



STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

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January 15, 2015

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Olympia, WA 98501

RE: Petition to repeal Chapter 173-503 WAC, Instream resources Program – Lower and Upper Skagit Water Resources Inventory Area (WRIA 3 and 4)

Dear Mr. Clarke:

This letter responds to the formal petition for repeal of WAC 173-503, that the Department of Ecology (Ecology) received from you on November 20, 2014, on behalf of the Washington REALTORS, Building Industry Association of Washington, North Puget Sound Association of REALTORS, Skagit-Island County Building Association, Snohomish-Camano Association of REALTORS, Master Builders of King and Snohomish Counties, Washington State Farm Bureau, and the Just Water Alliance.

The petition asserts that WAC 173-503, Instream Resources Protection Program – Lower and Upper Skagit Water Resources Inventory Area (WRIA 3 and 4) (Rule), is fundamentally flawed and should be repealed. Petitioners request that Ecology then initiate a rulemaking process to develop a new rule that provides for reasonable levels of water uses in rural parts of Skagit County, while protecting instream resources. In addition, if Ecology decides not to grant the petition to repeal the Rule, the Petitioners request Ecology to determine “that the Skagit Basin Rule does not require tributary-based mitigation for exempt groundwater users, and that compliance with the Rule is based on the measurements of impacts at the Skagit River mainstem gauge in Mt. Vernon, as provided in WAC 173-503-040.”

This letter first responds to the petition requesting repeal of the Rule, as required under the Administrative Procedure Act, RCW 34.05.330 (APA). Then, after responding to the petition, this letter will respond to your alternative request concerning Ecology’s interpretation and implementation of the Rule.

I. RESPONSE TO PETITION FOR REPEAL OF WAC 173-503

Many landowners in the Skagit have had their property development plans put on hold as a result of the Washington Supreme Court’s decision in *Swinomish Indian Tribal Community v. Department of Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013). Ecology staff and managers interact



with these citizens almost daily, and are working very hard to help resolve water supply concerns for Skagit Basin residents. It is a priority of our agency and the Water Resources Program to find durable and legal water supply solutions for homes and businesses in the Skagit Basin.

We are responding to your petition in accordance with the provisions of RCW 34.05.330, the section of the APA governing petitions for the adoption, amendment, or repeal of agency rules. Ecology has thoroughly evaluated and considered the issues raised in your petition. After careful consideration and review, Ecology denies your request to repeal the Rule. However, even though we have decided to not grant your petition at this time, the APA allows us to provide alternative means to address concerns raised by the petition. Actions by Ecology that are intended to address some of your concerns are also described below.

#### **A. Areas of Concern Raised in the Petition**

In your petition letter you discuss the following areas of concern supporting your request for repeal of the Rule:

- Petitioners believe Ecology was dishonest or negligent in removing a draft rule provision exempting single domestic use from the version of the Rule that was formally proposed and adopted.
- The petition asserts the Rule, as currently implemented, violates the 1996 Water Resource Memorandum of Agreement (1996 Skagit MOA), which cannot be interpreted to mean that the parties agreed to a complete prohibition on new permit-exempt wells in rural areas.
- The petition asserts the Rule violates certain provisions of the state water code. More specifically you assert that:
  - RCW 90.54 requires Ecology provide water supplies for human needs and to protect instream resources and values, at the same time.
  - Ecology failed to seek expressions of the public interest when making water management decisions.
  - Establishment of instream flow levels must meet the four-part test in RCW 90.03.290, and that the flow levels established in this Rule do not meet the “water availability” part of the test.
  - The adopted instream flow levels exceed the levels that are required for protection of instream values under RCW 90.54.020(3)(a).
- The petition asserts that permit-exempt withdrawals are not causing low-flow issues in Skagit Basin tributaries.
- The petition asserts the Rule is causing damage to water resource management efforts around Washington State. The petitioners would prefer that Ecology “focus its resources on solving specific problems caused by Ecology’s own rules instead of engaging in policy work that would provide no relief to those in the Skagit Basin who need it most.” Further, the petitioners argue that Ecology resources spent trying to provide relief to Skagit Basin property owners through mitigation are being misspent, and that the mitigation effort “perpetuates a fundamentally flawed, unlawful, and unfair regulation.”

- The petition asserts that the *Swinomish* decision does not constrain Ecology's legal authority to repeal the Rule.

## **B. Factors Considered by Ecology in Reaching its Decision on the Petition**

In reaching its decision on the petition, Ecology considered all of the petitioners' concerns described above and included in the petition. Ecology has decided to deny the petition and not proceed to repeal the Rule at this time. Under RCW 34.05.330(1), the following discussion provides Ecology's reasons for denial of the petition, and addresses the concerns raised in the petition:

- Repeal of the Skagit Rule will not have the effect of turning back the clock. In *Swinomish*, the Supreme Court ruled that, under current law, Ecology cannot reallocate water associated with instream flows to permit-exempt domestic water use. This means all withdrawals of water must mitigate for impacts to flows, including permit-exempt uses that are established after April 14, 2001, the date that the original Rule became effective. Under the APA, a rule adopted by an agency, including one that repeals an existing rule, must fall within the agency's statutory authority. Under RCW 90.54.020(3)(a), Ecology is required to maintain base flows for the protection of instream values. Repealing the Rule and starting a new rulemaking process -- rather than engaging in a process to amend the Rule in a manner that would continue to adequately protect base flows -- would result in a complete lack of instream flow protections in the Skagit Basin until such time as a new rule could be adopted in the future. Eliminating the existing instream flows without simultaneously replacing them with provisions that would be compliant with RCW 90.54.0032(3)(a) would violate the law and exceed Ecology's statutory authority.
- It is true that Ecology released a draft version of the Skagit rule in February 2000 that contained language specifically excluding instream flows from applying to permit-exempt wells (for single domestic use). However, after receiving and evaluating extensive comments on that draft version of the rule, Ecology chose to propose rule language that did not include the single domestic exemption. Thus, the actual version of the Rule that was formally proposed through the APA rulemaking process on October 18, 2000, and was released for public review comment and hearings, did not include any provision exempting permit-exempt groundwater use from being subject to the instream flows. The proposed (and later adopted) rule included express language stating that "[f]uture consumptive water right permits issued hereafter for diversion of surface water in the Lower and Upper Skagit (WRIA 3 and 4) and perennial tributaries, *and withdrawal of groundwater in hydraulic continuity with surface water in the Skagit River and perennial tributaries*, shall be expressly subject to instream flows established in WAC 173-503-040 (1) through (3)." WAC 173-503-040(5) (emphasis added). This action indicated our intent to make permit-exempt wells subject to instream flows. Full notice of the proposed rule language was provided to the public, and the public was provided with the opportunity to provide written comments and/or or testify on the proposed rule at

a public hearing. Thus, the actual rulemaking history contradicts the petition's contention that the removal of the exemption language "was either an act of dishonesty or negligence."

- Ecology does not agree that RCW 90.54.050(1) **requires** Ecology to reserve water for future out-of-stream uses. The statute provides Ecology with discretion as to whether reservations of water should be created through rulemaking in basins where water is available for future appropriations. Further, we also disagree with the petition's interpretation of RCW 90.54.020(5). This provision of the Water Resources Act directs Ecology to manage water resources in a way that will ensure the water is preserved and protected in potable condition, but does not require that water be allocated for domestic use. The "overriding considerations of the public Interest" (OCPI) provision in the same section of the Water Resources Act states that "Perennial 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. Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served." RCW 90.54.020(3)(a). This provision requires the retention of adequate flows in rivers to preserve instream values. A determination that OCPI will be served by a water use that impairs the flows can provide the only exception to the maintenance of the "base flows." In *Swinomish*, the Supreme Court held that the terms "instream flows" and "base flows" are interchangeable. *Swinomish*, 178 Wn.2d at 580.
- The regulatory instream flow levels established in the adopted Rule represent ecologically-based minimum flows necessary to protect and preserve fish populations and other instream resources, and do not "enhance" instream resources or exceed base flows.
- Regulatory instream flows are not established through the water right permitting process, and, thus, the criteria in RCW 90.03.290 are not applicable in the context of instream flow rulemaking. While, under RCW 90.03.345, instream flows are equivalent to water rights in that they are assigned priority dates based on the dates of their establishment and cannot be impaired by the exercise of junior rights, they are established by Ecology through rulemaking under authority of RCW 90.22.010-.020 and RCW 90.54.040, and are not subject to the four-part test for permit applications.

Ecology recognizes the difficult situation in the Skagit Basin. Since the decision in *Swinomish*, we have been analyzing potential approaches for rulemaking that would both protect instream flows and provide water supply for future community needs.

Based on our analysis, we believe that, under current law, we could not successfully develop a rule for the Skagit Basin that would create available water for future community growth in rural areas, without a high likelihood of being legally challenged. Our analysis, and stakeholder feedback we have received, indicates that rulemaking under current authority would not actually provide certainty for landowners with respect to their future ability to secure a reliable water supply.

Once adopted, minimum instream flows are equivalent to water rights, which are protected from impairment. The instream flows adopted for the Skagit River do not provide water availability for year-round use during most years. Court decisions have linked any consumptive use of water that is hydraulically connected to the Skagit River, however small and indirect, to impairment of the minimum instream flows. Case law also supports the requirement for the agency to set flow levels that preserve and protect instream resources, which have been set at levels to protect intermittent, but beneficial, high flow conditions.

In the past, Ecology has used a finding under OCPI to establish reservations of water that would impair minimum flows. However, the court in *Swinomish* held that use of this public interest test was inappropriate for providing water for multiple private uses in the Skagit.

Under current law, Ecology has no rulemaking tools that would allow us to adequately protect instream resources and effectively make water available for new year-round consumptive uses in the Skagit Basin.

### **C. Alternatives to Rulemaking**

Under RCW 34.05.330(1), when an agency denies a petition to repeal a rule -- as Ecology is doing here -- an agency has the option of offering alternatives to rulemaking that will address a petitioner's concerns. We have been working very hard to provide on-the-ground solutions for property owners in the Skagit Basin including purchasing water rights, mitigation banks, extending water supply infrastructure, rainwater collection, infiltration, and re-timing reservoir release. We are partnering with organizations like the Washington Water Trust who are successfully operating water banks in other parts of the state. There are complex legal and technical aspects to the range of projects needed to provide mitigation throughout the Skagit Basin. Mitigation for the lower Nookachamps subbasin, relying on water rights acquired from the Big Lake Water Association, is moving forward. We are also in negotiations and optimistic that mitigation solutions for the main stem of the Skagit will be in place soon.

In addition Ecology is facilitating discussions and analyzing stakeholder ideas for changes to water resource laws that could provide limited water availability for new domestic uses in rural areas. Through these efforts, we will continue to explore potential approaches in which instream flow rulemaking can better support the multiple objectives of the Water Resources Act.

## **II. RESPONSE TO REQUEST RELATING TO INTERPRETATION OF WAC 173-503**

In addition to petitioning for repeal of the Rule, in the alternative, your letter requests Ecology to determine that the Rule does not require tributary-based mitigation for permit-exempt uses, and that compliance with the Rule will solely be based on measurement of impacts at the Skagit River mainstem gauge in Mount Vernon. Regarding this request concerning Ecology's

interpretation and implementation of the Rule, Ecology agrees that the plain language of the Rule could allow junior permit-exempt groundwater uses that would not interfere with instream flows, as measured at the Mount Vernon gauge. However, the technical application of the Rule in this manner may face substantial obstacles to providing durable solutions for people in the Skagit Basin.

If Ecology were taking action on a water right permit application requesting a right to withdraw groundwater that would reduce flows in tributaries while effects on the Skagit River are mitigated, we do not believe the public interest component of the four-part test under RCW 90.03.290 could be met for the following reasons:

- Ecology studies have documented that late summer/early fall flows in the tributary streams are very low and dependent on groundwater base flow. The tributary streams are more sensitive to flow impacts than the Skagit River. They are much smaller and a given withdrawal is a much larger fraction of the entire stream flow. Ecology's inquiry would consider the impact of a specific use on the creek in question.
- The 2006 rule amendment included closures of the Skagit subbasins. Closures embody Ecology's determination that water is not available for further appropriations. While the Supreme Court invalidated the rule amendment, the closure findings are historical facts that Ecology must consider in making future water management decisions.

The requirement to maintain "base flows" for the protection of instream values under RCW 90.54.020(3)(a) is a fundamental principle relating to the management and allocation of water resources. Similarly, where Ecology is required to take an action to approve a mitigation strategy to allow for permit-exempt uses, a public interest determination may be required. For example, the public interest test would be applicable to an application for transfer of a senior groundwater right into trust.

With respect to permit-exempt groundwater uses, establishing water rights under the groundwater permit exemption does not require meeting the four-part test in RCW 90.03.290. Therefore, if sufficient mitigation were provided at the Mount Vernon gage, a plain reading of the Rule could authorize new uses throughout the watershed, including tributary subbasins. This could be done through transfer of a surface water right, to fully offset effects on Skagit River flows caused by new permit-exempt uses throughout the watershed. Unfortunately, despite potential options available to Ecology to mitigate only at the Mount Vernon gage, there are obstacles to the success of this approach. We are concerned that further litigation, with an uncertain outcome, is likely if this approach is taken. We believe that addressing the fundamental needs of all interests in this watershed, including the local and tribal governments, is the only way permanent water management solutions will be achieved in the Skagit.

We recognize and share the frustrations of property owners regarding how long it is taking to find solutions. However, our experience in the Kittitas watershed has shown that finding and implementing permanent solutions results in a far better long-term outcome for all concerned.

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In closing, your petition to repeal WAC 173-503, the Skagit instream flow Rule, is denied. Ecology will consider all feasible mitigation plans. However, because of likely legal challenge that would result in continued uncertainty, we cannot commit at this time to your alternative suggestion to require mitigation only at the gage in Mount Vernon. While Ecology is not granting your rulemaking petition, we are sincere in our commitment to solving water supply problems for property owners while protecting the valuable instream resources of the Skagit River Basin. Ecology will continue to seek mitigation opportunities in the Basin and seek permanent, durable solutions through appropriate and legal water policy changes.

Sincerely,



Maia D. Bellon  
Director

cc: Tom Loranger, Ecology  
1996 Skagit Water Resource MOA Parties:  
Laurie Gere, Mayor, City of Anacortes  
Bob Powell, General Manager, PUD #1 of Skagit County  
Sharon Dillion, Skagit County Commissioner  
Ken Dahlsted, Skagit County Commissioner  
Ron Wesen, Skagit County Commissioner  
Jennifer Washington, Chairwoman, Upper Skagit Tribe  
Brian Cladoosby, Chairman, Swinomish Indian Tribal Senate  
Norma A. Smith, Chairwoman, Sauk-Suiattle Indian Tribe  
Phil Anderson, Director, WDFW  
Skagit Basin Legislators:  
Senator Barbara Bailey  
Representative Norma Smith  
Representative Dave Hayes  
Representative Dan Kristiansen  
Representative Elizabeth Scott  
Representative Kristine Lytton  
Representative Jeff Morris  
Rob Duff, Office of the Governor  
Tom Buroker, Ecology

