



The American Waterways Operators

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November 30, 2017

Ms. Amy Jankowiak
Washington Department of Ecology
Northwest Regional Office
3190 160th Ave SE
Bellevue, WA 98008

Re: Proposed Rule Making WSR 17-20-107 to Designate Puget Sound a No Discharge Zone

Dear Ms. Jankowiak:

On behalf of the American Waterways Operators, the national trade association for the tugboat, towboat and barge industry, thank you for the opportunity to comment on the Washington State Department of Ecology's (Ecology) notice of proposed rule making to designate the waters of Puget Sound as a No Discharge Zone (NDZ) pursuant to Section 312(f)(3) of the federal Clean Water Act (CWA).

The U.S. tugboat, towboat and barge industry is a vital segment of America's transportation system. AWO's 350-member companies own and operate barges and towing vessels operating on the U.S. inland and intracoastal waterways; the Atlantic, Pacific and Gulf coasts; and the Great Lakes. Our industry's 5,500 towing vessels and 31,000 barges comprise the largest segment of the U.S.-flag domestic fleet. The tugboat, towboat and barge industry provides family-wage jobs and ladders of career opportunity for more than 50,000 Americans, including 38,000 positions as mariners on board our vessels, and supports more than 300,000 jobs in related industries nationwide. Each year, our vessels safely, securely and efficiently move more than 760 million tons of cargo critical to the U.S. economy, including petroleum products, chemicals, coal, grain, steel, aggregates, and containers. Tugboats also provide essential services in our nation's ports and harbors, including shipdocking, tanker escort and bunkering. These vessels transit 25,000 miles of inland and intracoastal waterways, providing the nation with a safe, secure, low-cost, environmentally friendly means of transportation for America's domestic commerce.

Many AWO members operate towing vessels and barges in Puget Sound, moving freight and reducing congestion on Washington's highways and railroads while producing fewer pollutants than trucks and trains. In addition, harbor, ship assist and crew boats perform lightering,

ship docking, tanker escort, bunkering, marine construction and other services in ports throughout Puget Sound, supporting the maritime industry that is critical to the region's economy.

Nationwide, AWO's member companies are proud to be part of an industry that is the safest and most fuel-efficient, and has the smallest carbon footprint, of any surface transportation mode. We are deeply committed to building on the natural advantages of marine transportation and leading the development of higher standards of marine safety and environmental protection.

In 1994, AWO became the first transportation trade association to adopt a code of safe practice and environmental stewardship for member companies. Today, compliance with the Responsible Carrier Program is a condition of AWO membership and members undergo independent third party audits every three years to demonstrate their continued compliance.

This history and these organizational characteristics inform our view of Ecology's proposed rule making. We seek to protect the marine environment in which our vessels operate, to provide a practicable regulatory framework that allows for the safe and efficient movement of essential commerce, and to ensure that unwarranted regulations do not result in the diversion of cargo to other ports outside of Puget Sound or to other transportation modes that pose increased risks to safety and the environment.

AWO and our members who operate in Puget Sound are deeply concerned with this rule making. These concerns have been consistently raised by AWO throughout the preliminary stakeholder outreach period that began in early 2013, at advisory committee meetings in June and July of 2013, in numerous comments to Ecology, in numerous meetings with Ecology, in ongoing legal proceedings, and in comments and meetings with the federal EPA. It is AWO's contention that, throughout the five-year process that Ecology has undertaken to develop this rule, legitimate concerns from the vessel operating community have been ignored.

Ecology's proposed NDZ draft petition should be withdrawn because:

- Ecology has not demonstrated that the proposed rule making will provide any benefit or water quality improvement in Puget Sound;
- Ecology misrepresented the stakeholder engagement process as collaborative and driven by consensus when concerns of vessel operators were never meaningfully addressed;
- Ecology's study that purported to support its claim that federal performance standards for Type II Marine Sanitation Devices (MSDs¹) are inadequate for all of Puget Sound has been refuted;
- Ecology has not presented a valid Certificate of Need as required by statute;

¹ We note that we generally use "MSDs" to refer to Type II MSDs, not to Type I MSDs, which are not employed by towing vessels, or Type III MSDs, which are holding tanks.

- Ecology's Certificate of Need is still the subject of litigation and has been remanded to the Pollution Control Hearings Board for further proceedings (remand pending on Ecology's appeal of the October 27, 2017 Thurston County Superior Court Order);
- Ecology provided information to EPA that misrepresented the size and scope of the regulated community by as much as 470%;
- Ecology provided information to EPA that misrepresented both the adequacy and the reasonable availability of pumpout capacity for the regulated community of vessels in Puget Sound;
- The proposed NDZ will negatively impact Washington's economy by imposing significant additional regulatory compliance costs on vessel operators; and
- There are more effective and less costly ways to mitigate vessel sewage pollution in Puget Sound that have not been adequately considered.

Each of these enumerated reasons are troubling on their own. Taken together, they are indicative of a broken regulatory process that has ignored the collective concerns of towing vessel operators, fishing vessel operators, recreational boaters, passenger vessel operators, ports, the U.S. Coast Guard, the U.S. Navy, deep draft vessel operators, shoreside and on-water labor groups, marine architects, shipyards, and marine equipment manufacturers.

Facts have been countered by a campaign of misinformation. Ecology has claimed throughout the rule development process that this rule making would ban the discharge of raw sewage in Puget Sound. Discharging raw sewage in Washington waters is already illegal and has been for many years. This regulation would instead ban the use in Puget Sound of federally approved on-board sewage treatment systems that working vessels typically employ to maintain operational integrity and responsibly manage sewage effluent. There is no empirical evidence to suggest that use of these federally approved on-board sewage treatment systems has caused any water quality impairment in Puget Sound.

Ecology Has Not Presented a Valid and Justifiable Basis for its Rule Making

Ecology cannot justify this rule making based on any scientific or technical basis. Ecology's petition to EPA does not even allege that treated sewage from vessels is a problem in Puget Sound:

Even though vessel sewage discharges may account for only a small portion of the total pollutant load entering Puget Sound, their impacts may be disproportionately large. Because vessels are mobile, their discharges may occur directly over sensitive environmental resources, causing localized water quality problems.

An analysis of the contribution of treated sewage from vessels using Type II MSDs to the total pollutant load entering Puget Sound suggests that even given an extraordinary amount of on-water activity of the affected vessel population, their total contributed pollutant load would be

0.006% of the total regional contribution.² Ecology has not produced any evidence to suggest that this tiny percentage of treated effluent from vessels has had any impact on water quality whatsoever, let alone impacts which are “disproportionally large.” Furthermore, there is no evidence whatsoever to suggest that the activity being regulated by this rule making has ever caused water quality problems of any kind in Puget Sound.

Nor has Ecology demonstrated that federally-approved MSD technology is inadequate to protect water quality in Puget Sound. To support its contention that MSDs are inadequate, the agency cites one nine-year-old study to stand for the proposition that “many MSDs often perform far below the mandated treatment standards under normal use.” The 2008 EPA study cited to support this conclusion examined cruise ships carrying approximately two thousand passengers each. Yet the study’s conclusions were applied to all other vessels including towing vessels operating with typical crews of between three and 12 persons. Ecology ignored the thrust of the 162-page EPA study and relied wholly on five pages of information that described the performance of MSDs aboard cruise ships seventeen years ago in Alaska.

The 2008 EPA study represents the entire basis for the draft petition’s discussion about MSD performance. Ecology did not consult manufacturers of Type II MSDs or the United States Coast Guard, which approves MSDs for use aboard vessels. The Coast Guard regularly inspects these MSDs to verify that they are installed and performing as intended. Ecology conducted no tests of its own and cites no other studies or documentation to support its conclusion about MSD performance. Ecology is proposing to prohibit the use of onboard treatment technology in Puget Sound without justification.

Ecology also attempted to justify this rule making by misrepresenting the pollution load contribution of vessels in Puget Sound. In December 2015 and April of 2016, it commissioned analyses of tracer simulations that purported to support its Certificate of Need by demonstrating the impact of vessel sewage in Puget Sound. Anchor QEA, a nationally recognized environmental and engineering consulting firm that specializes in aquatic, shoreline and water resource projects, analyzed these findings. Anchor QEA’s analysis concluded that Ecology had utilized an accurate hydrodynamic model, but had input modeling scenarios that were “fundamentally flawed” and produced results that were “absurd by any stretch of the imagination.” Specifically, Ecology’s modeling scenarios envisioned hourly discharges from a single vessel containing 2.017 billion persons discharging raw sewage. In all other modeling scenarios, Anchor QEA concluded that “Ecology’s pulse modeling predicted compliance with state water quality standards with very wide safety margins.”³

Given the absence of data to support the conclusion that the regulation would achieve significant or measurable benefits to water quality, and given the fact that Ecology misrepresented the nature of the regulated activity, the scope of the pollution caused by the regulated activity, and the performance of devices that it seeks to ban from use in Puget Sound, the rule making should

² AWO Letter to Amy Jankowiak, Washington Dept. of Ecology, pp. 3-4. (April 21, 2014.)

³ Anchor QEA Letter to Heather Bartlett, Washington Dept. of Ecology, pp. 2-3. (August 11, 2016.)

be withdrawn.

Ecology Has Underrepresented the Costs of the Proposed NDZ

The costs of Ecology's proposed rule making are well understood, uniformly agreed-upon, and too excessive to support this regulation. According to Ecology's Proposed Rule Making Form CR-102:

Total 20-year present value costs for retrofits are estimated to be between \$511 million and \$551 million, including all costs estimated... Total 20-year present value costs associated with pumpouts are estimated to be between \$190 million and \$211 million, including all costs estimated.

Towing vessel operators will bear a significant portion of the retrofit and pumpout costs associated with this rule making. To comply with the proposed NDZ, a typical towing vessel would need to undergo a retrofitting procedure to install and plumb a sewage system and holding tank that is compliant with all relevant Coast Guard and IMO regulations. Retrofitting vessels for tankage is time consuming and costly. Some vessels, due to age, configuration, or tonnage restrictions, cannot feasibly be retrofitted. Space is often severely restricted aboard towing vessels since much of the available room is consumed by propulsion units, fire-suppression and safety equipment, living space for crew, and tankage for fuel, potable water and ballast water. Furthermore, modifications of tankage impacts vessel void spaces which are fundamental to seakeeping ability. Modifications of void space could lead to tragedy.

Beyond the retrofitting costs, towing vessel operators would also bear substantial operating costs to comply with the rule. Vessel operators would need to purchase and consume excess fuel to transit to pumpout facilities. Once at the facility, they would need to pay for the pumpout service. Since there are no commercially-available shoreside pumpout facilities where towing vessels regularly transit in Puget Sound, towing vessel operators would need to use a pumpout truck at substantial additional cost. This disruption in waste management practices would also incur costs associated with interrupting the schedule of the vessel, such as crew changes if the increased length of time of the voyage implicates Coast Guard work/rest rules.

Ecology's projected 20-year costs in exceedance of \$750 million would be a source of concern regardless of whether the regulation was supported by empirical data and a legitimate technical basis. Here, because there is no corroborating data or technical basis, the \$750 million price tag is simply unsupportable, and Ecology should withdraw the rule making.

A Potential Way Forward in Partnership

Ecology's NDZ rule making should be withdrawn because it does not address the real issues facing water quality, disproportionately penalizes one industry and is too detrimental to the Puget Sound maritime industry and the region's economy. Ecology should take additional time to consider all of the factors mentioned in this and previous letters from AWO, the Puget Sound

NDZ Marine Alliance and other comments from concerned stakeholders. The maritime sector is prepared to collaborate on meaningful measures to safeguard water quality, including AWO's recommendation of targeted NDZs for high-risk areas of water quality impairment.

AWO, along with a great many concerned stakeholders, would support a series of targeted NDZs for shellfish beds, areas of impaired water quality, and areas of high-bacteria concentrations. We believe that targeted NDZ initiatives would address all of Ecology's concerns and safeguard the interests of recreational users, the aquaculture industry and commercial vessel operators. AWO believes that targeted NDZs would provide a better level of protection, would ease administration and compliance and would provide a comparatively low-impact means of demonstrating the effectiveness of NDZ policy. Alternatively, using the state-wide California NDZ as a model, the maritime industry is willing to cooperate on Sound-wide policy that allows only vessels without holding tanks to release treated effluent through a federally-approved MSD.

AWO recognizes the importance of a healthy Puget Sound. Many of our member companies and their employees live and work on the Sound. We have a mutual obligation to ensure that the Sound's environmental, economic and recreational benefits can be sustained for future generations. AWO would actively support remedial or protective actions that are grounded in scientific evidence and could be empirically demonstrated to improve water quality in Puget Sound. However, it is difficult to discern how or where the Sound-wide NDZ contemplated by this rule making would meaningfully contribute to water quality improvement. It is, however, easy to identify where it would negatively impact the region's maritime industry and economy. For these reasons, AWO expects Ecology to withdraw this rule making and to work closely with stakeholders to identify practical, science-based solutions to water quality problems in Puget Sound.

Thank you for the opportunity to comment. AWO would be pleased to answer any questions or provide further information.

Sincerely,



Charles P. Costanzo