



July 7, 2012

Ann Wessel
Washington Department of Ecology
Bellingham Field Office
1440 – 10th Street Suite 102
Bellingham, WA 98225-7028

**RE: Dungeness River Water Management Rule
Proposed WAC 173 – 518**

Dear Ms. Wessel:

These comments on the proposed Dungeness River Water Management Rule (“Proposed Rule”) are submitted on behalf of Washington REALTORS® and the Sequim Association of REALTORS® (“REALTORS®”). REALTORS® work on behalf of 13,000 members in Washington State, on issues relating to residential and commercial real estate transactions, property development, and homeownership.

Ecology’s proposed Rule represents the culmination of instream flow protection efforts for the Dungeness Basin that date back nearly 20 years. Our local members have actively participated in many of these efforts, including local watershed planning. Throughout this period, REALTORS® appreciate the time taken by Ecology staff to provide information and answer questions from our members, and to meet with stakeholders in the local area to understand the Proposed Rule and how it will impact landowners and the real estate industry.

However, while our members support protecting instream flows and fish species in the Dungeness Basin, we do not support Ecology’s proposed rule. Like other water resource rules adopted by Ecology in recent years, the proposed rule creates a regulatory scheme that is overly complicated and costly relative to the actual impact of future exempt well withdrawals in the Dungeness Basin. While the proposed rule would utilize a mitigation bank to provide water supply, the details of this mitigation have yet to be determined as part of the proposal. Further, we do not believe that much of the legal or economic analysis underlying the rule is factually or legally correct.

For these reasons, REALTORS® join the Clallam County Department of Planning and other concerned citizens in requesting that Ecology delay adopting this or any water

resource rule in the Dungeness Basin. As an alternative to the proposed rule, Ecology should (1) Analyze future buildout and associated consumptive water use from new exempt wells in sub-basins of concern; (2) Determine whether that level of consumptive water use has any measurable effect on streamflows; and (3) If an impact can be shown, utilize its authority under the Trust Water Program and water code to acquire water rights and implement other mitigation strategies.

Over the past few decades, Ecology has invested millions of dollars in streamflow protections in the Dungeness Basin directed at senior surface water rights that have significant direct effects on streamflows. Because of this, irrigation withdrawals have less of an impact on streamflows than occurred decades ago. There is no reason the agency cannot spend a fraction of that amount of money to address any cumulative streamflow impact that may be caused by junior exempt wells in the future.

This type of approach would result in protections to instream flows without conflicting with the county's land use plan and zoning, the reasonable expectations of rural landowners, or burdening the county's land use permitting process and average citizens with water restrictions and mitigation requirements that have failed in other parts of the state. In addition, this non-regulatory approach would spare Ecology the time and expense of making itself part of the local subdivision and building permit process, functions that Ecology is neither authorized, funded, or structured to adequately perform.

Our specific concerns with the proposed rule are provided in the attached memo. If you have further questions, please contact Bill Clarke at (360) 943-3301.

Sincerely,

A handwritten signature in black ink that reads "Faye Nelson". The signature is written in a cursive, flowing style.

Faye Nelson, 2012 President
Washington REALTORS®

A handwritten signature in black ink that reads "Heidi Hansen". The signature is written in a cursive, flowing style.

Heidi Hansen, 2012 President
Sequim Association of REALTORS®

Enc.

MEMORANDUM

July 7, 2012

TO: Washington Department of Ecology

FROM: Bill Clarke, for Washington REALTORS/Sequim REALTORS®

RE: Comments on Proposed WAC Chapter 173-518
Dungeness Basin Water Management Rule

1. Proposed Rule Violates State Water Code Requirement That Adequate Potable Water Supply for Human Domestic Needs Be Provided.

The Proposed Rule's failure to provide sufficient water supply through the proposed 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 instream flow 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. The Proposed Rule fails to include any "adequate potable water supply for human domestic needs." This legal flaw in the rule was noted by Ecology staff:

. . . We intend to appropriate a new water right under 90.54.020(3) to fish and habitat which is 73% of the river. We appropriate 0% to domestic use under 90.54.020(5) . . .

February 28, 2012 email from Tryg Hoff, Exhibit A.

REALTORS® are greatly concerned that the availability of water in the Proposed 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 Proposed Rule does not provide the water supply necessary to meet "human domestic needs."

One of the ironies of the conflict with land use plans and zoning created by Ecology's Proposed 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 of 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 Proposed Rule and the Growth Management Act.

Further, 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 Rule will be to limit or condition rural development in certain areas of WRIA 18, and to make Clallam County water availability decisions for land subdivisions under RCW 58.17.110 and building permits under RCW 19.29.097 subject to the requirements of the rule. 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 and zoning specifically including a “rural element” that allows rural development consistent with rural character.

At this point, we don't see how the Proposed Rule is coordinated at all with the county's comprehensive plan or with the specific zoning adopted in those parts of Clallam County where water supply from purveyors is not available. After spending millions of dollars and over two decades on GMA and watershed planning efforts, Ecology is now poised to adopt a rule that is inconsistent with the local land use plan by failing to provide adequate water supply – the exact opposite result intended by the GMA and Watershed Planning Act.

2. In the Dungeness Basin, Past Public Investments in Streamflow Restoration Make the Proposed Rule Unnecessary – And Show Why a Capital Approach, Not a Regulatory Approach, Is Best Suited for Instream Flow Protections.

Ecology's recent success in using public funds to restore streamflows in the Dungeness Basin is well-documented. Washington State University and the University of Washington completed a study in 2004 on Ecology's water acquisition program that detailed the extent of efforts in the Dungeness Basin. The report states as follows:

In the Dungeness Area, agricultural water users have been relatively receptive to the Water Acquisition Program. In 2001, thirteen one-year split-season leases (August 1 to September 15) totaling 417 acre-feet per year were completed. The combination of water right leases and irrigation system improvements in 2001

resulted in an estimated 8.5 cfs of additional water in the Dungeness River. In 2003, twenty-five similar split season leases were concluded, each for a three-year period, totaling 10.17 cfs.

Of Water and Trust: A Review of the Washington Water Acquisition Program; Prepared By Nicholas P. Lovrich (Principal Investigator), Washington State University and Dan Siemann, University of Washington (secondary authors omitted), March 2004, page 9, Exhibit B.

These instream flow improvements were the result of significant state and federal funding. As described by Ecology:

State, federal, and local partners have invested 26 million dollars in salmon habitat recovery projects in the last approximately 15 years in the Dungeness of which 10.5 million was for water conservation, irrigation efficiency, and acquisition projects to improve flow in the Dungeness. Diversions were reduced by about 10 cfs during that period. That's about \$1 million per cfs of flow improvement.

January 23, 2012 email from Tom Loranger [Exhibit C]

Finally, these recent improvements in Dungeness Basin streamflows should be viewed in the context of streamflow improvements achieved over the past few decades. A review of Dungeness River water use efficiency programs concluded that diversions from Dungeness River have been reduced from the pre-1979 average of 150 cfs, to 109 cfs before 1990, and down to 56 cfs in 2001.

In recent years, increasing efficiency has created a significant reduction in agricultural diversions. Diversions have dropped from a seasonal average of 150 cfs (4.3 cms) during flood irrigation (before 1979) to 109 cfs (3.1 cms) (before 1990) to 56 cfs (1.6 cms) in 2001.

Integrated Approaches to Riverine Resource Stewardship: Case Studies, Science, Law, People, and Policy, Allan Locke, Hal Beecher (and other co-authors), Instream Flow Council.

The substantive improvements in streamflows must be compared to the relative impact of future exempt withdrawals as calculated by Ecology. Ecology has calculated the likely consumptive impact of exempt wells in the Dungeness Basin, including all regulated tributary sub-basins, as part of the Proposed Rule. In this analysis, Ecology projects for the next 20 years the same rural development growth rate as occurred in the watershed from 1990 – 2010, which Ecology acknowledged was “a flawed assumption as the current well construction [sic] is about half of the rate observed between 1990 and 2010.” *February 2, 2012 email from Dave Nazy [Exhibit D]. Ecology*

then calculated average annual consumption of 100 gallons per day, and maximum daily consumptive use in July of 320 gallons per day, accounting for higher indoor and outdoor water use during the peak water use months of summer. Based on this, Ecology calculated the impacts from new exempt wells as follows:

Average Instantaneous Consumptive Use in WRIA 18 Over 20 years	.5487 cfs
Maximum Instantaneous Consumptive Use in WRIA 18 Over 20 years	1.75 cfs

February 2, 2012 email from Dave Nazy (Exhibit D)

Thus, assuming a rural development growth rate equal to the housing boom period that Ecology acknowledges as “a flawed assumption,” the consumptive impact of all new exempt wells of 1.75 cfs is only 17.5% of the streamflow diversion reductions already achieved by Ecology. Further, while the streamflow improvements occurred with surface water rights having direct and immediate impacts on the Dungeness River and tributaries, these exempt well “impacts” are occurring through wells that will varying distances from surface waters, thus having indirect and often immeasurable impacts.

A different Ecology analysis concluded that the Proposed Rule would prevent impacts of about .77 cfs across the entire basin over the next 20 years. *March 7, 2012 email from Tryg Hoff, Exhibit E.* A third Ecology analysis, based on Office of Financial Management information was summarized as follows: “OFM estimates of new residences in the unincorporated areas of the Dungeness in the next 20 years: 2000 to 3500, @ 350 gallons per day consumptive use per exempt well, this would be 1.1 to 1.9 cfs of consumptive use. *January 23, 2012 email from Tom Loranger, Exhibit C.*

Altogether, these impact estimates compared to past Ecology investments in Dungeness Basin streamflow restoration show why the Proposed Rule should not be adopted. After investing \$10 million in public funds to obtain a 10 cfs improvement, plus an additional \$16 million in related habitat restoration work, Ecology is now poised to adopt a rule for which the agency’s own numbers show a cost impact of between \$7.7 million and \$23 million – all to prevent somewhere between .77 cfs and 1.9 cfs of impact on streamflows. And this level of impact is based on assumed growth rates equal to the housing boom of 1990 – 2010, assuming that groundwater withdrawals have identical impacts on streamflows as surface water diversions, and assuming 350 gallons per day of consumptive use for each new exempt well, none of which are logical assumptions.

3. 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 Proposed 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, and by a capital approach of acquiring mitigation water rights if needed.

4. New Ecology Policy of Closing Basins to Exempt Wells and Requiring Mitigation On A Project-By-Project Basis is Costly and Complex for All Involved.

The Proposed Rule is the latest iteration of Ecology’s new model of instream flow rules – a model that should be abandoned and replaced with something that is simpler and less costly to both regulated entities (homeowners and local governments) as well as to Ecology. Under the rules adopted by Ecology in the 1970’s and 1980’s, instream

flow rules generally included an exemption for domestic use, and sometimes a domestic exemption coupled with a potential in-home domestic exemption. (see, e.g., WAC 173-511-070, Nisqually Basin Instream Flow Rule)

This exemption meant that while Ecology would use the rule to reach its desired outcome of closing basins to new surface and groundwater withdrawals, that at least the in-home domestic portion of exempt uses would remain lawful. This ensures that homeowners have a valid legal water supply, and can meet the requirement in RCW 19.27.097 and RCW 58.17.110 to show proof of water supply, but would still allow Ecology to adopt and regulate against an instream flow level.

Further, the provisions of RCW 90.44.050 provides that certain withdrawals are exempt from the general permit requirements of the water code. Under Ecology's Proposed Rule, all new water uses, including exempt uses must obtain mitigation. This mitigation consists of a portion of an existing water right through the Dungeness Water Exchange. Thus, the ability to use an "exempt" well is now conditioned on the requirement to purchase a portion of a permitted water right – the exempt well is no longer exempt from the permit process.

Ecology's new generation of instream flow rules creates new costs and complexities for all parties involved by inserting the agency and its various untested applications of water law to small exempt uses. As seen in Upper Kittitas County, Skagit County, and Jefferson County, the structure of new Ecology rules makes it extremely costly for homeowners to know whether water is legally available or obtain legal water supply. At their worst, Ecology's new rules close vast areas of land to even in-home domestic water use as no legal water supply is available: there are no water rights to transfer directly or indirectly through a water bank or water exchange and no reasonable way for homeowners to mitigate. Local government land use decisions are greatly complicated, as Ecology is stuck with unmanageable rules of its own making. As an example, Ecology's Skagit Basin instream flow rule resulted in a moratorium on all new exempt wells in a certain part of the basin, which affected whether Skagit County could find that water supply was available for purposes of issuing a building permit. Skagit County inquired of Ecology as to whether water supply was legally available under Ecology's own rule, and was informed as follows:

On behalf of the Department of Ecology (Ecology), I am responding to your email of June 13, 2012 concerning the water right issue related to Thomas Crane's application to Skagit County for a building permit.

On May 30, 2012, Jacque Klug of Ecology sent a letter to Mr. Crane which explained that there is "legal uncertainty associated with your water withdrawal that results from your failure to have a proper building permit," because while it appears that Mr. Crane's water use commenced prior to Ecology's June 27, 2011 issuance of the notice that the Carpenter-Fisher is closed to new water

appropriations, his property was not included in Ecology's accounting of water uses under the reservation, which is currently over-allocated by approximately 3,000 gallons per day. Consequently, Ms. Klug informed Mr. Crane that:

Because we understand that your well is the only source of water supply for your home, and you may have a water right that vested prior to the closure, we will not enforce the closure against you at this time so that you may obtain a building permit and come into compliance with a Skagit County building permit. Please be aware that your water right could be subject to regulation in the future. This could mean being directed to cease using water.

Subsequent to this letter, Skagit County staff requested Ms. Klug to provide a "yes or no" answer as to whether Mr. Crane has a lawful right to water that can support the County's issuance of a building permit. I am writing you now to provide the County with clarification on Ms. Klug's letter to Mr. Crane.

As you are aware, the Washington Supreme Court recently held in *Kittitas County v. Eastern Washington Growth Management Hearings Board* that it is the counties' (and not Ecology's) responsibility to determine whether applicants for subdivisions under RCW 58.17.110 and applicants for building permits under RCW 90.27.097 demonstrate evidence of an adequate legal water supply to enable the counties' issuance of subdivision approvals and building permits. *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 178-180, 256 P.3d 1193 (2011). The Supreme Court further pronounced in that decision that Ecology has a role to assist the counties in making determinations of whether adequate water supply is available in making land use decisions. *Kittitas County*, 172 Wn.2d at 180. In that vein, as the administrator of the Skagit River Basin Instream Flow Rule, WAC 173-503, Ecology offers the following recommendation to the County.

For the reasons explained in Ms. Klug's letter, it is not possible to provide a "yes or no" answer as to whether Mr. Crane has a lawful non-interruptible right to water from the Carpenter-Fisher reservation. However, because it presently is not certain that Mr. Crane has a lawful water right, Ecology recommends, at this time, that the County determine that Mr. Crane has not demonstrated evidence of an adequate water supply to support issuance of a building permit under RCW 19.27.097. Ecology is working to develop a broader subbasin-wide mitigation effort for property owners in the Carpenter-Fisher basin which may provide mitigation for Mr. Crane's groundwater withdrawal. Ecology will provide a different recommendation in the future if mitigation for Mr. Crane's water use can be secured, either through his own effort, or through Ecology's current program to develop mitigation to allow for new uses of water in the Carpenter-Fisher Subbasin notwithstanding the closure.

Ecology recognizes that having an unpermitted, inhabited residence is at odds with your public health and safety responsibilities under the County's Building Code and is willing to work with Skagit County to resolve the situation. Yet, given the legal uncertainty associated with Mr. Crane's water use, Ecology believes it would be a disservice to affirm such an uncertain water right through a building permit approval at this time, especially since Ecology is actively working on mitigation projects that may provide legal coverage for Mr. Crane's withdrawal.

. . .

June 25, 2012 email from Alan Reichman, Assistant Attorney General – Ecology Division, to Will Honea, Chief Civil Deputy Prosecutor, Skagit County.

The length and complexities of Ecology's response to Skagit County's basic question, and the ultimate conclusion "that it is not possible to give a yes or no answer" demonstrate the unnecessary complexities that Ecology's new rules introduce to local water availability decisions. Average citizens will be seeking to buy vacant lots and will need to understand "is water supply available" – a yes or no answer is needed in a timely manner for the real estate transaction to function properly and to protect consumers.

REALTORS® believe that if Ecology seeks to address impacts from exempt withdrawals on instream flows, it should do so in a way that does not impose complex and costly regulatory impacts on landowners and local governments. This can be done through Ecology's existing authority in the water acquisition program and trust water statutes. Regulation of small water uses that have little or no measurable impact on streamflows imposes significant costs with little environmental gain.

5. Ecology Lacks Authority to Delegate Functions Necessary to Administer A State Regulation to a Private Entity, and Such Delegation Violates Trust Water Statute

Under the Proposed Rule, Ecology continues its recent practice of closing a basin to all new water rights and exempt uses, and then allowing new water uses to occur if mitigated. The Proposed Rule is unique, however, in that it includes reliance on a private entity, the Dungeness Water Exchange, to provide the mitigation necessary to relieve landowners from the impacts of the rule. For both legal and policy reasons, this rule structure is unlawful and ill-advised.

Ecology's Proposed Rule provides that "water use may be mitigated through the purchase of credits available through the Dungeness Water Exchange." WAC 173-518-070(3)(a)(i). The Dungeness Water Exchange is not part of Ecology or under Ecology's

control, rather, it will be created by Washington Water Trust, a Washington non-profit corporation. As described by Ecology,

The statement ‘Washington Water Trust (WWT) will control water rights’ is inaccurate. What’s true is that WWT will be the administrator of the Dungeness Water Exchange. This organization will act as an exchange to bring voluntary buyers and sellers of water rights together.’”

April 10, 2012 email from Sally Toteff to Pete Church-Smith [Exhibit F].

The Proposed Rule cites Ecology’s legal authority for this type of “water exchange” process as Chapter 90.42 RCW, the state’s trust water statute, and "Dungeness water exchange" is defined as “a water bank pursuant to the Water Resources Management Act, chapter 90.42 RCW. Within RCW Chapter 90.42 are the water banking provisions that relate to the envisioned water exchange process. However, this statute makes clear that water banking authority rests with Ecology – there is no statutory to delegate this function to a private entity. RCW 90.42.100(1) states that “**The department** is hereby authorized to use the trust water rights program for water banking purposes statewide.” (emphasis added) Further, the water banking statute provides that water banking may be used “to provide a source of water rights **the department** can make available to third parties on a temporary or permanent basis for any beneficial use under chapter 90.03, 90.44, or 90.54 RCW. RCW 90.42.100(2)(c). (emphasis added).

Ecology’s intended delegation of the proposed rule’s mitigation functions to the Washington Water Exchange also violates other provisions of the trust water statute. For example, the statute makes clear that trust water rights are to be managed by Ecology, not other parties: “A trust water right acquired by the state shall be placed in the state trust water program and managed by the department. . . .” RCW 90.42.040(1)

REALTORS® note the irony that the real estate industry would take issue with the structure and purpose of the Dungeness Water Exchange, as it likely could provide the only relief from the impacts of the rule on landowners. The point is not that mitigation should not be discussed or that water exchanges are without merit. Our point is that this type of mitigation (or what is known about it at this point) is far more costly and complicated than what is necessary to address future consumptive impacts from exempt wells and other water uses.

Moreover, Ecology’s new policy of closing basins to exempt withdrawals with hopes that water supply or mitigation is brought forward by 3rd parties feels like a series of evolving water policy experiments. Ecology’s regulatory methods and rulemaking analysis are changing from basin to basin and imposing huge costs on landowners, local governments, and the agency. In some areas (Skagit), homeowners have no viable mitigation. In other areas (Kittitas), some select areas were spared the economic

consequences of moratorium only because of the unique existence of the Suncadia water bank and the profit motives of other water rights holders.

6. Proposed Rule Has Numerous Major Parts to Be Determined in the Future Either by Ecology Or By 3rd Parties, and So Cannot Be Adopted.

Ecology's Proposed Rule has a number of major provisions that have yet to be determined or specified in any rulemaking document, and thus the Proposed Rule cannot be adopted. For example, the cost of purchasing mitigation has yet to be determined (and in any event, it appears that Ecology will have no control over the cost). Ecology's document *Frequently Asked Questions – Changes to Water User in the Dungeness Watershed, Exhibit G* ("FAQ") document states "Preliminary estimates for the cost of water mitigation as part of a building permit are \$500 to \$3,500." This cost range includes a seven-fold difference from bottom to top, and it is not known whether this cost range is accurate, or could double or triple. The FAQ document states that the fees for mitigation "go to the Exchange and would be used to purchase additional water rights ("mitigation credits") and also to fund flow restoration projects. From this, it is unclear whether the purchase of mitigation involves purchasing a quantity of water equal to consumptive use or whether it involves both mitigation plus additional "flow restoration."

Further, Ecology's mitigation flowchart in the FAQ document concludes that if water from a public water system is not available, then "Mitigation is required," with a note following stating "Note: As we go to press, a third option is being considered by Clallam County.) However, there are no provisions in the Proposed Rule that describe the regulatory requirements for this county-based mitigation process.

Altogether, the Proposed Rule includes no definite regulatory provisions regarding exactly where mitigation will be available, when, or how much it will cost. Ecology should not adopt this rule until the complete mitigation program can be developed and understood by landowners and other interests.

The promise of having a functional, affordable, and rational mitigation program in place at some unknown point in future after the adoption of an Ecology rule has 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 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). During the rulemaking process, it is impossible to analyze the true impacts of the rule: 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.

7. Ecology Must Clarify Language In Proposed Rule So It Is Clear That Mitigation Is Required For All New Uses

Ecology must clarify the rule language relating to when mitigation is required under the rule. Proposed WAC 173-518-080 paragraph 2 states that “based on this finding, ecology hereby reserves specific quantities of groundwater for future domestic supply only. These reserves are not subject to the instream flows established in WAC 173-518-040 or closures established in WAC 173-518-050.” Proposed WAC 173-518-080(2) then provides for three conditions for the use of groundwater from the reserves, which are (a) the water must be for domestic use; (b) water use shall meet conservation standards; and (c) such water use shall be measured and reported.

If new exempt well water use from the reserves is “not subject to the instream flows [or] closures,” how is there any authority to require mitigation for that water use? Or put another way, what is the purpose of establishing the reserves and declaring that the reserves are not subject to the instream flows and closure, if mitigation is still required? This is yet another example of how the proposed rule in the Dungeness Basin varies from other recent Ecology rules, including those in the Quilcene, Skagit, and Upper Yakima Basins. While it is appropriate for rules to address local considerations, Ecology is using a different legal standard that will be hard for landowners, local governments, and the real estate industry to understand.

8. 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 Proposed 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 , Exhibit H.

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).

Ecology’s analysis demonstrates that it is minimum instream flows that are typically in excess of the flow of water actually in the river. Based on historical flow gauge data, the actual flows are less than the flows 78% of the time in July, 89% of the time in August, 93% of the time in September, and 82% of the time in October. *February 8, 2012 Memo from Ecology Environmental Assessment Program, Exhibit I.* The Proposed Rule asserts that the “instream flows established in this rule are water rights . . . “ – but how can they be water rights if the water is not there?

9. 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 173-518-010(3) states that the rule will apply

“to the use and appropriation of surface and groundwater in the Dungeness River watershed begun after the effective date of this chapter. Unless otherwise provided for in the conditions of the water right in question, this chapter shall not affect:

...

Existing groundwater rights established under the groundwater permit-exemption where regular beneficial use began before the effective date of this chapter.

This provision violates relation-back doctrine that is part of Washington's water code. This flaw has been in prior versions of the draft rule, including prior Proposed WAC 173-518-070(4) that stated 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.”

REALTORS® previously commented on this legal flaw, and it appears that Ecology's response was not to correct the flaw, but to make its erroneous legal conclusion even more obscure. That is, rather than defining the priority date for exempt uses as done in prior rule drafts, the Proposed Rule removes this definition. Ecology's conclusion is further explained in an email from Ann Wessel dated April 9, 2012: “If you wait until the rule is in place to start using a permit exempt well for your intended purposes, your water use will be subject to the rule. You only establish a water right through regular beneficial use of water from your well.” *[Exhibit J]* Or, as explained by Ecology in its Questions and Answer document:

Q: I have already drilled a well but not started using it. Would my water use be subject to the rule?

A: Yes. If you have not started using the well for your intended purpose before the rule takes effect, your water use would be subject to the rule. You do not have an existing right unless you used water from the well for “regular beneficial use” prior to that date.

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 re-examined by Ecology 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 Rule further require that the priority date should be based on the relation back doctrine. The Proposed 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. 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 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 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.

REALTORS® request a provision be added to the Proposed Rule, if adopted, that provides if an development project was initiated prior to the effective date of the rule through issuance of a land subdivision approval, building permit, or well start card, that the project not be subject to the rule if completed with due diligence. The due diligence standard should be based on the terms of the local government land use approval and existing Ecology policies relating to the demonstration of due diligence for water right permit development schedules.

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

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

The prior appropriation doctrine, the basis for Washington's water rights system, is the same "first in time, first in right" system adopted in most Western states. The

purpose of this legal system was to provide an economic incentive for settlement of Western lands, not ensure proportionate allocation of responsibility for environmental impacts. Ecology's Proposed Rule uses the prior appropriation doctrine in a blunt fashion – exempting all water uses senior the Proposed Rule while subjecting all junior water uses – regardless of the impact caused by any specific junior or senior water right. For this reason, the Proposed Rule is constitutionally suspect.

Guidance required by the Washington State Attorney General's Office on avoiding unconstitutional takings of private property reaches the same conclusion:

Because government actions are characterized in terms of overall fairness, a taking or violation of substantive due process is more likely to be found when it appears that a single property owner is being forced to bear the burden of addressing some societal concern, when in all fairness the cost ought to be shared across society.

Advisory Memorandum: Avoiding Unconstitutional Takings of Private Property, Washington State Attorney General's Office, p. 15 (December 2006).

In addition to the regulatory takings analysis, regulations are also subject to substantive due process requirements. The 14th Amendment of the U.S. Constitution prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law . . ." U.S. Const. Amend. 14 § 1. The test for whether a regulation violates a property owner's substantive due process rights has three parts:

- (1) Whether the regulation is aimed at achieving a legitimate public purpose;
- (2) Whether the regulation uses means that are reasonably necessary to achieve the stated purpose; and
- (3) Whether the ordinance unduly oppresses the property owner.

Guimont, 121 Wn.2d 586, 609 (1993), *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330, cert. denied, 498 U.S. 911 (1990).

For example, in a State Supreme Court case concerning a statute requiring the owner of a closing Manufactured Housing Community (MHC) to pay relocation assistance, the Supreme Court found a violation of substantive due process in that the statute imposed all of the burdens of funding low income housing impacts on a single class of property owners, regardless of their level of impact:

"Likewise, in this case, the costs of relocating mobile home owners, like the related and more general problems of maintaining an adequate supply of low income housing, are more properly the burden of society as a whole than of individual park owners.

...

An individual park owner who desires to close a park is not significantly more responsible for these general society-wide problems than is the rest

of the population. Requiring society as a whole to shoulder the costs of relocation assistance represents a far less oppressive solution to the problem.

Guimont v. Clarke, 121 Wn.2d 586, 609 (1993),

Similarly, Ecology's Proposed Rule imposes all of the regulatory and financial burdens of the rule on junior exempt well users, regardless of the actual level of impact caused by an individual exempt well. While the prior appropriation establishes a legal framework for water rights based on priority date, that priority date system is not intended to supersede fundamental constitutional limitations.

Ecology's past public investments in Dungeness Basin streamflow protections provide an example of streamflow protection methods that as the *Guimont* Court stated, "require[s] society as a whole to shoulder the costs" of a "general society wide problem." Conversely, imposing the regulatory burden of streamflow protection solely on future exempt well users, who have the smallest level of impact and whose water uses are furthest removed from streamflows, raises similar constitutional issues as those in *Guimont*.

11. Cost Benefit Analysis Is Based on Legally Flawed Baseline And Must Be Redone

Ecology's Cost/Benefit Analysis ("CBA") relies heavily on two legal theories in order to produce cost/benefit numbers that enable adoption of the rule. The first is a new legal theory unveiled by Ecology that contradicts the agency's position in similar rulemakings in other basins. Ecology's initial CBA was based on the premise that until Ecology closed the basin, the owner of vacant land could in the future obtain a residential building permit relying on the exemption in RCW 90.44.050, and that this provided economic value to the landowner. Following this analysis, the draft CBA resulted in numbers in which the costs outweighed the benefits, in violation of the Administrative Procedures Act. Consequently, Ecology received advice from the Attorney General's Office, which advised as follows:

One issue I see that is contrary to the baseline we discussed last week when we were all on the phone is that you are assuming that people who have yet to establish an exempt use in the basin (prospective users) have a current legal right to the exemption and in turn you attach a value to that right (a million bucks for all exempt uses). This is simply not true. A prospective user has no legal right to the use of the exemption until the exemption is established. If a basin is closed and they have yet to establish a beneficial use of water, they have lost nothing other than an expectation . . .

March 19, 2012 email from Steve North, and other Cost/Benefit emails [Exhibit K]

This conclusion and direction from the AG's Office is contrary to the agency's conclusion in 2009, in the exempt well rule adopted in Upper Kittitas County. In that

rule, the agency concluded that “Without the rule, landowners could be expected to continue to develop groundwater supplies under the legal authority of the exemption from permitting found in RCW 90.44.050 and without any mitigation.” *WAC Chapter 173-539A, Upper Kittitas Groundwater Rule Concise Explanatory Statement, page 5.*

While it is true that a water right matures into a vested property rights only after it is applied to a beneficial use, this is a different question than whether an exempt well is legally available to a landowner, and what the priority date is for that withdrawal. The more straightforward analysis is that at all times before the Proposed Rule is adopted, an exempt well would allow the landowner to obtain a residential building permit from Clallam County; after the rule is effective, it would not. RCW 19.27.097 requires the local government to determine whether adequate potable water supply is available for a building needing potable water supply. The Washington Supreme Court recently confirmed this requirement that “. . . GMA provisions, codified at RCW 19.27.097 and 58.17.110, require counties to assure adequate potable water is available when issuing building permits and approving subdivision applications.” *Kittitas County v. Eastern Washington Growth Management Hearings Bd.* 172 Wn.2d 144 (2011)

Under existing law and county ordinance, Clallam County’s application form for this portion of residential building permit review references both RCW 19.27.097 and a Joint 1993 Department of Ecology and Health document titled Guidelines for Determining Water Availability for New Buildings. (*Exhibit L*). An exempt well that met the various water quality related provisions would be considered adequate to obtain a residential building permit. That is current legal baseline in Clallam County.

Further, Ecology’s baseline conclusion that the loss of the ability to use an exempt well caused by an Ecology regulation has no cognizable economic impact on the landowner is demonstrably false. In some Snohomish County areas of the Skagit River Basin, Ecology’s rule created a moratorium on new exempt wells, and thus residential lots were deemed not buildable by Snohomish County. In one example, this reduced the property tax valuation of a 1.03 acre lot from \$122,000 in 2011 to \$40,800 in 2012; a second example shows a reduced value of a 20 acre parcel from \$236,000 in 2011 to \$39,300 in 2012. (*Exhibit M*)

The second theory underlying Ecology’s CBA is that the rule provides significant landowner benefits in terms of preventing or reducing litigation. This “litigation avoidance” is assigned a value of between \$2.4 million and \$4.7 million, with associated “increased certainty in development” being valued at \$19.8 million to \$62 million. For example, Ecology staff researched the Dungeness rulemaking process history in order to find examples of litigation threats to provide to Ecology’s economist.

Quotes from Shirley Nixon at February 7, 2012 Clallam County Board of Commissioners public hearing to gather public input on the draft rule:

‘Litigation between neighbors is the only result if we don’t adopt a rule.’

‘Litigation will occur if a rule doesn’t get adopted to protect flows.’

There should be a transcript of this hearing available from the County.

Is this what Tryg needs?

March 12, 2012 email from Ann Wessel [Exhibit N]

Ms. Nixon’s statement of “neighbors” litigating certainly cannot be in reference to the hundreds of Clallam County citizens who have appeared in large numbers at public hearings and workshops over the past few years in opposition to the rule. Further, it is difficult to understand the “litigation prevention” values assigned to the Proposed Rule, especially when recent Ecology instream flow rules have created more litigation than they have prevented. For example, since the adoption of the 2001 Skagit Basin Instream Flow Rule, there have been two Superior Court appeals to the that rule (one to the original 2001 rule, a second to the 2006 amendment to the 2001 rule); a Snohomish County Superior Court case later appealed to the Court of Appeals on a related local water resource agreement, and numerous Pollution Control Hearings Board appeals. So, while an economist may be able to create a “litigation prevention” value for analytical purposes, the court filings would conclude otherwise.

In the end, the analytical contortions underlying the Proposed Rule are simply too much for the reasonable person to bear. REALTORS® point is not that Ecology should not respond to threats of litigation from environmental attorneys or other interest groups. Rather, our point is that if certain stakeholders insist that exempt well and other consumptive water use impacts be addressed to prevent actual impairment of existing water rights, then Ecology should find a way to calculate and offset those impacts in the least burdensome and most cost effective way possible, and in a way that treats future water users fairly.

12. Ecology Is Required To Complete Maximum Net Benefits Analysis

RCW 90.54.020(2) states that “allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits less costs including opportunities lost.” This means that as part of the rulemaking process, Ecology must perform a maximum net benefits analysis. At least one Ecology staff member raised this point during the rulemaking process:

RCW 90.54.020 lays out how water is supposed to be appropriated. In 2012 we intend to appropriate a new water right under 90.54.020(3) to fish and habitat which is 73% of the river. We appropriate 0% to domestic use under 90.54.020(5). How does this pass the Maximum Net Benefit test?

February 28, 2012 email from Tryg Hoff, Exhibit A.

It is yet unknown whether the rule would pass the Maximum Net Benefit test because Ecology has not done one. Ecology's Policy Statement on Maximum Net Benefits, Policy 2025, concludes that while Ecology will perform a maximum net benefits analysis for some types of instream flow rule making, it will not complete a maximum net benefits analysis when adopting instream flow rules such as the Proposed Rule, but will complete this analysis when adopting a rule creating a reservation of water for uses other than domestic use under RCW 90.54.050. That is, simply because the rule includes an extremely limited reservation of water for indoor domestic use (that exists only if mitigation does not materialize), Ecology avoids the Maximum Net Benefit test requirement by relying on an agency policy that violates the statutory requirement. The decision to not perform a maximum net benefits analysis is also discussed in an Ecology document prepared as part of the rulemaking process.

In this document, Ecology comments acknowledge that if a maximum net benefit test was performed, it could prevent adoption of the proposed rule:

Yikes this section is a problem – see my comment.

We are not doing a maximum net benefits analysis for the WRIA 18 rule – this is consistent with WR program policy: POL-2025. That policy says we don't do it to set flows or for domestic only reservations. For us to use this in the Dungeness we need to either explain why it isn't required or delete this whole section of the focus sheet.

Ann Wessel comments to 3/5/12 Economic Analyses Required for Proposed Water Resource Management Rules, Exhibit O.

However, under the terms of Ecology's own rule, it is clear this test is required. The Proposed Rule defines "allocation" as "the designation of specific amounts of water for beneficial uses." Proposed WAC 173-518-030. The Proposed Rule sets instream flow levels as water rights or "allocations" of water for instream purposes: "Instream flows established in this rule are water rights and will be protected from impairment . . ." Proposed WAC 173-518-040(3). In addition to the allocation of water for instream flows, the rule also establishes reservation of water for indoor domestic use under RCW 90.54.050(1). The rule is clearly an allocation that requires a maximum net benefits analysis, and Ecology's policy concluding that such analysis is not necessary is unlawful.

13. Incorporation of Ecology Rulemaking Documents By Reference

While Washington's water code is statewide, variances are developing at the watershed level through rules adopted by Ecology. While some variation is desirable to reflect local conditions, Ecology's analysis and regulatory positions have varied

throughout the state. This is of concern to REALTORS® who seek to maintain statewide consistency in areas such as real estate seller disclosure, real estate agency law duties, and buyer feasibility inquiries. A comprehensive review of recent and earlier Ecology instream flow rules is beyond the scope of this comment letter, but for purposes of including these other related documents in the administrative record for this rulemaking, REALTORS® incorporate by reference the following documents:

Ecology Rulemaking Documents for:

- WAC 173-503 – Skagit Basin Instream Flow Rule
- WAC 173-517 – Quilcene/Snow Instream Flow Rule
- WAC 173-539A – Upper Kittitas County Ground Water Rule
- WAC 173-532 – Walla Walla Basin Instream Flow Rule
- WAC 173-505 – Stillaguamish Basin Instream Flow Rule
- WAC 173-545 – Wenatchee Basin Instream Flow Rule

June 13 email from Ann Wessel, Exhibit P.