



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000

711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

Kristina Nelson-Gross
Olympic Resource Protection Council
PO Box 3010
Sequim, WA 98382

RE: Petition to amend Chapter 173-518 WAC, Water Resources Management program for the Dungeness portion of the Elwha-Dungeness - Water Resources Inventory Area (WRIA 18)

Dear Ms. Nelson-Gross:

This letter responds to the Olympic Resource Protection Council's (ORPC) formal petition for amendment of WAC 173-518, which the Department of Ecology (Ecology) received from ORPC on January 21, 2014.

Ecology shares ORPC's interest in effective and durable water strategies and solutions for the people, farmers, businesses, tribes, and aquatic resources of the Dungeness watershed. We are committed to continued coordination with ORPC as well as coordination with all interests in the valley. After working with watershed members since the 1990s, Ecology has come to learn the unique challenges and opportunities your area holds. We particularly appreciate being part of the Dungeness Water Management Agreement in Principle that gave local, state, and tribal leaders the opportunity to discuss new ways to consider and create a water management framework to serve the future. We also value collaboration with Clallam County to implement the water management rule and the water mitigation bank that is allowing sustainable development. Bringing new funds in support of flow mitigation and restoration projects and new funds to help ease implementation are other ways Ecology is offering solutions for the valley.

In regard to ORPC's petition, Ecology has thoroughly evaluated and considered the issues raised in the petition and shared during our February 27, 2014, meeting with ORPC. After careful consideration and review, Ecology is denying your request to initiate a rule amendment. We are responding in accordance with the provisions of the Administrative Procedures Act, RCW 34.05.330.

Four areas of concern are expressed in the ORPC Petition:

In our review of your petition letter, Ecology identified the following four areas of concern raised by the ORPC:

1. The first concern is that the rule establishes reserves of water for domestic use that rely on a finding that the overriding consideration of the public interest (OCPI) will be served. You cite the recent State Supreme Court decision in *Swinomish v. Ecology*, which rejected the use of OCPI as a justification for establishing reserves in the Skagit River watershed, as causing unreasonable uncertainty for new water users in the Dungeness watershed.



2. The second concern is with the method used for setting instream flow levels, and reliance on those flow levels to establish closures of streams in the watershed to new water appropriations. You assert that 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” and “no detriment to the public interest” prongs of the statutory test. You then assert that the justification for establishing closures of surface waters in the rule, based on a finding that water is not available, is not within Ecology’s authority.
3. The third concern relates to factoring in the influence of past stream flow restoration projects.
4. The fourth concern is that a “maximum net benefits” test for the instream flow levels is needed, since, in your view, the instream flow levels are in excess of base flows.

To address these concerns ORPC requests that Ecology:

- Amend the rule through a process that includes close coordination with the County and participation by all affected stakeholders, including representatives of rural property owners.
- Amend the rule to establish revised minimum flows meeting the requirements of RCW 90.03.345 and RCW 90.03.290, and based on an evaluation of flow requirements as they exist today, not as they existed over 20 years ago.
- Conduct a new assessment of the net impacts on streamflows of anticipated rural groundwater withdrawals.
- Establish a reserve of water utilizing authority under RCW 90.54.050(1), to meet the demand associated with build out conditions consistent with Clallam County’s adopted land use plans and designations.
- Give highest priority to amending the Dungeness rule, suspending Ecology’s work on rulemaking in other watersheds across Washington.

Factors and issues Ecology considered in the review of ORPC’s Petition

Ecology considered the following factors and issues as we reviewed your petition:

- Unlike the amended Skagit watershed rule, which was overturned by the Supreme Court, the Dungeness water management rule allows the use of water from the reserves for domestic purposes only and requires mitigation of that use. Only in extremely narrow circumstances are uses allowed from the reserves that are not mitigated. These uses are allowed in very limited amounts up to, but not in excess of, small “maximum depletion amounts.” Your request for an uninterruptible reserve of water to meet future residential water demand at full build out could not be established without conflicting with instream flows adequate to protect the fisheries resource.
- Each closure established in the adopted water management rule is appropriately based on a finding that water is not available for new appropriations.
- The “Regulation Review” section of the adopted rule, WAC 173-518-120, calls for an assessment of whether new studies are needed when target flows are attained in the Dungeness River. The Local Leaders Water Management Work Group (LLWG) process that sought local solutions to the water management issues in the Dungeness affirmed 105 cubic feet per second as the low-flow season interim target flow in their final report dated March 5, 2012.¹

¹ The LLWG Final Report is available at: http://www.clallam.net/HHS/EnvironmentalHealth/committee_LLWG.html

- The regulatory instream flow levels established in the adopted rule represent ecologically-based minimum flows necessary to protect and preserve fish populations, including Endangered Species Act listed species, and other instream resources, and do not “enhance” instream resources. 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. Instead, the authority and factors governing the establishment of instream flows through rulemaking are provided under provisions of RCW 90.22 and RCW 90.54.
- Since the instream flows set in this adopted rule do not enhance instream resources, we have correctly applied Ecology Policy 2025, and a Maximum Net Benefits determination is not required for this rule.²
- In regard to ORPC’s request to give highest rulemaking priority to the Dungeness, Ecology must consider the needs of all 62 watersheds in our state. I wish my agency had the resources necessary to carry out all requested watershed work, but our resources for rulemaking are very limited. My staff is currently engaged with rule development proposals for three other watersheds: Cowlitz, Grays-Elochoman, and Spokane. Over half of Washington’s watersheds are not covered by water management rules to date. It is imperative that we focus on getting new rules adopted where none exist. Due to limited staffing and budgetary resources Ecology can only work on previously identified highest priority rulemaking efforts.

Alternatives to rulemaking can address ORPC’s concerns

Under the Administrative Procedures Act, RCW 34.05.330(1), when an agency denies a petition to amend a rule -- as Ecology is doing here -- an agency has the option of offering alternative means to rulemaking that will address a petitioner’s concerns. When Ecology staff met with you in February, we understood that your primary concerns are related to having more certainty regarding water availability for property owners that wish to develop property, and reducing the uncertainty, cost, and administrative process for acquiring mitigation.

I believe we can work together to achieve significant progress towards ORPC’s interests without amending the rule. I have directed my staff to continue to make progress on improved efficiencies in rule implementation by staying actively engaged with the Dungeness Rule Implementation Forum and the Water Exchange Advisory Council.

Through the Rule Implementation Forum we work with the County, real estate agents, builders, irrigators, tribes and other interests to develop improvements to the administrative process for acquiring mitigation and meeting the requirement under the Growth Management Act to demonstrate adequate water availability. This forum is designed to ensure transparency on how the new Dungeness water management rule is being implemented, identify problems, and generate constructive ideas to assist people and improve rule implementation.

In addition, Washington State is investing \$2.025 million in state funds for restoration and mitigation projects in the Dungeness watershed. As specified in the budget proviso from the Legislature, Ecology worked with local leaders to prioritize projects for this funding. Ecology and local leaders also recognize the need for mitigation availability in the southern portion of the watershed and have identified an investment of \$100,000 to address the availability of water for outdoor use in that area.

² Policy 2025 is available at: <http://www.ecy.wa.gov/programs/wr/rules/images/pdf/pro2025.pdf>

Kristina Nelson-Gross

March 18, 2014

Page 4

The Dungeness Water Exchange Advisory Council provides input and advice on stream flow restoration and mitigation projects conducted by the Dungeness Water Exchange, a program administered by the Washington Water Trust. Ecology remains committed to participation in the Advisory Council, along with other Council members: Clallam County, City of Sequim, Clallam County PUD, Clallam Conservation District, Department of Fish and Wildlife, Jamestown S'Klallam Tribe, and Dungeness Water Users Association.

In closing, I again affirm my appreciation for ORPC's active interest in improving water management in the Dungeness Watershed. While Ecology is not granting your rulemaking petition, we are sincere in our commitment to improve the administrative process, enhance mitigation availability, and minimize costs to individuals.

Sincerely,

A handwritten signature in blue ink that reads "Maia D. Bellon". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Maia D. Bellon
Director

cc: Sarah E. Mack, Tupper Mack Wells PLLC