

Testimony of  
Nina Bell, J.D., Executive Director,  
Northwest Environmental Advocates  
before the Senate Environment, Water, and Energy Committee  
on Senate Bill 6036

My name is Nina Bell and I am the Executive Director of Northwest Environmental Advocates (NWEA). NWEA is based in Portland, Oregon and works in Oregon, Washington, and nationally, primarily but not exclusively on water quality issues. We are the plaintiff in the case against the U.S. Environmental Protection Agency (EPA) concerning the schedule of development for Total Maximum Daily Loads (TMDLs) in Washington State. We are also a plaintiff in a lawsuit against the EPA concerning its approval, and failure to engage in consultation under the federal Endangered Species Act, of Oregon's compliance schedule rules.

NWEA opposes SB 6036 for several reasons starting with the fact that it is unnecessary. The Washington Department of Ecology is fully capable of amending Washington's water quality standards without legislative intervention in the process. The agency knows the issues facing municipalities and industries holding National Pollutant Discharge Elimination Program (NPDES) permits. It is well aware that in order for the agency to use compliance schedules in those permits, those schedules must be authorized in the State's water quality standards. In addition, any changes to the State's water quality standards must be approved by EPA and are subject to formal consultation with the National Marine Fisheries Service and the U.S. Fish and Wildlife Service under the federal Endangered Species Act. This is a lengthy and complicated process that will only be made more complicated by inserting narrowly-drafted legislation into the mix.

If the legislature's intent is to move the process of amending Washington's water quality

standards along in a swift fashion, it likely will accomplish the opposite by passing this bill. First, as the bill itself recognizes, it will not be effective until Ecology has completed a rulemaking process to amend its water quality standards. If the changes directed by the legislature under subsection (1) are not approvable by EPA, the federal agency will inform Ecology of that fact, but the time frame in which EPA will act will not necessarily be the timely two-to-three month process the federal Clean Water Act requires and the legislature imagines it will be. If history is any guide, EPA may take years to complete its approval or disapproval action. If, in the end, EPA disapproves the change to Washington's water quality standards, Ecology will have to complete a new rulemaking process under subsection (2) of the bill in order to resubmit an approvable change to its standards to EPA. If, however, in the absence of legislation, Ecology could engage in a rulemaking unfettered by the directives of the legislature, it would be able to work closely with EPA before and during the rulemaking process with three beneficial results. First, Ecology could really listen to the public in conducting the rulemaking, unconstrained by the legislative directives. Second, by working with EPA in advance of the rule's completion, it would virtually ensure an approvable result. Last, Ecology could also solicit the input of the federal agencies which conduct the consultations under the Endangered Species Act, thereby improving the chances of smooth sailing in those waters.

Moreover, the legislature is suggesting that Ecology should engage in a rulemaking with a preordained outcome although Section 303(c)(1) of the Clean Water Act requires the State to hold "public hearings" for the purpose of amending a State's water quality standards. Public hearings in which the public is heard but ignored might not meet the requirements of federal law.

The second basis for our opposition to this legislation is its inconsistency with other requirements of the federal Clean Water Act and EPA's implementing regulations. Together

these require the following with regard to schedules of compliance: (1) “any schedule of compliance . . . shall require compliance as soon as possible”; (2) any compliance schedule over a year must have “interim requirements and dates for their achievement”; (3) any compliance schedule extending beyond the permit term must include an enforceable final effluent limitation; (4) the compliance schedule must be based on a finding, supported by an administrative record, that the compliance schedule “will lead[] to compliance with the effluent limitation . . . to meet water quality standards”; (5) schedules of compliance can only be issued when “appropriate,” which EPA has determined includes the following factors: how much time a discharger has already had, the degree to which the discharger has made good faith efforts to comply, whether modifications are needed to treatment works and how long that would take, and whether the discharger would plan on using the same treatment works as it has in prior permits. In addition, the mere fact that the agency needs time to develop a Total Maximum Daily Load (TMDL), site-specific criterion, or a Use Attainability Analysis (UAA) cannot serve as a basis for a compliance schedule, according to EPA.

In contrast to these EPA requirements, the proposed legislation would allow a discharger to obtain a compliance schedule based on whether it had made “significant investments in advanced treatment technology and has substantially reduced pollutant loading.” This narrow two-pronged finding violates the EPA requirement that compliance with effluent limitations be “as soon as possible” and only when “appropriate.” What the permit holder has accomplished in the past is irrelevant to the time frame it requires to complete the task. In addition, it limits the bases upon which Ecology could determine the extension of time was “appropriate” to two issues of past performance, ignoring the other EPA factors. This language also introduces two ambiguous terms, namely what are “significant” investments and what is “substantially reduced”

pollutant loading?

The bill proposes that Ecology determine a compliance schedule is allowable based on the “nature, magnitude, and cost of point and nonpoint pollution controls implemented by the entity seeking an extended compliance schedule.” This, however, is not an assessment of whether the controls can be implemented “as soon as possible” as required by federal regulations at 40 C.F.R. 122.47(a)(1).

The bill also includes a provision that allows compliance schedules extending longer than ten years to be authorized five years at a time. This stands in contrast to EPA’s requirement that any compliance schedule contained in an NPDES permit must include an enforceable final effluent limitation and a date for its achievement. Under EPA requirements, Ecology would have to prepare one compliance schedule and could not alter and extend it every five years as it saw fit.

The last reason we oppose this legislation is that it is bad policy. The bill perpetuates the disparity between regulated point sources and under regulated/unregulated nonpoint sources by limiting compliance schedules for point sources to ten years, in some circumstances, but allowing compliance schedules for nonpoint sources to exceed twenty years under other circumstances. Washington’s water quality is already seriously degraded due to nonpoint sources, making legislated further delays in both active and passive restoration efforts needed to restore degraded water quality for the protection of public health, the environment, and threatened and endangered species a short-sighted policy. While a completely denuded river bank cannot be expected to be fully shaded to its full natural potential within one, two, or even three decades, simply because trees need many years in which to grow, there is no such natural barrier to the human acts of installing riparian restoration. There is no rationale – other than to perpetuate existing costly

environmental degradation – for giving nonpoint sources more than twenty years to complete active restoration. Twenty years and more to install riparian restoration means innumerable additional decades we must wait to actually reap the benefits of that restoration in improved water quality. Such delays certainly beg the question of why Washington chooses to have water quality standards in the first place and raises serious concerns about the State’s commitment to restoring threatened and endangered salmonids.

Finally, the bill directs Ecology to “consider the nature, magnitude, and cost of point and nonpoint pollution controls implemented by the entity seeking an extended compliance schedule.” Unless a point source is engaged in watershed-based offsets, in which it achieves a portion of its effluent limitation by controlling nearby nonpoint sources, there is simply no basis for tying a point source’s compliance with the Clean Water Act and its implementing regulations to the lax controls associated with nonpoint sources, including, it should be noted, the language of the bill which itself perpetuates those low expectations for nonpoint source control. Even if a point source were using nonpoint source offsets as a method of achieving compliance with its effluent limitations, the nature, magnitude, and cost of controls are not necessarily related to whether the point source can come into compliance as soon as possible with the limitations. There is no public policy reason to allow a point source to offset its discharges with nonpoint source controls and then to arbitrarily extend the time frame in which it is required to institute those controls. The end result would be to extend Washington’s low expectations for the control of nonpoint sources into the NPDES-regulated arena. This is poor public policy and contrary to federal law.

Thank you for your consideration of our views.