



Department of Ecology

MAY 09 2019

Washington State Senate

Water Resources Program

May 6, 2019

Annie Sawabini
Department of Ecology
Water Resources Program
P.O. Box 47600
Olympia, WA 98504-7600

Re: Comments on Nooksack water resource inventory area rule amendment

Dear Ms. Sawabini,

Thank you for accepting these comments on the preliminary draft rule amendment to chapter 173-501 WAC, the Nooksack instream flow rule. We hope that the input of legislators who worked on the "Hirst fix" bill will be useful to you during the rulemaking process. Our overall message is simple: The department must adhere to the legislature's intent as expressed in chapter 90.94 RCW. There should be no daylight between RCW 90.94.020 and the final rule. Unfortunately, we are concerned that the preliminary draft rule amendment is not consistent with the law, as we outline below.

Authority

Recommendation 1: The rule amendment should cite RCW 90.94.020 as the specific source of authority for rulemaking.

The department must clearly identify RCW 90.94.020 as the source of rulemaking authority for the proposed rule amendment because that section of law establishes important limitations on the department's discretion. Furthermore, the bill that created chapter 90.94 RCW must be carefully followed in order to give assurance that the rule amendment will be consistent with the legislature's objective, which is to ensure that water is available to support development.¹ Indeed, for the Nooksack basin, the department is specifically mandated to "meet the requirements" of RCW 90.94.020 when adopting the rule amendment.²

Identifying the appropriate source of rulemaking authority will serve to guide the department as it determines the contents of the rule. RCW 90.94.020 specifically spells out the legislature's intent with regard to several major elements of the proposed rule amendment, and careful review of the statute shows that the law does not authorize certain features of the department's proposal.

¹ Ch. 1, Laws of 2018 (AN ACT Relating to ensuring that water is available to support development).

² RCW 90.94.020(7)(a).

Gallons-Per-Day

Recommendation 2: The conservation standard established in the rule amendment should be no less than a maximum annual average withdrawal of 3,000 gallons per day per connection.

Let's begin with the proposed single-connection water conservation standard of 500 gallons per day. In RCW 90.94.020, the legislature determined that the appropriate water use figure for the Nooksack basin is a maximum annual average of 3,000 gallons per day per connection.³ In contrast, the department's proposal cuts down the legislature's chosen gallons-per-day figure from 3,000 to 500, and does not measure water use on a maximum-annual-average basis.

The department's proposed reduction is too rigid and far more restrictive than the legislature envisioned in RCW 90.94.020. We strongly urge you to adopt the statutory approach, which sets a higher per-day use allowance and a flexible standard for measuring it.

Outdoor Use

Recommendation 3: The rule amendment should not include restrictions on outdoor use, which must be allowed under RCW 90.44.050.

Next we focus on the proposed limitation on outdoor water use. The rule amendment should not limit outdoor use because RCW 90.94.020 does not authorize limiting outdoor use.

Moreover, RCW 90.94.020(8) expressly disclaims regulation of uses other than "domestic" that are exempt from permitting under RCW 90.44.050.⁴ One of those "other" uses is "the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area," which is different than "domestic" use under RCW 90.44.050.⁵ The latter (domestic use) is subject to the restrictions of RCW 90.94.020, but the former (watering a lawn or garden) is not.⁶ The department lacks authority to regulate outdoor use under RCW 90.94.020, a statute that specifically instructs the department not to restrict "other uses" as defined in RCW 90.44.050.⁷

Drought Curtailment

Recommendation 4: The rule amendment should not include a drought curtailment provision.

³ RCW 90.94.020(5)(f)(ii).

⁴ "This section . . . does not restrict the withdrawal of groundwater for other uses that are exempt from permitting under RCW 90.44.050." RCW 90.94.020(8).

⁵ "That any withdrawal of public groundwaters for [1] stock-watering purposes, or [2] for the watering of a lawn or of a noncommercial garden not exceeding one-half acre, or [3] for single or group domestic uses in an amount not exceeding five thousand gallons a day, or as provided in RCW 90.44.052, or [4] for an industrial purpose in an amount not exceeding five thousand gallons a day, is and shall be exempt from the provisions of this section" RCW 90.44.050 (numbering added). See *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 313 (2011) (holding that RCW 90.44.050 establishes multiple distinct exemptions).

⁶ RCW 90.94.020(8).

⁷ *Id.*

The drought curtailment requirement is another aspect of the proposed rule amendment that does not line up with statute. RCW 90.94.020 does not require the curtailment of water use in the event of a declared drought emergency. Had the legislature wanted to include such a requirement, it knew how to do it. But the legislature did not impose drought curtailment in the Nooksack basin. To prove this, consider RCW 90.94.030, in which the legislature specifically allowed for a drought-triggered water use limitation in listed, named basins, but not including the Nooksack.⁸ Authorizing drought curtailment in RCW 90.94.030 for some basins, and excluding the same provision for basins covered under RCW 90.94.020, was a deliberate legislative choice, and we encourage you to abide by it.

Metering

Recommendation 5: The rule amendment should not require metering.

Finally, we wish to briefly address metering. In the Hirst fix bill, the legislature carefully limited metering to pilot projects that only apply in the Dungeness area and parts of Kittitas County.⁹ The department should not implement metering in any other basin, or for any other reason than to gather information for a legislatively required report.¹⁰ The legislature did not authorize metering in the Nooksack basin or for purposes beyond those listed in RCW 90.94.040.

Conclusion

We believe several elements of the proposed rule amendment for the Nooksack basin do not align with the legislature's intent for the Hirst fix as expressed in chapter 90.94 RCW. We appreciate the opportunity to share this information with you, and we invite you to contact us if you have any questions about this comment letter.

Sincerely,



Senator Doug Ericksen, Ranking Member
Senate Environment, Energy and Technology Committee



Senator Judy Warnick
13th Legislative District

⁸ RCW 90.94.030(4)(b).

⁹ RCW 90.94.040.

¹⁰ RCW 90.94.050.

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