

# NORTHWEST ENVIRONMENTAL ADVOCATES



September 26, 2019

Susan Braley  
Washington Department of Ecology  
Water Quality Program  
PO Box 47600  
Olympia, WA 98504-7600

*Via email: SUBR461@ecy.wa.gov*

Re: **Rulemaking - Chapter 173-201A WAC Water Quality Standards Multiple Revisions Formal Draft**

Dear Ms. Braley:

The following are comments by Northwest Environmental Advocates on the proposed revisions to Chapter 173-201A WAC Water Quality Standards in the “Multiple Revisions” rulemaking.

## **I. Temperature**

We support the proposed removal of WAC 173-201A-200(1)(c)(ii)(B) and WAC 173-201A-210(1)(c)(ii)(B). Clearly an allowance for heating waters that are currently at cooler temperatures than the applicable numeric criteria of up to 2.8° C from nonpoint sources is contrary to common sense and the needs of cold-water species, many of which are listed as threatened and endangered under the Endangered Species Act. At a time when water temperatures are rising due to climate change and loss of flows, it makes little sense to allow waters to heat up significantly if they are already cooler than applicable criteria. Moreover, some of these cooler waters are likely used and may some day be designated as “cold water refugia” for cold-water species. Removing this language from the standards is consistent with the U.S. Environmental Protection Agency Region 10 Guidance for Pacific Northwest State and Tribal Temperature Water Quality Standards (April 2003).

## **II. Designated Uses**

Ecology proposes to amend WAC 173-201A-210, the designated uses for marine waters by adding and deleting language to the definitions of Extraordinary quality, Excellent quality, Good quality, and Fair quality waters. We agree that the revisions to remove the accidental inclusion of salmon spawning in marine waters should be made. It is, however, unfortunate that Ecology continues to use the “classification system” of use designation for marine waters many years after it changed from a classification to a use-based designation for fresh waters. The classification approach seeks to set goals for water quality that are based on current conditions and current pollution levels, rather than on what is biologically best for aquatic species and achievable. This is contrary to the Clean Water Act and EPA’s implementing regulations (regardless of EPA’s acceptance of this approach) and Washington would better and more accurately protect its designated uses by making a change. For example, how does limiting the

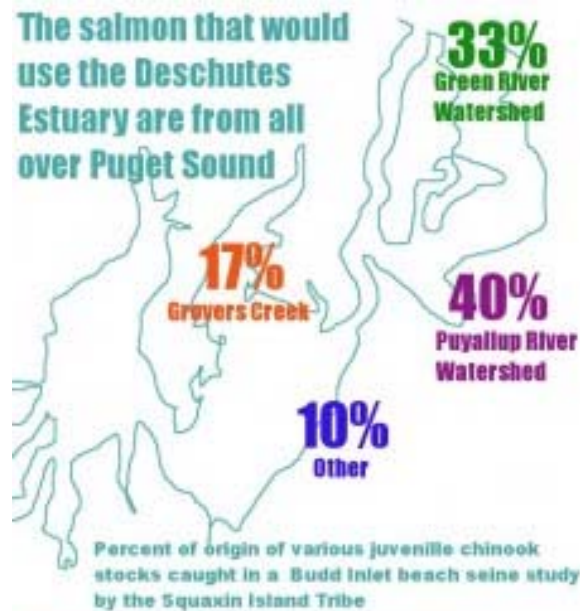
designation of Extraordinary quality uses to those marine waters that “markedly and uniformly exceed the requirements for all [aquatic life] uses,” in Ecology’s proposed revision, conform to the requirement that criteria be “based on sound scientific rationale” and “support the most sensitive use”? See 40 C.F.R. § 131.11(a). If a species is to be fully protected, it requires criteria that fully protect it. This proposed limit of the application of the most protective and biologically-based temperature, dissolved oxygen, turbidity, and pH criteria—see Tables 210(1)(c), (1)(d), (1)(e), and (1)(f)—to only those waters that are already of the highest quality ignores the fact that aquatic life species in other marine waters may require those most protective and biologically-based criteria. In some cases, such species may be threatened and endangered and yet they would still get a lower level of protection than Ecology believes is biologically necessary. In fact, it’s possible that in some locations, those species are threatened or endangered *because* of the low quality of the water that Ecology seeks to perpetuate through its classification system.

In addition, it is peculiar for Ecology to propose revisions to a use classification system that is already subjective and backwards without removing that which is subjective and backwards. For example, the difference between Excellent quality and Good quality is that the water quality of the former must meet or exceed the requirements for “all uses” and the latter just for “most uses.” The aquatic life uses that are enumerated are the same. The distinction of what constitutes “most uses” appears to be subjective and therefore is contrary to a method of applying the criteria that is based on sound science. It is also backwards. It states that the uses will be designated based on attainment of water quality that meets or exceeds the quality needed for aquatic life. In other words, the designation is based on the criteria, when the criteria are supposed to be based on the uses. 40 C.F.R. 131.11(a) (“States must adopt those water quality criteria that protect the designated use.”) The regulations do not state that states may limit the application of protective biologically-based criteria based on existing levels of pollution nor do they say that the uses shall be designated based on where the criteria are met or, more to the point, not met. The regulations also do not say that the state can provide a level of protection to designated uses that is not based on science. The emphasis is on the sound scientific rationale, namely biologically-based protections, not based on how polluted Ecology has already allowed the waters to become.

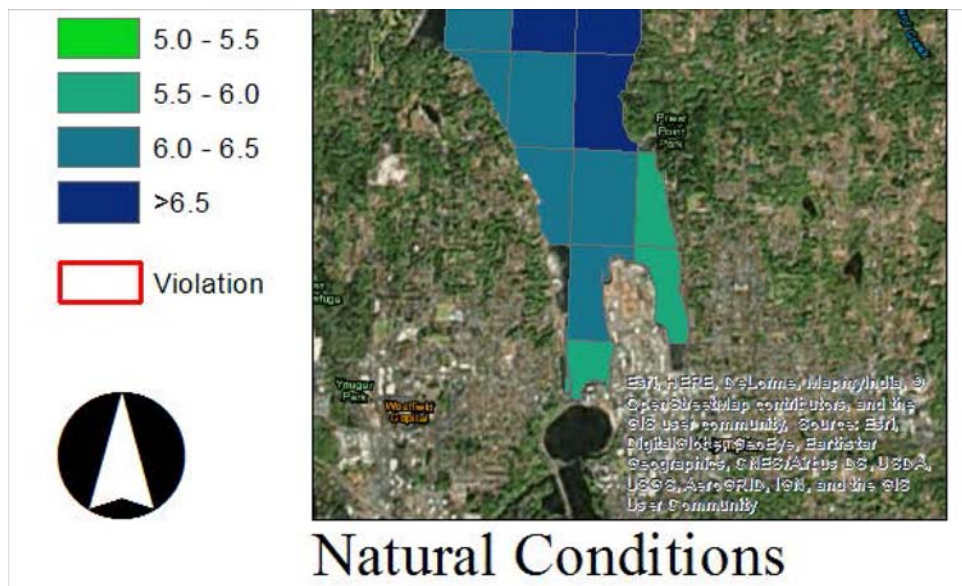
An example demonstrates how Ecology is using the classification system to maintain lower water quality for species than it would if it were designating them using a use-based system. In Budd Inlet, the uses are designated as follows: Budd Inlet south of latitude 47°04'N (south of Priest Point Park) aquatic life designation is “Good.” WAC 173-201A-612, Table 612. Good quality use designations are protected by a dissolved oxygen criterion of 5.0 mg/L. WAC 173-201A-210 Table 210(1)(d). In contrast, Ecology has modeled “natural conditions” for Budd Inlet. See, e.g., Budd Inlet Dissolved Oxygen TMDL, Updated project plan: May 3<sup>rd</sup>, 2017 at 4 (Fig. 1). These natural conditions include model grid cells that are naturally expected to have levels of dissolved oxygen of 6.0 – 6.5 mg/L and 5.5 – 6.0 mg/L. This range—5.5 – 6.5 mg/L, represents “[m]odeling of dissolved oxygen in mg/L on the day with lowest DO.” *Id.* In other words, Ecology has designated the use for Budd Inlet so as to apply a criterion for dissolved oxygen that is less protective than it believes the natural levels that could be attained. Moreover, in that same document, Ecology notes that should “Capital Lake bec[o]me an estuary, the WQS standard would be the same as the standard for the southern Budd Inlet, which is Good Quality (5.0 mg/L). *Id.* at 6. The results of the modeling are set out on the next page below.

Budd Inlet is an important rearing area for juvenile salmon. Budd Inlet is critical habitat for

Puget Sound Chinook Salmon. 50 C.F.R. § 226.212(i)(16); 70 Fed. Reg. 52630, 52688 (Sept. 2, 2005); *see also id.* at 52705 (critical habitat for Nearshore Marine Areas). According to the Squaxin Island Tribe, “[s]almon smolts from numerous Puget Sound river systems migrate into Budd Inlet.” Squaxin Island Tribe, Restoring the Deschutes Estuary would benefit salmon from all over Puget Sound, *available at* <https://www.squaxin-nr.org/2011/06/restoring-the-deschutes-estuary-would-benefit-salmon-from-all-over-puget-sound/> (last accessed Nov. 25, 2019). Here are the tribe’s data exhibited in graphic form:



Restoration of the Deschutes River estuary is more than supporting Deschutes River fish. Since salmon from all over Puget Sound use Budd Inlet (even lower Budd Inlet) restoring the Deschutes estuary is about restoring Puget Sound.



Susan Braley  
September 26, 2019  
Page 4

### **III. Effectiveness of Site Specific Criteria**

Ecology proposes to clarify in footnote dd of Table 240 that any metals criteria that are proposed to be adjusted on a site-specific basis on the basis of a demonstration of the water effects ratio approach are “not in effect until they have been incorporated into this chapter and approved by EPA.” As this represents the law and policy pertaining to the setting of water quality standards, we support the revision and appreciate Ecology’s clarifying the intent of its rules to avoid confusion.

Sincerely,

A handwritten signature in black ink, appearing to read "Nina Bell". The signature is fluid and cursive, with a large initial "N" and a long, sweeping underline.

Nina Bell  
Executive Director