



Water Resources Program for the Wenatchee River Basin, WRIA 45 Chapter 173-545 WAC Amendment

Small Business Economic Impact Statement

July 2007

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Water Resources Program
Olympia, Washington 98504-7710

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Introduction

The Washington State Department of Ecology (Ecology) is amending Chapter 173-545 of the Washington Administrative Code (WAC), Water Resources Program for the Wenatchee River Basin, Water Resources Inventory Area (WRIA) 45. The objective of this Small Business Economic Impact Statement (SBEIS) is to identify and evaluate the various requirements and costs that the proposed amendment might impose on business. In particular, the SBEIS examines whether the costs on businesses from the proposed rule impose a disproportionate impact on the state's small businesses. The Revised Code of Washington (RCW) 19.85.040 describes the specific purpose and required contents of an SBEIS.¹

This rule amendment proposes to:

- Retain perennial rivers, streams, and lakes in the Wenatchee River Basin with stream flows and levels necessary to protect and preserve in-stream values.
- Maintain stream functions by limiting the total maximum allocation of future surface waters and groundwater from the Wenatchee River Basin.
- Provide water to reliably satisfy the following future needs by creating a reservation of water for:
 - Domestic purposes.
 - Irrigation associated with a residence.
 - Potable domestic water associated with municipal, commercial, and industrial purposes.
 - Stockwatering.
- Set forth Ecology's policies to guide the protection, utilization, and management of Wenatchee River basin surface water and interrelated groundwater resources for use in future water right decisions.

Ecology is developing and issuing this Small Business Economic Impact Statement (SBEIS) as part of its rule adoption process and to meet Chapter 19.85 RCW. Ecology intends to use the information in the SBEIS to ensure that the proposed rule is consistent with legislative policy.

¹ Due to size limitations relating to the filing of documents with the Code Reviser, the SBEIS does not contain the appendices that further explain Ecology's analysis. Additionally, it does not contain the raw data used in this analysis, or all of Ecology's analysis of this data. However, the rule-making file contains this information and it is available upon request.

Analysis of Compliance Costs for Washington Businesses

We have evaluated the impacts of the proposed rule by analyzing and comparing water right management before and after the effective date of the amendment. The current framework that forms the baseline includes administrative procedures for considering applications for both new water rights and changes to existing water rights, and for the use of water by permit-exempt wells (RCW 90.44.050). Implementation of Chapters 90.22, 90.54, and 90.82 RCW are also part of this legal baseline. In proposing a reservation of water, the proposed rule creates new conditions considered in future water right decisions.

We provide a brief description of compliance requirements below. You can find a detailed description of water management under the existing and proposed rules in Appendix B and Appendix C.

Water Rights Administration under the Rule

The proposed amendment to Chapter 173-545 WAC will create new or modify existing “instream flows.” Instream flows are water rights for in-stream resources and are protected from impairment by “junior” water rights—those with a later priority date. This means junior water rights must stop use when stream flows do not meet the senior minimum instream flows.

The amendment also reserves water for future out-of-stream uses not subject to the instream flows and clarifies other requirements that might affect future uses. Expected impacts to water management are described below.

Surface Water

The decision process for surface water rights will be similar after the proposed rule amendment as before. Currently (baseline), except for single domestic and stockwatering purposes, Ecology grants water rights subject to the instream flows set. Under the proposed rule, new surface water uses from the reservation may continue use despite low stream flow conditions.

Uses that do not qualify for the reservation, up to the maximum allocation limits specified, may be permitted but will continue to be subject to the instream flows. Uses that do not qualify include new agricultural, commercial, or manufacturing uses. Under the amendment, these new uses must stop withdrawing water when minimum flows are not met. These businesses would also not be permitted to withdraw water during periods (typically August and September) when water is not available (a maximum allocation limit equal to zero). These uses may only continue during these periods if they are using water from storage or Ecology determines their use is sufficiently mitigated under an approved plan.

This amendment is not likely to represent a significant change from the current rule. In both cases, new out-of-stream uses would be subject to similar instream flow provisions, with the exception of water from the reservation provided in the amendment. Additionally, under both

the baseline and the proposed amendment, Ecology may approve applications for new consumptive surface water rights if the director determines it is “clear that overriding considerations of the public interest will be served.”

Groundwater Permits

Ecology will make decisions on new groundwater right permits under the amended rule as under the baseline, with the notable exception of water made available from the proposed reservation. The reservation of water applies to groundwater as well as surface water. Applications for groundwater in hydraulic continuity with the Wenatchee River and its tributaries would be subject to the instream flows under the baseline or the proposed rule, unless they use water from the reservation. Under both the proposed amendment and the baseline, Ecology may approve a use if it is “clear that overriding considerations of the public interest will be served.”

There is a high likelihood of well use within the basin impairing surface water levels and flows. The analysis and recommendations in the Wenatchee Watershed Management Plan regarding hydrogeology of the basin, and the location and depth where groundwater withdrawals generally occur support this finding.

Businesses that begin new agricultural, commercial, manufacturing projects or similar enterprises relying on wells for process water would be required to either:

- Suspend water use during periods of low flows,
- Develop storage mechanisms, or
- Develop strategies, acceptable to Ecology, to mitigate their impacts.

The amendment does not create the need for, and does not change the standards for, the analysis regarding whether instream flows are impaired. This would be the case under the baseline and would not represent an impact of the proposed rule. Both the proposed rule and the baseline allow for an applicant for a new groundwater use:

- To demonstrate that the proposed water use is not in hydraulic continuity with the surface waters of the Wenatchee River or its tributaries.
- To mitigate for any impacts to instream flows, thus enabling continuous use of water out-of-stream if mitigation strategies acceptable to Ecology are proposed.

Permit-Exempt Groundwater

Under the proposed rule, the applicant would gain an uninterrupted permit-exempt water use if the use is eligible for the reservation. Those developing a permit-exempt use not eligible for the reservation would be required to curtail their water use during low flow periods and would have no right to water during periods when it is not available (a maximum allocation limit equal to zero), typically August and September.

Under the baseline, water used for single domestic (including lawn and garden irrigation) and stockwatering purposes is exempt from the instream flows. All other permit-exempt uses are subject to curtailment during low flow periods.

Changes or Transfers of Water Rights

Ecology will continue to process changes or transfers of existing water rights as permitted by Chapters 90.03 and 90.44 RCW. The process is the same with the proposed amendment as with the baseline.

- Ecology would evaluate transfers of surface water rights considering the instream flows as they would be under the baseline.
- Requirements related to changes in the point of diversion from a surface point to a groundwater point, if it is from the same water source or from one groundwater source to another, are the same in the baseline and the proposed rule.

Reservation of Water

The reservation of water, the use of water under the reservation, and associated conditions for that use, are all part of the proposed amendment. The reservation will allow eligible prospective water users the benefit of having a continuous, reliable source of water during low flow periods, with a few restrictions. These restrictions include the finite quantity of the reservation. Domestic water use must also meet efficiency standards. Permitted surface water and groundwater withdrawals from the reservation will be required to meter and report their water use. Small businesses that locate outside the service area of municipal water suppliers are most likely to use permit-exempt wells. The amendment does not require permit-exempt uses to meter and report water use to Ecology. However, local public water purveyors, the county, or a municipal government may require metering and reporting through ordinances adopted to implement the watershed plan. Ecology also has authority to require metering and reporting under RCW 90.03.360 in the future.

Impacts to Businesses in WRIA 45

The primary impact to businesses of the proposed rulemaking will likely be the creation of a reservation for future allocations. Businesses that need water only for potable use for employees and customers will receive benefits from the reservation. Businesses that also need water for commercial or industrial manufacturing processes and landscape or commercial irrigation will see both costs and benefits.

The amendment will not directly affect existing water right holders. In general, the economic costs and benefits to businesses are from the business impacts from having less water in the river, but more available for out of stream use. Having the reservation makes water predictably and reliably available for more out of stream uses than would have been the case under the baseline. Therefore, it is likely most businesses will be positively affected. An exception to this would be businesses that utilize water in the river. The possible impacts are described below.

Impacts to businesses depending on instream flows

As mentioned above, the amendment creates a reservation. The reservation will provide water for domestic uses and associated residential irrigation, stockwatering, and potable water needs associated with commercial and industrial uses. These uses will be able to obtain reliable water in the future, up to the limits of the reservation.

Accessing the reservation will allow entities to use water for various uses during low flow periods. This will slightly reduce the amount of water in the river and could potentially indirectly impact in-stream benefits such as ecosystem services, recreation, and so on. For businesses that provide guide services such as rafting, fishing, and bird watching; or those dependent on dilution for waste removal; there could be a very minor impact. However, discussions with local interests show that little, if any, impact from the proposed flow reductions will result from establishment of the reservation.

Creation of the reservation

Under the baseline, groundwater withdrawals must curtail use during low flow periods. This includes permit-exempt groundwater withdrawals in continuity with the Wenatchee River or its tributaries, except single domestic and stockwatering uses. Under the amendment, some or all of the future needs of domestic uses and associated residential irrigation, stockwatering, potable water needs associated with commercial and industrial uses could be met through the reservation, even during low flow periods.

For businesses developing land for residential construction, having a reliable supply of domestic water and associated residential irrigation during low flow periods is a net benefit from this rulemaking.

The reservation of water for stockwatering will provide year-round access to water for new stockwatering uses, except for feedlots and other activities not related to normal grazing uses. Under the baseline, stockwater is treated identically. The change in the rule does not result in a net cost to stock-related businesses.

Impacts to existing permitted water rights

Allowing access to water through the reservation could affect the value of existing permitted water rights held by some businesses. The exact effect will depend on the allowable use, volume and point of diversion of the existing rights, the existing uses and the desired uses, and the volumes needed.

New water rights and permit-exempt withdrawals

New permitted surface water and groundwater withdrawals from the reservation for small businesses will be required to meter and report their water use. If more accurate water use data is needed in the basin, Ecology may also require water metering for permit-exempt wells.

Costs to Firms and Required Professional Services

As mentioned above, those business entities that depend on water in the river are most likely to experience costs from the amendment and those businesses that would obtain water from the reservation are most likely to gain the benefits. The cost analyses required in Chapter 19.85 RCW follow:

Reporting and recordkeeping: permit exempt well users

No additional reporting or recordkeeping will be required for small business using permit-exempt groundwater uses. If small businesses were to choose withdrawal from surface water or

groundwater through permits, there would be minimal additional costs from reporting their metered use. It is unlikely there would be many users that choose this option.

Additional professional services

No additional professional services are anticipated. For water users proposing uses eligible for the reservation and not exempted from the minimum instream flows in the current rule, the proposed rule reduces the need for small businesses to obtain consulting services. A reliable water supply is made available, without the expense and uncertainty of showing that the proposed use is in the overriding consideration of the public interest.

Costs of equipment, supplies, labor, and increased administrative costs

No additional equipment, supplies, labor or administrative costs are anticipated. We expect less than three new businesses per year to seek permits for surface water or groundwater withdrawals and thus be required to meter.

Other compliance requirements

As mentioned above, firms that depend on instream activities and potentially those that hold existing permits could incur adverse impacts.

- The impacts to instream users would be specific to the firm, but is unlikely to be significant since few firms are dependent on instream flows.³
- Existing water rights holders could be impacted if the value of their water right changes as a result of this rule. This would ultimately only affect those that want to transfer or lease a right and only for the period until the reservation is fully allocated to new uses. The exact cost is difficult to determine since it depends on many factors and very few if any transfers would happen in this fashion. Moreover, the reservation would tend to increase the availability of water relative to the baseline and decrease the incentive to transfer water in the future.

Creation of the reservation will be a net benefit for most businesses that need water. Water unavailable during low flow periods is damaging to any business that needs it for its own use or who are looking to develop residential or commercial properties.

In order to have water available during low flow periods under the baseline, water would have to be obtained through leases, transfers or on-site storage. On-site storage for a low flow period can cost approximately \$10,000-\$15,000⁴ for a typical residence; the amendment avoids this cost for those using the reservation. For other users, the cost of storage would likely preclude it as an option.

Agricultural users would likely be required to purchase or transfer water absent the proposed rule. This could mean some cost for every low flow year. This analysis assumes that water would be readily available for transfer or lease. If this is not the case, then prices would likely be very high. For those that do not require water for domestic needs during low flow periods, an interruptible water right remains an option under both the current and proposed rule.

³ Talks with local interests show few commercial activities in the basin depend on instream flows.

⁴ Cost assumes two-5,000 gallon underground potable-water rated tanks.

Quantification of Costs and Ratios

RCW 19.85.040 requires that additional analysis of impacts be provided. It is the purpose of this section to evaluate whether:

- Compliance with the amended rule will cause businesses to lose sales or revenue.
- The proposed rule amendment will have a disproportionate impact on small business.

Revenue Impacts

As noted previously, the most likely significant impacts are associated with decreased flows in the river and the creation of the reservation.

- The reduction of flows in the river is unlikely to significantly affect any firms within the Wenatchee basin.
- Those firms that will now be able to access water from the reservation will experience a benefit from being able to access water without constructing expensive storage alternatives, or purchasing or leasing rights as would be required under the baseline. The existing instream flow rule limits uses in exempt wells to periods of time when flows are adequate. It is estimated that summer flows will not meet the minimum instream flows in a majority of years and that storage would likely be required for most domestic uses absent the rule. In that sense, the rule will represent a negative cost (net benefit) to firms.

The net benefit to firms is the value of avoiding expensive storage, or purchasing or leasing water rights or other mitigation options to access water during periods of low flow. This will likely lower costs to some potential water users and to that extent, may increase revenues.

Existing water right holders might see some loss in the value of existing water rights and this would lower revenues. However, as mentioned above, this effect is likely to be relatively small and is not further considered.

Distribution of compliance costs

The distribution of compliance costs can be analyzed by evaluating those that would be required to meter their water use to qualify for the reservation (domestic use). Although the rule prescribes this, local ordinance already requires these businesses to meter.

It is possible that small businesses could have additional costs under the amendment if they pursue interruptible water rights. Ecology is unable to determine this cost as it would be very small and are unsure if future permitted water rights will be processed.

Known Costs

No businesses are required to comply with the rule. Businesses that choose to qualify for the benefits of the reservation must meter. These businesses would already be required to meter by local ordinance. Business uses that require water for drinking, bathing, sanitary purposes, cooking, laundering or other incidental human health and welfare requirements for employee or customer needs would qualify. Commercial or industrial process water uses do not qualify for the reservation.

The cost of a meter and installation for small water systems is estimated to range from \$300 to \$400.⁵ Ecology chooses to use \$400 per meter, including any reporting costs.

There were 141 small businesses in the potentially affected industries in the basin. For small businesses in these industries, the average number of employees is 4. For the top ten percent of potentially affected businesses, the average number of employees is 184.

Table 1. Proportional Costs to Businesses

	Estimated Costs	Average # of Employees		Cost Per Employee	
		Small Business	10% Largest	Small Business	10% Largest
Cost of a meter and reporting	\$400	4	184	\$100	\$2.17

The highest cost per employee for small business is \$100, and for the top ten percent of large businesses is \$2.17.

Overall, the data suggests that the impacts of the proposed rule will impose disproportionate costs to small businesses. However, there is clearly a very large net benefit to those who are required to comply with the proposed rule to qualify for the reservation.

Conclusions

No businesses are required to comply with the rule. Businesses that choose to qualify for the benefits of the reservation must meter. These businesses would already be required to meter by local ordinance.

All businesses of all sizes that qualify to use the reservation (normal domestic uses) will experience net benefits from the rule. When examining only the costs, the rule will have disproportional costs to small businesses.

Actions Taken to Reduce the Impact on Small Business

As noted above, it is unlikely that there will be significant adverse impacts on businesses (small or large) as part of this rulemaking under the baseline. Therefore, no specific measures have been taken to reduce or mitigate these rule impacts. In general, mitigation options and allowed uses under the reservation (i.e. potable domestic water for employees and customers) should provide for flexibility in obtaining water for beneficial uses.

⁵ Survey of well drillers, pump installers, and Ecology’s metering coordinator.

Involvement of Small Business in the Development of the Proposed Rule Amendments

The proposed rule amendment has been developed as an outcome of the Wenatchee watershed planning committee recommendations and process. This was an open process allowing for comment and participation by all entities as the project has proceeded. Participants in the planning unit included small businesses and organizations representing small businesses. Public hearings will be held after the filing of the CR-102 to consider the rule and allowing small businesses to provide additional input.

SIC Codes of Impacted Industries

No industries are required to comply with the proposed rule unless they seek to obtain new water right permits or permit-exempt water rights in the covered area. The following list shows Standard Industrial Codes (SIC) codes for existing developable properties in the Wenatchee River Basin.⁶ This serves as a representative sample of potential future businesses that may be affected.

**Table 2. Industries Likely Required to Comply with the Rule
(North American Industry Classification System⁷)**

Storage/packing agricultural produce	Code 1151
Deciduous Tree fruits	Code 0175
Horticulture nurseries	Code 1114
Produce stands	Code 1113
Fresh fruits and Vegetables	Code 5148
Commercial greenhouses	Code 1114
Hatcheries	Code 1129
Mining, Mineral extraction	Code 21
Residential building construction	Code 2361
Nonresidential building construction	Code 2362
Produce Market	Code 445230
Grape Vineyards	Code 111332
Fruit Farming	Code 111339
Wineries	Code 312130
Golf facility	Code 713910
Stables	Code 713990
Animal Production	Code 115210

⁶ Data provided by the Chelan County Assessor and by the Washington State Employment Security Department was the basis for this table.

⁷ Ecology has used NAICS codes rather than Standard Industrial Codes (SIC). It is a comparable system, used at the federal and state level, and has replaced SIC codes in common use.

Expected jobs created or lost

Ecology expects to issue one or two permits a year that would be for commercial or industrial uses subject to the proposed instream flows. The permits typically average 20 acres of irrigated land. Pear orchard, the most commonly grown crop in the area, produces revenue of \$10-12,000 per acre.⁸ Commercial crop production could therefore generate an estimated \$200,000 to 240,000 per year if the grower can successfully adapt the unreliable supply provided by the permit to meet the needs of pear orchard.

If 30 new permits or 600 new agricultural acres were issued water rights over the next 20 years we could expect 7.2 million in revenue. This could create 211 new supporting jobs.

Office of Financial Management's NAICS based input/output model⁹ provides estimates of interdependence among industrial sectors in the state. Each sector not only produces and sells goods or services, but also purchases goods or services for use within its production process. Ecology expects jobs created by compliance of the proposed rule in these areas:

	Employment
Crop production	141
Animal production	1
Construction	2
Food manufacturing	1
Wholesale trade	3
Retail trade	13
Transportation and warehousing	2
Information	1
Finance and insurance	3
Real estate	7
Professional services and management	11
Educational services	1
Health services	11
Arts, recreation, and accommodation	2
Food services and drinking places	6
Other services	6
Total Employment	211

⁸ Wenatchee Water Resources Inventory Area (WRIA) 45 Management Plan

⁹ <http://www.ofm.wa.gov/economy/io/default.asp>

Appendix A. References

1. Chelan County Conservation District, Wenatchee Water Resources Inventory Area (WRIA) 45 Management Plan, April, 2006
2. Huppert, Daniel, Gareth Green, William Beyers, Andrew Subkoviak and Andrew Wenzl, Economics of Columbia River Initiative, 2004
3. RS Means, Building Construction Cost Data, 55th Annual Edition, 1997

Appendix B – Proposed Rule (Chapter 173-545 WAC)

The complete rule language for establishing instream flows in WRIA 45 can be found in proposed Chapter 173-545 WAC. The following provides a brief description of the rule and further discussion of those specific rule provisions that may impact instream flows and/or out-of-stream uses of water.

WRIA 45 rule matrix – Tracking the proposed changes from the 1983 rule

1983 rule	2007 draft rule	Notes
	WAC 173-545-010 (new)	Adds a new section describing the rule's applicability and authority.
WAC 173-545-010	WAC 173-545-020	Revised the purpose to reflect RCW 90.82 watershed planning objectives.
WAC 173-545-030		Section (1) moved to -040 and section (2) moved to -050. All existing stations and flows from 1983 rule carry forward to the new rule and apply to all permits and exempt uses established from 1983 to adoption of the proposed rule.
	WAC 173-545-030 (new)	Definition of terms used in the rule
WAC 173-545-040 (deleted)		Replaced by section -080, which provides for an interim closure on Chumstick Creek. Peshastin Cr. closure replaced by instream flows in section -060.
WAC 173-545-050 (deleted)		
	WAC 173-545-040	Defines stream management units. Replaces section -030(1) in the 1983 rule. Added stations for three new streams (Chiwawa R, Peshastin Cr., and Nason Cr.) and a new station for Mission Cr.
	WAC 173-545-050	Defines adopted minimum instream flows from 1983 rule. Replaces section -030(2) in the 1983 rule.
WAC 173-545-060		Replaced by section -070. Policy modified to clarify that permits may be issued subject to instream flows (section -060) and maximum future allocation (-section -100). 1983 rule required that "lakes and ponds shall be retained substantially in their natural state."

	WAC 173-545-060	Proposed instream flows that apply to all future permitted and permit-exempt uses, unless a reservation applies. Three streams (Chiwawa R, Peshastin Cr., and Nason Cr.) will be protected with flow specific to their instream flow requirements rather than based on downstream conditions at a mainstem gage. Recommended flows are significantly more protective than the 1983 flows.
WAC 173-545-070 (deleted)		Exemptions from the 1983 flow rule will not apply to appropriations after the proposed rule is adopted. Replaced by section -090 reservations.
	WAC 173-545-070	New policy for lakes and ponds replaces section -060 in the 1983 rule.
WAC 173-545-080 (substantively deleted)		Replaced by section -110, which provides an interim closure for Chumstick Creek.
	WAC 173-545-080	Chumstick Creek interim closure for additional evaluation of instream flow requirements and a “cumulative impacts” evaluation pursuant to section -070(3) of the 1983 rule.
WAC 173-545-090		Replaced by section -130.
	WAC 173-545-090	Reservation of water for future (20-year domestic water forecast) use.
WAC 173-545-095		Replaced by section-140.
	WAC 173-545-100	Establishes maximum allocation limits. Total diversions and withdrawals, whether for direct appropriation or storage, are limited to these volumes of water.
WAC 173-545-100		Replaced by section -150.
	WAC 173-545-110	Identifies how permit actions will implement the rule.
	WAC 173-545-120	New section. Clarifies that impairment reviews will consider adopted instream flows.
	WAC 173-545-130	Rule enforcement section incorporates technical assistance requirements from RCW 90.03.605. Updates authorities from section -090 of the 1983 rule. Identifies Chelan County role.
	WAC 173-545-140	Replaces section -095 from 1983 rule. No significant change.

	WAC 173-545-150	Clarifies regulation review schedule. Makes review periodic but retains the “new information, changing conditions” standard from section -100 in the 1983 rule.
	WAC 173-545-160	Map.

Appendix C - Rule Analyses

Ecology anticipates that a significant portion of the proposed rule's implementation will be related to water rights and water management. Water rights and water management are governed by a series of statutes and court cases. Compliance with the rule will occur primarily within the context of complying with state water laws. Evaluating the impacts of the proposed rule involves describing the baseline from which the change caused by the rule is measured. The baseline includes water rights administration for both new and changes of water right applications under chapters 90.03 and 90.44 RCW and case law. It also includes the use and development of water by permit exempt wells pursuant to RCW 90.44.050. For the consideration of instream values, chapter 77.55 RCW and current implementation of chapter 90.22 and 90.54 RCW and WAC 173-545 as they relate to water rights and water management are also part of the baseline.

In the case of the Wenatchee basin, there is an existing in-stream flow rule in place. The Watershed Planning Act requires that Ecology complete an instream flow rule when planning units propose flows and meet the requirements of RCW 90.82.080 and indicates that the rule is not considered "a significant legislative rule." The Planning unit has met these requirements and so one baseline could be considered to be an instream flow rule similar to the proposed rule but without the proposed reservation. However, it is always possible that an instream flow rule would not be put forward even if the proposed rule was not adopted. In this case, the existing water management scenario would continue into the future. In order to better inform the rulemaking, Ecology has elected to consider a baseline assuming the existing instream rule remained in place.

In proposing the creation of the reservation of water, the rule creates a mechanism that allows for future uninterrupted domestic uses and associated residential irrigation, stockwatering, and potable water needs associated with commercial and industrial uses. Consideration of water availability is part of the water right application process. The four-part test for a water right from RCW 90.03.290 remains unchanged and includes examination of water availability. The proposed rule will quantify water availability for some uses through the reservation and establish new conditions for new water right permits in this watershed. Conditions may be imposed on a future water right to implement the rule. How the proposed rule changes consideration of requests for new water and or changes to water rights and in particular how environmental values are reflected in the decisions prior to and after the rule are described below.

Baseline (Current Rule)

Under state water law, the waters of Washington collectively belong to the public and cannot be owned by any one individual or group. Proposed diversions or withdrawals of any amount of water for any use from all surface or groundwater sources require a water right be obtained. A water right is a legal authorization to use a certain amount of public water for a designated purpose. A water right is necessary if you plan to divert or withdraw any amount of water for any use from:

- Surface waters (water located above ground) such as lakes, rivers, streams and springs.
- Groundwaters (water located underground).

Although all uses require a water right, certain groundwater withdrawals are exempt from permitting requirements. An application for a groundwater right permit is not required if your daily groundwater use from a well or wells will be 5,000 gallons a day or less for any of the following combinations of uses:¹⁰

- Stockwatering.
- Single or group domestic purposes such as drinking, cooking and washing.
- Industrial purposes.
- Watering a lawn or noncommercial garden that is a half acre or less in size.

Although the law allows an exemption from the water right permit process in these cases, all other water laws and regulations still apply to these uses.

Washington water law requires users of public water to receive approval from the state prior to the actual use of water. Approval to put water to beneficial use is granted in the form of a water right permit. The proposed use must meet four primary requirements (known as the “four-part test”) in order for Ecology to issue a water right permit:

1. The water will be put to beneficial use;
2. There will be no impairment to existing rights;
3. Water is available; and
4. The water use will not be detrimental to public welfare.

Ecology conducts an investigation of the application to confirm the information on the application and applies the four-part test mentioned above. In applying this four-part test, some of the facts Ecology considers are based on the particular water source, existing water rights, and watershed. These include instream flow rules (if they exist) and whether and how groundwater is connected to surface water sources. The results of the investigation and four-part test review are summarized in a report of examination (ROE). The ROE contains Ecology's staff-level recommendation on a water right application. Ecology can recommend a denial, an approval, or an approval with conditions. Once approved by an Ecology decision-maker, Ecology issues a final ROE and orders approving the ROE. If approved, the permit will likely have specific conditions.

Instream flow considerations within water right application administration has been the law since 1949 (See RCW 77.55.050). Generally, a flow of water sufficient to support game fish and food fish populations must be maintained at all times in the streams of this state. Under that statute, Ecology sends copies of water right applications to the Washington Department of Fish and Wildlife (WDFW) to see if approving the proposed withdrawal would compromise game and food fish populations. In 1969, by adoption of Chapter 90.22 RCW (Minimum Water Flows and Levels) and again in 1971, by adoption of the Water Resources Act, the Legislature added additional policies for instream flow considerations and the instream flow rule program. Instream

¹⁰ Publication #F-WR-92-104.

flows once adopted by rule are water rights protected from impairment from those rights junior in priority date to the instream flows (RCW 90.03.345). Ecology is prohibited by statute from allowing withdrawals of water that conflict with an instream flow regulation, unless there is a clear showing of overriding consideration of public interest (RCW 90.54.020(3)(a)). The current rule, WAC 173-545 adopted in 1983, contained procedures and requirements to implement the goals of the aforementioned statutes.

Consideration of a proposed withdrawal's impact on fisheries resources and flow is performed by professional fisheries biologists based on professional judgment using existing data and/or knowledge of the basin. The existing rule provides that surface water and groundwater withdrawals that would affect surface water are subject to the minimum instream flows. If a proposed use of water might compromise instream values, an application can either be denied or approved with the use conditioned on minimum flow levels. A general principle of the priority system associated with water law provides that any use of water under a junior water right must stop if a senior right is not satisfied and "calls" for water. Similarly, rights conditioned upon minimum flow levels are interruptible water rights that must be discontinued during times when streamflows are below the established flow value. A compliance program for flow-conditioned permits has been in place in the Wenatchee basin since 1985.

The current water management program can be broken down as follows:

Surface water allocations (water right permit)

New applications for surface water rights are forwarded to the WDFW for review and comment. The application is reviewed following public notice. WDFW may identify concerns specific to the application relating to adverse impacts to fish. The four part test is applied and in most cases Ecology will accept WDFW's recommendation. Ecology will condition the right in such a way that flows are protected. Generally, the instream flows from the rule are applied. Some permits were issued without minimum flows since the 1983 rule was adopted. Most are for small group domestic uses (cabins and campgrounds) from springs or wells removed from streams with instream flows that were determined not to interfere with the instream flows. In some cases, a specific concern from WDFW may not be addressed by the instream flow limitation and other additional conditions may be applied to the permit. It is also possible that the permit may be denied.

The only uses afforded a reliable supply of water under the 1983 rule are single domestic and stock watering uses (not including feedlots). All other uses are subject to the adopted minimum instream flows. WAC 173-545-070, however, provides that the minimum instream flows may be waived for prospective multiple domestic and municipal uses if the director determines that the overriding consideration of the public interest would be served. Such a case-by-case finding is uncommon.

Groundwater allocations (water right permit)

New applications for groundwater rights are, generally, subject to the same requirements as for surface water rights. The impact of a groundwater withdrawal on a surface water body (stream or lake) through hydraulic continuity is evaluated based on aquifer characteristics and accepted hydrogeologic study methods.

Within the Wenatchee basin, groundwater uses since 1983 were commonly issued with minimum instream flow conditions.

Groundwater allocations (permit-exempt)

New groundwater uses do not always require a water right permit. The groundwater code includes a permit exemption for some uses of water under specific conditions (RCW 90.44.050). The groundwater permit exemption is an exemption from the water right permit application process; all other water laws and regulations still apply. Typically, local health district and building permit officials determine when permit-exempt wells can be used. In general, there are few restrictions on location except for sanitary setbacks. Within urban areas, exempt uses are uncommon because municipalities often preclude by ordinance the drilling of wells within their jurisdictions.

Like any other water right, the use of a well for permit exempt purposes can be regulated in favor of senior rights if it impairs an existing right, including an adopted instream flow. Historically, Ecology has rarely regulated these water rights to protect senior water rights.

Changes or transfers of water rights (water right permits)

Existing water rights can be changed or transferred pursuant to chapters 90.03 and 90.44 RCW. Changes to existing water rights cannot be approved if the change would impair other water rights, whether junior or senior.

Reservations of water

There are no existing reservations of water within WRIA 45 for out-of-stream beneficial uses.

Closures of water sources in WRIA 45

Closures are based on a finding of no water availability, generally because the available supply has been fully allocated. The existing rule includes a closure for Peshastin Creek from June 15 to October 15.

Minimum flow compliance program

Since 1985, Ecology has regulated water users with permits and certificates provisioned with minimum instream flows. Regulation has occurred during 12 of the 24 years since the existing rule was adopted. Curtailment periods have ranged from as little a week or two late in the irrigation season to several months during the droughts of 2001 and 2005. Currently a total of 44 water users hold interruptible rights within the Wenatchee basin.

Rule Impacts to Water Right Administration

The future water right management program under the proposed rule can be broken down as follows:

Surface water allocations (water right permit)

New applications for surface water rights will still be forwarded to the WDFW for review and comment. The four-part test will be applied. In cases where the proposed withdrawals may impact instream needs, WDFW will recommend that the right not be issued or that any use granted be conditioned on minimum flows. In most cases Ecology will accept WDFW's recommendation and condition the right in such a way that flows are protected. Compared to the baseline, this is not a change.

Groundwater allocations (water right permits)

New applications for groundwater rights are, generally, subject to the same requirements as for surface water rights. The four-part test is applied. All applications will still be reviewed by WDFW and if there is a concern that water uses might adversely impact fish, WDFW will recommend that the right be so conditioned or as provided for in the instream flow rule. In most cases, Ecology will accept WDFW's recommendation and condition the right in such a way that flows are protected. The impact of a groundwater withdrawal on a surface water body (stream or lake) through hydraulic continuity will generally still be estimated based on aquifer characteristics and accepted hydrogeologic study methods. If the proposed appropriation were to capture water that would otherwise contribute to instream flows, the permit approval would be conditioned as interruptible to protect against impairment of the instream flow right.

As mentioned above, groundwater rights are subject to the same requirements as for surface water rights. However, in the past, groundwater rights have not been conditioned due to the difficulty in knowing impacts to surface sources based on the degree of continuity. The proposed rule clarifies the applicant's responsibility in demonstrating that groundwater extraction will not impair other rights. However, the impact created on the surface water source via hydraulic continuity is not necessarily impairment. A separate statutory requirement exists to analyze the possibility of impairment from withdrawals of ground and surface waters in continuity. This proposed rule does not affect this statutory requirement.

Groundwater allocations (permit-exempt)

The reservation of surface and groundwater for future domestic uses and associated residential irrigation, stockwatering, and potable water needs associated with commercial and industrial uses will provide for a management framework for these types of withdrawals. If there is no reservation in effect (the baseline), then legally only new single domestic and stockwater uses would enjoy a reliable supply of water.

Changes or transfers of water rights

Existing water rights can continue to be changed or transferred pursuant to chapters 90.03 and 90.44 RCW. Changes to surface water rights will continue to include consideration of the 1983 instream flow right. Transfers of point of diversion downstream or upstream on a source may be restricted based on in-stream flows from the rule the same as under the baseline. Most changes

in point of diversions from a surface point to a groundwater point from the same water source will probably not be impacted by the rule.

Reservations of water

The reservation of water, uses of water under the reservation, and associated conditions for that use are all new proposals. In large measure, the reservation will allow use of permit-exempt wells without them being subject to the instream flow right. These uses are subject to certain limitations as follows:

- (1) The quantities of reserved groundwater are set by type of use and location in rule.
- (2) A water right permit issued from the reservation must be consistent with the requirements of RCW 90.03.290.
- (3) All water uses from the reservation must be implemented using water use efficiency and conservation practices consistent with the watershed plan.
- (4) The reservation of water shall only be put to beneficial use within the stream management units defined in section 040 of the proposed rule. Applications for diversion or withdrawal of water for purposes outside of the stream management units defined in this rule shall be denied by the department.

If the proposed rule goes into effect, then use of the permit-exempt groundwater will now have to be eligible for the reservation if reliable year-round use is desired. Businesses that elect to rely on permit-exempt groundwater for their own needs or to develop saleable land will face more choices as to their best option if their use is not eligible for the reservation.

The proposed rule also proposes a future stock watering reservation for stock water as directed by RCW 90.22.040. Future stock watering in the proposed rule is accessed via either a diversion structures or wells and relates to normal grazing activities for the surface water use. In addition, RCW 90.44.050 provides an exception to the requirements for a groundwater right permit for stockwater. The rule sets a volume limit on this use of water but otherwise does not change the existing situation.

Maximum allocation

There is a maximum interruptible allocation of between 25 and 100 CFS proposed in the rule but this is also part of the baseline.