES permits cannot be put out for public comment using no-longer-applicable criteria.

IV. Ecology Proposes to Violate the Clean Water Act

The Clean Water Act requires that “[w]henver a State reviews water quality standards, ... such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title[.]” CWA § 303(c)(2)(B). Ecology is reviewing its water quality standards in this proposed rulemaking yet it is failing entirely to consider, let alone “adopt criteria” for all toxic pollutants for which criteria have been published. Ecology has failed to adopt aquatic life criteria since it first did so on November 25, 1992, with the exception of ammonia, chronic marine copper, and chronic marine cyanide. At a minimum, EPA has revised its recommended criteria for aquatic life for the following pollutants: acrolein, ammonia, arsenic, carbaryl, cadmium, chromium (III), chromium (VI), copper, diazinon, dieldrin, endrin, gamma-BHC (Lindane), mercury, nickel, nonylphenol, parathion, pentachlorophenol, selenium, tributyltin, and zinc. These revised criteria obligate Ecology to update its aquatic life criteria accordingly.

We hereby incorporate the attached Petition for Rulemaking Under the Clean Water Act, Water Quality Criteria for Toxics in the State of Washington.

Sincerely,



Nina Bell
Executive Director

Cheryl Niemi
March 23, 2015
Page 16

Attachment: NWEA, Petition for Rulemaking Under the Clean Water Act, Water Quality Criteria for Toxics in the State of Washington (Oct. 28, 2013).