



# RULE-MAKING ORDER PERMANENT RULE ONLY

## CR-103P (December 2017) (Implements RCW 34.05.360)

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STATE OF WASHINGTON  
FILED

DATE: November 14, 2024  
TIME: 7:32 AM

WSR 24-23-037

**Agency:** Department of Ecology AO #22-05

**Effective date of rule:**

**Permanent Rules**

- 31 days after filing.
- Other (specify) \_\_\_\_\_ (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

**Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?**

- Yes  No If Yes, explain:

**Purpose:** The Washington State Department of Ecology is adopting amendments to Chapter 173-201A WAC, Water Quality Standards for Surface Waters of the State of Washington. We are adopting revisions to natural conditions provisions in our surface water quality standards to provide water quality protection for aquatic life organisms and to establish possible methods for deriving those protective values.

The state’s water quality standards set limits on pollution in our lakes, rivers, and marine water in order to protect beneficial uses, such as swimming and fishing. The water quality standards are implemented through discharge permits and other regulatory mechanisms under the federal Clean Water Act. They are also used to identify polluted waters and set levels for water cleanup.

We adopted the following revisions in the rulemaking:

- WAC 173-201A-020, Definitions: adding a definition for a performance-based approach method and a definition for local and regional sources of human-caused pollution.
- WAC 173-201A-200(1)(c), Aquatic life temperature criteria, subsection (i): updating the allowable insignificant changes to freshwater temperature criteria when natural conditions are the applicable criteria.
- WAC 173-201A-200(1)(d), Aquatic life dissolved oxygen (D.O.) criteria, subsection (i): updating the allowable insignificant changes to freshwater dissolved oxygen criteria when natural conditions are the applicable criteria.
- WAC 173-201A-210(1)(c), Aquatic life temperature criteria, subsection (i) updating the allowable insignificant changes to marine water temperature when natural conditions are the applicable criteria.
- WAC 173-201A-210(1)(d), Aquatic life dissolved oxygen (D.O.), subsection (i): updating the allowable insignificant changes to marine water dissolved oxygen when natural conditions are the applicable criteria.
- WAC 173-201A-260(1), Natural and irreversible human conditions: updating the natural conditions criteria language and describing methods for determining natural conditions criteria values.
- WAC 173-201A-430, Site-specific criteria: updating how analyses must be conducted and document references.
- WAC 173-201A-470, Performance-based approach: adding this new section to describe and reference the methodology to determine natural conditions criteria values.

We evaluated the latest scientific data, methods, modeling tools, and approaches to update the natural conditions provisions necessary for refining aquatic life protection in Washington’s surface waters. As part of this process, we considered the Environmental Protection Agency’s recommended approaches for natural conditions in water

quality standards. This includes developing a performance-based approach for site specific criteria, a methodology document titled, “A Performance-Based Approach for Developing Site-Specific Natural Conditions Criteria for Aquatic Life in Washington”, referenced in the rule that sufficiently details a process that ensures predictable, repeatable outcomes that could be used to develop criteria that would protect the designated uses for a specific waterbody.

After rule adoption, we will submit the final rule language to the Environmental Protection Agency (EPA) for review and approval. After we submit the final rule to EPA, they have 60 days to approve or 90 days to disapprove the updated water quality standards. EPA must also consult with the US Fish and Wildlife Service and National Marine Fisheries Service to determine if the rule adequately protects endangered species. The rule goes into effect for Clean Water Act purposes, such as for the Water Quality Assessment and water quality permits, after it has been approved by the EPA.

We are not including a final Performance-Based Approach document with this rule adoption. We will continue to revise the performance-based approach based on public comment. As of now, our approach is to narrow the scope of this document to marine dissolved oxygen. Our goal is to share our progress early next year and go back out for public comment in Spring 2025. We will carefully consider comments received and publish a final version of the publication alongside our response to comments in Summer 2025. After we finalize the Performance-Based Approach document next year, the Office of the Attorney General will certify that the document is legally binding, then we will send the performance-based approach document to EPA for review and approval.

Because the performance-based approach document is only referenced, and not part of the Water Quality Standards regulations at WAC 173-201A-470 and revisions to the document would not change the adopted rule language, we are not required nor will be conducting a separate formal rulemaking for this document. However, we feel it is important to provide another opportunity for public and Tribal input on a revised draft. Further, this document, which governs how Ecology will use the performance-based approach for site-specific criteria development, must meet federal Clean Water Act requirements, which includes a public review process and EPA review and approval before use in federal Clean Water Act actions.

Until we publish a final version of this document and receive EPA approval following their review, we will not be able to use the performance-based approach document for site-specific criteria under the Clean Water Act, such as for water clean up plans (alternate restoration plans and Total Maximum Daily Loads).

**Citation of rules affected by this order:**

New:

Repealed:

Amended: Chapter 173-201A WAC

Suspended:

**Statutory authority for adoption:** Water Pollution Control, Chapter 90.48 RCW, provides clear and direct authority to Ecology to revise the Surface Water Quality Standards (RCW 90.48.035),

**Other authority:** State Review and revision of water quality standards, 40 CFR § 131.20, Requires states to periodically review and update the Water Quality Standards

**PERMANENT RULE (Including Expedited Rule Making)**

Adopted under notice filed as WSR 24-15-036 on July 11, 2024 (date).

**Describe any changes other than editing from proposed to adopted version:**

**Changes to WAC 173-201A-020, Definitions**

Edits were made to the definition of a performance-based approach (WAC 173-201A-020) for clarity and to remove references to federal regulations which were not applicable.

"Performance-based approach" means a water quality standard that is a transparent process (i.e., methodology) which is sufficiently detailed and has suitable safeguards that ensures predictable and repeatable outcomes, rather than a specific outcome. The outcomes from the performance-based approach are site-specific criteria (i.e., concentration limit for a pollutant) consistent with 40 C.F.R. 131.11 and 40 C.F.R. 131.13.

## **Changes to WAC 173-201A-200, Freshwater designated uses and criteria and WAC 173-201A-210, Marine water designated uses and criteria**

We clarified in the human-use allowance for dissolved oxygen in fresh (WAC 173-201A-200(1)(d)(i)) and marine (WAC 173-201A-210(1)(d)(i)) waters that D.O. refers to the D.O. concentration and the criteria in the applicable tables are numeric criteria. This was done to make clear that the human-use allowances apply to numeric criteria and not saturation state-based criteria.

(i) When a water body's D.O. concentration is lower than the numeric criteria in Table 200 (1)(d) (or within 0.2 mg/L of the criteria) and that condition is due to natural conditions, then ((human actions)) local and regional sources of human-caused pollution considered cumulatively may not cause the D.O. concentration of that water body to decrease more than 10 percent or 0.2 mg/L below natural conditions, whichever decrease is smaller.

## **Changes to WAC 173-201A-260, Natural conditions and other water quality criteria and applications**

We revised the general natural conditions provision at WAC 173-201A-260(1)(a) to make it clearer the required processes when Ecology pursues natural conditions criteria development for a site.

a) It is recognized that portions of many water bodies cannot meet the assigned aquatic life criteria due to the natural conditions of the water body. When a water body does not meet its assigned aquatic life criteria due to natural climatic or landscape attributes, the following will be used to determine site-specific numeric aquatic life criteria representing conditions unique to a water body; natural conditions constitute the water quality criteria.

(i) Aquatic life criteria based on natural conditions for temperature or dissolved oxygen for fresh or marine waters, or pH for fresh waters, will be derived by following either the site-specific criteria approach pursuant to WAC 173-201A-430 or the performance-based approach pursuant to WAC 173-201A-470.

(ii) For all aquatic life parameters other than those listed in WAC 173-201A-260(1)(a)(i), aquatic life criteria based on natural conditions will be derived by following the site-specific criteria approach pursuant to WAC 173-201A-430.

~~When natural conditions constitute the aquatic life water quality criteria, criteria values may be established using site specific criteria (see WAC 173-201A-430), use attainability analysis (see WAC 173-201A-440), or the performance-based approach (see WAC 173-201A-470).~~

## **Changes to WAC 173-201A-430, Site-specific criteria**

We made minor edits to WAC 173-201A-430 that removes language regarding the attainable conditions of a waterbody, as site-specific criteria protect existing and designated uses. We also removed the reference and associated citation to designated uses in 173-201A-430(1)(a), as this process is for development of criteria to protect uses, not designating new uses.

(1) Where the ~~attainable condition~~ of existing and designated uses for the water body would be fully protected using an alternative criterion, site-specific criteria may be adopted.

(a) The site-specific criterion must be consistent with the federal regulations on ~~designating and~~ protecting uses (currently 40 C.F.R. ~~131.10 and~~ 131.11); and

(3) The decision to approve the site-specific criterion must be based on a demonstration that it will protect the existing and ~~attainable~~ designated uses of the water body.

## **Changes to WAC 173-201A-470, Performance-based approach**

In the new section for the performance-based approach at WAC 173-201A-470, we made changes to clarify for what purpose and water quality constituents, and under what circumstances the performance-based approach may be used. This includes simplifying language in -470 and removing the “as revised” qualifier in -470(1), as any updates to this document must go through a public process and EPA review and approval before use for state and federal Clean Water Act (CWA) actions.

**WAC 173-201A-470 Performance-based approach.** ~~Where the natural water quality of a water body constitutes the aquatic life water quality criteria, a~~ The performance-based approach may be used by the Department to establish numeric criteria based on natural conditions that are fully protective of existing and designated aquatic life uses.

(1) Aquatic life water quality criteria must be derived using the procedures referenced in ecology publication 24-10-017, "A Performance-Based Approach for Developing Site-Specific Natural Conditions Criteria for Aquatic Life in Washington," ~~as revised.~~

(2) ~~Use~~ Application of the performance-based approach for establishing aquatic life water quality criteria is limited to the following listed water quality constituents:

- (a) Aquatic life temperature criteria in fresh water;
- (b) Aquatic life dissolved oxygen criteria in fresh water;
- (c) Aquatic life pH criteria in fresh water;
- (d) Aquatic life temperature criteria in marine water;
- (e) Aquatic life dissolved oxygen criteria in marine water.

(4) ~~If the requirements set forth in the development of aquatic life criteria using the performance-based approach cannot be met, then site-specific criteria can be established by following the alternatives listed at the requirements set forth in these procedures, then alternatives specified in the paragraph following WAC 173-201A-260(1)(a)(i) may be used.~~

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

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Web site: <https://apps.ecology.wa.gov/publications/summarypages/2410053.html>

Other: N/A

**Note: If any category is left blank, it will be calculated as zero.  
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.  
A section may be counted in more than one category.**

**The number of sections adopted in order to comply with:**

Federal statute:	New	___	Amended	___	Repealed	___
Federal rules or standards:	New	___	Amended	<u>1</u>	Repealed	___
Recently enacted state statutes:	New	___	Amended	___	Repealed	___

**The number of sections adopted at the request of a nongovernmental entity:**

New	___	Amended	___	Repealed	___
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**The number of sections adopted on the agency's own initiative:**

New 1 Amended 5 Repealed \_\_\_\_

**The number of sections adopted in order to clarify, streamline, or reform agency procedures:**

New 1 Amended 2 Repealed \_\_\_\_

**The number of sections adopted using:**

Negotiated rule making:	New	____	Amended	____	Repealed	____
Pilot rule making:	New	____	Amended	____	Repealed	____
Other alternative rule making:	New	____	Amended	____	Repealed	____

**Date Adopted:** November 14, 2024

**Name:** Laura Watson

**Title:** Director

**Signature:**

