

WSR 21-16-057

EMERGENCY RULES

DEPARTMENT OF ECOLOGY

[Order 21-11—Filed July 28, 2021, 4:11 p.m., effective July 28, 2021, 4:11 p.m.]

Effective Date of Rule: Immediately upon filing.

Purpose: The department of ecology is adopting a new emergency rule chapter 173-167 WAC, Emergency drought funding. This emergency rule provides eligibility criteria for grant funds to alleviate hardship resulting from the drought declared on July 14, 2021.

The emergency rule will be effective through November 25, 2021. If needed, ecology may adopt subsequent emergency rules.

Please visit our website for information and to participate in the rule-making process <https://www.ecology.wa.gov/Regulations-Permits/Laws-rules-rulemaking/Rulemaking/WAC-173-167-2021>.

Citation of Rules Affected by this Order: New chapter 173-167 WAC.

Statutory Authority for Adoption: Chapter 43.83B RCW, Drought conditions.

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.

Reasons for this Finding: An emergency rule is necessary to protect public health and safety and promote timelines that are in the best interest of the public. Once the rule is in place, ecology may distribute funds to alleviate hardship. Drought can cause immediate impacts to public bodies. To address these impacts, drought funding needs to be administered in a timely manner.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 13, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 13, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 13, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: July 28, 2021.

Laura J. Watson
Director

OTS-1434.4

**Chapter 173-167 WAC
EMERGENCY DROUGHT FUNDING**

NEW SECTION

WAC 173-167-180 Purpose and applicability. (1) Ecology is authorized to provide funding to public entities to implement projects and measures that alleviate undue hardship caused by drought conditions negatively affecting:

(a) The delivery of safe and reliable drinking water supplies;
(b) The survival of fish and wildlife; and
(c) The viability of agricultural activities and livestock operations.

(2) This chapter establishes criteria for grant eligibility, selection, issuance, and performance, and applies to projects under which ecology may disburse funds for addressing undue hardship caused by drought conditions.

(3) Provisions in this chapter supplement provisions of chapter 173-166 WAC. In the event of any conflict between this rule and chapter 173-166 WAC, the provisions of this chapter control.

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NEW SECTION

WAC 173-167-190 Definitions. Definitions only apply to this chapter:

(1) "Agreement effective date" means the date on which the grant agreement becomes effective, as specified in the agreement.

(2) "Agreement signature date" means the date the grant agreement is signed by ecology.

(3) "Applicant" means an entity that applies for a grant.

(4) "Budget" means, for the purpose of grant agreements, a breakdown of eligible costs by task.

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

(6) "Grant agreement" or "agreement" means the formal, written, contractual document that details the terms and conditions, scope of work, budget, and schedule of the grant, signed by authorized signatories of the recipient and ecology.

(7) "Recipient" means an entity that has a grant agreement.

(8) "Scope of work" means the tasks, deliverables, and timelines of the grant agreement.

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NEW SECTION

WAC 173-167-200 Funding limitations. (1) Ecology will administer grants in accordance with the *Administrative Requirements for Recipients of Ecology Grants and Loans*. (Publication No. 17-01-004.) Revised September 2017.

(2) Except for state agency applicants and as provided for in subsection (3) of this section, applicants must provide cost-share totaling fifty percent of the total eligible cost of the project.

(3) If an applicant is seeking funding for a public water system to address the immediate undue hardship arising from drought condi-

tions and it serves a population of less than twenty-five thousand individuals with a mean household income of eighty percent or less of the state average, these applicants qualify for an exemption from the cost-share requirement.

(4) The department will provide no more than one hundred thousand dollars to any single entity or any single project with funding authorized under this chapter, except applicants meeting criteria under subsection (3) of this section may qualify for up to seven hundred thousand dollars of funding.

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NEW SECTION

WAC 173-167-210 Application. (1) All applicants must use the electronic system identified by ecology to apply for grants. Applicants without access to the electronic system must use a process approved by ecology.

(2) The applicant must complete the application process and provide all required information, including:

- (a) Applicant information;
- (b) Project location and description;
- (c) Requested funding amount and budget for the project;
- (d) Description of project benefit(s), including:
 - (i) Problem(s) or need(s) the project would address;
 - (ii) Timing and the extent to which the project is expected to address the identified needs;
 - (iii) Quantity of water, acreage, and number of residences affected by the proposed project, as applicable;
 - (iv) Method(s) used to determine project benefits; and
 - (v) Metrics for project success, including quantitative metrics if available.
- (e) Scope of work for the project;
- (f) Any other information required by ecology to evaluate the project.

(3) Ecology may request additional information to assist in the application evaluation process and may remove an application from further consideration if the application is incomplete.

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NEW SECTION

WAC 173-167-220 Eligible public entities for grant funding under this chapter. (1) The first one million dollars in funding will be available to address drought hardships through requests made to:

- (a) The department of health for drinking water emergencies;
- (b) The department of fish and wildlife for fish health emergencies; or
- (c) The conservation commission for agricultural emergencies.

(2) The first one million dollars in drought response funding that is available under this chapter shall be reserved for state agencies to fund emergency response activities by local and state agen-

cies. Funding limitations and restrictions in WAC 173-167-200 do not apply to grants issued to state agencies under this subsection.

(3) If more than one million dollars of funding is made available for drought emergency response activities, ecology will solicit proposals directly for grants from the following entities:

- (a) State, county, or city governmental agencies.
- (b) Federally recognized tribes.
- (c) Public utility districts, formed under chapter 54.04 RCW.
- (d) Water and sewer districts, formed under chapter 57.02 RCW.
- (e) Conservation districts, formed under chapter 89.08 RCW.
- (f) Irrigation districts, formed under chapter 87.03 RCW.
- (g) Port districts formed under chapter 53.04 RCW.
- (h) Watershed management partnerships formed under RCW 39.34.200.

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NEW SECTION

WAC 173-167-230 Eligibility for funding. (1) 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, which can be found at <https://ecology.wa.gov/DOE/files/40/408b30b3-0d96-4d57-aad8-36e675448b08.pdf> (a map of the drought declaration area can be viewed at <https://ecology.wa.gov/Water-Shorelines/Water-supply/Water-availability/Statewide-conditions/Drought-2021>).

(2) Funding provided under the first one million dollars available under this chapter shall be authorized for drought impacts resulting in a public health emergency due to a lack of potable water, a fish health emergency due to water quality or quantity problems, or an agricultural emergency resulting in the potential for loss of life of agricultural animals or agricultural crops.

(3) If more than one million dollars of funding is made available for drought emergency response activities, one or more of the following must be partially or completely within the area of a drought declaration order by ecology:

- (a) The public water system's service area;
- (b) The geographic area where irrigated agriculture or livestock are located;
- (c) The source of water, or the water body, that supplies water to the entity applying for funding.

(4) The reduction in water supply caused by drought must cause, or is expected to cause, undue hardship, as described under WAC 173-167-260.

(5) Funding may be granted if the following conditions are met:

(a) The proposed project or measure must be for an established beneficial use of water and not used for irrigation of new acreage or another new or expanded use.

(b) The applicant must provide documentation to ecology or the granting state agency that demonstrates ability to complete the project or measure on or before the expiration of the declared drought emergency.

(c) Water derived from the project or measure must be put to beneficial use and address the current water shortage during the drought declaration.

(d) The proposed project or measure cannot impair existing water rights, including instream and out-of-stream rights.

(e) The applicant must obtain all required permits and approvals for the proposed project prior to initiating work.

(f) If an applicant is seeking funding for a public water system, the applicant must obtain Washington department of health approval of the proposed project.

(g) If an applicant is on behalf of a public water system, the system must describe water conservation actions or demonstrate that the applicant has already made reasonable efforts to address their water supply shortage through conservation measures.

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NEW SECTION

WAC 173-167-240 Waiver. To expedite drought relief projects and measures, ecology can approve funding or compensation under this chapter without complying with:

- (1) Notice of publication;
- (2) The State Environmental Policy Act; and
- (3) Competitive bidding requirements.

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NEW SECTION

WAC 173-167-250 Eligible projects or measures. (1) Eligible projects or measures include, but are not limited to:

(a) Leasing or acquiring water rights providing an uninterrupted water supply for instream or out-of-stream use;

(b) Establishing emergency interties or other alternate source(s) of supply;

(c) Obtaining an emergency supply of potable water from trucks or bottles;

(d) Addressing fish hatchery or migration barriers caused by drought conditions;

(e) The cost of providing personnel necessary to implement the activities identified in this section.

(2) Ecology retains the discretion to fund an eligible project for less than the amount requested or deny a grant request for an eligible project. Situations where ecology may reduce or deny a grant request for an eligible project include, but are not limited to, incomplete application submittal, unavailability of sufficient funding for a project, or evidence that information submitted in an application is false or inaccurate.

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NEW SECTION

WAC 173-167-260 Undue hardship. (1) Undue hardship will be evaluated by considering:

(a) The short-term and long-term economic, public health, or environmental effects the water shortage would have in the absence of drought relief on agricultural crops, livestock operations, public water system safety and reliability, or instream fish and wildlife resources.

(b) The degree to which current drought conditions are directly responsible for the effects described as undue hardship.

(c) The amount of water shortage experienced or forecast for each applicant.

(2) In the Yakima Basin (water resource inventory areas 37, 38, and 39), undue hardship exists for irrigators at a water supply threshold consistent with the objectives of the Yakima Basin integrated plan. Undue hardship for irrigation projects does not exist if irrigation districts with junior prorated allocations receive seventy percent or greater of normal water supply.

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NEW SECTION

WAC 173-167-270 Grant agreement. (1) Ecology will work with the recipient to prepare the grant agreement.

(2) A grant agreement issued and managed in ecology's electronic system must include, at a minimum:

- (a) Project description;
- (b) Expected outcomes;
- (c) Project budget and funding distribution;
- (d) Agreement effective date and expiration date;
- (e) Description of tasks, deliverables, and timelines;
- (f) Contact information for ecology and the recipient;
- (g) Signatures of authorized signatories;
- (h) General terms and conditions that specify requirements related, but not limited to:
 - (i) Amendments and modifications;
 - (ii) Assignment limits on transfer of rights or claims;
 - (iii) Inadvertent discovery plan for human remains and/or cultural resources;
 - (iv) Compliance with all laws;
 - (v) Conflict of interest;
 - (vi) Disputes;
 - (vii) Environmental data standards;
 - (viii) Governing law;
 - (ix) Indemnification;
 - (x) Independent status of the parties to the agreement;
 - (xi) Order of precedence for laws, rules, and the agreement;
 - (xii) Property rights, copyrights, and patents;
 - (xiii) Records, audits, and inspections;
 - (xiv) Recovery of funds;
 - (xv) Severability;
 - (xvi) Suspension;
 - (xvii) Sustainable practices;

- (xviii) Termination;
- (xix) Third-party beneficiary;
- (xx) Waiver of agreement provisions.
- (i) Special terms and conditions, if any;
- (j) Agreement-specific terms and conditions, if any;
- (k) Other items, if any, necessary to meet the goals of the grant program.

(3) All grant agreements under this chapter will include the latest version, as of the original agreement date, of ecology's grant general terms and conditions.

(4) Ecology may choose to extend a grant agreement at its sole discretion.

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NEW SECTION

WAC 173-167-280 Performance standards—General provisions. (1)

Nothing in this chapter influences, affects, or modifies existing ecology programs, rules, or enforcement of applicable laws and rules relating to activities funded by a grant.

(2) Ecology, or an auditor authorized by the state of Washington, may audit or inspect a recipient's grant agreements, records, and activities.

(3) New ecology grant agreements signed after the effective date of this chapter must be managed using ecology's designated electronic system. A recipient who cannot access the electronic system to meet a deadline or agreement requirements must use a process approved by ecology.

(4) Ecology may perform site visits to monitor the project, evaluate performance, and document compliance or any other conditions of the agreement.

(5) Recipients must:

- (a) Follow all applicable accounting and auditing laws and rules related to grants;
- (b) Use funds according to the agreement;
- (c) Use funds according to the recipient's own policies and procedures, and according to all applicable laws and rules;
- (d) Comply with all applicable laws, rules, orders, and permits when carrying out activities authorized by the agreement;
- (e) Obtain prior approval for equipment purchases over the amount specified in the agreement.

(6) As specified in the grant agreement, the recipient must submit the following to ecology:

- (a) Progress reports;
- (b) Payment requests;
- (c) Equipment and materials purchase reports, including receipts;
- (d) Documentation of project implementation;
- (e) A final closeout report;
- (f) Any other required information.

(7) Ecology will:

- (a) Follow all applicable accounting and auditing laws and rules related to grants;

(b) Monitor projects and review progress reports to assure compliance with applicable laws, rules, orders, permits, and terms and conditions of the agreement;

(c) Confirm receipt of required documentation and satisfactory completion of the project before approving final payment.

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NEW SECTION

WAC 173-167-290 Closing out the agreement. (1) The recipient must follow the closeout requirements in the agreement.

(2) Ecology is not obligated to reimburse the recipient the final payment if the recipient does not meet all closeout requirements within the time frames in the agreement.

(3) Ecology will close out the grant agreement when it determines the recipient has met the requirements or when the agreement has been terminated (see WAC 173-167-300).

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NEW SECTION

WAC 173-167-300 Termination of agreement. (1) Failure by the recipient to comply with a grant agreement may result in termination of the agreement.

(2) Ecology will attempt to contact the recipient regarding any issues with agreement compliance prior to terminating an agreement.

(3) Ecology's ability to make payments is contingent on availability of funding.

(4) Ecology will document the termination of an agreement.

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