



State of Washington
DEPARTMENT OF FISH AND WILDLIFE

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January 17, 2020

Via Electronic Submission

Ms. Annie Sawabini
Department of Ecology
Water Resources Program
PO Box 47600
Olympia, WA 98504-760

Re: WDFW Comments on Proposed Rule Language and Rule Supporting Document for WAC 173-501

Dear Ms. Sawabini:

The Washington Department of Fish and Wildlife (WDFW) appreciates the opportunity to comment on the Washington Department of Ecology's (Ecology) draft rule amendment to Chapter 173-501 WAC. The availability of adequate streamflows in the Nooksack watershed is essential to the recovery of salmonids, which play an important ecologic, economic, and cultural role in this watershed and in ocean fisheries and ecosystems. These fish are imperiled; the *WRIA 1 Salmonid Recovery Plan* identifies only three of the 25 salmonid stocks in the Nooksack as "healthy."¹ In 1985, Ecology, in close coordination with WDFW, took an important step toward the protecting salmonids in the Nooksack through the creation of the instream flow rules contained in Chapter 173-501 WAC. Unfortunately, despite these protections, streamflows in the Nooksack watershed frequently fall below the levels necessary to support salmon recovery efforts.² It is in this context that we view the amendment to the Nooksack instream flow rules. The Nooksack rule amendment was developed to fulfill the requirements of the Streamflow Restoration law enacted by the legislature in 2018 and codified primarily under 90.94 RCW. The law seeks to address the impacts of rural development on surface waters protected by rule through the establishment and implementation of a program to protect and enhance streamflows. After considerable effort, and in the face of an extremely tight, legislatively-mandated deadline, the watershed planning group in the Nooksack watershed was unable to approve the watershed plan addendum required by 90.94.020 RCW, thereby triggering the rulemaking requirement of subsection 7(a). WDFW is concerned that the proposed rule language does not provide certainty of adequate streamflows for salmon and steelhead recovery, and it may fall short of meeting the requirements of RCW 90.94.020.

¹ Water Resources Inventory Area 1 Salmon Recovery Funding Board. *WRIA 1 Salmonid Recovery Plan*. (2005), 2.

² WA Dept. of Ecology. *Draft Rule Supporting Document Chapter 173-501 WAC*. (2019), 19.

More specifically, WDFW is not confident that the rule will offset impacts to protected surface waters from future residential, permit-exempt well use and provide a Net Ecological Benefit because:

- 1) The streamflow benefits of many of the projects described in the rule-supporting document are extremely uncertain;
- 2) The project descriptions contained in the rule-supporting document lack sufficient detail to adequately assess their ecological benefits and may result in unintended, detrimental impacts to salmon and aquatic resources; and
- 3) Some subbasins have projected impairments to streamflows without containing a single beneficial project or action.

A regulatory approach (i.e., described in rule) to offsetting the consumptive use impacts associated with future residential, permit-exempt well use would best support the recovery of robust, healthy, and sustainable salmon populations.

WDFW is concerned that there is no regulatory requirement to offset future residential, permit-exempt well use embodied in the rule amendment. Ecology created a rule-supporting document to articulate the requirements of 90.94.020 RCW when the law specifically instructs Ecology to meet these requirements in rules.³ We view this explicit requirement as expressing the legislature's intent for a regulatory framework that ensures impacts will be offset with actions. Rule requirements that go unsatisfied have consequences; statements contained within rule-supporting documents do not. We find this distinction significant in the ability of this rule to address the requirements of 90.94.020. In its CR-102 rulemaking filing, Ecology articulates the requirements of RCW 90.94.020 as:

- 1) Estimate 20 years of projected consumptive water use of new permit-exempt domestic withdrawals in WRIA 1
- 2) Develop a set of projects and actions that will offset the estimated consumptive water use and result in a Net Ecological Benefit in the WRIA; and
- 3) Amend and add regulations necessary for implementing these projects and actions.

We do not believe that these objectives have been achieved by the proposed rule language. As it is currently configured, the rulemaking does not require new consumptive uses under RCW 90.94 to be offset by *any* projects or actions. Considering the investments made by WDFW and others during the streamflow restoration planning process, and in other salmon recovery and ecosystem restoration and protection processes, we hope to see greater assurances that the important restoration work contemplated by the law will be implemented, along with greater certainty that the desired benefits from that work be realized. Successful restoration of streamflows and instream resources is most certain when a regulatory framework is in place that requires projects and actions to restore and enhance the resource.

³ The Streamflow Restoration law directs Ecology to “adopt rules for that [Nooksack] water resource inventory area that meet the requirements of this section [RCW 90.94.020] by August 1, 2020.”

Water benefits used to offset impacts should be identified and quantified in a transparent, scientifically rigorous way, and include documentation and justification of key scientific methods used.

As we understand the proposed rulemaking, Ecology seeks to offset the impacts from future residential permit-exempt use and create a Net Ecological Benefit through two strategies. One is reducing future impacts through the adoption of a new regulation establishing a conservation standard for indoor domestic water use of 500 gallons per day. The other strategy is the prioritization of specific projects that have the ability to directly offset streamflow impacts by adding water back into the system or the ability to otherwise provide an ecological benefit. WDFW is concerned that the quantified streamflow benefits claimed for some projects are overstated. Overstating the benefits of these projects may result in future impacts to salmonids in the watershed and sets a confusing precedent for streamflow restoration planning occurring elsewhere in the state. Within the rule-supporting document, some habitat restoration and conservation projects are characterized as having streamflow benefits commensurate with in-kind (water-for-water) projects. While some habitat restoration projects may benefit streamflows, the uncertainties inherent with these kinds of projects make it extremely difficult to accurately quantify those benefits. The project matrix on page 41 of the rule-supporting document states that with the implementation of just one habitat restoration project, enough water will be created to offset over 12,000 residences, or nearly six times the estimated rural residential, permit-exempt well use projected over the coming 20 years. Given the sparsity of detail provided about each project, we are unable to ascertain what methodologies were employed to calculate the stated water benefits and the assumptions that underlie those calculations. A transparent and scientifically robust description of these benefit estimates is critical to ensure that impacts are sufficiently offset.

The descriptions of the projects and actions within the rule-supporting document lack sufficient detail to adequately assess their fitness for inclusion in the streamflow restoration effort.

We believe the implementation of a suite of process-based projects, formulated specifically to restore streamflows and benefit instream resources, is the key to the success of the streamflow restoration effort occurring around the state. Many promising projects are named in the rule-supporting document; however, many projects are still in the conceptual stage and important details remain unresolved that will bear on their ability to improve instream resources. We are concerned about projects that may deliver short-term benefits, but carry long-term risks. Projects that pipe water out-of-basin may affect the ability of salmonids to imprint and return to their natal streams. “Pump and dump” projects that withdraw from declining aquifers as a means to augment streams can result in the very impacts we seek to minimize and offset. Like all Washington watersheds, the Nooksack contains many complex and interrelated biotic and physical systems, it is essential that projects be carefully crafted to avoid inadvertent detrimental impacts. We provided our preliminary comments specific to projects considered during the

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WRIA 1 planning process during fall of 2018 and would be happy to provide additional feedback on specific projects as proposals are refined.

Subbasins with projected streamflow impairments should be ameliorated by at least one ecologically beneficial project or action.

During the WRIA 1 planning process, the watershed was delineated into subbasins for the purpose of assessing the adequacy of the project list as compared to projected impacts. As described in the rule-supporting document, certain subbasins have projected impacts without proposed projects to offset those impacts. While we understand that RCW 90.94 allows consumptive quantities of water to be offset out-of-place, there should be, at the very least, habitat or other project types identified that provide benefits at the subbasin level to attenuate anticipated impacts.

Streamflow offset targets calculated for each subbasin should be established in rule.

This rulemaking in the Nooksack is the first of its kind and will likely set a precedent for any future streamflow restoration rulemakings. A primary challenge is to develop a rule that satisfies the requirements of RCW 90.94.020 without being cumbersome and difficult to administer. To this end, we suggest including water offset benchmarks, not associated with any specific project, into the rule. This avoids having specific projects required by rule, yet provides accountability to ensure that in-kind benefits successfully offset the estimated future residential permit-exempt impacts.

WDFW looks forward to continuing to advance streamflow restoration efforts in the Nooksack and elsewhere that support the recovery of threatened and endangered salmonids. We understand the deadline for rule approval is quickly approaching and offer our assistance if it is useful to you. Please do not hesitate to contact me if you have any questions. Thank you for considering these comments; we hope they prove to be useful as you finalize this rule.

Sincerely,



Megan Kernan
Streamflow Restoration Coordinator