

Center for Environmental Law & Policy

Please see attached comment letter.



CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for
Environmental Law & Policy

Annie Sawabini
Department of Ecology
Water Resources Program
PO Box 47600
Olympia WA 98504-7600

May 10, 2019

RE: Preliminary Draft language for WAC 173-501 Amendments

Dear Annie:

Thank you for the opportunity to provide comment on the proposed changes to WAC 173-501, the WRIA 1 Streamflow Protection Rule, pursuant to the RCW 90.94 Streamflow Restoration Committee process. As discussed below, CELP has significant concerns about the approach taken to modifying this Rule. We look forward to working with Ecology to produce a final Rule that meets the requirements of RCW 90.94 while adequately protecting instream resources.

The Preliminary Draft language for Proposed Updates to WAC 173-501 (“Preliminary Draft Rule”) does not meet the requirements of RCW 90.94.020, provides no assurances that new permit-exempt water use will be offset, and contains no safeguards to ensure that the offset and habitat projects described in the Supporting Document will actually be carried out. The result in this case would be that new permit-exempt water use would continue essentially without restriction, while no further water or habitat projects would be mandated. As a result, streamflow depletion would continue, and the “Net Ecological Benefit” standard would not be met. Adoption of the language in the preliminary rule risks both harm to the environment and litigation.

Standing alone, the Preliminary Draft Language of the Rule will do nothing to restore streamflows in the Nooksack Basin, and represents a return to the pre-*Hirst* status quo in which there were neither meaningful restrictions on water use nor any effective provisions to mitigate or offset new water uses. The goals of the Streamflow Restoration Program (including providing water to offset impacts of new permit-exempt wells) would be addressed only if the actions described in the Supporting Document were carried out and functioned as described. However, there appears to be nothing that makes any of these actions binding, and the Preliminary Draft Rule would allow the new permit-exempt water use regardless of whether any mitigation is actually accomplished.

Adoption of the Preliminary Draft Rule as written would send a clear signal to Watershed Planning Group members in other WRIAs planning under RCW 90.94.020: if they fail to come

to agreement, so that Ecology assumes responsibility for adopting a Rule, that Rule will allow essentially unrestricted development with no meaningful requirement for mitigation. The message to development interests in particular is clear: failure to work within the process will be rewarded. The effects on instream flows in the Nooksack and other basins are predictable, and harmful to fish runs and other environmental values.

The Proposed Rule is contrary to the enabling statute (RCW 90.94.020).

Most seriously, the Preliminary Draft Rule ignores a clear statutory command to protect and enhance instream environments, including protecting streamflows from further depletion. RCW 90.94.020(1) provides that:

“Unless requirements are otherwise specified in the applicable rules adopted under this chapter or under chapter [90.22](#) or [90.54](#) RCW, potential impacts on a closed water body and potential impairment to an instream flow are authorized for new domestic groundwater withdrawals exempt from permitting under RCW [90.44.050](#) through *compliance with the requirements established in this section.*” (emphasis added).

RCW 90.94.020(7)(a) further requires that: “If a watershed plan that meets the requirements of this section is not adopted in water resource inventory area 1 (Nooksack) by February 1, 2019, the department must *adopt rules for that water resource inventory area that meet the requirements of this section* by August 1, 2020.” (emphasis added).

The “requirements of this section” referred to in these statements include offsetting potential impacts to instream flows resulting from new permit-exempt water use, and providing “net ecological benefit to instream resources.” RCW 90.94.020(4)(b-c). Under section 7(a), where the watershed planning committee for a given WRIA cannot agree on a watershed plan that offsets water use by new permit-exempt wells, the responsibility for meeting those requirements of RCW 90.94.020 devolves to Ecology. That was what happened in WRIA 1, and the Preliminary Draft Rule language discussed here is the result.

Unfortunately, the Preliminary Draft Rule proposed by Ecology neither ensures that offsetting water would be provided nor guarantees an NEB. The Preliminary Draft Rule itself has no provisions whatsoever for mitigation or offset of water use¹, and no mention of other habitat restoration projects. Under RCW 90.94.020, once Ecology adopts rules addressing permit-exempt wells, there is no further requirement that a plan for further habitat restoration or streamflow augmentation projects be adopted. Nothing in the statute provides that a “Supporting Document” has any legal force or requires that the actions in such a document actually take place to offset water use. Because the proposed Rule language fails to ensure that the statutory commands will be carried out, it would be subject to legal challenge under the APA.²

¹ Proposed WAC 173-501-070(4) may result in offset of some permit-exempt water use through “retiming” of stream flows; however, the Preliminary Draft Rule does not require that any such projects be carried out.

² The approach taken in the Preliminary Draft Rule is in accordance with the Draft Streamflow Restoration Policy and Interpretive Statement, issued May 6, 2019 (POL-2094) (see p. 10 of that document). However, the interpretation of RCW 90.94.020 that is assumed by POL-2094 also fails to meet the statute’s requirement that potential impacts actually be offset, for the same reasons outlined here.

There is no guarantee that the offset projects outlined in the Supporting Document would ever be completed.

The Supporting Document does set out a long list of possible water offset projects and makes predictions about the amount of water that would be offset by each. However, many of these are quite speculative (for example, the MAR project proposed as Project ID 8 has no current sponsor, and no site has yet been chosen). Further, nothing in the Preliminary Draft Rule requires that any of these projects actually be completed, and there is no mention in the Supporting Document of any binding commitment on anyone's part to see that they are. And nothing ties continued use of new water to successfully providing offset water. If the Rule is to depend on these projects for compliance with RCW 90.84.020(7)(a), then it logically must contain provisions to ensure that the projects actually happen.

One way to ensure that the offset projects are actually accomplished and that they succeed in offsetting impacts as predicted would be to expand on the adaptive management approach proposed by Ecology, and to incorporate a checkpoint at which compliance would be assessed to determine whether water use was actually being offset (the Supporting Document does state that the County will perform an assessment at five years to determine the amount of new water use and the amount of offset water provided). If such a check showed that adequate offset water is not being provided to keep up with new well impacts, then it would be appropriate to consider closing part or all of the watershed (under Ecology's existing management authority) until assurances of offset water are provided.

The NEB determination improperly relies on projects and actions that may never occur.

Many of the projects listed in the Supporting Document are uncertain to various degrees. Some (e.g., the storage projects in ID 8 and ID 28) lack even project sponsors. Others, notably the deep aquifer well proposed by Birch Bay and Blaine (ID 24) are wholly speculative (it appears to be unclear whether this project is feasible). A determination that new water use (which is highly likely if not certain to occur) will be offset by projects or actions which are much less certain is improper.

The proposed Rule ignores recent developments in streamflow protection.

Finally, this proposed Rule represents a major step back from Ecology's recent actions regarding instream flows. The Dungeness River Instream Flow Rule (WAC 173-518), effective 2013, contains effective regulations to ensure that water use is actually mitigated and would put a brake on new water use if mitigation to operate the water bank could not be found. The proposed WRIA 1 Rule contains none of these safeguards.

CELP is especially disappointed to see this retreat. As you know, we expended significant resources in helping to defend Ecology's Dungeness Rule, because it was both fair to water users and protective of the resource. The Court of Appeals has affirmed this rule, which provides a clear roadmap for how to allow development while protecting streamflows. The

strategy taken in the proposed update to WAC 173-501 is exactly the opposite: water is being made available for unrestricted development but with no guarantee that such new water use would be mitigated or offset.

Other points

- 173-501-065(2) refers to “new permit-exempt domestic wells constructed after the effective date of this rule amendment.” To be consistent with RCW 90.94.020, this should be “new permit-exempt domestic withdrawals of water,” not “new wells.”
- CELP strongly agrees with establishing lower limits for water use on new permit-exempt wells (Proposed WAC 173-501-065(5)). However, any limits on water use are meaningless without verification. Metering is essential to confirm that indoor use is within limits, and the final Rule should require metering of all new wells.
- How would the outdoor restriction to 1/12th acre per connection be verified? Would this be dependent on aerial views? How would such monitoring be paid for?
- “Subsistence gardening” is not defined. Unless it is, this is not a useful distinction.

CELP looks forward to working with Ecology to ensure that the final Rule provisions adopted meet the statute’s goal of protecting water resources. Please don’t hesitate to contact me if you would like any further information.

Sincerely,



Trish Rolfe
Executive Director