

NORTHWEST ENVIRONMENTAL ADVOCATES



June 11, 2013

Maia Bellon, Director
Washington Department of Ecology
300 Desmond Drive
Lacey, WA 98503-1274

Via E-mail only: maib461@ECY.WA.GOV

**Re: Water Quality Standards Triennial Review for Human Health Toxics –
Resignation from the Department of Ecology Delegates' Table**

Dear Ms. Bellon:

It is with regret that I submit this letter of resignation from the Delegates' Table for the Department of Ecology's process to establish new toxic criteria for the protection of human health for Washington's waters. Fortuitously, the Governor has just announced the creation of his own parallel "informal group of advisors from tribal and local government, as well as the business community," a group of advisors that omits the participation of environmental organizations. Excluding organizations that represent the health interests of Washington's citizens and who have expertise in the Clean Water Act and pollution control is both stunning and insulting. From our perspective, it appears to be yet one more misstep in a process positively beset by missteps. And it raises the question: in which of these two processes is the real discussion going to be had?

As you know, Washington's current water quality standards for human health are established by the now outdated National Toxics Rule, in which toxic criteria are based on a fish consumption rate of 6.5 grams/day. Because that fish consumption level falls well short of reflecting current national averages or the eating habits of Washington fish consumers, including the State's tribal members, the Department of Ecology has been discussing updating these criteria. However, as has been painfully revealed in recent news reports, Ecology is under significant political pressure from pollution dischargers to both offset increased fish consumption numbers, by changing other variables used in calculating criteria, and to create new regulatory loopholes, termed in Orwellian doublespeak "implementation tools," to relieve regulated pollution sources from having to curtail their toxic discharges.

Ecology has been wrestling to create a process by which to resolve these issues and, in particular, it has increasingly sought to avoid making policy decisions up front. In what can only be characterized as the agency's lurching from one approach to another, Ecology has finally settled on the idea of a "Delegate's [sic] Table." This group of stakeholders is intended to serve as something more than a series of workshops but something significantly less than a full-on

advisory committee. Various environmental organizations, Tribes, and tribal representatives were asked to serve on this Delegates' Table and all have either declined to serve or chose to not attend the first and only meeting of this group, held in October 2012. That is all, with the sole exception of Northwest Environmental Advocates (NWEA).

After thoughtful consideration, we have decided to resign from the Delegates' Table. We do not make this decision lightly, particularly given that our absence will leave the group without any non-polluting participants. Moreover, we believe Ecology can ill afford to lose our Clean Water Act expertise and experience from our intimate involvement with Oregon's intensive process to revise its human health standards. However, we believe that Ecology has pandered excessively to monied interests, failed to demonstrate a serious commitment to using the Clean Water Act to control toxic pollution, and will use the outcome of this Delegates' Table process to justify taking politically expedient actions. We cannot lend our name to such an outcome.

The remainder of this letter will explicate these points in greater detail, thereby illuminating NWEA's decision to resign, as well as to elaborate on how we think Ecology should move forward with this important and pressing task.

Ecology's Flawed Process

It is our view that Ecology has bent over backwards to satisfy pollution sources concerned about having to reduce their toxic discharges to Washington's waters. As a result, Ecology's approach to decision-making on this issue has been and continues to be infected by a stated desire to "push back" on the Clean Water Act, the U.S. Environmental Protection Agency's (EPA) implementing regulations, and federal guidance. The passage of time has demonstrated that Ecology has thrown open the doors to consider any and every option to decrease regulation as the *quid pro quo* for increasing the fish consumption rate. This has evolved in a series of steps, starting with Ecology's policy decision to re-consider each and every variable in EPA's equation that generates toxic criteria for the protection of human health. One of these variables is the risk to which the State will expose its citizens, a policy choice long established in Washington as a one-in-a-million risk of cancer.¹ The second step in this process was Ecology's agreement to establish inaptly-named "implementation tools," by which it would let permitted dischargers of toxic chemicals off the regulatory hook.² While considering and addressing the practical realities of making the State's toxic criteria more stringent is a fair topic of discussion for rulemaking, Ecology's ideas for regulatory relief far exceed the types of regulatory loopholes that have been tolerated to date under the Clean Water Act. For example, while variances – which are intended

¹ See WAC 173-201A-240(6); 40 C.F.R. § 131.36(d)(14)(iii). Washington went so far as to urge EPA to promulgate the one-in-a-million criteria nationwide and, if it did not, to urge a federal rule to "specifically address the issue of multiple contaminants so as to better control overall site risks." 57 Fed. Reg. 60848, 60867 (Dec. 22, 1992).

² At some points in the process Ecology announced it would develop these regulatory loopholes *prior to* the new toxic criteria, leaving open the prospect Washington would have an abundance of regulatory flexibility but not even new human health protection on paper. While the timing of these two regulatory packages remains unclear, Ecology has not agreed they will be linked.

to be short-term downgrades to water quality standards – are normally 3-5 years, Ecology seeks to institute 20-year variances. But even worse was to come.

In the October 2012 meeting, the agency made a further announcement that Ecology would leave no stone unturned in revising policies that support its regulatory program. Specifically mentioned were policies for determining whether Washington waters are impaired, that is identifying those waters that fail to meet water quality standards, and the issuance of discharge permits to toxic sources. For example, Ecology has specifically suggested removing impaired waters from its list that were based on levels of toxic contaminants found in fish tissue but this ignores the fact that fish tissue is the best medium in which to measure toxics because of the technological limitations in measuring toxics in water. In short, NWEA found the sheer scope of Ecology's proposed regulatory rollbacks particularly shocking and disheartening.

Although eager to announce its willingness to gut the States's water quality regulatory program, Ecology has expressed no concomitant desire to control other sources of toxics to Washington's waters. An extremely superficial effort to paper over the problem of unregulated toxics was made by a group that met a handful of times to generate a report in January 2013.³ The report contains not a single recommendation for increased regulation of sources that Ecology does not currently regulate and no proposals for rulemaking.⁴ But having produced a 30-page paper, Ecology now perceives itself free to carry on with the task of de-regulating currently regulated pollution sources.⁵

Finally, the purpose of this Delegates' Table remains unclear, particularly in light of the new Governor's advisory group. At most, it appears the Ecology group will meet six times and serve as a "sounding board" rather than an advisory committee. Because, with the exception of NWEA, the participants are exclusively pollution sources or allied with pollution sources, Ecology will be taking the pulse only of interests vested in an outcome that benefits their commercial endeavors. Left out are those who represent the fish consumers and water users of

³ Ecology, Washington Toxics Reduction Strategies Workgroup, *Toxics Policy Reform for Washington State*, January 16, 2013 at http://www.ecy.wa.gov/toxics/docs/trs_ToxicsPolicyReformWA.pdf.

⁴ The paper has 12 recommendations, the strongest being a tepid recommendation that Ecology be given limited authority to institute bans of certain chemicals. Oddly this group's recommendations also include the very regulatory loopholes being discussed by Ecology as so-called "implementation tools," not a single one of which is intended to reduce toxic inputs to Washington waters.

⁵ Ecology's website also includes some parting thoughts from Ted Sturdevant, its former Director, in which he states that "[t]o break the impasse, we have to ask a different set of questions: What is the simplest, least expensive and most effective way to address the root causes of toxic pollution?" Ecology, *Conversations on Washington's Future: Clean Water, Healthy Fish and a Sound Economy* at <http://www.ecy.wa.gov/about/ECONverse05.html>. He then describes a collaborative approach to phase out brake pads with heavy metals. Mr. Sturdevant does not explain why one example of a collaborative approach is a justification for not *regulating* the innumerable sources of toxic contaminants that remain.

Washington, that is the vast majority of its citizens and those who bear the burden of pain, heartache, and financial devastation of cancer and chronic diseases caused by toxic chemicals.

Moving Forward

It is NWEA's view that the environmental and tribal representatives who have refused to participate in Ecology's latest lurch in the process would likely come to the table if Ecology were willing to make policy decisions on the basis of what is best for the State's citizens, not just its business interests. This would be evident if Ecology first and very simply made certain major policy calls – such as retaining the State's current risk level for cancer – rather than throwing everything open for change. Specifically, Ecology needs to make clear this bartering of increased fish consumption and increased risk – the combination of which would generate a result equal to or less protective than current standards – is a fraudulent game it is not willing to play. Likewise, Ecology needs to, as Oregon did, settle on a fish consumption level that it believes is supported by the evidence, rather than negotiate that level based on its regulatory implications for toxic dischargers.

Second, having settled such fundamental matters of State policy, Ecology must make clear it genuinely wants the community of interests to discuss regulatory solutions for dischargers that are reasonable to all who make Washington home, not just business interests. This means an explicit retraction of statements about re-examining and possibly overturning every single Clean Water Act regulatory rule and policy in the State. It also means a commitment that Ecology will reject, up front, approaches that will poke holes into the integrity of the Clean Water Act by, *inter alia*, turning temporary regulatory relief into decades of noncompliance.⁶

Third, Ecology must commit to concurrently increase regulation of the numerous sources of toxics – industrial, commercial, residential, agricultural, and silvicultural – that currently contaminate Washington's waters with limited or no controls whatsoever. If Ecology wants to establish regulatory loopholes for permitted dischargers it must also commit to conducting rulemaking to establish pollution controls on currently un- or under-regulated sources of toxic pollution. There is no point in establishing new criteria if literally no pollution source is on the hook to reduce pollution.

Finally, Ecology must commit to completing rulemaking by a date certain. And it must agree that it will not adopt regulatory loopholes in advance of adopting new toxic criteria.

We believe these four steps would bring most of Washington's stakeholders to the table. However, in the absence of these actions, this entire process is at best an academic exercise. Potentially much worse, it is one likely to move the state's regulatory program backwards.

⁶ While Washington certainly can explore ideas for providing regulatory relief for permitted discharge sources, the reality is that there are only a few acceptable methods under the Clean Water Act: e.g., short-term variances that can be renewed, compliance schedules where sources can commit to an effluent-certain/date-certain outcome, intake credits, Use Attainability Analyses, site-specific criteria, and combinations thereof.

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Conclusion

Even Ecology is likely to agree it has handled poorly the process of updating these toxic criteria. But the problems are not limited to process. The agency has also misleadingly termed proposed regulatory loopholes "implementation tools," agreed to play a confidence game in which it might increase cancer risks to eliminate any safety benefit that would accrue to the public from increasing the fish consumption levels, and produced a fig leaf of a report to conceal its utter disinterest in regulating currently unregulated sources of toxics, even as it seeks to let regulated sources off the hook.

Washington citizens deserve better than this.

Until Ecology sponsors a discussion that is more than how to re-create the water quality regulatory program to meet the desires of toxic polluters, NWEA cannot see lending its name to the outcome. Naturally, we will continue to participate in the formal process and we hope that our expertise in the Clean Water Act and pollution control will continue be of use to Ecology.

Sincerely,

A handwritten signature in cursive script that reads "Nina Bell". The signature is fluid and elegant, with a large loop at the end.

Nina Bell
Executive Director

cc: Governor Jay Inslee
Kelly Suswind, Ecology
Melissa Gildersleeve, Ecology
Angela Chung, EPA