

# Water Quality Standards, Washington, and the Spokane River

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April 4th, 2021

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## What Are Water Quality Standards?

The Clean Water Act (“CWA”) was established with the purpose of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters.”<sup>1</sup> Among the many mechanisms to accomplish this goal, the CWA delegated the function of developing water quality standards (“WQS”) to the state.<sup>2</sup> States were to submit and seek approval of their WQS by the Environmental Protection Agency (“EPA”), otherwise, EPA could issue its own WQS on behalf of the state.<sup>3</sup>

Generally, there are several requirements for a WQS: (1) a designated use for each water body at issue, (2) water quality criteria that express the levels of pollutants that may be present in the water while still supporting the designated use, and (3) an anti-degradation policy.<sup>4</sup> There are many possible designated uses including, but not limited to: public water supply, industrial, agricultural, recreational, propagation of fish and wildlife, etc.<sup>5</sup> Generally, the statute prefers the use to be designated as fishable and swimmable, but the other reasons above may be listed in special circumstances such as additional natural occurring pollutant concentrations, naturally intermittent or low flow conditions, etc.<sup>6</sup> Generally, the CWA allows either narrative standards (descriptive standards) or numerical standards; however, numeric standards are *required* for toxics, including PCBs.<sup>7</sup> Finally, an anti-degradation policy seeks to prevent any decrease in water quality and provides protection based on three tiers.<sup>8</sup>

## Changing Standards?

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<sup>1</sup> 33 U.S.C. § 1251(a).

<sup>2</sup> *Id.*, at §1313(a).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*, at §1313(c)(2)(b).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* (emphasis added).

<sup>8</sup> *Id.*

Although WQS appears to be simple, there are multiple mechanisms for these WQS to change over time. First, the CWA requires states to reevaluate their WQS every three years to determine if revision or completely new standards are necessary.<sup>9</sup> In addition, states can seek a variance for a WQS.<sup>10</sup> A variance is essentially a time-limited criterion for that specific waterbody and pollutant that is permitted when a waterbody is struggling to meet the current WQS.<sup>11</sup> Another standard that may be present is a Total Maximum Daily Load (“TMDL”).<sup>12</sup> A TMDL is a new standard which is set for specific pollutants and essentially institutes a stricter WQS when the waterbody has failed to meet the WQS over a period of time.<sup>13</sup> Reevaluation of WQS may be significantly problematic for individual polluters, who must always make sure to keep up with the current WQS. Depending on how much the WQS changes from time to time, polluters not only must be aware of the changes, but also have technology that can meet the new WQS as well. This requires both time, money, and diligence on behalf of polluting facilities.

### **The Story of Washington & the Spokane River**

Since 1999, the human health criteria for PCBs in Washington has been .00017 nanograms per liter with a fish consumption rate (“FCR”) of 175 grams per day.<sup>14</sup> In 2015, Washington Governor Jay Inslee requested that Washington review its WQS, indicating that the WQS for toxics, including PCBs, was not stringent enough.<sup>15</sup> As time went on, Ecology and EPA struggled in creating a WQS that both curtailed to the state-centric nature of the CWA, but appeared stringent enough. In 2016, upon Ecology suggesting that this standard continue, EPA disapproved the WQS finding that it was insufficient to protect Washington’s designated uses.<sup>16</sup> Later in 2019, EPA “recommended .000064 micrograms per liter based on a FCR of 17.5 grams per day.”<sup>17</sup> However, EPA ultimately approved .000007 micrograms per liter” which was much more lenient than EPA’s recommendation.<sup>18</sup> Overall, Ecology, the State of Washington, polluters on the Spokane River, and the Tribes have had different ideas of what WQS would sufficiently protect human health and the environment. Ultimately, this interplay of variances and WQS changes has real effects on polluters who release effluent into the Spokane River. Several polluters on the Spokane River have inquired into variances to find more of a middle ground between EPA’s final approval and what variance those polluters believe is reasonable to

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<sup>9</sup> *Id.*, at §1313(c)(1).

<sup>10</sup> 40 CFR 131.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> 33 U.S.C. §1313(d).

<sup>14</sup> Letter from Environmental Protection Agency to Maia Bellon, Director, Department of Ecology (Nov. 15, 2016) <https://www.epa.gov/sites/production/files/2017-10/documents/wawqs-letter-11152016.pdf>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Letter from Environmental Protection Agency to Maia Bellon, Director, Department of Ecology (May 10, 2019) [https://www.epa.gov/sites/production/files/2019-05/documents/wawqsletter\\_td\\_dated\\_may\\_2019.pdf](https://www.epa.gov/sites/production/files/2019-05/documents/wawqsletter_td_dated_may_2019.pdf).

<sup>18</sup> *Id.*

eventually reach that WQS.<sup>19</sup> Further, polluters on the Spokane River need to be knowledgeable about changes so that they can make sure to have technology that can meet the WQS and reduce their effluent to ensure that the WQS is not being violated.

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<sup>19</sup> Craig Trueblood, et. al., *Washington State Department of Ecology Releases First-Ever Water Quality Standards Variances for PCBs*, *The Nat. L. Rev.* (July 10, 2020) <https://www.natlawreview.com/article/washington-state-department-ecology-releases-first-ever-water-quality-standards>.