



SQUAXIN ISLAND TRIBE

August 12, 2021

Mary Verner, Program Manager
Water Resources Program
Washington Department of Ecology
300 Desmond Drive SE
Lacey, WA 98503
mary.verner@ecy.wa.gov

Jeff Breckel, Chair
Salmon Recovery Funding Board
salmon@rco.wa.gov
Salmon Recovery Board Liaison
wyatt.lundquist@rco.wa.gov

Re: WRIA 13 Watershed Restoration & Enhancement Plan

Dear Mary and Jeff:

As you know, all members of the WRIA 13 committee, including the Squaxin Island Tribe ("Tribe"), voted to approve the WRIA 13 Final Draft Watershed Restoration and Enhancement Plan (Jan. 28, 2021) ("Plan"). The lone disapproving member was the Building Industry Association of Washington ("BIAW"). Since the Plan was not unanimously approved, the Streamflow Restoration Act, RCW Ch. 90.94 ("Act"), requires Board involvement before Ecology adopts a final plan. RCW 90.94.030(h).

While imperfect, the Final Draft Plan approaches the letter and spirit of the Act because its elements will likely lead to streamflow restoration and enhancement. For reasons described below, this letter urges that: (1) Ecology submit the Plan to the Salmon Recovery Funding Board ("Board") either intact or with provisions that improve upon efforts to restore and enhance streamflows; (2) the Board, after conducting a technical review, recommend that Ecology adopt the Plan in either its current state or, with additional recommendations that increase the plan's effectiveness; (3) Ecology adopt the Board-recommended plan and limit any amendments to those that strengthen the Plan's effectiveness; and (4) Ecology initiate rule-making as currently recommended by the Plan.

This is the correct path to a watershed plan that actually protects, restores and enhances fish-bearing waters in WRIA 13. State and federal laws, including the Treaty of Medicine Creek, require no less. Ecology and the Board should also understand the consequences if Ecology ultimately adopts a plan that fails to comply with the Act and engages in rule-making with an overly narrow scope. Local government(s) cannot legally approve streamflow-impactful buildings and subdivisions pending compliance with the Act and other water laws. Until compliance is achieved, applicants would have to provide evidence of legal and physical water availability.

Interagency Memorandum of Understanding

Squaxin understands that Ecology and the Recreation & Conservation Office (“RCO”) will be entering into an MOU that will guide the process. Squaxin respectfully requests a consultation during the drafting of the MOU and an opportunity to review drafts. We believe that MOU provisions will likely have some bearing on the process and outcome of a final plan and rule-making, and would greatly appreciate a chance to share comments. Squaxin also requests notice of the final MOU.

Background

Streams in WRIA 13 fall short of instream flows established by rule (WAC Ch. 173-514) and the rule’s stream closures are ignored. The WRIA 13 instream rule is nearly 40 years old, is woefully outdated and ineffective, and contains numerous provisions that conflict with state water statutes.

Accordingly, the Tribe during the Plan development process submitted many documents into the agency record that support the need for an effective WRIA 13 plan and rule-making with a broad scope¹. We urge Ecology and the Board to carefully consider these documents during the remaining steps of the process. We have attached two letters that in particular provide a helpful overview of the Tribe’s position. The Tribe’s December 7, 2020 letter to Ecology comments on four watershed plans (including the WRIA 13 plan) that overlap with Squaxin usual and accustomed fishing area (“U&A”). (Attachment 1) The Tribe described the impaired status of the WRIA 12-15 watersheds, the legal framework governing the plans, Ecology’s mandate to amend the outdated and ineffective WRIA rules, and criteria for successful plans. Also attached is an April 16, 2021, letter in which the Tribe approved the WRIA 13 Plan and described the positive aspects of the Plan as well as its shortcomings. (Attachment 2).

As mentioned, all WRIA 13 committee members, including Ecology, approved the Plan except for the BIAW.

The WRIA 13 Plan’s Rule-Making Recommendation

Item 7 under the Plan’s “Policy and Regulatory Recommendations” is entitled “Instream Flow Rules.” It recommends the following, with the stated purpose of “Greater protection of aquatic resources, streamflows, Tribal Treaty water rights, and senior water rights from future water demands”:

- Investigate the WRIA 13 salmon streams and determine needed revisions to the WRIA 13 Instream Flow (ISF) Rule (WAC 173-513). Streams under review for instream flow revisions will be clearly represented to the public through maps in an accessible manner. Consider need to close streams in WRIA 13 with summer salmonid habitat (which could include: Upper Deschutes River, Middle Deschutes River, Lower Deschutes River, McLane Creek, Green Cove, Woodland Creek, Woodard Creek, Percival Creek, Adams Creek, and other associated tributaries and small coastal streams with salmonid habitat) annually in the low flow season (typically from June through October) and what effect it would have on growth in the watershed. This would apply to water rights that have a priority date after any changes made to the instream flow rule.

¹Ecology has indicated that it will maintain these documents intact. We urge the Board to consult these documents during its process. Squaxin is available to answer any questions that the Board may have.

- Review other salmon streams without existing ISF between November and May and consider setting ISF levels using current methodology.
- Use the latest ISF assessment methodology to reassess ISF values for the Deschutes River below Deschutes Falls.
- Revise and add any other conditions consistent with the final watershed plan to the ISF rule.
- Ecology to initiate rulemaking to update the 40-year old WRIA 13 rule to reflect changed conditions and new information, and make the rule effective, legally consistent, and enforceable.

Plan at pp. 66-67. Rule-making of this nature is a particularly important part of the process for reasons described in the attached letters. We seek rule-making with a broader scope and that Ecology consult with Squaxin well in advance of initiating formal rule-making.

Process required by the Streamflow Restoration Act

The Act sets out five next steps in the watershed plan process:

If the watershed restoration and enhancement committee fails to approve a plan by June 30, 2021, [Ecology] shall submit the final draft plan to the [Board] and request that the [Board] provide a technical review and provide recommendations to [Ecology] to amend the final draft plan, if necessary, so that actions identified in the plan, after accounting for new projected uses of water over the subsequent twenty years, will result in a net ecological benefit to instream resources within the water resource inventory area. [Ecology] shall consider the recommendations and may amend the plan without committee approval prior to adoption. After plan adoption, [Ecology] shall initiate rule making within six months to incorporate recommendations into rules adopted under this chapter or under chapter 90.22 or 90.54 RCW, and shall adopt amended rules within two years of initiation of rule making. RCW 90.94.030(3)(h)

To summarize, Ecology first “submit[s] the final draft plan” to the Board. In so doing, the Tribe urges Ecology not to weaken any part of the Final Draft Plan. Any changes to the Plan should be to ensure that streamflow restoration and enhancement actually occur. Next, the Board conducts (1) a technical review of the Final Draft Plan and (2) prepares recommendations for amendments “if necessary, so that actions identified in the plan, after accounting for new projected uses of water over the subsequent twenty years, will result in a net ecological benefit [“NEB”] to instream resources within the water resource inventory area.” Importantly, the Legislature did not limit this provision to require offsetting 20 years of only domestic permit-exempt wells; rather, the statute’s plain language requires offsetting 20 years of all projected water uses. *Compare* RCW 90.94.030(3)(h) with .030(1) (“new domestic groundwater withdrawals exempt from permitting”).

Third, Ecology “shall” consider the Board’s recommendations and may amend the final draft plan without Committee approval prior to adoption. At minimum, Ecology cannot amend a plan in a manner that fails to meet the Act’s requirement – i.e., that the plan, after accounting for all new projected uses of water over the subsequent twenty years, will result in a net ecological benefit to instream resources. *See id.* Fourth, Ecology adopts the plan. Finally, Ecology “shall” initiate rule-making within six months “to incorporate recommendations into rules adopted under this chapter or under chapter 90.22 or 90.54 RCW.”

The Board's Mission and Authority

The Tribe respectfully urges that Board, after completing its technical review, recommend that Ecology adopt the WRIA 13 Plan either in its current form or, better yet, after correcting weaknesses as noted in the Tribe's April 16 approval letter. This action will be consistent with the Board's governing mission, authority, the Act and the 1971 Water Resources Act.

The Board's mission is to protect and restore imperiled salmonid fisheries. The Legislature when establishing the Board found that "repeated attempts to improve salmonid fish runs throughout the state of Washington have failed to avert [ESA] listings of salmon and steelhead runs". RCW 77.85.005. It further recognized:

These listings threaten the sport, commercial, and tribal fishing industries as well as the economic well-being and vitality of vast areas of the state. It is the intent of the legislature to begin activities required for the recovery of salmon stocks as soon as possible, . . .

Id. The Legislature also found that "A strong watershed-based locally implemented plan is essential for local, regional, and statewide salmon recovery", and that "credible scientific review and oversight is essential for any salmon recovery effort to be successful." *Id.*

When reviewing the WRIA 13 Plan, the Tribe urges the Board to apply the same "outcome-focused performance measures" that the Board applies towards grant applications. *See* RCW 77.85.110(3)(j), .135. The Board's goal should be a "strong" watershed plan that will be implemented to protect, restore and enhance salmonid fisheries. *See* RCW 77.85.005. The Board should also consider the 1971 Water Resources Act's mandate that "[a]ll agencies of state and local government, including counties" carry out their vested powers "in manners which are consistent with" the 1971 Act. RCW 90.54.090. Among other things, the Act includes in its declaration of "fundamentals" that "[p]erennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values." RCW 90.54.020(3)(a).

Thank you for your consideration. Please don't hesitate to contact us if you have any questions.

Sincerely,

s/ Jeff Dickison

Jeff Dickison, Assistant Director
Squaxin Island Natural Resources Department

Enclosures

cc: Megan Duffy, Director, RCO
Bennett Weinstein, Streamflow Section Manager, Department of Ecology
Angela Johnson, Watershed Lead, WRIAs 13 and 14, Department of Ecology
Alan Reichman, Assistant Attorney General
Andy Whitener, Director, Squaxin Island Tribe Natural Resources Department
Paul Pickett, consultant for Squaxin Island Tribe
Sharon Haensly, counsel for Squaxin Island Tribe

SENT BY ELECTRONIC MAIL

December 7, 2020

Mary Verner, Program Manager
Water Resources Program
Washington Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600
mary.verner@ecy.wa.gov

Re: Squaxin Island Tribe's comments on draft WRIA 12-14 Streamflow Restoration Plans

Dear Mary:

The comments in this letter apply to four draft watershed plans in WRIAs 12-15 being developed as part of the process created by ESSB 6091 and the Streamflow Restoration Act (the "Act", codified as RCW 90.94). (These plans are sometimes referred to as "Streamflow Restoration" or "Watershed Restoration and Enhancement" Plans.) These comments address the Squaxin Island Tribe's ("Tribe" or "Squaxin") expectations for the plans in context of the appropriate legal framework. The Tribe has invested, and will continue to invest, significant effort in the ESSB 6091 watershed planning process. WRIAs 12-15, which are covered by Section 203 of the Streamflow Restoration Act ("Act"), overlap with most of the Tribe's usual and accustomed fishing areas ("U&As") in South Puget Sound. Accordingly, the Tribe is focusing its efforts on developing plans that actually protect, restore and enhance fish-bearing waters. This is what the Act mandates.

We are quite concerned, however, that the four emerging draft plans fall far short of the mandates of the Act and other state laws, and violate the Tribe's federally-reserved water rights. The plain language of the Act requires more than noncommittal statements about offsetting twenty years of domestic permit-exempt wells. These plans must actually restore and enhance streamflows. In some basins, creeks are currently dewatered by existing permit-exempt wells, especially during low flow times (summer, fall) that are critical for fish spawning and rearing. In other places, water systems growing into inchoate state water rights will dewater fish-bearing streams. These harms are compounded by the predicted water scarcity that accompanies climate change in Western Washington. These plans, if properly devised, can help avoid delaying important water management decisions, avoid curtailments, and bring longer certainty to South Puget Sound.

This letter provides comments that apply to all four plans, covering the legal issues and our expectations for the Plans:

- Section A: Status of WRIA 12-15 Watersheds

- Section B: Correct Legal Framework for Plans
- Section C: Ecology's mandate to amend the rules for WRIAs 12-15.
- Section D: Criteria for Successful Plans

We want to be clear that the Tribe has engaged in the planning process in the spirit of cooperation and compromise. Our positions in the Committee meetings were motivated by that spirit, but do not necessarily reflect our legal views in the event that we are in future litigation.

For example, in meetings our representative Paul Pickett has made comments or declined to place blocks on plan actions and projects that contain non-binding, discretionary language (like "should" and "could"). Even when we accept non-binding plan language as part of a collaborative process, we still expect binding commitments from Committee members and from Ecology, including commitments enshrined in rule amendments. Interim decisions or agreements where we "stand aside" or agree to one element of the plan, out of a willingness to compromise and keep the process moving, do not necessarily mean approval of the plan as a whole, or even approval of the item we agreed to.

We reserve our rights to address the legal shortcomings of the planning process, despite Squaxin plan comments that allow the inclusion of plan elements that we believe do not meet the language and intent of the Act. Should we find the plan otherwise acceptable to approve, we expect to articulate this view in a signing statement to be included in the plan.

A. Status of WRIA 12-15 Watersheds

Most precipitation in these WRIAs arrives during the winter months when water demands are the lowest. During the summer there is little rain, and naturally low stream flows are dependent on groundwater inflow. This means that groundwater and surface water are least available when water demands are the highest. This is especially true in hot, dry years, and increasingly true with climate trends.

Much of the water supply in these watersheds is now compromised or controlled by the owners of claims, permits, rights, and permit-exempt wells. Increased demands from population growth, low summer and early fall streamflow levels, and impacts from climate change add to the challenge of finding new water supplies in these WRIAs. There is limited water available for new uses in parts of these WRIAs, especially given that river levels need to be maintained to ensure adequate water quality and fish migration. This reality is explicitly acknowledged by RCW 90.45.005(2)(a) ("The legislature finds that: . . . The state of Washington is faced with a shortage of water with which to meet existing and future needs, particularly during the summer and fall months and in dry years when the demand is greatest; . . .").

In the 1980's, Ecology adopted instream flow rules for many streams in these four WRIAs. These rules close, partially close, or set instream flow levels in numerous streams. For

those streams with gages, records indicate the streams are frequently not meeting instream flows during the late summer and early fall periods that are critical for salmon. *See, e.g., Ecology, Focus on Water Availability for WRIAs 13, 14.*

For years, Ecology has shirked its duty in these WRIAs to ensure that senior water rights, including instream flows, closures, and the Tribe's rights, are protected by enforcement of the laws and rules. Ecology in recent years has taken the incorrect position that these WRIA rules do not limit the use of permit-exempt wells, inviting a free-for-all that contravenes the governing statutes.

B. Correct Legal Framework for Plans

1. The draft plans exclude elements mandated by the Act, and/or make it impossible for Ecology to adopt without violating the Act.

Ecology's position is that it can adopt plans that only offset 20 years of "new" domestic permit-exempt wells and achieve net ecological benefit ("NEB"). This interpretation is incorrect. It ignores mandatory language in RCW 90.94.030. First, the statute, both implicitly and explicitly, mandates that offsets must at minimum include both permit-exempt domestic uses dating back to the date of WRIA rule adoption and new domestic permit-exempt wells. RCW 90.94.030(3)(b). Second, the law mandates that Ecology, before adopting the plan, "must" determine that actions identified in the plan, after accounting for all new projected uses of water over the subsequent twenty years – i.e., not just new, domestic permit-exempt wells – will result in a net ecological benefit ("NEB") to instream resources within the WRIA. RCW 90.94.030(c). Third, the plan "must" include an evaluation or estimation of the cost of offsetting all new domestic water uses over 20 years, not just new, domestic permit-exempt wells. RCW 90.94.030(d). Finally, the plan "must" estimate 20 years of all cumulative consumptive water use impacts – not just new domestic permit-exempt withdrawals. RCW 90.94.030(e).

2. Guaranteed plan implementation is mandatory, not optional.

As envisioned by the Act, Ecology-adopted watershed plans (with or without unanimous committee votes) can meet the Act's mandates by:

- (1) ensuring the offsetting of (a) existing domestic permit-exempt wells that are junior to instream flow rules, and (b) future domestic permit-exempt wells through 2038 (RCW 90.94.030(3)(b));
- (2) beginning to restore flows where instream flows are unmet;
- (3) assuring implementation; and
- (4) being enforceable.

See RCW 90.04.030(3)(b). That outcome, however, appears highly unlikely given the current nature of the draft plans.

ESSB 6091 allows streamflow impacts from new domestic permit-exempt wells – impacts that are highly likely to occur – provided adequate offsets are realized and NEB is achieved. ESSB 6091 accomplished this through the Act itself, as well as amending the Building and Subdivision codes and the Growth Management Act (“GMA”)¹. The Act authorizes new domestic permit-exempt wells to impair instream flows and impact closures “through compliance with the requirements [of RCW 90.94.030], unless instream flow rules specify otherwise. RCW 90.94.030(1). Among other things, RCW 90.94.030 requires plans that offset impacts and achieve NEB.

Ecology’s position effectively means that impacts can occur even if the projects and actions intended to offset permit-exempt wells and achieve NEB are not implemented. Ecology’s guidance states that the Act “does not predicate the issuance of building permits on the implementation of watershed plans or any projects and actions in those plans.” Ecology, *Streamflow Restoration Policy and Interpretive Statement*, POL-2094 at p. 10 (July 31, 2019) (Ecology POL-2094). We expect local governments to take the position that they can approve streamflow-impactful buildings and subdivisions because these approvals are consistent with the watershed plans, permit-exempt well law, and/or instream flow rules, even if implementation is not at all certain to occur or never occurs.

Compliance with RCW 90.94.030, however, requires implementation of offsets and NEB that is comprehensive, timely, and effective. Nowhere does the Act absolve Ecology or any other entity of the duty to ensure implementation of the projects and actions. Rather, it is clear that the Legislature directed Ecology to implement a program that restores and enhances streamflows. For all plans, regardless of whether the committees unanimously adopt them, Ecology must make a specific determination that requires guaranteed implementation. RCW 90.94.030(3)(c), (). Ecology can therefore not legally adopt a plan that fails to ensure that the impacts from new domestic permit-exempt wells and domestic permit-exempt wells constructed after the date of the ISF rule will be offset and that NEB will occur. There is no indication that the Legislature intended to sanction streamflow-impacting development while allowing Ecology to adopt plans that may never be implemented and thus fail to actually offset the impacts and achieve NEB.

Moreover, ESSB 6091 did not amend a host of water laws that recognize instream flows as water rights and prohibit junior withdrawals from impairing instream flows. Those laws, combined with recent Washington Supreme Court decisions that confirm instream flows as senior rights and prohibit impairment by junior uses, provide an important backdrop for analyzing the Act. See *Swinomish Indian Tribal Community v. Department of Ecology*, 178

¹ ESSB 6091 amended RCW 19.27.097, 58.17.110, 90.03.247, and 90.03.290; added a new section to chapter 36.70A RCW; added a new section to chapter 36.70 RCW; and created the new chapter 90.94 RCW.

Wash.2d 571, 311 P.3d 6 (2013); *Foster v. Washington State Dept. of Ecology*, 184 Wash.2d 465, 362 P.3d 959 (2015).

Ecology has proposed that watershed plans should contain “reasonable assurances” as to implementation. See Ecology, *Final Guidance for Determining Net Ecology Benefit*, GUID 2094 at p. 6 (July 31, 2019). It is unclear where this term came from and exactly what it means. It is clear, however, that reasonable assurance does not equate to certain implementation given Ecology’s repeated statements elsewhere that no one has a duty to implement. Accordingly, the plans’ predicted success must actually occur. In addition, the criteria for making this determination should include the incorporation of a monitoring plan to gauge effectiveness and a corrective action strategy if the benefits fail to accrue.

Finally, SEPA requires that Ecology interpret its laws in accordance with SEPA’s environmentally-protective policies and requires a heightened level of certainty for implementation. See, e.g., RCW 43.21C.030 (mitigation measures must be “reasonable and capable of being accomplished”). Since it appears that the watershed plans will result in significant impacts, Ecology will have to prepare EIS’s and mitigate the impacts. See, generally, RCW Ch. 43.21C.060.

3. The Plans, if adopted without the mandatory offsets, NEB and implementation, will interfere with the Tribe’s federally reserved water rights.

Tribes’ federally-reserved water rights have been litigated and found to exist under the longstanding *Winans* and *Winters* doctrines. See, e.g., *Aquavella II*, 121 Wash.2d 257, 850 P.2d 1306 (Wash. 1993). *Winans* rights are based on the doctrine that the treaties were “not a grant of rights to the Indians, but a grant of rights from them – a reservation of those [rights] not granted.” *United States v. Winans*, 198 U.S. 371, 381 (1905). *Winans* rights preserve pre-existing uses, and impress a servitude that runs against the state of Washington. The priority date for these rights is “time immemorial.” A water right for fishing “consists of the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive rights applies.” *United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1983).

Winters rights are federally created and arise when the federal government reserves land for a particular purpose. *Winters v. United States*, 143 F. 740, 742 (9th Cir. 1906); *Arizona v. California*, 373 U.S. 546 (1963). Creation of an Indian reservation carries an implied right to unappropriated water to the extent needed to accomplish the purposes of the reservation. The priority date is when the reservation was established.

Both types of rights exist and predate all rights created by state law. These rights include the right to prevent appropriators from using water so as to deplete water sources below levels that damage the habitat of fish that the Tribes have a right to take. Finally, the rights cannot be given away or diminished by state law.

There is no question that Squaxin has reserved water rights to instream flows. The historical record and case law confirm that the Squaxin people have been a fishing people since time immemorial; and that the purposes of the Squaxin Island Reservation were: (1) to create a sustainable, permanent homeland for the Squaxin people; and (2) to ensure the Squaxin people's access to and harvest of healthy fish populations to continue their fishing way of life.

This is consistent with the Ninth Circuit's ruling in the culverts case:

"Thus, even if Governor Stevens had made no explicit promise, we would infer, as in *Winters* and *Adair*, a promise to "support the purpose" of the Treaties. That is, even in the absence of an explicit promise, we would infer a promise that the number of fish would always be sufficient to provide a "moderate living" to the Tribes. *Fishing Vessel*, 443 U.S. at 686, 99 S.Ct. 3055. Just as the land on the Belknap Reservation would have been worthless without water to irrigate the arid land, and just as the right to hunt and fish on the Klamath Marsh would have been worthless without water to provide habitat for game and fish, the Tribes' right of access to their usual and accustomed fishing places would be worthless without harvestable fish."

9th Cir. Culverts decision, 853 F.3d 946, 965 (9th Cir. 2017); *see also id.* at 964 ("[The Stevens Treaties'] principal purpose was to secure a means of supporting themselves once the Treaties took effect"; "[The Indians] reasonably understood that they would have, in Stevens' words, "food and drink ... forever.").

When these rights are adjudicated, it is highly likely that the quantities of reserved rights will exceed many of the instream flows established in Ecology's rules. Accordingly, it defies common sense and the law to adopt watershed plans that sanction streamflow diminishment by permit-exempt wells or unsupported or non-guaranteed projects, when the Tribe (and public) have a legal right to those waters.

Finally, nothing in RCW Ch. 90.94 allows Ecology to violate federal law or exclude it from consideration when adopting these plans. Nor could it. *See, e.g.*, RCW 90.82.120(1) ("Plan parameters. (1) Watershed planning developed and approved under this chapter shall not contain provisions that: (a) Are in conflict with . . . federal laws, or tribal treaty rights . . .").

4. Successful South Sound plans and outcomes require significant Ecology engagement.

Successful WRIA 12-15 plans require Ecology to significantly engage in water management in the South Sound. The Tribe has proposed for the WRIA plans the appointment of a "water steward" with water master and groundwater supervisor responsibilities. This position could:

- (1) Help track plan activities vis-à-vis the salmon recovery database, measure plan outcomes, and determine if plan goals are being achieved;
- (2) support technical analyses of watershed conditions, including monitoring flows;
- (3) help to resolve disputes;

- (4) enforce use limits and senior rights;
- (5) take steps to avoid impairment of senior instream flow rights by junior users;
- (6) provide education/outreach;
- (7) participate and supporting committee meetings; and
- (8) coordinate drought responses.

See RCW 90.03.060(1); RCW 90.44.200. An additional reason to appoint a South Sound Water Steward is to improve Ecology's implementation and enforcement of the WRIA 12-15 rules. Ecology should actively seek resources and assign staff to serve in this position or its equivalent. This could include reassignment of existing resources and advocacy in the legislature for additional funding.

5. Potential consequences if plans fail to ensure offsets and NEB

If Ecology adopts a plan that fails to comply with RCW 90.94.030 (e.g., the plan lacks ensured implementation of offsets and NEB), and either refuses to rule-make or rule-makes with an overly narrow scope, then Ecology should understand the potential consequences. Local government(s) would be prohibited from approving streamflow-impactful buildings and subdivisions pending compliance. Until compliance is achieved, applicants would have to provide evidence of legal and physical water availability.

C. Ecology's mandate to amend the rules for WRIAs 12-15.

1. Why rules are defective and should be amended

Instream flow rules for WRIAs 12-15 are outdated, contain illegal provisions that are inconsistent with the governing statutes, don't explicitly regulate permit-exempt wells, and are rarely if ever enforced by Ecology. Among other things, these rules are illegal because Ecology lacks statutory authority to, by rule, exempt domestic and stock watering uses from instream flows. Instream flows are water rights with priority dates (the date of rule adoption); and apply to all junior groundwater withdrawals (permitted and permit-exempt) and surface water diversions.

Table 1 summarizes key problems with the exemptions in WRIA 12-15 rules.

For the following reasons, Ecology has a duty to amend these defective rules. First, leaving them in place will result in more impairment of instream flows. This is because the Act allows authorizes new domestic permit-exempt wells to impair instream flows and to impact closures "through compliance with the requirements [of RCW 90.94.030], unless instream flow rules specify otherwise. RCW 90.94.030(1). It does not appear that "instream flow rules" for WRIAs 12-15 "specify otherwise" – i.e., expressly provide an alternative path for offsetting new domestic permit-exempt wells and achieving NEB. In fact, Ecology's recent position (*see Hirst*) is that permit-exempt wells are exempt from instream flows when WRIA rules don't expressly address permit-exempt wells.

Table 1. Key problems with exemptions in the WRIA 12-15 rules

WRIA	Does the rule expressly regulate permit-exempt wells?	Does the rule implicitly regulate permit-exempt wells?	Does rule expressly state that water is unavailable for permit-exempt wells in specific area(s)?	Does rule contain illegal exemptions for permit-exempt wells?
WRIA 12 (WAC Ch. 173-512)	No.	Yes.	No.	Yes. Exempts from closures stock watering use, except as related to feed lots. (-060(2))
WRIA 13 (WAC Ch. 173-513)	No.	Yes.	No.	Yes. Exempts from the chapter (i.e., ISFs & closures) domestic use for a single residence and stock watering, except as related to feedlots, if no alternative source is available. If the cumulative effects of numerous single domestic diversions would seriously affect the quantity of water available for instream uses, then only domestic in-house use is exempt. (-070(2))
WRIA 14 (WAC Ch. 173-514)	No.	Yes.	No.	Yes. Exempts from the chapter (i.e., ISFs & closures) single domestic and stockwatering use, except as related to feedlots. If the cumulative impacts of numerous single domestic diversions would significantly affect the quantity of water available for instream uses, then only single domestic in-house use is exempt if no alternative source is available. (-060(2))
WRIA 15 (WAC Ch. 173-515)	No.	Yes.	No.	Yes. Exempts from the chapter (i.e., ISFs & closures) domestic use for a single residence, and stockwatering use except that related to feedlots. If the cumulative effects of numerous single domestic diversions would seriously affect the quantity of water available for instream uses, then domestic in-house use is exempt if no alternative source is available. (-070(3), (4))

Accordingly, to the extent that Ecology adopts watershed plans that fail to guarantee mandatory offsets and NEB (which in itself would violate the Act), Ecology must amend the WRIA 12-15 rules to achieve these outcomes. Put another way, Ecology lacks authority to both (1) adopt plans that do not guarantee offsets and NEB, and (2) fail to amend instream flow rules.

Second, Ecology cannot allow defective instream flow rules to remain in place because the Act allows local governments to rely on WRIA rules when planning and approving development that will interfere with instream flows. Again, leaving these defective rules in place will result in impaired flows and impacted closures. That is because ESSB 6091 amended the GMA, Building and Subdivision Codes to allow local governments, for purposes of complying with the GMA's provisions relating to surface and groundwater resources, to rely on ISF rules. RCW 90.36A.590; RCW 19.27.097, RCW 58.17.110.

Third, other statutory and regulatory provisions mandate that Ecology fix the WRIA 12-15 rules. For example, the 1971 Water Resources Act mandates that Ecology is “directed to modify existing regulations and adopt new regulations, when needed and possible, to insure that existing regulatory programs are in accord with the water resource policy of this chapter and the program established in subsection (1) of this section. RCW 90.54.040(2) (emphasis added). For the above reasons, rule-making is “needed” and “possible”.

See also Ecology's implementing regulations in WAC 173-500-010(4) (“The [1971 Water Resources Act] further directed [E]cology to modify existing regulations and adopt new regulations to insure that existing regulatory programs are in accord with the water resource policies of the act.”); WAC 173-500-070 (“[E]cology shall initiate a review of the rules established in this chapter whenever new information, changing conditions, or statutory modifications make it necessary to consider revisions.”). (Emphases added.) *See also* Ecology's regulations governing reservations of water for future water supply; WAC 173-590-010(5) (“The [1971 Act] further directs the [E]cology to modify existing regulations and adopt new regulations to insure that existing regulatory programs are in accord with the water resource policies of the act.”) (emphasis added).

Additionally, provisions in the rules for WRIs 12-15 mandate that Ecology “shall initiate a review” of rules “whenever new information, changing conditions, or statutory modifications make it necessary to consider revisions.” WAC 173-512-080, WAC 173-513-100, WAC 173-514-090, WAC 173-515-100 (emphases added).

Ecology takes a constricted position as to rulemaking that is inconsistent with its statutory and regulatory mandates, including its obligations as a steward of public water

resources. RCW 90.03.010 (“Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and, as between appropriations, the first in time shall be the first in right.”). Ecology’s position is that it must adopt rules to incorporate plan provisions only if: (1) the adopted plan recommends a change to the fee or the water use restriction prescribed in RCW 90.94.030(_); or (2) Ecology fails to adopt a plan by the statutory timeline. Ecology POL 2094, *Streamflow Restoration Policy and Interpretive Statement* at pp. 10-11 (July 31, 2019). Ecology’s position is to avoid rulemaking unless a plan contains recommendations that “require it” to rulemake. Even if Ecology decides to engage in rulemaking, its stated policy is to avoid addressing anything outside the scope of the Act.

2. Areas where rule-making is needed.

The Tribe has found, from experience in past water resources issues and the current WRIA planning process, that specific areas of the current rules need revision. Table 2 lists some of the revisions that we believe are necessary.

Table 2. List of proposed rule changes for WRIAs 12-15

Section/topic	Changes needed
Purpose	Update to current standards and goals
Establishment of Instream flows	Review all streams in WRIA and identify streams with salmon habitat depending on flow
Establishment of Instream flows	Conduct ISF studies for all salmon streams and either update ISF levels for streams in the rule or add ISF flows for streams lacking them.
Establishment of Instream flows	Remove exemption for ground water withdrawals that "would not interfere significantly with stream flow" in streams listed in the rule.
Establishment of Instream flows	Acknowledge seniority of Tribal water rights and update language for consultation with Tribes
Surface water source limitations to further consumptive appropriation	Close all streams with salmon habitat during the low flow season
Surface water source limitations to further consumptive appropriation	Add language to protect tributaries to closed streams
Surface water source limitations to further consumptive appropriation	Add language to expressly prohibit loss of flow during stream closures
Groundwater	Add section prohibiting impacts on ISF flows and closures from ground water withdrawals

Section/topic	Changes needed
Permit-exempt groundwater for future domestic uses.	Add a section similar to WAC 173-501 with fee requirements, including increased fees to support implementation.
Permit-exempt groundwater for future domestic uses.	Add a section similar to WAC 173-501 with water use limits and metering that apply to all PE wells.
Future surface and groundwater appropriations, including PEWs	Provide all Group A systems a "right of first refusal" for new connections. Require all new water connections within Group A service areas to hook up if connections is "timely and reasonable". Prohibit PE wells where timely and reasonable connection is available. Set a statewide standard for "timely and reasonable".
Future surface and groundwater appropriations, including PEWs	Add limitations to new surface and ground water appropriation similar to Quilcene Rule.
Future surface and groundwater appropriations, including PEWs	Establish setback requirements (depth and horizontal distance) for any new well from a stream listed in the rule
Future surface and groundwater appropriations, including PEWs	Require access to wells and meters for authorized Ecology, Dept. of Health, or county staff.
Mitigation	Set standards for mitigation
Mitigation	Mitigation for interties that affect instream flows and do not have existing mitigation.
Drought response	Counties must establish and ecology approve mandatory water conservation and drought response programs for all PE wells.
Drought response	Establish drought water use limits which go into effect during a drought declaration. Exemptions for food production, fire protection (approved by fire marshal), and approved environmental projects.
Exemptions	Remove any exemptions for single domestic wells and stock watering. Revise and update. Allow limited use of peak flows for environmental and low flow augmentation projects.
Enforcement	Ecology shall establish enforcement guidelines, which include halting building permits for development with PE wells if offset projects are insufficient to exceed PE well growth within a limited amount of time, such as 5 years.

Section/topic	Changes needed
Enforcement	Ecology will develop enforcement guidelines for complaint response and water users not following rules
Rule harmonization	Provide requirements that align water resources rules with GMA requirements such as comp plans and critical areas, with the goal of increasing recharge and reducing water withdrawals.
Reopener	Include standards for reviewing and revising the rule on a regular schedule (for example, every 5 years), or if new information or trends indicate loss of effectiveness.

D. Criteria for Successful Plans

After two years at the table in four WRIA Planning committees, our criteria for a successful plan are becoming clear. Ecology should support the Tribe to ensure these elements are included in each Plan:

1. **PE CU: A conservative (high) estimate of permit-exempt well consumptive use (PE CU) set as a target for offsets.**
 - Estimates for the future consumptive use of permit-exempt wells that provide the target for offsets and define the success of the plan must be based on conservative assumptions that ensure that water produced by successful offset projects will address potential consumptive use levels under all reasonable future scenarios of high growth and use. This “precautionary principle” approach is needed because once wells are installed they will not be removed, and there needs to be a high level of confidence that offset projects will exceed future PE CU under reasonable scenarios of higher use that are foreseeable.
 - To protect senior water rights, the CU estimate must be high enough to ensure certainty that PE well use will be offset under all reasonable potential future situations. This will also ensure that streamflow restoration is likely to be an additional benefit.
2. **Projects: Strong list of projects with good water quantities, reasonable certainty, identified sponsors, willing landowners, and covering areas of high PE well impacts and important salmon areas.**

- Projects are going to be uncertain, whether in an approved plan or in Ecology’s plan and rule. Most are undeveloped concepts that will need sponsors, willing landowners, feasibility studies, funding, permits, and when completed may not perform as expected. Projects with a reasonable likelihood of success are those that are well defined and have an identified sponsor. In addition, plans need to identify projects in areas where PE wells are most likely to have an impact and where increased flows in streams are most likely to benefit salmon habitat. And overall, strong implementation is necessary to increase the likelihood of effective projects getting done and the mandates of the Act being met.

3. Policies: Policy and regulatory recommendations that show good faith effort to meet legal requirements and provide additional streamflow benefits.

- The Tribe has proposed a variety of policy and regulatory recommendations that contribute to protecting and restoring streamflow (see Table 3). The Plan should propose the adoption and enhancement of a significant number of these policies. These are key elements of the Plan that both help reduce PE well impacts and increase water recharging ground water and supporting summer baseflows.
- Ecology and local governments, through the plan, should commit to policies that are certain to supplement the offset of past and future PEWs and achieve NEB, in addition to the offset projects. Implementation of innovative policies included in the plan will add benefits that increase the likelihood of streamflow restoration. In addition, some project proposals can address disputes over the legal requirements for plan content and make legal disagreements moot.

4. ISF Rule: Identification in the Plan of rule-making necessary to implement the Plan and for other reasons.

- As discussed above, there are many reasons for Ecology to initiate rule-making, both as a consequence of Plan adoption, to help ensure implementation, and because the existing South Sound WRIA rules are defective and failing to protect the water resource and fisheries. Ecology should identify the elements of each plan and other relevant needs that require rule-making and call these out in the Plan.

Table 3. List of Squaxin Island Tribe policy and regulatory proposals

Proposal Titles	Purpose
Assurance of Implementation	Document Ecology’s and Counties’ commitment to implementation

Proposal Titles	Purpose
	and adaptive management
Lead Organization for Implementation	Support long-term sustainable adaptive management
Monitoring and Research	Continue collecting data and information to support adaptive management and water management in general
Adaptive Management responses	Specify adaptive management responses if Plan implementation is falling behind
Funding for Plan Implementation	Support long-term Plan implementation and adaptive management through the lead organization
South Sound Water Steward	Provide improved and enhanced Ecology interface in the South Sound for Plan implementation and better management of instream flow rules
Water Supply Data for Comprehensive Water Planning	Provide critical data for water management and show good faith effort to comply with legal requirements
Upgrade Well Reporting	Bring Ecology's data collection on wells up to date with current technology and improve the information collected.
Water Conservation Policy - Education And Incentives Program	Provide an overarching conservation program for all permit exempt wells, in parallel with conservation plan requirements for Group A systems.
Drought limits	Address extreme hydrological events and climate change with water use limits when Ecology issues a drought declaration (like WRIA 1 rule)
ISF updates	Bring 1980s ISF rules up to date with current scientific methodology and increased protection for salmon stream.
Permit-exempt Well Withdrawal Limits	Set realistic permit-exempt well water use limits (like WRIA 1 rule).
Study of County Planning Streamflow Restoration Effectiveness	Compare how planning and permitting by local governments in the South Sound supports protecting groundwater recharge and stream flows, in order to identify successful strategies and areas for potential improvement.
Revolving Loan and Grant Fund for Small Public Water Systems	Counties can explore setting up a fund to offset the costs of connecting to a Group A system instead of a permit exempt well
County Policies to Promote Connections to Group A systems	Review "right of first refusal" in coordinated water system plans and county ordinances to find ways to discourage permit exempt wells inside water system areas.

5. Implementation and Adaptive Management: Implementation and Adaptive Management proposals that show commitment to implementation.

- Implementation of the Plan, as discussed above, is required under the law. And if a Plan is inadequately implemented and offset water is not created for existing and future PE wells that are junior to instream flows, and/or NEB is not guaranteed, both Ecology and the Counties may be at increased risk for litigation.
- But beyond that, the Tribe believes an approved Plan could provide much more vigorous, long-term implementation than if Ecology writes a plan and a rule. This could set the table for more cooperative water management, and provide future opportunities for collaboration to improve water management into the future.

6. NEB: Include an analysis of Net Ecological Benefit that actually demonstrates with high certainty that restores streamflow and enhances salmon habitat will result when projects and actions are implemented.

- As the Tribe commented during Ecology's comment period for the NEB guidance, the definition of NEB should be much broader than simply providing more offset water than expected PE well use. To fulfill the objectives of the Act, NEB must demonstrate that the plan will protect and increase streamflows, and implementation of the Plan will produce both significant benefits to salmon and no harm from effects such as geographic gaps or implementation time lags.

Conclusion

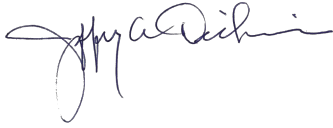
In conclusion, we ask that Ecology review the issues raised in this letter and take action to address the Tribe's concerns. We hope for the process to be a successful step forward for effective water management in the Tribe's South Sound U&A watersheds, and the beginning of adequate protections of Tribal water rights.

To reach those goals, however, Ecology needs to:

- Make immediate course corrections to improve how it is guiding the planning process and communicating with the Committees.
- Make a strong commitment to review and revise the rules for WRIAs 12-15 to ensure implementation of the plan and bring the rules up to date for protection of salmon and Tribal water rights.

This will make the difference between a future of collaborative water management or one of ongoing conflict and dispute. We hope you choose collaboration.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Jeff Dickison', with a stylized, flowing script.

Jeff Dickison, Assistant Director
Squaxin Island Natural Resources Department

cc: Bennett Weinstein, Streamflow Section Manager, Department of Ecology
Rebecca Brown, Watershed Lead, WRIA 12, Department of Ecology
Angela Johnson, Watershed Lead, WRIAs 13 and 14, Department of Ecology
Stacy Vynn-McKinstry, Watershed Lead, WRIA 15, Department of Ecology
Alan Reichman, Assistant Attorney General
Andy Whitener, Director, Squaxin Island Tribe Natural Resources Department
Paul Pickett, consultant for Squaxin Island Tribe
Sharon Haensley, counsel for Squaxin Island Tribe



SQUAXIN ISLAND TRIBE

ATTACHMENT 2

SENT BY ELECTRONIC MAIL

April 16, 2021

Mary Verner, Program Manager
Water Resources Program
Washington Department of Ecology
300 Desmond Drive SE
Lacey, WA 98503
mary.verner@ecy.wa.gov

Re: Squaxin Island Tribe's approval of Watershed Restoration and Enhancement Plan WRIA
13 – Deschutes Watershed (Final Draft Plan, March 18, 2021)

Dear Mary:

By this letter, the Squaxin Island Tribe ("Tribe") informs you that the Tribal Council has approved the above WRIA 13 Watershed Restoration and Enhancement Plan ("Plan"). The Tribe now looks to Ecology to adopt the Plan and fully commit to its implementation. This letter discusses our reasons for supporting the Plan as well as our concerns. In light of the uncertainties going forward, we also feel it necessary to reserve and not waive certain rights.

The Tribe acknowledges and greatly appreciates the hard work that went into this Plan by Committee members and Ecology staff and consultants. The Committee's engagement in the consensus process resulted in specific elements of the Plan that the Tribe fully supports:

- Using a "higher" permit exempt well growth estimate that accounts for future uncertainty;
- Inclusion of policy recommendations that, when implemented, should support streamflow restoration.
- Scientifically supported projects that may benefit flows and fisheries, with identified sponsors;
- Thurston County's commitments to projects and implementation;
- Thurston County's support for updating the WRIA 13 instream flow rules;

- Committee members' broad commitment for a Deschutes Watershed Council to guide implementation; and
- The Plan's acknowledgement of the importance of restoring streamflows.

The Tribe believes these positive aspects of the Plan outweigh some remaining flaws that include:

- The poor geographical distribution of projects. The Plan provides insufficient projects to restore streamflows in locations where impacts are likely to occur and harm salmon streams;
- A focus on the "moderate" permit-exempt well growth estimate and a weaker commitment to offset the higher estimate. Permit-exempt well growth may be faster than expected, and we can expect a hotter, dryer future with climate change. Providing offset projects to meet the moderate estimate may be insufficient to prevent future impacts to streamflows and protect Tribal rights; and
- Committee members' commitments to plan Implementation could be stronger. In particular, Ecology was unwilling to make firm commitments to Plan implementation, including establishing clear consequences if implementation fails to develop sufficient projects to offset higher permit-exempt well growth estimates across the WRIA.

Please understand that while the Tribe has approved the WRIA 13 Plan, it continues to have reservations about the state's process, which include a lack of assurance that streamflow restoration will actually occur and that protection of the Tribe's federally-reserved water rights. We expressed these and other concerns in our letter to you dated December 7, 2020.¹ Moreover, even if the Committee unanimously approves the Plan, we face significant uncertainty going forward, including Ecology action or inaction with regard to rulemaking, local government efforts, funding and implementation of projects and actions, and the accuracy of underlying Plan assumptions.

With that in mind, the Tribe feels it necessary to reserve and expressly not waive any rights including its right:

- (1) To assert an interpretation of state laws, including ESSB 6091, that differs from that presented in the Plan or elsewhere;
- (2) To take any legal action against any party if new evidence indicates that assumptions underlying the Plan are erroneous to the detriment of instream flows and fisheries;
- (3) To take any legal action to protect its interests against any party if, after a reasonable amount of time has passed, projects and actions identified in the Plan to offset impacts are not implemented; and/or
- (4) To bring any legal action against any party to seek any and all amendments of administrative rules or to oppose proposed amendments, including the WRIA 13 rule;

¹ This letter and the Tribe's other correspondence with Ecology is incorporated by reference.

In the event that the WRIA 13 Plan is not unanimously approved by the committee, the Tribe reserves all rights and does not waive any rights.

Additionally, the Tribe takes the position that neither the Plan, nor its approval of the Plan, nor its participation in the planning process:

- (5) Has any legal effect on its approval or disapproval of other watershed plans in the RCW Ch. 90.94 process;
- (6) Affects the existence, amount or enforceability of the Tribe's federally-reserved water rights, or its right to have them adjudicated; and/or
- (7) Has any effect on its right to take any legal action against any party to protect its interests.

During this process, the Tribe submitted many documents into the agency record that support the need for an effective Plan and WRIA rule. Ecology should take these documents into consideration during any decision-making relating to developing a watershed Plan and/or rule-making; and should maintain them in the agency record for the long term, particularly in light of the operative statutes' forward-looking elements.

To conclude, the Tribe looks forward to participating in constructive partnerships that implement the Plan and restore and enhance streamflows. We encourage Committee members to continue to improve water management in the South Sound through collaborative dialogue and relationships, and demonstration of a firm commitment through actions and investments.

Sincerely,



Andy Whitener, Director

Squaxin Island Natural Resources Department