



LUMMI INDIAN BUSINESS COUNCIL

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DEPARTMENT _____ DIRECT NO. _____

May 9, 2019

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Subject: Comments on the Preliminary Draft Rule Language for the Amendment to Chapter 173-501 WAC, Instream Resources Protection Program – Nooksack Water Resource Inventory Area (WRIA) 1

Dear Ms. Sawabini,

I am writing to provide comments on behalf of the Lummi Nation on the preliminary draft rule language for the Amendment to Chapter 173-501 WAC, Instream Resources Protection Program – Nooksack Water Resource Inventory Area (WRIA) 1 (preliminary draft rule). As you know, the Lummi Nation has treaty reserved water rights in WRIA-1 and on the Lummi Indian Reservation (Reservation). These rights include, but are not limited to, a federal Indian reserved water right to instream flows sufficient to support treaty fishing rights. In addition, the Lummi Nation also retains a federal reserved water right for consumptive uses necessary to fulfill the purposes of our Reservation.

Regrettably, the state legislature has chosen to ignore the rights of the Lummi Nation in an effort to placate a small but powerful number of special interests groups. The Department of Ecology has thus been placed in the unenviable position of drafting a rule destined to permit actions that will certainly result in the continued impairment of the rights of the Lummi Nation. It is against this backdrop that we provide the following technical comments with respect to your preliminary draft rule

While we appreciate the proposed reduction of the withdrawal limit and the interruptible nature of outdoor water use in the preliminary draft rule, if not coupled with metering – a necessary component for ensuring accountability – establishing compliance with these provisions will be difficult, if not impossible. Furthermore, the draft preliminary rule does not appear to create a net environmental benefit and the certainty of achieving required water offsets is low.

Below are more detailed comments.

1. **Withdrawal Limits:** While the reduction to 500 gallons per day (gpd) and 1/12 acre irrigated non-commercial lawn or garden per connection is an improvement over the currently effective 5,000 gpd maximum and 3,000 gpd annual average limits, we propose that a further reduction in the withdrawal limit – to 350 gpd for both indoor and outdoor use – would provide both a sufficient water supply for rural Whatcom County residents and a higher level of protection of instream flows. Three hundred and fifty (350) gpd has proven to be a reasonable amount of water for indoor and outdoor water use on the Lummi Peninsula pursuant to the settlement

agreement that resolved the *United States, Lummi Nation v. Washington State Department of Ecology, et al*, Civil Action No. C01-0047Z (U.S. District Court, Western District of Washington). Coupled with metering, the 350 gpd withdrawal limit would provide certainty to a conservation-based approach to water management.

2. **Acreage-Based Outdoor Water Use:** There should be a specific limit on the quantity of water allowed to be put to use for outdoor irrigation. As written, there is nothing to prevent residents from overwatering their 1/12 acre of lawn or non-commercial garden. Ecology appears to assume that any excess irrigation water will not be consumptively used (i.e., will become aquifer recharge), this is not universally true. If a gallon per day limit is not established for outdoor water use, we are also concerned with how Ecology will administer and enforce the acreage-based irrigation limits.
3. **Crop Irrigation Requirements:** The Crop Irrigation Requirement (CIR) used in the preliminary draft rule calculations should be nearly 25% higher for pasture/turf based on recent water rights work completed by Ecology contractors (e.g., Protested Report of Examination for Water Right Change, Water Right Number: GWC 2776(A) [G1-*04184C(A)], WR Doc ID 6800738). Without adjustment, Ecology stands to substantially underestimate actual irrigation demand.
4. **Safety Factor:** We agree a safety factor is needed. However, it should be applied to consumptive use estimates that already incorporate known sources of uncertainty. For example, the CIR should be part of the consumptive use estimate to which the safety factor is applied. In addition, the safety factor as applied in the preliminary draft rule does not account for either the 500 gpd indoor water use limit, or, since there is no metering or enforcement, of 3,000 gpd annual average or 5,000 gpd daily maximum use limits.
5. **Interruptible Outdoor Water Use:** We agree with the curtailment of non-subsistence based outdoor water use during a declared drought. That said, the curtailment criterion should be expanded to also be contingent on whether minimum instream flows are being met or not. Where watercourses are gauged, the gage information could be used to determine if minimum instream flows are being met. Where that data is not available, nearby gauged watersheds and/or the Nooksack River gage at Ferndale could be used.
6. **Accountability and Enforcement:** Without metering there is no reliable way to hold residents accountable to the withdrawal limits in the preliminary draft rule. There is also no discussion of how Ecology will enforce the any of the provisions of the preliminary draft rule.
7. **Critical Flow Period:** Establishment of a critical flow period is referenced in the Streamflow Restoration Act (RCW 90.94), but has not yet been defined by Ecology. The critical flow period should be defined as the irrigation season plus the low-flow season— April 1 to November 15.
8. **Offset Projects:** We find many of the water offset projects list in Table 6.1 of the Rule Supporting Document to be problematic.
 - a. Most of the listed offset projects were identified for alternative purposes prior to the passage of RCW 90.94, meaning that the preliminary draft rule relies largely on projects

unrelated to RCW 90.94 to achieve the goals of RCW 90.94 – thus undermining the goal of streamflow restoration.

- b. Many of the offset projects are conceptual or in the early stages of development (i.e., uncertainty of project implementation), rely on coarse-scale estimates of offset quantity (i.e., uncertainty of water replaced), may or may not be implemented effectively (i.e., uncertainty of project effectiveness and lifespan). We find it irresponsible to rely on such a project list to achieve the water-for-water offset required in RCW 90.94.
- c. Similarly, the project list does not effectively provide offsets near the projected future points of withdrawal (i.e., projects are out-of-place). To help rectify the inadequate spatial distribution of offset projects relative to impacts of future permit-exempt domestic wells, we strongly recommend that on-site mitigation be added on the project list.
- d. The estimated water offset attributed to the Skookum Creek Restoration (No. 19) will take more than 20 years to be realized. As such, the estimated water offset for the Skookum Creek Restoration should be treated like the Stewart Mountain/SF Nooksack Conservation (No. 21) offset, and be removed from the calculated total offsets within WRIA-1.
- e. The Managed Aquifer Recharge (MAR) – North Fork Site (No. 8) and Gravel Pits (No. 28) are still only conceptual and the estimated water offsets attributed to these projects should be removed from the calculated total offsets within WRIA-1.
- f. Three offset projects require inter-basin transfers (Nos. 24, 44, 45). We are concerned with the “scent” of the water with regards to the homing of salmonids for these three projects. Addressing these concerns needs to be satisfied prior to implementation of these projects.
- g. The Bertrand Augmentation (No. 2) and the Middle Fork Porter Creek Phase 4 (No. 23) projects will not provide water throughout the critical flow period (April 1 through November 15).
- h. The Coastal South, Lake Whatcom, and Sumas aggregated subbasins do not have any offset projects that will become effective within the 20-year planning period. With the removal of the MAR – North Fork site (No. 8), the North Fork of the Nooksack River will not have any offset projects.
- i. With the understanding that resources are limited, monitoring (e.g., surface and ground water, instream resources) should be included on the project list. If monitoring is not included, we will be ill-equipped to assess how conditions are changing and/or what additional management actions are necessary to help protect instream resources.

- j. Considered as a whole, the project list does not provide reliable offsets, particularly where impacts are projected to occur and during the critical flow period (i.e., projects are out-of-place and out-of-time)
9. **Fees:** We are concerned that Ecology has not proposed to increase the permit fee from the \$500 required under RCW 90.94. It stands to reason that the fees should be increased to cover the cost of administering the program and to provide at least a portion of the funding needed for water offset and ecological benefit projects. Without sufficient funding, there is a high level of uncertainty that necessary projects will actually be completed.
10. **Metering:** Metering needs to be required. At the December 5, 2018 WRIA 1 Watershed Management Board meeting, several representatives were on the record as generally in favor of mandatory metering (Lummi Nation, Nooksack Indian Tribe, City of Bellingham, and Washington State Department of Fish and Wildlife); the other members present stated a preference for voluntary metering (Whatcom County, PUD No. 1 of Whatcom County). Although consensus on mandatory metering was not achieved, the policy discussions around this topic indicate that several WRIA-1 entities agree that monitoring water use is an important component of responsible water resources management.
11. **Net Ecological Benefit (NEB):** The NEB analysis is insufficient; it does not characterize and quantify potential impacts to instream resources from the projected 20-year new domestic permit-exempt water use at a scale to meaningfully determine if the proposed projects are in-time and in-place. Far more detailed analysis is needed than annualized steady-state water use at the scale of WRIA 1.
- a. Lowland streams where development is likely to occur are already impaired and are important for fish production. These streams should not be subject to further degradation just because they already impacted.
 - b. Further temporal analysis is required. For instance, July water use will be greater than the average annualized water use, and will have a proportionally larger impact. Please refer to the December 5, 2018 Interim Work Product developed by Nooksack Natural Resources and Lummi Natural Resources Department technical staff as part of the WRIA-1 planning effort entitled "*Assessing the Ecological Effects of WRIA 1 Watershed Plan Update*" for documentation that contradicts the assertion that impacts to instream resources will be small, regardless of whether they are measurable or not.
12. **Adaptive Management:** The section on adaptive management requires mechanisms to ensure that corrective actions occur where performance goals are not met. We strongly urge Ecology to take into consideration Appendices J and K of the Draft WRIA 1 Watershed Management Plan Update (Draft Project Monitoring and Effectiveness Template, and Draft Monitoring and Adaptive Management Program, respectively). During development of the Draft Monitoring and Adaptive Management Program, we were advocating for a three-year interval and/or as-needed threshold for the two update steps, which did not make it into the draft released to the Planning Unit. The addition of these appendices, with the noted changes, to the Rule Supporting Document would benefit the adaptive management section.

- a. Instead of once every five years, self-assessments should be conducted every three years, and/or as needed if growth projections substantially underestimate the actual growth, and/or there is little or no progress on project implementation, and/or if projects are found to not be as effective as intended. This would also provide for an end-of-planning horizon evaluation (under RCW 90.94) in 2038 for the entire effort.
- b. In addition to tracking building permits, the number of permit-exempt wells drilled should also be tracked. Wells can be put into use long before the landowner applies for a building permit.

In closing, a 350 gpd limit for indoor and outdoor water use coupled with metering would provide a high level of certainty for the offsets needed and be far easier to effectively administer.

Thank you for your time and consideration of these comments. If you have any questions about the comments, please contact me (merlej@lummi-nsn.gov, (360) 312-2328) or Kara Kuhlman of my staff (karak@lummi-nsn.gov, (360) 312-2128).

Sincerely,



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