



AWB Board

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January 7, 2020

Annie Sawabini
Department of Ecology - Water Resources Program
PO Box 47600
Olympia, WA 98504-7600

RE: Amendments to Nooksack Instream Flow Rule, Chapter 173-501 WAC

Dear Annie:

The Whatcom Ag Water Board (“AWB”) is a coalition of six irrigation districts established to address water supply, water quality, drainage, and other issues affecting agriculture in Whatcom County.

Adequate water supply is a critical to ensuring the viability of agriculture and protection of rural lands in Whatcom County. While the State Supreme Court’s *Hirst* Growth Management Act decision related to the use of exempt wells for new residential development, the decision and Legislature’s response in SB 6091 both implicate water issues for agriculture. Specifically, if projects and programs in the Nooksack Basin to offset new exempt domestic withdrawals follow the model in other areas of Washington State, the result will be the loss of agricultural water rights to groundwater mitigation. This would be an ironic result, given that one of the stated purposes of the *Hirst* litigation was the protection of rural agricultural lands and rural character.

For these reasons, the AWB has actively participated in identifying projects to offset new domestic water use. The AWB’s tributary flow improvement project was included by the Legislature as a Foster Pilot Project, and this project has been approved for initial funding by the Department of Ecology.

The proposed rule amendment will support the efforts of the AWB and other water resource stakeholders to implement beneficial water resource projects. Specifically, the language proposed for WAC 173-501-070 provides Ecology with the flexibility to approve new interruptible uses through the water right permit process, if the new use offsets potential instream flow impacts from exempt domestic water use, or restores and enhances streamflows. This authority would still be subject to the requirements of the water code, including review for impairment for both new water rights or changes to existing water rights.

The AWB does have concern that the language, as proposed, creates two different standards in WAC 173-501-070, and a standard that is higher than required by the water code. Under proposed .070(4)(a), a water use may be allowed if it “offsets potential impacts to instream flows associated by permit-exempt domestic water use,” whereas under proposed

.070(4)(b), a water use that is not proposed for the purpose of offsetting domestic uses is subject to a higher standard of “restores and enhances instream flows.” Neither the four-part test for new water rights in RCW 90.03.290, nor the test for water right changes at RCW 90.03.380 requires restoration or enhancement of instream flows as a permitting standard. Under the language as proposed by Ecology, a proposed use that fully protects (but does not restore or enhance) instream flows, but is not designed to offset exempt wells, could arguably not be approved. This result would be counter to the efforts of water resource stakeholders to ensure that proposed water uses protect instream flows.

The requirement in proposed .070(4) to “restore and enhance” instream flows reads as if the language in RCW 90.94.020(4)(c) directing Ecology to determine that the actions taken over 20 years will achieve a “net ecological benefit to instream resources” is being applied to agency permit decisions under Chapter 90.03 RCW.

The AWB suggests the proposed language in .070(4) be modified as follows:

(4) New interruptible uses may be approved from streams regulated under WAC 173-501-040 if the department determines through the water right appropriation procedure under chapter 90.03 RCW that the proposed use is consistent with:

(a) The intent of chapter 90.94 RCW to offset potential impacts to instream flows associated with permit-exempt domestic water use; or

(b) Applicable laws and would protect, restores, or ~~and~~ enhances streamflows.

The AWB appreciates the efforts of Ecology staff to work with our organization on water resource planning and project efforts that will benefit both agriculture and instream resources in Whatcom County.

Sincerely,



Scott Bedlington, President
Ag Water Board

cc: Senator Doug Ericksen
Representative Luanne Van Werven
Representative Sharon Shewmake
NWRO Ecology Director Doug Allen
County Executive elect Satpal Sidhu