



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

January 18, 2026

Transmitted via Online Comment Portal

Ria Berns, Program Manager
Water Resources Program
Washington State Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

RE: Comment on Ecology's Proposed Rule to Amend Instream Resource Protection Program Rules in WRIAs 15

Dear Ms. Berns,

The Port Gamble S'Klallam Tribe ("Tribe") respectfully submits these comments in response to the Department of Ecology's ("Ecology") proposed rule ("rule") to incorporate certain limited requirements from RCW § 90.93.030(4) into Chapter 173-515 WAC related to permit exempt wells. The Tribe opposes the rule because the substantive and procedural defects in Ecology's adoption of the Water Resources Inventory Area 15 ("WRIA") Watershed Restoration and Enhancement Plan ("Plan") and the rule, outlined in this comment letter, will undoubtedly allow permanent degradation of water resources in WRIA 15, further diminish the Tribe's senior reserved water rights, and its Treaty-reserved fishing rights. The Tribe reiterates its request that Ecology pause the rulemaking process, withdraw the proposed rule, and expand the scope of the rule to incorporate recommendations made by the Department of Fish and Wildlife (WDFW), local Tribes, and the Salmon Recovery Funding Board ("SRF Board"). *See* RCW 34.05.335 (proposed rules may be withdrawn any time before adoption).¹

A. BACKGROUND

1. The Port Gamble S'Klallam Tribe and Its Reserved Fishing and Water Rights

¹ Materials referenced in this comment letter are incorporated by reference and were submitted through Ecology's comment portal.



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

The Tribe is a signatory to the Point No Point Treaty of 1855. It's reservation and a portion of its Treaty-reserved usual and accustomed fishing area are located in WRIA 15. Since time immemorial, the Tribe and its ancestors have lived, worked, and fished in Puget Sound and surrounding rivers and streams. Salmon, steelhead, and other fish in the Sound and surrounding streams have been and continue to be central to the Tribe's subsistence, culture, and economy. The Treaty, aboriginal use of its traditional territory, and the establishment of the Tribe's reservation confirm the Tribe's federal reserved water rights necessary to fulfill the purpose of the reservation as a permanent homeland and to continue its hunting and fishing way of life. *See generally, Winters v. United States*, 207 U.S. 564 (1908); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983).

Ecology is well aware that despite the Tribe's fishing rights enshrined in federal law, tribal harvests have been severely depressed by diminishing returns of salmon and steelhead for many decades. According to a recent study by the Northwest Indian Fish Commission (NWIFC), "the primary limiting factors to salmon recovery" within the Tribe's area of interest "are the quantity and quality of habitat in the watersheds where salmon begin and end their lives." NWIFC, *State of Our Watersheds* (2025) at 211. NWIFC found in 2025 that the increase in permit exempt wells continues to be a principal threat to instream flows for salmon. *Id.* at 6. This is because salmonid species, including ESA-listed Summer Chum and steelhead, rely on adequate stream flows to reach upstream spawning habitats and to keep water temperatures sufficiently cool in the summer and fall. *Id.* at 215. Protecting instream flows protects all water users, senior water right holders, and it is the statutory duty of Ecology to protect and enhance the high quality of the state's waters (*see, e.g.*, RCW § 90.54.020(3)(a),(b), and its obligation under the Treaty to uphold and not impair the Tribe's reserved rights.

2. Adequate Water Resources in WRIA 15 Depends on the Protection of Small Streams.

Ecology is aware that WRIA 15's small streams are uniquely vulnerable to depletion. It accurately characterizes diminishing water availability in WRIA 15 as follows:

During the summer, there is little rain, so low stream flows are dependent on groundwater inflow. This means that groundwater and surface water are least available when water demands are the highest. Increasing demands for water over time, from ongoing population growth, agriculture, and other consumptive uses as well as associated land use practices, have resulted in lower streamflows and declining groundwater levels in some areas. These decreases have impacted important resources



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

for fisheries and general stream health. The impacts of climate change in WRIA 15 are also yet to be fully realized. However, it is apparent that water availability is limited throughout the Kitsap Watershed.

Department of Ecology, Water Resources Program, WRIA 15 Kitsap Watershed Water Availability. In addition, groundwater aquifers in WRIA 15 are fragmentary and summer base flows are sustained by groundwater. WRIA 15 Plan at 16. Ecology also recognizes that groundwater is the “primary source of drinking water” for most of the population of the Kitsap Watershed, and therefore, “demand for groundwater increases with population growth.” WRIA 15 Plan at 13.

Ecology describes the impact of permit exempt wells this way:

Pumping from wells can reduce groundwater discharge to springs and streams by capturing water that would otherwise have discharged naturally. Surface water may be influenced by groundwater pumping such that flows are diminished. Consumptive water use (the portion not returned to the aquifer) potentially reduces streamflow, both seasonally and as average annual recharge. A well pumping from an aquifer connected to a surface water body can either reduce the quantity of water discharging to the river or increase the quantity of water lost from the river to groundwater (Barlow and Leake 2012).

Id.

Historically, Ecology took important steps to protect streamflow in WRIA 15. Chapter 173-515 WAC closed 54 streams or stream reaches in WRIA 15 based on Ecology’s determination that “there are no waters available for further appropriation” and finding that many these small streams “with estimated mean annual flows of 5 cfs or less” have “high instream values for anadromous fish, aesthetics, water quality, and/or recreation.” In addition, Chapter 173-515 WAC established instream flows on 21 streams in WRIA 15. These closures and instream flow rules are now many decades old, however, that fact that many of them go unmet demonstrate that they are not sufficiently protective given current stream conditions, additional development, and climate change, among other factors. WRIA 15 Plan at 18.

Development of a Plan for WRIA 15 presented an opportunity for Ecology to protect WRIA 15’s fragile water resources and habitat. Out of the five Streamflow Restoration and Enhancement Plans on which Ecology is conducting a rulemaking, it expects the greatest number of new permit exempt wells—5,215 of them—to be installed in WRIA



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

15 over the next 20 years. WRIA 15 Plan at 24. Ecology forecasts that these permit exempt wells will have a total consumptive use of 717.8 acre feet per year (AFY). *Id.* at 28.

The Tribe was a member of the WRIA 15 Watershed Restoration and Enhancement Committee (“Committee”) and offered comments at multiple stages of the planning process.² The Tribe did not approve the Plan because the effectiveness and completion of the offset and habitat projects in it are entirely speculative and unlikely to actually offset impacts to instream flows from permit exempt wells as required by RCW § 90.93.030. WDFW also did not approve the Plan and echoed the Tribe’s concerns, as did the Salmon Recovery Funding Board (SRF Board) when it reviewed the Plan. Moreover, Ecology did not consult with the Tribe prior to its adoption of the Plan.

Ecology is in the position of promulgating this rule because the Committee did not approve the Plan by consensus by the statutory deadline of June 30, 2021. In such situation, RCW 90.94.030 required Ecology to take three steps: (1) obtain technical review of the Plan by SRF Board; (2) “incorporate recommendations” from that technical review “into rules adopted under this chapter”; and (3) “determine that actions in the *will* result net ecological benefit to instream resources within [WRIA 15].” RCW § 90.94.030(3)(c), (h). As to the first requirement, Ecology obtained technical review of the Plan by SRF Board, but failed to fulfill the second requirement—to incorporate WDFW, the Tribe, or SRF Board’s recommendations into this rule. Regarding the third requirement, Ecology’s speculative “net ecological benefit” determination is at odds with its own guidelines and runs contrary to findings from SRF Board, the Tribe, WDFW and other local Tribes.

Unfortunately, as currently drafted, the rule—limited to the requirements of RCW § 90.94.030(4)—is so narrow in its scope that it ignores the concerns and recommendations of the Tribe, WDFW, and SRF Board and threatens the Tribe’s federal reserved water rights and Treaty fishing rights. Instead of incorporating recommendations, strengthening the Plan to ensure net ecological benefit, and promulgating additional instream flow rules, Ecology has chosen to take the risky step of allowing permit exempt wells to proliferate without first ensuring that offset projects will in fact be built in the locations

² The Tribe incorporates by reference its prior comments on the WRIA 15 Streamflow Restoration Enhancement Plan. *See* Letters from Port Gamble S’Klallam Tribe dated May 3, 2021, October 13, 2023, November 18, 2024, and April 28, 2025.



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

and in time to protect instream resources. This puts the cart before the horse and will further deplete instream flows in WRIA 15.

In sum, Ecology's decision to adopt the Plan and its refusal to include recommendations from the Tribe, WDFW, and SRF Board in this rule is unreasonable and unsupported by the facts and law.³ Ultimately, when given repeated opportunities to fulfill its statutory duty to “protect” and “enhance” the high quality of waters of the state (RCW § 90.54.020(3)(a),(b)) in the context of the Streamflow Restoration Act (ESSB 6091 (2018)), Ecology buries its head in the sand.

B. LEGAL FRAMEWORK

1. Permit Exempt Wells Remain an Exception to Groundwater Regulation and Their Use is Conditioned on Compliance With RCW § 90.94.030.

The historical context of the rule is crucial for understanding how the lack of safeguards in the Plan and rule will impact water resources WRIA 15. The use of permit exempt wells began as tool to continue developing in watersheds that were so overallocated that new water permits were generally unavailable:

Permit-exempt wells became the go-to loophole for obtaining water supply for new development. Dramatic increases in new exempt wells were observed in the 1990s and 2000s. Land developers, unable to obtain water rights, resorted to multiple permit-exempt wells to serve subdivisions. Because permit exempt wells are unregulated, no entity evaluates their impacts on the environment and pre-existing water rights.

Rachel Paschal Osborn, *From Loon Lake to Chuckanut Creek: The Rise and Fall of Environmental Values in Washington's Water Resources Act*, 11 WASH. J. OF ENVTL LAW & POL'Y 115, 149 (2021) (citations omitted).

When it enacted the Streamflow Restoration Act, however, the legislature did not generally authorize permit exempt wells in WRIsAs where streams were closed to new permits or limited by instream flow rules. Quite to the contrary, the Act *conditions* permit exempt wells in such WRIsAs on offsetting their impact through the development of offset and habitat projects required under RCW § 90.94.030.⁴ Strictly conditioning permit

³ Notably, the Tribe did not receive notification of Ecology's order adopting the WRIA 15 Plan in December 2024.

⁴ RCW § 90.94.030(1) (“Unless requirements are otherwise specified in the applicable rules adopted under this chapter or chapter 90.22 or 90.54 RCW, potential impacts on a closed water body and potential



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

exempt wells is prudent and necessary because they represent a significant *exception* to the rules that govern all other groundwater use. Conditioning permit exempt wells on offset projects is crucial because the WRIAs in which RCW § 90.94.030 applies *do not otherwise regulate permit exempt groundwater withdrawals*.⁵ It follows that as a critical source of protection for groundwater in WRIA 15, safeguards in the Plan should be robust and fully compliant with RCW § 90.94.030.

2. Minimum Statutory Requirements of a Watershed Restoration and Enhancement Plan

In enacting the Streamflow Restoration Act, the legislature required “[a]t a minimum, the plan *must* include those actions that the committee determines to be necessary to offset *potential* impacts to instream flows associated with permit-exempt domestic water use.” RCW § 90.94.030(3)(b) (emphasis added). The Act delineates high priority versus low priority offset projects in an effort to ensure that consumptive water use is in fact replace in time and in place:

The highest priority recommendations must include replacing the quantity of consumptive water use during the same time as the impact and in the same basin or tributary. Lower priority projects include projects not in the same basin or tributary and projects that replace consumptive water supply impacts only during critical flow periods. The plan may include projects that protect or improve instream resources without replacing the consumptive quantity of water where such projects are in addition to those actions that the committee determines to be necessary to offset potential consumptive impacts to instream flows associated with permit-exempt domestic water use.

Id. The Act also permits Ecology to approve a plan that include the following:

- modification of permit exempt well fees,
- standards for water use quantities that are less than authorized under RCW § 90.44,
- specific conservation requirements for new water users, and

impairment to an instream flow are authorized for new domestic groundwater withdrawals exempt from permitting under RCW 90.44.050 through compliance with the requirements established in this section.”).

⁵ RCW § 90.94.030(2) (“In the following [WRIAs] with instream flow rules . . . that do not explicitly regulate permit exempt groundwater withdrawals . . . the department shall establish watershed restoration and enhancement committees . . .”)



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

- other approaches to manage water resources.

RCW § 90.94.030(3)(f)(i)-(iv).

These requirements reflect the legislature's intent that offset projects effectively *replace* water pumped from permit exempt wells and enhance instream resources in fact by putting water back into streams, not that the projects merely intend to do so.

3. Rulemaking “to Incorporate Recommendations into Rules Adopted Under This Chapter.”

The Act directs that if the restoration and enhancement committee fails to approve a plan by June 30, 2031 Ecology “shall submit the final draft plan to the salmon recovery funding board” to provide a “technical review and provide recommendations” to Ecology to amend the final draft plan, if necessary. RCW § 90.94.030(3)(h). Ecology then “*shall consider the recommendations* and may amend the plan without the committee approval prior to adoption.” RCW § 90.94.030(3)(h) (emphasis added). After plan adoption, the Act directs Ecology to “initiate rulemaking within six months *to incorporate recommendations into rules* . . . and shall adopt amended rules within two years of initiation of rule making.” RCW § 90.94.030(3)(h) (emphasis added).

Notably, while RCW § 90.94.030(3)(g) requires rulemaking “*if necessary*, to incorporate recommendations” in WRIAs in which the Committee approved a plan, rulemaking to incorporate recommendations is not discretionary under RCW § 90.94.030(3)(h) for WRIAs that did not approve a plan: “[a]fter plan adoption, the director of the department *shall* initiate rulemaking within six months to incorporate recommendations into rules.” RCW § 90.94.030(3)(h) (emphasis added).

Despite the heightened requirements under RCW § 90.94.030(3)(h), there is no evidence that Ecology “consider[ed] the recommendations” of SRF Board and the instant rulemaking does not “incorporate” SRF Board’s recommendations into the rules. By limiting the rule to the few requirements under RCW § 90.94.030(4), Ecology has refused to consider and then incorporate crucial recommendations necessary to ensure that net ecological benefit is in fact achieved. Therefore, the proposed rule does not abide by the requirements of RCW § 90.94.030 and should be immediately withdrawn.

C. DEFECTS OF THE PLAN AND RULEMAKING

1. The Narrow Scope of This Rulemaking Excludes Repeatedly Expressed Concerns About and Recommendations to Improve the Plan.



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

As a member of the WRIA 15 Committee, the Tribe participated in numerous meetings between October 2018 and January 2021 to develop the Plan. The Tribe noted substantive problems with the Plan throughout these meetings, in comment letters, and ultimately issued Tribal Council Resolution No. 21-A-056 denying approval of the Plan for the following reasons:⁶

The plan does not sufficiently protect the Tribe's treaty reserved fishing and water rights. There is far too much uncertainty that the impacts to streamflows by permit exempt well withdrawals will be adequately mitigated and streamflows will not be further impaired. We have advocated for an adaptive management process that would allow for continued cooperation and improve water management in the WRIA, but the lack of well-developed projects and the absence of a framework for offsets to occur both in place and during critical flow periods, along with robust monitoring and water use enforcement, prevents us from approving the plan at this time.

Ltr. from Port Gamble S'Klallam Tribe to Mary Verner (May 3, 2021).

Notably, WDFW also did not approve the Plan.⁷ WDFW explained:

[T]here remains great uncertainty around the [Plan's] ability to offset the consumptive use impacts of future domestic permit-exempt well development. These uncertainties are further amplified by the complexities inherent in interactions between surface and groundwater systems. The estimated offset target and the projected flow benefits leave such a margin for error that the plan may fail to maintain streamflows, let alone restore or enhance them.

⁶ Port Gamble S'Klallam Tribe Resolution No. 21-A-056 (Apr. 12, 2021) finds and resolves in relevant part:

WHEREAS, The Tribe's Natural Resources staff and attorneys reviewed the Plan and determined that the plan did not achieve the higher offset goal, did not achieve offsets by subbasin, and did not identify projects with a high degree of success certainty.

NOW THEREFORE BE IT RESOLVED, the Tribal Council finds that the Plan provides little certainty that impacts to streamflows by permit exempt well withdrawals will be adequately mitigated and streamflows will not be impaired by said groundwater withdrawals;

BE IT FURTHER RESOLVED, that the Tribal Council hereby disapproves of the final adoption of the WRIA 15 Watershed Restoration and Enhancement Plan . . .”

⁷ See Ltr. from Megan Kernan, WDFW, Water Policy Section to Ecology (Apr. 23, 2021).



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

Id. WDFW’s disapproval stresses the uncertainty in consumptive use estimates, uncertainty related to streamflow benefits of the offset projects, significant reliance on habitat instead of offset projects, and uncertainty related to plan implementation:

- elements of the sampling design used to assess irrigated acreage risks unnecessarily increasing uncertainties in estimates of outdoor water use. The result of this limited design makes it difficult to know how much water will be intercepted by new permit-exempt wells and thus reduce streamflows. The planning process requires a reliable estimate of future consumptive use to develop an adequate offset portfolio of projects capable of replacing water.
- Ensuring that many of the claimed streamflow benefits described in the plan accrue during the critical flow period will require significant analysis beyond the extent conducted during this planning process. Currently the plan relies on flow benefits from highly conceptual managed aquifer recharged projects and water right acquisitions that lack identified locations and specificity related to the timing of their anticipated benefits. The disproportionate reliance on these conceptual water replacement projects makes it challenging to evaluate the plan’s ability to successfully offset estimated impacts, particularly during critical flow periods.

Id. When Ecology referred the Plan to SRF Board for technical review under RCW § 90.94.030(3)(h), the Tribe again reiterated its key concerns: offset projects will not effectively “mitigate increased summer demand and outdoor consumptive use when low flows have significant impacts on fish, water quality, and —later in the fall — may dramatically limit spawning,” the projects “do not directly replace water extracted by exempt wells,” forest conservation projects will have limited impact, and offset projects in one location in the watershed will have little practical impact on streamflow in which permit-exempt wells are concentrated.⁸

SRF Board echoed many of the Tribe’s concerns:

The watershed plan estimates a surplus and net ecological benefit of 2,115 acre-feet per year just by accounting for the offset projects. However, this includes a number of projects that we felt were uncertain and thus should

⁸ Ltr. from Port Gamble S’Klallam Tribe to Recreation and Conservation Office Director, Megan Duffy at 1-2.



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

not be included. In addition, there are projects that we felt overestimated the potential benefit.

Salmon Recovery Funding Board Decision Memo at 25.

The offset projects generally include many that are highly conceptual, which suggests that the potential offset in acre-feet per year is too high. More conservative estimates should be used for most of the managed aquifer recharge, rooftop runoff/low-impact development, and water right acquisition projects . . . Projects that pump groundwater to augment surface water should not be considered offset projects.

Id. at 26.

SRF Board also expressed concern that the Plan does not identify and address “streambed degradation as a root cause of reduced base flows even though it is well understood that reduced streambed elevations directly impact water table elevations and base flow volumes.” *Id.* at 25. SRF Board recommended that the Plan “[d]evelop and evaluate projects that reduce alterations of natural stream hydrology and avoid further manipulation of natural stream processes.” *Id.* at 26.

Finally, SRF Board concluded with three key recommendations:

- a. “[R]emove the less likely projects and consider other recommendations above.”
- b. “The quantities of offsets for the remaining projects should be summed up to ensure that they will still offset projected consumptive use and provide a net ecological benefit . . . It would be helpful to include information showing the stage of the project, its certainty and feasibility, funding sources, technical reviews, prioritization, private or public land, and identified project sponsors. We believe this would help evaluate the certainty that these projects will occur.”
- c. “[I]nclude mechanisms for monitoring, assessment, accountability, and adaptation to ensure successful implementation of the plan.”

Id. at 27-28.

WDFW agreed with the concerns SRF Board raised in its review. In particular, WDFW cautioned:

We share the panel’s observation that highly conceptual, impracticable, and unsponsored projects are less likely to be implemented and should be revised or removed from the plan as offset/habitat projects. However, in lieu of



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

replacing projects that are more likely to achieve tangible offsets, we believe that remaining projects should be re-evaluated to determine if NEB can be achieved.

Ltr. from Tristan Weiss and Nate White, WDFW to Recreation and Conservation Office (Oct. 3, 2023) at 2.

Unfortunately, the narrow scope of the rule, encompassing only requirements under RCW § 90.94.030(4), ignores these concerns and fails to incorporate any of the recommendations. As a result, the rule does not comply with RCW § 90.94.030(3)(h).

2. Ecology's Net Ecological Benefit Determination Conflicts With Findings from SRF Board, WDFW, and the Tribe.

Ecology's net ecological benefit determination for WRIA 15 is unreasonable and unsupported because it is contrary to its own Guidance for Determining Net Ecological Benefit and findings from Tribes and WDFW that participated on the Committee and from SRF Board. Consequently, the Plan and the rule that relies on Ecology's net ecological benefit determination fail to comply with RCW § 90.94.030(h).

The legislature's repeated use of the term "will" subsection .030(c) and (h) makes plain its intent that Ecology determine with a high degree of certainty that offset projects will be effective at achieving net ecological benefit and actually completed. Absent the recommendations of the Tribe, WDFW, and SRF Board, the Plan and the rule do not ensure projects' effectiveness or completion.

To assist the agency in making net ecological benefit determinations, Ecology promulgated Final Guidance for Determining Net Ecological Benefit, GUID-2094 Water Resources Program (July 31, 2019) (*hereinafter* NEB Guidance). In that Guidance, Ecology defines key terms as follows:

- Net ecological benefit: The outcome that is anticipated to occur through implementation of projects and actions in a plan to yield offsets that exceed impacts within: a) the planning horizon; and b) the relevant WRIA boundary.
- Net Ecological Benefit Determination: Occurs solely upon Ecology's conclusion after its review of a watershed plan submitted to Ecology by appropriate procedures, that the plan does or does not achieves a NEB as defined in this guidance. The Director of Ecology will issue the results of that review and the NEB determination in the form of an order.



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

- Reasonable Assurance: Explicit statement(s) in a watershed plan that the plan's content is *realistic* regarding the outcomes anticipated by the plan, and that the plan content is supported with scientifically rigorous documentation of the methods, assumptions, data, and implementation considerations used by the planning group.

NEB Guidance at 4-6.⁹

Ecology considers net ecological benefit in Chapter 6 of the Plan. Ecology determines that the Plan “provides a *path forward* for offsetting an estimated 717.8 AFY of new consumptive water use in WRIA 15.” Plan at 68 (emphasis added). This “path forward” rests on the development of “15 water offset projects with a total estimated offset of 2,873.1 AFY” which it estimates will yield a surplus offset of 2,155.3 AFY. *Id.* The offset projects are listed in Table 7, but only number 14. Elsewhere, Ecology speculates that “[p]rojects will protect over 950 acres of wetland, floodplain area, and other habitats for fish and wildlife. Over 17,000 feet along the streams will be protected or restored. Projects will restore over 10 miles of riparian areas over 75 acres of other habitats.” Plan at 80.

Ecology grossly overstates the potential benefits of the offset projects. As the Tribe, WDFW and SRF Board pointed out, the projects on which Ecology is basing its determination are conceptual, barebones proposals. *See* Sections C1, *supra* and discussion in this Section, *infra*. Ecology only generally acknowledges uncertainty of the actual success of the projects, but does not revise the Plan in any way to reduce uncertainty:

There is uncertainty associated with all of the analyses presented in the plan – including the projected number of new PE wells, the consumptive use estimates, the water offset benefits from the proposed projects, and the likelihood that all projects will be implemented and maintained. In addition, external factors like climate change and human migration patterns could influence the projections and estimates in this plan. Ecology relied on data available at the time of writing this plan and is transparent in the assumptions used in the analyses. Because of the large surplus in water offset, if some offset projects are not developed or benefits are less than

⁹ “Reasonable assurance” is a new term of art created by Ecology, yet it is unclear how it applies in practice in a net ecological benefit determination.



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

expected, a subset of projects can still provide sufficient water to offset the estimated new consumptive use.

WRIA 15 Plan at 82. In other words, Ecology believes that if it overshoots, everything will be fine. As long as it overestimates water use and assumes the completion of more projects than necessary, some unknown number of those projects may provide a “path forward” to achieve net ecological benefit. This fuzzy math piles uncertainty on top of uncertainty and does not add up to net ecological benefit.

Ecology attempts to smooth over doubt about Plan implementation by offering general assurances: “[t]hese types of projects have been successfully implemented in Washington” and the projects sponsors “have experience implementing these types of projects.” Plan at 67. But critical questions remain unanswered. For example, how many projects will receive funding? Given the limited and competitive nature of the funding, when will the projects receive funding? Will the projects that receive funding be constructed according to the concept laid out in the Plan? Will the projects that receive funding be constructed by the time that permit exempt wells are depleting streamflow? Will they be constructed in the location and with the effectiveness necessary to actually achieve net ecological benefit?

Given these outstanding questions, Ecology’s net ecological benefit determination is unreasonable and unsupported. By way of example, the failure to develop projects identified in the Plan with the amount of offsets, augmenting stream flows at the time, and the location intended by the Plan means that net ecological benefit would *not* be achieved in that subbasin to the detriment of streamflow and fish habitat. SRF Board highlighted this problem— “The location and quantity of net ecological benefit shows that all subbasins have a surplus, though this may change when the offset is revisited to adjust for our suggestions” (SRF Board Memo at 25-26)—and expected that Ecology would revise the Plan to account for its suggestions and recommendations. There is no evidence, however, that Ecology implemented SRF Board’s suggestions before adopting the Plan and it has refused to incorporate its recommendations as required by RCW § 90.94.030(h).

In addition, the Plan does not include the “[e]xplicit statement(s)” that the projects are “realistic regarding the outcomes anticipated in the plan” as required by Ecology’s own NEB Guidance to show there is reasonable assurance of achieving net ecological benefit. NEB Guidance at 6. Ecology cannot state that these projects “will” offset permit exempt wells as required by RCW § 90.94.030 because there are so many variables that could derail implementation, such as funding, engineering, hydrological conditions, and local



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

support, to name a few. The Plan and its appendices plainly do not provide the certainty the legislature required under RCW 90.94.030.

To reiterate, the infirmities and uncertainties in the Plan are as follows:

- a. Sponsors.** At least six offset projects do not identify any sponsor. Without identified sponsors, there is no certainty about whether or when the projects will be built at all. WRIA 15 Plan at 34-35, Table 7; Appendix E. Ecology explains that it and technical consultants “reached out to all identified project sponsors to confirm interest prior to including the projects in the watershed plan.” Plan at 32. Confirming sponsors’ “interest” falls short of reasonable assurance.
- b. Cost.** To the Tribe’s knowledge, none of the offset projects identified in the Plan have been fully funded. The projects are exceedingly expensive, ranging from an estimated \$279,000 to \$38,000,000 for a total of \$76 million dollars. *Id.* at 66. The estimates are now several years old and do not account for inflation, the competitive nature of the grants, and the state’s seriously depleted budget. Moreover, Ecology conceded on April 28, 2025 that neither this funding nor fees collected from permit exempt well users are anywhere near sufficient to fund the projects necessary to achieve the Plan’s goals. These factors make it even less likely that the projects will be built according to the size or effectiveness projected in the Plan, if they are built at all.
- c. Highly conceptual off-set plans with speculative effectiveness.**
 - SRF Board, WDFW and the Tribe found the estimated offsets of the projects to be “optimistic” because most of them are still conceptual.
 - The offset projects in the Plan will not necessarily “replac[e] the quantity of consumptive water use during the same time as the impact and in the same basin or tributary” as required by RCW § 90.94.030(3)(b). As a result, offset projects in one part of the watershed may have little practical impact on streamflow in areas where permit exempt wells are concentrated. This uneven protection of streams robs Peter to pay Paul and threatens the most vulnerable fish runs. The subbasin delineations in the Plan amplify this problem. *See* Appendix E describing design of offset projects as “conceptual.”
 - The actual offset amount and timing are entirely missing or speculative from certain projects. *See* Plan at 40, Table 8 (the “anticipated timing of streamflow benefit” of five MAR projects is specified as “TBD.”)



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

- The Plan relies on low priority projects that do not directly augment groundwater pumping, such as Project 15-SS-OP3 Mason County Rooftop Runoff to recharge groundwater at homes, Project 15-0WRIA-OP2 Forests for Streamflow which intends to preserve forestland, and Project 15-WRIA-OP4 Raingardens to improve infiltration on impervious surfaces. These projects should be removed from the Plan or downgraded to habitat projects.
- d. Implementation timing and uncertainty.** Relatedly, Ecology does not and cannot know or confirm whether the offset projects will be built by the time that permit exempt wells are installed or begin effecting streamflow. Many projects that have sponsors are far from ready to proceed. For example:
- Projects 15-BI-OP1, 15-BI-OP2 identify the City of Bainbridge as a “potential” sponsor, but “the City of Bainbridge Island indicated that their readiness to proceed at the time of this plan is relatively low.” Appendix E at E-30.
 - Project 15-WS-OP2 implementation still depends on an MAR feasibility analysis, procurement of easements and property acquisitions, planning, permitting and design. Appendix E at E-10.
- e. Ecology refused to adopt the adaptive management recommendations in Appendix G-7 of the original Plan, which SRF Board recommended be included in the Plan.** The Plan includes no steps, funding, partners, or regulatory standards to implement any of the crucial adaptive management measures recommended by SRF Board, such as monitoring streamflow, tracking new permit exempt wells, metering water use from permit exempt wells, tracking project implementation, annual and five year watershed assessments, etc. *See* Appendix G-7. Moreover, when the Tribe met with Program Manager Berns in April 28th, 2025, she explained that Ecology has authority to require metering of permit exempt wells, but would not include that requirement in the Plan or Rule. Moreover, she stated that Ecology will not analyze impacts to streamflow from permit exempt wells.

Given these substantial problems with the Plan, Ecology’s reasonable assurance determination, quoted below, is unreasonable:

Therefore, neither the completion of projects nor the attainment of their anticipated results are guaranteed. However, the inclusion of multiple projects vetted for pertinence and feasibility provides reasonable assurance



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

that projected consumptive use from new domestic permit-exempt withdrawals will be offset and that NEB will be achieved.

Moreover, Ecology's adoption of the Plan nearly verbatim from its draft form shows no evidence that it "examined or evaluated" the draft plan contrary to Ecology Policy 2094. In fact, Ecology admitted that it did not have a redline edit of the Plan showing any revisions to it following SRF Board's review. Communication from Berns to Newman (May 1, 2025). Therefore, it is impossible to know how Ecology concluded that the Plan met the statutory requirements before adopting it. Ultimately, Ecology's evaluation is a far cry from confirming funding, feasibility, effectiveness, and authorization for offset projects. Ecology's net ecological benefit determination is at odds with SRF Board's findings and recommendations and belies its claim of reasonable assurance and determination that the projects "will" provide net ecological benefit. In conclusion, nothing prevents thousands of permit exempt wells from being installed without a single project developed to offset their impact.

3. Ecology Admits That Well Fees and State Funding Are Grossly Insufficient to Cover the Cost of Projects.

At the April 28th, 2025 meeting with Ecology, the Tribe inquired whether Ecology had calculated the amount of revenue well fees would generate in comparison to the cost of the offset and habitat projects in the Plan. Ecology answered that it had not. The Tribe expressed significant concern about the limited amount of fees that would be collected and that raising the fee amount was encouraged under RCW § 90.94.030(3)(f). Ecology subsequently confirmed that it would not raise the fees. Communication from Berns to Newman (May 1, 2025). Ecology's stated reasons for not increasing well fees are that it would not have time to increase fees during this rulemaking, increased well fees would not be consistent with fees in other WRIAs and that well fees alone cannot fully fund the projects. *Id.* None of these reasons justify Ecology's decision not to attempt to raise additional funds for offset projects. Ecology's troubling concessions lead to the reasonable conclusion that Ecology did not adopt the Plan "with implementation in mind."¹⁰

¹⁰ Pol 2024 mistakenly interprets "implementation in mind" to relieve Ecology of the responsibility to ensure that the mitigation goals of the Streamflow Restoration Act are achieved: "RCW 90.94.020 and 90.94.030 do not create an obligation on any party to ensure that plans, or projects and actions in those plans or associated with rulemaking, are implemented. Further, the law does not predicate the issuance of building permits on the implementation of watershed plans or any projects and actions in those plans." Pol 2024 at 10. The Tribe disagrees with this interpretation.



PORT GAMBLE S'KLALLAM TRIBE
NATURAL RESOURCES DEPARTMENT
31912 Little Boston Rd. NE – Kingston, WA 98346

As an alternative to increasing fees in WRIA 15 alone, Ecology should consider promulgating a rule adjusting permit exempt well fees commensurate with inflation. By including an automatic adjustment of the fee, Ecology would avoid having to initiate another rulemaking for the sole purpose of adjusting the fee.

D. CONCLUSION

Ecology is well aware that this laissez faire approach to stream flow protection will not be successful. Rather, it is a recipe for ensuring the proliferation of permit exempt wells *without* the offsets required by law. This is not what the legislature intended or required when it enacted the Streamflow Restoration Act. And, the proliferation of permit exempt wells without basic safeguards in place in WRIA 15 threatens the Tribe's federal reserved water rights, Treaty fishing rights, ESA listed species in WRIA 15, and the impairment of other senior water rights in WRIA 15.

Instead of remedying these problems with the Plan through this rulemaking, Ecology made the discretionary decision to limit its scope. The Tribe disagrees with this discretionary decision because in doing so, Ecology once again ignores the Tribe's substantive concerns with the Plan and cuts off any opportunity to improve its effectiveness. By withdrawing or supplementing the proposed rule, and initiating a rulemaking under RCW Chapter Title 90, Chapter 94 to implement the Tribe, WDFW, and SRF Board's recommendations and new instream flow rules, Ecology has an opportunity to comply with RCW § 90.94.030 and fulfill its statutory mandate.

The Tribe appreciates the opportunity to comment on the proposed rule and looks forward to future opportunities to discuss its concerns about the Plan with Ecology.

Sincerely,

/s/ Benjamin Harrison

Environmental Scientist, Water Resources, Port Gamble S'Klallam Tribe

cc: Danielle Gallatin, Ecology, Statewide Rules Lead

Roma Call, Director, Natural Resources Department, Port Gamble S'Klallam Tribe

Steven Moe, Director, Legal Department, Port Gamble S'Klallam Tribe

Amber Caldera, Chairwoman, Port Gamble S'Klallam Tribe