

WASHINGTON STATE DEPARTMENT OF ECOLOGY

Public Hearing Location:
Department of Ecology, Padilla Bay Reserve
10441 Bayview Edison Road
Mount Vernon, Washington 98273

PUBLIC HEARING

JANUARY 9, 2020

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

PAGES 1 THROUGH 17

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1 MS. BALLARD: I'm Laura Ballard, Hearing
2 Officer for this hearing. This morning 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's 10:50 on
7 January 9th, and this hearing is being held at Padilla
8 Bay, Mount Vernon, 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 this hearing were emailed to
13 approximately 1,600 interested people, and a news
14 release was issued on November 19th, 2019. Notice was
15 also published in the following papers on November
16 22nd, 2019: Bellingham Herald and Skagit Valley
17 Herald.

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

23 Remember, your comments should be about three
24 minutes. When you reach 30 seconds, Barbara will
25 display a yellow circle. When your time is up, it will

1 show a red circle and the timer will sound. Please
2 summarize your comments so that the next person can
3 come to testify.

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

7 Please also speak clearly so we can get a
8 good recording of your testimony.

9 MS. BELL: Okay. So five people indicated
10 they're interested in providing testimony. I will call
11 up the first and also let you know who the second is so
12 that you can be prepared to come up. So Cliff Langley
13 first, and then Paul Isaacson next.

14 MR. LANGLEY: I'm Cliff Langley, a resident
15 of Whatcom County in the WRIA 1 district, and I am a
16 member of the Private Well Owners' Caucus.

17 I would like to start out by saying that the
18 Washington State Constitution was modeled after the
19 U.S. Constitution, which if followed was designed to
20 limit government and allow and preserve the rights of
21 individuals. We find ourselves in a time and situation
22 where that is not true and that people have no
23 confidence that they are being listened to.

24 Now, regarding what we're here today for,
25 there is consideration that rules being made which

1 affect private exempt wells, wells which have the least
2 effect and not really have been proven to affect stream
3 flow, rules that will greatly affect usage of private
4 rules, but in all practicality can't be enforced.

5 In 2018 the Whatcom County Planning Unit was
6 working on a plan that would satisfy 6091. As you
7 know, we came up with a plan that was passed by a super
8 majority of caucuses in the Planning Unit, but that was
9 not enough to put it into place.

10 So now you are intending to implement a plan
11 here that is different from what the super majority of
12 the Whatcom County Planning Unit approved.

13 What you are proposing, I believe, is
14 unreasonable when the volume of water drawn by these
15 wells is compared to the volume of water in the
16 Nooksack water basin.

17 I spoke with a State licensed engineer who is
18 a member of our caucus and has spent considerable time
19 investigating this. He told me that if, in fact, the
20 volume of water drawn out of the ground by all exempt
21 wells, both current and estimated future, was at the
22 maximum allowed by the Planning Unit plan, it would
23 still be within the allowable margin of error when
24 measured in decreased stream flow caused by exempt well
25 withdrawal, especially when you consider that 90

1 percent of the water drawn is returned to the ground
2 and does not go into the sewer where it is eventually
3 pumped into the Sound.

4 On behalf of the private well owners, current
5 and future, I am asking that you reconsider what you're
6 doing and adopt the recommendations that the
7 overwhelming majority of caucuses of the Whatcom County
8 Planning Unit approved. Thank you.

9 MS. BELL: Paul can come up, and then Nina.

10 MR. ISAACSON: Paul Isaacson. I'm the
11 president of the private well caucus -- private well
12 caucus in Whatcom County.

13 I've spent the last several days thinking
14 about how I would prepare some information for this
15 hearing, and I have thousands and thousands of sheets
16 of data in my office. I've paid a number of employees
17 several thousands of dollars to go over them. I have
18 legal staff within my office. And I've come up with a
19 conclusion that I decided today I would share with you
20 about rule-making, and I don't have a prepared
21 statement, so I'm going to take this a little more
22 personal.

23 A couple of years ago, a lady about 40 years
24 old knocked on my door with two children at ten o'clock
25 at night, and she was crying. She said Mr. Isaacson --

1 I didn't even know who this was. I thought I needed to
2 call the police or something. I said what's the
3 problem, what's going on here? She said I'm losing my
4 home right now and I'm losing the property because I
5 have a moratorium and I can't drill a well on my
6 property. What is wrong with me? What did I do? I
7 love the environment, I was born and raised in Whatcom
8 County, what have I done? What makes me so cruel?
9 What have I done? I said you haven't done anything.

10 So I went on to explain to her that we had
11 somebody file a lawsuit and that there would be some
12 kind of remedy down the road that may have some effect,
13 but throughout this 18 months what I've realized is
14 we're all sitting in this room dealing with less than
15 one percent of the water, but I had to buy into the
16 premise that we have a problem here, and I don't
17 believe that we have a problem.

18 I know that the public doesn't necessarily
19 believe that we have a problem. We're trying to remedy
20 something in a negotiated political climate through a
21 lawsuit. So when you're doing this, let's not perceive
22 that we have this horrible problem because we don't.

23 Now, I brought an illustration, and I blew it
24 up -- it's not a sign, but it's from your guys' -- your
25 site. It's less than one percent of the water we're

1 talking about.

2 So with all the industrial users and all
3 these other people, including the farmers and all the
4 others, if this process is difficult for less than one
5 percent, I can't even believe what you have ahead of
6 you. But what I want you to think about -- and I
7 understand most of you are here because it's your job.
8 I've done all of this free. Could you imagine doing
9 this every day free?

10 I just want you to think about that as you're
11 moving forward with these rules because I think this is
12 actually cruel what it's doing to a lot of people.
13 It's cruel and unusual punishment in my opinion after
14 18 months of reviewing records, and I personally spent
15 \$10,000 of research alone last year, including my own
16 time.

17 I want you to keep that in mind when you're
18 doing this rule-making. And thank you for listening to
19 me.

20 MS. BELL: After Nina is Brad Hanks.

21 MS. DENSON: I'm Nina Denson. I live in
22 Custer on five acres. I am a rural well exempt
23 resident. I talked yesterday about my wetlands, and
24 one of the parts that I forgot is when you're
25 developing property in Whatcom County and you have to

1 take trees out of the wetlands -- I had to replace four
2 trees for every tree that I took out of the wetlands.
3 And I signed a piece of paper with Whatcom County that
4 I will keep these trees alive. If they die, I have to
5 replace them. Trees are expensive, and trees take a
6 lot of water. My wetlands is way more than
7 half-an-acre, and I have to water it in August.

8 So when you're thinking about new wells and
9 new residents, you're just not being practical or
10 considering unintended consequences.

11 My information is that the State law is 5,000
12 gallons per home. The Planning Unit came up with 3,000
13 gallons. I have listened to this hearing yesterday and
14 today, and I hear all of these numbers, and to me
15 they're just arbitrary. They're not real numbers.

16 So 3,000 was a reasonable amount. 500 is not
17 a reasonable amount living on five or ten acres out in
18 the County.

19 And just like the other gentleman said, you
20 know, I would ask the question how many of these people
21 who are making this rule have exempt wells, or are they
22 city dwellers making rules for rural residents. You're
23 going to say that doesn't matter, and I'm going to say
24 this is personal. This is about living on your land
25 and how we can use it and what we can do with it, and

1 this is all arbitrary on your part, but it's personal
2 on our part.

3 MS. BELL: After Brad, Max Perry.

4 MR. HANKS: Brad Hanks, Bellingham. 5,000,
5 3,000 and 500. Respectively, those are the withdrawal
6 limits that the State law allows, the withdrawal limits
7 that the Planning Unit recommended, and finally the 500
8 gallons represents what the rule-making process is
9 trying to introduce. I submit to you that that is
10 wholly arbitrary and it should be increased.

11 But to the point made earlier about the
12 reason that we're standing in this room today relating
13 back to a lawsuit is partially correct, but I would
14 also submit to you that we are here because of the
15 Whatcom County Council's failure to act and abdicating
16 their responsibility to the citizens of Whatcom County.

17 And I understand that Ecology is trying to do
18 the best they can. You were basically brought
19 thousands of boxes, I'm sure, of paperwork by the
20 legislature and said, here, fix this for us, and I
21 commend you for trying to do your best with this
22 particular rule-making process, but I would ask you to
23 reconsider the withdrawal limits and go with what the
24 Planning Unit suggested for 3,000 gallons per day.
25 Thank you.

1 MR. PERRY: Max Perry, Whatcom County. I
2 spoke yesterday about our -- most wells are -- exempt
3 wells -- are on rural septic systems. And for a
4 500-per-gallon-per-day usage for a rural exempt well
5 with an 80 percent return, that's 400 gallons that
6 (indiscernible words) back into the water system, your
7 water well -- water aquifer.

8 If it's 90 percent, it's 450 gallons back in
9 the aquifer, and I would probably argue with Mr. Covert
10 about the irrigation being 90 percent consumptive. I
11 don't agree with that. Perhaps that would be for a
12 large agriculture operation with large guns and this
13 type of thing, if that's what he's thinking of. But
14 with a home system, 3,000 gallons, I estimate that --
15 and I've researched some of this -- that it's 70
16 percent attrition. And with 70 percent attrition,
17 3,000 gallons, 2,100 gallons per day goes back into
18 your water table, water aquifer.

19 So all I'm saying is that, just like Mr.
20 Isaacson showed the graph with the wells being such a
21 minute part of the water, total water, it's absurd to
22 have the restrictions that you're talking about on
23 these. Thank you.

24 MS. BELL: Any other comments? Do you have a
25 comment?

1 MS. PERRY: I have a comment.

2 MS. BELL: Okay, please come up.

3 MS. PERRY: My name is Carole Perry, and I'm
4 a resident of Whatcom County. Having followed this
5 whole process, I was very disappointed at these last
6 three hearings that there were so few people that
7 participated because in the year-long process when 6091
8 was passed, there was a lot of participation. And we
9 watched the hearings with the County Council where
10 hundreds of people were affected by this whole thing.

11 I really am encouraged by the comments that
12 have been made this morning, even though there's
13 half-a-dozen comments at each one of these, starting on
14 the 7th, the 8th, and now today on the 9th.

15 But I think -- and -- it's hard to limit my
16 comments, but according to what someone said earlier,
17 the founders looked ahead, and I want to just read a
18 paragraph for the record.

19 "The law should be understandable and stable.
20 The founders were sensitive to the fact that the people
21 have confidence in the law only to the extent that they
22 can understand it and feel that it is a rule of
23 relative permanence which will not be continually
24 changed. James Madison emphasized both of these points
25 when he wrote, 'It will be of little avail to the

1 people that the laws are made by men of their own
2 choice if the laws be so voluminous that they cannot be
3 read, or so incoherent that they cannot be understood,
4 if they can be repealed or revised before they are
5 promulgated or undergo such incessant changes that no
6 man who knows what the law is today can guess what it
7 will be tomorrow. Law is defined to be a rule of
8 action, but how can that be a rule which is little
9 known and less fixed?" From the Federalist Papers.

10 That's where we're at. The people are losing
11 confidence in their government. That's why there's no
12 one here.

13 MS. ANDREW: My name is Carmen Andrew. I'm
14 actually a Skagit County resident, but I am
15 (indiscernible due to paper rustling near microphone)
16 Washington, and I am a realtor that services all of
17 Skagit and Whatcom County.

18 And so I'm here on behalf of a lot of my
19 clients and their property rights and (paper rustling)
20 and very close to that line on the graph of the
21 Nooksack Basin.

22 So what I wanted to bring to your attention
23 is this idea of the subsistence gardening that's kind
24 of thrown in there at the end. It's a little
25 confusing. It seems like it's an entirely new

1 provision introduced at this phase and not contemplated
2 during the preliminary rule phase of the rule-making
3 process.

4 It's defined but has no general application
5 in the rule, and the only application is a specific
6 instance where a drought is declared. That statute
7 that forms the basis for this rule discusses drought
8 rules for other watersheds, but not this one, which
9 seems like it's a bit inappropriate.

10 There doesn't seem to be any discussion about
11 how this will be monitored or enforced, and worse, it
12 limits gardens for a rural household to only 1/12th of
13 an acre with an assertion of conservation.

14 It's interesting because the State authorized
15 that we can garden 1/6th of our acre, or 10,000 square
16 feet, and so this is 1/6th of what they've already
17 determined in the legislature. So it seems a bit
18 extreme because the State has already told us what we
19 can do with that.

20 I'd like to see other conservation measures
21 with irrigation timing, water savings, sprinkling, that
22 kind of thing. That seems that that should be
23 considered first before regulating a non-commercial
24 gardening lot size.

25 And this is a bit of a question, but I'll

1 just put it out there because I was a bit confused
2 reading the rule. If you have a single-family home and
3 they have an agricultural tax classification, which
4 just means they have to make so much per year, they may
5 have a larger garden and maybe they just go down and
6 they do a farmer's market to sell their vegetables --
7 it's not a commercial license, they aren't running a
8 full business, but they have this tax classification
9 they have to meet -- how does that affect them as well?
10 Thank you.

11 MS. BELL: Any other comments?

12 (No audible response.)

13 MS. BALLARD: If you would like to submit
14 comments to Ecology, please remember they're due
15 postmarked by January 17th, 2020. We accept written
16 comments in the following ways: Here at the hearing,
17 by mail or online using our online comment form. To
18 get instructions on how to comment by mail or online,
19 please pick up one of the Ecology handouts on the back
20 table. This information is also available on our
21 website, or you can contact Annie Sawabini.

22 All testimony received at this hearing, as
23 well as other hearings which were held in Bellingham
24 and Lynden, along with all written comments online and
25 by mail postmarked no later than January 17th, 2020,

1 will be part of the official record for this proposal.

2 Ecology will send notice about the Concise
3 Explanatory Statement, or CES publication, to everyone
4 that provided written comments or oral testimony on
5 this rule proposal and submitted contact information,
6 everyone that signed in for today's hearing that
7 provided an email address and other interested parties
8 on the Agency's mailing list for this rule.

9 The CES will, among other things, contain the
10 Agency's response to questions and issues of concern
11 submitted during the public comment period.

12 If you'd like to receive a copy but did not
13 give us your contact information, please let one of the
14 staff at the hearing know or contact Annie Sawabini at
15 the contact information provided for submitting
16 comments.

17 The next step is to review the comments and
18 make a determination whether to adopt the rule. The
19 Ecology Director will consider the rule documentation
20 and staff recommendations and will make a decision
21 about adopting the proposal.

22 Adoption is currently scheduled for May 2020.
23 If the proposed rule should be adopted at that time and
24 filed with the Code Reviser, it will go into effect 31
25 days later.

1 If we can be of any further help to you,
2 please don't hesitate to ask, or you can contact Annie
3 or Kasey if you have other questions.

4 On behalf of the Department of Ecology, thank
5 you for coming. I appreciate your cooperation and
6 courtesy.

7 Let the record show that the hearing is
8 adjourned at 11:12. Thank you.

9 (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:

That the foregoing proceedings were electronically recorded; that I was not present at the proceedings; that I was requested to transcribe the electronically-recorded proceedings; that a transcript was prepared by me by listening to the recorded proceedings;

That the foregoing transcript, consisting of pages 1 through 17, 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

Mary Jean Berkstresser

Mary Jean Berkstresser
Washington State Certified Court Reporter
CCR No. 2671

