Preliminary Regulatory Analyses:

Including the:

- Preliminary Cost-Benefit Analysis
- Least-Burdensome Alternative Analysis
- Administrative Procedure Act Determinations
- Regulatory Fairness Act Compliance

WAC chapter 173-166

Emergency Drought Relief

By

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For the

Water Resources Program

Washington State Department of Ecology

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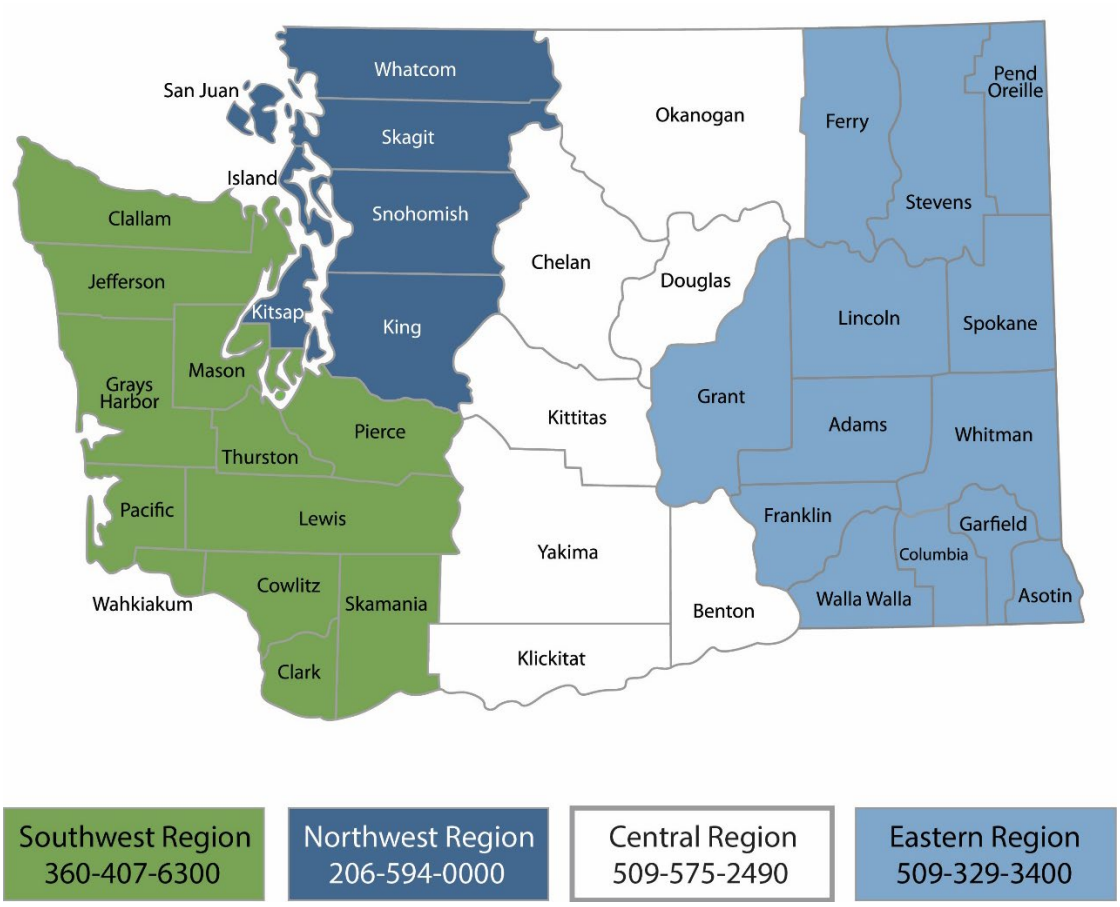
Map of Counties Served



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WAC 173-166 Emergency Drought Relief

Water Resources Program
Washington State Department of Ecology

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DEPARTMENT OF
ECOLOGY
State of Washington

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Abbreviations and Acronyms

APA	Administrative Procedure Act
CBA	Cost-Benefit Analysis
CPI	Consumer Price Index
EWEC	Executive Water Emergency Committee
HEAL	Healthy Environment for All
LBA	Least Burdensome Alternative Analysis
RCW	Revised Code of Washington
RFA	Regulatory Fairness Act
SEPA	State Environmental Policy Act
WAC	Washington Administrative Code
WSAC	Water Supply Availability Committee

Executive Summary

This report presents the determinations made by the Washington State Department of Ecology (Ecology) as required under Chapter 43.83B RCW, for the proposed Emergency Drought Relief rule (Chapter 173-166 WAC; the "rule"). This includes the:

- Preliminary Cost-Benefit Analysis (CBA)
- Least-Burdensome Alternative Analysis (LBA)
- Administrative Procedure Act Determinations
- Regulatory Fairness Act Compliance

Under Chapter 43.83B RCW, Ecology monitors water supply and, following the written approval of the governor, can issue a drought Order and Determination by the Director (publicly referred to as a drought emergency declaration). Under a declaration, Ecology is able to expedite applications for temporary water right changes between willing parties and provide funding assistance to alleviate undue hardship.

In 2023, the legislature added RCW 43.83B.435 establishing a dedicated emergency drought response account for immediate hardship caused by water unavailability. However, Ecology's current Emergency Drought Relief rule (Chapter 173-166 WAC) does not contain the details needed to administer these funds. For this, Ecology adopts Emergency Drought Funding rule Chapter 173-167, which is effective for a maximum of 120 days and often reissued multiple times within a drought declaration.

As drought becomes more frequent and severe due to climate change, the process of adopting emergency rules will be increasingly inefficient. Since there is no formal public comment on emergency rules under the APA, the current process also risks limiting transparency and public participation. Experts at Ecology have also found that grant applicants under the current process were most often denied because applications did not align with the appropriate funding source (e.g. a preparedness project applies for an emergency response grant), and noted that details around evaluating hardship are not well defined.

The proposed rule amendments incorporate details regarding the administration of funding, eligibility, standards, definitions, and other implementation language from Chapter 43.83B RCW and Chapter 173-167 WAC in such a way that Ecology would no longer need to conduct emergency rulemaking. In addition, the rule would distinguish each fund's requirements, and further clarify Ecology's authority, drought advisories, hardship determination, emergency order process, petitions, and public notice to address known issues and concerns.

As compared to the baseline of existing state and federal laws, we identified the following benefits and costs of the proposed rule amendments:

Benefits

- Provide the opportunity for eligible entities and the public, including sensitive and economically disadvantaged communities, to comment on components otherwise interpreted from statute or adopted through emergency rule,
- Clear direction on the necessary conditions for different types of drought relief and their duration,
- Increased opportunities for (Tribal) staff-to-staff engagement ahead of a drought declaration,
- Time savings for eligible entities and the public by clarifying multi-agency coordination in the declaration process,
- Time savings for eligible entities and the public by clarifying the process and details of evaluating hardship for a drought declaration,
- Clarity for entities experiencing repeat drought by explicitly allowing for cumulative impacts,
- Clarity for eligible entities who may otherwise be unaware of existing state matching-fund opportunities

Costs

Proposed amendments (See Sections 2.3.5 and 3.2.5 for detail) would extend the time Ecology has to address petitions for emergency drought declarations.

Allowing additional time for response or resolution to petition may delay associated benefits, like expedited water transfers and emergency drought grants. This is a potential cost for eligible entities compared to the baseline. However, allowing longer response times, when appropriate, would provide for more careful consideration of a petition, which is in the broader public interest. Based on discussions with Ecology staff, petitions occur infrequently, which limits the overall costs or benefits associated with related amendments.[2]

We conclude, based on a reasonable understanding of the qualitative costs and benefits likely to arise from the proposed rule amendments, as compared to the baseline, that the benefits of the proposed rule amendments are greater than the costs.

Least-Burdensome Alternative

We assessed alternative proposed rule content, and determined whether they met the goals and objectives of the authorizing statute. Of those that would meet the goals and objectives, we determined whether those chosen for inclusion in the proposed rule amendments were the least burdensome to those required to comply with them.

We considered the following alternative rule requirements and did not include them in the proposed rule amendments.

[2] In the past roughly 5 years, only one petition was received (and subsequently denied) to expand a drought declaration. No petitions have been received in protest of a drought declaration during the same period.

- Add “surface” to mentions of water supply
- Keep “natural condition” in the drought definition
- Involve a Tribal fish and wildlife specialist in undue hardship determinations

After considering alternatives, within the context of the goals and objectives of the authorizing statute, we determined that the proposed rule represents the least-burdensome alternative of possible rule requirements meeting the goals and objectives.

Regulatory Fairness Act

Regulatory Fairness Act This rulemaking is exempt from further analysis under the Regulatory Fairness Act, per RCW 19.85.025(4), as the proposed rule amendments do not impose compliance costs on existing businesses and are not likely to affect small businesses in the future.

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 43.83B RCW, for the proposed Emergency Drought Relief rule (Chapter 173-166 WAC; the "rule"). This includes the:

- Preliminary 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. Chapter 6 of this document describes that determination.

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 of this document provides the documentation for these determinations.

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

All determinations are based on the best available information at the time of publication. We encourage feedback (including specific data) that may improve the accuracy of this analysis.

1.1.1 Background

Washington is known for its rain. However, parts of the state east of the Cascade Range average fewer than 15 inches of annual rainfall, and during summer months, many watersheds in the state are reliant on mountain snowpack and reservoir storage to meet water supply needs.[3] With decreasing snowpack, variable spring rains, and above average temperatures due to climate change, the state's ability to rely on these water resources has and will continue to

[3] Mellor et al., 2024

diminish.[4] Seven of the past 10 years have seen drought conditions in all or part of our state. Economic losses during major events, such as the historic 2015 statewide drought, have been estimated to be over $1 billion in the agricultural sector alone, with additional impacts likely in energy, public health, aquaculture, recreation, and tourism.[5,6]

Chapter 43.83B RCW gives drought relief authority to Ecology. As part of its responsibility, Ecology monitors water supply conditions, including precipitation, streamflow, reservoir levels, and snowpack throughout the year. If a region is receiving, or is projected to receive, less than seventy-five percent of normal water supply and it is expected that undue hardship will be experienced by water users within that area, Ecology, following the written approval of the governor, issues an Order and Determination by the Director (publicly referred to as a drought emergency declaration).[7]

Under a declaration, Ecology can expedite processing of applications for temporary water right changes between willing parties and provide funding assistance to alleviate undue hardship from drought conditions. Entities eligible for relief include federally recognized Tribes, counties, cities, and towns, water and sewer districts, irrigation districts, public utility districts, port districts, and conservation districts.

Several updates have been made to statute in recent years. Notably, in 2023 the legislature added RCW 43.83B.435 establishing a dedicated emergency drought response account to provide grant funds ("funds" hereafter) for immediate hardship caused by water unavailability and clarified implementation details.

Ecology's current Emergency Drought Relief rule (Chapter 173-166 WAC) defines eligibility for emergency permits and water transfers, and the criteria for forecasting and declaring drought. However, it does not contain the details needed to administer emergency grant funds. To administer these, Ecology adopts an Emergency Drought Funding rule Chapter 173-167 WAC containing provisions for funding, eligibility, standards, and definitions.

Because emergency rules are only effective for a maximum of 120 days, Chapter 173-167 WAC is typically adopted each time a declaration is made (e.g. 2015, 2019, 2021, 2023, 2024 and 2025).[8] For droughts lasting longer than 120 days, Ecology may adopt subsequent emergency drought funding rules within a single drought declaration. At the time of this writing, the most recent example of emergency rule adoption occurred on August 7th, 2026, which is the second adoption under the April 8, 2026 Drought Emergency Declaration that was made for the entirety of the state.

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[4] Marshall et al. 2019

[5] Drought Planning and Preparedness Grants. https://ecology.wa.gov/about-us/who-we-are/news/2024/june-25-drought-planning-and-preparedness-grants. Reported in 2025 dollars using the Bureau of Labor Statistics CPI https://www.bls.gov/data/inflation_calculator.htm.

[6] McLain et al., 2017

[7] Note that undue hardship is not defined in rule, but rather determined by EWEC through a qualitative assessment (see Proposed WAC 173-166-045(2), and section 2.3.4 in this report).

[8] Versions of Chapter 173-167 WAC prior to 2021 are historical and not available on Ecology's website. To request copies contact Water Resources at 360-407-6872.

1.2 Reasons for the proposed rule amendments

As droughts become more frequent and severe, the process of adopting subsequent emergency drought funding rules will be increasingly inefficient. Since there is no formal public comment on emergency rules under the APA, the current process also risks limiting transparency and public participation in drought relief details and funding matters. Following the 2023 creation of the emergency drought response account in statute (RCW 43.83B.415), experts at Ecology found that grant applicants were most often denied because applications did not align with the appropriate funding source (e.g. a preparedness project applies for an emergency response grant). It was also noted that the process and details of evaluating hardship are not well defined.

The proposed amendments to the rule incorporate details regarding the administration of funding, eligibility, standards, definitions, and other implementation language from Chapter 43.83B RCW and Chapter 173-167 WAC in such a way that Ecology would no longer need to conduct emergency rulemaking during each drought declaration to make grant funds available. By adopting the proposed amendments through standard rulemaking, Ecology will provide the public with an opportunity to participate, guide, and formally comment on rules determining the grant funding process, otherwise not directly available through emergency adoption.

The proposed amendments align with recently updated statute and agency experience to clearly distinguish each fund's requirements, eligibility, and administration. In addition, the rule would reorganize sections and clarify Ecology's authority, drought advisories, hardship determinations, emergency order process, petitions, and public notice.

1.3 Summary of the proposed rule amendments

The proposed rule amendments would:

- Clarify Ecology's authority to act during a drought emergency
- Clarify, add, and remove definitions
- Clarify details of a drought advisory
- Clarify and expand details of a drought emergency order and hardship determination
- Clarify and update the petition process
- Clarify and expand details of drought emergency grants
- Clarify and expand details of drought preparedness grants
- Clarify and update grant funding administration
- Clarify public notice requirements

1.4 Document organization

The remaining chapters of this document are organized as follows:

- **Chapter 2 - Baseline and the proposed rule amendments:** Description and comparison of the baseline (what would occur in the absence of the proposed rule amendments) and the proposed rule requirements.
- **Chapter 3 - Likely costs of the proposed rule amendments:** Analysis of the types and sizes of costs we expect impacted entities to incur as a result of the proposed rule amendments.
- **Chapter 4 - Likely benefits of the proposed rule amendments:** Analysis of the types and sizes of benefits we expect to result from the proposed rule amendments.
- **Chapter 5 - Cost-benefit comparison and conclusions:** Discussion of the complete implications of the CBA.
- **Chapter 6 - Least-Burdensome Alternative Analysis:** Analysis of considered alternatives to the contents of the proposed rule amendments.
- **Chapter 7 - Regulatory Fairness Act Compliance:** When applicable. Comparison of compliance costs for small and large businesses; mitigation; impact on jobs.
- **Appendix A - APA Determinations:** RCW 34.05.328 determinations not discussed in chapters 5 and 6.

Chapter 2: Baseline and Proposed Rule Amendments

2.1 Introduction

We analyzed the impacts of the proposed rule amendments relative to the existing 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 Ecology does not adopt the proposed rule.

2.2 Baseline

The baseline for our analysis generally consists of existing laws and rules. This is what allows us to make a consistent comparison between the state of the world with and without the proposed rule amendments. We summarize the applicable rules and laws below and discuss applicable sections and subsections to rule amendments in Section 2.3.[9]

Chapter 43.83B RCW – Drought Conditions

Chapter 43.83B RCW outlines the legal framework for addressing drought impacts and authorizes Ecology to adopt rules for its implementation (RCW 43.83B.420). The statute defines drought, establishes the process for declaring drought emergencies, and authorizes Ecology to take actions to address undue hardship on water users and the natural environment from drought impacts. This includes:

- Expedited processing of applications for:
    - Emergency authorizations to withdraw public waters as an alternate source of water supply on a temporary basis, and
    - Temporary water right changes between willing parties.
- Providing funding assistance to alleviate undue hardship from current and future drought conditions through implementation of projects, planning, and other actions.[10]

Chapter 173-166 WAC – Emergency Drought Relief

Under Chapter 173-166 WAC, Ecology monitors water supply conditions, including precipitation, streamflow, reservoir levels, and snowpack continuously throughout the year. If a region is receiving, or is projected to receive, less than seventy-five percent of normal water supply and it is expected to cause undue hardship to water users within that area, Ecology, following the written approval of the governor, issues a drought emergency declaration (WAC 173-166-050 and -060). Beyond establishing a drought emergency, Chapter 173-166 WAC is

[9] Where appropriate, rule and statutory language may be paraphrased throughout this document for the purposes of synthesis, brevity and plain language. Summaries presented here do not supersede statute, adopted rules, or the rule as amended or proposed to be amended.

[10] As of 2023, RCW 43.83B.435 establishes a dedicated emergency drought response account to provide grant funds for immediate hardship caused by water unavailability and clarified implementation details.

focused on water access including procedures and criteria for emergency water-withdrawal permits (WAC 173-166-070), temporary water-right transfers (WAC 173-166-080), and general funding eligibility (WAC 173-166-040) while protecting existing rights and instream flows (WAC 173-166-070(6) & -080(d)).

Emergency Rule(s) Chapter 173-167 WAC

Chapter 173-167 WAC is a temporary emergency rule that describes the implementation of emergency drought grant funds, authorized by Chapter 43.83B RCW, upon an emergency drought order and declaration. Emergency rule language includes emergency fund limitations, eligibility, standards, and definitions.

Because emergency rules are only effective for a maximum of 120 days, Chapter 173-167 WAC is typically adopted each time a declaration is made (e.g. 2015, 2019, 2021, 2023, 2024 and 2025).[11] For droughts lasting longer than 120 days, Ecology may adopt subsequent emergency drought funding rules within any single drought declaration. At the time of this writing, the most recent example of emergency rule adoption occurred on August 7th, 2026, which is the second adoption under the April 8, 2026 Drought Emergency Declaration that was made for the entirety of the state.

The current version of Chapter 173-167 WAC is currently active and will continue to be re-adopted while the emergency drought declaration is in effect until the adoption of the proposed amendments to Chapter 173-166 WAC. Given the agency's documented history of successfully implementing drought relief funding by emergency rule, elements of the most recently adopted Chapter 173-167 WAC are also considered baseline.[12,13]

2.2.1 Implementation assumptions

While they are not included in the laws and rules of the baseline, our analysis necessitates an understanding of how laws and rules would be implemented. Ecology administers grants and loans according to existing guidance and administrative requirements (Yellow Book).[14] Updated guidelines for emergency drought relief have historically accompanied the emergency drought rule. We assume these sets of guidance provide the most likely implementation structures and processes for the proposed rule amendments, based on their past use and likely ongoing use under the baseline.

Administrative Requirements for Recipients of Ecology Grants and Loans

[11] Versions of Chapter 173-167 WAC prior to 2021 are historical and not available on Ecology's website. To request copies, contact Water Resources at 360-407-6872.
[12] Not specific to a particular geographic area.
[13] In other words, elements of the emergency rule represent the most likely regulatory environment in the absence of the proposed amendments. Assuming that emergency rules would not be adopted in the absence of the proposed rule is an unrealistic future regulatory context.
[14] Publication No. 23-01-002, revised July 2026. See https://apps.ecology.wa.gov/publications/UIPages/SummaryPages/2601001.html

Incorporated by reference in Chapter 173-167 WAC, Ecology administers grants in accordance with the Administrative Requirements for Recipients of Ecology Grants and Loans (Yellow Book).

The manual provides instructions, explanations, requirements, and definitions. It includes details on agreement language, costs, budgets, financial management, procurement, contracting, property management, closeout, and record keeping.

Individual Ecology funding program requirements are explained in specific grant or loan program guideline documents, and they supplement these administrative requirements.

Drought Response Grant Funding Guidance

Drought Response Funding Guidance is also typically issued by Ecology alongside Chapter 173-167 WAC and updated to, among other things, include the geographic scope of the declaration.[15]

While not a legal requirement, guidance provides practical details about the steps necessary to apply for and receive drought funding. We assume this precedent reflects the most likely way the proposed rule would be implemented.

2.3 Proposed rule amendments

The proposed rule amendments would:

- Clarify Ecology's authority to act during a drought emergency
- Clarify, add, and remove definitions
- Clarify details of a drought advisory
- Clarify and expand details of a drought emergency order and hardship determination
- Clarify and update the petition process
- Clarify and expand details of drought emergency grants
- Clarify and expand details of drought preparedness grants
- Clarify and update grant funding administration
- Clarify public notice requirements

A large portion of the proposed rule sections and amendments combine, summarize, or rearrange existing rule sections and state statute for clarity and plain language. These organizational and clarifying amendments would not materially change rule requirements from the baseline. **For brevity, we do not catalog or discuss all amendments and reorganizations in their entirety**. Rather, in the remaining chapter we focus on:

[15] See https://apps.ecology.wa.gov/publications/SummaryPages/2611003.html for an example of Drought Response Grant Funding Guidance in place at the time of this writing.

1. Proposed amendments that represent agency discretion. That is, those that contain new actionable information or direction beyond what would be reasonably expected under current law,
2. Proposed amendments for which it may be unclear whether they are exercising discretion, and
3. Major clarifications that might generate benefits or concern.

2.3.1 Clarify Ecology's authority to act during a drought emergency

Baseline

RCW 43.83B.410 establishes that upon the issuance of an order of drought emergency, the department may authorize emergency withdrawal of public surface and ground waters and approve a temporary change in purpose, place of use, point of diversion, or point of withdrawal consistent with existing state policy allowing transfer or lease of waters between willing parties.

RCW 43.83B.435 states that expenditures from the emergency drought response account are to provide relief for the immediate hardship caused by water unavailability while a drought emergency order is in effect.

RCW 43.83B.430 states that expenditures from the drought preparedness account may be used for drought planning and preparedness activities after legislative appropriations.

WAC 173-166-010(2) states that Ecology has authority to:

> (a) Issue emergency permits to withdraw public waters as an alternate source of water supply.
>
> (b) Approve water right transfers between willing parties.
>
> (c) Provide funding assistance for eligible drought projects and measures.

Proposed

WAC 173-166-010 and WAC 173-166-020 would each be amended to read as WAC 173-166-015 Authority and Purpose.

WAC 173-166-015(1) would provide the department with authority to:

> (a) Authorize emergency withdrawals of public waters as an alternate source of water supply on a temporary basis upon the issuance of an emergency drought.
>
> (b) Approve temporary water right changes between willing parties upon the issuance of an emergency drought order, and
>
> (c) Provide funding assistance to alleviate undue hardship from current and future drought conditions through implementation of projects, planning, and other actions.

Expected impact

The proposed WAC 173-166-015(2)(a) and (b) aligns with statute to clarify that Ecology only has authority to expedite authorizations and approve water right changes on a temporary basis upon the issuance of an emergency drought order.

WAC 173-166-015(2)(c) clarifies that the department has authority to provide emergency drought funding for immediate drought impacts, and future drought impacts. Further explanation of funding sources and their provisions are provided in WAC 173-166-075 and WAC 173-166-085 and discussed in Section 2.3.6 and 2.3.7.

Following the 2023 creation of the emergency drought response account in statute (RCW 43.83B.415), experts at Ecology found that grant applicants were most often denied because applications did not align with the appropriate funding source (e.g. a preparedness project applies for an emergency response grant). The proposed amendments, in conjunction with others discussed below, would align the rule with statute and more clearly distinguish fund requirements, eligibility, and administration. We expect that this clarity and organization will save individuals time by ensuring applications are written for the appropriate funding sources.

2.3.2 Clarify, add, and remove definitions

Baseline

See RCW 43.83B.011 and WAC 173-166-030 for current definitions.

In light of informal public comment, and discussion below, we note the definition of "Drought condition" in RCW 43.83B.011 means that the water supply for a geographic area, or for a significant portion of a geographic area, is below seventy-five percent of normal *and* [emphasis added] the water shortage is likely to create undue hardships for water users or the environment. The definition of "Drought conditions" in WAC 173-166-030 are water supply conditions where a geographical area or a significant part of a geographical area is receiving, or is projected to receive, less than seventy-five percent of normal water supply as the result of *natural conditions* [emphasis added] and the deficiency causes, *or* [emphasis added] is expected to cause, undue hardship to water users within that area.

Proposed

The proposed rule amendments in WAC 173-166-025 would:

Clarify or expand the following definitions:

- “The department”
- "Drought conditions"
    - Of note, the proposed rule amends the definition of drought conditions to read that the water supply for a geographic area, or for a significant portion of a geographic area, is, or is projected to be, below seventy-five percent of normal water supply, *and* [emphasis added] the water shortage is likely to create undue

hardships for water users or the environment.

- The proposed rule would remove “natural conditions” from the definition of drought conditions.

- "Executive water emergency committee” and “EWEC"
- "Water supply availability committee” and “WSAC"
- "Geographical area"
- "Normal water supply"

Remove the following definitions:

- “Essential minimum”
- "Previously established activities"
- "Reasonably efficient practices"
- "Supported registered water right claim"

Add the following definition:

- “Water year”

Expected impact

Definitions do not, in and of themselves, have regulatory impact beyond their use in the proposed rule amendments discussed in subsequent sections below.

Due to its focus in informal public comment, we note that removing “natural conditions” from the proposed definition of “drought conditions”, would help clarify that climate change could be argued as human driven rather than natural, and climate change can exacerbate drought. The conjunction “and” in the proposed definition of “Drought conditions”, compared to “or” under the existing rule where italicized above, aligns with statute (RCW 43.83B.011(2)), and clarifies that both conditions must be met before a declaration is made (see proposed WAC 173-166-040).

2.3.3 Clarify details of a drought advisory

Baseline

RCW 43.83B.405(1) reads:

Whenever it appears to the department, based on the definitions of drought condition and normal water supply set forth in RCW 43.83B.011, that drought conditions may develop, the department may issue a drought advisory. The drought advisory should seek to increase the awareness and readiness of affected water users and may recommend voluntary actions to alleviate drought impacts.

Note that there is no existing WAC addressing direct administration of drought advisories.

Proposed

New section WAC 173-166-035 Drought Advisories, which reads:

> (1) The department may issue a drought advisory when hydrologic factors indicate that drought conditions may develop in a geographic area.
>
> (2) A drought advisory does not authorize emergency actions or emergency drought response funding by the department but serves to increase public awareness and water user readiness for potential drought conditions.

Expected impact

The baseline rule authorizes response only after an emergency order. The proposed rule draws language from a 2020 update to RCW 43.83B.405(1) allowing Ecology to administer a pre-emergency advisory step before conditions meet statutory emergency thresholds. The proposed amendment clarifies that an advisory does not authorize emergency actions or emergency drought response funding.

The proposed amendments in this section benefit eligible entities and the public by clarifying when an advisory can be issued and its intent. However, because Ecology is not exercising discretion beyond the statutory baseline to issue an advisory, any impact of an advisory itself is limited for the purposes of this analysis.

2.3.4 Clarify and expand details of a drought emergency order and hardship determination

Baseline

RCW 43.83B.405 Drought advisories—Orders of drought emergency—Procedure.

WAC 173-166-050(1) Whenever it appears to the department of Ecology that drought conditions either exist or are forecast to occur, Ecology will consult with the state's water supply availability committee (WSAC) or its successor.

WAC 173-166-050(3) determines that WSAC will advise Indian tribes within the area if drought thresholds are met.

Proposed

WAC 173-166-050 and 173-166-060, would each be, amended, and reorganized as WAC 173-166-045 Emergency Drought Thresholds, and WAC 173-166-055 Drought Emergency Procedures and Order. WAC 173-166-045 differentiates water supply thresholds and undue hardship thresholds for the drought declaration process, including the roles of WSAC and EWEC to determine and evaluate them respectively. WAC 173-166-055 establishes the order and procedures in which water supply thresholds and hardship determinations must be made prior to seeking governor approval to issue an emergency drought order.

Of note:

WAC 173-166-055(1) would require that the department convene the water supply availability committee (WSAC) to determine if the water supply threshold has been met.

WAC 173-166-055(3) would require that the department notify potentially affected federally recognized Tribes, offer consultation, and solicit input on threshold determinations.

WAC 173-166-045(2)(a) would clarify that the undue hardship threshold for a drought declaration is evaluated for impacts on agriculture and non-agriculture economic impacts, public health, or the environment. This includes but is not limited to impacts to irrigated or dryland agriculture, industrial water supply, drinking water supply, or aquatic species resulting from inadequate streamflow or elevated temperature (WAC 173-166-045(2)(b)(i-iv)). WAC 173-166-055(4) states plainly that if convened, the EWEC shall make the threshold determination as to if the undue hardship threshold is met.

WAC 173-166-055(3) would require Ecology to consider input from associations(s) of nursery and landscape professionals.

Expected impact

The proposed rule clarifies that Ecology would "convene WSAC to determine", as opposed to "consult" WSAC under the current rule when determining if the water supply threshold has been met. Combined with the proposed definition of WSAC membership, amendments in WAC 173-166-055(1) would provide a benefit to eligible entities and the public by clarifying intent regarding multi-agency coordination in the declaration process.

Proposed rule amendments in WAC 173-166-055(3) would revise language to explicitly consult with and solicit input from federally recognized Tribes on threshold determinations.

While undue hardship is an organizing principle throughout statute and current rule, the process and details of evaluating hardship are not well defined, and experts at Ecology have indicated confusion from communities on the topic in the past. The proposed amendments provide additional detail and examples of independent undue hardship categories, and plainly state that if convened, EWEC shall make the determination as to if the undue hardship threshold is met. Since EWEC would retain baseline levels of discretion to make hardship determinations under the proposed rule, we do not expect impacts on declaration outcomes.[16] We do however expect eligible entities and the public to benefit from increased clarity around this process.

We note that amendments in WAC 173-166-055(7)(b) would clarify that "facts leading to the issuance of the order" under the existing rule to mean "water supply and undue hardship factors leading to the issuance of the order". This reflects Ecology's current expectations under existing law and is not expected to carry a material impact on an emergency drought order.

[16] This proposed section details ways in which the term has been largely treated under current and past implementation. Since hardship is not limited to categories presented in the proposed rule, the proposed amendment maintains flexibility to consider other impacts as well.

2.3.5 Clarify and update the petition process

Baseline

RCW 43.83B.405(2)(e) states that a person may petition the department to declare a drought emergency for the state or portions of the state. The department may review a petition, but any order of drought emergency issued after receipt of a petition must be based on the definitions of drought condition and normal water supply set forth in RCW 43.83B.011, and must be issued according to the procedure set forth in this section. The department must not rely exclusively on information presented in a petition when determining whether to issue an order of drought emergency.

WAC 173-166-060(4) states that persons may file written protest as to the contents of the order with Ecology, and Ecology will have fifteen calendar days to consult with WSAC, EWEC, and the governor to determine its validity.

WAC 173-166-060(5) states that a person who believes that an area should be declared may petition Ecology for such a declaration. Upon the receipt of such a petition, Ecology will have fifteen calendar days to make a determination as to its validity, using the procedure specified in [current rule WAC 173-166-050], and provide a decision to the applicant. The petition should contain (a) A description of the geographical area which is being requested for designation, (b) The nature of the relief sought in requesting such a designation, and (c) The facts upon which the petition is based.

Rules and law determine agency appeals processes. In particular WAC 173-166-130 and by reference the Pollution Control Hearings Board process for appeals of agency actions (RCW 43.21B.230).

Proposed

The proposed rule would create a new section WAC 173-166-065 that describes petitions for emergency drought order.

The proposed WAC 173-166-065(1) states that any person may petition the department to declare a drought emergency in areas not currently included in an emergency drought order. A complete petition must contain (a) A description of the geographic area requested for inclusion; and (b) A description of how the water supply and undue hardship thresholds are met, as described in WAC 173-166-045.

The proposed WAC 173-166-050(2) states that upon receipt of a complete petition submitted under this section, the department may evaluate the petition following the same procedure under WAC 173-166-055.

Expected impact

Amendments in WAC 173-166-065(1) would clarify that the facts upon which a petition to declare a drought emergency is based should include a description of how the water supply and undue hardship thresholds are met as described in WAC 173-166-045. The proposed

amendments change “will” to “may” evaluate the petition following procedure under WAC 173-166-055 (including convening WSAC and EWEC) and removes the requirement to provide a decision within 15 days. The proposed rule would remove explicit mention of protesting the contents of Ecology’s order. We note that the Agency’s standard appeals process under Chapter 43.21B RCW would still however apply.

The amendment would allow additional time if needed to respond to and resolve a petition, and could delay benefits like expedited water transfers and emergency drought grants. This is a potential cost for eligible entities compared to the baseline. However, some petitions may also be resolved more quickly and reduce unnecessary use of resources without mandatory WSAC and EWEC engagement if the first threshold of drought conditions are not met. This is a potential benefit to petitioners. Additionally, time dedicated to a petition, if appropriate, is in the broader public interest. Based on discussions with Ecology staff, petitions occur infrequently, which would limit the overall costs or benefits associated with these amendments.[17]

2.3.6 Clarify and expand details of drought emergency grants

Baseline

RCW 43.83B.435 states that Expenditures from the [emergency drought response] account may be used only for the costs of implementing the powers set forth in RCW 43.83B.410 through 43.83B.420 to provide relief for the immediate hardship caused by water unavailability.

RCW 43.83B.415(1)(a) states “The department is authorized to issue grants to eligible public entities to reduce current or future hardship caused by water unavailability stemming from drought conditions…”. RCW 43.83B.415(2) States that “grants may be used to develop projects that enhance the ability of water users to effectively mitigate for the impacts of water unavailability arising from drought”.

WAC 173-167-230(1) states that “An activity or project for response to emergency drought conditions must be partially or completely within the area of a drought declaration order by ecology…”

Proposed

The proposed rule creates a new section WAC 173-166-075 that describes emergency drought grant eligibility.

Of note:

WAC 173-166-075(4)(a) would establish eligibility if drought conditions are causing current water supply deficit, or will cause a water supply deficit under the current drought declaration;

[17] In the past roughly 5 years, only one petition was received (and subsequently denied) to expand a drought declaration. No petitions have been received in protest of a drought declaration during the same period.

and (b) associated drought impacts are causing undue hardship, which may include impacts caused by multiple years of consecutive drought.

WAC 173-166-075(5) would state that applicants seeking funds to alleviate emergency drought impacts must demonstrate that the project benefit will be partially or completely within the geographic area of a drought declaration order.

WAC 173-166-075(6) states that funded projects do not need to be completed while the emergency drought order is in effect. The project's benefit may be realized after the emergency drought order is expired or terminated.

Expected impact

Following the 2023 creation of the emergency drought response account in statute (RCW 43.83B.415), experts at Ecology found that grant applicants were most often denied because applications did not align with the appropriate funding source (e.g. a preparedness project applies for an emergency response grant). The proposed amendments would align the rule with statute, and more clearly distinguish each fund's requirements, eligibility, and administration in separate sections. Specifically, rule amendments in WAC 173-166-075 would reference funding for immediate impacts for current hardship due to drought conditions, and WAC 173-166-085 grant funding for drought preparedness to reduce future vulnerability when and if funding becomes available (see Section 2.3.7 for detail on preparedness grants). We expect that this clarity and organization will save individuals time by ensuring applications are written for the appropriate funding sources.

The proposed amendment would help clarify eligibility for entities whose hardship is a result of multiple years of consecutive drought conditions, and reduce the time and resources needed on associated applications.

The proposed amendment clarifies an applicant's ability to complete funded projects after a drought order has ended. Similar language was added to statute in 2020, and Ecology has generally advised applicants that projects not need to be completed while an order is in effect. Nonetheless, aligning rule and statute may save applicant time from seeking consultation and expand relief to applicants that may have otherwise assumed ineligibility.

The proposed amendments require that projects seeking funding for emergency drought impacts must be at least partially within the geographic area of a current emergency drought order. While this would be new to WAC 173-166, it currently exists in a similar form in WAC 173-167-230, and therefore is not considered to have an impact for the purpose of this analysis.

Together with other sections of this rulemaking, the proposed amendments would eliminate the need for emergency rulemaking in the future. Amending the rule through a standard rulemaking provides eligible entities and the public, including overburdened communities and vulnerable populations, the opportunity to comment on components otherwise interpreted from statute or adopted through emergency rule. This process further ensures equity and transparency around current and future granting opportunities.

2.3.7 Clarify and expand details of drought preparedness grants

Baseline

RCW 43.83B.430 states that "Expenditures from the [State drought preparedness] account may be used for drought planning and preparedness activities under this chapter, including grants issued under RCW 43.83B.415".

RCW 43.83B.415(1)(a) states "The department is authorized to issue grants to eligible public entities to reduce current or future hardship caused by water unavailability stemming from drought conditions…". RCW 43.83B.415(2) states that "grants may be used to develop projects that enhance the ability of water users to effectively mitigate for the impacts of water unavailability arising from drought. Project applicants must demonstrate that the projects will increase their resiliency, preparedness, or ability to withstand drought conditions when they occur." Several project examples are given under RCW 43.83B.415(2)(a-h) including but not limited to new water storage, source substitution, emergency supplies, education, and contingency planning.

RCW 43.83B.415(3) states that the department shall prioritize funding for projects designed to relieve the immediate hardship caused by water unavailability.

Proposed

A new section, WAC 173-166-085 describes drought preparedness grant eligibility.

Of note, the proposed section states that (1) the department may fund, from the drought preparedness account, grants to public entities for planning and preparedness activities to improve reliance and adaptation to drought. And (2) that projects must increase drought resilience, preparedness, or adaptation to reduce future vulnerability to drought impacts.

Several project examples are given under proposed WAC 173-166-085(2)(a) and (b), including planning efforts, policies, projects, or management practices to prepare for, respond to, and recover from, the impacts of future droughts or multi-year droughts.

WAC 173-166-085(3) would state that the department will prioritize drought resilience projects through this account that consider the needs of overburdened communities including Tribes and vulnerable populations within the planning or project area (when and if funds are appropriated for this account).

Expected impact

Following the 2023 creation of the emergency drought response account in statute (RCW 43.83B.415), experts at Ecology found that grant applicants were most often denied because applications did not align with the appropriate funding source (e.g. a preparedness project applies for an emergency response grant). The proposed amendments would align the rule with statute, and more clearly distinguish each funds requirements, eligibility, and administration in separate sections. Specifically, rule amendments in WAC 173-166-075 would reference funding

for immediate impacts for current hardship due to drought conditions (see 2.3.6 above for discussion), and WAC 173-166-085 grant funding for drought preparedness to reduce future vulnerability when and if funding becomes available. We expect that this clarity and organization will save individuals time by ensuring applications are written for the appropriate funding sources.

WAC 173-166-085(1) and (2) would largely paraphrase relevant sections of RCW 43.83B.415, and therefore have limited impacts for the purpose of this analysis.

The proposed rule WAC 173-166-085(3) would build on RCW 43.83B.415(3) to clarify that when drought resilience projects are under consideration through the preparedness account, overburdened communities including Tribes and vulnerable populations would be prioritized. This proposed amendment would help ensure that equitable fund distribution occurs when multiple applications are considered by the department.

2.3.8 Clarify and update grant funding administration

Baseline

RCW 43.83B.415(b) States that "except for projects for public water systems serving economically disadvantaged communities, the department may only fund up to 50 percent of the total eligible cost of the project. Money used by applicants as a cash match may not originate from other state funds."

Under RCW 70A.02.050, the Healthy Environment for All (HEAL) act requires the use of special screening tools that integrate environmental, demographic, and health disparities data, such as the state Environmental Health Disparities Map, to evaluate and understand the nature and needs of the people who the agency expects to be impacted by significant agency actions, including its funding processes under RCW 70A.02.080.

Under WAC 173-167-200(3), an economically disadvantaged community for the purposes of grant administration are those: ranked as a 9 or 10 for the sensitive populations indicator or population living in poverty indicator on the Washington state Environmental Health Disparities Map, or the applicant is, or the public water system serves, a federally recognized Tribe.

Proposed

A new section WAC 173-166-095 that describes drought grant administration.

WAC 173-166-095(3) states that the department may fund up to 100 percent of the total eligible costs of projects for public water systems serving economically disadvantaged communities. These are those that, on the Washington State Environmental Health Disparities Map, ranked as a 9 or 10 for the sensitive populations or population living in poverty indicator, or the applicant is, or the public water system serves, a federally recognized Tribe.

The proposed section states that money used by applicants as a cash match may not originate from other state funds (WAC 173-166-095(4)). WAC 173-166-095(5) states that match

requirements may be met through in-kind match, for example through volunteer services and/or interlocal agreements at a rate that is approved during grant scope negotiations.

Expected impact

The statute and current emergency rule state that economically disadvantaged communities may be exempt from the 50 percent share requirement but does not explicitly describe an alternative funding structure. The proposed amendment clarifies that, for exempt communities, the department may fund up to 100 percent of the total eligible costs (e.g., 0 percent cost match). Based on conversations with Ecology managers, those who meet exemption criteria are likely to receive full funding under existing statute and emergency rule. The proposed amendment provides clarity about the upper bound of the exemption, but is unlikely to generate new impacts for the purposes of this analysis.

During informal outreach, Ecology staff were made aware that funding match options were not commonly known. In this way, the proposed WAC 173-166-095(4) and (5) could expand the number of applicants under the proposed rule by explicitly stating funding match options for grantees to meet their grant agreement requirements.

The proposed rule includes a definition of economically disadvantaged communities that would be eligible for 100 percent cost reimbursement for eligible projects and activities. Details align with the most recently adopted WAC 173-167 and ensure Ecology continues to meet the intent of the HEAL act (Chapter 70A.02 RCW), including the use of the Washington State Health Disparities Map.

Together with other sections of this rulemaking, the proposed amendments would eliminate the need for emergency rulemaking in the future. Amending the rule through a standard rulemaking provides eligible entities and the public, including overburdened communities and vulnerable populations, the opportunity to comment on components otherwise interpreted from statute or adopted through emergency rule. This process further ensures equity and transparency around current and future granting opportunities.

2.3.9 Clarify public notice requirements

Baseline

WAC 173-166-070(10) and WAC 173-166-080(3)(f) authorizes Ecology to process emergency drought permits temporary changes in water rights respectively without compliance with requirements for notice of newspaper publication and The State Environmental Policy Act SEPA.

RCW 43.83B.410(1)(e) As to water withdrawal and associated works authorized under this subsection, the requirements of RCW 43.21C and public bidding requirements as otherwise provided by law are waived and inapplicable.

Proposed

Current WAC 173-166-070 and 173-166-080, would each be amended to read as proposed WAC 173-166-105 Emergency Water Withdrawals and Diversions and WAC 173-166-115 Emergency Water Changes, Transfers or Diversions.

Of note:

WAC 173-166-105(7) would authorize Ecology to process and approve temporary emergency withdrawals or diversions applications without compliance with the State Environmental Policy Act (SEPA) and public bidding requirements.

WAC 173-166-115(5) would authorize water change applications without a Notice of newspaper publication, or compliance with the SEPA.

Expected impact

The proposed changes clarify that when expediting withdrawal and transfer permits under emergency declaration, Ecology is exempt from SEPA and public bidding requirements, but not newspaper publication (i.e., the proposed amendment removes the exemption for notice of newspaper publication when emergency withdrawal permits are expedited). This aligns the proposed rule with existing statutory requirements. The proposed amendments do not impact exemptions regarding emergency water right transfers and other types of emergency changes, relative to baseline.

This ensures that notices of emergency withdrawal permits are published in newspaper publications and represents a benefit to the public by providing information and transparency.

Chapter 3: Likely Costs of the Proposed Rule Amendments

3.1 Introduction

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

3.2 Cost analysis

The proposed rule amendments would:

- Clarify Ecology's authority to act during a drought emergency
- Clarify, add, and remove definitions
- Clarify details of a drought advisory
- Clarify and expand details of a drought emergency order and hardship determination
- Clarify and update the petition process
- Clarify and expand details of drought emergency grants
- Clarify and expand details of drought preparedness grants
- Clarify and update grant funding administration
- Clarify public notice requirements

3.2.1 Clarify Ecology's authority to act during a drought emergency

Amendments in this subsection are not likely to impose a cost beyond baseline requirements (See section 2.3.1).

3.2.2 Clarify, add, and remove definitions

Definitions do not, in and of themselves, carry regulatory cost beyond their use in the proposed rule amendments (see section 2.3.2). We discuss any costs relevant to or involving these definition changes in the sections below.

3.2.3 Clarify details of a drought advisory

Amendments in this subsection are not likely to impose a cost beyond baseline requirements (See section 2.3.3).

3.2.4 Clarify and expand details of a drought emergency order

Amendments in this subsection are not likely to impose a cost beyond baseline requirements (See section 2.3.4).

3.2.5 Clarify and update the petition process

Amendments in this section are likely to impose zero to minimal cost beyond baseline requirements. As noted in section 2.3.5, these amendments would allow for additional time in which Ecology can respond to a petition to declare a drought emergency. Additional time to respond or provide resolution may delay benefits (e.g. a cost to the appellant) compared to baseline. However, conversations with Ecology staff suggest that petitions rarely occur, limiting total costs from this amendment. [18]

3.2.6 Clarify and expand details of drought emergency grants

Amendments in this subsection are not likely to impose a cost beyond baseline requirements (See section 2.3.6).

3.2.7 Clarify and expand details of drought preparedness grants

Amendments in this subsection are not likely to impose a cost beyond baseline requirements (See section 2.3.7).

3.2.8 Clarify and update grant funding administration

Amendments in this subsection are not likely to impose a cost beyond baseline requirements (See section 2.3.8).

3.2.9 Clarify public notice requirements

Amendments in this subsection are not likely to impose a cost beyond baseline requirements (See section 2.3.9).

[18] In the past roughly 5 years, only one petition was received (and subsequently denied) to expand a drought declaration. No petitions have been received in protest of a drought declaration during the same period.

3.3 Environmental justice costs[19]

Ecology does not anticipate any harm to Tribal water rights or resources or to overburdened communities or vulnerable populations from the rule.

[19] Input received from potentially impacted communities helped to inform the proposed rule amendments and our analysis of costs and benefits. See Chapter 6 for discussion of alternative rule content suggested during rule development, that was not included in the proposed rule. Community engagement and input are documented in the Environmental Justice Assessment for this rulemaking, and included in the rule file, when a final rule is adopted.

Chapter 4: Likely Benefits of the Proposed Rule Amendments

4.1 Introduction

We analyzed the likely benefits associated with the proposed rule amendments, as compared to the baseline. The proposed rule amendments and the baseline are discussed in detail in Chapter 2 of this document.

4.2 Benefits analysis

The proposed rule amendments would:

- Clarify Ecology's authority to act during a drought emergency
- Clarify, add, and remove definitions
- Clarify details of a drought advisory
- Clarify and expand details of a drought emergency order and hardship determination
- Clarify and update the petition process
- Clarify and expand details of drought emergency grants
- Clarify and expand details of drought preparedness grants
- Clarify and update grant funding administration
- Clarify public notice requirements

Note that the benefits of the proposed rule amendments are qualitative in nature and largely borne from providing clarity and alignment with statute, ensuring public involvement and Tribal engagement, and ensuring transparency and predictability in granting through the amended rule. These benefits are restated below from Chapter 2 and summarized again in Chapter 5.

4.2.1 Clarify Ecology's authority to act during a drought emergency

Following the 2023 creation of the emergency drought response account in statute (RCW 43.83B.415), experts at Ecology found that grant applicants were most often denied because applications did not align with the appropriate funding source (e.g. a preparedness project applies for an emergency response grant). The proposed amendments, in conjunction with others discussed below, would align the rule with statute and more clearly distinguish fund requirements, eligibility, and administration. We expect that this clarity and organization will provide a benefit in the form of saving individuals time by ensuring the appropriate applications are written (see section 2.3.1).

4.2.2 Clarify, add, and remove definitions

Definitions do not, in and of themselves, provide benefits beyond their use in the proposed rule amendments (see section 2.3.2). We discuss any benefits relevant to or involving these definition changes in the sections below.

4.2.3 Clarify details of a drought advisory

Adding additional clarity and detail to statutory language represents a benefit to eligible entities and the public by ensuring the implications of advisories are understood. Since Ecology can currently issue advisories under the statutory baseline, impacts of an advisory itself are limited to for the purposes of this analysis (see section 2.3.3).

4.2.4 Clarify and expand details of a drought emergency order and hardship determination

The proposed rule amendment clarifies that Ecology would "convene WSAC to determine", as opposed to "consult" WSAC under the current rule when determining if the water supply threshold has been met. Combined with the proposed definition of WSAC membership, these amendments would better delineate existing roles and responsibilities regarding multi-agency coordination in the declaration process. This is a benefit to participating members, eligible entities and the public by avoiding unnecessary confusion and communications with the department.

Proposed rule amendments would revise language to explicitly require that Ecology consult with and solicit input from federally recognized Tribes on threshold determinations, increasing opportunities for staff-to-staff engagement ahead of a drought declaration.

While undue hardship is an organizing principle throughout statute and current rule, the process and details of evaluating hardship are not well defined. The proposed rule amendments provide additional detail and examples of undue hardship categories, and plainly state that if convened, EWEC shall make the determination as to if the undue hardship threshold is met. Experts at Ecology have indicated confusion from communities on this topic in the past. We would therefore expect eligible entities and the public to benefit from increased clarity around this process.

4.2.5 Clarify and update the petition process

Amendments in this subsection are likely to generate zero to minimal benefits beyond baseline requirements. As noted in section 2.3.5, these amendments would allow for additional time in which Ecology can respond to a petition to declare a drought emergency. It also allows Ecology to determine when to convene WSAC and EWEC in response to a petition.

By evaluating the scientific merit of a petition at Ecology, prior to considering WSAC and EWEC involvement (comprised of outside experts, and directors of several state agencies), petitioners

may benefit from faster decision times. Allowing longer response times, when appropriate, would allow for more careful consideration of a petition, which is in the broader public interest.

We note that conversations with Ecology staff suggest these types of appeal rarely occur, limiting total benefits from this amendment. [20]

4.2.6 Clarify and expand details of drought emergency grants

The proposed amendment would help clarify eligibility for entities whose hardship is a result of current drought, exasperated by multiple years of consecutive drought conditions, and potentially reduce the time and resources needed on associated applications. We note that there are only limited instances where cumulative impacts, and associated benefits from the proposed amendment, would accumulate. One could be in an irrigation district whose water supply from a reservoir is impacted from drought the prior summer as the reservoir hasn't recovered yet. Or potentially, groundwater recharge impacts for shallow groundwater sources (shallow only, as deep aquifers recharge on longer timeframes).

Under the statute (RCW 43.83B.415(1)(a), funded projects can be completed after a drought order has ended. The amendment clarifying this fact may save eligible entities time from otherwise seeking consultation. Or it could expand relief to the degree some applicants would have otherwise assumed ineligibility without the clarity in the proposed amendments.

Together with other sections of this rulemaking, these proposed amendments would streamline administration of emergency drought funding; this includes eliminating the need for emergency rulemaking in the future. The proposed grant funding sections in the permanent rule provides an opportunity for eligible entities and the public to comment on these and other components. This is a benefit in terms of efficiency, assurance, and transparency around current and future grants (see Chapter 2.3.6).

4.2.7 Clarify and expand details of drought preparedness grants

The proposed rule clarifies that when drought resilience projects are under consideration through the preparedness account, projects that benefit overburdened communities including Tribes and vulnerable populations will be prioritized. The proposed amendments would help ensure that an equitable fund distribution occurs when multiple applications are considered by the department.

Together with other sections of this rulemaking, these proposed amendments streamline administration of emergency drought funding; this includes eliminating the need for emergency rulemaking in the future. The proposed grant funding sections in the permanent rule provides an opportunity for eligible entities and the public to comment on these and other components.

[20] In the past roughly 5 years, only one petition was received (and subsequently denied) to expand a drought declaration. No petitions have been received in protest of a drought declaration during the same period.

This is a benefit in terms of efficiency, assurance, and transparency around current and future grants (see Chapter 2.3.7).

4.2.8 Clarify and update grant funding administration

During informal outreach, Ecology staff heard that funding match options were not commonly known. The proposed amendments clarify and explicitly state funding matching options for grantees to meet their grant agreement requirements, which could expand the grant applicants.

The rule includes a definition of economically disadvantaged community. This would provide clarity on how to determine if a community is eligible for 100%reimbursement costs for eligible projects and activities. Language in the proposed rule defining economically disadvantaged community aligns with the most recently adopted Chapter 173-167 WAC, the intent of the HEAL act passed by legislature in 2021, including the use of the Washington State Health Disparities Map.

Together with other sections of this rulemaking, these proposed amendments would streamline administration of emergency drought funding; this includes eliminating the need for emergency rulemaking in the future. The proposed grant funding sections in the amended rule provides an opportunity for eligible entities and the public to comment on these and other components. This is a benefit in terms of efficiency, assurance, and transparency around current and future grants (See Chapter 2.3.8).

4.2.9 Clarify public notice requirements

Amendments in this subsection are not likely to generate benefits beyond baseline requirements (See Chapter 2.3.9).

4.3 Environmental justice benefits[21]

This proposed rule would increase clarity for Tribes, state and local governments, and the public regarding emergency drought funding by updating the rule's language with clearer definitions, processes, and eligibility requirements. Funding opportunities are not changing, as Ecology is adopting existing statutory requirements for emergency drought relief into this rule. Funding emergency drought relief supports all Washington communities through increasingly frequent statewide or near-statewide droughts.

To equitably distribute available funding, state law (RCW 43.83B.415) allows Ecology to fund up to 100 percent of the total eligible costs of projects for public water systems serving

[21] Input received from likely impacted communities helped to inform the proposed rule amendments and our analysis of costs and benefits. See Chapter 6 for discussion of alternative rule content suggested during rule development, that was not included in the proposed rule. Community engagement and input are documented in the Environmental Justice Assessment for this rulemaking, and included in the rule file, when a final rule is adopted.

economically disadvantaged communities. We propose criteria from the most recently adopted Chapter 173-167 to identify these communities, defined by census tracts ranked as 9 or 10 for the sensitive populations indicator or the population living in poverty indicator on the Washington State Environmental Health Disparities Map. Under the existing emergency rule, Ecology may also fund up to 100 percent of project costs for public water systems run by, or serving, federally recognized Tribes.

Additionally, all federally recognized Tribes are eligible for emergency drought grant funds and may use funding awards to address undue hardship from drought impacts. This eligibility is unaffected by the proposed rulemaking. Updates to the rule's language include explicit requirements to consult with and solicit input from federally recognized Tribes on undue hardship threshold determinations. The current rule already requires Ecology to notify affected federally recognized Tribes upon issuing an emergency drought order.

Together with other sections of this rulemaking, the proposed amendments would eliminate the need for emergency rulemaking in the future. Amending the rule through a standard rulemaking provides eligible entities and the public, including overburdened communities and vulnerable populations, the opportunity to comment on components otherwise interpreted from statute or adopted through emergency rule. This process further ensures equity and transparency around current and future granting opportunities.

Chapter 5: Cost-Benefit Comparison and Conclusions

5.1 Summary of costs and benefits of the proposed rule amendments

A key benefit of the proposed rule amendments would come from eliminating the need for emergency rulemaking in the future. Amending the rule through standard rulemaking provides eligible entities and the public, including sensitive and economically disadvantaged communities, the opportunity to comment on components otherwise interpreted from statute or adopted through emergency rule. This process further ensures equity and transparency around current and future granting opportunities.

Following the 2023 creation of the emergency drought response account in statute (RCW 43.83B.415), experts at Ecology found that grant applicants were most often denied because applications did not align with the appropriate funding source (e.g. a preparedness project applies for an emergency response grant). The proposed amendments would align the rule with statute, and more clearly distinguish each funds requirements, eligibility, and administration in separate sections. We expect that this clarity and organization will save individuals time by ensuring applications are written for the appropriate funding sources.

We expect other qualitative benefits because of the proposed amendments to include:

- Clear direction on the necessary conditions for different types of drought relief and their duration (see sections 2.3.1 and 4.2.1),
- Increased opportunities for staff-to-staff engagement ahead of a drought declaration (see sections 2.3.4 and 4.2.4),
- Time savings for eligible entities and the public by clarifying multi-agency coordination in the declaration process (see sections 2.3.4 and 4.2.4),
- Time savings for eligible entities and the public by clarifying the process and details of evaluating hardship for a drought declaration (see sections 2.3.4 and 4.2.4),
- Clarity for entities experiencing repeat drought by explicitly allowing for cumulative impacts (see sections 2.3.6 and 4.2.6),
- Clarity for eligible entities who may otherwise be unaware of existing state matching-fund opportunities (see sections 2.3.8 and 4.2.8)

Proposed amendments discussed in Sections 2.3.5 and 3.2.5 would extend the time Ecology has to address petitions for emergency drought declarations. In the same section of the rule, the proposed amendments would make WSAC and EWEC engagement optional when responding to a petition.

Allowing additional time for response or resolution to petition may delay associated benefits, like expedited water transfers and emergency drought grants. This is a potential cost for eligible entities compared to the baseline. However, some petitions also may be resolved more quickly under the proposed rule without mandatory WSAC and EWEC engagement when its clearly not

necessary based on not meeting the water supply threshold. Allowing longer response times, when appropriate, would provide for more careful consideration of a petition, which is in the broader public interest. Based on discussions with Ecology staff, petitions occur infrequently, which limits the overall costs or benefits associated with related amendments.[22]

5.2 Conclusion

We conclude, based on a reasonable understanding of the qualitative costs and benefits likely to arise from the proposed rule amendments, as compared to the baseline, that the benefits of the proposed rule amendments are greater than the costs.

[22] In the past roughly 5 years, only one petition was received (and subsequently denied) to expand a drought declaration. No petitions have been received in protest of a drought declaration during the same period.

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 that will achieve the general goals and specific objectives stated under (a) of this subsection." The referenced subsections are:

> (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, we must determine that the requirements of the rule are the least burdensome set of requirements that achieve the goals and objectives of the authorizing statute(s).

We assessed alternative proposed rule content, and determined whether they met the goals and objectives of the authorizing statute(s). Of those that would meet the goals and objectives, we determined whether those chosen for inclusion in the proposed rule amendments were the least burdensome to those required to comply with them.

6.2 Goals and objectives of the authorizing statute

The authorizing statute for this rule is Chapter 43.83B RCW. Its goals and objectives are:

- Effectively and efficiently take actions when a drought emergency occurs to alleviate hardship on water users and our natural environment,
- Build resiliency and preparedness before water shortages occur,
- Assist water users by supporting measures to strengthen the resiliency and preparedness of water users to drought conditions in the long term.

6.3 Alternatives considered and why they were excluded

We considered the following alternative rule requirements, and did not include them in the proposed rule amendments. Each section below explains why we did not include these alternatives.

- Add “surface” to mentions of water supply
- Keep “natural condition” in the drought definition
- Involve a Tribal fish and wildlife specialist in undue hardship determinations

6.3.1 Add “surface” to mentions of water supply

We considered adding “surface” to water supply definitions and references. However, adding this word was unintentionally limiting and is not consistent with the goals and objectives of the statute or current rule language. Shallow aquifer recharge may be impacted by back-to-back drought, particularly in the future as drought frequency increases. Since ground water may be considered as a drought indicator in the future, Ecology determined it was not recommended to limit flexibility in this regard.

6.3.2 Keep “natural condition” in the drought definition

We considered keeping “natural condition” in the rules drought definition. However, Ecology chose to remove the term because climate change--a key contributor to increasing and worsening drought over time--is human driven rather than natural. [23] This sentiment was echoed by informal comments received during rule development phase voicing concern about how anthropogenic (human-caused) climate change impacts on drought would be understood in the context of “natural condition” in the drought definition. Ultimately, our alternative better meets the goals and objectives of the statute of effectively and efficiently reducing hardship.

6.3.3 Involve a Tribal fish and wildlife specialist in undue hardship determinations

We considered the explicit involvement of a “Tribal fish and wildlife specialist” in undue hardship evaluation. This would have created more burden for Tribal fish and wildlife specialists if they were required to participate in all determinations, and following our treatment of EWEC in the proposed rule amendments, would not be necessary in all cases. We note that including Tribal participation and fish and wildlife expertise in the determination process is important to making the undue hardship threshold determination. To ensure this, the proposed rule would revise language to explicitly consult with and solicit input from federally recognized Tribes on

[23] Citation to CIG CMRW https://data.cig.uw.edu/climatemapping/

threshold determinations.[24] Rather than provide specific titles of the agencies and jobs, this approach also provides more flexibility for agencies and Tribes in determining representatives most appropriate to participate.

6.4 Conclusion

After considering alternatives, within the context of the goals and objectives of the authorizing statute, we determined that the proposed rule represents the least-burdensome alternative of possible rule requirements meeting the goals and objectives.

[24] We also note that EWEC membership includes Washington Department of Fish and Wildlife.

Chapter 7: Regulatory Fairness Act Compliance

We analyzed the compliance costs of the adopted rule amendments in Chapter 3 of this document. We conclude that the adopted rule amendments are not likely to result in compliance costs for any businesses. The rule is likely to result only in cost-savings for individuals, business, local government, and Tribes, as compared to the baseline. Based on this analysis, Ecology is exempt from performing additional analyses under the Regulatory Fairness Act, under RCW 19.85.025(4) which states that, "This chapter does not apply to the adoption of a rule if an agency is able to demonstrate that the adopted rule does not affect small businesses." Moreover, by not imposing compliance costs, the proposed rule amendments do not meet the RFA applicability standard under RCW 19.85.030(1)(a).

References

Marshall, A.M., Abatzoglou, J.T., Link, T.E. and Tennant, C.J., 2019. Projected changes in interannual variability of peak snowpack amount and timing in the Western United States. *Geophysical Research Letters*, *46*(15), pp.8882-8892.

McLain, K., Hancock, J., Drennan, M. , 2017. 2015 Drought and Agriculture: A Study by the Washington State Department of Agriculture. Washington State Department of Agriculture. Available at: https://cms.agr.wa.gov/getmedia/d814e329-dde6-4034-a878-8b6ba1b3f9b7/495-2015DroughtReport.pdf?_gl=1*1yemtas*_ga*ODA1NjQ4OTQ5LjE2OTcyMzEzNTE.*_ga_9JCK8SVQPE*czE3NzMyNTM2MTgkbzQkZzEkdDE3NzMyNTM2NDEkajM3JGwwJGgw

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Appendix A: Administrative Procedure Act (RCW 34.05.328) Determinations

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.

This rule amendment incorporates RCW 43.83B updates from 2020 and 2023, which include drought relief grant funding criteria, eligibility, standards and definitions. The current rule (WAC 173-166) details eligibility of applicants for emergency permits and water transfers, and the criteria for forecasting and declaring drought. It does not have provisions for emergency drought grant funding.

In 2023, under SHB 1138, Emergency Drought Response, permanent funding was designated for the emergency drought response account (RCW 43.83B.435) which is available through a grant program to alleviate immediate hardship caused by drought conditions. To make these funds available, Ecology has had to issue an emergency rule (WAC 173-167) alongside a drought declaration in order to provide eligible applicants information on funding limitations, eligibility, standards and definitions.

If Ecology did not conduct this rulemaking we would continue to adopt Emergency rules as necessary, and rulemaking would be needed each time we declared a drought to make grant funding available for eligible public entities to mitigate drought impacts. Because emergency rules are only active for a maximum of 120 days, Ecology current conducts Emergency rulemaking every 120 days while the drought was in effect to keep the grant resources available without interruption.

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.

Please 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.

No, this rule incorporates existing statute updates (RCW 43.83B) that allows Ecology to provide grant funding opportunities to eligible public entities for eligible drought relief activities and projects.

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.

No, this rule amendment will not impact the eligibility for emergency grant funds to public entities.

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, this rule provides clarity on 2020 and 2023 statute updates to RCW 43.83B, concerned with state declarations, funds, and water rights. It does not differ from federal regs on these matters or authorities.

- If **yes**, the difference is justified because of the following:

  ☐ (i) A state statute explicitly allows Ecology to differ from federal standards. [If checked, provide the citation included quote of the language.]

  ☐ (ii) Substantial evidence that the difference is necessary to achieve the general goals and specific objectives stated in Chapter 6.

  [If checked, explain.]

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.

This rule amendment to WAC 173-166 will include emergency drought funding information and 2020 and 2023 updates that were made to RCW 43.83B.