

July 12, 2024

Marla Koberstein
Washington Department of Ecology
Water Quality Program
P.O. Box 47696
Olympia, WA 98504-7696

Submitted via online Public Comment Form portal.

Re: Proposed Updates to the Washington Water Quality Standards for Natural Conditions Provisions in WAC Chapter 173-201A.

Dear Ms. Koberstein:

Please accept these comments on the proposed updates to the Washington Water Quality Standards for Natural Conditions. These comments are submitted on behalf of fourteen conservation and water quality organizations working throughout the State of Washington.

For many years, the Washington Department of Ecology (Ecology) has used its now-disapproved Natural Conditions Criteria (NCC) in developing Total Maximum Daily Loads (TMDLs) to override existing, biologically-based numeric criteria with levels of temperature and dissolved oxygen that it claims are natural. EPA does not review these results, even though many of the automatic overriding pollution levels have lethal and sublethal effects on salmon and other aquatic species.

Now, Ecology proposes to conduct business as usual. As such, its proposal for a new NCC does not constitute a “performance-based water quality standard” because it does not assure replicable outcomes, and it does not ensure protection of the most sensitive aquatic species. There are problems both with what Ecology includes and what Ecology fails to include in its proposed rules and guidance.

The following comments are the most significant problems with Ecology’s proposal. We strongly urge Ecology to consider these comments and revise the proposed updates to Chapter 173-201A WAC in light of this feedback.

1. Ecology fails to include historically higher water temperatures associated with significant habitat complexity in its proposed NCC.

Ecology proposes to take a simplistic look at what historically natural temperatures were in Washington’s waters. While natural temperatures may have exceeded the protective temperatures now established in the state’s numeric criteria, those naturally high temperatures were also accompanied by significant habitat complexity—cold water refugia large and small, side channels, hyporheic flows, beaver dams, large woody debris, etc. None of these mitigating elements are mentioned by Ecology in its proposal, despite the fact that it sets no limit on how high supposedly “natural” temperatures could be.

We urge Ecology to revise its proposal by acknowledging the habitat complexity of Washington’s historic natural temperatures because historically high temperatures were not present without other conditions that mitigated their effect on cold-water species such as salmon. We further urge Ecology to only apply NCC when there is a demonstrable showing of complex mitigating habitat.

2. There is nothing in the proposal to ensure that the replacement criteria produced by the NCC will protect aquatic life.

Ecology repeatedly states its new NCC will meet EPA regulation requirements to ensure the protection of the most sensitive beneficial uses. But, nowhere in its proposal does it explain how it will achieve that goal. Ecology offers no “test” of the resulting superseding criteria based on the biology of the species affected, and no consideration, as discussed above, to the other conditions that would have been present with the purportedly natural water quality. There is no purportedly natural temperature too high, nor purportedly low dissolved oxygen too low.

We strongly urge Ecology to provide more rationale for how the new NCC criteria meets EPA requirements and actually ensures the protection of the most sensitive beneficial uses and species.

3. Ecology fails to provide assurance that the resulting replacement criteria will reflect natural temperatures and dissolved oxygen levels.

Ecology’s use of models to determine natural temperatures relies heavily on making assumptions. Instead of showing how those assumptions will ensure that the modeling results achieve the most likely natural temperatures and dissolved oxygen levels, Ecology specifically states that it will determine its plan of action later, and figure out the details through future Quality Assurance Project Plans (QAPPs). Making these decisions down the road does not meet the definition of a performance-based approach that will “ensure predictable, repeatable outcomes.”

Ecology cites its history of developing TMDLs using its old NCC, but those TMDLs do not eliminate all human inputs. In this rulemaking, Ecology fails to explain how it will fix that problem and ensure that it removes all human inputs before it produces automatically overriding criteria. Ecology says almost nothing about how it will ensure that upstream water inputs will not include human impacts when it makes assumptions integrated into the TMDL models. Finally, although Ecology purports to address data gaps, it says nothing substantive about how it will address this key issue before EPA approves the new provision.

In light of these glaring omissions, Ecology must explain, now, how it will make assumptions, address data gaps, and not rely on QAPPs prepared later to provide assurances that its modeling exercise will achieve natural temperatures and dissolved oxygen levels. This specifically includes how Ecology will ensure that upstream water inputs do not include human impacts.

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4. The Human Use Allowance increment will not protect aquatic species.

Ecology proposes to define the increment of allowable human impacts to stream warming and dissolved oxygen depletion beyond natural conditions to not include human impacts from outside the country. For example, it does not factor in the Canadian contributions of nitrogen to the Puget Sound's dissolved oxygen problem or global climate change into allowable temperature increases. The results will not reflect natural conditions, and they will not protect aquatic species. Ecology cannot pick and choose which human inputs to include when setting a water quality criterion that is supposedly based on natural conditions. This defeats the purpose of removing these global impacts from the determination of supposedly natural conditions when, later, they are allowed back in with no consequences to pollution sources regulated under Washington water quality standards.

We do support Ecology's proposal to use ever smaller human use allowances for dissolved oxygen as modeled natural conditions become less protective of aquatic species. However, this approach should also apply to temperature, and there should be a point where incremental harm from human impacts is simply phased out because the natural level of dissolved oxygen is too low or the natural temperatures are too high.

5. The proposed NCC language is flawed.

Ecology proposes rule language stating that if a waterbody does not meet numeric criteria due to natural conditions, "the natural conditions constitute the water quality criteria." Instead, if Ecology proceeds with this rulemaking, it should make clear that the NCC only applies if Ecology has determined new criteria pursuant to the NCC.

The rule language contains no assurance that the result of a performance-based approach will protect the most sensitive beneficial uses. This includes the issues raised above, such as habitat complexity and requiring that modeled water temperatures naturally colder than numeric criteria and modeled dissolved oxygen levels naturally higher than numeric criteria must also apply.

Finally, Ecology proposes that it can change the performance-based guidance at will. This results in changing the water quality standard without public input, Tribal input, EPA approval, or consultation under the Endangered Species Act. This is entirely contrary to the principle of the performance-based approach, and this language must be removed to meet consultation and public engagement requirements.

Conclusion

As written, Ecology's proposed changes to Chapter 173-201A WAC do not constitute a "performance-based water quality standard." The proposal falls severely short by failing to provide the necessary rationale and assurances that the most sensitive beneficial uses are protected and that outcomes are replicable. We strongly urge Ecology to go back to the drawing board and start over.

Sincerely,

Teryn Yazdani, Staff Attorney
Columbia Riverkeeper

Katelyn Scott, Water Protector
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