



## **Water Banking Pilot Grants**

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*2021-2023 Funding Guidelines*

October 2021, Publication 21-11-023

## Publication and Contact Information

This document is available on the Department of Ecology's website at:

<https://apps.ecology.wa.gov/publications/summarypages/2111023.html>

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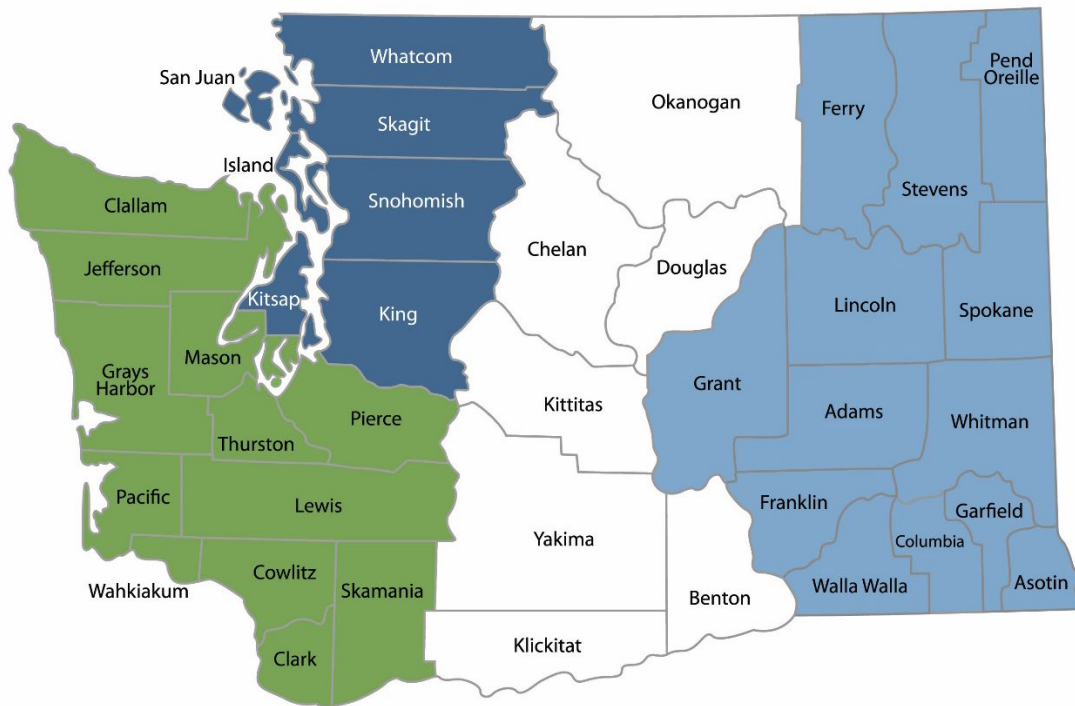
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Region	Counties served	Mailing Address	Phone
<b>Southwest</b>	Clallam, Clark, Cowlitz, Grays Harbor, Jefferson, Mason, Lewis, Pacific, Pierce, Skamania, Thurston, Wahkiakum	PO Box 47775 Olympia, WA 98504	360-407-6300
<b>Northwest</b>	Island, King, Kitsap, San Juan, Skagit, Snohomish, Whatcom	PO Box 330316 Shoreline, WA 98133	206-594-0000
<b>Central</b>	Benton, Chelan, Douglas, Kittitas, Klickitat, Okanogan, Yakima	1250 W Alder St Union Gap, WA 98903	509-575-2490
<b>Eastern</b>	Adams, Asotin, Columbia, Ferry, Franklin, Garfield, Grant, Lincoln, Pend Oreille, Spokane, Stevens, Walla Walla, Whitman	4601 N Monroe Spokane, WA 99205	509-329-3400
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Water Resources Program  
Washington State Department of Ecology  
Olympia, WA

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DEPARTMENT OF  
**ECOLOGY**  
State of Washington

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## Abstract

This guidance is intended to aid grant applicants in developing complete project proposals for water banking pilot grant funding. This document also provides applicants with information and assistance in completing the application.

This pilot grant round will provide up to \$14 million for eligible projects.

The grant funding opportunity opens November 17, 2021, and closes on June 30, 2023 at 5:00PM, or at such time as funding is no longer available.



# Chapter 1: Grant Funding Overview

In July 2021, the Legislature provided up to \$14 million in funding through two Ecology budget provisos (Appendix A), to buy water rights for water banks in rural counties with headwater streams. This funding is designed to help public entities and their partners preserve water rights in their basin for local use and streamflow.

Communities in headwater basins are increasingly concerned with the potential impacts of large water right transfers that move water rights far downstream. Once a water right is transferred downstream, it is difficult to later transfer that water right back to the headwater county. This new funding is intended to help eligible applicants develop local water banks and protect streamflow. One-third of all water rights acquired under this pilot program must be set aside strictly for permanent in-stream use to support streamflows and aquatic resources.

Ecology is soliciting proposals from eligible applicants to immediately begin addressing water banking needs in rural counties. Grants will be awarded based upon eligibility, suitability, and need for as long as funds are available.

Ecology will conduct an ongoing review of projects submitted for funding as complete applications are received. Applications missing required information will be considered incomplete. Ecology will inform applicants if their application is incomplete. Applicants must provide any missing information requested by Ecology before the application will be reviewed for a funding decision. Other complete applications may be considered ahead of your application while it remains incomplete.

Upon request, Ecology is available to meet with applicants prior to application submittal. If you are interested in meeting prior to submitting an application, please contact Ecology by emailing your request to: [WaterBankingGrants@ecy.wa.gov](mailto:WaterBankingGrants@ecy.wa.gov). Please include "meeting request" in the subject line of your email. Ecology will schedule meetings in the order that they are requested, and cannot guarantee meetings within a certain time-frame.

Applicants may also use email to submit questions about this funding opportunity. For more information, visit the [water banking grants webpage](http://ecology.wa.gov/WaterBankingGrants) (ecology.wa.gov/WaterBankingGrants).

**This funding opportunity will be open beginning November 17, 2021, and closes no later than June 30, 2023, at 5:00 p.m.**

Grant applicants may apply for a Total Eligible Cost of up to \$2,000,000. There is no funding match requirement. Grant awards may not exceed \$2,000,000 per applicant.

Grant applications will be accepted until all funds are awarded. Funding expires June 30, 2023.

## Chapter 2: Grant Program Details

### Eligibility Overview

Funding is limited to water banking strategies within rural counties with headwaters of a major watershed within their borders, referred to here as “rural headwater counties”.<sup>1</sup> See Appendix B for a [map](#) of rural headwater counties.

The following counties meet the funding requirement of being a rural headwater county:

- Adams
- Asotin
- Chelan
- Clallam
- Columbia
- Cowlitz
- Ferry
- Garfield
- Grays Harbor
- Jefferson
- Kittitas
- Klickitat
- Lewis
- Lincoln
- Mason
- Okanogan
- Pacific
- Pend Oreille
- Skagit
- Skamania
- Stevens
- Wahkiakum
- Walla Walla
- Whitman
- Yakima

Applicants must demonstrate the following eligibility requirements to qualify for grant funding under this pilot program:

- Status as a public entity or formal partnership with a public entity.
- Sufficient expertise and capacity to develop and maintain a water bank.
- A valid interest to purchase a water right.
- Adequacy of the water right for the intended use.
- A permanent commitment of one-third of the purchased water, calculated as a share of Ecology’s final determination of total valid quantity, to instream flow benefiting fish and wildlife.

Each of the eligibility requirements above are discussed in further detail in the sections below.

Grant awards may only be used to:

- Develop water banks in rural headwater counties.
- Acquire water rights appropriate for use in a water bank, including costs necessary to evaluate the water right for eligibility for its intended use.
- Fund activities necessary to create a water bank.

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<sup>1</sup> For the purposes of this funding opportunity, we refer to the definition of “rural counties” of RCW 82.14.370(5), and “shorelines of statewide significance” from [RCW 90.58.030\(2\)\(f\)\(v\)](#) (A) and (B).



## Applicant Requirements

### Eligible applicants

To be eligible for this funding opportunity, applicants must qualify as a public entity or be in a formal partnership with a public entity. Formal public-private partnerships must be documented by a duly executed agreement to partner in the grant application and project operation. Applicants who are private entities are required to provide this documentation with their application.

Public entities eligible for funding include:

- State, county, federal, or city governmental entities or agencies.
- Federally-recognized tribes.
- Public utility districts, formed under chapter 54.04 RCW.
- Water and sewer districts, formed under chapter 57.02 RCW.
- Conservation districts, formed under chapter 89.08 RCW.
- Irrigation districts, formed under chapter 87.03 RCW.
- Port districts, formed under chapter 53.04 RCW.
- Watershed management partnerships, formed under chapter 39.34.200 RCW.

Any other entity must be in a formally documented partnership with a public entity (as defined above) to be eligible for funding. The documentation must define the roles and responsibilities for the public and private entities including who will apply for and manage the grant, and the development and operations of the proposed water bank.

If approved for funding, the final water banking agreement (trust water right agreement) will be executed between Ecology and the public entity. Private entity applicants should reflect this when describing the roles and responsibilities.

### Expertise and capacity

Applicants must demonstrate sufficient expertise and capacity to develop and maintain a water bank to be eligible for grant funding. Applicants must describe their specific expertise and capacity in detail to meet this requirement. Grant applications must include a detailed plan to develop and maintain a water bank that meets local water needs of that county, which includes but is not limited to agricultural use and instream flow for fish and wildlife.

If the applicant is a private entity in a partnership with a public entity, the grant application must clearly describe the roles and responsibilities of each entity in the partnership with respect to development and maintenance of the water bank.

## Water Right Acquisition Requirements

### Interest in a water right

Applicants must demonstrate that they have secured a valid interest to purchase one or more specific water rights from willing sellers. Applicants must provide documentation of a “valid interest” which may include a signed purchase and sale agreement, a signed letter of intent by the water right seller, or other documentation indicating an agreement to sell a specific water right, cooperate in necessary change, and other administrative authorizations.

Water rights considered for this funding include adjudicated certificates, state-issued certificates, and other vested rights. Claims filed under RCW 90.14.068, unperfected permits, and permit-exempt uses are ineligible for grant funding.

### Adequacy

Applications must have sufficient information to show that the water right(s) proposed for purchase are adequate to mitigate the intended uses of the water bank. To qualify for a grant award, the Legislature required that applicants must “show that the water rights appear to be adequate for the intended use”. Therefore, the water right must be physically and legally available (for example, the water right must be adequate with respect to seasonality, location, seniority, and availability) to mitigate the intended uses. See “Reasons Ecology May Decline Funding” section below for reasons why Ecology may decline funding due to lack of water availability and other situations where the water right may not be suitable for the intended use.

### Water right change process

Water rights to be acquired for the purpose of operating a water bank must undergo review through the water right change process described in RCW 90.03.380 or RCW 90.44.100. This review requires Ecology to make a tentative determination of the extent and validity of the water right. Only that portion of a right found to be valid may be used to mitigate uses as part of a water bank. If a water right change was not completed prior to application, it must be completed as part of the project, and before funds for purchasing the water right are disbursed.

As a part of the water right change process, the water right's place of use will also be changed to instream flow within a primary and secondary reach.<sup>2</sup> The purpose of use will be changed to instream flow<sup>3</sup> and mitigation.

## Price and valuations

Applications must include the proposed total price of each water right to be purchased along with supporting documentation (such as purchase and sale agreement(s) reflecting the agreed value). Applicants should provide the seller's agreed cost per acre-foot of consumptive<sup>4</sup> water, and explain in the grant application how this price reflects local market value. If multiple water rights are proposed for purchase, this information is required separately for each water right.

Applicants must describe how the proposed price reflects market value. Applicants should use one or more generally accepted water right valuation methods, such as comparable sales, income capitalization, land price differential (Hedonic), or replacement/avoidance cost.

Ecology may require an independent valuation in order to determine final value for funding if an application is selected for a grant award.

Ecology will only disburse funding for the purchase of the quantity of water found to be valid in the tentative determination of extent and validity (discussed in the change process section above). The final price of the water right will be determined using the negotiated cost per consumptive acre-foot multiplied by the valid quantity to be purchased. Disbursement of funds for purchase of the water right will be administered only after the change process is complete.

## Dedicating one-third of purchased water to instream flow

Projects eligible for this funding must permanently commit one-third of the purchased water right to instream flow benefiting fish and wildlife.<sup>5</sup> Once the change process is complete and Ecology determines the water right's validity, one-third of the water right will be calculated from the total amount being purchased with grant funding. All water rights purchased with this

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<sup>2</sup> The place of use of an instream flow water right is defined within a primary and secondary reach. The primary reach is the stretch, or length of a stream that benefits from both the former consumptive use and return flow following a transfer. It is the reach between the original diversion point and the point where the last return flows from the original out-of-stream use reentered the stream. The secondary reach begins at the end of the primary reach, and continues downstream to a point determined by Ecology for management and tracking purposes. Therefore, after the right is transferred to instream flow, the secondary reach benefits only from the former consumptively used portion of the water right.

<sup>3</sup> For groundwater rights the purpose will be changed to groundwater preservation and mitigation. The place of use will be described as both the aquifer from which the water right originated, and the stream reach where the groundwater will discharge when it is not withdrawn. This would not apply for a water right from a deep aquifer that is not hydrologically connected to surface water.

<sup>4</sup> [Program Guidance: Determining Irrigation Efficiency and Consumptive Use](#)

<sup>5</sup> This requirement only applies to water right purchases under this pilot grant funding program.

funding must be suitable to be assigned to primary and secondary stream reaches (see the change process section above).

## Water Banking Proposal

Water banks provide mitigation for new water uses where water is unavailable or where new and unmitigated water use would otherwise impair existing water rights and/or be detrimental to the public interest.

For this funding opportunity, a proposed water bank must meet local water needs, which include (but are not limited to) use of water for agriculture, public water planning, and instream flow for fish and wildlife. The water bank must preserve water rights for use in the county of origin and for permanent instream flows for fish and wildlife through the primary and secondary reaches of the water right.

Applicants must provide a summary of the proposed water bank, including the bank's purpose and objectives. All or part of this summary will be posted on Ecology's website for a 30-day public comment period, and Ecology will review all comments received.

Applicants must describe the anticipated demand to be served by the bank including:

- Geographic area to be served by the bank.
- Types or purposes of existing or new uses to be mitigated.
- Quantities of water needed to serve existing or new uses.
- When water is needed to serve future uses.
- Any other information needed to evaluate impacts from the potential new uses.

Applications must include a detailed map clearly showing the water bank's proposed service area, and indicating the current and anticipated future uses.

Applications should include the expected timeline for establishing the proposed water bank. This includes the timing of any other agreements, permits, or consultation processes that are needed for the proposed water bank. Applications should estimate when the new uses intend to withdraw or divert water for beneficial use (for example, whether new uses are ready to withdraw water as soon as permits can be issued, or are part of a long-term plan).

Applicants are advised to conduct their own outreach and coordination, especially if the water bank requires permitting with an entity other than Ecology (for example, county building permit requirements). The applicant is responsible for coordinating with all permitting entities, and all other permitting requirements should be discussed in the water bank proposal.

## Reasons Ecology May Decline Funding

Ecology will decline funding for projects that do not meet the eligibility requirements set by the Legislature (Appendix A). Furthermore, an application for grant funding to purchase a water right for water banking must demonstrate adequacy for the intended use, as described in the

proposal. Ecology may decline to fund a proposed acquisition if it is inadequate to support the water banking proposal. The factors that may make a water right inadequate include, but are not limited to, the following:

- A water right change process determines that the right is not valid.
- The water right shares its place of use with other water rights.
- The water right's season of use is much shorter than that of the intended new uses.
- The water right lacks physically-available water.
- The water right's priority date is insufficient to be reliable for banking purposes. For example, the water right's priority date is so junior to other rights that curtailment risk makes it unreliable for the intended use.
- The water right provides water from a different water source than the source to be used by the intended new uses.
- The required one-third water right dedication cannot be assigned to primary and secondary stream reaches, as with a groundwater right that is not hydrologically connected to surface water.

Ecology may decline funding if it finds that creating a water bank will impair existing water rights or be detrimental to the public interest (RCW 90.42.040(4)(a)). The following sections provide explanations and examples for the factors listed above that may cause impairment.

## **Overlapping places of use**

The applicant must prove that the consumptive use associated with the water right proposed for purchase will no longer be exercised after the purpose of use of the right is changed. If the water right proposed for purchase shares a place of use with other water rights, this may be difficult. If consumptive water use continues with another overlapping right after it is used for water banking, it may be considered impairment to other users in that source, commonly known as "double dipping." Multiple water rights often support the same use, on the same parcel of land; this provides flexibility in the exercise of legal water rights according to the terms and limitations of each right over time. However, an applicant looking to purchase a right with an overlapping place of use must show that the consumptive use of the right proposed for purchase will not be backfilled by increased consumption from an overlapping right that continues after the change of the acquired right.

This is also true of water rights with places of use located within the service area of an irrigation district. An applicant requesting funding for the purchase of a water right that shares a place of use with an irrigation district may face difficulty demonstrating that consumptive use associated with that right will end.

## **Lack of availability**

Ecology may decline to purchase a valid water right due to concerns about availability. Even if a water right has been determined to be valid, the right may not be suitable for water banking. The right must also be available to mitigate new uses. The following examples describe circumstances in which availability will be a concern:

- The water right is only authorized for seasonal use, but the intended new uses are year-round.
- The water right has uncertain availability. For example, a water right from a snow-fed stream may be temporarily unavailable in late-summer months or completely unavailable in drought years.
- Water rights proposed for acquisition must have priority dates of sufficient seniority to be reliably available for water banking purposes.
- The water right accesses a different source than the intended uses such that acquired water will not be available to mitigate for the intended uses. For example, a water right from a stream may not be available to mitigate new groundwater uses that are not hydrologically connected to that stream.

## Chapter 3 Project Scoping Considerations

Ecology grant agreements include several sections, including the scope of work, agreement specific terms and conditions, and standard terms and conditions that apply to all agreements funded by Water Resources and Ecology. See Appendix C for current standard terms and conditions required for all grant agreements.

The following sections highlight some specific information that may help applicants develop their application including scope of work, schedule, and budget.

### Administrative Requirements

A complete listing of the administrative requirements for all grants and loans administered by Ecology is contained in the *Administrative Requirements for Recipients of Ecology Grants and Loans Managed* in EAGL at:

<https://apps.ecology.wa.gov/publications/SummaryPages/1701004.html>

### Scope of Work

Grant agreement task language, and any agreement specific terms and conditions will be negotiated and finalized between Ecology and the recipient. Due to the limited purposes of this funding and required steps for establishing a water bank, each grant agreement will have standard tasks (as described in the sections below). Unique tasks may be included in the grant application to meet the goals of the project if it meets the purpose and intent of the funding program.

The following sections include standard tasks associated with managing an agreement, developing a water bank, and acquisition of water rights for use in the water bank. Applicants should consider these standard tasks when developing their application, project schedule, and budget. All grant recipients must track spending by task within the project budget.

## **Project Administration**

A standard project administration task will be included in each agreement. This standard task language, used in all Water Resources grant agreements, will be provided by Ecology and cannot be edited. Recipient responsibilities on administering the project include:

- Maintenance of project records.
- Submittal of requests for reimbursement and corresponding backup documentation.
- Progress reports and recipient closeout reports.
- Submittal of required performance items.
- Compliance with applicable procurement and contracting requirements.

Applicants will be able to see the standard task language in EAGL when applying and will be required to enter a budget for this task.

## **Water Bank Development**

To develop or establish a new water bank, certain steps will be required in most cases. The water bank development task will include the water right change process, executing a water banking agreement (also known as a Trust Water Right Agreement), and dedicating the required one-third of purchased water to instream flow benefiting fish and wildlife. The timing of these steps may vary from project to project.

In most cases, a water right proposed for water banking use will need to undergo the water right change process to have its purpose of use changed to instream flow and mitigation, and to determine the quantity of valid water available for purchase. The change process will begin once the water right holder submits the corresponding water right change application(s). This process should include, but is not limited to, a draft report of examination, 30-day public comment period, and consideration of received comments. The record of decision will include a tentative determination of extent and validity. Once Ecology issues a final decision on the change application, there is a 30-day appeal period. To expedite processing of water right change applications, Ecology may obtain assistance from Ecology's cost-reimbursement consultant pool.

To establish the water bank, an executed water banking agreement will be required. This agreement between Ecology and the banker (the public entity) defines roles and responsibilities, specifies the terms and conditions under which the bank will operate, the process for assigning mitigation, and where mitigation may be used. Ecology will provide a first draft of the water banking agreement to start negotiations.

One-third of purchased water must be dedicated to instream flow benefiting fish and wildlife as a condition of grant funding. This one-third dedication must be described in the water right change application(s) and the water banking agreement.

## Water Right Acquisition

To establish a water bank, water rights suitable for use in a water bank must be acquired from a willing seller. Coordination with the seller should include timing expectations since Ecology will not disburse payment for purchase of a water right until after the water right change process is complete and the quantity of valid water available for purchase has been determined.

Grant funding may be used to conduct an appraisal to confirm that the water is purchased for fair market value. Applicants should provide evidence that the proposed price of the water right reflects market value. Ecology may require a valuation be conducted as part of the project.

Although Ecology grants work on a reimbursement basis, Ecology may deposit money in an escrow account to assist the recipient for a pending water right acquisition as long as certain conditions are met. Ecology requires a minimum of 30 days to process an escrow payment. If an applicant is interested in including an escrow component in their agreement, they are strongly encouraged to contact Ecology early in the agreement development process.<sup>6</sup>

## Ineligible Project Elements

Funding is available for the costs of acquiring water and developing water banks. Projects or project components that are ineligible to receive water banking pilot grant funding include, but are not limited to:

- Acquisition of water right claims filed under RCW 90.14.068, unperfected permits, and permit-exempt uses.
- Projects or project elements previously funded by Ecology. However, expansion or additional phases of a project that provide additional benefits may be eligible.
- Capital equipment and other major purchases made without prior approval from Ecology.
- Contaminated soils removal or remediation.
- Projects required under statute, rule, ordinance, or court order, or that conflict with other Ecology rules, projects, or guidance.
- Staff time not directly related to the project.
- Operation and maintenance costs.

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<sup>6</sup> An escrow process requires that the title company must be registered with Washington's Office of Financial Management and must provide a statewide vendor number ahead of closing to accept payment. Once an escrow payment is approved, it can take three to seven business days for the funds to be received in escrow. Documentation that will be required prior to closing includes a settlement statement, electronic wiring instructions and corresponding Quit Claim Deed recorded with the county auditor, Real Estate Excise Tax and other necessary tax forms.



- Compensation or damages for any claim or injury of any kind arising out of the project, including any personal injury, damage to any kind of real or personal property, or any kind of contractual damages, whether direct, indirect, or consequential.
- Dispute resolution under the grant agreement.
- Operating expenses or other indirect costs in excess of approved indirect salary rate.
- Overtime differential paid to employees of a public entity to complete administrative or force account work.
- Permit fees not directly required for the completion of the project.
- Professional dues.

More information on broader ineligible considerations can be found in [Administrative Requirements for Recipients of Ecology Grants and Loans Managed in EAGL](#) (the “Yellow Book”) See: <https://apps.ecology.wa.gov/publications/summarypages/1701004.html>

## Other Considerations

In addition to the considerations in the section above, potential grant applicants should consider the following items as they prepare to submit a grant application:

- There is no guarantee of any funding until an agreement is finalized, and any work done prior to a signed and executed grant agreement is at the applicant’s own risk.
- Final agreement budgets may differ from the amount requested in the application.
- Grant funding will not support ongoing operation costs of the water bank.
- In the event that Ecology makes an offer to fund an application, Ecology and the applicant will negotiate the scope of work and corresponding budget.
- The applicant is responsible for obtaining and complying with all permits necessary to execute the project.
- Grant recipients shall comply fully with all applicable federal, state, and local laws, orders, and regulations related to the grant agreement.
- All project grants will be administered in Ecology’s Administration of Grants and Loans System (EAGL).

## Chapter 4: How to Apply

### Ecology’s Administration of Grants and Loans (EAGL)

Applicants must submit applications for funding through the Ecology Administration of Grants and Loans (EAGL) system. The funding application and the instructional EAGL User’s Manual are available on our website at: <https://ecology.wa.gov/About-us/How-we-operate/Grants-loans>.

EAGL limits grant applications to one application per organization as a default to avoid duplicate applications. If an additional application is needed, the applicant may request that one be created by emailing [WaterBankingGrants@ecy.wa.gov](mailto:WaterBankingGrants@ecy.wa.gov). It may take a few days to create an additional application.

Applicants should include specific details about the project in the “Water Banking Form” in EAGL. This information will aid in our evaluation and application of eligibility criteria in Table 1, below.

In addition, applicants should include detailed maps as attachments with their applications. This may include maps of the water right(s) to be acquired, locations of new anticipated uses, and the proposed service area where the water bank intends to offer mitigation.

## Chapter 5: Evaluation Process

Ecology will evaluate project proposals based on applicant responses in the “Water Banking Form” and the supporting evidence provided in the application.

A total of 120 points are available. Table 1 shows the scoring criteria Ecology will use to select projects for funding. A team of Ecology Water Resources Program staff will review each project proposal for technical merit and eligibility.

In order to obtain funding an application must receive a score of at least 110 of the 120 points possible and must meet all eligibility scoring criteria (criteria numbers 1.1 through 1.5). The remaining scoring criteria evaluate need and cost (criteria numbers 2.1 and 3.1 respectively).

Applications must demonstrate that the bank will meet local water needs and that the proposed water right acquisition cost reflects market value. Evaluators will use the guidance below when evaluating need and cost.

**Need** is worth up to 10 total points:

- To receive 1-5 points, the application must describe how the water bank will meet local needs.
- To receive 6-10 points, the application must provide supportive documentation as evidence of local water needs.
- Higher points within each range will be awarded based on the specificity and urgency of need, including instream flow needs and the quality of supporting documentation.

**Cost** is worth up to 10 total points:

- To receive 1-5 points, the application must describe how the proposed cost of the water right acquisition accurately reflects market value using one of the valuation methods described under the “Price and Valuations” section in Chapter 2 of these guidelines.
- To receive 6-10 points, the application must provide additional documentation or valuation methods as described under the “Price and Valuation” section in Chapter 2 of these guidelines, or provide a completed independent valuation.

- Higher points within each range will be awarded for quality of methodology, independence of valuation, and value of water for price purchased.

Ecology will review applications submitted to EAGL prioritized into biweekly review periods. Grants will be awarded based on eligibility and the application receiving a minimum score of 110 points, for as long as funds are available. This process is not subject to the requirements for competitive procurement and public bidding.

Applications will be processed according to the review period in which they are submitted to EAGL so that applications received in the first period are afforded the first priority for funding. All applications receiving a total score of 110 or higher will be funded.

If grant funding is not adequate for all eligible applications within a review period, Ecology will prioritize funding according to a total evaluation score in excess of 110 points.

If additional funds become available later in the biennium, Ecology will resume the scoring process according to priority of the earliest review period available.

If a project is declined, applicants may reapply. Applicants should consider requesting a debriefing meeting with Ecology prior to resubmitting their application.

**Table 1. Scoring criteria**

<b>Category</b>	<b>Criteria Number</b>	<b>Criteria</b>	<b>Score</b>
1. Eligibility	1.1	Is the applicant a public entity or in a formally documented partnership with a public entity?	Yes = 20 points No = 0 points
	1.2	Does the applicant have sufficient expertise and capacity to develop and maintain a water bank?	Yes = 20 points No = 0 points
	1.3	Has the applicant secured a valid interest to purchase a water right?	Yes = 20 points No = 0 points
	1.4	Does the proposal sufficiently demonstrate that the water right is adequate for the intended use of the water bank?	Yes = 20 points No = 0 points
	1.5	Does the applicant agree to permanently commit one-third of the purchased water to instream flow benefiting fish and wildlife?	Yes = 20 points No = 0 points
2. Need	2.1	Does the application demonstrate that the proposed bank will meet local water needs?	0-10 Based on supportive evidence
3. Cost	3.1	Does the application demonstrate that the proposed price reflects market value?	0-10 Based on supportive evidence

## Appendix A: Funding Provisos

2021-23 operating and capital budget provisos provided up to \$14 million in grant funding for water banking strategies in rural headwater counties. Excerpts of the funding provisos are provided below.

### CAPITAL BUDGET – SHB 1080

#### **Sec 3112 – ECY – Page 175**

The appropriation in this section is subject to the following conditions and limitations:

(1)(a) The appropriations in this section are provided solely for the department to administer a pilot grant program for water banking strategies to meet local water needs.

(b) \$2,000,000 is provided solely for qualified applicants located within the Methow River Basin.

(2)(a) Grant awards may only be used for:

(i) Development of water banks in rural counties as defined in RCW 82.14.370(5);

(ii) Acquisition of water rights appropriate for use in a water bank including all costs necessary to evaluate the water right for eligibility for its intended use; and

(iii) Activities necessary to facilitate the creation of a water bank.

(b) For applicants located outside of the Methow River Basin, grant awards may only be used for the development of water banks in rural counties that have the headwaters of a major watershed within their borders and only for water banking strategies within the county of origin. For purposes of this section, "major watershed" has the same meaning as shoreline of statewide significance in RCW 90.58.030(2)(f)(v) (A) and (B).

(3) Grant awards may not exceed \$2,000,000 per applicant.

(4) For the purposes of a grant pursuant to this section, a water bank must meet water needs, which include, but are not limited to, agricultural use and instream flow for fish and wildlife. The water bank must preserve water rights for use in the county of origin and for permanent instream flows for fish and wildlife through the primary and secondary reaches of the water right.

(5) To be eligible to receive a grant under this section, an applicant must:

(a) Be a public entity or a participant in a public-private partnership with a public entity;

- (b) Exhibit sufficient expertise and capacity to develop and maintain a water bank consistent with the purposes of this appropriation;
- (c) Secure a valid interest to purchase a water right;
- (d) Show that the water rights appear to be adequate for the intended use; and
- (e) Agree to have one-third of any water right purchased with the funds appropriated under this section to have its purpose of use changed permanently to instream flow benefiting fish and wildlife.

Table 1. 2021-23 capital budget appropriation provided for water banking strategies to meet local needs.

2021-23 Appropriation:	
State Building Construction Account—State	\$5,000,000
Prior Biennia (Expenditures)	\$0
Future Biennia (Projected Costs)	\$0
<b>TOTAL</b>	<b>\$5,000,000</b>

**OPERATING BUDGET – ESSB 5092**

**Sec. 302 – ECY – Page 316-318**

**(31)** \$40,000 of the general fund—state appropriation for fiscal year 2022 is provided solely for the department to:

- (a) Develop recommendations and implement actions under existing authority to modify the process for the review of water banks to ensure that key information is made available to the public. The changes should consider requirements such as:
  - (i) A description of a proposed banking and operations plan, including the needs and customers the bank intends to serve, the geographic area to be served, the portfolio of available mitigating rights and their allowed uses, any anticipated change in use of available mitigating rights, any limitations the bank intends to impose in offering water rights for use, and anything else the department deems necessary to promote transparency and the public interest;
  - (ii) Reporting requirements that include any changes in the intended customers or needs being serviced by the bank, any change in the geographic area to be served, any anticipated change in the use of available mitigating rights, any change in limitation the banks intends to impose in offering water right for use, and any other change the department deems necessary to promote transparency and the public interest; and

(iii) Reporting requirements for publishing each change and providing notice to pertinent parties and soliciting public comment.

(b) The department must build off its work directed under chapter 357, Laws of 2020 to refine recommendations on improving the state's framework for water banking, water trust, and water right transfers. Recommendations should address issues of private investment in water banking and the merits of incentives and regulations pertaining to the out-of-basin transfer of water rights. In refining its recommendations, the department shall consult with tribes and consider input from stakeholders with expertise in water banking.

(c) By December 31, 2021, the department shall update the appropriate committees of the legislature on its progress on refining policy recommendations under this section, including any recommended statutory changes, and on the status of the pilot grant program established under subsection (32) of this section.

(d) By December 1, 2022, the department shall submit a report to the appropriate committees of the legislature on work conducted pursuant to this section and on the pilot grant program established under this section. The report should include but is not limited to a summary of water banking activity funded including success and challenges, a summary of outcomes of the pilot grant program, a summary of actions taken under current authority, and policy recommendations. The policy recommendations may also come in the form of agency request legislation.

**(32)** \$4,500,000 of the general fund—state appropriation for fiscal year 2022 and \$4,500,000 of the general fund—state appropriation for fiscal year 2023 are provided solely for the department to administer the pilot grant program for water banking strategies to meet water needs as described in this section. Within available appropriations, grants must be awarded to qualified applicants according to (c) of this subsection. Grant awards must be limited to not more than \$2,000,000 per applicant.

(a) Grant awards may only be used for:

(i) Development of water banks in rural counties as defined in RCW 82.14.370(5) that have the headwaters of a major watershed within their borders and only for water banking strategies within the county of origin. A major watershed has the same meaning as shoreline of the state in RCW 90.58.030(2)(f)(v) (A) and (B);

(ii) Acquisition of water rights appropriate for use in a water bank including all costs necessary to evaluate the water right for eligibility for its intended use; and

(iii) Activities necessary to facilitate the creation of a water bank.

(b) For the purposes of a grant pursuant to this section, a water bank must meet water needs, which include but are not limited to agricultural use and instream flow for fish

and wildlife. The water bank must preserve water rights for use in the county of origin and for permanent instream flows for fish and wildlife through the primary and secondary reaches of the water right.

(c) To be qualified for these funds, an applicant must also show:

(i) That the applicant has sufficient expertise and capacity to develop and maintain a water bank consistent with the purposes of this appropriation;

(ii) That the applicant has secured a valid interest to purchase a water right;

(iii) That the water rights appear to be adequate for the intended use;

(iv) That the applicant agrees to have one-third of any water right purchased with the funds appropriated under this section to have its purpose of use changed permanently to instream flow benefiting fish and wildlife; and

(v) That the applicant is a public entity or a participant in a public/private partnership with a public entity.

**(33)** \$500,000 of the general fund—state appropriation for fiscal year 2022 and \$500,000 of the general fund—state appropriation for fiscal year 2023 are provided solely for the department to:

(a) Establish and administer a pilot grant program for implementing water banking strategies to meet local water needs;

(b) Review water banking grant applications submitted under this section, including evaluation of water right suitability; and

(c) Develop and finalize water banking agreements, trust water right agreements, and other necessary legal instruments with entities selected to receive grants under this section.



## Appendix B: Map of Eligible Counties



Figure 1 Go to the [Eligibility Overview](#) for a list of counties.

# Appendix C: Ecology General Terms and Conditions (06/24/2021 Version)

## 1. ADMINISTRATIVE REQUIREMENTS

- a) RECIPIENT shall follow the "Administrative Requirements for Recipients of Ecology Grants and Loans – EAGL Edition." (<https://apps.ecology.wa.gov/publications/SummaryPages/1701004.html>)
- b) RECIPIENT shall complete all activities funded by this Agreement and be fully responsible for the proper management of all funds and resources made available under this Agreement.
- c) RECIPIENT agrees to take complete responsibility for all actions taken under this Agreement, including ensuring all subgrantees and contractors comply with the terms and conditions of this Agreement. ECOLOGY reserves the right to request proof of compliance by subgrantees and contractors.
- d) RECIPIENT's activities under this Agreement shall be subject to the review and approval by ECOLOGY for the extent and character of all work and services.

## 2. AMENDMENTS AND MODIFICATIONS

This Agreement may be altered, amended, or waived only by a written amendment executed by both parties. No subsequent modification(s) or amendment(s) of this Agreement will be of any force or effect unless in writing and signed by authorized representatives of both parties. ECOLOGY and the RECIPIENT may change their respective staff contacts and administrative information without the concurrence of either party.

## 3. ACCESSIBILITY REQUIREMENTS FOR COVERED TECHNOLOGY

The RECIPIENT must comply with the Washington State Office of the Chief Information Officer, OCIO Policy no. 188, Accessibility (<https://ocio.wa.gov/policy/accessibility>) as it relates to "covered technology." This requirement applies to all products supplied under the Agreement, providing equal access to information technology by individuals with disabilities, including and not limited to web sites/pages, web-based applications, software systems, video and audio content, and electronic documents intended for publishing on Ecology's public web site.

## 4. ARCHAEOLOGICAL AND CULTURAL RESOURCES

RECIPIENT shall take all reasonable action to avoid, minimize, or mitigate adverse effects to archaeological and historic archaeological sites, historic buildings/structures, traditional cultural places, sacred sites, or other cultural resources, hereby referred to as Cultural Resources.

The RECIPIENT must agree to hold harmless ECOLOGY in relation to any claim related to Cultural Resources discovered, disturbed, or damaged due to the RECIPIENT's project funded under this Agreement.

RECIPIENT shall:

a) Contact the ECOLOGY Program issuing the grant or loan to discuss any Cultural Resources requirements for their project:

- Cultural Resource Consultation and Review should be initiated early in the project planning process and must be completed prior to expenditure of Agreement funds as required by applicable State and Federal requirements.
- For state funded construction, demolition, or land acquisitions, comply with Governor Executive Order 21-02, Archaeological and Cultural Resources.
- For projects with any federal involvement, comply with the National Historic Preservation Act of 1966 (Section 106).

b) If required by the ECOLOGY Program, submit an Inadvertent Discovery Plan (IDP) to ECOLOGY prior to implementing any project that involves field activities. ECOLOGY will provide the IDP form.

RECIPIENT shall:

- Keep the IDP at the project site.
- Make the IDP readily available to anyone working at the project site.
- Discuss the IDP with staff, volunteers, and contractors working at the project site.
- Implement the IDP when Cultural Resources or human remains are found at the project site.

c) If any Cultural Resources are found while conducting work under this Agreement, follow the protocol outlined in the project IDP.

- Immediately stop work and notify the ECOLOGY Program, who will notify the Department of Archaeology and Historic Preservation at (360) 586-3065, any affected Tribe, and the local government.

d) If any human remains are found while conducting work under this Agreement, follow the protocol outlined in the project IDP.

- Immediately stop work and notify the local Law Enforcement Agency or Medical Examiner/Coroner's Office, the Department of Archaeology and Historic Preservation at (360) 790-1633, and then the ECOLOGY Program.

e) Comply with RCW 27.53, RCW 27.44, and RCW 68.50.645, and all other applicable local, state, and federal laws protecting Cultural Resources and human remains.

## **5. ASSIGNMENT**

No right or claim of the RECIPIENT arising under this Agreement shall be transferred or assigned by the RECIPIENT.

## **6. COMMUNICATION**

RECIPIENT shall make every effort to maintain effective communications with the RECIPIENT's designees, ECOLOGY, all affected local, state, or federal jurisdictions, and any interested individuals or groups.

## **7. COMPENSATION**

a) Any work performed prior to effective date of this Agreement will be at the sole expense and risk of the RECIPIENT. ECOLOGY must sign the Agreement before any payment requests can be submitted.

b) Payments will be made on a reimbursable basis for approved and completed work as specified in this Agreement.

c) RECIPIENT is responsible to determine if costs are eligible. Any questions regarding eligibility should be clarified with ECOLOGY prior to incurring costs. Costs that are conditionally eligible require approval by ECOLOGY prior to expenditure.

d) RECIPIENT shall not invoice more than once per month unless agreed on by ECOLOGY.

e) ECOLOGY will not process payment requests without the proper reimbursement forms, Progress Report and supporting documentation. ECOLOGY will provide instructions for submitting payment requests.

f) ECOLOGY will pay the RECIPIENT thirty (30) days after receipt of a properly completed request for payment.

g) RECIPIENT will receive payment through Washington State's Office of Financial Management's Statewide Payee Desk. To receive payment you must register as a statewide vendor by submitting a statewide vendor registration form and an IRS W-9 form at website, <https://ofm.wa.gov/it-systems/statewide-vendorpayee-services>. If you have questions about the vendor registration process, you can contact Statewide Payee Help Desk at (360) 407-8180 or email [PayeeRegistration@ofm.wa.gov](mailto:PayeeRegistration@ofm.wa.gov).

h) ECOLOGY may, at its sole discretion, withhold payments claimed by the RECIPIENT if the RECIPIENT fails to satisfactorily comply with any term or condition of this Agreement.

i) Monies withheld by ECOLOGY may be paid to the RECIPIENT when the work described herein, or a portion thereof, has been completed if, at ECOLOGY's sole discretion, such payment is reasonable and approved according to this Agreement, as appropriate, or upon completion of an audit as specified herein.

j) RECIPIENT must submit within thirty (30) days after the expiration date of this Agreement, all financial, performance, and other reports required by this Agreement. Failure to comply may result in delayed reimbursement.

## **8. COMPLIANCE WITH ALL LAWS**

RECIPIENT agrees to comply fully with all applicable federal, state, and local laws, orders, regulations, and permits related to this Agreement, including but not limited to:

a) RECIPIENT agrees to comply with all applicable laws, regulations, and policies of the United States and the State of Washington which affect wages and job safety.

b) RECIPIENT agrees to be bound by all applicable federal and state laws, regulations, and policies against discrimination.

c) RECIPIENT certifies full compliance with all applicable state industrial insurance requirements.

d) RECIPIENT agrees to secure and provide assurance to ECOLOGY that all the necessary approvals and permits required by authorities having jurisdiction over the project are obtained. RECIPIENT must include time in their project timeline for the permit and approval processes.

ECOLOGY shall have the right to immediately terminate for cause this Agreement as provided herein if the RECIPIENT fails to comply with above requirements.

If any provision of this Agreement violates any statute or rule of law of the state of Washington, it is considered modified to conform to that statute or rule of law.

## **9. CONFLICT OF INTEREST**

RECIPIENT and ECOLOGY agree that any officer, member, agent, or employee, who exercises any function or responsibility in the review, approval, or carrying out of this Agreement, shall not have any personal or financial interest, direct or indirect, nor affect the interest of any corporation, partnership, or association in which he/she is a part, in this Agreement or the proceeds thereof.

## **10. CONTRACTING FOR GOODS AND SERVICES**

RECIPIENT may contract to buy goods or services related to its performance under this Agreement. RECIPIENT shall award all contracts for construction, purchase of goods,

equipment, services, and professional architectural and engineering services through a competitive process, if required by State law. RECIPIENT is required to follow procurement procedures that ensure legal, fair, and open competition.

RECIPIENT must have a standard procurement process or follow current state procurement procedures. RECIPIENT may be required to provide written certification that they have followed their standard procurement procedures and applicable state law in awarding contracts under this Agreement.

ECOLOGY reserves the right to inspect and request copies of all procurement documentation, and review procurement practices related to this Agreement. Any costs incurred as a result of procurement practices not in compliance with state procurement law or the RECIPIENT's normal procedures may be disallowed at ECOLOGY's sole discretion.

## **11. DISPUTES**

When there is a dispute with regard to the extent and character of the work, or any other matter related to this Agreement the determination of ECOLOGY will govern, although the RECIPIENT shall have the right to appeal decisions as provided for below:

- a) RECIPIENT notifies the funding program of an appeal request.
- b) Appeal request must be in writing and state the disputed issue(s).
- c) RECIPIENT has the opportunity to be heard and offer evidence in support of its appeal.
- d) ECOLOGY reviews the RECIPIENT's appeal.
- e) ECOLOGY sends a written answer within ten (10) business days, unless more time is needed, after concluding the review.

The decision of ECOLOGY from an appeal will be final and conclusive, unless within thirty (30) days from the date of such decision, the RECIPIENT furnishes to the Director of ECOLOGY a written appeal. The decision of the Director or duly authorized representative will be final and conclusive.

The parties agree that this dispute process will precede any action in a judicial or quasi-judicial tribunal.

Appeals of the Director's decision will be brought in the Superior Court of Thurston County. Review of the Director's decision will not be taken to Environmental and Land Use Hearings Office.

Pending final decision of a dispute, the RECIPIENT agrees to proceed diligently with the performance of this Agreement and in accordance with the decision rendered.

Nothing in this Agreement will be construed to limit the parties' choice of another mutually acceptable method, in addition to the dispute resolution procedure outlined above.

## **12. ENVIRONMENTAL DATA STANDARDS**

a) RECIPIENT shall prepare a Quality Assurance Project Plan (QAPP) for a project that collects or uses environmental measurement data. RECIPIENTS unsure about whether a QAPP is required for their project shall contact the ECOLOGY Program issuing the grant or loan. If a QAPP is required, the RECIPIENT shall:

- Use ECOLOGY's QAPP Template/Checklist provided by the ECOLOGY, unless ECOLOGY Quality Assurance (QA) officer or the Program QA coordinator instructs otherwise.
- Follow ECOLOGY's Guidelines for Preparing Quality Assurance Project Plans for Environmental Studies, July 2004 (Ecology Publication No. 04-03-030).
- Submit the QAPP to ECOLOGY for review and approval before the start of the work.

b) RECIPIENT shall submit environmental data that was collected on a project to ECOLOGY using the Environmental Information Management system (EIM), unless the ECOLOGY Program instructs otherwise. The RECIPIENT must confirm with ECOLOGY that complete and correct data was successfully loaded into EIM, find instructions at:

<http://www.ecy.wa.gov/eim>.

c) RECIPIENT shall follow ECOLOGY's data standards when Geographic Information System (GIS) data is collected and processed. Guidelines for Creating and Accessing GIS Data are available at: <https://ecology.wa.gov/Research-Data/Data-resources/Geographic-Information-Systems-GIS/Standards>. RECIPIENT, when requested by ECOLOGY, shall provide copies to ECOLOGY of all final GIS data layers, imagery, related tables, raw data collection files, map products, and all metadata and project documentation.

## **13. GOVERNING LAW**

This Agreement will be governed by the laws of the State of Washington, and the venue of any action brought hereunder will be in the Superior Court of Thurston County.

## **14. INDEMNIFICATION**

ECOLOGY will in no way be held responsible for payment of salaries, consultant's fees, and other costs related to the project described herein, except as provided in the Scope of Work.

To the extent that the Constitution and laws of the State of Washington permit, each party will indemnify and hold the other harmless from and against any liability for any or all injuries to persons or property arising from the negligent act or omission of that party or that party's agents or employees arising out of this Agreement.

## **15. INDEPENDENT STATUS**

The employees, volunteers, or agents of each party who are engaged in the performance of this Agreement will continue to be employees, volunteers, or agents of that party and will not for any purpose be employees, volunteers, or agents of the other party.

## **16. KICKBACKS**

RECIPIENT is prohibited from inducing by any means any person employed or otherwise involved in this Agreement to give up any part of the compensation to which he/she is otherwise entitled to or receive any fee, commission, or gift in return for award of a subcontract hereunder.

## **17. MINORITY AND WOMEN'S BUSINESS ENTERPRISES (MWBE)**

RECIPIENT is encouraged to solicit and recruit, to the extent possible, certified minority-owned (MBE) and women-owned (WBE) businesses in purchases and contracts initiated under this Agreement.

Contract awards or rejections cannot be made based on MWBE participation; however, the RECIPIENT is encouraged to take the following actions, when possible, in any procurement under this Agreement:

- a) Include qualified minority and women's businesses on solicitation lists whenever they are potential sources of goods or services.
- b) Divide the total requirements, when economically feasible, into smaller tasks or quantities, to permit maximum participation by qualified minority and women's businesses.
- c) Establish delivery schedules, where work requirements permit, which will encourage participation of qualified minority and women's businesses.
- d) Use the services and assistance of the Washington State Office of Minority and Women's Business Enterprises (OMWBE) (866-208-1064) and the Office of Minority Business Enterprises of the U.S. Department of Commerce, as appropriate.

## **18. ORDER OF PRECEDENCE**

In the event of inconsistency in this Agreement, unless otherwise provided herein, the inconsistency shall be resolved by giving precedence in the following order: (a) applicable federal and state statutes and regulations; (b) The Agreement; (c) Scope of Work; (d) Special Terms and Conditions; (e) Any provisions or terms incorporated herein by reference, including the "Administrative Requirements for Recipients of Ecology Grants and Loans"; (f) Ecology Funding Program Guidelines; and (g) General Terms and Conditions.



## **19. PRESENTATION AND PROMOTIONAL MATERIALS**

ECOLOGY reserves the right to approve RECIPIENT's communication documents and materials related to the fulfillment of this Agreement:

- a) If requested, RECIPIENT shall provide a draft copy to ECOLOGY for review and approval ten (10) business days prior to production and distribution.
- b) RECIPIENT shall include time for ECOLOGY's review and approval process in their project timeline.
- c) If requested, RECIPIENT shall provide ECOLOGY two (2) final copies and an electronic copy of any tangible products developed.

Copies include any printed materials, and all tangible products developed such as brochures, manuals, pamphlets, videos, audio tapes, CDs, curriculum, posters, media announcements, or gadgets with a message, such as a refrigerator magnet, and any online communications, such as web pages, blogs, and twitter campaigns. If it is not practical to provide a copy, then the RECIPIENT shall provide a description (photographs, drawings, printouts, etc.) that best represents the item.

Any communications intended for public distribution that uses ECOLOGY's logo shall comply with ECOLOGY's graphic requirements and any additional requirements specified in this Agreement. Before the use of ECOLOGY's logo contact ECOLOGY for guidelines.

RECIPIENT shall acknowledge in the communications that funding was provided by ECOLOGY.

## **20. PROGRESS REPORTING**

- a) RECIPIENT must satisfactorily demonstrate the timely use of funds by submitting payment requests and progress reports to ECOLOGY. ECOLOGY reserves the right to amend or terminate this Agreement if the RECIPIENT does not document timely use of funds.
- b) RECIPIENT must submit a progress report with each payment request. Payment requests will not be processed without a progress report. ECOLOGY will define the elements and frequency of progress reports.
- c) RECIPIENT shall use ECOLOGY's provided progress report format.
- d) Quarterly progress reports will cover the periods from January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31. Reports shall be submitted within thirty (30) days after the end of the quarter being reported.
- e) RECIPIENT must submit within thirty (30) days of the expiration date of the project, unless an extension has been approved by ECOLOGY, all financial, performance, and other

reports required by the Agreement and funding program guidelines. RECIPIENT shall use the ECOLOGY provided closeout report format.

## **21. PROPERTY RIGHTS**

a) Copyrights and Patents. When the RECIPIENT creates any copyrightable materials or invents any patentable property under this Agreement, the RECIPIENT may copyright or patent the same but ECOLOGY retains a royalty free, nonexclusive, and irrevocable license to reproduce, publish, recover, or otherwise use the material(s) or property, and to authorize others to use the same for federal, state, or local government purposes.

b) Publications. When the RECIPIENT or persons employed by the RECIPIENT use or publish ECOLOGY information; present papers, lectures, or seminars involving information supplied by ECOLOGY; or use logos, reports, maps, or other data in printed reports, signs, brochures, pamphlets, etc., appropriate credit shall be given to ECOLOGY.

c) Presentation and Promotional Materials. ECOLOGY shall have the right to use or reproduce any printed or graphic materials produced in fulfillment of this Agreement, in any manner ECOLOGY deems appropriate. ECOLOGY shall acknowledge the RECIPIENT as the sole copyright owner in every use or reproduction of the materials.

d) Tangible Property Rights. ECOLOGY's current edition of "Administrative Requirements for Recipients of Ecology Grants and Loans," shall control the use and disposition of all real and personal property purchased wholly or in part with funds furnished by ECOLOGY in the absence of state and federal statutes, regulations, or policies to the contrary, or upon specific instructions with respect thereto in this Agreement.

e) Personal Property Furnished by ECOLOGY. When ECOLOGY provides personal property directly to the RECIPIENT for use in performance of the project, it shall be returned to ECOLOGY prior to final payment by ECOLOGY. If said property is lost, stolen, or damaged while in the RECIPIENT's possession, then ECOLOGY shall be reimbursed in cash or by setoff by the RECIPIENT for the fair market value of such property.

f) Acquisition Projects. The following provisions shall apply if the project covered by this Agreement includes funds for the acquisition of land or facilities:

1. RECIPIENT shall establish that the cost is fair value and reasonable prior to disbursement of funds provided for in this Agreement.

2. RECIPIENT shall provide satisfactory evidence of title or ability to acquire title for each parcel prior to disbursement of funds provided by this Agreement. Such evidence may include title insurance policies, Torrens certificates, or abstracts, and attorney's opinions establishing that the land is free from any impediment, lien, or claim which would impair the uses intended by this Agreement.

g) Conversions. Regardless of the Agreement expiration date, the RECIPIENT shall not at any time convert any equipment, property, or facility acquired or developed under this Agreement to uses other than those for which assistance was originally approved without prior written approval of ECOLOGY. Such approval may be conditioned upon payment to ECOLOGY of that portion of the proceeds of the sale, lease, or other conversion or encumbrance which monies granted pursuant to this Agreement bear to the total acquisition, purchase, or construction costs of such property.

## **22. RECORDS, AUDITS, AND INSPECTIONS**

RECIPIENT shall maintain complete program and financial records relating to this Agreement, including any engineering documentation and field inspection reports of all construction work accomplished.

All records shall:

- a) Be kept in a manner which provides an audit trail for all expenditures.
- b) Be kept in a common file to facilitate audits and inspections.
- c) Clearly indicate total receipts and expenditures related to this Agreement.
- d) Be open for audit or inspection by ECOLOGY, or by any duly authorized audit representative of the State of Washington, for a period of at least three (3) years after the final grant payment or loan repayment, or any dispute resolution hereunder.

RECIPIENT shall provide clarification and make necessary adjustments if any audits or inspections identify discrepancies in the records.

ECOLOGY reserves the right to audit, or have a designated third party audit, applicable records to ensure that the state has been properly invoiced. Any remedies and penalties allowed by law to recover monies determined owed will be enforced. Repetitive instances of incorrect invoicing or inadequate records may be considered cause for termination.

All work performed under this Agreement and any property and equipment purchased shall be made available to ECOLOGY and to any authorized state, federal or local representative for inspection at any time during the course of this Agreement and for at least three (3) years following grant or loan termination or dispute resolution hereunder.

RECIPIENT shall provide right of access to ECOLOGY, or any other authorized representative, at all reasonable times, in order to monitor and evaluate performance, compliance, and any other conditions under this Agreement.

### **23. RECOVERY OF FUNDS**

The right of the RECIPIENT to retain monies received as reimbursement payments is contingent upon satisfactory performance of this Agreement and completion of the work described in the Scope of Work.

All payments to the RECIPIENT are subject to approval and audit by ECOLOGY, and any unauthorized expenditure(s) or unallowable cost charged to this Agreement shall be refunded to ECOLOGY by the RECIPIENT.

RECIPIENT shall refund to ECOLOGY the full amount of any erroneous payment or overpayment under this Agreement.

RECIPIENT shall refund by check payable to ECOLOGY the amount of any such reduction of payments or repayments within thirty (30) days of a written notice. Interest will accrue at the rate of twelve percent (12%) per year from the time ECOLOGY demands repayment of funds.

Any property acquired under this Agreement, at the option of ECOLOGY, may become ECOLOGY's property and the RECIPIENT's liability to repay monies will be reduced by an amount reflecting the fair value of such property.

### **24. SEVERABILITY**

If any provision of this Agreement or any provision of any document incorporated by reference shall be held invalid, such invalidity shall not affect the other provisions of this Agreement which can be given effect without the invalid provision, and to this end the provisions of this Agreement are declared to be severable.

### **25. STATE ENVIRONMENTAL POLICY ACT (SEPA)**

RECIPIENT must demonstrate to ECOLOGY's satisfaction that compliance with the requirements of the State Environmental Policy Act (Chapter 43.21C RCW and Chapter 197-11 WAC) have been or will be met. Any reimbursements are subject to this provision.

### **26. SUSPENSION**

When in the best interest of ECOLOGY, ECOLOGY may at any time, and without cause, suspend this Agreement or any portion thereof for a temporary period by written notice from ECOLOGY to the RECIPIENT. RECIPIENT shall resume performance on the next business day following the suspension period unless another day is specified by ECOLOGY.

### **27. SUSTAINABLE PRACTICES**

In order to sustain Washington's natural resources and ecosystems, the RECIPIENT is fully encouraged to implement sustainable practices and to purchase environmentally preferable products under this Agreement.

a) Sustainable practices may include such activities as: use of clean energy, use of double-sided printing, hosting low impact meetings, and setting up recycling and composting programs.

b) Purchasing may include such items as: sustainably produced products and services, EPEAT registered computers and imaging equipment, independently certified green cleaning products, remanufactured toner cartridges, products with reduced packaging, office products that are refillable, rechargeable, and recyclable, 100% post-consumer recycled paper, and toxic free products.

For more suggestions visit ECOLOGY's web page, Green Purchasing, <https://ecology.wa.gov/Regulations-Permits/Guidance-technical-assistance/Sustainable-purchasing>.

## **28. TERMINATION**

### a) For Cause

ECOLOGY may terminate for cause this Agreement with a seven (7) calendar days prior written notification to the RECIPIENT, at the sole discretion of ECOLOGY, for failing to perform an Agreement requirement or for a material breach of any term or condition. If this Agreement is so terminated, the parties shall be liable only for performance rendered or costs incurred in accordance with the terms of this Agreement prior to the effective date of termination.

**Failure to Commence Work.** ECOLOGY reserves the right to terminate this Agreement if RECIPIENT fails to commence work on the project funded within four (4) months after the effective date of this Agreement, or by any date mutually agreed upon in writing for commencement of work, or the time period defined within the Scope of Work.

**Non-Performance.** The obligation of ECOLOGY to the RECIPIENT is contingent upon satisfactory performance by the RECIPIENT of all of its obligations under this Agreement. In the event the RECIPIENT unjustifiably fails, in the opinion of ECOLOGY, to perform any obligation required of it by this Agreement, ECOLOGY may refuse to pay any further funds, terminate in whole or in part this Agreement, and exercise any other rights under this Agreement.

Despite the above, the RECIPIENT shall not be relieved of any liability to ECOLOGY for damages sustained by ECOLOGY and the State of Washington because of any breach of this Agreement by the RECIPIENT. ECOLOGY may withhold payments for the purpose of setoff until such time as the exact amount of damages due ECOLOGY from the RECIPIENT is determined.

#### b) For Convenience

ECOLOGY may terminate for convenience this Agreement, in whole or in part, for any reason when it is the best interest of ECOLOGY, with a thirty (30) calendar days prior written notification to the RECIPIENT, except as noted below. If this Agreement is so terminated, the parties shall be liable only for performance rendered or costs incurred in accordance with the terms of this Agreement prior to the effective date of termination.

**Non-Allocation of Funds.** ECOLOGY's ability to make payments is contingent on availability of funding. In the event funding from state, federal or other sources is withdrawn, reduced, or limited in any way after the effective date and prior to the completion or expiration date of this Agreement, ECOLOGY, at its sole discretion, may elect to terminate the Agreement, in whole or part, or renegotiate the Agreement, subject to new funding limitations or conditions. ECOLOGY may also elect to suspend performance of the Agreement until ECOLOGY determines the funding insufficiency is resolved. ECOLOGY may exercise any of these options with no notification or restrictions, although ECOLOGY will make a reasonable attempt to provide notice.

In the event of termination or suspension, ECOLOGY will reimburse eligible costs incurred by the RECIPIENT through the effective date of termination or suspension. Reimbursed costs must be agreed to by ECOLOGY and the RECIPIENT. In no event shall ECOLOGY's reimbursement exceed ECOLOGY's total responsibility under the Agreement and any amendments.

If payments have been discontinued by ECOLOGY due to unavailable funds, the RECIPIENT shall not be obligated to repay monies which had been paid to the RECIPIENT prior to such termination.

RECIPIENT's obligation to continue or complete the work described in this Agreement shall be contingent upon availability of funds by the RECIPIENT's governing body.

#### c) By Mutual Agreement

ECOLOGY and the RECIPIENT may terminate this Agreement, in whole or in part, at any time, by mutual written agreement.

#### d) In Event of Termination

All finished or unfinished documents, data studies, surveys, drawings, maps, models, photographs, reports or other materials prepared by the RECIPIENT under this Agreement, at the option of ECOLOGY, will become property of ECOLOGY and the RECIPIENT shall be entitled to receive just and equitable compensation for any satisfactory work completed on such documents and other materials.

Nothing contained herein shall preclude ECOLOGY from demanding repayment of all funds paid to the RECIPIENT in accordance with Recovery of Funds, identified herein.

**29. THIRD PARTY BENEFICIARY**

RECIPIENT shall ensure that in all subcontracts entered into by the RECIPIENT pursuant to this Agreement, the state of Washington is named as an express third party beneficiary of such subcontracts with full rights as such.

**30. WAIVER**

Waiver of a default or breach of any provision of this Agreement is not a waiver of any subsequent default or breach, and will not be construed as a modification of the terms of this Agreement unless stated as such in writing by the authorized representative of ECOLOGY.