THE LAW OFFICES OF M. PATRICK WILLIAMS, PLLC

PATRICK WILLIAMS, ATTORNEY

600 N. 36th Street, Suite 228 • Seattle • Washington • 98103

206.724 .2282 • Patrick@patrickwilliamslaw.com

June 7, 2019

Washington State Department of Ecology
Water Resources Program
P.O. Box 47600
Olympia, WA 98504-6872

Re: Comment letter for Net Ecological Benefits

Submitted online

Ms. Sawabini:

This letter is submitted on behalf of the Tulalip Tribes.

The Tulalip Tribes reserved the right to take fish in their usual and accustomed fishing places pursuant to the Treaty of Point Elliot of January 22, 1855 (12 Stat. 927). These usual and accustomed treaty fishing areas include the freshwater areas of the Snohomish-Snoqualmie-Skykomish river basins and certain marine waters of the Puget Sound through which fish propagated in such basins pass. *U.S. v. Washington,* 459 F. Supp. 1020, 1038 (W.D. Wash. 1978); *U.S. v. Washington,* 626 F. Supp. 1405, 1527 (W.D. Wash. 1985), *Aff'd*, 841 F.2d 317 (9th Cir. 1988). The Tulalip Tribes are co-managers of fisheries and fish habitat with the federal government and Washington State.

Water rights of appropriate quality and quantity to support habitat for continuation and enhancement of fish runs is essential to the Tribes' treaty fishing rights.

This letter incorporates by reference the comments submitted by the Tulalip Tribes on December 10, 2018 regarding the Interim Net Ecological Benefits Guidelines.

There is a glaring omission from this guidance and that is any discussion of climate change. It is unquestioned that climate change will alter the precipitation, temperature, snow pack, and runoff norms that have been recorded over the last 100 years. Therefore, it is likely that some of the most relevant data relied upon by the planning units will not be very useful for projecting future conditions. Ecology and the planning units must account for these impacts as best they can, including utilization of the most up-to-date and peer reviewed studies. While it is understood that there are difficulties in making and

using assumptions related to predicted climate change impacts, it would be negligent on Ecology's part to not require some level of planning as it relates to climate change.

Furthermore, it is unwise of Ecology to not take the lead on climate change issues and instead rely on the planning units. Ecology has more data, more staff, more scientists, and more money to create projections based on potential changes due to climate change. Ecology must take the lead in this and ensure the plans it approves seriously consider and account for a changed hydrologic cycle.

Finally, the ambiguity, inconsistency, and lack of direction contained in the guidance make commenting on it difficult. The inherent flaw in this guidance document is that it lacks standards, measures, or metrics by which one can adjudge whether plans will actually negate impacts of permit exempt wells or create net ecological benefits.

1. Purpose:

Ecology states under the "Purpose" section of the Final Guidance that the phrase "net ecological benefit" is not a "scientific term" nor does it have a "technical basis" and that it is instead a creation of the legislature. However, Ecology was using this phrase in 2014 when it argued that Yelm's mitigation plan would result in "net ecological benefits." Ecology staff must have some thought as to what "net ecological benefit" was prior to the legislature including the phrase in ESSB 6091. It is disingenuous to claim there is no "technical basis" for the phrase because Ecology argued for the technical and scientific validity of the term in defending its approval of Yelm's water right. In fact, some of the mitigation measures proposed in the plan, which the Supreme Court rejected, had quantitative and qualitative metrics associated with them.

It appears that the legislature simply adopted Ecology's sequencing methodology it used to approve Yelm's water right when drafting section 301 of the bill. Ecology, through its actions and legal filings, has utilized the phrase "net ecological benefit" in order to justify impacts to instream flows. ESSB 6091 simply codifies these actions now. Net Ecological Benefit will be what Ecology has consistently argued that is; namely whatever suits Ecology's needs at that moment to approve new consumptive water uses that decrease instream flows.

Finally, Ecology disavows any other use of this phrase outside of the specific context defined in RCW 90.94.020, -.030 and RCW 90.94.090, including making funding decisions. Why? If Ecology has a valid reason for limiting the applicability of this guidance it needs to state it. While the phrase "net ecological benefit" does not appear under the funding section, this section does require Ecology to fund projects to "achieve the goals of the act" by "fulfilling obligations under this act to develop and implement plans to restore stream flows to levels necessary to support robust, healthy, and sustainable salmon populations." Does Ecology read the word "plans" in this section to mean something other than the plans detailed in RCW 90.94.020 and 030? Ecology must explain the reason for limiting the guidance.

2. Authorities:

Ecology notes that if a watershed restoration and enhancement committee is not able to submit a plan by June 30, 2021, that Ecology will create a plan with technical assistance from the salmon recovery board. Will the salmon recovery board use the same definitions and process outlined in this final draft or will it rely on other sources to determine how to provide "technical review and recommendations"? If so, how will the determinations of the salmon recovery board be made and to what degree will Ecology rely on them?

3.1 Definitions:

The vague definitions of "Net Ecological Benefit", "Net Ecological Benefit Determination", and "Net Ecological Benefit Evaluation" leave them nearly meaningless. While it is understandable that precise definitions are difficult for these terms, these definitions are conclusory, self-serving and provide no accountability. For instance, the definition for Net Ecological Benefit is "the outcome that is anticipated to occur through implementation of projects in a plan to yield offsets that exceed impacts…" And "offsets" are defined as, "The anticipated ability, as articulated in a watershed plan, for a project to counterbalance some amount of impact." Therefore, the definition of NEB is the outcome anticipated to occur through implementation of projects to yield a hoped for ability to "counterbalance some amount of impact."

The definition of offset is not sufficient. This definition is not what the legislature intended when it directed Ecology to "at a minimum…offset potential impacts to instream flows associated with permit-exempt domestic water use." The term "offset" is used nine time throughout ESSB 6091 and each time it is in reference to replacing the water that new consumptive exempt well uses will take from instream flows. For instance, RCW 90.94.020(4)(b) states watershed plans must include actions that at a minimum "offset potential impacts to instream flows associated with permit-exempt domestic use…" and continues that additional projects can be included if it is "necessary to offset potential consumptive use impacts to instream flows associated with permit-exempt domestic use." Therefore, the law requires "offsets" to provide a complete counterbalance to all the impacts from new domestic exempt well use. If "Net Ecological Benefit" is defined to allow for merely mitigating "some amount of impact" the definition is insufficient.

3.2 Watershed Planning:

There needs to be clarity regarding the deadline for when watershed planning groups must submit their plan prior to the statutory deadline. The guidance leaves it up to the lead planner to determine this deadline. If these plans are done thoroughly and correctly they will rely on lots of data and analysis to prove they meet the no impact and NEB standards. While each plan will vary in its data and methods there must be sufficient time available for Ecology to rigorously review the plans. If this is not set as a definite time there is concern that Ecology's review will be inadequate and therefore could approve plans that fail to meet the standards in the law. Ecology needs to consider what is an

adequate timeline now and let the planning units and public know what to expect and how to proceed.

Also, Ecology cannot delegate too much supervisory and approval authority to the planning units. While some planning units will use the most timely and relevant data, others may not. Additionally, the representation on some of the planning units may favor one stakeholder group over another. If this is the case, Ecology must maintain its authority and carefully review the recommendations and assumptions found in the plan. The standard of "considerable deference" abdicates too much authority.

3.2.3.5.B Non-Water Offset Projects:

Is it Ecology's understanding that non-water offset projects exist in perpetuity? The definition of "Offset" states that offsets must last in perpetuity since it is assumed that the impacts will continue unabated. How will the planning units or Ecology ensure that land-use based practices continue and are protected in perpetuity?

3.2.3.5.E Adaptive Management:

The guidance treats adaptive management in plans in a paradoxical manner. Ecology states it will recognize the inclusion of an adaptive management plan as evidence that the plan will be implemented thereby increasing its "reasonable assurance" and chances of being approved. However, in the next breath Ecology states that an adaptive management plan does not obligate the planning unit or Ecology to support the work in the plan. How does Ecology see adaptive management being implemented and supervised? If there is no obligation what will prevent the adaptive management plan from simply withering and vanishing?

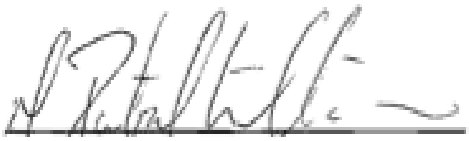
Conclusion

This guidance for determining NEB is insufficient, inconsistent, and incompatible with the bill. There are no assurances in the guidance that impacts from new exempt wells will be offset. There is no assurance that Ecology will rigorously review plans to ensure there will be no impacts from new exempt wells. There is no deadline for when plans need to be submitted to Ecology. There is no assurance that adaptive management plans will be sufficient, or even if they are, that they will be funded. There is no assurance that land-use based offsets will be maintained in perpetuity. There is no assurance that climate change impacts, one of the biggest issues of our time and one Governor Inslee is adamant about, will be considered or even mentioned. Ecology has improperly decided to delegate its authority and accountability to the planning units and create a guidance document that is so vague as to render it meaningless.

The guidance document could be one sentence; "Ecology does not know what NEB is but will know it when it sees it."

Thank you for your time and consideration.

Sincerely,



Patrick Williams
Law Offices of M. Patrick Williams, PLLC
206-724-2282

Cc: Tim Brewer
Anne Savery
Daryl Williams