



July 10, 2009

Ann Wessel  
Water Resources Program  
Dept. of Ecology  
P.O. Box 47600  
Olympia, WA, 98504-7600

Re: Comments on proposed WAC 173-517

American Rivers (AR) and Washington Environmental Council (WEC) appreciate the opportunity to comment on the proposed instream flow regulations for Water Resource Inventory Area (WRIA) 17, the Quilcene-Snow basin.

AR and WEC recognize the hard work undertaken by the WRIA 17 Planning Unit and the Department of Ecology. We also appreciate the difficult task of developing instream flow regulations that include substantial components for managing water supplies in the future.

The proposed amendments touch on a number of critical topics, and we believe that there are ways in which the proposed rules can be improved and clarified. In addition to our general comments, we include a more specific section-by-section review.

### **General Comments**

AR and WEC continue to have concerns with the Department of Ecology's application of the reservation concept and the routine reliance on "overriding considerations of the public interest" (OCPI). While Ecology's 2004 instream flow guidance recognizes the extraordinary nature of the OCPI test and provides some direction on when there is "a clear showing" necessary to invoke the provision, it is unclear how Ecology weighs the relevant factors for an OCPI analysis and what factors tip the scales to warrant the creation of a reservation for future water use.<sup>1</sup>

We urge Ecology to better document the data used to justify OCPI. It is not at all obvious what information was used to develop, for example, the 20-year demand projections for water use and whether alternatives such as conservation (demand reduction and supplier efficiency) were properly evaluated. Given the consequential nature of the OCPI decision making, it would greatly assist outside observers if Ecology could include its reasoning – and the supporting data – within a single document.

---

<sup>1</sup> See "Setting Instream Flows and Allocating Water for Future Out-of-Stream Uses" at 8 (Sept. 2004).

Application of the OCPI test has different pros and cons for any instream flow rule. However, best available science should be the foundation for any water management policy, including instream flow rules. The National Marine Fisheries Service (NMFS) has publicly recommended closing specific subbasins in WRIA 17 and setting any reservation in those areas to zero. NMFS has not made similar recommendations in previous instream flow rulemaking processes. Since the quality of an instream flow rule depends on the science in a specific basin, Ecology should incorporate the recommendations from NMFS in the final rule.

Although we have concerns with the analysis and process for creating a water reservation, we are pleased to see that the proposed rule puts limits on new permit-exempt well withdrawals and requires more from prospective water users in order to access the reserved water.

## **Specific Sections**

### Definitions (Section .030)

The definition of a “mitigation plan” in subsection 12 does not include a requirement for sound science or continued monitoring and accountability. We urge Ecology to include a sound science requirement in subsection (12)(a) of the rule, and we also strongly recommend the inclusion of a monitoring and accountability requirement to section (12)(b) to ensure that the mitigation plan is not impairing existing water rights or instream flows.

### Compliance and Enforcement (Section .040)

We interpret this section as requiring Ecology to “prepare and distribute technical and educational information” both after final adoption of the rule to help the public comply with the instream flow rule *and* after a violation has occurred. Public education and prevention is always a good idea, and we appreciate the inclusion of this provision. However, we urge Ecology to also dedicate resources to monitoring and enforcement measures to ensure that the goals and protections afforded by the instream flow rule are protected.

### Regulation Review (Section .060)

Under RCW 90.54.040(2), Ecology has the authority modify existing regulations, which includes instream flow rules. The draft instream flow rule language adds a consultation requirement for Ecology to initiate a review and modify the rule. We agree that working with local governments, tribal governments, and other relevant entities in a collaborative way is necessary to manage water responsibly. However, we caution against creating new barriers to revising or upgrading instream flow rules based on new information. For example, the projected changes to water resources from climate change may require Ecology to use its authority to modify rules to better protect the values found in RCW 90.22.010.

For clarity, we also suggest that Ecology to include in this section the requirement to notify the county when 50%, 75%, and 100% of the reserve has been allocated, as found later in the rule under WAC 173-517-160(6). We also suggest that Ecology and the county notify the public on the results of the allocation review for reserved water.

#### Instream Flows (Section .090)

In order to make it clear that senior water rights are the only rights not subject to the instream flow, subsection (3)(a) should read, “Water rights existing *before* the effective date of this chapter.”

#### Closures (Section .100)

Peak flows play an important role in protecting ecosystem health and should be considered in any instream flow rule that closes a basin to future appropriations. We support closures of the surface waters in Table 5 of the draft rule. However, it is unclear whether the closures on the Big Quilcene River and Chimacum Creek adequately take into account the role of peak flows on those streams. Both of these streams provide critical habitat for salmon species listed under the Endangered Species Act. We recommend modifying the rule to protect peak flows and the ecological benefits they provide. We also want to reinforce the need for clear and transparent decision making that is grounded in science for any instream flow rule, including the decision to close basins that are over allocated and do not have available water for future consumptive uses.

An instream flow rule should not appear to endorse water supply approaches that undermine the values the rule is intended to protect. For that reason, we urge Ecology to remove the inclusion of storage in subsection 1. Storage projects often have devastating impacts on fish, wildlife, recreation, and aesthetic values, all of which are supposed to be protected by an instream flow rule. We suggest changing the sentence to read, “Ecology finds that there is some water available above the instream flows at specific locations and times of year in the Big Quilcene River and Chimacum Creek that could be appropriated for uses that do not require year-round water supplies.”

As currently drafted, the instream flow rule could – perhaps unintentionally – appear to support storage as an “ideal” temporary use to store winter flows. Any storage project should only be discussed after a credible demand assessment, consideration of alternative sources of water like conservation and efficiency, and involve a comprehensive review of all environmental impacts.

We are pleased to see that the draft rule closes surface waters in coastal management areas. We also support the draft rule’s prohibition of future groundwater withdrawals, which includes permit-exempt wells, from aquifers that are connected to closed surface streams to prevent reducing surface stream flows.

### Future Water Use (Section .110)

Again, we are pleased to see the prohibition on future surface and ground water use if the use would adversely affect closed surface waters. We support the rule's requirement that a potential groundwater user must use sound science and technical information to prove that the proposed withdrawal would not impact surface streams.

It is also appropriate for Ecology to demand mitigation for future water use, but we urge Ecology to clarify that a potential water user must complete a "water-for-water" mitigation plan supported by sound science. Again, we feel strongly that the rule should require a mitigation plan to be science-based and contain all the tools necessary to implement, monitor, and assess the effectiveness of a mitigation plan. The mitigation language from the Skagit instream flow rule is the best template for future rules.<sup>2</sup> Specifically, any water right that depends on mitigation should include a re-opener provision if the mitigation proves insufficient and it should require monitoring as part of the rule's requirement for "adequate assurances."

For clarity, we suggest taking out the words "chooses to" in subsection 4 so that the section reads, "The person or entity seeking to commence the new appropriation submits a mitigation plan as defined..."

Rainwater collection can play an important role in sustainable water resource management so long as the collection and consumptive use of rainwater does not adversely impact stream flows and aquifer levels. It appears that this rule provides sufficient safeguards to strike an appropriate balance for rainwater collection and use.

### Conservation Standard (Section .120)

The first step in a true "conservation standard" would be to require permit-exempt wells to connect to a public water supply system if the connection can be made in a timely and reasonable manner. The rule correctly requires this step in coastal management areas but not basin-wide.

We are pleased to see limits on withdrawals from new permit-exempt wells in the draft instream flow rule. It is unclear what aspect of water use must be consistent with county codes and other applicable laws. Presumably, the amount of water used from permit-exempt wells is subject to the limits found in the following two subsections of the instream flow rule (i.e., 500 gpd maximum for individual users or an annual average of 350 gpd; a maximum of 5,000 gpd for a group). The types of beneficial uses allowed under the exemption are found in RCW 90.44.050. Clarification of this provision is needed to guarantee that the limits set in the instream flow rule and existing law govern future withdrawals.

---

<sup>2</sup> WAC 173-503-060(1)(c).

We strongly support the provision in subsection (2)(a) that allows Ecology to stop the withdrawal of water from a future permit-exempt well if the agency determines that the mitigation plan submitted to allow for use of more than 500 gpd is not effective.

#### Designated Coastal Management Areas (Section .130)

We are very pleased to see a requirement for groundwater users to connect to public water systems. However, we are concerned that the rule excludes the requirement for perhaps the largest public supply system in the basin, the city of Port Townsend. We hope to see a clear rationale based in the science and hydrology of the basin for this decision.

#### Interruptible Rights (Section .140)

It is important for the public to know that certain rights may be considered interruptible and may result in shutting of the water use. Again, we urge Ecology to recognize the importance of peak flows for the health of the Big Quilcene and Chimacum Creek. As discussed in our general comments, earlier this year NMFS found that no additional water was available in either of these subbasins at any time during the year. The NMFS finding and the science behind it must be considered and used to finalize the WRIA 17 instream flow rule.<sup>3</sup>

#### Reserves of Water for Future Use (Section .150)

The condition for allowing access to reserved water found in subsection 2 is confusing. The language appears to add a requirement for the county to provide a written statement that potable water is available – presumably from the reservation -- at both the building permit and subdivision approval stages of a project before reserved water will be made available. What if the county does not provide a written statement to Ecology at the subdivision approval stage but does submit a written finding of available water at the building permit stage? In order to facilitate accurate accounting of the amount of water used in the reservation and the amount of water available, it is critical to make sure that the process for obtaining a reserved water allocation is clear.

As stated earlier, we support the requirement for potential permit-exempt well users to first connect to a public water supply system. We applaud Ecology for including this important requirement in the draft rule.

The NMFS article cited earlier raised serious concerns with reserved water allocations in the Little Quilcene River, Big Quilcene River, Chimacum Creek, Salmon Creek, and Snow Creek management areas due to flow needs for threatened fish species.<sup>4</sup> However, the draft rule allows thousands of gallons per day to be used. Moreover, the rule also

---

<sup>3</sup> “State water proposal growing fears”, Peninsula Daily News, January 30, 2009.

<sup>4</sup> “State water proposal growing fears”, Peninsula Daily News, January 30, 2009, “Longenbaugh also recommended that additional water proposed for withdrawal, or reserves, be reduced to zero for Chimacum, the Little Quilcene River and Salmon and Snow creeks.”

allows permit-exempt wells in these sensitive areas without consideration of hydraulic continuity and potential impacts to surface flows, which may ultimately compound the instream flow problem in these subbasins.

Although we appreciate the additional notification requirements for permit-exempt well users in these areas, we urge Ecology to reconsider the science and set the reserved water allocation to zero.

#### Reservation Accounting (Section .160)

We are strongly supportive of the requirement for measuring new water uses. We also believe that Ecology must compare and adjust water use data based on the water use measurements that users are required to submit. Currently, the rule states that Ecology “may” make such adjustments. In order to provide the most accurate accounting and management of the system, it is imperative that Ecology use the most accurate information possible, and we believe that the 250 gallon per day standard does not capture the peak usage that occurs during the low flow periods.

#### **Conclusion**

The Department of Ecology should be applauded for incorporating innovative measures like rainwater collection in the WRIA 17 instream flow rule. AR and WEC believe that there are improvements that should be made to the proposals, but in general we support Ecology’s efforts and encourage additional rulemaking to protect all the state’s rivers and streams.

Again, AR and WEC appreciate the opportunity to comment and hope that these comments assist in the Department’s efforts.

Sincerely,

Darcy Nonemacher  
American Rivers

Mo McBroom  
Washington Environmental Council