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FILED
DEC 31 2014
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

RECEIVED
DEC 31 2014
DEPARTMENT OF ECOLOGY
EXECUTIVE

SUPERIOR COURT OF STATE OF WASHINGTON
FOR THURSTON COUNTY

MAGDALENA T. BASSETT, DENMAN J.
BASSETT, and OLYMPIC RESOURCE
PROTECTION COUNCIL,

Plaintiffs,

vs.

WASHINGTON STATE DEPARTMENT OF
ECOLOGY,

Defendant.

NO. 14-2-02466-2
SUMMONS (20 DAYS)

TO THE DEFENDANT: A lawsuit has been started against you in the above-entitled court by
MAGDALENA T. BASSETT, DENMAN J. BASSETT, and OLYMPIC RESOURCE
PROTECTION COUNCIL, plaintiffs. Plaintiffs' claims are stated in the written Petition for
Declaratory Judgment, a copy of which is served upon you with this summons.

In order to defend against this lawsuit, you must respond to the petition by stating your
defense in writing, and by serving a copy upon the person signing this summons within 20 days
after the service of this summons, excluding the day of service, or a default judgment may be

SUMMONS

Law Office of Thomas M. Pors
1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
Tel: (206) 357-8570
Fax: (866) 342-9646

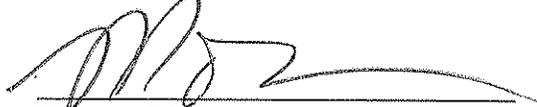
1 entered against you without notice. A default judgment is one where the plaintiff is entitled to
2 what he asks for because you have not responded. If you serve a notice of appearance on the
3 undersigned person, you are entitled to notice before a default judgment may be entered.

4 Please note that this lawsuit has been filed with the court. It is not necessary that you
5 make a demand that the lawsuit be filed.

6 This summons is issued pursuant to rule 4 of the Superior Court Civil Rules of the State
7 of Washington.

8
9 DATED this 30th day of December, 2014.

10
11 LAW OFFICE OF THOMAS M. PORS

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13 Thomas M. Pors, WSBA No. 17718
14 Attorney for Plaintiffs

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SUPERIOR COURT
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THURSTON COUNTY CLERK

SUPERIOR COURT OF STATE OF WASHINGTON
FOR THURSTON COUNTY

MAGDALENA T. BASSETT, DENMAN J.
BASSETT, and OLYMPIC RESOURCE
PROTECTION COUNCIL,

Plaintiffs,

vs.

WASHINGTON STATE DEPARTMENT OF
ECOLOGY,

Defendant.

NO. 14-2-02466-2

PETITION FOR DECLARATORY
JUDGMENT REGARDING THE
VALIDITY OF A RULE (RCW
34.05.570(2))

STATEMENT OF THE CASE

This is a petition for declaratory judgment under the Administrative Procedure Act to determine the validity of Chapter 173-518 WAC, the Water Resources Management Program for the Dungeness Portion of the Elwha-Dungeness Water Resource Inventory Area 18 (the "Dungeness Rule"). Petitioners allege that the Dungeness Rule is invalid for the reasons set forth below.

JURISDICTION AND VENUE

PETITION FOR DECLARATORY
JUDGMENT

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- 1 1. This court has jurisdiction to determine the validity of administrative rules under the
2 Administrative Procedure Act, RCW 34.05.570, through the filing of a petition for
3 declaratory judgment.
- 4 2. Venue is appropriate in Thurston County Superior Court pursuant to RCW
5 34.05.570(2)(b).

6 **PARTIES**

- 7 3. Petitioners Magdalena T. Bassett and Denman J. Bassett are husband and wife and reside
8 in and own real property in Clallam County, Washington. The Dungeness Rule, or its
9 threatened application, interferes with or impairs or immediately threatens to interfere
10 with or impair the legal rights or privileges of the petitioners.
- 11 4. Petitioner Olympic Resource Protection Council ("ORPC") is a Washington State non-
12 profit corporation whose purpose is to seek clear, fair and responsible regulations,
13 seeking to balance environmental protection with property rights and recognizing the
14 importance of both. Its members include Petitioners Magdalena T. Bassett and Denman
15 J. Bassett and other individuals and businesses affected by the operation of the Dungeness
16 Rule.
- 17 5. Petitioners' attorney is Thomas M. Pors, 1700 7th Avenue, Suite 2100, Seattle, WA
18 98101.
- 19 6. Defendant Department of Ecology (Ecology) is an administrative agency of the State of
20 Washington and was responsible for drafting and issuing the Dungeness Rule. Ecology's
21 mailing address is P.O. Box 47775, Olympia, WA 98504.

22 **STATEMENT OF FACTS**

- 23 7. Ecology adopted a new water management rule for the Dungeness watershed on
24 November 16, 2012. It went into effect on January 2, 2013. A copy of the Dungeness
25 Rule is attached as Exhibit 1. The Dungeness watershed includes the eastern portion of
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1 Water Resources Inventory Area (WRIA) 18, from Bagley Creek on the west to Bell
2 Creek on the east, and including the Dungeness River from its headwaters in the Olympic
3 Mountains to the Strait of Juan de Fuca. The Dungeness Rule is codified at Chapter 173-
4 518 WAC.

- 5 8. Ecology adopted the Dungeness Rule under the authority of the Watershed Planning Act
6 (chapter 90.82 RCW), the Water Resources Act of 1971 (chapter 90.54 RCW), the Water
7 Code (chapter 90.03 RCW), the Minimum Water Flows and Levels Act (chapter 90.22
8 RCW), and pursuant to the Administrative Procedure Act (chapter 34.05 RCW).
- 9 9. The Dungeness Rule applies to new uses and appropriations of surface and groundwaters
10 in the Dungeness River watershed begun after its effective date. Among other things, the
11 rule: (a) established minimum instream flows and closed named creeks and unnamed
12 tributaries to the Dungeness River year-round; (b) closed the Dungeness River main stem
13 from its mouth to its headwaters to new appropriations of water from July 15 to
14 November 15 each year; (c) restricts and regulates all new groundwater appropriations
15 including permit-exempt wells; (d) established mitigation requirements for all new
16 groundwater appropriations including permit-exempt wells; (e) established reservations
17 for specific quantities of groundwater for future domestic uses pursuant to “overriding
18 considerations of public interest;” and (f) established maximum depletion amounts for
19 named creeks and the Dungeness River in association with the reservations.
- 20 10. RCW 90.44.050 provides that certain groundwater withdrawals are exempt from the
21 requirement to obtain a water right permit, including the use of up to 5,000 gallons per
22 day for domestic purposes. Under the Dungeness Rule, all new water uses in the
23 Dungeness basin, including permit-exempt uses, must obtain mitigation in order for
24 Clallam County to determine that water is available for that use, and in some areas of the
25 basin mitigation is not available for outdoor uses such as irrigation and stock water. Thus,
26 failure to qualify for or, if qualified, to pay for mitigation under the Dungeness Rule will
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1 result in denial of building permits and subdivision approvals by Clallam County. Prior to
2 the effective date of the Dungeness Rule, Clallam County could issue a building permit
3 for a property in the Dungeness basin based on a new permit-exempt well without any
4 mitigation requirement and without having to determine whether water was "available" or
5 the basin was "closed".

6 11. The minimum instream flows established at WAC 173-518-040 were designed by
7 Ecology to achieve "optimum" conditions for fish habitat, i.e., to enhance stream flows
8 and fish habitat in addition to protecting the base flows of these streams. By design, the
9 minimum flows adopted at WAC 173-518-040 exceed the stream flows that are actually
10 available in the named creeks and the Dungeness River up to ninety percent (90%) of the
11 time. While these minimum flows do not affect senior water rights (those existing as of
12 the effective date of the Dungeness Rule), they have the effect of closing the basin to new
13 consumptive appropriations of surface water and groundwater for any new uses without
14 mitigation, and mitigation must be purchased by new water users pursuant to mitigation
15 plans not yet approved or funded as of the effective date of the Dungeness Rule.

16 12. Base flows are the portion of stream flow that is not surface runoff and results from
17 seepage of water from the ground into a channel slowly over time. It is the primary source
18 of running water in a stream during dry weather. If Ecology had established minimum
19 flows for the named creeks and the Dungeness River at the level of base flows rather than
20 optimum flows, the protected instream flows would be substantially lower, leaving more
21 surface and ground water in the basin for other uses, including domestic water supplies
22 for areas that are not served by public water systems.

23 13. By setting minimum flows for the named creeks and the Dungeness River at the level of
24 optimum flows rather than base flows, Ecology was required to perform a "maximum net
25 benefits" test as described in RCW 90.54.020(2), requiring a balancing of interests in
26 competing beneficial uses of water in the basin. Ecology did not perform a maximum net
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1 benefits evaluation for the Dungeness Rule despite numerous public comments and
2 warnings from its own employees that it needed to do so. As a result, Ecology allocated
3 all of the remaining water in the basin to enhance fish habitat and none of the water to
4 supply future human domestic needs, public health, or economic development.

5 14. Water usage in the Dungeness basin has declined substantially since the year 2000
6 through agreements between Ecology and the Dungeness Water Users Association,
7 including over 30 cubic feet per second (cfs) of previously-appropriated water rights for
8 irrigation that have been returned to the Dungeness River and are being protected in the
9 Washington Trust Water Rights Program. Further reductions in basin-wide water usage
10 through conservation have been demonstrated and are foreseeable into the future as a
11 result of public education and outreach by Ecology, Clallam County, and other agencies
12 and parties. These water savings in the basin are orders of magnitude greater than the
13 forecasted cumulative future impact of all permit-exempt groundwater uses in the
14 Dungeness basin, but they were not adequately taken into account as part of Ecology's
15 analysis of the need for the Dungeness Rule and the costs it imposes on residents and
16 property owners in the basin.

17 15. The Dungeness Rule affects how Clallam County determines availability of water for the
18 issuance of building permits and subdivision approvals under RCW 19.27.097 and RCW
19 58.17.100, respectively, by requiring mitigation for all new uses of groundwater,
20 including permit-exempt wells. This requirement dramatically increases the cost and
21 uncertainty of building homes and developing property in the basin and the cost to
22 Clallam County for administering the Dungeness Rule in concert with other land use
23 laws. The Dungeness Rule creates these burdens despite the relatively small total impact
24 of all predicted future uses of the groundwater permit exemption in the basin and the
25 availability of less burdensome alternatives to accomplish the rule's objectives that are
26 within Ecology's authority.

1 16. The reservations adopted at WAC 173-518-080 are for a finite amount of groundwater in
2 each of the named creek sub-basins. New permit-exempt well uses in these areas are
3 required to pay for mitigation credits according to mitigation plans that were not
4 approved as of the effective date of the rule. There is no certainty that mitigation will be
5 available to those wanting to build homes in these areas of the Dungeness basin, because
6 the Dungeness Rule depends upon the speculative future availability and purchase of
7 water rights on the open market by a private entity and upon the use of a complicated
8 ground water model that was not designed for the purpose of determining whether a
9 proposed future use of a minor quantity of groundwater is eligible for mitigation.

10 17. On October 2, 2013, the Washington Supreme Court invalidated a similar instream flow
11 protection rule for the Skagit River basin, concluding that Ecology's adoption of
12 reservations for future water uses on the basis of "overriding considerations of public
13 interest" exceeded Ecology's statutory authority. The reservations in the Dungeness Rule
14 at WAC 173-518-080 were also adopted on the basis of "overriding considerations of
15 public interest" and are therefore either invalid or susceptible to legal challenge, creating
16 significant uncertainty and additional costs for property owners, builders and Clallam
17 County to comply with the Dungeness Rule.

18 18. The Dungeness Rule purports to implement the 2005 Elwha Dungeness Watershed Plan
19 adopted by Clallam County following a watershed planning process conducted pursuant
20 to chapter 90.82 RCW. However, many of the regulations and restrictions in the
21 Dungeness Rule exceed those recommended by the WRIA 18 planning unit and approved
22 by Clallam County, including but not limited to the closure of groundwater to all new
23 appropriations without mitigation.

24 19. Pursuant to chapter 34.05 RCW, Ecology held public meetings on a draft rule in January
25 2012 and a public hearing on June 28, 2012, and accepted written comments until July 9,
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1 2012. Over 700 pages of written comments were submitted to Ecology, and the vast
2 majority of comments were in opposition to the rule.

3 20. The Board of County Commissioners of Clallam County, the City of Sequim (the largest
4 city within the watershed boundary), and over 300 citizens testified or provided written
5 comments in opposition to the Dungeness Rule as drafted by Ecology.

6 21. Ecology issued both a preliminary and final cost benefit analysis ("CBA") for the
7 Dungeness Rule pursuant to procedural requirements at RCW 34.05.328. An economist
8 employed by Ecology, Tryg Hoff, had been assigned to the Dungeness Rule team to
9 prepare the CBA in February and March of 2012. After Mr. Hoff determined that the
10 costs of the Dungeness Rule far outweighed its benefits and that the rule itself would be
11 illegal, Ecology reassigned him to another project and assigned the CBA to other Ecology
12 employees. The final CBA failed to correct numerous false assumptions about the rule's
13 costs and benefits that were disclosed by Mr. Hoff and by written comments and oral
14 testimony on the draft rule.

15 22. Scientists employed by Ecology determined that the total impact to surface waters in the
16 Dungeness basin of all future permit-exempt groundwater uses was approximately 0.57
17 cubic feet per second. This total region-wide impact is too small to warrant the draconian
18 measures employed in the Dungeness Rule to protect stream flows, including: (a) the
19 closure of groundwater to new permit-exempt wells and new uses of existing permit-
20 exempt wells; (b) the establishment of mitigation requirements that are uncertain in their
21 application and out of proportion to the impact of permit-exempt groundwater uses; (c)
22 the establishment of reservations that are invalid and fail to protect new groundwater uses
23 from legal challenges and uncertainty; and (d) the failure to account for significant state
24 and regional investments prior to the effective date of the rule that reduced existing
25 surface water diversions and protected stream flows in the basin in an amount that far
26 exceeds the total projected impact of future domestic wells and water uses in the basin.

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1 23. On January 21, 2014, Petitioner ORPC filed a formal petition for amendment of the
2 Dungeness Rule. The ORPC petition is attached as Exhibit 2.

3 24. On March 18, 2014, Ecology Director Maia Bellon responded to the ORPC petition,
4 denying its request to amend the Dungeness Rule. Director Bellon's response is attached
5 as Exhibit 3.

6 25. Petitioners Magdalena T. Bassett and Denman J. Bassett own a 2.53-acre parcel of land at
7 3473 Happy Valley Road, in Clallam County, Washington, which is used for growing
8 lavender and is zoned for one residence and farming, including the keeping of farm
9 animals such as horses, goats, sheep and llamas. The Bassetts cannot obtain a water right
10 permit or initiate use of a permit-exempt well for this property under the Dungeness Rule
11 because of the rule's effective closure of groundwater without mitigation and the
12 unavailability of mitigation for outdoor watering and farm animals in that area of the
13 watershed. This has resulted in damage to their lavender plants, significantly decreased
14 the value of the Bassett's property, and significantly diminished the prospects for sale of
15 their property.

16 26. Petitioners are not appealing Ecology's decision to deny ORPC's rulemaking petition.
17 Petitioners are challenging the validity of the Dungeness Rule and seeking a declaratory
18 judgment that the Dungeness Rule is invalid.

19
20 **FIRST CAUSE OF ACTION – IMPROPER OR INADEQUATE PROCEDURAL
COMPLIANCE FOR SIGNIFICANT LEGISLATIVE RULES (RCW 34.05.328)**

21 27. Either the Dungeness Rule is a "significant legislative rule" as that term is defined in
22 RCW 34.05.328(c)(iii), or Ecology voluntarily made RCW 34.05.328 applicable to the
23 Dungeness Rule.

24 28. The CBA for the Dungeness Rule includes numerous false assumptions and analyses
25 about the costs of the rule, including understating the cost of foregone development and
26 construction and failure to consider: (a) decreased property values and increased costs to
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1 develop land resulting from closure of the groundwater in the basin and the potential
2 unavailability of reserves and mitigation credits; (b) increased legal costs due to the need
3 to challenge the validity and application of the rule; (c) costs to the local economy and
4 decreased tax revenue resulting from a basin-wide reduction in well-drilling and home
5 construction, and decreased demand for landscaping and other products and services; and
6 (d) decreased employment.

7 29. The CBA for the Dungeness Rule includes numerous false assumptions about the benefits
8 of the rule and over-estimates or double-counts certain benefits, including but not limited
9 to: (a) avoided legal costs; (b) avoided fish losses; (c) protection of salmon habitat; (d)
10 increased certainty of development; and (e) protection of existing instream flow
11 restoration.

12 30. The CBA was fundamentally flawed for assuming that permit-exempt groundwater rights
13 have a later priority date than other water rights established by permit, and failing to give
14 any value to the pre-rule availability of the permit exemption for small groundwater uses
15 under RCW 90.44.050. The rule's effective closure of groundwater and failure to exempt
16 domestic uses of the groundwater permit exemption has resulted in significant losses of
17 property value and tax revenue that Ecology did not evaluate as a cost of enacting the
18 Dungeness Rule.

19 31. A proper economic analysis of the costs and benefits of the Dungeness Rule, including
20 those described in the preceding three paragraphs, would have concluded that the costs of
21 the Dungeness Rule outweigh its benefits. Therefore, the Dungeness Rule fails to comply
22 with RCW 34.05.328(1)(d).

23 32. Ecology failed to properly determine that the Dungeness Rule was the least burdensome
24 alternative for complying with the goals and objectives for the rule. Less burdensome
25 alternatives include, but are not limited to: (a) exempting certain domestic uses of
26 groundwater from the operation of the Dungeness Rule's instream flows and closures; (b)
27

1 drilling deeper wells to confined aquifers; and (c) mitigating the relatively minor total
2 impact of all predictable future uses of permit-exempt wells through regional mitigation.
3 Therefore, the Dungeness Rule fails to comply with RCW 34.05.328(1)(e).

4 33. The Dungeness Rule is inconsistent with the 2005 Elwha-Dungeness Watershed Plan,
5 which did not recommend a broad groundwater closure or require restrictions on water
6 use or well meters for individual land parcels. Therefore, Ecology failed to adequately
7 coordinate with Clallam County and the WRIA 18 Planning Unit to the maximum extent
8 practicable in violation of RCW 34.05.328(i).

9 34. The Dungeness Rule is inconsistent with the Clallam County GMA comprehensive plan
10 and development regulations, which prior to the Dungeness Rule allowed short plats and
11 building permits based on drilling and testing a permit-exempt well with no mitigation
12 requirement or groundwater closure in effect. A property owner in the Dungeness basin
13 who drills a well could have obtained a building permit under the Clallam County
14 regulations and then not be able to use the well under Dungeness Rule. Clallam County
15 changed its development regulations since the effective date of the Dungeness Rule to
16 require subdivision and building permit applicants to purchase a mitigation certificate, but
17 the invalidity of all or portions of the Dungeness Rule could render permitting in rural
18 areas of the County impossible or impractical. Therefore, Ecology failed to adequately
19 coordinate with Clallam County regarding its GMA comprehensive plan and
20 development regulations to the maximum extent practicable in violation of RCW
21 34.05.328(i).

22 **SECOND CAUSE OF ACTION -- EXCEEDENCE OF STATUTORY AUTHORITY**

23 35. The Legislature directed Ecology to allocate waters among potential uses and users based
24 on securing the maximum net benefits for the people of the state. The Legislature also
25 directed Ecology to protect perennial rivers and streams with "base flows" necessary to
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1 provide for "preservation" of wildlife, fish, scenic, aesthetic and other environmental
2 values. In the Dungeness Rule, Ecology allocated virtually all of the remaining surface
3 and ground waters in the Dungeness basin to "optimum flows" for fish habitat purposes.
4 These allocations of water exceed the base flows of the rivers and streams of the
5 Dungeness basin needed to preserve environmental values. Ecology failed to allocate any
6 water to human domestic uses, economic development, or other beneficial uses of water,
7 and failed to conduct a maximum net benefits analysis for the allocations of water in the
8 Dungeness Rule, in violation of RCW 90.54.020(2), RCW 90.54.020(5), 90.54.040(1)
9 and 90.03.005.

10 36. Ecology's Program Policy 2025, providing that a maximum net benefits analysis will not
11 be done for the adoption of instream flow rules, is inconsistent with RCW 90.54.020(2),
12 90.54.040(1) and 90.03.005 and therefore invalid. Because Ecology's interpretation of
13 applicable law in Policy 2025 is inconsistent with RCW 90.54.020(2), 90.54.040(1) and
14 90.03.005, it is not entitled to any weight and must be disregarded.

15 37. In *Swinomish Indian Tribal Community v. Ecology*, 178 Wn.2d 571, 311 P.3d 6 (2013)
16 ("*Swinomish*"), issued after the effective date of the Dungeness Rule, the Washington
17 Supreme Court invalidated a similar instream flow protection rule for the Skagit River
18 basin, concluding that Ecology's adoption of reservations for future water uses on the
19 basis of "overriding considerations of public interest" exceeded Ecology's statutory
20 authority. The Dungeness Rule includes similar reservations of water for future uses at
21 WAC 173-518-080, which Ecology also adopted on the basis of "overriding
22 considerations of public interest." Based on the *Swinomish* decision, the reservations at
23 WAC 173-519-080 exceed Ecology's statutory authority and are invalid. Because the
24 entire regulatory scheme and cost benefit analysis of the Dungeness Rule depend on these
25 reservations, the entire Dungeness Rule is invalid.

1 38. The surface water closures in the Dungeness Rule exceed Ecology's statutory authority
2 and are *ultra vires* because: (a) they were adopted with the purpose of protecting
3 minimum instream flows for the same surface waters, which are themselves *ultra vires*
4 for reasons set forth elsewhere in this petition, and Ecology lacks statutory authority to
5 close surface waters for the purpose of protecting minimum instream flows; (b) stream
6 closures by rule are not consistent with Ecology's duties under the Water Code to, *inter*
7 *alia*, investigate each application for a water right permit and determine what water, if
8 any, is available for appropriation and determine to what beneficial use or uses it can be
9 applied, and to make individual determinations about impairment and detriment to public
10 interest; (c) Ecology failed to make findings for each individual stream closure in the
11 Dungeness Rule that sufficient information and data was lacking to allow for making
12 sound decisions, in accordance with its limited statutory authority to close or withdraw
13 waters to further appropriation by rule; and (d) other statutory authorities for Ecology to
14 protect instream flows do not include the authority to close streams by rule. Because the
15 stream closures in the Dungeness Rule are *ultra vires*, Ecology cannot prohibit permit-
16 exempt groundwater withdrawals based upon impacts to such "closed" streams, or require
17 mitigation of such impacts.

18
19 **THIRD CAUSE OF ACTION – FAILURE TO COMPLY WITH THE WATER CODE**
20 **(CHAPTER 90.03 RCW)**

21 39. Pursuant to RCW 90.03.345 and the *Swinomish* decision, Ecology's allocations of waters
22 in the Dungeness basin to instream flows and reservations have the status of water rights
23 with priority dates. Ecology failed to comply with the four-part test of RCW 90.03.290
24 for establishment of a water rights for instream flows and reservations in the Dungeness
25 Rule, in violation of the RCW 90.03.290 and 90.03.345. Specifically, Ecology's
26 allocations of water to the instream flows adopted at WAC 173-518-040 exceed the
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1 natural flow of those named creeks and the Dungeness River, and there is not enough
2 water available for these allocations. In addition, the allocation of virtually all the
3 remaining water in the basin to instream flows without allocating sufficient water for
4 human domestic needs and economic development violates the requirement of RCW
5 90.03.290 that the allocations not be detrimental to the public interest.

6 40. The water exchange/mitigation program established pursuant to the Dungeness Rule is a
7 “resource management technique” within the meaning of RCW 90.03.255, which was
8 adopted by the Legislature with the goal of strengthening the state’s economy while
9 maintaining the overall quality of the state’s environment. Ecology failed to adequately
10 take into consideration the benefits and costs of the water exchange/mitigation program in
11 violation of RCW 90.03.255.

12 **FOURTH CAUSE OF ACTION - ARBITRARY AND CAPRICIOUS**

13 41. Ecology’s hydrogeologist for the Dungeness Rule calculated that the basin-wide total
14 future impact on stream flows of new post-rule permit-exempt ground water uses in the
15 Dungeness basin would be 0.57 cfs after twenty years. Water usage in the Dungeness
16 basin has declined substantially since the year 2000 through agreements between Ecology
17 and the Dungeness Water Users Association, including over 30 cfs of previously
18 appropriated water rights for irrigation that have been returned to the Dungeness River
19 and are being protected in the Washington Trust Water Rights Program. Further
20 reductions in basin-wide water usage through conservation have been demonstrated and
21 are foreseeable into the future as a result of public education and outreach by Ecology,
22 Clallam County, and other agencies and parties. These water savings in the basin are at
23 least fifty-two times greater than the forecasted cumulative future impact of all permit-
24 exempt groundwater uses in the Dungeness basin.

25 42. The Dungeness Rule is arbitrary and capricious in the following aspects:
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- 1 a. Establishing “optimal flows” for fish habitat in excess of natural instream flows
2 while failing to allocate water for domestic and other uses that support economic
3 development and a vital community;
- 4 b. Effective closure of groundwater basin-wide despite little or no evidence that the
5 basin-wide total future impact on stream flows of new permit-exempt ground
6 water uses will have a material impact on surface waters in the basin;
- 7 c. Requiring payments into a mitigation banking system as a prerequisite to
8 obtaining a building permit without legal certainty that mitigation is available or
9 that the reservations are legal and enforceable;
- 10 d. Requiring mitigation payments for indoor and outdoor uses of groundwater that
11 far exceed the cost of acquiring mitigation and managing the mitigation program;
- 12 e. Utilizing a mitigation model for individual applications that lacks objective
13 standards and draws arbitrary boundaries excluding certain rural lands from
14 eligibility for outdoor water usage; and
- 15 f. Utilizing a mitigation banking system operated by a nonprofit corporation that is
16 funded with public money and mitigation payments from property owners but
17 avoids public disclosure of its operations and decision-making, with no safeguards
18 to insure that collected moneys are used to mitigate impacts to instream flows,
19 instead of using a public utility or local government to operate the program with
20 transparency and public oversight.

21
22 **REQUEST FOR RELIEF**

- 23 1. Petitioners request a declaratory judgment from the court that the Dungeness Rule is
24 invalid on one or more of the following bases:
- 25 a. Ecology’s Cost Benefit Analysis for the Dungeness Rule is incorrect and/or
26 inadequate;
- 27

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- b. Ecology failed to consider less burdensome alternatives to the Dungeness Rule;
- c. Ecology failed to coordinate the Dungeness Rule with Clallam County's GMA plan and development regulations and/or with the WRIA 18 Watershed Management Plan;
- d. The Dungeness Rule exceeds Ecology's statutory authority; and
- e. The Dungeness Rule is arbitrary and capricious.

2. Petitioners further request an award of such costs and fees as the court may grant under the Uniform Declaratory Judgment Act, RCW 4.84.340, and state and local court rules.

DATED this 30th day of December, 2014.

LAW OFFICE OF THOMAS M. PORS



Thomas M. Pors, WSBA No. 17718
Attorney for Plaintiffs

EXHIBIT 1
[COPY OF DUNGENESS RULE]

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Chapter 173-518 WAC
WATER RESOURCES MANAGEMENT PROGRAM
FOR THE DUNGENESS PORTION OF THE ELWHA-
DUNGENESS WATER RESOURCE INVENTORY
AREA (WRIA) 18

Last Update: 11/16/12

WAC

173-518-010 General provisions.
173-518-020 Purpose.
173-518-030 Definitions.
173-518-040 Establishment of instream flows.
173-518-050 Closures.
173-518-060 Metering and reporting water use.
173-518-070 Future groundwater appropriations.
173-518-075 Mitigation plans.
173-518-076 Expedited processing.
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WAC 173-518-010 General provisions. (1) This chapter applies to all surface and groundwaters within the Dungeness River watershed of water resource inventory area (WRIA) 18, as defined in WAC 173-500-040, excluding the Elwha-Morse watershed basin. The rule covers the area from the Morse-Bagley watershed divide in the western portion of the basin, to the Bell-Johnson watershed divide on the eastern portion of the basin (the WRIA boundary). Please see WAC 173-518-140, Maps.

(2) The department of ecology (ecology) adopts this chapter under the authority of the Watershed planning (chapter 90.82 RCW), Water Resources Act of 1971 (chapter 90.54 RCW), Water code (chapter 90.03 RCW), Regulation of public groundwaters (chapter 90.44 RCW), Minimum Water Flows and Levels Act (chapter 90.22 RCW), and Water resource management (chapter 90.42 RCW); and in accordance with the Administrative Procedure Act (chapter 34.05 RCW).

(3) This chapter applies 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:

(a) Existing surface and groundwater rights established prior to adoption of the state surface water and groundwater codes, or by water right permit issued under state law;

(b) Existing groundwater rights established under the groundwater permit-exemption where regular beneficial use began

before the effective date of this chapter;

(c) The ability to serve water to a parcel that is part of a group domestic use under the groundwater permit exemption, provided the new use begins within five years of the date water was first regularly and beneficially used by one or more parcels in the group, and the group use remains within the limit of the groundwater permit exemption; and

(d) Federal and tribal reserved rights.

(4) In adopting this chapter, ecology generally enacts recommendations from the 2005 Elwha-Dungeness watershed management plan. The plan recommendations were approved on April 15, 2004, by the Dungeness River and Elwha-Morse management teams, groups composed of a broad range of local water interests.

The Clallam County board of commissioners approved the plan on June 7, 2005. Ecology has used plan recommendations as the foundation for developing this rule.

[Statutory Authority: Chapters 90.54, 90.22, 90.82, 90.03, 90.42, and 90.44 RCW. 12-23-054 (Order 07-17), § 173-518-010, filed 11/16/12, effective 1/2/13.]

WAC 173-518-020 Purpose. The purpose of this chapter is to manage water to better satisfy both present and future human needs; to retain natural surface water bodies in the Dungeness River watershed planning area with stream flows at levels necessary to protect instream values and resources; and to implement ecology's obligations under the Elwha Dungeness watershed plan. Instream resources include: Wildlife, fish, scenic, aesthetic, recreation, water quality, and other environmental values; navigational values; and stock water needs.

[Statutory Authority: Chapters 90.54, 90.22, 90.82, 90.03, 90.42, and 90.44 RCW. 12-23-054 (Order 07-17), § 173-518-020, filed 11/16/12, effective 1/2/13.]

WAC 173-518-030 Definitions. The definitions provided in this section apply only to this chapter.

"Allocation" means the designation of specific amounts of water for beneficial uses.

"Appropriation" means the process of legally acquiring the right to use specific amounts of water for beneficial uses, consistent with the ground and surface water codes and other applicable water resource statutes.

"Beneficial use" means uses of water as defined in chapters 90.03 and 90.54 RCW and WAC 173-500-050.

"Closure" means that water is no longer available for future appropriations without mitigation to offset the use. This is due to a finding by ecology that further appropriations from the closed stream(s) or hydraulically connected groundwaters would impair senior water rights or cause detriment to the public interest.

"Consumptive use" means use of water that diminishes the volume or quality of the water source.

"Control station" means a specific location where stream

flows and water levels are measured.

"Critical period" means for a given stream the thirty-day period with the lowest stream flow available to support a critical life stage for fish, as determined by Washington state department of fish and wildlife, ecology, and tribes, typically during the late summer or fall.

"Cubic foot per second" or **"cfs"** means the rate of flow representing a volume of one cubic foot passing a given point during one second.

"Domestic use" means use of water associated with human health and welfare needs, including water used for drinking, bathing, sanitary purposes, cooking, laundering, and other incidental household uses. The incidental uses must minimize the consumptive use of water. Examples of incidental household uses include, but are not limited to: Washing windows, car washing, cleaning exterior structures, care of household pets, and watering potted plants. Domestic use does not include other uses allowed under the groundwater permit exemption: Outdoor irrigation of up to one-half acre of noncommercial lawn or garden, stockwatering, and industrial use.

"Dungeness water exchange" means a water bank pursuant to the Water Resources Management Act, chapter 90.42 RCW.

"Ecology" means the Washington state department of ecology.

"Existing water right" includes perfected riparian rights, federal Indian and non-Indian reserved rights, or other perfected and inchoate appropriative rights, including water rights established under RCW 90.03.260 through 90.03.290 and 90.44.050.

"Hydraulically connected" means saturated conditions exist that allow water to move between two or more sources of water, either between surface water and groundwater or between groundwater sources.

"Instream flows" means a stream flow level set in rule to protect and preserve fish, wildlife, scenic, aesthetic, recreational, water quality, and other environmental values; and navigational values. The term "instream flow" means "base flow" under chapter 90.54 RCW, "minimum flow" under chapters 90.03 and 90.22 RCW, and "minimum instream flow" under chapter 90.82 RCW.

"Interruption" means a temporary halt or reduction in the rate and volume of withdrawal under water rights established after the effective date of this rule during periods when the flow in the river or stream falls below the instream flow levels set in WAC 173-518-040.

"Maximum depletion amount" means a limit on how much impact to water resources resulting from groundwater withdrawals will be allowable under this rule before ecology declares water is not available.

"Mitigation" means action taken to offset impacts from future water appropriations on closed surface water bodies or senior water rights, including the instream flow levels set in WAC 173-518-040, as provided in WAC 173-518-070.

"Nonconsumptive use" means a type of water use where either there is no diversion from a water source, or where there is no diminishment of the amount or quality of the water source.

"Permit-exempt withdrawals" or **"permit exemption"** means a groundwater withdrawal exempted from ecology water right permitting requirements under RCW 90.44.050, but which is

otherwise subject to the groundwater code and other applicable regulations.

"Proponent" means the person or entity that seeks a new appropriation of surface or groundwater, including through a permit exempt withdrawal.

"Public water system" means any system that provides water for human consumption or municipal purposes through pipes or other constructed conveyances. This includes both systems that meet the definition of municipal water supplier in RCW 90.03.015(3) and Group B systems as classified by the Washington department of health, and excludes a system serving one single-family residence or a system with four or fewer connections serving residences on the same farm.

"Reserve" means a limited allocation of water for future new uses not subject to interruption when stream flows fall below the levels adopted in this rule.

"Stream flow" means the amount of water flowing down a stream.

"Subbasin management unit" means a stream segment, reach, or tributary basin where a particular instream flow level, reserve, water diversion, or withdrawal limit applies.

"Timely and reasonable" means the timing and cost involved in providing potable water service by a public water system to a property consistent with Washington department of health guidance and local coordinated water system plan definitions.

"Water budget neutral" means either placement of other water rights into the trust water right program or stream flow improvement with appropriate assurances, that are at least equivalent to the amount of impact to surface water resulting from consumptive use of a proposed project.

"Water resource inventory area (WRIA)" means one of the sixty-two areas designated by the state of Washington through chapter 173-500 WAC to delineate area boundaries within the state for water management purposes.

"Water right change or transfer" means a change in the place of use, point of diversion or withdrawal, number of points of diversion or withdrawal, or purpose of use (including season of use), of an existing water right. A water right change application must be filed with ecology for approval. If approved, the modified water right will carry the priority date of the original water right.

"Water right permit" means a permit that represents approval by ecology to appropriate water for a beneficial use.

"Withdrawal" means the extraction and beneficial use of groundwater, or the diversion and beneficial use of surface water.

[Statutory Authority: Chapters 90.54, 90.22, 90.82, 90.03, 90.42, and 90.44 RCW. 12-23-054 (Order 07-17), § 173-518-030, filed 11/16/12, effective 1/2/13.]

WAC 173-518-040 Establishment of instream flows. (1) The instream flows established in this section are based on recommendations in the 2005 Elwha-Dungeness watershed plan, consultation with the Jamestown S'Klallam Tribe, the departments

of fish and wildlife, agriculture, and commerce; and public input received during the rule-making process.

(2) Instream flows established in this rule are necessary to meet the water resource management objectives of the Elwha-Dungeness watershed plan.

(3) Instream flows established in this rule are water rights and will be protected from impairment by any new water rights commenced after the effective date of this chapter and by future water right changes and transfers.

(4) Instream flows are expressed in cubic feet per second (cfs), and are measured at the control stations identified in Table I. Tables II A and B identify instream flows set by this rule.

(5) Exceptions to the instream flow requirements are provided in WAC 173-518-070, 173-518-080, and 173-518-085. Any other new water appropriation established after the effective date of this rule will be subject to interruption when stream flows drop below the instream flow levels set in Table II.

Table I
Subbasin Management Unit Information

Subbasin Management Point Name	Control Station by River Mile (RM); Latitude (Lat.), Longitude (Long.)	Stream Management Reach
Bagley Creek @ Hwy. 101	RM 1.4; 48°05'56"N, 123°19'47"W	From mouth to headwaters, including tributaries.
Bell Creek @ Schmuck Rd.	RM 0.2; 48°05'01"N, 123°03'25"W	From mouth to headwaters, including tributaries.
Cassalery Creek @ Woodcock Rd.	RM 1.8; 48°06'59"N, 123°06'31"W	From mouth to headwaters, including tributaries.
Dungeness River @ Schoolhouse Bridge	Ecology Gage 18A050 RM 0.8; 48°08'37"N, 123°07'43"W	From mouth to headwaters, including tributaries, except Meadowbrook and Matriotti creeks.
Gierin Creek @ Holland Rd.	RM 1.7; 48°06'05"N, 123°04'40"W	From mouth to headwaters, including tributaries.
Matriotti Creek @ Lamar Ln.	RM 1.3; 48°07'54"N, 123°09'46"W	From mouth to headwaters, including tributaries.
McDonald Creek @ Old Olympic Hwy.	RM 1.6; 48°06'20"N, 123°13'17"W	From mouth to headwaters, including tributaries.
Meadowbrook Creek @ Sequim-Dungeness Way	RM 1.2; 48°08'41"N, 123°07'27"W	From mouth to headwaters, including tributaries.
Siebert Creek @ Old Olympic Hwy.	Ecology Gage 18L060 RM 1.3;	From mouth to headwaters, including

Subbasin Management Point Name	Control Station by River Mile (RM); Latitude (Lat.), Longitude (Long.)	Stream Management Reach
	48°06'24"N, 123°16'42"W	tributaries.

Table II A
Instream Flows in the Dungeness River Basin
(cubic feet per second)

Month	Bagley Creek	Bell Creek	Cassalery Creek	Dungeness Mainstem	Gierin Creek
January	15	11	5	575	10
February	10	7	3	575	7
March	29	22	12	575	20
April	29	22	12	475	20
May	20	14	8	475	13
June	20	14	8	475	13
July	6	4	2	475	4
August	6	4	2	180	4
September	6	4	2	180	4
October	6	4	2	180	4
November	15	11	5	575	10
December	15	11	5	575	10

Table II B
Instream Flows in the Dungeness River Basin
(cubic feet per second)

Month	Matriotti Creek	McDonald Creek	Meadowbrook Creek	Siebert Creek
January	14	36	12	36
February	10	24	8	24
March	27	63	24	63
April	27	63	24	63
May	18	42	16	42
June	18	42	16	42
July	5	15	5	15
August	5	15	5	15
September	5	15	5	15
October	5	15	5	15
November	14	36	12	36
December	14	36	12	36

[Statutory Authority: Chapters 90.54, 90.22, 90.82, 90.03,

90.42, and 90.44 RCW. 12-23-054 (Order 07-17), § 173-518-040, filed 11/16/12, effective 1/2/13.]

WAC 173-518-050 Closures. Surface water: Ecology determines that, based on recommendations in the watershed plan, historical and current low stream flows, and the need to protect existing water rights, water is not reliably available for new consumptive uses from the streams and tributaries in the Dungeness River watershed listed in Table III, with the exception of certain times of year in the Dungeness mainstem. Therefore, Bagley, Bell, Cassalery, Gierin, Matriotti, McDonald, Meadowbrook, and Siebert creeks, and unnamed tributaries to the Dungeness River, are closed year round. The Dungeness River mainstem is closed from July 15 until November 15 each year. Table III shows the closure periods and affected reaches. Exceptions to the surface water closures are provided in WAC 173-518-070, 173-518-080, and 173-518-085.

Table III
Surface Water Closures

Stream Management Unit Name	Affected Reach	Timing
Bagley Creek	From mouth to headwaters, including tributaries.	All year
Bell Creek	From mouth to headwaters, including tributaries.	All year
Cassalery Creek	From mouth to headwaters, including tributaries.	All year
Dungeness Mainstem	From mouth to headwaters, including tributaries, except Meadowbrook and Matriotti creeks.	From July 15 - November 15
Gierin Creek	From mouth to headwaters, including tributaries.	All year
Matriotti Creek	From mouth to headwaters, including tributaries.	All year
McDonald Creek	From mouth to headwaters, including tributaries.	All year
Meadowbrook Creek	From mouth to headwaters, including tributaries.	All year
Siebert Creek	From mouth to headwaters, including tributaries.	All year
Unnamed tributaries to the Dungeness River	From mouth to headwaters.	All year

[Statutory Authority: Chapters 90.54, 90.22, 90.82, 90.03, 90.42, and 90.44 RCW. 12-23-054 (Order 07-17), § 173-518-050, filed 11/16/12, effective 1/2/13.]

WAC 173-518-060 Metering and reporting water use. All future new surface and groundwater appropriations, other than rainwater collection, shall measure withdrawals.

(1) Water meters must meet specifications available through ecology.

(2) Water meters must be read and reported in accordance with chapter 173-173 WAC or as directed by ecology.

[Statutory Authority: Chapters 90.54, 90.22, 90.82, 90.03, 90.42, and 90.44 RCW. 12-23-054 (Order 07-17), § 173-518-060, filed 11/16/12, effective 1/2/13.]

WAC 173-518-070 Future groundwater appropriations. All new groundwater appropriations must comply with the provisions of this chapter.

(1) Based on the hydrogeology of the basin, ecology determines that surface water and groundwater sources within the Dungeness watershed are hydraulically connected.

(2) If connection to a public water supply is not available in a timely and reasonable manner, then a new withdrawal from another well is allowed. Written evidence that connection is not available must be provided to ecology or the county before another well may be used for a new withdrawal.

A new permit-exempt withdrawal may receive water from an existing group domestic water system operating under the groundwater permit exemption. The new withdrawal will be considered an additional and separate exemption.

(3) New groundwater rights, including permit-exempt withdrawals under RCW 90.44.050, may be obtained that are not subject to the instream flows established in WAC 173-518-040 or to the closures established in WAC 173-518-050 if all statutory requirements are met and any of the following situations apply:

(a) A proposed use that would impact any surface water sources listed in Table III is mitigated through an ecology-approved mitigation plan, as defined in WAC 173-518-075.

(i) Water use may be mitigated through the purchase of credits available through the Dungeness water exchange. The exchange will identify methods and means of mitigation, including the use of water resources management techniques and water banking authorized under RCW 90.03.255 and chapter 90.42 RCW. The 2008 Dungeness Groundwater Flow Model (Pacific Groundwater Group, 2009) will be the basis for determining credits for offsetting the consumptive use associated with the proposed water use. At the time of rule adoption the 2008 Dungeness Groundwater Flow Model represents the best available method for calculating mitigation credits. If ecology determines a better method is available in the future, then ecology will apply the new method.

Drilling to the middle or deep aquifer, where available, is encouraged.

(ii) As an alternative to acquiring mitigation through the Dungeness water exchange, the proponent may choose to submit a mitigation plan. Ecology must approve the mitigation plan prior to plan implementation. If ecology determines that the mitigation is no longer effective, the water use shall cease until an effective mitigation plan is put in place.

(b) The proposed use is nonconsumptive, and is compatible with the intent of this chapter.

(c) The proponent shows, through scientifically sound studies and technical analysis, and to the satisfaction of ecology, that the proposed use will not adversely affect any surface waters closed in WAC 173-518-050.

(4) All new wells drilled must comply with state well drilling requirements in chapter 173-160 WAC, in particular the provisions to prevent contamination between aquifers in WAC 173-160-241.

(5) New permits for groundwater withdrawals may include a provision requiring that the permittee allow ecology employees access to the well and any associated measuring device upon request at reasonable times.

[Statutory Authority: Chapters 90.54, 90.22, 90.82, 90.03, 90.42, and 90.44 RCW. 12-23-054 (Order 07-17), § 173-518-070, filed 11/16/12, effective 1/2/13.]

WAC 173-518-075 Mitigation plans. The Dungeness water exchange and new water users choosing to mitigate must submit a mitigation plan to ecology to demonstrate how they will offset the impacts of their proposed consumptive use (see WAC 173-518-070 (3)(a)). The mitigation plan must receive ecology approval and be implemented before the proposed water use begins.

(1) The mitigation plan must:

(a) Ensure mitigation measures remain effective as long as the water use occurs.

(b) Include affirmative measures to prevent water provided for mitigation under the plan from being appropriated for any other purpose or by another person or entity.

(c) Include a monitoring and reporting plan, with a quality assurance/quality control plan.

(2) The mitigation plan must show that the proposed withdrawal, with mitigation in place, will not have any of the following impacts:

(a) Impair existing water rights;

(b) Be detrimental to the public interest, including consideration of projected domestic use in the area, the projected stream depletions within affected subbasins, the likelihood that mitigation to offset such projected stream depletions can be obtained or achieved, water budget neutrality with respect to the Dungeness River watershed, and maximizing instream benefits during the critical period;

(c) Result in a net loss of water from a closed source greater than the applicable maximum depletion amounts.

(3) The plan must include financial assurance for implementing the plan. Ecology may, for any reason, refuse any performance security ecology does not deem adequate. Financial assurances may include:

(a) A bank letter of credit;

(b) A cash deposit;

(c) A negotiable security;

(d) An assignment of a savings account;

(e) A savings certificate in a Washington bank;

(f) A corporate surety bond executed in favor of the

department of ecology by a corporation authorized to do business in the state of Washington under Title 48 RCW; or

(g) Other financial assurance deemed adequate by ecology.

[Statutory Authority: Chapters 90.54, 90.22, 90.82, 90.03, 90.42, and 90.44 RCW. 12-23-054 (Order 07-17), § 173-518-075, filed 11/16/12, effective 1/2/13.]

WAC 173-518-076 Expedited processing. Ecology may give priority to the processing of an application for a change or transfer of an existing water right, a water budget neutral determination, or issuance of a water right permit if the application or request is expected to:

- (1) Fully offset impacts to surface water;
- (2) Benefit stream flows; or
- (3) Otherwise substantially enhance or protect the quality of the natural environment.

[Statutory Authority: Chapters 90.54, 90.22, 90.82, 90.03, 90.42, and 90.44 RCW. 12-23-054 (Order 07-17), § 173-518-076, filed 11/16/12, effective 1/2/13.]

WAC 173-518-080 Reserves of water for domestic use. (1) Ecology has weighed the public interest supported by providing a limited amount of water for domestic water supply against the potential for negative impact to instream resources. Ecology finds that the public interest advanced by these limited reserves clearly overrides the potential for negative impacts on instream resources. (RCW 90.54.020 (3)(a).)

Based on this finding, ecology hereby reserves specific quantities of groundwater for future domestic supply only. These reserves of water are not subject to the instream flows established in WAC 173-518-040 or closures established in WAC 173-518-050.

Consumptive water use that would impact surface water sources listed in Table III must be mitigated in accordance with this chapter. Reserves shall be debited when mitigation water is not available. Table IV shows the reserve quantities for each subbasin management unit.

Table IV
Reserved Quantities

Subbasin Management Unit	Cubic Feet Per Second	Gallons Per Day
Bagley Creek	0.01	6,463
Bell Creek	0.0023	1,486
Cassalery Creek	0.0013	840
Dungeness River and Matriotti Creek	0.76	491,201
Gierin Creek	0.0109	7,045
McDonald Creek	0.003	1,939
Meadowbrook Creek	0.026	16,804

Subbasin Management Unit	Cubic Feet Per Second	Gallons Per Day
Siebert Creek	0.022	14,219

(2) Conditions for use of the groundwater reserves are as follows:

(a) Access to the reserves shall be only for the purpose of domestic water use as defined under WAC 173-518-030.

(b) Water use shall meet all applicable local or state conservation standards and be consistent with the watershed plan.

(3) If a use from a reserve does not comply with all conditions of the reserves, ecology may take action under WAC 173-518-110.

(4) Ecology shall maintain a record of all appropriations from the reserves and will make this information available on ecology's web page.

(5) Ecology will account for water use from the reserves by debiting the calculated impacts to each closed surface water. The impacts to surface water are calculated as a percentage of the consumptive portion of estimated or measured water use. The debits to the reserves will be determined after consideration of any implemented mitigation.

(a) For a new domestic use served by an individual or community on-site septic system, ecology will use a standard consumptive amount of fifteen gallons per day.

(b) For a new domestic use served by a sanitary sewer, ecology will use a standard consumptive amount of one hundred fifty gallons per day.

(c) Impacts to the closed surface waters listed in Table III will be calculated using the 2008 Dungeness Groundwater Flow Model (Pacific Groundwater Group, 2009), unless, in the future, ecology determines a better method is available.

(d) Ecology may periodically adjust the amounts deducted from the reserves based on the best information available on actual water use.

[Statutory Authority: Chapters 90.54, 90.22, 90.82, 90.03, 90.42, and 90.44 RCW. 12-23-054 (Order 07-17), § 173-518-080, filed 11/16/12, effective 1/2/13.]

WAC 173-518-085 Maximum depletion amounts. (1) All unmitigated impacts from the consumptive use of water from the reserves and impacts from implementation of ecology approved mitigation plans shall be debited against the maximum depletion amount for each affected subbasin.

(2) The maximum depletion amounts shall not be exceeded.

(3) No new use that would result in impacts to closed surface waters exceeding the maximum depletion amounts during the critical period shall be allowed. If the cumulative impact calculated for a subbasin exceeds the maximum depletion amount, additional mitigation must be achieved before new uses impacting that subbasin can be authorized.

(4) Ecology shall maintain a record of all appropriations that result in deductions against the maximum depletion amounts. Ecology will account for water use from the maximum depletion

amounts by debiting the calculated impact to each closed surface water. The impacts to surface water are calculated as a percentage of the consumptive portion of estimated or measured water use. The deductions from the maximum depletion amounts will be determined after consideration of any implemented mitigation.

(a) For parcels served by an individual or community septic system, ten percent of indoor water use is assumed consumptive.

(b) For parcels served by a sanitary sewer system, one hundred percent of indoor water use is assumed consumptive.

(c) Ninety percent of outdoor water use is assumed to be consumptive.

(d) Impacts to the closed surface waters listed in Table III will be calculated using the 2008 Dungeness Groundwater Flow Model (Pacific Groundwater Group, 2009), unless, in the future, ecology determines a better method is available.

(e) The amounts deducted against the maximum depletion amounts may be adjusted periodically by ecology, to reflect actual use based on the best information available.

(5) Maximum depletion amounts are associated with, and not in addition to, the reserve amounts listed in WAC 173-518-070. Table V shows the maximum depletion amounts for each subbasin management unit.

Table V
Maximum Depletion Amounts Due to New Groundwater Appropriation

Subbasin Management Unit	Cubic Feet Per Second	Gallons Per Day
Bagley Creek	0.01	6,463
Bell Creek	0.0023	1,486
Cassalery Creek	0.0013	840
Dungeness River and Matriotti Creek	0.76	491,201
Gierin Creek	0.0109	7,045
McDonald Creek	0.003	1,939
Meadowbrook Creek	0.026	16,804
Siebert Creek	0.022	14,219

[Statutory Authority: Chapters 90.54, 90.22, 90.82, 90.03, 90.42, and 90.44 RCW. 12-23-054 (Order 07-17), § 173-518-085, filed 11/16/12, effective 1/2/13.]

WAC 173-518-090 Future maximum allocation from the Dungeness River mainstem. (1)(a) Ecology determines that there are certain times of the year when there are stream flows in the Dungeness River mainstem above the instream flows, which provide critical ecological functions such as channel and riparian zone maintenance, sediment flushing, and fish migration. To protect the frequency and duration of these higher flows, this chapter limits the total amount of water available for withdrawal from the Dungeness River mainstem by setting maximum allocations from November 16 - July 14.

(b) Maximum allocations are established in Table VI for use in reviewing applications for interruptible water rights during times when stream flows exceed the instream flows for the Dungeness River mainstem from November 16 - July 14. Cumulative allocations must not exceed the numbers listed in Table VI, and must not impair instream flows.

Table VI
Maximum Allocations on the Dungeness River Mainstem
(cubic feet per second)

January	25
February	25
March	25
April	25
May	35
June	35
July 1 - 14	35
July 15 - 31	0
August	0
September	0
October	0
November 1 - 15	0
November 16 - 30	25
December	25

(2) Ecology may issue a permit under RCW 90.03.290, 90.44.050, or 90.03.370 within the maximum allocation limit after consultation with the Washington department of fish and wildlife and the Jamestown S'Klallam Tribe.

The water rights from the maximum allocation are subject to the instream flows set in WAC 173-518-040, and other provisions in statute, administrative rules, and case law.

(3) Ecology will track the amount of water appropriated from the Dungeness River from the maximum allocation. When the maximum allocation is fifty percent, seventy-five percent, and fully appropriated, ecology shall notify Clallam County in writing. Once fully and permanently appropriated, no more maximum allocation water may be appropriated.

[Statutory Authority: Chapters 90.54, 90.22, 90.82, 90.03, 90.42, and 90.44 RCW. 12-23-054 (Order 07-17), § 173-518-090, filed 11/16/12, effective 1/2/13.]

WAC 173-518-095 Storage projects. (1) Notwithstanding other provisions of this chapter, ecology, after consultation with Tribes, Clallam County, Washington department of fish and wildlife, and NOAA fisheries may, on a case-by-case basis, authorize storage projects for environmental enhancement and other beneficial uses consistent with the Elwha-Dungeness watershed plan. Such decisions shall consider the following:

- The management objectives of the storage project;

- The effect of the project on salmonids;
- The effect of the project on ecological functions provided by high stream flows;
- The cumulative effects of all such projects weighed against the public benefit the stored water would provide.

(2) The application for the storage project must include a monitoring and adaptive management component and show the ability to implement such a program. All other applicable permits must be obtained.

[Statutory Authority: Chapters 90.54, 90.22, 90.82, 90.03, 90.42, and 90.44 RCW. 12-23-054 (Order 07-17), § 173-518-095, filed 11/16/12, effective 1/2/13.]

WAC 173-518-100 Lakes and ponds. RCW 90.54.020 (3)(a) requires, in part, that the quality of the natural environment shall be protected, and where possible, enhanced; and lakes, ponds, and other small bodies of water shall be retained substantially in their natural condition. Future withdrawals must be consistent with this requirement.

[Statutory Authority: Chapters 90.54, 90.22, 90.82, 90.03, 90.42, and 90.44 RCW. 12-23-054 (Order 07-17), § 173-518-100, filed 11/16/12, effective 1/2/13.]

WAC 173-518-110 Compliance and enforcement. (1) In accordance with RCW 90.03.605, in order to obtain compliance with this chapter, ecology shall prepare and make available to the public technical and educational information, including the implementation plan, regarding the scope and requirements of this chapter. This is intended to assist the public in complying with the requirements of their water rights and applicable water laws.

(2) When ecology determines that a violation has occurred, it shall:

(a) First attempt to achieve voluntary compliance, except in egregious cases involving potential harm to other water rights or to the environment. An approach to achieving this is to offer information and technical assistance to the person, in writing, identifying one or more means to accomplish the person's purposes within the framework of the law.

(b) If education and technical assistance do not achieve compliance, ecology shall issue a notice of violation, a formal administrative order under RCW 43.27A.190, or assess civil penalties under RCW 90.03.600.

(3) Nothing in this section prevents ecology from taking immediate action to stop a violation if in the opinion of ecology the nature of the violation is causing harm to other water rights or to public or tribal resources.

[Statutory Authority: Chapters 90.54, 90.22, 90.82, 90.03, 90.42, and 90.44 RCW. 12-23-054 (Order 07-17), § 173-518-110, filed 11/16/12, effective 1/2/13.]

WAC 173-518-120 Regulation review. (1) Ecology, after consultation with local, tribal, and state governments, may initiate a review, and if necessary amend this rule under chapter 34.05 RCW, if significant new information becomes available.

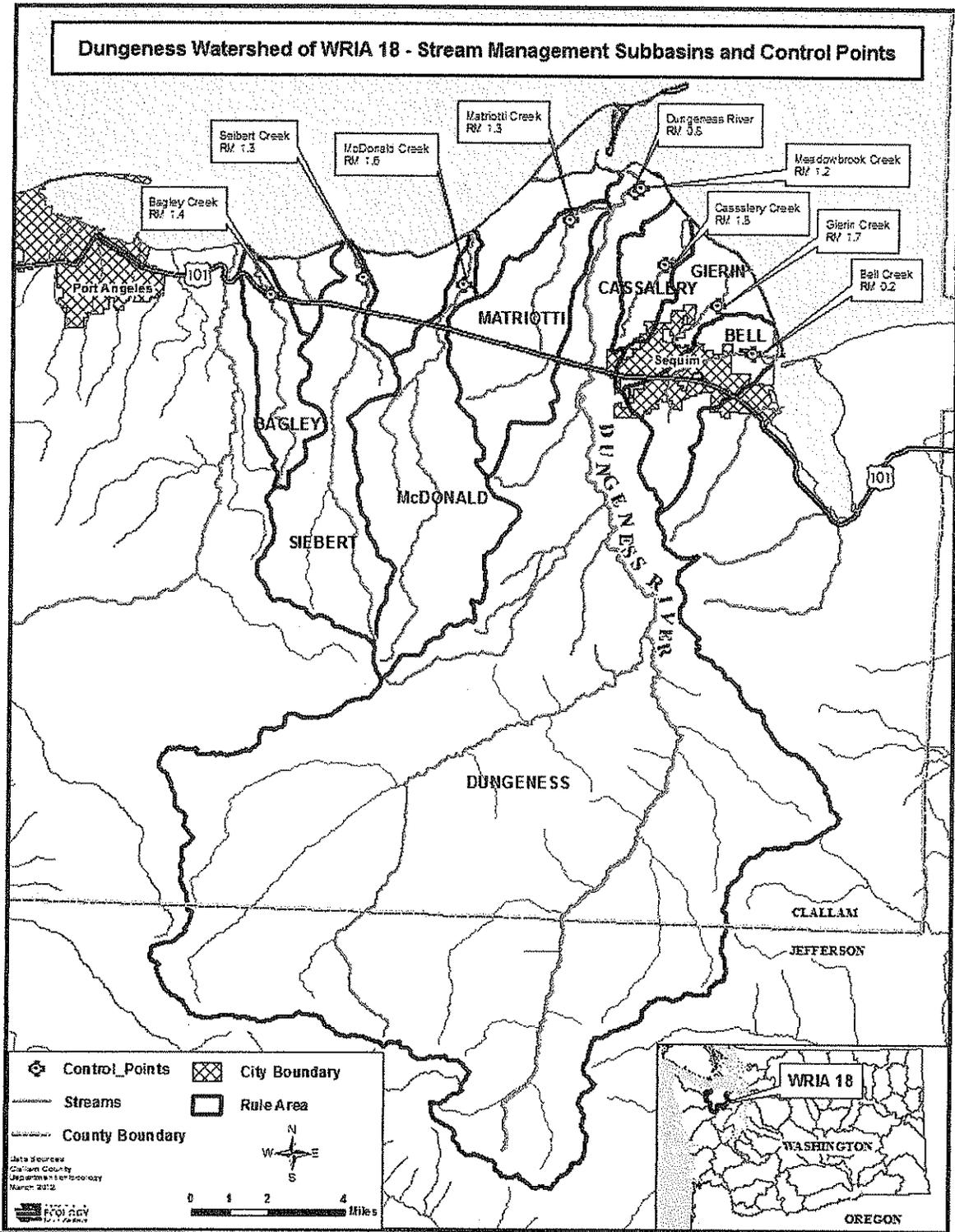
(2) If flow in the Dungeness River, calculated at river mile 4.2, attains an average daily flow of 105 cfs during the thirty-day critical period for eight out of ten consecutive years, then ecology will assess whether new instream flow or other technical studies are warranted for the Dungeness River.

[Statutory Authority: Chapters 90.54, 90.22, 90.82, 90.03, 90.42, and 90.44 RCW. 12-23-054 (Order 07-17), § 173-518-120, filed 11/16/12, effective 1/2/13.]

WAC 173-518-130 Appeals. All final written decisions of ecology pertaining to water right permits, regulatory orders, and related water right decisions made pursuant to this chapter are subject to appeal to the pollution control hearings board in accordance with chapter 43.21B RCW.

[Statutory Authority: Chapters 90.54, 90.22, 90.82, 90.03, 90.42, and 90.44 RCW. 12-23-054 (Order 07-17), § 173-518-130, filed 11/16/12, effective 1/2/13.]

WAC 173-518-140 Map.



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[Statutory Authority: Chapters 90.54, 90.22, 90.82, 90.03, 90.42, and 90.44 RCW. 12-23-054 (Order 07-17), § 173-518-140,

filed 11/16/12, effective 1/2/13.]

1 EXHIBIT 2
2 ORPC PETITION TO AMEND THE DUNGENESS RULE
3 (Exhibits omitted but incorporated by reference)
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PETITION FOR ADOPTION, AMENDMENT, OR REPEAL OF A STATE ADMINISTRATIVE RULE

Print Form

In accordance with RCW 34.05.330, the Office of Financial Management (OFM) created this form for individuals or groups who wish to petition a state agency or institution of higher education to adopt, amend, or repeal an administrative rule. You may use this form to submit your request. You also may contact agencies using other formats, such as a letter or email.

The agency or institution will give full consideration to your petition and will respond to you within 60 days of receiving your petition. For more information on the rule petition process, see Chapter 82-05 of the Washington Administrative Code (WAC) at http://apps.leg.wa.gov/wac/default.aspx?cite=82-05.

CONTACT INFORMATION (please type or print)

Petitioner's Name Olympic Resource Protection Council, c/o Kristina Nelson Gross
Name of Organization Olympic Resource Protection Council
Mailing Address P. O. Box 3010
City Sequim State WA Zip Code 98382
Telephone (360) 477-2103 Email kristina@kng-law.com

COMPLETING AND SENDING PETITION FORM

- Check all of the boxes that apply.
Provide relevant examples.
Include suggested language for a rule, if possible.
Attach additional pages, if needed.
Send your petition to the agency with authority to adopt or administer the rule. Here is a list of agencies and their rules coordinators: http://www.leg.wa.gov/CodeReviser/Documents/RClist.htm.

INFORMATION ON RULE PETITION

Agency responsible for adopting or administering the rule: Department of Ecology

1. NEW RULE - I am requesting the agency to adopt a new rule.

The subject (or purpose) of this rule is:

The rule is needed because:

The new rule would affect the following people or groups:

2. AMEND RULE - I am requesting the agency to change an existing rule.

List rule number (WAC), if known: WAC chapter 173-518, the Dungeness water management rule

I am requesting the following change: See attached.

This change is needed because: the existing rule is not consistent with state law or legislative intent. See attached.

balanced and equitable basin regulations consistent with state law as interpreted by the Washington Supreme Court in Swinomish Indian Tribal Community v. Dept. of Ecology, ___ Wn.2d ___, 311 P.3d 6 (2013).

The effect of this rule change will be: Ecology, ___ Wn.2d ___, 311 P.3d 6 (2013).

The rule is not clearly or simply stated: See attached.

3. REPEAL RULE - I am requesting the agency to eliminate an existing rule.

List rule number (WAC), if known: _____

(Check one or more boxes)

It does not do what it was intended to do.

It is no longer needed because: _____

It imposes unreasonable costs: _____

The agency has no authority to make this rule: _____

It is applied differently to public and private parties: _____

It conflicts with another federal, state, or local law or rule. List conflicting law or rule, if known: _____

It duplicates another federal, state or local law or rule. List duplicate law or rule, if known: _____

Other (please explain): _____

ATTACHMENT TO PETITION FOR RULE AMENDMENT

WAC chapter 173-518

OLYMPIC RESOURCE PROTECTION COUNCIL

Introduction

The Olympic Resource Protection Council (ORPC) is a non-profit organization whose members include owners of property and businesses within Water Resource Inventory Area (WRIA) 18 in Clallam County east of Morse Creek. ORPC has been critical of the existing Dungeness water management rule, WAC chapter 173-518, because of its significant and unnecessarily costly impacts on Clallam County residents seeking to develop or redevelop their properties consistent with county land use designations and planning policies. Now, with the Washington Supreme Court's recent ruling in the *Swinomish v. Ecology* case, ORPC's original criticisms are heightened by concerns regarding the lack of legal authority for the rule.

ORPC seeks to engage with the Department of Ecology and other stakeholders to craft a balanced, lawful, and effective water management regulation for the Dungeness Basin. For the following reasons, the existing rule must be amended.

- I. **The Dungeness water management rule is fatally flawed because it rests upon a system of "OCPI"-based water reservations that are *ultra vires* under *Swinomish v. Ecology*.**

The underlying premise of the Dungeness rule is that the impacts on the local economy and on rural residential development of highly restrictive minimum instream flows (and rule-based closures predicated on such flows) can be alleviated by a package of domestic use "reserves" adopted in reliance on "overriding considerations of the public interest" ("OCPI") pursuant to RCW 90.54.020(3)(a). WAC 173-518-080 provides in pertinent part as follows:

Ecology has weighed the public interest supported by providing a limited amount of water for domestic water supply against the potential for negative impact to instream resources. *Ecology finds that the public interest advanced by these limited reserves clearly overrides the potential for negative impacts on instream resources. (RCW 90.54.020(3)(a).)*

Based on this finding, ecology hereby reserves specific quantities of groundwater for future domestic supply only. *These reserves of water are not subject to the instream flows established in WAC 173-518-040 or closures established in WAC 173-518-050.*

WAC 173-518-080(1) (emphasis added).

Ecology's *Concise Explanatory Statement, Chapter 173-518 WAC* (Ecology Publication No. 12-11-039, November 2012) ("CES")¹ reiterates the OCPI basis for the domestic water reservations. CES at 48 (response to Comment 39).² The *Concise Explanatory Statement* also underscores the direct linkage between those OCPI-based reservations and the rule's minimum instream flows and closures. *See, e.g.*, CES at 75 (response to Comment 70)³; CES at 126 (response to Comment 164)⁴; CES at 128 (response to Comment 166)⁵; CES at 130 (response to Comment 170)⁶; CES at 417 (response to Comment 600).⁷

The inherent problem with the Dungeness rule is that Ecology's approach to OCPI has been soundly rejected by the Washington Supreme Court in *Swinomish Indian Tribal Community v. Ecology*, ___ Wn.2d ___, 311 P.3d 6 (2013). In light of *Swinomish*, the Dungeness rule must be drastically amended.

In *Swinomish*, issued after promulgation of the Dungeness rule, the Supreme Court decided that Ecology lacks authority to use OCPI to create a reservation setting aside water for future out-of-stream beneficial uses in the Skagit River Basin: "We conclude that Ecology has erroneously interpreted the statutory exception as broad authority to reallocate water for new beneficial uses when the requirements for appropriating water for these uses otherwise cannot be met. *The exception is very narrow, however, and requires extraordinary circumstances* before the minimum flow water right can be impaired." *Swinomish*, 311 P.3d at 8 (emphasis added).

¹ Available at <https://fortress.wa.gov/ecy/publications/publications/1211039.pdf>. ORPC incorporates by reference the documents cited in this Attachment to Petition for Rule Amendment. Documents not available online are attached as exhibits hereto.

² "The reserves of water established in this rule rely on a finding that the public benefits achieved by the limited domestic water reserves clearly overrides the potential for negative effect on instream resources, consistent with RCW 90.54.020(3)(a)."

³ "Ecology has duty [sic] to adopt instream flows as recommended in the 2005 Elwha-Dungeness Watershed Plan. Ecology has also made provisions for providing water for other uses. This rule establishes reserves of water to ensure water availability for future domestic uses."

⁴ "Ecology has a responsibility to protect water for domestic use and reserves are needed in this watershed to ensure water for domestic use is available as mitigation projects are phased in."

⁵ "Reserves coupled with maximum depletion amounts limit the maximum future impact to surface waters to 1 percent of low flow."

⁶ "[R]eserves . . . are sometimes a necessary part of a water management framework."

⁷ "The measures in this rule are intended to help protect stream flows by establishing instream flow levels and requiring mitigation for new withdrawals. This rule also establishes reserves of water to ensure there will be water available for domestic use, consistent with RCW 90.54.020(5) which calls for protection of water in a potable condition to satisfy human domestic needs."

The Washington Water Resources Act provides a “general declaration of fundamentals” for utilization and management of water, including the following: “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).

In the broadly-worded *Swinomish* majority opinion emphasizing the protection of minimum instream flows necessary for fish, wildlife, scenic, and aesthetic values, the Court rejected Ecology’s attempt to use OCPI to create set-asides that would enable future out-of-stream uses conflicting with such minimum stream flows. The Court held that OCPI is intended only as a narrow exception to be applied on a case-by-case basis, and cannot be used to justify a general set-aside within a basin regulation.

The Supreme Court held that Ecology’s use of the OCPI exception in the Skagit Basin rule was *ultra vires*, explaining that “a minimum flow set by rule is an existing water right that may not be impaired by subsequent withdrawal or diversion of water from a river or stream. The exception in RCW 90.54.020(3)(a) is a *narrow* exception, not a device for wide-ranging reweighing or reallocation of water through water reservations for numerous future beneficial uses.” *Swinomish*, 311 P.3d at 13 (emphasis in original).

The Court relied on its previous discussion of minimum flows in *Postema v. Pollution Control Hr’gs Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000), including the explanation that “once established, a minimum flow constitutes an appropriation with a priority date as of the effective date of the rule establishing the minimum flow. . . . Thus, a minimum flow set by rule is an existing right which may not be impaired by subsequent groundwater withdrawals.” *Swinomish*, 311 P.3d at 12 (citing *Postema*, 142 Wn.2d at 81). The Court stated that “Ecology’s interpretation of RCW 90.54.020(3)(a) does not follow our discussion of the overriding-considerations exception in *Postema*,” and held that Ecology’s application of the OCPI exception in the amended Skagit Basin rule was inconsistent with the entire statutory scheme because it “conflicts with the prior appropriation doctrine.” *Swinomish*, 311 P.3d at 13-14.

The Court’s interpretation of RCW 90.54.020(3)(a) – that OCPI cannot be relied upon as the basis for a general set-aside within a basin rule – applies with equal force to the Dungeness water management rule. Ecology lacks authority to rely on OCPI to establish “reservations” or “reserves” in a basin regulation setting aside water for future out-of-stream uses, as it has done in the Dungeness rule (WAC 173-518-080).

It has been suggested that *Swinomish* can be distinguished based upon the timing of the OCPI reservations vis-à-vis the minimum flows in the amended Skagit Basin rule. That suggestion is incorrect. The Court’s holding in *Swinomish* rests on its view of OCPI as a “narrow exception” that simply cannot be used to justify basin-wide reservations. It is irrelevant

whether Ecology attempts to establish a basin-wide OCPI reservation after or concurrently with establishment of a minimum flow. The *ultra vires* act is Ecology's reliance on OCPI for anything other than a "narrow exception" applied on a case-by-case basis.

In *Swinomish*, the Court explained that reservations "constitute appropriations of water," citing RCW 90.03.345. "Reservations of water must therefore meet the same requirements as any appropriation of water under the water code. '[B]efore a permit to appropriate may be issued, Ecology must affirmatively find (1) that water is available, (2) for a beneficial use, and that (3) an appropriation will not impair existing rights, or (4) be detrimental to the public welfare.'" *Id.* at 14 (citing *Postema*, 142 Wn.2d at 79, and RCW 90.03.290(3)). At least two of the requirements to appropriate water could not be met under RCW 90.03.290(3): "The proposed beneficial uses are for noninterruptible year-round uses, but water is not available for the proposed noninterruptible out-of-stream uses for which the water reservations are made. In addition, year-round withdrawals of water will impair the existing minimum flow rights, another reason why an application to appropriate would have to be denied under RCW 90.03.290(3)." *Id.* at 14.

In the Dungeness rule, Ecology has paired highly restrictive minimum flows and stream closures with OCPI-based reservations of water for specified uses, in order to create a relief valve from the otherwise draconian effect of the minimum flows and closures. *See* WAC 173-518-080(1). Without the relief provided by the reservations, the attempted compromise embedded in the Dungeness rule is a failure. Accordingly, Ecology must amend the Dungeness rule.

Ecology must develop an amended rule establishing reservations of adequate supplies of potable water for rural uses and development – *not through application of the OCPI exception*, but through Ecology's authority under RCW 90.54.050, which provides in pertinent part as follows:

In conjunction with the programs provided for in RCW 90.54.040(1), *whenever it appears necessary to the director* in carrying out the policy of this chapter, the department may by rule adopted pursuant to chapter 34.05 RCW:

(1) Reserve and set aside waters for beneficial utilization in the future, . . .

RCW 90.54.050 (emphasis added).

Utilizing its authority under RCW 90.54.050(1), Ecology must reserve and set aside quantities of groundwater to meet the water demand associated with buildout consistent with Clallam County's adopted land use plans and designations, as directed by RCW 90.54.020(5) ("Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs") and RCW 90.54.020(10) ("Expressions of the public interest will be sought at all stages of water planning and allocation discussions"). This will require

close coordination with the County; participation by all affected stakeholders, including representatives of rural property owners; and a credible, science-based assessment of the net impacts on streamflows of anticipated rural groundwater withdrawals.

If Ecology determines it is necessary to address impacts on streamflows from withdrawal of groundwater reserved under RCW 90.54.050, it should do so in a way that does not impose complex and costly regulatory impacts on property owners and local government. A basin-focused water acquisition and mitigation program, relying on Ecology's trust water right authority and matching up with the County's long-range planning goals and land use designations, would be an appropriate way to balance the various competing "fundamentals" in RCW 90.54.020. By contrast, the approach used by Ecology in the Dungeness rule – regulation of small groundwater uses with no measurable impact on streamflows – imposes significant costs without corresponding environmental benefits.

We urge Ecology to recognize the *Swinomish* decision as a wake-up call for Ecology's approach to instream flow rulemaking in general, and in the Dungeness basin in particular. Ecology's recent approach has caused widespread uncertainty, created direct conflicts with local land use planning authority, and imposed significant regulatory and transactional costs that are completely out of proportion to any identified benefits. Ideally, the *Swinomish* decision will prompt a reassessment of Ecology's rulemaking authority, and result in legislative clarification of the appropriate balance between protection of adequate supplies of water for domestic use and protection of base flows necessary for fish and other instream values.

In the meantime, however, Ecology must act promptly to remedy the problems it has created in the Dungeness rule. We recognize that Ecology's resources for rulemaking are very limited at this time, and that Ecology's limited staff is engaged in new rulemaking work in other watersheds. However, that other work should be suspended in light of the *Swinomish* decision. Fixing the Dungeness rule – and mitigating the damage caused by it – should be the agency's highest priority for rulemaking.

II. The Dungeness rule is fatally flawed because it rests on minimum stream flows and closures that are not consistent with RCW 90.03.345 and 90.03.290.

A. *Swinomish* requires minimum instream flows to meet the four-part test.

The Court's decision in *Swinomish* undermines not only Ecology's use of OCPI to create water reservations, but the minimum instream flows and closures established in the Dungeness rule. The Court held in *Swinomish* that reservations are "appropriations of water" under RCW 90.03.345, and "must therefore meet the same requirements as any appropriation of water under the water code" – i.e., the four-part test (beneficial use; water availability; no impairment of existing rights; no detriment to the public welfare) established under RCW 90.03.290.

The Court's reasoning in *Swinomish* does not apply solely to reservations; the cited statute explicitly applies to minimum flows as well: "The establishment of reservations of water for agriculture, hydroelectric energy, municipal, industrial, and other beneficial uses . . . *or minimum flows* or levels . . . shall constitute appropriations within the meaning of this chapter with priority dates as of the effective dates of their establishment." RCW 90.03.345 (emphasis added).

Under the Court's interpretation of RCW 90.03.345, minimum instream flows set by rule must also satisfy the four-part test. This includes not just availability of water, but the requirement that the appropriation embodied in a minimum flow not be detrimental to the public interest. *See* RCW 90.03.290.

B. The Dungeness rule minimum flows do not meet the "water availability" prong of the four-part test.

In the Dungeness rule, Ecology has established minimum flows at levels that are simply not present in the river at various times, and which by definition cannot satisfy the four-part test. WAC 173-518-040 provides in pertinent part:

The instream flows established in this section are based on recommendations in the 2005 Elwha-Dungeness watershed plan, consultation with the Jamestown S'Klallam Tribe, the departments of fish and wildlife, agriculture, and commerce; and public input received during the rule-making process.

Instream flows established in this rule are necessary to meet the water resource management objectives of the Elwha-Dungeness watershed plan.

WAC 173-518-040(1), (2).⁸ Nothing in the Dungeness rule reflects any finding by Ecology that the instream flows satisfy the four-part test in RCW 90.03.290.

The record underlying development of the Dungeness rule demonstrates that the instream flows in the rule cannot satisfy the water availability prong of the four-part test.⁹ Ecology has

⁸ Although Ecology relies on the Elwha-Dungeness Watershed Plan, reliance on a watershed plan does not excuse compliance with applicable law. Nothing in the watershed planning statute, RCW chapter 90.82, allows either a planning unit or Ecology to ignore applicable instream flow laws. *See* RCW 90.82.080; 90.82.085.

⁹ *E.g.*, CES at 17 ("Establishment of an instream flow does not require that water always be present at that flow level; it is merely a limitation on when new junior water rights may be exercised"); CES at 17-18 ("Although instream flows are not set with the expectation those flows will necessarily be in the river, . . ."); CES at 56 (response to Comment 53) ("Setting instream flow levels does not mean that those levels will always be met in the stream. Natural variations in rainfall and the use of existing water rights can result in actual flows being lower than the instream flows"); CES at 61 (response to Comment 59) ("A minimum instream flow under state law is not a hydrologically-defined base flow"); CES at 62 (response to Comment 60) ("Note that in recent years, the river was above 180 cfs for *most of* the dry months . . . This data supports that 180 cfs is *within the normal range* of the river") (emphasis added).

consistently asserted that the Dungeness basin is over-appropriated, relying on the 1924 adjudication awarding more than 500 cfs to the irrigators. See, e.g., *A Guide to Water and How We Use It in the Dungeness Watershed*, Ecology Publication No. 10-11-018 (June 2010).¹⁰ Ecology has also consistently maintained that the Dungeness rule will not impair existing rights. See WAC 173-518-010(3). Quantification of existing appropriative rights is therefore critical to determining water availability for minimum instream flows.

In the Jamestown S’Klallam Tribe’s Clean Water Act 319 Plan, *Protecting and Restoring the Waters of the Dungeness* (July 2007),¹¹ the Tribe noted that the Dungeness River was over-appropriated and provided the following table:

Table 5-3: Water Rights and Claims on the Dungeness River in cfs
(preliminary, based on Trust Water Rights MOU - table adapted from Entrix, 2005)

Dungeness River Agricultural Water Users	156.00
Other as decreed in 1924 adjudication (treated as relinquished in TWR MOU)	8.84
WDFW Fish Propagation (non-consumptive)	40.00
City of Sequim	1.40
Others	0.01
<u>Water Claims</u>	<u>1.90</u>
Total	208.15

Jamestown S’Klallam Tribe 319 Plan, p. 79.

Given that the irrigators’ rights were reduced to 93.5 cfs in September 2012, this reduces the overall total of water rights and claims to **145.65 cfs**. It should be noted that this amount does not include the approximately 30 cfs already allocated for instream flows by virtue of the State grant funding used in the restoration projects described in *A Review of the Implementation of the 1998 MOU Between the Department of Ecology and the Dungeness Water Users Association* (Ecosystem Economics, May 2011) (Exhibit 1 attached hereto) at 20. When those instream flow allocations are combined with existing appropriative rights, those allocations total approximately **175 cfs**.

According to Ecology fisheries biologist Brad Caldwell, the river’s median flows in August and September are 270 cfs and 180 cfs, respectively. B. Caldwell, *Response to Questions from Karen Terwilliger for Senator Hargrove* (Exhibit 2 attached hereto). If Ecology adopted instream flows meeting the water availability prong of the four-part test, fewer than 5 cfs

¹⁰ Available at <https://fortress.wa.gov/ecy/publications/publications/1011018.pdf>.

¹¹ Available at www.jamestowntribe.org/programs/nrs/319cplan.pdf.

would be available in September – *based upon median flows*.¹² Ecology has stated that the “daily mean flows in the late summer fall as low as 80 cfs,” and that 171 cfs is the mean monthly flow during the month of September. CES at 2.

Ecology has consistently relied on Dungeness ISF numbers recommended in a 1993 U.S. Fish and Wildlife Service paper, *Recommended Instream Flows for the Lower Dungeness River* (Hiss 1993),¹³ despite the fact that these numbers failed to consider the river’s hydrology. The 1993 recommendations were derived from a 1991 USFWS IFIM study, *Fish Habitat Analysis for the Dungeness River Using the Instream Flow Incremental Methodology* (Wampler and Hiss 1991).¹⁴ The 1991 IFIM study was based on field work conducted in 1988 and 1989. Hiss 1993 at 2; Wampler and Hiss 1991 at 1. The Abstract of the 1993 paper states:

At times, these flows may exceed the total natural flow in the river, for the flows are not based on hydrological statistics. Rather, they are based on providing full fish habitat protection by achieving the depths and velocities desired by fish given the channel shape at the time of measurement. These flows provide, for the first time, a benchmark against which lower flows can be evaluated in terms of percent fish habitat gained or lost for key species and life stages, when instream flow is increased or decreased by changes in diversion.

Hiss 1993 at i. In the section of the 1993 paper entitled “Cautions in Interpretation: Recommended Flows and Water Availability” the author emphasizes: “Historic low flow was not considered in our method; rather, our recommendations are based solely on fish habitat requirements. Therefore, the proposed flows provide a biological benchmark against which any flow can be evaluated in terms of percent fish habitat gained or lost.” *Id.* at 6.

The Dungeness River Agricultural Water Users Association draft Comprehensive Irrigation District Management Plan (HDR, December 18, 2006)¹⁵ (“CIDMP”) notes that the WUA diversion goals for the critical period of late summer through early fall will keep the median flow at the upper IFIM site above or near 100 cfs. CIDMP at 6-5. Importantly, 100 cfs “represents 75 percent of the optimum weighted useable area (WUA) from the IFIM study.” *Id.* The CIDMP acknowledged that 180 cfs “could not be achieved for long periods in most years even under natural conditions if there were no diversions from the Dungeness River.” *Id.*

¹² Ecology did not dispute the data in Comment 66 on the draft Dungeness rule to the effect that during the ten year period 2000-2009, only once has a flow of 180 cfs been achieved on September 1. CES at 71-72.

¹³ Available at www.fws.gov/wafwo/fisheries/Publications/FP070.pdf.

¹⁴ Available at <http://www.fws.gov/wafwo/fisheries/Publications/FP186.pdf>.

¹⁵ Available at www.clallamcd.org/publications/.

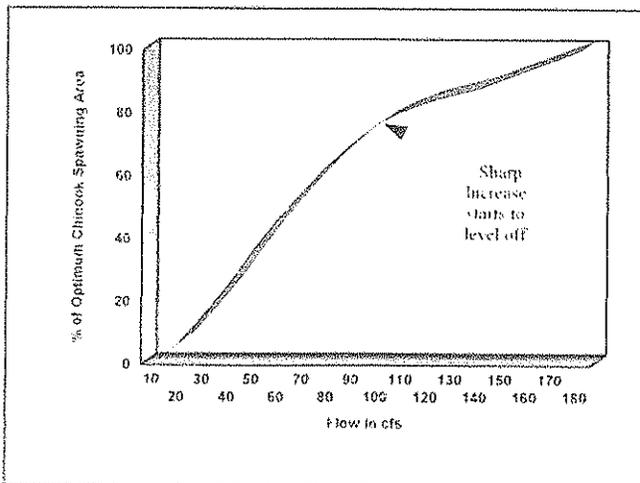
Contrary to evidence from the record that water is not available at such flow levels, the Dungeness rule establishes a minimum instream flow of 180 cfs in the Dungeness mainstem during August and September. WAC 173-518-040, Table IIA. Ecology disregarded hydrologically-defined base flows, relying instead on the “biological or ecological” approach articulated by WDFW’s Hal Beecher: “In a biological or ecological context, a minimum flow can be considered the lowest flow that will provide unimpaired fish conditions; lowering flow below the minimum can be expected to reduce potential fish production.” CES at 61 (response to Comment 59). This approach fails to satisfy the water availability prong of the four-part test in RCW 90.03.290.

C. The Dungeness rule minimum flows do not meet the “no detriment to the public welfare” prong of the four-part test.

In addition to failing to apply the “water availability” prong of the four-part test in RCW 90.03.290, Ecology failed to apply the “no detriment to the public welfare” prong of the four-part test to the minimum instream flows in the Dungeness rule. Ecology’s inclusion in the Dungeness rule of “optimum” instream flows that do not equate to actual minimum flows has produced needless hardship for the local community and for property owners and businesses within Clallam County.

Ecology established minimum instream flows in the Dungeness rule that “enhance” rather than “protect” the natural environment.¹⁶ Cf. RCW 90.54.020(3). Ecology acknowledged

¹⁶ Chinook migration, spawning, and rearing, and pink spawning, and steelhead rearing were selected as the priority species-life stages in the 1993 USFWS recommendation (Hiss 1993). Hiss explains that Chinook spawning habitat increases rapidly at flows up to 100 cfs; yet above 100 cfs, the “incremental gains” are less, but continue until the “overall maximum habitat area” is reached at 180 cfs. Hiss 1993 at 8. See also Figure 6.1, *Dungeness-Quilcene Water Resource Management Plan*, Ecology Pub. No. 94-WRMP-17-18 (June 30, 1994) (available at <https://fortress.wa.gov/ecy/publications/publications/94wrmp1718.pdf>):



that “minimum” is defined as “the smallest quantity, number, or degree possible or permissible,” that the term “base flow” in hydrology is “widely recognized as that component of streamflow sustained during extended dry periods by groundwater discharging to the stream channel,” and that the choice of these particular terms in the relevant statutes “appears to indicate an intent that instream flows be set at relatively low levels that could be expected to be present a relatively high percentage of the time.” CES at 72 (response to Comment 66).

Ecology nevertheless failed to apply the specific legislative language, opting instead to rely on the introductory sentence in RCW 90.54.020(3) for authority to “enhance” the quality of the natural environment. CES at 73.¹⁷ Ecology’s approach is not consistent with the legislative intent underlying RCW chapter 90.22 and RCW chapter 90.54:

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 extinguishment. 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. . . .

The words of the “fundamental” of RCW 90.54.020(3)(a), while not identical to those of the 1967 enactment contained in RCW 90.22.010, represent an affirmation of the general minimum instream flow policy established in 1967.

Inter-office Correspondence from Charles B. Roe, Senior Assistant Attorney General, to Eugene F. Wallace, Program Manager for Water Resources, Department of Ecology (February 20, 1986) (attached hereto as Exhibit 3) at 8-9. Mr. Roe explained: “Stated simply, the basic policy . . . is to keep all streams currently ‘alive’ in that condition. It is not, however, a policy designed to retain flows that are greater than necessary to ensure the continued existence of the instream values associated with the stream on a minimum basis.”

Ecology has cited *Dep’t of Ecology v. Public Utility Dist. No. 1 of Jefferson County*, 121 Wn2d 179, 849 P.2d 646 (1993) (“*Elkhorn*”) for the proposition that the Washington Supreme Court has affirmed “the method employed by Ecology . . . to establish instream flows.” CES at 73 (response to Comment 66). In the context of the Dungeness rule, it is inaccurate to suggest

The *Elwha-Dungeness Watershed Plan* (available at www.clallam.net/environment/elwhadungenesswria.html) identified USFWS policy on instream flows as adopting flows consistent with 80% of the mean monthly flow as one way to establish streamflows sufficient to “protect salmon listed under the ESA.” *Watershed Plan*, Appendix 1-A at 5. The *Watershed Plan* further notes that flow recommendations for the critical period of August through October provide 100% of the habitat area, expressed as a weighted usable area, for Chinook and pink salmon. *Id.*

¹⁷ “Ecology and the state Department of Fish and Wildlife have found from experience that instream flows set at low levels (such as the lowest flow of record or at hydrologic base flow levels) do not adequately preserve and protect instream values such as fish, recreation, and aesthetics. Therefore, Ecology regards the minimum permissible flow consistent with legislative intent as the lowest flow capable of protecting and preserving and where possible enhancing instream values.”

that *Elkhorn* allows Ecology to override legislative intent in setting minimum instream flows by rule. In *Elkhorn*, the Court affirmed Ecology's authority under the Clean Water Act to assure compliance with state water quality standards by establishing bypass reach instream flows in a Section 401 certification for a hydroelectric project on the Dosewallips River. *Id.* *Elkhorn* reversed as "clearly erroneous" the PCHB's *factual* determination that Ecology's flows were "enhancement" flows rather than minimum "protection" flows. *Id.* at 204 ("Ecology's intent was clearly to preserve, not to enhance, the fishery in the Dosewallips"). The Court did not reach the question "whether Ecology has the authority to enhance the Dosewallips fishery by a base flow requirement in the section 401 certificate." *Id.* at 204. *Elkhorn* does not undermine Mr. Roe's explanation of the legislative intent underlying RCW chapters 90.22 and 90.54.

Having established regulatory instream flows that go far beyond minimum "protection" of the natural environment and essentially preclude new appropriations for out-of-stream uses, Ecology thereupon resorted to the OCPI exception and an unwieldy and expensive well-by-well "mitigation" apparatus to enable future domestic use in the Dungeness basin. Had Ecology evaluated minimum flows necessary to protect – rather than enhance – the natural environment, it would have arrived at true "base flows" consistent with RCW 90.54.020(3)(a) that would not have resulted in such draconian impacts on the local community.

The minimum instream flows – and the stream closures resulting from Ecology's approach to "minimum" flows – in the Dungeness rule have the effect of foreclosing rural economic development and new residential uses in the Dungeness basin. This is what compelled Ecology to utilize the OCPI exception in the first place. Ecology has already found that the minimum flows and closures are clearly overridden by the public interest in providing water for domestic water supply.¹⁸ As such, the existing flows and closures in the Dungeness rule cannot meet the "no detriment to the public welfare" prong of the four-part test.

Ecology must amend the Dungeness rule to establish minimum flows under RCW 90.54.020(3)(a) that are consistent with RCW 90.03.345 and that meet the four-part test under RCW 90.03.290. Under the "no detriment to the public welfare" prong of the four-part test, Ecology lacks authority to set "optimal" flows aimed at achieving "maximum" fish habitat or to impose stream closures that it has already acknowledged are clearly overridden by the public interest in adequate future domestic supply.

D. The stream closures in the Dungeness rule are *ultra vires* and, to the extent predicated on Ecology's notion of minimum instream flows that cannot satisfy the four-part test, contrary to RCW 90.03.345 and 90.03.290.

The justification for closing numerous streams in the Dungeness rule is murky at best, but one thing is clear: to the extent based on protection of "minimum instream flows" for which

¹⁸ WAC 173-518-080(1).

water is not actually available, the closures are contrary to the Supreme Court's interpretation of the Water Code in *Swinomish*. In conjunction with establishment of reasonable minimum flows and future use reservations in an amended Dungeness rule, Ecology must reevaluate each stream closure in light of its existing legal authority and the Supreme Court's decision in *Swinomish*.

In the rule, Ecology defines "closure" as follows:

"Closure" means that water is no longer available for future appropriations without mitigation to offset the use. This is due to a finding by ecology that further appropriations from the closed stream(s) or hydraulically connected groundwaters would impair senior water rights or cause detriment to the public interest.

WAC 173-518-030. The definition of "closure" in the rule sets forth no specifics of any "findings" regarding water right impairment or detriment to the public interest supporting any of the stream closures in particular.¹⁹ See WAC 173-518-030; see also WAC 173-518-050.

In the "closures" section of the rule, Ecology determines that, *for surface water*, "based on recommendations in the watershed plan, historical and current low stream flows, and the need

¹⁹ A closure by rule, based upon a finding that further appropriations would impair senior water rights or cause detriment to the public interest, is not consistent with Ecology's duties under the Water Code. RCW 90.03.290 requires Ecology to investigate each application for a water right permit, "and determine what water, if any, is available for appropriation, and find and determine to what beneficial use or uses it can be applied." RCW 90.03.290(1); see also RCW 90.03.290(4) ("In determining whether or not a permit shall issue upon any application, it shall be the duty of the department to investigate all facts relevant and material to the application"). The statute further provides:

The department shall make and file as part of the record in the matter, written findings of fact concerning all things investigated, and if it shall find that there is water available for appropriation for a beneficial use, and the appropriation thereof *as proposed in the application* will not impair existing rights or be detrimental to the public welfare, it shall issue a permit stating the amount of water to which the applicant shall be entitled and the beneficial use or uses to which it may be applied But where there is no unappropriated water in the proposed source of supply, or *where the proposed use conflicts with existing rights, or threatens to prove detrimental to the public interest*, having due regard to the highest feasible development of the use of the waters belonging to the public, it shall be duty of the department to reject such application and to refuse to issue the permit asked for.

RCW 90.03.290(3) (emphasis added).

If a permit is refused because of conflict with existing rights, the statute enables an applicant to acquire those rights by purchase or condemnation, and provides that "the department may thereupon grant such permit." RCW 90.03.290(4). A blanket closure by rule, ostensibly to prevent impairment, is inconsistent with Ecology's duty to investigate and precludes permit applicants from utilizing the opportunity provided by RCW 90.03.290(4).

A blanket closure by rule, ostensibly because further appropriations would cause detriment to the public interest, is also inconsistent with the Water Code. Such a closure by rule precludes Ecology from giving "due regard to the highest feasible development of the use of the waters belonging to the public" in determining whether "the proposed use . . . threatens to prove detrimental to the public interest," as required by RCW 90.03.290(3).

In short, the Dungeness rule's definition of "closure" in WAC 173-518-030 embodies a notion of water "availability" that is in direct conflict with the agency's duties under the Water Code.

to protect existing water rights, water is not reliably available for new consumptive uses” from various streams and tributaries in the Dungeness River watershed. WAC 173-518-050. Although the structure of WAC 173-518-050 (beginning with the words “Surface water:”) suggests that Ecology may have considered separate provisions for groundwater closures, it did not include specific groundwater closures in the rule. The rule simply provides that future groundwater appropriations are subject to these stream closures, and sets “maximum depletion amounts” of unmitigated impacts to closed streams. WAC 173-518-070; 173-518-085.

The only statutory authority for a closure by rule is RCW 90.54.050, which authorizes Ecology to withdraw water from further appropriation because of a lack of sufficient information and data to allow for the making of sound decisions. However, that is not the basis for the stream closures in the Dungeness rule. Rather, Ecology explains that the closures are based upon a finding that water is not available. CES at 78 (response to Comment 74).²⁰

Ecology’s *Concise Explanatory Statement* expands upon this justification as follows: “An ‘administrative closure’ is a term used to describe a finding that water is not available for new diversions from a specific surface water body based on a recommendation from the Director of Washington State Fish and Wildlife made pursuant to RCW 77.57.020.” CES at 78 (response to Comment 75). However, RCW 77.57.020 does not authorize a closure by rule.

RCW 77.57.020 relates only to a case-by-case evaluation of *permit applications*.²¹ Nothing in RCW 77.57.020 overrides Ecology’s duty to investigate each permit application under RCW 90.03.290, or suggests that Ecology may by rule circumvent its duty to investigate each permit application.

²⁰ “This rule does not withdraw water from further appropriations because of a lack of information pursuant to RCW 90.54.050. The closure of surface water bodies is based on a finding that water is not available.”

²¹ RCW 77.57.020 provides in its entirety as follows:

It is the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state.

The director of ecology shall give the director [of WDFW] notice of *each application for a permit* to divert or store water. The director has thirty days after receiving the notice to state his or her objections *to the application*. The *permit shall not be issued* until the thirty-day period has elapsed.

The director of ecology *may refuse to issue a permit* if, in the opinion of the director of ecology, *issuing the permit* might result in lowering the flow of water in a stream below the flow necessary to adequately support food fish and game fish populations in the stream.

The provisions of this section shall in no way affect existing water rights.

RCW 77.57.020 (emphasis added). This statute addresses water right permits; it does not apply to permit-exempt groundwater withdrawals.

Ecology also resorts to its historical practices to explain the stream closures in the Dungeness rule:

“Closure” is a term of art historically used by the courts, Ecology, and Ecology’s predecessor agency. It signifies a determination that water is not available for appropriation from a surface water or groundwater source. It has appeared in water management rules throughout the state since the 1970s.

CES at 37 (response to Comment 19). “Closure” may be a “term of art” to Ecology, but it is not derived from the Water Code. Ecology’s historical practice is simply not an acceptable substitute for statutory authority. *See generally Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998). (Notably, Ecology has relied upon the same “OCPI” approach to support water reservations in several other water management rules, but that did not stop the Supreme Court in *Swinomish* from invalidating Ecology’s use of OCPI in the Skagit rule.)

Finally, Ecology also suggests that the stream closures in the Dungeness rule are predicated upon its authority to promulgate minimum instream flows by rule: “Ecology has closed (or seasonally closed) surface water bodies that chapters 90.22 and 90.54 RCW direct us to protect.” CES at 110 (response to Comment 134). *Compare* WAC 173-518-040, Tables II-A and II-B, *with* WAC 173-518-050, Table III.

RCW chapters 90.22 and 90.54 authorize Ecology to establish minimum instream flows or base flows. But those statutes do not (except in circumstances involving insufficient data or information, which Ecology has already explained do not exist here) authorize closure of a stream by rule.

Thus, it appears that the stream closures in the Dungeness rule result from Ecology’s notion of “biological or ecological” minimum instream flows – flows which are not now achieved in those streams.²² Under RCW 90.03.345 and *Swinomish*, Ecology cannot establish a minimum instream flow without satisfying the four-part test for a new appropriation. Ecology has no authority to establish a minimum instream flow unless water is available and unless the minimum flow would not be detrimental to the public welfare. Nor does Ecology have authority to establish by rule a “closure” intended to protect an *ultra vires* minimum instream flow, to prohibit permit-exempt groundwater withdrawals under RCW 90.44.050 based upon impacts to such “closed” streams, or to require mitigation of such impacts.

²² *See, e.g.*, Technical Memorandum, Assessment of Baseflow in Small Streams of the Dungeness Watershed (Peter Schwartzman, Pacific Groundwater Group, January 14, 2008), Ecology Publication No. 12-03-281 (available at <https://fortress.wa.gov/ecy/publications/publications/1203281.pdf>); Memorandum from Paul J. Pickett and Brad Caldwell to Brian Walsh and Cynthia Nelson re Flows at proposed Instream Flow regulatory control stations in the Dungeness portion of WRIA 18 (February 8, 2012) (attached hereto as Exhibit 4), Table 2; CES at 54 (Comment 51).

In light of the complete absence of legal authority and lack of any particularized findings to support Ecology's determination that water is not available from the closed streams, it is no wonder that many members of the local community believe that Ecology began with the objective of precluding use of the groundwater permit exemption in RCW 90.44.050, and then worked backward from there to arrive at the stream closures in the Dungeness rule.

Ecology must amend the Dungeness rule to eliminate the stream closures in WAC 173-518-050. Ecology must also amend the rule to eliminate all restrictions on permit-exempt groundwater withdrawals – including requirements for “mitigation” credits and deductions – based on those stream closures.

III. The Dungeness rule must be amended to take into account past investments to restore streamflows, including the 30 cfs permanently held by the State for instream flows.

The 1993 USFWS paper cautioned that the instream flow recommendations assumed then-current “existing” conditions. Hiss 1993 at 5. Then-current conditions were actually from 1988-1989. *Id.* at 2; Wampler and Hiss 1991 at 1; *see also Watershed Plan*, 3.13-2. Hiss explained:

Flows for maximum fish habitat and streambed gravel aggradation cannot be addressed separately in the long term. Human influence accelerated the natural erosion process and led to an unnaturally high rate of bedload aggradation. This condition appears linked to streambed instability. . . .

If the streambed aggradation problem can be solved, then the flow required for maximum fish habitat could decrease.

Hiss 1993 at 5-6.²³ The 1993 USFW study identified some potential solutions to the aggradation problems in the Dungeness, such as increasing flows *in the short term* to fix fish passage barriers at low flow. Hiss 1993 at 6. Over the long term, fish passage issues could be resolved by ensuring that the side channels remain stable during the spawning and incubation season. *Id.*

During the 20 years since this study was released, the Dungeness basin has been the subject of a multitude of soil stabilization projects, restoration and flow enhancement projects, and acquisition projects. *See* Exhibit 5 attached hereto. Many of these projects cite as an “overall goal” restoration of the Dungeness River. These projects are in addition to out-of-basin

²³ *See also Dungeness-Quilcene Water Resource Management Plan* (1994) at 6.4 (“Recommendations released in 1993 indicate that a minimum instream flow of 180 cfs or more for the Dungeness River is advised in the late summer, primarily to accommodate chinook and pink salmon. This is based on the present degraded habitat. . . . Conditions and factors outside of instream flow could and may make it difficult to attain the levels of production that existed in earlier times. It is hoped that habitat improvements may reduce the instream flow requirements to approach favorable conditions in the river for fish production.”)

projects, such as the massive Washington Harbor restoration (located just outside the WRIA 18 East boundary), most of which involve some component of salmonid habitat restoration and/or conservation.

Further, there is no indication Ecology accounted for the instream flows already dedicated to the streams as a result of State grant funding. According to the review conducted by Ecosystem Economics in 2011, approximately 30 cfs were placed in trust by the State. See Exhibit 1 (MOU Review) at 20, Table 12.

When the Dungeness rule is amended to establish true minimum flows meeting the requirements of RCW 90.03.345 and RCW 90.03.290, Ecology must evaluate the base flow requirements for the Dungeness River and other streams as they exist today, not as they existed over 20 years ago.

IV. If Ecology sets instream flows in excess of base flows, it must conduct a maximum net benefits test.

As explained above, base flows are minimum flow levels necessary for the preservation of fish and related values. Allocation of waters for fish habitat in excess of base flows is subject to the “maximum net benefits” principle, requiring a balancing of interests. Exhibit 3 (Charlie Roe Inter-office Communication) at 3-4, 10. The establishment of minimum instream flows by regulation is the first determination required by Ecology related to the retention of waters within a stream. “The second is to determine, after conducting a ‘maximum net benefits’ test as described in RCW 90.54.020(2), whether an additional increment of flow should be provided above ‘minimum’ flows to satisfy instream beneficial uses, such as aesthetic and fisheries uses.” *Id.* at 10.²⁴ This requires the balancing of interests in competing beneficial uses.

Here, Ecology failed to apply the maximum net benefits test to the instream flow levels established under the rule. Bill Clarke, in his July 7, 2012 formal comment on the rule on behalf of the Washington State Association of Realtors®, among many others, identified this failure. See, e.g., CES Comments 620 and 698.

In its *Concise Explanatory Statement*, Ecology stated that it was not required to conduct a maximum net benefits test, citing its own Policy 2025.²⁵ CES at 418 (response to Comment

²⁴ In a 1987 review of its instream resources and water allocation program, Ecology reached the same conclusion that, under existing law, “[t]he allocation by regulation of any flows in excess of Ecology’s minimum or base flows, including instream flows above the minimum or base level, would be subject to a maximum net benefits determination.” Ecology, Draft Environmental Impact Statement, Instream Resources and Water Allocation Program Review (February 1987) (available at <https://fortress.wa.gov/ecy/publications/publications/87900.pdf>), at 2-3.

²⁵ Emails from Ecology staff indicate that Policy 2025 (effective 1-31-2005) was developed in a settlement with the Center for Environmental Law and Policy (CELP) involving the Columbia River litigation. Other Ecology staff expressed concern about whether the policy “trumped” RCW 90.54.020. See Exhibit 6 attached hereto. To the

601). However, Ecology Policy 2025 does require the maximum net benefits test for “[d]evelopment of rules that would quantify the remaining water available for appropriation within a basin, particularly if the rule would tentatively commit a large quantity of water or a major share of the water resources of the basin, to future new appropriations.”²⁶

Here, the existing Dungeness rule effectively quantified the remaining water available for appropriation as zero, assuming the basin was over-appropriated based upon the 1924 adjudication. In an Ecology email to the Local Leaders Water Management Work Group, dated February 28, 2012 (Exhibit 7 attached hereto), the author suggested that the specific instream flow levels were of little consequence because Ecology had already decided to close the basin:

Revisions to recommended flows, whether lower or higher, will not impact water management practices under the proposed water management rule during the critical low-flow, high-use times of the year. The Dungeness is fully appropriated and no newly appropriated water will be available during that time period no matter what flows are adopted in rule.

Exhibit 7.

When it amends the Dungeness rule, Ecology must act consistently with all the “fundamentals” in the Water Resources Act, including this one: “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.” RCW 90.54.020(2).

Other provisions in the Act’s “general declaration of fundamentals” must also be applied when Ecology assesses maximum net benefits, including RCW 90.54.020(10) (“Expressions of the public interest will be sought at all stages of water planning and allocation discussions”) and RCW 90.54.020(5) (“Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs”). Ecology should take note that in *Swinomish*, 311 P.3d at 14, the Supreme Court rejected Ecology’s use of a balancing test *for OCPI* because “[u]nder the balancing test, the need for potable water for rural homes is virtually assured of prevailing over environmental values.” However, in the context of the maximum net benefits requirement, such a balancing test is required and cannot be avoided.

Conclusion

ORPC urges Ecology to begin the process of amending the Dungeness Rule by engaging all stakeholders, including representatives of rural property owners and businesses. We support amendment of the rule to create a balanced and effective water management program for the

extent that it suggests the maximum net benefits analysis is not required in connection with “enhancement” instream flows, Policy 2025 is inconsistent with the statute. See Exhibit 3 (Charlie Roe inter-office communication).

²⁶ POL-2025 (available at www.ecy.wa.gov/programs/wr/rules/images/pdf/pol2025.pdf) at 2.

Dungeness basin that will facilitate development consistent with Clallam County's long-range planning for this area without imposing unreasonable costs on residents and property owners. We urge Ecology to act consistently with the Supreme Court's decision in *Swinomish* by ensuring careful and conscientious application of the Water Code's four-part test to any proposed appropriations for minimum instream flows.

Ecology has already acknowledged the need for potable water for rural homes in the Dungeness basin. Now, after the Supreme Court's decision in *Swinomish*, it is time for Ecology to take a fresh look at how to meet that need. ORPC would welcome the opportunity to work with Ecology on necessary amendments to WAC chapter 173-518.

EXHIBIT 3
ECOLOGY'S DENIAL OF ORPC'S PETITION

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STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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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:

- o 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.
- o 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.
- o Conduct a new assessment of the net impacts on streamflows of anticipated rural groundwater withdrawals.
- o 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.
- o 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:

- o 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.
- o Each closure established in the adopted water management rule is appropriately based on a finding that water is not available for new appropriations.
- o 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
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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 cursive script that reads "Maia D. Bellon". The signature is written in black ink and extends across the width of the page.

Maia D. Bellon
Director

cc: Sarah E. Mack, Tupper Mack Wells PLLC