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**Re: Comments of the Washington Water Trust on Draft Language for Chapter 173-566
WAC — Streamflow Restoration Funding**

Dear Ms. Inman

Washington Water Trust (WWT) is a nonprofit organization which for over 20 years has used voluntary, market-based transactions, and cooperative partnerships to improve stream flows and protect water quality throughout Washington state. We lease and buy water from water rights holders, temporarily or permanently to leave instream, to improve and protect flows, especially during periods that are critical to the survival of imperiled salmon and steelhead. As our recent work in the Dungeness and the Yakima basins has shown, at the right time, at the right place, even just a small amount of water left instream can have an immensely positive impact.

WWT thanks Ecology for opportunity to comment on the proposed rules for Streamflow Restoration Funding. WWT strongly supports Ecology's efforts to protect, restore, and enhance streamflow and to mitigate impacts of permit exempt wells to the extent that the mitigation does not impair or impact instream flows. We offer our comments with the simple objective of promoting the success of the new streamflow restoration program in meeting its ambitious objectives.

I. General comments

Water Scarcity and Climate Change. Washington is increasingly a water scarce state, as underscored by the two Washington State Supreme Court decisions that created the impetus for ESSB 6091. We now face and will continue to face hard choices in allocating future water use as we try to accommodate new growth while preserving and enhancing instream flows. In the 29 watersheds that have instream flow rules, minimum flows necessary to protect fish and wildlife are all too often not met. For example, the Little Spokane River has been below minimum instream flow 27 of the 42

years since 1976 when the instream flow was set. Most of Washington's watersheds lack instream flow rules—leaving those watersheds essentially unprotected. Overlaying this concerning picture is the specter of climate change. Climate change is already changing water supply patterns in Washington.

In implementing ESSB 6091 protection and enhancement of instream resources must be a constant, overriding priority because climate change is likely to reduce streamflow in the most critical ecological periods. WWT applauds the draft rules to the extent that Ecology makes evaluating the benefits and streamflow resources a key consideration in the evaluation process. Proposed WAC 173-566-140. In WWT's 20-plus years of experience crafting mitigation and restoration solutions in Washington's waters, we have always worked within the framework of prior appropriation to secure permanent and reliable water. Unless rivers and tributaries have enough water instream to meet existing rights and instream or base flows, ESSB 6091 projects that purport to offset new domestic uses with junior water rights or out of kind mitigation could be subject to curtailment or interruption or could illicitly impair instream flows.

You Can't Fix It Without First Knowing What Needs to Be Fixed. ESSB 6091 imposes tight deadlines on watershed planning units, water restoration and enhancement committees, and lead agencies to amend or adopt watershed plans and propose projects that that will “measure, protect, and enhance instream resources and improve watershed functions.” RCW 90.94.202. At the very least, planned projects must offset the projected impact of domestic permit exempt wells (wells) and contribute to achieving net ecological benefits to aquatic resources in the watershed over the planning period. Yet, the proposed rule does not require—before any shovel hits the ground—that the plan quantify current total water availability in the WRIA (including the impact of current permit exempt wells), estimate when and where water shortfalls occur over the year, assess current habitat health for fish and wildlife and where, and when mitigation measures could best address any problems or flow shortfalls.

This information is essential. The success of the Act will depend upon the science that underpins plans and projects that come from the planning process. Without this baseline information, implementation of the Act—in particular, through the grandfathering of wells under Section 201 and projects designed to mitigate new wells, could result in impairment of existing private rights or applicable instream flow rules, or potentially impact Treaty-protected fishing rights. To avoid spawning a new generation of lawsuits in the wake of *Hirst* and *Foster*, Ecology should, through this rulemaking, require that applicants assess and quantify the effects of all proposed mitigation projects on existing flows in the watershed and the ability of the proposed project to contribute to the mandatory net ecological benefit objective for the area. This information is essential to prioritize projects that will, as ESSB 6091 mandates, offset the impact of Section 201 wells, in addition to future wells, while restoring and enhancing streamflows.

Technical Support for Mitigation Project Design and Evaluation. The overall success of the Streamflow Restoration Program depends upon the technical integrity of the mitigation projects proposed, in the early rounds of funding and as part of amended or adopted watershed plans. We recognize that the Department is encouraging each

watershed to assess its hydrology, environment, and future demands on consumptive use, and to develop localized projects and plans. Watershed planning should reflect local conditions and concerns. However, the mitigation projects authorized by the Act require grounding in the best available science and management practices: technical expertise that require the Department's direction up front. Given that projects are being proposed for funding immediately, it is not enough for the Department to sit a technical staff person at the table during the respective watershed planning processes.

We urge the Department to take a stronger, more directive role in setting out the science and technical assessments required to support project proposals, and watershed plans so that project proponents, and planning units and committees know what the Department considers to be the best available science and best management practices. Front loading this technical support will greatly enhance the likelihood that Ecology will receive credible plans and projects which it can ultimately approve. Not providing this guidance up front will make Ecology's job of reviewing and approving/disapproving the work products of the WRAs even more difficult and contentious. There are a variety of approaches which the Department could use to provide this essential guidance on designing, evaluating, and prioritizing projects (and the underlying WRA plans) that will contribute to the objectives of the program. One approach is to describe specifically those evaluation tools and practices that Ecology believes is appropriate to support the project classes enumerated in the proposed rule so that the public is educated "up front" on the types of evaluations which will pass muster. Another approach—not mutually exclusive—is to provide technical support for project development and evaluations, either through in-house expertise or consultant support, so that the work is done properly on the front end.

Extent and Validity Assessments. For over 20 years, WWT has set the bar for expedient but thorough assessments of water that is eligible for mitigation, and for water banking. The highest priority for offset projects for wells is mitigation water that replaces the new consumed water at the same rate as the impact and in the same basin or tributary. Section 202(4)(b). But left unanswered by the Act and the proposed regulations is how and when extent and validity assessments will be made for proposed projects in the developing plans. Will Ecology require that planning units and committees ensure that the projects being proposed contain "wet water?" The regulations should set forth criteria for when and how the extent and validity of water acquisition state whether assessment by a Certified Water Rights Examiner is required for a proposed project BEFORE it is included in a plan and how Ecology expects this critical assessment work to be funded.¹

Definitions. The definition of "watershed plan" is limited to the identification of "projects." The definition should be expanded to include the broad purposes of a plan—including a reference to planning components which reflect the use of best

¹ The proposed regulations at WAC 173-566-310(21), Ineligible projects and costs, makes ineligible for ESSB 6091 funding costs to develop water acquisition projects but suggests that Ecology may find other funding for such costs. Since procuring "wet water" is imperative for actual mitigation and streamflow protection, WWT urges Ecology to develop clear protocols and funding sources for extent and validity assessments to ensure that acquisition projects meet the Act's goals.

available science.

Best Available Science: Ecology should revise the draft rule to include a best available science requirement for all science underpinning proposed projects.

II. Specific Comments

WAC 173-566-010-Purpose: This rule should be amended to include “grant eligibility and assessment” to the current language.

WAC 173-566-010(7). Relation to Other Laws and Rules. Puget Sound Action Agenda. The proposed rule states that Ecology may not fund projects that conflict with the action agenda. That statement raises the question of whether Ecology will fund projects that are also eligible for Action Agenda funding.

WAC 173-566-030 Definitions.

“Basin” or “subbasin.” WWT suggests that Ecology express a preference for projects that mitigate, protect, or enhance with “basin or subbasin” since the statute contemplates a broader geographic scope, namely “basin or tributary.”

“Consumptive Use”: The definition of consumptive use is without reference to time or variations in use. Ecology should modify along the lines of RCW 90.03.380 which defines “annual consumptive quantity” to “mean[] the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, averaged over the two years of greatest use within the most recent five-year period of continuous beneficial use of the water right.”

“Instream resources” should be modified to refer to Chap. 90.22 RCW and RCW 90.54.020(3).

“New domestic permit-exempt wells.” The proposed definition includes wells used for indoor and outdoor use. However, this definition fails to clarify how it intersects with other exempted uses under RCW 90.54.050—most pertinently, the statute’s concurrent exemption for “the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area”. The latter is obviously an outdoor use which is arguably domestic as well.

“Watershed plan” The proposed definition is limited to projects that “offset the projected impacts of 20 years of future new permit-exempt domestic uses.” This definition improperly narrows the purpose of watershed plans (and amended watershed plans) from the language set forth in the Act. ESSB 6091 Sec. 202 (4)(a); Sec. 203(3)(a). WWT suggests that the final definition state that plans meet the purposes of the statute as set forth in WAC 173-566-010.

WAC 173-566-150 Funding Priorities

(1) Priority of location.

a. High priority: The proposed rule gives high priority within “watersheds

developing watershed plans or metering pilot project areas..." Presumably "developing watershed plans" refers both to Section 202 watersheds which are updating plans, Section 203 watersheds which are developing and adopting new plans and Section 204 watersheds which are implementing the meter pilot projects. If so, the rule language should be clarified.

b. **Moderate priority:** The proposed rule neglects to include "Treaty protected fish resources" and the Washington Department of Fish and Wildlife's "Surface Water Limitations."²The proposed rule should be corrected to include references to both since many critical fish stocks are not protected under state or federal law.

(2) Priority of project type: The rule should require that applicants describe how a proposed project will contribute to achieving the overall purposes of the program and relates to other watershed-based aquatic resource plans, including water quality plans, salmon recovery, floodplain restoration and the like.

WAC 173-566-200 Water right acquisitions. In the final rule, Ecology should specify the methodologies and procedures required for an extent and validity assessment of any proposed acquisition—and require that such work is done before submitting the project for consideration. Ecology should further specify if the costs of procuring or undertaking such work is reimbursable and, if so under what circumstances.

The draft rule should also require that applicants indicate whether the acquisition is permanent or temporary, and if temporary, for what duration and under what limitations. Ecology should further require in the final rule that any waters designated for protection or enhancement be placed in the Trust Water Rights program have the oldest priority dates reasonably achievable. Ecology should require proof up front that acquisitions of water for any purpose, instream flows or mitigation or offsetting domestic wells, does not impair existing rights of all type and in particular instream flows.

While outside the rule-making process, Ecology should beef up its ability to protect for instream purposes waters acquired pursuant to the Streamflow Restoration program. Moreover, as more junior "wet water" is acquired for mitigation, more enforcement of priority dates will be required—which will be challenging for Ecology.

WAC 173-566-210 Water Storage.

In addition to asking how applicants will procure and maintain all necessary permits (f), Ecology should address in the final rule to what extent, if any, development work is eligible for funding. It would be very helpful to WWT and other proponents of long-horizon, high-benefit projects if Ecology could also address in the rulemaking process or elsewhere, how projects like water storage/aquifer recharge—which take years to plan, develop, navigate environmental review, and permit—can compete for funding in this process. Finally, the rule should recognize that water storage projects -- and other mitigation project categories in the proposed rule --should describe how they will help

² "Surface water limitations" of WDFW concern the quantitative and migratory needs of both resident and anadromous fish and the need for sufficient water flow in the streams and rivers of the state.

offset a broad array of anticipated changes in water uses in the watershed over the planning period, and not just new domestic wells.

WAC 173-566-220 Altered water management or infrastructure. Ecology should amend the draft rule to add section 2(e) to require applicants to estimate the amount of water to be conserved and the methodology used to make the estimate.

Thank you again for the opportunity to submit comments in this rulemaking process. We look forward to working with you in implementing the Streamflow Restoration Act.

Very Truly Yours,



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