# Washington State Dairy Federation

Please see attached comment letter.
Thanks.

Washington State Dairy Federation

**March 2, 2024**

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(all via email only)

From: Dan Wood, Executive Director, Washington State Dairy Federation

Jay Gordon, Policy Director, Washington State Dairy Federation

Re: Comments on draft claim forms and instructions (ECY 070-744); Nooksack Water rights adjudication

The Washington State Dairy Federation is submitting comments regarding the draft claims forms and instructions that were issued in draft form for public comments on January 3rd, 2024.

Ecology's draft instructions risk seriously misinforming the public, particularly with respect to the permit exemptions in RCW 90.44.050. The Washington State Dairy Federation is concerned that these draft forms reflect Ecology's policy positions rather than an unbiased view of the law.

The Washington State Dairy Federation has worked to support the interests of Washington's dairy farmers for more than 130 years. Occasionally a single legislative or regulatory issue arises that threatens the ability of our dairy families' ability to continue farming. We have explained to Ecology staff and legislators that this adjudication is just such a threat. The very process creates a huge perceived risk from the uncertainty created; farmers will not know how much water they are entitled to or when they ultimately may be able to use it given the lengthy timeline before decisions are made, and final rulings issued that could threaten viability of farms due to lack of water.

Due to the uncertainty of water availability caused by the coming adjudication, farmers have begun to question if they should continue to farm, to raise livestock, to irrigate and to raise crops on their land. Because of the unknown future of water use in the Nooksack, the value of farmers' lands, livestock, and businesses are threatened. Access to credit is threatened as bankers limit their exposure to the risk involved in loaning money on collateral (land, crops and animals) with unknowable values. This question of how much water a farm has, when and how they can use it, when they cannot use it are all unanswered and given the lengthy process of an adjudication this uncertainty will hover over our farmers, their families, and their lenders for years or decades.

Whatcom County , in addition to being one of the most beautiful areas in Washington for people to enjoy, is also an excellent climate for cows and dairy farming. There are approximately 70 dairy farms operating in Whatcom County. Some supply milk to a dairy plant in Lynden, others sell directly to customers. Our association supports dairy farmers, not housing developers. However, we hear from dairy farmers asking why they should stay and risk losing the value of their hard work, the equity often built by many generations. For many, we are concerned the answer will be to sell their land to the highest bidder and move their farming operations to a more favorable region.

We bring all this up to convey that Ecology's decision to embark on an adjudication will have profound consequences for the landscape of Whatcom County. The Washington State Dairy Federation is hopeful and supports a settlement process to address the most controversial issues in the adjudication, particularly with respect to tribal rights, because extended litigation is a lose-lose scenario – providing poor to no solutions to preserve farms, increase fisheries, and support people and communities. Adjudication alone will cause Whatcom County to lose large numbers of commercial farms to suburban housing and recreational farms, replacing the dairy, potato, and berry farms that are the backbone of rural Whatcom County.

Given the seriousness of the adjudication, it is dismaying to see Ecology staff give multiple presentations to the public downplaying its significance. For example, at public meetings Ecology suggested water users need not consult with a lawyer about their water rights because Ecology is simply interested in gathering information and making objective determinations about water users' rights. As explained more in this letter, Ecology's draft claim forms and instructions unfortunately undermine public confidence that Ecology will be an unbiased voice in the adjudication.

**Ecology's Draft Instructions Substantially Misrepresent the Stock-Watering Permit Exemption**

The most obvious way in which Ecology's instructions misrepresent the law is in the assertion that the stock-watering permit exemption under RCW 90.44.050 is **only for drinking water.** The draft instructions state unequivocally, "Stock watering is drinking water for livestock, such as cattle." There is not a shred of support for such a narrow interpretation of the "stock-watering purposes" in the permit exemption.

If a dairy farm cannot clean up after milking its cows and cannot clean a milk tank, then they no longer qualify for a sanitary Grade A milk license—a legal necessity for operating a dairy in the United States - and they are out of the dairy business. If a farm cannot clean and care for their

cows, the cows get sick. If a farm cannot provide cooling relief on hot summer days, their cows will suffer. These farm activities, and others, require water for the care of livestock. These uses of water – known as stock watering purposes – are nothing new. Farmers have been using water for these purposes since long before enactment of the 1945 Groundwater Code. Dairy farms are required by necessity and by strict sanitary regulation to keep clean farms, clean and content cows, and sanitary equipment and milking areas.

The text of RCW 90.44.050 confirms that the "stock-watering" permit exemption includes uses of water in addition to and other than drinking water. The statute exempts "any withdrawal of public groundwaters for stock-watering purpose**s**." The plural "purposes" demonstrates the plain legislative intent that the exemption covers more than one purpose, that is, more than just drinking water. Just as Ecology's draft instructions recognize that the plural term "*domestic purpose**s***" includes a number of different uses associated "*with human health and welfare needs, such as drinking, cooking, sanitary purposes and other incidental use**s**,"* the stock-watering exemption "purpose**s**" also cover water used for a range of uses associated with commercial livestock operations. Washington dairy farmers have been using this permit exemption to sustain, care for, clean, and cool their animals, barns, and milking equipment and storage tanks for almost 80 years, since the 1945 Groundwater Code was adopted. Ecology's claim form instructions should recognize this long-standing interpretation of the law, this is not the place for the agency to advance a new, unwarranted and legally and grammatically unsupported narrow reading of statutory terms.

Ecology's definition of stock-watering also ignores the only precedent in which the term "uses" has been examined and defined. In *Timothy A. Dennis and Thomas Devries, Appellants v. State of Washington, Department of Ecology*, the Pollution Control Hearings Board held that the stock-watering exemption "covers all reasonable uses of water normally associated with the sound husbandry of livestock. This includes, but is not limited to, drinking, feeding, cleaning their stalls, washing them, washing the equipment used to feed or milk them, controlling dust around them and cooling them." PCHB No. 01-073, Summary Judgment Order (Sept. 27, 2001) at *9. Note the Devries case other two holdings - that the stock-watering exemption was limited to 5,000 gallons per day and that there was a "bundled" limit of 5,000 gallon per day for the four distinct exemptions – **were both overruled** by the Supreme Court in *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 312, 268 P.3d 892, 901 (2011). The Devries case is still the leading, only and unchanged definition of what are stock watering uses and should be included in Ecology's forms.

It is incredibly disappointing that Ecology's draft instructions are confusing, unclear, and would predictably lead water users to claim less of the water their livelihoods depend upon and that they are entitled to.

**The Draft Documents Conflate Domestic and Outdoor Uses**

On the first page of the instructions, Ecology writes that the Small-Use Court Claim Form is for people claiming water for *in-home* domestic use. Then, confusingly, on page 3, it says, "Domestic includes outdoor watering or irrigation for a personal lawn, garden, or landscaping." This does not

make sense because RCW 90.44.050 clearly recognizes separate exemptions for domestic and noncommercial irrigation. Ecology's forms should follow the law and keep these terms and uses separate. There also does not appear to be any legal basis for limiting domestic uses to only indoor activities. Activities like filling a swimming pool or washing a car would clearly qualify as "domestic" purposes, but the draft documents appear to make it impossible to claim such rights on a Small Use Court Claim Form. By confusing domestic and irrigation uses, Ecology's forms create the potential for people to be confused about which form they are required to file and, again, predictably lead to water users claiming less water than they are entitled to.

An additional confusing area is in the second to last paragraph on page 3. There, Ecology indicates that if a homeowner uses more than 500 gallons for their household pets they should use the long form. That language combined with the language stating there is 500 GPD "maximum **indoor** use" for domestic purposes and up to 500 GPD for household pets – totals up to 1000 gallons for eligibility to use the Small Claims form. This is inconsistent and confusing, is it 500 gallons or 1000 gallons? Is it indoor only? What if your pets drink water both outdoor and indoors?

**It is Unlawful to Provide Different Claim Forms to Different Users**

The Water Code includes provisions to help water users claiming a small amount of water. For example, RCW 90.03.160 (3) grants the Superior Court – *not Ecology* –the authority to establish a simplified process for claimants of small uses. Ecology is directed to "provide information" to help small claimants file their claims. RCW 90.03.140(1). However, nothing in the statute authorizes Ecology to require or allow small water use claimants to provide less information to the court—and by implication to the other parties. In fact, RCW 90.03.140(1) is clear that Ecology is to create "*a form*," singular, that "each defendant shall file with the clerk of the court." This is necessary here, so each claimant provides the same type and quality of information as all other claimants. It is a matter of equity and justice.

If Ecology desires to change the process, that is an issue for the courts to decide, with input from *all* interested parties. It is debatable, and should be debated at least, whether providing a different form for "small users" is warranted. One consideration should be whether it is appropriate for thousands of small users to get an easy pathway forward given that these "small users" may collectively equal more use than "large" water users and/or that these small users may be junior uses. These small uses could impact our farmers, who have been here for generations and must file the long form and wait in suspense for years to learn if and how their water rights are shaped by this adjudication process. Small users should be required to provide the same information as larger users in order to ensure all parties provide fully-informed input into any streamlined procedures the court may choose to consider at some point.

**The Small Use Court Claim Form Does Not Meet the Requirements of RCW 90.03.140**

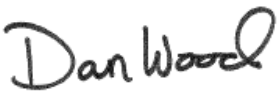
RCW 90.03.140(1)(a)-(l) sets out the information that must be submitted by "each defendant" in a general adjudication of water rights. However, the Small Use Court Claim Form does not include this information. The Small Use Court Claim Form is deficient in at least the following ways:

- "**(b) … annual and instantaneous quantities of water put to beneficial use**." The small use claim form only requires claimants to state that their use is *less* than 500 gpd, but it does not require them to state how much the claim is for.
- "**(d) The date the first steps were taken under the law to put the water to beneficial use**." The small use claim form only asks for the date that a residence was completed. This ignores the fact that Washington recognizes the "relation back" doctrine. *See Hunter Land Co. v. Laugenour*, 140 Wash. 558, 565, 250 P. 41, 44 (1926) ("The rule is that, when the actual diversion of water to a beneficial use on land is at a time later than the work of constructing the means by which [the water] is diverted…the time of diversion relates back to *the beginning of the work*" (emphasis added)). The date of construction does not substantially comply with the requirement to state when the "first steps were taken" to appropriate water.
- "**(f) The dates between which water is used annually**." Some homes may be occupied for much less than year-round, which could dramatically impact the amount of water that can be claimed. By failing to request the actual use of water, annually, the small use claim form repeats the errors of the "pumps and pipes certificates" issued years ago.

**Conclusion**

The Washington State Dairy Federation thanks you for your consideration of these important matters. Moreover, the Federation requests you revise and correct the forms to reflect established law and interpretations of law, to ensure fairness in the adjudication proceedings for all claimants.

Regards,



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