

Squaxin Island Tribe

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SQUAXIN ISLAND TRIBE

June 7, 2019

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

Re: Squaxin Island Tribe's comments on Draft Final Guidance for Determining Net Ecological Benefit

Dear Ms. Sawabini:

The Squaxin Island Tribe appreciates the opportunity to comment on Ecology's Draft Final Guidance for Determining Net Ecological Benefit ("May 6, 2019) ("Guidance").¹ The Guidance is a critical part of properly implementing ESSB 6091. While we appreciate the time that Ecology has invested in this first draft, it contains many significant flaws. We respectfully recommend that Ecology create a stakeholder workgroup to devise a version that is clearer, more useful and consistent with the law.

Background

In the 1854 Treaty of Medicine Creek, the Squaxin Island Tribe relinquished rights to an immense area of land in return for relocating to the Squaxin Island Reservation. As inducement for relocating, Article 3 of the Treaty secured to the Tribe "the right of taking fish, at all usual and accustomed grounds and stations. . . in common with all citizens of the Territory." The purpose of the Squaxin Island Reservation was the creation of a permanent homeland where the Squaxin people could sustain their fishing way of life throughout Southern Puget Sound.

Accordingly, when the United States reserved these rights to the Tribe, it also impliedly reserved sufficient water at those grounds and stations to support the fisheries. The rights, while currently unquantified, reserve instream flows in sufficient amounts to support healthy salmon populations throughout the Tribe's usual and accustomed fishing grounds and stations ("U&A"). See, e.g., *United States v. Adair*, 723 F.2d 1394, 1410, 1414 (9th Cir. 1983). The

¹ The Tribe incorporates by reference its previous letters commenting on Ecology's draft guidance, rules and interpretative statements relating to ESSB 6091. The Tribe's participation in this state process should not be interpreted to in any way diminish its Treaty reserved rights.

purposes of the Squaxin Island Reservation and the off-reservation fishing right would be defeated if the creeks that supported the fisheries and the Tribe's fishing way of life become de-watered and no longer support healthy fishing populations.

These instream flow rights arise from the Treaty of Medicine Creek and operate outside of state law. They cannot be given away or diminished by state law. They are property rights held in trust by the United States for the benefit of the Tribe, and are considered trust property. The priority date of these rights predates any rights created by state law. The reserved instream flow rights likely reserve more water than the state instream flows set in the 1980's on many streams throughout WRIs 11-15, which are within Squaxin's U&A.

The Tribe is voluntarily participating in this state process because it presents possibilities to address its longstanding concerns about the impacts of growth on Tribal fisheries. The process wisely brings together entities with varied interests and encourages creative collaboration to protect, restore and enhance instream flows and fish habitat.

The Tribe believes, however, that Ecology is interpreting the law far too narrowly.² Offsetting twenty years of domestic permit-exempt wells is not the only requirement of this law. Its plain language requires more. These plans must restore and enhance streamflow. In some basins, creeks are currently dewatered by existing permit-exempt wells, during time periods that are critical for fish spawning and rearing. In many cases, these unmitigated withdrawals are junior to the state determined instream flow rights. In other places, water systems growing into inchoate state water rights will dewater fish-bearing streams. These harms are compounded by the predicted water scarcity that accompanies climate change in Western Washington. The plans, if devised properly, can help avoid kicking the can down the road, avoid curtailments, and bring longer term certainty to South Puget Sound.

Comments

Section 1: Purpose (pp. 3-4)

1. The next to last paragraph on p. 2 states, "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)." As described below, Ecology has too narrowly defined "impacts". Also, Ecology should not excessively defer to "local expertise" in its process, which should be science-based, for determining whether a plan will actually restore and enhance watersheds.

Section 2: Authorities: Specific Provisions of RCW 90.94.020, RCW 90.94.030, and RCW 90.94.090 (pp. 4-5)

² The Watershed Planning Act prohibits plans from containing provisions that "are in conflict with existing state statutes, federal laws, or tribal treaty rights." RCW 90.82.120(1).

2. For clarity, the two sentences in the second paragraph pertaining to Ecology rulemaking should specify that one applies to RCW 90.94.020 and the other to RCW 90.94.030.

3. Ecology should consider using the Guidance to clarify the term “reasonably attainable” that appears in the pilot project section, RCW 90.94.080(8)(c).

4. Ecology should consider using the Guidance to clarify how “water quality, riparian habitat, or other instream functions” as appears in RCW 90.94.080(8)(c) will be addressed and balanced with water quantity to achieve the most benefit for fish and fish habitat.

Section 3. NEB for watershed planning under RCW 90.94.020 and RCW 90.94.030

5. The title of this section is confusing, since very little of it addresses NEB. We suggest “Description of watershed planning...”, since Section 4 discusses NEB.

Section 3.1: Definitions (pp. 5-6). The Tribe’s comments on definitions apply throughout the Guidance whenever these definitions are used.

6. The Guidance defines “action”, to paraphrase, as a government action like rulemaking or amending an ordinance, as opposed to an on-the-ground project to offset impacts. Guidance p. 5. It defines “project” as an on-the-ground activity to offset impacts. The statute, however, does not establish such clear lines between “actions” and “projects” (collectively referred to as “projects”). For example, it requires that plans include “actions” necessary to offset impacts and then describes highest priority “recommendations” and lower priority “projects.” RCW 90.94.030(3)(b); *see also* RCW 90.94.030(c) (before adopting a plan, Ecology must determine that “actions” identified in the plan will result in NEB). The statute uses “actions” and “projects” interchangeably, and Ecology should therefore do so as well.

7. The Guidance defines “domestic use” as withdrawals from permit-exempt wells. The statute, however, does not always use this term in the context of permit-exempt wells. Guidance at p. 5. *See, e.g.*, RCW 90.94.030(d) (plans must include evaluations of the cost of offsetting “new domestic water uses over the subsequent twenty years, including withdrawals exempt from permitting under RCW 90.44.050.”). Ecology should more broadly define “domestic use” consistent with the statutory language. On the other hand, the Tribe supports Ecology’s defining “domestic” to broadly encompass indoor and outdoor uses, including watering lawns and non-commercial gardens of up to one-half acre, although this definition should clarify that there may be some restrictions on some domestic uses when conditions warrant, such as during drought declarations.

8. The Guidance defines “impact” as that resulting from “new” consumptive water use. Guidance at p. 5. The statute, however, does not consistently restrict impacts to new uses. *See, e.g.*, RCW 90.94.030(3)(b) (“the plan must include those actions that the committee determines to be necessary to offset potential impacts to instream flows associated with

permit-exempt domestic water use”). Ecology should more broadly define “impact” in this regard and to align with the other definitions described within.

9. The Guidance defines “Net Ecological Benefit Determination” as occurring when Ecology during its plan review is “reasonably assured” that NEB will occur. Guidance at p. 5. This is not a term that is used in RCW 90.94.020 or .030, and establishes far too low a bar in light of statutory language that requires offsetting impacts, period. “Reasonably assured is also inconsistent with later statements in the Guidance. *See, e.g.,* Guidance at p. 7 (“... to provide reasonable assurances that the offsets and NEB contemplated by the plan will occur.”) (emphasis added). We suggest including language to the effect that “the watershed plan has well-documented reasons that the predicted success will actually occur.” In addition, the criteria for making this determination should include the incorporation of a monitoring plan to gauge effectiveness and a remediation strategy if the benefits fail to accrue.

10. The definition of “Net Ecological Benefit” is too narrow because it relies on overly restrictive definitions for “impact” and “offset” that only encompass NDPEWs. Moreover, this definition should clearly explain what “net”, “ecological” and “benefit” mean in the context of natural resources and environmental functions. We continue to believe that a definition of NEB should be based on a scientific characterization of improvements to the local ecosystem rather than an arbitrary declaration. To that end, we declare an interest in participating in such determinations as a co-manager and offer our assistance to accomplish this purpose.

11. The Guidance defines “offset” as limited to “impact”. Guidance at p. 6. As described above, “impact” is overly restrictive.

12. The definitions of Offset, Impact, and Net Ecological Benefit are vague and overly general. Impact is an “effect”, which is given no definition in a natural resources context. Offset is an “ability” to “counterbalance” an Impact, again with no natural resources context. NEB is an “outcome” where “offsets exceed impacts” – again with no context. Given the language of the term NEB, the definitions should clearly explain what “net”, “ecological” and “benefit” mean in a clearly explained context of natural resources and environmental functions. Does planting some trees somewhere in a watershed have an ecological benefit? Surely it does. But does it have a benefit that is clearly linked to the hydrological functions at hand? That is a different question and must be answered specifically within the watershed context and preferably by the people who know and understand the science of the watershed. For this reason, we again assert that the Tribe should be a partner, a co-manager in making these determinations.

13. The terms “water offset projects” and “non-water offset projects” that appear in the definitions of “action” and “project” are problematic, because many projects do not neatly fit one category. Projects can have a range of water-for-water benefits ranging from little or none to large quantities. These terms should be replaced with others such as “water infrastructure projects”, “habitat projects with water quantity benefits”, “habitat projects with other water-related benefits” (e.g. access, temperature).

Section 3.2: Watershed Planning (p. 7)

14. For the reasons that include the following, the Guidance needs restructuring: (1) Section 3.2.2 and 3.2.3.2 appear to address the same issue but are confusing and contradictory; and (2) the description of projects is deeply buried in subparagraph 3.2.3.5 in the subsection on minimal requirements.

As to (1), we think section 3.2.3.2 better describes the necessity for delineating subbasins for making determinations under this guidance. We reject the notion that NEB determinations can be made on the WRIA scale. As is evidenced by a WRIA like Kennedy – Goldsborough, with its numerous independent watersheds and different populations of salmonids throughout, making a determination at a WRIA scale does not respect the many requirements of water and fish usage that are often independent between these watersheds. It is simply unacceptable to accept impacts to one watershed and benefits to another on the basis that they are somehow balanced across the WRIA.

As to (2), projects are a major part of this program and deserve their own section following an explanation of NEB. We suggest something along these lines:

Define NEB

Minimum requirements for in-place, in-time offsets for permit-exempt wells.

Describe when offsets with benefits that are not in-place or in-time are appropriate

Concepts of first and second priority projects

Project categories:

- water infrastructure projects that are in-place/in-time
- water infrastructure projects that are not in-place/in-time
- habitat projects with water quantity benefits
- habitat projects with other water benefits (such as quality or access)

15. The Guidance improperly emphasizes minimum requirements and downplays the potential of plans to go beyond them. This is inconsistent with the letter and spirit of RCW Ch. 90.94, Ecology's mission, and the Tribe's goals for plans that meet the real needs of watershed restoration. The Guidance should thus encourage planning groups to fully address environmental needs related to streamflow. Minimum requirements as described in the Guidance are in no way "streamflow restoration", since they only protect streams from a narrow category of future impacts.

16. We respectfully suggest that a future revision of this Guidance be subject to a Plain Talk review.

Section 3.2.1: Roles and Responsibilities (p. 7)

17. The Guidance states, “Planning groups will prepare a watershed plan for their WRIA.” This may not be the only role of the planning groups. If they will also implement, monitor, and/or evaluate plans and projects, such as through adaptive management, the Guidance should say so.

18. The Guidance states, “These plans will include projects that are intended by the planning group to both offset all impacts and achieve an NEB.” This is too narrow given the statutory language. *See, e.g.,* comment #8 re definition of “impact”. We suggest something like, “These plans must include projects that are intended by the planning group to both offset all impacts from permit-exempt well use and account for all projected water uses while achieving NEB.”

19. The Guidance states that Ecology will provide “considerable deference” to plans where the planning group provides “reasonable assurances” that the contemplated offsets and NEB will occur. As described earlier, the term “reasonable assurance” does not appear in RCW 90.94.020 or .030, and Ecology should not be deferring to plans that do not meet a high bar with regard to projects.

Section 3.2.2: Minimum Geographic, Hydrologic, and Temporal Requirements (p. 7)

20. This section is confusing. It lacks a discussion of hydrologic scope, so it is unclear why that is included in the title. We therefore recommend retitling it to “Geographic and Temporal Scope”.

21. This section should also contain a subsection that addresses the “minimum” with regard to subbasins, existing permit-exempt wells and the 20-year horizon for future permit-exempt wells; as well as a separate subsection on other scales that discusses alternative geographic approaches and opportunities to address other past and future impacts, including the “in perpetuity” requirement of offsets.

Section 3.2.3: Minimum Planning Requirements

Subsection 3.2.3.1: Clear and Systematic Logic (pp. 7-8)

22. Please provide further explanation of how the adequacy of clear and systematic logic will be determined, and how Ecology will respond if it is dissatisfied with the adequacy of how planning groups arrived at their conclusions based on the assumptions they have made.

23. We suggest adding language similar to: “...the plans must thoroughly document the planning group’s understanding of that information, the potential sources and amounts of

uncertainty and how they affect the plan and the outcome, as well as the planning group's methods for reaching its conclusions."

Subsection 3.2.3.2: Delineate Subbasins (p. 8)

24. As mentioned above, this subsection should be incorporated into the earlier section on Geographic and Temporal Scope. Also, clarify that subbasins are specifically for the minimum requirement of in-kind/in-place analysis.

Subsection 3.2.3.3: Estimate New Consumptive Water Uses (p. 8)

25. For reasons explained in this letter, including that streams can't be restored without understanding and addressing existing uses, we recommend deleting "new" and changing this title to "Consumptive Water Uses".

26. For reasons explained herein, we recommend explaining the need for analyzing future permit-exempt consumptive water use, for estimating existing permit-exempt well consumptive water uses, and for estimating all consumptive water uses over the 20-year period.

Subsection 3.2.3.4: Evaluate Impacts from New Consumptive Water Use (p. 8)

27. The Guidance states that "In most cases it is anticipated that [it will be] reasonable to assume that the pumping effects of permit-exempt domestic wells on streamflow will be steady state". This is an unacceptable recommendation because it will tend to underestimate impacts in many if not most cases and result in under-mitigation. There is more pumping during the summer and early fall months that are critical for salmon. This section should be revised to recommend an assumption that maximum water seasonal water use occurs at the time of minimum instream flows. This is a conservative assumption that will be protective of streamflow. We recommend language to the effect, "To ensure protection of the resource, the analysis should assume that the maximum pumping effects of permit-exempt domestic wells will primarily affect streamflow during summer and early fall baseflow periods, since both generally occur at the same seasons, and this provides a conservative assumption to protect the resource."

28. A comment that pertains to this and other parts of the Guidance is the need for the Guidance to ensure a safety margin for mitigation. The concern is that effects of withdrawals cannot be undone easily if at all; and the effectiveness of mitigation is often uncertain and, at best, likely involves lag times in achieving implementation and benefits. Therefore, effects of withdrawals should be somewhat overstated and project benefits understated.

Subsection 3.2.3.5: Describe and Evaluate Projects for their Offset Potential (p.9)

29. We suggest that this topic be a new section that follows the sections on the assessment of impacts and NEB, rather than embedded in a sub-sub-sub-section.

30. Ecology should encourage broader, longer-term planning. For example, the Guidance suggests that projects with benefits beyond 20 years are less desirable than projects with benefits that decline or cease at 20 years. This should be reworded to clarify that longer-term benefits are more desirable than short-term benefits.

31. The following sentence should be deleted: “However, watershed plans are not required to include [projects that do more than offset new consumptive water use], and the planning groups are advised that should they opt to do so, they should be very cautious to understand that any work undertaken beyond the specific planning minimums increase risk that time, and funds, are spent on matters that will not necessarily yield a locally approvable or adoptable plan within the very tight timeframes of the law.” It should be replaced with:

Watershed plans must identify projects intended to offset impacts. Planning groups may, at their discretion, opt to identify projects in their plans that offset water use and anticipated effects beyond those associated with existing, unmitigated permit-exempt wells and new consumptive water use by permit-exempt wells initiated over the next 20 years. However, watershed plans are not required to include such projects, and the planning groups are encouraged to identify projects that address future cumulative water use. Planning groups should consider that work undertaken beyond the specific planning minimums increase the use of limited time and funds. However, a broad and robust plan may be necessary to yield a locally approvable or adoptable plan.

A. Project Description (p. 9)

32. The following sentence is confusing: “Ecology recommends that planning groups evaluate project benefits both in terms of how estimated consumptive use will impact flows, and how those changes, will translate into effects on instream resources.” We suggest something like, “Ecology recommends that planning groups evaluate project benefits both in terms of how the project addresses the estimated consumptive uses that impact flows, and how the project provides benefits to instream resources.”

33. In the list of information for each project: (1) add “Quantification of the flow offset benefits”; (2) add “Metrics to measure success and a monitoring strategy to collect data for those metrics”; and (3) replace “Descriptions of the species, life stages and specific ecosystem structure, composition, or function addressed” with “Descriptions of how the project affects: species at different life stages; and ecosystem structure, composition, and function”.

B. Examples of Projects (pp. 9-10)

34. The section needs to be expanded and moved to an appendix. It oversimplifies project types and does not mention many other project types.

35. The Guidance states, “Water Right Acquisitions. Ecology purchases water rights from willing sellers. . . .” This greatly oversimplifies the potential of this kind of project, which

can also involve partial changes of water rights to instream flow rights based on conservation, crop changes or other factors.

36. We suggest retitling “Other Water Offset Projects” to “Water infrastructure offset projects”. Also: (1) see our earlier comments for recommendations for better categories of projects; and (2) include stormwater infiltration projects and wastewater reclamation projects.

37. We suggest retitling “Non-water Offset Projects” to “Habitat projects with offset benefits”. Please see our earlier comments for recommendations of better categories of projects. Finally, we suggest revising the following to something like:

In addition to the projects needed to offset existing and new consumptive water use by permit-exempt wells, plans may include projects that protect or improve instream resources and replace a small consumptive quantity of water. These habitat offset projects can contribute to offsets and will also contribute toward achieving NEB”

38. Instead of stating “Projects that protect current habitats through riparian or upland conservation and management, or water conservation”, we suggest replacing with “Projects that provide benefits through riparian or upland conservation and management, or water conservation.” Protecting current habitats is a challenging metric to determine and needlessly limits projects to status quo conditions rather than restoring ecosystem function.

39. We suggest inserting a new bullet: “Projects that improve the quality or access to aquatic habitat”. Under this title, consider moving “Projects that reconnect areas with a gap between habitats such as fish barrier removal, or reconnection of off-channel habitat.” And, under this title, add: “Projects that improve the quality of aquatic habitat with water-related benefits, such as improved water quality or creating habitat refuges.”

C. Individual Project Evaluation (p. 10)

40. This section is confusing, contradictory and inconsistent with the law. The definitions of high and low priority contradict statements made elsewhere in the guidance and serve to limit the range of projects that could be considered. In particular, the definition of low priority is overly narrow and does not represent the full range of projects possible under the law.

D. Project Benefit Summation (p. 11)

41. We suggest replacing the following phrase “. . . 2) articulating any uncertainty that project benefits would occur. . . .” with “. . . articulating key uncertainties that affect the feasibility of project benefits and the probability that they would actually occur. . . .”

42. We suggest adding examples after “Planning groups must also include an assessment the degree of local support for projects” such as: “. . . including local treaty tribes,

private land owners, and governments that may be directly affected by or have some direct responsibility for project implementation, . . .”

43. We suggest adding to the bulleted list: “Permits or approvals required to implement projects”.

44. The following sentence is confusing: “The role of uncertainty in the offset estimates or non-water offset project benefits” as it is unclear how a “role” can “enhance or inhibit plan implementation”. We suggest starting with the phrase “Sources of uncertainty. . .”

E. Adaptive Management (pp. 11-12)

45. This discussion needs to be expanded to describe what adaptive management will look like in this context. We would expect it to include project success metrics, a monitoring program, and a process to check monitoring and adjust projects if needed.

Section 3.2.4: NEB Evaluation (pp. 12-13)

46. As mentioned above, this section should appear earlier in the Guidance and be a first-level section.

47. A document entitled “NEB guidance” should certainly contain more than slightly over one page about NEB for watershed plans under RCW 90.94.020 and .030. We suggest expanding this to better guide the planning group

48. Section 3.2.4.1: General NEB Methods and Considerations (p. 12)

49. The Guidance cites the WSU NEB technical supplement as a “reference”, but improperly diminishes its value. We believe that the document should be afforded greater importance, particularly if there is future confusion about NEB or the need to reconcile disagreements amongst the planning group or with Ecology’s determination of adequate NEB for adopting a plan. The discussion of NEB in the supplement is well-documented and its statements about ecological function make more sense than the Guidance. Accordingly, the Guidance should highlight Appendix C as an important resource that should be relied on by Ecology and the planning groups to evaluate NEB.

50. The Guidance suggests that it is acceptable that some projects will meet NEB but others will not. If Ecology finds it acceptable that only some projects will be fully implemented, this leaves open the possibility that only poor projects will be implemented and NEB will not be met. Accordingly, to meet the letter and spirit of the law – i.e., “actions identified in the plan . . . will result in a net ecological benefit to instream resources” – the Guidance should state that NEB will be met only when every identified project individually meets NEB.

Section 3.2.4.2: Specific Elements of an NEB Evaluation (p. 12)

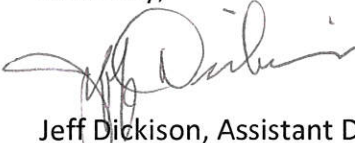
51. The descriptions in this section should not limit NEB to an assessment of only water quantity. This improperly interprets the term “ecological”.

Appendix A – ESSB 6091 – Recommendations for Water Use Estimates; Appendix B – Considerations for Evaluating Hydrologic Impacts by and Offsets for Permit-Exempt Domestic Wells. These documents improperly restrict water use estimate and impacts evaluation methodologies to new permit-exempt domestic wells. As described in this letter and our previous letters, that is inconsistent with RCW 90.94.020 and .030 by being overly restrictive.

We would like to conclude with a reminder that the legislative intent of RCW 90.94 was to “...develop and implement plans to restore streamflow to levels necessary to support robust, healthy, and sustainable salmon populations.” We encourage Ecology to make this an overarching theme of the guidance.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Dickison", with a stylized flourish at the end.

Jeff Dickison, Assistant Director
Squaxin Island Natural Resources Department