



SQUAXIN ISLAND TRIBE

November 8, 2018

Annie Sawabini
Department of Ecology
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Re: Squaxin Island Tribe's comments on Interim Guidance for Determining Net Ecological Benefit, Publ. No. 18-11-009 (June 2018)

Dear Ms. Sawabini:

The Squaxin Island Tribe ("Tribe") submits these comments on the above guidance.

By way of background, Squaxin's usual and accustomed fishing area ("U&A") overlaps with most of the Water Resource Inventory Area ("WRIAs") listed in RCW 90.94.030 – i.e., WRIAs 12 through 15 – all of which lack adopted watershed plans.¹ This letter refers to them as § 203 WRIAs or watersheds. ESSB 6091 (partly codified in RCW Ch. 90.94) purports to allow development in § 203 WRIAs and to impair instream flows and impact closed water bodies through compliance with RCW 90.94.030.

For § 203 WRIAs, Ecology must prepare and adopt watershed restoration and enhancement plans ("plans") by June 30, 2021. These plans must contain, among other things, actions and projects needed to offset impacts on instream flows from permit-exempt wells and to restore and enhance instream flows. That deadline is less than three years away.

As described below, Ecology's guidance is deficient and should be revised. A running theme is that Ecology in its guidance impermissibly deviates from the authorizing statutes.²

1. Ecology sets a low, across-the-board standard that plans merely offset new domestic permit-exempt wells, which impermissibly maintains the current degraded status quo.

¹ The Tribe has unadjudicated federal reserved water rights to healthy instream flows for fish throughout its U&A, flows that are both senior to state instream flows and often reserve more water. See *United States v. Adair*, 723 F.2d 1394, 1410, 1414 (9th Cir. 1983). And notably, the Watershed Planning Act prohibits watershed plans from containing provisions that "are in conflict with existing state statutes, federal laws, or tribal treaty rights." RCW 90.82.120(1).

² To the extent that the NEB guidance should be a rule, it exceeds Ecology's statutory authority, was adopted without complying with statutory rule-making procedures, and is arbitrary and capricious. See RCW 34.05.570(2)(c).

Throughout the guidance, Ecology misinterprets ESSB 6091 by declaring that an acceptable watershed plan need do no more than contain actions and projects that will offset new permit-exempt domestic wells.³ However, ESSB 6091 requires more by mandating streamflow “restoration” and “enhancement”. See, e.g., RCW 90.94.010, .020, .030, .050, .060, .070, .080. Neither term means merely returning streams in 2038 to their current degraded state. Of the seven streams in WRIA 14 where the Tribe collects data, most do not meet instream flows in the summer. And, many streams suffer from other flow-related deficiencies like high temperature (e.g., the Deschutes, Woodland, Kennedy, Johns, Goldsborough, Skookum, Mill and Cranberry).⁴ A plan that results in a degraded status quo after 20 years is incompatible with the label that the Legislature gave these plans: i.e., “watershed restoration and enhancement plans.” RCW 90.94.030. Notably, that same descriptor for plans is absent in § 202, which labels them as “updated” “watershed plans”. RCW 90.94.020(4).

Moreover, there can be no “net ecological benefit” (“NEB”) if all that happens is offsetting the next 20 years of domestic permit-exempt wells. While merely achieving this offset may be sufficient for streams with flows that meet instream flows, it is insufficient for unhealthy streams. In these latter cases, ESSB 6091 requires more to restore and enhance streamflows and fish habitat. As described below, the Legislature envisioned that Ecology must calculate all new projected uses of water over 20 years and then determine if plans and their actions and projects (including offsets, restoration and enhancement) will result in a net ecological benefit.

The Legislature requires that Ecology before adopting a § 203 plan must determine that actions and projects identified in the plan – after accounting for “new projected uses of water” – will result in a “net ecological benefit” to instream resources within each WRIA. RCW 90.94.030(c) (emphases added). This provision is not expressly restricted to new domestic permit-exempt wells. Additionally, the common understanding of the word “benefit” in the phrase “net ecological benefit” (“NEB”) means more than ending up with the degraded status quo in 2038. “Benefit” means “an advantage or profit gained from something.”⁵ The concept of “benefit” is missing if the situation in 2038 is merely a return to the current degraded status quo or arresting a decline.

Ecology also ignores that it must include in plans an estimate of the “cost of offsetting new domestic water uses over the subsequent twenty years, including withdrawals exempt from permitting under RCW 90.44.050.” RCW 90.94.030(3)(d) (emphasis added). Similarly, this mandate is not restricted to “new domestic permit-exempt wells.” Ecology’s restrictive view is also inconsistent with RCW 90.94.030(e), which requires that plans include estimates of “the cumulative consumptive water use impacts over the subsequent twenty years, including

³ Ecology made the same error in its draft rules for Streamflow Restoration Funding, WAC Ch. 173-566, in which it improperly defines projects and watershed plans as successful if they do no more than offset new domestic permit-exempt wells. The Tribe references and incorporates its comments on the draft rules, which it submitted on October 27, 2018.

⁴ See, e.g., <https://nwifc.org/publications/state-of-our-watersheds/> (Accessed Oct. 24, 2018).

⁵ Available at <https://en.oxforddictionaries.com/definition/benefit> (Accessed Oct. 24, 2018).

withdrawals exempt from permitting under RCW 90.44.050". (Emphasis added.) Again, this is not as narrowly focused as Ecology's interpretation.⁶

Ecology is looking to the Watershed Planning Act, RCW Ch. 90.82, to help interpret the Streamflow Restoration Act. *See, e.g., Ecology, ESSB 6091 – Streamflow Restoration, Initial Policy Interpretations* (March 20, 2018). It is notable that the Watershed Planning Act does not limit the scope of watershed plan analysis to permit-exempt domestic wells – rather, it mandates a broader assessment of water supply and use. RCW 90.82.070 (describing a plan's mandatory water quality component). Among other things, the Watershed Planning Act mandates that watershed plans address how using inchoate municipal rights will affect the implementation of instream flow strategies identified in the plans. RCW 90.82.048.

2. Ecology improperly uses ESSB 6091 to focus on the recovery of ESA-listed species.

Ecology interprets the NEB provision's reference in RCW 90.94.030(3)(c) to "instream resources" to mean and/or emphasize ESA-protected species. Guidance at p. 3 ("Ecology interprets 'instream resources' in the context of this provision of ESSB 6091 to include the instream resources and values protected under RCW 90.22.010 and RCW 90.54.020(3)(a), with an emphasis on measures to support the recovery of threatened and endangered salmonids."); p. 4 ("Calculating the consumptive impact of new domestic permit-exempt water use at the smaller subbasin scale will inform the extent to which impacts to specific reaches will adversely affect target species with a documented presence (e.g., spawning and rearing of individual salmonid species listed under ESA); p. 6 ("Non-water offset projects should focus on actions that improve the composition, structure, and function of aquatic systems. These projects should support the recovery of threatened or endangered salmonids and/or native species.").

Ecology's interpretation is inconsistent with the plain language of ESSB 6091. For § 203 plans, measures to protect ESA-protected species appear in the optional, not mandatory, list of plan components. RCW 90.94.030(3)(a) ("The watershed restoration and enhancement plan should include recommendations for projects and actions that will measure, protect, and enhance instream resources and improve watershed functions that support the recovery of threatened and endangered salmonids.") (emphasis added). "Should" is not mandatory. Contrast "should" with § 202 plans, where initiating governments "must" update watershed plans to "include recommendations for projects and actions that will measure, protect, and enhance instream resources and improve watershed functions that support the recovery of threatened and endangered salmonids." RCW 90.94.020(4)(a) (emphases added).

⁶ In this way, Ecology's documents entitled, *ESSB 6091 – Streamflow Restoration Recommendations for Water Use Estimates* (April 5, 2018) and *ESSB 6091 – Initial Policy Interpretations* (March 20, 2018) are also defective, since they misinterpret ESSB 6091 as only requiring the offsetting of new permit exempt domestic wells, and limit methodologies to such wells.

Accordingly, nothing in ESSB 6091 pertaining to § 203 plans restricts instream resources to ESA-protected species.⁷ Ecology is inappropriately using ESA listings to exclude from or downplay consideration of mitigation, restoration and enhancement of streamflows for non-listed fish populations. Ecology needs to revise the guidance in this respect.

3. Ecology improperly downplays the importance of critical data and assessments that are required to fulfill the NEB mandate and produce scientifically-supported plans.

As described in the Tribe's comments on Ecology's draft funding rule (submitted Oct. 27, 2018), Ecology improperly focuses on funding shovel-ready projects in § 203 WRIAs over the gathering and assessment of data needed to create meaningful, scientifically-supported watershed plans. Compounding the error, the NEB guidance repeatedly downplays the importance of data-driven watershed plans. *See, e.g.*, Guidance at pp. 4-5 ("If available, data on consumptive domestic permit exempt use impacts should be used to characterize: Timing or location of impacts[;] Sensitivity of individual streams to new withdrawals[;] The proportion of flow impacted[; and] Whether stream flow is identified as a limiting factor for recovery in a local salmon recovery plan); p. 9 ("Benefits from proposed mitigation projects must be described in detail and quantified to the maximum extent practicable."). (Emphases added.)

Similarly, Ecology's guidance makes optional a list of plan components for the NEB analysis that cannot be optional if the plans are intended to be scientifically-supported and effective. Guidance at p. 8 ("Plan components to be used in the NEB analysis: [1] May be structured in the form of a ledger or matrix that describes all the impacts and offsets in detail and sums up the net ecological effect; [2] Should describe the scale at which the plan is designed to achieve success (e.g., subbasin or WRIA); [3] Should include a description of the projected impact to instream flows that will not be offset through replacement of water. To the extent possible, describe this projected flow impact in terms of ecological impact to instream resources; [4] Should include a description of how the recommended projects and actions will offset the total projected new consumptive domestic permit-exempt water use over the subsequent 20 years throughout the watershed; [5] Should address the feasibility of plan implementation. This includes what is known about funding available under ESSB 6091 and other funding sources. The plan should also prioritize projects for funding and clearly identify the group of projects and actions that must be funded to achieve NEB."). (Emphases added.) Accordingly, Ecology should replace "should" and "may" with "must" or "shall" in this regard.

The end result of this process must be plans that will effectuate mitigation and restored and enhanced instream flows. Ecology should revise its guidance accordingly.

⁷ The § 203 WRIAs within Squaxin's U&A support populations of chum and coho, neither of which are ESA-listed. Only winter steelhead is ESA-listed.

4. Ecology affords itself excessive discretion to reject high priority mitigation projects.

Ecology's guidance states, "Where highest priority projects are not feasible, ESSB 6091 authorizes plans to include lower priority projects –those that do not occur in the same subbasin or tributary (but are within the same WRIA) or only replace water during critical flow periods." (p. 6, emphasis added.) ESSB 6091 does not use this phrase, much less grant Ecology authority to evaluate projects based on a feasibility determination. Nor does Ecology define this term. The Tribe's concern is that Ecology or other committee members could seek to exclude in-time, in-place projects simply because they are politically unpalatable, expensive or inconvenient.

5. Ecology improperly indicates that local governments can leave in place unprotective ordinances and policies.

Ecology's guidance states, "Plans should also be consistent with existing land use regulations." Guidance at p. 7. Here, Ecology improperly disconnects the ESSB 6091 process from local government planning and development review efforts. Local governments have obligations to protect and enhance instream flows and fisheries under ESSB 6091, the GMA and 1971 Water Resources Act and other statutes that require more than leaving existing ordinances in place. *See, e.g.*, ESSB 6091 §§ 101-104. And, Ecology is obligated to steer local governments towards improving instream flows. *See, e.g.*, RCW 43.21A.010, RCW 43.21A.064, RCW Ch. 90.54, RCW 90.42.0005(c), RCW 90.44.430. Accordingly, Ecology at minimum should expressly anticipate that local governments will likely need to change laws and policies. And, it must offer local governments technical assistance to help them amend their laws to be consistent with statutes that mandate protection and enhancement of instream flows and closures, as well as with amended WRIA rules and watershed plans.

6. Ecology has a history of poorly managing streams in § 203 WRIsAs, and must use this process to do better.

Now is the time for Ecology to correct course on its poor treatment of § 203 watersheds in Squaxin's U&A. For years, it has shirked its responsibility to ensure that senior instream flows are met and closures honored.

In 2008, the Tribe petitioned Ecology to amend the WRIA 14 rule to withdraw groundwater in the Johns Creek basin until it had sufficient information at hand to engage in informed decision-making as to water management and allocation. *Squaxin Island Tribe v. Gregoire*, 177 Wn.App. 734 (2013). Ecology denied the Tribe's petition but promised to embark on an alternate path. When Ecology abandoned the alternative path, the Tribe again petitioned Ecology. This time, the Tribe added a request that Ecology amend the ineffective WRIA 14 instream flow rule. Again Ecology refused, responding that its priority was to adopt new instream flow rules and not to fix

old ineffective ones. *See id.* Ecology also ignored the Governor’s directive that it “secure implementation of measures to protect instream flows from depletion”.⁸

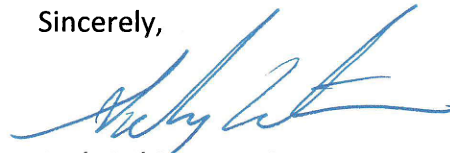
Subsequently Ecology in the *Hirst* case took the irresponsible position that older instream flow rules (e.g., for the § 203 WRIsAs) that did not expressly subject permit-exempt wells to instream flows and closures allowed counties to ignore those restrictions in their comprehensive plans and development regulations. *Whatcom County v. Hirst*, 186 Wn.2d 648 (2017). Not only was this position inconsistent with Ecology’s position in the Johns Creek case, Ecology made the empty suggestion that Mr. Hirst could obtain relief by petitioning for a rule change, something that the Tribe had earlier tried to do without avail and that Ecology had made futile.

To conclude, the Tribe is engaging in this process with the expectation that Ecology and other committee members will use it to ensure sustainable development and fisheries, rather than merely maintaining the degraded and declining status quo. The Tribe will strive to reach agreement with other committee members on the contents of the § 203 watershed plans. Ecology, however, is undermining the outcome by taking positions that are inconsistent with the statute and are unlikely to result in effective watershed plans.

For the above reasons, Ecology must redraft its guidance to correct the deficiencies described in this letter. The Tribe stands willing to assist.

Thank you for your consideration.

Sincerely,



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Squaxin Island Natural Resources Department

cc: Mary Verner, Director, Department of Water Resources, mary.verner@ecy.wa.gov
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⁸ Ltr. From Governor Gregoire to Ecology Director Sturdevant (May 5, 2010).