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June 13, 2017

Re: Comments on Washington's Water Quality Assessment Policy 1-11 Update Process

Dear Ms. Bresler:

The undersigned organizations work on environmental issues that impact the water quality of the Puget Sound Watershed.

Puget Soundkeeper Alliance's mission is to protect and preserve the waters of Puget Sound, a mission that brings us out on the water on weekly patrols to identify, report, and stop pollution. This mission forms the basis of our policy, education and outreach, and enforcement work under the Clean Water Act. We are committed to fighting water pollution at the source, and to working to ensure that our water quality continuously improves so that Washington's waters will one day be swimmable, fishable, and drinkable. Soundkeeper was pivotal in creating the strongest industrial and municipal stormwater regulations in the country as well as the nation's most protective fish consumption standard of 175 grams per day, a more accurate and protective rate of consumption that informs our current water quality standards and policies.

We appreciate the opportunity to participate in the update process for Washington's Water Quality Assessment Policy 1-11, the Policy used for assessing water quality data, determining if water bodies are polluted, and deciding if further action is needed.

1. Category 4P

Section 303(d) of The Clean Water Act requires states to identify waters within its boundaries "for which the effluent limitations …are not stringent enough to implement any water quality standard applicable to such waters."[1] For these impaired waters, the state ***shall*** establish a TMDL (Total Maximum Daily Load) for the pollutants[2] that are exceeding standards.[3] The

[1] 33 USC § 1313(d)(1)(A)
[2] Throughout this letter, the terms "pollutant", "chemical", and "parameter" may be used interchangeably.
[3] 33 USC § 1313(d)(1)(C)

purpose of a TMDL is to clean up a waterbody by restricting the amount of pollutants that can be added to it. It entails calculating Waste Load Allocations (WLA's) for dischargers of the pollutant – restricting polluters' ability to discharge more pollutants into an already impaired waterbody.

During the last Policy 1-11 Update meeting with the Department of Ecology on March 30th, a new category of impairment, Category 4P, was discussed as a potential off-ramp to avoid a Category 5 listing for PCB impaired waters. Implementing a new pollutant specific Category for PCB's to avoid a Category 5 listing, and to avoid end-of-pipe limits on dischargers, would violate the purpose and the letter of the Clean Water Act.

Ecology subsequently published meeting Summarization Notes on April 12th, 2017, in the form of a memo from Melissa Gildersleeve to Interested Stakeholders. The memo indicates that "we already have a path forward that meets the discussions from what I was hearing during the meeting."[4] Rather than creating a new Category 4P for PCBs, Ecology suggests that Category 4B can be used as "an alternative solution from having a waterbody waiting Category 5 until Ecology has time to complete a TMDL," and to "forge a path forward separate from developing a TMDL." *Id.*

Category 4B applies when a waterbody is impaired but does not require a TMDL because a Pollution Control Program is already in place and effectively cleaning up the water. EPA has written several Guidance documents articulating Category 4B requirements.[5] Per Washington's current listing Policy, a Category 4B listing is appropriate where

> ***a local, state, or federal authority is implementing a pollution control program*** (or sediment cleanup plan), and Ecology determines that the program or strategy is expected to result in the waterbody meeting water quality standards…A 303(d) listing is not required because the pollution control program is designed to improve and attain water quality in a manner comparable to a TMDL and is in the process of being implemented. This will not include cases when Ecology determines that the program is not being successfully implemented. Progress on water quality improvements is an essential element of a successful pollution control strategy.[6] [Emphasis added].

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[4] Gildersleeve, Melissa. Summarization Notes Category 4B (Other Pollution Control Program for PCB Impaired Waters), Dated April 12, 2017. Available online at: http://www.ecy.wa.gov/programs/wq/303d/2016/4BPCBFINAL.pdf

[5] See Generally: https://www.epa.gov/tmdl/integrated-reporting-guidance. See also, United States Environmental Protection Agency Memorandum "Information Concerning 2016 Clean Water Act Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions" Memorandum, dated August 13, 2015, available on line at https://www.epa.gov/sites/production/files/2015-10/documents/2016-ir-memo-and-cover-memo-8_13_2015.pdf ; United States Environmental Protection Agency Memorandum "Information concerning 2008 Clean Water Act Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions" Memorandum, dated October 12, 2006, available online at https://www.epa.gov/sites/production/files/2015-10/documents/2006_10_27_tmdl_2008_ir_memorandum.pdf

[6] Water Quality Assessment Policy 1-11, page 15. Available online at http://www.ecy.wa.gov/programs/wq/303d/WQpolicy1-11ch1.pdf

We appreciate the goal to incorporate flexibility into efforts to clean up water pollution when flexibility translates into more effective, creative, and collaborative solutions without sacrificing effective enforcement mechanisms. Likewise, we support efforts to improve water quality and meet state water quality standards at a faster pace - so long as expediency is not a tradeoff for accountability for quality of the results. The undersigned are concerned about the potential for abuse of Category 4B as a means for polluters to avoid accountability and/or delay reducing their pollutant loads when a quantifiable reduction in pollutant loading would otherwise be required – and enforceable - via Waste Load Allocations (WLA's) implemented pursuant to a TMDL.

Quite simply put: a Category 4B listing is not an "escape hatch" for polluters seeking to avoid a Category 5 listing of impairment for PCBs. If a waterbody is polluted and there are known point-source dischargers already discharging that pollutant to the waterbody under effluent restrictions, the effluent restrictions are not working and the water belongs on the Clean Water Act Section 303(d) impaired waters list – it must be assigned Category 5 and further restrictions must be placed on dischargers.

With regard to the Policy 1-11 update process, Puget Soundkeeper supports a Policy update that does not further blur or conflate the distinctions between Category 5 and Category 4B which are already in place. While a Category 4B may be an appropriate listing for a waterbody when a "local, state, or federal authority is implementing a pollution control program…designed to improve and attain water quality in a manner comparable to a TMDL,"[7] it is not a "holding Category" for waters that are already impaired but are not yet being cleaned up.

2. General Policy Update Concerns

a. Use of TECS and DWECS

One of the major changes to Policy 1-11 proposed by Ecology during the public meetings process is to forego the use of an FTEC calculation – the method used to back-calculate water column data by use of fish tissue - and to instead use fish tissue and water test results separately to calculate TECS (tissue exposure concentration) and DWECS (drinking water exposure criteria) to determine if waterbodies meet Washington's Human Health Criteria.

The undersigned agree with many of the challenges cited by Ecology to using water column data and to determining the persistence of a pollutant concentration in a waterbody. We agree with the rationale of separating out the water-born threat from the tissue-born threat, and thus we agree with the premises cited by Ecology for use of TECS and DWECS. We would note that while the TECS and DWECS for carcinogens and non-carcinogens listed in tables in one of Ecology's recent publications[8] appear reasonable and take into account both the human health

[7] Water Quality Assessment Policy 1-11, page 15. Available online at http://www.ecy.wa.gov/programs/wq/303d/WQpolicy1-11ch1.pdf

[8] "Water Quality Assessment/Policy 1-11 Updates, Human Health Criteria Alternatives Proposed by Ecology March 2017," pages 17-23 of the document, Attachment 1, is titled "Draft Chemical Comparison Table of Tissue Exposure

criteria from the EPA and the fish consumption rate, these tables are somewhat difficult to interpret and could be re-worked and/or simplified for clarity.

b. Use of Best Available Technology

We want to emphasize that Policy 1-11 should require the use of tests capable of testing down to the legal numeric limits for each pollutant. This is the best way to accurately and definitively comply with the legal standards. Ecology has repeatedly stated that many criteria cannot be tested down to the legal numeric limit by regular lab tests. Which criteria cannot be tested down to the legal limits? What are the best tests available for each parameter, and what is the lowest level of each parameter that such technology can detect?

The best available science and testing techniques must be used - alternative methods of testing should only be permitted where there is no known scientific test capable of directly testing down to current parameter limits. Costs should not play a factor in determining the best science, or in any evaluation of the acceptable levels of exposure to pollutants via any pathway including fish consumption or drinking water.

c. Data Use

The undersigned are generally concerned by what appear to be attempts to circumvent implementation of the recently established, EPA approved, Human Health Criteria – legal numeric water quality standards established pursuant to the Clean Water Act and based upon the updated fish consumption rate in Washington of 175 grams per day. These standards are meant to limit the quantity of certain identified chemical pollutants in Washington's waters to ensure that our waters are drinkable, swimmable, and fishable – by all Washingtonians. These standards cannot be ignored, bypassed, or weakened by using substitute types of tests or methods of testing that are more likely to inaccurately result in a finding of non-impairment, or a delisting when actual levels of a pollutant in a waterbody exceed a legal limit.

We do not agree with a policy that makes it easier to list based on non-cancer causing endpoints than carcinogenic chemicals. As carcinogenic substances may be more likely to cause more harm, we should be more protective when it comes to carcinogenic chemicals and set the threshold lower when it comes to listing based on such findings, not higher. We also are not in agreement with Ecology's decision to consider anadromous fish for purposes of a Category 2 listing instead of a Category 5, though we understand this is a compromise to ensure that anadromous fish such as salmon – fish that are frequently consumed – are used as evidence of impairment.

d. Delisting and Listing Concerns

We should be moving forward towards a more protective clean water regime, not backwards. For this reason, we are concerned that the revised Policy may make it easier to de-

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Concentrations and Drinking Water Exposure Concentration with Human Health Criteria." Available online at: http://www.ecy.wa.gov/programs/wq/303d/2016/HHC-TissueAlternative_032017.pdf

list waters when water quality has not improved to the point of attainment based on scientific testing.

Category 5 waterbodies should not be de-listed based on passage of time, age of data, subsequently calling data into question, or for any other reason besides proof - the most recent direct scientific evidence - that pollutant levels have been reduced to meet the legal limits in that waterbody. The current Policy states: "Listings from previous assessment cycles will not be reassessed according to this policy unless more recent information associated with the parameter and waterbody segment is made available."[9] We agree with this premise and would clarify that the "more recent information" should be scientific data collected using the best available technology for testing that paramater.

We agree with Ecology and EPA that a scientific finding of impairment and Category 5 listing should not be subject to an appeal process or administrative challenges. The process of monitoring, testing, and verifying the data prior to reaching a finding of impairment is sufficient to ensure listing accuracy. Introducing methods of questioning findings of impairment will result in unnecessary delays to cleaning up polluted waters. We also agree with Ecology that a finding of impairment should not require a two- step process.

3. **Need for Tribal Consultation**

The undersigned are concerned by the apparent lack of adequate representation of first nations at the public meetings that occurred in 2017 regarding the Policy 1-11 update process. What steps has Ecology taken to engage with first nations on this issue? When were first nations consulted? Where and what is their feedback regarding the proposed revisions to Policy 1-11?

We thank you for reviewing our comments and look forward to participating further in the design and review process for Washington's Water Quality Assessment Policy 1-11 update.

Sincerely,

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Puget Soundkeeper Alliance

Jerry White
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[9] (Policy 1-11, p. 19).