

WSR 22-20-039
PREPROPOSAL STATEMENT OF INQUIRY
DEPARTMENT OF ECOLOGY

[Order 22-05—Filed September 27, 2022, 8:27 a.m.]

Subject of Possible Rule Making: The Washington state department of ecology is considering revising chapter 173-201A WAC, Water quality standards for surface waters of the state of Washington. We are considering amendments to:

- WAC 173-201A-200 (1)(c), aquatic life temperature criteria, including, but not limited to, subsection (i).
- WAC 173-201A-200 (1)(d), aquatic life dissolved oxygen (D.O.) criteria, including, but not limited to, subsection (i).
- WAC 173-201A-210 (1)(c), aquatic life temperature criteria, including, but not limited to, subsection (i).
- WAC 173-201A-210 (1)(d), aquatic life dissolved oxygen (D.O.), including, but not limited to, criteria subsection (i).
- WAC 173-201A-260(1), natural and irreversible human conditions.
- WAC 173-201A-310(3), Tier I - Protection and maintenance of existing and designed uses.

We may amend other sections of chapter 173-201A WAC as necessary to be consistent with, or provide support to, any revisions to the sections noted above.

We are considering revisions to several natural conditions provisions in our surface water quality standards. 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 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 goal is to refine the natural conditions criteria to protect characteristics inherent and unique to a specific water.

We will evaluate the latest scientific data, methods, modeling tools, and approaches to update natural conditions provisions necessary for refining aquatic life protection in Washington's surface waters. As part of this process, we will consider the Environmental Protection Agency's (EPA) recommended approaches for natural conditions in water quality standards. One example is 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.

Statutes Authorizing the Agency to Adopt Rules on this Subject: RCW 90.48.035, water pollution control, rule-making authority; and 40 C.F.R. 131.20 Water Quality Standards - State review and revision of water quality standards, requires states and tribes (with primacy for clean water actions) to periodically review and update the water quality standards.

Reasons Why Rules on this Subject may be Needed and What They Might Accomplish: **A. Reason for Rule Making:** We are considering 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 (excluding lakes).

It is important that we have a provision in the water quality standards recognizing that conditions in some surface waters naturally do not meet water quality criteria at all times throughout the year. Nearly all states have some provision of this kind. Washington needs natural conditions provisions to effectively implement our Clean Water Act programs.

We identified a natural conditions rule making as a priority in our most recent triennial review, which was submitted to EPA in April 2022.

B. Approach to Rule Making: We plan to conduct a single rule making to revise our natural conditions criteria. We will engage with stakeholders, tribes, and other interested parties as we develop the full scope of procedures for natural conditions provisions. These may include general provisions, procedures for determining what conditions are natural to surface waters, and some parameter-specific considerations (such as temperature) or surface water type (such as rivers or streams).

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

C. Rule-making Scope: The scope of this rule making includes the natural conditions provisions and parameter-specific natural condition criteria in all surface water types.

This work 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 will evaluate EPA recommendations during this rule making and determine whether to adopt them.

Other Federal and State Agencies that Regulate this Subject and the Process Coordinating the Rule with These Agencies: We will work with tribes to discuss, and seek input on, rule-making activities. Other coordinating federal and state agencies include the United States EPA, National Oceanic and Atmospheric Administration, and the United States Fish and Wildlife Service.

Process for Developing New Rule: Ecology will follow the standard process for the adoption of rules under the Administrative Procedure Act (chapter 34.05 RCW).

Interested parties can participate in the decision to adopt the new rule and formulation of the proposed rule before publication by contacting Marla Koberstein, Department of Ecology, Water Quality Program, P.O. Box 47600, Olympia, WA 98504-7600, phone 360-628-6376, Washington relay service or TTY 711 or 877-833-6341, email marla.koberstein@ecy.wa.gov, website <https://ecology.wa.gov/Regulations-Permits/Laws-rules-rulemaking/Rulemaking/WAC-173-201A-Natural-Conditions>. Sign up to receive email notices https://public.govdelivery.com/accounts/WAECY/subscriber/new?topic_id=WAECY_61.

Additional comments: Interested parties can stay informed about the rule-making and public involvement opportunities as described

above. Ecology will extend an offer for government-to-government consultation with tribal governments during each phase of rule development.

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