

COMMENTS ON BEHALF OF

**ASSOCIATION OF WASHINGTON BUSINESS, NORTHWEST PULP & PAPER
ASSOCIATION, AMERICAN FOREST & PAPER ASSOCIATION, GREATER
SPOKANE, INC., FOOD NORTHWEST, AND WESTERN WOOD PRESERVERS
INSTITUTE**

**ON THE STATE OF WASHINGTON PROPOSED HUMAN HEALTH WATER
QUALITY CRITERIA**

CR 102 – WSR 24-19-075 (September 17, 2024)

October 25, 2024

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ATTACHMENT C: HDR, Treatment Technology Review and Assessment for Association of Washington Business, Association of Washington Cities and Washington State Association of Counties (May 24, 2022)

ATTACHMENT D: Northwest Pulp & Paper Ass’n et al. comment letter on EPA proposed HHQWC for Washington, EPA Docket No. EPA-HQ-OW-2015-0174 (May 31, 2022).

ATTACHMENT E: Complaint, Plaintiffs’ Motion for Summary Judgment, and Plaintiffs’ Combined Reply Memorandum in *Washington Association of Business et al. v. United States Environmental Protection Agency et al.*, Civil Action No. 23-cv-3605, United States District Court for the District of Columbia.

Association of Washington Business, Northwest Pulp & Paper Association, American Forest & Paper Association, Greater Spokane Inc., Food Northwest, and Western Wood Preservers Institute submit the following comments on the Department of Ecology (Ecology) proposed revision to certain human health water quality criteria in the state water quality standards. WSR 24-19-075 (September 17, 2024).

Because the proposed action would simply substitute federal human health water quality criteria (HHWQC) for the existing criteria contained in Washington state regulations, the commentators incorporate by reference their May 31, 2022, comment letter on EPA proposed HHWQC for Washington. Attachment D. As set forth in the May 2022 comment letter, the EPA HHWQC are not based on any legitimate legal authority, sound science, and EPA policies for deriving HHWQC. The EPA ruling also failed to properly defer to the risk management determinations that are the prerogative of the state of Washington as reflected in the current language of WAC 173-201A-240, Table 240, footnotes B and E. EPA also failed to properly assess and document the likely cost of the federal standards. The commentators request that Ecology respond to the comments in that letter in addition to the comments set forth below. These comments are supported by the attachments identified in the table of contents as well as the documents contained in the Supporting Documents Files submitted with these comments. Documents in the Supporting Documents File are identified by page number within parentheses in footnote citations. We request that this comment letter, the 2022 comments letter, attachments, and Supporting Documents File be included in the rulemaking docket.

Introduction

Maintaining and improving water quality in the state of Washington is our shared goal. We support sustainable water quality standards that result in cleaner water, preserve aquatic life, and protect human health. To be effective in reaching these goals, the adopted standards must be based on accurate and complete data, recognized scientific principles, and prudent risk management calculations. Most of all, water quality standards must reflect the important balance between protection and attainability to justify significant public and private investments necessary to meet the standards.

In announcing the 2016 human health water quality criteria codified in WAC 173-201A-240, Washington State officials voiced confidence in the thorough process Ecology followed in developing the state HHWQC and the resulting protections the standards afford the people of Washington. For example, in a November 15, 2016, statement, then-director Maia Bellon publicly expressed disappointment with EPA's rejection of the state HHWQC proposal:

We're disappointed that Washington state's approach wasn't accepted in its entirety. We worked hard to craft new water quality standards that were balanced and made real progress – improving environmental protection and human health while helping businesses and local governments comply.

We were always clear in our goal –to meet EPA’s requirements and tailor our proposal to work for Washington state. We believe we did that with the clean water standards we adopted...¹.

As members of Washington’s regulated community, we have consistently maintained our commitment to improving water quality. We recognized that while these standards were some of the most protective standards adopted by any state in the nation, they reflected an effort to satisfy Clean Water Act requirements while providing a path to compliance, challenging though it was.

By contrast, Ecology is now undertaking a politically motivated repeal of state criteria and adoption of the EPA criteria as state criteria. Ecology provides no substantive rationale or explanation to support its proposed action, which reveals that the singular purpose of this effort is to provide a strategic advantage to EPA in defending the federal standards in federal court.² Or as Ecology euphemistically characterizes its purpose, “to provide durability and regulatory certainty for pollution limits that were set” by EPA. This is an illegitimate basis for rulemaking. And the significant implications of the rule render unlawful Ecology’s attempt to skirt the requirements of the Washington Administrative Procedure Act. The proposed rule meets the definition for a “significant legislative rule” under section 34.05.328(5)(c)(iii), and as such this rulemaking cannot evade the procedural requirements for significant legislative rules.³ Moreover, if the EPA criteria were to be vacated or remanded, there would be no legal basis for this proceeding under section 34.05.310(4)(c).⁴ It is important to recognize the unintended consequences of the proposed rule.

The criteria that Ecology proposes to adopt have foreseeable consequences that Ecology, like EPA before it, has simply failed to consider. Two years after EPA’s final rule, and eight years after Ecology’s 2016 rule was finalized, Ecology has undertaken no assessment of the costs and benefits of its proposed criteria *today*. It is erroneous to simply assume it is reasonable to codify federal standards in state law (and thus add the State’s endorsement of those standards) without considering the standards in light of current circumstances. Such a consideration would entail evaluation of alternative approaches and the costs and benefits associated with Ecology’s chosen criteria. Ecology’s proposal makes no effort to undertake these essential elements of reasonable rulemaking. If it did so, Ecology would discover that its proposed criteria impose impossible standards and onerous costs on regulated parties and the Washington’s population at large. Faced with the inability to meet an unattainable standard and the resulting permit uncertainty, employers are less likely to invest in newer water treatment technologies or other upgrades to modernize and expand their operations, with the result that many will choose to leave the State, putting at risk important family-wage jobs, including union jobs and those bringing critical economic activity to rural areas.

Similarly, local governments across Washington State will be required to invest untold millions, possibly billions, of dollars in new technology even though these investments will not result in compliance with the EPA standards Ecology proposes to adopt. Those costs will be

¹ Ecology, “Ecology Director Maia Bellon responds to EPA’s announcement on Washington’s water quality standards Department of Ecology News Release,” (November 15, 2016) (07960-07961).

² Association of Washington Business, et al. v. EPA, et al., D.D.C. No. 23-cv-3605.

³ RCW 34.05.328(5)(c)(iii) (2024).

⁴ RCW 34.05.310(4)(c) (2024).

passed on to the citizens of the State in the form of higher utility and tax rates at a time when many are already facing economic challenges. This added burden would compound the skyrocketing cost of living for Washingtonians due to record inflation driving up the costs of housing, food, fuel, and other essentials. These burdens will fall heaviest on the citizens of our State who can least afford another increase in their costs of living. These are the implications of the proposed rule; law and sound public policy dictate that Ecology not proceed with the proposed rule without a clearly documented implementation plan and environmental justice assessment.

In contrast to the thorough and inclusive process employed by Ecology to develop its standards, EPA's rule was not based on a comprehensive assessment of all relevant factors. EPA was arbitrary and capricious in selecting only some of the elements and factors that the state specifically chose, after years of in-depth discussions, for its overall risk management decisions. For instance, EPA should not have disregarded Ecology's risk factor, relative source contribution, and bioconcentration determinations while accepting Ecology's 175 g/day fish consumption rate, as all were inter-related components of the State's risk management decision. EPA did not adequately justify its decisions to reject Ecology's consideration of these factors which drive the federal HHWQC Ecology now proposes to adopt. Ecology cannot lawfully repeal the state standards and adopt the EPA standards without conducting its own analysis of these issues as this action is a significant legislative rule.⁵

Ecology could correct EPA's errors by adopting new criteria that are based on legitimate State risk management decisions. Instead, Ecology replicates EPA's mistakes. It would be a mistake for the State to assume the federal standards are the floor to any future state standards without first conducting additional analysis.

EPA has never provided any guidance on how its PCB criterion can be implemented. Ecology cannot proceed without filling that gap. Ecology is acting in derogation of the state Administrative Procedures Act by proceeding with this rulemaking without disclosing to the public how it intends to implement the EPA standards adopted as state standards.

The commentators respectfully request that Ecology reconsider and abandon this rulemaking.

Comment No. 1: Ecology has already incorporated EPA's HHWQC by reference, so this rulemaking is unnecessary.

Ecology states in the subject CR 102 that this rulemaking is exempt from significant legislative rulemaking requirements because it is merely incorporating federal standards by reference. Ecology did not take this approach in a recent rulemaking to issue Aquatic Life Toxic Criteria adopted certified on September 11, 2024. In that rulemaking Ecology added to Table 240 in WAC 173-201A-240 footnote H, which provides: "Human health criteria applicable for Clean Water Act purposes in the state of Washington are contained in 40 C.F.R. 131.45 and effective as of December 19, 2022 (87 FR 69183)." Ecology added footnote H to each of the human health

⁵ RCW 34.05.328(5)(c)(iii) (2024).

criteria that was disapproved and replaced by the EPA rule. Ecology has failed to explain why this rulemaking is necessary where the state water quality standards already acknowledge EPA criteria by reference.

Ecology's opaque reference to "durability and regulatory certainty" suggests that Ecology's true motivation may be to attempt to moot a pending federal case challenging EPA's water quality standards. If that is Ecology's purpose, it is improper. Ecology has attempted no reasoned explanation for preferring the federal criteria to Ecology's own 2016 criteria.

Comment No. 2: Ecology is engaging in substantive rulemaking subject to significant legislative rulemaking requirements by proposing to repeal its 2016 HHWQC rule.

Many of the commentators participated in Ecology's rulemaking process that resulted in the 2016 HHWQC. That effort included hours of public meetings, advisory committee meetings, scientific review, and a thorough analysis of the elements required under significant legislative rulemaking requirements. Ecology's 2016 standard retains regulatory significance, because they are the last EPA-approved State standards, and they would remain in effect if EPA's 2022 rule were to be vacated in pending litigation. Ecology cannot withdraw the 2016 state rule and adopt EPA HHWQC without going through the same process to properly articulate and document Ecology's rationale and allow for meaningful, and legally required, public participation.

In 2016, Ecology made a risk management decision to derive human health criteria for carcinogens based on a risk factor of 1×10^{-6} for all parameters except Polychlorinated Biphenyls (PCBs) which was set at a specific level of 4×10^{-5} . *See* WAC 173-201A-240, Table 240, footnotes B and E. It is the prerogative of the State to make these risk management decisions. Ecology's proposed rulemaking to supplant its prior risk management decision with EPA's uniform risk factor of 1×10^{-6} is a substantive change to the state water quality standards and goes beyond incorporating or adopting a federal standard by reference. This action is subject to significant legislative rulemaking requirements.

Under section 34.05.328(5)(c)(iii), a "significant legislative rule" is defined as follows.

A "significant legislative rule" is a rule other than a procedural or interpretive rule that (A) adopts substantive provisions of law pursuant to delegated legislative authority, the violation of which subjects a violator of such rule to a penalty or sanction; (B) establishes, alters, or revokes any qualification or standard for the issuance, suspension, or revocation of a license or permit; or (C) adopts a new, or makes significant amendments to, a policy or regulatory program.⁶

Given that the rule adopts substantive provisions of law, revokes and then establishes standards that would be used for permits and reflects new and significant amendments to Ecology's water quality standards, the proposed rule is a significant legislative rule. The State's last official regulatory word on human health criteria was the 2016 rule. Here, Ecology purports to remove those standards and adopt new ones without any explanation of the reasons for changing its view about each of the inputs and resulting criteria from the conclusions it reached

⁶ RCW 34.05.328(5)(c)(iii) (2024).

in 2016. It is not enough to say the State is compelled to adopt EPA’s standards without change—that is not correct. The State could adopt different standards and submit them for EPA approval, and EPA must approve them if they are based on sound science and adequately protect the designated uses, based on the record, even if they differ from the federal rule.

Moreover, the EPA criteria are subject to ongoing litigation, and if the EPA criteria were to be vacated or remanded, there would be no legal basis for this proceeding under RCW 34.05.310(4)(c).

Comment No. 3: The proposed criteria are based on an unreasonable fish consumption rate.

The EPA criteria that Ecology proposes to adopt as a State standard are based on a fish consumption rate (FCR) of 175 g/day—far in excess of EPA’s default national FCR of 22 g/day and higher even than EPA’s recommended 142 g/day rate for subsistence fishers. *See* EPA, “*Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health*” (“2000 Methodology”), 2000 Methodology at 1-5. The 175 g/day FCR rests on unreasonable assumptions based on a cherry-picked and outdated survey of tribal members in the Columbia River Basin. A Fish Consumption Survey of the Umatilla, Nez Perce, Yakama, and Warm Springs Tribes of the Columbia River Basin 69 (Columbia River Inter-Tribal Fish Commission 1994), tinyurl.com/53c9x9ar. The study reported on “rates of consumption represent fish obtained *from all sources*,” including grocery stores—in other words, fish not even exposed to Washington waters and thus unaffected by the proposed criteria. *Id.* (emphasis added). And the FCR fails to account for the fact that anadromous fish species that spend most of their lives in ocean waters far from the shore (e.g., many species of salmon) have lower degrees of exposure to pollutants in inland waters than fish and shellfish found exclusively inland.

Ecology should set state standards based on contemporary and accurate data about fish consumption from Washington waters and should take into variations in where fish species live and the variation in fish consumption over a lifetime. *See* National Health and Nutrition Examination Survey 21–22 (Apr. 2014) (adjusting risk to account for the reality that people do not eat the same amount of fish every day over a lifetime).⁷

Commentators incorporate by reference comments submitted in response to EPA’s 2021 proposed rule. *See* Attachment D at 26-52.

Comment No. 4: The proposed criteria are unmeasurable, unattainable, and therefore unreasonable.

The 7 ppq PCB criterion is so small that modern technology cannot even reliably detect or measure the pollutant at that concentration. EPA’s most recently approved, state-of-the-art method for measuring PCBs to determine compliance with an NPDES permit “has an average analytical quantitation limit for each PCB congener of approximately 2,000 [ppq], which is a substantial improvement over the current regulatory method,” but “well above” EPA’s criterion. 87 Fed. Reg. at 69,195–96 (describing Method 1628). The “current regulatory method” can

⁷ https://www.epa.gov/sites/default/files/2015-01/documents/fish-consumption-rates_2014.pdf

reliably quantify PCB concentrations only at 500,000 ppq and greater. See 40 C.F.R. § 136.3. Even extremely sensitive analytical methods (which are not approved by EPA to measure NPDES compliance) come nowhere close to reliably measuring 7 ppq—at best, at 1,000 ppq (Method 8082A) or 100 ppq (Method 1668C).

Even if the measurement methods were up to the task, 7 ppq is not achievable. As the City of Spokane explained, “[t]he City does not believe 7 ppq will ever be realistically achieved in the Spokane River or in other water bodies across the State” because “PCBs continue to be introduced into the environment under the Toxic Substances Control Act” at a concentration limit “7 billion times less restrictive than the proposed WQS.” Spokane Letter 2 (emphasis added). And in a public presentation to stakeholders, Washington’s Department of Ecology has effectively recognized the same: no existing technology can achieve 7 ppq PCBs. Workshop on PCB Variances for Spokane River Dischargers 83 (Nov. 14, 2019), https://www.ezview.wa.gov/Portals/_1962/Documents/SpokaneRiverCleanWater/VarianceWorkshop_All.pdf.

The available empirical evidence confirms the same conclusion. A 2013 study by the Association of Washington Business determined that the “best performing” municipal treatment facility in Washington using a microfiltration membrane could reduce PCBs to an approximate range of between 190 and 630 ppq. EPA-HQ-OW-2015-0174-0380, at 12. When AWB updated the study in 2022, it again concluded that “[t]he lowest levels achieved based on the literature review were ... two orders-of-magnitude greater than the proposed [criterion]” of 7 ppq.

It is unreasonable for Ecology to adopt a water quality standard that it knows is impossible to attain. Setting an unattainable standard misleads the public, leaves the regulated community without any foreseeable route to compliance, and prevents industry and municipalities from undertaking the long-term planning that is essential to responsible operation.

Commentators incorporate by reference comments submitted in response to EPA’s 2021 proposed rule. *See* Attachment D at 56-60.

Comment No. 5: Ecology may not finalize an Environmental Justice Assessment or conduct SEPA review without undertaking a cost-benefit analysis and an implementation plan.

Ecology has failed to conduct the requisite cost-benefit analysis required by RCW 34.05.328 (10(d) and (3) of the State APA. A responsible consideration of the rule’s costs would reveal a significant burden on the regulated community that is not justified by any corresponding public benefit. This is particularly the case for the PCB criterion that Ecology proposes to adopt as a state standard. Most wastewater treatment plants and receiving waters in Washington exceed the PCB criterion. There is no evidence that any current technology exists that can achieve the EPA PCB criterion. The level of treatment required as a result of this rule is likely to result in substantial new construction of costly wastewater treatment facilities and significant increases in wastewater utility costs and corresponding utility rates and The commentators have previously submitted information on the high cost of treatment to attain the EPA human health criteria, *see, e.g.,* Attachment C, yet neither EPA nor Ecology has quantified and justified the costs of the criteria that Ecology proposes to adopt.

Likewise, neither EPA nor Ecology has provided an implementation plan for the proposed criteria. Ecology cannot reasonably adopt this standard without an implementation plan that allows it to mitigate the cost and impact of additional treatment on burdened communities. Ecology cannot evaluate environmental justice without an assessment of where the necessary treatment facilities would be located and the impact of building new wastewater treatment plants on the affected communities. For example, the criteria Ecology proposes to adopt may limit the ability of wastewater treatment plants to accept additional influent. In that event, communities may not be able to meet their obligations under the Growth Management Act and may face adverse effects on the availability of affordable housing and their ability to address homelessness. It is also probable that advanced treatment will require additional treatment plant footprints, additional energy consumption, and additional use of chemicals. Ecology has not evaluated the potential impact on greenhouse gas emissions or community health from the addition of new treatment facilities.

Ecology is also constrained in conducting review under the State Environmental Policy Act (SEPA) without an implementation plan. The SEPA checklist published with the proposed rule is illusory without an implementation plan. Ecology has no basis for determining the absence of significant environmental and human health impact without some understanding of how it will be implemented and the resulting costs and benefits.

Commentators incorporate by reference comments submitted in response to EPA's 2021 proposed rule. *See* Attachment D at 64-71.