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Sent by Electronic Mail to Rebecca.Inman@ecy.wa.gov

Rebecca Inman, Rulemaking Lead
Washington Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Re: Comments Regarding Proposed Rule Chapter 173-566 WAC -
Streamflow Restoration Funding

Dear Ms. Inman:

I am submitting this comment letter on behalf of the Stevens County Board of County Commissioners. The Board has serious concerns about Ecology's Preliminary Draft of the Streamflow Restoration Funding Rule, Chapter 173-566 WAC, ("Preliminary Draft Rule"). Specifically, the Board is concerned that Ecology's Preliminary Draft Rule is not consistent with the Legislature's directive in Chapter 90.94 and establishes an unclear and possibly unworkable process for project funding. I submit these written comments in addition to Stevens County's comments provided in the October 4, 2018, public meeting in Spokane.

I. Funding Priorities

Ecology's Preliminary Draft Rule does not prioritize projects according to Chapter 90.94 RCW. RCW 90.94.070 and 90.94.080 state, in pertinent part, that expenditures of the Watershed Restoration and Enhancement Bond may be used to:

assess, plan, and develop projects that include acquiring senior water rights, water conservation, water reuse, stream gaging, groundwater monitoring, and developing natural and constructed infrastructure, which includes, but is not limited to, projects such as floodplain restoration, off-channel storage, and aquifer recharge or other actions designed to provide access to new water supplies with **a priority given to projects in watersheds developing plans as directed by RCW 90.94.020 and 90.94.030 and watersheds participating in the pilot project in RCW 90.94.040.**

(emphasis added). Nevertheless, Ecology's Preliminary Draft Rule states that "high priority" projects are "[w]ithin watersheds developing watershed plans or metering pilot project areas described in RCW 90.94.040." WAC 173-566-150(1)(a). As currently written, Ecology is providing "high priority" to "watersheds drafting watershed plans" which can include any watershed in the state drafting a watershed plan. The Preliminary Draft Rule is inconsistent with RCW 90.94.070 and RCW 90.94.080 which specifically directs Ecology to give priority to "watersheds developing plans as directed by RCW 90.94.020 and 90.94.030." Ecology cannot adopt a rule that is inconsistent with the plain language of the statute. RCW 34.05.570(2)(c).

Providing funding to projects in watersheds developing plans under Chapter 90.94 RCW is central to the Legislature's effort to offset the impact of permit exempt wells in watersheds with Ecology's instream flow rules. The Washington State Legislature enacted ESSB 6091 on January 19, 2018 as a "fix" to the Whatcom County v. Hirst decision by the Washington State Supreme Court.¹ The Hirst decision created an obligation on counties and local governments to determine if water was physically and legally available before issuing building permits/plat approvals based on permit-exempt uses. The Legislature specifically directed the planning units in 16 specified watersheds subject to Ecology's instream flow rules to develop plans and projects to offset impacts for future permit exempt domestic water uses. The purpose behind ESSB 6091 is to plan, implement and maintain projects to offset permit-exempt water use for future growth under the Growth Management Act.²

RCW 90.94.070 and 90.94.080 clearly require Ecology to provide funding priority to mitigation projects identified through the process proscribed in RCW 90.94.020, RCW 90.94.030 and RCW 90.94.040. Ecology needs to prioritize funding for watersheds planning under Chapter 90.94 RCW to ensure projects are in place when development occurs. If Ecology does not provide priority to projects identified in these updated and adopted watershed plans, local governments may not be able to fund the mitigation projects needed to offset future permit-exempt domestic needs as required by the Growth Management Act. Consequently, the state will find itself in the same situation as before the Hirst decision.

Ecology needs to revise WAC 173-566-150 of the Preliminary Draft Rule to give highest priority to: "projects in watersheds developing plans **as directed by RCW 90.94.020 and 90.94.030** and watersheds participating in the pilot project in RCW 90.94.040."

¹ Whatcom County v. Hirst, et al., 186 Wn.2d 648 (2016).

² RCW 19.27.097(1)(c); RCW 36.70A.590; RCW 36.70.692; and RCW 58.17.110.

II. Water Right Acquisition Funding

Ecology's Preliminary Draft Rule for water right acquisition funding creates an unclear process that does not provide priority to watersheds developing plans as directed by RCW 90.94.020 and RCW 90.94.030. WAC 173-566-200 proscribes a process for seeking funding that is undefined, likely unworkable and not consistent with RCW 90.94.070 and 90.94.080.

Ecology's Preliminary Draft Rule creates a new undefined process for water right acquisitions by requiring prospective applicants to coordinate with Ecology. Ecology's rule does not proscribe the process for coordinating with Ecology. The Preliminary Draft Rule is also unclear on whether the failure to comply with this provision of the rule will prohibit grant funding. Ecology's effort to encourage early coordination with project proponents, is important. However, the current drafting of the Preliminary Draft Rule creates an undefined process. Instead, Ecology should remove this provision and provide public outreach to encourage project proponents to work with Ecology before submitting a grant application.

Ecology's Preliminary Draft Rule states that the "[c]osts to develop a water right acquisition project are ineligible for funding under this chapter. . . ." WAC 173-566-200(2). RCW 90.94.070(2) and RCW 90.94.080(2) state, in pertinent part, that "[e]xpenditures may be used to assess, plan and develop projects that include acquiring senior water rights. . . ." Ecology's rule needs to be consistent with state law.

WAC 173-566-200(3) of Ecology's Preliminary Draft Rule proposes a prioritization of water right acquisitions inconsistent with RCW 90.94.070 and RCW 90.94.080. WAC 173-566-200(3) requires a project proponent to describe how a project will offset impacts to new permit-exempt domestic wells, support the recovery of threatened or endangered salmonids, and provide mitigation for new water supplies. WAC 173-566-200(4) states that "[p]rojects will be selected for funding based on the benefits described in (3)." There are watershed groups developing plans as directed by RCW 90.94.020 and 90.94.030 that do not have threatened or endangered salmonid populations. Under Ecology's Preliminary Draft Rule, watersheds without threatened or endangered salmonids will be scored below other watershed groups, which is inconsistent with the law. Ecology must revise the Preliminary Draft Rule to consider a water right acquisition project's alignment with RCW 90.94.070 and RCW 90.94.080.

Ecology's Preliminary Draft Rule also needs to be revised to align with current water right acquisition practices. WAC 173-566-200(5) outlines a process in which Ecology would reimburse a project proponent after purchase of a water right. Ecology's proposed process is problematic for two reasons: First, it would require a project proponent to obtain some kind of bridge funding; and second, it is not consistent with standard purchase and sale agreements. Water right

acquisitions are relatively routine in our state. Typically, the closing or completion of a water right purchase and sale agreement is handled through an escrow officer or similar process. The water right holder is not asked to convey legal title to the water right until receiving payment according to the terms of the purchase and sale agreement, all of which is handled typically by an escrow officer. Ecology routinely works to purchase water rights through this process in many parts of the state. The acquisition of a water right under Ecology's Preliminary Draft Rule should be no different. Ecology's grant funding should be held in escrow or similar process and paid in exchange for a deed that can be recorded.

III. Additional Concerns with the Preliminary Draft Rule

- WAC 173-566-100(3) appears to have a typo because it internally references subsection (3) rather than subsection (4).
- WAC 173-566-120(4) should include the terms "during that grant cycle" at the end of the second sentence so not to preclude an applicant from resubmitting with additional information.
- WAC 173-566-130 allows Ecology to divide a project into phases. However, Ecology should not divide a project into phases that undermines the effectiveness of the mitigation project.
- WAC 173-566-300(1) should specify that Ecology can only determine allocation of funding in a grant cycle to certain project types if the information is published in the guidance prior to the beginning of the funding cycle.
- WAC 173-566-310(3) should not limit funding to projects with National Pollution Discharge Elimination System (NPDES) permits. Otherwise the Preliminary Draft Rule will prohibit funding for reclaimed water projects that operate under a NPDES Permit. Rather, Ecology should prohibit funding for actions needed to comply with a NPDES Permit.

IV. Missing Considerations

A. *Consistency or Lack of Consistency with Net Ecological Benefit*

Ecology should consider adding additional priority points in the grant application review, not in conflict with meeting the mandates to have water available under GMA, which considers a project's role in achieving net ecological benefit (NEB) under Chapter 90.94 RCW. If a grant applicant can show that a project or group of projects proposed for funding meets or exceeds the definition or guidance for NEB, these projects should rank higher than those that do not achieve NEB.

B. *Operation and Maintenance Costs*

A critical omission in Ecology's current efforts under Chapter 90.94 RCW, including the Preliminary Draft Rule, is the identification of the source of funding

for project operation and maintenance costs. The funding of water storage, gaging, recharge and restoration projects in a watershed under the Preliminary Draft Rule will require operation and maintenance costs. Ecology must actively work to find funding for these costs and support the long-term operation and maintenance costs of funded projects. Otherwise, Ecology's funding for these types of projects will be severely undermined.

C. Feasibility Studies

Ecology's Preliminary Draft Rule explains that grant funds can be used to "investigate project feasibility". WAC 173-566-010. However, the Preliminary Draft Rule does not explain how those projects will be prioritized. Local governments planning under Chapter 90.94 RCW are likely to need funding to conduct feasibility studies and Ecology's rule needs to make clear how those projects will be evaluated, prioritized and funded.

D. Funding Cycles

Ecology's Preliminary Draft Rule must specify that Ecology will undertake a "Funding cycle" every year, not once every biennium, until completion and implementation of the plans adopted under Chapter 90.94 RCW. Chapter 90.94 RCW requires watershed plans to offset future permit-exempt water use be completed by 2021. Local governments need to be able to seek funding on a timely basis in order to implement projects identified in the adopted plan. If Ecology waits for two years between funding cycles, there will be further delay to implementation of offsets for future permit-exempt domestic water uses.

V. Conclusion

Ecology's funding of projects to offset the impacts of permit-exempt domestic water uses as outlined in Chapter 90.94 RCW is critical to Stevens County's success to provide for future water needs. Therefore, it is imperative to Stevens County Board of County Commissioners that Ecology's funding decisions align with the purpose and intent of Chapter 90.94 RCW.

Sincerely,

MENTOR LAW GROUP, PLLC



JESSICA C. KUCHAN

CC: STEVENS COUNTY BOARD OF COUNTY COMMISSIONERS
ERIK JOHANSEN, DIRECTOR, STEVENS COUNTY LAND SERVICES