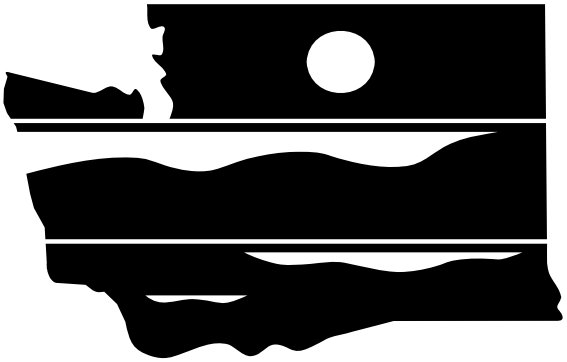

WASHINGTON STATE
DEPARTMENT OF
ECOLOGY

As required by
the Washington State Administrative Procedures Act
Chapter 34.05 RCW

CONCISE EXPLANATORY STATEMENT
AND
RESPONSIVENESS SUMMARY
FOR THE ADOPTION OF
Chapter 173-201A WAC,
Water Quality Standards for Surface Waters of the State of Washington

November 20, 2006
Publication: 06-10-070

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Administrative Procedures Act, RCW 34.05

CONCISE EXPLANATORY STATEMENT AND RESPONSIVENESS SUMMARY FOR THE ADOPTION OF

CHAPTER 173-201A WAC
Water Quality Standards for Surface Waters of the State of Washington

Prepared by:

The Watershed Management Section
Washington State Department of Ecology
Water Quality Program

November 20, 2006

Publication No. 06-10-070

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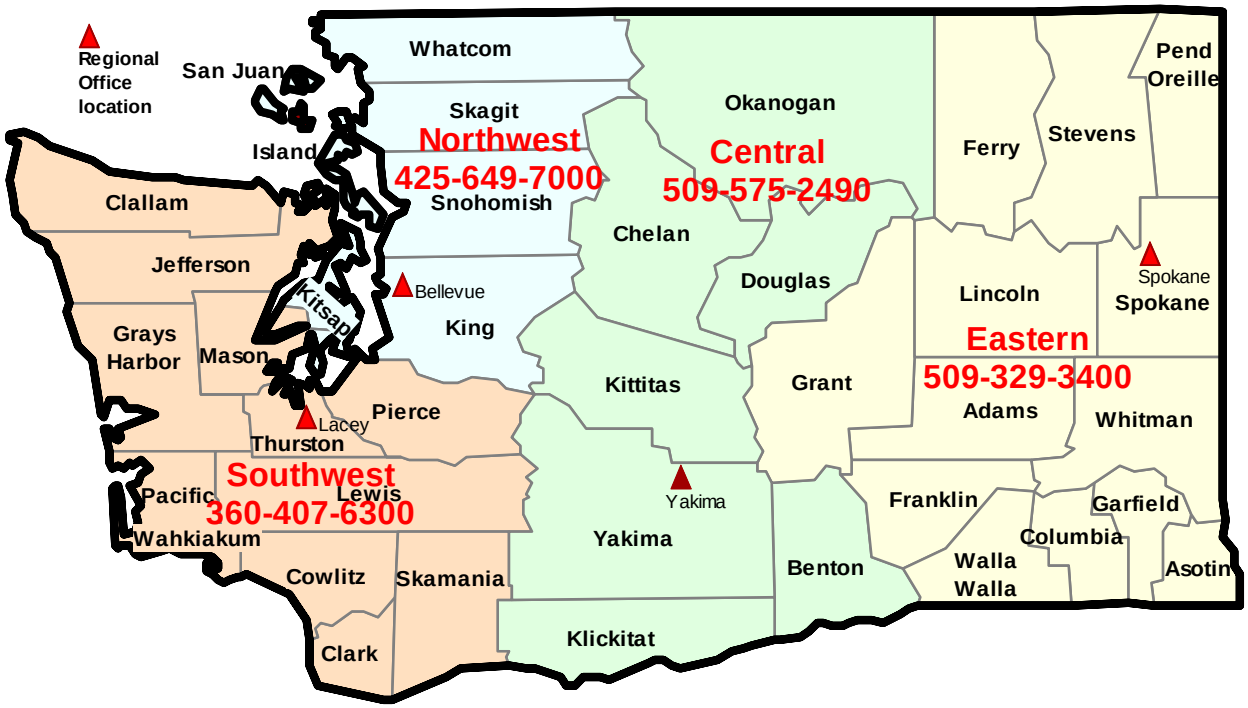

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Concise Explanatory Statement

I. Introduction

The Washington Department of Ecology (Ecology) is directed by Chapter 90.48 RCW to develop water quality standards to protect the aquatic resources of the state and to participate in the programs established under the federal Clean Water Act. Federal rules establish that the US Environmental Protection Agency (EPA) must determine if state water quality standards meet the requirements of federal laws and regulations prior to their being in effect for actions requiring federal approval. In July 2003 Ecology adopted significant revisions to the surface water quality standards regulation (Chapter 173-201A) and then submitted those revisions to the EPA for approval. In March 2006 the EPA formally disapproved portions of those adopted standards.

Under the federal rules, once EPA disapproves a state's standards the federal government must begin the process of developing a corrective federal rule. As a matter of policy, however, EPA provides states with information on what would be required to obtain approval, thus allowing the state an opportunity to move expeditiously to correct the deficiencies at the state level.

Ecology decided that it would be in the best interest of the state to propose a corrective state rule rather than to have the corrections be carried under federal authority. Such a federal rule would have created a very complex regulatory scheme for both the state and its stakeholders. Additionally, any future refinements to those affected standards would require modification of the federal regulations, making such changes more cumbersome and potentially problematic.

As part of the March 2006 disapproval, EPA provided Ecology with maps and information showing where and how the aquatic life use designations in the state standards needed to be corrected to obtain approval. EPA also provided similar information showing where supplemental temperature criteria were needed to protect summer spawning and emergence of salmonids. Ecology then started a formal revision to the state water quality standards based on the maps and underlying information provided by EPA. A public review was held July 5 – September 5, 2006, to gather public comment on the proposed revisions.

Ecology is scheduled to file the revisions to the surface water quality standards on ***November 20, 2006,*** with the rule becoming effective on 31 days after filing on ***December 21, 2006.***

After adoption, Ecology will submit these revisions to the EPA for its review. EPA has 60 days to approve the changes as meeting all applicable federal laws and regulations, or 90 days to disapprove the changes and to provide remedies or pursue a corrective federal rule. Until approved by EPA these changes are not available for use in programs authorized and administered under the authorities of the federal Clean Water Act.

II. Differences between proposed and final rule

The following describes the differences between the text of the proposed rule as published in the Washington State Register and the text of the rule as adopted, other than minor editing changes:

A) The proposed revisions to the water quality standards included changes in the designated uses of the upper portion of the Little Klickitat River watershed. These changes took two forms:

- WAC 173-201A-602 (Table 602) of the proposed regulation stated that the "Little Klickitat River and tributaries above the junction with Cozy Nook Creek" had the designated aquatic life use of "Core Summer Habitat"; and
- The supplementary spawning publication referenced in WAC 173-201A-200(1)(c)(iv) included applying a 13°C criteria to portions of this same water body from February 15-June 15.

After discussing the specific results of the spawner survey data collected by Yakama Nation with the Tribal biologist and EPA, and considering the results of temperature modeling of the streams in the Little Klickitat drainage, Ecology is:

- Not changing the designated use to "Core Summer Habitat"; and
- Is changing the ending date of the spawning window from June 15 to June 1.

The best available information suggests that the stream does not serve as core summer salmonid habitat and lacks the natural capability of achieving the proposed "Core Summer Habitat" criteria of 16°C (7-day average daily maximum). Additionally, spawning is believed to end by May in the system. Thus incubation should be largely complete by June 1. The map for WRIA 30 contained in supplementary spawning publication 06-10-038 will show the requirement to apply a 13°C above Cozy Nook Creek in the Little Klickitat Drainage applies until June 1 rather than the proposed June 15. WAC 173-201A-602 (Table 602) will show that "Little Klickitat River from mouth to headwaters" has the designated aquatic life use of "Spawning/Rearing" which will receive a 7-day average daily maximum temperature of 17.5°C.

B) Two errors were found in Table 602, WRIA 45, for Peshastin Creek from National Forest Boundary to headwaters (including tributaries) except where designated char, and Peshastin Creek from junction with Mill Creek to National Forest Boundary (including tributaries). No changes were intended to the recreational use designations for any waters in the state as part of this rulemaking. Additionally, the box for warmwater fish use was checked in addition to the appropriate core use type for the stretch of water above the national forest boundary. These mistakes went unnoticed in the public review process. The recreational uses have been returned to what they were in the 2003 version of the standards regulation, and the conflicting designation of warm water fish use was removed from Table 602 for the Peshastin Creek above the forest service boundary.

C) Section 600(2) now states that "The water quality standards for surface waters for the state of Washington do not apply to segments of waters ~~listed in Table 602~~ that are on Indian reservations." The final version corrects the statement so it is clear that the state standards do not apply to waters on Indian reservations.

D) The following corrective changes were made to the supplementary spawning maps in the publication referenced at WAC 173-201A-200(1)(c)(iv):

- The colored lines depicting char rearing habitat were removed from the supplementary spawning maps. This was done to make the maps easier to read and to keep the maps focused on the areas where supplementary protection for spawning is needed.
- The August 1 – July 1 spawn time period was added to the Cascade, Sauk, Suiattle, and Whitechuck Rivers (WRIA 4). This was based on spawner survey data from the Washington Department of Fish and Wildlife (WDFW) and tribal biologists.
- The Sept. 15-June 15 spawn timing period was added to the main-stem Snohomish River from the Pilchuck River confluence upstream to the Skykomish/Snoqualmie forks (WRIA 7.) This was based on spawner survey data from the Washington Department of Fish and Wildlife (WDFW) and tribal biologists.
- Spawning maps were modified in WRIA 30 to remove depiction of char use on reservation lands since Washington's standards do not apply within tribal jurisdictions.
- The Feb. 15-June 1 spawn time period for steelhead was added to Yellowhawk Creek in WRIA 32. This was based on spawner survey data from the Washington Department of Fish and Wildlife (WDFW) and tribal biologists.
- The Sept. 1 – June 15 spawn timing period on the Tucannon River was mapped to end just past the Cold Creek confluence in WRIA 35. This was based on spawner survey data from the Washington Department of Fish and Wildlife (WDFW) and tribal biologists.
- The map for WRIA 37 was corrected so that the char spawning temperature correctly reads 9°C rather than 13°C.
- The Feb. 15 – June 15 spawn timing period for steelhead was removed from the Tieton River in WRIA 38. This was based on spawner data from the Washington Department of Fish and Wildlife (WDFW) and tribal biologists.
- The char spawning assignment to the Bumping River above Bumping Lake was removed in WRIA 38 after examination of spawner survey data from the Washington Department of Fish and Wildlife (WDFW) and tribal biologists.
- The Sept 15 – June 15 spawn timing period for that portion of the Upper Yakima River from Lake Easton up to Lake Kachelus was changed to Sept. 15 – May 15 in WRIA 39. This was based on spawner survey data from the Washington Department of Fish and Wildlife (WDFW) and tribal biologists.
- Spawning maps were modified in WRIA 49 to remove depiction of char use on reservation lands since Washington's standards do not apply within tribal jurisdictions.

III. Comments summary

Comments are summarized in the following pages according to the topics below. Responses to those who provided public comments are indexed by the comment numbers shown next to the name of the contributor:

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Lewis River
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Washington Potato Committee	*11, 12, 21, 22, 23, 24, 25, 26*
Washington Department of Fish and Wildlife	*5, 8, 51*
Washington State Horticultural Association	*1,2,3,4,*
Western Washington Agricultural Association	*11, 12, 13, 27*

Comments and responses by category:

General comments

1) The DOE proposal is fish centric, does not reflect reality, and is trying to force streams to meet one-size-fits-all standards that the streams cannot even meet under natural conditions. (Washington State Horticultural Association)

The current proposal is focused on the temperature needs of the state's salmonid populations; therefore, it does appear to be fish centric. The proposal will not force streams to achieve temperatures that cannot be met under natural conditions. The temperature standards are a combination of numeric criteria and narrative criteria. A key narrative criterion is that where the a water body cannot meet its assigned numeric criteria under natural conditions, then human influences can warm those waters by an additional 0.3°C above that estimated warmer natural condition. We build this natural condition allowance into our regulatory programs. Thus, a small increment of warming due to human actions is allowed when a stream cannot naturally meet the assigned criteria.

2) Ecology has no basis for establishing standards in terms of optimal conditions for growth. (Washington State Horticultural Assoc)

The standards are not designed for optimal growth conditions. Even the core summer salmonid habitat criterion of 16°C (7-DADMax) will not result in optimal growth and freedom from the risk of warm water fish diseases under the normal expected range of field conditions. Ecology understands that fish populations can still be robust at temperatures both above and below the criteria values. However, temperatures above the criterion generally begin to cause adverse effects to the health of salmonid populations. Decreases in the variety of fish life-strategies, decreases in the time for successful spawning and incubation, less resistance to unusual climatic conditions, increased prespawning mortality, and reduced species diversity are all predictable results of warming the water.

3) Ecology should not classify streams according to one maximum temperature reading. (Washington State Horticultural Assoc)

The state standards include six levels of aquatic life uses and associated criteria plus two supplemental spawning criteria. The special spawning and incubation criteria apply during discrete date windows that match the existing fisheries uses of these waters. The numeric temperature criteria are expressed as a 7-day average of daily maximum temperatures and do not apply to the warmest ten percent of years. Thus, the streams are neither classified nor regulated using a single maximum temperature reading.

The text underlying this comment also seems to suggest that human disturbances may be potentially positive. We would concur that there are some situations where human modification of the environment can actually help local fisheries, such as providing flows where none would have existed naturally. The state and federal standards' regulations do have provisions for accounting for these net benefits and allowing unique standards to be set. Ecology's bottom line is the protection of the resource and we have no objections to supporting unique criteria in a water body that will achieve greater protection.

4) Ecology's provisions for human allowance are inadequate. (Washington State Horticultural Assoc)

Ecology did not propose any changes to the human allowances established in the state standards as part of this current rulemaking. The allowance that exists (0.3°C) has been in our state standards for a very long time. It represents a level of change that would present a de minimis increased risk to aquatic resources even where natural conditions are significantly higher than the assigned numeric criteria. We have also found that it provides significant relief for entities that discharge very warm water since it applies after the discharge has been diluted.

5) We support the rulemaking and encourage Ecology to move swiftly to review the adequacy of the dissolved oxygen criteria in protecting incubating salmonids. (People for Puget Sound, Washington Environmental Council, Olympic Forest Coalition, Northwest Indian Fisheries Commission, Washington Department of Fish and Wildlife, US Fish and Wildlife Service, Squaxin Island Tribe)

We appreciate your support. Ecology is moving forward in its review of the adequacy of the dissolved oxygen standards for protecting incubating salmonids and will propose any regulatory changes determined necessary as expeditiously as possible.

6) The tribes have raised a number of other issues related to water quality standards that need revision. From the Squaxin Island Tribe's perspective, the primary issues are the marine water designations, and some changes that should be made to better reflect how those marine waters are used. (Squaxin Island Tribe)

Ecology looks forward to working with the tribes to identify issues that need resolution in the state standards during future rulemakings.

7) Section 600(2) states: "The water quality standards for surface waters for the state of Washington do not apply to segments of waters listed in Table 602 that are on Indian reservations." As written this could give the false impression that state standards apply to reservation waters that are not listed specifically in Table 602. (Northwest Indian Fisheries Commission)

Ecology agrees that this potentially misleading language should be corrected. We have incorporated your suggested correction to remove the words "listed in Table 602" to make clear the state standards do not apply to any waters on Indian reservations.

8) Fisheries information is constantly expanding and Ecology should develop an expedient system for incorporating new information into the water quality standards. (Washington Department of Fish and Wildlife, US Fish and Wildlife Service, Northwest Indian Fisheries Commission)

Ecology will be happy to work with the state and federal fisheries agencies and the tribes to develop a process for considering new fisheries information in a timely manner. Such a system would be used in revising the state standards and in ensuring the uses are protected in-between rulemakings.

9) *What happens to a temperature TMDL when the temperature target changes in mid-implementation? And what will Ecology do differently with streams newly designated 16°C that are already not meeting the 17.5°C standard? (Skagit County Public Works)*

Based on our experience to date, we don't expect any significant changes to the TMDLs that have been completed. We expect that the implementation strategies and the allocations for both point and nonpoint sources will typically remain the same under the old criteria as well as the new criteria. Point sources in both situations will be held to the same de minimis impact on temperature (0.3°C) at the edge of a chronic mixing zone — unless there are some TMDL waters that would have met the old criteria but not the new criteria. Nonpoint source controls are expected to remain the same in the forested regions that are governed by the forest and fish rules, and the implementation plan will continue to focus on trying to restore and maintain fully functioning riparian corridors in the non-forested regions. Essentially the same nonpoint source BMPs will be necessary to meet the old criteria as the new criteria in most waters where TMDLs have been completed.

10) What effect will these new designations have on NPDES Phase II stormwater permitting? (Skagit County Public Works)

We do not anticipate any effects on stormwater permitting at this time. In general, we believe that neither temperature nor dissolved oxygen criteria are at high risk of being violated due to stormwater that is being managed with BMPs currently being required by the Department.

11) The fact that the Department's proposed rule was essentially written by federal fisheries agencies inappropriately usurps the Clean Water Act authority delegated to the Department of Ecology by the Environmental Protection Agency. (Washington Potato Committee, Western Washington Agricultural. Association.)

EPA's authority to approve or disapprove the state's standards is clearly established in federal regulation. Those regulations also grant EPA the responsibility to develop corrective standards if the state does not move swiftly to correct the deficiencies identified by EPA.

The information that EPA used in its review was the same information that Ecology had begun to use earlier in the rulemaking process. It is also the same information that Ecology would have used if EPA had not assisted in clarifying where they believed our fisheries use designations were in error. This fisheries information is the best available information describing the use of our state's waters by salmonids. These fisheries databases were developed and are maintained by our state Department of Fish and Wildlife.

12) Specific stream designations in Washington were arrived at inappropriately. Data bases should not be used as the basis for setting standards as all uses should be verified on the ground. (Western Washington Agricultural. Association, Washington Potato Committee).

The databases are used to store information collected in the field by fisheries biologists working for and in partnership with the WDFW. Thus, field verified data forms the basis. The WDFW databases represent the best available fisheries information for our state. Only "Known" distribution data, based upon field observations, was used for the fisheries use determinations. The public process surrounding this review allowed anyone with contradictory information for any of the streams to affect the final rule. The application of the state standards using this fisheries data base represents the best approach to ensure the appropriate thermal protection will occur for this sensitive resource.

13) We question why more stringent standards are being proposed if the science already tells us that they are not achievable under natural background conditions in many streams and rivers. (Western Washington Agricultural Association.)

The numeric criteria are based on a scientific evaluation of what fish need from a biological standpoint to live and thrive in a healthy environment. Thus, the numeric criteria become the goal for achieving healthy waters for salmon and other aquatic species. The criteria are commonly met on both the east and west sides of the state, even if they are not met everywhere or all of the time. It is important to recognize, however, the numeric criteria only apply at locations and times where the criteria can be achieved under natural conditions. At all other locations and times the estimated natural condition (commonly described as the system potential) would override the numeric criteria. For temperature, this is allowed through a narrative criteria (WAC 173-201A-200(1)(c)(i)) directing that when a water body's temperature is warmer than the numeric criteria due to natural conditions then human sources of warming would be allowed to increase the water temperature by no more than 0.3°C (0.54°F). This system ensures that where a water body can provide a high level of support for aquatic communities, then the numeric standard is the regulatory target. But where the system does not have the potential to meet that goal, then we will not hold human sources accountable for what is a natural condition.

14) We encourage Ecology to use flexibility in implementing the temperature criteria. Alternative pathways such as TMDLs are bureaucratic and not flexible. Use attainability analyses (UAA) are another tool available to correct uses, but Ecology has chosen not to use them. (Northwest Pulp and Paper Association)

Ecology has already begun the process of developing guidance for implementing the new temperature criteria. That guidance is consistent with the recommendations included with the EPA regional temperature criteria guidance document. Ecology has and will continue to use the natural conditions provision of the standards both for Clean Water Act 303(d) listing and permitting decisions. Ecology describes how 303(d) listing decisions will be made in the Water Quality Policy 1-11, Chapter 1; specifically in the section pertaining to natural condition determinations.

To set the record straight on UAAs in Washington, only two UAAs have been formally developed in Washington. One was withdrawn by the applicant prior to Ecology making a formal decision, and the other asked for the removal of uses that were actually shown in the UAA itself to be existing in the water body. Ecology responded to this second UAA by informing the proponent that the UAA did support making changes to the uses, but not to the extent recommended in the report. The applicant in this case chose to upgrade their facility instead and to see first if they could comply with the criteria that troubled them. This does not describe a broken UAA system as much as an untested system. Ecology will support any UAA submitted that actually meets the federal requirements for removing designated uses.

15) Ecology should review all of the uses in the state every 5 years. (Northwest Pulp and Paper)

Ecology does not believe that creating a requirement to review the designated uses for all of the states waters every five years would be an effective use of public resources. We certainly are willing to examine in depth those waters where the uses designated in the standards do not appear to match the uses that actually occur on the ground. We expect that such reviews will become more common in the future now that the state has focused more intensely on bringing our waters into full compliance with the water quality standards.

16) Ecology did not adequately respond to our comment letter from the 2003 rulemaking, so we are resubmitting it as part of this rule revision. (Northwest Pulp and Paper)

Since the comments presented in your March 7, 2003 comment letter do not apply to the current rule proposal for use designation changes, we have not responded to them in this response summary. Instead, we will send you a letter separately providing individualized responses to the comments you raised during the 2003 rulemaking.

17) The criteria associated with the aquatic life use should be more flexible and allow for individual determinations that the fish community is healthy at alternative temperatures. (Bureau of Reclamation , Heller, Ehrman, White, and McAuliffe)

The numeric criteria in the standards are based on a scientific evaluation of what fish need from a biological standpoint to live and thrive in a healthy environment. Thus, the numeric criteria become the goal for achieving healthy waters for salmon and other aquatic species. The criteria and the uses are thus inextricably linked together. The criteria describe in greater detail the uses they are assigned to protect. They cannot be readily separated for analysis. If such separation is contemplated a first step would be to show that the same level of protection intended by the application of the specific numeric criteria would occur with some alternative water quality condition in the water body. This type of approach is permitted under state and federal water quality regulations, and usually takes the form of scientifically-derived site specific criteria. Such changes, however, require careful water body specific investigations, potential changes in the water quality standards regulation, and approval by the U.S. Environmental Protection Agency and ESA review.

18) Do not color code lakes as having char criteria applied because Ecology still hasn't figured out how to apply their criteria realistically in stratified waters. (Heller, Ehrman, White, and McAuliffe)

We need to assign designated aquatic life uses to lakes even though we have a special narrative clause explaining that the goal is to maintain conditions within 0.3°C (temperature) and 0.2 mg/l dissolved oxygen of the estimated natural conditions. If we didn't apply the char criteria, then we would need to apply one of the other aquatic life designations. Whether or not a lake is designated char or designated salmon and trout rearing does not affect the complexity of assessing compliance in lakes.

19) The use for the 7-DADMax should begin 7 days after the start date of the spawning season criteria. (Heller, Ehrman, White, and McAuliffe)

What you are suggesting would move the date of application seven days further into the fall. This would conflict with having set the specific date in the first place. During the 2003 rulemaking, Ecology specifically defined the 7-DADMax as follows: "The 7DADMax for any individual day is calculated by averaging that day's daily maximum temperature with the daily maximum temperatures of the three days prior and the three days after that date." If we were to take a different approach, it would likely be to include the six days prior to the first day of application of the criteria in the fall in computing the average, and end the averaging right on the ending date of any spring spawning criteria. However, the description of how we calculate a 7-DADMax was adopted into the 2003 rule, and we did not suggest in this current rulemaking that we were considering changing it. While you may view this as not being a substantial change, we have found the selection of spawning date windows to be important to stakeholders, and any change in the effective application of the spawning criteria would be viewed as significant. The fact that it was not a topic that we had proposed or discussed in the corrective rule revision would make changing it substantial under our state's Administrative Procedures Act.

SEPA/SBEIS

20) Ecology initialed as "not applicable" the SEPA checklist question "Will the proposal require any new roads or streets, or improvement in existing roads or streets?", and did not include a map in the SBEIS for all built and natural areas within 2,000 feet of affected waters. These actions mean that the change in the standards will not require any changes to existing environments, no mandatory relocations or removal of levees, roads, streets, culverts, or utility projects. It also means the property owners will not face increased taxes or local improvement district costs for built environments like they will on new construction for any added buffers that resides on public owned, easement, and private land. We support this decision. (Regional Road Maintenance ESA Forum)

The response "not applicable" demonstrates that this is not a construction project that will directly or indirectly result in the need to add or modify existing transportation systems. Since this was a statewide rulemaking rather than a discrete construction project, Ecology also published a non-project checklist so that the effect of the proposal on the environment would be more readily understood.

Ecology does not agree that once a transportation project is constructed it becomes part of the environment and exempt from having to make any changes necessary to nullify their effect in causing or contributing to a violation of the state standards. We also do not know what, if any, changes may be necessary, or where changes will be required. This is because the rules apply at the state level and there are many ways an affected party may chose to come into compliance if some change or improvement is necessary.

We have worked diligently over the years to ensure that development interests understand that they are ultimately responsible for designing and maintaining facilities that do not cause or contribute to a violation of the water quality standards.

Your letter also suggests Ecology's SBEIS should have included a map of all built and natural environments that are within 2,000 feet of affected streams. You have asserted that by not doing so property owners will not be faced with increased taxes or buffers. Ecology could not create such a safe harbor from having to meet state and federal water quality laws and regulations. The water quality standards have limited flexibility to consider the human infrastructure as if it were part of the natural system. In fact, the effects of such human projects are specifically targeted for review and control under both state and federal water quality regulations.

21) Ecology's preliminary draft Benefit, Costs, and Least Burden Analysis (BCLBA) inaccurately analyzed the impact of riparian buffers. (Washington Potato Committee)

The analysis estimates that there are 22 miles of stream where row crops (including potatoes) are grown that would be impacted by this corrective rule. In addition as we have looked at these rule changes our analysis does not state that we would require any different best management plans than what is already required under the existing water quality standards implementation process. It is important to remember that the changes in this federally required rule are amendments to current water quality standards. Therefore these changes are incremental. Most BMPS used to meet current water quality standards would be used to meet these changes.

In addition the draft cost benefit analysis has overestimated the costs "applying riparian buffers to all potentially plantable land adjacent to affected waters likely overstates potential compliance costs associated with the proposed rule. Not all waters affected by the rule may require buffers; some waters may already be achieving the proposed standards. In addition, buffers may be needed to achieve compliance with the 2003 WQS revision, and thus would not represent an incremental cost of the proposed standards." Page 4-24.

Ecology and local conservation districts have had a history of success using federal grant programs to offset costs of buffers. We agree that all farmers might not have access to all federal grant programs. We do have state grant and loan programs that value buffer installation especially when it is to protect sensitive uses such as salmonids habitat.

Ecology disagrees that its economic analyses underestimate the potential size of buffers on agriculture and the potential impact on the economic viability of individual farms, and that it is naive in assuming that federal programs will minimize the cost impact. Controls on agriculture

to meet the water quality standards in the rule may be required in the context of a TMDL. The literature cited in existing or drafted temperature TMDLs supports Ecology's assumptions regarding the likely buffer size that will be employed in a TMDL, not the 300-foot buffer suggested by the commenter.

As stated in Ecology's analysis, the actual impact on farms will vary with farm size, location, riparian acreage, and the type of foregone production, if any. Data for the specific farms that may be ultimately affected by the rule were not available. Thus, Ecology used average farm data to provide an example of impacts under "model" farm assumptions, and cost share percentages ranging from 10 percent to 75 percent. Ecology believes this is a reasonable approach to assessing the potential incremental impacts on agriculture.

Ecology cannot comment on the claim that Northwest Washington farmers are at risk of failure due to limited available land, nor can we address this issue. However, if the viability of individual farms is entirely dependent on the net income from production in the riparian zone, these farms are already at risk of failure for reasons other than implementing controls needed to meet water quality standards. Furthermore, when net incomes are low enough to constitute a risk of financial failure, then the opportunity costs of removing land from production are also low, contrary to the commenter's suggestion.

Ecology acknowledges that there are some geographical limitations in CRP, CREP, EQIP, CSP, and other agricultural conservation cost-share and low-interest loan programs. However, Ecology disagrees that these limitations would significantly affect the eligibility of agricultural producers near streams affected by the proposed rule. For example, 27 of the 39 counties in Washington State contain lands and streams that are eligible for funding of riparian buffers under CREP (http://filecab.scc.wa.gov/CREP/Landowner_Participation_Information.pdf), and virtually all of the waters affected by the proposed rule are in these 27 counties. This situation is consistent with the fact that the primary goal of the CREP program in Washington State, which provides funds exclusively for riparian buffers, is to restore salmonid habitat.

Although CSP, EQIP, and CRP have other priorities in addition to restoring salmonid habitat, these programs are all available near the streams affected by the proposed rule. Since CSP signups began in 2004, Washington has had 14 watersheds (WRIAs) eligible for new CSP signups, including many watersheds in which there are waters affected by the proposed rule. There are 12 multi-county and Tribal EQIP local work teams covering various parts of the state; in every team, the FY06 EQIP ranking criteria assign a nonzero weight to riparian forest buffer implementation (http://www.wa.nrcs.usda.gov/programs/eqip/FY06/eqip_packets.html). Finally, CRP is similarly widely available, and although CRP funds numerous BMPs, riparian forest buffers are also among them. Thus, virtually every area in the state in which there are waters affected by the proposed rule is covered by one or more of these conservation programs, and every program accommodates riparian buffers.

Ecology also acknowledges that federal and state conservation programs have not always been funded at the levels promised by legislators. However, Ecology notes that the estimated $4.1 million upper-bound cost of the proposed rules for agricultural land, which is based on an assumption of planting new buffers on every stream is small in comparison to the amounts

already paid annually to Washington agricultural producers for conservation programs, and the amounts budgeted for future payments. For example, in FY2005, Washington agricultural producers received $77 million under CRP and $1.6 million for CREP, in addition to $4.2 million approved for CSP and, for FY2004, $14.7 million available for financial assistance through EQIP (this total does not include technical assistance). None of the signup programs (CRP, CREP, CSP) are fully enrolled; for instance, Washington's CREP program can accept 90,000 more acres, and the national CRP program can accept 4 million more acres.

Ecology disagrees that federal laws would have to change in order to allocate more money to these conservation subsidy programs. For example, the state could increase its share of CREP funding (by agreement, it contributes at least 20 percent of CREP funding, but it could increase that share without violating the agreement.) :Local EQIP committees could prioritize restoration of salmonid habitat and Washington growers and stakeholders could lobby to authorize more state watersheds for CSP signups. All of which would serve to increase funding for cost-share programs in the state without requiring changes in federal laws.

22) Ecology should not rely on a "one-size fits all riparian buffer for its analysis of the proposed rule. (Washington Potato Committee)

We recognize that there is ongoing debate within the state about what the correct buffer should be. In the absence of any type of statewide decision on this issue we are requesting up to 100 ft buffers based on the shade potential that is modeled in our Water Quality Improvement Plans. These plans (TMDLS) establish shade requirements that are necessary to meet water quality standards. The cost estimates are based on what is happening right now and not on any potential buffer widths that might be determined in a different policy or regulatory setting.

23) Ecology's analysis of the possible opportunity costs of its proposed rule is woefully inadequate. (Washington Potato Committee)

See responses to other comments on the Draft BCLBA in comment number 21.

Ecology recognizes the benefits of a strong local agricultural community and wants to protect and preserve agricultural land in our state as well. This rule will only impact a small number of farms and in those cases the BMPS/buffers that we would require under current rules should not be different than what we would require under this proposed rule. We disagree that this proposed corrective rule will have a catastrophic impact on agriculture especially since we are already working with the agriculture community to install buffers and other BMPs to meet the existing water quality standards.
The commenter does not identify specific "flaws" in the model farm analysis, the purpose of which is to estimate, based on available information, the potential incremental control and opportunity costs that may ultimately result from meeting the water quality standards established by the rule.

24) Ecology naively assumes that federal farm programs will be available to alleviate the financial impact of riparian buffers on Washington Agriculture. (Washington Potato Committee)

See responses to other comments on the Draft BCLBA in comment number 21..

The references to federal support programs in the draft Cost Benefit Analysis and Small Business Economic Impact Statement were not meant to state that there would be no impact to agriculture. The references were meant to acknowledge that these programs do exist and if they are applicable to specific farms in establishing buffers they can be a very helpful resources. We have worked with conservation districts and farmers in a number of areas to take advantage of these federal resources so we do not feel it is inaccurate to include them in the analysis. We will make it clear in the final Cost Benefit analysis that the federal programs are not always available to all geographic areas. We think that the economic analysis is accurate and meets the requirements of the state Administrative Procedures Act.

The grant and loan programs discussed in the analysis do not just rely on federal programs; they include state programs managed by Ecology. You are correct that many of these sources are under funded, however, we have been very successful at getting money through state as well as federal program to farmers that are interested in implementing practices such as putting in buffers.

25) The Department's proposals to minimize the impact of its proposed rule on small-business farms are unrealistic and not possible. (Washington Potato Committee)

See responses to other comments on the Draft BCLBA in comment number 21..

We recognize that we have limited ability to influence federal grant programs. However, we have worked with them very successfully in our state to establish best management practices on a number of farms. While we recognize they can be limited, they are also a very valuable source that we have used in a number of areas across the state. Therefore, we believe it is appropriate to include them in this analysis.

We do have the ability to influence our state grant programs. We have relied on our state nonpoint funding to implement buffers and other programs where we have willing partners. The implementation of buffers is a critical and high priority for our nonpoint grants.

We disagree that our analysis is not sufficient to meet the state Administrative Procedure Act.

26) Ecology's Small Business Economic Impact Statement for the Proposed Changes to Washington's Surface Water Quality Standards is woefully inadequate for the same reasons cited in Comments 6 and 7. (Washington Potato Committee)

See our response to other comments on the BCLBA in comment number 21..

The small business impact analysis looks at the cost to farmers for a 75 percent cost share, a 25 percent cost share and a 10 percent cost share. We have met the requirements for the small business economic impact assessment under state law. The commenter does not identify specific "flaws" in the model farm analysis, the purpose of which is to estimate, based on available information.

27) We are concerned over the economic assessment for the impact to farms of the proposed standards. (Western Washington Agricultural Association)

Ecology recognizes that federal programs will not alleviate all the impacts on farmers. Most businesses do not receive funding to help them meet regulations so it is important to include this information in our analysis. In addition to the federal funding we do have state grant and loan programs which we can and have made available to help install buffers.

28) I do not believe the economic analyses made it clear if there would be any economic impacts to small treatment plants on small rivers such as the discharge of Goldendale. (City of Goldendale, Central Klickitat Conservation District)

As stated in the small business analysis, municipal facilities are not small businesses, although, they could pass their control costs onto consumers (e.g., households and indirect commercial and industrial dischargers) through rate increases. However, it is not possible to predict which dischargers to each facility would be affected and by how much. The cost-benefit analysis provides analysis of potential impacts for a sample of small (minor) municipal dischargers. Much of this information is site specific for each individual facility and the water body it is discharging into. The analysis took a subsample of dischargers to determine the impact on them.

Ecology agrees that there could be costs to hydroelectric generation facilities in the context of a TMDL or Clean Water Act Section 401 certification. However, data are not currently available to determine the extent of controls that may be required.

Hoh River

29) The people that farm the Hoh River valley know what is good for the streams. Trees along the streams, large woody debris in the streams, and setting back levees are all based on bad science. These things are actually bad for fish and water quality. Grazing rivers and using rip rap are good for fish and water quality. High temperatures are needed to protect salmon from bull trout. Turbidity is natural, and it unreasonable to try and make rivers clean enough to drink from. Elk, crows, and the visitors to the Olympic National Park are the source of the fecal pollution. Only private land owners are being asked to provide buffer strips. (Marjorie Dickson, Marilyn Lewis)

Ecology appreciates your interest in keeping streams healthy as well as your concerns over how Ecology and others are managing the natural resources of the state. We do not share the conclusions that you have reached on many of the issues you raised in your letter. What we do generally agree with is that no single cause exists for the degradation of the rivers in our state. Historic practices, current practices, public and private institutions and infrastructure projects all contribute to what we now have to work with and to hopefully improve upon. We also agree that to be successful, restoration efforts need to be carefully developed to fit the hydraulics and the biological systems of the specific rivers to which they are to be applied. Not all restoration projects are the same and not all are successful.

It is understandable why people living on a river may have a different view of those streams and of some of the more extreme forms of stream restoration that are discussed and used around the country. Ecology is not trying to make the river clean enough to drink, and we would never recommend that anyone drink untreated surface waters. Even ground water supplies should be regularly checked to ensure that animal or human waste or other pollutants have not made the water unhealthy.

What Ecology is trying to maintain is healthy waters for future generations to enjoy and benefit from. Thank you again for your thoughtful comments. We do appreciate your willingness to share your views and look forward to working with you to address water quality issues of the Hoh watershed.

Lewis River

30) We are concerned with the application of the 13°C supplemental spawning criteria to the segment of the Lewis River from Cedar Creek to Merwin Dam between September 1 and June 15. We recommended the criterion be applied only from February 15 to June 15, as is proposed for the segment immediately downstream between Cedar Creek and Houghton Creek. (PacifiCorp)

We have discussed your suggestion with the National Marine Fisheries Service and the state Department of Fish and Wildlife and cannot support your recommendation. Spring chinook in the North Fork Lewis is designated as a "primary" population in the interim recovery plan. This designation indicates that within the context of overall ESU and DPS recovery objectives, the goal for this population is to improve its status from high risk to low risk. To achieve this long-term objective, it will be crucial to develop adequate passage through the Lewis River hydropower system and to develop a reintroduction program for spring chinook (including an appropriate strategy for hatchery and wild broodstock). However, it is also crucial, especially in the near term, to maintain existing spring chinook spawning habitat in the North Fork Lewis, including those spawning between Cedar Creek and Merwin Dam.

Your comments seem to suggest that the temporal separation between fall and spring chinook spawning is because of temperature limitations, and that this situation should be maintained to promote fall chinook survival over spring chinook survival. To our knowledge, temperature has not been shown to be the primary cause of the existing temporal separation (it is likely multiple effects), although, the possibility exists. While the current spring chinook population is largely of hatchery origin, it will still serve as the foundation for reintroduction efforts, and we need to maintain and enhance the existing natural spawning fish. The fall chinook population is comparatively more robust, and cooler water temperatures should be beneficial to their survival.

31) Concerns over temperature and dissolved oxygen were not brought up in the settlement agreements on the Lewis River Hydropower projects. (PacifiCorp)

Ecology was not involved in the settlement agreements on the Lewis River Hydropower projects and therefore cannot speculate on why temperature and dissolved oxygen were not brought up during the settlement negotiations. Many of the entities and agencies that have supplied the

fisheries information that we are now using in this rule were involved in the settlement agreement. Those same entities are among the strongest advocates for making the stricter use changes that Ecology is proposing in this current rule-making.

32) We are concerned with the application of the 9.5 mg/l criteria to the areas proposed for core summer salmonid habitat in the Lewis River. (PacifiCorp)

The 9.5 mg/l criteria is established to provide a higher level of oxygen support for salmonid rearing, and to assist in ensuring that oxygen will be fully protective of incubating salmonids. Ecology believes that a 9.5 mg/l criterion is needed at this time to protect waters with summer spawning or emergence. The scientific literature is very clear on the need to maintain high oxygen levels in the gravels to provide for full survival to emergence. Thus, we find no technical basis to remove this protection from the proposed changes to the Lewis River. Additionally, changing the dissolved oxygen criteria would not be possible in this rulemaking. Ecology did not notify the public that it was considering making changes to the dissolved oxygen criteria, except for changing where the core rearing uses applied across the state. Since it is a contentious issue that was not considering as part of the rulemaking, changing the criteria to a seasonal one in response to a public comment would not be possible at this time.

To complicate this issue further, EPA, the federal fisheries agencies, the state Department of Fish and Wildlife, and tribes are very concerned that the 9.5 mg/l criteria may not be protective enough. Ecology has begun the process of collecting literature and designing a study to assess the risks to salmonids incubating in waters assigned the 9.5 mg/l criterion. This process is expected to take two to three years to complete, after which time Ecology may move towards a revision of the water quality standards to address the appropriateness of the oxygen criteria. At that time, it will be particularly relevant to again have this discussion and to determine if the 9.5 mg/l criterion should remain part of the general use category or whether different rearing and spawning criteria are warranted for Washington.

You have cited the Oregon standards as evidence that 9.5 mg/l is not necessary. However, the Oregon standards are designed differently with separate and more stringent criteria that are applied in the gravels and during the spawning period. Ecology brought this approach up during earlier discussions on the draft rule and was met with strong opposition from a variety of stakeholders. In response to this opposition that we did not adopted seasonal criteria during the 2003 rulemaking. These new revisions, however, do provide seasonal temperature criteria to protect summer spawning. Perhaps in future rule-makings seasonal dissolved oxygen criteria can be considered as well.

Little Klickitat River

33*) The proposed changes to the Little Klickitat River basin should not be made until use for steelhead spawning above River mile 6.1 has been confirmed. We do not believe they use this area of the basin. (City of Goldendale, Klickitat County. Planning Department., Klickitat Public Utility District, Central Klickitat Conservation District)*

Ecology, working with the WDFW and the Yakama Nation, has confirmed that steelhead spawn above river mile 6.1. Adult steelhead and their redds were found in multiple locations in the upper reaches of the watershed in each of the three years surveys were conducted. These areas included from Goldendale to Three Creeks, E. Prong, W. Prong, and Butler Creeks. Thus steelhead spawning is an existing use of the upper Little Klickitat watershed. While redds were found as late as May 20, the field biologist for the tribe believes they were constructed two or three weeks earlier.

Ecology conducted a TMDL technical study for the Little Klickitat drainage that concluded that even if all human sources of warming were eliminated from the watershed, the coolest temperature that could be expected, with the exception of the heavily groundwater dominated Bloodgood Creek (that was not part of the proposed changes), would be a 7-day average daily maximum of about 18°C.

EPA recommended a June 15 date for ending the supplementary spawning period (13°C criteria) in the upper watershed based on elevation rather than known timing of spawning in the upper watershed. After speaking to EPA they also agree that the data may better support a June 1 ending date in both the upper and lower portions of the watershed where spawning is occurring.

These factors together convince Ecology that the Little Klickitat River Drainage should not be upgraded to "Core Summer Salmonid Habitat," and that the 13°C supplemental spawning criteria should end on June 1 rather than June 15 as proposed. The Little Klickitat River will instead be classified "Salmonid spawning, rearing, and migration" and assigned a 7-day average daily maximum temperature criteria limit of 17.5°C, and have a 13°C supplemental spawning criteria that is to be applied from February 15 to June 1.

34) Ecology's own TMDL indicates that the temperature criteria cannot be achieved under natural conditions in the Little Klickitat River basin. (City of Goldendale, Klickitat Co. Planning Dept., Klickitat PUD, Central Klickitat Conservation District)

Ecology agrees that most of the waters proposed for upgrade to the 16°C criterion in the Little Klickitat drainage appear incapable of meeting that criterion even under modeled natural conditions. Such models represent our best estimate on what can be attained in a system. In this case, a closer examination of the fisheries data suggests that Steelhead spawning can typically be expected to end by late April or early May. The combination of the fisheries data and the TMDL study results convinces Ecology that the drainage should not be upgraded to Core Summer Salmonid Habitat. (See response to comment 33 above)

Nookachamps Creek

35) We question the designation of Nookachamps Creek between Big Lake and Barney Lake for "Salmon and trout spawning, core rearing, and migration." (Skagit County Public Works)

Ecology, working with the WDFW and the Upper Skagit Tribe, has confirmed that high densities of juvenile coho salmon are relying on this drainage. The Nookachamps is one of the highest coho producing streams in the Skagit River watershed. It is this widespread and

extensive use by juvenile coho that convince Ecology that the Core Summer Salmonid Habitat use designation is indeed appropriate.

None of the waters whose uses are proposed for change in this current rulemaking, including those in the Nookachamps drainage, use proximity to a lake as the basis for that change. All the changes are based on information showing that species and life stages are present in the summer months that need greater protection.

36) We question the designation of the upper reaches of the East Fork Nookachamps Creek and Walker Creek as char where fish presence seems unlikely. (Skagit County Public Works)

The native char use designations in the Nookachamps drainage were based on application of a stream order and altitude screen (during our 2003 Water Quality Standards revision) rather than on the basis of observed char spawning activity. The screen was used in recognition that it would incorporate waters that may not currently contain bull trout or Dolly Varden. It also recognizes that these fish readily colonize otherwise suitable waters, and so the application of this screen would preserve future habitats for char. In addition, the screen was viewed as acceptable through its protection of the general types of waters where other cold water sensitive aquatic species are likely to be found (including thermally sensitive amphibian and insects species). Thus there were a number of reasons why it was determined appropriate to apply the native char use using the stream order and elevation screen.

Okanogan River

37) Current information clearly shows that Pacific salmon and steelhead only use the Okanogan River for spawning above river mile 15.5. The lower river should be designated for rearing and migration only. (Douglas County PUD)

Ecology's proposal did not propose the application of the 13°C spawning criteria below river mile 15.5, so our proposal appears to agree with the commenter's concern. The commenter also suggested that the designated use for the lower river be downgraded to just rearing and migration. Downgrading the uses of a water body (removing the spawning use) requires completion of a use attainability analysis to demonstrate that the use is neither existing nor attainable. This has not occurred for the lower Okanogan River.

Salmon Creek

38) Salmon Creek in WRIA 28 should not be designated Core Summer Salmonid Habitat as it was approved as a low priority stream for salmonid recovery in a plan approved by the National Marine Fisheries Service. (Clark County, City of Battleground)

It has been suggested that designation of Salmon Creek as core habitat and portions of Salmon and Mill Creeks as spawning habitat conflict with and would jeopardize the implementation and

success of the Interim Regional Recovery Plan for the Washington Portion of the listed lower Columbia salmon and steelhead ESUs. (NMFS approved this interim plan on February 3, 2006--see http://www.nwr.noaa.gov/Salmon-Recovery-Planning/Recovery-Domains/Willamette-Lower-Columbia/Index.cfm.)

The comment notes that populations of salmon and steelhead in Salmon Creek were designated as "stabilizing" populations in the interim recovery plan. Ecology asked NMFS to clarify their intentions. NMFS explained that the designation indicates that within the context of overall ESU and DPS recovery objectives, the goal for these particular populations is to maintain their current status. The plan makes clear that maintaining the current status of these populations will require implementation of recovery actions (see, e.g., vol. I, p. 5-9, and vol. II, chap. H, pp. 104-105). The proposed water quality standards for Salmon and Mill Creeks are consistent with achieving this "stabilizing" objective for the Salmon Creek populations.

Additionally, the commenter states that riparian restoration currently being carried out by Clark Public Utilities, protections provided by Clark County's Habitat conservation Ordinance, and DOE's TMDL are sufficient to maintain the Salmon creek populations at their current status. The interim recovery plan, however, reached a preliminary conclusion that these programs needed expansion to attain plan objectives (see vol. II, chap. H, pp. 175-188).

Also, the NMFS recovery plan includes temperature as a primary limiting factor for coho, and a secondary limiting factor for both fall chinook and winter steelhead (pg. H-133, section 3.4.3). "Restoring degraded water quality with emphasis on temperature impacts" is also listed as the 6th highest (of 11) priority measure for the subbasin (pg. H-181). The significance of this limiting factor is exacerbated by the low summer flow regime.

WDFW has indicated that Winter Steelhead is spawning in Salmon Creek late into the spring. Such late spring spawning needs to be protected by maintaining cold oxygen rich waters. Ecology has thus concluded that the designated use for Salmon Creek should be upgraded as proposed.

39) Designating Salmon Creek in WRIA 28 Core Summer Salmonid Habitat creates a conflict with the natural conditions allowance contained in the state standards. (Clark County, City of Battleground)

There is no conflict with the natural conditions clauses established in the water quality standards. If water temperatures are naturally above the 16°C or 13°C criteria, then the natural conditions narrative standard would be in effect and restrict human warming to a 0.3°C increase above that naturally warmer temperature. This is how the standards are intended to work.

40) Salmon Creek in WRIA 28 should not be designated Core Summer Salmonid Habitat as doing so may interfere with efforts to improve flows in the Creek by discharging reclaimed waste water. (Clark County, City of Battleground)

This current rule change is being made based on the presence of temperature sensitive species and life stages. Making these changes does not rule out the possibility of fine-tuning the standards further in these waters or elsewhere in the basin during future rule changes. We acknowledge that further changes that would relax these new criteria and such use designations may not be easy to make, but it is a possibility. Ecology will support any alternative approach that can be shown to provide better protection for the beneficial uses of the creek. We do not find sufficient basis in your letter to override the proposed changes to the criteria and use assignments in WRIA 28. However, Ecology welcomes the opportunity to discuss issues surrounding the potential discharge of reclaimed water.

Snohomish – Snoqualmie River Basin

41) Change the "The Snohomish River from mouth . . . to . . . river mile 8.1" from primary contact to secondary contact recreational uses. Then delete the footnote. (Heller, Ehrman, White, and McAuliffe)

It is understandable why you would view this change as not being substantial since the underlying bacterial criteria would not be changed. However, EPA would view this as downgrading the designated use and would require a Use Attainability Analysis to justify the change to a non-Clean Water Act goal use. State rulemaking law would also potentially view this as substantial since we did not suggest that we were considering any changes to recreational uses. This has been a very focused rulemaking and Ecology will not be adding new topics, even though they may seem de minimis in nature.

42) *The use designations for bull trout remain too broad and many waters continue to be designated as bull trout spawning and juvenile rearing habitat where fish are no known to be present, and where there is no evidence that bull trout were historically present. Ecology continues to designate stream segments using a relatively simple "filter" of stream order and altitude. A specific example of a watershed that is misidentified as bull trout spawning and rearing is the South Fork Tolt River. A number of intensive fish surveys have been conducted and char have never been found. There is no evidence of historic use above a natural barrier located downstream of Tolt Reservoir. Another example is the upper Snoqualmie River above Snoqualmie Falls. For these reasons we recommend the proposed water quality standards be changed so that the standards do not create designations of bull trout habitat on any part of the South Fork Tolt River or on the Snoqualmie River above Snoqualmie Falls. Ecology should instead develop a more rigorous native char filter. USFWS is developing such a filter and Ecology should consult with them. (Seattle City Light)*

The native char use designations made to the rule in 2003 and are not a subject of the current proposed rule. The changes you are questioning have already been adopted into the state standards. To eliminate them in response to a public comment at this time when we had not informed people that we might consider doing so would not be an appropriate change for us to make under the state Administrative Procedures Act. Doing so would bypass appropriate public involvement in that decision. The native char use designations in the Tolt and Snoqualmie drainages were based on application of a stream order and altitude screen rather than on the basis of observed char spawning activity. The screen was used in recognition that it would

incorporate waters that may not currently contain bull trout or Dolly Varden. It also recognizes that these fish readily colonize otherwise suitable waters, and so the application of this screen would preserve future habitats for char. In addition, the screen was viewed as acceptable through its protection of the general types of waters where other cold water sensitive aquatic species are likely to be found (including thermally sensitive amphibian and insects species). Thus there were a number of reasons why it was determined appropriate to apply the native char use using the stream order and elevation screen. Future rulemakings may be able to take advantage of more advanced techniques for identifying potential char waters.

43) *We are concerned that Ecology's water quality standards do not adequately account for naturally warm waters, as evidenced by Ecology's choice to assign water quality criteria without field data, modeling, or other analysis that would show where the criteria are appropriate. (Seattle City Light)*

The criteria include provisions that are designed to accept naturally warm waters. These provisions are implemented in the application of the standards both through permitting and Total Daily Maximum Load analyses (water quality improvement plans). This system is focused on preserving cold water by ensuring that water meeting the numeric criteria will be preserved at times and locations when the criteria are indeed attainable. At locations and times when temperatures are naturally warmer than the criteria, an additional increment of warming is permitted above that warmer natural condition for human actions.

Tieton River

44) Reclamation is unaware of any steelhead redds being identified in the Tieton River. Designations should reflect where spawning is known to occur, with proper citations provided and where it is presumed to occur along with the basis for the presumption The 13°C criteria should be removed from the Tieton since there is no known steelhead or chinook spawning in the stream. (Bureau of Reclamation)

Based on examination of available steelhead spawner survey data from WDFW and tribal biologists, the Feb. 15-June 15 spawn timing period for steelhead was removed for the Tieton River.

White Salmon River

45) The map showing spawning locations for the White Salmon River was not accessible. (Klickitat County. Planning Department.)

If you were having trouble accessing the map online we would have gladly sent you either a hard copy or immediately emailed you a copy of the spawning map for the WRIA. We received very few complaints about maps not being readily accessible. Our investigations of those few that were reported showed no pattern or systemic cause. It is likely that the system was just overtaxed at that particular point of time at either end of the internet connection. We found the maps to be readily downloadable when attempting to verify complaints that we received, and

since we would have immediately responded to requests to obtain the maps in an alternate format we do not find sufficient cause to provide an extension to the rulemaking process.

46) Bull trout are rarely observed in the White Salmon River basin. (Klickitat Co. Planning Dept.)

The native char use designations in the White Salmon drainage were based on application of a stream order and altitude screen (during our 2003 Water Quality Standards revision) rather than on the basis of observed char spawning activity. The screen was used in recognition that it would incorporate waters that may not currently contain bull trout or Dolly Varden. It also recognizes that these fish readily colonize otherwise suitable waters, and so the application of this screen would preserve future habitats for char. In addition, the screen was intended to provide protection to the general types of waters where other cold water sensitive aquatic species are likely to be found (such as thermally sensitive amphibian and insects species). Thus there were a number of reasons why it was determined appropriate to apply the native char use using the stream order and elevation screen.

Yakima and Columbia River systems

47) Several sources of information are now available to show that bull trout spawning and juvenile rearing occurs between Keechelus Lake and Lake Easton on the upper Yakima. (US Fish and Wildlife Service- Judy De Laverne)

Thank you for your comments and for following up with the references and documentation. Unfortunately, this information arrived after the public comment period so is not a part of the official record. Further, we were made aware that EPA reviewed this information and chose not to use it as part of the disapproval of the standards. Therefore, Ecology does not feel it is appropriate to change at this time without further public review, but will propose this change in use during the next standards revision effort. At that time we would expect to propose extending the char use. In this intervening period, however, Ecology will apply antidegradation Tier I protection for this existing char use when applying water quality controls (permits, TMDL clean up plans, 401 certifications) to these waters even though it is not listed specifically in the water quality standards. In the meantime, it will be important that your agency work with the federal U.S. Bureau of Reclamation and the U.S. Forest Service to do what they can to provide cold oxygen rich waters downstream of the Keechelus Reservoir.

48) *There is insufficient information to support assigning a spawning criterion to the upper Yakima River watershed. No surveys have been conducted for steelhead in WRIA 39 and only limited surveys in WRIA 38. Reclamation knows of no data to confirm the presence of spawning steelhead above the Easton Diversion Dam. Ecology's map incorrectly shows the 13°C spawning criteria applying from September 15 to June 15 between Keechelus Reservoir and Easton Diversion Dam. This is not consistent with EPA's map. (Bureau of Reclamation)*

The map mistakenly showed a steelhead spawning use distribution to June 15. We agree there is no documented summer spawning of steelhead in this reach, and Ecology has corrected our spawning map. However, to protect spawning through emergence by Spring Chinook (a documented use) we are retaining the 13°C criteria from September 15 to May 15.

49) *EPA and Ecology's maps are different when it comes to showing char in the water below Keechelus Reservoir. Additionally only a few redds have been found, and reclamation does not believe this is compelling data to warrant a char designation below the reservoir. (Bureau of Reclamation)*

The char use that you are referring to was adopted into the standards during the 2003 rule making. It was not proposed as a topic for public review during this rulemaking. The EPA and Ecology maps did in fact show it as an existing designated use, but perhaps the line work on the spawning map obscured it sufficiently for you to miss it on the EPA spawning map.

50) Water quality criteria that did not undergo revision were not included in the EPA review and approval process. The allowable daily maximum temperature criteria of 21°C and 20°C on the lower Yakima and Columbia Rivers exceed the threshold for bull trout migration and salmonid spawning, both of which are existing uses. The marine waters were also not included in the standards revisions. (US Fish and Wildlife Service)

Ecology will continue its efforts to bring the temperatures of the lower Yakima main-stem and Columbia rivers down to within the natural capability of these systems to provide cold oxygen rich waters to the state's fisheries. Presently these waters are not meeting their assigned criteria and TMDLs are needed to help define what can be done to cool the waters. Ecology will be developing the TMDL for the lower Yakima, but we are still awaiting finalization of EPA's long overdue Columbia River Temperature TMDL. We did not have sufficient reason or resources to undertake a review of the marine water criteria. We look forward to finding out what your concerns are with our marine water criteria for future consideration.

WDFW corrections

51) We have found several errors in the application of the Department of Fish and Wildlife's fisheries information in the proposed revisions to the water quality standards. (Washington Department of Fish and Wildlife)

Ecology has corrected all of the errors identified in the application of the WDFW data as described in your comments below. Ecology appreciates the significant effort WDFW has taken to provide a quality check of the final maps and rule language, and to recheck this information in response to public comments received during this rulemaking. The specific changes made by Ecology are noted below in italics.

SPAWN MAP COMMENTS *(all have been addressed by Ecology as of 8/24/2006)*

1. **WRIA 4**: The Ecology map does not indicate the special **Aug. 1-July 15** spawn timing period assigned to sections of the Cascade, Sauk, Suiattle and Whitechuck Rivers. *Based on examination of spawner survey data from WDFW and tribal biologists, the Aug. 1-July spawn time period was added to the Cascade, Sauk, Suiattle and Whitechuck Rivers on 8/18/06.*

2. **WRIA 7**: The Ecology map does not indicate the **Sept. 15-June 15** spawn timing period assigned to the mainstem Snohomish River from the Pilchuck River confluence upstream to the Skykomish/Snoqualmie forks. *Based on examination of spawner survey data from WDFW and tribal biologists, the Sept 15-June 15 spawn timing period was added to the mainstem Snohomish River from the Pilchuck River confluence upstream to the Skykomish/Snoqualmie forks on 8/24/06.*

3 **WRIA 16**: The Ecology map does not indicate char use in Lake Cushman. Based on the text assigning char use to the "Skokomish River, North Fork, from longitude -123.2233 and latitude 47.4160 (below Cushman Upper Dam) to headwaters (including tributaries)", this depiction should include the reservoir as well, which is just a wider portion of the stream. *Based on review of the language of the original findings, the map was modified to indicate char use running through Lake Cushman on 8/18/06.*

4 **WRIA 30**: The Ecology map depicts char use on reservation land; the decision was made to not map fish use on reservation lands for this rule-making. *Based on this original decision, the map was modified to remove depiction of char use from reservation lands on 8/18/06.*

5 **WRIA 32**: The Ecology map does not depict the steelhead spawn timing period assigned to Yellowhawk Creek. *Based on examination of spawner survey data from WDFW biologists, the Feb. 15-June 1 spawn time period for steelhead was added to Yellowhawk Creek on 8/18/06.*

6. **WRIA 35**: The extent of the Sept 1-June 15 spawn timing period in the Tucannon River is uncertain, based on overlap of colors. *Based on examination of spawner survey data from WDFW biologists, the Sept. 1- June 15 spawn timing period on Tucannon River was mapped to end just past the Cold Creek confluence*

approximately 5 miles from the confluence of the Tucannon River and Punjab Creek on 8/18/06.

7. **WRIA 37**: The Ecology map legend has a typo, labeling char spawning temperature as "13C" rather than 9C. *This typo was corrected on 8/18/06.*

8. **WRIA 38**: The Ecology map depicts a steelhead spawn timing period of **Feb. 15-June 15** on the Tieton River. *Based on examination of available spawner survey data from WDFW and tribal biologists, the Feb. 15-June 15 spawn timing period for steelhead was removed from the Tieton River on 8/24/06.*

9. **WRIA 38**: The Ecology map includes a small piece of char spawning in the Bumping River above Bumping Lake (Reservoir). *Based on examination of spawner survey data from WDFW and tribal biologists, the char spawning assignment to the Bumping River above Bumping Lake was removed on 8/24/06.*

10. **WRIA 39**: The Ecology map depicts a spawn timing period of **Sept. 15-June 15** in the Upper Yakima River up to Lake Kachelus. *Based on examination of available steelhead spawner survey data from WDFW and tribal biologists, the Sept. 15-June 15 spawn timing period for that portion of the Upper Yakima River from Lake Easton up to Lake Kachelus was changed to Sept. 15-May 15 on 8/24/06.*

11. **WRIA 49**: The Ecology map depicts steelhead spawning on Omak Creek, which lies on reservation land; the decision was made to not map fish use on reservation lands for this rule-making. *Based on this original decision, the map was modified to remove depiction of steelhead spawning use from stream reaches that lie wholly within reservation lands reservation lands on 8/24/06.*

IV. Summary of public involvement opportunities

1) Public workshops followed by formal public hearings were held throughout the state on the following dates and locations in August 2006:

Olympia Mon., Aug.7
Department of Ecology Auditorium ROA 32, 34, 36
300 Desmond Dr.
Lacey

Longview Tues., Aug. 8
Lower Columbia College
1600 Maple St.

Bellingham Wed., Aug. 9
Whatcom County Courthouse
311 Grand Avenue

Wenatchee Mon., Aug 14
Douglas County PUD
1151 Valley Mall Pkwy
East Wenatchee

Tri-Cities Tues., Aug. 15
Benton County PUD
2727 West Tenth Ave.
Kennewick

2) A focus sheet summarizing the content of the rulemaking and the workshop hearing schedule was sent to approximately 800 individuals subscribing to the water quality standards listserv.

3) A focus sheet summarizing the content of the rulemaking and the workshop hearing schedule was sent to approximately 6,000 individuals who have asked to be placed on the water quality standards mailing list.

4) Personal notice was provided to key stakeholders by Ecology management.

5) A press release was sent out statewide by Ecology's public information office staff.

6) Special meetings were provided upon request:

- August 10 – Hosted public meeting in Silvana.
- August 10 – Met with Chehalis Water Quality Partnership.
- August 14 – Met with representatives of irrigators (Mike Rundlett Tom Myrum).

7) CR102 Rule Proposal Notification Published in State Register.

V. Appendices

The following materials are provided in order of listing:

- Focus Sheet
- Listserv notice
- Press Release
- Public Notice of EPA Disapproval
- CR 102 Rule Proposal
- Transcripts from public hearings
- Final Rule text
- Final Version of Supplemental Spawning Publication
- Disapproval Letters from USEPA
- Determinations required under Chapter 34.05, Administrative Procedures Act, not contained in other public documents prepared for this rulemaking:
    - Determination that the rule does not require those to whom it applies to take and action that violates the requirements of another federal or state law.
    - Determination that the rule does not impose more stringent performance requirements on private entities than on public entities unless required to do so by federal or state law.
    - Determination on whether the rule differs from any federal regulation or statute applicable to the same activity or subject matter, and determination that any difference is justified.
    - Efforts to coordinate the rule, to the maximum extent practicable, with other federal, state, and local laws.

Focus on **Changes to the Water Quality Standards**

from Ecology's Water Quality Program

Workshops and Hearings

Workshops begin at 6:00pm

Public hearings to follow immediately

Olympia
Monday, August 7
Department of Ecology
Auditorium
ROA 32, 34, 36
300 Desmond Dr.
Lacey

Longview
Tuesday, August 8
Lower Columbia
College
1600 Maple St.

Bellingham
Wednesday, August 9
Whatcom County
Courthouse
311 Grand Avenue

Wenatchee
Monday, August 14
Douglas County PUD
1151 Valley Mall
Pkwy
East Wenatchee

Tri-Cities
Tuesday, August 15
Benton County PUD
2727 West Tenth Ave.
Kennewick

Ecology to revise Washington's Water Quality Standards following EPA ruling

The U.S. Environmental Protection Agency (EPA) has formally disapproved parts of Washington's water quality standards because they do not go far enough under the Clean Water Act to protect salmon and bull trout in certain streams and rivers. The Washington State Department of Ecology (Ecology) is proposing a new set of rules to fix the deficiencies identified by EPA.

Why did EPA disapprove parts of the standards?

In 2003, Ecology revised its water quality standards and adopted new maximum temperature criteria (17.5°C, 16°C, 12°C) that apply to specific river segments to protect salmonid fish species. At the time, Ecology planned to further analyze fish-use information and, as necessary, revise where these temperature criteria apply. Ecology also adopted special criteria to protect salmon and trout, and bull trout spawning areas (13°C and 9°C, respectively) which were to be applied on a case-by-case basis.

Under the federal Clean Water Act, EPA must review a state's water quality standards to ensure they are protective. EPA must also make sure any state standards they approve will not jeopardize listed species under the Endangered Species Act (ESA) or adversely modify their critical habitat.

As part of its review, EPA analyzed available fish-use information and concluded the standards were too warm in some rivers to protect cold water fish species and to meet federal requirements. They also determined that they could not rely upon Ecology's plans to review fish uses as assurance the uses would be protected.

As part of its disapproval, EPA has identified specific areas throughout the state where it has determined the temperature criteria are not adequately protective.

Why is temperature such a critical issue?

Salmon, trout, and char (bull trout) need cold water temperatures to sustain a healthy population. Warm rivers impair the growth of such cold water species, make them more susceptible to disease, and cause them to be out-competed by fish that prefer warmer temperatures. Human-caused warming of river temperatures has been identified by the National Marine Fisheries Service and the U.S. Fish and Wildlife Service as a key limiting factor in the recovery of salmon and bull trout in the state of Washington (for example, in the draft Puget Sound Recovery Plan).

June 2006 06-10-050

Original printed on recycled paper

What actions can be done to cool rivers and streams?

Many activities contribute to water temperature problems. Over the last century, trees that provide shade along river banks have been removed due to forestry and agricultural practices and urban development. Rivers have been altered by dams and levees and the discharge of industrial and municipal wastewater.

Actions to cool rivers include:

- Planting and protecting trees near streams to provide shade.
- Reducing sediment runoff and establishing more logs in streams to create deeper channels and cooler pools.
- Removing or setting back levees to allow streams to wander more naturally, thereby increasing cool groundwater inflow.
- Restoring summer stream flow to make streams less susceptible to warming.
- Minimizing hot water discharges from industrial and municipal sources.

Although some programs are already in place to restore temperatures, more protective standards will help focus needed improvement on areas where sensitive aquatic resources occur.

What are the implications for other criteria, such as dissolved oxygen?

Changing the fish-use designations for some streams will also result in more stringent dissolved oxygen criteria. Specifically, the dissolved oxygen criteria for streams that are changed to a more stringent use designation will increase from 8.0 mg/L to 9.5 mg/L. Although Ecology did not revise its dissolved oxygen criteria in 2003, the National Marine Fisheries Service and the National Fish and Wildlife Service have indicated possible concerns that the current dissolved oxygen limits, even at the more stringent use designation, may not be protective enough. Ecology has committed to further study of dissolved oxygen affects on fisheries uses over the next two years.

What happens next?

After EPA disapproves a state's water quality standards, the state has the opportunity to fix the deficiencies by adopting revisions to its standards. Ecology is now proposing a new set of rules to address the use designation and temperature issues needed to gain EPA approval. Ecology has scheduled public hearings for August 2006 (see schedule on front cover of this announcement) and has begun the administrative process required to change the water quality standards regulation.

What changes are included in the proposed revisions?

- Change designated uses for many rivers from salmonid "spawning and noncore rearing" to "core summer salmonid habitat" and change rule text to better describe the basis for the use.
- Change a small number of rivers to the "char spawning and rearing" designated use type and change rule text to better describe the basis for the use.
- Add salmonid spawning locations and timing windows where explicit spawning/incubation temperature criteria would apply.
- Correct miscellaneous minor (typographic) errors introduced during the 2003 rule making.

How can I get more information on the issues?

To view Ecology's water quality standards rule making documents please go to the Department of Ecology website at: http://www.ecy.wa.gov/programs/wq/swqs/epa-status.html. Copies of the material can also be obtained on CD or on paper by contacting: Ann Kahler 360-407-6404.

Listserv Notice

Department of Ecology proposes revised water quality standards.

The state Department of Ecology (Ecology) has proposed revisions to a portion of the surface water quality standards (Chapter 173-201A WAC) it submitted to the federal Environmental Protection Agency (EPA) for approval in 2003.

The proposed revisions follow an EPA ruling in March that Ecology's 2003 standards did not sufficiently protect cold water fish to satisfy the requirements of the federal Clean Water Act (CWA) and the federal Endangered Species Act (ESA). The revised standards would apply more stringent temperature and dissolved oxygen criteria to a large number of water bodies where EPA determined that more stringent protection is needed.

The rule revisions will affect rivers throughout the state, including major rivers that drain into Puget Sound such as the Nooksack, Skagit, Stillaguamish, Snohomish, Green, Puyallup and Nisqually Rivers. These rivers include important spawning, rearing and migration habitat for ESA threatened species of salmon, steelhead, and bull trout.

Ecology will conduct five public workshops and hearings on the proposed revisions. Workshops will begin at 6 p.m., with public hearings to follow immediately after the workshops.

Olympia, August 7, 2006
Department of Ecology Auditorium
300 Desmond Dr.
Lacey, WA 98504

Longview, August 8, 2006
Lower Columbia College, Student Bldg
1600 Maple St.
Longview, WA 98632

Bellingham, August 9, 2006
Whatcom County Courthouse
311 Grand Ave.
Bellingham, WA 98225

Wenatchee, August 14, 2006
Douglas County PUD
1151 Valley Mall Parkway
East Wenatchee, WA 98802-4497

Tri-Cities, August 15, 2006
Benton County PUD
2727 West Tenth Ave.
Kennewick, WA 99336

A focus sheet on the rulemaking can be found at:
http://www.ecy.wa.gov/biblio/0610050.html

Copies of the draft rule and additional supporting documentation can be found at: http://www.ecy.wa.gov/programs/wq/swqs/epa-status.html

News Release

FOR IMMEDIATE RELEASE – June 27, 2006
06-109

Ecology Department proposes revised water quality standards

OLYMPIA—The state Department of Ecology (Ecology) today proposed revisions to a portion of the water quality standards it submitted to the federal Environmental Protection Agency (EPA) for approval in 2003.

The proposed revisions follow an EPA ruling in March that Ecology's 2003 standards did not sufficiently protect cold water fish to satisfy the requirements of the federal Clean Water Act (CWA) and the federal Endangered Species Act (ESA). The revised standards would apply more stringent temperature and dissolved oxygen criteria to a large number of water bodies where EPA determined that more stringent protection is needed.

"We believe these new standards will help better protect fish in our state's water bodies, including many that drain into Puget Sound," said Dave Peeler, manager of Ecology's water quality program. "We look forward to receiving public input on these important revisions."

The state's water quality standards set regulatory requirements for maintaining the health of lakes, rivers, and marine waters. The standards are used to set the level of pollution that is allowed to enter waters while keeping them clean and safe for people, fish and wildlife.

The rule revisions will affect rivers throughout the state, including major rivers that drain into Puget Sound such as the Nooksack, Skagit, Stillaguamish, Snohomish, Green, Puyallup and Nisqually Rivers. These rivers include important spawning, rearing and migration habitat for ESA threatened species of salmon, steelhead, and bull trout.

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2727 West Tenth Ave.
Kennewick, WA 99336

For more information on Ecology's water quality standards, please visit http://www.ecy.wa.gov/programs/wq/swqs/epa-status.html.

# # #

Contact: Glenn Kuper, Department of Ecology, (360) 407-6848;

Ecology's Web site: http://www.ecy.wa.gov

Broadcast version

The state Department of Ecology today announced proposed revisions to a portion of the water quality standards it submitted to the federal Environmental Protection Agency for approval in 2003.

The revisions follow an EPA ruling that certain rivers and streams require more stringent standards to protect salmon and bull trout and to satisfy the requirements of the federal Clean Water Act and the federal Endangered Species Act.

Comment on the new standards can be directed to the Department of Ecology.

ENVIRONMENTAL BULLETIN

March 2006

Washington Water Quality Standards

U.S. Environmental Protection Agency, Region 10 | Washington State Department of Ecology

Ecology to revise Washington's Water Quality Standards following EPA ruling

The U.S. Environmental Protection Agency (EPA) announced that it is formally disapproving parts of Washington's water quality standards because they do not go far enough under the Clean Water Act to protect salmon and bull trout in certain streams and rivers. The Washington State Department of Ecology (Ecology) intends to propose a new set of rules to fix the deficiencies identified by EPA.

Why did EPA disapprove parts of the standards?

In 2003, Ecology revised its water quality standards and adopted three maximum temperature criteria (17.5°C, 16°C, 12°C) that apply to specific river segments to protect salmon and bull trout. At the time, Ecology planned to further analyze fish-use information and, as necessary, revise where these temperature criteria apply. Ecology also adopted special criteria to protect salmon and bull trout spawning areas (13°C and 9°C, respectively) to be applied on a case-by-case basis following the additional analysis of the fish-use information.

Under the federal Clean Water Act, EPA must review and approve or disapprove a state's water quality standards to ensure that they are protective. EPA must also make sure its approval of a state's standards does not jeopardize listed species under the Endangered Species Act (ESA) or adversely modify their critical habitat. Given these requirements for use protection, EPA was unable to accept Ecology's plans to review fish uses as assurance that the uses would be protected.

As part of its review, EPA analyzed available fish-use information to determine if the standards were protective. EPA concluded the standards for some streams and rivers were too warm to protect salmon and bull trout, and determined that it was necessary to identify the specific areas where changes to the fish-use designations and more protective temperature criteria are needed to meet federal requirements.

What areas will be impacted?

As part of its disapproval notice, EPA identified specific areas throughout the state where it has determined that the temperature criteria are not protective. For example, EPA is specifying changes for all major rivers that drain into Puget Sound, such as the Nooksack, Skagit, Stillaguamish, Snohomish, Green, Puyallup, and Nisqually Rivers. These rivers include important spawning, rearing, and migration habitat for ESA threatened species of Chinook salmon and bull trout.

Maps that show where EPA has specified more stringent temperature criteria can be found online at: www.epa.gov/r10earth/washington-wqs.htm.

Who will be affected by the revisions to the temperature criteria?

Many activities contribute to water temperature problems. Over the last century, trees that provide shade along river banks have been removed due to forestry and agricultural practices and urban development. Rivers have been altered by dams to store water and levees for flood control. And in a few cases, industrial and municipal discharges can warm a stream. Although some programs are already in place to restore temperatures and meet existing standards, the more protective water quality standards will help focus needed improvement to protect salmon and bull trout.

(continued)

Why is temperature such a critical issue?

Salmon (including steelhead) and bull trout need cold water temperatures to survive and to sustain a healthy population. Warm rivers impair the growth of salmon and bull trout, make them more susceptible to disease, and cause them to be out-competed by fish that prefer warmer temperatures. Human-caused warming of river temperatures has been identified by the National Marine Fisheries Service and the U.S. Fish and Wildlife Service as a key limiting factor in the recovery of salmon and bull trout in the State of Washington (for example, in the draft Puget Sound Recovery Plan).

What actions can be done to cool rivers and streams?

Actions to cool rivers include planting and protecting trees near streams to provide shade; reducing sediment runoff and establishing more logs in streams to create deeper channels and cool pools; removing or setting back levees to allow streams to wander more naturally, thereby increasing cool groundwater inflow; restoring summer stream flow to make streams less susceptible to warming; and limiting hot water discharges from industrial and municipal sources. These actions, which cool rivers and restore fish habitat, have begun to be implemented in many watersheds in the state.

What are the implications for other criteria, such as dissolved oxygen?

Changing the fish-use designations for some streams will also result in more stringent dissolved oxygen criteria. Specifically, the dissolved oxygen criteria for streams that are changed to a more stringent use designation will increase from 8.0 mg/L to 9.5 mg/L. Although Ecology did not revise its dissolved oxygen criteria in 2003, the National Marine Fisheries Service and the National Fish and Wildlife Service have indicated possible concerns that the current dissolved oxygen limits, even at the more stringent use designation, may not be protective enough. Ecology has committed to further study dissolved oxygen affects on fisheries uses over the next two years. No other criteria will be affected by the changes to fish-use designations.

What happens next?

After EPA disapproves a state's water quality standards, the state has the opportunity to fix the deficiencies by adopting revisions to its standards. Ecology intends to propose a new set of rules to address the use designation and temperature issues needed to gain EPA approval. Ecology will move quickly to hold hearings and begin the administrative process required to change the water quality standards regulation. EPA, tribes and federal fish agencies have committed to help support the State as it moves forward with these corrections.

For More Information, please contact:

John Palmer, EPA
206-553-6521

Melissa Gildersleeve, Ecology
360-407-6461

Alternative formats are available. For reasonable accommodation, please call Charles Bert, EPA, at 360-753-8073. TTY users, please call the Federal Relay Service at 800-877-8339.

PROPOSED RULE MAKING

CR-102 (June 2004)
(Implements RCW 34.05.320)
Do **NOT** use for expedited rule making

Agency: Department of Ecology AO # 06-04

☒ **Preproposal Statement of Inquiry was filed as WSR** April 14, 2006 ; or
☐ **Expedited Rule Making--Proposed notice was filed as WSR** ____; or
☐ **Proposal is exempt under RCW 34.05.310(4).**

☒ **Original Notice**
☐ **Supplemental Notice to WSR** _____
☐ **Continuance of WSR** _____

Title of rule and other identifying information: (Describe Subject) Chapter 173-201A WAC Water Quality Standards for Surface Waters of the State of Washington. This rule making would be directed toward correcting deficiencies noted by EPA in their formal disapproval (March 22, 2006) of Washington's 2003 revisions to the state surface water quality standards (Chapter 173-201A WAC).

Hearing location(s): See attachment

Date: _____ Time: _____

Submit written comments to:
Name: Sabrina Payne
Address: Water Quality Program
Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600
e-mail SPAY461@ecy.wa.gov
fax (360)407-6426 **Received** by Sept. 5, 2006

Assistance for persons with disabilities: Contact
Sabrina Payne by August 1, 2006
TTY (800) 833-6388 or (360) 407-6157

Date of intended adoption: October 31, 2006
(Note: This is **NOT** the effective date)

Purpose of the proposal and its anticipated effects, including any changes in existing rules:

This proposed corrective rule would:

- Change the designated uses for many rivers from "spawning and noncore rearing" to "core summer salmonid habitat" and change rule text to support the basis for these changes. This change will result in many rivers going from a 7 day average temperature of 17.5°C to a 7-day average daily maximum of 16°C and the dissolved oxygen criteria will go from 8.0 mg/l to 9.5 mg/l.
- Change a small number of rivers to the "char spawning and rearing" designated use type and change rule text to support the basis for these changes. This change will result in some rivers going to a 7-day average daily maximum of 12°C from the old daily 7 day average of 16°C or 17.5°C.
- Add spawning locations and timing windows where explicit spawning/incubation temperature criteria would apply for salmonids. These changes will apply a 7-day average daily maximum criterion of 13°C to protect spawning and incubation of salmon and trout (9°C for the spawning of bull trout.)
- Correct miscellaneous minor (typographic) errors introduced during the 2003 rule making

Statutory authority for adoption: Chapter 90.48.035 RCW

Statute being implemented: Chapter 90.48 RCW

Is rule necessary because of a:

Federal Law?	☒ Yes	☐ No
Federal Court Decision?	☐ Yes	☐ No
State Court Decision?	☐ Yes	☐ No

If yes, CITATION:
CITE: 40FRI131.20

CODE REVISER USE ONLY

CODE REVISER'S OFFICE
STATE OF WASHINGTON
FILED
JUN 21 2006
10:22 AM
06-13-104

DATE 6/19/06

NAME (type or print)
Polly Zehm

SIGNATURE Polly Zehm

TITLE
Deputy Director

(COMPLETE REVERSE SIDE)

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:
N/A

Name of proponent: (person or organization) Department of Ecology ☒ Private ☐ Public ☐ Governmental

Name of agency personnel responsible for:

	Name	Office Location	Phone
Drafting	Melissa Gildersleeve	Department of Ecology HQ	(360) 407-6461
Implementation	Melissa Gildersleeve	Department of Ecology HQ	(360) 407-6461
Enforcement	Melissa Gildersleeve	Department of Ecology HQ	(360) 407-6461

Has a small business economic impact statement been prepared under chapter 19.85 RCW?

☒ Yes. Attach copy of small business economic impact statement

A copy of the statement may be obtained by contacting:
Name: Sabrina Payne
Address: 300 Desmond Drive
Lacey, WA 98504

phone (360) 407-6157
fax (360) 407-6426
e-mail SPAY461@ecy.wa.gov

☐ No. Explain why no statement was prepared.

Is a cost-benefit analysis required under RCW 34.05.328?

☒ Yes A preliminary cost-benefit analysis may be obtained by contacting:
Name: Sabrina Payne
Address: 300 Desmond Drive
Lacey, WA 98504

phone (360) 407-6157
fax (360) 407-6426
e-mail SPAY461@ecy.wa.gov

☐ No: Please explain:

ATTACHMENT

Hearing location(s)

Olympia
Department of Ecology Auditorium
300 Desmond Dr.
Lacey, WA 98504
Date: August 7, 2006
Workshop Starts: 6:00pm
Hearing immediately following

Longview
Lower Columbia College
Student Bldg
1600 Maple St.
Longview, WA 98632
Date: August 8, 2006
Workshop Starts: 6:00pm
Hearing immediately following

Bellingham
Whatcom County Courthouse
311 Grand Avenue
Bellingham, WA 98225
Date: August 9, 2006
Workshops Starts: 6:00pm
Hearing immediately following

Wenatchee
Douglas County PUD
1151 Valley Mall Pkwy
East Wenatchee, WA 98802-4497
Date: August 14, 2006
Workshops Starts: 6:00pm
Hearing immediately following

Tri-Cities
Benton County PUD
2727 West Tenth Ave.
Kennewick, WA 99336
Date: August 15, 2006
Workshops Starts: 6:00pm
Hearing immediately following

Transcripts from Public Hearings

Public Hearing in Lacey on August 7, 2006

Water Quality Standards Rule Amendment
August 7, 2006

Lacey Washington

OK, this a public hearing. Let the record show that it's 7:10 pm on August 7, 2006, and this public hearing is being held in the Ecology building in Lacey. The primary purpose of today's hearing is to receive comments regarding the proposed Washington Water Quality Standards revisions. Legal notice of this hearing was published in the Washington State Register on July 5th. Notices of the hearing were mailed to approximately 6500 people and it was put on the Ecology Water Quality Standards webpage, June 26th.

First commenter:

My name's John Konovsky, and I'm here tonight representing the Squaxin Island Tribe at this hearing on the new proposed rule for Washington water quality standards. First I want to take this opportunity to thank both EPA and Ecology for working diligently with the tribes and also the services to make these standards as good as we can get them at this time. I've reviewed on behalf of Squaxin WRIAs 13, 14 and a portion of WRIA 15, and the use designations that Ecology proposes for those watersheds. The portion of WRIA 15 that I reviewed includes those freshwater tributaries to marine water south of the Tacoma Narrows Bridge. All these waters are in the Squaxin Island Tribes usual and accustomed fishing area. I want to say that I concur with the proposals in the rule for the designation of what used to be called (core areas?) and now I can't remember what the current wording is. But, we concur with those revised designations. In terms of the spawning designations, I've also reviewed WRIAs 13, 14 and a portion of 15 and we concur with those spawning designations where the 13 degree standard will apply late in the summer. With that said, I can't leave here without being totally complimentary. I have to have at least one issue to raise. And, the tribes in our discussions over the last year, with services EPA and Ecology, also raised a number of other issues related to the water quality standards that need revision. From the Squaxin Island Tribe's perspective, the primary issues are the marine water designations, and some changes that should be made to better reflect how those marine waters are used. In the course of our discussions, the Squaxin Tribe and Ecology, EPA and the services agreed to move ahead on the freshwater designations, and there was some promise that we'd figure out a way to address the marine water designations and I just want to remind everyone, EPA, Ecology and the services, that Squaxin still sees the need and requests that they move ahead as quickly as possible to address the marine water designations.

And that is the end of my testimony.

Hearings Officer: Thank you.

END

Public Hearing in Longview on August 8, 2006

No formal testimony was given.

Public Hearing in Bellingham on August 9, 2006

No formal testimony was given.

Public Hearing in Wenatchee on August 14, 2006

Water Quality Standards Rule Amendment
August 14, 2006
Wenatchee, Washington,

Let the record show that it is 7:20 pm on August 14, 2006 and this public hearing is being held at the Douglas County Public Utility District, located at 1151 Valley Mall Parkway, East Wenatchee, Washington. The primary purpose of this hearing is to receive public comments regarding the proposed changes to Chapter 173-201a, Water Quality Standards for Surface Waters of the state of Washington. The legal notice of this hearing was published in the Washington State Register, Issue #06-13-104. Approximately 6,500 interested parties were notified by direct mail of the rule filing and hearing dates. In addition, Ecology posted the rule amendment and hearing information on the Ecology website on June 26, 2006. Ecology also issued a statewide press release announcing the times and dates of the public hearings.

At this point in time, we have one person who has indicated they would like to provide testimony, and that is Ms. DeLaverdine (sp).

Judy, if you'd like to come up and begin your testimony? Please?

State your name and address for the record, please, and go ahead and have a seat…make yourself comfortable.

OK, my name is Judy DeLaverne, of US Fish and Wildlife Service.

I just wanted to say just a couple quick notes. (I've) been working with DOE and EPA on the temperature criteria changes, and our office still has some things that we're working on. And, we will be doing consultations with them here once we get through this process. Some of the areas that we have concerns with are the Upper Yakima, where we have bull trout spawning and we have some bull trout spawning information that we just gathered at the same time that EPA sent in the disapproval information, and so we're going to try to get that into the record. Also, some concerns about the 20 and 21-degree temperature standard on the main stem Columbia and the Yakima Rivers, where we have ESA listed species traveling through those migratory areas.

Also, as you guys already addressed, we're probably going to work real closely with DOE to work on the dissolved oxygen criteria, and it will be pretty interesting to see what kind of methods we come up with. That's pretty much all the comments that I want to make today.

Hearings Officer: OK, thank you very much.

Is there anyone else at this point in time who would like to provide formal testimony for the public record? No? OK.

The testimony that was presented at this hearing, in addition to the other three hearings that were held on the west side last week, as well as any written comments that are received are part of the official record for this proposal and whether a comment is submitted orally or in writing, it receives equal weight in the decision making process. The public comment period ends on September 5th, 2006. Please address your comments to Sabrina Payne, Department of Ecology, Post Office Box 47600, Olympia, Washington, 98504-7600. Comments must be received by the Department of Ecology by 5 o-clock PM, on September 5th, 2006. You could also email the comments to Sabrina, and Sabrina's email address, and this is not case sensitive, is swqs@ecy.wa.gov. You can also fax comments to Sabrina, and the fax number is area code 360.407.6426. All of the oral or written comments received during the public period will be responded to in a document called the Response to Comments Summary. That document will state Ecology's official position on the issues and the concerns that have been raised during the public comment period. That document will automatically be mailed out to anyone who provided oral or written testimony. In addition, it will also be posted on the water quality standards webpage when it has been completed.

Ecology is expecting to adopt the proposed changes to the water quality standards by October 31st, 2006. If Ecology believes comments received either in writing or in oral testimony could substantially change the filed rule, another public notice of draft of comment period may be necessary which could result in delay of the rule adoption. The ultimate decision to issue the permit, or I'm sorry…to sign the rule will be made by the Ecology Director, Jay Manning. Once

the rule is adopted, it becomes effective 31 days later. However, it will not be used for Federal Clean Water Act purposes until the Environmental Protection Agency makes their approval action.

So, on behalf of the Department of Ecology, thank you so much for joining us for our public workshop and hearing and this hearing is adjourned at 7:25 pm. Thank You.

Public Hearing in Kennewick on August 15, 2006

Water Quality Standards Rule Amendment
August 15, 2006
Kennewick, Washington

Let the record show that it is 7:35 pm on August 15, 2006 and this public hearing is being held at the Benton County Public Utility District, located at 2727 West 10th Avenue in Kennewick, Washington. The primary purpose of this hearing is to receive public comments regarding the proposed changes to Chapter 173-201a, Water Quality Standards for Surface Waters of the State of Washington. The legal notice of this hearing was published in the Washington State Register, Issue No. 06-13-104. Approximately 6,500 interested parties were notified by direct mail of the rule filing and hearing dates. In addition, Ecology posted the rule amendment and hearing information on the Ecology website on June 26, 2006. Ecology also issued a statewide press release announcing the dates and times of the public hearings that were held around the state.

At this point in time, nobody indicated on the sign-in sheets they would like to provide testimony, but we do have a gentleman who has a question he would like to put on the public record.

So, if you'd please come up, state your name, who you are affiliated with for the record, and, please, begin your testimony, Sir.

Commenter:

My name's Doug Miller. I'm with Klickitat PUD, Goldendale, Washington.

My question I had was in regards to … the question I asked was "Are small communities with NPDES charges going to be affected under the small business as a cost analysis, and I used the treatment plant on the Methow River as to its cost analysis that was given in the report. The report shows that it has very little effect on its cost of doing business. So, when I asked the question if this was the case, it seemed to me that I got actually got a different answer, in that "Yes, small treatment plants on small rivers could be greatly affected by this TMDL listing. So, if I'm wrong, I apologize, but if it is, I think that the record shows

showing what the potential cost would have been for a small town on a small river, so that other small towns could have seen the impacts. That's basically my only response. I have something of another nature. I didn't really get to look at the data that sits behind small hydro-electric generation facilities and what the impacts are for what types of fish are going to be impacted on the temperature on that. So, I think that for small hydro-electric generation facilities that there could be some more costs incurred that may not be known at this time. Because, water stratification behind dams may be to the benefit of fish that we aren't aware of or may be detrimental, I'm not sure, but I just think that it should have been more pointed out as to what the cost risk analysis was. And, on a personal note, I really appreciate the opportunity to speak. Thank you.

Hearings Officer: Thank you. OK, is there anyone else who would like to provide testimony or have a question put on the public record?

No? OK.

All of the testimony presented tonight at this hearing, as well as written comments and written testimony that was presented at the four other hearings we've held around the state are part of the official record for this proposal, and whether it's oral testimony or written comments, everything that we receive, receives equal weight in the decision making process. The public comment period ends on September 5th, 2006. Written comments must be postmarked or have arrived at the headquarters of the Department of Ecology by 5 pm on September 5th, 2006. Send you comments to Sabrina Payne, Department of Ecology, PO Box 47600, Olympia, Washington, 98504-7600. You may email your comments to Sabrina, and Sabrina's email address is swqs@ecy.wa.gov, and that is not case sensitive. Comments can also be sent to Sabrina via fax. The fax number for Sabrina is area code 360-407-6426. All of the oral and written comments that are received during the public comment period are going to be responded to in a document called a Response to Comment Summary that will state Ecology's official position on the issues and the concerns that have been raised. That document will automatically be mailed out to everyone who provided oral or written testimony. It will also be posted on the Water Quality Standards webpage when it's been completed. If you would like a copy, if you could get a hold of Sabrina once it's completed, she'd be happy to mail you one, too.

Ecology's expecting to adopt the proposed changes to the water quality standards rule by October 31st, 2006. If the agency believes comments received either in writing or in oral testimony could substantially change the filed rule, another public notice of draft and comment period may be necessary, which could delay or result in the rule adoption. The ultimate decision whether or not to sign the rule will be made by the Ecology Director, Jay Manning. Once the rule is adopted, it becomes effective 31 days later. However, it will not be used for

Federal Clean Water Act purposes until the Environmental Protection Agency makes their approval action.

At this time, I would like to thank you very much for attending our workshop and public hearing. On behalf of the Department of Ecology we appreciate you taking time out of your evening to join us. This hearing is adjourned at 7:43. Thank You.

Final Rule Text

The following shows the final changes that have been made to Chapter 173-201A WAC

Supplemental Spawning Criteria Publication

The following is the final version of the map publication used to show where supplemental spawning criteria are required under WAC 173-201A-200(c)(iv)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

March 22, 2006

Reply to
Attn Of: OW-135

David C. Peeler, Program Manager
Washington Department of Ecology
P. O. Box 47600
Olympia, Washington 98504-7600

Re: Partial Disapproval of the 2003 Revisions to the Washington Water Quality Standards Regulations

Dear Mr. Peeler:

On January 12, 2005 the Environmental Protection Agency (EPA) approved portions of Washington's 2003 water quality standard revisions. EPA has now completed its review of specific aquatic life designated uses and associated temperature criteria of the State of Washington's July 2003 revised water quality standards (WAC 173-201A-600(1) and 602 and WAC 173-201 A-200(1)(c)). Based on this review and pursuant to Section 303(c) of the Clean Water Act (CWA) and its implementing regulations at 40 CFR 131.5 and 131.21, EPA is disapproving those provisions as they apply to specific waterbodies as detailed below and in the enclosures.

EPA found two fundamental deficiencies when reviewing these portions of the standards. First, Washington did not use the available fish distribution information when converting the designated uses from their former "class" system to their new "use-based" system. This resulted in new rules which did not appropriately designate uses for specific water body segments. Secondly, Washington recognized that the temperature criteria adopted for the "Salmon and trout spawning, core rearing, and migration," "Salmon and trout spawning, non-core rearing, and migration," and "Char" uses are not always protective of spawning (e.g., summer spawning). In order to address this, Washington adopted spawning criteria for salmon and char, however, the State did not identify where or when the spawning criteria needed to be applied.

After reviewing the available fish distribution information, EPA has determined that some streams have incorrect aquatic life use designations, and some streams have temperature criteria that are not protective of the appropriate fish uses in the streams. In light of this information, EPA is disapproving the following:

- Washington's designation of certain waters for "Salmon and trout spawning, non-core rearing, and migration" use and the associated 17.5°C temperature criterion because the record demonstrates that these waters should be designated as "Salmon and trout spawning, core rearing, and migration" use and have an associated 16°C temperature criterion;

- Washington's designation of certain waters for the "Salmon and trout spawning, core rearing, and migration" use and the "Salmon and trout spawning, non-core rearing, and migration" use and the associated 16°C and 17.5°C temperature criteria because the record demonstrates that these waters should be designated "Char" use with an associated 12°C criterion;

- Washington's designation of certain waters for the "Salmon and trout rearing and migration only" use because the record demonstrates that these waters should be designated as "Salmon and trout spawning, non-core rearing, and migration" use;

- Washington's application of the 16°C and 17.5°C temperature criteria associated with the "Salmon and trout spawning, core rearing, and migration" use and the "Salmon and trout spawning, non-core rearing, and migration" use for specific waters where and when the record demonstrates that 13°C is needed to protect salmon and steelhead spawning and incubation; and

- Washington's application of the 12°C temperature criterion associated with the "Char" use for specific waters where and when the record demonstrates that 9°C is needed to protect Char (bull trout) spawning and incubation.

The details of EPA's disapproval and specified changes to the Washington 2003 water quality standards, as well as the regulatory and scientific basis for its disapproval and specified changes, are contained in the enclosed "Basis for EPA's Partial Disapproval of Washington's 2003 Water Quality Standard Revisions" and its appendices. Additional scientific information is also contained in the administrative record for this decision.

EPA has been working closely with the State to resolve these issues. We understand that the State plans to proceed with rulemaking to remedy the problems identified above. EPA commends the State for its efforts to resolve these issues. We intend to continue working closely and cooperatively with the State during the coming months to support the State in its rulemaking process. This includes EPA's assistance, during the State's public process, in explaining its basis for the specified changes to the Washington water quality standards.

While EPA's recommendations are based on the best available scientific data and rationale regarding the fish uses that are occurring in the specified waters and the temperatures necessary to protect these species and their life stages, EPA acknowledges that there may be issues regarding the attainability of the numeric temperature criteria in some waters. EPA recognizes that waters may exceed water quality standards for

temperature for many different reasons, including natural conditions, and that the nature and complexity of the challenge associated with reducing temperatures to meet WQS varies across a spectrum of factors. For example, the effect of restoring riparian areas of a waterbody to increase the amount of shade and reduce the amount of direct sun impinging upon the water is well understood, whereas some modifications to dam operations to reduce water temperatures can be very difficult and complex and in some cases, may not be technologically, environmentally, and/or economically feasible.

EPA understands that flexibilities exist under the Washington water quality standards, the Clean Water Act and applicable guidance to address circumstances where there may be attainability issues. We are prepared to work with you, other federal and state agencies, and affected parties to explore and appropriately utilize the available options to ensure attainable water quality standards are established. Available options include: 1) invoking the State's natural background temperature provision where the natural background temperature is higher than the numeric temperature criteria, 2) use of the State's "Compliance Schedules for Dams" provision for waters affected by the existence and/or operation of dams, 3) use refinement and the development of alternative numeric criteria in conjunction with a use attainability analysis (UAA), 4) the development of alternative site-specific criteria, and 5) a potential hybrid of options 1-4. In the near term, EPA believes that Washington's "Compliance Schedules for Dams" provision provides a particularly useful mechanism in the near term to address compliance issues for waters affected by the existence and/or operation of dams, while also providing further opportunity to explore and utilize long term options to ensure attainable standards are established.

If you have any questions, please feel free to contact me at (206) 553-7151, or you may contact Kathleen Collins at (206) 553-2108 or John Palmer at (206) 553-6521.

Sincerely,

Mike Gearheard
Director
Office of Water and Watersheds

Enclosures

cc: Melissa Gildersleeve, Washington Department of Ecology
Mark Hicks, Washington Department of Ecology
Fran Wilshusen, Northwest Indian Fisheries Commission
Kenneth Berg, USFWS
Steven Landino, NOAA

Julie Carter, Columbia River Inter-Tribal Fish Commission
Mark White, Chehalis Confederated Tribes
John St. Pierre, Confederated Tribes of the Colville Reservation
Mike Iyall, Cowlitz Indian Tribe
Rodney Thysell, Hoh Tribe
Ann Seiter, Jamestown S'Klallam Tribe
Deane Osterman, Kalispel Tribe
Carol Brown, Lower Elwha Klallam Tribe
Merle Jefferson, Lummi Nation
Vince Cooke, Makah Tribe
Isabel Tinoco, Muckleshoot Tribe
David Trout, Nisqually Tribe
Bob Kelly Jr., Nooksack Tribe
Sharon Purser, Port Gamble S'Klallam Tribe
Bill Sullivan, Puyallup Tribe
Mel Moon, Quileute Tribe
Bruce Jones, Quinault Nation
Christine Woodward, Samish Indian Nation
James L. Joseph, Sauk-Suiattle Tribe
Gary Burns, Shoalwater Bay Tribe
Keith Dublanica, Skokomish Tribe
Ian Kanair, Snoqualmie Tribe
Rudy Peone, Spokane Tribe
Jim Peters, Squaxin Island Tribe
John Drotts, Stillaguamish Tribe
Denise Williams, Suquamish Tribe
Allen Rozema, Swinomish Tribe
Terry Williams, Tulalip Tribes
Scott Schuyler, Upper Skagit Tribe
Carroll Palmer, Yakama Nation

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, WA 98101

JUL 10 2006

DEPARTMENT OF ECOLOGY
JUL 11 2006
WATER QUALITY PROGRAM

Reply to
Attn Of: OWW-135

Dave Peeler, Program Manager
Water Quality Program
Washington Department of Ecology
P.O. Box 47600
Olympia, Washington

Dear Mr. Peeler:

The purpose of this letter is to clarify some discrepancies found in our March 2006 partial disapproval of Washington's 2003 Water Quality Standards revisions, and to disapprove several stream segments that EPA inadvertently omitted in its March 2006 partial disapproval letter. These issues are discussed in more detail below.

Ecology, WDFW, USFWS, and several northwest tribes participated in a quality review of the EPA GIS maps and the accompanying appendices found in EPA's March's 2006 disapproval letter. This process resulted in identifying some discrepancies between the GIS maps, which reflects EPA's disapproval of stream segments, and the appendices/tables, which provides the supporting information for the GIS maps. EPA's clarifications of the discrepancies, and its revised GIS maps are provided in the attached enclosures.

The Upper Skagit Tribe recently informed EPA that its March 2006 partial disapproval letter overlooked the fish distribution data that the Tribe provided for several streams in WRIA 3. After reviewing the Tribe's data, EPA has determined that these streams have incorrect aquatic life use designations. Therefore, pursuant to section 303(c) of the Clean Water Act and its implementing regulations at 40 CFR 131.5 and 131.21, EPA is disapproving Washington's designation of "Salmon and trout spawning, non-core rearing, and migration" use and the associated 17.5°C temperature criterion for Fisher Creek and its tributaries; Carpenter Creek and its tributaries; Nookachamps Creek (from the Skagit River to its confluence with Barney Lake); East Fork of the Nookachamps (from Barney Lake to Turner Creek); and Turner Creek. The record demonstrates that these waters should be designated as "Salmon and trout spawning, core rearing, and migration" use and have an associated 16°C temperature criterion. This

disapproval action is discussed in more detail in the attached enclosure. Also enclosed are revised GIS maps.

If you have any questions on this matter, please contact John Palmer at 206-553-6521 or Kathleen Collins at 206-553-2108.

Sincerely,

Mike Gearheard, Director
Office of Water and Watersheds

Enclosures
cc: Steve Landino, NOAA
Ken Berg, USFWS
Dick OConner, WDFW
Jon-Paul Shannahan, Upper Skagit Tribe
Fran Wilshusen, NWIFC

ENCLOSURE

Part I of this enclosure provides EPA's clarification of the discrepancies identified in the March 2006 partial disapproval letter. Part II of this enclosure provides a discussion of EPA's disapproval action in WRIA 3.

I. Clarifications

WRIA 1 – California Creek
Discrepancy: EPA's GIS map indicates that this creek should be designated as "Salmon and trout spawning, non-core rearing and migration" (hereafter referred to as "non-core") however, Appendix C indicates this creek should be designated as "Salmon and trout spawning, core rearing and migration" (hereafter referred to as "core").

Response: Appendix C contains a note stating that a personal communication from the Nooksack Tribe indicates that steelhead spawning occurs in California Creek (summer steelhead spawning/incubation is a factor EPA used to determine if a stream should be designated as "core"). However, at this time, data does not exist to substantiate the spawning use. Additionally, the WDFW Databases (i.e., the primary sources of information used by EPA for determining fish distributions) do not show summer spawning/incubation California Creek. Because there is no documented summer spawning/incubation, EPA did not disapprove the Ecology's "non-core" use and associated criteria for this stream. Therefore, this stream should be designated as "non-core" on the GIS map.

WRIA 3 – Nookachamps Creek.
Discrepancy: EPA's GIS map did not correctly reflect that Ecology designated Nookachamps Creek from Barney Lake to Big Lake as "core" in its 2003 Water Quality Standards.

Response: In the process of evaluating the Upper Skagit Tribe's data for Nookachamps Creek, EPA discovered that it had made an error on its GIS map. The GIS map depicted Nookachamps Creek from Barney Lake to Big Lake as "WAC non-core" when, in fact, Ecology's regulations designate streams flowing into lakes "core" use. EPA has revised its GIS map to correct this error.

WRIA 13 – Perceval Creek.
Discrepancy: EPA's GIS map indicates that Percival Creek should be designated as "non-core," however, Appendix C indicates that this creek should be designated as "core."

Response: Appendix C shows Chinook spawning/incubation occurs after mid-September. EPA's March 2006 letter states that streams where spawning/incubation occurs prior to mid-September should be designated as "core." Since Percival Creek does not meet this requirement (or any of the other factors listed in EPA's March 2006 letter which would indicate the need for a "core" designation) EPA did not disapprove the Ecology's "non-

core" use and associated criteria for this stream. The EPA finding for Percival Creek contained in Appendix C was in error.

WRIA 14 – Uncle Johns Creek.
Discrepancy: EPA's GIS map does not depict Uncle Johns Creek at all, however, Appendix C indicates that Uncle Johns Creek should be designated as "core."

Response: EPA's GIS map is error. The map scale used by EPA when developing the GIS map was not detailed enough to depict Uncle Johns Creek. For the reasons indicated in Appendix C, EPA disapproved Ecology's "non-core" use and associated criteria for this stream. EPA has revised its' GIS map to include Uncle Johns Creek (see attached revised map).

WRIA 21 – Upper portion of Salmon River, Middle Fork.
Discrepancy: EPA's GIS map did not correctly reflect that Ecology designated this river as "char" in its 2003 Water Quality Standards regulation.

Response: EPA has corrected its' GIS map to correctly reflect Ecology's "char" use designation (see attached revised map).

WRIA 29 – Rock, Carson, Jewett Creek, Catherine Creek, and Major Creek.
Discrepancy: EPA's GIS map indicates that these creeks should be designated as "core," however, Appendix C indicates they should be designated as "non-core."

Response: Appendix C is incorrect because the WDFW Databases show that summer steelhead spawning/incubation occurs in these creeks. While this information was captured in the GIS map it was inadvertently left out of Appendix C. EPA's GIS map is correct, EPA disapproved the "non-core" use designation for these streams. These streams should be designated as "core" use.

WRIA 31 – Harrison Creek.
Discrepancy: EPA's GIS map indicates that this creek should be designated as "non-core," however, Appendix C indicates it should be designated as "core."

Response: EPA's GIS map is correct. EPA did not disapprove Ecology's "non-core" use and associated criteria for this stream because spawning/incubation in Harrison Creek occurs below the elevation threshold where spawning is likely to occur in the summer (see appendix D of the March 2006 letter for additional information). EPA's finding in Appendix C is in error in its reference to upper Harrison Creek as "core" use.

WRIA 31 – Lower Squaw Creek.
Discrepancy: EPA's GIS map indicates that a short segment of lower Squaw Creek should be designated as "core," however, Appendix C indicates only upper Squaw Creek should be designated as "core."

Response: EPA's GIS map is in error by depicting the lower segment of Squaw Creek as "core" use. As stated in Appendix C, EPA's finding for "core" applied only to upper Squaw Creek. Lower Squaw Creek is not likely to have summer spawning/incubation because spawning occurs below the elevation threshold where spawning is likely to occur in the summer (see Appendix D of the March 2006 letter for additional information). EPA did not intend to disapprove Ecology's "non-core" use for this segment, and has corrected the GIS map (see attached map).

WRIA 37 – Sulfur Creek.
Discrepancy: EPA's GIS map identifies this creek as "non-core" but Appendix A does not provide any information indicating this creek should be changed from Ecology's "salmon and trout rearing and migration only" designation.

Response: EPA's GIS map should have reflected Ecology designation of "rearing and migration only" use. EPA has corrected the GIS map (see attached map).

WRIA 38 – Tieton River, South Fork.
Comment: EPA's GIS map indicates that South Fork Tieton River, from Rimrock Lake to just below the first tributary of the South Fork Tieton River should be designated as "core." However, Appendix D indicates that the entire South Fork Tieton River should be "char."

Response: Appendix D is correct, EPA disapproved the Ecology "core use" designation to the confluence with Rimrock Lake. EPA's GIS map mistakenly did not show "char" use for South Fork Tieton River down to the confluence with Rimrock Lake. EPA has corrected the GIS map (see attached map).

WRIA 39 – Camp Creek, Salmon La Sac Creek, and Little Boulder Creek.
Comment: EPA's GIS map did not depict these three creeks as "char," however all the streams in this area are designated for char use. It is unclear why these three creeks are designated as "core."

Response: EPA's GIS map mistakenly did not depict these 3 creeks as "char." EPA disapproved Ecology's "core use" for these three creeks. EPA has corrected the GIS map (see attached map).

WRIA 48 – Lake Creek
Comment: EPA's GIS map depicts all of Lake Creek as "char" but Appendix E doesn't have a discussion of Lake Creek.

Response: EPA's GIS map is correct, the discussion regarding Lake Creek is contained in the Chewuch River discussion (this discussion references extensive char use in Lake Creek).

II. Disapproval Action

In our March 2006 partial disapproval of Washington's 2003 Water Quality Standards revisions, EPA disapproved Ecology's "non-core" use designation for the lower Skagit River and determined it should be "core" use. For this river segment, EPA made an exception to it's general determination that tributaries to "core" streams should be designated "core" (see March 2006 letter), unless the tributary had fish information that supported a "core designation." The Upper Skagit Tribe provided EPA with fish distribution data which EPA overlooked in its March 2006 partial disapproval letter regarding several tributaries to the lower Skagit River. The data shows that there is extensive coho rearing in these streams and summer steelhead spawning. This data shows that these streams should be designated as "core."

As stated in EPA's March 2006 letter, EPA primarily relied on the Washington Department of Fish and Wildlife (WDFW) Databases to make its disapproval decisions, however, where appropriate, other available information was considered. The data provided by the Tribe shows there is high density summer rearing of coho throughout the Nookachamps drainage. Furthermore, WDFW Database shows that there is summer steelhead spawning for portions of the Nookachamps. As stated in EPA's March 2006 letter, these are factors that are used to apply a "core" use designation to a stream (see pages 4-5 of the March 2006 letter). Therefore, EPA is disapproving Washington's designation of "salmon and trout spawning and non-core rearing" use and the associated 17.5°C temperature criterion for the Nookachamps Creek (from the Skagit River to its confluence with Barney Lake); East Fork of the Nookachamps (from Barney Lake to Turner Creek); and Turner Creek (a tributary of East Fork Nookachamps Creek). For clarity, it should be noted that in its March 2006 partial disapproval letter EPA disapproved the East Fork of the Nookachamps from the confluence of Turner Creek to its confluence with Washington's char designation. The record demonstrates that these waters should be designated as "Salmon and trout spawning, core rearing, and migration" use and have an associated 16°C temperature criterion (see EPA's revised GIS map).

The Tribe also provided EPA with information showing that high density summer rearing of coho occurs throughout the Fisher and Carpenter Creek drainages. As stated above, high density salmonid rearing is a factor EPA used to apply a "core" use designations to streams. Therefore, EPA is disapproving Washington's designation of "salmon and trout spawning and non-core rearing" use and the associated 17.5°C temperature criterion for Fisher Creek and its tributaries, and for Carpenter Creek and its tributaries. The record demonstrates that these waters should be designated as "Salmon and trout spawning, core rearing, and migration" use and have an associated 16°C temperature criterion (see EPA's revised GIS map).

Determinations required under Chapter 34.05, Administrative Procedures Act, not contained in other public documents prepared for this rulemaking

i) Determination that the rule does not require those to whom it applies to take an action that violates requirements of another federal or state law.

This longstanding regulation sets the water quality goals for all of the surface waters in Washington. By establishing numerical limits on the allowable amount of pollution that can occur to the state's waters, the standards serve as the driver for designing control programs. These rules do not require anybody to take an action that violates federal or state law.

ii) Determination that the rule does not impose more stringent performance requirements on private entities than on public entities unless required to do so by federal or state law.

This longstanding regulation sets the water quality goals for all of the surface waters in Washington. By establishing numerical limits on the allowable amount of pollution that can occur to the state's waters, the standards serve as the driver for designing control programs that pertain to the regulated community as well as to those that are not regulated but contribute to nonpoint pollution. These rules do not impose more stringent requirements on public or private entities.

iii) Determination on whether the rule differs from any federal regulation or statute applicable to the same activity or subject matter, and determination that any difference is justified.

Federal requirements for water quality standards are found in federal laws and federal regulations. The key federal law that standards' implement is the federal Clean Water Act. Title 40 of the Code of Federal Regulations, particularly Part 131 (40 CFR Part 131). The United States Environmental Protection Agency (USEPA) also establishes guidance for implementing the federal regulations.

The changes to the state's freshwater temperature criteria and associated use designations are consistent with the federal regulations on protecting aquatic life. This rulemaking was developed with the assistance of the US Environmental Protection Agency in response to their formal disapproval of Washington's 2003 revisions of the water quality standards. These changes were explicitly designed to comply with newly released guidance from EPA, and were developed to represent a package of changes necessary for the state standards to be approved by EPA as necessary under federal laws and regulations.

iv) Efforts to Coordinate the rule, to the maximum extent practicable, with other federal, state, and local laws.

The changes associated with this rulemaking only make modest changes to the temperature and dissolved oxygen criteria and the designated aquatic life uses assigned to a select number of water bodies across the state. This rulemaking does not introduce any new regulatory elements into the state water quality standards. Washington has had surface water quality standards for well over 40 years. These standards are well intergraded with other state laws and programs, and are directly mandated in both state and federal law. The state standards are reviewed by the US EPA to ensure that they adhere to federal water quality and endangered species laws and regulations.