



Wild Fish Conservancy
N O R T H W E S T
S C I E N C E E D U C A T I O N A D V O C A C Y

December 17, 2010

Becca Conklin
Washington Dept. of Ecology
Surface Water Quality Standards
P.O. Box 47600
Olympia, WA 98504-7600

Via Email: swqs@ecy.wa.gov

Re: Surface Water Quality Standards Triennial Review

Dear Ms. Conklin:

Wild Fish Conservancy appreciates the opportunity to comment on the latest Triennial Review of surface water quality standards (WQS). A nonprofit conservation organization headquartered in Duvall, Washington, Wild Fish Conservancy is dedicated to the recovery and conservation of the region's wild-fish ecosystems. Through science, education, and advocacy, WFC promotes technically and socially responsible habitat, hatchery and harvest management to better sustain the region's wild-fish heritage.

Ecology is soliciting views on which topics it should choose to review in the next Triennial Review of Water Quality Standards. Topics are chosen based on the expected environmental benefits, technical complexity, available staff resources, federal mandates, and need for change in the water quality standards guidance, rule, or process (Ecology publication 10-10-071). Our comments submitted here are in addition to those submitted by Northwest Environmental Advocates (NEA) on our behalf. We could present a long list of topics that Ecology should consider based on the benefits to wild fish and ecosystem recovery, but are going to focus solely on the need for implementation methods for Tier I antidegradation, and supplement the comments submitted by NEA with additional examples.

Protective water quality standards are one of the keys to recovering of wild-fish populations and their ecosystems. Just as the federal Clean Water Act (section 101(a)(2)) and the state Water Pollution Control Act (RCW 90.48.20 and 30) protect biological properties (including habitat

alteration), the state's water quality standards do afford considerable protection to aquatic life. They could provide more protection if antidegradation was more vigorously implemented.

Because no implementation methods for Tier I antidegradation have been identified by Ecology, it is somewhat difficult to understand exactly how Tier I is implemented. It appears that Tier I antidegradation is implemented only through the issuance of NPDES permits (including the associated development and implementation of TMDLs), even though Tier I is supposed to apply to "all waters and all sources of pollution" (WAC 173-201A-300(2)(e)(i)). Ecology considers Tier I antidegradation to be fulfilled if it develops and applies effluent limitations based on the numeric water quality criteria in the standards. It does not appear that Ecology evaluates the "sources of pollution" (i.e., activities of persons) to determine if "existing uses" are actually protected, aside from application of the numeric criteria-based effluent limitations. Nor does Ecology ensure that other programs that it oversees (e.g. Shoreline Management Act, provisions of the Growth Management Act, etc.) are consistent with Tier I antidegradation

This is ironic considering the major court victory Ecology won in 1994 before the US Supreme Court. Ecology's application of its antidegradation policy in a Section 401 certification was upheld, even though the certification included instream flows based solely on best professional judgment, as no WAC instream flows had been promulgated for the river in question (PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994)). Years later, Tier I is implemented in a very limited manner.

Large numbers of permitted activities take place daily that singly or cumulatively contribute to the loss of existing uses. Numerous state programs are ostensibly in place to protect habitat, but they do not afford the same protection as does Tier I antidegradation. In some programs, such as stormwater, Ecology actually recognizes that existing uses will be lost, but issues permits regardless (*see* p I-25, Ecology publication 05-10-029, Stormwater Management Manual for Western Washington). The fact that local governments control land use development under their Growth Management Act authority is not an excuse as their GMA-mandated comprehensive plans are supposed to be developed consistent with state water quality standards (WAC 365-195-735(2)(a); *see also* WAC 365-195-700¹).

Under the GMA, many, if not all, local jurisdictions use "water-typing" as the method by which they extend protection to "waters of the State." Ostensibly, this is a method that extends the same protection to waters with similar attributes, regardless of their location. But there is no

¹ This regulation reads "For local jurisdictions subject to its terms, the Growth Management Act mandates the development of comprehensive plans and development regulations that meet statutory goals and requirements. These plans and regulations will take their place among existing laws relating to resource management, environmental protection, regulation of land use, utilities and public facilities. **Many of these existing laws were neither repealed nor amended by the act... At the planning stage, this means that a conscious effort to address the requirements of other existing law is needed as an essential initial step in the process.** This need poses an unprecedented challenge to all governmental entities - municipalities, counties, regional authorities, special districts and state agencies - to communicate and collaborate. The act is a mandate to government at all levels to engage in coordinated planning and cooperative implementation" (emphasis added). The failure of GMA-mandated plans to take Tier I antidegradation into account is attributable to a lack of identified implementation methods for Tier I.

guarantee that the protection extended to waters is the same across all jurisdictions. Even more egregious, there is no guarantee that waters are similarly “typed” (as “fish-bearing” or “nonfish-bearing”) from one jurisdiction to another. One local government may rely on the demonstrably inaccurate maps of the Department of Natural Resources, while another may have ground-truthed the maps during development of their Critical Areas Ordinance (CAO). Ecology does nothing in its reviews of CAOs to ensure that existing uses are accurately catalogued, let alone protected.

The fact that local governments, through the GMA, are the first line of habitat protection has led to well-founded fears that inconsistent application will lead to uneven protection. The Puget Sound Partnership’s Action Agenda calls for region-wide protection standards that “should be designed to apply anywhere in Puget Sound, bring consistency to protection decision-making across the region, and build on existing decision-making tools as much as possible.” Protection of existing uses should be the base level of protection, but without articulated and comprehensive implementation methods, inadequate protection will continue to be the result.

The GMA is one example among many. Wild Fish Conservancy staff published a paper in 2009 on the role of antidegradation in Washington’s watershed protection and ecosystem or species recovery plans and concluded that Tier I antidegradation is not implicitly or explicitly recognized in most programs.² We incorporate that paper as part of our comments by reference. The lack of recognition is due, at least in part, to the lack of clear implementation methods. If wild-fish populations and ecosystems are going to be conserved and recovered, our existing habitat must be conserved and protected, and the best place to start is by implementing the most basic habitat protection regulation. Ecology should articulate comprehensive Tier I antidegradation implementation methods as part of this Triennial Review.

Thank you for the opportunity to comment. Please contact Mark Hersh of my staff at mark@wildfishconservancy.org or at 425-788-1167 if you have any questions.

Sincerely,



Kurt Beardslee
Executive Director

cc: Dennis McClerran, USEPA, Region 10
Will Stehl, NOAA Fisheries, NW Region
Robin Thorson, USFWS, Region 1

² “The Clean Water Act’s Antidegradation Policy and Its Role in Watershed Protection in Washington State,” by C.M. Hersh, West-Northwest Journal of Environmental Law and Policy, No. 15, Vol. 2, 215-278.