Whatcom County Association of REALTORS(R)

This comment is provided on behalf of the over 830 members of the Whatcom County Association of REALTORS(R). This comment is in addition to the many comments provided by individual members. The text of the comment is included here while the "official comment" on letterhead and signed by the Executive Officer/Gov't Affairs Dir. is in the PDF document attached.

January 17, 2020

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

RE: Proposed Nooksack River Instream Flow Rule Amendment – Water Resource Inventory Area 1
WSR 19-04-091; Chapter 173-501 Wash. Admin. Code

Ms. Sawabini:

On behalf of the over 830 members of the Whatcom County Association of REALTORS®, please consider the following comments on the above proposed rule amendment. It is the opinion of our members that this proposed rule is contrary to the spirit and intent of the Streamflow Restoration Act, that the rule will have devastating impacts on the rural lifestyle in Whatcom County, and that the evidence cited as support for this rule is erroneous.

At the outset, it is instructive to recall that WRIA 1/Whatcom County was at the very center of the controversy that resulted in the Washington Supreme Court decision in Hirst v. Whatcom County. That case, at its essence, was a Growth Management Case that concluded counties were no longer able to rely on Department of Ecology for a determination that utilizing permit-exempt wells for rural development was appropriate; counties must now make a separate determination that an building permit utilizing an exempt well for potable water did not impair senior water rights or a protected water body. The impact of that decision, particularly in Whatcom County, was extensive and devastating. Families were suddenly homeless, projects in-process were scrambling for allowable water sources, and the Whatcom County Assessor was poised to reduce rural land values using a 90% market reduction factor. Overnight, rural households went from pursuing the American dream to living a Washington nightmare.

After nearly fourteen months of laboring under a construction moratorium imposed by the Whatcom County Council, and with the assistance of our state legislative delegation and the excellent input from our State Association's water counsel, we celebrated the passage of Engrossed Substitute Senate Bill 6091, the legislation to be entitled the Streamflow Restoration Act. The prospect of local stakeholders debating and deciding on the appropriate use of local resources was a welcome challenge, one that many of us accepted eagerly. Unfortunately, after months of work, the Planning Unit did not successfully present a WRIA 1 Watershed Plan update to the County Council and the process shifted to Ecology.

Metering: At the outset, the Association notes that Ecology's or Whatcom County Council's authority to meter wells is undisputed. While we understand that Ecology wanted to reassert its

power to issue a metering order at any point, it seems unnecessary to raise a controversial topic in a rule amendment when Ecology does not appear ready to issue such an order. Including that language in this amendment only serves to fuel rhetoric and enflame passions. We would suggest removing that language as Ecology's authority to implement metering is without question and does not bear special mention in a rule specific to WRIA 1.

Titles: It is interesting at the outset to note that Ecology extensively relies on the titles of Rev. Code Wash. § 90.94 as justification for a focus on stream flows and habitat restoration. Several times during the public hearing, staff would rely on the fact that the "crux of the statute" was to ensure that adequate stream flows are maintained balanced against development in rural areas. The original title of ESSB6091, however, was entitled "AN ACT Relating to ensuring that water is available to support development . . .." ESSB 6091, pg 2 (2018). There is no mention in the title about streamflow restoration or habitat restoration. That is not to say that those considerations are not important as they are clearly established in the section, but Ecology's focus in this rulemaking proceeding is clearly and overwhelmingly focused on streamflow restoration and habitat; water use by rural households is clearly a secondary consideration in this process and, as a result, leads to an absurd result.

Domestic Use: A review of any legal authority involving rulemaking reveals one indisputable truth: words matter. Precision in language is the hallmark of a well drafted administrative rule. Similarly, administrative rules should seek to utilize the same language of an authorizing statute to ensure consistency and to avoid any implications that the agency may be exceeding any delegated legislative authority. This rule amendment does not meet this basic standard.

The rule amendment relies heavily on the term "domestic" and creates two categories for regulation: "indoor domestic water use" and "outdoor domestic water use." This is a dichotomy that is not supported in the applicable statutes.

Ecology's supporting document relies exclusively on a single Washington Supreme Court Case, Dept. of Ecology v. Cambell & Gwinn, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002), as justification for the expansive use of the term "domestic" in this rule amendment. Cambell, according to the court itself, "involves the scope of the exemption for "any withdrawal of public ground waters ... for single or group domestic uses in an amount not exceeding five thousand gallons a day." RCW 90.44.050." Id. at 9, 43 P.3d at 10 (emphasis added). The court, analyzing the number of residential connections available on a single permit-exempt well for domestic purposes, ultimately concluded that if more than a single residence connected, the total withdrawal by those homes for domestic purposes could not exceed the 5,000 gallon per day limit expressed in Rev. Code Wash. § 90.44.050. Id at 21, 43 P.3d at 15. What is interesting to note is that nowhere in Dept. of Ecology v. Campbell does the court discuss any other exemption within the exemption clause of Rev. Code of Wash. § 90.44.050.

The most interesting aspect of Ecology's "Supporting Document" analysis of "domestic" is not the use of Dept. of Ecology v. Campbell, but the fact that Ecology even cites a subsequent case that confronted head-on the exemption clause of Rev. Code of Wash. § 90.44.050, but then completely ignores the implications of that Washington Supreme Court ruling. If that were not egregious enough, the Department also ignores guidance provided in a subsequent Attorney General's opinion on the matter that explicitly analyzed the various exemptions contained in the exemption clause of Rev. Code of Wash. § 90.44.050. Presentation of a legal analysis to the public that, at best, contains only one-half of an analysis of the relevant statutory and case law (no applicable policy documents are cited) under the guise of "harmonizing" is a disservice to the public subject to this law. Ecology has not harmonized anything, but instead has merely attempted to use various parts of Rev. Code of

Wash. § 90.94 in an effort to make a new administrative definition of the term "domestic."

This omission is even more egregious when one considers that Ecology, in its own supporting document, makes reference to various other WRIAs for guidance on the drafting of this rule. While the vast majority of those recent WRIA rulemaking proceedings do not address "domestic use" in any format, one WRIA does: Dungeness (WRIA 8) adopted in 2013. Ecology Supp. Doc., pg. 15-16. Ecology explicitly recognizes in its summary of that WRIA rule, "Domestic use is defined as indoor use only, with outdoor use separate." Id. The Dungeness rule was, perhaps, one of the most contentious and thoroughly examined rulemaking process in recent memory, a process in which our REALTOR® colleagues were intimately involved. Yet, Ecology ignores clear precedent in terms of distinctions between indoor and outdoor use in that rule, a rule citied as authority in another aspect of the immediate proceeding, and takes an entirely different tack by combing the separate uses. Again, this omission is beyond comprehension when the distinction between indoor and outdoor use is clearly expressed in the supporting document for WRIA 8.

Regulation of public groundwater within Washington State is governed by Rev. Code Wash. §§ 90.44.020 et seq. The general rule is that any withdrawal of groundwater requires a permit with four express exceptions: 1) stock watering; 2) "the watering of a lawn or of a noncommercial garden not exceeding one-half acre in size;" 3) "single or group domestic uses in an amount not exceeding more than 5,000 gallons a day" or 4) industrial purposes not exceeding 5,000 gallons per day. Rev. Code Wash. § 90.44.050 (2018). The applicable clause in Rev. Code Wash. § 90.44.050 (2018) is commonly referred to as the "exemption clause." See, Five Corners Farmers v. Ecology, 268 P.3d 892, 898, 173 Wn. 2d 296, 306, ¶ 15 (2011). The Washington Supreme Court relied on prior Attorney General opinions that reached similar conclusions concerning the appropriate interpretation of this statute. See, e.g., WA AGO 2005 No. 17 (Nov. 18, 2005). "Each category is limited only by the qualifying phrase following it." Five Corners Farmers, 268 P.3d at 901, 173 Wn. 2d at 313, ¶ 28.

This rule contradicts the separate categories of outdoor watering and domestic water by conflating "single or group domestic uses" with "watering of a lawn or noncommercial garden not exceeding one-half acre in size." This attempt is even more blatant in that the statute uses the word "domestic" to reflect one type of use and "watering" to denote an outdoor use. This is a sophisticated statute, one that is complex and relies on different words to distinguish between very different uses.

The distinction between domestic uses and watering uses is also reflected in the Streamflow Restoration Act. A careful review of that statute reveals that the legislature restricted its discussion related to withdrawals to "domestic" uses; the legislature made no reference to watering of lawns or gardens. "[P]otential impacts on a closed water body and potential impairment to an instream flow are authorized for new domestic groundwater withdrawals exempt from permitting under RCW 90.44.050." Rev. Code Wash. § 90.94.020(1) (2018) (Emphasis added). "This section only applies to new domestic groundwater withdrawals exempt from permitting under RCW 90.44.050 . . . and does not restrict the withdrawal of groundwater for other uses that are exempt from permitting under RCW 90.44.050." Rev. Code Wash. § 90.94.020(8) (2018) (Emphasis added). It is axiomatic that the legislature is aware of prior enactments when adopting new statutes and, when the legislature uses different words to characterize different uses, that the legislature's intent is clear that a different result should occur. Here, if the legislature wanted to include "watering" as a use combined with "domestic" uses, it could have easily done so. That distinction, however, is one that the legislature clearly intended to be limited to domestic uses and, indeed, specifically refused to address the other uses in the exemption clause.

Science: Numerous Association members attended the open houses scheduled for late April in Whatcom County. Many members' questions focused on the need for such a drastic reduction in the amount of water authorized for withdrawal under the preliminary rule. The answer, provided, was that recent rulemakings in other WRIAs supported the reduction as did the Department's research. When we told the representatives that we did not see how that conclusion was supported, we were told to "present other science." The sparse description of Ecology's research in the preliminary draft supporting document, unfortunately, does not explain why such a drastic reduction was necessary for this WRIA.

First, the only description applicable to other WRIAs and WRIA 1 appears to be proximity in time. "In order to develop water use standards for the new permit-exempt wells, Ecology looked at other water use standards, descriptions, and assumptions established for domestic permit-exempt wells in recent instream flow rules in other WRIAs in Washington." Rule Supp. Doc. pg. 9. The next paragraph states that these are post-2001 rules, that the rules are not uniform, and that withdrawal limits were based on location or other conditions. While this is interesting information, there is no attempt by the Department to describe those considerations how the Department utilized those considerations in the WRIA 1 analysis. To then foist the "burden of proof" on the public to bring better information is not only an abdication of Ecology's role in this process, but is patently unfair in that it requires the public to then prove that a reduction from the statutory amount is not warranted. In any event, the Association shall try.

WRIA Comparison: The Association reviewed the various recent rules cited by the Department. Aside from the bare information available from various Ecology websites, it is impossible for laypersons to delve into those rules and perform an adequate comparison. What was possible, however, was to discuss the impacts that these recent rules have had on members of other Associations who work in and have a familiarity with the impacts created by those rules.

The most drastic comparison is available for WRIA 18, Dungeness, as the Association there was intimately involved in the process of developing the rule and there has been significant litigation about that rule. The Washington Court of Appeals dedicated an entire segment in its opinion concerning the WRIA 18 to describing the condition of the Dungeness basin saying:

Because of water scarcity, DOE determined that surface water was not reliably available for new consumptive uses in the basin. The rule closed year-round eight specific tributaries as well as all unnamed tributaries to the Dungeness River. [Citation omitted.] It also closed the Dungeness River mainstem between July 15 and November 15 every year [Citation omitted.]

Bassett v. Ecology, 51221"II, pg. 4 (Wash. App. Ct., Div. 2, April 2, 2019) The picture depicted in the Dungeness rule is one of a stressed watershed in which there has been obvious over appropriation in most if not all surface water bodies.

It should also be noted that the Dungeness, as a matter of geography, does not receive nearly the same amount of precipitation or runoff that the Nooksack River receives. Similar conditions as the Dungeness exist for the Quilicene-Snow (WRIA 17).

Ecology's preliminary rule includes amendments to the current Nooksack Instream Flow rule. What is interesting to note is that there are no amendments proposed to the seasonal or year-round closures contained in that rule. Indeed, the mainstem of the Nooksack river is not proposed to be closed at all and only two "forks" of the river, the North and South Fork are closed for two and four months respectively. This is made more interesting by Ecology's own Figure 4.1 that demonstrates

that offset volumes in this rule are predominantly in the North Fork (21 acre feet/year), which is only closed two months of the year while the South Fork, which is closed 4 months of the year, is expected to only require 4 acre feet/year of offset. These numbers are even less when you account for the fact that Ecology used a 1.5 multiplier to calculate these volumes meaning the actual offset for the North and South forks are 14 afy and 2.6 afy respectively. The Middle Fork, which has even less offset required, is not proposed for closure at all. Tributaries to the Nooksack, according to the rule are either closed or seasonally closed at a ratio of approximately 46% to 54% respectively, a vast difference from the Dungeness where all tributaries are closed.

The two most recent rules in close physical proximity to WRIA1 are WRIA 3 (Skagit) and WRIA 5 (Stillaguamish). The Skagit basin has been closed to all groundwater withdrawals since the Washington Supreme Court's ruling favoring the Swinomish Nation, so no definitive conclusions may be drawn from that rule. WRIA 5, however, does not contain a gallon limitation on new groundwater withdrawals that are shown to not have a hydraulic connection to surface waters. Likewise, the other WRIAs listed in the supporting documents do not have withdrawal limits save those located on the peninsula or in the arid WRIA near Walla Walla (WRIA 32) which has a limit nearly two and one-half times that proposed for WRIA 1.

Definition of "Domestic": It should also be noted for completeness that no WRIA cited as support for this rule reduces the size of the land available for outdoor water as is proposed in the WRIA 1 rule and, moreover, the rules do not contain consistent definitions of the term "domestic." As mentioned above, words matter in the administrative rule context and effective rulemaking relies on consistent interpretation and application of identical words. Even "domestic" definitions that include outdoor uses attempt to draw the distinction between the two in an attempt to give credence to the exclusion clause of Rev. Code Wash. § 90.44.050 (2018). Ecology should take this opportunity to use a clear, succinct definition of the term "domestic" to only include water for usual and customary household uses as are identified in other WRIA rules. Ecology should avoid, at all costs, any definition that would blend or otherwise confuse the clear delineation of uses provided by the legislature as set forth in Rev. Code Wash. § 90.44.050.

Meeting Instream Flows: Ecology includes as support for the proposed rule a graph demonstrating the percentage of time instream flows are not met for the Nooksack River. Sup. Doc. Figure 3.1, pg. 10. The most interesting conclusion to be drawn from that graph is not the percentage of time that instream flows are not met, but the consistency with which the data points on that graph are tightly concentrated and the trend is not capable of any other interpretation as it is clearly similar.

When one considers that those data points represent monthly readings over a nearly 50-year period, a period of time when the population of Whatcom County has very nearly tripled, the flow rates year-to-year have remained uncannily consistent to within a few percentage points. If the impact from permit exempt wells from an increased rural population were to be significant to this discussion, it would necessarily follow that there would be a demonstrated change in the percentage of time flows are not met. This is not supported by the evidence cited by Ecology.

Impermissible Use of Statutes: Ecology also includes a disturbing discussion wherein it asserts as follows in relevant part:

The new domestic water use standards in RCW 90.94 were not uniform across the 15 WRIAs specified in the law.
* * *
The WRIAs included in RCW 90.94.020 include a MAA of 3,000 gpd. The WRIAs included in

RCW 90.94.030 include a MAA of 950 gpd, reduced during drought to 350 gpd for indoor use only and for maintaining a fire control buffer during drought.

Sup. Doc. pg 9. The determination by an administrative agency that two separate statutory provisions that contain explicit language on withdrawal limitations for separate categories of WRIAs should be interpreted together to support a 80% reduction from the statutory limit expressly stated for a WRIA is baffling. Had the legislature intended that WRIAs in Rev. Code Wash. § 90.94.020 would be subject to lower limitations similar to those in Rev. Code Wash. § 90.94.030, the legislature would have blended the two together, most likely in a single statutory provision. We are not allowed to guess about legislative intent, however, and this is not what the legislature clearly stated.

What is more disturbing is that Rev. Code of Wash. § 90.94.020 actually provides that rules should specify "[s]tandards for water use quantities that are less than authorized under REC 90.44.050 or more or less than authorized under subsection (5) of this section for withdrawals exempt from permitting." There is absolutely no evidence in the supporting document that Ecology sought to evaluate whether a withdrawal amount between the 5,000 gpd in 90.44 and the 3,000 gpd MAA in Rev. Code Wash. § 90.94 et seq. is appropriate. It would appear that Ecology has abandoned such an evaluation in favor of a cookie-cutter approach to WRIA rules when the legislature clearly intended that different WRIAs would be evaluated in the context of differing circumstances.

Ecology's own Policy Document, POL-2094, cited in the Supporting Document, clearly delineates the different standards for watersheds listed in the Act. Ecology, on page 4 of POL-2094, apparently limits determinations of drought and rules applying to declared drought emergencies to WRIAs listed in Rev. Code Wash. § 90.94.030. Section 5 of the policy document states:

For WRIAs listed in RCW 90.94.030:

Where applicable, record withdrawal curtailment during drought emergencies on affected properties.

Streamflow Restoration Policy and Interpretive Statement, POL-2094, pg 4 § 5, (2019). Ecology also makes a distinction on the types of rules Ecology will adopt depending on whether the WRIA is listed in Rev. Code Wash. § 90.94.020 OR § 90.94.030. The Policy Statement states in relevant part:

If a watershed plan has not been adopted by the prescribed deadline, Ecology is required to commence a rulemaking process under RCW 90.94.020 or 90.94.030.

• Ecology will not write a watershed plan update for WRIAs identified in RCW 90.94.020. As required under the law, Ecology will initiate rulemaking and develop rule supporting documents that meet the intent and requirements of RCW 90.94.020. At a minimum, the rule supporting documents will include: a WRIA-wide estimate of consumptive use from new permit-exempt domestic withdrawals over the planning horizon; a list of projects and actions that Ecology is reasonably assured could be completed to offset the consumptive use; and a NEB determination.

• For the WRIAs identified in RCW 90.94.030, Ecology will follow the procedures specified in RCW 90.94.030(3)(h). Ecology will submit the final draft plan to the Salmon Recovery Funding Board for a technical review, and provide recommendations to amend the final draft plan, if necessary. Ecology shall consider the recommendations and may amend the final draft plan without committee approval prior to adoption.

Id. at pg. 11 (emphasis added). Contrary to its own policy document, Ecology now combines the requirements of .020 and .030 to include a drought component to the WRIA 1 rule, a WRIA that is clearly excluded from .030, the only section that includes the mention of drought considerations. Yet, Ecology somehow "harmonizes" the sections, in direct contravention of its own policy document, to introduce a construct of "subsistence gardening" and restrictions should a drought emergency be declared. This is not only a gross misinterpretation of the statute, but a violation of Ecology's own stated policy.

Bertrand Creek: Ecology's supporting document contains much information about Bertrand Creek located in the North Central portion of Whatcom County. This water body, situated in the heart of the agricultural area of Whatcom County, is perhaps the most burdened water body in the entire WRIA. Accordingly, Bertrand Creek and its hydrology has been studies comprehensively and the particular circumstances of that body are well understood by environmentalists, agricultural groups, land use professionals, and even local scientists.

What is also interesting is that it is well known to persons in Whatcom County that a local respected hydrologist performed an evaluation on the effect of permit exempt wells in the Bertrand Creek watershed. That evaluation demonstrated that if 100 new permit exempt wells were constructed in the Bertrand Creek watershed, the impact on that stream would be negligible. Specifically, Mr. Lindsay writes:

The exaggerated maximum worst-case potential impact to flow in Bertrand Creek from the 100 wells would be around 0.38 afd (3.8 % of late summer flow) and the more realistic impact estimate, based on 350 gpd of use, is around 0.027 afd, or only 0.3 of late summer flow.
Assoc. Earth Sciences, Lindsay Memo, June 19, 2017, pg. 5 (Ex. "A"). Mr. Lindsay continues saying:
Even in areas of the proposed numerical model with high data density, and good calibration data (Bertrand Creek drainage), the extremely conservative estimate of maximum potential impact to surface water from the use of 100 permit-exempt wells will be significantly less than the lowest possible streamflow measurement error that will be used to calibrate the model. The more realistic potential impact of 0.027 afd is less than 6% of the potential error associated with the streamflow measurement data. Therefore, any simulated predicted impact to the stream based on this scenario would be statistically insignificant and not defensible.
Id. The conclusion from this modeling seems to oppose, diametrically, the conclusion that Ecology has suggested that further withdrawal limits are necessary. If 100 wells have a negligible impact on a highly appropriated water body, so negligible as to be almost undetectable, it is not possible that further restrictions WRIA-wide are necessary or warranted.
Projected Households are Inflated: Ecology has stated on numerous occasions that this rulemaking is informed by the work of the WRIA 1 Planning Unit during 2018. When asked how much of the research and work was utilized by Ecology in the development of this rule, the response at the open houses and public hearings was that virtually none of that work was allowed to be used by the Department. What is very interesting to note is that some of the work seems to have been "cherry picked" when it suits the Department's views, while other information has been cast aside.
An example of such "cherry picking" includes that list of proposed projects evaluated by the Planning Unit to support the offset of anticipated consumptive use of new construction during the 20-year planning cycle. At the initial public hearing, it was stated that only projects that had received some funding or were otherwise deemed "viable" were included in Ecology's evaluation and, because those projects did not adequately offset consumption, a conservation limit was

necessary. Yet, during the very next public hearing when a member of the public noted that fully-funded or partially-funded projects on the Planning Unit list exceeded anticipate consumptive use by a factor of nearly 2.5, the analysis suddenly changed to including projects in specific sub-basins and subsequent analysis using "adaptive management."

Later, another member of the public provided information that, contrary to the Planning Unit's estimate of permit-exempt connections, Whatcom County has only issued 31 permits in the first two years of the 20-year planning cycle. Stated another way, ten-percent of the planning period has passed and actual permits expressed as a percentage of anticipated permits is only 14%. If "adaptive management" were to play the significant role that Ecology purports it to play, would it not seem appropriate to realize that the Planning Unit's estimate of permit-exempt wells for domestic purposes would need to be reevaluated in light of the significant disparity concerning actual permits? Yet, in the face of evidence that Whatcom County is only meeting 14% of the anticipated need for permit-exempt wells, Ecology uses this as evidence that an extreme reduction in daily withdrawals is warranted. Such analysis defies explanation.

One example is the projected housing estimated to be constructed in the rural areas of Whatcom County in the next 20 years. Ecology utilized the Planning Unit's working number of 2,150 new homes over a twenty-year period, or approximately 107 new homes per year on average. What Whatcom County reported at the end of 2018, a number that has not been updated as of this writing, is that only 8 homes using permit-exempt wells had been constructed in Whatcom County during the first year of the planning period. The Association requested updated numbers as required to be kept by Whatcom County pursuant to Rev. Code Wash. § 90.94.020(5)(c) (2018), but the County has not responded. In any event, it would appear that the number of proposed households is not on track for the over 100/year as projected, but is something much less, a fact that was known to Ecology's representative during the Planning Unit process but apparently is ignored for purposes of this rulemaking proceeding. Current building permits should be evaluated and projections altered to closely approximate the real number of home that may be constructed during the planning period.

Reductions of Outdoor Watering Area: Similar to the discussion of exempt uses under the exclusionary clause of Rev. Code Wash. § 90.44.050(2018) concerning domestic use, it is unclear on what authority Ecology is relying to limit outdoor watering to 1/12 of an acre. It would appear that Ecology has taken the 3,000 gpd limit, divided that by 500 gallons, and made a determination that a Group "B" water system would only support six units. Using that six unit figure, Ecology then has divided the one-half acre outdoor watering limitation in Rev. Code Ann. § 90.44.050 (2018) to arrive at the 1/12 value.

As outlined in the "domestic" discussion above, the exclusionary clause sets forth four distinct and separate uses that are limited only by the qualifying language following each category, i.e., "domestic and industrial are limited to 5,000 gpd; outdoor watering is limited in terms of size (one-half acre); stockwatering is unlimited. Ecology is not permitted to simply amend a statute to fit an agenda without express legislative authority to do so. Accordingly, the preliminary rule should reflect the one-half acre limitation in the statute as written or Ecology should delineate the authority granted to it to make such an amendment to the statute, and amendment that is not obvious from the statutory language of either the groundwater or streamflow acts.

Fiscal Impact: Finally, the Association has discussed the implications of this rule on land values in rural Whatcom County with our real estate appraiser members. The results of their analysis also demonstrate additional hardship resulting from this rule.

The appraised each noted that values assigned to land take in a variety of factors, one of which is the availability of potable water necessary for construction. As a matter of appraisal principles, land that is constrained in some manner from neighboring properties must, accordingly, have less of a value than the value assigned to the unencumbered property. The reduction from 5,000 gpd to 3,000

gpd was not a significant reduction as the ability of most rural households to use that amount for domestic use was not substantially limited. However, the 80% reduction proposed in this rule from the 3,000gpd limit will be a significant factor that then implicates not only the operation of a household, but ancillary uses, likely a machine shop, that will not be possible. Such a limitation for rural households means, in essence, that the land cannot be put to the use customarily associated with a rural lifestyle. Accordingly, the market value of that property must be reduced.

The implications are immense. Lending institutions are required to value lending portfolios based on appraised value and, in turn, calculate financial reserves based on those values. A significant drop in the value of rural properties resulting from water limitations means that institutions will be required to revalue the portfolios, adjust reserve balances, and make future lending decisions based on the values established after the rule. The typical scenario will be that a rural household that has a loan on a property prior to construction will suddenly realize that the amount of additional borrowing power for construction is limited to new appraised value; the number will certainly be less and, in worst case scenarios, may be negative. Households that have financed land through personal loans or using lines of credit could suddenly find themselves having to provide additional collateral (property or cash) to the lender in order to secure that debt. The practical result is that, rather than preserving the rural lifestyle, we have added additional unnecessary burdens.

The Whatcom County Association of REALTORS®, together with our members and aligned organizations, remains committed to creating an amended instream flow rule for WRIA 1 that both meets our needs for water conservation, habitat restoration, and rural lifestyle preservation. The preliminary rule from Ecology will not achieve those goals. Accordingly, the Association requests that Ecology revise and propose a rule closely aligned with the significant legislative goals sought to be achieved through this legislation and that more closely balances the disparate interests fairly. If the rulemaking team has any questions concerning these comments, the Association is prepared to meet with Ecology at any time to further discuss our concerns.

Sincerely,

R. Perry Eskridge
Exec. Officer/ Gov't Affairs Dir.
Land Use Caucus Chair, WRIA 1 Planning Unit

cc: 42nd Leg. Dist.
Board of Directors
File
RPE/

WHATCOM COUNTY ASSOCIATION OF REALTORS®
founded 1956

January 17, 2020

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

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ESSB 6091, pg 2 (2018). There is no mention in the title about streamflow restoration or habitat restoration. That is not to say that those considerations are not important as they are clearly established in the section, but Ecology's focus in this rulemaking proceeding is clearly and overwhelmingly focused on streamflow restoration and habitat; water use by rural households is clearly a secondary consideration in this process and, as a result, leads to an absurd result.

Domestic Use: A review of any legal authority involving rulemaking reveals one indisputable truth: words matter. Precision in language is the hallmark of a well drafted administrative rule. Similarly, administrative rules should seek to utilize the same language of an authorizing statute to ensure consistency and to avoid any implications that the agency may be exceeding any delegated legislative authority. This rule amendment does not meet this basic standard.

The rule amendment relies heavily on the term "domestic" and creates two categories for regulation: "indoor domestic water use" and "outdoor domestic water use." This is a dichotomy that is not supported in the applicable statutes.

Ecology's supporting document relies exclusively on a single Washington Supreme Court Case, *Dept. of Ecology v. Cambell & Gwinn,* 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002), as justification for the expansive use of the term "domestic" in this rule amendment. *Cambell*, according to the court itself, "involves the scope of the exemption for "any withdrawal of public ground waters ... for single or group domestic uses in an amount not exceeding five thousand gallons a day." RCW 90.44.050." *Id.* at 9, 43 P.3d at 10 (emphasis added). The court, analyzing the number of residential connections available on a single permit-exempt well *for domestic purposes*, ultimately concluded that if more than a single residence connected, the total withdrawal by those homes *for domestic purposes* could not exceed the 5,000 gallon per day limit expressed in Rev. Code Wash. § 90.44.050. *Id* at 21, 43 P.3d at 15. What is interesting to note is that nowhere in *Dept. of Ecology v. Campbell* does the court discuss any other exemption within the exemption clause of Rev. Code of Wash. § 90.44.050.

The most interesting aspect of Ecology's "Supporting Document" analysis of "domestic" is not the use of *Dept. of Ecology v. Campbell*, but the fact that Ecology even cites a subsequent case that confronted head-on the exemption clause of Rev. Code of Wash. § 90.44.050, but then completely ignores the implications of that Washington Supreme Court ruling. If that were not egregious enough, the Department also ignores guidance provided in a subsequent Attorney General's opinion on the matter that explicitly analyzed the various exemptions contained in the exemption clause of Rev. Code of Wash. § 90.44.050. Presentation of a legal analysis to the public that, at best, contains only one-half of an analysis of the relevant statutory and case law (no applicable policy documents are cited) under the guise of "harmonizing" is a disservice to the public subject to this law. Ecology has not harmonized anything, but instead has merely attempted to use various parts of Rev. Code of Wash. § 90.94 in an effort to make a new administrative definition of the term "domestic."

This omission is even more egregious when one considers that Ecology, in its own supporting document, makes reference to various other WRIAs for guidance on the drafting of this rule. While the vast majority of those recent WRIA rulemaking proceedings do not address "domestic use" in any format, one WRIA does: Dungeness (WRIA 8) adopted in 2013. *Ecology Supp. Doc.*, pg. 15-16. Ecology explicitly recognizes in its summary of that WRIA rule, "Domestic use is defined as indoor use only, with outdoor use separate." *Id.* The Dungeness rule was, perhaps, one of the most contentious and thoroughly examined rulemaking process in recent memory, a process in which our REALTOR® colleagues were intimately involved. Yet, Ecology ignores clear precedent in terms of distinctions between indoor and outdoor use in that rule, a rule citied as authority in another aspect of the immediate proceeding, and takes

an entirely different tack by combing the separate uses. Again, this omission is beyond comprehension when the distinction between indoor and outdoor use is clearly expressed in the supporting document for WRIA 8.

Regulation of public groundwater within Washington State is governed by Rev. Code Wash. §§ 90.44.020 *et seq.* The general rule is that any withdrawal of groundwater requires a permit with four express exceptions: 1) stock watering; 2) "the watering of a lawn or of a noncommercial garden not exceeding one-half acre in size;" 3) "single or group domestic uses in an amount not exceeding more than 5,000 gallons a day" or 4) industrial purposes not exceeding 5,000 gallons per day. Rev. Code Wash. § 90.44.050 (2018). The applicable clause in Rev. Code Wash. § 90.44.050 (2018) is commonly referred to as the "exemption clause." *See, Five Corners Farmers v. Ecology*, 268 P.3d 892, 898, 173 Wn. 2d 296, 306, ¶ 15 (2011). The Washington Supreme Court relied on prior Attorney General opinions that reached similar conclusions concerning the appropriate interpretation of this statute. *See, e.g.,* WA AGO 2005 No. 17 (Nov. 18, 2005). "Each category is limited only by the qualifying phrase following it." *Five Corners Farmers*, 268 P.3d at 901, 173 Wn. 2d at 313, ¶ 28.

This rule contradicts the separate categories of outdoor watering and domestic water by conflating "single or group domestic uses" with "watering of a lawn or noncommercial garden not exceeding one-half acre in size." This attempt is even more blatant in that the statute uses the word "domestic" to reflect one type of use and "watering" to denote an outdoor use. This is a sophisticated statute, one that is complex and relies on different words to distinguish between very different uses.

The distinction between domestic uses and watering uses is also reflected in the Streamflow Restoration Act. A careful review of that statute reveals that the legislature restricted its discussion related to withdrawals to "domestic" uses; the legislature made no reference to watering of lawns or gardens. "[P]otential impacts on a closed water body and potential impairment to an instream flow are authorized for new domestic groundwater withdrawals exempt from permitting under RCW 90.44.050." Rev. Code Wash. § 90.94.020(1) (2018) (Emphasis added). "This section only applies to new domestic groundwater withdrawals exempt from permitting under RCW 90.44.050 . . . and does not restrict the withdrawal of groundwater for other uses that are exempt from permitting under RCW 90.44.050." Rev. Code Wash. § 90.94.020(8) (2018) (Emphasis added). It is axiomatic that the legislature is aware of prior enactments when adopting new statutes and, when the legislature uses different words to characterize different uses, that the legislature's intent is clear that a different result should occur. Here, if the legislature wanted to include "watering" as a use combined with "domestic" uses, it could have easily done so. That distinction, however, is one that the legislature clearly intended to be limited to domestic uses and, indeed, specifically refused to address the other uses in the exemption clause.

Science: Numerous Association members attended the open houses scheduled for late April in Whatcom County. Many members' questions focused on the need for such a drastic reduction in the amount of water authorized for withdrawal under the preliminary rule. The answer, provided, was that recent rulemakings in other WRIAs supported the reduction as did the Department's research. When we told the representatives that we did not see how that conclusion was supported, we were told to "present other science." The sparse description of Ecology's research in the preliminary draft supporting document, unfortunately, does not explain why such a drastic reduction was necessary for this WRIA.

First, the only description applicable to other WRIAs and WRIA 1 appears to be proximity in time. "In order to develop water use standards for the new permit-exempt wells, Ecology looked at other water use standards, descriptions, and assumptions established for domestic permit-exempt wells in recent instream flow rules in other WRIAs in Washington." Rule Supp. Doc. pg. 9. The next paragraph states that these

are post-2001 rules, that the rules are not uniform, and that withdrawal limits were based on location or other conditions. While this is interesting information, there is no attempt by the Department to describe those considerations how the Department utilized those considerations in the WRIA 1 analysis. To then foist the "burden of proof" on the public to bring better information is not only an abdication of Ecology's role in this process, but is patently unfair in that it requires the public to then prove that a reduction from the statutory amount is *not* warranted. In any event, the Association shall try.

WRIA Comparison: The Association reviewed the various recent rules cited by the Department. Aside from the bare information available from various Ecology websites, it is impossible for laypersons to delve into those rules and perform an adequate comparison. What was possible, however, was to discuss the impacts that these recent rules have had on members of other Associations who work in and have a familiarity with the impacts created by those rules.

The most drastic comparison is available for WRIA 18, Dungeness, as the Association there was intimately involved in the process of developing the rule and there has been significant litigation about that rule. The Washington Court of Appeals dedicated an entire segment in its opinion concerning the WRIA 18 to describing the condition of the Dungeness basin saying:

> Because of water scarcity, DOE determined that surface water was not reliably available for new consumptive uses in the basin. The rule closed year-round eight specific tributaries as well as all unnamed tributaries to the Dungeness River. [Citation omitted.] It also closed the Dungeness River mainstem between July 15 and November 15 every year [Citation omitted.]

Bassett v. Ecology, 51221-1-II, pg. 4 (Wash. App. Ct., Div. 2, April 2, 2019) The picture depicted in the Dungeness rule is one of a stressed watershed in which there has been obvious over appropriation in most if not all surface water bodies.

It should also be noted that the Dungeness, as a matter of geography, does not receive nearly the same amount of precipitation or runoff that the Nooksack River receives. Similar conditions as the Dungeness exist for the Quilicene-Snow (WRIA 17).

Ecology's preliminary rule includes amendments to the current Nooksack Instream Flow rule. What is interesting to note is that there are no amendments proposed to the seasonal or year-round closures contained in that rule. Indeed, the mainstem of the Nooksack river is not proposed to be closed at all and only two "forks" of the river, the North and South Fork are closed for two and four months respectively. This is made more interesting by Ecology's own Figure 4.1 that demonstrates that offset volumes in this rule are predominantly in the North Fork (21 acre feet/year), which is only closed two months of the year while the South Fork, which is closed 4 months of the year, is expected to only require 4 acre feet/year of offset. These numbers are even less when you account for the fact that Ecology used a 1.5 multiplier to calculate these volumes meaning the actual offset for the North and South forks are 14 afy and 2.6 afy respectively. The Middle Fork, which has even less offset required, is not proposed for closure at all. Tributaries to the Nooksack, according to the rule are either closed or seasonally closed at a ratio of approximately 46% to 54% respectively, a vast difference from the Dungeness where all tributaries are closed.

The two most recent rules in close physical proximity to WRIA1 are WRIA 3 (Skagit) and WRIA 5 (Stillaguamish). The Skagit basin has been closed to all groundwater withdrawals since the Washington Supreme Court's ruling favoring the Swinomish Nation, so no definitive conclusions may be drawn from that rule. WRIA 5, however, does not contain a gallon limitation on new groundwater withdrawals that

are shown to not have a hydraulic connection to surface waters. Likewise, the other WRIAs listed in the supporting documents do not have withdrawal limits save those located on the peninsula or in the arid WRIA near Walla Walla (WRIA 32) which has a limit nearly two and one-half times that proposed for WRIA 1.

Definition of "Domestic": It should also be noted for completeness that no WRIA cited as support for this rule reduces the size of the land available for outdoor water as is proposed in the WRIA 1 rule and, moreover, the rules do not contain consistent definitions of the term "domestic." As mentioned above, words matter in the administrative rule context and effective rulemaking relies on consistent interpretation and application of identical words. Even "domestic" definitions that include outdoor uses attempt to draw the distinction between the two in an attempt to give credence to the exclusion clause of Rev. Code Wash. § 90.44.050 (2018). Ecology should take this opportunity to use a clear, succinct definition of the term "domestic" to only include water for usual and customary household uses as are identified in other WRIA rules. Ecology should avoid, at all costs, any definition that would blend or otherwise confuse the clear delineation of uses provided by the legislature as set forth in Rev. Code Wash. § 90.44.050.

Meeting Instream Flows: Ecology includes as support for the proposed rule a graph demonstrating the percentage of time instream flows are not met for the Nooksack River. Sup. Doc. Figure 3.1, pg. 10. The most interesting conclusion to be drawn from that graph is not the percentage of time that instream flows are not met, but the consistency with which the data points on that graph are tightly concentrated and the trend is not capable of any other interpretation as it is clearly similar.

When one considers that those data points represent monthly readings over a nearly 50-year period, a period of time when the population of Whatcom County has very nearly tripled, the flow rates year-to-year have remained uncannily consistent to within a few percentage points. If the impact from permit exempt wells from an increased rural population were to be significant to this discussion, it would necessarily follow that there would be a demonstrated change in the percentage of time flows are not met. This is not supported by the evidence cited by Ecology.

Impermissible Use of Statutes: Ecology also includes a disturbing discussion wherein it asserts as follows in relevant part:

> The new domestic water use standards in RCW 90.94 were not uniform across the 15 WRIAs specified in the law.
>
> * * *
>
> The WRIAs included in RCW 90.94.020 include a MAA of 3,000 gpd. The WRIAs included in RCW 90.94.030 include a MAA of 950 gpd, reduced during drought to 350 gpd for indoor use only and for maintaining a fire control buffer during drought.

Sup. Doc. pg 9. The determination by an administrative agency that two separate statutory provisions that contain explicit language on withdrawal limitations for separate categories of WRIAs should be interpreted together to support a 80% reduction from the statutory limit expressly stated for a WRIA is baffling. Had the legislature intended that WRIAs in Rev. Code Wash. § 90.94.020 would be subject to lower limitations similar to those in Rev. Code Wash. § 90.94.030, the legislature would have blended the two together, most likely in a single statutory provision. We are not allowed to guess about legislative intent, however, and this is not what the legislature clearly stated.

What is more disturbing is that Rev. Code of Wash. § 90.94.020 actually provides that rules should specify "[s]tandards for water use quantities that are less than authorized under REC 90.44.050 or more or less than authorized under subsection (5) of this section for withdrawals exempt from permitting." There is absolutely no evidence in the supporting document that Ecology sought to evaluate whether a withdrawal amount between the 5,000 gpd in 90.44 and the 3,000 gpd MAA in Rev. Code Wash. § 90.94 *et seq.* is appropriate. It would appear that Ecology has abandoned such an evaluation in favor of a cookie-cutter approach to WRIA rules when the legislature clearly intended that different WRIAs would be evaluated in the context of differing circumstances.

Ecology's own Policy Document, POL-2094, cited in the Supporting Document, clearly delineates the different standards for watersheds listed in the Act. Ecology, on page 4 of POL-2094, apparently limits determinations of drought and rules applying to declared drought emergencies to WRIAs listed in Rev. Code Wash. § 90.94.030. Section 5 of the policy document states:

> For WRIAs listed in RCW 90.94.030:
>
> Where applicable, record withdrawal curtailment during drought emergencies on affected properties.

Streamflow Restoration Policy and Interpretive Statement, POL-2094, pg 4 § 5, (2019). Ecology also makes a distinction on the types of rules Ecology will adopt depending on whether the WRIA is listed in Rev. Code Wash. § 90.94.020 ***OR*** § 90.94.030. The Policy Statement states in relevant part:

> If a watershed plan has not been adopted by the prescribed deadline, Ecology is required to commence a rulemaking process under RCW 90.94.020 or 90.94.030.
>
> □ Ecology will not write a watershed plan update for WRIAs identified in RCW 90.94.020. As required under the law, Ecology will initiate rulemaking and develop rule supporting documents that meet the intent and requirements of RCW 90.94.020. At a minimum, the rule supporting documents will include: a WRIA-wide estimate of consumptive use from new permit-exempt domestic withdrawals over the planning horizon; a list of projects and actions that Ecology is reasonably assured could be completed to offset the consumptive use; and a NEB determination.
>
> □ For the WRIAs identified in RCW 90.94.030, Ecology will follow the procedures specified in RCW 90.94.030(3)(h). Ecology will submit the final draft plan to the Salmon Recovery Funding Board for a technical review, and provide recommendations to amend the final draft plan, if necessary. Ecology shall consider the recommendations and may amend the final draft plan without committee approval prior to adoption.

Id. at pg. 11 (emphasis added). Contrary to its own policy document, Ecology now combines the requirements of .020 and .030 to include a drought component to the WRIA 1 rule, a WRIA that is clearly excluded from .030, the only section that includes the mention of drought considerations. Yet, Ecology somehow "harmonizes" the sections, in direct contravention of its own policy document, to introduce a construct of "subsistence gardening" and restrictions should a drought emergency be declared. This is not only a gross misinterpretation of the statute, but a violation of Ecology's own stated policy.

Bertrand Creek: Ecology's supporting document contains much information about Bertrand Creek located in the North Central portion of Whatcom County. This water body, situated in the heart of

the agricultural area of Whatcom County, is perhaps the most burdened water body in the entire WRIA. Accordingly, Bertrand Creek and its hydrology has been studies comprehensively and the particular circumstances of that body are well understood by environmentalists, agricultural groups, land use professionals, and even local scientists.

What is also interesting is that it is well known to persons in Whatcom County that a local respected hydrologist performed an evaluation on the effect of permit exempt wells in the Bertrand Creek watershed. That evaluation demonstrated that if 100 new permit exempt wells were constructed in the Bertrand Creek watershed, the impact on that stream would be negligible. Specifically, Mr. Lindsay writes:

> The exaggerated maximum worst-case potential impact to flow in Bertrand Creek from the 100 wells would be around 0.38 afd (3.8 % of late summer flow) and the more realistic impact estimate, based on 350 gpd of use, is around 0.027 afd, or only 0.3 of late summer flow.

Assoc. Earth Sciences, Lindsay Memo, June 19, 2017, pg. 5 (Ex. "A"). Mr. Lindsay continues saying:

> Even in areas of the proposed numerical model with high data density, and good calibration data (Bertrand Creek drainage), the extremely conservative estimate of maximum potential impact to surface water from the use of 100 permit-exempt wells will be significantly less than the lowest possible streamflow measurement error that will be used to calibrate the model. The more realistic potential impact of 0.027 afd is less than 6% of the potential error associated with the streamflow measurement data. Therefore, any simulated predicted impact to the stream based on this scenario would be statistically insignificant and not defensible.

Id. The conclusion from this modeling seems to oppose, diametrically, the conclusion that Ecology has suggested that further withdrawal limits are necessary. If 100 wells have a negligible impact on a highly appropriated water body, so negligible as to be almost undetectable, it is not possible that further restrictions WRIA-wide are necessary or warranted.

Projected Households are Inflated: Ecology has stated on numerous occasions that this rulemaking is informed by the work of the WRIA 1 Planning Unit during 2018. When asked how much of the research and work was utilized by Ecology in the development of this rule, the response at the open houses and public hearings was that virtually none of that work was allowed to be used by the Department. What is very interesting to note is that some of the work seems to have been "cherry picked" when it suits the Department's views, while other information has been cast aside.

An example of such "cherry picking" includes that list of proposed projects evaluated by the Planning Unit to support the offset of anticipated consumptive use of new construction during the 20-year planning cycle. At the initial public hearing, it was stated that only projects that had received some funding or were otherwise deemed "viable" were included in Ecology's evaluation and, because those projects did not adequately offset consumption, a conservation limit was necessary. Yet, during the very next public hearing when a member of the public noted that fully-funded or partially-funded projects on the Planning Unit list exceeded anticipate consumptive use by a factor of nearly 2.5, the analysis suddenly changed to including projects in specific sub-basins and subsequent analysis using "adaptive management."

Later, another member of the public provided information that, contrary to the Planning Unit's estimate of permit-exempt connections, Whatcom County has only issued 31 permits in the first two years of the 20-year planning cycle. Stated another way, ten-percent of the planning period has passed and actual permits expressed as a percentage of anticipated permits is only 14%. If "adaptive management" were to play the

significant role that Ecology purports it to play, would it not seem appropriate to realize that the Planning Unit's estimate of permit-exempt wells for domestic purposes would need to be reevaluated in light of the significant disparity concerning actual permits? Yet, in the face of evidence that Whatcom County is only meeting 14% of the anticipated need for permit-exempt wells, Ecology uses this as evidence that an extreme reduction in daily withdrawals is warranted. Such analysis defies explanation.

One example is the projected housing estimated to be constructed in the rural areas of Whatcom County in the next 20 years. Ecology utilized the Planning Unit's working number of 2,150 new homes over a twenty-year period, or approximately 107 new homes per year on average. What Whatcom County reported at the end of 2018, a number that has not been updated as of this writing, is that only 8 homes using permit-exempt wells had been constructed in Whatcom County during the first year of the planning period. The Association requested updated numbers as required to be kept by Whatcom County pursuant to Rev. Code Wash. § 90.94.020(5)(c) (2018), but the County has not responded. In any event, it would appear that the number of proposed households is not on track for the over 100/year as projected, but is something much less, a fact that was known to Ecology's representative during the Planning Unit process but apparently is ignored for purposes of this rulemaking proceeding. Current building permits should be evaluated and projections altered to closely approximate the real number of home that may be constructed during the planning period.

Reductions of Outdoor Watering Area: Similar to the discussion of exempt uses under the exclusionary clause of Rev. Code Wash. § 90.44.050(2018) concerning domestic use, it is unclear on what authority Ecology is relying to limit outdoor watering to 1/12 of an acre. It would appear that Ecology has taken the 3,000 gpd limit, divided that by 500 gallons, and made a determination that a Group "B" water system would only support six units. Using that six unit figure, Ecology then has divided the one-half acre outdoor watering limitation in Rev. Code Ann. § 90.44.050 (2018) to arrive at the 1/12 value.

As outlined in the "domestic" discussion above, the exclusionary clause sets forth four distinct and separate uses that are limited only by the qualifying language following each category, *i.e.*, "domestic and industrial are limited to 5,000 gpd; outdoor watering is limited in terms of size (one-half acre); stockwatering is unlimited. Ecology is not permitted to simply amend a statute to fit an agenda without express legislative authority to do so. Accordingly, the preliminary rule should reflect the one-half acre limitation in the statute as written or Ecology should delineate the authority granted to it to make such an amendment to the statute, and amendment that is not obvious from the statutory language of either the groundwater or streamflow acts.

Fiscal Impact: Finally, the Association has discussed the implications of this rule on land values in rural Whatcom County with our real estate appraiser members. The results of their analysis also demonstrate additional hardship resulting from this rule.

The appraised each noted that values assigned to land take in a variety of factors, one of which is the availability of potable water necessary for construction. As a matter of appraisal principles, land that is constrained in some manner from neighboring properties must, accordingly, have less of a value than the value assigned to the unencumbered property. The reduction from 5,000 gpd to 3,000 gpd was not a significant reduction as the ability of most rural households to use that amount for domestic use was not substantially limited. However, the 80% reduction proposed in this rule from the 3,000gpd limit will be a significant factor that then implicates not only the operation of a household, but ancillary uses, likely a machine shop, that will not be possible. Such a limitation for rural households means, in essence, that the land cannot be put to the use customarily associated with a rural lifestyle. Accordingly, the market value of that property must be reduced.

The implications are immense. Lending institutions are required to value lending portfolios based on appraised value and, in turn, calculate financial reserves based on those values. A significant drop in the value of rural properties resulting from water limitations means that institutions will be required to revalue the portfolios, adjust reserve balances, and make future lending decisions based on the values established after the rule. The typical scenario will be that a rural household that has a loan on a property prior to construction will suddenly realize that the amount of additional borrowing power for construction is limited to new appraised value; the number will certainly be less and, in worst case scenarios, may be negative. Households that have financed land through personal loans or using lines of credit could suddenly find themselves having to provide additional collateral (property or cash) to the lender in order to secure that debt. The practical result is that, rather than preserving the rural lifestyle, we have added additional unnecessary burdens.

The Whatcom County Association of REALTORS®, together with our members and aligned organizations, remains committed to creating an amended instream flow rule for WRIA 1 that both meets our needs for water conservation, habitat restoration, and rural lifestyle preservation. The preliminary rule from Ecology will not achieve those goals. Accordingly, the Association requests that Ecology revise and propose a rule closely aligned with the significant legislative goals sought to be achieved through this legislation and that more closely balances the disparate interests fairly. If the rulemaking team has any questions concerning these comments, the Association is prepared to meet with Ecology at any time to further discuss our concerns.

Sincerely,

R. Perry Eskridge
Exec. Officer/ Gov't Affairs Dir.
Land Use Caucus Chair, WRIA 1 Planning Unit

cc: 42nd Leg. Dist.
Board of Directors
File

RPE/