

Ag Water Board

See attached for our updated comments on the proposed Nooksack Rule.

We would appreciate the opportunity to discuss these ideas and other matters between Ecology and the AWB in the near future.

Henry Bierlink, Director
Ag Water Board
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AWB Board

Scott Bedlington, Bertrand WID
Kevin Te Velde, North Lynden WID
Jeff De Jong, South Lynden WID
Mike Boxx, Laurel WID
Marty Maberry, Drayton WID
Andy Enfield, Sumas WID

May 2, 2019

Annie Sawabini, Rulemaking Lead
WA State Department of Ecology
Annie.Sawabini@ecy.wa.gov

Dear Annie and Ecology Team:

The Ag Water Board of Whatcom County reviewed your initial draft of the WRIA 1 rule amendment under RCW 90.94 Streamflow Restoration. While there are bright spots in the draft that provide us some hope of heading in the right direction for addressing our concerns it falls far short of what is really needed to solve Whatcom's water issues.

Your draft moves in the right direction - as it at least shows that Ecology knows that the current rule limits various project/permitting ideas. We question the nearly exclusive tie to offsetting exempt well impacts. That continues to be the tail that wags the dog on water issues, and we hope Ecology doesn't spend the next 10 years amending rules to deal solely with exempt well issues, without addressing other parts of Ecology's rules that limit water resource permitting and mitigation options.

The list of suggestions below has been vetted by our Board and the consultants we have worked with over the years. We have plenty experience with bumping against the inflexible nature of the rule and are pleased that Ecology has been directed to open the Rule for amendments. This is an opportunity that neither Ecology or the WRIA #1 Watershed Management Board can afford to miss.

Attached are 4 relevant documents that specify what we'd like to see included in the amended rule and some history of how we came to these suggestions.

- [Memo requesting specific Rule changes](#)
- [Bertrand WID's request for Rule change](#) – October 1, 2013
- [Ecology's response](#) – December 5, 2013
- [BWID response to Ecology](#) – December 18, 2013

Recently the Bertrand Watershed Improvement District (BWID) made use of an Ecology grant to explore stream augmentation and surface to ground water conversions. We had three conversions ready to proceed when Ecology notified us that their understanding of the *Foster* decision meant work could not proceed.

The lack of rule flexibility has been stymying positive projects that would both improve stream flows and address farmers' irrigation issues has been a problem for too long. Rule amendments don't happen often as you note in your December 5, 2013 letter. Now that we have the process in place let's make sure we don't miss the opportunity to make the needed changes that will contribute to a positive partnership between tribes, agencies, and farmers. Through those partnerships, and rules that work to advance creative and flexible resource management, we can look forward to the Nooksack being a leading example of how to build a responsible resource management strategy.

We will follow up with you to discuss these comments further.

Sincerely,

Henry Bierlink, Administrator
Ag Water Board

DRAFT ECOLOGY RULE LANGUAGE – WAC 173-501-070(4)

(4) New interruptible uses may be approved from streams regulated under WAC 173-501-040 if the department determines through a water right permit application process under Chapter 90.03 RCW that the proposed use is consistent with the intent of Chapter 90.94 RCW to restore and enhance streamflows, and would offset potential impacts to instream flows associated with permit-exempt domestic water use.

AWB PROPOSED CHANGES

(4) New interruptible uses may be approved from streams regulated under WAC 173-501-040 if the department determines through a water right permit application process under Chapter 90.03 RCW that the proposed use is consistent with the intent of Chapter 90.94 RCW or Chapter 90.03 RCW to protect, restore, or ~~and~~ enhance streamflows, or the proposed use ~~and~~ would offset potential impacts to instream flows associated with permit-exempt domestic water use, or any other beneficial use.”

INTERPRETATION LANGUGAGE:

- New interruptible uses from streams under -040 (Nooksack River and tributaries);
- May be approved by Ecology through a permit decision;
- If new interruptible use is either:
 - (a) Consistent with intent of Chapter 90.94 RCW or Chapter 90.03 RCW to protect, restore or enhance streamflows, or
 - (b) Would offset potential impacts associated with domestic exempt wells or other water uses.



Vern VandeGarde
President
Steve Groen
Greg Ebe
Peter Vlas
Marty Maberry

Henry Bierlink Administrator

October 1, 2013

Ms. Maia Bellon, Director
Washington State Department of Ecology
300 Desmond Drive
Lacey, WA 98503-1274

Dear Director Bellon:

The Bertrand Watershed Improvement District (WID) is requesting your assistance. Chapter 173-501 of the Washington Administrative Code (WAC), the Instream Resources Protection Program – Nooksack Water Resource inventory Area (WRIA) 1, was adopted in 1986. This rule established instream flows on 29 streams or stream reaches, established new seasonal or year-round closures on 26 streams, and confirmed existing administrative low flows or closures on approximately 18 streams and lakes.

The regulation was accompanied by a program document that provides an overview of the watershed and the rationale for the adoption of the rule. In that document on page 17, it states, “for the most part, ground water supplies are abundant” and on page 25 in the Irrigation section it states “because ground water supplies in much of the farming area are adequate, much of the irrigation utilizes ground water sources.”

According to the U.S. Department of Agriculture (USDA) 2007 Census of Agriculture, Whatcom County’s farm gate value of \$326,450,000 ranks it 1st out of 17 counties in western Washington, 6th out of 39 counties in the state, and in the top 3 percent of U.S. counties. Whatcom County is also second in the state for dairy production and in the top 6 percent of U.S. counties, and more than 79 percent of the state’s red raspberries are produced in Whatcom County.

Nearly 28 years have passed since this management program was adopted. Overall, the WID believes the WAC has met many of its intended purposes in terms of providing a level of protection for the watershed’s instream resources. However, since the adoption of the program, there has been a major change in how the relationship between ground and surface water resources is understood and managed. For example, it is now generally accepted that, sooner or later, the major portion of the ground water in the shallow aquifers underlying much of the watershed will flow into a surface water creek or stream.

While the relationship between ground and surface water was addressed in WAC 173-501-060, we believe that the existing regulation is much too limiting when it is coupled with today’s increased understanding of the relationship between ground and surface waters. WAC 173-501-060 states:

If department investigations determine that there is significant hydraulic continuity between surface water and the proposed groundwater source, any water right permit or certificate issued shall be subject to the same conditions as affected surface waters. If department investigations determine that withdrawal of groundwater from the source aquifers would not interfere with stream flow during the period of stream closure or with maintenance of minimum instream flows, then applications to appropriate public groundwaters may be approved. (emphasis added)

The WID agrees with and supports the intentions of this section; however, when considering the current knowledge of hydraulic continuity and the high number of year-round closures established in this rule, it seems that there are very few cases where the conditions in this section could allow for approval.

While streams in the lowlands of Whatcom County typically experience low stream flows in the late summer and early fall, the shallow groundwater aquifer recharges completely every year and low flows are only an issue during a limited period. There is no long-term decline in the aquifers.

As the awareness of the relationship between ground and surface waters has increased, many agricultural water users have voluntarily removed their surface water diversions from the streams and have switched to ground water as their source of supply. This has benefitted instream flows because the direct impact on the streams is diminished and the impacts on the stream are delayed. In recent years, more and more water users have expressed an interest in moving their groundwater diversions even farther from the streams to the point where their pumping would not impact the streams until after the low flow period has passed. However, when the streams are closed year round, both surface and groundwater relocations are legally problematic. While the WID realizes that not all water supply alternatives will work in every case, there are many cases where creative solutions will work and the water resource management rules should not preclude those kinds of solutions, especially in a county where water is used to produce such high economic values.

The WID understands that part of the reason for establishing year-round closures instead of seasonal closures was that it made administration of the rule easier as it minimizes the need for compliance staff, which has always been in short supply. It is easier to not allow any uses than to have to monitor stream flows and water use on a continuous basis.

With the establishment of the Washington State Department of Ecology's (Ecology) Bellingham Field Office and creation of a water master position to enhance compliance, we request that Ecology revisit the Nooksack rule. WAC 173-501-100 addresses regulation review as it states, "the department of ecology shall initiate a review of the rules established in this chapter whenever new information, changing conditions, or statutory modifications make it necessary to consider revisions."

We are requesting a rule revision aimed at converting the year-round closures to more appropriate and realistic seasonal closures throughout the lowland basins of WRIA #1. Such changes would continue to provide protection of instream resources while also allowing for the development of water supply

options that are not presently allowed. As an added incentive, any existing water rights that would submit water right change applications would be subject to the current metering and reporting requirements, thus providing Ecology with better data on water use and a better basis to determine whether compliance actions are needed.

The WID asks that you consider these much needed changes as a high priority that will continue to protect instream values, as well as provide much-needed relief and a sense of hope to water users pursuing innovative water management solutions in this important watershed. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "HENRY BIERLINK". The signature is stylized with a long horizontal line extending to the right.

Henry Bierlink, Administrator

cc: Bertrand Watershed Improvement District Board
Mr. Tom Loranger, Department of Ecology, Water Resources Program Manager
Ms. Jacque Klug, Department of Ecology, NWRO Water Resources Supervisor



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

December 5, 2013

Henry Bierlink, Administrator
Bertrand Watershed Improvement District
1796 Front Street
Lynden, WA 98264

RE: Petition to Amend WAC 173-501 – Instream Resources Protection Program – Nooksack
Water Resource Inventory Area (WRIA) 1

Dear Mr. Bierlink:

This letter is in response to your October 1, 2013, letter and formal petition for amendment of WAC 173-501, which the Washington State Department of Ecology (Ecology) received from the Bertrand Watershed Improvement District (WID) on October 8, 2013.

In large part due to the increased understanding of ground and surface water since the rule's adoption in 1986, WID is requesting that the rule be amended to change year-round stream closures to seasonal closures throughout the lowland basins of the Nooksack watershed. You maintain that year-round closures limit the implementation of stream flow enhancement projects.

Ecology has carefully considered the concerns raised by your petition. We share your interest in developing innovative water management solutions that could benefit water users, provided there is assurance that protection of instream resources can be maintained. Ecology also understands that since the adoption of the rule there has been an evolution in the understanding of the relationship of the interaction between ground and surface waters.

Although your proposal has merit, Ecology is denying your request to initiate a rule amendment at this time pursuant to RCW 34.05.330. Ecology reviewed data from the gages on Fishtrap, Bertrand, and Dakota Creeks and we have concluded that while instream flows are often met in the winter months, instream flows are not met 100 percent of the time. Therefore, additional technical review is needed before Ecology can initiate any rule amendments to WAC 173-501.

In addition to needing further technical justification for a rule amendment, there are two more factors that contribute to the denial of your petition:

- Ecology's resources for rulemaking are very limited at this time. Our limited staff is currently fully committed to rule development proposals for the Lewis, Grays-Elochoman, and Spokane watersheds, which Ecology has identified as the agency's highest priorities for rulemaking at this time. Additionally, a number of other watershed planning groups have



Henry Bierlink
December 5, 2013
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approached Ecology about starting rulemaking to adopt instream flows in many of the basins in the state where flows are not yet set (flows remain unset in over half of Washington's watersheds). It is an unfortunate reality that Ecology must prioritize its limited staffing and budgetary resources to focus the existing planned high priority rulemaking efforts.

- A key measure to implement the adopted WRIA 1 watershed plan is the Instream Flow Action Plan that directed the planning unit to determine instream flows necessary to meet the needs of local tribes under treaty obligations for fish production. Negotiations to establish a revised instream flow protection program to meet this obligation were put on hold in 2010 for various reasons. More recently, the Lummi Nation and Nooksack Indian Tribe have requested the U.S. government quantify their treaty-reserved water rights in the basin and on their respective reservations. The status of the Tribes' request is not clear at this time.

While Ecology cannot undertake rulemaking at this time, we want to continue working with you to address your concerns. Thus, Ecology commits to working with the Bertrand WID to conduct further surface and ground water analysis. Ecology will use this data to evaluate whether seasonal rather than year-round closures would allow more water management flexibility while maintaining the same level of protection instream. Ecology recommends evaluating a limited number of priority streams for possible seasonal rather than year-round closure, or choosing one stream as a pilot. The existing capital funds grant held by the WID may be used to conduct this analysis. Ecology is also willing to seek additional funds to support these studies. Ecology commits to scheduling a meeting with representatives from the WID by the end of the year to discuss our ideas.

Ecology appreciates the Bertrand WID's active interest in improving water management in the Nooksack Watershed, and while we cannot grant your petition at this time, we are sincere in our commitment to work with you to assess the feasibility of your proposal. Please contact Doug Allen, Bellingham Field Office Manager at (360) 715-5200 to start developing the next steps to take in this matter.

Sincerely,



Maia D. Bellon
Director

cc: Members of the WRIA 1 planning unit
Merle Jefferson, Lummi Nation
Robert Kelly, Nooksack Indian Tribe
Tom Loranger, Water Resources Program Manager
Jacque Klug, Water Resources NWRO Section Manager
Doug Allen, Bellingham Field Office Manager



Board of Commissioners

Vern VandeGarde
President
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Peter Vlas
Marty Maberry

Henry Bierlink Administrator

December 18, 2013

Ms. Maia Bellon, Director
Washington State Department of Ecology
300 Desmond Drive
Lacey, WA 98503-1274

Dear Director Bellon:

We are disappointed that Ecology feels compelled to deny our request to open up the lowland WRIA #1 basins to seasonal rather than year-round closures. But we are encouraged that Ecology commits to working with us in alternative ways that may address our concerns. This letter responds to some of the points Ecology makes in the denial letter and proposes some paths that we might productively explore together.

We begin by seeking clarification on the 4th paragraph of your letter where you state that “. . . instream flows are not met 100% of the time”. We understand that this presents a problem but we also question if that is a legitimate standard to be held to. If indeed the flows were set at the 50% exceedence level, as we understand they were, how is it possible to meet flows 100% of the time? Wouldn't the expectation be that the flow goals would only occur naturally 50% of the time or on average once every 2 years? It seems that we need to understand this standard much better.

Our second concern is the reference to the Tribes' quantification requests to the federal government. While we fully agree that the implications of the response to this request will have significant bearing on how water is managed in the entire WRIA we emphasize that indecision on this matter should never be a reason for delaying positive actions that meet the dual goals of addressing our water availability concerns and providing more water and habitat in our streams.

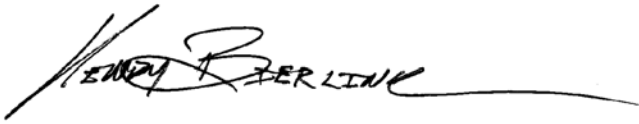
Finally, we'd like to respond to your offer to mutually explore how we can build a defensible case for water management flexibility. Specifically:

- We are ready to meet with Ecology in the next weeks once a response to this letter has been thought through. Hopefully we can find a time the last week of December or early January.
- We invite Ecology to look at developing a ground/surface water model in the Bertrand that serves as a first step towards the development of a larger model that is being considered by the WRIA #1 Joint Board. These projects need to be carefully thought through and coordinated and we expect Ecology will be ensuring that the products of these models will be sufficient to allow your permit inspectors to make clear and defensible water right decisions. We expect you will actively participate in the Joint Board deliberations about these models.

- We agree that a significant portion of the Augmentation grant currently held by the Bertrand WID might be applied to advancing this model. We also recognize that an investment in the needed modeling effort will require significantly more funding. The Joint Board recently reviewed a Groundwater Data Assessment Report which outlines some logical paths forward. Table 7 of this report includes recommendations for next steps and a projected budget of between \$470,000 and \$625,000. A true partnership by Ecology might well include building these costs, or at minimum a portion of these costs, into the State budget being debated in early 2014.

The Bertrand WID asks that you consider these questions and suggestions and respond with suggestions of your own and a proposed time for furthering our discussions over how we can provide for improved water management in the Bertrand leading to improvement management throughout WRIA #1.

Sincerely,

A handwritten signature in black ink that reads "HENRY BIERLINK". The signature is stylized with a long horizontal line extending to the right.

Henry Bierlink, Administrator

cc: Bertrand Watershed Improvement District Board
Mr. Tom Loranger, Department of Ecology, Water Resources Program Manager
Ms. Jacque Klug, Department of Ecology, NWRO Water Resources Supervisor
Mr. Doug Allen, Department of Ecology, BFO