From: pearl hewett [redacted]
Sent: Friday, July 06, 2012 9:14 PM
To: Wessel, Ann (ECY); [redacted]
Subject: Dungeness Water Rule I support Kaj Ahlburgs' comment - we want answers

Dungeness Water Rule

I support Kaj Ahlburgs' comment - we want answers

Pearl Rains Hewett

Kaj Ahlburg
[redacted]

Ann Wessel July 5, 2012
Washington State Department of Ecology
ann.wessel@ecy.wa.gov

Dear Ms. Wessel,

Please find following my formal comments on the proposed Water Resources Management Program for the Dungeness portion of the Elwha-Dungeness Water Resource Inventory Area (WRIA) 18, Chapter 173-518 WAC. I will first offer some fairly broad comments, followed by more specific comments on the language of the rule and a list of questions. The questions submitted are part of my formal comments and I request they be answered in your Concise Explanatory Statement. The questions also serve as comments to make the appropriate changes to the extent the questions can not be satisfactorily answered.

General Comments

1. The cost benefit analysis (CBA) is flawed and needs to be redone. It does not include, or even consider, decreases in property values that would result from the proposed rule. It does not include, nor even consider, the diminution in economic activity as fewer people choose to engage in the now more expensive pursuit of building a house and landscaping a garden in the covered area. It also does not include or analyze the resulting loss of sales and property taxes and decrease in employment. It double counts the benefits from “avoided fish losses” and protecting salmon restoration: the only benefit of salmon restoration is avoiding fish losses. It uses an arbitrary and outlandishly high amount of over $20 million for benefits from avoiding litigation and increased certainty of development if the rule is passed, even though no litigation is pending or even threatened and the only uncertainty of development currently is the one caused by the threat of this rule. On the other hand it ignores the very real cost of the likely litigation if the rule is implemented as now written.

Ecology’s own economist, Mr. Tryg Hoff, is on the record with a formal notice that the costs of the rule exceed its benefits and that it fails under RCW 34.05.328 (1)(d). The economic

analysis now served up by Mr. Hoff's successor is indeed a *"'cooked' analysis"* that is *"ignoring the economic evidence",* as Mr. Hoff was pressured, but refused, to prepare. The approach suggested in comment 2. below would go far to bring benefits and costs more into balance.

The rule making process needs to be put on hold while an independent economic cost benefit analysis is done. Only if such analysis results in benefits exceeding costs should the rule making process continue. Any other result would almost certainly result in lengthy and expensive litigation in which Ecology's position would be very shaky.

2. Instead of requiring "mitigation" payments, Ecology should follow the Skagit County approach of having the State purchase the required water rights through an appropriation in its capital budget. This would also constitute a less burdensome alternative, as required by RCW 34.05.328 (1)(e), and cure the most serious problems with the cost/benefit analysis for the proposed rule currently being upside down, as described in comment 1. above.

3. RCW 19.85.040(1) requires the Small Business Economic Impact Statement (SBEIS) to *"consider, based on input received, whether compliance with the rule will cause businesses to lose sales or revenue".* The proposed rule will have material adverse effects on the revenues and profits of realty, building, landscaping and well drilling small businesses. To comply with RCW 19.85.040(1), the SBEIS needs to be revised to reflect that.

4. The metering requirement runs afoul of the RCW 34.05.328 (1)(e) least burdensome alternative rule. There are now sophisticated techniques for estimating well pump usage through residential electric metering, something that would clearly be less burdensome than spending $1.4 to $2.1 million on well meters and millions more on monitoring and administration. Your employee Robert Barwin's e-mail dated March 12, 2012, in which he wrote *"Given the relatively low costs of the metering requirement, I didn't even bother with describing a metering v. no metering alternative",* shows there never was the serious consideration of less burdensome alternatives required by RCW 34.05.328 (1)(e) with respect to a requirement expected to cost property owners millions of dollars.

5. There is insufficient peer reviewed scientific data on the hydrologic continuity between all private exempt wells and the streams in the Dungeness basin, particularly wells that draw water from the second or third aquifer down. Ecology claims that the confining beds separating these lower confined aquifers from the uppermost aquifer and the river beds are, in fact, permeable, but there is no peer reviewed scientific study supporting that assertion.

Section 90.54.030 (3) requires Ecology to *"Develop such additional data and studies pertaining to water and related resources as are necessary to accomplish the objectives of this chapter".* Ecology should commission such a study, and incorporate its results into the rules before proposing any final version of the rules.

Furthermore, in WRIA 17 a study performed, I believe, by the USGS showed that a very significant amount of water travels directly from the mountains underground through deep confined aquifers to the sea. If this were the case in the Dungeness basin, the focus should shift to attempting to bring some of this water up to the surface to allow it to replenish stream flows when they are low. A similar study should be performed for WRIA 18 East before implementing any rules.

Ecology should produce peer reviewed scientific studies that show which wells in which specific areas, and drilled at what depths into which aquifers, have hydrologic continuity with

streams in the Dungeness basin. Only those wells for which hydrologic continuity with rivers in the Dungeness Basin has been proven to have a material and adverse effect on stream flows, reducing them below required minimum instream flows, should the proposed rules subject to the restrictions you want to impose on all wells (metering, reduction in allowed daily withdrawals below 5,000 gpd, restrictions on outdoor watering, mitigation payments, etc.). Ecology has no statutory authority to regulate wells that can not be proven to be hydraulically connected and such an approach would violate the least burdensome alternative requirement.

6. RCW 90.54.020 (1) states that "*Uses of water for domestic, stock watering, … irrigation, … are declared to be beneficial."* Ecology's attempt to discriminate against outdoor water uses in the future is directly inconsistent with this statement. Such outdoor uses, which are an essential component of the rural life style of Clallam County, under the statute need to be given equal priority to "domestic use".

7. Ecology's internal e-mail correspondence (Tryg Hoff, Dave Nazy) on the rule making process shows that the estimated impact of permit-exempt well water withdrawals on the Dungeness is relatively de minimis – as little as 0.77cfs, an amount so small that is inside the error of measurement of the stream flow gauges used. This needs to be kept in mind when balancing the advisability of imposing severe restrictions on land use, development, and availability of affordable housing (restricting supply drives up price) against the benefits for fish habitat that might be achieved.

In "Findings – Purpose 1997 c 360 § 1" in connection with RCW 90.03.255 the legislature found that *"It is the goal of this act to strengthen the state's economy while maintaining and improving the overall quality of the state's environment."* The draconian restrictions on water use your draft rule would impose in the Dungeness Valley are directly contrary to the legislature's mandate in the Water Code to balance environmental protection against strengthening the state's economy. These restrictions also violate the maximum net benefits rule in RCW 90.54.020(2), which mandates that allocation of water resulting in maximum *"total benefits less costs including opportunities lost … for the people of the state"* (and not the fish of the state, whose interests have to balanced with, and can not override, the interests of the people).

8. The draft rule exceeds Ecology's statutory authority and contradicts common sense. This authority only extends to requiring instream flows equal to the stream flow derived from groundwater inflow or discharge, protecting currently existing instream flows, but not to requiring flow levels, as this draft rule does, that may be desirable from a fish habitat perspective but that in actuality have rarely been achieved. In some instances the minimum instream flows you propose to set have been achieved historically less than 10% of the time, and in others never. Required minimum instream flows for each stream and each month should be set at levels that for the last 10 years have actually been achieved a high percentage of the time (I suggest 80% or 90%).

WAC 173-518-020 states that the purpose of the rule is *"retain natural surface water bodies … with stream flows at levels necessary to protect instream values and resources"*. Please explain from where Ecology derives the statutory authority for such a purpose.

9. You propose that the priority date for an exempt well will be the date that water is put to beneficial use, and distinguish between the different subcategories of beneficial uses (e.g., prior domestic use does not give the right to water a garden in the future). Such a rule would be bad public policy.

It would tell a landowner who has a permitted well for future use that he must place it in use now, even if not needed, to avoid losing its use in the future when it will be needed. It would tell a landowner who owns land without a well on it that he perhaps plans to build on later, that he must immediately drill a well and begin using it. This would result, in addition to unnecessary consumption of electricity from running a well pump 24/7 (and think how hard our utilities are working to get everyone to save electricity) in over 1.8 million additional gallons of water (at 5,000 gpd) being extracted from the aquifer every year for each well. Surely this would be a result directly opposed to the goals of the proposed rule. A common sense adjustment is needed.

10. In WAC 173-518-085 (4) (c) you propose that 90% of outdoor water use should be assumed to be consumptive, compared to 10% for indoor use in a house served by a septic system. Instead of penalizing those who use their irrigation water efficiently, you should make allowances for the fact that much more water that flows through a drip system used at night returns to the aquifer, than, for example, would be the case for a sprinkler system used during the day. In fact, the recharge rate for an underground drip system should be no different than that for a septic tank drain field. Your own internal correspondence refers to a recharge rate of about 75% for water in irrigation ditches. The rate should be even higher for water discharged underground by a buried drip system. Any average percentage must be based on scientific evidence and take into account different means of irrigating and different recharge rates.

11. Pursuant to the Watershed Planning Act, Ecology must show deference to the will of the people of Clallam County, as expressed in their comments to you, and through their elected Board of Commissioners and Director of Community Development.

Section 90.82.005 states that "*The purpose of this chapter is to … provide local citizens with the maximum possible input concerning their goals and objectives for water resource management and development*."

Section 90.82.010 states that *"The local development of these plans serves vital local interests by placing it in the hands of people who have the greatest knowledge of both the resources and the aspirations of those who live and work in the watershed; and who have the greatest stake in the proper, long-term management of the resources."*

Finally, in "Findings -- 2003 1st sp.s. c 4 § 1" in connection with this RCW 90.82.040 the legislature stated that *"The legislature declares and reaffirms that a core principle embodied in chapter 90.82 RCW is that state agencies must work cooperatively with local citizens in a process of planning for future uses of water by giving local citizens and the governments closest to them the ability to determine the management of water in the WRIA or WRIAs being planned."*

During the June 28 public hearing you heard universal public opposition from almost 300 citizens, the only person in favor of the rule being an employee of a state environmental agency. The Board of County Commissioners is on record as unanimously being opposed to the rule as drafted, as is the City of Sequim, the major town in the area covered by the rule, and the Director of Community Development. A multitude of business and industry organizations from the affected area also are on record opposing the rule as now proposed. Ignoring this opposition and these statutory requirements and legislative intent can only lead to unnecessary litigation and lengthy delays in the implementation of any rule.

Specific drafting comments

1. WAC 173-518-070(2) - Specify under what statutory authority the RCW 90.44.050 right for permit-exempt well water withdrawals can not be exercised if connection to a public water supply is available, even if only at exorbitant cost. In the absence of such authority, remove this provision. Specify precisely what written evidence that connection is not available will be acceptable under the rule.

2. WAC 173-518-070(3)(a)(i) – Specify exactly how drilling to the middle or deep aquifer is encouraged. Given per foot drilling costs, doing so may well cost the homeowner thousands or tens of thousands of dollars extra. How will he be compensated for, or incentivized to incur, such an expenditure?

3. WAC 173-518-075, line 5: add after "ecology approval", "which shall not be unreasonably withheld".

4. WAC 173-518-075(3): delete in line 2 ", for any reason," and add after "adequate" in line 3 "in its reasonable judgment".

5. WAC 173-518-075(3)(g): add after "ecology", "in its reasonable judgment".

6. WAC 173-518-080, 2. paragraph, line 2: add after "supply", "and outdoor irrigation of an area not exceeding ½ acre per residence" (see general Comment #6 above).

7. WAC 173-518-110(3), line 3: add after "causing", "material".

8. WAC 173-518-120: add a subsection (3) reading "Ecology shall initiate a review, and if necessary amend, this rule if requested by the Clallam County government at any time more than five years after its implementation."

Questions

1. What section in the state statutes provides Ecology with the authority to override RCW 90.44.050 with an agency rule? Since in the proposed rule it seems the availability of reserves or mitigation can not be assured in all cases, the rule if adopted would override RCW 90.44.050 in those cases.

2. Why didn't Ecology examine depreciated land value as a result of the rule? Land with use of the exemption outlined in RCW 90.44.050 is clearly worth more than when you have to pay for water, or in some cases have the uncertainty as to whether water from reserves or mitigation will be available at all. Why did your economists fail to describe and analyze this?

3. P. 20 of the CBA states that existing state law requires metering of all new withdrawals, including permit exempt ones, in the Dungeness watershed (WRIA 18). Are you referring to all of WRIA 18 or just the area affected by this rule? What section in the RCWs contains that requirement? Where in state law is the area affected by this rule, constituting only a portion of WRIA 18, defined?

4. Pp. 20 – 21 of the CBA introduces the concept of “maximum depletion amounts”, which you admit “is new to instream flow rules”. On what section of the RCWs does Ecology base its statutory authority to create this new concept now and use it in a rule?

5. P.21 of the CBA states that “new permit-exempt well use may not occur where an existing municipal water supplier can provide service”. What constitutes the statutory authority that overrides permission to withdraw public groundwaters under RCW 90.44.050, which contains no such qualification?

6. P.27 of the CBA states that the cost of foregoing outdoor water use, where neither reserves nor mitigation credits are available, is $1,000 per household. Given the common rule of thumb of spending about 10% of the value of the house on landscaping, and given that the mean price for a detached home in the Sequim area is over $250,000, how did you arrive at a “cost” of a mere $1,000 for not being able to have outdoor landscaping for which the homeowner on average would have been willing to pay over $25,000?

7. Why is litigation part of the “baseline”? What evidence supports this assumption?

8. Do you have hard factual proof for the assertion that “permit-exempt uses are at an elevated risk of being litigated”?

9. Why does the assumption of litigation also include an assumption that development throughout the entire basin would be brought to a halt?

10. How exactly was the $19.9 to $62.1 million cost of avoided litigation arrived at?

11. Who exactly would have borne the assumed cost of litigation?

12. How is the assumed cost of litigation divided between attorneys’ fees, judgments for damages and reduced property values of the parties assumed to be losing?

13. On what are the assumptions regarding who would win or lose the lawsuits, and the likelihood they would be settled rather than litigated to conclusion, based?

14. Please set forth in detail: (a) the amounts of irrigator water rights (p. 10 of the preliminary CBA mentions 518 cfs in 1924), (b) when they were established, (c) where applicable, the dates on which failure to beneficially use each of those rights led to their automatic extinction, and (d) quantify in cfs rights for how much irrigation water were extinguished on what dates due to lack of beneficial use, and what rights are still in existence (with last known date of beneficial use). It is important to understand that water rights purchased by a water bank from irrigators actually are water rights that have been in recent enough beneficial use to still be valid. It also is important to understand by how much senior withdrawal rights have diminished since 1924 simply through non-use and relinquishment.

15. What is the expected cost in terms of agricultural production and jobs of agricultural land taken out of production as a result of no longer being able to be irrigated because the irrigation water rights were sold to the water bank to be used for mitigation? Why is this cost not included in the cost/benefit analysis?

16. Why does the proposed rule and analysis involve your agreement with the Jamestown S'Klallam Tribe and the proposal to restore stream flows? What legal authority does Ecology have to *restore* stream flow, rather than just requiring instream flows equal to the stream flow derived from groundwater inflow or discharge?

17. Why does Ecology utilize hypothetical impairment claims? Where is the statutory authority to do so?

18. If all the rivers are hydraulically connected, how can you close some year round and not others?

19. What is "administratively closed", what was the authority and basis for such an action and when was it taken, and why does Ecology believe this has legal significance as part of the baseline if there currently are no restrictions on permit-exempt wells in the affected area?

20. What statute authorizes the definition of "closure"?

21. What statute authorizes "mitigation" as utilized as part of the definition of "closure"?

22. What statute or legal precedent authorizes the definition of "hydraulically connected"?

23. Why does your least burdensome alternative analysis ignore many less burdensome alternatives, such as the wholesale purchase of water rights by the state or another entity, or impounding excess spring run off water and releasing it back into the rivers in late summer, when stream flows are lowest?

24. How does Ecology decide to close a basin that historically shows less water use every year? Why wasn't historic water use presented in the analysis? Why are water available and water used not described?

25. Who formulated the Overriding Considerations of the Public Interest determinations?

26. Who do you expect will sue claiming that the benefits of this rule don't exceed the costs? What do you expect the plaintiffs' causes of action to be?

27. Table 3 in the CBA projects 162 to 403 new domestic uses per year. How can this be accurate when Clallam County estimates an average of 65 new building permits per year outside a service area? Please explain the calculations.

28. RCW 19.85.040(2)(d) requires that the Small Business Economic Impact Statement include an estimate of the number of jobs that will be created or lost as the result of compliance with the proposed rule. Why was this not done?

29. RCW 19.85.040 requires the agency to describe in the Small Business Economic Impact Statement the additional costs to businesses, how the agency reduced regulatory requirements, how small businesses were involved in the development of the rule, a description

of the steps to reduce the costs on small businesses, and a variety of other items that must be analyzed. Why was this not done?

I look for forward to your responses. I strongly urge you to place the rule making process on hold while an independent economic cost benefit analysis is prepared. Thank you for your consideration.

Sincerely,

Kaj Ahlburg