

From: Shirley Nixon [REDACTED]
Sent: Monday, July 09, 2012 4:49 PM
To: Wessel, Ann (ECY)
Subject: Shirley Nixon Comments - Set #3 - Dungeness Rule

Dear Ann Wessel,

This is my third and final set of comments on the proposed Dungeness Rule, Chapter 173-518 WAC. Thank you for considering them along with previous sets of comments emailed on June 29 and earlier today.

I would be happy to discuss all of these with you and others on the Dungeness Rule team.
Best regards,

Shirley Nixon
[REDACTED]

Shirley Nixon Comments on Proposed Dungeness Rule (comment set #3; July 9, 2012)
This third set of comments includes those specific to certain provisions of the proposed rule.

I. WAC 173-518-030 – Definitions.

- A. “Interruption” is defined as referring to water rights *issued* after the effective date of the rule. The term “issued” should be changed to “acquired”. Permit exempt water groundwater rights are not generally thought-of as “issued”; they are acquired via beneficial use. Such rights should clearly be subject to interruption under the rule, however.
- B. “Water budget neutral” is defined too broadly to include out-of-kind mitigation (non-water) mitigation for new consumptive uses. Remove the “either/or” language and change the definition of “water budget neutral” to that found in the November 2010 draft rule. That is:

“Water budget neutral” means an appropriation for a project where withdrawals of ground water are proposed in exchange for placement of other water rights into the trust water right program that are at least equivalent to the amount of consumptive use for the project.

Reasoning: In a watershed such as the Dungeness where recovery of ESA-listed salmon is limited by low flow conditions and water quality concerns, there is no practical substitute for water-for-water (bucket for bucket) mitigation for new water uses.

- II. **WAC 173-518-040 (3) –Priority Date of Rule.** I am unaware of any unanimous agreement among members of the Planning Unit that the priority date of the Dungeness Instream Flows will be the date of rule adoption. If there is no such agreement, then the priority date of the flows should be back-dated as prescribed in RCW 90.03.080(2)(a).

- III. **WAC 173-518-060 – Metering.** Metering and recording of all water use in the basin is important to successful water management, and this section should be expanded to include metering and reporting to Ecology of all future as well as existing water uses. This section should also be strengthened to clearly state that each water user is responsible for keeping and producing on request all historical metering records applicable to each water right.
- IV. **WAC 173-518-070 & WAC 173-518-075– Future groundwater appropriations and Mitigation Plans.** I disagree with this and future sections’ implications that it is possible to prospectively “mitigate” for new permit exempt groundwater uses through purchasing mitigation credits from a Water Exchange or elsewhere. A new use is either permit exempt (meaning no interaction with Ecology before putting water to use), or it is not. The only way the rule’s mitigation provisions would make legal sense to me in the context of an exempt well would be if the project proponent is required to submit a water right application under RCW 90.03.260, as allowed under the Ground water Code: *PROVIDED, FURTHER, That at the option of the party making withdrawals of groundwaters of the state not exceeding five thousand gallons per day, applications under this section... may be filed and permits and certificates obtained in the same manner and under the same requirements as is in this chapter provided in the case of withdrawals in excess of five thousand gallons a day.* RCW 90.44.050. Only upon receiving such a water right application would Ecology then be able to consider a tendering of mitigation. Ecology would apply the four-part-test, and issue a permit with appropriate mitigation conditions for the desired amount of domestic water. Just as with any other water right permit, the priority date would be the date of the water right application. A development schedule would be one of the conditions shown on the permit, a metering provision would be required and not optional, and the permittee would later return and “prove up” the amount of actual beneficial use.

Given case law, Attorney General Opinions, and my reading of the RCW’s, I believe that the only way that Ecology can legitimately – via rule - prevent new exempt well users from using a full measure of up to 5000 gallons of water per day would be to prohibit new exempt wells entirely and close the watershed. Assuming that a basin is closed, Ecology may then require by rule that each prospective new water user --- even a small domestic user --- submit a water right application and a mitigation plan to be processed under RCW 90.03.290. If such an application is received without a mitigation plan or the applicant refuses to mitigate, then the permit application must be denied. If the permit application passes muster via the groundwater model with the mitigation tendered by the applicant, then a new permit, and later a certificate for an amount less than 5000 gallons per day may be issued.

- V. **WAC 173-518-080 – Reserves of Water for Domestic Use & WAC 173-518-085 – Maximum Depletion Amounts.** I strongly disagree with the creation of such reserves, and disagree with Ecology’s citation to statutory OCPI to justify them. It is contrary to the public interest to continue to deplete flow-degraded rivers and streams – especially in fish-critical basins. Furthermore, it is bad enough that elsewhere in the proposed rule are reliances upon the assumption that indoor domestic water use will consume only 15 gallons of water per day, and that “septic recharge” will adequately mitigate for the rest of the daily water withdrawn. It is even more troubling that Ecology would adhere to this arbitrary consumptive quantity figure when guessing how much to “debit” a Reserve. The rule should eliminate all references to Reserves, and close the affected streams instead.
- VI. **WAC 173-518-090 – Future Maximum Allocation from the Dungeness Mainstem.** It is important to include a flow regime designed to protect high flows, which have their own important ecological functions. This provision should remain in the rule.