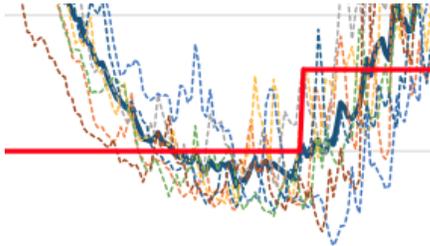


From: [Zachary Barborinas](#)
To: [Klug, Jacque \(ECY\)](#)
Cc: [Joe Mentor](#); [Jessica Kuchan](#)
Subject: Fisher Creek Mitigation Comments
Date: Thursday, April 03, 2014 3:28:11 PM
Attachments: [Screen Shot 2014-04-02 at 8.53.48 PM\[3\].png](#)
[Screen Shot 2014-04-02 at 9.15.45 PM.png](#)
[Screen Shot 2014-04-02 at 9.22.02 PM.png](#)
[942AB8A9-7966-4CC0-955B-6C0EC6EE2665.png](#)
[Screen Shot 2014-04-03 at 2.32.43 PM.png](#)
[Screen Shot 2014-04-03 at 2.35.02 PM.png](#)
[SkagitRuleDrafts&InternalMeetingNotes.pdf](#)

Jacque -

Here are my comments regarding the draft Fisher Creek Mitigation enhancement plan and few other items regarding the Skagit Watershed. Please let me know if my accompanying pictures did not make it through. They are clips from Ecology documents and elsewhere that support my comments. They are attached in their entirety for reference. I have cc'd Joe Mentor and Jessica Kuchan as well.

- The 2001 Instream Flow Rule needs to be amended with revised minimum instream flow levels. 10,000 cfs has not been historically met. Ecology granted a water right to fish that does not exist 100% of the time.



- Ecology failed to comply with RCW 90.54.020 (5) in the 2001 Instream Flow Rule Final Version filed. Ecology has a responsibility to preserve and protect water for domestic needs. Paragraph (2) removed.... Why is removal of a paragraph causing this current problem? Amend the rule and put this paragraph back. Science does not support its original removal so there is no scientific reason not to put it back.

February 7, 2000 – Final Draft

WAC 173-503-090 EXEMPTIONS. (1) Nothing in this chapter shall affect existing water rights, perfected riparian rights, federal Indian and non-Indian reserved rights, appropriative or otherwise existing on the effective date of this chapter, nor shall it affect existing rights relating to the operation of any navigation, hydroelectric, or water storage reservoir or related facilities.

(2) Single domestic shall be exempt from the provisions established in this chapter, except surface and ground waters specially closed to any further appropriation, including otherwise exempted single domestic uses. For all other streams, when the cumulative impact of single domestic diversion begin to significantly affect the quantity of water available for instream uses, then any water rights issued after that time shall be issued for in-house use only, if no alternative source is available. Consistent with local land use and water system plans, single domestic water users, exempted from permit requirements, shall hook up to a public water system when connection to such a system is practical and at that time discontinue self-supplied domestic supply.

(3) Nonconsumptive uses which are compatible with the intent of this chapter may be approved.

March 14, 2001 – Filed Version

173-503-070 Exemptions.

(1) Nothing in this chapter shall affect existing water rights, including perfected riparian rights, federal Indian and non-Indian reserved rights, or other appropriative rights existing on the effective date of this chapter, nor shall it affect existing rights relating to the operation of any hydroelectric or water storage reservoir or related facilities.

(2) Nonconsumptive uses which are compatible with the intent of this chapter may be approved.

- Ecology is basing the requirement to mitigate Fisher Creek on a 10,000 cfs minimum instream flow level measured at the MV/Burlington bridge. This measurement point is UPRIVER and 100% irrelevant to Fisher Creek. Carpenter-Fisher Subbasin and all other land DOWNRIVER from the measurement point should not require mitigation since Ecology arbitrarily included it in the 2001 Instream Flow Rule as part of the Skagit Watershed. There is absolutely no science to support its inclusion. Fidalgo Island was not included, yet it is part of the Skagit Watershed...why not? Because it is irrelevant to the measurement station.



- According to USGS, the measurement station at the Skagit Bridge is accurate to 0.01 ft and it takes 10-20 cfs (depending on level of river) to identify that change in the river's level. Fisher Creek 50 year projected impact is 0.02 cfs. Your measurement station to administer the law is NOT capable of measuring the impact Ecology claims to be detrimental to fish. (Besides the fact the measurement station is UPSTREAM from Fisher Creek). Or, that the Skagit River fluctuates over 1 ft. in height daily..... If landowner/farmer use of water is so negligent the measurement station cannot identify it at one localized spot, where exactly is habitat impairment occurring?
- Without "clear justification" Ecology did not include well use in the 2001 Instream Flow Rule. However, internal Ecology meeting notes dated April 27, 2000 also reveal the agency didn't know the effect of permitted wells on instream flows in the Skagit Watershed at that time. **Why are we spending millions in taxpayers money mitigating if the impairment to habitat was not known?**

3. Ground water

- No way to regulate against instream flows.
 - Dan would like to exclude exempt wells - but there does not seem to be a clear justification.
 - We don't know the effect of permitted wells on instream flows and would be forced to deny; or allow under "overriding consideration of the public interest".
- My understanding is that Ecology has nearly 600 cfs in water rights that have yet to be assigned. The Skagit Watershed is not maxed out. You have yet to fully determine that. Besides, further internal Ecology notes indicates this maximum allocation was a BIG ISSUE:

040 – Maximum Allocation – BIG ISSUE. Study team recommended a diversion cap as a "biologically-safe withdrawal level." Can we really put a cap on other than adjudicated water use? What about claims, especially those that haven't state level of use? There are 1347 claims in WRIA 3. As soon as we deny some applicant due to the Max Cap having been exceeded, we will surely end up in court.

- Need additional justification for allocation cap.
- In creation of the 2001 Instream Flow Rule, internal Ecology notes reveal they were very concerned with tribal rights? Why weren't taxpayer citizen rights considered?

090 – Exemptions – New language is needed to fully state that tribal rights are not affected by the rule.

- As noted in the draft mitigation report, "Ecology observed zero streamflow (e.g., a dry streambed) on a number of occasions during the dry season at the monitoring stations in Starbird Creek at Bulson Road and West Fork Little Fisher Creek near Countyline Road."
 - A 50-year projected impact of 9.3 GPM will not change this fact (dry stream-beds) and therefore landowners should not be held responsible for Ecology's desire to provide streamflow that never existed. The building moratorium should be lifted immediately since impairment is not happening from well use and this draft report just confirms it. Utilizing water that never existed in the stream is not habitat impairment.
 - Landowners should not be held financially responsible for Ecology's desire to create streamflow for fish.
- If a water right is purchased for these enhancement projects, the Department of Ecology needs to step up and take the responsibility of administering/monitoring/reporting them. You are the Water Resource Manager. This has nothing to do with Indians and not wanting them to own the water. This is an overall stakeholder problem. The vocal majority of stakeholders helped create this watershed problem. Ecology is only passing the buck if another stakeholder is named as the owner of the water rights. In my opinion, it is a conflict of interest. You are inviting more problems down the road. I recommend you name the landowners within the sub basin as owners, but Ecology oversees. You cannot let another stakeholder within the area own the water..... It will be a problem.
 - I am thankful for the Upper Skagit and their obvious efforts, however, why does it take a Tribal entity to provide Ecology a path forward? If Ecology is unwilling to openly place blame on the Stakeholders that created this problem, you cannot hide behind another. You are the Water Resource Manager in charge of a public trust. You are doing yourselves no service by hiding behind a sponsored enhancement project. This will become very obvious as these projects move on and it will not be accepted by citizens.
 - Outdoor watering must be included with this enhancement project. My property is currently for sale and "no outdoor watering" is an issue with interested buyers. I cannot sell my property.
 - Properties east or up-tributary from your proposed mitigation property sites need to be served by this enhancement project. This plan does not address the obvious roadblocks the Swinomish Tribe will bring forward regarding this detail.
- Realistically, this project needs to be scrapped and a legislative solution needs to occur. Provide landowners and farmers with water to live. Put a cap on it, limit it, monitor it, etc. But Ecology has not proven anything about impairment. Ecology will save themselves headaches in the

future if they make corrections to the horribly flawed 2001 Instream Flow Rule now.

Ecology is asking taxpaying citizens to buy into the "absurd environment" that was thankfully and rightfully acknowledged by David Hawkins. This enhancement project only perpetuates the problem. There needs to be a universal solution for everyone. The lack of science, and arbitrary and capricious nature of the 2001 Instream Flow Rule has no solid ground when it comes to exempt wells. If Ecology come forward with something realistic and sound that allows people to move on with there lives, I will be the first in line to make that happen collaboratively. I would jump at the opportunity to help in this fashion. Until then, I refuse to accept the absurdity of our reality. I just wish Ecology would as well.

Thank you for your time in considering these comments.

Regards,

Zachary J. Barborinas
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