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chamber of commerce

July 29, 2005

Mike Gallagher, PBT Coordinator
Department of Ecology
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*Submitted electronically: mgal461@ecy.wa.gov*

**AWB Comments on Ecology's Proposed PBT Rule**

Dear Mr. Gallagher,

The Association of Washington Business appreciates the opportunity to submit comments on Ecology's proposed Persistent Bioaccumulative Toxins (PBT) Rule, Chapter 173-333 WAC. AWB members participated on the department's PBT rule advisory committee and overall, we commend the department on the stakeholder process used to develop the rule language. The department wisely provided an opportunity to stakeholders to assist in selecting the meeting facilitator, who earned high marks for his facilitation expertise. And although there is still room for improvement, we appreciate Ecology incorporating suggestions made by AWB on earlier versions of the rule.

While the PBT program and related efforts have been in place for a number of years now, in many ways Ecology is charting new ground by adopting a policy on how the agency will address this particular set of chemicals and a list of PBTs by rule. Although difficult to quantify, the rule will likely impact businesses in a negative way. The added attention and pressure applied to the listed chemicals by state and local agencies, environmental advocates and the Legislature may eventually result in costly regulations. AWB members provide the following comments and requested changes in the attached mark-up in an effort to improve the rule and the ability of the department to implement its provisions, and lessen the rule's potential economic impacts. In addition, AWB supports comments made by member companies and organizations including Northwest Pulp & Paper Association, Weyerhaeuser, American Chemistry Council, Chlorine Chemistry Council, National Council for Air & Stream Improvement, the Bromine Science and Environmental Forum, Chlorinated Paraffins Industry and the North American Metals Council.

**WAC 173-333-100 Introduction.** Generally speaking, throughout the rule the word "reduce" should be substituted in place of the word "minimize". "Reducing" uses and releases and threats to human health and the environment is a more realistic expectation of what is feasible. During

the stakeholder process, committee members agreed that the PBT rule should result in a reduction of threats to human health and the environment. The word "minimize" however, establishes a level of reduction or could mandate an action "at any cost". This is an unrealistic expectation.

Consistent with Ecology's position that the PBT rule is a "procedural rule", the third paragraph of 173-333-100 should make clear that the goal of this chapter is to "establish a process". Actions recommended as part of chemical action plans to accomplish the goal of reducing threats to human health and the environment must consider and include a "management" option. An example might include a process or handling change in operation to address a particular exposure pathway, rather than a reduction in use of that particular chemical.

Substituting "phasing out" in place of "eliminating" and adding "feasibility" to the goal of the rule is important. Phasing out implies an elimination over time and represents a reasonable expectation of what is feasible for a company who may be required to discontinue using or install additional pollution prevention or other controls. The "phasing-out" of a chemical is more conducive to allowing for the testing of alternatives prior to discontinuing the production or use of a listed chemical. Also, many PBTs are naturally occurring substances and can not be eliminated.

**WAC 173-333-130 Exemptions to the PBT list.** AWB appreciates Ecology's exemption of EPA registered pesticides under the Federal Insecticide, Fungicide and Rodenticide Act and fertilizers regulated under the Washington Fertilizer Act from the PBT list.

**WAC 173-333-140(5) Administrative principles (Coordination).** Ecology should add "federal" agencies on its list of entities to coordinate the development and implementation of CAPs and when revising the PBT list.

**WAC 173-333-200 Definitions.**
**"Chemical action plan".** Ecology has sensibly included the word "manage" in describing measures designed to control the uses and releases of PBTs. Consistent with earlier comments highlighting the need to implement a rule with realistic expectations and a strong consideration of costs and benefits of recommended actions, AWB requests that the word "feasible" proceed "reduce" and "phase-out" be inserted in place of "eliminate".

**"Feasible".** The current definition more accurately describes the definition of what is "possible" rather than "feasible". A possible action may in fact not be feasible. Merriam-Webster provides a qualitative word to its definition of "feasible", which is "reasonable". "Reasonable" is defined as "not extreme or excessive; moderate; fair". AWB requests that this concept be included in the definition of "feasible" and offers the words "viable, workable and practicable" for Ecology's consideration in better defining what is "feasible".

**WAC 173-333-300(3)(a) What is the purpose of the list?** Consistent with earlier comments, we request that the word "phased-out" be inserted in place of "eliminate".

**WAC 173-333-310(2) What chemicals or chemical groups are included on the PBT list?** The quality and justification of the list of PBT chemicals, recommended actions in CAPs and the rule itself the will be based on credible scientific information. AWB supports Ecology's decision that a chemical must be persistent, bioaccumulative and toxic (P&B&T) in order to be listed. The department has also set specific criteria defining a certain level or threshold of persistence, bioaccumulation and toxicity that a chemical must exhibit in order to be listed in WAC 173-333-320. The majority of chemicals on Ecology's draft list of PBTs meet these criteria. Some however, such as Decabromodiphenyl ether (Deca-BDE) and short-chain chlorinated paraffins (SSCP) do not meet these criteria. AWB supports comments made by the Bromine Science and Environmental Forum and the Chlorinated Paraffins Industry regarding these two chemicals and requests they be removed from the PBT list. In addition, Ecology has determined that it will follow EPA's lead in determining whether metals should be listed as PBTs through its Metals Risk Assessment Framework, which is still underway. AWB supports comments made by the North American Metals Council on this subject and requests that all metals be removed from the PBT list.

**WAC 173-333-320(2)(a), (b) &(c) What criteria will ecology use to identify and add chemicals or chemical groups to the PBT list?** AWB requests that "credible scientific information" be substituted in place of "evidence". This is an important modification to ensure that the rule is based on sound science.

**WAC 173-333-400 What is a chemical action plan (CAP)?** Consistent with earlier comments seeking to implement a practical PBT rule, AWB requests that recommended actions included in CAPs be "feasible" and "reduce threats to" rather than "protect" human health and the environment. CAPs should include recommendations for reducing and "phasing-out" rather than "eliminating" uses and releases and "reducing", not "minimizing" exposure to specific PBTs.

**WAC 173-333-410(a) What evaluation factors and processes will ecology use to select PBTs for chemical action plan preparation? (Selection factors).** Opportunities for reducing or phasing-out uses and releases should be "feasible" and need to "have a measurable net benefit to human health and the environment". The concept of ensuring alternative chemicals and/or recommending actions that have a net benefit to human health and the environment was a widely shared viewpoint by stakeholders who participated on Ecology's advisory committee.

**WAC 173-333-420 What are the contents of the CAP?**
**(b) Production, uses and releases.** PBTs include "man made and naturally occurring" sources and need to be part of any analysis estimating the amount of PBTs used and released.

**(e) Identification of policy options.** Consistent with earlier comments, the concept of feasibility needs to be incorporated into policy options addressing PBTs; "phasing-out" is more appropriate and realistic than "eliminating" uses and releases.

**(e)(iv) Other options.** Ecology should ensure that available substitutes are "less harmful" than the PBT being addressed.

**(f)(E) Recommendations.** Consistent with the comment above and with comments made by members of the advisory committee, AWB requests that Ecology include in its recommendations "an assessment of available alternatives that pose less harm to human health and the environment than the PBT being addressed".

**(D)(iii) Performance measures.** To assess progress at appropriate milestones, an analysis of the "costs" and an evaluation of "whether the goals and purpose of the CAP are being achieved" should be performed. This information will help guide future decisions and help determine if changes in policies and recommendations are needed or warranted.

**(3) Economic analysis.** AWB appreciates Ecology's inclusion of concepts such as cost-benefit, economic impacts and feasibility as part of the contents of CAPs. AWB maintains that the PBT rule and CAPs could have a significant impact on Washington businesses. RCW 34.05.328 provides a set of safeguards pertaining to "significant legislative rules" (SLRs). AWB acknowledges that Ecology has determined that the PBT rule is a "procedural rule", however because of the value they provide, we believe that these important SLR safeguards should be included in the development of CAPs and recommended actions. Specifically, Ecology should:

1. Determine that the CAP is needed and consider alternatives;
2. Complete a cost-benefit analysis and determine that the probable benefits of the CAP and recommendations are greater that their probable costs;
3. Recommend the least burdensome alternative between alternatives of the CAP;
4. Determine that the CAP does not recommend more stringent performance requirements on private entities than on public entities;
5. If recommended CAP actions exceed federal regulations, justify why;
6. Measure whether the CAP is achieving its stated purpose.

**WAC 173-333-430(7) What process will ecology use to develop CAPs? Final Recommendations.** Consistent with good rulemaking, agencies include a responsiveness summary to comments received during the rulemaking process. Ecology should not only review all public comments on its recommendations in a draft CAP, but also respond to those comments to assist stakeholders and interested parties in understanding agency decisions.

AWB appreciates Ecology's consideration of the above comments and the attached mark-up. Our members look forward to working with the department as the agency moves forward in adopting and implementing the final PBT rule.

Sincerely,

Grant Nelson
Governmental Affairs Director

Attachment