



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

November 8, 2018

Rebecca Inman
Dept. of Ecology
PO Box 47600
Olympia WA 98504-7600

Dear Ms. Inman:

This letter concerns Ecology's rulemaking 173-566 WAC Streamflow Restoration Funding Rule as well as the forthcoming final guidance for determining Net Ecological Benefit. Ecology previously offered government-to-government consultation on rulemakings for Streamflow Restoration Funding and Final Guidance for Determining Net Ecological Benefit and this letter is intended to provide comment in response to the request for government-to-government consultation on behalf of Port Gamble S'Klallam Tribe.

The Issue:

Streamflow Restoration Act was passed as the Hirst "fix". It requires watershed planning in WRIs which have adopted instream flow rules but do not explicitly regulate permit exempt wells. The planning committee must ensure a *net ecological benefit* for instream resources through projects that offset (or mitigate) the impacts of the projected number of permit-exempt wells for the next 20 years. Offset projects will be eligible for Streamflow Restoration Funding on a statewide competitive basis.

Two steps for offsets

The first step toward mitigation for impacts to instream flows and resources must be water for water offsets. Out-of-kind, non-water offset projects should be counted toward net ecological benefits only after water for water offsets are achieved at the point of compliance.

Ecology has issued interim guidance on how to define "Net Ecological Benefit". A Net Ecological Benefit determination means anticipated benefits to instream resources from actions designed to restore streamflow will offset and exceed the projected impacts to instream resources from new water use. There is a potential for a departure from the letter of the Streamflow Restoration Act and the guidance however, wherein the guidance states "where necessary, the benefits of some types of offsets may be evaluated qualitatively."

Out-of-kind mitigation was found to be unlawful in the Foster decision, and the Streamflow Restoration Act appears to follow the court's reasoning, wherein sections 202(4)(b) and 203(3)(b) state: "At a minimum, the watershed plan must include those actions that the planning



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units determine to be necessary to offset potential impacts to instream flows associated with permit-exempt domestic water use. The highest priority recommendations must include replacing the quantity of consumptive water use during the same time as the impact and in the same basin or tributary.... The plan may include projects that protect or improve instream resources without replacing the consumptive quantity of water **where such projects are in addition to those actions that the committee determines to be necessary to offset potential consumptive impacts** to instream flows associated with permit-exempt domestic water use.”

We interpret this language to imply that the proposed offsets must meet two criteria – first, water for water offsets at the point of compliance must be met, and only then, after the impact is mitigated in-kind, can the net ecological benefit standard be achieved through additional out-of-kind mitigation. This two-step standard should be clarified in the final guidance, to more closely follow the letter of the law.

Water policy vs water rights

We expect as Washington experiences considerable growth, water rights available for retirement will be hard to find. This would lead to situations where a watershed planning committee must establish some equivalence for out-of-kind projects through a vague standard of ‘net ecological benefit’ to an entire WRIA. The quantities of water and scale of impact at the headwater stream or sub-watershed are bound to be on average, diminutive, assuming that water use estimates provided by Ecology are valid into the future. If the standard of mitigation is vague and impacts are mitigated generically, we see a scenario where cumulatively real impacts occur but are later justified by a positive societal benefit relative to the scale of impact. While Ecology may wish to use flexibility in order to balance competing needs when allocating water, PGST is obliged to protect instream flows for aquatic resources and ecosystems for future generations and we oppose a system of water allocation that trades instream rights subject to prevailing societal needs.

Interim Guidance

The interim guidance describes four “elements”.

Element 1, characterize and quantify potential impacts to instream resources from the proposed 20-year new domestic permit-exempt water use at a scale that allows meaningful determinations of whether proposed offsets will be in-time and/or in the same subbasin.

What will follow if the determination finds that proposed offsets will not be in-time and/or in the same subbasin? Will Ecology revoke a permit-exempt water right? Will the County revise its growth management plan?



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Element 1 instructs committees to calculate impacts to target species with a documented presence. Salmon stocks are depressed, and some species may be extirpated from stream reaches which they may recolonize in the future. Impacts to potential fish habitat should also be considered.

Element 2, describe and evaluate individual offset projects.

Ecology should establish science-based mitigation ratios between in-kind and in-time and in-place water offset projects and non-water offset projects, similar to wetland mitigation ratios. To do this, Ecology should develop stream functional assessments, and consider the disturbance regime for the various geomorphic regions, land uses and stream types.

Element 3, explain how the planned projects are linked or coordinated with existing plans and actions underway to address factors impacting instream resources.

Coordination is useful, but this element implies that existing plans have already established the degree of watershed or reach scale impairments and the factors driving those impairments. Furthermore, the effectiveness of different restoration practices is not well established.

While salmonid habitat limiting factors reports are rich sources of qualitative information these reports rely mostly on professional judgement. More sophisticated and/or robust analysis may be needed.

Element 4, provide a narrative description and quantitative evaluation (to the extent practical) of the net ecological effect of the plan.

Determining the net ecological effect of a WRIA-scale plan and a suite of proposed actions is near impossible. We have not yet determined any consistent way to measure ecological benefit, and in the face of uncertainty, committee members will find themselves discounting the cumulative effects of many future water users and call the plan good enough, especially when weighing the value of aquatic resources against increasing housing and land-use needs for society at large.

Etc.

We are also seeking affirmation of the following existing policies regarding instream flow rules and language in ESSB 6091

- Instream flow rules are not subject to maximum net benefits analysis required under the Water Resources Act of 1971, as found in Northwest Steelhead and Salmon Council et. al. v Ecology, (PCHB 81-148).
- The net ecological benefit analysis is not a standard that can be applied to water right transfers, such as inter-basin transfers.



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- What is the status of a task force to review mitigation sequencing as triggered by the Foster decision?
- Streamflow restoration act funding should be allocated with some level of equity among WRIAs. Large-scale water storage projects designed primarily to supply new uses should not be eligible (see Switzler Canyon project).

Sincerely,

Sam Phillips
Environmental Scientist
Port Gamble S'Klallam Tribe