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RE: Okanogan County Farm Bureau Comments – Draft Streamflow Restoration Policy and Interpretive Statement

Ms. Cykler,

Please accept these comments on behalf of the Okanogan County Farm Bureau (OCFB) related to the Draft Streamflow Restoration Policy and Interpretive Statement. While we appreciate the opportunity to provide written comments, we are deeply concerned with some the department's assumptions and interpretations underpinning the document itself, which has lead to inconsistencies with legislative intent and statutory law within the draft Streamflow Restoration Policy and Interpretive Statement.

Section 3, Definitions

Page 2, "Domestic Use" is defined to mean "In the context of Chapter 90.94 RCW, "domestic use" and the withdrawal limits from permit-exempt domestic wells include both indoor and outdoor household uses, and watering of a lawn and noncommercial garden up to one-half acre in size."

The definition is inconsistent with statutory law. Engrossed Substitute Senate Bill 6091 only applies to new domestic exempt withdrawals after January 19, 2018 and does not include the watering of a lawn or noncommercial garden up to one-half acre in size. The term "indoor" is only found in Section 203 of ESSB 6091 and only in the context of a drought emergency. Outdoor uses are not mentioned at all within the legislation.

In addition, RCW 90.94.020(8)¹ states, "This section only applies to new domestic groundwater withdrawals exempt from permitting under RCW 90.44.050 in the following water resource inventory areas with instream flow rules adopted under chapters 90.22 and 90.54 RCW that do not explicitly

¹ Section 202(8) of ESSB 6091

Okanogan County Farm Bureau Comments
Streamflow Restoration policy

regulate permit-exempt groundwater withdrawals: 1 (Nooksack); 11 (Nisqually); 22 (Lower Chehalis); 23 (Upper Chehalis); 49 (Okanogan); 55 (Little Spokane); and 59 (Colville) and **does not restrict the withdrawal of groundwater for other uses that are exempt from permitting under RCW 90.44.050.**” (emphasis added)

RCW 90.44.050 states, in part, “EXCEPT, HOWEVER, That any withdrawal of public groundwaters for stock-watering purposes, or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area, or 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 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.” Watering of lawn or of a noncommercial garden not exceeding one-half acre in area is a separate exempt use and clearly not limited under ESSB 6091.

Page 2, “Net Ecological Benefit (NEB) is defined to mean: “Is the outcome that is anticipated to occur through implementation of projects in a plan to yield offsets that exceed impacts within: a) the planning horizon; and, b) the relevant WRIA boundary.”

The OCFB and others around Washington State have long taken issue with the department’s “single molecule” policy as it relates to surface/groundwater continuity and the policies/regulations/decisions which have stemmed from this flawed agency policy. In order to provide consistent policy and regulatory decisions, the OCFB believes the same policy should be applied in determining net ecological benefit. If a single molecule of water can result in denial or conditioning of water right decisions, a single molecule of water above the expected consumptive use of water from exempt wells would be a net ecological benefit. The department should provide clear guidance that a single molecule of improvement meets the net ecological benefit standard.

Page 3, “New Consumptive Use” is defined to mean “The consumptive water use portion of new permit-exempt domestic groundwater withdrawals anticipated to be initiated within the planning horizon. Water Resources Program Policy 1020 (1991) states, ‘Consumptive water use causes diminishment of the source at the point of appropriation,’ and that, ‘Diminishment is defined as to make smaller or less in quantity, quality, rate of flow, or availability.’ For the purposes described here, consumptive water use is considered water that is evaporated, transpired, consumed by humans, or otherwise removed from an immediate water environment due to the use of new permit-exempt domestic wells.”

The definition includes a reference to Footnote 4 which says, “New consumptive water use in this document addresses new homes connected to permit-exempt domestic wells. Generally such new homes will be associated with wells that are yet to be drilled during the planning horizon. However, new uses could also occur where new homes are added to existing wells on group systems relying on permit-exempt wells. In this document the well use discussed refers to both these types of new well use.”

The OCFB is deeply concerned with these statements. There is nothing in the law remotely suggesting Ecology has the authority to require mitigation for existing wells. Group B water systems utilize exempt wells under 90.44.050. These systems were designed and approved, subject to the 5,000 gpd limit established in RCW 90.44.050. Development activities associated with existing Group B wells are subject to the 5,000 gpd limitation. If a Group B well was approved to serve eight homes, it can serve eight homes regardless of when the homes are built. These simply are not new consumptive uses.

Furthermore, RCW 19.27.097(5)² states “Any permit-exempt groundwater withdrawal authorized under RCW 90.44.050 associated with a water well constructed in accordance with the provisions of chapter 18.104 RCW before the effective date of this section is deemed to be evidence of adequate water supply under this section.” Clearly the Legislature intended to “grandfather” existing single and group domestic uses. The addition of a home onto an existing Group B water system is not a new consumptive use and should not be subject to the provisions on RCW 90.94 in any way.

Page 3, “Planning Groups” is defined to mean, “A general term that refers to either a planning unit preparing a watershed plan update required by RCW 90.94.020 or a watershed restoration and enhancement committee preparing a plan required by RCW 90.94.030.”

RCW 90.94.020³ uses the term “planning unit” in the context of RCW 90.82. The use of the term “planning unit” as established and understood under RCW 90.82 should be the prevailing definition.

Page 3, “Watershed Plan” is defined to mean, “A general term that refers to either a plan update prepared by a planning unit required by RCW 90.94.020 or a watershed restoration and enhancement plan prepared by watershed restoration and enhancement committee required by RCW 90.94.030.”

The term “Watershed Plan” is in fact not a general term. The legislative debate for the passage of ESSB 6091 clearly envisioned the planning process and the term “watershed plan” in the context of “watershed planning” established under RCW 90.82. In addition, RCW 90.94.020⁴ specifically references RCW 90.82 which demonstrates the Legislature’s intention to utilize and follow the watershed planning process already established in RCW 90.82.

Section 4, Applicability

Page 4, applicability to Yakima basin indicates “additional requirements are required.” Under section 101(1)(e), codified under RCW 19.27.097 (1)(e), the department “may” impose requirements to satisfy adjudicated water rights. We would note, the Acquavella Adjudication in the Yakima Basin was limited to surface water rights and did not adjudicate ground water rights. Any requirement imposed by the department related the adjudication must be limited, under the law, to those necessary to satisfy the adjudication.

Section 5, Local Government Obligations

Page 5, the draft Policy and Interpretive Statement states, “Under chapter 90.94 RCW, Ecology interprets local governments to have the following obligations: ...” This statement is overly broad and should be revised to clearly articulate the applicability of local government obligations. RCW 90.94.020 and RCW 90.94.030⁵ respectively, apply to 15 specific WRIAs and not the entire state. In addition, WRIA boundaries do not necessarily correspond with a local government’s jurisdictional boundary. Clarification should be added to ensure local governments understand their obligations are limited to their jurisdictional responsibilities within the applicable WRIA.

Section 6, Water Use Limits Under RCW 90.94.020 and 90.94.030

Page 5 of the draft Policy and Interpretive Statement includes the following statement: “The water use limits under Chapter 90.94 RCW further restrict the limits identified in RCW 90.44.050 for domestic water use and watering of a non-commercial lawn or garden.” While it is accurate to say RCW 90.94

² Section 101(5) of ESSB 6091

³ Section 202 of ESSB 6091

⁴ Section 202 of ESSB 6091

⁵ Sections 202 and 203 of ESSB 6091

limits domestic water use in certain WRIs, it is wholly inaccurate and inconsistent with the legislative intent and statutory law to say RCW 90.94 in any way limits the watering of a lawn or non-commercial garden.

We would note, page 4 of the draft Policy and Interpretive Statement correctly states “The requirements in RCW 90.94.020 and 90.94.030 only pertain to domestic permit-exempt withdrawals that require a new building permit, and do not affect other uses exempt from permitting under RCW 90.44.050.” As previously stated, RCW 90.44.050 lists a number of uses that are exempt from permitting and specifically lists the watering of a lawn or non-commercial garden as a use separate from single or group domestic uses. Further, RCW 90.94.020(8)⁶ states, “This section only applies to new domestic groundwater withdrawals exempt from permitting under RCW 90.44.050 in the following water resource inventory areas with instream flow rules adopted under chapters 90.22 and 90.54 RCW that do not explicitly regulate permit-exempt groundwater withdrawals: 1 (Nooksack); 11 (Nisqually); 22 (Lower Chehalis); 23 (Upper Chehalis); 49 (Okanogan); 55 (Little Spokane); and 59 (Colville) **and does not restrict the withdrawal of groundwater for other uses that are exempt from permitting under RCW 90.44.050.**” (emphasis added)

Page 5 of the draft Policy and Interpretive Statement states, “In the context of chapter 90.94 RCW, “domestic use” and the GPD withdrawal limits include both indoor and outdoor household uses, and watering of a lawn and noncommercial garden up to one-half acre in size.”

As previously discussed herein, this statement is wholly inconsistent with legislative intent and statutory law. There is nothing in ESSB 6091 which limits any exempt uses listed under RCW 90.44.050 except for single and group domestic withdrawals in the specifically enumerated WRIs.

Section 7, Planning Under RCW 90.94.020 and 90.94.030

Page 6 of the draft Policy and Interpretive Statement includes the following statement: “Plans and plan updates must identify projects necessary that at a minimum, offset the consumptive use of new groundwater permit-exempt domestic withdrawals over the next 20 years and achieve NEB.”

We appreciate the department acknowledging “plans and plan updates must identify projects”; unfortunately, the department has failed to include any language pertaining to an actual review of existing plans to recognize projects previously identified through watershed planning efforts. In the legislative debate for ESSB 6091, the Legislature clearly recognized that many existing plans include a number of projects that have never been developed which would mitigate exempt well water use. The department must include language in the Policy and Interpretive Statement clearly articulating the need to review existing plans for projects that may meet the requirements of RCW 90.94.020 and 90.94.030.

Page 7 of the draft Policy and Interpretive Statement includes two statements not supported by legislative intent or statutory law. First, the Policy and Interpretive Statement states, “Projects identified in plans or plan updates should meet the intent of chapter 90.94 RCW for development of **new** projects and actions that benefit instream resources, offset the consumptive use of new permit-exempt domestic wells that come online during the twenty-year planning horizon, and achieve NEB in the WRIA.” (emphasis added) The second interpretation says, “Projects completed **before** January 19, 2018 **will not** count towards the required consumptive use offset and/or providing NEB.” (emphasis added) Neither of these statements are supported by the law, as nothing in ESSB 6091 would prohibit inclusion of previously completed projects as an offset for new exempt well usage. Washington State has a long history of considering previous actions/projects that meet multiple objectives for purposes of meeting long-term intentions.

⁶ Section 202(8) of ESSB 6091

Watershed planning, growth management planning, shorelines management, salmon recovery, etc. all contribute to a productive ecosystem. In cases where previous actions/projects meet the objectives of ESSB 6091, they should be included as an offset. Further, a strict prohibition against counting previous actions/projects would prevent the use of existing water banks, water transfer programs and similar programs in the plans and plan updates as offsets, which is counterproductive.

Page 8 of the draft Policy and Interpretive Statement includes the following statement: “Ecology will not consider mitigation required by existing environmental regulations such as critical area buffers, shoreline setbacks, stormwater/LID, floodplain management, forest practices, NPDES requirements, etc. as contributing towards the required consumptive use offset and/or NEB. Ecology understands that regulations required by other laws or programs would apply regardless of the passage of chapter 90.94 RCW. This is irrespective of whether or not a building or project had yet been constructed under the regulation.”

This position/interpretation is clearly inconsistent with legislative history and intent. In 1995, the Legislature passed Engrossed Substitute House Bill 1724 which included several finding and intent statements which indicate the legislative intention was to eliminate duplicative regulation and mitigation. The Legislature recognized “the increasing number of local and state land use permits and separate environmental review processes required by agencies has generated continuing potential for conflict, overlap, and duplication between the various permit and review processes.”⁷ Section 201(1)(a) of ESHB 1724 (1995) provides additional insight into the Legislature’s intent, which states, “These plans, regulations, rules, and laws often provide environmental analysis and mitigation measures for project actions without the need for an environmental impact statement or further project mitigation.” In addition, the notes found under RCW 36.70B.030 state, “RCW 43.21C.240 provides that project review should not require additional studies or mitigation under chapter 43.21C RCW where existing regulations have adequately addressed a proposed project's probable specific adverse environmental impacts.”

The department’s stated position that mitigation stemming from existing environmental regulation will not be counted as contributing to consumptive use offset and/or NEB is not supported by legislative intent or law and should be eliminated from the draft document.

Several statements are included in the “Plan Approval, Review, and Adoption” subsection⁸ of the draft Policy and Interpretive Statement which are contrary to the established planning process recognized under RCW 90.82 and not supported by law. For example, the documents states, “For the purposes of chapter 90.94 RCW, Ecology defines plan and plan update approval as an action taken on the local level (**i.e. by the WRIA planning group**) to document support for the WRIA’s respective plan or plan update.” (emphasis added) The “WRIA planning group” has no authority to obligate an initiating government to the provisions of a watershed plan; only the initiating governments themselves have the ability to do so. While the planning unit/group must approve the plan for purposes of making a recommendation to the initiative governments, the final plans must be approved by the initiating governments to have the force of law.

Section 9, Foster Pilot Projects

This entire section should be removed from the draft Policy and Interpretive Statement until Task Force work is completed. It is premature for the department to include any guidance related to Foster pilot projects.

⁷ RCW 36.70B.010(2)

⁸ Page 8

Okanogan County Farm Bureau Comments
Streamflow Restoration policy

Once again, on behalf of the Okanogan County Farm Bureau, I thank you for the opportunity to comment on the Draft Streamflow Restoration Policy and Interpretive Statement. Please contact us if you have any questions regarding our comments and concerns. We stand ready to work with the department to ensure the continued viability of agriculture and that our members' property rights are protected.

Sincerely,

Dick Ewing
President
Okanogan County Farm Bureau