



Washington State Senate

December 9, 2019

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

Re: Proposed instream flow rule amendment for chapter 173-501 WAC (Nooksack WRIA)

Dear Ms. Sawabini,

We are submitting this comment letter for the administrative record because the Department of Ecology is not implementing the *Hirst* fix legislation according to its terms.¹ As legislators who worked on, and ultimately supported, the bill that created the statutory authority underlying the proposed rule amendment for WRIA 1, we contend that your proposal does not comply with the law we enacted, for at least four reasons. The proposed rule unlawfully:

- Restricts water use on lawns and gardens
- Includes a drought-triggered water use restriction
- Deviates from the "maximum annual average" method of measuring water use
- Proposes to meter future water use

We offer a brief explanation on each point.

1. The proposed rule unlawfully restricts water use on lawns and gardens

The department's proposed rule creates a new category called "outdoor domestic water use"—which it defines as water used for noncommercial lawns and gardens—and then limits such use to an area not exceeding 1/12 acre.² But the department is not authorized to impose this restriction, because RCW 90.94.020 only applies to "domestic" use, and watering a lawn or garden is not a domestic use under the relevant statutes and case law.

¹ ESSB 6091 (2018), codified in part as chapter 90.94 RCW.

² For withdrawals serving a single connection, the proposal limits outdoor domestic water use to 1/12 acre. For group connections, outdoor domestic water use is limited to 1/12 acre, and may not exceed a total of 1/2 acre for the entire group.

RCW 90.94.020, the statute that is the legal basis for the rule amendment, only applies to domestic uses of water and does *not* restrict other permit-exempt uses set forth in RCW 90.44.050. This distinction is provided in RCW 90.94.020(8):

"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."³

Simply put, the proposed rule may not place restrictions on watering lawns and gardens, stock water, or water for industrial use, because those categories are "other" (not domestic) uses that are distinctly and separately categorized under RCW 90.44.050.

The department errs by lumping together indoor and outdoor use under the single heading of "domestic" use because the legislature and courts have established that domestic use and water for a lawn or garden do not belong in the same category. The legislature recognized this distinction by specifically citing the water use categories listed in RCW 90.44.050. Furthermore, this reading of RCW 90.44.050 is consistent with the interpretation of that statute as spelled out by the Supreme Court of Washington's landmark opinion in *Five Corners Family Farmers v. State*.⁴ The department's proposed rule contradicts RCW 90.94.020 and judicial precedent.

2. The proposed rule unlawfully includes a drought-triggered water use restriction

In addition to the restriction on watering lawns and gardens, the proposed rule amendment also erroneously authorizes the curtailment of water use while a drought emergency order is in effect. This curtailment provision is not authorized under RCW 90.94.020, because that statute does not contain any statutory direction to curtail water use during drought.

Conversely, a *different* statute—RCW 90.94.030—*does* authorize water curtailment during times of drought, but *only* in eight named WRIAs, *excluding* the Nooksack WRIA.⁵ The legislature deliberately authorized drought curtailment for the eight named watersheds in RCW 90.94.030, and deliberately did *not* include this authority for watersheds regulated under RCW 90.94.020. There is no statutory authority for a drought curtailment provision in an amended Nooksack rule because the Nooksack watershed is governed by RCW 90.94.020, not RCW 90.94.030.

3. The proposed rule unlawfully deviates from the "maximum annual average" method of measuring water use

The legislature understood that enacting RCW 90.94.020 might lead to some new restrictions on domestic water use following the local watershed plan update process, *but* the legislature also took great pains to ensure that any such limitations would *not* be measured on a rigid daily basis.

³ RCW 90.94.020(8) (emphasis added).

⁴ *Five Corners Family Farmers v. State*, 173 Wn. 2d 296 (2011).

⁵ Under RCW 90.94.030, drought curtailment is only allowed in the following watersheds: 7 (Snohomish); 8 (Cedar-Sammamish); 9 (Duwamish-Green); 10 (Puyallup-White); 12 (Chambers-Clover); 13 (Deschutes); 14 (Kennedy-Goldsborough); and 15 (Kitsap).

Unfortunately, the department's proposed rule establishes a hard-and-fast 500 gallons-per-day limit, explicitly contravening the maximum annual average limits specified in RCW 90.94.020.

The legislature established that the user of a new permit-exempt well may obtain approval for "a maximum annual average withdrawal of three thousand gallons per day per connection."⁶ This maximum-annual-average provision recognizes that daily water use may sometimes exceed the gallonage limit, but that this would be acceptable so long as the limit was not be exceeded on an average basis over the course of an entire year. The department's 500 gallons-per-day rule is therefore flatly inconsistent with the limit provided in statute.

4. The proposed rule unlawfully proposes to meter future water use

Furthermore, in its rule the department expressly reserves the right to require metering of future water use in the Nooksack watershed, yet the legislature never authorized this. In fact, RCW 90.94.040 limits metering under the *Hirst* fix legislation to a pilot project exclusively reserved for the area covered under the Dungeness water rule within WRIA 18, and the area in which the Kittitas County water bank program operates in WRIA 39. It should be obvious to the department and anyone else reading the law that this authorization for metering does not cover WRIA 1. The legislature did not authorize metering in the Nooksack watershed.

Thank you for considering these comments. We are very concerned that the department's proposed rule amendment is not consistent with the *Hirst* fix legislation, and that ignoring the legislature's prescriptions in this rulemaking will invite failure.


Sincerely,



Senator Jim Honeyford



Senator Judy Warnick



Senator Shelly Short

⁶ RCW 90.94.020(5)(f)(ii).