THE SUQUAMISH TRIBE
**FISHERIES DEPARTMENT**

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June 7, 2019

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

**Re: Suquamish Indian Tribe's comments on Draft Final Guidance for Determining Net Ecological Benefit**

Dear Ms. Sawabini:

This letter transmits the Suquamish Tribe's comments on the Department of Ecology's Draft Final Guidance for Determining Net Ecological Benefit. The Suquamish Tribe (Tribe), a federally recognized Indian Tribe, is a signatory to the Treaty of Point Elliott with the United States. 12 Stat. 927 (1855). The Tribe's adjudicated usual and accustomed fishing grounds and stations (U&A) extend from the northern tip of Vashon Island through the Puget Sound and Salish Sea to the Fraser River, including Haro and Rosario Straits, and the Hood Canal. *United States v. Washington*, 459 F. Supp. 1020, 1049 (W.D. Wash. 1975). The Tribe's U&A includes several WRIAs; however, the Tribe has decided to focus on WRIA 15 while requesting updates on the WRIAs 7 and 9 to continue its engagement in these WRIAs.

The Kitsap Watershed (WRIA 15) is located on the west side of Puget Sound and the eastern side of Hood Canal, containing all Kitsap County, the northeastern part of Mason County and the northwestern part of Pierce County. The watershed lacks major rivers but does include numerous smaller streams. Due to reliance on precipitation, low summer stream flows are dependent on groundwater inflow, which means that groundwater and surface water are least available when water demands are the highest.

The Draft Final Guidance confuses the purpose and intent of the legislature with respect to Net Ecological Benefits. First, any watershed restoration and enhancement plan must mitigate for new domestic permit-exempt wells and other withdrawals with either water rights acquisitions or other projects that provide instream flow benefits. Essentially, new water withdrawals must be accounted for with in-kind and in-time mitigation. Withdrawal mitigation then must contribute to the Net Ecological Benefit. If mitigation under ESSB 6091 does not include water-for-water mitigation plus a Net Ecological Benefit then in 20 years the streams in Kitsap County will not be "restored" or "enhanced" but will simply continue to be degraded until no longer present and would defeat the purpose of protecting stream flow and habitat for salmon survival.

1. **The first priority in mitigating for domestic permit-exempt wells and other withdrawals is replacing the quantity of consumptive water use during the same time and in the same basin or tributary.**

WRIA 15 is a §203 WRIA meaning that it has no watershed plan and that a watershed restoration and enhancement plan must be developed and include recommendations "for projects and actions that will measure, protect, and enhance instream resources and improve watershed functions that support the recovery of threatened and endangered salmonids." RCW 90.94.030 (a). Recommendations should "include, but are not limited to, acquiring senior water rights, water conservation, water reuse, stream gaging, groundwater monitoring, and developing natural and constructed infrastructure, which includes but is not limited to such projects as floodplain restoration, off-channel storage, and aquifer recharge. Qualifying projects must be specifically designed to enhance stream flows and not result in negative impacts to ecological functions or critical habitat." RCW 90.94.030 (a). In WRIA 15, the potential for floodplain or off-channel is restoration is limited due to the valley confined stream systems.

At the bare minimum a §203 watershed restoration and enhancement plan require actions "necessary to offset potential impacts to instream flows associated with permit-exempt domestic water use." However, "the plan may include projects that protect or improve instream resources without replacing the consumptive quantity of water where such projects *are in addition* to those actions that the committee determines to be necessary to offset potential consumptive impacts to instreams flows associate with permit-exempt water use." RCW 90.94.030 (b) (emphasis added). Before adoption of a watershed restoration and enhancement plan Ecology must determine "actions identified in the plan, after accounting for new projected uses of water over the subsequent twenty years, will result in a net ecological benefit to instream resources within the water resource inventory area." RCW 90.94.030 (c). The first and most critical priority and action is mitigating water with in-kind and in-time contributions.

NEB evaluations first, "should compare the total projected impact from new consumptive water use in all the subbasins in the WRIA with the total amount of water offset benefits

generated by all of the planned WRIA projects. The evaluation should then compare the impacts and offsets in each subasin." Draft Final Guidance, Section 3.2.4.2. However, "all impacts must be offset at the WRIA level as part of achieving the NEB." This scheme has the potential to allow the continued degradation of some streams and habitats in a WRIA at the benefit of other streams which still results in overall degradation to salmon habitat and runs.

Also, if a project is being used for wetland mitigation or salmon recovery, it should not also be used to offset water use. Projects used for *Foster* mitigation should not be used for *Hirst* mitigation. If the goal is to actually achieve a net ecological benefit, then the same mitigation cannot be used on multiple projects.

**2. A Net Ecological Benefit must do more than simply offset domestic permit-exempt wells and other withdrawals, especially in WRIA 15.**

In WRIA 15 pressures from population growth, low groundwater levels and diminishing surface water streams coupled with impacts from climate change often lack water when it is most needed during the summer months. Currently 21 streams are closed year-round and 14 streams are closed seasonally in WRIA 15. *Focus on Water Availability*, Department of Ecology.[1] From the Tribe's perspective, we begin this process in a deep hole due to over-appropriation and the proliferation of domestic and other permit-exempt uses from unfettered growth in rural areas.

Low flows in all streams within the basin are completely controlled by groundwater. Groundwater is also the primary source of drinking water for current and future human populations of WRIA 15. *See 2016 State of our Watersheds-Suquamish Tribe*, Northwest Indian Fisheries Commission.[2] Chico Creek, one of the most important salmon producing streams on the peninsula and a recovery focus area for the Suquamish Tribe, failed to meet minimum instream flows during June to September for at least 13 years that data were available. *Id.* Critically low flows through Kitsap County, especially in summer months, is a serious threat to the survival of salmonids and other instream Treaty-reserved resources.

In order for there to be any kind of net ecological benefit in WRIA 15, each new domestic permit-exempt well must first mitigate for water with water and then contribute to the net ecological benefit of the stream system or the streams in WRIA 15 will continue to degrade. On average, approximately 250 new permit-exempt wells per year are installed in Kitsap County. Without a dramatic reversal of development patterns in WRIA 15 that add home after home to rural areas not served by permitted water utilities, future impacts to streamflow in WRIA 15 associated with current and future permit-exempt wells are not speculative and, therefore, demand mitigation that more than off-sets impacts to streamflow. The impacts from climate change are only exacerbating the impacts.

[1] Available at https://fortress.wa.gov/ecy/publications/documents/1111020.pdf.
[2] Available at geo.nwifc.org/sow/SOW2016_Report/Suquamish.pdf.

**3. Ecology must consider the cumulative impacts from new consumptive water use.**

Ecology must consider the cumulative impacts from new consumptive water use and not only focus on the next 20 years. Ecology must consider the cumulative effect of past and currently permitted uses, past and current permit exempt uses, and reasonably foreseeable future withdrawals whether subject to permit requirements of RCW 90.44.050 or exempt from such requirements. Further, Ecology must include past, current, and projected future permit exempt uses such as for stock watering or for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area. Such non-domestic uses are not limited in quantity the way that domestic and industrial permit exempt uses are. While consideration of future impacts from permit-exempt wells is important these impacts have to be considered with past impacts, .

Section 3.2.3.4 states that the planning group's evaluation to "instream resources due to new consumptive water will consider, to the degree possible: 1) habitat, including but not limited to the location and length of affected stream reaches, 2) fish and related aquatic species and their presence, distribution, and life stages, and 3) ecosystem function, structure and composition. This evaluation will include at a minimum, whether streamflow, or streamflow affected traits (i.e. temperature), are a limiting factor to salmon recovery." While all these instream resources should be considered, the priority is wrong. Ecosystem function has to be the first priority, without water in the stream habitat does not matter. It is well documented that stream flow and streamflow affected traits are a limiting to factor to salmon recovery and should be assumed by Ecology.

**4. Projects to offset water assume that there is water to work with and that is not the case in WRIA 15.**

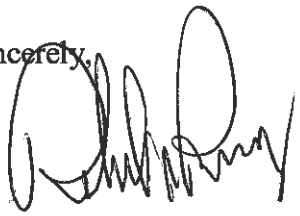
A major problem with Ecology's description of watershed plan's projects to offset impacts is that it always assumes that there is water or that non-water projects "may protect or improve instream resources without replacing the consumptive quantity of water" but the problem in WRIA 15 is there is not water in the streams to meet minimum flows. Any additional withdrawal of water will add to the dewatering of the stream in such a way that non-water projects will have no impact.

Ecology also places too much emphasis on water rights acquisitions to mitigate for permit-exempt wells. While in theory this may provide for more paper water, the problem is that paper water rights may not actually increase flows in streams with vulnerable fish and wildlife. If the water right is not being used it will not mitigate but instead will result in status quo.

The Net Ecological Benefit is the ecological benefit applied to a stream system after water-for-water mitigation has occurred to achieve a healthy stream system. ESSB 6091 (including RCW 90.94) requires more than simply offsetting by requiring streamflow "restoration" and "enhancement." A plan that would perpetuate future and ongoing degradation of streamflow is

incompatible with the intent of the Legislature and is not the course change that is needed to protect and enhance healthy streams and healthy salmon populations. For WRIA 15, there must be steps taken to first, enhance streamflow and then, enhance fish habitat that provides an overall benefit and not merely mitigation as an offset of new domestic (and other) permit-exempt wells and other withdrawals.

Sincerely,



Rob Pursuer, Director
Fisheries Department
Suquamish Tribe