

The Law Offices of M. Patrick Williams
600 N. 36th Street, Suite 228 • Seattle, Washington 98103
(206) 724 - 2282
Patrick@patrickwilliamsllaw.com

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Washington State Department of Ecology
Water Resources Program
P.O. Box 47600
Olympia, WA 98504-6872

Re: Comment letter for Net Ecological Benefits Guidance

Submitted via Department of Ecology Public Comment Website

To Whom It May Concern:

This letter is submitted on behalf of the Tulalip Tribes.

The Tulalip Tribes reserved the right to take fish in their usual and accustomed fishing places pursuant to the Treaty of Point Elliot of January 22, 1855 (12 Stat. 927). These usual and accustomed treaty fishing areas include the freshwater areas of the Snohomish-Snoqualmie-Skykomish river basins and certain marine waters of the Puget Sound through which fish propagated in such basins pass. *U.S. v. Washington*, 459 F. Supp. 1020, 1038 (W.D. Wash. 1978); *U.S. v. Washington*, 626 F. Supp. 1405, 1527 (W.D. Wash. 1985), *Aff'd*, 841 F.2d 317 (9th Cir. 1988). The Tulalip Tribes are co-managers of fisheries and fish habitat with the federal government and Washington State.

Water rights of appropriate quality and quantity to support habitat for continuation and enhancement of fish runs is essential to the Tribes' treaty fishing rights.

Ecology's Interim Guidance for Determining Net Ecological Benefits, which will be used to evaluate the first and possibility precedent setting projects, is insufficient to meet the requirements of ESSB 6091. The Tulalip Tribes acknowledge that Ecology will reach out to them in the future, prior to finalizing the guidance document, however it appears these early projects will be wholly decided by Ecology using questionable methodology. The Tulalip Tribes respectfully request that Ecology make this process transparent and ensure the requirements in the bill to restore and enhance instream flows and values are implemented.

The Tulalip also want to note that ESSB 6091 requires, at a minimum, water for water mitigation of impacts from new permit exempt wells in section 202 and 203 watersheds. There are only two priorities of actions. Highest priority actions are ones that replace

water in-time and in-place to the impacts caused by exempt wells. Lower priority actions are those that are not in-time or in-place but still use water for mitigation.

It is only when these requirements are met that a 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.” Section 202(3)(b). (emphasis added).

As stated in the Tribes’ comment letter on Ecology’s Interim Guidance on restoration funding, the lack of data regarding current and future impacts are of great concern. Without updated information on the hydrology, geology, and current baseline of users in the basin the ability to predict impacts on a 20-year timeline will prove difficult and could result in the approval of projects that are insufficient. In these early days of implementation, Ecology must only approve projects that not only offer the best assurance of offsetting impacts, but also those with the most up to date data and that include ongoing monitoring.

Additionally, Ecology needs to clarify what is required from an application. The guidance document states “plans should be structured and transparent accounting that itemizes and compares projected impacts against recommended offsetting projects for use in the NEB evaluation.” Guidance pg. 3. Ecology must not accept any proposal that does not do this. The word “should” needs to be “shall”. Unfortunately, this type of discretionary language continues throughout the guidance document. The next “requirement” for proposals is that impacts from future permit-exempt wells and the planned offsets “should be quantified wherever possible.” Id.

The purpose of ESSB 6091, aside from prioritizing exempt wells, is to ensure there is no continued impact to instream flows and ecological values of aquatic ecosystems. Any proposal that cannot quantify the impacts of future exempt well use or the benefits of the projects must be rejected. Once again the guidance on this criteria must have more certainty around it. Certainly not all impacts and/or benefits can be known with 100 percent accuracy, but any project approved by Ecology must demonstrate a very high degree of certainty backed by relevant data. In short, Ecology needs to remove the word “should” from the criteria required in a valid application and replace it with the word “shall.”

The Tulalip incorporate by reference the letter submitted regarding the interim funding guidelines, which address the required elements of a proposal.

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

This element is essential to determining whether a potential project will be successful or not and it is good that Ecology is requiring it. However, Ecology does not go far enough to ensure that the proposals meet this requirement. The guidance document states that the following items should be analyzed, but only if the data on consumptive impacts of exempt wells is available. Absent meaningful data, Tulalip encourages Ecology to require conservative estimates (e.g. wells are withdrawing directly from surface water bodies) of exempt wells on streams and other aquatic environments.

- Timing or location of impacts
- Sensitivity of individual streams to new withdrawals
- The proportion of flow impacted
- Whether stream flow is identified as a limiting factor for recovery in a local salmon recovery plan.

This information is critical to ensuring offsets are actually effective. Any proposal that does not have data on what the impacts are cannot reasonably be considered.

Element 2. Describe and evaluate individual offset projects.

Water Offset Projects:

Ecology must ensure that any water right purchased and transferred to a water bank, trust water right, or retired is a valid right that will actually place water back in the stream and will be protected. Groundwater rights and aquifer recharge projects need to be analyzed carefully so that timing and unintended consequences do not occur.

Non-water Offset Projects:

These projects must be examined very carefully, backed by a transparent, agreed upon, and open data and scoring system. It is best that Ecology not fund any non-water project in this initial funding cycle to make sure these types of projects will actually provide the benefit the proponent claims. Since these types of projects do not directly offset the negative impacts exempt wells the benefit to the streams are debatable at best.

The list of questions for non-water offset projects is a good start and Ecology needs to make sure they are clearly and completely answered.

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

Instream resources itself is a vague term and should be well defined by Ecology to ensure that measures taken in a project are quantifiable and meet specific goals or objectives of a project.

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

This is a very troubling section for the initial approval of these first projects. The components listed in the guidance document are not mandatory and therefore there will not be uniformity in how NEB is determined. Since the language used in the guidance document only states that the NEB analysis “may” be in a matrix, or “should” describe the scale of the plan, or “should” account for impacts that won’t be mitigated it will lead to potentially arbitrary and capricious decisions on which projects are approved. There must be standards and requirements for NEB analysis.

Section 301

This section is very troubling to the Tulalip. The use of out-of-kind and out-of-place mitigation does not provide fish with what they need most; water. While riparian buffers and land acquisition is helpful in some instances they will matter less and less in the future as the timing of summer flows and amount of winter snowpack continue to change due to climate change. Furthermore, Section 301 reverses and overrides the statutory protections found in the Washington Water Code. The state Supreme Court made it clear that instream flows set by rule are water rights and cannot be impaired and that the injury suffered by them from junior appropriators is both legal and ecological. These pilot projects are projects that would not have been allowed prior to ESSB 6091 because they will cause legal and ecological harm to instream flows. If the future of water management in Washington is going to rely on these types of projects to meet future water demand the rivers and fish protected by tribal treaty rights are in extreme peril.

Once again the vague language found in the bill and in the guidance expands the loophole in the Water Code. Ecology needs to interpret the bill language as strictly as possible to ensure proponents of these projects truly have a real need and no other alternatives. The proponent can apply for one of these projects if water offset projects are not “reasonably attainable.” Ecology must verify and work with proponents so that these out-of-kind, out-of-place projects are a last resort. This means Ecology must closely examine the future water demand, conservation measures, and demand-side controls to put the responsibility on the proponent that they have done all they can to maximize the available water. Simply looking around for a senior water right to purchase and not finding one or not being able to afford it is insufficient to meet the “reasonably attainable” threshold.

Ecology must make the criteria for a permit application mandatory and replace the word “should” with “must.” Also, the elements that are required must be rigorously evaluated and verified independently by Ecology. This is particularly true for the first element; that the proponent could not avoid or minimize the impact. Ecology must ensure the proponent is implementing conservation measures (as required in the Municipal Water Law), has reliable demand forecast data, and has exhausted every possible option to avoid the impacts.

In fact, the Tulalip Tribes ask that Ecology not fund or approve any out-of-kind mitigation project for an applicant who is not meeting its requirements under other applicable and relevant laws including the Municipal Water Law, Shoreline Management Act and Growth Management Act.

Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick Williams", written over a horizontal line.

Patrick Williams
Law Offices of M. Patrick Williams, PLLC
206-724-2282

Cc: Tim Brewer
Anne Savery
Daryl Williams
Kurt Nelson