DEPARTMENT OF ECOLOGY
State of Washington

Final Regulatory Analyses

Including the:
Final Cost-Benefit Analysis
Least-Burdensome Alternative Analysis
Administrative Procedure Act Determinations
Regulatory Fairness Act Compliance

Chapter 173-566 WAC
Streamflow Restoration Funding

June 2019
Publication no. 19-11-074

Publication and Contact Information

This report is available on the Department of Ecology's website at:
https://fortress.wa.gov/ecy/publications/SummaryPages/1911074.html

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Chapter 173-566 WAC

Streamflow Restoration Funding

by

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for the

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Washington State Department of Ecology
Olympia, Washington

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Acronyms

APA	Administrative Procedure Act
CBA	Cost-Benefit Analysis
FY	Fiscal Year
LBA	Least-Burdensome Alternative Analysis
LLC	Limited Liability Company
PCHB	Pollution Control Hearings Board
RCW	Revised Code of Washington
RFA	Regulatory Fairness Act
SAAM	State Administrative and Accounting Manual
TWRP	Trust Water Rights Program
WAC	Washington Administrative Code

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Executive Summary

This report presents the determinations made by the Washington State Department of Ecology (Ecology) as required under chapter 34.05 Revised Code of Washington (RCW) and chapter 19.85 RCW for the streamflow restoration funding rule (chapter 173-566 Washington Administrative Code (WAC); the "rule"). This includes the:

- Final cost-benefit analysis (CBA)
- Least-burdensome alternative analysis (LBA)
- Administrative Procedure Act determinations
- Regulatory Fairness Act compliance

Background to the rule:

In January 2018, the Washington State Legislature passed Engrossed Substitute Senate Bill 6091 (session law 2018 c 1), which directs Ecology to implement a program to restore and enhance streamflows. The law authorizes funds for projects designed to offset the impact of new permit-exempt domestic withdrawals and to restore streamflows to flow levels necessary to support robust, healthy, sustainable salmon populations. It authorizes the appropriation of $300 million (not to exceed $20 million in any given year) for a minimum of 15 years, as needed to distribute the $300 million in bonds authorized for such purposes.

The Legislature made up to $20 million available to fund projects in 2019 Fiscal Year (FY, July 1, 2018 – June 30, 2019). To guide the grant program for 2019 FY, Ecology issued "Streamflow Restoration Grants Fiscal Year 2019 Interim Funding Guidance."

Ecology is adopting this rule to establish and govern the grant program for funding cycles for FY 2020 and beyond.

Summary of the rule:

The rule establishes both guidelines and requirements for how and when Ecology distributes streamflow restoration funding.

Several guidelines explain how Ecology will process and evaluate grants. These guidelines explain internal operations and per RCW 34.05.310(4)(b) are exempt from this analysis.

The rule also establishes requirements for the following areas that grant applicants must follow to receive streamflow restoration funding:

- Eligible applicants
- Grant applications
- Funding priorities
- Project phasing
- Eligible project types
- Ineligible projects and costs

- Grant agreements and management
- Appeals

Summary of costs and benefits:

The rule is likely to impose costs on grant applicants by requiring them to comply with grant application requirements. Over the duration of the grant program, we estimate costs to include:

- $4,815 per applicant to fill out the application. Assuming 46 applicants per year, this equates to a net present value of $2.9 million.
- $90 to $1,799 extra per applicant for those applying for water acquisition projects. Assuming 11 applications for acquisition projects per year, this equates to a net present value of $13 thousand to $259 thousand.

Many, but not all, entities eligible to receive project funding under this grant receive another source of streamflow restoration funding through the *Planning and Participation Grants*. These planning grants could fund the costs incurred by the rule.

The potential benefits of the rule include:

- Increased certainty that grant funding will support projects that serve the public good and natural environment, rather than private or out-of-state interests.
- Increased certainty that grant funding will support projects that result in the most benefit to streamflows and the environment, that are likely to be successful, and that would not have occurred otherwise.
- Reduced administrative burden for applicants applying for grants. Increased opportunities for project sponsors to take advantage of cost efficiencies, cost savings, and other funding opportunities.
- Reduced administrative burden for Ecology in processing and reviewing grant applications.
- A less costly process for dispute resolution on funding decisions.

Ecology concludes, based on reasonable understanding of the quantified and qualitative costs and benefits likely to arise from the rule, that the benefits of the rule are greater than the costs.

Least-burdensome alternative analysis:

The goals and objectives of the authorizing statute are:

- To “ensure that water is available to support development” (2018 c 1).
- “To implement a program to restore and enhance stream flows by fulfilling obligations under this act to develop and implement plans to restore stream flows to levels necessary to support robust, healthy, and sustainable salmon populations” (2018 c 1 § 304).
- “To assess, plan, and develop projects that include acquiring senior water rights, water conservation, water reuse, stream gaging, groundwater monitoring, and developing natural and constructed infrastructure, which includes, but is not limited to, projects such as floodplain restoration, off channel storage, and aquifer recharge, or other actions

designed to provide access to new water supplies with priority given to projects in watersheds developing plans as directed by sections 202 and 203 of this act and watersheds participating in the pilot project in section 204 of this act" (2018 c 1 § 207 and § 208). After considering alternatives to the rule's contents, as well as the goals and objectives of the authorizing statute, Ecology determined the rule represents the least-burdensome alternative of possible rule contents meeting these goals and objectives.

Regulatory Fairness Act compliance:

Ecology analyzed the compliance costs of this rulemaking in this document. Based on this analysis Ecology determined the rule does not impact small businesses; see chapter 2.3.1 for a discussion of eligible and ineligible grant applicants. Therefore, Ecology is not required to prepare a small business economic impact statement (RCW 19.85.030(1)(a)).

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Chapter 1: Background and Introduction

1.1 Introduction

This report presents the determinations made by the Washington State Department of Ecology (Ecology) as required under chapter 34.05 Revised Code of Washington (RCW) and chapter 19.85 RCW for the streamflow restoration funding rule (chapter 173-566 Washington Administrative Code (WAC); the "rule"). This includes the:

- Final cost-benefit analysis (CBA)
- Least-burdensome alternative analysis (LBA)
- Administrative Procedure Act determinations
- Regulatory Fairness Act compliance

The Washington Administrative Procedure Act (APA; RCW 34.05.328(1)(d)) requires Ecology to evaluate significant legislative rules to "determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the law being implemented." Chapters 1 – 5 of this document describe that determination.

The APA also requires Ecology to "determine, after considering alternative versions of the rule…that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives" of the governing and authorizing statutes (RCW 34.05.328(1)(d)). Chapter 6 of this document describes that determination.

The Washington Regulatory Fairness Act (RFA; chapter 19.85 RCW) requires Ecology to evaluate the relative impact of rules that impose costs on businesses in an industry. It compares the relative compliance costs to small businesses to the largest businesses affected. Chapter 7 documents that analysis, when applicable.

The APA also requires Ecology to make several other determinations (RCW 34.05.328(1)(a) – (c) and (f) – (h)) about the rule, including authorization, need, context, and coordination. Appendix A provides the documentation for these determinations.

1.1.1 Rule and program introduction

In January 2018, the Washington State Legislature passed Engrossed Substitute Senate Bill 6091 (session law 2018 c 1), which directs Ecology to implement a program to restore and enhance streamflows. This is the authorizing statute for this rule.

The law authorizes funds for projects designed to offset the impact of new permit-exempt domestic withdrawals and to restore streamflows to flow levels necessary to support robust, healthy, sustainable salmon populations. It authorizes the appropriation of $300 million (not to exceed $20 million in any given year) for a minimum of 15 years, as needed to distribute the $300 million in bonds authorized for such purposes.

The Legislature made up to $20 million available to fund projects in 2019 Fiscal Year (FY, July 1, 2018 – June 30, 2019). To guide the grant program for 2019 FY, Ecology issued "Streamflow Restoration Grants Fiscal Year 2019 Interim Funding Guidance." This interim guidance was based on the authorizing statute and Ecology's Administrative Requirements for Recipients of Ecology Grants and Loans (the Yellow Book).

Ecology is adopting this rule to establish and govern the grant program for funding cycles for FY 2020 and beyond.

1.2 Summary of the adopted rule

The rule establishes both guidelines and requirements for how and when Ecology distributes streamflow restoration funding.

Several guidelines explain how Ecology will process and evaluate grants. These guidelines explain internal operations and per RCW 34.05.310(4)(b) are exempt from this analysis.

The rule also establishes requirements for the following areas that grant applicants must follow to receive streamflow restoration funding:

- Eligible applicants
- Grant applications
- Funding priorities
- Project phasing
- Eligible project types
- Ineligible projects and costs
- Grant agreements and management
- Appeals

1.3 Reasons for the adopted rule

Because streamflow restoration funding is a long-term grant program, establishing standards under a rule (rather than guidance) is consistent with financial management best practices. Establishing the program under a rule also:

- Provides the public with clear standards and transparency for how we will manage public funds; and
- Provides a process whereby the public has an opportunity to participate in developing those standards.

1.3.1 Eligible applicants

Establishing up front who is eligible and ineligible for streamflow restoration grant funding will help prevent those who are ineligible from applying for grants. This approach will avoid costs of ineligible applicants applying for grants and Ecology processing and rejecting those applications.

The rule defines “eligible applicants” to include:

- Washington State agencies
- Local governments and quasi-governments within Washington state (including special purpose districts)
- Federal government agencies
- Tribal governments with reservation lands or treaty rights within Washington
- Non-profit organizations

These entities have the authority to carry out streamflow restoration projects, they coordinate with each other, and are actively engaged in the types of activities that will meet the intent of the law. Ecology determined that these entities will carry out the work under the law for the greater good of the people of Washington State.

The rule defines an “ineligible applicant” as a:

- Private citizen
- For-profit business including but not limited to all forms of private partnerships, incorporated entities, or LLCs
- Foreign or out-of-state governments
- Any agents acting on behalf of such entities

Ecology determined that these entities are more likely to be acting in their own interests rather than prioritizing the public benefit. While private activities may have some public benefit, they are less likely to meet the intent of the law or have as much benefit as those activities carried out by the eligible applicants.

Foreign and out-of-state governments were deemed ineligible because they are more likely to pursue projects that benefit their jurisdictions and less likely to pursue projects with a direct benefit to the people of Washington State.

1.3.2 Grant application

Under the rule, entities requesting grant funding must complete and submit a grant application. This is standard procedure for a grant program. The rule lists the information an applicant must provide to be considered for a grant. Ecology considers all of the required information in the rule’s application necessary to adequately assess whether, and to what degree, the proposed project meets the intent of the authorizing statute.

1.3.3 Funding priorities

The rule outlines how Ecology will rank or score projects relative to each other. This priority system reflects the priority outlined in the authorizing statute.

1.3.4 Project phasing
The rule allows grant applicants to split their project into phases; this may be initiated by the applicant or by Ecology. Ecology may then fund only the initial phase. Allowing the possibility of only funding initial phases of a project makes it more likely that funds are spent effectively and that funded projects are likely to meet the goals of the authorizing statute.

1.3.5 Eligible project types
The rule establishes what types of projects are eligible for streamflow restoration grant funding. This will help prevent applicants from submitting applications for projects that would not be funded. This will also avoid costs of applicants applying for ineligible projects and the cost of Ecology processing and rejecting those applications. The types of projects outlined in the rule are consistent with those projects listed in the authorizing statute (RCW 90.94.070(2) and 90.94.080(2)).

1.3.6 Ineligible project costs
The rule outlines which costs are eligible and ineligible for funding. This will allow applicants to plan for which project costs will be covered under a grant and prevents surprises where an applicant incurs costs that they expect will be covered, but are not.

1.3.7 Grant agreements and management
The rule outlines the requirements for what a grant applicant must do to manage the grant, if Ecology approves their application. This ensures grant recipients are aware of expectations for grant management before they apply for a grant.

1.3.8 Appeals
The rule establishes a voluntary pathway for dispute resolution on funding decisions that provides an alternative to litigation. It also clarifies the venue in which grant applicants should file an appeal, should they choose to litigate the matter. Establishing these processes in rule gives applicants an alternative to formal litigation and removes ambiguity about the appeal process.

1.4 Document organization
The remainder of this document is organized in the following chapters:

- Baseline and the adopted rule (Chapter 2): Description and comparison of the baseline (what would occur in the absence of the rule) and the rule requirements.
- Likely costs of the adopted rule (Chapter 3): Analysis of the types and amount of costs we expect impacted entities to incur as a result of the rule.
- Likely benefits of the adopted rule (Chapter 4): Analysis of the types and size of benefits we expect to result from the rule.
- Cost-benefit comparison and conclusions (Chapter 5): Discussion of the complete implications of the CBA.
- Least-Burdensome Alternative Analysis (Chapter 6): Analysis of considered alternatives to the contents of the rule.

- Regulatory Fairness Act Compliance (Chapter 7, when applicable): Comparison of compliance costs to small and large businesses; mitigation; impact on jobs.
- RCW 34.05.328 determinations not discussed in Chapter 5 or 6 (Appendix A).

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Chapter 2: Baseline and the Adopted Rule

2.1 Introduction

We analyzed the impacts of the rule, within the context of all existing requirements (federal and state laws and rules). This context for comparison is called the baseline, and reflects the most likely regulatory circumstances that entities would face if the rule were not adopted. It is discussed in Section 2.2, below.

2.2 Baseline

The baseline for our analyses generally consists of requirements in existing rules and laws. This is what allows us to make a consistent comparison between the state of the world with and without the rule.

For this rulemaking, the baseline includes:

- Chapter 90.94 RCW
- Session law 2018 c 1 (ESSB 6091)
- RCW 43.88.160
- State Administrative and Accounting Manual (SAAM)
- Washington State Department of Ecology Administrative Requirements for Recipients of Ecology Grants and Loans (Yellow Book)

The APA (RCW 34.05.310(4)(c)) provides that the baseline can include existing laws and rules; it does not indicate that it may include guidance. Despite this, Ecology believes the guidance listed above is an appropriate addition to the baseline. RCW 43.88.160(1) requires that "[a]ny agency maintaining its own accounting and reporting system shall comply with the updated accounting procedures manual and the rules of the director [of financial management] adopted under this chapter." The SAAM is the accounting procedures manual required by RCW 43.88.160(1). Ecology's Yellow Book then reflects requirements of the SAAM.

We interpret that under the baseline, Ecology would still establish and administer a grants program to distribute streamflow restoration funding. This conclusion is based on four sections of session law 2018 c 1:

- Section 304 directs Ecology to use appropriated funds to "implement a program to restore and enhance stream flows by fulfilling obligations under this act to develop and implement plans to restore stream flows to levels necessary to support robust, healthy, and sustainable salmon populations."
- Sections 206, 207, and 208 state that expenditures from the Watershed Restoration and Enhancement accounts "may be used to assess, plan, and develop projects..."

We interpret that these provisions require Ecology to fund projects. While theoretically it would be possible for the agency to develop, fund, and operate projects ourselves with little input from

local entities, Ecology has determined that this option would not be feasible to implement or cost effective.

In addition, RCW 90.94.020 and 90.94.030 emphasize locally developed and locally chosen projects. Therefore, we believe that irrespective of a rule, the best use of streamflow restoration funds, and the best way to implement the goals of the statute, is to operate a grant program that solicits applications from local entities. If the rule were not adopted, program implementation would be governed by the laws, rules, and guidance listed above and not by a rule specific to the operational and administrative requirements for the grants program.

2.3 Adopted rule

The rule establishes requirements for the following areas:

- Eligible applicants
- Grant applications
- Funding priorities
- Project phasing
- Project types
- Ineligible project costs
- Grant agreements and management
- Appeals

2.3.1 Eligible applicants

Baseline

The baseline does not include any specifications about what type of entities are eligible for streamflow restoration funding.

Adopted rule

The rule defines "eligible applicants" to include:

- Washington State agencies
- Local governments and quasi-governments within Washington state (including special purpose districts)
- Federal government agencies
- Tribal governments with reservation lands or treaty rights within Washington
- Non-profit organizations

The rule defines an "ineligible applicant" as a:

- Private citizen

- For-profit business including but not limited to all forms of private partnerships, incorporated entities, or LLCs
- Foreign or out-of-state governments
- Any agents acting on behalf of such entities

Expected impact

Defining eligible and ineligible applicants will limit the entities who may apply and receive grant funding. Eligible applicants will incur costs to apply for grant funding, but then may have the benefit of receiving the grant. Ineligible entities will know not to apply for the grants, thereby avoiding the cost of preparing and submitting an application. The rule therefore reallocates funding across entities, resulting in no net cost across applicants.

Limiting funding opportunities to eligible applicants will ensure that grants go to entities that are:

- Equipped to implement the types of projects directed under the authorizing statute.
- More likely to develop projects that benefit the people of Washington.

Together, these increase the likelihood that grant funds are spent on projects that result in significant environmental benefit to our state.

2.3.2 Grant applications

Baseline

Under the baseline, applicants have to apply for grant funding. However, the baseline does not include any specific requirements for how an entity should file an application for streamflow restoration grants nor any other grant program. In absence of any specific direction or requirements, we assume that applying for a grant under this scenario could be as easy as sending a brief email to Ecology with project details. While this would not be consistent with standard administrative practice, given the lack of specification under the baseline, it would be possible.

Adopted rule

The rule establishes required elements of an application for streamflow restoration grants, including the requirements that the applicant:

- Use the electronic system identified by Ecology to apply for the grant. If an applicant lacks access to the system, they may use another process approved by the agency.
- Provide all required information, including details of the project.
- Submit their application by the due date, if one is provided.

The rule also allows:

- Applicants to reapply for funding if the project was not awarded a grant in a previous funding cycle.

- Ecology to request more information on the project. Failure of the applicant to provide that information may result in Ecology not considering it for funding.

Expected impact

The rule requires the applicant to follow steps for submitting their grant application and provide information on the proposed project. These are basic requirements that are standard for most grant programs, as they provide funders with information necessary to evaluate the project. Preparing the application and submitting it through the prescribed system will be time consuming for applicants, thereby imposing a cost on grant applicants. However, as applicants would still have to apply for funding under the baseline, only the extra time spent tailoring the application to meet the rule requirements is attributable to the rule's adoption. It is also plausible that having specific requirements in rule could save applicants time, as they will not need to spend resources trying to research how to prepare and submit their application and what information they should include.

2.3.3 Funding priorities

Baseline

RCW 90.94.070 and 90.94.080 establish that funding should be prioritized for projects in watersheds developing plans under RCW 90.94.020 and 90.94.030 and watersheds participating in the pilot project under RCW 90.94.040.

In addition, session law 2018 c 1 § 304 authorizes the appropriation of funds for projects that restore and enhance streamflows to levels necessary to support robust, healthy, and sustainable salmon populations.

Adopted rule

The rule makes no change to the baseline.

Expected impact

None

2.3.4 Project phasing

Baseline

The baseline does not include any specifications concerning the phasing of projects.

Adopted rule

Under the rule, project applicants may choose to split their project into phases. Ecology reserves the right to split a project into phases and only fund the initial phase.

Expected impact

Allowing applicants to phase their projects could result in cost efficiencies and cost savings for the project sponsor, as it could allow for adaptive management and increased opportunity to seek matching funds.

Alternatively, if Ecology awarded the grant but divided a project into phases against the wishes of the applicant, this could cause the applicant to spend additional time and money reorganizing project logistics. This could require extra staff time and resources. However, these costs would be eligible to be covered under the grant; therefore, the applicant would not incur any additional or non-reimbursable costs.

Allowing applicants to split their projects into phases ensures grant recipients spend funds effectively. It helps to prevent a scenario whereby Ecology funds a full project, only to find partway through that the project is unsuccessful or ineffective. While this could lead to incomplete projects, it helps ensure that all funded project phases result in environmental benefit. In addition, splitting projects into phases improves the applicant's ability to adaptively manage a project, which will make projects more likely to meet the goals of the authorizing statute.

2.3.5 Eligible project types

Baseline

RCW 90.94.070 and 90.94.080 establish that funding may be used to assess, plan, and develop projects that include:

- Acquiring senior water rights
- Water conservation
- Water reuse
- Stream gaging
- Groundwater monitoring
- Developing natural and constructed infrastructure, which includes, but is not limited to:
    - Floodplain restoration
    - Off-channel storage
    - Aquifer recharge
    - Other actions designed to provide access to new water supplies

The Yellow Book requires that any grant recipient whose project generates environmental data prepare and submit a Quality Assurance Project Plan.

Adopted rule

The rule restates the types of projects eligible to receive funding under the baseline. In addition, the rule establishes additional requirements for certain types of projects:

- Applicants proposing water right acquisition projects must have a pre-application meeting with Ecology. They must also change the water right purpose of use to instream flow and permanently convey the water right to Ecology to be held in the Trust Water Rights Program (TWRP).
- Applicants proposing conservation and water use efficiency projects must permanently convey the saved water to Ecology to be held in the TWRP for instream flow purposes.

The rule also restates the requirement that applicants for environmental monitoring projects must follow all grant requirements for submitting data.

Expected impact

The rule does not change the types of projects that may be funded through streamflow restoration grants. It does place extra requirements on projects involving water right acquisitions and conservation and efficiency. These requirements include having a pre-application meeting with Ecology and completing an extra administrative step – these requirements will require time and resources from the applicant, thus imposing an additional cost above what would occur under the baseline. However, the requirements help ensure that water right acquisitions and conservation and efficiency projects result in an environmental benefit.

2.3.6 Ineligible project costs

Baseline

The baseline is prescriptive in how public funds may be used. Public funds cannot be used for costs related to:

- Projects previously funded by Ecology.
- Staff time not directly related to the project.
- Operations and maintenance.

The baseline also limits the use of funds to only those projects that:

- Meet the intent of the authorizing statute.
- Do not conflict with other Ecology rules.

Adopted rule

The rule places further restrictions on how project applicants use streamflow restoration grant funding. Streamflow restoration funds cannot be used for projects that:

- Are already required under another statute, rule, ordinance, or court order.
- Conflict with Ecology guidance.

In addition, the rule establishes that costs incurred before the effective date of the grant agreement are at the recipient's risk.

Expected impact

The rule establishes that costs incurred before the effective date of the agreement are "at the recipient's risk." This means an applicant may incur those costs. Costs attributed to the rule that would be incurred before the effective date of the agreement would include staff time spent preparing the grant application. These costs are described in Section 3.2.2.

The rule also establishes that funds may not be used for projects that are already required under another statute, rule, ordinance, or court order. This provision will not impose costs on a project applicant. Rather, it indicates to potential applicants that if their project is already required by statute, rule, ordinance, or court order they should not apply for funding. This provision ensures

that funds are only spent on projects that would not otherwise occur, and therefore helps maximize the environmental benefit that happens *as a result* of these funds being spent.

Lastly, the rule establishes that funds may not be used for projects that conflict with other Ecology guidance. This provision will not impose costs on a grant applicant. Rather, it indicates to potential applicants that if their project conflicts with other Ecology guidance, they should not apply for funding. This provision helps ensure that projects result in environmental benefits only and not environmental harm.

2.3.7 Grant agreements and management

Baseline

The baseline includes requirements and guidelines for establishing the grant agreement and for grant management. This includes requirements that:

- Grants are subject to all existing accounting and auditing requirements.
- Projects funded under these grants are still subject to existing laws and regulations.
- Ecology manages the grant agreement in the electronic system and the agreement must include all required information.

The baseline also includes provisions on how to manage amendments to the grant agreement, performance standards, and closing out the agreement.

Adopted rule

The rule places no additional requirements on the grant applicant.

Expected impact

None.

2.3.8 Appeals

Baseline

Grant applicants have the ability to appeal Ecology's decision on their grant application under the baseline. The venue for such an appeal, however, is somewhat unclear under the relevant statutes.[1] While it is likely that an applicant could file an appeal with the Pollution Control Hearings Board (PCHB), it is also possible that they could file the appeal in Superior Court pursuant to the APA.

Adopted rule

The rule establishes a voluntary process for dispute resolution regarding Ecology's decision on a grant application. Before filing an official appeal, applicants may:

[1] Chapter 43.21B RCW and chapter 34.05 RCW.

- Seek review of the grant decision by the Water Resources Program Manager.
- Seek review of the grant decision by the Ecology Deputy Director.

The rule also establishes that applicants may file an appeal with the PCHB pursuant to chapter 43.21B RCW.

Expected impact

Applicants may follow a dispute resolution process with Ecology prior to filing an appeal with the PCHB. While participating in this process would entail spending time upfront working with Ecology, it increases the likelihood that the issue is resolved without formal litigation, thereby avoiding significant legal costs. The rule also clarifies the venue in which appeals may be filed, thereby reducing uncertainty for grant applicants.

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Chapter 3: Likely Costs of the Adopted Rule

3.1 Introduction

We estimated the likely costs associated with the rule, as compared to the baseline. The rule and the baseline are discussed in detail in Chapter 2 of this document.

In one sense, the rule does not impose costs on entities per se, as no one is *required* to apply for grant funding. However, should an entity wish to apply for funding, they must comply with the rule. Therefore, we analyzed the cost associated with the rule for those entities applying for funding, as compared to the baseline.

It is also worth noting that all costs associated with the rule are borne by public entities or nonprofits, as these are the only entities eligible for grant funding. Many, but not all, of these entities receive another source of streamflow restoration funding through the *Planning and Participation Grants*, which could fund the costs incurred by the rule. For many entities, therefore, the costs incurred by the rule may be in the end, borne by the state.

3.2 Cost analysis

The rule establishes requirements for the following areas:

- Eligible applicants
- Grant application
- Funding priorities
- Project phasing
- Eligible project types
- Ineligible project costs
- Grant agreement and management
- Appeals

3.2.1 Eligible applicants

No costs are incurred as a result of the rule. See Section 2.2.1 for discussion of impacts and transfers.

3.2.2 Grant applications

Each grant applicant will need to spend time and resources to complete and submit their application in accordance with the rule's requirements. This cost would occur under the baseline; thus, the cost attributable to this rule is the amount of time needed to prepare an application that meets the rule's requirements, minus the time it would take to prepare an application under the baseline. As the baseline has no specific application requirements, we assume that applying for a grant under this scenario could be as easy as sending a brief email to Ecology with project details. For ease of analysis, we assume this cost is negligible.

Time per grant application:

A good estimate for the time required to complete and submit the application, as required by the rule, is the time an applicant spent completing and submitting an application for streamflow restoration grant funding using the FY 2019 guidance.[2] While the requirements for the application in the rule and in the 2019 guidance are not identical, they ask for similar information and in a similar level of detail. Therefore, time spent completing and submitting the 2019 application is a good estimate for how much time an applicant may spend completing and submitting the application as required by the rule.

To estimate this time, we did an informal survey of nine entities who applied for 2019 streamflow restoration grants. The time applicants spent completing the application ranged from four hours for a water right acquisition project to 119 hours for a large-scale water storage project. The mean time was 44.56 hours. Two of the nine applicants hired an outside consultant to help with the application, with the cost estimated at $1,275 and $6,000. Typically one person worked on the application, often a Natural Resources Manager or similar position. Applicants surveyed noted that they spent significant time developing the project itself. However, because this work would have occurred in absence of the rule, costs in developing the project are not included here.

Table 1: Time cost per grant application

Average hours spent per application	Mean hourly wage[3]	Overhead[4]	Average consultant cost	**Total cost per application**
44.56	$69.34	29.7%	$808	**$4,815**

[2] Guidance for the FY 2019 grant round, including application requirements, is found in: WA Department of Ecology (2018). Streamflow Restoration Grants Fiscal Year 2019 Interim Funding Guidance. June 2018.

[3] Estimated using the mean hourly wage for "Natural science managers." US Bureau of Labor Statistics (2016). 2016 Wages by Area and Occupation. Washington State. Mean hourly wage data for "Natural science managers."

[4] WA Department of Ecology (2018). Ecology 2019 Standard Cost assumptions. October 24, 2018.

Number of applications:

The rule does not specify how often Ecology will offer streamflow restoration funding grants during the grant program. For this analysis, we conservatively estimate that Ecology will offer the grant cycle (or solicit and accept applications) every year through 2033.[5]

In the 2019 grant cycle, Ecology received 46 grant applications. For this analysis, we use this number to estimate the number of applications we will receive per grant cycle in future funding rounds.

Total cost for completing and submitting all applications:

Assuming preparation of one application costs the applicant $4,815 and that Ecology receives 46 applications in each of the 14 grant cycles, the total net present value over the duration of the funding program for the cost of preparing applications is $2.9 million.[6]

3.2.3 Funding priorities

As the rule makes no changes to the baseline, no costs are incurred as a result of the rule.

3.2.4 Project priorities

No costs are incurred as a result of the rule. See Section 2.2.4 for discussion of impacts and transfers.

3.2.5 Eligible project types

The rule restates the types of projects eligible to receive funding under the baseline; in this aspect, it imposes no additional costs. However, the rule establishes additional requirements for certain types of projects, which will impose new costs on applicants.

Applicants proposing water right acquisition projects must have a pre-application meeting with Ecology. In our experience, this meeting could range from a one-hour phone call to multiple in-person and phone meetings. We estimate that on the upper end, it could necessitate 20 hours of work from the applicant. Applicants involved in these meetings are typically a Natural Resources Manager.

[5] Ecology may choose to solicit projects once a year or once every two years. The assumption represents the most conservative option and is not an indication of Ecology's intent.

[6] Using a discount rate of 1.03%. This is the average historic rate of return on US Treasury I-Bonds 1998 through 2018.

Table 2: Time cost per acquisition pre-application meeting

Estimate type	Hours needed per pre-application meeting	Mean hourly wage[7]	Overhead[8]	**Cost per pre-application meeting**
Lower-bound estimate	1	$69.34	29.7%	**$90**
Upper-bound estimate	20	$69.34	29.7%	**$1,799**

In the 2019 streamflow restoration funding grant cycle, Ecology received 11 applications for water acquisition projects. For this analysis, we use this number to estimate the number of applications for acquisition projects we will receive in each future grant cycle.

Assuming the pre-application meeting costs one applicant between $90 and $1,799 and that Ecology receives 11 applications for acquisition projects in each of the 14 grant cycles, the total net present value over the duration of the funding program for the cost of the pre-application meeting is between $13 thousand and $259 thousand.[9]

Applicants proposing water acquisition projects and conservation and water use efficiency projects must permanently convey the saved water to Ecology to be held in the TWRP for instream flow purposes. Applicants should complete the paperwork to convey the water right to the TWRP after they received the grant. Because staff time used for working on the project is eligible for grant funding, the cost incurred by the applicant working on conveying the water right will be reimbursable. Therefore, we do not estimate the cost on the applicant, as it will not represent a cost borne by the entity.

3.2.6 Ineligible project codes

No costs are incurred as a result of the rule. See Section 2.2.6 for a discussion of impacts.

3.2.7 Grant agreement and management

As the rule makes no changes to the baseline, no costs are incurred as a result of the rule.

3.2.8 Appeals

Under the baseline, a grant applicant may file an appeal with the PCHB or Superior Court. If an applicant wants to file an appeal, they would first need to spend time deciding which venue to file it with. Once decided, they would need to spend time preparing and filing their appeal. While plausible that the appellant prepare the legal briefs themselves, it is likely that the appellant would need to hire an attorney to mount an effective appeal.

[7] US Bureau of Labor Statistics (2016). 2016 Wages by Area and Occupation. Washington State. Mean hourly wage data for "Natural science managers."

[8] WA Department of Ecology (2018). Ecology 2019 Standard Cost assumptions. October 24, 2018.

[9] Using a discount rate of 1.03%. This is the average historic rate of return on US Treasury I-Bonds 1998 through 2018.

Under the rule, the applicant may seek review from Ecology before filing an appeal. This option could result in significant cost savings for the grant applicant, as it would reduce the likelihood that formal court appeals would be needed (thereby preventing legal costs).

Should the applicant choose to file an appeal (either after or instead of working with Ecology), the cost to do so would be similar to that incurred under the baseline.

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Chapter 4: Likely Benefits of the Adopted Rule

4.1 Introduction

We estimated the likely benefits associated with the rule, as compared to the baseline (described in Chapter 2 of this document).

4.2 Benefit analysis

The rule establishes requirements for the following areas:

- Eligible applicants
- Grant applications
- Funding priorities
- Project phasing
- Eligible project types
- Ineligible project costs
- Grant agreements and management
- Appeals

The Legislature authorized the appropriation of $300 million for projects to restore and enhance streamflows. The requirements in the rule help ensure the most efficient use of these public funds. The requirements also better ensure that the projects funded meet the intent of the authorizing statute, restoring and enhancing streamflows to provide the greatest environmental benefit.

4.2.1 Eligible applicants

Establishing eligible entities up front will reduce the administrative burden of preparing, processing, and reviewing grant applications submitted by ineligible parties.

In addition, limiting eligible applicants to public entities and nonprofit organizations will ensure grant funding supports projects that serve the public good and natural environment, rather than private interests. Limiting eligible applicants to entities in Washington State will help ensure that projects are completed, and subsequent environmental benefits accrue, within Washington State.

4.2.2 Grant applications

The level of detail required on applications as identified in the rule will help ensure that Ecology funds projects with the most benefit to streamflows and the environment. For example, the rule requires applicants to include information on project benefits and the environmental or streamflow problems that the project is intended to address. This information will provide Ecology with the information needed to approve funds for projects that address the biggest or most critical streamflow or aquatic habitat problems.

The level of detail required will provide Ecology with enough information about proposed projects as to prevent funding projects that do not yield significant environmental benefit or do not address the most critical areas. Per the authorizing statute, projects should contribute to the restoration and enhancement of "streamflows to levels necessary to support robust, healthy, and sustainable salmon populations" (2018 c 1 § 304). In short, the application requirements in the rule help ensure the most environmental benefit is gained from use of these public funds.

In addition, clear application requirements will help applicants understand what information is necessary to include, thereby reducing administrative burden.

4.2.3 Funding priorities

As the rule makes no changes to the baseline, no benefits are accrued as a result of the rulemaking.

4.2.4 Project phasing

Allowing applicants to phase their projects could result in cost efficiencies and cost savings for the project sponsor. It will allow them to adaptively manage their project, making changes throughout project development to make sure that in the end, the project best meets the goals of the authorizing statute. Also, after funding of initial phases, it could better situate them to leverage additional funding from other sources.

In addition, only funding initial stages of a project will help ensure that streamflow restoration funding is spent on projects that are likely to be successful. Were Ecology to not allow funding of project phases, the agency could fund an entire project, only to learn a few years in that it is not likely to be successful. Funding in phases increases the certainty the funded project phase will result in or contribute to environmental benefit.

4.2.5 Eligible project types

Requiring a pre-application meeting with Ecology for water right acquisition projects will help ensure these projects result in an environmental benefit. Water right acquisitions are complicated; it is not uncommon for a project sponsor to think they have a valuable water right, only to find later that it is not valid or would not realistically improve streamflow (if the water right were curtailable, for example). Meeting with Ecology to discuss the acquisition project will ensure the projects that receive funding will put "real water" instream and in valuable locations.

Similarly, requiring that applicants who propose water acquisition projects or conservation and water use efficiency projects permanently convey the saved water to Ecology to hold in the TWRP for instream flow purposes will ensure these projects result in an environmental benefit. Failure to require that the water is held in the TWRP could result in the water being reallocated or used for another purpose, thereby negating the project's environmental benefit.

4.2.6 Ineligible project costs

Establishing that funds may not be used for projects that are already required under another statute, rule, ordinance, or court order maximizes the effectiveness of this funding. Projects required under another statute, rule, ordinance, or court order will occur regardless of receiving a streamflow restoration grant. The benefit to the environment from the project will also occur regardless of the grant; therefore, the value added from the grant would be zero. Limiting grants to only those projects that will not otherwise occur maximizes the environmental benefit that happens *as a result* of these funds being spent.

Establishing that funds may not be used for projects that conflict with Ecology guidance ensures that funded projects do not harm the environment or public health. This increases the certainty that funded projects achieve the most benefit to the environment and/or streamflows.

Lastly, grant applicants and recipients will be able to more clearly understand which projects and costs are eligible for funding. This will reduce the administrative burden of applying for ineligible projects and costs, and reduce the administrative burden of Ecology processing these applications.

4.2.7 Grant applications and management

As the rule makes no changes to the baseline, no benefits are accrued as a result of the rulemaking.

4.2.8 Appeals

Cost savings incurred under the rule are described in Chapter 2.2.8.

In addition, by establishing a clear path for appeals, the rule provides clarity on the process, thereby reducing the time a potential appellant will need to spend researching appeal options.

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Chapter 5: Cost-Benefit Comparison and Conclusions

5.1 Summary of the costs and benefits of the adopted rule

The rule is likely to impose costs on grant applicants by requiring them to comply with grant application requirements. Over the duration of the grant program, we estimate costs to include:

- $4,815 per applicant to fill out the application. Assuming 46 applicants per year, this equates to a net present value of $2.9 million over the duration of the grant program.
- $90 to $1,799 extra per applicant for those applying for water acquisition projects. Assuming 11 acquisition project applications per year, this equates to a net present value of $13 thousand to $259 thousand over the duration of the grant program.

Many, but not all, of the entities eligible to receive project funding under this grant receive another source of streamflow restoration funding through the *Planning and Participation Grants*, which could fund the costs incurred by the rule.

The potential benefits of the rule include:

- Increased certainty that grant funding will support projects that serve the public good and natural environment, rather than private or out-of-state interests.
- Increased certainty that grant funding will support projects that result in the most benefit to streamflows and the environment, that are likely to be successful, and that would not have occurred otherwise.
- Reduced administrative burden for applicants applying for grants. Increased opportunities for project sponsors to take advantage of cost efficiencies, cost savings, and other funding opportunities.
- Reduced administrative burden for Ecology in processing and reviewing grant applications.
- A less costly process for dispute resolution on funding decisions.

5.2 Conclusion

Ecology concludes, based on reasonable understanding of the quantified and qualitative costs and benefits likely to arise from the rule, that the benefits of the rule are greater than the costs

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Chapter 6: Least-Burdensome Alternative Analysis

6.1 Introduction

RCW 34.05.328(1)(e) requires Ecology to "...[d]etermine, after considering alternative versions of the rule and the analysis required under (b), (c), and (d) of this subsection, that the rule being adopted is the least burdensome alternative for those required to comply with it and that will achieve the general goals and specific objectives stated under (a) of this subsection." The referenced subsections state that an agency must:

> (a) Clearly state in detail the general goals and specific objectives of the statute that the rule implements;
>
> (b) Determine that the rule is needed to achieve the general goals and specific objectives stated under (a) of this subsection, and analyze alternatives to rule making and the consequences of not adopting the rule;
>
> (c) Provide notification in the notice of proposed rulemaking under RCW 34.05.320 that a preliminary cost-benefit analysis is available. The preliminary cost-benefit analysis must fulfill the requirements of the cost-benefit analysis under (d) of this subsection. If the agency files a supplemental notice under RCW 34.05.340, the supplemental notice must include notification that a revised preliminary cost-benefit analysis is available. A final cost-benefit analysis must be available when the rule is adopted under RCW 34.05.360;
>
> (d) Determine that the probable benefits of the rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented;

In other words, to be able to adopt the rule, Ecology is required to determine that the contents of the rule are the least burdensome set of requirements that achieve the goals and objectives of the authorizing statute(s).

Ecology assessed alternatives to the rule content and determined whether they met the goals and objectives of the authorizing statutes. Of those alternatives that would meet the statutory goals and objectives, Ecology then determined whether the rule was the least burdensome alternative for those required to comply with the rule.

For additional alternatives that were suggested during the public comment period, and Ecology's response, see the associated Concise Explanatory Statement for this rulemaking.

6.2 Goals and objectives of the authorizing statute: Chapter 90.94 RCW and 2018 c 1 (ESSB 6091)

The goals and objectives of the authorizing statute are:

- To "ensure that water is available to support development" (2018 c 1).

- "To implement a program to restore and enhance stream flows by fulfilling obligations under this act to develop and implement plans to restore stream flows to levels necessary to support robust, healthy, and sustainable salmon populations" (2018 c 1 § 304).
- "To assess, plan, and develop projects that include acquiring senior water rights, water conservation, water reuse, stream gaging, groundwater monitoring, and developing natural and constructed infrastructure, which includes, but is not limited to, projects such as floodplain restoration, off channel storage, and aquifer recharge, or other actions designed to provide access to new water supplies with priority given to projects in watersheds developing plans as directed by sections 202 and 203 of this act and watersheds participating in the pilot project in section 204 of this act" (2018 c 1 § 207 and § 208).

6.3 Alternatives considered and why they were not included

6.3.1 Operate the grant program under guidance

Ecology considered operating the grant program under guidance, similar to how we are doing so for the 2019 FY grant cycle. However, because streamflow restoration funding is a long-term grant program, establishing standards under a rule (rather than guidance) is consistent with financial management best practices. Establishing the program under a rule also:

- Provides the public with clear standards and transparency for how we will manage public funds; and
- Provides a process whereby the public has an opportunity to participate in developing those standards.

Operating the program under rule rather than guidance better meets the goals and objectives of the statute and is less burdensome on potential grant applicants.

6.3.2 Specify a funding allocation for certain regions or basins

While the Legislature authorized streamflow restoration funding to be spent statewide, Ecology considered apportioning funds to specific geographic regions or categories of basins (such as those identified in RCW 90.94.020 and 90.94.030). Instead, Ecology chose to not apportion funds in the rule, but rather leave this as an option to establish in guidance or during the processing of grant applications. By not putting an apportionment in rule, Ecology leaves flexibility to base apportionment on environmental conditions and on the applications received. This flexibility improves the agency's ability to meet the goals and objectives of the statute.

6.3.3 Prioritize projects based on different criteria

Ecology considered being more prescriptive in the types of projects we would prioritize for funding. For example, the rule could have stated that water storage projects would be given priority over riparian planting projects. Instead, Ecology chose to limit the prioritization to the factors identified in the statute. The evaluation process as prescribed in the rule should ensure that projects with larger benefits to streamflows or instream resources are likely to score higher than projects with less benefit. Note that Ecology could add more detail to scoring criteria in guidance, should the agency find that more detail would be beneficial to applicants. However, by being less prescriptive in rule and restating the priorities outlined in statute, Ecology leaves

flexibility to base further prioritization criteria on environmental conditions and on the applications received. This flexibility improves the agency's ability to meet the goals and objectives of the statute.

6.4 Conclusion

After considering alternatives to the rule's contents, as well as the goals and objectives of the authorizing statute, Ecology determined the rule represents the least-burdensome alternative of possible rule contents meeting these goals and objectives.

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Chapter 7: Regulatory Fairness Act Compliance

7.1 Introduction

Ecology has analyzed the compliance costs of this rulemaking in previous chapters of this document. Based on this analysis Ecology has determined the rule does not impact businesses; see Chapter 2.3.1 for a discussion of eligible and ineligible grant applicants. Therefore, Ecology is not required to prepare a small business economic impact statement (RCW 19.85.030(1)(a)).

References

US Bureau of Labor Statistics (2016). 2016 Wages by Area and Occupation. Washington State.

US Treasury Department (2018). Historic rates of return on I-Bonds, 1998 – 2018.

WA Department of Ecology (2017). Administrative Requirements for Recipients of Ecology Grants and Loans (Yellow Book). August 2017. Publication number 17-01-004.

WA Department of Ecology (2018). Ecology 2019 Standard Cost Assumptions. October 24, 2018.

WA Department of Ecology (2018). Streamflow Restoration Grants Fiscal Year 2019 Interim Funding Guidance. June 2018. Publication number 18-11-010.

WA Office of Financial Management. State Administrative and Accounting Manual (SAAM).

Appendix A.
Administrative Procedure Act (RCW 34.05.328)

A. RCW 34.05.328(1)(a) – Clearly state in detail the general goals and specific objectives of the statute that this rule implements.

See chapter 6.

B. RCW 34.05.328(1)(b) –

1. Determine that the rule is needed to achieve the general goals and specific objectives of the statute.

See chapters 1 and 2.

2. Analyze alternatives to rulemaking and the consequences of not adopting this rule.

Alternatives to rulemaking could include:

- Operating the grant program using "best professional opinion," without a rule or guidance.
- Operating the program with guidance alone.
- Funding grants only for projects in adopted plans.
- Foregoing a grant program and having Ecology develop, fund, and manage all projects.

The statute does not have sufficient detail for Ecology to make decisions on which project proposals would be funded or not funded. Not formally determining clear funding metrics would likely result in reduced project quality coupled with less environmental benefit, wasted state and proponent resources, and extensive litigation.

A rule provides the public with clear standards and transparency for spending public funds, and the rulemaking process under the APA provides the public with an opportunity to take part in developing those standards.

Please see the Least Burdensome Alternative Analysis, chapter 6 of this document, for discussion of alternative rule content considered.

C. RCW 34.05.328(1)(c) - A preliminary cost-benefit analysis was made available.

When filing a rule proposal (CR-102) under RCW 34.05.320, Ecology provides notice that a preliminary cost-benefit analysis is available. At adoption (CR-103 filing) under RCW 34.05.360, Ecology provides notice of the availability of the final cost-benefit analysis.

D. RCW 34.05.328(1)(d) – Determine that probable benefits of this rule are greater than its probable costs, taking into account both the qualitative and quantitative benefits and costs and the specific directives of the statute being implemented.

See chapters 1 – 5.

E. RCW 34.05.328 (1)(e) - Determine, after considering alternative versions of the analysis required under RCW 34.05.328 (b), (c) and (d) that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated in Chapter 6.

See chapter 6.

F. RCW 34.05.328(1)(f) - Determine 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 rule does not require those to whom it applies to take an action that violates requirements of another federal or state law. We determined that because there are no other federal, state, or local laws or rules that apply to streamflow grant funding. The rule also is designed to meet general accounting principles and requirements. When implementing the projects for which funding may be awarded, the rule requires the recipient to meet all applicable laws (see list below).

- Obtain and comply with all necessary permits.
- Complete SEPA review prior to project construction.
- Complete any federal or state cultural resources requirements prior to project construction.
- Protect water quality and comply with relevant water quality standards.
- Comply with existing accounting and auditing requirements of state laws and regulations applicable to the issuance of grants.
- Comply with all laws.

G. RCW 34.05.328 (1)(g) - Determine 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.

The conditions of the rule apply equally to all entities eligible to take part in the grant program.

H. RCW 34.05.328 (1)(h) Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter.

No. There are no federal regulations or statutes specific to how Washington distributes grant funding to protect or restore streamflow conditions. In addition, although the rule

varies somewhat from the state rules governing other grant programs, there is no other grant program with exactly the same objectives.

I. RCW 34.05.328 (1)(i) – Coordinate the rule, to the maximum extent practicable, with other federal, state, and local laws applicable to the same subject matter.

We coordinated this rule with the requirements in the authorizing statute, Chapter 90.94 RCW – Streamflow Restoration. There are no other federal, state, or local laws that are applicable to streamflow grant funding. We also used the rules that regulate other agency grant programs as guidance in developing the rule: primarily Chapters 173-322A and 173-323 WAC. This allowed us to model our rule off other best practice.