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JUN 27 2012

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OFFICE OF DIRECTOR



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June 26, 2012

Ann Wessel, Instream Flow Rule Lead
Washington State Department of Ecology
1440 10th Street, Suite 102
Bellingham WA 98225

Ted Sturdevant, Director
Washington State Department of Ecology
PO Box 47600
Olympia WA 98504-7600

Re: Official Comments to Proposed Rule 173-518

Dear Ms. Wessel and Mr. Sturdevant:

I represent the City of Sequim with respect to proposed final administrative rule 173-518.

We are submitting comments on the proposed final rule.

General Comments

The rule in its entirety has a defect which is more clearly set forth in the proposed WAC 173-518-010. That defect is that the statutory definition of WRIA 18, as recognized by the Legislature in much of the enabling law [RCW 90.82.020(4), 90.71.010(13) and 90.74.010(6)], includes the Elwha/Morse Creek watershed, the Morse Creek/Bagley watershed, the Dungeness watershed, and the Bell/Johnson watershed. With that broad area, the statutory requirement [RCW 90.82.060(2)(a)] for a voting member to be the largest city in the WRIA mandated that Port Angeles be the voting city, and thereby excluded Sequim from a vote and from direct funding under 90.82.040. However, the new rule covers *only* the Dungeness watershed and several other minor watersheds but specifically *excludes* the Elwha/Morse Creek watershed basin. With that exclusion, Sequim is the largest city in the WRIA. Thus the City of Sequim would be entitled to a vote and to funding for rule development. The map referenced in this section as an attachment is not the map approved by the State in the above-listed rules and their references to existing WACs. The attached map excludes the Elwha basin which is part of WRIA 18.

The statutory history authorizing the development of WRIA rules mandates that the largest affected city in the WRIA and county and irrigation district users get to sit at the table and try to agree on a rule utilizing State funding. In fact, such city and the county have a vote. When the voting members approved the concepts in this rule, the City of Sequim did not have any authority to vote. Consequently, the City of Sequim did not have any power to structure the proposed watershed rule upon which this rule says it is based. Had the City of Sequim been able to so vote, an entirely different rule may have been proposed by agreement. A different rule definitely would have been proposed by Sequim.

By excluding the Elwha/Morse Creek watershed basin from the current rule definition of WRIA 18, the Department of Ecology is creating a new and different WRIA. This is not authorized by the enabling statutes.

The City is concerned that in subsection (4) of section 010, DOE specifically references decisions made by the voting entities and states that the 2005 plan was the foundation and basis for this rule. Thus, the rule is flawed from its inception. The City of Sequim should have been a voting entity if we were dealing with the Dungeness basin. Thus, Sequim is placed at a disadvantage in a number of ways: It was not a voting member for the full WRIA 18, the rule does not affect the Elwha/Morse Creek watershed basin, and the votes of the statutorily-authorized voting entities negatively affects Sequim when the basin is limited to the Dungeness and other basins where the City of Sequim would have been a voting member.

In addition to the City's concerns that we may have been able to agree on a rule without DOE imposing a rule, the exclusion of the Elwha/Morse Creek watershed basin presents substantial obstacles to the City's potential desire to use Elwha/Morse Creek watershed basin water both from a direct purchase of water rights standpoint and from an intertie standpoint. It is respectfully submitted that DOE should either follow the definition created by statutory recognition of WRIA 18 --- which definition includes the Elwha/Morse Creek watershed basin --- or DOE should seek legislative authority to create a new WRIA, such as 18 East. It is the City of Sequim's position that failure to properly identify the WRIA and the attempt to regulate a different area of land than is authorized by statute and regulation invalidates the proposed rule.

Another general comment also related to WAC 173-518-010(3) is the fact that the language of the section *does appear to* consider the laws applicable to municipal water systems. Generally speaking, the language changes from the draft rule appear to deal with a requirement that the withdrawals be put to regular beneficial use only for exempt wells. This of course is *not* a requirement for municipal systems, which are regulated under the "pumps and pipes" theory. It still is a requirement for other non-municipal permitted water rights holders. However, it appears that the first bullet under (3) covers it. It is suggested that the rule use conventional numbering where each of the four bullets be replaced with (a), (b), (c) and (d).

Another concern in the same section is that it is not intended to affect "federal and tribal reserved rights." There is no definition of federal and tribal "reserved rights." There are, of course, various speculative federal and tribal "reserved rights." It would seem more reasonable to change that sentence to "federal and tribal legally protected rights to the extent of such legal protection." This issue has yet to be fully litigated and there is no reason for language in this rule which could be construed as either an admission by the State of Washington or as a grant of rights by the State.

Comments on Other Sections

Section 020, Purpose, does not follow the statutory language. Section 020 says a purpose is to set "stream flows at levels necessary to protect in-stream values and resources." It should read "necessary to protect currently existing in-stream flows and currently existing in-stream values." It should also state that it is also intended to protect existing water rights. The inclusion of "in-stream ... resources" is not authorized in enabling legislation.

Case law seems to say that aesthetic use of water for such things as ornamental ponds and "water features" is contrary to good water management.

In the definition section, 030, the term “beneficial use” is vastly improved from the earlier draft except that the inclusion of the WAC reference still includes a definition not provided for in statute.

From case law and past practice of DOE, it appears that such things as new ornamental pools and water features, while perhaps aesthetically pleasing, would not be beneficial uses, while older pools and fountains might be under the statutory definition. Again, the referenced WAC should be precisely consistent with the statute.

“Closure.” The term, “closure” does not appear in statutes. “Withdrawal from appropriation” does [RCW 90.54.050(2)], but the “closure” definition is not authorized by statute, nor have the required findings or hearing notices been promulgated. The required language and the interpretation in AGO 2009 #6 should be followed. The term “mitigation” as set forth in the definition of “closure” is found nowhere in water law statutes relating to water rights and possible potable water except once in the policy section of RCW 90.42. Thus, mitigation as provided for in the definition of “closure” is not authorized by statute. Nowhere in water law is there a provision where DOE is allowed to withdraw from appropriation water from any basin because of shortage or pending shortage, and then turn around and “sell” water rights under the guise of mitigation. While this may be crucial to DOE’s concept of “water banking,” it is not authorized by statute. It is respectfully submitted that DOE, if it wishes to obtain water rights, whether it calls that obtaining of water rights “reserving water rights” or “the obtaining of water rights,” needs to apply for water rights like any other user and, unless DOE is a municipal water supplier, it must use those rights within the statutory time period or lose them.

“Domestic Use.” This definition is not correct unless limited to exempt wells. While AGO 2009 #6 spells out that garden watering cannot be included in the 5000 gallons per day exempt well amount (because there is another statutory right to exempt water for such uses in addition to the 5000 gallons per day), the statutes dealing with exempt wells are not authorized to define domestic use for other water rights such as municipal water rights.

“Hydraulically connected.” The definition of “hydraulically connected” does not fit any statutory definition and does not fit the court definition found in Postema v. Pollution Control Hearings Board, 142 Wn 2d 68, 76, 11 P3d 726 (2000). It is respectfully submitted that Postema is the only authority DOE has for regulation based upon hydrologic connectivity, and we should use the definition found in that case. This is critical for validity of the Rule because such connectivity must be the basis for the withdrawal from appropriation of the waters in the Dungeness Basin. Are some wells in the basin not hydraulically connected? If so, which ones? If there are wells which are not so connected, how can this rule apply to them?

“In-stream flow” definition. The minimum flows set appear to be under the statutory authority found only in RCW 90.22. RCW 90.22.020 requires prerequisite notices. It is questionable whether notices given under the WRIA planning statute and which do not specifically mention RCW 90.22.020 qualify as proper notices to set minimum in-stream flow. Further, minimum in-stream flow must be consistent with the *existing in-stream flow* based upon current lawful water usage. Any authority to set minimum in-stream flow probably comes from the Clean Water Act, 33 USC §1251-1387 (1972 and 1977). See Public Utility District #1 of Pend Oreille County v. State Department of Ecology, 146 Wn 2d 788, 51 P3d 744 (2002), and 40 CFR § 131.12 (1993). Thus, until an in-stream flow amount is adopted, assuming proper notice, the rule can protect only what exists at the time the rule is adopted, not what the “historical” in-stream flow used to be. Even if the rule could relate back to earlier in-stream flows, those could not be earlier than 1977.

“Mitigation” definition. The mitigation definition does not fit any statutory requirements and it must do so. The best definition is probably found in RCW 90.03.265(1)(d). It is respectfully submitted that DOE, in a rule, is not entitled to contradict, supersede, or expand the statutory definition.

Municipal water system definition. It is respectfully suggested that a municipal water system definition be included. The definition should be the one found in RCW 90.03.015(3) and (4). It certainly would be appropriate to simply reference that the definition of municipal water system is the same as that contained in the referenced statute. This was suggested in our previous comments but not incorporated into the rule.

“Nonconsumptive use.” This term is not mentioned in statutes. It is an important term used in this rule. The term uses “water source” which is also not defined in the rule. Is the “water source” the whole river or the whole aquifer? If it is the river, then the tail water is a nonconsumptive use. If it is the aquifer, then water pumped from an aquifer but used in a way that “tail water” returns to the aquifer, is the amount of tail water nonconsumptive? More significant for Sequim, is water withdrawn from an aquifer which is processed and returned to the aquifer as Class A reclaimed water a nonconsumptive use?

The inclusion of Clean Water Act language dealing with quality as well as amount is inappropriate. There is Clean Water Act case law stating that water temperature is a “quality” factor. This concept should not be part of a water rights rule. This rule should not be skewed toward habitat protection, at least not to the exclusion of beneficial water reuse projects. There is no authority in the statutes for this definition. RCW 90.54.020 could provide some useful definitions.

“Reservation.” While this definition fits the rest of the rule, there is no authority for a reservation as so defined. The only authority appears to be RCW 90.54.050(1).

However, the findings in this rule seem to imply that there is no water available to “reserve.” You can’t reserve for future use, water which does not exist.

“Water resources inventory area (WRIA).” While the definition is nearly correct, it must be emphasized that the rule violates this very definition. The rule, to be statutorily correct, should state the date the WAC was referenced by the State Legislature when WRIsAs were statutorily authorized. E.g. WAC 173-500 as adopted on ___ date.

Water right change or transfer definition. This definition should simply be a statutory reference and should not attempt to interpret the statute. RCW 90.03.380 defines water rights changes or transfers. DOE has no authority to redefine these.

Water right permit definition. This term is defined by statute at RCW 90.03.250. Clearly, the definition provided by DOE does not meet the statutory definition and far exceeds the authority granted to DOE in the statute.

WAC 173-518-040(5) has some problematic wording. It deals with the term “new water uses” which could be construed to mean new uses under a permit authorizing such uses for municipal water supplies. While it is true that new uses for “use it or lose it” users may not have problems with the definition, municipal users should have problems with it. Municipal users may use water for new uses, within the limits of their water rights. Either municipal users should be excluded from this subsection, or the term “new uses” should be changed to “new water rights.”

In addition, generally this section in subsections (1) and (3) create water rights without a petition for establishment of those water rights. Section (5) interferes with municipal water rights as explained, and might require such municipal owners to need special permissions or be prohibited from taking additional water even though they own those water rights. RCW 90.03.247 sets forth requirements. There appears to be no authority to call in-stream flows “water rights,” especially when a petition to appropriate water has not been filed by DOE and proper notice to establish in-stream flows has not occurred. In addition, the proposed WAC 173-518-080 seems to create “super water rights” which are not subject to the in-stream flow rules. This does not appear to be allowed by statute, either.

WAC 173-518-050 closures. The only statute authorizing anything resembling “closures” appears to be RCW 90.54.050. That statute doesn’t specifically talk about the term “closures.” Since that statute requires specific notices, those notices should at least be referenced in section 050 and all the terms of the statute in section 050 should be the same terms used in the WAC section 050.

Further, in the statute, there is a requirement that DOE must find that there is not sufficient data to allow making sound decisions on appropriation. But that needs to be said in the WAC or in some findings. Absent that, the closure is not permitted.

It also appears that, under the statute, DOE needs to go through the State Senate and House standing committees first.

The law does not seem to allow DOE to withdraw water from further appropriations except for certain special applicants. In other words, you can't withdraw the waters from appropriation unless you have insufficient information to make sound decisions. If DOE has insufficient information to make sound decisions, DOE cannot turn around and withdraw even more waters and then set up some comprehensive scheme to allow "mitigation" without actually replacing the new appropriation of water. If in fact DOE has found that the basin is over-appropriated, there is even more reason why DOE cannot turn around and withdraw additional waters and set up a water bank and comprehensive mitigation plan. The statute simply doesn't allow it, however meritorious the intent may be. (The City's objections do not apply to distribution of DOE purchased trust water.)

WAC 173-518-060 Metering and reporting water use. This is a necessary component of water management for the future. This section does not go far enough. Wells which may be exempt from a water rights permit are not exempt from metering requirements under any statute or common law principle. All wells should be metered.

WAC 173-518-070, Future Groundwater Appropriations. This section is problematic for the City. This section appears to prohibit new withdrawals but then says that it does not apply "if connection to a public water supply is not available in a timely and reasonable manner" It then allows the drilling of private wells. This is inconceivable if in fact the basin is closed or if there is insufficient information to decide whether or not a basin should be closed. It appears that this section would potentially allow a city resident, when there is a moratorium on city water, to potentially develop in the city with water from an exempt well.

This section also does not deal with a public water system which has so many additional customers it cannot supply them. Will this be interpreted to mean that a city water system can use exempt wells under this section?

In addition, the City does not want to be in a position where it is required to provide such services and use up its limited water supplies outside of the city limits. It is respectfully submitted that DOE either closes waters to further appropriation, or doesn't close waters to further appropriation. DOE has no apparent authority to say, in effect, "There's no more water, but you can drill and appropriate more water if the City or PUD can't serve you because they have insufficient water and you pay for 'mitigation'."

A minor issue is that any such additional use of an exempt well should mandate metering of the entire exempt well.

WAC 173-518-080, Reserves of Water for Domestic Use, provides in the third paragraph that consumptive water use must be mitigated. There needs to be a provision stating that the section does not apply to municipal water systems within their maximum water right. Subsection (d) is unlawful. DOE must reserve a finite amount of water. Any additional reservation must be done by adoption of a rule, not by administrative fiat.

WAC 173-518-095, Storage Projects. The City has discussed above the problems with limiting the WRIA to a size other than as recognized by the Legislature. The problems with this subsection are similar. This section requires consultation with the tribes, Clallam County, Department of Fish and Wildlife and NOAA fisheries but does not even include the largest city in the WRIA, let alone Sequim in the modified WRIA. This is not acceptable. Sequim must be included in the list. It is respectfully submitted that the other largest water purveyor, the Public Utility District, should also be included in the list.

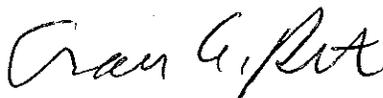
WAC 173-518-100, Lakes and Ponds. It is respectfully submitted that this provision should distinguish between *created* ponds and bodies of water and *natural* ponds and bodies of water. It appears that this particular section is intended to try to bring back what the Corps of Engineers lost with its court-ruled inability to require regulation of bodies of water and water not directly connected to navigable water. This section would also appear to be an attempt to change Washington law by recognizing something that doesn't exist in Washington law, namely the right to regulate non-mitigation-created wetlands such as ponds. Again, there is no exemption for municipal systems and there is no logic in the process. Ponds and many other artificial bodies of water waste water because they increase evaporation. This is particularly true of ornamental ponds. Ecology may have habitat protection justification in mind, but the language does not recognize that habitat protection is not specifically a justification of a water right, and the rule isn't even so limited to habitat restoration or protection.

WAC 173-518-140 Maps. This map is not the map of WRIA 18. It is a map of most of the Dungeness Basin. There is no statutory authority for this map. The map must include WRIA 18 as recognized by the Legislature.

The City of Sequim recognizes the efforts of the Department of Ecology to try to deal with the many conflicting interests in water rights regulation. The City also recognizes the lack of legal authority for DOE to deal with extremely significant issues such as limiting the 5000 gallon per day exempt wells. However, the City encourages

DOE to offer executive request bills to change the statute. It is respectfully suggested that attempting to do indirectly what is not lawful to do directly is a dangerous course fraught with potential legal challenges.

Yours truly,



Craig A. Ritchie
City Attorney

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