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June 3, 2019

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Water Resources Program  
PO Box 47600  
Olympia WA 98504-7600

**RE: Okanogan County Farm Bureau Comments – Draft Guidance for Determining Net Ecological Benefit**

Ms. Sawabini,

Please accept these comments on behalf of the Okanogan County Farm Bureau (OCFB) related to the Draft Guidance for Determining Net Ecological Benefit. 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the document itself, which has lead to inconsistencies with legislative intent and statutory law within the draft Guidance for Determining Net Ecological Benefit.

**Section 1 Purpose, Page 3** - "This guidance is designed to rely on local expertise to determine the appropriate amount that benefits must exceed impacts for their specific Water Resource Inventory Area (WRIA)."

The OCFB appreciates and supports the department's stated position to "rely on local water expertise." Unfortunately, there appears to be several instances within the draft guidance which could be interpreted to allow the department to substitute its judgment for that of the local expertise.

**Section 2 Authorities, Page 4** - "the law requires Ecology to determine, 'prior to adoption of the... plan... that actions identified in the watershed 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.'"

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.

### Section 3 NEB for Watershed Planning

#### 3.1 Definitions

**Page 5** - “Domestic Use: 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.”

This definition is inconsistent with legislative intent and 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.

RCW 90.94.020(8)<sup>1</sup> 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)

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 5** - “Net Ecological Benefit (NEB): 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.”

As noted above, the department must recognize a single molecule of water in excess of expected consumptive water use from exempt wells as a net ecological benefit for regulatory consistency.

**Page 6** - “New Consumptive Water Use: 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.”

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<sup>1</sup> Section 202(8) of ESSB 6091

## Okanogan County Farm Bureau Comments

### Determining Net Ecological Benefit

This section also includes reference to footnote 5, which states, “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) 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.

### **3.2 Watershed Planning**

#### **3.2.1 Roles and Responsibilities**

**Page 7** - “These plans will include projects that are intended by the planning group to both offset all impacts and achieve an NEB.”

As written, the language goes beyond legislative intent. The purpose of ESSB 6091 was to address potential impacts associated with new domestic exempt wells, not “all impacts.” The draft language could be interpreted to require local watershed plans achieve net ecological benefit for all water uses within a WRIA.

#### **3.2.3 Minimum Planning Requirements**

##### **3.2.3.1 Clear and Systematic Logic**

**Pages 7&8** – “Sound watershed planning also properly recognizes past related and relevant planning processes and conclusions. Therefore, planning groups will describe how their watershed plan, including the projects, is linked or coordinated with other existing plans such as local salmon recovery plans or other recovery plans underway in the WRIA. See POL 2094 for additional information.”

The OCFB agrees with this statement; unfortunately, actions on the ground suggest Ecology is unwilling to consider “past related and relevant planning processes and conclusions” (i.e. land purchases, retired water, projects identified in existing plans not implemented, local land use controls which limit density/development, OFM population projections, etc.) as part of the Watershed Plan update in WRIA 49. Over the past twenty years, public agencies have purchased thousands of acres of land within Okanogan County, much of which had water rights associated with it. The department has thus far not recognized the “net ecological benefit” that has been provided through these land purchases as a credit against future exempt well water use.

##### **3.2.3.2 Delineate Subbasins**

**Page 8** - “Watershed plans must include a partitioning of the WRIA into suitably-sized subbasins to allow meaningful analysis.”

Nothing in ESSB 6091 requires a partitioning of a WRIA by the Planning Unit. This may be something the department wants to encourage, but it cannot require it, nor can failing to do so be rationale to disapprove a plan.

### **3.2.3.3 Estimate New Consumptive Water Uses**

Page 8 - “Watershed plans must include new consumptive water use projection, and the technical basis for such projection, at the subbasin scale.”

Nothing in the law requires such evaluation to occur on a subbasin scale.

### **3.2.3.4 Evaluate Impacts from New Consumptive Use**

Page 8 - “Watershed plans must consider both the amounts of new consumptive water use initiated by new permit-exempt well pumping over the next 20 years and how the effects of that water use will be distributed.”

The OCFB believes such evaluation must also take into consideration the amount of water already being conserved within the basin through previous governmental actions (i.e. land purchases, retired water, etc.) When considering new consumptive uses, local planning units should also consider OFM population projects and local land use policies which limit development/densities. It is simply not reasonable to assume 100% of population growth will rely on exempt wells and require mitigation based on that assumption.

Page 8 - “In addition, “In most cases it is anticipated that the wide distribution of future well locations and depths, across varying hydrogeological conditions may make it reasonable to assume that the pumping effects of permit-exempt domestic wells on streamflow will be steady state.”

This statement ignores local land use policies/regulations which may limit development in various areas within a WRIA. There is no “steady state” and one size does not fit all.

Page 8 - “Plans should also consider links to other ongoing planning work, and existing projects and actions to understand local conditions in the watershed where the new consumptive water use is projected to occur.”

The OCFB agrees, but that must include an analysis as to how much water has already been conserved and/or retired through previous governmental actions.

### **3.2.3.5 Describe and Evaluate Projects for their Offset Potential**

Page 9 - “Watershed plans must identify projects intended to offset impacts.”

The OCFB agrees; however, projects previously identified in an existing watershed plan should be evaluated first to prevent duplicative planning work (as anticipated through links to ongoing work and existing projects/actions).

### **3.2.4.2 Specific Elements of an NEB Evaluation**

Page 12 - “First, NEB evaluations 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 projects in the WRIA.”

This statement goes far beyond legislative intent and statutory law. ESSB 6091 addressed consumptive use and associated impacts of exempt wells, not “total projected impact from new consumptive water use in all subbasins ...” The language suggests watershed plans being updated, subject to Section 202 of ESB 6091, shall consider all consumptive uses. That is simply not the case and not supported by law.

Okanogan County Farm Bureau Comments  
Determining Net Ecological Benefit

**Page 12** - “If the plan has enough project benefits to offset the impacts, then the planning group needs to determine if the plan has additional benefits beyond the minimum amount needed to offset the impacts from new consumptive water use.”

Once again, the statement suggests plans must offset the impacts from new consumptive water use, not just consumptive use from exempt wells, which goes beyond legislative intent and statutory law. Furthermore, only consumptive use from single or group domestic purposes needs to be offset, not all RCW 90.44.050 exempt uses.

**Page 13** - “Adaptive management conditions should also be included to address uncertainty.”

The OCFB would note this statement is inconsistent with 3.2.3.5 E which suggests “adaptive management” is not required, but is recommended.

Once again, on behalf of the Okanogan County Farm Bureau, I thank you for the opportunity to comment on the Draft Guidance for Determining Net Ecological Benefit. 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