

Reclaimed Water Rule Making Committee Meeting
February 25, 2009
9:30-2:30 p.m.

Welcome and Introductions 1
Updates..... 1
Overview of Rule Development 4
Baseline Rule Part III 5
Baseline Rule Part IV 10
Wrap-Up and Action Items..... 12
Meeting Attendees..... 13

Welcome and Introductions

Tim Gaffney, Washington Department of Ecology (Ecology) welcomed the members of the Rule Advisory Committee (RAC) and introduced Bill Hashim as the facilitator for this meeting. Bill led the RAC in a round of introductions and reviewed the meeting agenda.

Craig Riley, Washington Department of Health (DOH), joined the meeting by phone.

Updates

- Tim Gaffney thanked the RAC for providing comments on the Draft Baseline Rule. The comments will be posted to the Reclaimed Water Web site (<http://www.ecy.wa.gov/programs/wq/reclaim/index.html>) soon. Kathy Cupps and Tim are going through the comments, and they will have new comments posted to the Web site as soon as possible.
- Kathy reminded the RAC that the comments they receive from the group and from individual members will be incorporated into the Draft Baseline Rule and reviewed again by the group.

Legislation and Water Rights issues

Kathleen Emmett explained that the reclaimed water permitting bill is still active. In the Senate the bill is known as SB 5504 and will undergo a second reading by the Rules Committee. In the House of Representatives, the bill is known as HB 1482. It has been amended and is scheduled for public hearing by the House Appropriations Committee on February 26, 2009 at 8:00 a.m.

Lynn Coleman stated that HB 1482 is sponsored by Representative McCoy and he has made an amendment to it. While the legislation was requested by Ecology, once it has a sponsor in the legislature it becomes the sponsor’s bill and is no longer considered Ecology’s bill. The amendment states “Use of reclaimed water may only occur if the use does not cause detriment or injury to existing water rights under RCW 90.03.380.” Lynn said that the amendment has water right impairment implications under RCW 90.46.120 and RCW 90.46.130.

While Ecology's main interest is to receive the permitting authority in the bill, Ecology would like to have the RAC's and the Water Rights Committee's feedback regarding the amendment. Melodie Selby, who is Ecology's legislative liaison for this bill, and Jacklyn Ford, legislative staffer for the House Appropriations Committee, will attend the Water Rights Committee's meeting tomorrow to discuss the amendment with the group. Lynn would like to discuss the water rights impairment concept addressed by the amendment and then discuss the language in the amendment.

For the RAC discussion, Lynn provided a handout outlining the water rights impairment analysis guidance for reclaimed water facilities, Representative McCoy's amendment and the section of the water code referenced by the amendment. Lynn acknowledged that currently there is no definition of or standard for water rights impairment in any of the statutes; however, Ecology considers impairment in the same context as the issuance of a new water right or transfer of a water right.

RAC members discussed the amendment and Lynn asked them to send their comments to their fellow RAC members also serving on the Water Rights Committee (Bill Peacock, Walt Canter, Hal Schломann, Don Perry and Clint Perry). Lynn will e-mail the RAC a summary of the Water Rights Committee's discussion about the amendment.

Questions/Comments:

- *What is Ecology's role in clarifying the changes in the bill?* Lynn said that the Water Rights Committee will discuss the change in-depth tomorrow. Ecology wants to use the stakeholder process to determine if common ground on the change can be found. If not, then Ecology will make a decision on how to proceed.
- *Does Ecology's viewpoint on impairment change reclaimed water from ownership, as described in RCW 90.46.110, to a right?* The language in RCW 90.46 discusses the exclusive right to own reclaimed water. A reclaimed water facility has the exclusive right to use the water it produces. Contributors to that facility cannot claim ownership of the reclaimed water because it originates from their water right.
- *What does the amendment do to reclaimed water facilities?* Dave Monthie explained:
 - Existing water law says that reclaimed water facilities cannot impair downstream water holders. The amendment eliminates the downstream and upstream language, which is an issue in the Yakima watershed.
 - The amendment deletes the reference to freshwater discharges which raises the issue whether marine discharges will require water rights impairment analysis.
 - It is unclear whether compensation or mitigation will be required if water rights are impaired.
 - The amendment also raises questions whether the other RCW 90.03.380 requirements will be applied, and/or whether requirement under both RCW 90.03.380 and RCW 90.46 will apply to water rights impairments issues.

- It will completely change the concepts that the Water Rights Committee has worked on over the past year.
- *What is Ecology's viewpoint on the changes caused by the amendment?* Lynn said that Dave's explanation laid out the worst-case scenario. On the other hand, the language is not that different from the way Ecology currently views water rights impairment. However, given the current language in the amendment you cannot determine which sections of RCW 90.03.380 are being referenced.
- *Does Ecology grant marine water rights?* Ecology does not grant marine water rights, so the amendment would not impact reclaimed water facilities in marine areas.
- *How is detriment and injury determined? How do you identify who is doing it? How do you establish it?* Lynn said that the Yakima Nation had detriment and injury set by federal court decree using the TWSA. Dave suggested that if the Yakima Tribe is having a problem, then the bill should have an amendment limited to the Yakima basin or basins that have been adjudicated and are subject to federal court decree. Lynn thought it was worth discussing; however she noted there are other basins that have the same issue.
- *Would it be useful for lobbyists to contact McCoy to ask what he's willing to yield to?* Yes, but it would be better for the RAC to speak with a unified voice.
- Heather Trim requested that the RAC discuss this issue since some RAC members do not attend the Water Rights Committee meetings and the amendment impacts the work of both stakeholder groups.
- Clint reminded the group that the bill can always be amended on the floor. He said that a statement from the RAC on this amendment would have influence on the representatives voting on this bill.
- Craig said that determining impairment is the responsibility of the project proponent and the RAC needs to acknowledge that a proponent is not required by statute to do a water impairment analysis.
- Some RAC members felt that if you cannot define detriment then that is an impediment to the process.
- Hal said the issue is that someone downstream is having their water right impaired because the water is no longer being discharged downstream, but instead is being used as reclaimed water. He is concerned about the amendment because the tribes do not consider municipal water rights as consumptive rights. Lynn said that she is not sure that Ecology considers all water rights consumptive rights.
- Dave said that Representative McCoy does not want someone engaged in upstream conservation to increase flows downstream to only have those efforts undermined by reclaimed water facilities reducing flows and negating upstream water conservation goals.
- Dave is concerned about situations where a water right holder at the mouth of the river might be affected by reclaimed water if it affects the water quality standards.
- Hal said he thought the reference to RCW 90.03 was incorrect and will be changed to RCW 90.46; however Lynn said that the incorrect statute discussion was about RCW 90.48 which had to be changed to RCW 90.46.

- It was recommended that Ecology discuss the challenges of implementing RCW 90.03.380 in practice.

Overview of Rule Development

Kathy Cupps presented and explained the rule development process timeline handout. The RAC will make recommendations regarding implementation guidance while developing the rule so that guidance will be available within a few months after the rule is adopted.

Kathy gave out the “Work in Progress – Revised Outline - Baseline Rule” handout which reflects some of the comments received thus far. She also explained that the RAC’s goal for the meeting is to review Section III-Engineering and Section IV – Permitting of the Draft Baseline Rule.

Questions/Comments:

- *Did the RAC decide how it will review the comments on the Baseline Rule?* Kathy and Tim will post all the comments on the Reclaimed Water Web site. They are collecting the comments and will incorporate them as appropriate into the Draft Baseline Rule if they are consistent with existing authorities and practices. Otherwise they will be part of the new rule or in guidance documents.
- *How many comments did Ecology receive on Part A - phases I and II?* Seven people responded with multiple written comments. The comments will be posted to the Reclaimed Water Web site as soon as possible.
- *Does the Draft Baseline Rule include our earlier comments?* No, the current version is the same as that presented last month. Ecology is working on incorporating the relevant comments into the Baseline Rule. Other comments are flagged for consideration in the New Rule or guidance documents. *Will the new rule meet the APA guidance on rules?* Yes.
- Don provided a list of recommendations regarding reliability of reclaimed water as a water source. The list relates to a concern that if a reclaimed water supplier fails to produce reclaimed water then the provider needs to know their fallback water resources. Don suggested that Ecology use this list to develop rules or guidance for smaller entities that may not think about these issues and may need to include them in their contracts. Since the planning section was removed from of the Baseline Rule, John Kounts recommended including this list of recommendations in a “parking lot” of ideas for guidance development.

Baseline Rule Part III

Kathy Cupps lead the RAC through a review of Section III – Submission of Engineering Documents.

WAC 173-219-A14 – Applicability and scope – no comments.

WAC 173-219-A15 - Explanation of use of terms

The RAC decided during the January 2009 meeting to move all definitions to the beginning of the rule. There is no definition for feasibility study or report because it is unclear whether it is a study or report. The feasibility submittal must go to Ecology and DOH.

WAC 173-219-A16 – Lead Agency – no comments.

WAC 173-219-A17 – Relationship to other laws and regulations

The RAC recommended including the ASR (aquifer storage and recovery) rule submittal requirements either within the reclaimed water rule or to cite chapter 173-157 WAC.

- *If you have a reclaimed water facility that experiences an upset, where is that water going? Is it possible to capture it all and retreat it once you have the system online again?* Kathy said the reliability plan would need to cover that issue. Hal thought if you have adequate storage and treatment, then it is not a wastewater discharge. If that is the case, then the facility would need a reclaimed water permit. Holmes Harbor is an example of this case.
- Clint recommended making a distinction between the ASR rule and wastewater discharge when considering reclaimed water, beneficial use and streamflow augmentation. Heather said that the distinction is based on water quality.

WAC 173-219-A18 – Ownership and oversight

This section was discussed during the January 2009 meeting, and will be moved to another location.

WAC 173-219-A19 – Operator Requirements

Operator certification requirements were discussed during the RAC's January 2009 meeting. Since then Ecology has been researching the certification and practices of other states.

The RAC recommended that Ecology consider requirements for pretreatment operator certification.

- *Reclaimed water facilities will have pretreatment activities and many operators do not have a lot of experience in this area, so will this section have such a requirement?* Currently there is no licensing requirement for pretreatment activities.
- Kathy said that pretreatment requirements will be covered further in the technical standards and this could include facility staff responsibilities.

Walt mentioned that there may be a need for a blending certification. Blending is the combining of raw water and reclaimed water to meet volume requirements. Walt recommended studying Nevada's blending certification requirements.

WAC 173-219-A20 – Submittal Requirements

The RAC recommended that this section require submittals for the reclaimed water permit. The RAC also recommended adding "facilities plan" to Subsection 2c and considering removing Subsection 3c.

The RAC discussed whether reclaimed water facilities should submit a comprehensive plan or whether a feasibility report is essentially a comprehensive plan. The RAC decided that for reclaimed water a feasibility report is not the same as a comprehensive plan. They recommended that Ecology review its process for requiring comprehensive plans.

The RAC also discussed the water rights impairment analysis requirement, and recommended that the Water Rights Committee discuss this requirement and develop language for the new rule and guidance.

- *Which submittal describes the treatment quality?* Usually the engineering report or facilities plan specifies treatment quality. Heather recommended adding an additional bullet that specifies the level of treatment. Kathy said this is addressed in Section A26 of the Draft Baseline Rule.
- Dave pointed out that currently there is no statute requiring a reclaimed water facility submit a comprehensive plan to Ecology.
- Kathy explained that a facilities plan is not a comprehensive plan but is a federal requirement. Under WAC 173-240 wastewater facilities must submit an engineering report. On the federal level there is a similar requirement, but it is called a facilities plan. If a facility is receiving federal funds, then it has to submit a facilities plan. The engineering report and feasibility study are a step above the comprehensive plan.
- Dave stated that at this time there is no statute requiring that new facilities submit a water rights impairment assessment for Ecology's approval in order to obtain approval for the project. The statute only says that a facility cannot impair water rights. Lynn confirmed that Dave was right, and that Ecology has technical guidance for this.
- *If a water rights impact assessment is required, will marine dischargers be forced to conduct one?* Current guidance requires a water rights impairment analysis for all projects; however, marine dischargers can simply state that the discharge is into a marine area and does not impair water rights holders. Kathy said that another option is to add an exemption about marine discharge.
- *How will tidally-influenced areas assess water rights impairment?* This is an important issue and Ecology currently does not have guidance for those areas. The Water Rights Committee will discuss this issue and make recommendations for the new rule. Heather recommended Ecology clarifies the difference between marine and tidal influence.

- Karla Fowler recommended that Ecology clarify the submittal deadlines in Sections A20 and A21, which are 60 and 90 days respectively, because they contradict each other. Kathy said in general it takes Ecology more than 60 days to review each submittal, and that review deadlines need to be fixed. Don recommended removing Section A20, Subsection 3.
- Dave recommended adding a submittal schedule and explanation of each submittal requirement.

WAC 173-219-A21 – Review standards

The RAC expects additional comments about this section regarding existing practices and what needs to be fixed.

WAC 173-219-A22 – Requirement for professional engineer

The RAC decided to leave “engineering” in the text of this section. The RAC recommended that if the project proponent’s professional engineer had to sign off on reports, then Ecology should have to have an agency professional engineer review it.

Does Ecology require all reports be signed by a professional engineer, even those not related to engineering? Kathy said that this is the existing practice under the submittal requirements for wastewater facilities.

WAC 173-219-A23 – Right of inspection

The RAC had concerns about a reclaimed water facility’s authority to allow inspection of non-facility (private) land. Many members thought an inspection requirement in the facility’s user agreement would solve this issue, and recommended adding language to the section that clarifies why Ecology is conducting the inspection and states that the inspection is allowed “as per end user agreement.”

Ecology will ask the attorney general about this issue.

WAC 173-219-A24 – Approval of Construction Changes

The RAC wanted to know the meaning of “significant” and how it is explained in guidance.

WAC 173-219-A25 – Feasibility Report

The RAC further discussed the need for a comprehensive plan and whether it is a part of the feasibility report or separate from it. Currently, feasibility studies may receive funding from Ecology.

The RAC discussed that a water utility publishes a comprehensive plan every six years and it usually considers future water resources, not just reclaimed water. The feasibility study considers all water resource alternatives available and if reclaimed water is the best alternative, then the utility would draft a detailed plan about it.

Many RAC members felt that a feasibility study submittal should not be required unless the facility is receiving public funds. The requirements in the old Section A13 are usually included in the engineering report, and could be included in a guidance document or fact sheet.

Kathy said she needs help with developing language for this section.

- *What is the purpose of the feasibility study?* The purpose is to assess the feasibility of the reclaimed water project. Currently the DOH and Ecology recommend that utilities working on general sewer plans consider reclaimed water, and the utility may choose to complete a feasibility study.
- Craig said that there's value in the feasibility study because people discount the value of reclaimed water. The feasibility study may help make a better informed decision.

WAC 173-219-A26 – Engineering Report

RAC recommendations for this section included:

- Flagging Subsection 4 for additional language regarding water quality standards and addressing water quality concerns proactively.
- Changing the language in Subsection 2 to expand the engineer experience requirements to include distribution.
- Adding “equivalency determination” to Subsection 6b(ii).
- Correcting the numbering of the entire section.
- Requesting that percolation projects not be included as direct aquifer recharge because of stream augmentation issues.
- Flagging Subsection 7g and suggesting that the requirements be tied to technical standards.
- Adding more details about Subsection 8.

The RAC discussed whether the permit application should include existing water quality and how treatment will address emerging chemicals. Some members were concerned that if the “emerging chemicals” did not have a standard associated with them, then it would be a problem for the reclaimed water facility. Others felt that the public will be more concerned about treatment of emerging chemicals in reclaimed water than they are about wastewater. The RAC will review the technical standards and come back to this issue during a future meeting.

- *What happens when reverse osmosis is not the most up to date treatment technology (as specified in Subsection 6b(ii))?* For ASR there is a pilot study using other technology, so an equivalency determination may be made.
- *Are the separation distance and retention time horizons in Subsection 7g horizontal and vertical?* Kathy said that Subsection 7g reflects what is currently in the rules.

WAC 173-219-A27 – Plans and Specifications

The RAC recommended adding “as necessary” to Subsection 3 and further clarifying the requirements of this subsection.

- *What is Subsection 3 for and is it appropriate here?* Subsection 3 is a domestic wastewater treatment facility report requirement, and it might not be appropriate except in determining a treatment system's ability to treat water if it is receiving additional flows and loading.
- *How should a reclaimed water facility collect information for Subsection 3 if it isn't taking flows and loads?* Kathy said that this is a sewer system capacity question on whether the sewer system and treatment plant will be able to treat the additional flows and loads. For a reclaimed water facility there is still the issue of whether the loads will get to the plant and whether they will be treated at the necessary levels.

WAC 173-219-A28 – Operation and Maintenance Manual

The RAC recommended including distribution system requirements, adding language about manual requirements and elaborating on Footnote #62.

WAC 173-219-A29 – Construction Quality Assurance Plan

The RAC recommended the attorney general review this section and discuss how Ecology is currently implementing these requirements.

- Craig questioned the validity of the section since there are errors of omissions requirements under professional engineering registration. If the facility is private and there are no tax dollars being spent on it then the quality assurance is the responsibility of the engineer who stamps the plan. He recommended removing the section.
- Don said he doesn't recall seeing this section under the existing wastewater facility rule, and that Ecology generally delegates a lot of authority to the facilities being constructed.

WAC 173-219-A30 – Approval of Construction Change

The RAC recommended deleting this section since the requirements are covered in Section A24.

WAC 173-219-A31 – Declaration of Completion of Construction

The RAC recommended streamlining the Baseline Rule by deleting Section A29 and using this section.

WAC 173-219-A32 – Permit Required – no comments.

WAC 173-219-A33 – Explanation of terms

Definitions will be moved into definitions section.

WAC 173-219-A34 – Types of permits issued under this chapter – no comments.

WAC 173-219-A35 – Coordination with non-lead agency – no comments.

Baseline Rule Part IV

Kathy continued leading the group through a discussion of the Draft Baseline Rule's Section IV - Permits.

WAC 173-219-A36 – Relationship to water pollution control act permits

The RAC recommended changing the language to:

“Typically the permit requirements under this rule and under the Water Pollution Control Act, chapter 90.48 RCW are contained...”

- *Does this section mean that surface and reclaimed water discharges are under one permit?* Yes, Ecology normally places them under one permit. However, there are circumstances where the permits are separate. For example, King County has NPDES permits and reclaimed water permits.
- *Would the new rule allow separate permitting of surface and reclaimed water discharges to continue?* This will be discussed during the rule development process.

WAC 173-219-A37 – Relationship to water right permits

The RAC felt this section needs further clarification especially relating to water rights issues. There was discussion about whether water rights holders would be impacted if a reclaimed water facility placed water into the ground or in aquifer storage and immediately withdrew the water.

- Lynn suggested adding the existing statutory language to this section.

Clint recommended changing the two references to “wastewater treatment facility” to reclaimed water facility. Kathy commented that the language is as it is in the statute.

WAC 173-219-A38 – Application for permit

The RAC's recommendations included:

- Establishing a time frame for Subsection 1. The language currently states the application must be filed “in sufficient time” which is vague.
 - Adding the permit’s length of coverage.
 - Adding “or qualified designee” to Subsection 3, following up with attorney general about the legality of this language and writing guidance for permittees.
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- *Concerning Subsection 2, will the permittee have to submit a new application because a prospective user wants to do something not currently listed as an allowable use?* Some agencies fold use amendments into their annual water reuse summary, which could be considered a supplement. Others felt that if there is a new use or change in use, then the permittee should have to go through the application process, and that most permittees include the known and predicted uses in their water reuse plan. Heather felt there should be some sort of threshold which triggers the new application requirement.
 - *What is a “principle executive officer or ranking elected official”?* This is a NPDES requirement. If the facility is private then the principle executive officer signs and if it is a public facility then the ranking elected official signs. However, for some agencies this is unclear. For example, for state agencies the ranking elected official is the governor, but most likely the facilities superintendent will sign.

WAC 173-219-A39 – Staff determinations – fact sheet

The RAC recommendations included:

- Adding language about the completeness and consistency of the fact sheet.
 - Correcting the numbering of the section.
 - Considering replacing the fact sheet with a statement of basis.
 - Adding more fact sheet summaries that cover: storage uses, distribution uses and water quality based on use and need.
 - Separating notification to the non-lead agency described in Subsection 3 or at least clarifying the requirement.
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- *What does “upon request” in Subsection 5 mean?* The fact sheet is a public document so “upon request” means that Ecology will send the fact sheet to anyone who requests it, and is a way for the process to be transparent.
 - *Are fact sheets legal documents; therefore they cannot be changed or updated?* No.
 - *If Ecology makes a decision and receives feedback from DOH that would require a change, would the fact sheet be updated?* Ecology’s responses to comments would be an appendix to the fact sheet. The fact sheet itself would not be changed.

WAC 173-219-A40 – Notice to public and other agencies

The RAC recommended that Ecology determine whether “affected country” in Subsection 3 is supposed to be country or county.

WAC 173-219-A41 – Public access to information – acceptable as written

WAC 173-219-A42 – Public hearings

The RAC recommended:

- Making the hearing location “convenient to stakeholders.”
- Adding language to Subsection 2 which sets a minimum number of hearing requests that would trigger a hearing.

WAC 173-219-A43 – Notice of public hearing

No decision was made about this section.

- Heather recommended having a stakeholder list included in the permit appendices Kathy said it isn’t a legal requirement; however Dave said it would become a requirement if it is placed in the new rule.

WAC 173-219-A44 – Appeal of a permit – acceptable as written

Wrap-Up and Action Items

The RAC made progress in going through the Baseline Rule and will finish Section IV at the next meeting on Wednesday, March 25, 2009. RAC members can attend the meeting at Ecology Headquarters or join the meeting via video conferencing at Ecology’s Northwest Regional Office in Bellevue. During the meeting the RAC will continue to discuss the Draft Baseline Rule.

Prior to the next meeting:

- Submit your comments on Sections III and IV of the Baseline Rule to Tim Gaffney by Wednesday, March 11.
- Comments on the Baseline Rule will be posted to the Reclaimed Water Web site.
- Lynn will e-mail a summary of the Water Rights Committee’s discussion about the amendment to the RAC.
- Ecology will work to incorporate the suggestions and changes to the Baseline Rule Sections I, II and III by the March meeting.

Meeting Attendees

Committee Members and Alternates	Ecology Staff
Dan Pingel, City of Lacey	Katharine Cupps, Agency Lead
Frank Needham, City of Sequim	Tim Gaffney, Rule Writer
Bill Peacock, City of Spokane	Lynn Coleman
Tim Wilson, City of Tumwater	Kathleen Emmett
Ann Wick, WA Dept. of Agriculture	Jim McCauley
Doug Raines, WA Dept. of Corrections	Bill Hashim, Facilitator
Don Perry, Lakehaven Utility District	Diann Strom, Note Taker, EnviroIssues
Clint Perry, Evergreen Valley Utilities	
Susan Kaufman-Una, King County	Department of Health Staff
Dave Monthie, King County	Craig Riley
Karla Fowler, LOTT Alliance	Stuart Glasoe
Paul Schuler, PNW Clean Water Assoc.	
Heather Trim, People for Puget Sound	Guests
John Kounts, PUD Coalition	None
Hal Schlomann, WASWD	
Walt Canter, WASWD	