

WSR 23-06-064

EMERGENCY RULES

DEPARTMENT OF HEALTH

[Filed February 28, 2023, 10:52 a.m., effective February 28, 2023, 10:52 a.m.]

Effective Date of Rule: Immediately upon filing.

Purpose: Drinking water state revolving fund (DWSRF) loan program, loans for lead service line (LSL) identification and replacement. The department of health (department) is amending sections of chapter 246-296 WAC to redefine the term "disadvantaged community," update application requirements, and clarify loan rating and ranking criteria to conform with requirements in the federal bipartisan infrastructure law (BIL). The amendments allow the department to conform to the United States Environmental Protection Agency tools for identifying disadvantaged communities, modernizes the calculation for water systems to qualify as a disadvantaged community, removes water system plan requirements for those systems that are seeking a loan to address LSL identification and replacement, and removes obsolete priority rating and ranking criteria to allow more water systems to qualify for loans.

Citation of Rules Affected by this Order: Amending WAC 246-296-020, 246-296-100, and 246-296-130.

Statutory Authority for Adoption: RCW 70.119A.170.

Other Authority: Federal Safe Drinking Water Act, 40 C.F.R. Part 35 Subpart L; and BIL, P.L. 117-58.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest; and that state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this Finding: The rule amendment is necessary for the preservation of the public health, safety, and general welfare of state citizens so that applicants can apply for LSL identification and replacement loans during the loan cycle that opens April 1, 2023, and closes April 28, 2023, which allows for up to full principal forgiveness to communities that qualify as disadvantaged in conformance with the requirements under BIL. This rule amendment increases public health protection by broadening the types of qualifying infrastructure improvements as outlined in BIL, in addition to traditional funding uses such as replacing aging infrastructure, installing treatment to remove regulated contaminants, restructuring failing water systems, and responding to public health emergency events.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 3, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 3, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 3, Repealed 0.

Date Adopted: February 28, 2023.

Kristin Peterson, JD
Chief of Policy
for Umair A. Shah, MD, MPH
Secretary

OTS-4380.4

AMENDATORY SECTION (Amending WSR 22-07-025, filed 3/9/22, effective 4/9/22)

WAC 246-296-020 Definitions, abbreviations, and acronyms. The definitions, abbreviations, and acronyms in this section apply throughout this chapter unless the context clearly indicates otherwise.

(1) "Affordability" means a community's ability, on a per household basis, to pay for rate increases that result from a DWSRF loan project.

(2) "Application" means the DWSRF loan request form provided by the department.

(3) "Application package" means the DWSRF loan application form(s), requirements, terms of assistance, and related information created by the department.

(4) "Borrower" means the person that has legal and financial responsibility for the DWSRF loan.

(5) "Capitalization grant" means an award by EPA of funds to a state for the DWSRF and other purposes as authorized in Section 1452 of the SDWA.

(6) "Construction completion report" means a form provided by the department and completed for each specific construction project to document:

(a) Project construction in accordance with chapter 246-290 WAC and general standards of engineering practice;

(b) Physical capacity changes;

(c) Satisfactory test results; and

(d) The completed form is stamped with an engineer's seal, and signed and dated by a professional engineer.

(7) "Default" means failure to meet a financial obligation such as a DWSRF loan payment.

(8) "Department" means the Washington state department of health.

(9) "Disadvantaged community" means the service area of a proposed project within a public water system (~~where the project will result in:~~

~~(a) Water rates that are more than one and one-half percent of the MHI of the service area; or~~

~~(b) Restructuring, when one or more public water systems are having financial difficulties.)) and the water system:~~

(a) Serves less than 3,300 people; and

(i) Is identified as a disadvantaged community in accordance with the United States Environmental Protection Agency Environmental Climate and Economic Justice Screening Tool; or

(ii) Is in a geographic area where a combined household burden indicator and poverty prevalence indicator results in a moderate-high burden or above; or

(b) Service area is located in a rural county as defined by the office of financial management; and

(i) Is identified as a disadvantaged community in accordance with the United States Environmental Protection Agency Environmental Climate and Economic Justice Screening Tool; or

(ii) Is in a geographic area where combined household burden indicator and poverty prevalence indicator results in a moderate-high burden or above.

(10) "DWSRF (drinking water state revolving fund)" means the program that meets the requirements of RCW 70A.125.160 to administer federal funds and other funds deposited in a dedicated account used to finance public water system infrastructure improvements and drinking water program activities.

(11) "DWSRF loan" means an agreement between the department and the borrower in which the DWSRF provides funds for eligible assistance and the borrower agrees to repay the principal sum, applicable interest, and DWSRF loan fee to the DWSRF.

(12) "DWSRF loan fee" means a nonrefundable fee that is charged on all DWSRF loans, including DWSRF loans for which all or part of the principal is forgiven.

(13) "Ecology" means the Washington state department of ecology.

(14) "Eligible public water system" means a Group A community public water system, either privately or publicly owned, or a non-profit Group A noncommunity public water system.

(15) "Emergency" means an event such as a natural disaster or other unforeseen or unavoidable circumstances that causes damage or disrupts normal public water system operations and requires immediate action to protect public health and safety. A failure to maintain, replace, reconstruct, upgrade, or make necessary infrastructure improvements does not constitute an emergency.

(16) "EPA" means the United States Environmental Protection Agency.

(17) "Green project" means a public water system infrastructure improvement project that includes water efficiency, energy efficiency, or environmental innovations as follows:

(a) Water efficiency projects use improved technologies and practices to deliver equal or better service with less water, including preventing water loss and reducing customer demand to protect water resources;

(b) Energy efficiency projects use improved technologies and practices to reduce energy consumption or produce cleaner energy for use in water treatment;

(c) Environmentally innovative projects use new or innovative approaches to manage water resources in a more environmentally sustainable way. Projects that are considered environmentally innovative include those that:

(i) Prevent or remove pollution;

(ii) Help a community adapt to climate change through water resource protection programs; or

(iii) Result in other proven, sustainable environmental benefits.

(18) "Group A public water system" is defined and referenced under WAC 246-290-020.

(19) "Group B public water system" means a public water system that is not a Group A public water system and is defined and referenced under WAC 246-291-005.

(20) "Household burden indicator" means the total combined annual basic drinking water, wastewater, and storm water cost as a percent of the upper limit of the lowest 20th percentile household income.

(21) "Individual water supply system" means any water system that is not subject to chapter 246-290 or 246-291 WAC; and provides water to either one single-family residence, or to a system with four or fewer connections, all of which serve residences on the same farm.

~~((21))~~ (22) "IUP (intended use plan)" means the federally required document prepared each year by the department identifying the intended uses of the DWSRF funds and describing how those uses support the DWSRF goals.

~~((22))~~ (23) "Loan closeout" means a loan agreement is complete when the loan is repaid in full.

~~((23) "MHI (median household income)" means the midpoint or the average of two midpoints in the range of household incomes in the project's service area. The median divides the list of households in a service area into two parts; half of the households exceed the median, and half of the households are below the median.)~~

(24) "Multiple benefit" means projects that address more than one type of health risk.

(25) "Municipality" means a city, town, special purpose district, or municipal corporation established according to the applicable laws of this state.

(26) "NEPA" means the National Environmental Policy Act of 1969, 42 United States Code 4321 et seq., PL-91-190.

(27) "Nonprofit organization" means an entity that has a federal tax exempt status identification number.

(28) "Owner" means any agency, subdivision of the state, municipal corporation, firm, company, mutual or cooperative association, institution, partnership, person, or any other entity that holds as property a public water system.

(29) "Person" means any individual, corporation, company, association, society, firm, partnership, joint stock company, or any governmental agency, or the authorized agents of these entities.

(30) "Poverty prevalence indicator" is the result of the service area population below 200 percent of the federal poverty limit divided by the population for whom poverty status is determined.

(31) "Principal forgiveness" means that a reduction of a percentage of the total loan amount is not required to be paid back by the borrower. Principal forgiveness is applied when the project is complete.

~~((31))~~ (32) "Project report" means a department-approved document the borrower or borrower's agency develops under WAC 246-290-110.

~~((32))~~ (33) "Public water system" is defined and referenced under WAC 246-290-020.

~~((33))~~ (34) "Receivership" means the voluntary or involuntary transfer of ownership and operation of a public water system according to chapter 7.60 RCW and RCW 43.70.195.

~~((34))~~ (35) "Regional benefit" means project improvements that affect more than one public water system.

~~((35))~~ (36) "Restructuring" means changing public water system ownership including, but not limited to:

(a) Consolidation of two or more existing public water systems into a single public water system;

(b) Transfer of ownership; or

(c) Receivership.

~~((36))~~ (37) "SDWA (Safe Drinking Water Act)" means Public Law 93-523, including all amendments.

~~((37))~~ (38) "SEPA" means the State Environmental Policy Act under chapter 43.21C RCW.

~~((38))~~ (39) "Set-aside" means the use of a portion of DWSRF funds allotted to the state for a range of specific SDWA-related activities under Section 1452 of the SDWA, to fund new programs, and for other drinking water program activities.

~~((39))~~ (40) "SERP (state environmental review process)" means the NEPA-like environmental review process adopted by Washington state to comply with the requirements of 40 C.F.R. 35.3140. SERP combines the SEPA review with additional elements to comply with federal requirements.

~~((40))~~ (41) "Surface water" means a body of water open to the atmosphere and subject to surface runoff.

~~((41))~~ (42) "Sustainable" means able to continue a benefit into the future as a result of appropriate public water system design, processes, operations, governance, and maintenance.

~~((42))~~ (43) "SWSMP (small water system management program)" means a document for a small nonexpanding Group A public water system developed and approved under WAC 246-290-105.

~~((43))~~ (44) "System capacity" means a public water system's operational, technical, managerial, and financial capability to achieve and maintain ongoing compliance with all relevant local, state, and federal plans and regulations.

~~((44))~~ (45) "Transfer of ownership" means to change legal ownership of a public water system from one person to another.

~~((45))~~ (46) "Water right" means a legal authorization, such as a permit, claim, or other authorization, on record with or accepted by the department of ecology, authorizing the beneficial use of water in accordance with all applicable state laws.

~~((46))~~ (47) "WFI (water facilities inventory)" means a department form summarizing a public water system's characteristics.

~~((47))~~ (48) "WSP (water system plan)" means a document that a Group A community public water system submits to the department as required under WAC 246-290-100. The plan addresses a public water system's capacity to comply with relevant local, state, and federal plans and regulations, describes the public water system's present and future needs, and establishes eligibility for funding under this chapter.

[Statutory Authority: RCW 43.70.040 and 2020 c 20. WSR 22-07-025, § 246-296-020, filed 3/9/22, effective 4/9/22. Statutory Authority: RCW 70.119A.170 as amended by 2016 c 111. WSR 16-14-086, § 246-296-020, filed 7/5/16, effective 8/5/16. Statutory Authority: RCW 70.119A.170. WSR 16-06-100, § 246-296-020, filed 3/1/16, effective 4/1/16. Statutory Authority: RCW 70.119A.170 and Federal Safe Drinking Water Act, H.R. 1452. WSR 12-01-077, § 246-296-020, filed 12/19/11, effective 2/1/12. Statutory Authority: RCW 70.119A.170. WSR 01-21-137, § 246-296-020, filed 10/24/01, effective 11/24/01.]

AMENDATORY SECTION (Amending WSR 12-01-077, filed 12/19/11, effective 2/1/12)

- WAC 246-296-100 DWSRF loan eligibility and application requirements.** To be eligible for a DWSRF loan, an applicant shall:
- (1) Document that the public water system has the system capacity to stay in compliance with applicable federal, state, and local drinking water requirements, unless:
 - (a) The funding will bring the public water system into compliance; and
 - (b) The owner of the public water system agrees to reasonable and appropriate changes to stay in compliance.
 - (2) ~~((Before applying for a DWSRF loan,))~~ Except when applying for a DWSRF loan that addresses lead service line identification or lead service line replacements; the applicant shall have a current department-approved WSP or SWSMP that:
 - (a) Includes the proposed project; and
 - (b) Addresses any difficulties with system capacity((~~+~~)).
 - (3) Comply with federal, state, and local drinking water requirements or a variance under WAC 246-290-060, unless the DWSRF loan will fund projects that result in public water system compliance;
 - (4) Comply with any department or EPA orders;
 - (5) Install a source meter on each source if meters are not already installed;
 - (6) Install service meters on all service connections if meters are not already installed within the project area, unless:
 - (a) The project is for a transient noncommunity public water system;
 - (b) The project is for a mobile home park with a source or master meter;
 - (c) The project is for an apartment building or complex with a source or master meter; or
 - (d) The department determines that installing meters is:
 - (i) Prohibitive for the DWSRF project as a whole; and
 - (ii) Waiving the meter requirement is necessary to award a DWSRF loan for a project to resolve high priority public health problems.
 - (7) Have no outstanding fees or penalties owed to the department.
 - (8) Provide documentation that the project has sufficient water rights as determined by ecology.
 - (9) Comply with the requirements of WAC 246-296-120(1).

[Statutory Authority: RCW 70.119A.170 and Federal Safe Drinking Water Act, H.R. 1452. WSR 12-01-077, § 246-296-100, filed 12/19/11, effective 2/1/12. Statutory Authority: RCW 70.119A.170. WSR 01-21-137, § 246-296-100, filed 10/24/01, effective 11/24/01.]

AMENDATORY SECTION (Amending WSR 16-14-086, filed 7/5/16, effective 8/5/16)

- WAC 246-296-130 Project priority rating and ranking criteria.** The department shall, at a minimum, consider the following to assign points, and rate and rank proposed projects:
- (1) Criteria for risk categories and points based on:
 - (a) Type and significance of public health problems the project will resolve;

(b) If the project is needed to bring the public water system into compliance with federal, state, and local drinking water requirements;

(c) Current compliance status; and

(d) ~~((Affordability on a per household basis, determined by comparing the community's average water rate to the MHI in the community's service area, for a community public water system.))~~ Disadvantaged community status.

(2) Additional points based on the type of project being proposed, if the project:

(a) Is to restructure a public water system;

(b) Creates a sustainable regional public health benefit;

(c) Has multiple benefits that are sustainable;

(d) Is consistent with the Growth Management Act;

(e) Is financially sustainable; or

(f) Qualifies as a green project (~~(~~

~~g) Serves a disadvantaged community; or~~

~~(h) Results in service meters on existing services not currently metered))~~).

[Statutory Authority: RCW 70.119A.170 as amended by 2016 c 111. WSR 16-14-086, § 246-296-130, filed 7/5/16, effective 8/5/16. Statutory Authority: RCW 70.119A.170 and Federal Safe Drinking Water Act, H.R. 1452. WSR 12-01-077, § 246-296-130, filed 12/19/11, effective 2/1/12. Statutory Authority: RCW 70.119A.170. WSR 01-21-137, § 246-296-130, filed 10/24/01, effective 11/24/01.]