

# Chapter 173-166 WAC

## EMERGENCY DROUGHT RELIEF

### WAC

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### DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

173-166-090	Funding assistance—General criteria. [Statutory Authority: RCW 43.83B.420. WSR 91-03-081 (Order 90-53), § 173-166-090, filed 1/17/91, effective 2/17/91.] Repealed by WSR 18-09-031 (Order 17-01), filed 4/11/18, effective 5/12/18. Statutory Authority: RCW 43.83B.420.
173-166-100	Funding assistance—Agricultural criteria. [Statutory Authority: RCW 43.83B.420. WSR 91-03-081 (Order 90-53), § 173-166-100, filed 1/17/91, effective 2/17/91.] Repealed by WSR 18-09-031 (Order 17-01), filed 4/11/18, effective 5/12/18. Statutory Authority: RCW 43.83B.420.
173-166-110	Funding assistance—Fisheries criteria. [Statutory Authority: RCW 43.83B.420. WSR 91-03-081 (Order 90-53), § 173-166-110, filed 1/17/91, effective 2/17/91.] Repealed by WSR 18-09-031 (Order 17-01), filed 4/11/18, effective 5/12/18. Statutory Authority: RCW 43.83B.420.
173-166-120	Requests for drought relief—Contacts—Applications. [Statutory Authority: RCW 43.83B.420. WSR 91-03-081 (Order 90-53), § 173-166-120, filed 1/17/91, effective 2/17/91.] Repealed by WSR 18-09-031 (Order 17-01), filed 4/11/18, effective 5/12/18. Statutory Authority: RCW 43.83B.420.

**WAC 173-166-010 Purpose.** The legislature in 1989 gave permanent drought relief authority to the department of ecology and enabled ecology to issue orders declaring drought emergencies. Chapter 171, Laws of 1989 amends chapter 43.83B RCW (Water supply facilities).

(1) Chapter 171, Laws of 1989 authorizes the Washington state department of ecology (ecology) to assist in alleviating future drought conditions throughout the state, and sets forth the criteria and procedures for implementing the 1989 drought relief legislation.

(2) Ecology has authority under chapter 171, Laws of 1989 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.

[Statutory Authority: RCW 43.83B.420. WSR 91-03-081 (Order 90-53), § 173-166-010, filed 1/17/91, effective 2/17/91. Statutory Authority: 1977 c 339 § 75. WSR 78-04-019 (Order 78-3), § 173-166-010, filed 3/10/78.]

**WAC 173-166-020 Authority.** This regulation is promulgated by the department of ecology under authorities and

(4/11/18)

procedures provided in chapter 171, Laws of 1989 after notification as provided in chapter 34.05 RCW.

[Statutory Authority: RCW 43.83B.420. WSR 91-03-081 (Order 90-53), § 173-166-020, filed 1/17/91, effective 2/17/91. Statutory Authority: 1977 c 339 § 75. WSR 78-04-019 (Order 78-3), § 173-166-020, filed 3/10/78.]

**WAC 173-166-030 Definitions.** As used in this chapter:

(1) "Ecology" is the department of ecology.

(2) "Drought conditions" 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 and the deficiency causes, or is expected to cause, undue hardship to water users within that area.

(3) "Essential minimum" for the fisheries resource is:

(a) That amount of water or flow rate established as a regulation adopted by ecology pursuant to RCW 90.22.020 or 90.54.050;

(b) That amount of water or flow placed as a proviso on a water right permit or certificate; or

(c) That amount of water or flow established on an interim basis to assure the maintenance of fisheries requirements. Such a determination will be made by ecology, in consultation with, among others, the department of fish and wildlife, any concerned federal agencies and affected Indian tribes.

(4) "Executive water emergency committee (EWEC)" is a committee, chaired by the governor's office, including members of state, local, and federal agencies which reviews water supply information provided by the water supply availability committee and determines potential effects of water shortages upon the state of Washington. Affected Indian tribes will be invited to participate.

(5) "Geographical area" is an area within the state of Washington which can be described either by natural or political boundaries and which can be specifically identified in an order declaring a drought emergency. Examples of specific geographical areas include, but are not limited to:

(a) The state of Washington.

(b) Counties.

(c) Water resource inventory areas (WRIAs) as defined in chapter 173-500 WAC.

(d) Individual watersheds which constitute only a portion of a WRIA but whose boundaries can be topographically described.

(e) Groundwater management areas and subareas as defined in chapter 173-100 WAC.

(f) Designated sole source aquifers.

(g) Combinations of the above areas.

(6) "Normal water supply" is for the purpose of determining drought conditions, the median amount of water available to a geographical area, relative to the most recent thirty-year base period used to define climate normals. The

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determination of drought conditions will consider seasonal water supply forecasts, other relevant hydro-meteorological factors (e.g., precipitation, snowpack, soil moisture, stream-flow, and aquifer levels) and also may consider extreme departures from normal conditions over subseasonal time frames.

(7) "Previously established activities" include:

(a) The irrigation of a specified number of acres, using reasonably efficient practices, under a valid water right permit or certificate, or a supported registered water right claim.

(b) Those fish-management activities presently employed to maintain the fisheries resource. The resource itself must neither be restored nor enhanced by drought relief actions available under the provisions of this chapter.

(c) The delivery of water by public and private entities through existing supply systems to present populations, areas, and/or facilities for purposes that are nonagricultural and nonfishery related.

(8) "Reasonably efficient practices" are those practices including, but not limited to, methods of conveyance, use, and disposal of water which are reasonable and appropriate under the circumstances to bring about water use efficiency as determined by an area-specific application of criteria identified by ecology, which may include, among others:

(a) Customary practices in the area;

(b) Reasonableness of any facilities at the time of installation;

(c) Cost of improvements and impacts of the costs of upgrading facilities on the continued use of water by an appropriator;

(d) Changes in water use practices and technology; and

(e) Impact of alternative water use practices on other water uses and the environment.

(9) "Supported registered water right claim" is a registered water right claim which includes sufficient evidence to satisfy ecology that a valid water right would be confirmed should the claim be adjudicated. Applications made for emergency drought permits or water transfers under this chapter must incorporate, either by reference or inclusion, necessary information to enable ecology to make an informed determination with respect to the claim. Such information may include, but is not limited to:

(a) Documentation of continuous historical exercise of the claimed right;

(b) Historical maps depicting the historical means of irrigation and the areas covered by the claimed right;

(c) Legal documentation, including any previous court or administrative board decisions, which addresses the historical nature and extent of the claimed right;

(d) "Old-timer" testimony which addresses the historical nature and extent of the claimed right.

(10) "Water supply availability committee (WSAC)" is a committee, with a core membership consisting of ecology, the National Weather Service, the Natural Resources Conservation Service, the U.S. Geological Survey, the U.S. Bureau of Reclamation, and other federal agencies involved in water supply forecasting, which reviews pertinent hydrological and meteorological information and assesses water supply conditions for the state of Washington.

[Statutory Authority: RCW 43.83B.420. WSR 18-09-031 (Order 17-01), § 173-166-030, filed 4/11/18, effective 5/12/18; WSR 91-03-081 (Order 90-

53), § 173-166-030, filed 1/17/91, effective 2/17/91. Statutory Authority: 1977 c 339 § 75. WSR 78-04-019 (Order 78-3), § 173-166-030, filed 3/10/78.]

**WAC 173-166-040 General eligibility rule.** (1) Applications for emergency drought permits, water transfers, or funding assistance made under this chapter will be processed only for previously established activities in a geographical area declared to be suffering from drought conditions. Where required by law, such activities must be conducted under a valid water right permit, certificate, or supported registered water right claim.

(2) Applications will be processed if the water user is receiving, or is projected to receive, less than seventy-five percent of normal water supply for the previously established activity and experiencing or expected to experience undue hardship as a result.

(3) All permits and approvals issued under this chapter will be subject to existing rights.

(4) Water obtained through the issuance of temporary permits or water right transfers must be put to beneficial use in lieu of water which is unavailable because of drought conditions.

(5) All permits and approvals issued under this chapter will be of a temporary nature and will contain an expiration date.

[Statutory Authority: RCW 43.83B.420. WSR 18-09-031 (Order 17-01), § 173-166-040, filed 4/11/18, effective 5/12/18; WSR 91-03-081 (Order 90-53), § 173-166-040, filed 1/17/91, effective 2/17/91. Statutory Authority: 1977 c 339 § 75. WSR 78-04-019 (Order 78-3), § 173-166-040, filed 3/10/78.]

**WAC 173-166-050 Forecast of drought conditions.**

(1) Whenever it appears to the department of ecology that drought conditions as defined in WAC 173-166-030(2) either exist or are forecast to occur, ecology will consult with the state's water supply availability committee (WSAC) or its successor. Other appropriate sources of water supply information, such as the Columbia River water management group, the U.S. Army Corps of Engineers, and other water managers, may be consulted by the WSAC as needed.

(2) Ecology may solicit input from local authorities to aid ecology in determining the anticipated level of hardship and will make that information available to the executive water emergency committee (EWEC).

(3) Should the WSAC determine that a geographical area is receiving, or is likely to receive, seventy-five percent or less of its normal water supply, it will advise the EWEC and the Indian tribes within the area. The EWEC will then make a determination as to whether or not undue hardships will occur as a result of the shortage.

(4) Should the EWEC determine that an area will suffer undue hardship as a result of a reduced water supply, it will submit a recommendation to that effect to the governor for written approval. Affected Indian tribes will be notified at the time such a recommendation is submitted.

(5) Upon securing the written approval of the governor, ecology will then issue an order declaring a geographical area to be suffering from drought conditions and publish that order in a newspaper of general circulation in the area affected by the order.

[Statutory Authority: RCW 43.83B.420. WSR 18-09-031 (Order 17-01), § 173-166-050, filed 4/11/18, effective 5/12/18; WSR 91-03-081 (Order 90-53), § 173-166-050, filed 1/17/91, effective 2/17/91. Statutory Authority: 1977 c 339 § 75. WSR 78-04-019 (Order 78-3), § 173-166-050, filed 3/10/78.]

**WAC 173-166-060 Orders declaring drought conditions.** (1) If the department of ecology determines that a geographical area is suffering from drought conditions, it may, upon the advice of the WSAC, with the concurrence of the EWEC, and the written approval of the governor, issue an order to that effect.

(2) The order declaring drought conditions for a geographical area must contain the following elements:

(a) A description of the geographical area which is being so designated.

(b) The facts leading to the issuance of the order.

(c) The statutory authority upon which the order is being issued.

(d) The commencement date and termination date of the order. The termination date may be no later than one calendar year from the date the order is issued.

(e) Brief descriptions of the emergency actions which are possible under the order.

(f) Provisions for the termination of withdrawals if essential minimum flows are jeopardized.

(3) Ecology must publish the order declaring a geographical area to be suffering from drought conditions in a newspaper of general circulation in the area affected by the order.

(4) Persons may file written protest as to the contents of the order with ecology. Ecology will have fifteen calendar days from the date of receipt of the protest in which to consult with members of WSAC, EWEC, and the governor and to make a determination as to its validity.

(5) A person who believes that an area should be declared to be suffering from drought conditions may petition ecology for such a declaration. Upon the receipt of such a petition, ecology will have fifteen calendar days from the date of receipt of the petition in which to make a determination as to its validity, using the procedure specified in WAC 173-166-050, and provide a decision to the applicant. The petition should contain the following information:

(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.

(c) The facts upon which the petition is based.

(6) Orders declaring areas to be suffering from drought conditions may, with the written approval of the governor, be amended one or more times to change the termination date, provided that the termination date of the order, as amended, is no more than two calendar years from the date the order is first issued.

(7) Orders declaring areas to be suffering from drought conditions may be issued for different areas of the state and sequentially for the same area if drought conditions persist.

[Statutory Authority: RCW 43.83B.420. WSR 18-09-031 (Order 17-01), § 173-166-060, filed 4/11/18, effective 5/12/18; WSR 91-03-081 (Order 90-53), § 173-166-060, filed 1/17/91, effective 2/17/91. Statutory Authority: 1977 c 339 § 75. WSR 78-04-019 (Order 78-3), § 173-166-060, filed 3/10/78.]

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**WAC 173-166-070 Emergency drought permits.**

Ecology may allow water users to obtain water from alternate sources during drought conditions. To accomplish this, ecology may issue emergency drought permits authorizing withdrawals of groundwater and surface water, including dead storage in reservoirs. Permits will be processed under the following criteria:

(1) Applicants must be conducting a previously established activity within a geographical area declared to be suffering from drought conditions.

(2) An application will be processed if the water user is receiving, or is projected to receive, less than seventy-five percent of normal water supply, as the result of natural drought conditions, for the previously established activity and experiencing, or is expected to experience, undue hardship as a result.

(3) Ecology, plus all state and local agencies with authority to issue permits or other authorizations in connection with emergency actions authorized under the provisions of this chapter, will have fifteen calendar days from the date of receipt of the respective application(s) in which to provide a decision to the applicant. Agencies with authority to review applications for emergency drought permits, such as under RCW 75.20.050, and affected Indian tribes will have fifteen calendar days from the date ecology receives the application in which to provide ecology with an opinion as to any effects of the proposed withdrawal.

(4) Waters authorized to be withdrawn must be used in relation to a previously established activity as defined in this chapter. The permit must not cover irrigation of new lands, restoration or enhancement of the fisheries resource, or a new water use than practiced in the past by individuals, private entities, or public bodies.

(5) Emergency drought permits may authorize replacing all or a portion of the normal supply that is unavailable due to drought, but cannot increase authorized use.

(6) The withdrawal must not reduce flows or levels below essential minimums necessary to assure the maintenance of fisheries requirements and to protect federal and state interests including, but not limited to, power generation, navigation, water quality, and existing water rights.

(7) Emergency drought permits issued under this chapter will be temporary in nature and must expire no later than the expiration date of the order declaring the area in which the permitted activity is authorized to be suffering from drought conditions.

(8) Priority will be given to domestic and irrigation uses of water for any emergency withdrawals authorized under this chapter.

(9) Emergency drought permits issued under this chapter must contain provisions for termination should the withdrawal reduce flows or levels below essential minimums as defined in this chapter.

(10) To expedite the issuance of emergency drought permits, ecology is authorized to process the applications and issue the permits without compliance with requirements for:

(a) Notice of newspaper publication.

(b) The State Environmental Policy Act.

[Statutory Authority: RCW 43.83B.420. WSR 18-09-031 (Order 17-01), § 173-166-070, filed 4/11/18, effective 5/12/18; WSR 91-03-081 (Order 90-53), § 173-166-070, filed 1/17/91, effective 2/17/91. Statutory Authority:

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Chapters 43.83B and 43.27A RCW. WSR 88-13-037 (Order 88-11), § 173-166-070, filed 6/9/88.]

**WAC 173-166-080 Temporary transfers of water rights.** (1) Ecology may approve emergency water right changes in order to effect a transfer of water between willing parties. Water right changes can include purpose of use, place of use, and point of diversion.

(2) Examples of possible water right transfers include, but are not limited to, the following situations:

(a) A water right holder may choose to reduce irrigated acreage and transfer the unused water to another water right holder whose normal water supply is decreased by drought conditions. The acreage irrigated with transferred water on the second parcel may not exceed the acreage reduction on the first parcel.

(b) A water right holder may transfer a water right from an out-of-stream use to an instream use.

(c) Municipalities or other public bodies may transfer water between one another.

(3) Requests for water right transfers will be processed under the following criteria:

(a) Applicants must be conducting a previously established activity within a geographical area declared to be suffering from drought conditions.

(b) An application for a water right transfer will be processed if the recipient water user is receiving, or is projected to receive, less than seventy-five percent of normal water supply, as the result of natural drought conditions, for the previously established activity and experiencing, or is expected to experience, undue hardship as a result.

(c) All approvals by ecology for water right transfers under this chapter will be temporary in nature and will be for the purpose of alleviating drought conditions. These approvals must terminate no later than the expiration date of the order which declares the area to be suffering from drought conditions.

(d) Water right transfers between willing parties may be approved when an emergency exists only if such a transfer will not affect existing rights whatsoever, or reduce flows or levels below essential minimums, or adversely affect federal and state interests including, but not limited to, power generation, navigation, and water quality.

(e) Water rights may be transferred within areas declared to be suffering from drought conditions. Water rights may also be transferred from outside an area declared to be suffering from drought conditions into an area declared to be suffering from drought conditions, provided such a transfer of water is physically possible and is consistent with the provisions of RCW 90.03.380, 90.03.390, and 90.44.100. Water rights will not be transferred from within an area declared to be suffering from drought conditions to outside that area.

(f) To expedite water transfers during drought conditions, ecology can approve temporary changes in water rights without compliance with requirements for:

(i) Notice of newspaper publication.

(ii) The State Environmental Policy Act.

(g) In those cases where temporary water transfers require court approval while general adjudication proceedings are ongoing, ecology will assist the court in coordina-

tion, maintaining communications, and providing technical assistance when requested.

(h) The temporary changing of a water right under this chapter will not be admissible as evidence in either supporting or contesting the validity of water claims in a general adjudication of water rights in the state of Washington.

(i) Ecology, plus all state and local agencies with authority to issue permits or other authorizations in connection with emergency actions authorized under the provisions of this chapter, will have fifteen calendar days from the date of receipt of the respective application(s) in which to provide a decision to the applicant. Agencies with authority to review applications for temporary water right transfers, such as under RCW 75.20.050, and affected Indian tribes will have fifteen calendar days from the date ecology receives the application in which to provide ecology with an opinion as to any effects of the proposed transfer.

[Statutory Authority: RCW 43.83B.420. WSR 18-09-031 (Order 17-01), § 173-166-080, filed 4/11/18, effective 5/12/18; WSR 91-03-081 (Order 90-53), § 173-166-080, filed 1/17/91, effective 2/17/91.]

**WAC 173-166-130 Appeals.** All final written decisions of the department of ecology made pursuant to this chapter shall be subject to review by the pollution control hearings board in accordance with the provisions of chapter 43.21B RCW.

[Statutory Authority: RCW 43.83B.420. WSR 91-03-081 (Order 90-53), § 173-166-130, filed 1/17/91, effective 2/17/91.]

**WAC 173-166-140 Regulation review.** The department of ecology will initiate a review of the rules established in this chapter whenever new information, changing conditions, or statutory modifications make it necessary to consider revisions.

[Statutory Authority: RCW 43.83B.420. WSR 91-03-081 (Order 90-53), § 173-166-140, filed 1/17/91, effective 2/17/91.]