NORTHWEST ENVIRONMENTAL ADVOCATES

December 23, 2022

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P.O. Box P 47600
Olympia, WA 98503 *submitted via*: https://wq.ecology.commentinput.com/?id=QmFx2

Re: **Water Quality Program Policy 1-11 Chapter 1, Including Freshwater Harmful Algae Blooms Methodology, Non-Substantial Revisions**

Dear Mr. Donahue:

The following are Northwest Environmental Advocates' comments on the Department of Ecology's proposed revisions to Water Quality Program Policy 1-11 Chapter 1, namely its proposed Harmful Algae Blooms Methodology and purportedly Non-Substantial Revisions.

I. 2D. Harmful Algae Blooms – Freshwater

Ecology states: "Any advisory issued solely for the preemptive purposes of protecting human health and without reasonable information to support bloom toxicity will not be used to support an impairment determination." DRAFT Policy 1-11 Harmful Algae Blooms at 3. However, this is not consistent with federal requirements at 40 C.F.R. § 130.7(b)(5)(i) (waters identified as "threatened" must be listed). At the very least, Ecology must explain what it means by "reasonable information to support bloom toxicity," but the language certainly suggests that Ecology does not intend to include any threatened waters, contrary to federal law.

Likewise, Ecology's requirement that various conditions exist for two or more years in order to justify placing a water into Category 5 is not consistent with the requirement to list "threatened" waters. Clearly a waterbody that has experienced "[t]wo cyanotoxin sampling events meet DOH recommendations for a WARNING or DANGER public health advisory" or a "WARNING or DANGER public health advisory for potentially toxin-producing cyanobacteria or algae has been issued by a local or state health jurisdiction" for any single year is a water that is threatened. Ecology's proposal to distinguish between water quality sampling leading to or sufficient to

support health advisories—requiring two or more years—with "one or more probably or confirmed human or animal HABs exposure events resulting in illness or death"—requiring only one year—is entirely arbitrary. People, pets, and wildlife do not need to be killed or made ill in order for a waterbody to have water quality that is harmful to designated uses. The equivalent for a temperature impairment would be that waters could only be listed after one year's worth of deathly high temperatures unless temperature resulted in a confirmed fish kill. The point of the Clean Water Act is to protect designated uses, not to wait until people and animals are killed or injured. Ecology must remove the requirement for two years' worth of impaired water quality for HABs Category 5 listings. Similarly, advisories in place for under two weeks are "threatened" waters and should be listed under Category 5.

Ecology has not adequately clarified the distinction between Category 3 and Category 2 listings. In both instances, Ecology says that it will use one of these categories when the "available data are insufficient" or "the listing does not qualify for Category 5," respectively. The insufficiency of data—whether they are not over two years, not over two weeks, or advisories not supported by data—meets the Ecology definition for both categories 2 and 3. Therefore, Ecology must make the distinction clear.

II. Purportedly Non-Substantial Revisions

We strongly disagree that the revisions proposed by Ecology are either "non-substantial," or nonsubstantive.

Information Submittals Based on Narrative Standards

In its description of Washington's water quality standards as including narrative criteria, Ecology omits that these standards also include the designated uses. These both have independent applicability and Ecology is incorrect in implying that designated uses have no other purpose than to justify numeric and narrative criteria. Its description that it will "consider the assessment of data and information relevant to narrative standards that demonstrates degradation of a designated use" is the methodology that should be used to show that designated uses are impaired, not that narrative criteria have been violated. Narrative criteria do not require the impairment or degradation of a designated use in order to be violated. Narrative criteria only require that the conditions are not safe for such uses, just as numeric criteria do not require a concurrent degradation of a use but pertain to the water quality conditions that are not supportive of a use. One would think that the state responsible for *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 114 S. Ct. 1900 (1994) would comprehend the difference between designated uses and narrative criteria. See also discussion immediately below if you continue to not understand this very basic point about the Clean Water Act.

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Assessment of Studies to Determine Impairment based on Narrative Standards

Paragraph one states that "Ecology may use narrative criteria." DRAFT Policy 1-11 Non-Substantial Revisions at 7 (emphasis added). This is incorrect. Ecology is obligated to use narrative criteria. Federal regulations require the listing of waters for which point and nonpoint source controls are not sufficient to meet water quality standards. *See* 40 C.F.R. § 130.7(b)(1). For purposes of this section, as with the Clean Water Act in general, the phrase "water quality standards" means all parts of a standard—designated uses, numeric and narrative criteria, and the antidegradation policy. *See id.* § 130.7(b)(3) ("For the purposes of listing waters under §130.7(b), the term 'water quality standards' refer to those water quality standards established under section 303 of the Act, including numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements.") (emphasis added). This could not be more clear. Yet Ecology continues to conflate designated uses with narrative criteria, to ignore antidegradation entirely, and to overly restrict its use of narrative criteria and designated uses.

Ecology correctly adds to its methodology that data and information that must (not "may") be evaluated against narrative criteria include its proposed addition of: "environmental data for chemical, biological, or physical parameters for which numeric standards have not been adopted, field surveys, or site-specific water quality studies providing information on designated use support." Draft at 7. It errs, however, in suggesting that only "data" are adequate for such findings. And it continues to conflate narrative criteria with designated uses, as described above.

Then Ecology gets to the specifics with the following proposed requirements:

> To determine a designated use impairment based on narrative criteria in the WQA, data and information packages must demonstrate a direct link between the environmental alteration in the waterbody and the degradation of a designated use. Submittals must include the following information:
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> 1. documentation of persistent deleterious, chemical, or physical alterations of an AU, ***and***
> 2. documentation of degradation of a designated use in the same AU, ***and***
> 3. documentation or supporting scientific evidence that directly links the deleterious, chemical, or physical alterations as the cause of the designated use degradation in the same AU.
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> The information provided must clearly document the connection between a persisting environmental alteration occuring [sic] within an AU and the effects to the designated use in the same AU in order to meet credible data requirements. The connection between these two lines of evidence is necessary to make a reasonable impairment determination. When sufficient information is available, an AU upstream of an impaired AU may be placed in Category 5, given there is

> credible data and documentation that directly links the upstream condition to the degradation of the designated use in the downstream AU.

Id. at 7–8. There is simply no basis for Ecology's requirement that designated uses must be shown to be "degraded" to demonstrate that the water quality is in violation of a narrative criterion. As NWEA has explained previously, the narrative criterion on toxics calls for a different result. WAC 173-201A-240(1) states: "Toxic substances shall not be introduced above natural background levels in waters of the state which have the potential either singularly or cumulatively to adversely affect characteristic water uses, cause acute or chronic toxicity to the most sensitive biota dependent upon those waters, or adversely affect public health, as determined by the department." The words "which have the potential" to affect designated uses is not the same as Ecology's interpretation that requires these toxic substances to have already adversely affected the uses. Therefore, Ecology's proposed methodology is not consistent with its water quality standards and is not consistent with federal law.

It is not necessary for us to comment in detail on the examples Ecology gives because the methodology is entirely flawed. But some of it is idiotic. Ecology will only list based on aesthetics if there is "quantifiable documentation that the general public has indicated" there is a problem. Does this mean that some number of the members of the public have to lodge complaints about algal blooms along Puget Sound beaches before Ecology will make a determination about an impairment that is in front of its nose? For aquatic life and wildlife, Ecology will only list a waterbody for a toxic contaminant known to cause health impairments in laboratory experiments if the species that depends upon water is also degraded to the point that it can be measured in Washington waters? Is Ecology's policy to push species to the brink of extinction before it uses its Clean Water Act authorities and obligations to protect aquatic/aquatic-dependent species? Apparently it is.

Ecology's other newly added admonitions, Draft Methodology at 9, say that it will not place a waterbody in Category 5 based on "naturally occurring environmental processes." But this begs the question. As there is no natural conditions criterion exemption, on what legal and factual basis will Ecology make this determination? And on what basis does Ecology limit "biological data or information" to only "resident species," thereby eliminating entirely anadromous species such as salmon and migratory species such as the Southern Resident killer whales even in the face of peer-reviewed scientific evidence showing how pollution not covered by numeric criteria is causing their decline? Ecology's desire to protect polluters from having to control pollution and to maintain the unacceptable status quo of Washington waters with unsafe levels of pollution is stunning.

Unlike the proposed HABs methodology, Ecology does not provide any information on what sources of data and information it will be using. For example, it could inform the public that it will be using the data gathered by the Eyes Over Puget Sound project (or

not). It seems obvious that Ecology has no intention of assembling its own data and information to demonstrate noncompliance with narrative criteria and has placed any effort in this regard onto the commenting public.

Natural Conditions

Ecology is certainly incorrect in terming the suspension of its natural condition methodology "non-substantial" but it is certainly correct in not using a part of the water quality standards that is no longer applicable under the Clean Water Act for the purpose of generating the 303(d) list.

Conclusion

Ecology continues to develop and use a 303(d) listing methodology that fails to conform to federal law. To the extent that the reason for this is the state credible data law, Ecology should set out clearly how the state law prevents it from meeting federal law requirements so that the U.S. Environmental Protection Agency can easily step in and address those areas.

Sincerely,

Nina Bell
Executive Director