Concise Explanatory Statement And Responsiveness Summary For Amendments To:

Chapter 173-95A WAC, *Uses and Limitations of the Centennial Clean Water Fund*

And Chapter 173-98 WAC, *Uses and Limitations of The Water Pollution Control Revolving Fund*

Prepared by Tim Hilliard

Washington State Department of Ecology, Water Quality Program

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For additional copies of this document contact:

Tim Hilliard
Dept. of Ecology
Water Quality Program
PO Box 47600
Olympia, WA 98504-7600

Tel.: (360)407-6429

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Executive Summary:

The Department of Ecology's Water Quality Program is amending Chapter 173-95A WAC, "Uses and Limitations of the Centennial Clean Water Fund" and Chapter 173-98 WAC, "Uses and Limitations of the Water Pollution Control Revolving Fund." The current language of Chapter 173-95A WAC was adopted in December, 1997 to implement Chapter 70.146 RCW, **"**Water Pollution Control Facilities Financing." The current language of Chapter 173-98 WAC was adopted in April, 2000 to implement Chapter 90.50A RCW, "Water Pollution Control Facilities--Federal Capitalization Grants."

The Washington Department of Ecology administers the Centennial Clean Water Fund (Centennial Fund) and the Washington State Water Pollution Control Revolving Fund (SRF). The Centennial Fund provides grants and low-interest loans from the Water Quality Account (established by the Washington State Legislature in 1987) to local governments for water quality protection and improvement programs. The SRF provides low-interest loans to local governments for water quality protection and improvement. The federal SRF program was established by Congress in 1987 as a means to phase out the federal construction grant program for wastewater treatment facilities. In response to the new federal program the Washington State Legislature created the Washington State SRF program in 1988.

Ecology is expanding Chapter 173-95A WAC beyond a single-purpose rule implementing provisions related to the Growth Management Act as it relates to the Centennial Fund. Stakeholders have asked Ecology to provide greater consistency and predictability to the Centennial Fund. Likewise, an external advisory group has recommended to Ecology that the agency make changes to current practice, to reflect those changes in Chapter 173-95A WAC, and to provide a framework for the entire program in the rule. Moreover, Ecology management believes that the public forum presented by the rule amendment process is the best way to be open and responsive to public concerns while making changes to current practice.

Chapter 173-98 WAC covers the SRF much more completely than Chapter 173-95A WAC covers the Centennial Fund. However, some of the same reasons for amendment apply – to provide greater consistency and predictability, to make changes to current practice, and to allow a public forum to be responsive to public concerns while making changes to current practice. Also, Ecology is making changes as part of an ongoing effort to achieve a high level of consistency and integration between the management of the SRF and of the Centennial Fund.

During the public participation process many people were informed of the proposed changes (see Chapter VII). However, only three individuals chose to make formal comments on the changes. These comments related to local prioritization, financial hardship determination and criteria, growth management, document approval, and other subjects.

This explanatory statement describes the rule amendment process and the changes (as proposed and as adopted), responds to comments made during the public comment phase, and outlines the implementation plan. Questions concerning the subject matter discussed in this document should be directed to Tim Hilliard at (360)407-6429.

I. Introduction and Background Statement

Administration

The Washington Department of Ecology administers the Centennial Clean Water Fund (Centennial Fund) and the Washington State Water Pollution Control Revolving Fund (SRF).

The Centennial Fund provides grants and low-interest loans from the Water Quality Account to local governments for water quality protection and improvement projects and programs. Chapter 70.146 RCW, enacted in 1987, provides Ecology with the authority to implement this fund. Ecology has administered the fund since its establishment in 1989.

The SRF provides low-interest loans to local governments for water quality protection and improvement. The federal SRF program was established by Congress in 1987 as a mechanism to phase out and replace the federal construction grant program for wastewater treatment facilities. In response to the new federal program the Washington State Legislature created the SRF program in 1988.

Management

The two programs have been coordinated with each other and with other programs since their inception. These have included the federal construction grant program for wastewater treatment facilities (no longer in place), Referendum 39, and the Clean Water Act Section 319 Nonpoint Fund.

The proposed rules would address consistency and coordination between the two programs (as well as others), allow some major policy changes, as well as allow the full framework of the Centennial Fund to be reflected in rule form. Local government grant and loan clients have asked Ecology to provide greater consistency and predictability to the Centennial Fund. Likewise, an external advisory group has recommended to Ecology that the agency make changes to current practice, to reflect those changes in Chapter 173-95A WAC, and to provide a framework for the entire program in the rule. Moreover, Ecology management believes that the public forum presented by the rule amendment process is the best way to be open and responsive to public concerns while making changes to current practice.

Current thinking, especially since the Hillis vs. the Department of Ecology ruling, says that policy involved with funding decisions should be in rule form.

State Environmental Policy Act

Amendment of these rules does not require going through State Environmental Policy Act (SEPA) because “standards” are not being proposed as provided in chapter 197-11-704(2)(b)(i) WAC). Therefore, the amendments are considered categorically exempt.

Pollution Prevention

These rule changes do not directly implement pollution prevention measures. However, certain aspects of the rules incorporate pollution prevention measures, including application questions

(used in the prioritization of applications) which address pollution prevention. For example, both rules include provision of a major question area (worth 34 percent of the total score), which asks "What are the specific public health and water quality impairments caused by the problem and what are the pollution prevention aspects?" This is found in WAC 173-95A(040)(3)(b) and WAC 173-98(040)(3)(b).

Final Language

The final language of the two rules is in most cases identical to the proposed rules. Ecology is making changes to improve clarity without changing the meaning or processes, to fix typographical or editing mistakes, and to more accurately reflect policy direction articulated during the workshops, hearings, and Advisory Council meetings. Several changes reflect public comment during the hearings of the public comment period. This document describes the specific changes and the process followed to ensure that the public was given an opportunity to influence the final language of the rule if they desired to. None of these changes are substantive.

II. WAC 173-95A: Differences Between the Existing Rule and the Proposed Rule

The following chapter is a discussion of significant changes to the existing Centennial Fund rule, WAC 173-95A (as it is on the books today), and the proposed version as it was published in the State Register for public review and comment. Each major change includes a discussion of the rationale for the change. Note that these are highlights; there is much more that is new in the rule, mostly reflecting details of current practice.

WAC 173-95A-030:

Administration of other state and federal funds:

- Other pass-through funds provided by the state legislature (or from other sources) to Ecology will be managed in a manner consistent with the Centennial Fund rule (current practice).

Affordability / financial hardship determination:

- Hardship rate 1.5 percent of MHI (current practice).

- Defendable operation / maintenance / replacement (O/M/R) costs may be included in financial hardship consideration even though they are not eligible for funding (current practice).

- Ecology will use the latest census data, inflated annually where needed by the Consumer Price Index (varies slightly from current practice which was to inflate by a fixed three percent per year).

Categories / set-asides:

- Amount equal to 1/3 of competitive funding is reserved for activities projects.

- Maximum of 2/3 of competitive funding is reserved for facilities construction projects where hardship has been shown, unless demand for the reserve is limited.

- Varies from current practice, which has no such reserves.

In-kind goods and services as match for grants:

- **Activities:** Allow all grant recipients to use any combination of in-kind and cash for match with $250,000 ceiling amount but allow higher ceiling amounts ($500,000) for activities grants when match is all cash.

- Varies from current practice, which allows a maximum of $250,000 ceiling amount with no more than half of the match being in-kind, except that Conservation Districts and Indian tribes can have an all in-kind match.

- **Facilities:** Only allowed for projects in communities which Ecology has designated to participate in an official *Small Town Environmental Program* (STEP) project – no change from current practice.

Interest rates and loan terms:

- Interest rates based on market rate for tax-exempt municipal bonds.
- No change from current practice.

Ceiling amounts and match for activities projects:

- **Grant** ceiling amounts $250,000 when matched with any combination of cash and/or in-kind; $500,000 when match is all cash; 25 percent match.
- Also discussed in Section 060.
- **Loan** ceiling amounts $500,000, no match required.

Previously funded objectives (projects addressing same needs as projects Ecology has funded in past):

- Ineligible for grants, eligible for loans.
- Also discussed in Section 060.
- No change from current practice.

Ceiling amounts, grant eligibility, and match requirements for facilities planning, design, and construction projects under the Centennial fund:

- Facility construction loan-only except partial grant funding for construction projects in cases of financial hardship (change from current practice).
- No grants for growth, comprehensive sewer / stormwater planning, site-specific planning, or facilities design in any cases, even in hardship (no change from current practice).
- Up to 50 percent of the eligible cost of a facility project (plus a percentage equal to the county's three-year average unemployment rate if that average exceeds the state's three-year average), or $5,000,000 (whichever is lower) may come from Ecology grant sources, then no more grants for the specific project scope for the life of the project.
- No more than one-third of competitive grant amount to any one project in a single fiscal year.
- An project that qualifies for hardship consideration, and is identified as falling at the funding cut-off line and thereby receiving less than the grant amount for which they are eligible in a single fiscal year will be given priority for the difference in subsequent funding cycles given

that the funding recipient can show that the project is proceeding and that funds are available by legislative appropriation.

- No more than two-thirds of competitive grant amount for a fiscal year will be used for facility construction projects where financial hardship has been demonstrated.

- Also discussed in Section 060.

- Major changes from existing practice.

WAC 173-95A-040:

Funding cycle:

- Define minimum time periods, notices, etc. – exact dates not set (no change from current practice).

Evaluation system for applications:

- Retains and refines pilot system used in Fiscal Year (FY) 2000 and FY 2001, specifies main headings and allocation of points; individual questions may change with legislative priorities, etc.

- No major changes from practice used in FY 2000 and FY 2001.

Emergency funding:

- On case-by-case basis, identify available funds, or request permission from legislative staff to use deobligated funds from previous biennia (no change from current practice).

WAC 173-95A(050)

Local prioritization system for applications:

- States philosophy -- why we use local prioritization in our rating system.

- Uses Water Resource Inventory Areas (WRIAs) as local prioritization area.

- No major changes from practice used in FY 2000 and FY 2001.

WAC 173-95A-060:

Limitations on commercial / industrial / institutional (C/I/I) flows:

- Loan-only in all cases.

- A maximum 30 percent of the Ecology share of the total eligible project cost may be intended for non-residential needs.

- Flows from primary and secondary schools are considered part of residential flow in determining total eligible costs for a facilities project.

Solid and hazardous waste, drinking water, flood control:

- Do not fund projects where primary focus is solid and/or hazardous waste, drinking water, or flood control (no change from current practice).

State agency projects:

- Not fund state agency projects, except activity projects proposed by state institutions of higher education may be considered for funding when they are not part of the school's statutory responsibilities (this reflects a change; these types of projects were eligible for funding in some cases in the recent past).

Stormwater facilities / activities:

- Clarifies eligibility, provides clearer guidance.

WAC 173-95A 070:

Growth Management Act:

- May not award grant or loan funds for facilities projects (except in cases of public health need or substantial environmental degradation) with a public body that is out of compliance Growth Management Act (GMA) until the public body is in compliance, no change from current practice.

WAC 173-95A-080:

Submittal timing and approval of prerequisite documents:

- Prerequisite technical engineering documents (site-specific facilities plans when applying for design funds, design when applying for construction funds) must be approved by the end of application cycle for a project to be eligible for funding consideration. The draft documents must be sent at least 60 days prior to the desired approval date to allow sufficient time for review and approval, per Chapter 173-240 WAC.

- Reflects practice in the past but represents a change from practice used in FY 2000 and FY 2001, where a grace period was allowed.

WAC 173-95A-100:

Timely use of funds and project length:

- Projects must be started within 16 months – and completed within 5 years – of the publication of the final offer list.

- Allows time extensions totaling no more than one year, when Water Quality Program Manager determines that there is an adequate reason.

- Exceptions and exception process defined are outlined in the rule – examples might be a natural disaster, environmental window for in-stream work, or a mandate such as a compliance order.

- This is a change from current practice.

WAC 173-95A-110:

Signage on projects:

- Signage required on site-specific projects and acknowledgement is required in published materials, etc., produced using funds from grants and loans (but not overly prescriptive).

- Change from current practice – although this was required in the past.

Coordination with other state and federal funding agencies and programs:

- Coordinate maximum funding amounts with other state and federal agencies.

- No change from current practice.

III. WAC 173-95A: Differences Between the Proposed Rule and the Adopted Language

The following section discusses the differences between the rule as it was proposed and the language that is being adopted. The changes are minor, with most of them being clarifications. A few are to correct minor errors and one set of changes is intended to provide consistency with policy direction Ecology has communicated throughout the public process for amending this rule.

WAC 173-95A-020 (Definitions):

- Subsections (16), (17), and (18) all contained the phrase "in order to meet the recipient's National Pollution Discharge Elimination System or state waste discharge permit" and in each of those three definitions this phrase has been amended to read: "in order to meet the water quality based effluent limitations in the recipient's National Pollution Discharge Elimination System or state waste discharge permit."

  This change is intended to clarify what parts of the discharge permits the definition was referring to.

- Subsection (32), "Interlocal costs," read: "…means the cost of goods or services provided to a project under the terms of an interlocal agreement by a public body eligible to apply for centennial funds."

  It now has an added clarification that reads "These costs may be considered as part of a cash match if they are eligible for funding under the grant agreement."

- Subsection (35), "Local prioritization process," read: "…means a process to prioritize projects locally" and now has an added clarification that reads "as specifically described in Section 050 of this chapter."

  This is intended to clarify that the definition does not refer to any type of process other than the one specifically outlined in this chapter.

WAC 173-95A-030:

- Subsection (2) started by saying "Eligibility." It is changed to read "Eligibility to apply for funding." This is intended to help differentiate this section from later parts of the rule that address eligibility of individual project elements for funding under a grant or a loan.

WAC 173-95A-050:

- Subsection (7) read in full: "Eligibility for local prioritization points requires that certain procedures, detailed in the funding guidelines for each annual funding cycle, be followed." This language is deleted as the agency decided the rule, with minor additions, in the form of a new Section 050(7) and 050(8), described the process is sufficient detail and the caveat about the guidelines wasn't needed. It is also intended to respond to a public comment that the entire process should be in rule form.

- The replacement subsection (7) reads: "In cases where a required signatory to the ad hoc group process refuses to become involved with the process, does not respond to the request to become involved, or agrees to become involved but does not do so, the ad hoc group may provide the department with proof that the group was asked to participate. This proof must be submitted with the signed list of priorities, by the deadline for submitting that list. Where this proof is provided, the lack of the signature will not stop the department from awarding local priority points. Proof should consist of copies of registered mail asking the required group to become involved." This is intended to clarify the signature process, to reflect existing practice and the policy as it was always intended, and to respond to comments that the process was overly proscriptive.

- A new subsection (8) is added which reads in full "The list of local priorities, with signatures, is due to the department no later than forty-five days after the end of the application period each fiscal year." This is intended to place this information into the rule, which was originally planned for the annual guidelines. It is also intended to respond to a public comment that the entire process should be in rule form.

WAC 173-95A-060:

- The line in subsection (8)(f) read "Watershed coordinators with the express purpose of watershed plan development and implementation" and is shortened to read "Watershed plan development and implementation," which staff believe better conveys the flexibility that was intended, and removes an implication that such work wasn't reimbursable if the staff did not have that exact job title – something that was never intended.

WAC 173-95A-070:

- In subsection (5)(a) a comma is deleted to better convey the meaning of the sentence.

IV. WAC 173-98: Differences Between the Existing Rule and the Proposed Rule

The following chapter is a discussion of significant changes to the existing State Revolving Fund rule, WAC 173-98 (as it is on the books today), and the proposed version as it was published in the State Register for public review and comment. Each major change includes a discussion of the rationale for the change.

Section 030:

Affordability / financial hardship determination:

- Hardship rate 1.5 percent of MHI (current practice).
- Defendable O/M/R costs may be included in financial hardship consideration even though they are not eligible for funding (current practice).
- Ecology will use the latest census data, inflated annually where needed by the Consumer Price Index (varies slightly from current practice which was to inflate by a fixed three percent per year).

Evaluation system for applications:

- Retains and refines pilot system used in FY 2000 and FY 2001, specifies main headings and point share; individual questions may change with legislative priorities, etc.
- No major changes from practice used in FY 2000 and FY 2001.

Local prioritization system for applications

- Reference to Centennial rule, no specific language in SRF rule – see changes to Centennial rule, in Chapter II.

Funding cycle:

- Define minimum time periods, notices, etc. – exact dates not set (no change from current practice).

Section 050:

Categories / set-asides

- Nonpoint source and estuary categories are combined, so only two categories: facilities and nonpoint / estuary.
- No more than eighty percent of the funding in a year may be used for projects in the facilities category unless demand for funding in the nonpoint / estuary category is limited.

- No more than twenty percent of the funding in a year may be used for projects in the nonpoint / estuary category unless demand for funding in the facilities category is limited.

Ceiling amounts and match:

- Loan ceiling amounts for activities projects – half of estuary / nonpoint category, no match required.

- Loan ceiling amounts for facilities projects – half of facilities category, no match required.

Limitations on commercial / industrial / institutional (C/I/I) flows:

- Loan-only in all cases.

- A maximum 30 percent of the Ecology share of the total eligible project cost may be intended for non-residential needs.

- Flows from primary and secondary schools are considered part of residential flow in considering total eligible costs for a facilities project.

Solid and hazardous waste, drinking water, flood control:

- Projects where the primary focus is solid and/or hazardous waste, drinking water, or flood control may not be funded (no change from current practice).

State agency projects:

- Not fund state agency projects, except activity projects proposed by state institutions of higher education may be considered for funding when they are not part of the school's statutory responsibilities (this reflects a change; these types of projects were eligible for funding in some cases in the recent past).

Section 060:

Submittal timing and approval of prerequisite documents:

- Prerequisite technical engineering documents (site-specific facilities plans when applying for design funds, design when applying for construction funds) must be approved by the end of application cycle for a project to be eligible for funding consideration. The draft documents must be sent at least 60 days prior to the desired approval date to allow sufficient time for review and approval, per Chapter 173-240 WAC.

- Reflects practice in the past but represents a change from practice used in FY 2000 and FY 2001, where a grace period was allowed.

Section 075:

Growth Management Act:

- May not award grant or loan funds for facilities projects (except in cases of public health need or substantial environmental degradation) with a public body that is out of compliance Growth Management Act (GMA) until the public body is in compliance, no change from current practice.

Section 090:

Timely use of funds and project length:

- Projects must be started within 16 months – and completed within 5 years – of the publication of the final Intended Use Plan.

- Allows time extensions totaling no more than one year, when Water Quality Program Manager determines that there is an adequate reason.

- Exceptions and exception process defined are spelled out in the rule – examples might be a natural disaster, environmental window for in-stream work, or a mandate such as a compliance order.

- Change from current practice.

Section 110

Coverage factor for loans:

- SRF loan recipients will no longer be required to include a coverage factor, as described in detail below:

  All SRF loan recipients constructing water pollution control facilities were required to maintain coverage on their loans. This was one of several measures intended to help ensure there would not be a default on the loan. Coverage requirement means that the annual net revenue from user fees, after the payment of senior lien obligations and other applicable costs, is at least equal to 120 percent of annual debt service on the loan (and any other obligations on a parity with the loan).

  The coverage factor increased the overall project cost, and in order to meet the coverage requirement, local governments needed to increase sewer fees. The result was an increased financial burden on sewer users, and in extreme cases this burden could cause the project to be unaffordable.

  Ecology retained a financial consultant to conduct an analysis of the SRF portfolio. One of the tasks of the consultant was to determine whether Ecology could eliminate the coverage requirement without jeopardizing the perpetuity of the portfolio. Regarding this issue, the

analysis showed that the other security requirements in the loan agreement and in state law help ensure there will not be a loan default, and that the coverage requirement is not needed.

Section 120

Selection and eligibility of facilities refinancing under SRF.

- Defines two categories of application for refinancing, **interim** refinance and **standard** refinance.

- Interim refinance is where the applicant proceeded on its own accord but the project is still in progress – these will be treated like any other application, which reflects current practice.

- Standard refinance is where the applicant went forward using a source of money other than one from Ecology, and the project is complete – the provisions for standard refinance reflect a change from current practice: Ecology will use a shorter, simpler application, all project prerequisites must have been met at time of project, not retroactively; no Ecology debt will be refinanced; refinance projects will only be funded if there is limited demand for funding for new projects; ranking will be by financial capability (impact on ratepayers); and the first payment for standard refinance projects will be due six months from signed agreement.

Signage on projects:

- Signage required on site-specific projects and acknowledgement is required in published materials, etc., produced using funds from grants and loans (but not overly prescriptive).

- Change from current practice – although this was required in the past.

V. WAC 173-98: Differences Between the Proposed Rule and the Adopted Language

The following section discusses the differences between the rule as it was proposed and the language that is being adopted. The changes are minor, with most of them being clarifications. A few are to correct errors and one set of changes is intended to provide consistency with policy direction Ecology has communicated throughout the amendment process.

General:

- In numerous places the abbreviation IUP was written out as "Intended Use Plan" for clarity.

WAC 173-98-020 (Definitions):

- Subsection (2), the definition of "Applicant," was shortened from "…a public body requesting financial assistance for water pollution control facilities projects authorized in section 212 of the act. "Applicant" can also mean an entity other than a public body which requests financial assistance authorized by sections 319 and 320 of the act. An entity must be financially stable and clearly have the capacity to repay their loans" to simply "…a public body that has applied for funding." This is for simplicity, clarity, and to coordinate better with the language in the Centennial Rule (WAC 173-95A).

- Subsections (17) and (18) each contained the phrase "in order to meet the recipient's National Pollution Discharge Elimination System or state waste discharge permit" and in each case this phrase has been amended to read: "in order to meet the <u>water quality based effluent limitations in the</u> recipient's National Pollution Discharge Elimination System or state waste discharge permit." This change is intended to clarify what parts of the discharge permits the definition was referring to, and to coordinate better with the language in the Centennial Rule (WAC 173-95A).

WAC 173-98-040:

- Subsection (1)(d):

  Was:

  > (d) When there is limited demand for funds from the current IUP, projects from any past IUP, starting with the most recent, may be funded in priority order, where:
  > (i) Cost overruns to a funded project are shown to be justifiable; or
  > (ii) Final cost reconciliation shows that higher costs are reasonable; or
  > (iii) A funding offer was withdrawn due to an applicant's inability to demonstrate readiness to proceed; or
  > (iv) The applicant did not receive any or all of the moneys requested for the project.

Due to clarifications of the role of federal law, discussions with the Environmental Protection Agency, and a desire to clarify exactly what this means, it was edited to read:

> (d) When there is limited demand for funds from the current funding cycle, projects from any past intended use plan, starting with the most recent, may be funded in priority order, where:
>
> (i) Cost overruns to a funded project are shown to be justifiable; or
>
> (ii) Final cost reconciliation shows that higher costs are reasonable; or
>
> (iii) The applicant received partial funding for the project and the change is shown on a current intended use plan.

Subsection (2)

- The last sentence of this subsection read:

> "Applications for SRF financial assistance for nonpoint projects must address the remedies and prevention of water quality degradation associated with nonpoint source water pollution and must not be inconsistent with needs identified in the department's nonpoint source pollution assessment and management program."

Due to clarifications of the role of federal law, discussions with the Environmental Protection Agency, and a desire to clarify exactly what this means, the last sentence of this subsection was edited to read:

> "Applications for SRF financial assistance for nonpoint projects must implement the remedies and prevention of water quality degradation associated with nonpoint source water pollution and must not be inconsistent with needs identified in the department's approved nonpoint source pollution management plan."

WAC 173-98-050:

- In subsection (b) the proposed language was:

> (b) Nonpoint source and comprehensive estuary conservation and management category: Not more than twenty percent of the fund will be available for the implementation of program established under section 319 of the act for the management of nonpoint sources of pollution, and subject to the requirements of that act, or for the development and implementation of a comprehensive conservation and management plan under section 320 of the act relating to the National Estuary Program, and subject to the requirements of that act. Those projects will be under the nonpoint source and comprehensive estuary conservation and management category.

This was edited to reflect concerns from the Environmental Protection Agency that the exact meaning was not clear and possibly could be construed to be in conflict with federal law. The language being adopted reads:

(b) Nonpoint source and comprehensive estuary conservation and management category: Not more than twenty percent of the fund will be available for the implementation of programs or projects established under the department's approved nonpoint source pollution management plan established under section 319 of the act, and intended for the management of nonpoint sources of pollution, and subject to the requirements of that act, or for programs or projects established under a comprehensive conservation and management plan under section 320 of the act relating to the National Estuary Program, and subject to the requirements of that act. Those projects will be under the nonpoint source and comprehensive estuary conservation and management category.

WAC 173-98-060

- In subsection (2)(a), (2)(c)(i), and (2)(d), identical phrases which Ecology intended to changed were not changed in the proposed rule.

  The three phrases were "approved or deemed approvable" and are changed in the adopted language to read simply "approved."

  The corresponding phrases in the Centennial Fund rule, WAC 173-95A(080)(2), were correctly amended in the proposed language, and all policy statements and presentations Ecology made during the development of the amendments made it clear that this was the intention. The Financial Advisory Council was in support of this change. Leaving it in the proposed rule was simply an oversight.

VI. Summary of Comments and Responses

Oral testimony at Public Hearings

There was no oral testimony during the public hearing held on October 25, 2000, in Yakima, or during the public hearing held on October 26, 2000, in Spokane.

At the public hearing held on October 27, 2000, in Bellevue, there was oral testimony from a single person. The only oral testimony was that of Jolene Unsoeld, of Olympia. These comments were almost the same as the written comments that she provided at a later date during the public comment period, so most of them will be addressed with her written comments.

Oral testimony from Jolene Unsoeld, citizen, Olympia, at hearing in Bellevue, October 27, 2000:

Ms. Unsoeld discussed the history of the program and of grants for water quality in Washington state. She summarized the intent of Chapter 70.146 RCW as "do good things and do it equitably, and keep the big picture in mind," and stated that ought to be what guides us.

Response: Ecology agrees with these statements.

She discussed the formula used to determine financial hardship.

Response: Her discussion, and Ecology's response, will be included below with the discussion of her written comments.

Ms. Unsoeld also addressed the local priority process and rigid rules requiring signatures of a variety of public bodies.

Response: This issue will also be included below with the discussion of her written comments.

Ms. Unsoeld commended Ecology on the integration of the different funds but stated that the complex new rules would have to be used side by side with the guidelines. She suggested combining all the documents.

Response: Staff does not believe this is the case. The guidelines are carefully updated each year so that applicants do not need to consult the rules in order to apply. The rules provide consistency, predictability, policy statements to back decisions, etc. Much of the policy found in the rules does not need to be consulted at the time of application. The guidelines provide the information an applicant needs to apply, negotiate a funding agreement, and receive funds. They provide this information in a format that makes using it at that point in time simpler. Due to legal restrictions on how a rule is phrased and the layout that must be used, etc., it is impossible to write a rule that can be read as easily as our annual guidelines.

Written Comments

The public comment period ran from October 6, 2000 to November 3, 2000. During that time period, three written comments were received. Copies of the written comments will be provided on request, and are summarized and responded to below. For each comment, separate issues are summarized and responded to independently.

Written comment 1:

Tom Clingman, utility planner, Thurston County Department of Water and Waste Management, delivered October 30, 2000:

- General – Mr. Clingman comments on an aspect of the Fiscal Year 2001 funding application (which he acknowledges is beyond the scope of the rule and hence of this responsiveness summary) allowing more points for projects that are already approved. He believes that this is invidious and asks that projects that are in the approval process get the same points as those already approved.

Response: The application form is not part of the rule. However, staff would like to point out that under the proposed rules, applications will not be considered unless the prerequisite documents are approved by the end of the application period, making this distinction irrelevant.

- General – Mr. Clingman discusses the other ways besides the rules that policy statements are made such as the annual guidelines and appendices, evolving priorities with Ecology staff, etc. He mentions that there are several items not in the rules which he feels are significant, including GMA compliance issues. He asks what criteria were used to decide what would be in the rule and what would be in the guidelines and appendices, and what process there is for affected jurisdictions to provide input into policy that is not in rule form. He asks that such a process be created and points at the Puget Sound Action Team's PIE grant process as an example of one which communicates its annual focus well.

Response: The Financial Assistance Council is a group such as he describes and staff has mentioned this group at all public meetings, hearings, and workshops in recent years. The group includes representation of a wide variety of stakeholders and the representatives are expected to communicate with their constituency.

Regarding the issue of communicating annual focus, Ecology rarely has as intense of an annual focus as the PIE grants. Part of the reason for this rule is to provide a consistent program from year to year. What focus changes these programs do have is usually based on legislative provisos and is communicated with the annual guidelines and at the annual funding workshops, where possible.

- 173-95A-020(24) – Mr. Clingman comments that the "funding cut-off line" is too inflexible. He feels that there are times when a local government is offered funding for a project and later is unable to use the funding and feels that a clause allowing projects below the original cut-off line to be funded if additional funds become available.

Response: Ecology normally does this during the comment period (between the draft and final Offer Lists). It can also be done after the offer list with funds appropriated by the legislature for the current biennium. The current phrasing of Chapter 173-95A WAC allows enough flexibility to do this at a later period in the funding cycle if current biennium funds become available due to declined offers, deobligation, etc. The use of the term "funding cut-off line" is intended as a convenient definition to convey a concept and is never used in the rule to refer to a fixed, inflexible line.

In Chapter 173-98 WAC the situation is similar. Any projects that have been listed on the Intended Use Plan may be funded if the funds become available. There is more flexibility under federal law.

- 173-95A-020(32) – Mr. Clingman believes that interlocal expenses should be allowed as cash match and asks that clarification be made in the rule as to whether this is the case.

Response: Interlocal expenses are considered cash, as defined in the document "Administrative requirements for Ecology Grants and Loans." However, it would be easy to clarify in the rule and Ecology has done so – see 173-95A-020(32).

- 173-95A-020(34) – The definition of local priority process is unneeded and Mr. Clingman suggests it be deleted.

Response: Staff feels that it is important to define local prioritization in the definitions section (173-95A-020) so it can be used throughout the rule without cumbersome definitions appearing each time. Ecology did make a change to this definition to further clarify it.

- 173-95A-030(6) – Mr. Clingman questions Ecology's reasons for having two ceiling limits for nonpoint based on whether or not there is an entirely cash match or if there is any in-kind match for the project. He feels that in-kind is often crucial to a project if Ecology is worried about in-kind being poorly tied to the project that this could be clarified in the funding agreement rather than through the distinction in the ceiling amounts.

Response: The reasoning behind the differing ceiling amounts is that, while both cash and in-kind show local commitment, there is a much greater level of difficulty in administrating in-kind, both for Ecology and for the funding recipient. The ceiling amounts are raised to reflect an increase in the cost of projects, etc. Activities projects which are entirely matched with in-kind are now allowed for all applicants, not just a few. However, managing in-kind on a large scale (such as would be required for a 25 percent match for a $500,000 grant) would make for a huge administrative load. Staff agreed with the Financial Assistance Council that the two ceiling amounts give applicants an opportunity to apply for larger projects when a cash financial commitment is available, but still allows the flexibility for smaller projects to use volunteer labor and donated materials.

- 173-95A-030(8) – Mr. Clingman supports the new considerations for financial hardship and points out that the maximum grant amount is now limited to 50 percent.

Response: Comment noted. The grant amount was limited to 50 percent of total eligible costs within the ceiling amount in the past as well, although it could be increased in cases of documented financial hardship. The proposed rule language allows some increases above 50 percent (within the ceiling amount) in limited situations based on unemployment levels.

- 173-95A-030(9) – Mr. Clingman also supports the continued flexibility to lower interest rates if warranted.

Response: Comment noted.

- 173-95A-050 – Mr. Clingman goes on to discuss local priority points, stating that he believes the rules change little from the process used in Fiscal Year 2001, which he feels worked well. However, he feels that the provision that more details will be provided in each year's guidelines reopens the issue. He feels that the process should be either entirely in the rule or entirely in the annual guidelines.

Response: The entire process is spelled out in the rules – the intent of staff was that the guidelines would put this into effect. Upon review, the only part that staff considered part of the actual policy that is not in the rule is that Ecology would accept proof that a local prioritization group had attempted to get a signature in lieu of an actual signature. Staff also agreed that the reference to guidelines is not needed. In response staff replaced 173-95A-050(7) with language about accepting proof in lieu of signature. Another line was added at 173-95A-050(8), stating when the local priorities were due each year, in part to further ensure that the entire process was covered in the rule and did not need further details added in guideline each year. Of course, Ecology will include a detailed, user friendly discussion of the local priority process in each year's guidelines for the convenience of the applicants. This discussion will include a statement of the philosophy behind the local prioritization process. It will also include information on the legislative, statutory, and budgetary provisos and other directives which Ecology is required to consider in priority-setting, so that the local groups can use these as guidance in their prioritization process.

- 173-95A-100(1) – Mr. Clingman comments on the requirement to begin work in a timely manner, pointing out that the challenge of permitting will make the timeline difficult for many applicants. He suggests that certain specifically stipulated delays that are beyond the control of the applicant should be itemized in the rule, allowing more time to begin the project.

Response: Eligible expenses related to a permit application process are considered valid expenses in a facility project and so constitute "beginning the project." Therefore, extending the time allowed to begin a project for permit problems is not an issue.

Written comment 2:

Written Comments From Jolene Unsoeld, citizen, Olympia, delivered by hand, November 3, 2000:

General Comments:

- General – both rules – Ms. Unsoeld points out that Chapter 70.146 RCW, "*Water Pollution Control Facilities Financing*," is missing in the publication Water Quality Program Financial Assistance Laws and Rules, December 1999, and Water Quality Program Financial Assistance for Fiscal Year 2001 -- Volume Two: Appendices, December 1999, page 9, Appendix C.

Response: This was not intentional and staff takes full responsibility for leaving it out of the volume of laws and rules as well as leaving it out of the list of laws and rules in another document. The document containing the collected laws and rules was added to the funding package as a convenience at the last moment and in haste Chapter 90.48 RCW, "Water Pollution Control," was put in instead of Chapter 70.146 RCW, "Water Pollution Control Facilities Financing." During the development of the proposed rules Chapter 70.146 RCW was closely consulted at all stages.

- General – both rules – Ms. Unsoeld believes that Ecology should work with its sister agencies and departments to develop such a strategy and to develop measures to track infrastructure expenditures and programs and their success.

Response: Staff agrees heartily and such an effort is already underway.

- General – both rules – Ms. Unsoeld states that the rules add unnecessary complexity, pointing out that the Financial Assistance Restructuring Committee (a committee which recommended to Ecology that the rules be amended) said to "keep the process simple and user-friendly." She cites the added length of the rules as an example of the additional level of complexity. She notes that the same restructuring committee report recommended that Ecology adopt the funding method into regulation, which she says inserts one more layer of technical language that each local government applicant must digest. She points out that the annual guidelines for Fiscal Year 2001 were "pretty readable" and feels that the user will now have to read the guidelines side-by-side with the rule.

  She discusses the integration of the funding application cycle for the Centennial Clean Water Fund, the State Revolving Fund, and Section 319 Nonpoint Source Fund. She then asks why Ecology does not follow these same guidelines by better integrating the regulations. She suggests "cut the length, complexity, and duplication of these proposals."

  She further states that in addition to making things simpler for the public if the regulations are much simpler, that it would give Ecology flexibility to administer the statute which should not be thrown away.

Response: Ecology did consider combining the rules but rejected that idea for several reasons. First, different chapters of the RCW control the two programs and staff felt it would be more intuitive to have a rule related to each of these two chapters. Second, federal law mandates the uses and limitations of the SRF but not the centennial Fund. Third, the two rules already existed and it would have required combining them and then rescinding one of them, potentially

confusing to anyone who knew that a specific rule pertained to a specific program. Finally, the areas in which the two rules must differ – for example in some aspects of eligibility or the many areas that are unique to a loan program – would add, not reduce, complexity.

Staff believe that the situation is not as complex as Ms. Unsoeld thinks. Applicants will not need to have three documents spread out during the application cycle to understand the programs. The guidelines will be thoroughly updated to reflect the changes for Fiscal Year 2002 (and subsequent years). Applicants do not need to use the rules when developing their applications. All information relevant to the application process is in the guidelines. In fact, staff attempt to reduce the complexity by (whenever possible) speaking only of grants / loan eligibility or facilities / activities eligibility, etc. rather than about eligibility for the individual funding programs (SRF, Centennial, Section 319). Applicants are asked to apply for funding for their project (understanding that certain types of project or project component may be limited to a particular funding source). Ecology staff determine which funding source (or combined sources) is most appropriate for funding specific projects once a prioritized funding list has been established.

Staff understands that the rules are complex; it's hard to write about issues such as grants and loans in legal language without a degree of complexity. Ecology believes that the use of comprehensive guidelines (written in a format that reduces the differences between the programs) for the purposes of application and well-planned and conveniently located application workshops help make up for the complexity of the rules.

- General – both rules – Ms. Unsoeld feels that it adds to complexity to begin every subsection of the code with a question.

Response: Ecology's rule drafting guidelines suggest "Use a question and answer format in your section headings. This can be used in your draft to help you discover whether or not your rule sections say what the headings says they do, whether or not your rule sections are in the order you want them to be. You can also use the question and answer headings for your final rule." Staff followed the guidance and note that this is recommended by many of the clear rule writing experts today.

- General – 173-95A – Ms. Unsoeld states that the Legislature has diverted funds from the Centennial Fund.

Response: Comment noted.

- General – 173-95A – Ms. Unsoeld states that the appropriate and required local match is set forth in RCW 90.48.290 where it says "No grant shall be made in an amount which exceeds the recipient's contribution to the estimated cost of the project…" She knows that Ecology staff do not agree that RCW 90.48.290 applies to the Centennial Fund program she believes it does. She believes that Ecology is out of compliance with this statute and has exercised a vast array of deviations from the 50 percent limitation, without standards or authority for doing so. She states that she can find no statutory authority that would permit such a

digression. She also states that in the proposed new rules, Ecology is proposing variations from the 50 percent match, which she believes are violations of RCW 90.48.290(1).

Response: The language in RCW 90.48 was written prior to the creation of the Centennial Fund and last amended in 1987 when the Federal Clean Water Act was amended. It references grants given as part of (or match to) the now completed Federal Construction Grants program. This is clear when one looks at 90.48.290(2) which states that no grants can be given if the project "does not qualify for and receive a grant of federal funds…" If this were in reference to the Centennial Fund, all grants would be impossible, because the federal grants program has no new money unless specifically authorized by Congress (although Ecology is still assisting the US Environmental Protection Agency in the final close-out of some of the grants from this program). The legislature created and continues to fund the Centennial loan and grants program – it is clear that the legislative intent is for this program to continue. Chapter 70.146 RCW was codified explicitly to reflect the creation of the Water Quality Account and the loan and grant program that is now known as the Centennial Fund. This is the RCW that guides this program and this rule.

Ecology has been implementing Chapter 70.146 RCW, Water Pollution Control Facilities Financing since the program was established by the Legislature in the 1986. In addition to the statute, the Legislature gave Ecology the following additional direction in Part 7, Section 702 of the 1987-89 capital budget:

> *(b) In determining the appropriate level of state assistance for eligible facilities and activities, the department shall consider:*
>
> *(i) The need to provide additional assistance for eligible activities undertaken by local public bodies which lack taxing or revenue generating authority; and*
>
> *(ii) The need to provide additional assistance for eligible facilities undertaken by local public bodies that would suffer severe financial hardship in the absence of such additional assistance.*

While this was only a single biennium's budget, it was the first biennium of full implementation of the Centennial Fund. The language of the original Centennial Fund rule, Chapter 173-95 WAC, was guided in part by the provisions of that budget and (for financial hardship) the specific concepts contained in the excerpt above. The provisions for financial hardship determination and consideration from that rule has continued to guide the Centennial Fund throughout its history, even after the rule itself was rescinded in 1994. Since that time, the legislature has repeatedly stressed the importance of assistance to small towns and economically distressed communities.

Comments related to specific sections in 173-95A:

- 173-95A-020(11) – Ms. Unsoeld states that the Centennial Fund is not intended to fund growth and quotes RCW 70.146.010 which says that the intent is not to fund capacity beyond

110 percent of existing needs. She points out the definition of eligible costs doesn't mention the restriction on capacity beyond 110 percent.

Response: Ms. Unsoeld is correct that the language in RCW 70.146.010 clearly prohibits Ecology from using Centennial Funds for funding the portion of the costs of a facilities project intended to address growth beyond 110 percent of existing needs. The definition of eligible costs in 173-95A-020(11) attempts only to define the concept, not to express any of the many types of specific eligible and ineligible projects or project components. These are discussed in detail in WAC 173-95A-060. In WAC 173-95A-060(6)(b) it states that "construction of water pollution control facilities with reserve capacities to meet up to 110 percent of existing residential needs" is eligible for loans. In WAC 173-95A-060(7)(b) it further states that "construction of facilities for the control, storage, treatment, disposal, or recycling of domestic wastewater to meet existing need" may be eligible for grants when hardship has been demonstrated. Nowhere in the list of eligible project types and project elements is there any provision for funding growth beyond 110 percent of existing needs using Centennial Funds, as a grant or as a loan, even in hardship situations.

- 173-95A-020(49) – Ms. Unsoeld believes that the definitions of "small flows" in the two rules should be the same, but there is a difference in how much detail is included in the definition related to what portion of the total flow is considered "small."

Response: Ecology believes that Ms. Unsoeld was comparing the definition in one rule with regulatory language in the other rule. The definitions in the two rules agree, as does the regulatory language.

- 173-95A-030(8) – Ms. Unsoeld comments that she supports the concept of hardship consideration for grants and loans but has concerns about how the hardship is determined under the proposed rules, does not understand the basis for the formula (sewer rates as a percent of median household income), and offers some ideas for a more equitable system of hardship consideration.

  Summarizing the intent of the legislation (Chapter 70.146 RCW), she points out that financial capability is part of what Ecology is required to consider in awarding funding. She believes that the formula is based on an incomplete theory and greater equity would result if other considerations were included instead of making the entire hardship determination fit in one equation.

Response: Ecology agrees that hardship consideration is important but we believe that we have designed an equitable system.

- 173-95A-030(8) – Ms. Unsoeld discussed the formula used to determine hardship, and says that it does not fit with the idea of equity because some communities that have a median household income above the state's average have qualified for hardship while some that are well below the state's average have not qualified. She provided some examples from the Fiscal Year 2001 Offer List.

Response: The financial hardship process that Ecology has developed is based on the project's financial impacts on the residential ratepayer, expressed as a percentage of the median household income in the project area. Where an expensive project serves a small number of households, there may be a particularly heavy per household financial impact. This may put even a high-income area into a situation where there are extremely high sewer rates and they place an undue burden on the residential ratepayer. While this is an extremely rare situation, Ecology chose not to design a system that would deny relief when such a situation does occur.

Her list of specific projects which received or didn't receive hardship consideration on the Fiscal Year 2001 funding list ignores the many other factors which came into play besides just the median household income. These factors include the type of project (hardship is not applicable to some types of project, such as facilities design or planning, and all activities), the financial impacts of the project, whether the applicant has secured all other necessary financial assistance for the project, and whether or not the applicant even asked for hardship consideration. Finally, the fact that some applicants did not receive funding at all might have been due to the fact that the project received a lower priority ranking in the rating system. The rating system, as required by RCW 70.146.070(1)(a), is based on protection of water quality and public health.

- 173-95A-030(8) – Ms. Unsoeld suggested a two-step process for determining hardship. The first would be a threshold above which a community would never qualify for hardship – for example, 75 percent of the state median household income. Along with median household income, she said that she believes that other factors might be included in the threshold such as unemployment, and the average cost of homes in the community. She suggested making unemployment be one of the factors to consider in establishing a "hardship" threshold, and secondly to make it an even percentage of the state-wide unemployment rate (i.e., 150% of average state-wide unemployment rate for the last three years). The second group of factors that she said should be included are what other related actions the applicant has pursued to help themselves, such as other water quality projects, collecting fees to pay for future expansion, etc.

Response: Ecology staff and the members of the Financial Advisory Council had discussed at length methods such as Ms. Unsoeld describes. While this is an interesting alternative and has merit, there are also reasons why the Council and Ecology staff and management eventually rejected such methods. First, staff note that the system (as adopted) is a sliding scale by design, which makes it far easier for a low-income area to receive financial hardship consideration than a high income area. However, there are cases in which the financial impact of a system may be extreme on a small group of homeowners, having an unbearable impact on the ratepayer even where an area is not a poor community.

Moreover, it appears that with Ms. Unsoeld's proposed alternative there is a potential for a high level of complexity for the applicant and for Ecology – it would be very administration-intensive. For example, communities might need to survey a project area for median home value or collect evidence of other projects and activities, etc., before applying for funding. Then, Ecology staff would have to review the additional amount of data. Ecology does not have staff with expertise is real estate market value, or areas such as this. Ecology is constantly attempting to simplify

the application and evaluation processes – for applicants as well as for the agency – and this method would tend to increase the complexity.

- 173-95A-030(8)(c)(iv) – Ms. Unsoeld believes that the proposed language is unnecessarily complicated.

Response: Ecology agrees that the language is complicated, but also that it is stating a very complicated concept. Ecology will include a simpler discussion, with examples, in the application guidelines for Fiscal Year 2002 and subsequent years.

- WAC 173-95A-030(8)(iv) and WAC 173-98-030(3)(iv) – Ms. Unsoeld commented that these two places in the two rules state that in certain situations where the normal method cannot be used, "financial hardship determinations will be made on a case-by-case basis." She asks "What sort of factors will be considered?"

Response: This would be limited to rare cases where there is no residential user base to compute financial hardship – such as loans for facilities projects associated with reducing water quality impacts of irrigation practices. The factors might be hardship designation for the county, crop prices, debt load of the irrigation district, or water costs in relation to similar districts. This would never be applied without a thorough demonstration of hardship and financial impacts on the loan or grant recipients.

- WAC 173-95A-030(8)(iv)(b) – Ms. Unsoeld notes that operation and maintenance costs are not an eligible expense under the current or proposed rules and agrees that this is the correct course of action, and sees no justification for Ecology to have included operation and maintenance as part of the costs when determining hardship eligibility. However, she also states that she feels that if certain changes are made to the hardship analysis form, the problem may be eliminated. While she does not specify the changes, she says that Ecology staff outlined proposed changes to the form that would satisfy her objection. She commented on the problem to raise awareness of it.

Response: Ms. Unsoeld is correct in her statement that these costs are not eligible under the rules, but that they are used as one of the financial factors in computing hardship. This is true of other costs as well – for example, Ecology will not pay for the existing debt service, but it is used in computing hardship. The reason is that these are real costs, that the local sewer customers pay for with their sewer fees, and so are valid indicators of hardship. As she notes, the form used for Fiscal Year 2002 will have major revisions and Ecology hopes these changes will address her concerns.

- 173-95A-050 – Ms. Unsoeld expresses support for the concept of locally derived priorities for grant and loan funding but has concerns about specific provisions in the proposed rules related to local prioritization. The following paragraphs summarize her concerns.

  Ms. Unsoeld comments that she does not understand the connection to the watershed planning act and using WRIAs for local prioritization. Allowing local watershed planning groups organized under the Watershed Planning Act to act as the local prioritization group.

Her reservations are based on the fact that there was only a two-year test of the local prioritization process, on the fact that the purposes of the Centennial Clean Water Fund (RCW 70.146.010), the State Revolving Fund (RCW 90.50A.005), and the Watershed Planning Act (RCW 90.82.005) are very different in their objectives, with the watershed planning group mainly concerned mostly with water quantity and the others with Water Quality.

She is also concerned with long-term accountability and appearance of fairness related to having these groups do the prioritization, suggesting that process in the future could be undermined if there is any appearance that the members of the watershed planning groups might trade favorable rating on local prioritization of grants and loans for later support on water rights issues.

Response: Ecology believes that even the first year of the local prioritization pilot was a success, and during the second year only a few of the state's 62 WRIAs had problems. Ecology's Financial Advisory Council, composed of stakeholders, has also recommended that Ecology proceed with this approach. Ecology believes that local prioritization is ready for full implementation.

The watershed planning groups consist of representatives of agencies, etc. that have a strong interest in water quality as well as quantity, and in fact, may include a water quality focus in their day-to-day responsibilities as a group, too. Ecology believes that where these groups exist, allowing them to be the lead group for the purposes of local prioritization encourages cooperation, reduces the duplication of effort, and rewards the areas where such groups have been created. Because the grants and loans offered under the proposed rules do not address water resources, staff does not agree that there is a conflict of interest.

- 173-95A-050(4) – She comments that it would be unfortunate if FORM (necessary participation and sign-off of each WRIA principal) is a priority over SUBSTANCE (providing financial assistance for highest priority environmental needs).

Response: Staff understands how this can be seen as merely form, but does not agree that this is the case. Ecology provides a matrix of required signatures for each local prioritization area, so the applicants do not need to figure out which signatures are needed. If they simply cannot get cooperation from a required signatory, Ecology accepts proof that they tried to get a signature and accepts the agreement even without that signature. The only remaining reason not to have a signature is that the group doing the local prioritization intentionally chose to exclude the missing group – a true problem and an unacceptable situation, not simply a matter of form. Local priority-setting is an opportunity to get local decision-makers together to make coordinated decisions – and to reward those who do this. Staff firmly believes that true local coordination is invaluable and should not be diluted.

Due to this comment, another comment, and our own review of this section, however, Ecology has clarified the rule to include information about accepting proof of that the local prioritization group has attempted to get a signature in lieu of the signature. See Chapter III for details on this and other changes between the proposed rule and the adopted language.

- 173-95A-050 – Ms. Unsoeld commented that Ecology should not put local prioritization into the rule but should wait a few years until it is more tested, and then add it to the rule.

Response: Staff saw much success even the first year of this process and only a few of the state's 62 WRIAs had problems the second year. Ecology believes that this approach is ready for full implementation.

- 173-95A-050 – Ms. Unsoeld discusses in general terms the purpose of the GMA, to plan for and control growth, and states that the Centennial Clean Water Fund and State Revolving Fund are not intended to support growth. She states that the task of making regulations out of the statutes for the GMA and the funding programs is made difficult because the GMA is out of date. She concludes that this makes it imperative that Ecology cooperate closely with the Department of Community, Trade and Economic Development on GMA issues. Ms. Unsoeld states her belief that Ecology should have been conferring with the Growth Management Program under the Office of Community Development throughout the development of these amendments and notes that there isn't a representative of the Office of Community Development on the Water Quality Financial Assistance Council.

Response: The language in the rule, although it was moved, was not substantively changed in this amendment process and is effectively the same language that was the main body of Chapter 173-95A WAC as adopted in 1997, well before this amendment process began. While she is correct that no one from the Growth Management program was on the Financial Assistance Council during the development of the language for the amendments, staff from a variety of agencies including the Growth Management Program of the Department of Community Trade and Economic Development were available during the original development of that part of the rule. For consistency, the interagency group developed very similar language for this rule and for Chapter 399-30 WAC which guides the Public Works Trust Fund.

Again, during the development of the final language for the rule, Ecology Staff asked Shane Hope, Managing Director of the Growth Management program, to review the language. She did so, and responded that the language meets the requirements of the GMA. She reminded Ecology staff that the Governor, in signing the bill that amended the GMA, directed Ecology to interpret the exceptions narrowly.

- 173-95A-050 – Ms. Unsoeld notes that the applicants for funding and their proposals must be in compliance with the GMA and quotes RCW 36.70A.110(4) (the RCW which codifies the GMA) which includes an exception to the prohibition of extending urban services to rural areas when such extension is "necessary to protect basic public health and safety and the environment." She also quotes from RCW 70.146.070(2), which states that Ecology cannot give grants and loans for water pollution control facilities when the applicant is out of compliance with the GMA, again providing an exception "to address a public health need or substantial environmental degradation."

  She discusses what counties need to plan under the GMA and the reasons behind certain provisions in the act. She states that there are additional references for determining non-

compliance and that these references should supplement Ecology's thinking and the relationship of the GMA to water quality financial assistance programs.

She believes that Ecology should take no further action on the proposed rule amendments until it has discussed with the Growth Management Program under the Office of Community Development how best to coordinate these standards and regulations between the two agencies and their respective statutes. She also believes that a pending decision of the Court of Appeals will require changing in wording in the rules.

She summarizes her position on GMA by saying that the only acceptable language concerning GMA compliance to the proposed rules would be directly from the GMA itself. She believes that Ecology should not use language that she is certain the courts will make null and void.

Response: Ecology, as required by 1997 amendments to RCW 70.146, wrote the rule amendments to allow some projects to proceed even when the jurisdiction is out of compliance with the GMA, if the project is necessary due to "substantial environmental degradation" or "public health need." This only applies to projects which are otherwise eligible for funding, and have received a priority ranking high enough to be funded. As noted above, there was close cooperation with the Growth Management staff during the development of this language.

Ecology does not agree that the rule is inconsistent with the GMA. In fact, it is a very literal interpretation of the GMA-required language in RCW 70.146.070(2). No change is needed to this language, which was written with the help of staff from Growth Management, the Public Works Board, the State Department of Health, the Office of the Attorney General, and several different groups within Ecology.

If a court decision changes the situation, Ecology should respond at that time, but it would not be acceptable practice to make changes to the rule in anticipation of that decision.

Comments related to specific sections in 173-98:

- 173-98-030(3) – see Ms. Unsoeld's comments on 173-95A-030(8) and subsections which cover the same subject matter

- WAC 173-98-050(7)(d)(iii) – Ms. Unsoeld addresses what she calls a new definition which states that capacity in excess of twenty years is an ineligible cost. She states that this language subverts the 110 percent limitation, and is a violation of law. She asks that Ecology not use these rule amendments to subvert the law.

Response: What Ms. Unsoeld calls a new definition in WAC 173-98-050(7)(d)(iii) is not new, nor is it a definition. This statement of non-eligibility has been in that rule since it was written more than ten years ago, forbidding SRF loans for facilities projects or components addressing capacity in excess of twenty years. This reflects the different regulations that guide the SRF and the Centennial fund. The federal regulations say "these funds may be used to fund the cost-effective reserve capacity of these projects" (Part III Environmental Protection Agency 40 CFR Part 35: State Revolving Fund Program Implementation Programs Regulation: Rule – CFR

35.3135: Specific Capitalization Grant Agreement Requirements). The EPA defines the cost-effective reserve capacity as being 20 years. Ecology has long made the distinction of allowing Centennial grants to the amount of existing need, relegating the portion up to 110 percent of exiting need to loans from the Centennial or SRF programs (but in practice, nearly always the SRF), and loans for greater than 110 percent of existing need (but no more than the amount to cover costs of projected growth for twenty years) to the SRF. This area of difference is one of the most profound differences between the SRF and the Centennial program.

- 173-98-075 – see Ms. Unsoeld's comments on 173-95A-050 which covers the same subject matter

Written comment 3:

Faxed by Nancy Conrad, Mayor, the Town of Coupeville, received November 3, 2000

- 173-95A-030(8): Mayor Conrad supports the provisions made for financial hardship but asks that a correlation be made to sewer rates in the community.

Response: The hardship determination is based on the communities sewer rates.

- 173-95A-040(3): Mayor Conrad points out that her community is proactively addressing potential problems but that the application gives a higher priority to projects addressing existing environmental problems. She asks that consideration also be given to communities with emergent problems which they are trying to address.

Response: While protection of the state's water has always included the funding of projects addressing emergent problems, the Centennial Fund gives a higher priority to projects addressing the correction of demonstrated, existing problems. The emerging problems will also receive priority when possible but the small amount of available funding will always be a limiting factor.

- 173-95A-080: Mayor Conrad asks that Ecology reconsider making documents which are deemed "approvable" acceptable as prerequisites to being considered for funding, and offers the problems facing her town as an example of why this is an important point.

Response: Ecology is under pressure from the State Legislature to come up with ways to be more timely in the use of money from the Centennial Fund. Specifically, the Supplemental Capital Budget for Fiscal Year 2001 included language directing Ecology to developing policy to establish time limits for distribution of funds. Several aspects of these rule amendments are intended to facilitate the flow of money. One such area is this provision, which is intended to keep projects on track. Many times a project proponent has believed they are close to being ready to begin a project, but it has turned out that they were not. This has sometimes allowed projects that are not ready to proceed to compete for funding. This can potentially have the effect of denying funding for a project that is ready. In extreme cases it leads to funds being tied up for several years before the recipient is able to use the funds. A project that does not have approval of its prerequisite documents is not as well advanced along the path towards

completion than a project that does have approval. This is true not only in the case of the direct issue of document approval but also in the parallel issues of environmental review, council or board approval, etc.

VII. Summary of Public Involvement Actions

Water Quality staff have been working for more than a year on amendments to Chapter 173-95A WAC (Uses and Limitations of The Centennial Clean Water Fund) and Chapter 173-98 WAC (Uses and Limitations of The Water Pollution Control Revolving Fund). Public involvement in this rule process was a top priority from the start. Staff developed – and stuck to – a public involvement plan that helped streamline the whole process. Here are some highlights:

Financial Assistance Council: The existing "Financial Assistance Council," a stakeholder group, made the rule the major subject of their semi-monthly meetings from November 1999 to November 2000.

Pre-draft involvement: Widespread public notice was given early in the process, before there was draft rule language. In April – still before the draft language – staff held four public workshops in Spokane, Moxee City, Tacoma, and Bellevue. These were publicized through press releases, mailings to about 2,400 interested parties, using the standard financial assistance mailing list of all known eligible entities and other interested parties (such as environmental groups, consultants, and associations), and to about 1,000 parties by e-mail (using the agency rules mailing list). There were also press releases to the agency's standard press release list. Eighty-one stakeholders attended the workshops and representatives of the press attended the workshops in Spokane and Moxee City.

Formal public notice of hearings and comment period: The state register published the draft rule language and hearing schedule in October, and staff posted materials on the Internet at the same time. The public notice process was the same as for the workshops, with the addition of notice in the state register.

Public hearings: There were three hearings – October 25, 2000, in Yakima, October 26, 2000, in Spokane, and October 27, 2000, in Bellevue. There were 21 stakeholders who attended the hearings, and representatives of the press attended the hearings in Spokane and Yakima. One citizen testified during the hearings.

Formal comment period: A one-month public comment period followed the announcement. During the public comment period, there was little comment. Staff attribute the lack of comments to the open, extensive public involvement process, to the clear explanation of the changes, and to some degree on the uncontroversial nature of the rule changes – not to any lack of interest on the part of the public. There were three written comments. One of the written comments was made by the same party as the oral testimony.

VIII. Implementation Plan

External Implementation

Ecology will publicize the rule changes through the annual funding *Guidelines,* through our annual funding workshops (held in four or more locations around the state in January of each year), through our Internet pages, and through direct contact with the many stakeholders we talk to on a daily basis.

Internal Implementation

Water Quality Program staff are responsible for rule implementation. Rule-writing staff will provide written material to guide implementation and hold informational meetings to assist other staff at headquarters and in the regions in understanding the rule changes. Training, in conjunction with our annual funding workshops, is also a distinct possibility if early discussion with regional staff shows it is needed.

Reporting Requirements

Centennial Fund: Ecology sends a biennial report to the legislature on the financial aspects of the agency's various water quality financial assistance programs, including the Centennial fund and the SRF, according to statutory direction and a formatting agreement with the legislative staff.

SRF: Ecology's agreement with the EPA includes requirements for Ecology to report annually to the Environmental Protection Agency (EPA) on the SRF.