



Washington State Senate

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December 4, 2019

Department of Ecology

DEC 10 2019

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

Water Resources Program

Re: Comments on proposed amendments to chapter 173-501 WAC (Nooksack WRIA)

Dear Ms. Sawabini,

The Department of Ecology's proposed amendment to the Nooksack basin instream flow rule is unlawful because it restricts water use for noncommercial lawns and gardens. The legislature did not authorize the department to restrict water use for noncommercial lawns or gardens under RCW 90.94.020, which is the statutory basis for your proposal to amend the rule. I am requesting that the department change its proposal by removing the restrictions on water use for noncommercial lawns and gardens.

I voted to approve the bill that created RCW 90.94.020 in part because it protects water use for noncommercial lawns and gardens and other permit-exempt uses. The pertinent provision reads:

"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."¹

This provision refers to RCW 90.44.050, where the meaning of an exempt domestic withdrawal is provided. That statute creates distinct categories of exempt uses, including a category for "domestic" use and another for noncommercial lawns and gardens of a certain size. The Washington Supreme Court confirmed this interpretation in *Five Corners Family Farmers v. State*, where it said that the exemption clause of RCW 90.44.050 breaks down into distinct categories, including any withdrawal of public groundwaters "for single or group *domestic* uses in an amount not exceeding five thousand gallons a day," or "for the watering of a lawn or of a noncommercial garden not exceeding one-half acre in area."² The legislature chose to apply RCW 90.94.020 to *domestic* uses, but not to other uses that are exempt under RCW 90.44.050,

¹ RCW 90.94.020(8) (emphasis added).

² *Five Corners Family Farmers v. State*, 173 Wn. 2d 296, 313 (2011) (emphasis added).

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such as the watering of a noncommercial lawn or garden. RCW 90.94.020 does not authorize the department to restrict water use for noncommercial lawns and gardens.

In its proposed rule, the department violates RCW 90.94.020 and *Five Corners Family Farmers* by combining indoor use and the watering of a noncommercial lawn or garden under a single category called "domestic" use. Please correct this problem by removing water use restrictions on noncommercial lawns and gardens from the final rule, and please include this letter in the administrative record for your rulemaking.

Sincerely,

A handwritten signature in blue ink that reads "Doug Ericksen". The first letter "D" is circled, and there is a small number "11" written inside the circle.

Senator Doug Ericksen
Ranking Member
Senate Environment, Energy and Technology Committee