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[Sent via e-mail to cyne461@ecy.wa.gov]
January 4, 2010

Cynthia Nelson
Washington Department of Ecology
PO Box 47600
Olympia WA 98504-7700

RE: Initial Comments on Draft Version of WAC Chapter 173-518
Dungeness Instream Flow Rule

Dear Cynthia:

Washington REALTORS® represents the interests of approximately 18,000 members and their clients on matters relating to the development and transfer of residential and commercial real estate. We appreciate the opportunity to submit initial comments on Ecology draft version of WAC Chapter 173-518, the proposed Dungeness Basin Instream Flow Rule ("ISF Rule"), and request that our comments be included in the agency's rulemaking record.

As you know, the proposed ISF Rule, and the recently adopted WAC Chapter 173-517 instream flow rule for the Quilcene basin are of great concern to our local members. This letter includes comments on the rule language as well as suggestions on analysis that should be conducted during the formal rulemaking process.

1. Proposed Flow Levels Are Not "Minimum Flows" and Exceed Ecology's Statutory Authority.

Ecology's authority to adopt minimum instream flow is provided in Chapter 90.22 and 90.54 RCW, and both provide authority to Ecology adopt only "minimum" or "base" flows. RCW 90.22.010 provides that Ecology "may establish minimum water flows or levels . . . " RCW 90.54.020(3)(a) states that rivers and streams "shall be retained with baseflows . . ." Ecology lacks authority to adopt instream flow levels that are not true "minimum flows" or "baseflows." Ecology has defined "baseflow" as "that component of streamflow derived from groundwater inflow or discharge." *Sinclair and Pitts, Estimated Baseflow Characteristics of Selected Rivers and Streams, Ecology Water Supply Bulletin No. 60, Pub. No 99-327 (October 1999).*

The flow levels proposed by the ISF Rule are contrary to the statutory authority granted to Ecology to set flows. A 1986 client advice letter from the Office of the Attorney General to Ecology describes the extent of Ecology's instream flow rulemaking authority. Notably, this letter was written by Senior Assistant Attorney General Charles B. Roe, a preeminent water lawyer and original drafter of the statutes in question. The opinion of the Attorney General's Office, was as follows:

> . . . The intent was, simply stated, that streams with certain values were not to be dried up or reduced to trickles. Rather, flows, usually of an amount extending to a limited portion of a

> stream's natural flow were to be retained in order to protect instream values of the stream from total relinquishment. Of import here, the thrust of the 1967 legislation was not designed to maintain a flow in excess of the smallest amount necessary to satisfy the protection and preservation values and objectives just noted . . .
>
> *Letter from Office of the Attorney General to Eugene F. Wallace, Program Manager for Water Resources, dated February 20, 1986, at 8.*

The Attorney General letter further describes a two-step process under which flows that may be higher than a true minimum flow may be adopted through a "maximum net benefit" legal framework. The two-step maximum net benefit process is described (again, by Mr. Roe) in the Washington State Bar Association's Real Property Deskbook:

> Of import here, the 1967 and 1971 legislation was not designed to maintain a 'minimum' flow in excess of the smallest amount reasonably necessary to satisfy the protection and preservation of such values. It was not, however, the legislative intent to preclude [Ecology's] power, in appropriate factual situations, to establish higher or 'enhanced' instream flows than those established under the minimum flows provided by RCW 90.22.010.
>
> *WSBA Real Property Desk Book, Water Rights, § 117.9(1)(b), p. 132-133.*

The PCHB has also confirmed that instream flows are to be minimum flows, which may be increased only through the two-step maximum net benefits test – i.e., that the initial flow level is a true baseflow, not an optimal fish flow:

> "Tacoma first urges that base flows may not be set at levels which provide the optimum flow regime for fish. We agree . . . "
>
> *PUD No. 1 of Jefferson County et al. v. Ecology et al., PCHB No. 86-118 (1988).*

Perhaps more importantly, the PCHB has also concluded that Ecology's instream flow authority enables it only to protect existing instream flows, not establish flows beyond actual flows to provide a "restoration" level of instream flow protection:

> The optimum fish flows adopted as base flows by Ecology are also inconsistent with the statutory authorization for base flows. Base flows, as authorized at RCW 90.54.020(3)(a), are those 'necessary to provide for preservation of' fish and related values. The term 'preservation' is not specifically defined, nor ambiguous. . . the term 'preservation' means 'the act of preserving' . . .
>
> The evidence in this matter is that the optimum fish flows adopted as base flows enhance fish habitat beyond that provided by the river in its natural state. This is inconsistent with the statutory plan that base flows 'keep safe' or preserve fish habitat, rather than enhance it.
>
> *Id.*

The proposed instream flow levels for the Dungeness River far exceed actual flow levels, and are not minimum flows. Specifically, the proposed flows for August, September, and October are 180 cfs. Using the date of September 1, this flow level has only been reached once since 2000.

Year	USGS Flows for Dungeness River
2009	112 cfs
2008	166 cfs
2007	148 cfs
2006	140 cfs
2005	99 cfs
2004	173 cfs
2003	157 cfs
2002	96 cfs
2001	148 cfs
2000	200 cfs

See http://waterdata.usgs.gov/nwis/uv?12048000 (USGS flow gauge data for Dungeness River).

2. Exempt Well Withdrawals Are Not Causing Significant Impact on Streamflows.

Like in other instream flow rules recently adopted by Ecology, an underlying assumption is that impacts to streamflows have been directly caused by increased reliance on exempt groundwater wells that capture groundwater that otherwise would provide instream flow. While wells of a certain depth and location will capture groundwater that provide baseflow, the presumption that all wells must be regulated to protect surface water flows is not supported by the specific hydrogeology in WRIA 18.

While certain documents relating to the ISF Rule assume that the reliance on exempt wells over the past 30 years has caused instream flow impacts, actual flow data does not support this presumption. Specifically, see flow data again for September 1 for the period of record from 1937 to 1948:

Year	USGS Flows for Dungeness River
1948	162 cfs
1947	146 cfs
1946	237 cfs
1945	143 cfs
1944	97 cfs

1943	174 cfs
1942	140 cfs
1941	212 cfs
1940	162 cfs
1939	156 cfs
1938	160 cfs
1937	174 cfs

The flow levels on September 1 for this historical period of record are similar to actual flows on September 1 from the past decade – in spite of the increasing reliance on exempt groundwater withdrawals that appears to be a cause of Ecology's concern for streamflows. While a short answer may be that changes in irrigation practices toward more efficient irrigation diversion and delivery methods has resulted in streamflow improvements that more than offset any groundwater withdrawal impacts, the reality is that far more will be done to protect streamflows by focusing efforts on continuing to improve the efficiency of all surface and groundwater diversions.

3. Proposed ISF and Consistency with Local Land Use Plans and Zoning – Further Analysis of Land Use Conflicts is Required.

REALTORS® are greatly concerned that the availability of water in the proposed ISF Rule is inconsistent with land use plans and zoning adopted at the local level. Throughout WRIA 18, our members have assisted clients with transactions in which future development of vacant parcels relies on the use of exempt wells. Hundreds of such parcels of developable land exist within WRIA 18, and are part of Clallam County's land use plan adopted under the Growth Management Act. While the owners of these parcels believe water will be available in the future, the reality is that the groundwater reservations in the proposed ISF Rule will result in unbuildable lots, causing a severe loss of value to ordinary citizens.

One of the ironies of the conflict with land use plans and zoning created by Ecology's proposed ISF Rule is that it is the exact conflict that the Legislature sought to avoid through the watershed planning process – a process implemented in WRIA 18. Under RCW 90.82.070(1)(e), each watershed plan shall include "an estimate of the water needed in the future for use in the management area." Because the watershed plan was developed for WRIA 18 and approved by the Clallam County Commissioners, this information should be put to use. Specifically, Ecology should review the amount of water necessary to implement the County's land use plan and ensure that sufficient water is made available to avoid a conflict between its own ISF Rule and the Growth Management Act.

A meaningful analysis of the future conflict between ISF rules and local land use plans has been notably absent from the recent ISF rules adopted by Ecology. This is unfair both to the local governments who have spent significant time and expense to complying with the planning requirements of the GMA, and to local landowners who have purchased vacant land that at the time of purchase was buildable – but in the future may not be because of the limited water reservations in the ISF Rule. REALTORS® request that during the formal rulemaking period, Ecology provide a meaningful analysis of whether the water available for future domestic use in WRIA 18 will allow for implementation of local land use plans based on existing zoning.

We don't believe this is asking much – in fact, the Administrative Procedures Act already requires it. Under the APA, Ecology is required to "coordinate the rule, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter." RCW 34.05.328(1)(i). The primary regulatory impact of the proposed ISF Rule will be to limit or condition rural development in certain areas of WRIA 18. Obviously, this is the same "activity or subject matter" regulated by the GMA itself, which requires local governments to adopt a comprehensive land use plan specifically including a "rural element" that allows rural development consistent with rural character.

At this point, we don't see how the proposed ISF Rule is coordinated at all with the county's comprehensive plan or with the specific zoning that has been adopted in many parts of the county. For example, some of the limited groundwater reservations provide enough water only for 2 or 3 additional exempt wells to be drilled – far short of the number of buildable lots in those sub-basins. If Ecology is going to adopt a regulation that renders a significant number of lots unbuildable or imposes mitigation requirements on those lots, Ecology should be straightforward with those landowners about the future impact of its regulation.

Finally, Ecology failure to provide sufficient water supply through the proposed ISF Rule violates RCW 90.54.020(5), one of the fundamental requirements of the state's Water Resources Act. This provisions states that "Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs." The policy enacted by the Legislature that adequate potable water for human domestic needs "shall be preserved and protected" could not be stated more clearly. An ISF Rule that violates statutory authority by adopting more than minimum flows while failing to provide sufficient water for future domestic uses clearly violates the Water Resources Act.

4. Ecology Must Conduct Accurate Small Business Economic Impact Statement and Cost Benefit Analysis of Proposed ISF Rule.

Under the APA, Ecology is required to conduct both a Small Business Economic Impact Statement (SBEIS) and Cost-Benefit Analysis. REALTORS® ask that unlike the recent SBEIS and cost-benefit analysis conducted in the WRIA 17 rulemaking, that the analysis for the proposed ISF Rule specifically analyze (a) negative economic impacts to construction and real estate caused by limiting the water available for domestic use; (b) increased development costs associated with mitigation plans; (c) reductions in property value to landowners; and (d) lost local and state tax revenues associated with unbuildable property.

We hope that Ecology's economic analysis in WRIA 18 will avoid whatever methodology resulted in the extremely dubious conclusions in WRIA 17. For example, the WRIA 17 analysis concluded that as a consequence of adopting the instream flow rule, 819 new jobs will be created. For example, 384 jobs would be created in the construction sector, and 20 jobs in real estate. It is absurd for Ecology to assert that a rule placing a fixed limit on the supply of water available for future residential growth would result in a net gain of over 800 jobs, and specific gains in residential construction and real estate that would not occur otherwise. While we understand that the role of an agency in rulemaking is to produce analysis that defends the agency decision, the conclusion that instream flow rules actually create jobs in real estate and construction that would not exist absent the rule does not pass the straight face test.

5. Under Washington Water Law, Priority Date for Exempt Wells, Like Other Beneficial Uses, Must Be Based on Relation-Back Doctrine

Ecology's draft ISF Rule states that the priority date for exempt wells will be the date that water is put to beneficial use. Proposed WAC 173-518-070(4) states as follows: "The priority date of a withdrawal under the permit exemption in RCW 90.44.050, is the date upon which water is first put to beneficial use."

Ecology's conclusion that a water users priority and the right to use water is established only upon beneficial use is inconsistent with both the historical common law of water rights, and how the State Legislature codified the relation back doctrine. Ecology's current interpretation creates significant risk for lenders, homebuilders, and homebuyers and should be carefully examined and modified.

> "The relation back doctrine was created under the principles of equity to allow an appropriator to receive as a priority date the date the appropriator first initiated the use of water and not later when the appropriation was completed. The ability to receive the early priority date depended on the appropriator's diligence in applying water to use.
>
> *An Introduction to Washington Water Law, Office of the Attorney General, January 2000, at III:27, citing RCW 90.03.340 and Hunter Land Co. v. Laugenour, 140 Wn. 558, 565 (1926).*

The relation back doctrine is relevant to the process used to develop new housing in order to provide certainty to lenders, builders, and homebuyers. If the right to use water for domestic use is not actually obtained until the time of beneficial use, lenders and homebuilders are at significant risk that water may not be available. In the development process, the time from when a construction loan is issued to when the house is completed by a builder and then sold to a homebuyer can often take a number of years. During this period of time, the local government will have to determine whether water is available under RCW 19.27.097 in order for a building permit to be issued. The priority date for this type of project should relate back to when the project was first initiated, to protect the investments of the lender and builders, and so that consumers know that water will be available.

The structure of the mitigation requirements in the proposed ISF Rule further require that the priority date should be based on the relation back doctrine. The proposed ISF Rule would mandate that mitigation plans include financial assurances such as bank letters of credit, a cash deposit, negotiable securities, savings certificates, or surety bonds. *See Proposed WAC 173-518-080.* Even though such assurance would be provided by water users, Ecology appears to offer to no security in return – the priority date is part of the assurance to lenders and buyers as to the validity of water supply and viability of the project. Ecology should not impose costly and complicated mitigation requirements and yet be unwilling to provide regulatory assurance in return.

For permitted water rights, the relation back doctrine was codified so that the "date of filing of the original application" becomes the priority date. RCW 90.03.340. Because exempt wells require no application, the analogous point in time would be the notice of intent filed by a well driller. So long as the project is developed and completed with due diligence, the priority date should relate back to the date of the notice.

Further, Ecology's conclusion in the proposed ISF Rule that the priority date of an exempt withdrawal is the date of beneficial use is inconsistent with how it has dealt with the same legal issue in other instream flow rules. For example, in Chapter 173-503 WAC, the Skagit Basin Instream Flow Rule, the rule provides that exempt withdrawals based on a reservation of water have a priority date of the date of rule adoption when the water reservation was established. For other exempt withdrawals, the

Skagit Instream Flow Rule does not provide a date of priority. This is likely correct, since the exact priority date of an exempt withdrawal may be based on fact specific considerations. In any case, Ecology should not be adopting instream flow rules in different parts of the state that are based on different legal standards.

6. Ecology Lacks Authority to Condition Beneficial Use of Water from Exempt Well on Obtaining Permit for Residential Structure.

The error in Ecology's conclusion that the date of beneficial use of an exempt well determines its priority date is further compounded by its conclusion that "for domestic use, beneficial use shall not be considered to occur until water is used within a permitted residential structure." *Proposed WAC 173-518-070(4).* By creating the additional legal requirement that beneficial use of water from an exempt well does not occur until a local government has issued a permit, Ecology is unlawfully conditioning the use of an exempt well on the action of a local government. What constitutes "beneficial use" of water is determined by the state water code (See RCW 90.54.020(1)), not by the action of local government.

Further, it is common for construction projects to use (if not require) beneficial use of water at the construction site for uses such as dust control, fire suppression, potable consumption, concrete mixing, and other construction-related uses. Owner-builders often live on-site during construction, not in the "permitted residential structure," but in a temporary structure or recreational vehicle. Such uses of water clearly establish beneficial use.

7. Proposed ISF Rule Must Be Reviewed To Determine Whether It Is Constitutional.

The proposed ISF Rule imposes its regulatory burden solely on water uses that are junior to the priority date of the adoption of the rule. Because all senior uses are not subject to the rule, even though most junior uses will be small withdrawals of water under the exempt well statute, Ecology should review the proposed ISF Rule to determine whether it meets constitutional requirements. In 2008, the Washington State Court of Appeals, Division I, issued a decision invalidating a King County ordinance in part on grounds that King County failed to show that the regulatory restriction on property owners subject to the ordinance was proportional to the impact caused by those property owners. *Citizens' Alliance for Property Rights v. Sims*, 145 Wn.App 649 (2008).

Small exempt groundwater withdrawals will have little or no impact on surface waters in comparison to large groundwater withdrawals or diversions directly from the surface water source. Thus, there is no "proportionality" in the proposed ISF Rule. As the Court said in the CAPR decision,

These holdings are consistent with the fundamental purpose of the Takings Clause, which is *not* to bar government from requiring a developer to deal with problems of the developer's own making, but which *is* "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Id. at 669, citing *Burton v. Clark County,* 91 Wn.App. 505, 521-22 (1998) and quoting *Dolan v. Tigard,* 512 U.S. 374 at 384.

Ecology's proposed ISF Rule clearly lacks the proportionality necessary to pass muster under a constitutional analysis. We believe Ecology should review the proposed ISF Rule under the Attorney General's Memorandum for Avoiding Unconstitutional Takings of Property established under RCW 36.70A.370 during the formal rulemaking process.

8. Ecology Should Not Proceed With Rule Adoption Until Mitigation Programs Are in Place.

As it has done in other basins, Ecology appears poised to move forward with rule adoption without having mitigation programs in place. As an initial comment on mitigation, many of the areas that would be subject to groundwater closures absent mitigation likely have little impact on surface water flows. Yet, mitigation will be required across the basin regardless of the specific impacts of a proposed withdrawal.

The promise of having a functional, affordable, and rational mitigation program in place at some unknown point in the future after the adoption of an Ecology rule has been problematic in other parts of the state. The strategy of first closing basins through rulemaking and only then developing mitigation strategies is a bad idea that should not be repeated. As evidenced by regulatory closures enacted by Ecology in Skagit or Kittitas Counties, the closure logically results in motivating people seeking to use water before the reservations are depleted (Skagit) or a dramatic increase in the cost of water for transfer that could be part of a mitigation program (Kittitas). By closing a basin first, and then seeking to obtain water rights for mitigation, Ecology creates exclusively a seller's market that drives up costs that will ultimately be paid by homeowners.

During the rulemaking process, it is impossible to analyze the true impacts of the rule because there is no mitigation plan or requirements in place: will mitigation sufficient for an average single-family house cost $1,000 or $20,000; will mitigation plan approval take one week or one year? Ecology must seek to develop mitigation requirements as part of the rule itself, so that regulated entities can understand the rule and its impacts. While premise for requiring mitigation in many parts of the basin is dubious, at the least, the mitigation requirements must be integrated into the local land use approval process. Homeowners and small builders should be expected to possess expertise in hydrogeology or provide Ecology or local governments with costly consultant reviews in order to obtain building permits.

Thank you for the opportunity to provide initial comments on the draft ISF Rule.

Sincerely,

Bill Riley, President
Washington REALTORS®

cc: Clallam County Board of Commissioners
Sen. Jim Hargrove
Rep. Lynn Kessler
Rep. Kevin Van De Wege