



PROPOSED RULE MAKING

CR-102 (July 2022)
(Implements RCW 34.05.320)
Do **NOT** use for expedited rule making

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STATE OF WASHINGTON
FILED

DATE: May 10, 2024
TIME: 7:58 AM

WSR 24-11-047

Agency: Department of Ecology AO # 22-05

Original Notice

Supplemental Notice to WSR _____

Continuance of WSR _____

Preproposal Statement of Inquiry was filed as WSR 22-20-039 ; or

Expedited Rule Making--Proposed notice was filed as WSR _____; or

Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1); or

Proposal is exempt under RCW _____.

Title of rule and other identifying information: (describe subject)

The Washington State Department of Ecology is proposing amendments to Chapter 173-201A WAC, Water Quality Standards for Surface Waters of the State of Washington. We propose the following revisions in the rulemaking:

- WAC 173-201A-020, Definitions: adding a definition for a performance-based approach method and adding 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(2), Site-specific criteria: updating how analyses must be conducted.
- WAC 173-201A-470, Performance-based approach: adding this new section to describe and reference the methodology to determine natural conditions criteria values.
- Ecology publication 24-10-017, A Performance-Based Approach for Developing Site-Specific Natural Conditions Criteria for Aquatic Life in Washington, a separate rule document that provides the methodology to determine natural conditions criteria values.
- Minor, non-substantive edits to rule language in WAC 173-201A-430(2) to reflect the latest version of referenced documents.

For more information on this rulemaking, please visit: <https://ecology.wa.gov/regulations-permits/laws-rules-rulemaking/rulemaking/wac-173-201a-natural-conditions>

Hearing location(s):

Date:	Time:	Location: (be specific)	Comment:
June 27, 2024	1:30 p.m.	Webinar	<p>Presentation, question and answer session followed by the hearing. We are also holding this hearing via webinar. This is an online meeting that you can attend from any computer using internet access.</p> <p>Join online and see instructions: https://waecy-wa.gov.zoom.us/meeting/register/tZcqGvpj4iEtRh8qyEo6xIR-1kKMkEIszn For audio call US Toll number 1-253-205-0468 and enter access code 837 0878 5880. Or to receive a free call back, provide your phone number when you join the event.</p>
July 2, 2024	5:30 p.m.	Webinar	<p>Presentation, question and answer session followed by the hearing. We are also holding this hearing via webinar. This is an online meeting that you can attend from any computer using internet access.</p> <p>Join online and see instructions: https://waecy-wa.gov.zoom.us/meeting/register/tZUudquqT4pGtSAOQ4bwabHFIMDV2iwNfR2 For audio call US Toll number 1-253-205-0468 and enter access code 813 0367 5300. Or to receive a free call back, provide your phone number when you join the event.</p>

Date of intended adoption: October 23, 2024 (Note: This is **NOT** the **effective** date)

<p>Submit written comments to: Name: Marla Koberstein Address: Send US mail to: Department of Ecology Water Quality Program PO Box 47600, Olympia, WA 98504-7600</p> <p>Or Send parcel delivery services to: Department of Ecology Water Quality Program Email: Submit comments by mail, online, or at the hearing(s). Fax: N/A</p> <p>Other: Online at https://wq.ecology.commentinput.com?id=gHacGx2j4E By (date) <u>July 12, 2024</u></p>	<p>Assistance for persons with disabilities: Contact Ecology ADA Coordinator Phone: 360-407-6831</p> <p>Fax: N/A TTY: People with speech disability may call TTY at 877-833-6341. People with impaired hearing may call Washington Relay Service at 711 Email: ecyADAcoordinator@ecy.wa.gov</p> <p>Other: N/A By (date) <u>June 19, 2024</u></p>
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Purpose of the proposal and its anticipated effects, including any changes in existing rules:

We are proposing 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.

Natural conditions provisions recognize that conditions in some surface waters during some seasons and in some

areas naturally do not meet water quality criteria. For example, a naturally low-flowing stream in a natural prairie without any human alteration or human-caused pollution may have seasonally higher temperatures than the limit set to protect fish. These inconsistencies may be due to natural processes or seasonal conditions that prevent a waterbody from meeting the applicable aquatic life criteria. Our proposed revisions refine the natural conditions provisions to protect characteristics inherent and unique to a specific water.

We evaluated the latest scientific data, methods, modeling tools, and approaches to propose updates to 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 (EPA) recommended approaches for natural conditions in water quality standards. This includes considering and proposing a performance-based approach, which would adopt into rule a sufficiently detailed process that ensures predictable, repeatable outcomes that could be used to develop criteria that would protect the designated uses for a specific waterbody.

The list below shows existing and new criteria we propose to update in Washington's water quality standards.

Proposed revisions to existing criteria:

- Updates to the natural conditions provision to limit use to aquatic life criteria.
- Updating allowances for human impacts to fresh and marine waters for dissolved oxygen and temperature when the natural conditions constitute the water quality criteria.
- Updates to the site-specific criteria process for an allowance for natural conditions to be used as a basis for developing these criteria.

Other proposed changes:

- Adding definitions for the performance-based approach and local and regional sources of human-caused pollution.
- Adding a new section detailing the use of the performance-based approach and applicable aquatic life criteria.
- Adding rule document referenced in the water quality standards that details the methodology of the performance-based approach.

Minor non-substantive edits:

- One update to reflect the latest and current revision for a referenced EPA document.

Reasons supporting proposal:

A. Reason for Rulemaking

We propose these revisions to address EPA's 2021 disapproval of previously-approved natural condition provisions in our standards, including for fresh and marine dissolved oxygen and temperature human allowances (excluding lakes).

We recognized that it is important Washington has a provision in the water quality standards recognizing that conditions in some surface waters naturally do not always meet water quality criteria throughout the year. We propose these provisions to effectively implement our Clean Water Act programs.

Further, this rulemaking was identified as a priority in our most recent triennial review, which was submitted to EPA in April 2022.

B. Approach to Rulemaking

We have decided to proceed with updating all necessary natural conditions provisions in a single rulemaking. We have engaged with stakeholders, Tribes, and other interested parties as we developed the full scope of

procedures for natural conditions provisions. This included development of the general provisions, procedures for determining what conditions are natural to surface waters, and some parameter specific considerations for temperature and dissolved oxygen.

In this rulemaking, we considered all the latest scientific data, methods, modeling tools, and natural conditions provisions approaches. Further, we evaluated previous natural conditions provision approaches in Washington and other states, as well as previous EPA policies and decisions regarding natural conditions (such as a performance-based approach). We worked with EPA and other federal agencies responsible for reviewing biological impacts of a rule to anticipate whether the proposed rule language will meet Endangered Species Act (ESA) protection requirements.

C. Rulemaking Scope

The scope of this rulemaking includes the natural conditions provisions and parameter-specific natural condition criteria in all surface water types.

This rulemaking is specific to the aquatic life criteria and how native aquatic species have acclimated or adapted to their environment, even if that environment does not naturally meet our state's aquatic life criteria. The natural conditions provisions are not related to any of the human health criteria in our state.

We evaluated EPA recommendations during this rulemaking, including draft, deliberative, staff-level recommendations made specifically for Washington's performance-based approach, and are proposing to adopt natural conditions criteria and criteria value development methodologies based on these EPA recommendations.

Statutory authority for adoption: RCW 90.48.035 provides clear and direct authority to Ecology to revise the Surface Water Quality Standards (SWQS). Additionally, 40 CFR 131.20 requires states and tribes with Federal Clean Water Act authority to periodically review and update the SWQS

Statute being implemented: Chapter 90.48 RCW - Water Pollution Control

Is rule necessary because of a:

Federal Law?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
Federal Court Decision?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
State Court Decision?	<input type="checkbox"/> Yes	<input type="checkbox"/> No

If yes, CITATION: 40 CFR 131.20

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters: For more information, see the Technical Support Document, Ecology Publication 24-10-015, the draft Rule Implementation Plan, Ecology Publication 24-10-016, and the Preliminary Regulatory Analyses, Ecology Publication 24-10-022, available on our rulemaking webpage.

Type of proponent: Private Public Governmental

Name of proponent: (person or organization) Department of Ecology

Name of agency personnel responsible for:

	Name	Office Location	Phone
Drafting:	Kalman Bugica	Lacey – Headquarters	360-972-4638
Implementation:	Melissa Gildersleeve	Lacey – Headquarters	360-522-6441
Enforcement:	Vincent McGowan	Lacey – Headquarters	360-407-6405

Is a school district fiscal impact statement required under [RCW 28A.305.135](#)? Yes No

If yes, insert statement here:

The public may obtain a copy of the school district fiscal impact statement by contacting:

Name:
Address:
Phone:
Fax:
TTY:

Email:

Other:

Is a cost-benefit analysis required under [RCW 34.05.328](#)?

- Yes: A preliminary cost-benefit analysis may be obtained by contacting:

Name: Marla Koberstein

Address: Department of Ecology

Water Quality Program

PO Box 47600, Olympia, WA 98504-7600

Phone: 360-628-6376

Fax: N/A

TTY: People with speech disability may call TTY at 877-833-6341. People with impaired hearing may call Washington Relay Service at 711

Email: marla.koberstein@ecy.wa.gov

Other:

- No: Please explain:

Regulatory Fairness Act and Small Business Economic Impact Statement

Note: The [Governor's Office for Regulatory Innovation and Assistance \(ORIA\)](#) provides support in completing this part.

(1) Identification of exemptions:

This rule proposal, or portions of the proposal, **may be exempt** from requirements of the Regulatory Fairness Act (see [chapter 19.85 RCW](#)). For additional information on exemptions, consult the [exemption guide published by ORIA](#). Please check the box for any applicable exemption(s):

This rule proposal, or portions of the proposal, is exempt under [RCW 19.85.061](#) because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Please cite the specific federal statute or regulation this rule is being adopted to conform or comply with, and describe the consequences to the state if the rule is not adopted.

Citation and description:

This rule proposal, or portions of the proposal, is exempt because the agency has completed the pilot rule process defined by [RCW 34.05.313](#) before filing the notice of this proposed rule.

This rule proposal, or portions of the proposal, is exempt under the provisions of [RCW 15.65.570\(2\)](#) because it was adopted by a referendum.

This rule proposal, or portions of the proposal, is exempt under [RCW 19.85.025\(3\)](#). Check all that apply:

[RCW 34.05.310](#) (4)(b)
(Internal government operations)

[RCW 34.05.310](#) (4)(e)
(Dictated by statute)

[RCW 34.05.310](#) (4)(c)
(Incorporation by reference)

[RCW 34.05.310](#) (4)(f)
(Set or adjust fees)

[RCW 34.05.310](#) (4)(d)
(Correct or clarify language)

[RCW 34.05.310](#) (4)(g)
((i) Relating to agency hearings; or (ii) process requirements for applying to an agency for a license or permit)

This rule proposal, or portions of the proposal, is exempt under [RCW 19.85.025\(4\)](#) (does not affect small businesses).

This rule proposal, or portions of the proposal, is exempt under RCW _____.

Explanation of how the above exemption(s) applies to the proposed rule: We analyzed the compliance costs of the proposed rule amendments in Chapter 3 of the Preliminary Regulatory Analysis (Publication # 24-10-022). We conclude that the proposed rule amendments are not likely to result in compliance costs for any businesses. The proposed rule is likely to result only in cost-savings for dischargers, as compared to the baseline. Based on this analysis, Ecology is exempt from performing additional analyses under the Regulatory Fairness Act, under RCW 19.85.025(4) which states that, "This chapter does not apply to the adoption of a rule if an agency is able to demonstrate that the proposed rule does not affect small businesses." Moreover, by not imposing compliance costs, the proposed rule amendments do not meet the RFA applicability standard under RCW 19.85.030(1)(a).

(2) Scope of exemptions: Check one.

The rule proposal is fully exempt (*skip section 3*). Exemptions identified above apply to all portions of the rule proposal.

The rule proposal is partially exempt (*complete section 3*). The exemptions identified above apply to portions of the rule proposal, but less than the entire rule proposal. Provide details here (consider using [this template from ORIA](#)):

The rule proposal is not exempt (*complete section 3*). No exemptions were identified above.

(3) Small business economic impact statement: Complete this section if any portion is not exempt.

If any portion of the proposed rule is **not exempt**, does it impose more-than-minor costs (as defined by RCW 19.85.020(2)) on businesses?

- No Briefly summarize the agency's minor cost analysis and how the agency determined the proposed rule did not impose more-than-minor costs. _____
- Yes Calculations show the rule proposal likely imposes more-than-minor cost to businesses and a small business economic impact statement is required. Insert the required small business economic impact statement here:

The public may obtain a copy of the small business economic impact statement or the detailed cost calculations by contacting:

Name:

Address:

Phone:

Fax: N/A

TTY: People with speech disability may call TTY at 877-833-6341. People with impaired hearing may call Washington Relay Service at 711. To request ADA accommodation for disabilities, or printed materials in a format for the visually impaired, call Ecology at 360-407-7668 or visit <https://ecology.wa.gov/accessibility>.

Email:

Other:

Date: May 10, 2024

Name: Heather Bartlett

Title: Deputy Director

Signature:

