

WASHINGTON STATE DEPARTMENT OF ECOLOGY

Public Hearing Location:
Lynden Middle School
8750 Line Road
Lynden, Washington 98264

PUBLIC HEARING

JANUARY 8, 2020

RE: PROPOSED RULE FOR CHAPTER 173-502 WAC,
INSTREAM RESOURCES PROTECTION PROGRAM
NOOKSACK WATER RESOURCE INVENTORY AREA 1

PAGES 1 THROUGH 23

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1 MS. BALLARD: I'm Laura Ballard, Hearing
2 Officer for this hearing. This afternoon we're
3 conducting a hearing on the proposed amendments for
4 Chapter 173-501 WAC, Instream Resources Protection
5 Program, Nooksack Water Resource Inventory Area 1.

6 Let the record show that it is 3:40 on
7 January 8th, and this hearing is being held at Lynden
8 Middle School, Commons Area, Lynden, Washington.

9 Legal notices of this hearing were published
10 in the Washington State Register, December 4th, 2019,
11 Washington State Register Number 19-23-084. In
12 addition, notices of the hearing were emailed to
13 approximately 1,600 interested people. A press release
14 was issued on November 19th, 2019. And notice was also
15 published in the following papers on November 2nd:
16 Bellingham Herald and Skagit Valley Herald.

17 Ruth will be calling up people to provide
18 testimony in random. Once everyone who has indicated
19 that they wanted to testify has had the opportunity,
20 I'll open it up for others if time allows.

21 Comments should be about three minutes. When
22 you reach your 30 seconds, Barbara will display a
23 yellow circle. When your time is up, we will show a
24 red circle and the timer will sound. Please summarize
25 your comments so that the next person can come and

1 testify.

2 When you step up to the front, state your
3 name, and if you haven't given us contact information,
4 please do so. You can also provide this after the
5 hearing.

6 Please speak clearly so we get a good
7 recording of your testimony.

8 MS. BELL: Okay, what I'm going to do is call
9 up a person to testify and then also call out the name
10 of the next person so they are prepared to come up and
11 keep doing that as we go along.

12 So let's start with Rick -- I guess Maricle?
13 Apologies if I mispronounce your last name. How do you
14 pronounce it?

15 MR. MARICLE: Maricle.

16 MS. BELL: What is it?

17 MR. MARICLE: Maricle.

18 MS. BELL: Okay, great.

19 MR. MARICLE: But we respond to --

20 MS. BELL: Okay. And then after Rick, we'll
21 do Rick Meyer.

22 MR. MARICLE: Okay, I came to speak today
23 because I for 40 years have been growing a garden that
24 provides my family with all the vegetables they need
25 for the year. And two things about this rule concern

1 me in that regard.

2 One, I know that in dry periods to keep that
3 garden growing, I have to irrigate, and I will -- I've
4 estimated my typical irrigation on that is 1,000
5 gallons a day to keep that garden growing.

6 The second thing in this rule is that the
7 area you've allowed for gardens, not only includes the
8 garden, but also the landscaping that's required by the
9 County around the house, which means that 1/12th acre
10 is approximately the size of my garden, and so from the
11 standpoint of water to irrigate and available land
12 that's allowed to be used in that irrigation, your rule
13 does not allow a family to grow a garden to supply
14 vegetables for themselves for the year. It simply
15 doesn't -- and you've mentioned subsistence gardening.
16 It precludes subsistence gardening. Thank you.

17 MS. BELL: Are you Rick?

18 MR. MEYER: Yes.

19 MS. BELL: And then after Rick we'll have
20 Brad, Brad Hanks.

21 MR. MEYER: Hi, my name is Rick Meyer, and my
22 first comment is just to say that I think the
23 500-gallon-a-day limit is way too low, and I haven't
24 seen any justification for that particular number. I
25 have seen some documentation from other areas that I

1 know were considered where that number is considerably
2 higher, and I'd like you to consider increasing that
3 substantially.

4 I'm also concerned with the expanding of your
5 focus on outdoor domestic use and the use of the term
6 "harmonizing" and focusing on the law that says you can
7 set more specific guidelines in drought situations.
8 Expanding that from a drought situation to continual
9 use to me seems to be excessive and beyond the scope of
10 what should be addressed at this issue.

11 I'm also concerned with the size limit, if
12 you have the authority to do that, to focus on 1/12th
13 of an acre when in other areas of the legislation it
14 clearly seems to say that that should be at minimum a
15 1/2 acre.

16 Thank you for your time.

17 MS. BELL: Brad? After Brad, Max Perry.

18 MR. HANKS: Brad Hanks, Bellingham. Ecology
19 uses information from various WRIAs that have also
20 engaged in rule-making processes, and these WRIAs are
21 in the northern Puget Sound region and on the
22 Washington Peninsula. The only WRIAs with identical
23 proposed withdrawal limits are those on the Peninsula,
24 WRIAs that have drastically different watersheds
25 receiving less than 1/2 of the precipitation found in

1 the Nooksack Watershed.

2 The only local WRIA with a new rule is WRIA
3 5, Stillaguamish, and it has no withdrawal limitation,
4 domestic or otherwise.

5 The other WRIA used for this rule lies in the
6 Walla Walla region, WRIA 32, an arid region, and has a
7 withdrawal limit that is 2 1/2 times that of the
8 proposed withdrawal limit on the Nooksack.

9 At a minimum, the rule should be informed by
10 those WRIAs that exhibit similar precipitation amounts
11 and physical characteristics.

12 And thank you.

13 MS. BELL: Max Perry. I apologize for
14 getting this wrong. Henry?

15 MR. PERRY: Max Perry, Whatcom County. And I
16 just want to address that what exempt wells use and
17 what they return back into, in place, in time, into the
18 aquifer, into the water system.

19 As I mentioned last -- yesterday -- last
20 night, we've been there at our place for 50 years, and
21 I don't have the exact gallonage that Rick had, Rick
22 Maricle, but we do water. We do raise a garden and
23 keep everything going. But it's estimated that for our
24 indoor use that up to 90 percent -- or around 90
25 percent -- goes back into the septic tank, back into

1 the aquifer, back into -- by our place, Deer Creek,
2 that's just down the hill from us. And that most
3 exempt wells will use the same thing. They'll use
4 septic systems the same way, and so your septic systems
5 will go back into that, into the -- again, return back
6 into the ground for the indoor use.

7 So the irrigation use then is probably not as
8 efficient, but it's up to 70 to 75 percent efficient
9 for irrigation. Some evaporation on that.

10 So all that is saying is that the wells that
11 you're talking about for the next 20 years, the amount
12 of water consumed out of the system is negligible.
13 Most of the wells will have a septic system also, and
14 so it would be returning back into the aquifer.

15 So thank you.

16 MS. BELL: After Henry we'll have Skip.

17 MR. BIERLINK: I'm Henry Bierlink from
18 Lynden, representing the Ag Water Board. We're going
19 to be submitting some details of comments and testimony
20 in written form, but I just thought I'd summarize a
21 couple of points.

22 One is to commend you for providing a bit
23 more flexibility in a very rigid law that has often
24 been standing in the way of us doing some of the things
25 that make sense for both stream flows and for solving

1 some of the problems that we've had with unpermitted
2 water use over the number of years that we've been
3 working on it.

4 There are some issues in here that we think
5 that you're going to get trapped in yet by the way some
6 of the language looks, and some of the suggestions
7 we'll suggest will try to alleviate some of those kind
8 of problems.

9 We also want to mention that we believe that
10 the purpose of this law is to protect, as well as to
11 enhance and restore. So protection in itself is also a
12 very important thing to be doing, and not always having
13 everything required to be at the restoration or
14 enhancement status. We need to protect the streams
15 that we have, and that's a goal that's well worth it as
16 well.

17 But overall, we are happy that you're moving
18 in some little bit more -- you're making somewhat more
19 flexibility into a law that has really stood in the way
20 in a lot of ways of the very good things that we've
21 been working on. So thank you.

22 MS. BELL: Okay, Skip Richards, and after
23 Skip we'll have Alan Chapman.

24 MR. RICHARDS: I made my comments earlier.

25 MS. BELL: Okay.

1 MR. CHAPMAN: So my comments are based on a
2 detailed review of the supporting document, the one
3 that you issued in November, I think it is. And in
4 there I found nothing to explain why particular use
5 rates were chosen. 500 gallons for indoor. Why not
6 450 or 600 or 800? It doesn't say. It doesn't give
7 any detailed analysis to justify that particular choice
8 of number. The same problem with the outdoor figure.

9 All I've heard so far, either orally from
10 Ecology staff and it seems to be restated in the
11 supporting document, is this sort of vague method of,
12 well, we estimate what actual consumptive use is going
13 to be over the 20-year period, fully offset that, and
14 then add some ecological benefit. Okay, well -- and
15 then on top of that, you come up with a safety factor
16 of 1.5. Well, why not 1.25? Or why not 2? There's no
17 specific rationale provided as to why that particular
18 number was chosen.

19 And since the RH2 study performed no
20 sensitivity analyses, no real uncertainty estimates,
21 you really had no basis for doing so, so it looks like
22 that 1.5 is just pulled out of thin air, and there's
23 nothing in the supporting document to suggest
24 otherwise.

25 Also, uncertainty works both ways. It could

1 be 1 1/2 times more or 1 1/2 times less. We don't know
2 for sure. I'm assuming that's what your adaptive
3 management thing is about, and we'll get to that later.

4 The same thing with net ecological benefit.
5 What is the minimum threshold required for net
6 ecological benefit? The Statute 90.94 doesn't say.
7 The supporting document doesn't say. It could be one
8 gallon per minute per sub-basin, who knows? It doesn't
9 say. And if not, why not?

10 So now let's just perform some eighth grade
11 arithmetic on this thing. 260 acre feet per year
12 offset -- add the safety factor of 390. Well, you've
13 got 3,767 acre feet per year of projects. So after you
14 do all this arithmetic, you wind up with a whole
15 surplus. This was mentioned before by one of the
16 questioners.

17 So again, why couldn't you just stick with
18 the 3,000 gallons per day on a half-acre. You do the
19 arithmetic, and you've got plenty of room in there
20 using the methodology you stated to accomplish those
21 purposes. Well, the question -- the answer before was
22 the funding. Well, this doesn't have to happen
23 immediately. Over 20 years the funding could be made
24 available. Therefore, this whole thing is an exercise
25 in only one branch of science, political science.

1 There's no justification for it at law or real science.

2 Thank you very much.

3 MS. BELL: Okay, Nina Denson. And then after
4 Nina, R. Perry Eskridge.

5 MS. DENSON: My name is Nina Denson. I am a
6 rural resident. I have a well. I am concerned about
7 the recommendations of the Department of Ecology for
8 new wells. I believe rural people are mostly good
9 stewards of the land. I don't believe that they need
10 government to tell them what they can and can't do with
11 their land.

12 The new water withdrawal gallons are truly
13 restrictive to a 5 to 10-acre piece of land with a
14 house, a garden, fruit trees, and maybe some animals.
15 I have wetlands on my piece of property with a severe
16 slope above it. I have planted grass. However, if I
17 don't keep it watered, the grass dries out, and then
18 when it rains, the dirt washes down into the wetlands.
19 The County tells me, just like that other gentleman --
20 I developed my property two years ago, and the County
21 tells me what I can plant and what I can't plant and
22 how I have to protect that wetlands. I can't do
23 anything with it, but I have to protect it. So if I
24 can't water it during the summertime, it gets
25 destroyed.

1 So when I read through the information -- I'm
2 getting confusing information, but I read through all
3 the information that I got about how the water
4 withdrawal decision was made. I see that they are
5 using a WRIA from the Peninsula area and one from Walla
6 Walla, both of which have different rain amounts than
7 the Nooksack WRIA. The Stillaguamish WRIA would be
8 more appropriate to use as a comparison, and my
9 information was that there were no withdrawal limits,
10 domestic or otherwise.

11 I believe that this is about control and not
12 about protecting water.

13 MS. BELL: Okay. And after R. Perry, we are
14 going to have Luann VanWerven.

15 MR. ESKRIDGE: I heard you guys talking about
16 before that your lawyers had told you this was all
17 appropriate, and I've got to tell you off the bat that
18 I hate to disparage other people in my profession, but
19 you need new lawyers.

20 When I was going through the supporting
21 document, what I found really interesting is that
22 Ecology says that they're trying to harmonize the
23 various statutes, but I've got to tell you that you
24 literally ignore the clues that lie in there about how
25 domestic is defined.

1 The very case you site as authority for your
2 domestic definition is the case of -- oh, geez, I
3 didn't write it down, but it's Department of Ecology
4 versus Campbell and Gwinn, and that case when you read
5 it carefully talks about domestic use, homes, indoor,
6 one connection or six, that's it.

7 If your lawyers had bothered to even take
8 that case and do what we call Shepardizing, which is
9 make sure it's still good law, they would have
10 discovered that that exact case was cited no less than
11 twice in another case called Five Corners Family
12 Farmers. That case actually discusses Campbell and
13 Gwinn when they talk about the fact that you cannot
14 combine the four exemptions in 90.44 together, which is
15 exactly what this rule has done. It has taken the
16 outdoor 1/2 acre watering requirement and combined it
17 with domestic use.

18 Your attorneys ignore two -- if you take the
19 Campbell case decided in 2002, they ignore two
20 subsequent Attorney General's opinions that tell them
21 that's not right and this Washington Supreme Court
22 case, which adopts those Attorney General opinions as
23 part of their rationale and tells them you cannot
24 combine those uses. It's right there.

25 It's just sloppy lawyering. I can tell you

1 that this brief to support our interpretation of this
2 pretty much writes itself. I could do it in about -- I
3 would guess -- I told Mary Kay two days. I'm going to
4 lower that down to about five hours.

5 Adaptive management. Ecology keeps throwing
6 out this use. The Planning Unit estimated 110 new
7 homes every year. We know -- we know for sure that
8 there have only been 31 permits total issued in the
9 past two years, 1/20th of the way through the planning
10 session, and we are only barely at 20 percent.

11 There's no change in the analysis on this
12 change in facts. There's nothing in there about this.

13 The other thing I want to say is you're
14 supposed to require conservation, and you don't even
15 discuss it. If you cut three mature Douglas Fir trees
16 in building your house, you have mitigated nearly 3,000
17 gallons per day use. Thanks.

18 MS. BELL: And then the next person, Mary
19 Kay, you'd like to --

20 MS. ROBINSON: Yes, I do.

21 MS. BELL: Okay.

22 MS. VANWERVERN: Thank you. Luanne VanWerven,
23 State Representative from the 42nd District. And I am
24 drafting very specific comments in response to this
25 proposed rule-making, but today I want to speak more

1 broadly or generally.

2 As someone who was involved in the proposal
3 of Senate Bill 6091, I was part of a work group that
4 put together science-based solutions for our area,
5 specifically WRIA 1. And it is concerning to me that
6 somewhere along the way we went from -- that the
7 Department of Ecology has veered from the intent of the
8 State legislature, that we have gone from 3,000 gallons
9 a day to 500 gallons a day, and that seems to be a very
10 arbitrary number.

11 Like I said, we were involved in
12 science-based solutions, and we had addressed those
13 issues. And so I am very concerned that you are not --
14 these proposed rules are not consistent with Senate
15 Bill 6091 that we presented on a bipartisan basis,
16 Republicans, Democrats, signed by the Governor, and
17 then somehow we ended up here.

18 There is another way that the proposed rules
19 do not comply with the law enacted, and that is that it
20 unlawfully restricts water use on lawns and gardens.
21 6091 never intended that.

22 So the other thing that is concerning to me
23 is that well owners are held to a stricter standard
24 than cities or water association members. And when you
25 think about the amount of water that is consumed by

1 well owners and compare that to municipalities and also
2 water associations, it is just a mere fraction of that.

3 So I am very concerned that you are not
4 complying with the rule that was passed by the
5 legislature, and I would ask you to reconsider this
6 rule-making process and go in the right direction.

7 MS. BELL: After Mary Kay, we'll have Kathy
8 Sabel.

9 MS. ROBINSON: Mary Kay Robinson, Bellingham.
10 Now I've been listening to the testimony, and what
11 occurred to me was that the evaluation of the projects,
12 the offsets -- there's a lot of emphasis on that. That
13 there's an evaluation and a somewhat nebulous term,
14 adaptive management, et cetera, that -- the offset
15 projects that were suggested or put forth as far as the
16 Planning Unit are not sufficient to do that for a
17 variety of reasons.

18 The timeframe for this plan is 20 years, and
19 like Perry said earlier, we plan 110 homes a year.
20 We're now at 31. We're way behind.

21 There's a fair -- estimating that growth with
22 population, housing permits, et cetera, is a fairly
23 binary conversation. You know, you take the numbers,
24 you do the math, and it's an algebraic conversation.
25 Whereas, the projects themselves are very interpretive.

1 It's like we think this might happen. We're not sure.
2 This isn't -- maybe it should be closer. It's a lot
3 of shoulds, a lot of judgment calls, et cetera, and it
4 is based on knowledge of today. Knowledge of today is
5 dictating 20 years' worth of projects essentially.

6 This -- and I'm holding up my iPhone --
7 didn't exist 20 years ago, so we're making decisions
8 from a technology standpoint of what's possible today
9 and just dismissing some of the projects that are on
10 there because essentially they're being dismissed as
11 not doing the job of mitigating and offsetting that
12 water.

13 We're making decisions with today's knowledge
14 and today's technology and today's funding saying it's
15 not possible, it's not possible, within 20 years to
16 offset the growth that we are not even meeting today.

17 To me there's a big disconnect. This is an
18 example.

19 MS. BELL: After Kathy, we have Carole Perry.
20 Would you like to comment?

21 MS. SABEL: I wanted to add a little bit to
22 my comments from yesterday, which were at the
23 Bellingham meeting I discussed that Whatcom County has
24 Code 24.11.60, which uses the RCW 90.94, so that when
25 anybody in Whatcom County applies for a building

1 permit, in order to have legal water availability, they
2 have to meet -- there's a menu of criteria, one of
3 which from the RCW 90.94 says if you have an existing
4 well that was built before the law passed, only if it
5 meets the criteria of well water construction -- so
6 whatever those rules are. If it does not meet those
7 rules, then they also would be an existing well, would
8 also be subject to the 3,000 gallons per day and the
9 fee.

10 So what I asked yesterday was what's the
11 County going to do since this rule only applies to new
12 wells? So what's not clear to me and what I think
13 Ecology needs to put in there supporting documentation
14 is since you're not looking at existing wells in that
15 case, explain why. Explain what offset you could have
16 gotten or are getting right now. I don't know on those
17 31 new wells that the County reported to Ecology in the
18 last two years, were any of them existing wells that
19 did not meet the criteria and, therefore, had to drill
20 a new one. That's what my assumption is, that if
21 you're not able to -- I don't know if you're able to do
22 fixes to the existing well or not. And even if you did
23 it, I don't know if that existing well would still be
24 subject to that 3,000 gallon rule. So to me, that
25 needs to be in the analysis.

1 Since these are projections and estimates,
2 how many existing wells do we think fit that criteria
3 where they would be reduced from 5,000 to whatever the
4 rule has and how many right now are being subjected or
5 will be as an estimate to the 3,000 because that 3,000
6 only lasts until the new rule is passed.

7 So I hope that clarifies what I was getting
8 at, and I hope the County can answer some of these
9 questions from real data they have in these last two
10 years. Thank you.

11 MS. BELL: Okay, Carole.

12 MS. PERRY: I didn't -- I didn't formally
13 sign up, but because I went to, I think, every meeting
14 of the Planning Unit last year and I still can't
15 understand all of this. I'm just a citizen, and I
16 understand, DOE, that you're under the same pressure
17 that the Planning Unit was under, one year to come up
18 with this.

19 And let me tell you, the Planning Unit is
20 just a little bigger than this group, and they spent
21 hundreds of hours trying to figure this all out for
22 their fellow citizens. They didn't get a dime. It
23 wasn't their job. They were under pressure. And I
24 don't think anything that I say today will change a
25 word. I guess I watch government a lot.

1 But I want you to know what went on. In
2 January, as we were approaching the deadline, the
3 County Council really wanted that update to get done,
4 so they said -- I think they passed it unanimously.
5 They said if the Planning Unit would send them an
6 update that was passed by a majority, they would send
7 it on. And I'm not sure about -- I can't interpret the
8 law and all that, but that was -- and they said to Gary
9 Stoyka, the lead agency person in the Planning Unit,
10 vote for the update. There was a lot of pressure
11 because February 2nd was the date.

12 And just for the record, I know that what I'm
13 saying is not going to affect -- the Planning Unit did
14 pass an update, and it did satisfy, as far as I could
15 tell, what the law required. But there were two
16 caucuses that voted against it, and because I think it
17 would be improper for me to say who in this setting, I
18 won't. But that's how close it came.

19 Some of your fellow citizens worked hard, and
20 they're still working hard as a Planning Unit to form
21 an update, a plan, for this County because even as 6091
22 was being debated in Olympia, the point was made that
23 not every WRIA is the same. We're different.

24 And I've run out of time. Thank you.

25 MS. BELL: Thank you. Okay, that concludes

1 those who signed up to testify. Is anybody else
2 interested in testifying at this point?

3 (No audible response.)

4 MS. BALLARD: If you'd like to send Ecology
5 written comments, please remember they're due
6 postmarked by January 17th, 2020. We accept written
7 comments in the following ways: Here at the hearing,
8 by mail or online using our comment form. To get
9 instructions on how to comment by mail or online,
10 please pick up one of the Ecology handouts at the back
11 table. This information is also available on our
12 website, or you can contact Annie Sawabini.

13 All testimony received at this hearing, as
14 well as other hearings that were held in Bellingham and
15 will be in Mount Vernon, along with all written
16 comments online and mail postmarked no later than
17 January 17th, 2020, will be part of the official record
18 for this proposal.

19 Ecology will send notice about the Concise
20 Explanatory Statement on this rule proposal and
21 submitted contact information, everyone that signed in
22 for today's hearing that provided an email address and
23 other interested parties on the mailing list for this
24 rule.

25 The CES will, among other things, contain the

1 Agency's response to questions and issues of concern
2 submitted during the public comment period.

3 If you'd like to receive a copy but did not
4 give us your contact information, please let one of the
5 staff at this hearing know or contact Annie Sawabini at
6 the contact information provided for submitting
7 comments.

8 The next step is to review the comments and
9 make a determination whether to adopt the rule. The
10 Ecology Director will consider the rule documentation
11 and staff recommendations and will make a decision
12 about adopting the proposal.

13 Adoption is currently scheduled for May of
14 2020. If the proposed rule should be adopted at that
15 time and filed with the Code Reviser, it will go into
16 effect 31 days later.

17 If we can be of any further help, please do
18 not hesitate to ask, or you can contact Annie or Kasey
19 if you have other questions.

20 On behalf of the Department of Ecology, thank
21 you for coming. I appreciate your cooperation and
22 courtesy.

23 Let the record show that this hearing is
24 adjourned at 4:13. Thank you.

25 (END OF RECORDING)

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C E R T I F I C A T E

I, MARY JEAN BERKSTRESSER, a Certified Court Reporter in and for the State of Washington, residing at Olympia, Washington, do hereby certify:

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That the foregoing transcript, consisting of pages 1 through 23, is a full, true and complete transcript of all discernible and audible remarks;

That as a CCR in this state, I am bound by the Rules of Conduct as codified in WAC 308-14-130. All transcription arrangements and fees in this case are offered to all parties on equal terms;

That I am not a relative, employee, attorney or counsel of any party to this action, or a relative or employee of any such attorney or counsel, and I am not financially interested in the outcome thereof;

DATED AND SIGNED this 20th day of January, 20

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