WASHINGTON STATE DEPARTMENT OF ECOLOGY

Responsiveness Summary
and
Concise Explanatory Statement

For the adoption of:

Chapter 173-505 WAC
Water Resources Management & Instream Flow Program
Stillaguamish River Basin Water Resource Inventory Area (WRIA) 5

Administrative Order # 02-17

August 2005

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As required by the Washington State Administrative Act, Chapter 34.05 RCW.

RESPONSIVENESS SUMMARY
AND
CONCISE EXPLANATORY STATEMENT
FOR THE ADOPTION OF

CHAPTER 173-505 WAC, Water Resources Management Program – Stillaguamish River Basin Water Resource Inventory Area (WRIA) 5

Administrative Order # 02-17

Prepared by:

Steve Hirschey,[1] Thom Lufkin,[2] and Tasha French[3]

Washington State Department of Ecology

Water Resources Program
Northwest Regional Office, 3190 - 160th Ave. SE, Bellevue, WA 98008-5452

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[1] Water Resources Program, Northwest Regional Office, 3190 160th Ave. SE, Bellevue, WA 98008-5452
[2] Water Resources Program, Headquarters Office, PO Box 47600, Olympia, WA, 98504-6700
[3] Information Technology Program, Headquarters Office, PO Box 47600, Olympia, WA, 98504-6700

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I. Introduction and Background

The Water Resources Act of 1971 provides that the quality of the natural environment shall be protected and, where possible enhanced. In addition, perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. (See chapter 90.54.020(3) Revised Code of Washington (RCW))

The Washington State Department of Ecology's (Ecology) Water Resources Program (Program) determined that it was necessary to develop an Instream Resource Protection Program (IRPP) setting instream flows for certain streams and river segments and in some cases stream closures within the Stillaguamish River Basin. The Stillaguamish River Basin is named Water Resource Inventory Area (WRIA) 5 pursuant to chapter 173-500 Washington Administrative Code (WAC).

The purpose of the instream flow rule for WRIA 5 is to establish a water right for instream flows to satisfy the statutory directive to protect the instream resources of fish, wildlife, water quality, navigation, recreation, scenic, aesthetic and other environmental values. Instream flow requirements will be conditioned by permit proviso on new water right applications, or applications to change existing water rights that affect sources of water covered by the proposed rule.

The rule-making process has increased awareness that water allocation decisions and the retention of flows instream must be made in the context of a more holistic watershed approach to water management than has historically been the case. The Stillaguamish River Implementation Review Committee (SIRC) was organized to address stream habitat and water management issues in the basin. Members include representatives from Tribes, federal and local government, special interest groups, and the general public. Public participation in the rule development process is critical to the successful adoption and implementation of an instream flow rule.

Purpose of this rule

The purpose of the instream flow rule for WRIA 5 is to establish a water right for instream flows to satisfy the statutory directive to protect the instream resources of fish, wildlife, water quality, navigation, and recreation, scenic, aesthetic and other environmental values.

Key elements of this rule

The rule:

- Establishes instream flows to protect aquatic resources, including habitat for threatened and endangered salmonids;
- Establishes a reserve of water to meet new rural domestic and business potable needs
- Establishes a reserve of ground water to meet new stock watering needs;
- Establishes a maximum allocation of water during peak runoff that will provide some water for storage while protecting stream ecological functions; and
- Establishes procedures for future water use permitting, reservation implementation.

Statutory authority for this rule

Authority for promulgation of the rule resides in a number of statutes as follows:

RCW 43.21A.064(9)	Department of Ecology
RCW 43.27A.090(11)	Water Resources
Chapter 90.22 RCW	Minimum Water Flows & Levels
Chapter 90.54 RCW	Water Resources Act of 1971

The Water Resources Act of 1971 provides that the quality of the natural environment shall be protected and, where possible enhanced. In addition, perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, and aesthetic and other environmental values, and navigational values. The Statute provides that these objectives will be satisfied through rule making. The code also provides the only way to create a water right for instream resource protection is through rule making. (See chapter 90.54.020(3) Revised Code of Washington (RCW))

Rule schedule

The **adoption date** of this rule will be **August 26, 2005.** The effective date will be 31 days after the rule is filed with the code reviser. Therefore, the **effective date** will be **September 26, 2005**.

II. Concise Explanatory Statement: Differences between the proposed and final rule

There are numerous changes from the rule published with the CR-102, and this rule adopted and published with the CR-103. The changes were made in response to comments as well as upon Ecology's initiative. All changes made are for rule clarity to more precisely identify the rule or requirement. The changes made do not change the substance or the intent of the rule.

WAC 173-505-010 General. In subsection (2)(b) the last half of the second sentence was deleted. The change was made to clarify the relationship of hydraulic continuity, impairment of instream flows, and provisions for junior water rights. The determination of hydraulic continuity and determination of impairment (effect on the flow or level of a stream or river) are two different questions. The presumption on hydraulic continuity was struck, as it is a fact specific inquiry.

WAC 173-505-020 Purpose. In subsection (2), the word reservation was made plural. The change was made because there are two stockwatering reservations. In subsection 3, the last sentence was modified to clearly state the rule's requirements do not replace statutory requirements. A commentor thought the rule supplanted or replace the statutory criteria for water right decision making and that is not the case. A sentence was added that the rule does not relieve anyone from compliance with relevant statutory requirements.

WAC 173-505-030 Definitions. A second sentence was added to the introductory language to clearly state that definitions in this section, if they are different than how the word is described in other water rules, is used for this chapter. The sentence added is "In the event that these definitions differ from those contained in related rules, the definitions presented here will supersede any others for this chapter."

The definition of "municipal water supplier" from the Statute was added because we deleted a definition of "public water supply". The term "municipal water supplier" is more precise and comports with the Municipal Water Law of 2003. The definition was added to facilitate users being able to locate terms instead of providing a statutory reference.

The definition of "municipal water supply purposes" from the Statute was added because we deleted a definition of "public water supply". The term "municipal water supply purposes" is more precise than "public water supply" and comports with the Municipal Water Law of 2003. The definition was added to facilitate users being able to locate terms instead of providing a statutory reference.

The definition of "public water system" was deleted and replace with "municipal water supplier". Some public water systems are not municipal water suppliers and that caused some commentor confusion related to the policy of requiring connection to public water system as compared to a municipal water supplier.

The definition of “reservation” was modified to more clearly state the effective date of a reservation, as well as the priority date of a given appropriation from a reservation, is the same as the effective date of this chapter.

The definition of “timely and reasonable” was deleted. The term as defined in the original proposal did not comport with the term as used and defined by Department of Health. The term is also one part of a municipal water suppliers’ duty to serve under RCW 43.20.260. To avoid confusion, we deleted the version in the rule.
WAC 173-505-040 Establishment of stream management units. The location description of the Jim Creek station had the wrong longitude. The longitude in the proposed rule was 122 03 07. The correct longitude is 122 03 06. The location of the station did not change.

WAC 173-505-070 Stream closures. In subsection (1) the language on hydraulic continuity of ground water and closure of surface water was clarified. The closure applies to ground water the withdrawal of which will have an effect on the flow or level of the rivers and streams.

In subsection (2) we list the exceptions to the closures. Originally, Ecology did not list section 060, lakes, because a lake is not a stream. However, a commentor was confused as to whether or not lakes were subject to the closure. Lakes are not subject to the closure so we added section 060 to the list of sections excepted from the closure to clearly state that lakes are not closed.

In subsection (3), first sentence, we changed the word “noninterruptable” to be “uninterruptible”. The change was made for consistency because uninterruptible is the word used in the rest of the chapter. The words mean the same thing.

WAC 173-505-080 Future stock watering. In subsection (1)(b) the second sentence was was changed to read "Uses that meet the following conditions shall be considered to qualify as direct stock watering from a stream:" The change was made to recognize that stockwatering tanks that meet the criteria of the rule are recognizes as a direct diversion and not a change of water right.

In subsection (2), the volume of the reserve was changed from two to twenty. An error was discovered in calculating the reserve. The change of two to twenty is substantially different from the proposed rule. The effect of the change is to allow more stockwatering in the future than would have been satisfied with two acre-feet. Also in subsection (2) the language related to a daily limit on use of water the ground water reserve was deleted. The language deleted is “of up to five thousand gallons per day for individual users.” The language was deleted because of a recent Attorney General’s informal opinion that stockwatering via the ground water permit exempt well is unlimited as to a daily volume. The informal opinion is contrary to previous guidance on this issue. Because of the uncertainty surrounding this issue the language was removed.

WAC 173-505-090 Reservation of permit-exempt ground water for future domestic uses. Subsection (2)(a) was modified to more clearly state the water from the reservation is for single or group domestic use. The new language is “This reservation is for either single or small group domestic uses, as defined in WAC 173-505-030(5).”

A new subsection (2)(d) was written to replace the old (2)(d)(i) to reflect the policy local government’s recognize the reservation to activate it if they make decisions regarding water supply for buildings requiring potable water or a decision on the platting of property and the project proponent will use water from the reserve. This idea was in the original proposed rule as requiring local governments to make the terms and conditions of the reservation a term and condition of a building permit. That language was deleted.

Subsection (2)(e) was modified to clearly state that an applicant for a building permit or subdivision approval proposing a water use under the reservation must comply with the terms of the reservation. The reference to subsection “b” was deleted as it is not applicable to the water user.

A new subsection (2)(f) was drafted to replace the old (2)(e)to make a better connection to the RCW 43.20.260 and the Municipal Water Law of 2003. The policy or requirement is the same, the new language is more precise and removed confusion regarding public water systems that are not subject to RCW 43.20.260.

The old subsection (2)(f) was deleted in response to commentors who said it was unreasonable, unworkable and could not be enforced. This is the section of the proposed rule that would have required water wells constructed after the effective date of the rule, and within the service area of a public water system to be abandoned if pubic water supply was extended into the area. Ecology recognized it was problematic and deleted the language.

The old subsection (3) related to Ecology providing notice of the reservation was deleted. The same idea with different language is reflected in new subsection (2)(d).

In the proposed subsection (4), second sentence, the word "only" was struck from the sentence. The word was struck because the list of other water sources was not exclusive. There are other ways to meet water needs than "only" the ones listed.

In subsection (4)(b) the language "The county or city shall provide ecology with an annual report on the number of building permits and subdivision approvals that will use water from the reservation. This report must also identify the type of use associated with each approval." was deleted. Several comments noted the language appeared to be an unfunded mandate from the State and or the State was trying to get the local governments to do the reservation accounting. It was also noted that Ecology lacked statutory authority to compel the local governments to provide the data. It was not and is not Ecology's intent to have the local governments do the reservation accounting. To avoid confusion, the language was deleted. Ecology will still use the information from the local governments, however it is not a requirement of the rule.

Proposed subsection (6) was deleted because of confusion it created. The policy is that if conditions change, Ecology will reevaluate the reservation of water and its use. Ecology was not specific that this reevaluation would be done by rule making. The section was deleted since proposed WAC 173-505-170, Regulation Review provides for an opportunity to review the rule. The deleted language was duplicative.

Subsection 090(7)(a) was modified to add the idea that accounting for water use under the reservation can include empirical data on actual water use.

WAC 173-505-100 Maximum allocations. In subsection (2), first sentence, the reference to a USGS gage on the Stillaguamish River at Silvana was changed to refer to an Ecology gage at the same location.

Subsection (3) was modified to clearly state that existing water rights are not subject to instream flow requirements. The language created confusion as to whether or not existing rights would be subject to instream flows. That is not the case. The proposed rule in section 010(3) says existing rights are not affected. For the rule to be internally consistent, consistent with statutes, and avoid confusion, the change was made.

WAC 173-505-110 Future permitting actions. In subsection (1)(c) the word "additional" was deleted. The word implied that existing studies may not be sufficient and that is not the case. To avoid confusion the change was made.

WAC 173-505-120 Alternative sources of water. In subsection (2) the words "the proposed" was replaced with " a new". The originally proposed language was not clear that alternative sources of water can be used instead of a new source.

III. Summary of Public Involvement Opportunities for the Stillaguamish Instream Resources Protection and Water Resources Program, Chapter 173-505 WAC.

The rule was developed by the Department of Ecology in conjunction with regional salmon recovery groups, with feedback from the Tribes, local government and utilities and other interested groups and citizens.

A focus sheet was prepared and mailed out when the CR-102 was published on February 16, 2005. It was mailed to over 300 interested parties. A news release was sent out on February 17, 2005. A message was also sent to Ecology's Water Resources "listserv," which contains over 600 names and email addresses on February 18, 2005.

Newspaper ads announcing the open comment period and public hearings were published on March 10 and March 17, 2005 in the following newspapers:

- Everett Herald
- Skagit Valley Herald
- Arlington Times

A public hearing was held in Mount Vernon on March 24, 2005 at the Police and Court Campus. Eleven people were present at the hearing in Mount Vernon and three of them gave public comments. Another public hearing was held in Arlington, also on March 24, 2005, at the Stillaguamish Valley Museum in the Pioneer Hall. A total of seventy people were in attendance at the Arlington hearing and fourteen people gave public comments.

The Water Resources Program solicited written comments on the rule until April 25, 2005. The comment period was then extended to allow more time for additional comments. The extension was from April 25, 2005 to May 13, 2005. The comment period extension was published in the same newspapers as above.

IV. Responsiveness Summary

Section 010 – General

Comment 208

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Darrington Hearing on Skagit rule proposal, March 8, 2005

Comment: I. . .would like to thank Ecology for all of its work, and I have spent the better part of two years working with Dan and Geoff and others trying to find a solution to the problem of reconciling the needs for water for aquatic resources and for the county's population. Unfortunately, I think we are still a long ways away from finding that solution.

Response: Thank you for your comment. Ecology is more than willing to continue the dialogue with Skagit County regarding water right management and issues in the Stillaguamish Basin.

Comment 209

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Darrington Hearing on Skagit rule proposal, March 8, 2005; Mt. Vernon Hearing on Skagit rule proposal, March 9, 2005

Comment: O-D: Skagit County's interests are in developing and implementing a fair and effective program to protect and restore aquatic resources, but at the same time to ensure an adequate reliable water supply for its citizens. Specifically, the county's interested in ensuring that there is a supply to accommodate the future needs of the county's growing population for domestic supply protecting the county's agricultural base, and providing water for other future economic needs and protecting the property rights of its citizens. The proposed, the rule as it is currently proposed, the rule amendment I should say, fails to address the county's concerns, and we would like for it to be substantially revised.

O-MV: For the record I would like to summarize briefly the county's concerns. First, the county is interested in developing and implementing a fair and effective program to protect and restore aquatic resources. For that reason the county has adopted a stringent critical areas ordinance in an agreement in 2004 in agreement with the upper Skagit Tribe to impose significant restrictions on development in the Upper Skagit Basin. The county also is interested in ensuring an adequate reliable water supply for its citizens. That means accommodating future needs for domestic supply and taking into account the county's comp plan and utility plans, protecting the county's agricultural base, taking into account changing conditions and increasing needs for water for agriculture and also for your other future economic needs and finally protecting the property rights of Skagit County citizens. Unfortunately, the rule does none of these things, and for that reason we believe that it should be substantially revised before it becomes final.

Response: Thank you for your comment. Ecology recognizes Skagit County's interests and responsibilities in implementing a fair and effective program to protect and restore aquatic resources and at the same time to ensure an adequate reliable water supply for its citizens. Ecology believes the proposed rule provides clarity and predictability for the development of new sources and the reallocation of existing sources. Meeting new demands will take a combination of both.

Comment 210

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Darrington Hearing on Skagit rule proposal, March 8, 2005; Mt. Vernon Hearing on Skagit rule proposal, March 9, 2005

Comment: O-D: Based on the frequency of flows as was shown in the presentation tonight, we do not believe that building permits can be issued in large areas of the county. The county's water supplies under the reservations that are described in the rule will be exhausted within a matter of 15 to 20 years. With all due respect to the Department of Ecology, the amount of water in the reservation is a pittance compared to the amount of water that is available in this basin.

O-MV: Based on the frequency of flows under the rule, building permits cannot be issued by the county except for use by those where for the reservation is available. Yet we believe that reservation is illusory, is far inadequate to meet the needs that the county has identified. The flows in the river are -- are low, they are below the -- they are rarely met and for that reason we believe they are too high. In fact, the flows this year have fallen below the amount set in the instream flow rule since about the middle of February, and so as of mid-February we would be under significant water restrictions in this county.

Response: Thank you for your comment. Ecology recognizes that the reservations of water are finite and that they will be fully used someday - assuming growth beyond the current twenty year population projection occurs. Given a long enough time-period, it is reasonable to say the reservations will be used. The Legislature recognized the finite and variable supply of water by adopting the Prior Appropriation doctrine into law many years ago. It is axiomatic that at some point in time, available supplies will be allocated. At that point in time, new or additional water uses will have to be met from reallocation of existing supplies or new supplies developed in areas where instream flow and existing rights are not impaired. The proposed rule provides for both.

Comment 211

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Darrington Hearing on Skagit rule proposal, March 8, 2005; Mt. Vernon Hearing on Skagit rule proposal, March 9, 2005

Comment: O-D: The rule is not enforceable as it is currently drafted, and we believe it preempts the county's land use regulatory authority.

O-MV: The restrictions of the rule are not enforceable. Neither Ecology nor Skagit County can restrict statutory exemptions from state regulations, and I'm referring specifically to the exempt well statute. The proposal would impose building permit conditions. It's unclear who would enforce those permit conditions. It's not clear whether there are new responsibilities imposed on local governments, and if there are, who will pay for those additional responsibilities.

Response: Thank you for your comment. Ecology respectfully disagrees. We do not believe the proposed instream flow rule is unenforceable, nor do we share the same interpretation of what it means for certain groundwater wells to be exempt from permitting requirements. The State does rely upon voluntary compliance and the rule provides for a phased enforcement program, starting with technical guidance. Only after pursuing all other available approaches will Ecology issue regulatory orders to enforce the water code. Ecology has proposed a change to the initial proposed rule language regarding local actions. The rule, in and of itself, creates no new obligations on the County. State statutes already require that the County make a finding of adequate and potable water availability for the purposes of a building permit or subdivision approval. The rule creates new information for the County to consider in its determination of whether adequate and potable water is available.

Comment 212

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Darrington Hearing on Skagit rule proposal, March 8, 2005

Comment: The restrictions of the rule are arbitrary. There is no science at all supporting them.

Response: Thank you for your comment. Ecology respectfully disagrees. The reservation volumes were determined by using a percent loss of habitat from instream flow habitat. That habitat value was then converted to a flow or annual volume of water.

Comment 213

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Darrington Hearing on Skagit rule proposal, March 8, 2005; Mt. Vernon Hearing on Skagit rule proposal, March 9, 2005

Comment: O-D: We do not agree that senior water rights are protected. In fact, we believe that many of those smaller water users are, in fact, impaired by. . . the draft rule.

O-MV: Finally. . .on this issue we believe the amendment unlawfully restricts senior exempt well water rights. We absolutely disagree with your notion that an exempt well must have been put to beneficial use in order to arise. The only authority you have to impose restrictions on water rights with a prior, an earlier priority date is where a permit or an application has been filed. There is specific statutory authority to impose conditions on those water rights but not on exempt wells.

Response: Thank you for your comments. Ecology respectfully disagrees that existing rights are impacted by the proposed rule. The rule will create an instream flow water right with a priority

date the same as the effective date of the rule, in this case September 22, 2005. Any water right senior to the instream flow, established prior to September 22, 2005, will not be regulated or curtailed to satisfy the instream flow right.

Comment 214

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Darrington Hearing on Skagit rule proposal, March 8, 2005; Mt. Vernon Hearing on Skagit rule proposal, March 9, 2005

Comment: O-D: We are hopeful that our concerns will be addressed through this rule making, but we are not optimistic. Skagit County has appealed the existing rule and we will be joining this amendment to our appeal if it is not substantially changed. And that's all I have to say.

O-MV: We have been hopeful that our concerns would be addressed through this rule-making process. You described how Ecology decided to amend the existing rule. The amendment to the existing rule is also a requirement of a court order that applies to this process. We have been hoping that this rule-making process would resolve that appeal and would avoid the need for future appeals but we are not optimistic based on what you have proposed. Skagit County has appealed the existing rule. We will be joining the amendment to this -- proposed amendment to our appeal if it is not substantially changed.

Response: Thank you for your comment. The comment does not pertain to the Stillaguamish rule making, but instead to the Skagit rule amendment. Given that your comment pertains to no section of the proposed Stillaguamish rule, Ecology has no response.

Comment 216

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Mt. Vernon Hearing on Skagit rule proposal, March 9, 2005

Comment: You have indicated that there are shortfalls in water supplies in a number of subbasins in the Skagit Basin, but you have not made up for those anywhere. The reservations, which is a question I would have asked had the question and answer session continued, was how much of the water budgets already have been used. That is not clear to us. However, the rule attempts to count water use that already has been occurring since 2001 against the water budgets, and we would like to know how much you think that really means there is available.

Response: Thank you for your comment. The water supplies in Skagit County are not germane to the Stillaguamish rule. In general, none of the water budgets, or reservations, have been used. They cannot be in use or used, since they are only proposed and do not exist.

Comment 220

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Mt. Vernon Hearing on Skagit rule proposal, March 9, 2005

Comment: We believe this rule would preempt county land use authority. It fails to allow for commercial and industrial use in the Upper Basin, and there is no provision for agricultural water use. Background documents as agricultural needs will be addressed later. We do not believe this is realistic and is unduly burdensome on the county and its residents. We believe that the agricultural water needs should be addressed now. There is no reservation made in this rule for agricultural water use, and, in fact, the rule implies that the reservation is a finite one-time resource, and that there would be no water available in the Skagit Basin for future agricultural needs or increases in agricultural needs.

Response: Thank you for your comment. Ecology respectfully disagrees that the rule would preempt county land use authority. You are correct that the rule does not provide a reservation of

water for commercial and industrial uses in the Stillaguamish basin. That omission is purposeful. The reservations of water for basic human needs and stockwater come from explicit statutory direction. The focus on instream uses is also based on specific statutory direction (please see RCW 90.22.010). Your comment is correct that there is no reservation made in this rule for agricultural water use, and the reservation is a finite one-time resource. Your comment is incorrect that there would be no water available in the Stillaguamish Basin for future agricultural needs or increases in agricultural needs. The rule provides for new water development and changes or transfers to existing agriculture water rights. Future agriculture water needs in the basin can be met from existing rights or the development of new rights. They could not be met through reservations designated for domestic use.

Comment 221

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Mt. Vernon Hearing on Skagit rule proposal, March 9, 2005

Comment: There are a number of impacts of this rule that are not. . .addressed and that we believe should be before final rule is adopted. First and foremost, the rule ignores the impacts of. . .releases from the hydro dams in the headwaters of the Skagit.

Response: Thank you for your comment. There are no hydro dams in the headwaters of the Stillaguamish basin. The proposed rule does not consider hydropower releases, given there are none.

Comment 223

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Mt. Vernon Hearing on Skagit rule proposal, March 9, 2005

Comment: Finally, I think we need to really step back from some of the preconceived notions about exempt well water use, and also, about water as a limiting factor in the Skagit Basin.

Response: Thank you for your comment. Ecology is unsure about the language in the rule to which your comment pertains. Ecology has no preconceived notions about exempt well water use, nor water as a limiting factor particular to the Stillaguamish Basin. However, Washington's water law (see Title 90 generally) is premised, in part, on water being a limited resource. There are many references in statute to water as a scarce, limited resource to be managed wisely.

Comment 224

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Skagit County is strongly opposed to adoption of Ecology's proposed amended Skagit Instream Flow Rule. . . .[T]his proposal is not supported by Ecology's rulemaking record and is contrary to the law in several key respects.

Response: Thank you for your comment. Ecology respectfully disagrees that the proposed rule-making is not supported by the record and or contrary to the law.

Comment 225

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Ecology's Skagit instream flow rule and proposed rule amendment fail to balance the needs of water for people, fish and agriculture, as otherwise required by state law. The Department of Ecology exceeds its statutory authority by adopting an instream flow rule that fails to balance competing resource needs, including domestic water supplies. The Water Resources Act declares three "water resources objectives" for allocating the state's water resources. These objectives are to provide sufficient water for: 1) residential, commercial, and industrial needs; 2) fish populations; and 3) productive agriculture.1 The legislative history of this provision indicates a strong policy directive to balance the needs of water for people, fish and agriculture. The proposed rule amendment largely ignores this statutory mandate by establishing instream flow regulations without adequately addressing out-of-stream water needs. Ecology cannot ignore its obligation to preserve and protect an adequate supply of potable water for human domestic use.2

1 RCW 90.54.005. Similarly, the Watershed Planning Act's flow setting provision reflects the four goals of "ensuring that the state's water resources are used wisely, protecting existing water rights, protecting instream flows for fish, and providing for the economic well being of the state's citizens and communities."

2 RCW 90.82.010.

Response: Thank you for your comment. Your references to the Watershed Planning Act may be correct, but are inapplicable to this rule making. The Stillaguamish rule is not being promulgated under chapter 90.82 RCW and watershed planning pursuant to that statue was not done in this basin. Potential initiating governments chose not to pursue planning under chapter 90.82 RCW. Nevertheless, Ecology agrees that the proposed rule making does not balance the needs for water for people, farms, and fish as might be done in a watershed plan under chapter 90.82 RCW. Rather the rule's main focus is on instream flow needs to protect fish. However, the rule is not ignoring Ecology's obligation to preserve and protect an adequate supply of potable water for human domestic uses through creation of a domestic reservation. See RCW 90.54.020(5). The reservation of water for domestic use meets this need. In addition, please see RCW 90.22.040 and the stockwater reservations in the rule.

Comment 226

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Ecology acknowledges that the proposed amended rule is necessary because the 2001 rule does not adequately meet the agency's mandate to provide water for human needs.3 In response to this admitted problem, Ecology proposed creating of a domestic reservation which "will provide for an uninterruptible water supply for many . . . parcels" throughout the county.4

3 Ecology Comment Period-Hearing Notice, Pub. No. 05-11-001.

4 DNS at 3.

Response: Thank you for your comment. Your comment pertains solely to the proposed Skagit Basin rule and is not applicable to the Stillaguamish rule making.

Comment 227

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: With respect to exempt wells established after the effective date of the 2001 rule, such water users may apply to participate in the proposed reservation.5 Ecology personnel have publicly stated that they intend to treat all post-2001/pre-amendment exempt wells as part of the reservation.

5 Proposed WAC 173-503-150.

Response: Thank you for your comment. Your comment pertains solely to the proposed Skagit Basin rule and is not applicable to the Stillaguamish rule making.

Comment 228

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Ecology recognized flaws in the existing rule, and committed to fix them. Nevertheless, Ecology limited the scope of the current rulemaking, effectively excluding consideration of needed changes. For example, RCW 90.03.345 indicates that a reservation of water for beneficial uses under RCW 90.54.050(1) establishes a priority date as of the effective date of the reservation. To preserve and protect an adequate and safe supply of domestic water, however, Ecology must include within the scope of its current rulemaking a revision of the existing rule's effective date to correct the disparity between the priority dates for the instream flow rule and the reservations.

Response: Thank you for your comment. Your comment is not applicable to the Stillaguamish rule making. There is no existing rule to amend. This is a new and different rule-making process.

Comment 230

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: As required under the Growth Management Act (GMA) each decade the Office of Fiscal Management provides Skagit County with long-term population projections. In its GMA planning the County is required to adopted OFM's high, medium, or low growth forecasts. In water resources planning, Skagit County applies the high growth projection and a 50 year planning horizon to guarantee adequate water supplies are available to meet demand. Projected over the next 50 years, anticipated growth equates to a need to supply water to an additional 220,000 people, or 84,615 new households.6 Assuming growth is consistent with County planning (80 percent urban, 20 percent rural), 44,000 new rural residents will need 16,923 new dwellings. By contrast, the proposed groundwater reservation in Ecology's proposed rule amendment would accommodate only 6,100 new households, assuming water use is limited to 175 gpd. If 350 gpd of consumption is assumed,7 only 3,046 residences will have water. This result leaves Skagit County unable to accommodate projected population growth in the County. Ecology's proposed rule amendment leaves literally thousands of rural residents without potable water and Skagit County without the ability to accommodate the population growth another state agency directs it to provide for.

6 HydroLogic Services Company, Current and Projected Future Water Demand for Skagit County's Irrigated Agriculture, 5-6 (2005). The anticipated number of households is based on an assumed 2.6 persons per household.

7 For purposes of the amended rule, water is "consumed" whether through evaporation, human consumption, or loss to a system through water treatment.

Response: Thank you for your comment. Ecology recognizes Skagit County's obligations under the Growth Management Act. The numbers provided in the comment are not applicable to the Stillaguamish basin, even though a small, rural part of Skagit County is in the Stillaguamish basin. However, the idea of meeting projected water needs in the rural areas is applicable to the Stillaguamish basin. Ecology's assessment of the need in Skagit County is that the projected 20 year rural growth can be met with the reservation. The reservation will not meet all future needs forever into the future with new water. Water is a limited resource. The Water Code is premised on water being a limited resource. Future needs will be met by a combination of reallocation of existing rights and new water rights. In addition, the GMA, provides a framework for the County to address population and water needs in advance of a crisis through the planning process.

Comment 234

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Ecology unlawfully seeks to restrict lawful water use. Ecology's proposed amended Skagit River instream flow rule improperly characterizes priority dates of lawful water rights recognized under RCW 90.44050. The proposed amended rule declares that "withdrawal of ground water in hydraulic continuity with surface waters in the Skagit River and perennial tributaries shall be expressly subject to instream flows."24 The proposed amended rule further notes that: "All water rights commenced prior to this amendment but subsequent to the original establishment of instream flows . . .shall be subject to the provisions of this chapter as they existed prior to this amendment."25 The 2004 guidance on setting instream flows issued by Ecology provides an explanation of how Ecology intends to implement this provision by stating: "The priority date associated with a permit-exempt groundwater right is the date of first beneficial use, which in the case of domestic use for new residents would typically be the date of occupancy of the residence.26 As explained below, we believe this statement of the law is incorrect.

24 WAC 173-503-040(6).
25 Proposed WAC 173-503-150.
26 Guidance: Setting Instream Flows and Allocating Water for Future Out-of-Stream Uses (2004) at p. 5.

Response: Thank you for your comment. Ecology respectfully disagrees that the proposed rule seeks to restrict lawful water uses. Ecology's position is that the priority date associated with a permit-exempt groundwater right is the date of first beneficial use, which in the case of domestic use for new residents would typically be the date of occupancy of the residence. An argument can be made that the priority date of the permit exempt well is the date action was taken to create the right, assuming due diligence is shown to perfect the right. Generally, the use of water is close in time to the construction of the well.

Comment 235

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: The priority date for exempt wells is the date upon which the appropriator first initiated efforts to apply water to a beneficial use. Under settled law, the priority date of a water right relates back to the date the first step was taken to perfect the water right.27 Washington courts have stated that under state water law, a water right priority date relates back to the time the application is filed.28 RCW 90.03.247 provides Ecology with explicit authority to impose conditions on permitted water rights to protect instream flows. Otherwise, a water right priority date is the application date for a new water right, not the date upon which the right is first applied to beneficial use.

27 RCW 90.03.340,90.44.130. Hunter Land Co. v. Lauaenour, 140 Wash. 558,565, 250 P. 41 (1926).
28 See e.g., Ecologv v. Theodoratus, 135 Wn.2d 582, 591, 957 P.2d 1241 (1998), Hillis v. Ecology, 131 Wn.2d 373, 384-85, 932 P.2d 139 (1997), Jensen v. Ecology, 102 Wn.2d 109,114, 685 P.2d 1068 (1984).

Response: Thank you for your comment. See response to comment 234. Your comment about priority date and applications for water right permits is noted and generally correct. Ecology respectfully disagrees with your statement that the law is settled on the priority date associated with permit exempt ground water wells because no application is filed. Ecology does not establish priority dates for any water rights, permitted or not, so this is a moot point. An adjudication of water rights in the Superior Court would determine the priority dates of any and all rights. The proposed rule also has no language on this point.

Comment 236

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: There is a different rule under Washington law for groundwater withdrawals that are exempt under the requirements of RCW 90.44.050. The priority date of an exempt groundwater withdrawal must be considered in light of pre-code water law. A leading treatise discusses this issue directly: "Historically, before the permit process came into existence, and presumably for those uses today that are exempt from the permit process, the priority date depended on when the "first step" to appropriate water was taken; for if the succeeding steps were completed with "due diligence," the priority date related back to the date of the first step. The courts required a combination of (1) an intent to appropriate and (2) an overt act to constitute the first step, followed by the (3) diligent pursuit. In general, the first step had to occur on the ground to give evidence of the bona fide intent to appropriate. Because this first step required some initial investment of time and money by the claimant, it was seen as giving evidence of the bona fide intent and therefore was justification for giving the claim to the claimant. When the first step was followed by due diligence resulting in consummation of the water use, the priority date related back to when the first step was taken."29 The priority date of a water right relates back to the first steps taken under the law to establish a water right, regardless of whether the right arises under a permit or is recognized under RCW 90.44.050. It is incorrect to say that the priority date for exempt wells coincides with the first instance of beneficial use. Instead, the first steps taken to establish the right is submitting a well log to Ecology, or a development application to the County that indicates the applicant's intent to rely on an exempt well.30

29 2 R. Beck, ed., Waters and Water Rights 92-93 (1991 ed.) (citations omitted)(emphasis added).

30 There is another legal theory under which Washington law would establish an earlier priority date for exempt groundwater withdrawals. Exemption from the groundwater code leaves exempt well withdrawals subject to the common law that existed at the time the groundwater code was enacted. The common law before 1945 recognized correlative rights, under which a landowner retains the right to use the waters under his property to the extent necessary to make beneficial and reasonable use of his property. See Patrick v. Smith, 75 Wash. 407,134 P.1076,1079 (1913); Evans v. City of Seattle, 182 Wash 450,47 P.2d 984,987 (1935). As a correlative right, this right arises as an incident of landownership, becoming one of the many sticks in the bundle of rights conveyed with real property. Correlative groundwater rights are considered riparian rights to groundwater. See Robert E. Beck, ed., 3 Waters and Water Rights § 22.01, at 195-6 (Michie ed. 1991)(citing A. Dan Tarlock, Law of Water Rights and Resources § 4.06(3), at 4-18 n.16 (1989). Consequently, the priority date attaches to the property at the time the first deed patent passed from the federal government to a private landowner.

Response: Thank you for your comment. Please see response to comment 234 and 235.

Comment 237

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Ecology improperly seeks to regulate lawful activities otherwise are exempt from state regulation. Ecology can condition a pending permit to require compliance with an instream flow adopted after a water right priority date was established.31 This authority is recognized, however, only where the agency already has granted a water right permit and where the statute provides explicit authority to condition water right applications and permits. No such authority exists with respect to exempt wells. RCW 90.03.247 -- the only provision of law providing Ecology with conditioning authority -- applies only to permitted water rights. There is no comparable regulation of exempt groundwater rights. Consequently, authority to condition a water right permit does not extend to requiring subordination of an exempt groundwater right to a later-adopted instream flow rule.

31 RCW 90.03.247.

Response: Thank you for your comment. Ecology respectfully disagrees with your analysis. Ecology's position is that a permit-exempt ground water right is a water right, the same as any

other water right, absent the permit. A legal justification for regulation of permit-exempt wells in the rule is essentially three layered. First, the actual restriction on any new exempt use occurs as a result of the basin closure. Ground water is closed to all new withdrawals, including permit-exempt uses. Ecology's authority to do so arises from the same authority that Ecology has to do any closure – our authority to protect instream flows and other water rights. For example, Ecology invoked that authority in the Methow basin rule to prohibit exempt withdrawals as well as permitted withdrawals. Second, a reservation is created based upon overriding considerations of the public interest (see RCW 90.54.020(3)(a)) because the closure results in a finding of water unavailability. Third, the reservation places reasonable limits on uses that it authorizes. Ecology has authority to create a reservation, and has implied authority to limit use of reserved water, as long as the limits are rational, i.e., not arbitrary or capricious. The limits proposed in the Stillaguamish reservations have a number of strong rationales, e.g., a restriction on outdoor use during low flows reduces impacts on the stream.

Comment 238

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Ecology is a state agency created by statute. The agency only has the authority granted to it by the state legislature. In Ecology v. Rettkowski, the Supreme Court held that Ecology lacks implied powers. Recently, in Biggers v. Bainbridge Island, the Washington Court of Appeals applied the same standard to a local government. The Biggers court invalidated the City of Bainbridge Island's moratorium on shoreline development activities exempt from permitting requirements under the Shoreline Management Act. The court noted that the City: "Exists and derives its authority in power from the State Constitution and the Legislature. 'It has neither existence nor power apart from its creator, the Legislature, except such rights as may be granted to municipal corporations by the State Constitution."32 In a similar case, the State Supreme Court recently invalidated a resolution passed by the Tacoma-Pierce County Board of Health banning smoking in all public establishments throughout Pierce County. The Supreme Court held that a health board's regulatory authority comes solely from statutory delegation. The Court ruled that a local regulation is invalid if the regulation "conflicts with a statute that "permits what is forbidden by state law or prohibits what state law permits."33

32 Biggers v. Bainbridge Island, ___Wn. App. ___, 103 P. 2d 244,247 (2004).
33 Entertainment Industry Coalition v. Tacoma-Pierce County Health Dept., Wn.2d ___, 105 P.3d 985,988 (2005) citing Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health, 151 Wn. 2d 428,433,90 Wn. 2d 37 (2004).

Response: Thank you for your comment. We agree that Ecology is a creature of statute and that it only has the authority granted to it by the state legislature. We believe we are acting under that authority.

Comment 239

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Here, in enacting the exempt well provision, the Legislature provided an exemption from state regulation. Ecology has no authority to restrict activities which the Legislature expressly exempted from its regulatory purview and any regulation which does so is invalid. Like the City of Bainbridge Island and the Pierce County Health Board, Ecology has no authority beyond that provided by the Legislature. Here, the Legislature has provided an exemption from state regulation for small groundwater withdrawals and Ecology may not restrict activities that are otherwise are exempt from its regulatory purview.

Response: Thank you for your comment. Please see response to comment 237.

Comment 241

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Ecology has no authority to regulate as between otherwise lawful water uses and water users. Ecology's Skagit instream flow rule and its proposed rule amendment are inconsistent with the Supreme Court's decision in Ecology v. Rettkowski. In that case, the Washington Supreme Court ruled that the statutory adjudication process is the sole means of determining the existence, amount and priorities of existing water rights.36 Consequently, the Court ruled that Ecology does not have independent authority to make these determinations for purposes of regulating between un-adjudicated existing rights. Determinations as to the extent, validity and priority "implicate important property rights."37 The Court reasoned that, because of the complicated nature of such inquiries and the profound effect of the determinations, the Legislature entrusted the superior courts with responsibility to determine the validity between existing water rights.38 Contrary to this limitation on Ecology's statutory authority, the proposed amendment, as described in the Preliminary Benefit-Cost Analysis, assumes that any exempt well put into use after April 2001 is "legally required to curtail use during low flows."39 This is precisely the kind of determination under the Water Code that is reserved for adjudication in superior court. Ecology cannot, by rule or otherwise, determine the priority between existing exempt wells and the instream flow rule.

36 Rettkowski v. Ecology, 122 Wn. 2d 219,234,858 P. 2d 232 (1993).
37 id. at 228.
38 Id.
39 Preliminary Benefit-Cost & Least Burdensome Analysis for Amendment to Chapter 173-503 WAC, at 19.

Response: Thank you for your comment. This comment is not applicable to the Stillaguamish basin. The proposed rule has no language determining the relative priority of water rights within the Stillaguamish basin.

Comment 245

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Ecology improperly limited the scope of the amended rule by failing to include reconsideration of instream flow levels within the proposed rule amendment. There is abundant evidence to suggest that the instream flow levels were not properly set. Mean monthly flows do not meet the instream flow requirement about 20 percent of the time. In addition, mean daily flows have not continuously satisfied the instream flow requirement for twelve consecutive calendar months at any time during the period of record (63 years) at USGS Gage #13-200500, for the Skagit River near Mt. Vernon. It is arbitrary and capricious to establish minimum flows at a level which rarely occurs. The resulting flows, while desirable in terms of habitat, are not minimum flows but appear to be some sort

Response: There is no existing rule to amend; it appears that this comment may pertain to the Skagit instream flows not the Stillaguamish. This is a new rule making and there is no existing rule to reconsider.

Comment 246

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Instream flows are based on Duke Engineering and Services, Inc.'s 1999 Final Technical Report, Lower Skagit River Instream Flow Studies.48 A review of the report found that in conducting the rearing analysis, "erroneous hydrologic data were inextricably entered into at least 7 of the 10 transects."49 These erroneous entries caused: "major errors in the predicted water surface elevations at seven of the ten transects. Even in a large river like the Skagit, errors of 1.0 ft or more are unacceptable; in the DEAS rearing file, seven of the transects had errors larger than this, and three transects had errors larger than 5.0 ft. . . . As a result of these errors, the WUA rearing results reported in DEAS 1999 are incorrect. The amount of error is great enough that no conclusions on the flow habitat relationship can be drawn from the DEAS analysis.50 Errors in determining optimal rearing flows are of grave concern because rearing flows for chinook salmon and steelhead trout were used to set minimum flows for more than half the year, including all of the lowest flow periods.51

48 See Duke Engineering and Services, Inc., Final Technical Report, Lower Skagit River Instream Flow Studies 120 (1999).
49 Hardin-Davis, Inc., Review of "Final Technical Report Lower Skagit River Instream Flow Studies" by Duke Engineering and Services, Inc., June 1999,4 (2005).
50 Hardin-Davis, Inc., Review of "Final Technical Report Lower Skagit River Instream Flow Studies" by Duke Engineering and Services, Inc., June 1999,4 (2005).
51 Duke Engineering and Services, Inc., Final Technical Report, Lower Skagit

Response: There is no existing rule to amend; this is a new rule making. The Duke Engineering work you cited pertains to the Skagit basin. Duke Engineering did no instream flow work in the Stillaguamish basin.

Comment 248

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: More troubling, the Department has not focused on the more important issue of how the rule amendment will affect future growth demand. This cannot be addressed by a one-time email exchange or telephone conversation with Skagit County staff as to the number of buildable lots in each basin. The buildable lot information was developed for settlement discussions to provide an order of magnitude for water budgets under discussions in those negotiations. These numbers cannot be legitimately taken to be the limit on future development and densities within the basins.52

52 Skagit County, Map of Affected Parcels June 2004. This map does not include attached parcels in the saltwater drainages that are subject to the proposed rule amendment.

Response: Thank you for your comment. Your comment is not applicable to the Stillaguamish rule making. There is no existing rule to amend. This is a new rule rule-making.

Comment 249

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Skagit County GIS has prepared a preliminary assessment of affected lots that far exceeds the values used in the proposed rule amendment.53 This analysis also illustrates the fundamental flaw in the assumptions used by the Department in developing the reservations. Unless Ecology is prepared to conduct a thorough review of affected parcels and development potential for those parcels, the buildable lot assumptions are not appropriate for establishing

reservations for future water use.
53 Skagit Basin Statistics for Affected Parcels March 16, 2005.

Response: Thank you for your comment. Your comment is not applicable to the Stillaguamish rule-making. Ecology knows of no Skagit County preliminary assessment of affected lots in the portion of the Stillaguamish basin that is in Skagit County. The size of the reservation in the Stillaguamish rule proposal was not determined based on the number of buildable lots in the basin.

Comment 253

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Ecology's proposed amended Skagit instream flow rule is inconsistent with other existing and proposed agency rules, and the instream flow guidance document. Ecology's proposed rule amendment is inconsistent with the Instream Flow Guidance Document. The guidance document recognizes the need to provide water for future out-of-stream needs. The guidance document indicates that water reservations will be limited to that amount of water that can be withdrawn while causing less than one to two percent fish habitat loss during a one in ten-year low flow condition (i.e., measured at a ninety percent exceedance level).58 By contrast, the rule amendment uses the lesser of two percent or the amount of water needed for buildable lots, depending on Ecology's analysis of population growth.

58 Guidance Document, at pp. 16-17.

Response: Thank you for your comment. Whether or not the proposed Stillaguamish rule is consistent with other watershed rule making activities is immaterial. The reason rules are done at the watershed scale is because issues and solutions to issues depend on the individual circumstances of the various watersheds, especially for watersheds planning pursuant to chapter 90.82 RCW. That statute arguably envisions customized watershed plans tailored to the geographic, hydrologic, and societal factors uniquely present in the basin. The Stillaguamish rule making is not being done pursuant to chapter 90.82 RCW. Rules proposed in basins not planning pursuant to chapter 90.82 RCW are or could be considered consistent to the extent they have the same statutory foundation. However, it is anticipated that local factors based on basin specific issues will lead to differences policies and programs within the statutory framework. Of course any proposed policy or program has to be in keeping with the statutes. As to the Instream Flow Guidance Document, it provides a range of ideas and options for watersheds to consider. Ecology’s guidance document is guidance and is not required to be followed. The purpose of the document is to provide watershed planning groups with a foundation to start from when determining an instream flow. The Guidance documents states that it is intended to provide general guidance and not to prescribe any set methodology or approach. A guidance document is just that guidance, not a rule. It is the basin specific ideas, policies and programs, guided in part by the guidance document, that are then promulgated.

Comment 254

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: The proposed rule amendment for the Skagit River is inconsistent with Ecology's proposed Samish and Stillaguamish instream flow rules. The proposed Samish and Stillaguamish instream flow rules follow the guidance document by proposing a reservation for future out-of-stream water uses totaling (sic) about two percent of total low flow. The Skagit rule amendment only provides this amount where Ecology estimates lower growth levels. Using a habitat-based

flow level in one basin and not in another invites confusion and a number of unintended consequences. There are a several other inconsistencies between the three proposals, which are highlighted in a side-by-side comparison attached to this letter and incorporated by reference.59

59 Ecology has explained inconsistencies between the Skagit rule amendment and other proposals based on the fact that the Watershed Planning Act allows Ecology to fashion rules that are tailored to specific recommendations of watershed planning groups. Watershed planning was not successfully completed in the Samish watershed, and Ecology and stakeholders agreed not to undertake watershed planning in the Skagit River Basin because implementation of the 1996 MOA already was underway by the time the Watershed Planning Act passed the following year. It is disingenuous for Ecology now to adopt a rule that "punishes" Skagit County for the conscious decision of all parties, including Ecology, to focus watershed planning activities on the Samish Basin instead.

Response: Thank you for your comment. Your comment is not applicable to the Stillaguamish rule making; also see response to comment 253 which explains that each instream flow rule will be unique because each watershed is unique.

Comment 258

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Ecology is improperly creating a new regulatory regime where all land use and building permit decisions are subject to ultimate veto by the Department including the potential after-the-fact revocation of a reservation. The rule amendment does not provide any standard or other guidance on how Ecology proposes to evaluate whether a local decision is "consistent" with the rule. Coupled with improper reservation by the Department of the right to modify a reservation, and thereby amend the rule without following rule making procedures, there will be no finality to land use decisions by the County. At any time, as with the rule amendment itself, the Department can declare existing water use to be unlawful. This is precisely how Ecology proposes to treat exempt wells placed in use after April 2001 and prior to adoption of the rule amendment.

Response: Thank you for your comment. Ecology respectfully disagrees that the rule creates a new regulatory regime where local land use decisions are subject to ultimate veto by Ecology. Please see the response to comment 256 for additional information.

Comment 259

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Ecology's Skagit Instream Flow Rule and its Proposed Rule Amendment Violate Rulemaking Procedural Requirements. Before adopting a significant legislative rule, an agency must show that the rule is, among other things: 1) supported by a cost/benefit analysis; 2) the least burdensome alternative; and 3) consistent and coordinated with other federal, state and local laws.62 A significant legislative rule is one which adopts substantive provisions of law pursuant to delegated legislative authority, or adopts or significantly amends a new regulatory program.63 A rule adopted without compliance with these procedural requirements is subject to invalidation under the Administrative Procedure Act (APA).64

62 RCW 34.05.328(1).
63 RCW 34.05.328(5)(c)(iii).
64 RCW 34.05.570(2)(c).

Response: Thank you for your comment. Ecology does not believe that the rule making for the Stillaguamish basin violates the Administrative Procedures Act. Supporting documentation such as the cost benefit analysis, the least burdensome alternative, as well as its consistency with other state, federal, and local laws is available on Ecology's web page at:

http://www.ecy.wa.gov/laws-rules/activity/wac173505.html

Comment 283

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Ecology's current strategy to adopt instream flow rules will undermine Skagit County's efforts to comply with the Growth Management Act and other provisions of law relating to water availability. The County also is concerned about the fairness and enforceability of the proposed rule. Skagit County will shoulder much of the burden for enforcement of the rule, without having had an opportunity to consult with Ecology on how the rules will be implemented. Skagit County would like to see the rule amendment substantially revised. We hope you will take these comments in mind and follow our recommendations. We look forward to working with you and other state agencies and interested parties to develop effective, responsible regulations to protect Skagit County's aquatic resources.

Response: Thank you for your comment. Skagit County is on record in several of its comments that Ecology's current strategy to adopt instream flow rules will undermine Skagit County's efforts to comply with the Growth Management Act and other provisions of law relating to water availability. Absent specific comments on the rule language, Ecology does not see that the proposed rule undermines the ability of Skagit County in regards to GMA. As to fairness and enforceability of the rule, you are correct that the rule can appear to be unfair to future users, for example, whose outdoor water use might be limited. However, that is precisely the impact and expected result of the prior appropriation doctrine; junior water rights may not be fully exercised if senior rights cannot be satisfied. Future water users always have the option of acquiring more senior rights to avoid these limitations. Addressing the fairness or equity of the Water Code is beyond the scope of this rule. Regarding enforceability, Ecology is responsible to enforce the water code and associated rules. Skagit County is not being asked to enforce Ecology's rules. However, Skagit County, pursuant to RCW 90.54.090, has an obligation to, whenever possible, carry out powers vested in them in manners which are consistent with the provisions of chapter 90.54 and implementing rules.

Comment 284

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Nothing in Ecology's record shows that flows in saltwater drainages between the Samish River and Skagit River basins affect flows in the Skagit River. Nevertheless, Ecology's existing instream flow rule applies to these areas. Inexplicably, the proposed rule amendment leaves this provision unchanged. Furthermore, the current rule language only excludes some saltwater islands in WRIA 3 from the rule. A strict reading of this section would make withdrawals from some saltwater islands (e.g.., Sinclair Island) commencing after the effective date of the rule subject to interruption unless the project proponent funds a study to show that these withdrawals are not in continuity with the Skagit River. Restricting the rule applicability to the Skagit River basin would remove this unnecessary requirement. Ecology staff argues that these areas are included under the proposed rule amendment not because of their hydraulic continuity with the Skagit River but because they were included in the original rule and the Agency decided not to include an amendment to this section within the rule amendment. This rationale exalts form over substance and shouldn't be the basis for compounding an earlier error.

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish instream flow rule making. Saltwater drainages between the Samish River and Skagit River

basins may affect flows in the Skagit River, but not the Stillaguamish River.

Comment 285

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: On August 13, 2004, the Governor's Water Policy Advisor Committee circulated a "straw man" proposal for the parties to consider. The straw man proposal proposed to define the Skagit Basin (and the proposed rule coverage) as "the area drained by the Skagit River and its tributaries." Nevertheless, in its proposed amended rule the department neglected to apply this definition.

Response: Thank you for your comment. The comment pertains to the Skagit rule and is not applicable to the Stillaguamish instream flow rule making.

Comment 286

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Ecology's approach of including language from other sections of the RCW in the purpose section is uniquely applied to the proposed amended Skagit River rule. Reiterating existing statutory obligations adds nothing to the rule, potentially confusing and complicating implementation. The rule could be simplified, without adverse effect to the goals of implementing a fair and effective program to protect instream and out-of-stream resources by adopting the more succinct approach similar to the approach contained in the proposed Samish and Stillaguamish rules.

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish instream flow rule making.

Comment 294

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: The amended rule creates a conflict with the CAO which could be avoided if the amended rule allowed well development in areas where public water service is available when well development reflects the least damaging practicable alternative. Third, the CAO protects fish and wildlife habitat conservation areas, together with a 200 foot buffer around such areas.9 The amended rule fails to recognize conflicts which may arise where "timely and reasonable" service extension under the amended rule will result in disturbance to habitat conservation areas that otherwise could be avoided by limited exempt well development. The CAO also protects against injury from development within 200 feet of geologic hazards.10 The amended rule would effectively require an applicant to connect to an existing public water supply even if doing so would require potentially destabilizing construction or excavation in these critical and sensitive areas.

9 SCC 14.24.500- 530.
10 SCC 14.24.400-440.

Response: Thank you for your comment. Ecology respectfully disagrees that the rule creates a conflict with Skagit or Snohomish County critical area ordinances. The law requires that new development within the service area of a municipal water system must connect to the system,

when the connection can be made in a timely and reasonable manner. Please see RCW 90.54.020(8) and RCW 43.20.260. The rule is merely reflecting the statute and making a link to permit exempt water wells. Finally, should public water service be extended, nothing in the rule says local ordinances will not be followed. Protection of critical areas and implementation of local ordinances is the purview of the local government and the rule does not change that.

Comment 304

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: . . .Ecology's position contradicts its decision to make additional allocations subject to the IFIM instream flow levels. If additional withdrawals must be curtailed when flows drop below 10,000 cfs, why limit additional withdrawals to 830 cfs, since that number is meant to be protective of a flow rate of 8,300 cfs. Using the instream flow committee's ten percent criterion, the maximum interruptible allocation should be 1,000 cfs for September, since that would be ten percent of the 10,000 cfs flow, which is the minimum flow for September when use of these allocations would be allowed.

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish instream flow rule making.

Comment 305

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Furthermore, why are additional withdrawals not available for up to ten percent of each month's 50 percent exceedance flow, since that would provide the same level of protection for each month? On page 18 of Ecology's Supplemental Environmental Analysis (SEA), Ecology states, "to retain instream 90% of the mean monthly flow and limit allowable withdrawal rights to the 10% biologically acceptable withdrawal quantity..." when discussing the instream flow committee's total allowable withdrawal limit. Later in the same section of the SEA, Ecology inexplicably sets maximum withdrawals during all months where the estuary limits are not in effect to the limit for the low-flow month of September (830 cfs), rather than using the instream flow committee's recommended out-of-stream allocation of 10% of mean monthly flow for each month (which range from 830 cfs to 1,610 cfs).

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish instream flow rule making.

Comment 306

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: The proposed amended rule is arbitrary and capricious because Ecology ignored the policies contained in its Instream Flow Guidance Document. The guidance document reflects a policy of setting reservation levels to an amount which will result in a one to two percent reduction in available habitat during low flow periods because Ecology and WDFW determined that such reductions will not adversely effect fish populations. This policy is set forth in Appendix A of the guidance document. The reservation for the lower, middle, and upper Skagit River subbasins are not based on these biological considerations, but are instead based on Ecology's misrepresentation of data showing the number of currently zoned building lots within the sub-

basin. The proposed amended rule is therefore in conflict with Ecology's recently issued policy statements.

Response: Thank you for your comment. Ecology respectfully disagrees the proposed rule is arbitrary and capricious because Ecology ignored the policies contained in its Instream Flow Guidance Document. Please see comment 253, where it is explained what the guidance document is intended for. In the Stillaguamish basin, reservation levels were set at an amount which will result in a range from zero to two percent reduction in available habitat during low flow periods.

Comment 307

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: The December 20, 2004 iteration of the proposed amended rule closed the Big Lake, Lake McMurray, Carpenter Creek, Fisher Creek, and Upper and Lower Nookachamps basins. The latest version closes many more tributary basins. Ecology should explain what information it relied on in making its December 20, 2004 determination and what changed to necessitate such a dramatic increase in closures.

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish instream flow rule making.

Comment 311

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Subsection 073(2)(d)(iii) prohibits the use of interruptible withdrawals for domestic supply purposes in subbasins that are not closed. It is possible to construct a domestic water system that could make use of interruptible rights, and could rely on storage during low flow periods. This approach is currently being pursued by the Skagit PUD and could also be used for smaller systems. Ecology certainly acknowledges this possibility in both the Small Business Economic Impact Statement and the Preliminary Benefit-Cost & Least Burdensome Analysis where, in fact, the Department makes the case that the avoidance of the costs of these systems is the primary economic benefit of their rule amendment proposal. Since Ecology has concluded that use of interruptible withdrawals in mainstem areas would not harm aquatic resources, there does not appear to be a basis to prohibit their use. Subsequently, the restrictions on the use of interruptible withdrawals for domestic supply purposes in subbasins that have not been dosed should be removed from the rule.

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish instream flow rule making. The proposed rule making does not contain a Subsection 073(2)(d)(iii)that prohibits the use of interruptible withdrawals for domestic supply purposes in subbasins that are not closed. It is possible to construct a domestic water system that could make use of interruptible rights, and could rely on storage during low flow periods.

Comment 327

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: [O]n August 13, 2004, the Governor's Water Policy Advisor circulated a "straw man" proposal for the parties to consider. In the straw man proposal, limits on domestic withdrawals were only established for major tributary basins. Withdrawals from areas not in "capped" tributaries - specifically, withdrawals from wells located near the mainstem Skagit and Sauk rivers - were not limited, on the basis that these large rivers are not sensitive to the domestic withdrawal quantities that are likely to occur in these areas. Nevertheless, in its rule amendment proposal, the department sets limits on withdrawals from these mainstem basin areas.

Response: Thank you for your comment. The comment is not applicable to the proposed rule. The Governor's Water Policy Advisor circulated a "straw man" proposal for the parties to consider in the Skagit basin, not the Stillaguamish basin.

Comment 330

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Agriculture is tremendously important to Skagit County - both economically and culturally. Agriculture is anticipated to expand over the planning horizon and uninterruptible supplies should be preserved to protect the communities which depend upon agriculture for their livelihood and lifestyle. It is insufficient, as the background document promises, to leave agricultural issues to a later date. Moreover, it is unclear why the proposed stockwatering reservation for the Skagit River is significantly smaller, as a percentage of available flows, than the reservations proposed for either the Samish or Stillaguamish rivers.

Response: Thank you for your comment. The comment is not applicable to the proposed rule. However, Ecology agrees that agriculture is important in those areas of Skagit County and Snohomish County covered by the Stillaguamish basin. Generally in the Stillaguamish basin, there is a trend away from farming and agriculture water use. Ecology believes future agriculture water use in the Stillaguamish basin can be met from existing rights.

Comment 336

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: WAC 173-503-150- Water Rights Subject to Instream Flows Predating the Reservation: Subsection 150 states that parties who have "commenced" water rights subsequent to the effective date of the existing instream flow rule but prior to creation of the domestic reservation may apply to participate in the reservation, thereby exempting them from interruption. The meaning of "commenced" is ambiguous, but Ecology's instream flow guidance document indicates that the department considers the "priority date associated with a permit-exempt ground water right is the date of first beneficial water use, which in the case of domestic use for new residence would typically be the date of occupancy of the residence." This is incorrect because the priority date relates back to the date the first step was taken to perfect the water right. Dan Swenson stated at the March 8, 2005 public meeting in Darrington that Ecology intends to treat all exempt well withdrawals initiated subsequent to the effective date of the existing Instream flow rule but prior to creation of the domestic reservation as withdrawals from the reservation. Discrepancies between Ecology's representations and the plain language must be resolved.

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish basin since there is no Stillaguamish rule in effect. This is a new rule making and any existing water rights will be senior to rights created by this rule making.

Comment 449

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Under WAC 173-503-073, a local government must acknowledge that interruptible water supplies cannot be used for year-round domestic supply. Does this provision preclude use of on-site storage for supply to augment interruptible supplies during low flow periods?

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish rule making. There is no statement in the rule that an interruptible water supply cannot be used for year-round domestic supply. If an interruptible water supply is used, storage or some other source of water would need to be available during times the interruptible water supply is off.

Comment 453

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: In a draft version of the rule dated November 20, 2004, Ecology proposed water reservations ranging from over 3,000 gallons per clay (Stevens Creek) to over 133,000 gallons per day (Grandy Creek). The final draft rule amendment included substantially smaller water budgets. How did Ecology initially determine the size of the proposed reservations and what criteria did it apply in deciding to reduce the size of the water budgets?

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish rule making. Proposed reservation quantities have not changed for the proposed Stillaguamish rule. For reservation information please see response to comments 215, 303, and 306.

Comment 460

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: What effect will the rule amendment have on the relocation of the Town of Hamilton, the proposed mining, and the reclamation work to establish the Town's new site?

Response: Thank you for your comment. The Stillaguamish rule will have no effect on the town of Hamilton, or the proposed mining and reclamation work to establish Hamilton's new site. Hamilton is not in the Stillaguamish basin.

Comment 462

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: How many unadjudicated water rights claims exist in the Skagit River Basin?

Response: Thank you for your comment. In the Stillaguamish basin there are approximately 2,737 water right claims filed pursuant to chapter 90.14 RCW on file, with approximately 242 in Skagit County and the rest in Snohomish County. However, the number of claims in the Skagit River Basin is not relevant to the Stillaguamish rule-making.

Comment 464

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Ecology cites the USGS report 'Numerical Model Analysis Of The Effects Of Ground-Water Withdrawals On Discharge To Streams And Springs In Small Basins Typical Of The Puget Sound Lowland, Washington (USGS 1999) and other reports to support its interpretation of hydraulic continuity in the basin. What are the other reports Ecology is referring to?

Response: Thank you for your comment. Other reports Ecology is referring to include: 1) Snohomish County Ground Water Management Area – Final Phase, Snohomish County Department of Planning and Development Services, January 31, 2000; 2) Snohomish County Ground Water Management Plan, prepared by Golder Associates Inc., May 1999; 3) Geohydrology Memorandum, Snohomish County Groundwater Management Program, Golder Associates, November 20, 1996; 4) The Ground-Water System and Ground-Water Quality in Western Snohomish County, Washington, U.S. Geological Survey, Water-Resources Investigations Report 96-4312, 1997; and 5) Snohomish County Groundwater Characterization Study, Economic and Engineering Services, INC., July 1991.

Comment 469

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: During rulemaking, why didn't the Department of Ecology use groundwater modeling software, such as MODFLOW, to determine the potential effects anticipated domestic withdrawals from certain aquifers and/or areas would have on instream flows? Wouldn't the use of groundwater modeling software results in conjunction with the IFIM/ RHABSIM results lead to the promulgation of a more realistic and more defensible rule?

Response: Thank you for your comment. Ecology did not use groundwater modeling software, such as MODFLOW to do the things referred to in your comment because no such calibrated model exists for the Stillaguamish basin. It was beyond the scope of this rule-making to create and calibrate such a ground water model. Ground water modeling software results, in conjunction with the IFIM/RHABSIM results, may or may not lead to a more realistic assessment of well development impacts on stream flow changes. Generally, MODFLOW is not a model used to estimate changes to stream flow; rather the model will calculate a stream flow depletion volume (how much water comes from the stream) and not what the overall stream flow may be. Changes in stream flow can be linked to changes in fish habitat through RHABSIM. Whether any of the modeling is realistic depends on the data used in the model, calibration of the model, and how it is applied. Currently there is no conceptual and/or analytical model that does what you suggest to link MODFLOW with RHABSIM.

Comment 471

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: The Skagit River Instream Flow Committee recommended that out of stream withdrawals in months not subject to estuary protection limits should be limited to 10% of the 50% exceedance curve for that month, which Ecology refers to as a "biologically acceptable withdrawal quantity" (page 18, Supplemental Environmental Assessment, October 30, 2000).

Under this recommendation, the total withdrawals allowable would range from 830 cfs in September to 1,610 cfs in December. Why did the Department of Ecology ignore this recommendation from the instream flow committee and set the total allowable withdrawal limit at 830 cfs for all applicable months (September through January)? Hydrologic impact limits such as these are usually implemented to protect ecologically useful high flows. What was Ecology's logic in setting a high-flow protection criterion equal to a low-flow month? Didn't the Department contradict the purpose of this protective limit by making additional withdrawals subject to interruption?

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish rule making.

Comment 846

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The rule will have a profound effect on how and where that growth will take place. Limiting water supplies may create an incentive for landowners to accelerate development. A "first in, first served" or "use it or loose it" mentality will prevail and this could occur in rural areas as owners scramble to build before the reservation evaporates.

Response: Thank you for your comment. Ecology disagrees with your statement. The rule will not have a profound effect on how and where that growth will take place. Growth in the watershed will be dictated by County and City land use and development regulations. The rule is not limiting water supplies, but rather creating an instream flow right for the rivers and streams as well as the reserves of water. Given the reserves for rural domestic water are sufficient for over twenty years, it is unlikely that the rule will create an incentive for landowners to accelerate development.

Comment 847

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The rural growth inducing effect of the proposed amended rule is in direct conflict with the Skagit County Comprehensive Plan and the goal of directing growth towards urban areas where services can be provided.17

17 Skagit County Comprehensive Plan, 4-1 (2003).

Response: Thank you for your comment. Ecology does not agree that the rule, in and of itself, will have a rural growth inducing effect in direct conflict with the Skagit County Comprehensive Plan and the goal of directing growth towards urban areas where services can be provided. Ecology sees no evidence to support the suggestion that this will result in a significant redirection of growth within the watershed away from urban areas. Taking into consideration buildable lots within urban growth areas, as well projected public water available, we see no directing of growth by this rule. Please see responses to comments 843 and 844.

Comment 848

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The rule could also induce higher growth within urban areas as well as other non-urban (rural) areas outside of the Skagit River Basin. This will result in increased density and demand for services that are not contemplated under current planning.

Response: Thank you for your comment. Ecology does not agree the rule, in and of itself, will induce higher growth within urban areas as well as other non-urban (rural) areas outside of the Skagit River Basin. Ecology also sees no evidence to support the suggestion that this will result in a significant redirection of growth as sufficient water is available to meet projected rural demand for the next 20 years. Taking into consideration buildable lots within urban growth areas, as well projected public water available, we see no directing of growth by this rule. See response to comments 843, 844, and 847.

Comment 849

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Areas outside of the Skagit River Basin offer their own land carrying capacity constraints.

Response: Thank you for your comment. Ecology agrees that areas outside of the Skagit River Basin offer their own land carrying capacity constraints.

Comment 854

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology recognizes "[water availability is one major determinant of land use."l8 Ecology also recognizes statewide implementation of restrictions on exempt well use "could result in cumulative and significant unavoidable impacts to homeowners and municipalities in the state."19 It is troubling that despite this recognition, the DNS contains only cursory discussion of the amended rule's effect on land use. The DNS states: "In urban areas and other areas served by public water, the proposal requires the existing public utility supply water for any new development. For areas not presently served by public water systems, the proposed rule provides water to satisfy most projected domestic needs. Attachment 1 shows by subbasin the potential number of residences served by the reservation and estimates of future demand at build-out. In most cases the future demand is satisfied. In other areas, such as the Nookachamps, Fisher, and Carpenter Creek, public water supplies will likely be required to meet maximum anticipated demand. Over time, Skagit PUD should be able to provide service to most areas of the Nookachamps, Fisher, and Carpenter subbasins."20

18 Wash. Dept. of Ecology, Instream Resources and Water Allocation Program Review Draft Environmental Impact Statement 3-11 (1987).
19 Wash. Dept. of Ecology, Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6-65 (2003).
20 Determination of Nonsignificance, 11.

Response: Thank you for your comment. Ecology and the law (see chapters 19.27 and 58.17 RCW) recognize that water availability is one determinant of land use. Ecology also recognizes that land use is controlled by local government, for instance through zoning. Land use and potential impacts to land use were analyzed within the rule development and disclosed in the checklist. However, the Nookachamps, Fisher, and Carpenter creeks are not part of the Stillaguamish basin and were not analyzed as part of this rule making.

Comment 856

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology's conclusion, based on this information, is that "in most cases, the future demand is satisfied."21 This conclusion ignores significant adverse effects to areas with insufficient water as well as the cumulative significant adverse effect of the shortfall.
21 Determination of Nonsignificance, 11.

Response: Thank you for your comment. Ecology is unaware of areas with insufficient water for at least the next twenty years. Twenty years is a reasonable time period prescribed by GMA for long-range planning. Please see response to comments 843 – 847 and 851.

Comment 858

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The significant localized effect in subbasins like the Upper Nookachamps is striking. In the Nookachamps the rule amendment will deny water to 527 of 551 lots - ninety-six percent of the parcels in the subbasin.

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish basin; the Nookachamps subbasin is not in the Stillaguamish basin and this rule does not apply there.

Comment 859

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: In Fisher Creek, there will be a ninety-five percent reduction. Several other subbasins suffer similar significant localized impacts.

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish basin. Fisher Creek is not in the Stillaguamish basin and this rule does not apply in Fisher Creek.

Comment 860

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Fisher and Nookachamps Creeks will effectively be closed to future development absent public water supplies.

Response: Thank you for your comment. Fisher and Nookachamps Creeks are not in the Stillaguamish basin; therefore considerations regarding their closure is beyond the scope of this rule-making.

Comment 861

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: In Fisher Creek, the reservation is only large enough to support seven

residences. This is unlikely to be enough water to serve existing residences constructed since April 2001. Ecology staff has also represented at a public meeting that the reservation for Nookachamps Creek is not available for additional development. The DNS fails to disclose that the rule amendment will operate as a building moratorium in these basins until public water is available, assuming that it is financially supportable at rural densities. . .

Response: Thank you for your comment. Fisher Creek is not in the Stillaguamish basin, therefore considerations regarding this creek is beyond the scope of this rule-making.

Comment 864

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology previously noted that encouraging public water systems to extend service into rural areas as an alternative to exempt well development "could result in increased development of current rural areas. Increased suburbia and its more intensive land uses will result in adverse impacts on water quality, habitat, earth, and other environmental media. Therefore, [requesting public water systems to extend service into rural areas] may result in significant cumulative and unavoidable adverse impacts."24 Ecology failed to resolve the conflict between these statements.

24 Final Environmental Impact Statement for Watershed Planning Under Chapter

Response: Thank you for your comment. The extension of domestic water delivery to rural areas will not increase allowed density without specific changes to the County's comprehensive plan, zoning designations, and/or development ordinances. These changes are under the jurisdiction of the county, its municipalities, and local water purveyors and would undergo environmental review when those agencies are prepared for related decision-making. Finally, the County, through the local decision making process and in light of existing laws will make the decision on whether or not municipal water systems expand into the areas zoned

Comment 867

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Even under this best-case scenario, hundreds of parcels will be left without water. . . Under this best-case scenario, one in five parcels will have no water supply and cannot be developed.

Response: Thank you for your comment. Please see response to comments 843 and 844.

Comment 868

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The localized effects are most significant in the Fisher and Nookachamps subbasins where over 90 percent of the otherwise buildable lots are left without access to potable water.

Response: Thank you for your comment. Fisher and Nookachamps Creeks are not in the Stillaguamish basin; therefore, their consideration is beyond the scope of this rule making.

Comment 869

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The cumulative effects of this reduction are equally significant, impacting 817 parcels throughout the county.

Response: Thank you for your comment. Please see response to comments 843 and 844.

Comment 872

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Conflicts with the Growth Management Act -- Ecology concluded without analysis that the proposal "does not conflict with any local, state, or federal laws or requirements for the protection of the environment."27

27 Determination of Nonsignificance, 18.

Response: Thank you for your comment. GMA sets the following goals to guide the development of comprehensive plans and development ordinances by cities and counties planning under the Act (in part):

- Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner. (RCW 36.70A.020(1))
- Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development (RCW 36.70A.020(2))
- Encourage economic development… within the capacities of the states natural resources, public services, and public facilities. (RCW 36.70A.020(5))
- Maintain and enhance natural resource-based industries, including… fisheries industries. (RCW 36.70A.020(8))
- Conserve fish and wildlife habitat. (RCW 36.70A.020(9))
- Protect the environment and enhance the state's high quality of life, including air and water quality and the availability of water. (RCW 36.70A.020(10))
- Ensure those public facilities and services necessary to support development shall be adequate to serve the development… (RCW 36.70A.020(12))

In RCW 36.70A.030 Definitions:

(12) "Public facilities" include streets, roads, highways. . .domestic water systems…

(13) "Public services" include fire protection and suppression…

(14) "Rural character" refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan:

(e) that reduce the inappropriate conversion of Undeveloped land into sprawling, low-density development;

(f) that generally do not require the extension of urban government services; and,

(g) are consistent with the protection of natural surface water flows and ground water and surface water recharge and discharge areas.

(16) "Rural governmental services" or "rural services" include those public services and public facilities historically and typically delivered at an intensity usually found in rural areas,

and may include domestic water systems, fire and police protection services, transportation…"

RCW 36.70A.070 (5) (b) states in part "The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural government services needed to serve the permitted densities and uses.

These statues apparently would fully support the amended rule, including the potential extension of public water systems into rural areas when necessary to support allowed levels of development. Levels of development planned or and approved by Skagit County.

Comment 874

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology previously recognized this risk, noting that requiring expansion of public water systems to rural areas "may create conflicts with the Growth Management Act (GMA) if the areas proposed for water supply extension are not within an urban growth area. The extended availability of public water supplies may create pressures to develop or redevelop affected areas at higher density."29

29 Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6-68.

Response: Thank you for your comment. GMA recognizes that extension of a domestic water system into rural areas is sometimes necessary to support rural development. (RCW 36.70A.030(16)) Skagit County must determine when and if it will designate, change, or rezone any rural areas to allow public water supplies at rural levels or to accommodate denser development. Environmental review will be required at that time, should that occur. Also please see response to 864.

Comment 875

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Requiring expansion of public water systems to rural areas "may require revisions to local comprehensive land use plans and/or update of the water system plan of the participating public water system. Funding would need to be identified to finance major water line extensions."30

30 Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6-68.

Response: Thank you for your comment. Ecology has no authority to "require" expansion of public water systems. The Watershed Planning FEIS was intended to facilitate the environmental review required prior to watershed plans' (created by multi-jurisdictions, including public water purveyors) adoption by jurisdictional counties. Together, these entities have a much wider scope of decision-making authority than Ecology. Local entities declined to participate in the watershed planning process and consequently this rule was not promulgated in that way. Please also see response to comment 864.

Comment 876

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Furthermore: "Establishing instream flows may limit the potential for obtaining new water rights from an affected water body. In such cases, the lack of available water may limit

or alter the nature of new development. Where water supplies cannot be obtained from another source or 'created' through water use efficiency measures, comprehensive land use plans may need to be amended. . .Local governments may need to modify their comprehensive land use plans if establishment of an instream flow adversely impacts the projections water resource availability upon which such plans are predicated."31

31 Final Environmental impact Statement for Watershed Planning Under Chapter 90.82 RCW 6-123 - 6-124.

Response: Thank you for your comment. Even without the rule, a lack of available water to support unlimited growth may limit or alter the nature of new development. There currently is no guarantee that water is available. In fact, a water right does not guarantee water is available to satisfy the right as junior right holders may be required to curtail or cease use in deference to senior users under the prior appropriation doctrine. The creation of the rural reservation should help the County in finding water available for the growth it contemplates over the next twenty years.

Comment 877

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology also previously acknowledged that "if water supply becomes limited, people may make different decisions on where to work, live, and farm than they would make where the water supply is not limited."32

32 Wash. Dept. of Ecology, Final Environmental Impact Statement (Including Program Overview) Western Washington Instream Resources Protection Program 5 (1979).

Response: Thank you for your comment.

Comment 878

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology has not considered how the proposed rule will impact development throughout the Skagit River Basin or whether changes in growth patterns will be consistent with GMA planning. The importance of such considerations is apparent in light of projections that Skagit County's population may more than triple between 2000 and 2050.33

33 See Economic and Engineering Services, Inc., Skagit County Coordinated Water System Plan Regional Supplement Table 7-3 (June 1999) (population projections provided by the Washington State Office of Financial Management).

Response: Ecology (and the law) acknowledges that water is a limited resource. Ecology further acknowledges that development may be curtailed in areas lacking a reliable water source until an alternative source is made available. Projected growth for these areas is likely to be redirected Potential rural development has water available under the created reservations for the twenty-year planning period. The counties will have an opportunity to assess water availability when the plan must be reconsidered or updated, particularly with the clarity provided in the current proposed rule.

Comment 879

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Changing the assumptions upon which Skagit County and major water purveyors

planned will significantly impact planning efforts and necessitate wide ranging amendments to planning efforts.

Response: Thank you for your comment. Please see the response to comment 878.

Comment 880

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Conflicts with the Skagit County Critical Areas Ordinance – Skagit County's Critical Areas Ordinance (CAO) regulates impacts to wetlands, wetland buffers, geologic hazard areas, and protects fish and wildlife habitat conservation areas. The DNS fails to disclose conflicts which may arise where service extensions which are "timely and reasonable" under the amended rule will result in disturbance to critical areas which could be avoided by well development.

Response: Thank you for your comment. It is not possible to measure or predict the likelihood of a utility line needing to pass through a designated critical area where no such disturbance would be necessary if wells were to be developed. It may be more or less than the likelihood that avoided well development would have occurred within critical areas. In any case the amended rule will not change the need for utility line extension projects to comply with requirements set in Skagit County's CAO.

Comment 882

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The infrastructure assessment should evaluate the environmental impacts of actually constructing all of these new pipelines through farmland, forest and creeks versus the relatively minimal impacts required to install a single or small group domestic well system.

Response: Thank you for your comment. Ecology has no authority to determine the method of supplying water where unmet needs have been identified. If public water systems are extended to these areas, siting of the related facilities will be within the purview of the local jurisdictions and water purveyors and would require environmental review prior to implementation. For Ecology to perform analysis of this type at this time would be purely speculative, particularly considering the impossibility in determining which parcels will develop wells under the reservations and when any area may experience a lack of water

Comment 884

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The provision of housing is also a fundamental component of the GMA[35] necessitating that Ecology consider impacts on housing.

35 Chapter 36.70A RCW.

Response: Thank you for your comment. Please see response to comment 884.

Comment 885

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Impacts on housing supply -- The DNS incorrectly concludes that no housing units would be eliminated by the proposed rule.36

36 Determination of Nonsignificance, 12.

Response: Thank you for your comment. The rule amendment has no impact on existing water rights and therefore will in no way impact existing housing reliant on existing water rights.

Comment 886

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: This conclusion is directly contradicted by Ecology's own admission that not all buildable parcels will have access to potable water.37

37 Determination of Nonsignificance, 11-12.

Response: Thank you for your comment. The conclusion in response to comment 885, "The rule amendment has no impact on existing water rights and therefore will in no way impact existing housing reliant on existing water rights." is reasonable. If the conclusion referenced in comment 886 is that not all vacant parcels will have a permit exempt well available to them. that is correct. That is the result of water being a limited resource. However, to say that a permit exempt well is not available to some parcel is not the same as saying they will not have access to potable water. Please see response to comment 843.

Comment 887

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: As Tables 1 and 2 demonstrate, 817 to 1,024 parcels become unbuildable under the amended rule. Prohibiting development of as many as one-fourth of all rural buildable parcels has a significant direct impact on the Skagit County housing supply.

Response: Thank you for your comment. Please see response to comments 843 and 886.

Comment 889

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The cumulative effect of reducing rural developable lots by 20 to 25 percent is significant. The localized effect of denying additional development in the Nookachamps and Fisher Creek subbasins imposes a significant localized effect on the provision of housing and affordable housing in these subbasins.

Response: Thank you for your comment. Please see response to comments 886 and 843. The Nookachamps and Fisher Creek sub basins are not affected by the Stillaguamish rule making, and the rule does not deny additional development in the Nookachamps and Fisher Creek sub basins.

Comment 890

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Impacts on affordable housing -- Counties that plan under GMA must "encourage the availability of affordable housing to all economic segments of the population, promote a variety of residential densities and housing types, and encourage preservation of existing housing stocks."38

38 RCW 36.70A.020(4).

Response: Thank you for your comment. Ecology agrees that the comment reflects RCW 36.70A.020(4) and that Counties that plan under GMA must address affordable housing.

Comment 894

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Impacts to affordable housing are deeply disturbing because almost 6,000 Skagit County households have a demonstrated need for affordable housing.42

42 Skagit County Comprehensive Plan, 3-11 (2003).

Response: Thank you for your comment. Comment noted. Please see response to comment 893.

Comment 896

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The fundamental uncertainty in Ecology's conclusions is evident in the statement that "[over time, Skagit PUD should be able to provide service to most areas of the Nookachamps, Fisher, and Carpenter subbasins."44 Multiple qualifiers make this conclusory statement meaningless.

44 Determination of Nonsignificance, 11

Response: Thank you for your comment. For this rule-making, Ecology has reached no conclusions regarding the Nookachamps, Fisher, and Carpenter subbasin. Those subbasins are not in the Stillaguamish basin, nor are they subject to this rule making.

Comment 897

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Uncertainty over which areas will receive service, when that service will be made available, and the cost of providing such services make it impossible to determine the significance of requiring connections.

Response: Thank you for your comment. Please see response to comment 896.

Comment 898

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Impacts on Sensitive Agricultural Lands: The closure of basins to further development creates a potential demand for farmland redevelopment. Redevelopment and the loss of prime farmlands will adversely affect historic and cultural resources central to Skagit County's agricultural heritage and identity. Adverse effects to prime farmlands, historic, and cultural resources are all factors the lead agency considers in evaluating the significance of a proposal's impacts.45 Impacts to these factors were overlooked in preparation of the DNS.
45 WAC 197-11-330(3)(e)(i).

Response: Thank you for your comment. Ecology respectfully disagrees with a premise of your argument. The premise is that the closure of a basin means there will be no new uses or redevelopment of existing uses of water and or that water will somehow limit land use. That is simply incorrect. The closure of a basin has nothing to do with pressures for farmland redevelopment. GMA requires local jurisdictions to adopt plans, zoning, and ordinances that protect prime farmland from conversion or redevelopment. (RCW 36.70A.060 and 36.70A.177) If measures in place are insufficient to prevent redevelopment of prime farmland, or if Skagit County chooses to remove protection of farmlands redevelopment of farmland in these sub basins is likely. The magnitude of this potential impact is reliant on the level of protection prime farmlands are provided under Skagit County ordinance.

Comment 899

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Skagit County contains some of the most productive farmland in western Washington. The DNS recognizes that "Skagit County (which contains nearly all of the agricultural areas in the Skagit basin) agricultural products had a $217,384,000 market value."46 The American Farmland Trust, in association with Washington State University, conclude the "[total known economic impacts of Skagit County agriculture . . . totals approximately $600 million annually. There are at least 3,300 people engaged in full-time equivalent employment tied directly to agricultural activities, and at least 5,650 people total engaged in employment generated overall by the local agriculture industry." American Farmland Trust, Economic Impacts of Agriculture in Skagit County, WA 3 (2003).
46 Determination of Nonsignificance, 9.

Response: Thank you for your comment. Comment noted.

Comment 900

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The Final Environmental Impact Statement for Watershed Planning under Chapter 90.82 RCW similarly recognizes that agriculture represents 25 percent of total land use in Skagit County.47

47 Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 4-21.

Response: Thank you for your comment. Comment noted.

Comment 901

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: As the American Farmland Trust recently reported, "[for every $1 collected in

taxes on agricultural lands in Skagit County, only 51 cents in community services is provided by governments, thus producing a 49 cent surplus in revenue to support government services provided to other local taxpayers. By comparison, for every $1 collected in taxes on residential lands in Skagit County, governments must provide $1.25 in community services. Skagit County farmers thus provide a significant tax benefit for other local taxpayers."48

48 American Farmland Trust, Economic Impacts of Agriculture in Skagit County, WA 3 (2003).

Response: Thank you for your comment. Comment noted.

Comment 902

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Accordingly, any action which impacts agriculture, impacts not only the 3,300 plus people employed in agriculture, but all those who depend on government services substantially underwritten by agricultural production.

Response: Thank you for your comment. Comment noted.

Comment 905

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology is undertaking a comprehensive program to regulate instream flows throughout the state and has previously treated individual planning efforts as part of an integrated whole.51

51 See e.g. FEIS for Watershed Planning; FEIS for Western Washington instream Resource Protection Program; DEIS for Instream Resources and Water Allocation Program Review; Guidance, Setting Instream Flows and Allocating Water for Future Out-Of-Stream Uses.

Response: Thank you for your comment. Comment noted.

Comment 906

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: As of July 2003, watershed planning efforts were underway in 42 of the state's 63 WRIAS.52 Ecology's rulemaking schedule anticipates adoption of ten instream flow rules governing eleven WRIAs during 2005.53

52 Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 1.

53 Wash. State Dept. of Ecology, Instream Flozu Rule-Making Schedule, January 2005-September 2006 (Feb. 28,2005).

Response: Thank you for your comment. Comment noted.

Comment 907

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology is following a similar process for the Samish River Basin immediately to the north of and tributary to the Skagit River Basin, and in the Stillaguamish River Basin immediately to the south of the Skagit River. Anticipated rule adoption in all three of these basins

is anticipated within the next six months.

Response: Thank you for your comment. Comment noted. The rule-making for the Skagit and Samish River basins has been postponed for at least six months to allow time for the parties to negotiate a resolution to litigation issues.

Comment 908

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The three proposed rules are thus interdependent parts of a larger course of action and the interactions between the three rules need to be considered

Response: Thank you for your comment. Ecology respectfully disagrees. Please see response to comment 904.

Comment 909

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Restrictions on exempt well development in the Skagit River Basin will discourage development in rural parts of the county, shifting growth patterns towards urban centers served by municipal water purveyors or towards redevelopment of agricultural lands with existing, senior water rights. Similar restrictions in the Samish and Stillaguamish basins will have a comparable effect. The synergistic effect of these three proposals will change the face of development in north-western Washington, reducing growth throughout the 3,526 square miles of Whatcom, Skagit, and Snohomish counties covered by these rules.

Response: Thank you for your comment. Ecology respectfully disagrees. Please see response to comments 843 through 848 and 898.

Comment 910

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology needs to address the significance of the urbanizing impacts its proposal will have on these Washington counties.

Response: Thank you for your comment. Ecology respectfully disagrees. Please see response to comments 843 through 848 and 898.

Comment 911

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology recognizes that regional restrictions can have significant cumulative effects when it states: "Should established flows reduce the amount of water available for out-of-stream uses, [setting instream flows by administrative rules] in multiple watersheds could reduce development on a regional or statewide scale."54 Despite this recognition, the DNS glosses over clearly significant cumulative effects.

54 Final Environmental Impact Statement for Watershed Planning Under Chapter

Response: Thank you for your comment. Ecology respectfully disagrees. Please see response to comments 843 through 848 and 898.

Comment 930

Commentor: Jodi Slavik, Building Industry Association of Washington

Type: Letter dated April 25, 2005

Comment: The Building Industry Association of Washington (BIAW) appreciates this opportunity to comment on the proposed Stillaguamish Water Management Rule, establishing instream flows for the Stillaguamish River in WRIA 5. BTAW represents over 11,200 member companies in the land development and building trades, many of which build in WRIA 5. These members rely on thoughtful, long-term planning that is predictable, stable, and allows for needed economic growth. Unfortunately, the proposed instream flow rule undermines certainty, usurps local planning, and stymies economic growth. For these reasons, BIAW is adamantly opposed to the proposed rule language. Our opposition is detailed below.

Response: Thank you for your comment. Comment noted.

Comment 931

Commentor: Jodi Slavik, Building Industry Association of Washington

Type: Letter dated April 25, 2005

Comment: Ecology lacks authority to impose a reservation that restricts exempt wells. RCW 90.44.050 expressly exempts the withdrawal of ground water "for single or group domestic uses in an amount not exceeding five thousand gallons a day" from state permitting, and it further grants these wells "a right equal to that established by a permit issued under the provisions of this chapter." Ecology cannot, by rule, change the express exemption of RCW 90.44.050 such that only a finite amount of wells will be allowed in WRIA 5.

Response: Thank you for your comment. Ecology respectfully disagrees that Ecology lacks authority to impose a reservation that restricts exempt wells. Under the exemption in RCW 90.44.050, individuals may receive a "right equal to that established by permit issued" by Ecology without applying and receiving a permit from Ecology as the statute would otherwise require under certain conditions. (See RCW 90.44.050). One specific exemption is for single and group domestic uses that do not exceed 5,000 gallons per day. While these domestic groundwater wells do not require departmental review to ensure that they are valid, they are equal water rights subject to limitations that pertain to permitted rights, such as being junior to senior rights, minimum flows and closures.

Ecology has the authority to close water bodies to future appropriations and to set instream flows. (See Postema v. PCHB, 142 Wn.2d 68, 95; RCW 90.22 (authority to set minimum flows); RCW 90.54.020(3)(a) (authority to retain "base flows" to preserve fish, wildlife, etc.); RCW 90.03.247 (authority to set minimum flows) ; RCW 43.27A.090(7), (11) (authority to promulgate rules respecting future water use); and RCW 43.21A.064(9) (authority to promulgate rules to administer RCW 90.03)). Ecology's authority to close a water body from further appropriation applies to all appropriations and withdrawals; it is not limited only to permitted appropriations and withdrawals. Neither does RCW 90.44.050 exempt domestic groundwater wells from the provisions of the water code authorizing closures. Rather, as noted above, domestic groundwater wells are treated as any other right, as equal.

Recognizing the importance of, and statutory direction for, safe water supplies for human health purposes, in the Stillaguamish basin Ecology proposes a reservation of water for domestic purposes. RCW 90.54.050(1) and RCW 90.03.345 both authorize Ecology to "reserve" or set aside water for certain purposes. Reservations have priority dates that allow those that make use of reservation water -- even years after the creation of the reservation -- to benefit from the reservation's more senior priority date. Reservations are also for defined beneficial use, in

discrete areas, for specific purposes and hence have limited quantities, which means that they are finite and can be exhausted.The establishment of reservations is left to Ecology's discretion.

As discretionary acts, reservations may be reasonably conditioned when created. In many cases, Ecology attempts to include conditions on the use of reservations in order to ensure efficiency of water use, or prolong the life of the reservation and ensure the maximum number of people may benefit from it. No one is required to use reserved water as a source. For instance, people may purchase existing water rights rather than use reserved water. However, those who wish to benefit from a reservation must abide by its conditions and limits, even domestic well users. As noted above, RCW 90.44.050 only exempts certain domestic well users from the requirement to obtain a permit. RCW 90.44.050 does not authorize domestic well users to ignore other portions of water law, including regulations that close water bodies and regulations that create and condition reservations of water. Also please see response to comment 237.

Comment 934

Commentor: Jodi Slavik, Building Industry Association of Washington

Type: Letter dated April 25, 2005

Comment: The statute most reflective of the balancing of natural resource protection and economic growth is the Growth Management Act, RCW 36.70A. In this chapter, the goals of housing, economic development, and property rights are paired with the environment, open space, and limitation of sprawl. Under RCW 36.70A, local governments are vested with the authority to create comprehensive plans that provide ample housing and job opportunities while protecting local resources. This is a careful balancing act; local governments thoroughly weigh public benefit and cost before producing growth plans and development regulations. However, these thoughtful, long-term plans are usurped when the Ecology creates a finite limitation of water for exempt wells in rapidly growing areas. Similarly, Ecology is abrogating its duty to preserve and protect sufficient water for domestic needs when it creates arbitrary limits on ground water withdrawals.

Response: Thank you for your comment. Ecology respectfully disagrees that local governments long-term plans are usurped when the Ecology creates a finite limitation of water for exempt wells in rapidly growing areas. Water availability and existing water rights should be considered by local government in the development of their land use regulations. Nothing is precluding local government from considering the proposed rule, as well as existing water rights, in their deliberative process. Ecology is not abrogating its duty to preserve and protect sufficient water for domestic needs when it creates limits on ground water withdrawals, given what is known today, and the competition for water. The proposed reservations are sufficient to meet projected rural domestic needs well into the future.

Comment 941

Commentor: Jodi Slavik, Building Industry Association of Washington

Type: Letter dated April 25, 2005

Comment: Ecology further asserts "This rule has been developed over a long period with substantial public involvement. Several public meetings were held to discuss the language and the proposed rule was posted on Ecology's website." Supposedly this statement is made to comply with RCW 90.54.010, which provides in part: "(b) Through a comprehensive planning process that includes the state, Indian tribes, local governments, and interested parties, it is possible to make better use of available water supplies and achieve better management of water resources. . . . "(d) Comprehensive water resource planning must provide interested parties adequate opportunity to participate. Water resource issues are best addressed through cooperation and coordination among the state, Indian tribes, local governments, and interested parties."

However, two public informational meetings and posting the rule on the website does not rise to the level of "substantial public involvement." In addition, "[t]he Stillaguamish River is not a WRIA where watershed planning is being conducted." (Ecology Focus sheet, August 2004) Without a watershed planning group, how has Ecology gathered the requisite information to make an informed analysis of economic impacts on small business?

Response: Thank you for the comment. What constitutes “substantial public involvement” is a matter of opinion. Ecology believes it has adequately involved the public during the rulemaking process. This has occurred through the conventional rulemaking process under Chapter 34.05 RCW, which includes public meetings, public commenting periods, and procedures for analysis. Outreach and notification about the development of instream flow rules in general, and the Stillaguamish in particular, occurred at both the statewide and local or regional level. Specifically for this rule, and over a two year period, Ecology met numerous times with representatives of Snohomish County, Snohomish County Health District, Snohomish Public Utility District, the Stillaguamish Implementation Review Committee, North Snohomish Water Utility Coordinating Council, Snohomish Conservation District, Skagit County, City of Stanwood, City of Arlington, City of Marysville, Stillaguamish Tribe, Tulalip Tribes, State agencies, Water Resources Advisory Committee, and others.

Ecology gathered information to make an informed analysis using existing data on water use and water rights, existing and new modeling for fish habitat needs, outreach and contacts with stakeholders, and acquired Assessor’s data for all parcels including all parcels owned by small businesses. Impacts to small businesses were at least partly associated with potential restrictions on land use of which ownership of land is a key issue. Understanding what entities own the land was done by analysis of Assessor’s data. As to the scope of the rule, please see response to comments 469 and 1025.

Comment 943

Commentor: Jodi Slavik, Building Industry Association of Washington

Type: Letter dated April 25, 2005

Comment: BIAW opposes the rule amendments to Chapter 173-505 WAC. The proposed rule surpasses Ecology's authority and has dramatic impacts on the regional housing industry, as well as the Snohomish and Skagit County economies. In a final blow to local homebuilders and taxpayers, Ecology fails to address or otherwise mitigate these impacts in the rule or in the supporting Cost-Benefit

Response: Thank you for your comment. Ecology respectfully disagrees with your comment. Please see response to comments 930 through 942.

Comment 944

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: The City of Arlington is pleased to submit our comments on the draft of the Stillaguamish River Basin-Instream Resource Protection & Water Resource Program, Chapter 173-505 WAC (""Rule"). This letter conveys our interest in a Rule that would significantly affect how we do business as a purveyor of water in our regionally recognized service area.

Response: Thank you for the comment; comment noted.

Comment 945

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: The city is currently preparing our approach to meeting the aggressive goals set

for us under the Growth Management Act--perhaps more than doubling our population in the next 20 years. We have capacity to supply instantaneous demand for only a few more years, and will need to increase that supply by about 80% by 2023. One estimate of annual demand indicates we will exhaust our capacity by 2019, and may need an additional 3,100 acre-feet by 2050.

Response: Thank you for the comment, comment noted. Ecology recognizes that the City has a pending water right application for the Airport well and that the future needs of the City are in flux.

Comment 946

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: We understand and agree with the need for instream flow protection. Indeed, the City of Arlington's proactive approach with other environmental efforts, including TMDLs headed by Ecology staff, speaks to our genuine concern and intent to embrace sustainable development concepts. However, this Rule, as drafted, would significantly and unacceptably limit our opportunities for meeting our water supply obligations. Our foremost comments on the rule are summarized in four bullets below. We then elaborate on each of these areas, and suggest one or more alternatives for resolution of our concerns.

Response: Thank you for your comment and for the City of Arlington's proactive approach with other environmental efforts, including TMDL efforts headed by Ecology staff. Ecology respectfully disagrees that the rule, as drafted, will significantly and unacceptably limit Arlington's opportunities for meeting water supply obligations.

Comment 948

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: Spada Reservoir is the water source for most of southwestern Snohomish County, as well as about one-fifth of Arlington's annual consumption and it is likely the authors assumed this source would supply continued growth within the Stillaguamish basin. The Snohomish County Council, authorized by the Public Water System Coordination Act of 1977, recognized Arlington and other northern Snohomish County localities in 1988 as a Critical Water Supply Service Area. Our participation with other communities in a long range capacity and distribution planning exercise resulted in the Northern Snohomish County Coordinated Water System Plan (CWSP). Although the CWSP identified Spada Reservoir as one source available to the city, it requires us to look first at potential supplies located within or much closer to the Stillaguamish basin. As a result, this Rule would appear to constrain and be contrary to the direction of the CWSP.

Response: Thank you for your comment. Ecology recognizes that Spada Reservoir is the water source for most of southwestern Snohomish County, as well as about one-fifth of Arlington's annual consumption. However, there is no assumption by Ecology that Arlington's use of Spada water would supply continued growth within the Stillaguamish basin. The rule is not contrary to the direction of the CWSP in that the rule provides no preference for where municipal water purveyors obtain their water. In fact Ecology believes the rule complements the CWSP, for example implementing the statutory requirement to obtain water supply from a municipal provider when service can be provided. See RCW 43.20.260.

Comment 949

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: In addition, there are practical difficulties created by the assumption of a regional supply that are not easily addressed. The City of Everett and Snohomish County PUD have priority contractual commitments with other customers. Existing infrastructure limitations would also require expensive capital improvements that are not within the near-term means of the PUD, the wholesaler that delivers water from Spada Reservoir to Arlington.

Response: Thank you for your comment. Please see response to comment 948.

Comment 962

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: Ecological assumptions. This Rule contains some language and assumptions that could result in reduced benefits to salmon recovery in the Stillaguamish basin, and perhaps incomplete or ineffective protection for salmonid populations on a regional scale. We are concerned that the well-intentioned use of the Rule as one tool for helping to meet salmonid recovery goals in Puget Sound may not be completely thought through, yielding unsatisfactory results both for the fish and our customers. Several of our comments made earlier in this letter also have implications that make us question the benefits to fish.

This rule recommends water reclamation, reuse, and artificial recharge and recovery as alternatives to establishing new water sources. These measures are common recommendations and increasingly used in practice, but they also result in greater losses and therefore greater consumption, gallon (used) for gallon (withdrawn). In our case, we may need to reuse or recharge in the future in order to stretch our supplies. If our wastewater return flows were fully diverted from the river during a peak day demand for potable water, discharge in the mainstem Stillaguamish River would be reduced by approximately 6 cfs, or 4 cfs more than under typical operations in 2004. If other water users made similar efforts to reclaim and reuse water in the name of conservation (that is, more fully consume the water they use), the cumulative effect on instream flows from senior water users could result in declining discharge. This is an instance where a well-intentioned requirement would have a negative impact on fish in the Stillaguamish basin.

Response: Thank you for your comment. Your comment is correct in that, there may be some instance where a well-intentioned requirement would have a negative impact on fish in the Stillaguamish basin. Any reuse of waste water in the basin would be evaluated under existing law and there is certainly nothing is chapter 90.46 RCW (reclaimed water statute) that precludes the assessment you mention. That statute says in part, “The legislature further finds and declares that the utilization of reclaimed water by local communities for domestic, agricultural, industrial, recreational, and fish and wildlife habitat creation and enhancement purposes, including wetland enhancement, will contribute to the peace, health, safety, and welfare of the people of the state of Washington. To the extent reclaimed water is appropriate for beneficial uses, it should be so used to preserve potable water for drinking purposes. Use of reclaimed water constitutes the development of new basic water supplies needed for future generations.” Ecology believes adverse impacts to natural resources would be evaluated in any reclamation assessment.

Comment 963

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: Although Spada Reservoir has perhaps a luxurious capacity to supply future growth in Snohomish County, we are concerned about the effects on fish at basin and regional scales. We have demonstrated that our wholesale water purchases amount to interbasin

transfers of water resulting in augmentation of Stillaguamish basin flows in about 10 months each year. The literature is full of examples where interbasin transfers of water to satisfy the demands for water in one basin, already depleted by population growth, have resulted in depleted supplies in both basins. We therefore suggest that reliance on the Spada Reservoir as the lone source for our supplies is inappropriate and ecologically incompatible with the needs of the Sultan-Skykomish-Snohomish River system. The complex result, in simple terms, is more of a temporary shift in blame than a long-term solution.

Response: Thank you for your comment. Please see response to comment 948. In short, there is no Ecology assumption of reliance on the Spada Reservoir as the sole source for Arlington's supplies.

Comment 965

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: We propose that an improved Rule would encourage public suppliers--at least the larger Suppliers--to look first in "their own, wetter backyard" before considering interbasin water transfers. Planners and growth managers would need to validate that a basin contains adequate water supplies prior to allocating growth to cities, UGAs, and rural areas within that basin. It may be too late to implement this approach in the southwestern county, but it is both timely and critical for the Stillaguamish basin, with its smaller communities that are beginning to experience rapid growth.

Response: Thank you for your comment. Please see response to comment 948. The proposed rule neither encourages nor discourages municipal water suppliers as to where to look for potential sources of water to meet future needs. Ecology agrees, and encourage local government to have, planners and growth managers for local government validate that a basin contains adequate water supplies prior to allocating growth to cities, UGAs, and rural areas within that basin

Comment 967

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: The City recognizes the Stillaguamish River is at the heart of life as we know it, and we are earnest in our effort to be good stewards of it. We recognize the need to assure an adequate level of instream flow for the River, and appreciate the tremendous effort Ecology has made in tackling these complex issues. (Thanks in particular, Steve, for taking the time to meet with our staff to discuss the Rule.) However, the current version of this Rule is simply too restrictive for us to meet the needs of our citizens and our environment, and address our obligations under the Growth Management Act. We look forward to working with Ecology and others to manage the basin for the wise use of its

Response: Thank you for your comment.

Comment 977

Commentor: James Miller, City of Everett

Type: Letter dated May 18, 2005

Comment: The purpose of this letter is to support the need for the proposed Instream Flow Rule for the Stillaguamish River. We believe that instream flows must be set in order to protect fish habitat as a key element of any salmon recovery plan for Puget Sound.

Response: Thank you for your comment and your support for setting instream flows for the Stillaguamish River.

Comment 978

Commentor: James Miller, City of Everett

Type: Letter dated May 18, 2005

Comment: Everett provides water to over 75% of Snohomish County. Our wholesale and retail planning service area includes the western half of Snohomish County from the King County boundary to Skagit County. As such, this includes the lower Stillaguamish River basin which was one of the areas addressed in our 2000 Water Plan for the possible future provision of water. At this time, only Arlington obtains about 20% of their water from our water supply. The rest is outside of our existing water usage area.

Response: Thank you for your comment; comment noted.

Comment 979

Commentor: James Miller, City of Everett

Type: Letter dated May 18, 2005

Comment: We support the setting of appropriate instream flows by rule as an essential part of the State's water resources management responsibilities. We believe that establishing instream flows at levels needed to protect fish runs is necessary to create certainty for all water users and uses in a basin. We have found that the instream flows set for the Sultan River can result in benefits to both people (hydropower, water supply, and flood control) and fish. However, unlike the Stillaguamish, in the Sultan Basin we have the advantage of a large storage project and the ability to manage flows to ameliorate the effects of natural

Response: Thank you for your comment and, again, your support for setting appropriate instream flow rules for the Stillaguamish River.

Comment 982

Commentor: James Miller, City of Everett

Type: Letter dated May 18, 2005

Comment: We support the need for an instream flow rule for the Stillaguamish River and Ecology's efforts so far in developing the Proposed Rule. We suggest that some policy refinements suggested above would help to make the Rule more acceptable to basin stakeholders.

Response: Thank you for your comments and your suggested refinements to the rule.

Comment 983

Commentor: Ted and Jean Oien, Camano Vu Dairy

Type: Letter dated April 18, 2005

Comment: Part of the reason no watershed planning group was formed on the Stillaguamish River basin is due to the many groups that we already have formed and attend. There is only so much time that active farmers can devote to all these various projects. It seems like a lot of them could be combined and the spring and summer are the busiest time of year for our area farmers. We are trying to make a living in this wonderful valley.

Response: Thank you for your comment. Ecology does strive to consolidate and or limit the groups formed on our behalf or to address environmental issues because there is only so much

time that active farmers can devote to all these various projects. In fact, in November of 2004, Ecology held a joint water quality and water quantity meeting precisely because of such suggestions as yours.

Comment 984

Commentor: Ted and Jean Oien, Camano Vu Dairy

Type: Letter dated April 18, 2005

Comment: During the summer we do not water our lawns. We do not add pesticides to it. We grow dandelions instead.

Response: Thank you for your comment.

Comment 985

Commentor: Ted and Jean Oien, Camano Vu Dairy

Type: Letter dated April 18, 2005

Comment: We don't need any more rules and we are already overregulated which has forced more and more dairy farms and their families out of business. If buraqcracies (sic) continue to do this and we will be importing our foods from other countries which have no regulations and no safety standards of chemicals.

Response: Thank you for your comment, comment noted. Ecology respectfully disagrees that a rule is not needed to establish an instream flow water right and fulfill the statutory directive of chapter 90.54 RCW. The only way to create an instream flow water right is by rule. Ecology very clearly understands that agriculture interests in the Stillaguamish basin feel they are overregulated.

Comment 986

Commentor: Ted and Jean Oien, Camano Vu Dairy

Type: Letter dated April 18, 2005

Comment: Maybe if we had less construction and building in the area, there would be less need for more water.

Response: Thank you for your comment. You are absolutely correct; if there were less construction and building in the area, there would be less need for more water.

Comment 987

Commentor: Ted and Jean Oien, Camano Vu Dairy

Type: Letter dated April 18, 2005

Comment: Let the Tribes take less fish and maybe the populations of fish would come back more readily.

Response: Thank you for your comment. Fish harvest issues are beyond the scope of this rule. However, in general, your comment that if less fish are taken maybe the populations of fish would come back more readily is probably true. However it is uncertain that natural spawning populations would more readily come back, if the harvest is of hatchery stocks. The balance between harvest and habitat will no doubt continue to be addressed for years as we strive to restore salmon stocks in the basin.

Comment 988

Commentor: Ted and Jean Oien, Camano Vu Dairy

Type: Letter dated April 18, 2005

Comment: Why put trees along sloughs that are shrinking?

Response: Thank you for your comment. Riparian zone (i.e., river bank) vegetation management is beyond the scope of this rule making. However, such management can have a significant effect on water temperature and may be important to increase bank storage of water for subsequent release to instream flows. A functional riparian zone may be very necessary to achieve salmon recovery, but is not a specific part of this instream flow rule.

Comment 989

Commentor: Ted and Jean Oien, Camano Vu Dairy

Type: Letter dated April 18, 2005

Comment: Why are fish more important than people?

Response: Thank you for your comment. Ecology has not by any means taken the position that fish are more important than people and respectfully disagrees that this is implied by the proposed rule.

Comment 991

Commentor: Ray Hoffman, Seattle Public Utilities

Type: Letter dated May 13, 2005

Comment: As you are aware, the City of Seattle has extensive experience in water resource management, through both our water supply and hydroelectric projects on several rivers in the State. For decades, we have worked to understand the rivers where we have operations and to involve stakeholders in meaningful, cooperative decision making about the management of these river systems. This work has resulted in FERC license agreements and an HCP that guarantee biologically and hydrologically instream flows that are actively managed by the City with participation of other governments and which are supported and informed by ongoing research and adaptive management. We believe these approaches can serve as a model for other basins because they have demonstrated that sound science, active management and good communication can indeed produce better outcomes with respect to water resource management and to the protection of ecological functions in these watersheds.

Response: Thank you for your comment. Ecology is aware that the City of Seattle has extensive experience in water resource management, through both our water supply and hydroelectric projects on several rivers in the State. Ecology is one of the agencies that participates in both Federal Energy Regulatory Commission and Habitat Conservation Plan work being done by the City of Seattle.

Comment 995

Commentor: Ray Hoffman, Seattle Public Utilities

Type: Letter dated May 13, 2005

Comment: The Rule appears to fulfill your mandate to consider both multiple instream and out- of-stream needs.

Response: Thank you for your comment; Ecology agrees with your comment.

Comment 996

Commentor: Ray Hoffman, Seattle Public Utilities

Type: Letter dated May 13, 2005

Comment: The process for rule development appears to have been respectful of local interests and to have engaged local stakeholders.

Response: Thank you for your positive comment about public participation and stakeholder engagement in developing the rule proposal. Ecology realizes such involvement is extremely important.

Comment 997

Commentor: Ray Hoffman, Seattle Public Utilities

Type: Letter dated May 13, 2005

Comment: The acceptability of the rule would benefit from Ecology clearly communicating the scientific rationale for the Stillaguamish Rule. It is our understanding that during most of the years, portions of the Rule will not be met because the Rule has been set at a level to protect base flows that may occur naturally on only an occasional basis. As a result, it could appear that the Rule has been established in a manner such that it cannot be met, which without adequate explanation, could undermine the credibility of the Rule.

Response: Thank you for your comment. Ecology agrees the acceptability of the rule would benefit from Ecology clearly communicating the scientific rationale for the Stillaguamish Rule. Ecology believes it has clearly communicated the scientific rationale for the Stillaguamish Rule. The City of Seattle's understanding that during portions of the year or time periods of the years, the instream flows will not be achieved because the instream flow numeric standards has been set at a level to protect base flows that may occur naturally on only an occasional basis is correct. In some cases, for example the North Fork Stillaguamish at Oso the summer low flows are well below what will be established as an instream flow. However, in wet years, the instream flows will be achieved. Please see response to comment 298.

Comment 999

Commentor: Richard Raisler

Type: Letter dated March 23, 2005

Comment: I am a Skagit Valley citizen, retired businessperson and volunteer interested in protecting and preserving water quality of Washington lakes, streams and rivers. It is critical that you adopt instream flows to protect fisheries, wildlife, and ecology. Limiting future groundwater use is prudent and necessary for future generation's quality of life.

Response: Thank you for your comment and your support of Ecology's efforts to adopt instream flows for the Stillaguamish River.

Comment 1000

Commentor: Richard Raisler

Type: Letter dated March 23, 2005

Comment: Your decision to adopt instream flows for the Stillaguamish River is a critical component towards this effort. Thank you for this bold and necessary step. This decision comes after many years of not using your authority granted by the State in 1971. Please use your authority prudently and where ever necessary to protect Puget Sound Chinook salmon, steelhead, sea run cutthroat, and all species of salmon.

Response: Thank you for your comment. Ecology agrees that it is very important to adopt instream flows for the Stillagaumish River and elsewhere, as necessary, to protect endangered salmon, other fisheries, and instream values.

Comment 1002

Commentor: Richard Raisler

Type: Letter dated March 23, 2005

Comment: Many citizens, tribes, and organizations are contributing to the protection, restoration, and enhancement of the Stillaquamish Watershed. Thank you for joining in the process.

Response: Thank you for your comment and your recognition of the various entities that have a common interest in protecting, restoring, and enhancing the Stillaguamish Watershed.

Comment 1003

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: These comments are submitted on behalf of Skagit County on the Department of Ecology's proposed Stillaguamish Instream Flow Rule. Skagit County's comment letter on Ecology's proposed Skagit River amended instream flow rule and the documents attached thereto are incorporated by reference into the County's comment letter on the proposed Stillaguamish rule. The documents referenced herein are likewise incorporated by reference.

Response: Thank you for your comment. Comments made by Skagit County on the Skagit basin proposed instream flow rule amendment are addressed, where applicable, in this Responsiveness Summary portion of the Stillaguamish Concise Explanatory Statement. However, comments on specific streams or basins associated with amendments to the Skagit rule are not addressed if those specific comments are not applicable to this rule making. Any general comments or questions are addressed or answered.

Comment 1004

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Skagit County is concerned with any actions in the Stillaguamish River basin because a significant portion of the basin in within Skagit County. As the fifth largest tributary to Puget Sound,1 the Stillaguamish River is an important resource which needs to be addressed as part of a comprehensive regional program. Skagit County believes it is critical that the adjacent Samish, Skagit, and Stillaguamish River basins be treated as part of the regional community which they represent and that Ecology proceed with an integrated approach to addressing what are fundamentally regional issues.

1 Ecology, Proposed Stillaguamish Water Management Rule, http:/ /www.ecy.wa.gov/programs/wr/instream-flows/Stillaguamishbasin.html

Response: Thank you for your comment. Ecology respectfully disagrees that the Samish, Skagit, and Stillaguamish basins need to be addressed as part of a comprehensive regional program. While the rivers maybe part of the regional community, assuming the region is very large, there is no compelling reason why a water management program in the Stillaguamish is dependent on programs in other basins. In fact the basins are very distinct and not dependent on each other from a water-related perspective.

Comment 1005

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Ecology's Stillaguamish Instream Flow Rule exceeds Ecology's statutory authority: Ecology only has that authority granted to it by the state legislature. In Ecology v. Rettkowski, the Supreme Court held that Ecology lacks implied powers. Recently, in Biggers v. Bainbridge Island, the Washington Court of Appeals applied the same standard to a local government. The Biggers court invalidated the City of Bainbridge Island's moratorium on shoreline development activities exempt from permitting requirements under the Shoreline Management Act. The court noted that the City: "[Exists and derives its authority in power from the State Constitution and the Legislature. It has neither existence nor power apart from its creator, the Legislature, except such rights as may be granted to municipal corporations by the State Constitution."2 In a similar case, the State Supreme Court recently invalidated a resolution passed by the Tacoma-Pierce County Board of Health banning smoking in all public establishments throughout Pierce County. The Supreme Court ruled that a local regulation is invalid if it "prohibits what is permitted by state law."3 As explained below, Ecology's proposed rule is clearly inconsistent with this line of cases.

2 Biggers v. Bainbridge Island, 124 Wn. App. 858. . .103 P. 3d 244, 247 (2004).

3 Entertainment Industry Coalition v. Tacoma-Pierce County Health Dept., 153 Wn.2d 657, 664, 105 P.3d 985, 988 (2005) citing Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health, 151 Wn. 2d 428, 433, 90 Wn. 2d 37 (2004).

Response: Thank you for your comment. Ecology respectfully disagrees that the proposed rule exceeds our statutory authority. Please see RCW 43.21A.064(9), RCW 43.27A.090(11), Chapter 90.22 RCW and Chapter 90.54 RCW.

Comment 1006

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Ecology improperly seeks to regulate lawful activities which are exempt from agency regulation: State law expressly exempts certain groundwater wells from permit requirements. Ecology has no authority to restrict activities which the Legislature expressly exempted from its regulatory purview and any regulation which does so is invalid. Where the Legislature has provided an exemption from state regulation for small groundwater withdrawals and Ecology may not restrict activities that are exempt from its regulatory purview.

Response: Thank you for your comment. Please see response to comments 237, 312, and 457.

Comment 1007

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Ecology cannot overcome limitations on its statutory authority by enlisting counties to enforce regulations against exempt well use, nor can Ecology condition rights on a county's promulgation of local ordinances. Such actions are the province of the Legislature, not an executive department agency.

Response: Thank you for your comment. Please see response to comments 237, 312, and 457. As to Ecology conditioning rights on a county's promulgation of local ordinances, the rule language to which you are referring was deleted. However, Ecology does believe that County government has an obligation and role in potable water used for buildings or relied upon for subdivision of land.

Comment 1008

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Ecology can condition a pending permit to require compliance with an instream flow adopted after a water right priority date was established.4 This authority is recognized, however, only where the agency already has granted a water right permit and where the statute provides explicit authority to condition water right applications and permits. No such authority exists with respect to exempt wells. RCW 90.03.247 -- the only provision of law providing Ecology with conditioning authority -- applies only to permitted water rights. There is no comparable regulation of exempt groundwater rights. Consequently, authority to condition a water right permit does not extend to requiring subordination of an exempt groundwater right to a later-adopted instream flow rule.

4 RCW 90.03.247.

Response: Thank you for your comment. Please see response to comments 237, 312, 457, 1006, and 1007.

Comment 1012

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Ecology's proposed rule preempts county land use regulatory authority: The proposed rule grants Ecology authority to limit or restrict further use of the domestic supply reservation established under the rule "if existing County and city land-use decisions, including zoning changes in building permit and subdivision approvals, allow for uses inconsistent with [the Stillaguamish instream flow rule] or for increased densities that adversely affect small tributaries and other flow sensitive areas."10 This provision allows Ecology to preempt local land-use decisions that are reserved exclusively to the County Board of Commissioners under the Growth Management Act.11

10 Proposed instream flow rule, at WAC 173-505-090(6).

11 RCW 36.70A.070; Snohomish County v. Anderson, 123 Wn.2d 151, 868 P.2d 116 (1994); Whatcom County v. Brisbane, 125 Wn.2d 345, 884 P.2d 1326 (1994).

Response: Thank you for your comment. Ecology respectfully disagrees the proposed rule preempts county land use regulatory authority: Please see comments 843 through 848, and 898. The rule language cited is deleted from the final proposal. That language created confusion as to how Ecology would limit or restrict further use of the domestic supply reservation established under the rule. If Ecology was compelled to change the rule, it would be by another rule making action. That is provided for in rule in section 170, regulation review.

Comment 1015

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Ecology's proposed rule conflicts with other governmental efforts: Ecology must consider conflicts with federal and local laws or requirements protecting the environment.17 The proposed rule is in conflict with prior agency determinations and multiple laws and requirements. Ecology concluded without analysis that the proposal "does not conflict with any local, state, or federal laws or requirements for the protection of the environment."18 The effect of the proposed amended rule's emphasis on connecting to public water systems is to increase public water system expansion into rural areas. Ecology previously recognized this risk, noting that requiring expansion of public water systems to rural areas "may create conflicts with the Growth Management Act (GMA) if the areas proposed for water supply extension are not within an urban growth area.

The extended availability of public water supplies may create pressures to develop or redevelop affected areas at higher density."19 Requiring expansion of public water

systems to rural areas "may require revisions to local comprehensive land use plans and/or update of the water system plan of the participating public water system. Funding would need to be identified to finance major water line extensions."20 Furthermore: "Establishing instream flows may limit the potential for obtaining new water rights from an affected water body. In such cases, the lack of available water may limit or alter the nature of new development. Where water supplies cannot be obtained from another source or 'created' through water use efficiency measures, comprehensive land use plans may need to be amended. . .

Local governments may need to modify their comprehensive land use plans if establishment of an instream flow adversely impacts the projections water resource availability upon which such plans are predicated.21 Ecology also previously acknowledged that "[i]f water supply becomes limited, people may make different decisions on where to work, live, and farm than they would make where the water supply is not limited."22 Ecology's proposed rule proceeds in spite of clear inconsistencies with these prior statements.

17 WAC 197-11-330(3)(e)(iii).
18 Determination of Nonsignificance, 29.
19 Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6-68
20 Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6-68
21 Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6-123 - 6-124.
22 Wash. Dept. of Ecology, Final Environmental Impact Statement (Including Program Overview) Western Washington Instream Resources Protection Program 5 (1979).

Response: Thank you for your comment. Ecology respectfully disagrees the proposed rule is in conflict with other federal and local laws or requirements protecting the environment. The proposed rule does not require, nor will its effect be, an increase of public water system expansion into rural areas. Please see response to comments 217, 222, 294, and 316 that address facets of hooking up to a municipal water purveyor. Ecology would agree that there may be potential changes to local land use plans to reflect water rights and or water management in the future. Any changes to land use plans to reflect water resource management is under the purview of the Counties and can be incorporated in the next updates of those plans. The statute contemplates a linkage between water management and the powers and duties of all subdivisions of government. For example, please see RCW 90.54.130 RCW where Ecology is directed to make advisory recommendations to inform local governments on water. RCW 90.54.090 also has the same idea wherein the statute says," …All agencies of state and local government, including counties and municipal and public corporations, shall, whenever possible, carry out powers vested in them in manners which are consistent with the provisions of this chapter."

Comment 1016

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Ecology also failed to coordinate with County planning efforts. Skagit County is concerned that Ecology's 20-year planning horizon is unreasonably short. Given the importance of water supply planning, Skagit County strongly believes the proposed reservation should reflect the 50-year timeline utilized by the County.

Response: Thank you for your comment. Ecology respectfully disagrees that it failed to coordinate with Skagit County. Several meetings were held and a lot of emails were exchanged with staff from several departments of Skagit County, as well as the Skagit County Health Department. Ecology believes the 20 year time period is a reasonable projection period. Twenty years is the longest time period required under GMA planning and capital facility plans have a six year horizon. Time periods beyond twenty years and associated populations may help form boundary conditions but are speculative at best.

Comment 1017

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Ecology further failed to coordinate with salmon recovery efforts with the basin. Shared Strategy for Puget Sound is currently performing a low-flow study in the Stillaguamish River basin, the results of which are anticipated this summer. Ecology should defer action on its proposed rule until this study becomes available and until consistency between salmon recovery efforts within the basin can be harmonized. Our common goals cannot be met by disconnected and potentially conflicting actions.

Response: Thank you for your comment. Ecology respectfully disagrees Ecology failed to coordinate with salmon recovery efforts. Ecology provided numerous updates and opportunities for comments on the proposed rule for the Stillaguamish Implementation Review Committee, the Lead Entity for salmon recovery in the basin. The proposed chapter for the Stillaguamish basin in the Shared Strategy for Puget Sound ESU draft Recovery Plan states "Instream flow levels should be set at an optimum level to ensure recovery goals and actions within this recovery plan are achieved…" page 62, Stillaguamish Watershed - WRIA 5 Chinook Salmon Recovery Plan, Final Plan (SIRC Review Draft), April 13, 2005. The instream flow optimum levels referred to come from this proposed rule and work done to determine instream flow needs. The commentor is correct that Shared Strategy for Puget Sound is currently performing a study in the Stillaguamish River basin, the results of which are anticipated this summer. However, the study is not a low flow study but rather an assessment of land use, impacts to stream flow, and changes to fish population. The study may shed light on why stream flow is low in either Church Creek or Pilchuck Creek, but will not provide new information on what instream flows should be. Simply put, the study will not provide information applicable to the establishment of instream flows. The study does show promise as a way to evaluate changes to stream flow from human actions at the landscape scale.

Comment 1018

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Moreover, it is inappropriate to proceed with development of the Stillaguamish River rule until the Skagit River basin rule is finalized. The Skagit River is the main water supply source within the region. Ecology cannot determine whether limited water availability will shift development into the Stillaguamish River basin until the amount of available water in the Skagit River basin is determined. Absent an understanding of development pressures, Ecology cannot determine the adequacy of available water under the proposed Stillaguamish rule.

Response: Thank you for your comment. Please see response to comment 904. In general, the Skagit River rule making is a separate and distinct action from this rulemaking. The Skagit River may be a main source of water for the Skagit basin; it is not a source of water used in the Stillaguamish basin. There is no transfer or exportation of Skagit basin water south. To Ecology's knowledge, there are no proposals for moving Skagit River water south; no pending applications for water right propose this. At this point in time, water availability or lack of it from the Skagit has no bearing on rule-making to establish instream flows for the Stillaguamish basin.

Comment 1023

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Ecology's proposed Stillaguamish rule violates procedural rulemaking requirements: Before adopting a significant legislative rule, an agency must show that the rule is, among other things: 1) supported by a cost/benefit analysis; 2) the least burdensome alternative; and 3) consistent and coordinated with other federal, state and local laws.26 A significant legislative rule is one which adopts substantive provisions of law pursuant to delegated legislative

authority, or adopts or significantly amends a new regulatory program.27 A rule adopted without compliance with these procedural requirements is subject to invalidation under the Administrative Procedure Act (APA).28

26 RCW 34.05.328(1).
27 RCW 34.05.328(5)(c)(iii).
28 RCW 34.05.570(2)(c).

Response: Thank you for your comment. Ecology respectfully disagrees that the proposed Stillaguamish rule violates procedural rulemaking requirements: The cost/benefit analysis, the least burdensome alternative, and consistency with other federal, state and local laws is documented in the rule making file. The cost/benefit analysis, the least burdensome alternative, and analysis of consistency with other federal, state and local laws are documents posted on Ecology's World Wide Web page. Please see http://www.ecy.wa.gov/programs/wr/instream-flows/stillaguamishbasin.html

Comment 1031

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Ecology's current strategy to adopt instream flow rules will undermine the County's efforts to comply with the Growth Management Act and other provisions of law relating to water availability. Skagit County is also concerned about the fairness and enforceability of the proposed rule. Skagit County will shoulder much of the burden for enforcement of the rule, without having had an opportunity to consult with Ecology on how the rules will be implemented. Skagit County appreciates the opportunity to present these comments and looks forward to working with you and other state agencies and interested parties to develop effective, responsible regulations to protect aquatic resources within the Stillaguamish basin.

Response: Thank you for your comment. Ecology respectfully disagrees that adopting the proposed instream flow rules will undermine the County's efforts to comply with the Growth Management Act. Please see response to comments 843 through 848, and 898. Skagit County's concern that Skagit County will shoulder much of the burden for enforcement of the rule is misplaced. Ecology will enforce the rule. That portion of the proposed rule that said, "An ordinance or other administrative action is established by the appropriate city or county that provides that the same requirements as (a), (b), (c), (e), (f), (g) and (h) of this subsection shall be conditions within a building permit or subdivision approval if the water adequacy finding for such permit or approval is based upon the reservation contained herein" has been deleted.

The new language to capture that idea or policy is "The reservation shall be applicable only when the appropriate city(ies) or counties submit a written acknowledgement to the department that confirms that any legally required determinations of adequate potable water for building permits and subdivision approvals will be consistent with applicable provisions of this chapter. Once this chapter is adopted and written acknowledgement is received, the department will promptly notify those city(ies) or counties, the Tribes, water well contractors and the public that the reserve is in effect in those jurisdictions where acknowledgements exist." Please see WAC 173-505-090(2)(d). Ecology is simply echoing statute in asking local governments to consider water rights and water management issues in their deliberative processes.

Comment 1032

Commentor: Becky Kelley and Ross Freeman, WEC and American Rivers

Type: Letter dated May 13, 2005

Comment: General support for the establishment of instream flows: As noted in our prior informal comments (Dec 10, 2004), WEC and American Rivers are generally very supportive of the state establishing instream flows. One third of the Washington's watersheds have some form

of instream flow protection, put in place over a ten-year period from the mid 70s to mid 80s. The fact that only one instream flow has been established in Washington State in the subsequent two decades starkly illustrates the important work that needs to be done. Consequently, we hope that Ecology will not countenance any delay tactics from entities less supportive of the proposed Stillaguamish flow rule.

Response: Thank you for your comment and general support for the establishment of instream flows. Comment noted.

Comment 1040

Commentor: Becky Kelley and Ross Freeman, WEC and American Rivers

Type: Letter dated May 13, 2005

Comment: Inadequate Recognition of Impacts Related to Forestry: Over 76% of the Stilly watershed is comprised of forestry, and according to Ecology documentation, "There are many habitat limiting factors (e.g., temperature, sediment, altered stream flows, loss of estuarine habitat) negatively affecting the salmon population and their ecosystem. Most factors are result of upland forestry activities."5 Given the acknowledged impact of forestry on the Stilly, why is there no direction on this limiting factor within the rule? Although we understand there are legal limitations, surely Ecology and WDFW could coordinate with the Department of Natural Resources to ensure that their forest practices in the area conform to the state's obligation to protect and enhance stream flow.

5 Action Plan for Setting Achieving and Protecting Stream Flows, Washington Department of Ecology and Washington Department of Fish and Wildlife, P.25 (January 23, 2004).

Response: Thank you for your comment regarding inadequate recognition of impacts related to forestry. In general, Ecology agrees with your assessment. However, the instream flow rule can not address forest practices. However, Ecology and WDFW should be able to coordinate with the Department of Natural Resources, as well as the Forest Service, to work for forest practices that support the State's obligation to protect and enhance stream flow.

Comment 1044

Commentor: Clair Olivers, Snohomish County Public Utility District #1

Type: Letter dated May 17, 2005

Comment: In an unregulated stream, like the Stilly, nature does not always provide flows that are optimal or even sufficient to support desired fish populations. This fact presents a significant challenge to the effort to draft a rule that is protective of a specified level of fish habitat.

Response: Thank you for your comment.

Comment 1047

Commentor: Clair Olivers, Snohomish County Public Utility District #1

Type: Letter dated May 17, 2005

Comment: We support the need for the instream flow Rule for the Stillaguamish River and applaud Ecology's efforts so far in developing the Proposed Rule. We feel that the technical work is supportable and suggest that some policy refinements would help to make the Rule more acceptable to a wide array of basin stakeholders. We look forward to working with Ecology as the Rule is developed and implemented. Thank you for the opportunity to comment.

Response: Thank you for your comment and support for the need for the instream flow rule for the Stillaguamish River.

Comment 1048

Commentor: Pam Bissonnette, King County Department of Natural Resources and Parks

Type: Letter dated May 13, 2005

Comment: This letter is in response to the request from the Department of Ecology for comments on the proposed Water Management Rule for the Stillaguamish watershed. Thank you for the opportunity to provide comments on this proposed rule. Although the Stillaguamish watershed does not cross King County boundaries, it is joined to King County watersheds through regional efforts to recover Endangered Species Act-listed populations of chinook salmon and bull trout, and by regional interests in maintaining the quality of life cherished by local communities.

Response: Thank you for your comment. Ecology agrees the Stillaguamish watershed is joined to King County watersheds through regional efforts to recover Endangered Species Act-listed populations of chinook salmon and bull trout, and by regional interests in maintaining the quality of life cherished by local communities.

Comment 1049

Commentor: Pam Bissonnette, King County Department of Natural Resources and Parks

Type: Letter dated May 13, 2005

Comment: Technical and policy work over the past five years through the Shared Strategy and watershed planning processes such as that in the Stillaguamish watershed, has made it clear that instream flow issues are fundamental to meeting the ecological, cultural and economic needs of the region. On top of the dire condition of salmon stocks, all the Puget Sound watersheds face significant challenges from population growth and climate change. All these issues cross jurisdictional boundaries and call for proactive and immediate action related to instream flow management. The Stillaguamish rule-making process is an opportunity to act to ensure the flow needs of people and fish are met as these challenges become more tangible.

Response: Thank you for your comment. Ecology agrees with your comment that the Stillaguamish rule-making process is an opportunity to act to ensure the flow needs of people and fish are met.

Comment 1050

Commentor: Pam Bissonnette, King County Department of Natural Resources and Parks

Type: Letter dated May 13, 2005

Comment: King County supports establishing a water right for instream needs in the Stillaguamish watershed on the current schedule. King County fully supports the objectives of Ecology in developing this rule for the Stillaguamish River in order to protect the important functions this river system performs for fish and their habitat needs, as well as providing some direction and boundaries for other future uses of the water in the system. As one of the first rules to be proposed by Ecology under the new flow rule guidance document, the proposed rule is likely to provide a template for future statewide or watershed rulemaking by Ecology. King County is hopeful that the final rule sets a strong precedent for new rules that support the achievement of flows meeting the needs of people and fish.

Response: Thank you for your comment that King County supports establishing a water right for instream needs. As to the Instream Flow Guidance Document, it provides a range of ides and options for watersheds to consider. Your comment is correct that the Stillaguamish proposed rule is one of the first rules to be proposed by Ecology after issuance of the flow rule guidance document. However, the proposed rule is not likely to provide a template for future statewide or watershed rulemaking by Ecology. The guidance document states that it is intended to provide general guidance and not to prescribe any set methodology or approach. A guidance document is just that, guidance, not a rule. Each watershed is unique. It is the basin specific ideas, policies,

and programs, guided in part by the guidance document, that are then promulgated. Please see response to comments 253 and 306. Of course any proposed rule and associated policy or program has to be in keeping with the statutes.

Comment 1052

Commentor: Pam Bissonnette, King County Department of Natural Resources and Parks

Type: Letter dated May 13, 2005

Comment: King County supports further work by DOE to clarify the relationship of this rule, and other new and existing rules, to flows needed for salmon recovery. We should not underestimate the contribution of an updated instream flow rule to flow regimes supporting sustainable and harvestable salmon populations, especially in watersheds without rules -- and therefore no water right for instream uses. Staff from DOE and Washington Department of Fish Wildlife have made it clear, however, that having an instream flow rule will not in itself ensure a flow regime sufficient for salmon recovery. As a first principle, DOE should craft the rule to ensure that it does not impede or undermine achieving the recovery goals and objectives in the anticipated watershed plans and regional Recovery Plan.

Response: Thank you for your comment and comment noted. Ecology believes that the rule is crafted to ensure that it does not impede or undermine achieving the recovery goals and objectives in the anticipated watershed plans and regional Recovery Plan. Your comment is correct, that staff from Ecology and Washington Department of Fish Wildlife have been clear that having an instream flow rule will not in itself ensure a flow regime sufficient for salmon recovery. Ecology will continue to work with others in the basin to meet the flows needed for salmon

Comment 1053

Commentor: Pam Bissonnette, King County Department of Natural Resources and Parks

Type: Letter dated May 13, 2005

Comment: In addition, this rule-making process, given its similar timing to that of the anticipated June 2005 Recovery Plan for chinook, is an opportunity for DOE to convey to the region its perspective on how instream flow rules can and should be related to the establishment of instream flow conditions that significantly improve the potential for the recovery of local salmon populations. DOE should take advantage of this opportunity through language in the rule itself, background information released with the final rule, or other means.

Response: Thank you for your comment. Please see response to comment 1052.

Comment 1055

Commentor: Pam Bissonnette, King County Department of Natural Resources and Parks

Type: Letter dated May 13, 2005

Comment: On a broader note, King County welcomes the arrival of the Gregoire administration and its choice of Jay Manning as the new head of DOE. We look forward to having many opportunities to make progress on shared natural resource management objectives. It is our assumption that the state's salmon recovery strategy "Extinction is Not an Option", retain its validity under the new administration and that DOE will pursue the objectives and actions identified in that strategy. One such action guided by that strategy is adoption of the final Stillaguamish rule and other new rules. I look forward to further opportunities to work with DOE to identify and implement actions that will ensure instream flow conditions that support a range of ecological, cultural and economic needs of the region, including recovery of local salmon populations. If you would like to discuss any of these topics in more detail or if you have any questions, please contact David St. John, Special Projects Manager in the Water Policy Unit, in the Director's Office of the Department of Natural Resources and Parks. . .

Response: Thank you for your comment. You are correct in your assumption that the state's salmon recovery strategy "Extinction is Not an Option", retains its validity under the new administration and that DOE will pursue the objectives and actions identified in that strategy. Ecology looks forward to working with King County on further opportunities to identify and implement actions that will ensure instream flow conditions that support a range of ecological, cultural and economic needs of the region, including recovery of local salmon populations.

Comment 1061

Commentor: David Monthie, King County Department of Natural Resources and Parks

Type: Letter dated December 14, 2004

Comment: There is no explicit mention of other activities that are state-regulated, or over which the state has control, that may have significant impacts on stream conditions. For example, ensuring proper forest practices is of particular importance in maintaining or improving the environmental integrity of this basin. Inasmuch as the scope of this rule (and other rules) as outlined in the Guidance Document goes beyond the direct authority of Ecology (e.g., in establishing quantified standards for domestic water use, which would otherwise appear to be the purview of the Department of Health or local boards of health), it would appear that Ecology's rules should consider (or explicitly reference) other activities and standards that clearly have or would affect achieving the goals of this rule and other rules with regard to protecting flows. Ecology could also consider referencing, and requiring consistency with, programs and plans developed for the protection of fish under explicit state authorities (e.g., Salmon Recovery Act) or federal ones (e.g., the ESA).

Response: Thank you for your comment. Your comment is correct that there is no explicit mention of other activities that are state-regulated, or over which the state has control, that may have significant impacts on stream conditions. The State and Ecology are working to better communicate that one agency's mission and regulatory framework impact the other agencies. In the Stillaguamish basin land use under the control of Department of Natural Resources does have an impact on flow. However, the rule's limited scope precludes addressing those issues in this rule. As to the rule establishing quantified standards for domestic water use, it does not do so.

Comment 1068

Commentor: David Monthie, King County Department of Natural Resources and Parks

Type: Letter dated December 14, 2004

Comment: We want to note that the Stillaguamish basin will be the subject of a pilot project funded through the Shared Strategy process to evaluate instream flows and their relationship to the watershed recovery plans being developed for the Puget Sound ESU. We suggest that Ecology attempt to incorporate the results of that project into its evaluation of the best flow regime to support the recovery

Response: Thank you for your comment. Unfortunately, that study is not complete and will not be by the time this rule making is finalized. However, Ecology will certainly use the results of that study as we move towards salmon recovery and ensuring that water flows and instream habitat are not limiting factors.

Comment 1069

Commentor: Jon Hasselman, National Wildlife Federation

Type: Letter dated May 12, 2005

Comment: Please find enclosed the comments of the National Wildlife Federation ("NWF") on the proposal to amend W.A.C. 173-505 for the Stillaguamish River Basin. With over one million members nationwide, and approximately 25,000 members within the state of Washington, NWF is the nation's largest conservation advocacy and education organization. The mission of NWF is to inspire Americans to protect wildlife for our children's future. NWF has a keen interest in the Department of Ecology's efforts to protect and restore instream flows throughout the state. Species protected under the federal Endangered Species Act ("ESA") as well as other aquatic species at risk -- including the listed Puget Sound chinook salmon -- rely on adequate flows of high quality water in the Stillaguamish River. As a general matter, NWF applauds Ecology for resuming the development of new instream flow rules for the Stillaguamish River and elsewhere in the state. New rules have not been adopted in decades, and most basins have become overappropriated. Accordingly, at a minimum it is critical to set instream flow rules so communities can begin addressing the difficult questions of allocation of limited resources and restoration of degraded streams.

Response: Thank you for the positive comments regarding Ecology's proposal to establish an instream flow rule for the Stillaguamish River Basin. Ecology recognizes the large membership and keen interest NFW has in the Department of Ecology's efforts to protect and restore instream flows throughout the state.

Comment 1071

Commentor: Jon Hasselman, National Wildlife Federation

Type: Letter dated May 12, 2005

Comment: CLIMATE CHANGE AND NORTHWEST RIVERS: NWF recently released a comprehensive summary of the state of knowledge regarding likely climate change impacts to Pacific Northwest Rivers, a copy of which is attached.1 The report highlights the likely flow and water quality impacts of predicted climate change on several of the region's rivers, including three that flow into Puget Sound. Washington state is already beginning to feel the effects of climate change: regional temperatures have increased by an average of 1.5 degrees during the 20th century.2 Snowpack has decreased 11 % since the mid-1900s, and the dates of peak snow accumulation and snowmelt-derived streamflow has shifted by up to a month earlier during the same period.3 Analysis of Cascade glaciers reveal substantial decreases over the past few decades. For example, the glaciers that feed the Skagit River basin have lost 44% of their mass over the past 150 years, and that pace is increasing.4 According to the University of Washington's Climate Impacts Group ("CIG"), average annual temperatures could rise by as much as 4.7 degrees F by the 2020s, and up to 5.8 degrees F by the 2040s. While precipitation is likely to increase, it is more likely to fall as rain rather than as snow. Indeed, the region could see an additional 50 percent decline in the next 45 to 75 years in average snowpack, significantly reducing the source of summer flows for Puget Sound and Columbia basin rivers.

1 National Wildlife Federation, Fish out of Water: A Guide to Global Warming and Pacific Northwest Rivers(March 2005). We incorporate the report, and the studies discussed therein, by reference into these comments.
2 Id. At 10
3 Id.
4 Id. at 25.

Response: Thank you for your comment on climate change. Your comment points out an important issue, one which we all will learn to address, and that the rule provides limited response to. The response to global warning and significant change to the water management framework would be to initiate a new rule making. Please see section 170 on regulation review. We currently have no predictive capability on changes to stream flow in response to climate changes that is useful for administrative rule making. For the Stillaguamish system, a rain driven system, the increased winter precipitation predicted with global warming can be expected to increase flows. Even if known, climate change effects on the flow of water in streams and rivers in the Stillaguamish basin would not change the predicted flows of water needed for fish habitat.

However, if the changes in flow pattern changed channel morphology, the habitat information used would not be as applicable. Section 170 of the rule provides that Ecology will review this chapter whenever significant new information is available, a significant change in conditions occurs, or statutory changes are enacted that are determined by the department to require review.

Comment 1072

Commentor: Jon Hasselman, National Wildlife Federation

Type: Letter dated May 12, 2005

Comment: CLIMATE CHANGE AND NORTHWEST RIVERS: These changes could dramatically affect water resource management in the Stillaguamish River and elsewhere. Research demonstrates that the reduced snowpack will contribute to potentially significant shifts in volumes and timing of streams flows in snowmelt-fed rivers. Summer (July--September) flows are expected to decrease, and the peak spring runoff will shift earlier in the year.5 These rapid changes could have dramatic effects on aquatic species--particularly salmonids--already stressed by habitat degradation, hydrosystem operations and other human factors. Salmonids are highly adapted to local conditions, and not well suited to rapid changes in conditions as are predicted in these models. Changes in flow during the winter--chiefly more intense and/or sustained high flow events--also presents risks to salmonids. Excessive flows can mobilize sediments that clog salmon redds and scour out needed gravel.
5 Id.at19.

Response: Thank you for your comment. Please see response to comments 1070 and 1071. Ecology recognizes that climate change could dramatically affect water resource management in the Stillaguamish River and elsewhere. However, how to include that uncertainty into this rule is unknown. Ecology's proposed course of action is to initiate a new or amended rule making whenever significant new information is available or a significant change in conditions occurs.

Comment 1073

Commentor: Jon Hasselman, National Wildlife Federation

Type: Letter dated May 12, 2005

Comment: CLIMATE CHANGE AND NORTHWEST RIVERS: Moreover, the climate change models suggest dramatic impacts to water quality, particularly temperatures. Salmonids are highly sensitive to temperatures, and there is evidence that most Western Washington rivers and streams are already near or above critical temperature thresholds. Climate change models suggest that summer temperatures will be pushed further in coming years, presenting yet more threats to aquatic species and salmonids. Other extensive research nationwide on cold water fish bears this out.6
6 Id.at 15.

Response: Thank you for your comment. Ecology recognizes that climate change suggests possibly dramatic impacts to water quality, particularly temperatures. In the Stillaguamish basin, temperature is being address by a Total Maximum Daily Load clean up plan. Please see Ecology's web page at http://www.ecy.wa.gov/programs/wq/tmdl/watershed/index.html for more information. There is also a relationship between water quality and quantity and establishing an instream flow will protect water quality from impacts created by future diversions.

Comment 1074

Commentor: Jon Hasselman, National Wildlife Federation

Type: Letter dated May 12, 2005

Comment: THE STILLAGUAMISH INSTREAM FLOW RULE: As noted above, NWF applauds Ecology's intention to develop scientifically credible flow levels in the Stillaguamish basin, and to appropriate all remaining unappropriated water in the basin for fish, wildlife and other instream values.

Response: Thank you for your comment and support for the intention to develop scientifically credible flow levels in the Stillaguamish basin, and to appropriate all remaining unappropriated water in the basin for fish, wildlife and other instream values. In promulgating the rule, Ecology believes we have developed and used scientifically credible information. The remaining unappropriated water was appropriated for fish and wildlife and other instream values. Please see section 070 of the rule.

Comment 1077

Commentor: Jon Hasselman, National Wildlife Federation

Type: Letter dated May 12, 2005

Comment: NWF is not unaware of anticipated growth, and accompanying water needs, in the Stillaguamish basin. Providing water for new growth, while mitigating its impacts and preserving wildlife and instream values, will require an aggressive yet thoughtful comprehensive approach to watershed and streamflow planning. NWF makes the following recommendations: a) We cannot control climate change (at least in the short to medium term) or ocean conditions. We can, however, better regulate land uses in salmon habitat, harvest, hatchery operations, and other stressors to salmon so that they are better equipped to survive and adapt to changing conditions. Washington's continued support of habitat restoration actions and strong implementation of the Growth Management Act and Shorelines Management Act, among other laws, will help. In particular, encouraging local communities to adopt Low Impact Development standards will go a long way towards allowing basins like the Stillaguamish to accommodate new growth without further degrading the existing resource.

Response: Thank you for your comment. Ecology agrees it will take a holistic approach to manage the water and preserve and protect wildlife and instream values. Whether or not an aggressive yet thoughtful comprehensive approach to watershed and planning will occur in the basin is up to the local governments and citizens of the Stillaguamish basin.

Comment 1078

Commentor: Jon Hasselman, National Wildlife Federation

Type: Letter dated May 12, 2005

Comment: Ecology should work with the Department of Fish and Wildlife and the Tribes to identify the subbasins within the Stillaguamish watershed that are most important for fish and wildlife. Ecology should not permit any additional unmitigated withdrawals from these basins, and should focus its efforts there on restoration.

Response: Thank you for your comment. Ecology, the Department of Fish and Wildlife, and the Tribes have worked to prioritized salmonid recovery actions in the basin. Please see the Chinook Salmon Recovery Plan for the basin. That plan will guide restoration efforts. Ecology is not aware that any sub basins were specifically identified as flow limited based on diversion or use of water. Some low flow problem stream reaches were identified, but the causes of the low flows were not determined. With the closures of stream and rivers in the basin (see section 070 of the rule), future (if any) new, unmitigated, surface water diversion rights for year around use will be permitted.

Comment 1080

Commentor: Jon Hasselman, National Wildlife Federation

Type: Letter dated May 12, 2005

Comment: We urge Ecology to provide greater detail and structure on the range of permissible mitigation plans in the draft rule. Absent specific scientific evidence to the contrary, NWF does not believe as a general matter that anything other than bucket-for-bucket, in-place and in-time replacement of a withdrawal is suitable mitigation for new water withdrawals. As noted above, Ecology should consider developing mitigation scenarios that improve streamflows -- as recently proposed for the Columbia River -- rather than simply struggle to maintain an inadequate baseline.

Response: Thank you for your comment urging Ecology to provide greater detail and structure on the range of permissible mitigation plans in the draft rule. In the draft rule, the definition of mitigation states mitigation is a scientifically sound plan voluntarily submitted by a project proponent to offset the impacts of a proposed water use and approved by the department. A mitigation plan can be submitted to the department for a stream, basin, reach, or other area. A mitigation plan must show that the withdrawal with mitigation in place will not impair existing water rights, including instream flow rights, or diminish water quality. The plan must provide mitigation for the duration of the water use. Ecology can not require mitigation as part of an application for a water right. Please see RCW 90.03.255. Finally, Ecology agrees that mitigation strategies that improve stream flow conditions are preferable to those that simply struggle to maintain an inadequate baseline.

Comment 1081

Commentor: Jon Hasselman, National Wildlife Federation

Type: Letter dated May 12, 2005

Comment: Ecology should require monitoring and metering. It is difficult to imagine how water management can be effectively carried out without effective metering of withdrawals and oversight over flows.

Response: Thank you for your comment. Please see response to comment 1038.

Comment 1116

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Mount Vernon Hearing, March 24, 2005

Comment: If Mr. Fitzpatrick does not like the Stillaguamish rule, I would count him lucky because of the inconsistencies internally and -- and with other laws of -- of this rule pale in comparison to those of the Skagit. Skagit County, too, would like to work with the Department of Ecology to fashion a responsible enforceable instream flow program for the Stillaguamish River, but we don't like to be dictated to, and we feel very much that the department has done precisely that with regard to the three instream flow rules that are currently being proposed that cover the entire -- entirety of Skagit County.

Response: Thank you for your comment. Ecology did not intend to, and does not believe we dictated a rule to Skagit County and or Snohomish County. In fact public outreach over the previous several years was intended to obtain insights and guidance from the Counties, local governments, Tribes, and the public as to the proposed instream flow rule and water management framework.

Comment 1117

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Mount Vernon hearing, March 24, 2005

Comment: Ecology recognizes that there are significant limitations on the authority of the department to impose the kinds of restrictions that are called for in this instream flow rule. . . .[H]owever, the department refuses to recognize or to acknowledge the restrictions on local governments that also exist.

Response: Thank you for your comment. Ecology respectfully disagrees that the department refuses to recognize or acknowledge restrictions on local government. Both Ecology, as a State Agency, and Counties as subdivisions of government can only do that which the law enables. Ecology can honestly say we've learned a great deal regarding the limitations of local government. In many respects water management is shared governance. We believe that it is how we share that governance, within the limits of our respective enabling statutes, that has been our points of confusion and misunderstanding.

Comment 1118

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Mount Vernon hearing, March 24, 2005

Comment: As I read the law, the Department of Ecology can impose metering requirements on any ground water withdrawals, including those that are exempt under the ground water code, and Counties can, under -- under the Growth Management Act, protect aquifer recharge areas, the Counties can regulate subdivisions, and the Counties can require connection to public water service if it is timely and reasonably available. In our part of the Stillaguamish basin, the Lake Cavanaugh area, there are no plans to provide public water service now or in the future, yet that simple fact is ignored in this regulation. We are limited in -- under the State constitution and under the laws of Washington as to what we can and cannot regulate, and where we have not been granted explicit authority we do not have it. Neither does the Department of Ecology. And we do not believe it's appropriate for the department to adopt a rule that requires the Counties to enforce it where the Counties. . .do not have the authority to do so.

Response: Thank you for your comment. Ecology agrees with your description of what Ecology and the County can respectively regulate. Ecology is fully aware there are not public water systems in the area of Skagit County near Lake Cavanaugh that provide potable water for residential use. In fact, recognition of the use of surface water from Lake Cavanaugh for potable supply and the lack of public water systems is why proposed WAC 173-505-060 was written the way it is. The proposed rule language of Section 090(2)(d)(i) which was misunderstood as requiring local government to enforce water law has been modified in response to your, and others, comments.

Comment 1123

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Mount Vernon hearing, March 24, 2005

Comment: Another concern we have, which we share with Snohomish County, is -- is in protecting the viability of agriculture as the -- as the center piece of our -- of our local economy. Skagit County studies show -- and we've submitted these studies for the record in the Skagit rule -- and while I'm at that point I suppose I should say that we would like to incorporate by reference all of the materials that we submitted for the Skagit rule making as part of the Stillaguamish rule making record. But our studies show that . . .agricultural irrigation needs in this area are, in fact, increasing, and they will continue to do so. There are two reasons for that. One is that the climate is warming. I don't think there's any question about that. And that causes an increase in the evapotranspiration of water for agriculture. Second is that there is a trend towards the production

of higher value crops. And when you look at the materials that we submitted for the Skagit rule making you'll see those trends, in fact, are proven pretty much across the board.

Response: Thank you for your comments. The comments regarding agriculture for the Skagit basin are not applicable to the Stillaguamish basin. Ecology recognizes that agriculture is very valuable to the local, regional, and state economy and that irrigation water can be an important factor in production. Ecology's evaluation of irrigated agriculture in the Stillaguamish basin found that there is very little of it. In fact, working farms in Snohomish County's portion of the Stillaguamish basin are declining in real numbers.

Comment 1124

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Mount Vernon hearing, March 24, 2005

Comment: There is no review of -- and has been no review of regional water needs. And that is another major concern of ours. We have participated over the last six weeks or so, maybe even two months, in -- in workshops and public hearings and in discussions with the department over the proposed rules for the Samish, the Stillaguamish and the Skagit. And in every case we've asked the question whether the department has examined regional water needs, and the answer always is no. And we look at the needs for water in the Stillaguamish basin, but we do it without regard to what the needs are for water in the Skagit, and the same with the Samish. And the result of that is that we foreclose opportunities to use the most plentiful resources, which in our case is the Skagit, in favor of requiring basins to produce their own water to use there, regardless of whether it's appropriate and whether. . .the amount of water that's available from that basin is adequate to meet the population needs and agricultural needs in that area.

Response: Thank you for your comment. You are correct that Ecology conducted no new review of regional water needs. Such a review is not warranted. For public water supply neither the Skagit County Coordinated Water System Plan nor the North Snohomish Coordinated Water System Plan address new needs for a regional supply. There are no applications for water right on file that propose such a need. There simply is no regional purveyor with such a need. Skagit County Public Utility District and Snohomish County Public Utility District, arguably the entities that could be regional purveyor (at least for their respective counties) have sufficient water rights to meet their foreseeable needs.

Comment 1126

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Oral testimony, Mount Vernon hearing, March 24, 2005

Comment: . . . I think you know this, but Snohomish County is a charter county. We do not have. . .a county commissioner system of government, but rather under our charter. . .an independent elected County Executive and a legislative branch composed of the County Council. And although there has not been formal governmental action by Snohomish County in regard to the proposed rule, I do wish to indicate to you that there has been a great deal of dialogue between the legislative and the executive branches of government. There appears to be a unanimity of view between the executive and the legislative branches of government. And in addition to Ms. Isenberg's presence today, I anticipate that another County Council representative, Mr. Moats, who staffs as the Legislative Analyst for the Planning and Development Committee of the County Council, is planning to be with you this evening for your meeting in Arlington.

Response: Thank you for your comment. Ecology recognizes that Snohomish County is a charter county and that it has an independently elected County Executive and a legislative branch composed of the County Council and there appears to be unanimity of view between the

executive and the legislative branches of government in the County.

Comment 1127

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Oral testimony, Mount Vernon hearing, March 24, 2005

Comment: County Executive Reardon has placed as one of his priorities as he began his term in Snohomish County the preservation and the enhancement of agriculture in Snohomish County. And it's rather fortuitous that you have the meeting on the 24th because it was last week that Executive Reardon finished the first phase of his implementation to basically improve agricultural viability in Snohomish County by issuing Executive Order 05-43 which is to establish a policy for preserving and enhancing the agricultural economy. And this couples with a Snohomish County Agricultural Action Plan which has been finalized and has been issued. In developing the action plan the executive branch worked in conjunction with the legislative branch. Councilmember Koster from the First District, which includes the Stillaguamish basin, co-chaired an agricultural summit with Executive Reardon from which the action plan flowed. And I previously indicated to Steve before the meeting that I will leave copies of both the executive order and the action plan for the record for the Department of Ecology so that you can see.

Response: Thank you for your comments regarding the importance of agriculture to Snohomish County and of County Executive Reardon's emphasis on preserving and enhancing agriculture in Snohomish County. Ecology recognizes the importance of agriculture to the County and residents of the Stillaguamish basin.

Comment 1128

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Oral testimony, Mount Vernon hearing, March 24, 2005

Comment: There is a great deal of concern on behalf of County Executive Reardon that the proposed rule by the Department of Ecology will severely impact the agricultural community in Snohomish County which. . .which we are committed to protecting. And we also feel that the proposed rule will perhaps burden the agricultural community more than other uses that are contemplated.

Response: Thank you for your comment. Ecology respectfully disagrees that the proposed rule will severely impact the agricultural community in Snohomish County.

Comment 1129

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Oral testimony, Mount Vernon hearing, March 24, 2005

Comment: . . . [A]lthough I'm here today to, in a sense, express our concern in Snohomish County and opposition to the rule as presently drafted, I do want to include in my comments an invitation to the Department of Ecology to work with Snohomish County through this process. Not only in just receiving, in a sense, the formal comments that you'll be receiving in this process, but to make available to you some of the resources and the experience that the Snohomish County government has in regard to these matters, particularly in regard to management

Response: Thank you for your comment and the invitation to the Department of Ecology to work with Snohomish County through this process. Ecology believes the many meetings with Snohomish County staff have helped Ecology's understanding of the issues and contributed to shaping the rule language.

Comment 1133

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Oral testimony, Mount Vernon hearing, March 24, 2005

Comment: Finally, some miscellaneous comments about what we, from a County perspective, are concerned about. Not only in the sense of the proposed substance of the rule, but, I mean, you know, clearly you have to recognize that -- that under the Growth Management Act the ability of anyone to hook up to a public water system is precluded if you are outside of an urban growth area. So clearly the agricultural basin, the Stillaguamish valley, is outside almost all the UGA areas. Any hookup to any public water system, if it wasn't cost prohibitive, is simply not allowed under the. . .GMA regulations that we have, and also the cost would perhaps be totally impermissible. And as for, in a sense, a human development under the various codes that are applicable in Snohomish County, accessibility to a public water system is simply not an option unless you've been already included in an urban growth area. And currently the County is involved in its update to the ten-year Comprehensive Plan as required under GMA. The recommendation has not come from the Department of Planning and Development Services, and I do know there is going to be an emphasis on -- on trying to preserve agricultural uses and space in the Stillaguamish region. But I have to say that if Ecology is anticipating that there is going to be any major shift in urban growth boundaries, I think that is certainly not foreseeable from what the executive branch sees at this particular point.

Response: Thank you for your comment. Ecology is not anticipating that there is going to be any major shift in urban growth boundaries. As to the use of public water systems in rural areas to meet water needs, that decision is up to the local jurisdictions. Please see response to comments 843 through 848, and 898. The Growth Management Act is not being undermined by Ecology through this rule making and any decisions related to land use and growth are up to the local jurisdictions.

Comment 1134

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Oral testimony, Mount Vernon hearing, March 24, 2005

Comment: Finally, we will note, and I won't detail it out because I know it's well known to Ecology, but these proposed regulations coming from the Department of Ecology seem to envision a lot of additional responsibilities to be placed upon County government. In part, in administering these programs, reviewing the availability of water, making determinations as to whether building permits will be allowed, and other various sorts of responsibilities which the rule contemplates will be taken on by your subdivision, the Counties. We don't see any analysis of what this is going to mean to the Counties. We haven't seen any basis to determine that. . .Ecology has the right to shift these responsibilities to County government, or that, in fact, this would not be simply another unfunded mandate from the State for local government to absorb.

Response: Thank you for your comment related to local government coordination and recognition of the rule. The revise rule language does not require local ordinances be adopted to effectuate a reservation. The rule now reads, that the reservation shall be applicable only when the appropriate city or county submit a written acknowledgment to the department that confirms that any legally required determinations of adequate potable water for building permits and subdivision approvals will be consistent with applicable provisions of this chapter. Ecology believes the County should consider the reservation and all water management with in its deliberative processes on land use and use of water in the basin. Please see RCW 90.54.090, where the law requires all agencies of state and local government, including counties and municipal and public corporations, shall, whenever possible, carry out powers vested in them in manners which are consistent with the provisions of this chapter.

Comment 1135

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Oral testimony, Mount Vernon hearing, March 24, 2005

Comment: Now, although I practiced law for 30 years, I'm not here in a capacity as a lawyer, having transferred to the executive's office. And so by no means do I wish to engage in -- in laying out various legal theories. I do wish to express, because I have consulted with them, the willingness of the prosecuting attorney's office to discuss those issues with Ecology, but I would merely make the point that if you are anticipating that County government will be your partner in implementing what you come up with, then the time is here for you to treat your potential partner as a partner and to get our feedback and take into consideration some of the costs and the burden, from an administrative standpoint, that you expect local government to absorb.

Response: Thank you for your comment. Please see response to comment 1134.

Comment 1136

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Oral testimony, Mount Vernon hearing, March 24, 2005

Comment: Finally, I would like to conclude again on the basis that we are deeply concerned about what is being proposed. We don't like what is being proposed. You can anticipate that Snohomish County will be submitting extensive written comments before the end of the period. But in saying that, I want to underscore for the Department of Ecology a genuine willingness to work with you to try to find some viable solutions here. We, of course, are concerned about our agricultural community, but we are also concerned about the quality of life in Snohomish County and in areas that -- along the Stillaguamish. And we want to provide our expertise and background to you, and we hope we will be working constructively with you in the future.

Response: Thank you for your comments and offer to provide Snohomish County expertise and background to Ecology. Ecology also hopes that the agency and the County will be working constructively together in the future.

Comment 1137

Commentor: Hal Beecher, Washington Department of Fish and Wildlife

Type: Oral testimony, March 24, Mt Vernon and Arlington Hearings; letter dated March 24, 2005.

Comment: Mt. Vernon Hearing: The Washington Department of Fish and Wildlife supports adoption of the proposed instream flows for the Stillaguamish basin and the associated rules as WAC 173-505. The. . .proposed rules include compromises consistent, we believe, with meeting concurrent demands and needs of both people and fish.

Arlington Hearing: The Department of Fish and Wildlife supports adoption of the Proposed Stillaguamish Instream Flows and associated rules. The proposed rules include compromises consistent, we believe, with meeting the concurrent needs of both people and fish.

Letter, March 24, 2005: The Washington Department of Fish and Wildlife (WDFW) supports adoption of the proposed Stillaguamish instream flows and associated rules as WAC 173-505. The proposed rules include compromises consistent, we believe, with meeting the concurrent needs of both people and fish.

Response: Thank you for your comments and support for the instream flow rule.

Comment 1140

Commentor: Hal Beecher, Washington Department of Fish and Wildlife

Type: Oral testimony, March 24, Mt Vernon and Arlington Hearings; letter dated March 24, 2005.

Comment: Mt. Vernon Hearing: Instream flows will not independently ensure recovery of

harvestable production. Adequate flows, combined with other appropriate management of habitat and harvest, addressing other limiting factors, as well as providing historic and normative hydrology, are also necessary. Fish inhabiting the Stillaguamish River basin include Chinook salmon, listed as Threatened under the federal Endangered Species Act, as well as coho, chum and pink salmon, bull trout, steelhead and cutthroat trout.

Arlington Hearing: Instream flows will not independently ensure recovery or harvestable production. Adequate flows, combined with other appropriate management of habitat and harvest, addressing other limiting factors, as well as providing historic and normative hydrology, are also necessary. Fish inhabiting the Stillaguamish River Basin include Chinook Salmon, listed as Threatened under the Federal Endangered Species Act, as well as Coho, Chum and Pink Salmon, Bull Trout, Steelhead and Cutthroat Trout.

Letter, March 24, 2005: Instream flows will not independently ensure recovery or harvestable production. Adequate flows, combined with other appropriate management of habitat and harvest, addressing other limiting factors, as well as providing historic and normative hydrology, are also necessary. Fish inhabiting the Stillaguamish River basin include Chinook salmon, listed as Threatened under the federal Endangered Species Act, as well as coho, chum, and pink salmon, bull trout, steelhead, and cutthroat trout.

Response: Thank you for your comment, recognition of the limits of the instream flow rule to achieve the desired fisheries and habitat results needed to recover the listed species in the basin. Ecology agrees with your comments.

Comment 1186

Commentor: John Postema,

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: My name is John Postema. 19127 99th Avenue Southeast, Snohomish. I wrote for the Farm Bureau a Member Alert. And for those who are - have not received it, there's copies right there by the door. The importance to farmers are such that we feel that all of us should know very well what's going to happen.

Response: Thank you for taking the time to comment on the rule.

Comment 1187

Commentor: John Postema,

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: I spent four years on the Snohomish County Ground Water Advisory Committee. And we -- There's a big -- That was funded by the -- about half-million dollars by the DOE. And we found a lot of different things. That in this particular basin, according to the studies done by Gold & Associates, there was only -- the annual relationship between consumptive use and the ground water recharge was 1.56, -- .6. So less than 2 percent. And I want you to keep it in mind because that is an important issue. Because if we're going to take the water away from farmers and property owners, that's important.

Response: Thank you for your comment and service in the past on the Snohomish County Ground Water Advisory Committee. Ecology acknowledges the ground water study did evaluate or estimate the potential consumptive use in various sub basins as a percent of potential recharge and that the numbers range anywhere 12 percent for the Portage Creek basin to 0.1 percent for Canyon Creek basin. Ecology is not going to take the water away from farmers and property owners exercising valid water rights. The proposed rule does not impact or affect existing water rights.

Comment 1191

Commentor: John Postema,

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: All new building permits will be issued unless the applicant complies with those conditions and other conservation requirements. Another very important thing, I think, is all future water usage will become subject to the use-it-or-lose-it rule. I don't know how it applies. So if you don't use it for the first couple years, you might just lose it. I assume that it's just only for the new water. I hope.

Response: Thank you for your comment. The rule language was changed in regards to the reservation being a condition of any building permit or subdivision approval. However, Ecology believes that local governments issuing building permits or land subdivision approvals must comply with chapters 19.27 and or 58.17 RCW as applicable. Any finding of adequate and potable water made by a local jurisdiction should consider the exiting water management framework. Please see response to comments 240, 310, 332, 446, 447, and 1013 for more on this point. Finally, the phrase "use-it-or-lose-it" relates to the fact a water right is a use right. If there is no use for five years with out sufficient cause, then the right can be lost. The water right holder would have an opportunity to present any evidence they have to refute the alleged non use of water. Please see chapter 90.14 RCW for more on relinquishment of a water right.

Comment 1193

Commentor: John Postema,

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: Farm Bureau is concerned about fish just like all of us. And the problem with this proposal is it doesn't address the issue. I mean, it doesn't do anything about sedimentation. It doesn't do anything about siltation. And it takes -- It could take away.

Response: Thank you for your comment. Ecology appreciates your concern and actions taken to restore the fisheries. Ecology acknowledges that rule does not address sedimentation or siltation. Those issues are beyond the scope of this rule. However, sedimentation and siltation are issues addressed in the salmon recovery plan for the Stillaguamish basin.

Comment 1194

Commentor: John Postema,

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: And now I have to go back to what the Gold & Associates study found is that in all Snohomish County the. . .consumptive use in relation to the annual ground water charge is less than 2 percent. And that applies here, too. So what can we fix? And this is -- By the way, this was a projection. I think it was 12-years-and-a-half. It was done in 1994. And so what will it do? . . . And I had a discussion with. . .Dan a little earlier about. . .if a doctor says you are suffering and you have one-percent chance if you do this, or you change your lifestyle, what will you pick? Will you pick the one percent to survive? You won't. And the problem with this whole proposal is it's so irrational.

Response: Thank you for your comment related to consumptive use. The objective of the rule is to establish an instream flow water right. Ecology acknowledges that future water rights, water rights created after the rule is effective, may be impacted by the rule. That is simply an application of the prior appropriation doctrine of our Water Code. The percent of water harvested in a basin is not germane to the establishment of an instream flow. That information may be helpful in managing the existing supply or potentially targeting basins for ground water

development, but not for the establishment of an instream flow right. Ecology recognizes that if water development is limited in a basin, that implies more water can be developed. Ecology offers that is a specious fact. Only site specific information and assessment of the impacts of a water source development are material to a water availability or impairment assessment.

Comment 1195

Commentor: John Postema,

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: I believe, and I told. . .Steve that. . . this is close to fraud to the people because the farmers will not be able to survive. It doesn't matter what they agree that it says; it doesn't matter what anybody says. But if you don't have water, you can't do anything.

Response: Thank you for your comment. Ecology respectfully disagrees with your comment. Please see response to comments 330 and 1027 for more on agriculture water use and the rule.

Comment 1196

Commentor: John Postema,

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: I also believe there are some technical problems with this. The RCW, as Steve said, the State Code requires the Department of Ecology to do certain things. And it. . . also requires them to. . . evaluate all the water components, what goes into it. It's supposed to do this. And this is RCW 90.82.070. And it says the assessments, which shall be included, are an estimate of the surface and ground water present in the management areas. Now, whatever I've heard tonight, that's not -- Nobody knows. And estimate of the surface and ground water available in the management area,. . .taking into account seasonal and other variations and estimate to the water in management areas represented by claims in the water rights, claims registry, water use permits, certified rights, existing main stream flow rules, et cetera. And an estimate of the surface and ground water actually being used in the management areas. Those are requirements. And I don't think that this proposal rules takes it into account.

Response: Thank you for your comment related to technical problems with the rule and requirements of RCW 90.82.070. Ecology acknowledges that chapter 90.82 RCW says that watershed planning under this chapter shall address water quantity in the management area by undertaking an assessment of water supply and use in the management area and developing strategies for future use. Ecology acknowledges that little of that was done for this project, primarily because this is not a rule developed pursuant to chapter 90.82 RCW. The assessments cited were, generally, beyond the scope of this rule-making. Please see responses to comments 254, 469, and 1025 for more on the scope of the rule-making.

Comment 1201

Commentor: John Postema,

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: So to wrap it up. This whole project, I think the Department of Ecology is barking up the wrong tree. And if they would be able to. . .make this go, then there won't be any more agriculture in this part of the County.

Response: Thank you for your comment. Ecology respectfully disagrees. Please see responses to comments 330 and 1027 for more on the relationship of this rule to agriculture.

Comment 1202

Commentor: John Roney, Snohomish County

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: I'm John Roney. I'm the Agriculture Coordinator at Snohomish County. And I'm representing County Executive, Aaron Reardon, who is out of the area right now. Mr. Reardon's administration, which is a little over a year now, one of the priorities has been try to reestablish communication with the ag community and to find opportunities to stabilize ag where. . .there is need and to grow ag as we can have available lands and the ingenuity of our farmers and markets to provide our products.

Response: Thank you for your comment. Ecology recognizes the importance of agriculture to Snohomish County.

Comment 1203

Commentor: John Roney, Snohomish County

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: We're in opposition to the imposition of this rule because we think it will be too limiting on the growth that can occur for our farmers. We intend -- Mr. Reardon intends to work with the County Council and file written notice with the State. I think we have until the [25th] . . .of April. . . . We've been working with our Surface Water Management Department in our Prosecuting Attorney's Office to try and understand what this rule really means in terms of impact. I don't think we know that yet. We're not comfortable with the methodologies and the basis for the stream flows. We think there's probably some flaw -- It's flawed. And what we would prefer to do at Snohomish County would be to work in partnership with DOE and our farm and rural community to find options and methods to reach a goal. We've been participating in the shared strategies movement an -- an organization that has been trying to find win-wins situations for fish and for agriculture. And we're very concerned, like John Postama just mentioned, that imposition of this rule could mean another death threat to the ag community and we're not going to allow -- sit back and allow that to happen.

Response: Thank you for your comment. Ecology respectfully disagrees the rule will be too limiting on the growth that can occur for farmers. Please see responses to comments 330 and 1027 for more on the relationship of this rule to agriculture. Ecology also would prefer to work in partnership with Snohomish County, and the farm and rural community to find options and methods to reach a goal of water resource management.

Comment 1206

Commentor: Scott Fowler, Dahlman Pump & Well Drilling, Inc.

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: I'm Scott Fowler. I'm with Dahlman Pump & Well Drilling, Burlington, Washington. P.O. Box 422. I'm here representing the Washington State Drilling & Ground Water Association and their future clients. We agree with Ecology that watersheds should be managed at the basin level. So we applaud you for that.

Response: Thank you for your positive comment.

Comment 1209

Commentor: Ty Costa,

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: I started out by talking about the State water right laws and have made that comment. The other bill of rights I want to just mention here is Amendment VI. It says, "Not to be deprived of life, liberty or property without due process of law." We have a very short time to on this to make our comments while they've had several years to put this all in order for them. So I. .

.want to make that point. Because when a young man goes into service, he takes an oath. He takes an oath of allegiance to protect the Constitution of the United States against foreign and domestic. And I don't think the Department of Ecology is following up behind that.

Response: Thank you for your comment regarding State water right laws, the Bill of Rights, and due process of law. Ecology takes very seriously and tailors our actions to respect private property rights.

Comment 1210

Commentor: Ty Costa,

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: The other issue is agriculture. The price of crude oil. We are getting into this position of bringing in food. When that food that comes in, the tomatoes from Argentina and so on, come in by ship. When that barrel price hits a hundred dollars a barrel, guess what you're going to be buying tomatoes for, if you can find it? And I just use tomatoes as a product. But we need to protect our food sources. Water is the number one thing that's going to keep us fed.

Response: Thank you for your comment regarding agriculture. Ecology respectfully disagrees with the suggestion that the proposed rule is detrimental to agriculture. Please see responses to comments 330 and 1027.

Comment 1211

Commentor: Jody Brown, Stillaguamish Tribe of Indians

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: First, I'd just like to say that the Stillaguamish Tribe was a part of the instream flow setting process from the beginning. And we appreciate that. And we take our role as co-managers in the. . .Stillaguamish watershed seriously. We support the proposed instream flow rule. There are a few situations -- a few parts of the rule that the Tribe has commented on already and may not necessarily be in favor of. However, overall, the Tribe is in favor of the rule.

Response: Thank you for your positive comments, as well as the participation of the Stillaguamish Tribe in the instream flow setting process from the beginning. Ecology appreciates your support.

Comment 1212

Commentor: Jody Brown, Stillaguamish Tribe of Indians

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: The Tribe believes that water is a limited resource. We all depend on it. Farmers do. Homeowners. Businesses. And the Tribes themselves. Mostly, the fish depend on water. It's not rocket science to believe that fish need water. And the Tribe. . .believes that ensuring there is enough water for fish is just a part of salmon recovery. Salmon are at the heart of the Tribe's lifestyle. And many of you may or may not be aware, but the Stillaguamish Tribe has not really had a fishery for salmon for quite sometime. Especially Chinook Salmon, which are the most important for the Tribe.

Response: Thank you for your comments.

Comment 1214

Commentor: Jody Brown, Stillaguamish Tribe of Indians

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: I guess overall we would just like to state that the Tribe is. . .in favor of the instream flow rule. And I guess if you have any comments that you would like to address to the Tribe or if you have any questions, you can contact me or someone at the Tribe. And I'll be here after the meeting if you have any questions,

Response: Thank you for your comment and support for the instream flow rule.

Comment 1215

Commentor: Beverly Hatfield,

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: At the risk of being the ridiculous here, I am a private homeowner in the area. Came here more for interest. First of all, I would like to applaud the farmers. Marlene especially. As I've watched the news, especially with the concern about the drought, I, as a private citizen, have made the choice. I live on a little less than a quarter of an acre. I would call myself a hobby gardener. I'm not planting -- I'm not planting a garden this year because I know it will take water. I am on city water. So this doesn't affect me at all.

Response: Thank you for your comment and interest in the proposed instream flow rule.

Comment 1216

Commentor: Beverly Hatfield,

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: But what I'm here for now, because I chose to be here this evening, is I'm alarmed by the ridiculousness of certain things. I wrote in my notes here "fish." Always fish. That's alarming to me. We're a roomful of people here; not a roomful of fish. It was alarming to me the way that the concerns were categorized on his slide show: Fish, wildlife, recreation, navigation, esthetics, water quality, livestock need, potable needs. Potable needs is what we drink. That's the last thing on the list. That alarms me. I'm appalled by it, quite honestly. I'm not afraid to sit up here and say I'm a conservative. And I'm not in agreement with the way that our Legislature is leading this State; that goes from water on up.

Response: Thank you for your comment. There is no priority in law among the beneficial uses of water.

Comment 1217

Commentor: Beverly Hatfield,

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: And knowing very little about it -- I did receive this member alert. The last thing I would like to say is that at the very bottom -- And I guess it was John who -- who put this together -- says, "Note: Any water withdrawals by Indian tribes will not be affected." I'd like to know the answer to that. That's all.

Response: Thank you for your comment regarding the Farm Bureau Alert. Ecology respectfully disagrees with the statement on the Farm Bureau Alert in that water rights held by Tribes are included in the State's water management framework. The statement on the Farm Bureau Alert is true to the extent any withdrawals by Tribes are sanctioned by existing water rights. The rule does not impact existing water rights. However, any future water rights obtained in the basin by the Tribe, or anyone else for that matter, will be subject to the rule.

Comment 1218

Commentor: Marlene Ross,

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: Well, I want to thank all of you people, hard-working people, for being here, too. I certainly agree with her, too. We all love fish. We all love wildlife. We love everything on our land and around it. But we should maybe -- The -- the people just come to us citizens and real quickly say that, "Oh, if we don't do this and don't do that, we're going to lose our water rights." Like the gentleman said, he's -- They've had a long time to work on it. We don't. We don't have time.

Response: Thank you for your comment.

Comment 1219

Commentor: Marlene Ross,

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: So if -- if things are so serious and so bad, they need to put a gate on the entrance to Washington State. And every person that decides to move to Washington State shall be fined. And the citizens that are born and raised here and made the land what it is today, they should be given priority to preserve the State of Washington and take care of it. Turn it into a beautiful, pristine tourist attraction to enjoy the beautiful water and the mountains and the grass. Because when you drive up the road, the thing that's pretty are the pastures and the dairy farms and the gardens. Not the condominiums and cities.

Response: Thank you for your comments.

Comment 1220

Commentor: Marlene Ross,

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: So if the people want to move into the State of Washington, let them pay for it. Don't take and. . .cause us landowners that have been here all of our lives one expensive thing after the other until we can't afford to live here. Then what will we have? Just row after row of condominiums?

Response: Thank you for your comment. Ecology respectfully suggests that you engage your local elected officials and suggest changes to local land use laws. Ecology recognizes you and other local residents appear to view this rule as the first of many more to come. That is certainly not the intent of the Ecology in its role of managing and co-managing the state's environmental resources.

Comment 1221

Commentor: Marlene Ross,

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: Those are the ones; I. . .go down the road. I've been here all my life. And. . .somebody was going to build something. And they bulldozed it all away. And there's a building there. And guess what happened? It's vacant. There's only so much money in people's pockets.

Response: Thank you for your comment.

Comment 1222

Commentor: Marlene Ross,

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: And after all the trees are gone and all the streams are gone, it isn't the

landowner that's ruining the land, it's development. So if you're going to make it hard for us farmers and property owners, make it hard for the developers and everything else. I don't want a new city down the road. I want the wilderness. We're taking care of the land. If it wasn't for us, there wouldn't be any left. Anyway, something has got to be done to where the property owner has more rights and to take care of their land at their own expense, because we always have and we always will. That's what kills the fish and everything else, are the newcomers that come in and don't care. They just want to get a job. Send the factory jobs to Moses Lake. Anyway, thank you very much.

Response: Thank you for your comments. Ecology respectfully suggest you engage your local government about meaningful land use planning and protection of agriculture lands through the Growth Management Act if you view existing laws as being ineffective.

Comment 1225

Commentor: Steve Aslanian,

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: . . .I think that we all should realize, when we look at our grandkids, that any plan that allows the build-out of one-half the existing lots in this basin and also does not address subdivisions will remain part of a problem.

Response: Thank you for your comment.

Comment 1233

Commentor: Calvin Joyner, US Forest Service, USDA

Type: Letter dated May 12, 2005

Comment: New section WAC 173-505-010 (3) and (4) states that existing water rights, including federal Indian and non-Indian reserved rights, will not be affected by the proposed rule. The Forest Service agrees with this statement, as we have federally reserved rights based on several authorities including our enabling legislation, the 1897 Organic Administration Act. We recognize that the extent of federal reserved rights would be determined through an adjudication process. While we concur overall with the instream flows quantified for the Stillaguamish River Basin, we retain the right to claim additional instream flows for streams on NFS (National Forest Systems) lands if necessary to meet conditions of our reservation authorities. We expect that these needs will be commensurate with the flow needs of the state.

Response: Thank you for your comment. WAC 173-505-010 (3) and (4) do state that existing water rights, including federal Indian and non-Indian reserved rights, will not be affected by the proposed rule. Ecology acknowledges that, while the Forest Service concurs overall with the instream flows quantified for the Stillaguamish River Basin, the Forest Service retains the right to claim additional instream flows for streams on NFS (National Forest Systems) lands if necessary to meet conditions of our reservation authorities.

Comment 1235

Commentor: Calvin Joyner, US Forest Service, USDA

Type: Letter dated May 12, 2005

Comment: We appreciate the opportunity to comment on the proposed rule. It is our objective to manage water resources on NFS [National Forest Service] lands in cooperation with States, other Federal agencies, Tribal governments, stakeholders, and holders of valid water rights to provide mutually beneficial programs for protecting, restoring, maintaining, and utilizing water resources. To accomplish this objective, we would like to participate in watershed planning group efforts (or to work directly with Ecology if there is no watershed planning group effort), to

quantify instream flows on NFS lands in the upcoming basins across Washington. The Forest Service would also like to work with Ecology toward joint ownership of instream flow water rights on NFS lands in the future, where feasible.

Response: Thank you for your comment. Ecology recognizes and appreciates the Forest Service objectives regarding managing water resources on NFS lands. Ecology welcomes Forest Service participation in watershed planning group efforts (or Ecology efforts if there is no watershed planning group involved) to quantify instream flows on NFS lands in the additional basins across the state. Ecology also welcomes the possibility of working with the Forest Service toward joint ownership of instream flow water rights on NFS lands in the future, where feasible. Ecology believes such cooperative work is feasible and we look forward to working together.

Comment 1237

Commentor: Kimberly Ordon, Tulalip Tribe

Type: Letter dated May 13, 2005

Comment: The Tulalip Tribes would like to offer comments on the. . .rulemaking for the Stillaguamish River basin. The present-day tribal entity known as The Tulalip Tribes of Washington is the political successor in interest to certain tribes, bands, and groups of Indians who were parties to the Treaty of Point Elliott of January 22, 1855 (12 Stat. 927). United States v. Washington, 459 F. Supp. 1020, 1039 (W.D.Wash. 1978). The Tulalip Tribes are a federally recognized Indian tribe and reside on the Tulalip Indian Reservation established pursuant to the Treaty of Point Elliot of January 22, 1855 (12 Stat. 927) and by The Executive Order of December 23, 1873. The Tulalip Tribes reserved the right to take fish in their usual and accustomed fishing places pursuant to the Treaty. These usual and accustomed treaty fishing areas include the freshwater areas of the Snohomish and Stillaguamish river basins and certain marine waters of the Puget Sound through which fish propagated in such basins pass. U.S. v. Washington, 459 F. Supp. 1020, 1038 (W.D. Wash. 1978); U.S. v. Washington, 626 F. Supp. 1405, 1527 (W.D. Wash. 1985), Aff'd, 841 F.2d 317 (9th Cir. 1988). The right to take fish includes the right to habitat protection including a reserved water right of appropriate quality and quantity to support continuation and enhancement of fish runs. In the Stillaguamish River basin, the Tulalip Tribes and the Stillaguamish Tribes work jointly to protect treaty resources.

Response: Thank you for your comments. Ecology recognizes that The Tulalip Tribes are a federally recognized Indian tribe, which is the political successor in interest to certain tribes, bands, and groups of Indians who were parties to the Treaty of Point Elliott of January 22, 1855. Ecology also recognizes that the Tulalip Tribes have a reserved right to take fish in their usual and accustomed fishing places pursuant to the Treaty; and that these usual and accustomed treaty fishing areas include the freshwater areas of the Snohomish and Stillaguamish river basins, as well as certain marine waters of the Puget Sound through which fish propagated in these basins pass.

Comment 1238

Commentor: Kimberly Ordon, Tulalip Tribe

Type: Letter dated May 13, 2005

Comment: Tulalip lauds the Department of Ecology's effort to set instream flows as an important step in the statewide effort to restore fish and fish habitat. Because Tulalip depends on salmon for its economic livelihood and its cultural survival the Tribes supports this effort.

Response: Thank you for your comment and support of the Department of Ecology's effort to set instream flows as an important step in the effort to restore fish and fish habitat.

Comment 1239

Commentor: Kimberly Ordon, Tulalip Tribe

Type: Letter dated May 13, 2005

Comment: Tulalip currently participates in a number of forum with the purpose of developing salmon recovery plans to respond to Endangered Species Act listings of chinook stocks by the National Marine Fisheries Service (NMFS). Tulalip currently serves as Vice Chair of the Snohomish River Basin Recovery Forum which has just completed its comprehensive Salmon Recovery Plan for the Snohomish Basin. Tulalip serves on the Development Committee of Shared Strategies. Tulalip scientists are members of the Technical Recovery Team (TRT) appointed by NMFS to assist in developing recovery plans. Tulalip scientists also serve on the Snohomish Technical Team and the Stillaguamish Technical Advisory Group (STAG) both of which are charged with developing the technical foundation for salmon recovery plans. Tulalip also participates on the Stillaguamish Implementation Review Committee (SIRC) which is responsible for developing and implementing a salmon recovery plan in the Stillaguamish basin. Last, Tulalip is a leader in Puget Sound hatchery reform of hatchery practices to fit with salmon recovery planning in both the Stillaguamish & Snohomish basins.

Response: Thank you for your comments. Ecology recognizes and appreciates the participation and leadership Tulalip has shown in resource management.

Comment 1240

Commentor: Kimberly Ordon, Tulalip Tribe

Type: Letter dated May 13, 2005

Comment: Clearly, Tulalip takes its resource management obligations seriously in order to manage fishery resources and improve habitat in the Tribes' U&A places. Tulalip has a keen interest in protecting and restoring the salmon resources of its U&A places. The Tulalip fishing fleet has severely curtailed harvest in order to return more fish to spawning grounds. However, it is apparent that this is not enough to restore a once robust and thriving fishery. Habitat improvements must be made to capitalize on escapement goals set by fisheries managers. We have legal, policy, & cultural obligations as managers of this resource to insure that actions are taken to improve habitat in such a way as to bring about recovery of tribal resources. Tulalip scientists in cooperation with others have identified instream flows as limiting factors for salmon recovery. Therefore, Tulalip views Ecology's efforts to adopt instream flows as a key component to respond to the State's salmon recovery obligations.

Response: Thank you for your comments. Ecology recognizes that Tulalip takes its resource management obligations seriously in order to manage fishery resources and improve habitat in the Tribes' U&A places. Ecology certainly appreciates that Tulalip views the department's efforts to adopt instream flows as a key component to respond to the State's salmon recovery obligations.

Comment 1241

Commentor: Kimberly Ordon, Tulalip Tribe

Type: Letter dated May 13, 2005

Comment: Toward that end, Tulalip expects that Ecology's instream flow program ensure salmon recovery by either meeting or exceeding other efforts that are currently underway in the Tribes' U&A that are aimed at salmon recovery planning. Tulalip is concerned that there are some aspects of the Stillaguamish rule that do not meet these expectations. While the Tribes supports most components of the proposed rule, there are some elements that are problematic.

Response: Thank you for your comment regarding Tulalip's expectation that Ecology's

instream flow program will ensure salmon recovery by either meeting or exceeding other efforts that are currently underway in the Tribes' U&A that are aimed at salmon recovery planning. Ecology recognizes that other important salmon recovery efforts are under way. Recently, the Shared Strategy for Puget Sound compiled a proposed recovery plan that reflects the participation of the Stillaguamish Implementation Review Committee (SIRC) and local governments in the planning process; the plan includes a Chinook Salmon Recovery Plan for the Stillaguamish Basin. The instream flow rule is recognized in the plan as one element of recovery. Other factors are also identified as causing changes to stream flow and instream habitat. Ecology has stated more than once that an instream flow rule, in and of itself, does not add more water to a stream or guarantee the flow. As a water right, the instream flow can and will be used to curtail (interrupt) future diversions when the instream flow is below established levels. In that respect, the rule should keep more flow in some streams and river reaches than otherwise would be the case. Ecology anticipates establishing a program to achieve flows in flow-limited streams or stream reaches as a next step in water management in the basin. However, a combination of improvements to instream habitat will be required to ultimately succeed in salmon recovery. Please see responses to comments 1052 and 1057 for additional information regarding this subject.

Comment 1244

Commentor: Kimberly Ordon, Tulalip Tribe

Type: Letter dated May 13, 2005

Comment: Forest Practices: Another variable that Ecology did not take into consideration when developing its rule is the impact from forest practices in the Stillaguamish basin. Over 75% of the basin was identified by Ecology as being in some way affected by forest practices either by loss of habitat, increased sediment loading instream, temperature increases and more. Despite recognition of these negative impacts, the rule does not take any measures to respond to these affects. Failure to address forest practices impacts will make the instream flow rule less effective in protecting fish and fish habitat.

Response: Thank you for your comment related to forest practices. Ecology concurs, as does the salmon recovery plan, that silt and sediment load are a problem for fish production. Those issues are beyond the scope of this rule making. Forest practices will be addressed through the Timber, Fish, and Wildlife agreements. Please see the Salmon Recovery Plan for actions planned to address sediment and silt. Ecology will share your comment with the Department of Natural Resources.

Comment 1245

Commentor: Kimberly Ordon, Tulalip Tribe

Type: Letter dated May 13, 2005

Comment: Recharge from Septic Tanks ,WAC 173-505-070: Tulalip does not agree that recharge from septic tanks should be considered by Ecology when issuing water rights. It is the Tribes' opinion that water is being returned to a different aquifer system than that from which it was withdrawn. Currently, Ecology lacks the ability to account for water it has already allocated through its permit system. Tulalip has little confidence that Ecology can add the burden of tracking, in any meaningful way, recharge from this source. The bank account will never be reconciled.

Response: Thank you for your comment. Ecology is accounting for use of the reservation water by accounting for each well drilled that uses reserved water. Given the reserve will be used in rural areas where domestic waste is treated in on-site septic systems, accounting for that return flow seems reasonable. That is different that considering return flow for the issuance of a water right. Generally speaking the wells tapping the reserve will be shallow and in the glacial alluvium. Ecology recognizes that return flows from a septic system do not flow back to where the water is

withdrawn given sanitary set-back requirements. However, the water is generally coming out of the glacial alluvium and going back to the same aquifer displaced in space and time. The displacement in space is still within the same basin and usually fairly close in distance. Ecology acknowledges that efforts to accurately account for water use for water rights allocated through its permit system is not perfect. A system will have to be put in place to account for use of reserved water. Please see response to comments 314, 315, 320, 865, 866, and 937 for more on accounting for use under the reservation.

Comment 1246

Commentor: Kimberly Ordon, Tulalip Tribe

Type: Letter dated May 13, 2005

Comment: Mitigation Plans, WAC 173-505-100: Tulalip strongly disagrees with allowing exemption from instream flow requirements by surface and ground water permits subject to an approved mitigation plan. Unless a mitigation plan can show measurable and continued benefit to instream flows, no exemption should be allowed.

Response: Thank you for your comment regarding mitigation and Tulalip's strong disagreement with allowing exemption from instream flow requirements by surface and ground water permits subject to an approved mitigation plan. Please see response to comments 1080, and 1111 for more on mitigation and the rule.

Comment 1249

Commentor: Kimberly Ordon, Tulalip Tribe

Type: Letter dated May 13, 2005

Comment: Summary: The Tulalip Tribes support adoption of an Instream Flow rule for the Stillaguamish River basin taking into consideration the necessary amendments or additions listed here. Tulalip is particularly concerned with the reservation of water for future allocations particularly in light of future climate impacts. Tulalip supports a rule that meets obligations to accomplish salmon recovery.

Response: Thank you for your comments on the rule.

Comment 1250

Commentor: Scott Fowler, Dahlman Pump & Well Drilling, Inc.

Type: Letter dated May 10, 2005

Comment: Thank you for taking time to address my concerns regarding the instream flow rule on the Stillaguamish basin and other basins in the state. This instream flow rule basically sets up the future expanse of public water. It does nothing to protect instream flow and probably will hurt instream flows in the future.

Response: Thank you for your comment. Ecology respectfully disagrees. As to the expansion of public water, please see comment 1284. Regarding the protection of instream flows, please see the comments of Dr. Hal Beecher of the Washington Department of Fish and Wildlife concerning the State's position that the proposed flows will be positive for fish.

Comment 1251

Commentor: Scott Fowler, Dahlman Pump & Well Drilling, Inc.

Type: Letter dated May 10, 2005

Comment: The vision of the Department of Ecology and the Department of Health is to have everyone on public water. Public water does have some benefits (higher density of people per

square acre) but has some negative side effects like redistributing water from one basin to another, thus transporting water out of basins through sewer systems and high uses of water through lawn irrigation. All of these have a high negative impact on instream flow.

Response: That you for your comment. Ecology respectfully states that this agency and the Department of Health do not have a vision of everyone being on pubic water. The Legislature and the law guide Ecology's actions in this regard. Please see the Municipal Water Law of 2003. Also, RCW 90.54.020(8) states in part, Development of water supply systems, whether publicly or privately owned, which provide water to the public generally in regional areas within the state shall be encouraged. Development of water supply systems for multiple domestic use which will not serve the public generally shall be discouraged where water supplies are available from water systems serving the public. Please also see RCW 43.20.260 for more on the duty of a municipal water supplier to supply water in its retail service area.

Comment 1252

Commentor: Scott Fowler, Dahlman Pump & Well Drilling, Inc.

Type: Letter dated May 10, 2005

Comment: On the reverse side in rural Washington residential wells and small Class B well systems keep the most of that said water in the basin. Nowhere in Washington State has the Department of Ecology (DOE) been able to prove that legal exempt well or group of these wells has had a negative impact on instream flow. One can as easily argue that a residential well with septic system actually improves instream

Response: Thank you for your comment. Please see response to comment 1207.

Comment 1253

Commentor: Scott Fowler, Dahlman Pump & Well Drilling, Inc.

Type: Letter dated May 10, 2005

Comment: Your plan also has a very limited supply of water set aside for agriculture. If the ag community cannot use their property to earn a living, it will be sold and made into hard surface. Most ag property is located in excellent recharge areas.

Response: Thank you for your comment that the rule has a very limited supply of water set aside for agriculture. In fact, the rule has no set aside of water for agriculture. For more on agriculture water use, please see response to comments 330 and 1027. Ecology agrees that most agriculture lands in the Stillaguamish basin have a surface geology that is excellent for recharge.

Comment 1254

Commentor: Scott Fowler, Dahlman Pump & Well Drilling, Inc.

Type: Letter dated May 10, 2005

Comment: It seems to me that Ecology has its heart in the right place but is creating a mountain of legal and property rights legislation out of a molehill.

Response: Thank you for your comment.

Comment 1255

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: These comments are submitted on behalf of Snohomish County in response to

the Department of Ecology's proposed rule, Chapter 173-505 WAC, establishing instream flows for the Stillaguamish River. This letter includes some attachments which are hereby incorporated by this reference. Snohomish County wishes to express its appreciation to the Department for extending the official comment period until May 13, 2005. The additional two weeks has facilitated County review of the proposed rule. However, the additional time granted has not been sufficient to perform the rigorous policy and scientific analysis required to properly evaluate the proposed rule and its affect upon the residents of Snohomish County. The County also wishes to express its appreciation to you for your willingness to discuss the proposed rule and for meeting with County staff in regard to the proposed rule.

Response: Thank you for your comment.

Comment 1256

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: Introduction: The Stillaguamish River and its watershed are almost entirely located within Snohomish County. The river and its tributaries are significant not only for their aquatic species, including salmon, but the also for the out-of-stream uses which depend upon the river. These include adequate water to serve municipal and human needs, including the water needs of various Snohomish County cities such as Arlington. In addition, the economic base of north Snohomish County depends upon water availability, especially agriculture. The maintenance of agriculture is economically significant to Snohomish County not only because of the economic activity currently associated with agriculture, but also because of its potential for increased economic development through such endeavors as food processing. In addition, agricultural lands in the Stillaguamish Valley are tied to tourism and its development. Snohomish County believes the rule, as proposed, does not provide sufficient water for agricultural uses in the future which is discussed more fully below.

Response: Thank you for your comment.

Comment 1257

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: Responding to the proposed Instream Flow Rule is particularly difficult in regard to the Stillaguamish River. As you know, there is very little information available to begin with because there has been no 2514 Plan for the River. Snohomish County certainly does not have readily available information about all of the users of out-of-steam water. Ecology has admitted that although it has the most information about water rights, it does not have available to share with the County, any concrete data as to the actual consumption of water, especially for agriculture. Ecology admits that it does not currently know what water rights are actually being used, whether some should be relinquished for non-use, and that it really does not have a handle on how much water is being used without a water right or right to do so. Yet, it now proposes a rule which will result in a water right for instream flow which will take priority over subsequent rights and may have a dramatic effect on what water rights can actually be transferred to satisfy water needs in the future, particularly for agriculture.

Response: Thank you for your comment. Ecology recognizes that no watershed planning under chapter 90.82 RCW was conducted in the basin. Ecology also acknowledges that data on actual consumption of water under existing rights is limited. Finally, Ecology acknowledges that future changes or transfers to existing rights will include an evaluation of regulated surface waters if the source of the water proposed for changing has an instream flow established by this rule.

Comment 1258

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: These observations are made not to criticize Ecology's efforts, but to point out that the proposed rule is highly significant to the future of Snohomish County and appears to be establishing regulations without sufficient data, based upon assumptions which may or may not be justified. Accordingly, Snohomish County urges Ecology to defer taking final action on the rule, and to work with Snohomish County in developing the necessary information (which need not be a full scale 2514 type planning effort) so that the rule can be properly evaluated and finalized. Should Ecology agree to defer such final action, we pledge to work collaboratively with you to determine an appropriate instream flow rule.

Response: Thank you for your comment.

Comment 1259

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: Skagit County Comments Incorporated. Snohomish County generally supports, and incorporates herein by this reference, the comments made by Skagit County on proposed WAC 173-505.

Response: Thank you for your comment

Comment 1260

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: The proposed instream flow rule fails to strike the appropriate balance required by law. The Water Resources Act (RCW 90.54.005) declares three "water resources objectives" for allocating the state's water resources. These objectives are to provide sufficient water for: 1) residential, commercial, and industrial needs: 2) fish populations; and 3) productive agriculture. The legislative history of this provision indicates a strong policy directive to balance the needs of water for people, fish and agriculture. The proposed rule ignores this statutory mandate by establishing instream flow regulations without adequately addressing out-of-stream water needs.

Response: Thank you for your comment. Comment noted. For the scope of this rule making please see response to comments 469 and 1025.

Comment 1263

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: The rule may cause significant injury to the long-term commercial viability of agriculture within Snohomish County. The amount of the reservation for some existing and future agricultural needs appears to be insufficient. We are concerned that the rule will have a disproportionately negative effect on agriculture relative to other activities, due to the way existing water rights law treats municipal water supply rights versus agricultural rights. Even if the GMA allowed bringing water to agricultural uses from other sources, current water right laws would not allow this unless the water was under a right for agricultural use.

Response: Thank you for your comment. There is no reservation for irrigated agriculture in the rule. A reservation for agriculture is beyond the scope of this rule making. However, Ecology believes that existing agriculture water rights can meet future agriculture needs. For the State

Environmental Policy Act compliance Ecology completed a checklist. For agriculture Ecology said, large portions of the site are used for agriculture, although much of the Stillaguamish Watershed is in the protected areas of the Mount Baker National Forest. The areas used for agriculture in the watershed, particularly to the east of Interstate 5, closely follow the riparian areas surrounding the North Fork Stillaguamish River. The principle agricultural region is west on Interstate 5 and along the riparian areas of the mainstem, North Fork, and South Fork.

Agricultural production, based on the latest figures available includes: Over 2,500 acres of mixed grasses; 1,700 acres of field corn; about 1,100 acres of green peas; approximately 600 acres of Irish potatoes; about 510 acres of winter wheat; 240 acres of field spinach; 160 acres of corn (type not specified); 135 acres of alfalfa (for hay); 110 acres of perennial ryegrass; 75 acres of ornamentals for nurseries; approximately 60 acres of hybrid poplar; 55 acres of cucumbers; 25 acres of seed beets; 20 acres of sweet corn; 20 acres of seed cabbage; 10 acres of spring oats; 10 acres of red fescue; 7 acres of pumpkins; 4 acres of Christmas trees; and 1 acre of apples.

Adding all uses is 7,342 acres of production. The number of irrigated acres for water right permits, certificates, and claims on paper is 48,164 acres. We know that not all claims for water rights (see chapter 90.14 RCW) represent vested water rights, but surely some part does. We also know that wet water rights is less than total paper water rights - but only an adjudication can confirm a water right.

In 1992 the United States Geological Survey found about 1,700 acres of irrigated agriculture in the Snohomish and Stillaguamish basins overlaid by the coordinated water system planning area. That area is larger that just the Stillaguamsih basin. In 2002, the Washington State Department of Agriculture found that approximately 5,725 acres of land were irrigated in all of Snohomish County. The majority of irrigated acreage in Snohomish County is in the Snohomish system, not the Stillaguamish system. Again, Ecology's contention is that existing agriculture rights can meet the future agriculture needs in the Stillaguamish basin.

Comment 1264

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: The County remains committed to keeping commercial agriculture viable in the Stillaguamish River watershed, and any instream flow rule developed should not unfairly affect agriculture at the favor of other land uses. At the time of the public hearing in Mount Vernon, I provided you as part of the record the Snohomish County Agricultural Action Plan which demonstrates the County's commitment to preserving and enhancing the agricultural economy in Snohomish County. In addition, we have learned at the recent "Focus on Farming Conference" that the future of agriculture is probably dependent on planting higher value crops which will require more water than is currently used. See remarks of Dr. Carolyn Henri, Ph.D., attached. With climatic change occurring, and the need to develop agricultural based industries, such as food processing or potentially biodiesel, to provide a solid economic base for continuing agriculture in the future, the need for more water for agriculture in the future seems self-evident. The proposed rule, while providing, some additional reserve for agriculture, does not appear to be based on the actual needs of a viable agricultural sector in the future.

Response: Thank you for your comment. Ecology acknowledges that Snohomish County sees a need for more water for agriculture in the future and that it seems self-evident. Such a need is not evident to Ecology. After a review of Dr. Henri's paper and several conversations with Dr. Henri, Ecology's understanding is that there is no known future agriculture water needs assessment for the Stillaguamish basin. Ecology's review of the Snohomish County Agricultural Action Plan does demonstrates the County's commitment to preserving and enhancing the agricultural economy in Snohomish County. However, the document does not discuss or even mention irrigation or water as a limiting factor for agriculture. There simply is no credible data to

suggest a need for an agriculture reserve or that water use or water rights are in any way limiting agriculture activities in the basin.

Comment 1269

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: We are concerned that there may not be a link between the identified "problem" -- low flows in the Stillaguamish River -- and the "solution" offered by the draft rule -- curtailing future water withdrawals.

Response: Thank you for your comment. The proposed instream flow rule and creation of instream flow rights are to prevent problems of low flows in the Stillaguamish River in the future. Ecology is fulfilling a statutory mandate to establish the instream flows

Comment 1270

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: Ecology has stated that existing withdrawals have led to the current shortage of fish habitat during low-flow periods. However, an examination of the 75-year record of mean monthly flows in August at the USGS gage at Arlington shows no clear historical reduction in this flow statistic. If the "problem" is indicated by these flow statistics, it has been present to an unchanged degree since 1928. Therefore it is not clear that the rule will prevent the "problem" from getting worse, or conversely, whether the absence of the rule would increase future problems. We recommend that DOE give more consideration to defining the actual problems and the affect of the rule on solving these problems. As stated above, we would be happy to work with you on this issue.

Response: Thank you for your comment. Ecology has not stated that existing withdrawals have led to the current shortage of fish habitat during low-flow periods. Ecology understands that a statement in the salmon recovery plan would indicate certain low flows are exacerbated by withdrawals of water. However, Ecology did not make that statement and Ecology has no credible information to show specific withdrawals or diversion cause specific flow problems. Ecology acknowledges that Snohomish County's review of the 75-year record of mean monthly flows in August at the USGS gage at Arlington shows no clear historical reduction in this flow statistic. Perhaps the establishment of the instream flow rule will help to keep August flows at the USGS gage at Arlington from being to low to support instream values.

Comment 1271

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: *[THIS COMMENT WAS RETRACTED IN A LATER LETTER FROM SNOHOMISH COUNTY; SEE BELOW]* -- In developing the rule, DOE did not adequately consult with the WRIA planning agencies and organizations such as the Shared Strategy group, to ensure that its rule is consistent with salmon recovery planning goals. Snohomish County has been working for several years to develop collaborative, science-based WRIA plans for salmon recovery in the Stillaguamish basin. As you may know, in March 1999, the National Oceanic and Atmospheric Administration (NOAA) Fisheries listed the Puget Sound Chinook salmon evolutionarily significant unit as a threatened species under the Endangered Species (ESA). In November 1999, the United States Fish and Wildlife Service (USFWS) listed the Puget Sound bull trout distinct population segment as a threatened species under the ESA. Both listings under the ESA are for species that exist within the jurisdiction of Snohomish County, and in particular,

the Stillaguamish River. The County has previously stated its commitment to work toward the recovery of these listed species. Under ESA Section 4(f), NOAA Fisheries (for the Chinook salmon) and USFWS (for bull trout) are required to develop and implement recovery plans to address the recovery of the species. One of the most essential elements for the development and implementation of effective recovery programs is coordination and cooperation among federal, state, and local agencies, tribes, non-governmental organizations, and private citizens.

Response: Comment retracted by Snohomish County (see below).

Comment 1272

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: The rule is vague (and therefore may violate constitutional principles relating to due process), as to the standards that must be met by an applicant for obtaining approval for water withdrawal in closed basins. The rule provides that for applicants who cannot access water reservations, a permit for withdrawal of water for consumptive uses from sources closed during certain portions of the year will be denied unless the applicant can acceptably mitigate for the impacts during the closure periods or demonstrate to the satisfaction of the department that the proposed withdrawal will not affect instream flows set by the rule. Neither of the highlighted standards is sufficient to avoid a vagueness challenge. DOE should consider providing what forms of mitigation will be acceptable, and when and how its "satisfaction" can be obtained under this rule.

Response: Thank you for your comment and comment noted. For mitigation, please see response to comments 1080 and 111.

Comment 1273

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: With respect to the transferability of existing water rights that are senior to the instream flow reservation, the rule may violate state law. RCW 90.03.380(6) provides that, "[n]o applicant for a change, transfer, or amendment of a water right may be required to give up any part of the applicant's valid water right or claim to a state agency, the trust water rights program, or to other persons as a condition of the processing the application." (Emphasis added). Where the proposed rule would render a senior water right junior to the new instream flow rule through the mechanism of approving a water right transfer, the rule violates RCW 90.03.380(6).

Response: Thank you for your comment. Ecology respectfully disagrees with the County's legal analysis. The applicant for change to a water right has the discretion to not accept a decision made by Ecology to approve a change to any water right subject to an instream flow. The senior water right holder would voluntarily, if they so chose, accept the changed right being subject to an instream flow proviso.

Comment 1274

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: Furthermore, to the extent that the rule impairs existing water rights (either permitted or exempt), the DOE could face takings claims similar to those recently seen by the United States where it imposed flow restrictions for protection of ESA-listed species. Water rights have been deemed to be compensable property rights under the takings clause of the

constitution. Accordingly, great care should be taken to avoid such takings of property rights unless compensation to the holder of such rights is made.

Response: Thank you for your comment.

Comment 1277

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: We thank you for the opportunity to comment. The County intends to be actively engaged in this process as it moves forward in order to provide representation of our citizen's interests and to ensure that the resulting regulations are consistent with our salmon recovery efforts, agricultural conservation efforts, and based on sound science. We look forward to working with you on this rule.

Response: Thank you for your comment. Ecology looks forward to your active engagement in the rule development and its implementation

Comment 1278

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 20, 2005

Comment: Dear Mr. Hirschey, In the Snohomish County comment letter on the proposed Stillaguamish Instream Flow Rule dated May 12, 2005, I stated that in developing the rule DOE did not adequately consult with WRIA planning agencies and organizations to ensure that the rule would be consistent with salmon recovery planning goals (see comment 7 of letter). Since submitting the comment letter, Surface Water staff informed me that I may have made a misstatement which was not caught in the initial editing. DOE did in fact make efforts to discuss the flow rule with various organizations involved in WRIA planning, including the Stillaguamish Implementation Review Committee, of which Snohomish County is a member. We appreciate that you did so and apologize for making the misstatement. Accordingly, I retract the statement and Ecology need not respond to it. Please place this letter in the record so that the correction and retraction is properly noted. Thank you for your attention to this matter. If you have any questions, please feel free to contact me.

Response: Thank you for your comment and retraction of your previous incorrect statement.

Comment 1279

Commentor: Shawn Yanity, Stillaguamish Tribe of Indians

Type: Letter dated November 8, 2004

Comment: The Stillaguamish Tribe is supportive of setting instream flows in the Stillaguamish Watershed, The Tribe appreciates the spirit of natural resource co-management that has occurred between Washington Department of Ecology, Washington Department of Fish and Wildlife, Tulalip Tribes and itself in determining what flows are necessary for fish. As you are aware, the Tribe has a vested interest in the protection of water resources for fish. Salmon are integral to the cultural, spiritual, and economic well being of the Stillaguamish Tribe. This letter shall serve as Formal comments from the Stillaguamish Tribe regarding the proposed instream flow rule for WRTA 05.

Response: Thank you for your comment and the support of the Stillaguamish Tribe in the setting instream flows and that the Tribe appreciates the spirit of natural resource co-management that has occurred between Washington Department of Ecology, Washington Department of Fish and Wildlife, and Tulalip Tribes in determining what flows are necessary for

fish.

Comment 1280

Commentor: Shawn Yanity, Stillaguamish Tribe of Indians

Type: Letter dated November 8, 2004

Comment: The Stillaguamish Tribe, a federally recognized tribe since 1978 and Point Elliot Treaty Tribe, has inhabited the lands of the Stillaguamish Watershed since time immemorial. Therefore, we feel it necessary to include language in the instream flow rule acknowledging that the Tribe has a treaty reserved senior water right in the watershed. Actual quantification of the water right may be uncertain at this time, but our treaty reserved water right has a priority date that is time immemorial and requires proper recognition in the instream flow rule language.

Response: Thank you for your comment. The rule states, in part, in section 010(4) (4) that the chapter shall also not affect federal Indian and non-Indian reserved rights. The Stillaguamish Tribe of Indians and the Tulalip Tribes reserve the right to a claim for a treaty-derived off-reservation instream flow right with senior priority. That language was added to the rule at your request. The extent of such rights, of course, can only be adjudicated in a federal or state court.

Comment 1286

Commentor: Shawn Yanity, Stillaguamish Tribe of Indians

Type: Letter dated November 8, 2004

Comment: To reiterate, the Stillaguamish Tribe is supportive of establishing minimum instream flow rules and would like to continue to work cooperatively with Ecology. We have some serious concerns as to whether the proposed rules adequately protect fish. We have an equal if not greater concern that the Department of Ecology is not properly recognizing the co-management role of the tribe as well as rights reserved by treaty.

Response: Thank you for your comment. Comment noted.

Comment 1287

Commentor: Steve Anthes, Kettle Range Conservation Group

Type: E-mail dated March 23, 2005

Comment: On behalf of the Kettle Range Conservation Group, we strongly support the adoption of an Instream Flow Rule to protect the fisheries, wildlife, and ecology in the Stillaguamish River.

Response: Thank you for your comment. Ecology appreciates your support.

Comment 1288

Commentor: Steve Anthes, Kettle Range Conservation Group

Type: E-mail dated March 23, 2005

Comment: Many of our members, supporters, and staff enjoy world-class Steelhead fishing, recreation along the river, and river sports such as rafting and kayaking. We enthusiastically support a limit on future groundwater use that robs our streams and river of water, especially in the predicted continuation of hot and dry springs and summers.

Response: The proposed Stillaguamish rule seeks to regulate ground water, that if withdrawn would have an effect on the flow or level of a regulated water body. Ecology believes we have done so; please see section 070 of the rule.

Comment 1290

Commentor: Steve Anthes, Kettle Range Conservation Group

Type: E-mail dated March 23, 2005

Comment: However, we understand that Ecology has not stated how the proposal will help meet Puget Sound Chinook salmon recovery goals. We think any stream flow protection policy should result in better protection of fish and streams.

Response: Thank you for your comment. Ecology agrees that any stream flow protection policy should result in better protection of fish and streams. For the relationship of the rule to ESA, please see response to comments 1052, 1057, and 1241.

Comment 1293

Commentor: Steve Anthes, Kettle Range Conservation Group

Type: E-mail dated March 23, 2005

Comment: Finally, we are very concerned that Ecology acknowledges the impacts on stream flows associated with logging, but makes no attempt to incorporate any safeguards. This approach is unacceptable to us.

Response: Thank you for your comment related to forest practices. Ecology concurs, as does the salmon recovery plan, that silt and sediment load are a problem for fish production. Those issues are beyond the scope of this rule making. Please see the salmon recovery plan for planned actions to address sediment and silt. Ecology will share your comment with the Department of Natural Resources. Ecology agrees that failure to address forest practices impacts will make the instream flow rule less effective in protecting fish and fish habitat.

Comment 1294

Commentor: Steve Anthes, Kettle Range Conservation Group

Type: E-mail dated March 23, 2005

Comment: Thank you for you kind consideration in this important matter.

Response: Thank you for commenting on the rule.

Comment 1295

Commentor: Chalice Bailey

Type: E-mail dated April 26, 2005

Comment: My love for the rivers and oceans prompts me to send this request. Our waters are precious, life-giving resources, not only for people, but for the wild animals, the fish, etc. Please protect the quality of our rivers and the continuation of a viable aquifer by considering the following: Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.

Response: Thank you for your comment. The rule or reservations created do not limit or facilitate growth. Land use and growth management is controlled by the local jurisdiction. The rule does not change that. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth.

Comment 1296

Commentor: Chalice Bailey

Type: E-mail dated April 26, 2005

Comment: Please protect the quality of our rivers and the continuation of a viable aquifer by considering the following: Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.

Response: Thank you for your comment. Ecology agrees that any stream flow protection policy should result in better protection of fish and streams. For the relationship of the rule and instream flows to the Endangered Species Act and salmon recovery please see response to comments 1052, 1057, and 1241.

Comment 1297

Commentor: Chalice Bailey

Type: E-mail dated April 26, 2005

Comment: Please protect the quality of our rivers and the continuation of a viable aquifer by considering the following: Measure future water use. We need to know how much water is being used in order to manage it more wisely.

Response: Thank you for your comment regarding metering of water use. Ecology agrees with the concept of accounting for water use. In general, metering is an effective way to account for water use. The rule exempts only single domestic users from metering. Wells that will be used by two or more residences and new permitted uses must be metered. For the water used by a single connection metering is not the only way to account for water use. Based on well logs, normal well construction techniques, and pumps commonly used we can reasonably know the number, depth of withdrawal and instantaneous use of water. To account for use on an annual basis is the other main unknown. In this case we have empirical data from nearby Skagit County for domestic rural water use on an annual basis. Use of the reserve on an annual basis can be reasonably accounted for using the 350 or 175 gallons per day figure, which ever is appropriate, multiplied by the number of wells. That annual usage is then deducted from the remaining volume of water in the reserve. The rule language on accounting for use under the reserve was changed to include empirical data in the accounting if the project proponent chooses to do so. The level of data accuracy for use of water from the reserve is sufficient for this water management tool. Please also see response to comment 1038.

Comment 1298

Commentor: Chalice Bailey

Type: E-mail dated April 26, 2005

Comment: Please protect the quality of our rivers and the continuation of a viable aquifer by considering the following: Include recommendations to reduce the impacts of logging.

Response: Thank you for your comment related to forest practices. Ecology concurs, as does the salmon recovery plan, that silt and sediment load are a problem for fish production. Those issues are beyond the scope of this rule making. Please see the salmon recovery plan for planned actions to address sediment and silt. Ecology will share your comment with the Department of Natural Resources. Ecology agrees that failure to address forest practices impacts will make the instream flow rule less effective in protecting fish and fish habitat.

Comment 1299

Commentor: Chalice Bailey

Type: E-mail dated April 26, 2005

Comment: Thank you for your good work. Thank you for your consideration.

Response: Thank you for taking the time to comment.

Comment 1300

Commentor: Eldon Ball

Type: E-mail dated April 30, 2005

Comment: Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.

Response: Thank you for your comment related to ensuring that the groundwater "reserve" does not lead to sprawling development, harming farms and fish. The rule or reservations created do not limit or facilitate growth. Ecology believes the reservation is sufficient to meet the need of forecasted population growth for twenty years. The purpose of the reserve is to provide water for rural development approved by the counties consistent with the counties land use plans and zoning. The rule does not change the local jurisdictions obligation under the Growth Management Act. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth.

Comment 1301

Commentor: Eldon Ball

Type: E-mail dated April 30, 2005

Comment: Include recommendations to reduce the impacts of logging.

Response: Thank you for your comment related to forest practices. Ecology concurs, as does the salmon recovery plan, that silt and sediment load are a problem for fish production. Those issues are beyond the scope of this rule making. Please see the salmon recovery plan for planned actions to address sediment and silt. Ecology will share your comment with the Department of Natural Resources. Ecology agrees that failure to address forest practices impacts will make the instream flow rule less effective in protecting fish and fish habitat

Comment 1302

Commentor: Eldon Ball

Type: E-mail dated April 30, 2005

Comment: Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.

Response: Thank you for your comment. Ecology agrees that any stream flow protection policy should result in better protection of fish and streams. The proposed instream flows are based on spawning chinook salmon and juvenile steelhead rearing flow habitat needs. However, Ecology has often stated that establishment of an instream flow does not add or take water from a system. Achieving established instream flows is also part of the solution to the problem your comment calls out. For the relationship of the rule and instream flows to the Endangered Species Act and salmon recovery please see response to 1052, 1057, and 1241.

Comment 1305

Commentor: Bill & Patti Barmettler

Type: E-mail dated March 23, 2005

Comment: I don't know all the details about the proposed rules for the Stillaguamish, but I'd like to commend Ecology for trying to get out ahead of the problem.

Response: Thank you for taking the time to comment and support of Ecology's instream flow

program.

Comment 1306

Commentor: Bill & Patti Barmettler

Type: E-mail dated March 23, 2005

Comment: I've been involved (as a concerned citizen, not a professional) with water quality and quantity problems on the Chehalis River, which I believe is over-allocated about 400% by Ecology's estimates.

Response: Thank you for your comment.

Comment 1307

Commentor: Bill & Patti Barmettler

Type: E-mail dated March 23, 2005

Comment: When the Chehalis is below the minimum instream flow (the instream flow number is almost surely too lax) most of summer it's a little late to be trying to deal with the problem.

Response: Thank you for your comment; your comment is noted. Ecology agrees that any stream flow protection policy should result in better protection of fish and streams. For the Stillaguamish system, the proposed instream flows are based on spawning chinook salmon and juvenile steelhead trout rearing flow habitat needs. However, Ecology has often stated that establishment of an instream flow does not add or take water from a system. The instream flow as a water right can be used to curtail (interrupt) future diversions when the instream flow is below established level. In that respect, the rule should keep some streams and river reaches with more flow than otherwise. Achieving established instream flows is part of the solution to the problem your comment calls out. For the relationship of the rule and instream flows to the Endangered Species Act and salmon recovery please see response to comments 1052, 1057, and 1241.

Comment 1308

Commentor: Bill & Patti Barmettler

Type: E-mail dated March 23, 2005

Comment: . . .[E]xempt wells continue to proliferate. By capping the number and size of wells that will be permitted, Ecology can draw a line in the sand now. You'll catch heat from both sides of course but I think the basic idea is excellent.

Response: Thank you for your comment. Ecology views the line in the sand you noted to be better incorporation of water withdrawn by permit-exempt wells into the over all management framework. Any lawful water use under the ground water permit exemption creates a water right with both privileges and obligations. One of the obligations is curtailment of use if a senior right is not satisfied. Reconciling interruptible water rights and pubic water supply is the issues the reservation was designed to address. Incorporation of the reservation into local land use plans and resource management plans should lead to better overall water

Comment 1309

Commentor: Patricia Bolton

Type: E-mail dated April 14, 2005

Comment: I have enjoyed fishing and visiting the Stilly for many years and want to see it protected.

Response: Thank you for your comment; comment noted.

Comment 1310

Commentor: Patricia Bolton

Type: E-mail dated April 14, 2005

Comment: Instream flow rules set by State Ecology are a good idea but I'm very concerned that it could backfire. We need to make sure the levels and reserves don't encourage over-development of the watershed and impacting the long term

Response: Thank you for your comment related to ensuring that the groundwater "reserve" does not lead to sprawling development, harming farms and fish. The rule or the reservations it creates do not limit or facilitate growth. Ecology believes the reservation is sufficient to meet the need of forecasted population growth for twenty years. The purpose of the reserve is to provide water for rural development approved by the counties consistent with the counties land use plans and zoning. The rule does not change the local jurisdictions obligation under the Growth Management Act. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth.

Comment 1311

Commentor: Patricia Bolton

Type: E-mail dated April 14, 2005

Comment: ALL policies and rules should result in sustainable flows to protect the migration and spawning of salmon, steelhead and sea-run cutthroat trout in the Stilly and tributaries.

Response: Thank you for your comment. Ecology agrees that any stream flow protection policy should result in better protection of fish and streams. Generally, the proposed instream flows are based on spawning chinook salmon and juvenile steelhead trout rearing flow habitat needs. However, Ecology has often stated that establishment of an instream flow does not add or take water from a system. Achieving established instream flows is also part of the solution to the problem your comment calls out. For the relationship of the rule and instream flows to the Endangered Species Act and salmon recovery please see responses to comments 1052, 1057, and 1241.

Comment 1313

Commentor: Patricia Bolton

Type: E-mail dated April 14, 2005

Comment: Thank you for your consideration. Thanks for considering this citizen's views!

Response: Thank you for taking the time to comment and for your support of Ecology's proposed instream flow rule.

Comment 1314

Commentor: Harold Boswell

Type: E-mail dated April 26, 2005

Comment: Please consider the following in adopting protections for the river: Ensure policy

supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.

Response: Thank you for your comment. Ecology agrees that any stream flow protection policy should result in better protection of fish and streams. Generally, the proposed instream flows are based on spawning chinook salmon and juvenile steelhead trout rearing flow habitat needs. However, Ecology has often stated that establishment of an instream flow does not add or take water from a system. Achieving established instream flows is also part of the solution to the problem your comment calls out. For the relationship of the rule and instream flows to the Endangered Species Act and salmon recovery please see response to comments 1052, 1057, and 1241.

Comment 1317

Commentor: Harold Boswell

Type: E-mail dated April 26, 2005

Comment: Please consider the following in adopting protections for the river: Include recommendations to reduce the impacts of logging.

Response: Thank you for your comment related to forest practices. Ecology concurs, as does the salmon recovery plan, that silt and sediment load are a problem for fish production. Those issues are beyond the scope of this rule making. Please see the salmon recovery plan for planned actions to address sediment and silt. Ecology will share your comment with the Department of Natural Resources.

Comment 1320

Commentor: David Breed

Type: E-mail dated April 28, 2005

Comment: It is important to note that I am a property owner in the Stilly watershed, a patron of local organic farmers, and a volunteer "Salmon Watcher" for Snohomish County. So I understand that such actions will have a direct impact on me and the fish I love.

Response: Thank you for taking the time to comment; your comment on basin residence is noted.

Comment 1321

Commentor: David Breed

Type: E-mail dated April 28, 2005

Comment: Please do not be deceived by the undoubtedly loud voices you will hear from property owners, farmers, and developers who would like to turn the Stilly into just another overused and overdeveloped river. Some of us value it and the wildlife it supports more than we value the dollar value of property or resources it produces.

Response: Thank you for your comment and comment noted. The proposed instream flow rule is established to protect the instream flows as provided for by law. However, Ecology has often stated that establishment of an instream flow does not add or take water from a system. The instream flow as a water right can be used to curtail (interrupt) future diversions when the instream flow is below established level. In that respect, the rule should keep some streams and river reaches with more flow than otherwise. Achieving established instream flows will be part of the solution.

Comment 1323

Commentor: Maria Butler

Type: E-mail dated April 11, 2005

Comment: Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.

Response: Thank you for your comment. Ecology agrees that any stream flow protection policy should result in better protection of fish and streams. Generally, the proposed instream flows are based on spawning chinook salmon and juvenile steelhead trout rearing flow habitat needs. However, Ecology has often stated that establishment of an instream flow does not add or take water from a system. Achieving established instream flows is also part of the solution to the problem your comment calls out. For the relationship of the rule and instream flows to the Endangered Species Act and salmon recovery please see responses to comments 1052, 1057, and 1241.

Comment 1325

Commentor: Maria Butler

Type: E-mail dated April 11, 2005

Comment: Include recommendations to reduce the impacts of logging.

Response: Thank you for your comment related to forest practices. Ecology concurs, as does the salmon recovery plan, that silt and sediment load are a problem for fish production. Those issues are beyond the scope of this rule making. Please see the salmon recovery plan for planned actions to address sediment and silt. Ecology will share your comment with the Department of Natural Resources. Ecology agrees that failure to address forest practices impacts will make the instream flow rule less effective in protecting fish and fish habitat

Comment 1327

Commentor: James Chapman

Type: E-mail dated April 13, 2005

Comment: I support the Department of Ecology's plan to establish instream flow rules for the Stillaguamish River. It is an action that is long overdue. The "Stilly" supports steelhead, five species of salmon, exceptional recreation opportunities and working farms. I have personally spent the last several years helping build the Lime Kiln Trail along it south banks upstream from Granite Falls. However, water pollution and unplanned development threaten what is special about the Stillaguamish watershed.

Response: Thank you for your comment, support for the proposed instream flow rule and work you have personally done over the last several years helping build the Lime Kiln Trail.

Comment 1328

Commentor: James Chapman

Type: E-mail dated April 13, 2005

Comment: If Ecology adopts a strong "instream flow rule" the Stilly can continue providing for fish, wildlife, water quality, and recreation. On the other hand, too much additional new water use could encourage more "sprawl" development, which would harm fisheries, farming and the quality of life in the watershed.

Response: Thank you for your comment related to ensuring that the groundwater "reserve"

does not lead to sprawling development, harming farms and fish. The rule or the reservations created by it do not limit or facilitate growth. Ecology believes the reservation is sufficient to meet the need of forecasted population growth for twenty years. The purpose of the reserve is to provide water for rural development approved by the counties consistent with the counties land use plans and zoning. The rule does not change the local jurisdictions obligation under the Growth Management Act. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth.

Comment 1333

Commentor: James Chapman

Type: E-mail dated April 13, 2005

Comment: They should also include recommendations to reduce the impacts of logging. Logging can have a tremendous impact on water quality and quantity.

Response: Thank you for your comment related to forest practices. Ecology concurs, as does the salmon recovery plan, that silt and sediment load are a problem for fish production. Those issues are beyond the scope of this rule making. Please see the salmon recovery plan for planned actions to address sediment and silt. Ecology will share your comment with the Department of Natural Resources.

Comment 1335

Commentor: James Chapman

Type: E-mail dated April 13, 2005

Comment: Thank you for the opportunity to comment. Thank you for your consideration.

Response: Thank you for taking the time to comment.

Comment 1336

Commentor: Nelson Cone

Type: E-mail dated April 28, 2005

Comment: Save the Stilly.

Response: Thank you for your comment. Ecology believes that any stream flow protection policy should result in better protection of fish and streams.

Comment 1337

Commentor: Nelson Cone

Type: E-mail dated April 28, 2005

Comment: Thank you for your consideration.

Response: Thank you for taking the time to comment.

Comment 1338

Commentor: Eric Doyle

Type: E-mail dated April 14, 2005

Comment: I am a professional fisheries biologist active in salmon and steelhead conservation efforts in Washington State. I am also an avid fly-fisherman and a member of the Wild Steelhead Coalition. I am deeply concerned about the impacts that water resources development will have on our beloved Stillaguamish River.

Response: Thank you for your expression of concern.

Comment 1339

Commentor: Eric Doyle

Type: E-mail dated April 14, 2005

Comment: As you may know, the Stilly is legendary in fly-fishing lore as one of the great rivers on which the pursuit of steelhead with the fly was born. Unfortunately, like so many of our rivers, today's steelhead runs are a mere fraction of those historically pursued by the pioneers of this great sport. I spend thousands of dollars a year in Washington state pursuing this hobby, as do many of my friends and colleagues. We are a powerful economic force. As a group, we are deeply concerned about the recent declining trends in regional steelhead populations.

Response: Thank you for your comments.

Comment 1340

Commentor: Eric Doyle

Type: E-mail dated April 14, 2005

Comment: We are not alone in our concerns. As I'm sure you are now aware, NOAA Fisheries has indicated that they will initiate a status review of Puget Sound steelhead to determine their eligibility for listing under the ESA. The petition for listing was submitted by a retired lifelong WDFW employee who, like myself, is deeply concerned about the future of this wonderful game fish. Given my knowledge of the current status and trends of our steelhead, I view the likelihood of listing to be as high as 60 to 70%.

Response: Thank you for your comment and it is noted that NOAA Fisheries has indicated that they will initiate a status review of Puget Sound steelhead to determine their eligibility for listing under the ESA. The basin is home to fish stocks listed under the Endangered Species Act and perhaps the steelhead will be added to the list. Generally, the proposed instream flows are based on spawning chinook salmon and juvenile steelhead trout rearing flow habitat needs. However, Ecology has often stated that establishment of an instream flow does not add or take water from a system. Achieving established instream flows is also part of the solution to the problem your comment calls out. For more on the relationship of the rule and instream flows to the Endangered Species Act and salmon recovery please see responses to comments 1052, 1057, and 1241.

Comment 1341

Commentor: Eric Doyle

Type: E-mail dated April 14, 2005

Comment: While you may or may not view this as a moral imperative as I do, it is certainly a prudent course of action for your agency. If PS steelhead are listed under the ESA, their life history requirements will compel a hard look at instream flows in all regional rivers. Why not take steps now to be better prepared to meet the demands of ESA compliance?

Response: Thank you for your comment; please see response to comment 1340.

Comment 1345

Commentor: Eric Doyle

Type: E-mail dated April 14, 2005

Comment: Thank you for your consideration on this critically important issue.

Response: Thank you for taking the time to comment and support of Ecology's instream flow program.

Comment 1346

Commentor: Lawrence Doyle, Greywolf Fly Fishing Club

Type: E-mail dated April 12, 2005

Comment: As the (Gardner Washington) representative to the Washington Steelhead Summit, I have closely studied and strongly support the American Rivers' instream flow and groundwater policies. The structure of these policies of course are the proper ones to emulate for our Beautiful Stillaguamish and protection of the wild fish

Response: Thank you for your comments.

Comment 1347

Commentor: Lawrence Doyle, Greywolf Fly Fishing Club

Type: E-mail dated April 12, 2005

Comment: The actual flows, storage, and architecture of the river system of course are scenario dependent and most familiar to you and DNS. (sic) With care and attention, knowledge and backbone, the usual development pressures, both physical and political can be channeled to control the instream flow profiles and groundwater usages which historically have been compromised on most rivers.

Response: Thank you for your comment. Ecology agrees with your comment and views this rule-making as part of the basin specific care and attention you call for.

Comment 1349

Commentor: Lawrence Doyle, Greywolf Fly Fishing Club

Type: E-mail dated April 12, 2005

Comment: Believe me, developers and land owners will be constantly attempting to usurp and overturn the protection policies. You have my support and voice. Thank you for your consideration.

Response: Thank you for taking the time to comment and support of Ecology's instream flow program.

Comment 1350

Commentor: Corbett Kroehler

Type: E-mail dated April 27, 2005

Comment: The Stillaguamish River ("Stilly") is home to a world class Steelhead fishery, five species of salmon, exceptional recreation opportunities, working farms, and people. Unfortunately, water pollution and unplanned development threaten to harm what is special about

the Stillaguamish watershed.

Response: Thank you for your comment.

Comment 1351

Commentor: Corbett Kroehler

Type: E-mail dated April 27, 2005

Comment: Washington state has become the de facto vanguard with respect to various types of environmental protection and, even though I live on the opposite side of the country, I often look to Washington for examples of responsible management of taxpayer resources. With regard to the Stillaguamish, if a strong "instream flow rule" is adopted, you can protect remaining stream flows for fish, wildlife, water quality, and recreation. However, allowing too much additional new water use could encourage more "sprawl" development, which would harm fisheries, farming and the quality of life in the watershed.

Response: Thank you for your comment concerning Washington state being a leader with respect to various types of environmental protection. With regard to the Stillaguamish, if a strong "instream flow rule" is adopted, you can protect remaining stream flows for fish, wildlife, water quality, and recreation, but allowing too much additional new water use could encourage more "sprawl" development, which would harm fisheries, farming and the quality of life in the watershed. The rule or reservations created do not limit or facilitate growth. Land use and growth management is controlled by the local jurisdiction. The rule does not change that. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth.

Comment 1352

Commentor: Corbett Kroehler

Type: E-mail dated April 27, 2005

Comment: Only one rule has been adopted in the past two decades. It's time for your state to act to protect our fisheries, streams and quality of life. While setting a new instream flow does not automatically increase the amount of water available to support fish, it will help protect existing flows and define fish flow needs.

Response: Thank you for your comment. Your point on the limited number of instream flow rules adopted in the past twenty years is noted. Recently, the Entiat basin rule was adopted and soon the Stillaguamish rule will be added to the list of adopted instream flow rules. Your comment is also correct that setting a new instream flow does not automatically increase the amount of water available to support fish, but it will help protect existing flows and define fish flow needs. Thank you for taking the time to comment and for your support of Ecology's instream flow program.

Comment 1354

Commentor: Steve Lovelace

Type: E-mail dated April 26, 2005

Comment: Include recommendations to reduce the impacts of logging.

Response: Thank you for your comment related to forest practices. Ecology concurs, as does the salmon recovery plan, that silt and sediment load are a problem for fish production. Those issues are beyond the scope of this rule making. Please see the salmon recovery plan for planned actions to address sediment and silt. Ecology will share your comment with the Department of Natural Resources. Ecology agrees that failure to address forest practices impacts

will make the instream flow rule less effective in protecting fish and fish habitat.

Comment 1356

Commentor: Steve Lovelace

Type: E-mail dated April 26, 2005

Comment: Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.

Response: Thank you for your comment. Ecology agrees that any stream flow protection policy should result in better protection of fish and streams. Generally, the proposed instream flows are based on spawning chinook salmon and juvenile steelhead trout rearing flow habitat needs. However, Ecology has often stated that establishment of an instream flow does not add or take water from a system. Achieving established instream flows is also part of the solution to the problem your comment calls out. For the relationship of the rule and instream flows to the Endangered Species Act and salmon recovery please see response to comments 1052, 1057, and 1241.

Comment 1358

Commentor: Robert Meyer

Type: E-mail dated April 26, 2005

Comment: The following are ways that Ecology's Stillaguamish proposal could be improved: Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.

Response: Thank you for your comment. The rule or reservations created do not limit or facilitate growth. Ecology believes the reservation is sufficient to meet the need of forecasted population growth for twenty years. The purpose of the reserve is to provide water for rural development approved by the counties consistent with the counties land use plans and zoning. The rule does not change the local jurisdictions obligation under the Growth Management Act. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth.

Comment 1359

Commentor: Robert Meyer

Type: E-mail dated April 26, 2005

Comment: Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.

Response: Thank you for your comment. Ecology agrees that any stream flow protection policy should result in better protection of fish and streams. Generally, the proposed instream flows are based on spawning chinook salmon and juvenile steelhead trout rearing flow habitat needs. However, Ecology has often stated that establishment of an instream flow does not add or take water from a system. Achieving established instream flows is also part of the solution to the problem your comment calls out. For the relationship of the rule and instream flows to the Endangered Species Act and salmon recovery please see response to comments 1052, 1057, and 1241.

Comment 1361

Commentor: Robert Meyer

Type: E-mail dated April 26, 2005

Comment: Include recommendations to reduce the impacts of logging.

Response: Thank you for your comment related to forest practices. Ecology concurs, as does the salmon recovery plan, that silt and sediment load are a problem for fish production. Those issues are beyond the scope of this rule making. Please see the salmon recovery plan for planned actions to address sediment and silt. Ecology will share your comment with the Department of Natural Resources. Ecology agrees that failure to address forest practices impacts will make the instream flow rule less effective in protecting fish and fish habitat.

Comment 1366

Commentor: Sherry Perkins

Type: E-mail dated April 27, 2005

Comment: The following are ways that Ecology's Stillaguamish proposal could be improved. Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.

Response: Thank you for your comment. Ecology agrees that any stream flow protection policy should result in better protection of fish and streams. Generally, the proposed instream flows are based on spawning chinook salmon and juvenile steelhead trout rearing flow habitat needs. However, Ecology has often stated that establishment of an instream flow does not add or take water from a system. Achieving established instream flows is also part of the solution to the problem your comment calls out. For the relationship of the rule and instream flows to the Endangered Species Act and salmon recovery please see response to comments 1052, 1057, and 1241.

Comment 1367

Commentor: Sherry Perkins

Type: E-mail dated April 27, 2005

Comment: Include recommendations to reduce the impacts of logging.

Response: Thank you for your comment related to forest practices. Ecology concurs, as does the salmon recovery plan, that silt and sediment load are a problem for fish production. Those issues are beyond the scope of this rule making. Please see the salmon recovery plan for planned actions to address sediment and silt. Ecology will share your comment with the Department of Natural Resources. Ecology agrees that failure to address forest practices impacts will make the instream flow rule less effective in protecting fish and fish habitat.

Comment 1371

Commentor: Kathryn Piland

Type: E-mail dated May 5, 2005

Comment: I am concerned about the current and possible future condition of the Stillaguamish River. Please adopt a strong "instream flow rule" to enhance salmon recovery efforts while also continuing to provide people adequate supplies of this most precious of natural resources-clean water.

Response: Thank you for your comment and concern for the current and possible future condition of the Stillaguamish River. A strong stream flow protection policy should result in better

protection of fish and streams. Ecology agrees that any stream flow protection policy should result in better protection of fish and streams. Generally, the proposed instream flows are based on spawning chinook salmon and juvenile steelhead trout rearing flow habitat needs. However, Ecology has often stated that establishment of an instream flow does not add or take water from a system. Achieving established instream flows is also part of the solution to the problem your comment calls out. For the relationship of the rule and instream flows to the Endangered Species Act and salmon recovery please see response to comments 1052, 1057, and 1241.

Comment 1373

Commentor: Kathryn Piland

Type: E-mail dated May 5, 2005

Comment: Develop partnerships with other governmental agencies and community groups to encourage wise water use by everyone.

Response: Thank you for your comment that Ecology should develop partnerships with other governmental agencies and community groups to encourage wise water use by everyone. Ecology has met with many basin residents, local governments, utilities, environmental groups, the salmon recovery planning committee and others to inform them about the rule and seek their involvement. The rule implementation plan for the new rule also includes outreach and education with basin residents to encourage wise water use.

Comment 1375

Commentor: Kathryn Piland

Type: E-mail dated May 5, 2005

Comment: Include recommendations to reduce the impacts of logging. I am not against the logging industry--we all use products made from trees. There is a way to do it sustainably and I would gladly support those companies who do so.

Response: Thank you for your comment related to forest practices. Ecology concurs, as does the salmon recovery plan, that silt and sediment load are a problem for fish production. Those issues are beyond the scope of this rule making. Please see the salmon recovery plan for planned actions to address sediment and silt. Ecology will share your comment with the Department of Natural Resources. Ecology agrees that failure to address forest practices impacts will make the instream flow rule less effective in protecting fish and fish habitat.

Comment 1376

Commentor: Bruce Reed

Type: E-mail dated March 26, 2005

Comment: The watershed of the Stillaguamish River ("Stilly") is home to a world class Steelhead fishery, five species of salmon, exceptional recreation opportunities, and a number of people. Unfortunately, pollution and sprawl threaten to harm what is special about the Stilly.

Response: Thank you for your comment and it is noted.

Comment 1379

Commentor: Bruce Reed

Type: E-mail dated March 26, 2005

Comment: The problems I have with the proposal include: Ecology has not stated how the proposal will help meet Puget Sound Chinook salmon recovery goals - any stream flow protection

policy should result in better protection of fish.

Response: Thank you for your comment. Ecology agrees that any stream flow protection policy should result in better protection of fish and streams. Generally, the proposed instream flows are based on spawning chinook salmon and juvenile steelhead trout rearing flow habitat needs. However, Ecology has often stated that establishment of an instream flow does not add or take water from a system. Achieving established instream flows is also part of the solution to the problem your comment calls out. For the relationship of the rule and instream flows to the Endangered Species Act and salmon recovery please see response to to comments 1052, 1057, and 1241.

Comment 1382

Commentor: Bruce Reed

Type: E-mails dated March 26, 2005 and May 1, 2005

Comment: MARCH 26: Ecology acknowledges the impacts on stream flows associated with logging, but makes no attempt to incorporate any safeguards.
MAY 1: Include recommendations to reduce the impacts of logging.

Response: Thank you for your comment related to forest practices. Ecology concurs, as does the salmon recovery plan, that silt and sediment load are a problem for fish production. Those issues are beyond the scope of this rule making. Please see the salmon recovery plan for planned actions to address sediment and silt. Ecology will share your comment with the Department of Natural Resources. Ecology agrees that failure to address forest practices impacts will make the instream flow rule less effective in protecting fish and fish habitat.

Comment 1384

Commentor: Bruce Reed

Type: E-mail dated May 1, 2005

Comment: Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.

Response: Please see response to comment 1379.

Comment 1386

Commentor: Donald Shank

Type: E-mail dated April 28, 2005

Comment: I am writing to urge you to adopt an instream flow protection policy for the Stillaguamish River. The Stillaguamish isn't just some ditch full of water. It is a complex series of processes and associations, and instream flow is a vital factor in the makeup of this river. When activities like logging and development take place at levels that alter the surface and subsurface hydrology of this basin, the Stilly is altered as well, sometimes with unforeseen and unintended consequences.

Response: Thank you for your comment urging Ecology to adopt an instream flow protection policy for the Stillaguamish River. Ecology agrees that logging and development can alter the surface and subsurface hydrology of this basin. Ecology concurs, as does the salmon recovery plan, that silt and sediment load are a problem for fish production. Those issues are beyond the scope of this rule making. Please see the salmon recovery plan for planned actions to address sediment and silt. Ecology will share your comment with the Department of Natural Resources. Ecology agrees that failure to address forest practices impacts will make the instream flow rule

less effective in protecting fish and fish habitat.

Comment 1387

Commentor: Donald Shank

Type: E-mail dated April 28, 2005

Comment: We must act to ensure that ample instream flows exist to protect the fish, wildlife and family owned farms of the Stilliguamish Valley. To set aside merely "adequate" flows is to invite disaster if initial calculations of what is adequate are incorrect. Better to err on the side of caution, and nature, rather than pressing the "edge of the envelope" trying to satisfy a demand for perpetual growth, a demand which by definition can never be sated in a finite system. If in the future it turns out we were wrong, far too cautious, we can always change it. If we allow expansion of development and intensive logging and we are wrong, it's too late to go back and change it, once the salmon runs have been destroyed and farms paved over.

Response: That you for your comments. Ecology's proposed instream flow rule is to establish an instream flow for the rivers and streams in the basin and to provide the framework for water management. The proposed rule does provide for off stream water use;, however, the scope of the rule is focused on instream flows.

Comment 1389

Commentor: Donald Shank

Type: E-mail dated April 28, 2005

Comment: Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.

Response: Thank you for your comment that any stream flow protection policy should result in better protection of fish and streams. Ecology agrees that any stream flow protection policy should result in better protection of fish and streams. Generally, the proposed instream flows are based on spawning chinook salmon and juvenile steelhead trout rearing flow habitat needs. However, Ecology has often stated that establishment of an instream flow does not add or take water from a system. Achieving established instream flows is also part of the solution to the problem your comment calls out. For the relationship of the rule and instream flows to the Endangered Species Act and salmon recovery please see responses to comments 1052, 1057, and 1241.

Comment 1391

Commentor: Donald Shank

Type: E-mail dated April 28, 2005

Comment: Include recommendations to reduce the impacts of logging.

Response: Thank you for your comment related to forest practices. Ecology concurs, as does the salmon recovery plan, that silt and sediment load are a problem for fish production. Those issues are beyond the scope of this rule making. Please see the salmon recovery plan for planned actions to address sediment and silt. Ecology will share your comment with the Department of Natural Resources. Ecology agrees that failure to address forest practices impacts will make the instream flow rule less effective in protecting fish and fish habitat.

Comment 1393

Commentor: Donald Shank

Type: E-mail dated April 28, 2005

Comment: These protections should have been granted decades ago, and they certainly should not be delayed any longer. We have plenty of examples of what happens when we fail to protect instream flows, so let us not allow this vital and valued resource to remain at risk any longer. Take the day and drive north, go up to Barlow Pass and follow the Stillaguamish River through the South Fork Valley, down to the mainstem near Arlington, through Silvana and on to the Sound. Better yet, get out and take some hikes, and when you get past Granite Falls get in a canoe and float the western half. See and feel this treasure for yourself, understand both intellectually and viscerally why these protections are so important, then take action to preserve the Stillaguamish River for the generations who will follow us.

Response: Thank you for your comment and suggestion to take the day and experience the Stillaguamish River. As part of Ecology's effort to be come informed regarding the river, several float trips were conducted to survey and get to know the river. You are correct that to see and feel this treasure, to understand both intellectually and viscerally why instream flow protections are so important helps in taking action to preserve the Stillaguamish River for the generations who will follow us. Thank you for taking the time to comment.

Comment 1394

Commentor: Val Schroeder

Type: E-mail dated April 26, 2005

Comment: The Stillaguamish River ("Stilly") is home to a world class Steelhead fishery, five species of salmon, exceptional recreation opportunities, working farms, and people. Unfortunately, water pollution and unplanned development threaten to harm what is special about the Stillaguamish watershed.

Response: Thank you for your comment.

Comment 1395

Commentor: Val Schroeder

Type: E-mail dated April 26, 2005

Comment: If a strong "instream flow rule" is adopted, we can protect remaining stream flows for fish, wildlife, water quality, and recreation. However, allowing too much additional new water use could encourage more "sprawl" development, which would harm fisheries, farming, and the quality of life in the watershed.

Response: Thank you for your comment calling for a strong instream flow rule to be adopted to protect remaining stream flows for fish, wildlife, water quality, and recreation and to ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish. The rule or reservations it creates do not limit or facilitate growth. Land use and growth management is controlled by the local jurisdiction. The rule does not change that. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth. Ecology believes we have proposed a strong, statutorily authorized instream flow rule.

Comment 1396

Commentor: Val Schroeder

Type: E-mail dated April 26, 2005

Comment: Please adopt a rule that stops unplanned sprawl development and protects fish, water quality and the rural lifestyle of the Stillaguamish watershed. The Stilly proposal would: 1)

Adopt an instream flow. An instream flow is long overdue and critical to protect the Stilly's fisheries and other instream resources before they are gone forever.

Response: Thank you for your comment that any stream flow protection policy should result in better protection of fish and streams. Ecology agrees that any stream flow protection policy should result in better protection of fish and streams. Generally, the proposed instream flows are based on spawning chinook salmon and juvenile steelhead trout rearing flow habitat needs. However, Ecology has often stated that establishment of an instream flow does not add or take water from a system. Achieving established instream flows is also part of the solution to the problem your comment calls out. For the relationship of the rule and instream flows to the Endangered Species Act and salmon recovery please see response to comments 1052, 1057, and 1241.

Comment 1400

Commentor: Val Schroeder

Type: E-mail dated April 26, 2005

Comment: The State was granted authority in 1971 to adopt rules to protect lakes and streams from future water withdrawals. So far, Washington's Dept of Ecology has adopted instream flow rules for one-third of Washington's 62 watersheds. Only one rule has been adopted in the past two decades. It's time for the state to act to protect our fisheries, streams and quality of life. While setting a new instream flow does not automatically increase the amount of water available to support fish, it will help protect existing flows and define fish flow needs.

Response: Thank you for your comment noting that only one instream flow rule has been adopted in the past two decades. Ecology agrees that it's time for Washington State to act to protect our fisheries, streams, and quality of life. It is true that setting a new instream flow does not automatically increase the amount of water available to support fish, but it will help protect existing flows and define fish flow needs. Your point on the limited number of instream flow rules adopted in the past twenty years is noted. Recently, the Entiat basin rule was adopted and soon the Stillaguamish rule will be added to the list of adopted instream flow rules. Thank you for taking the time to comment and support Ecology’s instream flow program.

Comment 1401

Commentor: Ricky Taylor

Type: E-mail dated April 12, 2005

Comment: The Stillaguamish River is home to a world class Steelhead fishery, five species of salmon, exceptional recreation opportunities, working farms, and people. Unfortunately, water pollution and unplanned development threaten to harm what is special about the Stillaguamish watershed.

Response: Thank you for your comment and it is noted. The proposed instream flow rule will address part of the issues you raise. Ecology is also proposing a Total Maximum Daily Load plan for the basin to address water quality issues.

Comment 1403

Commentor: Ricky Taylor

Type: E-mail dated April 12, 2005

Comment: Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.

Response: Thank you for your comment that any stream flow protection policy should result in better protection of fish and streams. Ecology agrees that any stream flow protection policy

should result in better protection of fish and streams. Generally, the proposed instream flows are based on spawning chinook salmon and juvenile steelhead trout rearing flow habitat needs. However, Ecology has often stated that establishment of an instream flow does not add or take water from a system. Achieving established instream flows is also part of the solution to the problem your comment calls out. For the relationship of the rule and instream flows to the Endangered Species Act and salmon recovery please see response to comments 1052, 1057, and 1241.

Comment 1405

Commentor: Ricky Taylor

Type: E-mail dated April 12, 2005

Comment: Include recommendations to reduce the impacts of logging.

Response: Thank you for your comment related to forest practices. Ecology concurs, as does the salmon recovery plan, that silt and sediment load are a problem for fish production. Those issues are beyond the scope of this rule making. Please see the salmon recovery plan for planned actions to address sediment and silt. Ecology will share your comment with the Department of Natural Resources. Ecology agrees that failure to address forest practices impacts will make the instream flow rule less effective in protecting fish and fish habitat

Comment 1408

Commentor: TerryAnn Towers

Type: E-mail dated April 13, 2005

Comment: Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.

Response: Thank you for your comment that any stream flow protection policy should result in better protection of fish and streams. Ecology agrees that any stream flow protection policy should result in better protection of fish and streams. Generally, the proposed instream flows are based on spawning chinook salmon and juvenile steelhead trout rearing flow habitat needs. However, Ecology has often stated that establishment of an instream flow does not add or take water from a system. Achieving established instream flows is also part of the solution to the problem your comment calls out. For the relationship of the rule and instream flows to the Endangered Species Act and salmon recovery please see responses to comments 1052, 1057, and 1241.

Comment 1409

Commentor: TerryAnn Towers

Type: E-mail dated April 13, 2005

Comment: Include recommendations to reduce the impacts of logging.

Response: Thank you for your comment related to forest practices. Ecology concurs, as does the salmon recovery plan, that silt and sediment load are a problem for fish production. Those issues are beyond the scope of this rule making. Please see the salmon recovery plan for planned actions to address sediment and silt. Ecology will share your comment with the Department of Natural Resources. Ecology agrees that failure to address forest practices impacts will make the instream flow rule less effective in protecting fish and fish habitat

Comment 1412

Commentor: Bill Van Natter

Type: E-mail dated April 14, 2005

Comment: It was gratifying to learn that the Department of Ecology is proceeding with stream flow rules for the Stilly. This river is a jewel and is an ideal setting for the implementation of fair and enforceable water stream flow rules. Please do not be deterred or bullied by demands for the further degradation of this very significant quality of life resource.

Response: Thank you for your comment and support of Ecology's proposed instream flow rule.

Comment 1414

Commentor: Jeffrey Weist

Type: E-mail dated April 11, 2005

Comment: Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.

Response: Thank you for your comment that any stream flow protection policy should result in better protection of fish and streams. Ecology agrees that any stream flow protection policy should result in better protection of fish and streams. Generally, the proposed instream flows are based on spawning chinook salmon and juvenile steelhead trout rearing flow habitat needs. However, Ecology has often stated that establishment of an instream flow does not add or take water from a system. Achieving established instream flows is also part of the solution to the problem your comment calls out. For the relationship of the rule and instream flows to the Endangered Species Act and salmon recovery please see responses to comments 1052, 1057, and 1241.

Comment 1416

Commentor: Jeffrey Weist

Type: E-mail dated April 11, 2005

Comment: Include recommendations to reduce the impacts of logging.

Response: Thank you for your comment related to forest practices. Ecology concurs, as does the salmon recovery plan, that silt and sediment load are a problem for fish production. Those issues are beyond the scope of this rule making. Please see the salmon recovery plan for planned actions to address sediment and silt. Ecology will share your comment with the Department of Natural Resources. Ecology agrees that failure to address forest practices impacts will make the instream flow rule less effective in protecting fish and fish habitat

Section 020 - Purpose

Comment 218

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, March 9, 2005 hearing in Mt. Vernon on the Skagit rule proposal.

Comment: The rule fails to address regional needs. At the same time you are moving forward with this proposed rule you are moving forward with proposed rules in the Samish and in the Stillaguamish Basins. There has been no effort at all to reconcile the regional need for water and to reconcile the limitations imposed on other water supplies. Our belief is that the county's water supplies will be exhausted within 15 to 20 years if this rule is put into effect.

Response: Thank you for your comment. You are absolutely correct, the proposed rule does not address regional water needs. There is no need to address regional water needs in the Stillaguamish basin. In a portion of the Stillaguamish basin there is a Coordinated Water System

Plan. Perhaps Snohomish County can be considered a regional water provider. However, their service is limited to their service area. Essentially, Ecology saw no need to address regional water needs given no current or proposed plan or process for regional water delivery. The proposed rule has a narrow scope focused at instream flows and establishing the reservations called for by statute when an instream flow rule is promulgated.

Comment 275

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding proposed Skagit instream flow rule.

Comment: Coordination with federal, state and local laws. 1. Growth Management Act and Comprehensive Plan. Ecology concluded without analysis that the proposal "does not conflict with any local, state, or federal laws or requirements for the protection of the environment."84 However, as the DNS notes, "rural areas are . . . otherwise generally dependant on individual wells and septic tanks."85 There is insufficient water in the proposed reservation to satisfy the needs of all currently available parcels within Skagit County. The effect of the proposed rule is to encourage public water system expansion into rural areas. Ecology, however, admits that expansion of public water systems to rural areas "may create conflicts with the Growth Management Act if the areas proposed for water supply extension are not within an urban growth area. The extended availability of public water supplies may create pressures to develop or redevelop affected areas at higher density."86 Few, if any, of the areas most affected by inadequate reservations are within the urban growth area.

84 Determination of Nonsignificance, 18.
85 Determination of Nonsignificance, 15.
86 Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6-68.

Response: Thank you for your comment. Ecology respectfully disagrees that Ecology concluded without analysis that the proposal "does not conflict with any local, state, or federal laws or requirements for the protection of the environment. The reservation can meet projected demand for the next twenty years. The reservation is not sized to meet any or all future demand forever into the future. To do so would be premised on an infinite amount of water and that is not accurate. The proposed rule does not compel or require the expansion of municipal water suppliers. Rather, if the municipal water supplier is in place and service can be provided by a municipal supplier under its duty to serve, then service should be obtained from the municipal supplier rather than from new wells using reserved water.

Comment 282

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding proposed Skagit instream flow rule.

Comment: Conclusion: Ecology's proposed Skagit Instream Flow Rule amendment - and the existing rule -- ignores the agency's broader legislative mandate to balance instream and out-of-stream needs. The proposed rule falls short of this objective. Instead, the agency is short-changing rural residents by ignoring their current and future needs for water. Ecology's Skagit Instream Flow Rule imposes an institutional aridity on rural Skagit County and unnecessarily restricts the amount of water available.95 This direction is not supported by the law, nor is it responsible public policy.

95 For example, available studies demonstrate that additional water supplies are needed to accommodate the County's long-term population growth. See Skagit County Coordinated Water System Plan Regional Supplement. Other studies show that water can be made available from the Skagit River without causing harm to aquatic resources. See Duke Engineering Report. Ecology's rule development plan for its proposed amendment to the Skagit instream flow rule fails to address these issues, or to reconcile its proposed rules with available scientific and technical studies.

Response: Thank you for your comment. The proposed instream flow rule does not ignore

Ecology's broad legislative mandates to balance instream and out of stream uses. In fact the reservations of water were created to meet out of stream domestic needs of rural land owners and stock watering needs. Ecology strongly disagrees the proposed rule is short-changing rural residents by ignoring their current and future needs for water. As to current needs or current water use, the rule has no bearing. The proposed rule does not imposes an institutional aridity on rural Skagit County. The proposed reservations and availability of surface water from Lake Cavanaugh will meeting the twenty year projected needs of Skagit County residents in the Stillaguamish basin. Above and beyond that, reallocation of existing rights and conservation or efficiency measures can be used to meet water needs. Any studies regarding water availability in the Skagit basin are not applicable to the Stillaguamish basin. Ecology knows of no studies that assert limited water availability in the Stillaguamish basin. A review of the Skagit County Coordinated Water System Plan Regional Supplement (CWSP) shows there are two public water systems in Skagit County in the Stillaguamish basin and neither of theses systems have any hookups, rather they are a fire station and store. The CWSP makes no mention of rural water needs in the Stillaguamish basin other than to say projecting rural water needs is difficult. There is simply no water demand projection in the CWSP applicable to that part of Skagit County overlaid by the Stillaguamish basin. Finally, during rule development many technical and scientific studies were reviewed and used in formulating the rule. These include:

"The Relation of Stream flow to Habitat for Anadromous Fish in the Stillaguamish River Basin, Washington" by S. S. Embrey for the U.S. Geological Survey, Report 86-4326 (1987)..

Ecology hired Steward & Associates, a consulting firm, to create hydraulic instream flow models, calibrate the models, and document the model calibration using empirical data collected by Embrey in the mid -1980's. Steward & Associates then combined the hydraulic models with fish preference models the State created within Physical Habitat Windows 2002 (PhabWin 2002). PhabWin 2002 is a pure Windows version of Physical Habitat Simulation created by Thom Hardy's group at the Institute for Natural Systems Engineering at Utah State. The work of Stewart and Associates is documented in a series of Excel spreadsheets and documents available on Ecology's web site at: http://www.ecy.wa.gov/programs/wr/instream-flows/stillaguamishbasinsepa.html

Ecology hired Steward & Associates to create hydraulic models, calibrate the models, and document the model calibration using empirical data collected by Embrey in the mid -1980's. The work of Stewart and Associates is documented in a series of Excel spreadsheets and documents. The work of the consultant is can be summarized as follows:

oCalibDetail.pdf, 14 pages of summary sheets of IFIM hydraulic model calibration information in a format prescribed by the State. Includes outputs of the model after calibration of data set. (205.2 KB)

oWRAI_5_all_sites.pdf, 133 pages of summary sheets of IFIM model calibration or data changes made prior to running the hydraulic models. (2.97 MB)

oWUA_compiled.xls – Excel spreadsheet, consisting of 14 books, with the Weighted Useable Area versus flow statistics for all sites all species of fish. This is the PHABWIN output that shows the habitat versus flow relationship. (121 KB)

oVAF_all_sites.xls - Excel spreadsheet, consisting of14 books, with the velocity adjustment factors for each cell, for each transect, for each site and model. This information is used to assess how well the hydraulic model is calculating cell velocities from regression equations (hydraulic model). (90.5 KB)

oWeighting memo.doc – a Word file, one page, that describes transect weighting

Section 030 - Definitions

Comment 288

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: The definition of "appropriation" provides the basis for Ecology to subject exempt groundwater withdrawals to stream closures under WAC 173-503-051. Whether stream closures are applicable to exempt groundwater withdrawals is an unsettled question of law.

Response: Thank you for your comment. Ecology believes that stream closures are a reasonable water management tool and those potential future appropriations whether by permit exempt wells or applications for permit are subject to the existing water management framework for the basin and the prior appropriation doctrine adopted in Washington State.

Comment 289

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: The definition of "domestic water use" states that "outdoor watering shall be limited to an area not to exceed a total of 1/12 of an acre, or [3,630] square feet, for all outdoor uses for each individual domestic water use." Water for up to one-half acre of noncommercial lawn or garden, and commercial and industrial uses, are exempt by the provisions of RCW 90.44.050.2 The proposed definition excludes all use of water for commercial or industrial purposes except for human consumption thus restricting uses expressly exempted from state regulation. Ecology lacks the authority to restrict ground water withdrawals that otherwise qualify for exemption from state regulation under RCW 90.44.050.3 Moreover, prohibiting all commercial and industrial uses in rural parts of Skagit County where alternative sources of supply are unavailable not only conflicts with existing planning efforts, but interferes with the provision of basic services in rural areas.

2 Kim v. Pollution Control Hearing Bd., 115 Wn. App. 157,61 P.3d 1211 (2003).

3 See Entertainment Industry Coalition v. Tacoma-Pierce County Health Dept., Wn.2d.__, 105 P.3d 985, 938 (2005) citing Parkland Light & Water Co. v. Tacoma-Pierce County Bd. Of Health, 151 Wn. 2d 428, 433, 90 Wn. 2d 37 (2004); Rettkowski v. Ecology, 122 Wn. 2d 219, 226, 858 P. 2d 232 (1993); Biggers - v. Bainbridge Island,__ Wn. App. __103 P. 2d 244, 247 (2004).

Response: Thank you for your comment and it is noted. Ecology believes that stream closures are a reasonable water management tool. Potential future appropriations whether by permit exempt wells or applications for permit are subject to the existing water management framework for the basin and the prior appropriation doctrine. Water rights are created by appropriations done pursuant to RCW 90.44.050. Ecology believes that all water rights are included in the water management framework. Please see response to comment 237.

Comment 290

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: The proposed definition for the term "Instream flow" attempts to consolidate a number of statutory definitions using the phrase "base flow" or "minimum flow." The Washington Supreme Court repeatedly has interpreted the water code such that the court interprets different words to have different meanings.4 The various statutory terms included within this definition may have different meanings, and it is wrong for Ecology to assume they do not.

4 See e.g., Pend Oreille Pub. Utility Dist. V. Ecology, 146 Wn. 2d 778, 797, 51 P.3d 744 (2002).

Response: Thank you for your comment. Ecology believes that the different terms, base flow and minimum instream flow, found in the different laws that pertain to instream flow management mean the same thing. Ecology grants that there is no case law on point. However in administering both chapters 90.22 and 90.54 over the years the instream flows proposed are to protect instream values. The methodologies use to assess instream needs have been upheld in litigation. Completion of the instream flow assessments leads to a numeric standard for the instream flow. It

is immaterial if that numeric standard is called a base flow or a minimum instream flow. In providing a definition in the rule that equates the two terms, Ecology seeks to avoid confusion in the future.

Comment 291

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: "Timely and reasonable" under the proposed amended rule means the ability to provide service within 120 days and which requires a line extension of no more than 500 feet. The definition grants Ecology the discretion to declare connection unreasonable if connection cannot be provided for less than twice the cost of an individual alternative source. First, there is no requirement that Ecology will exercise this discretion.

Response: Thank you for your comment. The proposed definition of timely and reasonable will be deleted from the proposed final rule.

Comment 292

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Second, the 120-day period does not begin to run until the purveyor's written approval of a request for service; this leaves an applicant at the purveyor's mercy. The definition should include a provision allowing exempt well development to proceed where the purveyor fails to make service available in a timely and reasonable manner. The Coordinated Water System Plan (CWSP) contains detailed utility service review procedures, including procedures applicable when a utility is unwilling to provide service.6 No such provision is contained in the amended rule. Ecology failed to recognize conflicts between the definition of "timely and reasonable" contained in the proposed amended rule and the CWSP.

6 See Economic and Engineering Services, Inc., Skagit County Coordinated Water System Plan Regional Supplement, 5-3 - 5-14 (1999).

Response: Thank you for your comment. The definition of timely and reasonable will be deleted from the final rule. The rule, in the part related to the use of reservation water, has the requirement that if a proposed development is in the service area of a municipal water system, then that system should provide service. Please see RCW 43.20.260. Administration of that provision will be done by the local jurisdiction as contemplated by the North Snohomish Coordinated Water System Plan (NSCWSP). For municipal suppliers outside the NSCWSP, Department of Health will administer that portion of the public water supply issue.

Comment 295

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Next, in the definition of "timely and reasonable manner", Ecology bases its mandatory hookup requirement on the distance of a project from the location of "the purveyor's water pipe line", but later states that the Ecology may determine that cost of connection is unreasonable based on the cost to connect to "an appropriate public water system." The terms "purveyor" and "appropriate public water system" are not adequately defined, such that it is impossible to assess when a connection would be timely and reasonable. Ecology should provide

clear definitions of these terms.

Response: Thank you for your comment. Please see responses to comments 291 and 292. The definition of timely and reasonable will be deleted from the proposed final rule. The term purveyor has its ordinary meaning, an entity who sells water. The phrase appropriate public water system has been changed to municipal water purveyor to comport with the Municipal Water Law of 2003.

Comment 296

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: . . .[T]he proposed definition of "withdrawal" differs sharply from the definitions contained in the proposed Samish and Stillaguamish rules. If, under the proposed definition, "physical movement" refers to the water's natural motion rather than a physical action inducing that movement, a universe of heretofore unimagined natural processes fall within the scope of "withdrawal." There is no reason to depart from a well-recognized definition and create ambiguity by adopting the proposed change.

Response: Thank you for your comment; however, it is not applicable to the Stillaguamish rule making. The term withdrawal is defined as the appropriation or use of ground water, or the diversion or use of surface water.

Comment 308

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Future Permitting Actions: The effects of this section depend heavily on the definition of "timely and reasonable." The problems with this definition explained above severely compromise this section.

Response: Thank you for your comment. The proposed definition of timely and reasonable will be deleted from the proposed final rule.

Comment 969

Commentor: Rich Hoey, Department of Health

Type: Letter dated March 18, 2005

Comment: WAC 173-505-030(10): Concerns with this verbiage: Public water systems are not established under RCW 43.20.260. RCW 43.20.260 refers to a municipal water supplier's duty to provide service under certain conditions. The verbiage as written implies that Ecology expects all systems (with the exception of a single family residence and a system or a family farm) to have a "duty to serve" expectation. RCW 43.20.260 does not imply that all public water systems fall into this expectation.

Response: Thank you for your comment. The definition proposed in WAC 173-505-030(10) (public water supply) was deleted in response to your concern. The definitions of "municipal water supplier" and municipal water supply purpose" were added to better make the connection to RCW 43.20.260.

Comment 970

Commentor: Rich Hoey, Department of Health

Type: Letter dated March 18, 2005

Comment: WAC 173-505-030(13): Concerns with this verbiage: This verbiage does not align itself with the stated goal (i.e., to require the applicant to request service of the purveyor). Instead, this verbiage reflects cut and dry timely and reasonable criteria in all duty to serve situations. We believe that a cut and dry perspective may have the unintended consequence of allowing greater development of exempt wells. In our experience, situations vary greatly and water utilities and local government need flexibility to provide service in a manner that will minimize the proliferation of new wells. Suggested change to this verbiage: Deletion of this definition. Provide direction in WAC 173-505-090 (2)(e).

Response: Thank you for your comment. The proposed definition of "timely and reasonable" in WAC 173-505-030(13) was deleted in response to your concerns.

Comment 973

Commentor: Rich Hoey, Department of Health

Type: Letter dated March 18, 2005

Comment: The following is provided in the event that Ecology wishes feedback that would promote a stronger "duty to serve" expectation than the current stated goal (i.e., stronger than to require the applicant to request service of the purveyor). WAC 173-505-030 (10): Suggested change to this verbiage: Deletion of this definition.

Response: Thank you for your comment. The proposed WAC 173-505-030 (10) was deleted. Please see response to comment 969.

Comment 974

Commentor: Rich Hoey, Department of Health

Type: Letter dated March 18, 2005

Comment: The following is provided in the event that Ecology wishes feedback that would promote a stronger "duty to serve" expectation than the current stated goal (i.e., stronger than to require the applicant to request service of the purveyor). WAC 173-505-030 (13): Suggested change to this verbiage: Suggest deletion of this definition. Suggest adding the following verbiage to WAC 173-505-090 (2)(d): An ordinance or other administrative action is established by the appropriate city or county that provides definition and procedural direction relating to the provision of water service in a "timely and reasonable" manner.

Response: Thank you for your comment. The proposed definition of "timely and reasonable" in proposed WAC 173-505-030(13) was deleted in response to your concerns. Your suggested idea of "adding the following verbiage to WAC 173-505-090 (2)(d) An ordinance or other administrative action is established by the appropriate city or county that provides definition and procedural direction relating to the provision of water service in a "timely and reasonable" manner." was not included in the rule. Ecology has no authority to tell a city or county to provide definition and procedural direction in regards to timely and reasonable. Ecology will defer to RCW 43.20.260 for such matters.

Comment 1001

Commentor: Richard Raisler

Type: Letter dated March 23, 2005

Comment: This will require having a mitigation strategy that is proven to prevent abuse of the law.

Response: Thank you for your comment. The rule provides a definition of mitigation and Ecology agrees that proven mitigation will help to prevent abuse of the law. However, Ecology is limited in the guidance it can provide. The statute, RCW 90.03.255, provides that "The department shall, when evaluating an application for a water right, transfer, or change filed pursuant to RCW 90.03.250 or 90.03.380 that includes provision for any water impoundment or other resource management technique, take into consideration the benefits and costs, including environmental effects, of any water impoundment or other resource management technique that is included as a component of the application. The department's consideration shall extend to any increased water supply that results from the impoundment or other resource management technique, including but not limited to any recharge of ground water that may occur, as a means of making water available or otherwise offsetting the impact of the diversion of surface water proposed in the application for the water right, transfer, or change. Provision for an impoundment or other resource management technique in an application shall be made solely at the discretion of the applicant and shall not otherwise be made by the department as a condition for approving an application that does not include such provision." Given Ecology can not require mitigation and that we need to evaluate any proposed impoundment or other resource management technique, the opportunity for the applicant to be creative is created by statute. However, Ecology will look to the actual water impact of the proposal.

Comment 1014

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Ecology's proposed definition of consumptive use conflicts with established regulatory direction: Ecology's attempt to define consumptive use to include qualitative changes is unprecedented and inconsistent with regulatory direction. In Ecology's regulations implementing the water resources management program established pursuant to the Water Resources Act of 1971 Ecology states that "[for purposes of this chapter and subsequent regulations formulated for planning and management within individual water resource inventory areas, the following definitions shall be used: . . .'Consumptive use' means use of water whereby there is a diminishment of the water source."12 Ecology claims Water Resources Act of 1971 as authority for its Stillaguamish instream flow rule,13 and therefore must comply with WAC 173-500-050. The definition contained quoted above is the same definition contained in Ecology's Conservancy Board regulations,14 and instream flow rule for the Walla Walla River Basin.15 The definition quoted above is substantively the same as the definition contained in Ecology's instream flow rule for the Colville River Basin.16 Ecology should not inexplicably depart from this established policy. Ecology's approach in the Stillaguamish River Basin is also inconsistent with the approach adopted for the neighboring Samish and Skagit river basins, both of which define consumptive use in accordance WAC 173-500-050. Ecology's departure from regulatory direction and established practice should be reversed.

12 WAC 173-500-050.
13 WAC 173-505-010(1).
14 WAC 173-153-030.

Response: Thank you for your comment. In response to your comment Ecology changed the rule language to ensure there is no confusion that the definition of "consumptive use" in this rule is only for this rule. The definition was changed from that in WAC 173-500-050(5) to be more explanatory. Diminishment of the source can be from either a quantity or quality perspective. Ecology does not view the definition change to be in conflict with established regulatory direction. The statutory foundation for linking water quantity and water quality lies, in part, in RCW 90.22.010 and RCW 90.54.020(3). Finally, case law also supports the linkage of water quality and quantity.

Comment 1101

Commentor: Karen Allston, Center for Environmental Law and Policy

Type: Letter dated May 12, 2005

Comment: "Permit-exempt withdrawals" or "permit exemption": should include language that acknowledges these withdrawals are subject to all applicable law, not just the ground water code. "Public water system" is defined at RCW 70.119.020(8) and 90.03.015, not RCW 43.20.260.

Response: Thank your for your comment. Ecology agrees with your comment that permit-exempt withdrawals pursuant to RCW 90.44.050 are subject to all applicable law, not just the ground water code. However, the definition was not changed, since the definition captures that idea. The term "Public water system" was deleted from the definitions section and replaced with municipal water supplier. This was done to better comport with the Municipal Water Law of 2003.

Comment 1102

Commentor: Karen Allston, Center for Environmental Law and Policy

Type: Letter dated May 12, 2005

Comment: "Timely and reasonable manner": We question whether Ecology has authority to define timely and reasonable. In any event, we believe the State Department of Health and/or local jurisdictions are better positioned to define timely and reasonable. The Legislature has made clear that public water supply is the preferred option for water supply. With the passage of HB 1338, public water suppliers now have a "duty to serve" residential users. Reliance on exempt wells for domestic water supply should be the last option utilized. If Ecology retains this definition, the definition should embody this preference. It should also include encourage satellite management of smaller water supply systems as a preferred alternative to exempt wells, consistent with stated policies and requirements in Ch. 70.119A RCW. The 120-day and 500-foot definitions appear to be arbitrary and not entirely consistent with other state law (see, e.g., Ch. 70.116 RCW and Ch. 70.119A RCW).

Response: Thank you for your comment on "Timely and reasonable manner" The term was deleted from the proposed rule. The term as defined in the original proposal did not comport with the term as used defined and used by Department of Health and RCW 43.20.260. To avoid confusion, we deleted the version in the rule. We agree with your comment that State Department of Health and/or local jurisdictions are better positioned to define timely and reasonable. We also agree with your comment public water supply is the preferred option for water supply for development in the service area of a municipal supplier. Several changes were made to the rule to make it better conform with the Municipal Water Law.

Comment 1103

Commentor: Karen Allston, Center for Environmental Law and Policy

Type: Letter dated May 12, 2005

Comment: Additionally, the term "purveyor" is undefined and should be replaced with "public water system" as defined in RCW 90.03.015.

Response: Thank you for your comment. The term purveyor and public water system are not defined in the rule now. Municipal water supplier and municipal water supply purposes were added to make a stronger link to the Municipal Water Law of 2003

Comment 1188

Commentor: John Postema

Type: Oral testimony at Arlington Hearing, March 24, 2005

Comment: We analyzed what this 24-page document actually could do and there's a couple things that Steve did not mention. One of them is that outdoor watering will be limited to 3,630 square feet. Now, if you build a house at 3500, you'll be about 130 square feet less for whatever use, maybe lawn, maybe gardening. Since I'm in the nursery business, I don't particularly like that aspect of it.. . .So 1/12th of an acre for any outdoor water use. And I'm not sure how that goes to farmers when it goes bare. . .parcels. So if you have a ten-acre parcel and you want to have some new water use, the way I read this document.

Response: Thank you for your comment regarding a limitation of outdoor watering to 3,630 square feet. Ecology acknowledges the limitation on outdoor lawn watering for those domestic users of the reservation. Ecology believes the limits are necessary to balance off stream water use with instream needs. Ecology does not agree that a house size of 3500 square feet means the owner is then limited to 130 square feet of out door use. The owner, assuming they are using reserved water, would be limited to 1/12 acre of area, about 3,630 square feet; the space used for a house or buildings is not included in the calculation..

Comment 1418

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: The definition of "'mitigation plan" in the proposed Skagit and Stillaguamish rules contains a qualitative component that is absent from the Samish River rule. Expanding this definition reflects a change in Ecology policy and may also create a conflict with hydropower Licensing and operation.

Response: Thank you for your comment. Water quantity and quality are inextricably linked. The definition proposed reflects that connection. The definition is specific to this rule making and will create no conflict with hydropower licensing or operation.

Comment 1419

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: "Nonconsumptive use" includes reference to water quality. This is a new and unique approach to defining nonconsumptive uses. Ecology is inconsistent in its application of this approach because water quality is not a component of the definition contained in the proposed Samish River rule. Ecology should assume, absent information to the contrary, that exempt wells are in compliance with all applicable health department requirements. Under the proposed definition, few if any water uses would be nonconsumptive. Specifically the definition excludes hydropower, which traditionally is treated as nonconsumptive.

Response: Thank you for your comment. Water quantity and quality are inextricably linked. The definition proposed reflects that connection. Ecology makes no assumption that permit-exempt wells are in compliance with all applicable health requirements. The local health district is responsible for any assessment of the quality of the water for domestic supply they authorize.

Comment 1420

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the

then-proposed Skagit Instream Flow Rule amendments

Comment: The definition of "Permit exempt" well is misleading. Several sections of the groundwater code in addition to an exemption from permitting requirements are inapplicable to exempt wells. RCW 90.44.070 requires Ecology to deny any permit application where the withdrawal would exceed the capacity of the aquifer to reasonably yield water, or where the withdrawal would unreasonably interfere with artesian well pressure. Since no permit is required for wells exempted under RCW 90.44.050, Ecology cannot rely on RCW 90.44.070 to limit exempt well development where ground water mining is occurring.

Response: Thank you for your comment. Ecology does not agree with Skagit County's legal understanding of requirements for permit-exempt wells. The groundwater exemption under RCW 90.44.050 is an exemption only from a water right application, not from the provisions and requirements of the statutes and regulations for groundwater withdrawals, including compliance with instream flow rules.

Comment 1421

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: RCW 90.44.100(1) allows water users to apply for a change in their permitted or certificated point of withdrawal or use without loosing their priority date. Change applications are not available for exempt wells because exempt wells are appurtenant to the land; if an exempt well water right was moved to a new location, the owner of the transferring parcel would retain the legal right to drill another exempt well. The result would be creation of a new water right rather than the transfer of an existing right. Since an exempt well user is unlikely to obtain a permitted or certificated right, they are likely unable to benefit from such a change.

Response: Thank you for your comment. Comment noted.

Comment 1422

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: RCW 90.44.110 contains a prohibition against waste. The final paragraph authorizes Ecology to, "in the issuance of an original permit, or an amendment to an original permit or certificate of vested rights to . . . specify for the proposed well or wells or other works a manner of construction adequate to accomplish the provisions of this section." RCW 90.44.110's authority to specify the manner of construction dues not extend to exempt wells.

Response: Thank you for your comment. Ecology does not agree with Skagit County's understanding of the legal requirements applicable to permit-exempt wells and how such wells fit into the overall water right framework.

Comment 1423

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Paragraph four of RCW 90.44.130 designates the priority date for permitted or

certificated withdrawals. It does not address the priority date for exempt wells.

Response: Thank you for your comment. Ecology does not agree with Skagit County's understanding of the legal requirements applicable to permit-exempt wells and how such wells fit into the overall water right framework.

Comment 1424

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Under RCW 90.44.445, only certificated water right holders may participate in acreage expansion programs.

Response: Thank you for your comment. Comment noted.

Comment 1425

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: RCW 90.44.450 allows the Department to require metering of withdrawals as a condition of a new permit. This section does not authorize Ecology to require metering of withdrawals from exempt wells. Additionally, the Legislature specifically exempted certain small wells from portions of the groundwater code; Ecology lacks authority to restrict the commensurate legislatively-created rights.

Response: Thank you for your comment. Ecology does not agree with Skagit County's legal understanding of requirements for permit-exempt wells. The groundwater exemption under RCW 90.44.050 is an exemption only from a water right application, not from the provisions and requirements of the statutes and regulations for groundwater withdrawals, including compliance with instream flow rules.

050 - Instream flows

Comment 242

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding proposed Skagit instream flow rule.

Comment: Ecology's authority to set instream flows does not include the authority to protect "maximum" flows for spawning and rearing habitat. Ecology's instream flow guidance document describes how Ecology will determine instream flow levels. The document describes steps Ecology and the Washington Department of Fish and Wildlife (WDFW) will take to determine instream flow levels. The guidance document directs agency fish scientists to estimate flows that "provide maximum spawning and rearing habitat."40 Ecology is using the methodology contained in the guidance document to establish instream flow levels for the Skagit River. As the guidance document points out, Ecology's flow setting authority arises from several sources. There is no legal authority, however, for Ecology to establish stream flows based on flow estimates that provide "maximum" spawning and rearing habitat.41 In fact, both statutes and case law suggest a narrower view. The Minimum Water Flows and Levels Act authorizes Ecology only to establish "minimum water flows" to protect fish and wildlife resources and aesthetic or recreational values.42 Similarly, the Water Resources Act authorizes Ecology to set "base flows" necessary

"to provide for protection of wildlife, fish, aesthetic and other environmental values, and navigation."43 Further, in the Yakima River adjudication, the Court has described "minimum"stream flows as the "minimum instream flow which is necessary to maintain anadromous fish life in the river."44

40 Guidance Document, at p. 2. (emphasis added). The document indicates that flow data might lead to a different, "more realistic" estimate of the "biological flows" needed by various fish populations. Unfortunately, the document does not explain how or why this will occur.

41 On November 9, 2004, Ecology conducted a workshop to explain the Department's proposed Stillaguamish instream flow rule. One of Ecology's presenters described "anti-degradation standards" for instream flows, which the presenter claimed were inherent in the state's water quality laws, regulations and policies. Statement of Brad Caldwell, Stillaguamish Instream Flow Rule Workshop, Arlington, Washington, November 9, 2004. Ecology similarly proposes to incorporate water quality regulations into the Skagit River instream flow rule through expansive definitions of "Mitigation plan" and Nonconsumptive use," as well as through restrictions on future permitting actions. Proposed WAC 173-503-060(2)(c). But the guidance document makes no mention whatsoever of water quality laws rules or policies, nor does it explain how these laws provide Ecology with authorities that extend beyond those laws more directly related to setting instream flows.

42 RCW 90.22.010 (emphasis added).

43 RCW 90.54.020(3)(a).

44 In re. Rights to the Use of the surface Waters of the Yakima River Drainage Basin, 121 Wn. 2d 257,279-80,850 P.2d 1306 (1993).

Response: Thank you for your comment. Ecology sets a minimum instream flow that is the minimum flow necessary to protect and preserve the fish, wildlife, aesthetic, recreation, and other instream values. The statutory objective of setting minimum or base flows is the protection and preservation of instream values. Webster's defines protect as: "to shield from injury, danger or loss." Similarly, preserve is defined as: "to keep from harm, damage, or danger." Enhance is defined as: "to make greater in value, augment." Improvements in instream flow prediction methods such as the Instream Flow Incremental Method (IFIM) indicate that to preserve and protect all, or nearly all, of the instream physical habitat supporting naturally reproducing fisheries resources, flows considerably higher than these low levels would have to be established. Therefore, in reference to the above definition of minimum, although a "minimum" possible stream flow may be zero or some very low flow rate, the minimum permissible flow is regarded by Ecology as the lowest flow consistent with legislative intent capable of achieving the objective of protecting and preserving and where possible enhancing instream values.

Ecology has found from experience that if instream flows are set at low levels such as the lowest flow of record, or at hydrologic base flow levels, and enough water rights are issued to consistently depress flows to this level, instream values such as fish, recreation, and aesthetics will not be adequately protected or preserved. They may not be totally extinguished, but the reduction in value can be severe. It is clear that very low instream flows cannot, in most cases, achieve an acceptable level of protection and preservation. Additionally, when Ecology established stream flows (minimum instream flows) we do not establish instream flows that provide for maximum spawning and rearing habitat. That is normally impossible because different fish species and life stages exist simultaneously in the river and each has a different flow requirement. There is no single flow that will simultaneously provide optimum habitat for all fish species and life stages. There is only an "optimum" flow in the sense that for a given fish species and life stage our simplified computer model of a complex biological river system predicts at what flow one would achieve the highest amount of fish habitat.

The Washington State Supreme Court found that when Ecology determines and sets a minimum instream flow we must consider the "…uncertainty inherent in the computer modeling of the complex biological system of the river." For example, the PHABSIM model uses only three of the many variables that determine fish habitat. The three variables PHABSIM uses are water depth, water velocity, and substrate. However, there are other important flow-related habitat variables, including predation, competition and territoriality, sedimentation and its effect on eggs and food supplies, the adequacy of flows to prevent eggs from dehydrating, and the creation of barriers to migration. Because PHABSIM's predictions regarding fish habitat are based on this artificial concept of habitat, Ecology's biologists are conservative in their estimation of the flows that would best protect the fishery.

PHABSIM optimizes a flow regime only in the sense that for a given species and a given life stage of that species, the model predicts at what flow the largest amount of weighted usable area of habitat will be present. Even on the assumption that maximizing weighted usable

area is “optimum” for that life stage of that species, the same flow regime may not be optimum for other life stages of the same species, or for other species. Ecology has proposed minimum instream flows to protect and preserve the instream resources. The flows would be protective close to the maximum habitat as modeled through Physical Habitat Windows 2002 (PhabWin 2002). PhabWin 2002 is pure Windows version of Physical Habitat Simulation created by Thom Hardy’s group at the Institute for Natural Systems Engineering at Utah State. The flow is protective of instream resources, but does not enhance the instream resources.

Comment 243

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding proposed Skagit instream flow rule

Comment: Under the terms of the 1996 Memorandum of Agreement Regarding Utilization of Skagit River Basin Water Resources for Instream and Out of Stream Purposes (1996 MOA), Public Utility No. 1 of Skagit County (Skagit PUD), and the City of Anacortes funded a study by Duke Engineering and Services, Inc. to support Ecology's instream flow rulemaking. The Duke Engineering report presented a range of flow options. Ecology chose the highest flow - the flow intended to provide the maximum spawning and rearing habitat. This approach exceeds Ecology's statutory mandate and ignores Ecology's obligation to provide "sufficient water for residential, commercial and industrial need . . . [and] providing sufficient water for productive agriculture."45 We do not agree Ecology's authority to set instream flows allows the agency to establish regulatory minimum flows levels that effectively preclude the use of water for future out-of-stream uses.

45 RCW 90.54.005.

Response: Thank you for your comment. Your comment related to the 1996 Memorandum of Agreement Regarding Utilization of Skagit River Basin Water Resources for Instream and Out of Stream Purposes is not applicable to the Stillaguamish rule making. The comment on Ecology's authority to set instream flows that allows the agency to establish regulatory minimum flows levels that effectively preclude the use of water for future out-of-stream uses is noted. The proposed instream flows in the Stillaguamish rule making do not preclude the use of water for out-of-stream needs nor do they have any relationship with the 1996 Memorandum of Agreement.

Comment 244

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding proposed Skagit instream flow rule

Comment: Instream flow levels should be both hydrologically achievable and scientifically defensible. In the Skagit River Basin, the only scientific report prepared to support the Skagit River instream flow rule specifically found that 830 cfs could be withdrawn from the Skagit River significantly alternating the hydrologic regime,46 without causing harm to aquatic resources. Nevertheless, the rule establishes a far lower allowable withdrawal and associates flow that, continuously and on a year-round basis, has never been met.47

46 See Duke Engineering and Services, Inc., Final Technical Report, Lower Skagit River Instream Flow Studies 136 (1999).

47 If measurements are based on mean monthly flows, river levels have continuously exceeded those established as "minimum flows" under the Skagit River instream flow rule only one year in every ten on average.

Response: Thank you for your comment. This comment is not applicable to the Stillaguamish rule-making.

Comment 247

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter to Ecology regarding proposed Skagit instream flow rule

Comment: Ecology's proposed rule amendment is not supported by sound science or other substantial evidence. The buildable lot assumptions in the rule are flawed. The number of estimated additional parcels at build-out used to set reservation quantities in the proposed rule amendment is inaccurate. Although these data originated from Skagit County, they were derived from criteria established during the early phases of the settlement negotiations.52 The criteria used at that time excluded many parcels that are affected by the current rule amendment. Among the exclusions at the time the data were generated are: parcels located within 200 feet of an existing PUD transmission line parcels located outside of the Skagit River basin buildable parcels located in counties other than Skagit (i.e., Snohomish and Whatcom counties) At no time did the Department of Ecology request parcel data that would be relevant to the current proposed rule language even though the Department modified the rule criteria in a manner that would result in the inclusion of additional affected parcels. The parcel enumerating criteria that changed since the settlement negotiations include:

- expanding the boundaries of the Skagit River basin to include areas within separate saltwater drainages
- changing the mandatory hookup requirement to include all parcels located within 500 feet of any public water system pipeline
- applying reservations to basins that include land in other counties
- creating reservations for main stem segments of the Skagit River that include previously un-quantified tributaries

These changes have resulted in an overall increase in the number of potentially buildable parcels that are not accounted for in the reservation budget. In addition to these changes in criteria, it should be pointed out that the number of potentially buildable parcels is constantly changing due to the creation of new parcels during land divisions. These newly created parcels would also be excluded from Ecology's parcel count, and therefore would also be excluded from the reservations. It is arbitrary and capricious for Ecology to impose a regulation of such profound impact without conduction (sic) a preliminary assessment of the affected parcels done for a completely different purpose. More troubling, the Department has not focused on the more important issue of how the rule amendment will affect future growth demand. This cannot be addressed by a one-time email exchange or telephone conversation with Skagit County staff as to the number of buildable lots in each basin. The buildable lot information was developed for settlement discussions to provide an order of magnitude for water budgets under discussions in those negotiations. These numbers cannot be legitimately taken to be the limit on future development and densities within the basins.

Response: Thank you for your comment. Your information appears to pertain to the Skagit River basin and information about parcels within that basin. Ecology respectfully disagrees with your analysis. For the Stillaguamish rule, Ecology' conducted an assessment of instream flow needs based on an instream flow study. The rule contains no buildable lot assumptions. Assumptions regarding buildable lots were used in the State Environmental Policy Act determination of nonsignificance and associated checklist. The number of potential lots for building on is one way to assess how much future demand can be satisfied by the proposed reservation. The number of buildable lots was not used to set reservation quantities. Rather, quantities of reserved water were determined based on how much water can be taken from the river without causing a significant decrease in fish habitat.

Comment 297

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: WAC 173-503-040 - Establishment of Instream Flows: The proposed amended Skagit River rule is unique among Ecology's recently proposed instream flow rules to expressly address treatment of pending applications. The proposed amended rule incorrectly states that the

priority date for exempt wells coincides with the date upon which a well is first put to beneficial use. This ignores that under the relation back doctrine, the priority date obtained by a water user who diligently develops a water right relates back to the date upon which the user first took steps to develop the right.11

11 Hunter Land Co. v. Laugenour, 140 Wash. 558, 565, 250 P. 41 (1926).

Response: Thank you for your comment. The treatment of pending applications is governed by statute. Please see RCW 90.03.247. Ecology respectfully disagrees with your assertion regarding the priority date of a water right create pursuant to the ground water permit exemption. Please see responses 234 and 235.

Comment 298

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Mean monthly flows do not meet the instream flow requirement about 20 percent of the time. In addition, mean daily flows have not continuously satisfied the instream flow requirement for twelve consecutive calendar months at any time during the period of record (63 years) at USGS Gage #12-200500, for the Skagit River near Mt. Vernon. It is arbitrary and capricious to establish minimum flows at a level which rarely occurs. The resulting flows, while desirable in terms of habitat, are not minimum flows but appear to be some sort of target or optimal

Response: Thank you for your comment. Statistics from the Skagit basin on mean monthly flow and percent of time average flows or mean daily flows achieve instream flow requirements are not applicable to the Stillaguamish rule. However, Ecology recognizes that proposed instream flows will be achieved at a low frequency. The proposed instream flows are set to be protective of instream values. Hydrologic achievability is not an absolute measure but a relative measure of the likelihood that a given flow may occur on some date in the future. Events with a low frequency of occurrence are recognized as need to sustain the resources. The proposed flows must be biologically defensible first, and within that range of biologically defensible flows the hydraulic achievability is factored in.

Comment 299

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Instream flows are based on an IFIM study prepared by Duke Engineering and Services, which has since been found to contain major errors undermining the rearing habitat analysis upon which instream flows are set.

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish instream flow rule making.

Comment 300

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: In addition, the flows used at the Skagit River gage (instream flow control point) are regulated flows based on releases from upstream reservoirs. The analysis did not consider the entire watershed but assumed the flows at the control point were natural flows. In light of

these errors, Ecology would be remiss if it maintains the existing rule without reevaluating the flawed science upon which it is based.

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish instream flow rule making. There are no regulated flows in the Stillaguamish basin since there are no dams on the North Fork or South Fork of the Stillaguamish River or significant tributaries. Generally speaking, flows at the control points reflect natural flows with existing water use.

Comment 301

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: In addition, the Duke report also states, "nearly all of the spawning in the lower mainstem of the Skagit River takes place just below the Highway 9 bridge . . . " yet the current rule language conditions withdrawals throughout the Skagit basin, including those from areas located downstream of these spawning areas, on flow levels that are intended to protect spawning. These flow restrictions do not appear to be warranted. Subsequently, flow restrictions for the protection of spawning habitat (i.e., those set for the months of April, May, June, October, and November, and for December 2-15) should not apply to withdrawals occurring downstream of the spawning areas identified in the Duke report.

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish instream flow rule making.

Comment 302

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Subsection 050(1) recognizes that "two hundred cubic feet per second is available to be appropriated through ground water withdrawal or surface water diversion." The Duke Engineering Report concluded that total withdrawals of up to ten percent of the 50 percent exceedance flow would not significantly alter the historic hydrologic regime. Ten percent of the 50 percent exceedance flow in September, the month with the lowest historic flows, is 830 cfs. This implies that additional allocations of less than 830 cfs would be protective of instream resources during a low flow period. When all existing rights and claims have been considered, 253 cfs remains available for appropriation.12 To ignore this analysis and without justification declare that only 200 cfs is available for appropriation, and then to allocate less than one percent of the available flows to uninterruptible domestic supplies is arbitrary and capricious.

12 Wash. Dept of Ecology, Supplemental Environmental Analysis, Instream Resources Protection Program, Upper and Lower Skagit Water Resources Inventory Areas (WRIAs 3 and 4),17-20 (2000). The SEA contains an error in computation, incorrectly concluding that 277 cfs is available for future appropriation. Corrected figures are used throughout this analysis (830 cfs allowable withdrawal - 577 cfs existing and claimed rights = 253 cfs available water).

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish instream flow rule making. This is a new rule making with no existing rule in place.

Comment 454

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: The instream flows were set relative to the Skagit River gaged flows near Mount Vernon for the period of record (USGS Gage #12-200500). The flows at this point are entirely regulated. How do you justify using a regulated record as a basis for setting instream flows?

Response: Thank you for your comment. The comment about using a regulated record as a basis for setting instream flows is not applicable to the Stillaguamish rule making. There are no regulated flows, as in flows from a dam, in the Stillaguamish basin.

Comment 465

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: What is the source of precipitation data used to calculate 7Q10 flows for the ungauged subbasins. What part of each sub-basin do these data represent? Were these data integrated across each sub-basin, or do they only represent a single point?

Response: Thank you for your comment. No 7Q10 flows for the ungauged sub basins in the Stillaguamish basin were calculated for this project. For this project, precipitation data from Everett and Arlington was used.

Comment 466

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: What are the periods of record for precipitation data used to calculate the 7Q10 CSM/inch (cfs/mi2/in) numbers for the gauged sub-basins? Are they the same as the streamflow periods of record used to calculate the 7Q10 values? Were 7Q10 records evaluated to determine if they cover a period of particularly wet or dry years? This is especially important for subbasins with short records (e.g., East Fork Nookacharnps and Wiseman Creek, each with 8 years of data).

Response: Thank you for your comment. No 7Q10 flows for the ungauged sub basins in the Stillaguamish basin were calculated for this project. See response to comment 465.

Comment 467

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: It appears that in most cases estimated runoff (in inches based on streamflows) was used to estimate 7Q10 CSM/inch numbers while for Alder Creek precipitation was used. In all instances, the higher of the precipitation or runoff numbers were used, which in turn results in lower estimated 7Q10 flow for the ungauged basins when actual precipitation data are used. Can you explain the reasoning for the different approaches at different sub-basins?

Response: Thank you for your comment. No 7Q10 flows for the ungauged sub basins in the Stillaguamish basin were calculated for this project.

Comment 468

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the

then-proposed Skagit Instream Flow Rule amendments

Comment: What is the basis for the assumption that a 1-2% loss in habitat corresponds with a 1-2% loss in stream flow during low-flow conditions? This is a critical assumption because it leads to the determination of the reservation quantities.

Response: Thank you for your comment. There is no assumption that 1-2% loss in habitat corresponds with a 1-2% loss in stream flow during low-flow conditions for the Stillaguamish rule making.

Comment 472

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Since the entire basis for the selected minimum stream flows is the protection of habitat in the lower Skagit River mainstem, why doesn't the Department of Ecology allow return flow credit for domestic users that are connected to a sewer system when these systems return used water to the mainstem via treatment plant outfalls?

Response: Thank you for your comment. The entire basis for the selected minimum stream flows is not the protection of habitat in the lower Skagit River mainstem, but rather protection of habitat in the Stillaguamish tributary systems as well as the mainstem Stillaguamish River.

Comment 980

Commentor: James Miller, City of Everett

Type: Letter dated May 18, 2005

Comment: Our main concern is that the Proposed Rule sets an instream flow for the North Fork during August at 800 cfs. We do not believe that this meets one of your key criteria of "hydrologically achievable." This is over double the average monthly flow or 50% exceedence level. Instead it is at the 10% exceedence level meaning it could only be met in the natural flow condition one out of ten years. This would not meet any reasonable standard of achievability. In an unregulated river, like the Stillaguamish, nature does not always provide flows that are optimal to support desired fish populations. The proposed instream flows for the summer months are all higher than the average flows for these months. This creates a double whammy for water suppliers because this is the time of highest municipal water

Response: Thank you for your comment. Being hydrologically achievable is not a statutory standard to consider in the establishment of an instream flow rule. However, Ecology does look at a range of biologically defensible instream flows and then adjusts down any proposed instream flow if the hydrology warrants a change. In the end, the flow must still be biologically defensible. Your comment is correct that in an unregulated river, like the Stillaguamish, nature does not always provide flows that are optimal to support desired fish populations. We will all have to learn how to manage peak summer use in light of instream flow needs.

Comment 990

Commentor: Ray Hoffman, Seattle Public Utilities

Type: Letter dated May 13, 2005

Comment: Please accept this letter as an indication of our support for the Department of Ecology's instream flow rule-setting process, in general, and for its proposed Stillaguamish Basin Rule (WAC 173-505), in particular. We believe that this statutory authority to establish instream flow rules should remain with Ecology as the manager of the waters of the State.

Response: Thank you for your supportive comment; it is appreciated.

Comment 992

Commentor: Ray Hoffman, Seattle Public Utilities

Type: Letter dated May 13, 2005

Comment: We believe that instream flow rules provide an important foundation for water resource management and believe that they should be established in each watershed. Especially for systems that do not have formal water management planning processes, rule-setting provides for an initial analysis of basin hydrology in comparison to aquatic habitat, The process of assembling this information and sharing it with basin stakeholders can foster important dialogue about the balance of instream and out-of-stream uses and values. The resulting rule often provides a baseline of protection and essential information for public and private entities planning for their future.

Response: Thank you for your comment. Ecology agrees with you that instream flow rules provide an important foundation for water resource management and believe that they should be established in each watershed. Especially for systems that do not have formal water management planning processes, rule-setting provides for an initial analysis of basin hydrology in comparison to aquatic habitat. Ecology also agrees the process of assembling instream flow information and sharing it with basin stakeholders can foster important dialogue about the balance of instream and out-of-stream uses and values.

Comment 993

Commentor: Ray Hoffman, Seattle Public Utilities

Type: Letter dated May 13, 2005

Comment: We also believe that establishing instream flow rules provides an opportunity to complement rule-making with additional water resource management tools, such as reservations for rural residents and stock watering, trust water acquisition and requirements for using municipal water supply where it is reasonably available. While the rules themselves don't guarantee the implementation of these tools, they do serve as useful steps towards more comprehensive water resource management.

Response: Thank you for your comment. Ecology agrees with City of Seattle that establishing instream flow rules provides an opportunity to complement rule-making with additional water resource management tools, such as reservations for rural residents and stock watering, trust water acquisition and requirements for using municipal water supply where it is reasonably available. The City is correct that the rules in and of themselves don't guarantee the implementation of these tools. Rather they do serve as useful steps towards more comprehensive water resource management.

Comment 994

Commentor: Ray Hoffman, Seattle Public Utilities

Type: Letter dated May 13, 2005

Comment: We would caution, however, that each watershed is unique in its mix of natural features, human uses of the resource, and institutional capacity for water resource management. Ecology's program for developing and refining instream flow rules and for promoting comprehensive water resource management must be respectful of these unique features in each watershed Ecology considers. With respect to the Stillaguamish Rule, we have not undertaken a thorough technical review. Nonetheless, we have learned about the technical and policy process that Ecology has undertaken and have the following general comments: 1) The technical analysis

was built on the legacy of prior studies and appears to have used qualified personnel and proven methods.

Response: Thank you for your comment. Ecology agrees with the City of Seattle that each watershed is unique in its mix of natural features, human uses of the resource, and institutional capacity for water resource management. Ecology's program for developing and refining instream flow rules and for promoting comprehensive water resource management are respectful of the unique features in each watershed. Also, it is true that the technical analysis for the Stillaguamish rule was built on the legacy of prior studies and did use qualified personnel and proven methods.

Comment 998

Commentor: Ray Hoffman, Seattle Public Utilities

Type: Letter dated May 13, 2005

Comment: In summary, we feel that Ecology's effort to generate new instream flow rules is an important benefit to the water resources and aquatic ecosystems of the State. We encourage your continued cooperation and communication with the local and regional public and wish you the best of luck in completing the rulemaking process and implementing these rules. Thank you for the opportunity to comment.

Response: Thank you for the very positive comment.

Comment 1009

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Ecology's authority to set instream flows does not include the authority to protect "maximum" flows for spawning and rearing habitat: Ecology's instream flow guidance document describes how Ecology will determine instream flow levels. The document describes steps Ecology and the Washington Department of Fish and Wildlife (WDFW) will take to determine instream flow levels. The guidance document directs agency fish scientists to estimate flows that "provide maximum spawning and rearing habitat."5 As the guidance document points out, Ecology's flow setting authority arises from several sources. There is no legal authority, however, for Ecology to establish stream flows based on flow estimates that provide "maximum" spawning and rearing habitat. The Minimum Water Flows and Levels Act authorizes Ecology only to establish "minimum water flows" to protect fish and wildlife resources and aesthetic or recreational values.6 Similarly, the Water Resources Act authorizes Ecology to set "base flows" necessary "to provide for protection of wildlife, fish, aesthetic and other environmental values, and navigation."7 Further, in the Yakima River adjudication, the Court has described "minimum" stream flows as the "minimum instream flow which is necessary to maintain anadromous fish life in the river."8

5 Guidance Document, at p. 2. (emphasis added). The document indicates that flow data might lead to a different, "more realistic" estimate of the "biological flows" needed by various fish populations. Unfortunately, the document does not explain how or why this will occur.
6 RCW 90.22.010
7 RCW 90.54.020(3)(a).
8 In re. Rights to the Use of the surface Waters of the Yakima River Drainage Basin, 121 Wn. 2d 257, 279-80, 850 P.2d 1306 (1993).

Response: Thank you for your comment. Please see response to comment 242.

Comment 1010

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Ecology developed an IFIM model of the Stillaguamish River to support its proposed instream flow rule. The IFIM model presented a range of flow options. Ecology chose the highest flow - the flow intended to provide the maximum spawning and rearing habitat. From December through April, the proposed minimum flows are higher than the flows of 100% weighted usable areas (WUA). This approach exceeds Ecology's statutory mandate and ignores Ecology's obligation to provide "sufficient water for residential, commercial and industrial need . . . [and providing sufficient water for productive agriculture."9 Ecology's authority to set instream flows does not allow the agency to establish regulatory flow levels that effectively preclude the use of water for future out of stream uses.

9 RCW 90.54.005.

Response: Thank you for your comment. Please see response to comment 242.

Comment 1011

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Even more fundamentally, Skagit County supports the goals of salmon protection and restoration, however, the County is concerned that Ecology's proposed rule is not justified by these goals. Analysis of 75-years of flow data at the Anacortes gage indicates no clear reduction in mean monthly flows during the month of August and Ecology acknowledges that most habitat limiting factors "are [the] result of upland forestry activities." Efforts to establish minimum flows when instream flows do not represent a limiting factor does little to address the cause of decline and creates a distraction from more pressing concerns. Ecology's efforts would be better placed in areas substantially related to the cause of decline.

Response: Thank you for your comment. The analysis of 75-years of flow data at the Anacortes gage is not applicable to the Stillaguamish basin. The City of Anacortes is on the Skagit River, not the Stillaguamish. However, the establishment of an instream flow is not dependent on flow being a limiting factor for salmon production and or August mean monthly flow showing no significant gain or loss. The establishment of an instream flow is to keep flow from being a problem. The Endangered Species Act and actions taken to address it are not criteria for the establishment of an instream flow. Please see RCW 90.544.020.

Comment 1019

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: The methodology applied in developing the Stillaguamish instream flow rule is inconsistent with existing and proposed agency rules, and the instream flow guidance document: Ecology's proposed rule is inconsistent with the instream flow guidance document. Ecology bases the flow reservation on habitat reductions that could occur during a very dry condition. Ecology's baseline varies between the "90% exceedance flow in the driest month" and the "7-day, 10-year low flow (7Q10)." In this case, Ecology interpreted the 1-in-10 year low flow condition as the 90% exceedance flow for the driest month. Brad Caldwell approximated the 90% exceedance flow for September at 431 cfs. Using the juvenile steelhead WUA supplied by Steward and Associates, and a habitat-loss threshold of 1% (not 2%), he arrived at a reservation of 5 cfs. In other words, a 5 cfs withdrawal from an existing flow of 431 cfs reduced juvenile steelhead WUA by 1%.

Ecology's approach is extremely conservative and lacks justification for application of 1% rather than 2% threshold assumptions. Within the limits of precision of the PHABSIM models, a 1% WUA loss is not significant. Also, mathematically, the frequency of this WUA loss is rare. The 1-in-10-year low flow in the driest month occurs about 1/120,h [Note: not sure what "h" means] of the time on an annual basis. A WUA reduction of 1% that happens less than 1% of the time is below the threshold of detection. The flow reduction needed to cause even a 1% WUA loss during commonly-occurring flows is much more than 5 cfs. If Ecology had chosen

the 2%-loss guideline here, their reservation would have been about 10 cfs instead of 5 cfs.

Response: Thank you for your comment that the instream flow assessment methodology applied in developing the Stillaguamish instream flow rule is inconsistent with existing and proposed agency rules, and the instream flow guidance document. Ecology respectfully disagrees with your comment. First we will respond to your comments about the modeling used, and then more generally to reservation calculation and the instream flow guidance document.

The instream flow assessment used is a commonly used method in Washington that courts have found adequate. To assess instream flow needs in the Stillaguamish basin, Ecology used, "The Relation of Stream flow to Habitat for Anadromous Fish in the Stillaguamish River Basin, Washington" by S. S. Embrey for the U.S. Geological Survey, Report 86-4326 (1987), as a starting point. Ecology hired Steward & Associates, a consulting firm, to create hydraulic instream flow models, calibrate the models, and document the model calibration using empirical data collected by Embrey in the mid-1980's. Steward & Associates then combined the hydraulic models with fish preference models the State created within Physical Habitat Windows 2002 (PhabWin 2002). PhabWin 2002 is a pure Windows version of Physical Habitat Simulation created by Thom Hardy's group at the Institute for Natural Systems Engineering at Utah State. The work of Stewart and Associates is documented in a series of Excel spreadsheets and documents available on Ecology's web site at: http://www.ecy.wa.gov/programs/wr/instream-flows/stillaguamishbasin_sepa.html.

The IFIM data was used to determine the proposed instream flows as well as size the reservation. Ecology sized the reservations to minimize potential impacts to aquatic resources. Your comment is correct that Ecology bases the flow reservation on habitat reductions that could occur during a very dry condition and use statistical data for the 90 percent exceedance flow in the driest month as a surrogate for that condition. Ecology, using the IFIM model for the mainstem Stillaguamish River found that at the 90 percent exceedance flow in September of 431 cubic feet per second (cfs) that a loss of 5 cfs of water would be a 1percent loss of steelhead juvenile habitat. As such, a 5 cfs reservation is designed to avoid and minimize impacts to stream flows.

Most importantly, the size of the reservations themselves has been kept very small to minimize potential impacts on fish. The size of each of the reservations has been limited to amounts that the Washington State Departments of Ecology and Fish and Wildlife fish biologists believe will have very little impact on the long term sustainability of the fish population. Ecology agrees the approach to sizing the reservation is conservative and believes that it should be so. The instream flow guidance document does suggest a 1 – 2 percent range for habitat loss when calculating a reserve. As a guidance document, the guidance is then applied as appropriate.

There are no set numbers for what percent of habitat loss is acceptable. As your comment states, even the limits of precision of the models would lead to a conservative application. We strive to be at 1 percent but with multiple fish species (such as Chinook and Steelhead) and multiple life stages (such as rearing and spawning) it is impossible to have one number for the habitat loss. By necessity fisheries biologists have to give priority to one species and life stage priority over another when looking at various amounts of habitat loss from a computer model. Ecology looks to balance the needs of all the species and life stages so while we aim for 1 percent it cannot always be hit, but we try to do so. Regarding "a 1 percent WUA loss is not significant": we disagree. Ecology and WDFW believe it is significant. A loss of 1 percent that occurs one hundred times is a loss of 100 percent. Doubling the reserve quantity from 1 percent to 2 percent would double the impacts on the fish. Regarding the 90 % exceedance flow in the driest month and the 7-day, 10-year low flow (7Q10): these two numbers are essentially the same. The monthly 90% exceedance flow is not a rare event. On an annual basis the monthly 90% exceedance flow or less can occur most every year. The number of days it occurs each month varies.

Regarding "A WUA reduction of 1% that happens less than 1% of the time is below the threshold of detection": we disagree. This characterization of a 1% loss of habitat as below the level of detection is the same as death by 100 cuts as described above. In addition, the characterization of the loss as occurring 1% of the time is misleading. The monthly 90%

exceedance flow means that streamflows occur less than that amount 10% of the time. This means that 10% of the time during the low flow month most critical for fish survival, the habitat loss is 1% or greater.

Comment 1020

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Using monthly exceedance flow statistics for the mainstem, and the same juvenile steelhead WUA data used by Ecology, Hardin-Davis, Inc. calculated the overall September WUA values (habitat exceedance analysis) with several potential flow reservations. Setting existing conditions as 100% WUA, the values for 5, 10, and 25 cfs withdrawals were 99.7, 98.4, and 97.9%. In other words, a constant 25 cfs withdrawal in September yielded a 2.1% reduction in WUA. Had Ecology applied the methodology it advocates in the guidance document, the reservation contained in the proposed Stillaguamish rule would be significantly larger.

Response: Thank you for your comment. Ecology's fisheries biologist, Brad Caldwell, using the IFIM model output for the mainstem Stillaguamish River, found that at the 90 percent exceedance flow in September of 431 cubic feet per second (cfs) that a loss of 5 cfs would be a 1 percent loss of steelhead juvenile habitat. So the theoretical 25 cfs loss of flow would be a 5 percent loss of steelhead juvenile habitat, not 2.1 percent as stated in the comment. A 5 percent loss of habitat is not protective of the fisheries resources or instream values.

Comment 1033

Commentor: Becky Kelley and Ross Freeman, WEC and American Rivers

Type: Letter dated May 13, 2005

Comment: General support for the establishment of instream flows: According to Ecology's website, the Stillaguamish watershed is home to numerous salmonid species such as Coho (a depressed population), Pink, Chum, and Sockeye salmon, and Steelhead and Cutthroat trout. Two species, Chinook salmon and Bull trout, are listed as threatened under the Endangered Species Act. Clearly, adequate instream flow is an important building block for recovery of these species. While the proposed rule states as its purpose the retention of "perennial rivers, streams, and lakes in the Stillaguamish River basin. . .to "protect and preserve" fish and other environmental values . . ."1, the rule provides for up to 2% loss of habitat of these species. Given the goal of the State's Salmon Recovery Strategy to "Retain or provide adequate amounts of water in streams to protect and restore fish habitat required by wild salmonids," we recommend that the rule more clearly specify how the rule supports fish recovery. For example, the supplemental SEPA documentation states that reserves for future uses will support human domestic needs and stockwatering, but how will these reserves help salmon? Has the 2% impact been accounted for in the tributaries or just the main stem? If the impact is on the tributaries, it clearly would be much greater than 2%. Has Ecology conducted this analysis? Please explain.
1 WAC 173-505-020.

Response: Thank you for your comment. Ecology agrees that adequate instream flow is an important building block for recovery of these species. The rule supports fish recovery by limiting the depletion of stream flows in the future from more diversions of water during low flow times. The rule does not add water back to the stream nor guarantee a certain flow will be in the river. An achieving flow program needs to be coupled with the established flow to more fully ensure stream flow is not limiting salmonid production. The reserves will help fish recovery in the future, by limiting depletion during low flow times. The two percent impact is accounted for in the main stem. Impacts to flow from reservation development in the tributaries will depend on when the well is developed and how much ground water contributing to stream flow it captures. It is not possible to predict where and when the wells will be drilled in the basin, therefore there is no analysis on this point. However, based on past development, it is anticipated the rural wells will

be evenly distributed across the basin (along the rivers and streams).

Comment 1034

Commentor: Becky Kelley and Ross Freeman, WEC and American Rivers

Type: Letter dated May 13, 2005

Comment: General support for the establishment of instream flows: There are many uncertainties over the planning horizon that can further reduce the amount of water in the system, including climate change and modeling inaccuracies. It is likely that climatic changes in particular will affect the water availability assumptions over the course of the proposed 20-year planning horizon (which is based on human population projections). As currently configured, fisheries and instream flows appear to assume the risk associated with these uncertainties. Accordingly, is there an adaptive management strategy and/or planned actions to address these potential flow impacts?

Response: Thank you for your comment. Ecology agrees that are many uncertainties over the planning horizon that can potentially reduce the amount of water in the system, including climate change and modeling inaccuracies. The adaptive management strategy and/or planned action to address these potential flow impacts would be a new rule making to amend this rule. The rule provides for review in section 170, entitled "Regulation Review."

Comment 1042

Commentor: Clair Olivers, Snohomish County Public Utility District #1

Type: Letter dated May 17, 2005

Comment: The purpose of this letter is to support the need for and offer comments on the proposed Instream Flow Rule for the Stillaguamish River. As you know, the Snohomish County Public Utility District #1 (District) provides electric and water service throughout Snohomish County. Specifically, we are the provider of retail electric service in the Snohomish County portion of the Stillaguamish River basin; and, we operate three water systems within the basin and provide a supplemental wholesale supply of water to the City of Arlington.

Response: Thank you for your comment and Snohomish County Public Utility District #1's (District) support of the proposed instream flow rule for the Stillaguamish River. Ecology recognizes that the District provides electric and water service throughout Snohomish County and specifically, that the District operates three water systems within the basin and provides a supplemental wholesale supply of water to the City of Arlington.

Comment 1043

Commentor: Clair Olivers, Snohomish County Public Utility District #1

Type: Letter dated May 17, 2005

Comment: We feel that the setting of instream flows by rule is an essential part of the State's water resources management responsibilities, whether in response to flows agreed upon in locally-developed basin plans or by Ecology action in the absence of such plans, as in the case of the Stilly. We believe that establishing instream flows at levels needed to protect fish runs and other significant instream values is necessary to creating certainty for all water users and uses in a stream basin. Our experience in the Sultan River leads us to conclude that active management using sound science and an adaptive approach can result in benefits to both people (hydropower, water supply, and flood control) and fish. However, in the Sultan we have the advantage of a large storage project and the ability to manage flows to limit some natural extremes.

Response: Thank you for your supportive comments. Your comments, and especially the Sultan River comment, are noted.

Comment 1045

Commentor: Clair Olivers, Snohomish County Public Utility District #1

Type: Letter dated May 17, 2005

Comment: We have not conducted a thorough technical review of the Stillaguamish Rule; however, we have attended several presentations on it and participated in discussions on the work behind the Rule. The approach used to establish the relationship between flow and fish habitat seems to be based on generally-accepted principles and methods. There is, however, no linkage to fishery management in the instream flow-setting process; so, there is no way to determine if the habitat quantities to be protected and fish escapement numbers are correlated. This leaves open the question of whether lower flows at some times and locations would be sufficient to support the fish management program for the basin. A case in point is the data for the flow point on the North Fork of the Stilly above Arlington, which is a stream where there has been only minimal modification of the natural environment, but where flows would not meet the Rule requirement in late Summer in the vast majority of years. This result would be difficult to explain and, we believe, unnecessarily creates confusion and doubt about the basis and validity of the Rule. This is a weakness of the instream flow-setting process that needs some further evaluation to insure wider support of these rules, in addition to the necessity for stronger ties between habitat management and fishery management.

Response: Thank you for your comment. Your comment is correct in that the approach used to establish the relationship between flow and fish habitat is based on generally-accepted principles and methods. Your comment is also correct that there is no linkage to fishery management in the instream flow-setting process; there is no way to determine if the habitat quantities to be protected and fish escapement numbers are correlated. There is no need to correlate flow with fish escapement numbers. The flow of water to protect the habitat (and other instream values) is for both anadromous and resident fish and both are present in the streams and rivers. The flows adopted are thought to be protective of the habitat and other instream values. Fisheries management and escapement goals of the co-managers does not change Ecology's mandate for instream flow protection. There really is not a need to evaluate whether lower flows at some times and locations would be sufficient to support the fish management program for the basin.

Finally, your comment on achievability of the instream flow for example the North Fork of the Stilly above Arlington is noted. In fact the basin above the stream gauge mentioned is highly altered by logging and forest practices. The basin is experiencing an increase in high flow, an indicator that winter run off is not being detained on the forest. The volume of water withdrawn for off the North Fork is small, as your comment indicated. The achievability of the instream flow is not necessarily a weakness of the flow and habitat assessment method. Ecology would agree that further evaluation of instream flow achievability and understanding of that issue would insure wider support of these rules. Please also see response to comments 242, 290, 298, and 997 for more on instream flow achievability and optimum versus minimum flows.

Comment 1054

Commentor: Pam Bissonnette, King County Department of Natural Resources and Parks

Type: Letter dated May 13, 2005

Comment: King County supports immediate action by DOE, working with other state agencies, tribes and local governments, to identify and implement actions that improve instream flows. Beyond helping the region understand the relationship of instream flow rules to salmon recovery needs, DOE can help watersheds move beyond the narrow administrative constraints of instream rules to actions that restore flow regimes. King County applauds the efforts DOE has made to broaden its technical and policy perspective on the features of flow regimes that need protection and restoration -- moving beyond a minimum flow focus to include other factors such as peaks, timing, seasonality, frequency and rate of change. King County is hopeful that the

agency carries its broadening perspective forward into the identification and implementation -- by DOE and others -- of actions putting the region on the path to flow regimes that meet the needs of people and recovered salmon populations. DOE should ensure that it carry any momentum from the completion of the new flow rule into efforts to improve flows.

Response: Thank you for your very supportive comments. Ecology recognizes that the basin residents, Ecology, other state agencies, tribes and local governments need to identify and implement actions that improve instream flows. In the proposed salmon recovery plan, the instream flow is but one of several tools or planned actions. Your comment is correct that the region needs help and greater depth to understand the relationship of instream flow rules to salmon recovery needs. While not a rule action, Ecology can help watersheds move beyond the narrow administrative constraints of instream rules to actions that restore flow regimes. Your comment is noted regarding a flow regime in the rule that includes other factors such as peaks, timing, seasonality, frequency, and rate of change.

Comment 1056

Commentor: David Monthie, King County Department of Natural Resources and Parks

Type: Letter dated December 14, 2004

Comment: The proposed flow regime is evidently based on an IFIM evaluation that was done quite some time ago. The characteristics of the river system may have been altered considerably since then because of several large floods, one major landslide, and siltation due to heavy logging and associated practices. While we can understand that a complete redoing of the IFIM work would take considerable time, and carry a significant cost, we would suggest that some form of verification of the original transects be undertaken. This could be an evaluation through aerial photos, or field inspections of a certain percentage of the cross sections. This work would provide a higher level of comfort with the assumptions underlying the IFIM calculations.

Response: Thank you for your comment. Your comment is correct that the proposed flow regimes are based, in part, on IFIM field data for stream channel and velocities that was done quite some time ago. The characteristics of the river system probably have been altered considerably since then because of several large floods, one major landslide, and siltation due to heavy logging and associated practices. The field work done in 1988 and is valid if the channel morphology is generally the same. By "generally", Ecology means the characterization of the river done by transect selection and weighting done in 1988 is valid for today. The ratio of riffles to pools is more or less the same now as when the study was done. The river has most probably changed at the original individual transects; it is the overall characterization that has not changed. The Stillaguamish system carries a very high sediment load and has for sometime. The riffles and pools in the system may migrate, but the ratio of them to each other has not changed. The issue of channel morphology and the potential that the old IFIM transect data and river characterization was not valid was evaluated by Ecology and we determined that the Embry data was useful. Fish biology as modeled in PHABWin 200 was updated as well as new hydraulic models being run and calibrated.

Comment 1057

Commentor: David Monthie, King County Department of Natural Resources and Parks

Type: Letter dated December 14, 2004

Comment: It is not clear whether the proposed approach addresses fully the needs of bull trout, an Endangered Species Act (ESA) listed species that is present and spawns in the Stillaguamish system. There is also a pending petition to list steelhead under the ESA, and the rule should factor that possibility into its flow proposals.

Response: Thank you for your comment. Your comment is correct, in that it is not clear whether the proposed approach for establishing instream flows addresses fully the needs of bull trout, an Endangered Species Act (ESA) listed species that is present and spawns in the

Stillaguamish system. To Ecology it is not clear what volume of flow in a river or instream habitat would address the needs of bull trout, or chinook salmon under the ESA. NOAA Fisheries and or U.S. Fish & Wildlife, in their role as administrators of the ESA are the entity that can answer that question. Generally, the proposed instream flows are based on the habitat needs of spawning chinook salmon and juvenile steelhead trout rearing flow needs. Ecology has been very clear that the establishment of an instream flow does not add or take water from a system. The instream flow as a water right can be used to curtail (interrupt) future diversions when the instream flow is below established level. In that respect, the rule should keep some streams and river reaches with more flow than otherwise. Achieving established instream flows is also part of the solution to the problem your comment calls out. Please see the Washington Department of Fish and Wildlife's comment letter on the rule.

Comment 1059

Commentor: David Monthie, King County Department of Natural Resources and Parks

Type: Letter dated December 14, 2004

Comment: It is not clear whether Ecology has used the Viable Salmonid Population (VSP) framework that is guiding development of the regional salmon recovery plan that is expected to be completed by 2006, as well as the supporting tools (e.g., habitat models). If not, the proposed flow regime to be adopted by the state could conflict with the regional recovery plan developed under the ESA. It would be important to ensure that the federal services comment on this possibility.

Response: Thank you for your comment. Ecology did not use the Viable Salmonid Population (VSP) framework that is guiding development of the regional salmon recovery plan in our assessment of instream flows. Fish habitat is but one of the values that is to be protected by the instream flow. Even if fish were the sole focus of the program, Ecology knows of no instream flow assessment techniques that use the VSP framework. Ecology believes the instream flow rule will lessen the degradation to instream flows by the exercise of new water rights in the future. It is not anticipated the proposed flow regime to be adopted by the state will conflict with the regional recovery plan developed under the ESA. That plan has very little to say about flow. In fact for hydrology, the principal focus of the recovery plan is to retain and increase forest canopy and restore and maintain riparian zones. As the region works to implement the Shared Strategy for Salmon Recovery in an adaptive management framework, the issue of flow and its relationship to recovery will be addressed.

Comment 1060

Commentor: David Monthie, King County Department of Natural Resources and Parks

Type: Letter dated December 14, 2004

Comment: We would support the objective of capping withdrawals so that total flows in the system allow for maintenance of a "normative" flow regime in terms of hydrologic characteristics. We appreciate that the Guidance Document points out the value of developing ecological flows that protect ecological functions that are important to preserving and protecting fish and wildlife populations. This is consistent with the views of the States Independent Science Panel with regard to flow and ecosystem conditions necessary to achieve recovery. We disagree with the inference in the Guidance Document that, in streams with a lack of historic flow data or with a highly altered hydrologic regime, the use of IFIM, PHABSIM or toe-width approaches is sufficient to establish an appropriate flow standard. Without some historic hydrologic context (useful in both cases), departures in flow conditions cannot be appropriately represented in such models. Even in data-poor or highly altered watersheds, the use of hydrologic models such as HSPF or DHSVM can provide a reasonable synthetic record that can be used as a precursor to more specific habitat-based models such as IFIM, thus increasing confidence in the predictions of flow-habitat responses.

Response: Thank you for your comment. The proposed rule does limit or cap withdrawals so that total flows in the system allows for maintenance of a "normative" flow regime in terms of hydrologic characteristics. Your comment about the Guidance Document, is noted, but not addressed as it is not germane to the rule.

Comment 1070

Commentor: Jon Hasselman, National Wildlife Federation

Type: Letter dated May 12, 2005

Comment: NWF submits these comments to highlight one critical issue that is not unique to the Stillaguamish, but as important here as anywhere else: the failure to consider the high likelihood of future changes to the river's timing, quality and quantity of flows associated with global climate change. While Washington state has been a leader in efforts to reduce and mitigate the effects of climate change, the reality is that climate change is here, and we must plan to address its consequences. Regrettably, the proposed rule provides for an increase in consumptive uses even though the science strongly indicates that instream flows will be dramatically affected over the coming decades due to climate change. We urge Ecology to revisit this proposal, taking into account this science.

Response: Thank you for your comment regarding global climate change. Your comment points out an important issue, one which we all will learn to address, and that the rule provides limited response to. The response to global warning and significant change to the water management framework would be to initiate a new rule making on water management. Please see section 170 on regulation review. We currently have no predictive capability on changes to stream flow in response to changes climate useful for administrative rule making. For the Stillaguamish system, a rain driven system, the increased winter precipitation predicted with global warming can be expected to increase flows. Even if known, climate change effects on the flow of water in streams and rivers in the Stillaguamish basin would not change the predicted flows of water needed for fish habitat. However, if the changes in flow pattern changed channel morphology, the habitat information used would not be as applicable. Given the achievability of the instream flows now global warming would only lessen the achievability. Please see response to comments 298, 997, and 1045) for more information on achievability of a flow.

Comment 1076

Commentor: Jon Hasselman, National Wildlife Federation

Type: Letter dated May 12, 2005

Comment: Perhaps more importantly, the rule and accompanying modeling do not account for the likely impacts to the Stillaguamish River from climate change, as discussed above. NWF contacted Ecology's consultants who performed the underlying hydrologic modeling, and confirmed that climate change was not considered in their flow modeling. NWF further confirmed that building the predicted hydrological impacts of climate change into the flow model would be technically feasible. NWF urges Ecology to redo the hydrologic analysis in a way that incorporates anticipated impacts of climate change. Since the proposed instream flows are typically not satisfied today, it appears highly likely that flows will fall short by an even larger margin in the future. In this light, Ecology's proposal to authorize future withdrawals from an already degraded baseline merits reconsideration.

Response: Thank you for your comment. Ecology agrees that impacts to the Stillaguamish River from climate change were not considered in the flow modeling. Ecology begs to differ with NWF that building a reasonably good predictive hydrological impacts of climate change into a flow model is technically feasible. Future flow scenarios can be developed, but major assumptions regarding precipitation and land use would have to be made. NEW recognizes that climate change models indicate for snow driven systems it appears highly likely that flows will be

less in the summer in the future. Ecology is unsure the same can be said for precipitation driven systems. However, given the limited achievability of flows now, any new water right (setting aside the reservation water) will be conditioned on or subject to instream flows. If the instream flow fall short by an even larger margin in the future, the right is still regulated the same.

Comment 1079

Commentor: Jon Hasselman, National Wildlife Federation

Type: Letter dated May 12, 2005

Comment: Given that streamflows are already inadequate, Ecology should seek to develop and implement measures that provide additional instream flows before authorizing any new uses. For example, efforts to encourage conservation and efficiency in domestic and agricultural uses could provide a buffer to accommodate new growth.

Response: Thank you for your comment. Regarding achievability of stream flow, please see response to comments 298, 997, and 1045. Ecology agrees with your comment that efforts to encourage conservation and efficiency in domestic and agricultural uses could provide a buffer to accommodate new growth. Please see section 120 of the rule, related to alternative sources of water to meet new needs.

Comment 1115

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Mount Vernon Hearing, March 24, 2005

Comment: First of all, Skagit County recognizes the importance of the Stillaguamish River basin as a producer of salmon and the importance of habitat in the Skagit -- in the Stillaguamish basin as it relates to the entire Puget Sound region. Having said that, we are opposed to adoption of this rule, not so much for this rule in itself, but because of the unresolved questions around the proposed instream flow rule for the Skagit River.

Response: Thank you for your comment; comment noted.

Comment 1121

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Mount Vernon Hearing, March 24, 2005

Comment: We question the science behind this rule. There is no direct correlation between flow and habitat loss, and there isn't necessarily a direct correlation between habitat loss and salmon productivity. We question whether using a weighted usable area standard to equate to that is appropriate, especially since the weighted usable area that we're referring to is habitat that is not available under natural flow conditions. We question the direct one-for-one connect between surface water and ground water. I've been taught that and I believe this -- that water almost always comes from someplace and it goes someplace else, but that doesn't mean that in every circumstance in every part of this basin a -ground water well will have a direct and immediate and one-for-one connection to a surface water body.

Response: Thank you for your comment. The use of Instream Flow Incremental Methodology and the modeling programs in PHABSIM (or PHABWIN, see response to comment 242) have been used extensively in instream flow settings. The models and their application have been challenged in court and found to be acceptable methods. Ecology agrees there is not necessarily a direct correlation between habitat loss and salmon productivity. Other factors contribute to salmon population gains or losses.

Concerning hydraulic continuity, existing studies indicate a substantial likelihood

that all waters within WRIA 5 are in hydraulic continuity with the surface waters covered by the rule. Your comment is correct that in every circumstance in every part of this basin a round water well will not have a direct and immediate and one-for-one connection to a surface water body. The rule does not say that is so. The rule provides an opportunity for ground water right applicants or others to show that a proposed withdrawal will not have an effect on the flow or level of the rivers and streams.

Comment 1130

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Oral testimony, Mount Vernon Hearing, March 24, 2005

Comment: In regard to the rule -- and we appreciate the comments that were given by staff earlier in the session that, in fact, Ecology had considered historical stream flows in fashioning the rule, which they did apparently in conjunction with a biological assessment that relates to fish populations. Although those are reassuring comments, I have to tell you that in looking at the rule we in Snohomish County have to believe, particularly in regard to the Stillaguamish River, that either very little weight was given to the historical flow record in the Stillaguamish River, or in fact, it had been ignored.

Response: Thank you for your comment regarding the use of historical flow records. Ecology respectfully disagrees Ecology ignored or failed to use relevant flow data from the basin. As part of the project stream flow hydrographs and associated expected frequency of occurrence was created. The stream flow analysis for the project was done by northwest hydraulic consultants, inc (nhc). Please see http://www.ecy.wa.gov/programs/wr/instream-flows/stillaguamishbasin_sepa.html. A review of that information will show Ecology used relevant data on stream flow from the basin.

Comment 1131

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Oral testimony, Mount Vernon Hearing, March 24, 2005

Comment: Our reference to the data, to the stream flow gage at Arlington which was referenced in the staff presentation, indicates that over the 70-year historical flow rate, that at that gage in Arlington the river has met the proposed August flow rate standard. . .by Ecology only six times in the last 75 years. And our analysis from Surface Water Management is that the river never met those standards at any time in August from 1923 to 1949, and it's never been met since 1976, and we have been unable to detect any clear historical reduction in flow which seems to account for this disparity. And so we would urge Ecology not to go forward with the rule at this point until there is really a -- another examination of the historical flow rates, which the -- which Snohomish County would be happy to assist and dialogue with Ecology in that regard, so that we can determine that, in fact, the true flow levels in the Stillaguamish are being recognized, and that we could therefore look for appropriate solutions.

Response: Thank you for your comment. As to the achievability of proposed instream flows, please see response to comments 298, 997, and 1045.

Comment 1132

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Oral testimony, Mount Vernon Hearing, March 24, 2005

Comment: The other thing that we want to point out, and I think you're all aware of the shared strategy initiative, which is to try to bring to resolution, particularly in the whole Puget Sound basin, an approach to water issues, including levels and stream flows, but also water

quality and a variety of other land-use-related things, in order to protect and enhance our aquatic life. But while you're in the process of developing and potentially issuing this rule, shared strategies is performing a low-flow study analysis in the Stillaguamish River. And Snohomish County, our Surface Water Management Division of Public Works which reports to the executive branch, is involved in performing some of that work on behalf of the shared strategy analysis. And so we would urge upon Ecology at this point to. . .simply not rush forward with this rule until the information that is going to be developed out of the shared strategy approach is available for Ecology's consideration. And Bill Leif from Surface Water Management -- and I think, Steve, you know Bill -- he will have the time lines available at least when that is going to be -- at least we anticipate what would be available to provide that information to the Department of Ecology.

Response: Thank you for your comment regarding the Shared Strategy pilot study. Ecology is also involved in the project and very familiar with the project. The pilot study is to develop a tool to assess landscape changes to hydrology and stream flow and then use Ecosystem Diagnostic Treatment (EDT) to model changes to fish populations. Ecology wants to stress the project is the development of an assessment tool. The project is not done as of early August and is not expected to be competed through peer review until sometime in September. In any event, the project is not a low-flow study analysis in the Stillaguamish River. The project will produce no new information related to what instream flow levels should be. However, the project may shed light on what changes to stream hydrology can be expected in the future given assumptions on land use, number of permit exempt wells drilled and withdrawal of water by water right holders. That information may be very relevant to a program focused at achieving instream flows. There is simply nothing in the Shared Strategy pilot study that will shed light on the issues addressed in the rule. Therefore Ecology sees no reason to stop the rule development process and wait for the study to be completed.

Comment 1138

Commentor: Hal Beecher, Washington Department of Fish and Wildlife

Type: Oral testimony, March 24, Mt Vernon and Arlington Hearings; letter dated March 24, 2005.

Comment: Mt. Vernon Hearing: The instream flows proposed for adoption are based on detailed instream flow studies at a number of locations throughout the Stillaguamish basin as well as . . . Supplementary analyses of instream flows needed for fish in other parts of the watershed. These studies are the result of collaboration among co-managers of the fish resources, the Department of Fish and Wildlife, Stillaguamish Tribe and Tulalip Tribes, federal agencies and the Department of Ecology. They resulted in recommendations for instream flows that will support good fish habitat in the Stillaguamish River basin.

Arlington Hearing: The instream flows proposed for adoption are based on detailed instream flow studies at a number of locations throughout the Stillaguamish basin as well as supplementary analyses of instream flows needed for fish in other parts of the watershed. These studies are the results of collaboration among co-managers of the fish resources, the Department of Fish and Wildlife, Stillaguamish Tribe, and Tulalip Tribes, as well as federal agencies and the Department of. . . Ecology. They resulted in recommendations for instream flows that will support good fish habitat in the Stillaguamish River basin.

Letter, March 24, 2005: The instream flows proposed for adoption are based on detailed instream flow studies at a number of locations throughout the Stillaguamish River basin, as well as supplementary analyses of instream flow needs for fish in other parts of the watershed. These studies are the result of collaboration among co-managers of the fish resources (WDFW, Stillaguamish Tribe, and Tulalip Tribes), federal agencies, and the Department of Ecology. They resulted in recommendations for instream flows that will support good fish habitat in the Stillaguamish River basin.

Response: Thank you for your comment and Ecology acknowledges that you've accurately presented a history of the Stillaguamish proposal's development and what the rule includes.

Comment 1139

Commentor: Hal Beecher, Washington Department of Fish and Wildlife

Type: Oral testimony, March 24, Mt Vernon and Arlington Hearings; letter dated March 24, 2005.

Comment: Mt. Vernon Hearing: We recognize that the rules proposed are intended to provide for but limit additional out-of-stream water use and diversion. We recognize that the instream flows we have recommended will not always be met in the river. Our studies indicate that when flows are below those recommended, fish production is reduced. Lowering instream flows below those proposed would result in more frequent and greater reduction of fish production and higher risks for salmonid recovery. The instream flows recommended will support conditions necessary for fish production to sustain harvest and to allow stock recovery.

Arlington Hearing: We recognize that the rules proposed are intended to provide for but . . . Limit additional out-of-stream water use and diversion. We recognize that the instream flows we have recommended will not always be met in the river. Our studies indicate that when flows are below those recommended, fish production is reduced. Lowering instream flows below those proposed would result in more frequent and greater reduction of fish production and higher risks to salmonid recovery. The instream flows recommended will support conditions necessary for fish production to sustain harvest and to allow stock recovery.

Letter, March 24, 2005: We recognize that the rules proposed are intended to provide for but limit additional out-of-stream water use and diversion. We recognize that the instream flows we have recommended will not always be met in the river. Our studies indicate that when flows are below those recommended, fish production is reduced. Lowering instream flows below those proposed would result in more frequent and greater reduction of fish production and higher risks for salmonid recovery. The instream flows recommended will support conditions necessary for fish production to sustain harvest and to allow stock recovery.

Response: Thank you for your comment, recognition of the achievability of the proposed instream flows, and impact of the withdrawal of the reserved water. Ecology agrees with your comments.

Comment 1197

Commentor: John Postema

Type: Oral testimony, Arlington Hearing, March 24, 2005

Comment: The -- the other one -- And I think you already found out that instream flow is based -- when. . . we were on the Ground Water Committee, this was about the Snohomish River system, and we talked about instream flow and assessment, we wanted to address the wells. And I thought we would take about 25 to 30 percent of wells. That was probably what I thought it was. Well, it turned out to be less than 2 percent. And so then we said, "You know what? Let's take all this water we're using, like the PUD and the Everett and the City of Seattle," let's put it back in the system and find out what it shows. And you know what? We still were 28 percent short. Close to 30 percent. We said, "How is that possible?" Well, I didn't know that the stream flow is based not on historical data. It is based on habitat, you know. And that's how - how the law apparently reads. But it means that we cannot meet any of those base flows. And I was just told that in some of the areas, in fact, the County will have those comments I'm quite sure, that we haven't met any of those base flows in the last 30 years.

Response: Thank you for your comment related to achievability of the proposed instream flows. Please see response to comments 298, 997, and 1045 for more on achievability. The comment is correct the proposed instream flows are to protect habitat. The commentor is incorrect in that historical stream flow data was used in the analysis.

Comment 1198

Commentor: John Postema

Type: Oral testimony, Arlington Hearing, March 24, 2005

Comment: So you're already -- have a big problem. Because it's artificially set way too high. You will not historically, but based on whatever we think that the fish will like to have at a particular time in August. So, you know, fish can't wait apparently. I've seen them wait and they wait until September when the first rains come in. But that apparently doesn't come into the picture. The bottom line is this: What good will it do to take of that 1.56 percent what we're using of water of the annual ground water recharge, what good will it do to fix this problem?

Response: Thank you for your comment on the achievability of the instream flows. Please see response to comment 1197. Ecology respectfully disagrees the instream flows are set artificially set way too high. The established flows are biologically defensible and hydrologically achievable. Ecology recognizes that fish behavior is an important factor in fisheries management and you are correct that salmonids very well may pool up in the lower part of a stream system and wait until September when the first rains come in.

Comment 1213

Commentor: Jody Brown, Stillaguamish Tribe of Indians

Type: Oral testimony, Arlington Hearing, March 24, 2005

Comment: This. . .instream flow is only being a part of salmon recovery would help in the recovery of the Chinook Salmon. But there are many other aspects of habitat, such as sedimentation, which I've heard several people talk about, and the temperatures and other water quality situations that are important for salmon for their recovery.

Response: Thank you for your comment that the instream flow rule is only a part of salmon recovery, will help in the recovery, and that there are many other aspects of habitat, such as sedimentation, temperatures and other water quality situations that are important for salmon for the recovery. Ecology agrees with your comments.

Comment 1231

Commentor: Calvin Joyner, US Forest Service, USDA

Type: Letter dated May 12, 2005

Comment: The US Department of Agriculture Forest Service is very interested in the process of protecting water resources in the State of Washington. The Forest Service fully supports the designation of instream flows necessary for the protection and restoration of wildlife, fish, water quality, scenic, and aesthetic values. The Forest Service direction for managing instream flows on National Forest Systems Lands (NFS) (i.e., public lands managed by the Forest Service) is similar to Washington State's Instream Flow Protection and Water Resources Program in many respects.

Response: Thank you for your positive and supportive comments.

Comment 1232

Commentor: Calvin Joyner, US Forest Service, USDA

Type: Letter dated May 12, 2005

Comment: We consider it important to develop instream flows that are associated with the natural hydrograph, as much as possible, and include provisions for variable flows. High flows are critical to maintaining the morphology and habitat characteristics of streams and to species using

those habitats. We support the Department of Ecology in this effort to protect the resources by creating both a low flow component and a maximum component of the instream flow allocation (New sections ((Washington Administrative Code)) WAC 173-505-050 and 173-505-100).

Response: Thank you for your comment and that the Forest Service supports both a low flow component and a maximum component of the instream flow allocation.

Comment 1234

Commentor: Calvin Joyner, US Forest Service, USDA

Type: Letter dated May 12, 2005

Comment: The success of the instream flow rule in meeting the needs of the wildlife, fish, water quality, scenic and aesthetic values of the Stillaguamish River relies heavily on the data and methods used to determine the desired flows. We hope that Ecology errs somewhat on the side of the resources to provide a margin of safety. We understand the relationship of water to the economic viability of an area, and that too restrictive, or unnecessarily large water reservations for instream flows, may unduly restrict development in the counties. However, once a water permit or right is given, it is extremely difficult, if not impossible to take back water for the common good.

Response: Thank you for your comment. Ecology agrees the assessment method used is important. Ecology used an Instream Flow Incremental Methodology assessment for the North Fork, South Fork, main stem, and significant tributaries. For the smaller streams the toe-width method was used. Ecology believes the flows are biologically defensible, hydrologically achievable, and necessary to fulfill our statutory obligation.

Comment 1236

Commentor: Calvin Joyner, US Forest Service, USDA

Type: Letter dated May 12, 2005

Comment: We commend the Department of Ecology and the Washington State legislature for recognizing the importance of instream flows and look forward to working with you on water resource management.

Response: Thank you for your supportive comment. Ecology looks forward to working with the US Forest Service as well.

Comment 1282

Commentor: Shawn Yanity, Stillaguamish Tribe of Indians

Type: Letter dated November 8, 2004

Comment: If Ecology continues to allow exempt wells in this area, even when limiting to in-house use when Pilchuck Creek flows fall below the proposed instream flow, then this will further exacerbate the summer low flow problem in Pilchuck Creek and instream resources could be severely harmed. The Tribe supports stronger language in the proposed instream flow rule that limits the number of exempt wells that could go in this area. We also support language stating that when senior instream flow water rights on Pilchuck Creek are below the proposed flows, all junior water rights and/or exempt wells must be shut off.

Response: Thank you for your comment regarding Pilchuck Creek flows and your request for language stating that when senior instream flow water rights on Pilchuck Creek are below the proposed flows, all junior water rights and/or exempt wells must be shut off. Ecology recognizes the issue and will regulate junior interruptible water rights when the flow of Pilchuck Creek is below the instream flow. However, use of the ground water reserve will be allowed in the Pilchuck

Creek basin until the reserve is allocated. Given the rural density and distribution of wells in the Pilchuck Creek basin, the impact to instream flows will be diminished, but still some effect. A strategy for achieving instream flows needs to be developed and implemented as part of the water management framework.

Comment 1363

Commentor: Mike O'Shea

Type: E-mail dated May 1, 2005

Comment: I sincerely request that a healthy instream flow for the Stilliguamish be established. This must be a healthy flow to enable the preservation and recovery of salmon and steelhead.

Response: Thank you for your comment. Ecology agrees that any stream flow protection policy should result in better protection of fish and streams. Generally, the proposed instream flows are based on spawning chinook salmon and juvenile steelhead trout rearing flow habitat needs. However, Ecology has often stated that establishment of an instream flow does not add or take water from a system. Achieving established instream flows is also part of the solution to the problem your comment calls out. For the relationship of the rule and instream flows to the Endangered Species Act and salmon recovery please see response to comments 1052, 1057, and 1241.

Comment 1377

Commentor: Bruce Reed

Type: E-mail dated March 26, 2005

Comment: I support adoption of an instream flow generally as critical to protect the Stilly's fisheries, wildlife, and ecology before they are gone forever. A limit on future groundwater use is prudent: if we use too much groundwater, we rob our streams and river of water, especially in hot, dry summers.

Response: Thank you for your comment and support to adopt an instream flow rule. Ecology agrees that groundwater contributes to the base flow of rivers and streams in the watershed. Ecology views the limit you note to be better incorporation of water withdrawn by the permit exempt well into the over all management framework. Any lawful water use under the ground water permit exemption creates a water right with both privileges and obligations. One of the obligations is curtailment of use if a senior right is not satisfied. Reconciling interruptible water rights and pubic water supply is the issues the reservation was designed to address. Incorporation of the reservation into local land use plans and resource management plans should lead to better overall water management. In addition, the rule provides a closure or seasonal closure to many streams and the ground water, that if withdrawn would effect the flow or level of the regulated stream. Please see section 070 of the rule.

060 - Lakes and Ponds

Comment 1281

Commentor: Shawn Yanity, Stillaguamish Tribe of Indians

Type: Letter dated November 8, 2004

Comment: The Stillaguamish Tribe views the language in WAC 173-505-060 to be un-protective of instream flows. According to Ecology's WRATS database, Lake Cavanaugh, a largely summer vacation home community, and its distributary Lake Creek currently have 48

permitted and certificated water rights from their surface waters totaling 0.75 cfs. In addition, there are currently 24 water right applications pending totaling 1.43 cfs in the WRATS system with priority dates senior to the proposed instream flow rule. Assuming approval of these water right applications, a total of 2.18 cfs could potentially be withdrawn from these systems, thus reducing flows to Pilchuck Creek, which already suffers from excessively low summer flows. If permitted and certificated water are counted alone, aside from exempt wells, this 2.18 cfs loss could create a 26% reduction of flow during a 90% exceedence flow event on Pilchuck Creek during Chinook spawning.

Response: Thank you for your comment that the Stillaguamish Tribe views the language in WAC 173-505-060 to be un-protective of instream flows. Ecology's statutory guidance on lakes and ponds is that lakes and ponds shall be retained substantially in their natural condition. (Please see RCW 90.54.020(3)) Withdrawal of lake water will be limited to 150 gallons per day for domestic in-house use. Ecology believes that will be protective of Lake Cavanaugh's water surface elevation from change due to riparian water use. As your comment points out, Lake Creek, the distributary to Lake Cavanaugh could have reduced flow because of the use of lake water. Ecology does not dispute your calculation of potential reduction of habitat in Pilchuck Creek, assuming the water diverted from the lake would have reached the Pilchuck Creek from Lake Creek. However, beaver activity and human manipulation of the lake outlet appear to influence the flow of Lake Creek more than the use of lake water. This points to management of activities at the lake outlet as perhaps a better way to control the flow of water in Lake Creek. A lake management district is not proposed in the rule for Lake Cavanaugh, but perhaps that should be considered by basin residents.

070 - Closures

Comment 277

Commentor: Joe Mentor, Jr., Skagit County

Type: March 28, 2005 letter to Ecology regarding proposed Skagit rule amendments

Comment: Ecology also previously acknowledged that "[If water supply becomes limited, people may make different decisions on where to work, live, and farm than they would make where the water supply is not limited."89 Ecology has not considered how instream flows, closures, or the small proposed groundwater reservation may impact development throughout the Skagit River Basin, or whether changes in growth patterns will comport with Growth Management Act planning or requirements. The importance of such considerations is apparent in light of projections that Skagit County's population may more than triple between 2000 and 2050.90

89 Wash. Dept. of Ecology, Final Environmental Impact Statement (Including Program Overview) Western Washington Instream Resources Protection Program 5 (1979).

90 See Economic and Engineering Services, Inc., Skagit County Coordinated Water System Plan Regional Supplement Table 7-3 (June 1999) (population projections provided by the Washington State Office of Financial Management).

Response: Thank you for your comment. Ecology respectfully disagrees Ecology has not considered how instream flows, closures, or the proposed groundwater reservation may impact development throughout the Skagit River Basin. Use of surface or ground water was looked at in the Stillaguamish basin for that part of the basin overlaid by Skagit County. It is Ecology's assessment that water from Lake Cavanaugh for those riparian to the lake, or from the reservation or from new source development will meet the projected needs for twenty years. Again there is no expectation that unfettered new water will be available forever to meet all development needs into the future beyond 20 or 50 years. That would be an unrealistic expectation in light of the finite amount of water available.

Comment 470

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Does the Department of Ecology believe that all surface water diversions and groundwater withdrawals in the Skagit Basin have the same effect on stream

Response: Thank you for your comment. Ecology does not believe that all surface water diversions and groundwater withdrawals in the Skagit Basin have the same effect on stream flows. Usually a larger surface diversion will have a larger impact on surface water flow than a smaller diversion from the same point since more water is taken out of the river. Generally, a larger ground water withdrawal will also have a larger impact to stream flow than a smaller withdrawal form the

Comment 953

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: Hydrologic analyses. This Rule contains assumptions that weaken Ecology's hydrologic analyses, resulting in an undue burden on the City. Ecology makes a broad and unsupported assumption that all groundwater in the basin is in direct hydraulic continuity with the rive; However, the 1996 USGS report on ground water in Snohomish County (WRIR 96-4312) identifies several geohydrologic units in the Stillaguamish basin with horizontal hydraulic conductivities that may range from thousandths of a foot to thousands of feet per day. We believe this heterogeneous geologic character likely provides two or more aquifers that are practically and distinctly separate from the river. For example, our wellhead protection plan, reviewed by both the Departments of Ecology and Health in 2004, identifies that the 10-year time of travel of ground water around our airport well, situated 2 to 3 miles from the Stillaguamish River, does not intersect the river. The Haller Park well field, however, draws water from the river on a daily basis. These highly variable time scales demonstrate distinctly different opportunities for managing water usage in the basin during critical periods that range from days to months.

Response: Thank you for your comment regarding hydrologic analyses. Your comment is correct that "…[b]ased on the hydrogeology of the basin, and the location and depth where ground water withdrawals generally occur, future ground water withdrawals have a high likelihood of capturing water that would result in impacts to surface water flows and levels in the Stillaguamish River basin." The rule also provides that if such hydraulic continuity and impacts to surface water flows do not exist, a ground water permit, not subject to instream flows, can be issued. Ecology is familiar with the study referenced, the 1996 USGS report on ground water in Snohomish County (WRIR 96-4312). You are absolutely correct that document identifies several geohydrologic units in the Stillaguamish basin with horizontal hydraulic conductivities that may range from thousandths of a foot to thousands of feet per day. The assumption that this heterogeneous geologic character likely provides two or more aquifers that are practically and distinctly separate from the river can be assessed by site specific pumping tests. You noted that Arlington's wellhead protection plan indicates that the 10-year time of travel of ground water around Arlington's airport well, situated 2 to 3 miles from the Stillaguamish River, does not intersect the river. The Haller Park well field, however, draws water from the river on a daily basis is noted. Ecology notes that Ecology does not review and or approve well head protection plans, those plans are reviewed and approved by Department of Health.

Comment 954

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: Consequently, the rate at which individual aquifers provide base flow support during low flow times has not yet been shown sufficiently to justify closing of the entire basin, especially appropriations of ground water. The closure of the basin is our most serious concern with the Rule, because it would limit new sources within our service area, create an additional burden in the evaluation in the impairment of senior and junior water rights, and require potentially very costly analyses to demonstrate a lack of detrimental instream impacts.

Response: Thank you for your comment. Ecology agrees that more site specific, well specific information can be used to determine which individual aquifers provide base flow support during low flow times and the time of that base flow contribution. That type of information can lead to more focused water management. However, Ecology disagrees with your comment that existing information is not sufficient to justify closing of certain stream reaches or streams. Existing water rights and instream flow needs are the basis for the closures. The closure does extent to ground water the withdrawal of which would impair regulated surface water. Ecology recognizes that assessment of hydraulic continuity and potential impairment of existing rights is Arlington's most serious concern with the rule. The burden to evaluation the potential impairment of senior and junior water rights exists with our without the rule. It is true the rule creates the instream flow right, another right to evaluate in the analysis. Finally, the rule does not limit new sources within Arlington's service area.

Comment 955

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: The closure also does not appear to be supported by a water balance. Ecology uses exceedence hydrographs to evaluate and define instream flow reservations throughout the basin, but we have not found a water balance that documents over-appropriation or helps to identify alternative water sources. Our understanding from Ecology presentations and meetings is that the Stillaguamish basin is not fully appropriated or over-appropriated. Given the constraints that a basin closure would place on us as low-impact water users (see below), basin closure would yield too few benefits at too high a cost.

Response: Thank you for your comment. Your comment is correct in one sense, in that the closure is not supported by a water balance. No mass water balance was done as part of the rule making process. Ecology did uses exceedance hydrographs to evaluate and define frequency of achieving stream flows. However the reservations were not established based on exceedance hydrographs, but rather through an assessment of impact to instream values during low flow times. Whether or not a basin or sub basin is over-appropriated or fully allocated would not be determined with a mass water balance. Your comment is correct that Ecology does not consider the entire basin to be fully appropriated or over-appropriated. The constraints that a basin closure may place, usually in assessment of existing rights, is the same for all water users in the basin. Whether or not the benefits of a closure out weight the costs was assessed in the cost benefit analysis. In total, the benefit of the rule out weights the costs of the rule.

Comment 956

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: Ecology apparently did not consider the range of effects of public water supplies on river discharges. For example, there is no consideration that although our well withdrawals are considered a consumptive use, that we actually augment river discharge on an annual basis through the return of our treated wastewater to the river in volumes greater than it is withdrawn. Using 2004 data, withdrawals from our riverside Haller Park well field exceeded wastewater

return flows on 66 days, most between June 15th and August 22nd. Even if all groundwater withdrawn by the City directly and immediately affected river flows, including the airport well, the net effect to the river on a peak demand day was a reduction of about 2 cfs, or about one-tenth of one percent of the instream flow proposed for the lower Stillaguamish River each August. For 300 days during the year, we actually increased the discharge of the river between 0.5 and 2 cfs, with an annual net discharge of more than 66 acre-feet more than we withdrew. The additional volume is the water we purchased from Snohomish County PUD (whose source is Spada Reservoir on the Sultan River) and from the City of Marysville (with some sources in the Snohomish basin).

Response: Thank you for your comment. The City is correct that Ecology did not consider the range of effects of public water supplies on river discharges. Within the rule making, there is no consideration that the City's well withdrawals are considered a consumptive use, and that the City actually augment river discharge on an annual basis through the return of treated wastewater to the river in volumes greater than it is withdrawn. There was and is no reason to consider such information in the development of the rule. Ecology does not doubt your data; it simply is not applicable to the rule development. That information and data may be applicable to the City in developing new water rights. RCW 90.03.255 provides, "The department shall, when evaluating an application for a water right, transfer, or change filed pursuant to RCW 90.03.250 or 90.03.380 that includes provision for any water impoundment or other resource management technique, take into consideration the benefits and costs, including environmental effects, of any water impoundment or other resource management technique that is included as a component of the application. The department's consideration shall extend to any increased water supply that results from the impoundment or other resource management technique, including but not limited to any recharge of ground water that may occur, as a means of making water available or otherwise offsetting the impact of the diversion of surface water proposed in the application for the water right, transfer, or change. Provision for an impoundment or other resource management technique in an application shall be made solely at the discretion of the applicant and shall not otherwise be made by the department as a condition for approving an application that does not include such provision." Should the City wish Ecology to consider wastewater plant return flows and river augmentation by the wastewater plant within the evaluation of an application for water right, the City can, at its discretion, file mitigation or other resource management technique plan.

Comment 957

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: Few uses of water are either 100% consumptive or 100% nonconsumptive. All uses can be classified as very consumptive or very nonconsumptive or somewhere in-between. These data demonstrate that although we hold one of the larger consumptive water rights in the basin, we are much closer to beneficial or zero impacts than we are to severe-detrimental impacts.

Response: Thank you for your comment. Please see response to comment 956.

Comment 959

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: We have several suggestions for creation of an improved Rule. First, basin closure should be dropped from the Rule; its need should be determined within the watershed planning process after full consideration of the basin water

Response: Thank you for your suggestions to improved the rule by dropping basin closures, please see response to comment 955. Given that no watershed planning process pursuant to

chapter 90.82 RCW has been initiated or planned for in the basin, it does not seem prudent to defer to a process that does not exist. This rule making does not preclude watershed planning taking place in the future.

Comment 960

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: Second, we believe the rule needs to identify those aquifers that truly provide the base flow needed to provide sufficient flows for sustainable and productive fisheries support. A robust and defensible approach might be to model base flow contribution areas using aquifer characteristics and well draw-down tests throughout the basin to define a continuity gradient from full to partial to none around mainstem channels and tributaries.

Response: Thank you for your comment. It was and is beyond the scope of this rule making to identify those aquifers that provide the base flow needed to provide sufficient flows for sustainable and productive fisheries support.

Comment 1035

Commentor: Becky Kelley and Ross Freeman, WEC and American Rivers

Type: Letter dated May 13, 2005

Comment: General support for the establishment of instream flows: We support the policy to close streams that may be impaired further by additional surface or groundwater withdrawals. Although we are aware of the sensitivity of several of the streams proposed for closure, and we believe it is appropriate to take such action, WEC and AR cannot speak to whether the proposed rule adequately addresses sensitive tributaries.

Response: Thank you for your comment and support to close streams when appropriate. Closures are one of the many tools used to manage water.

Comment 1125

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Mount Vernon Hearing, March 24, 2005

Comment: We have a concern in particular with the Lake Cavanaugh area. As I mentioned before, there is no public water available in that area, now or in the future. The rule seems internally inconsistent as well in saying that water is available through permitting, but, in fact, the Pilchuck basin is closed during the many months from May 31st, I believe, under the rule, until October 16th. That leaves us without a supply of water in that basin, and there's no provision made to. . .accommodate that.

Response: Thank you for your comment. In response to your comment, the rule language has been modified to clearly state that lakes and ponds are not subject to the stream closures. Water is available from Lake Cavanaugh.

080 - Stock Watering

Comment 329

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the

then-proposed Skagit Instream Flow Rule amendments

Comment: Under section 075, Ecology purports to exempt changes in the place of use from the normal change application requirements. There is no statutory basis for such authority and to create a category of changes which are exempted from review could result in injury to other water users. The stock watering reservation contained in the proposed amended rule allows for withdrawal of up to 130,000 gpd from surface or groundwater. Unlike the domestic reservation, the stock watering reservation does not distribute withdrawals to avoid potentially significant localized impacts. If withdrawals from the stockwatering reservation are confined to a small area, they could result in a potentially significant impact to localized resources.

Response: Thank you for your comment. The language of section 080 has been changed. Ecology is not exempting certain changes to water rights from the water right change process. Rather, Ecology views the stockwater tank, assuming it meets all the criteria listed, to be a direct diversion from the stream for stock watering

Comment 903

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated March 16, 2005 regarding the DNS for the proposed Skagit rule

Comment: Under the proposed amended rule, the stockwatering reservation applies throughout Water Resource Inventory Areas (WRIAs) three and four. This is in stark contrast to the domestic reservation's subbasin allocation. The amended rule fails to recognize the possibility that uneven development of stockwatering wells throughout the planning area could result in locally significant impacts. The impact of clustered well development may have significant impacts which have been ignored by the DNS.

Response: Thank you for your comment. Development of stockwatering wells under the reserve will be in areas zoned appropriate for stock, generally the rural areas. Ecology's understanding of lot size authorized in the rural area is that clustered wells (wells within 50 to 100 feet of each other) will not occur because of lot size.

Comment 1104

Commentor: Karen Allston, Center for Environmental Law and Policy

Type: Letter dated May 12, 2005

Comment: Because it is unclear which specific surface waters are reserved, and in light of the fact that certain surface waters are "closed" to further appropriations under WAC 173-505-070, this proposed reservation is not legally justifiable. Ecology provides no rationale or justification for allowing this reservation for all surface waters in the Stillaguamish Basin. It is unclear whether the two acre-foot per year reservation is additive, i.e., whether every year an additional two acre-feet per year is reserved, so that in 10 years, a total of 20 acre-feet is determined to be available for use under this reservation. In the absence of a requirement that users of this reservation meter and report their water use, there is no reasonable means by which Ecology can track this proposed water use and ensure the proposed reservations are not exceeded. Nor will Ecology be able to ensure compliance with this section absent requiring metering and reporting of water use under this reservation. CELP recommends this entire section be stricken and that stock water uses go through the permit system and receive water if Ecology determines it is available pursuant to applicable law.

Response: Thank you for your comment. The stockwater reserve for surface water is basin wide and statutory direction for it comes from RCW 90.22.040. Ecology does not have discretion to not include the reserve. The stockwater ground water reserve is for ground water, basin wide, and was changed to 20 acre feet, not the 2 as originally published. There was a math error that was not caught in calculating the reserve originally. The 20 acre foot reserve is an annual total.

The annual totals are not additive; the 20 acre feet is the total reserve. Ecology agrees that accounting for use under the reserve will be a challenge. Users of the reserve water will have to be identified and accounted for.

Comment 1189

Commentor: John Postema

Type: Oral testimony, Arlington Hearing, March 24, 2005

Comment: As far as the livestock watering, you will be required, if you want new water usage, to take your livestock away from the streams and rivers. And, by the way, there's about 90 of those creeks and rivers. So it's not only the Stilly; it's also what feeds into it, plus about 70 lakes and ponds. And you only will be able to use it for drinking water. This is what. . .the rule will say. Not for washing it or whatever. For drinking water. And, also, you will only be allotted so. . . many cows or cattle as the land can. . .support. Now, that's. . .a very far-reaching thing. I think that's, you know, that's why feed lots are not. . .included. Water usage will be metered and the amount of livestock shall be limited to the carrying capacity of the grazing lands.

Response: Thank you for your comment regarding livestock watering. Ecology respectfully suggests the commentor has misread or understood the proposed rule. Nowhere in the proposed rule does it say stock owners that want new water usage will be required to take your livestock away from the streams and rivers. Ecology acknowledges that fencing riparian zones and keeping stock out of the stream course helps improve water quality and water quantity. In fact public money is spent with willing land owners through the Snohomish Conservation District to fence riparian zones. For those stock owners using the ground water or surface water stockwater reserves, the rule contains no metering requirement. The limitation of the surface water stockwater reserve to the carrying capacity of the grazing lands is a statutory directive and not a discretionary action by Ecology. Please see RCW 90.22.040.

Comment 1265

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: In addition, the rule completely fails to provide adequate water for stock watering for dairies or other livestock operations that are deemed to be concentrated animal feeding operations (CAFOs) under the law. Such an overly restrictive reservation for agricultural water use may significantly injure the long-term commercial viability of agriculture within the County and the region.

Response: Thank you for your comment. Comment noted.

090 (1) Reservation Volume

Comment 215

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, March 8, Darrington hearing on Skagit rule proposal

Comment: The water budgets are focused on use for existing parcels. I think it's truly unfortunate that Ecology requested the building parcel data that it did without explanation as to why the data was being requested. It is taken out of context, and is not -- is highly misleading as an indication of future population projections. We also believe it's unfortunate that the Department has ignored the county's comp plan and the population projections, which we believe are a much more reliable indication of what the future needs will be.

Response: The water budgets for the Stillaguamish basin were determined based on how much water could be taken from the instream flow and not cause significant harm to aquatic resources, not how much water the County would like to have. The assessment of how much future needs in the basin can be served by the reserves was done by a parcel analysis and population projections. In the parcel analysis case, it is clear the proposed reservation will not serve all parcels if they all develop new permit exempt wells. That is not surprising as the reservation's purpose is not to meet all future needs. Using the twenty year population forecast, it appears clear the proposed reservations will meet the project needs.

Comment 229

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter regarding the proposed Skagit instream flow rule

Comment: Skagit County is concerned that the amount of water to be made available for out-of-stream uses under the proposed rule amendment is insufficient to meet anticipated needs. The County particularly objects to Ecology's failure to address water needs referenced in the County's Comprehensive Plan. This omission demonstrates the lack of balance in Ecology's current instream flow initiative

Response: Thank you for your comment. In fact, Ecology used the latest and best information we could get from Snohomish and Skagit Counties in regards to population projections.

Comment 231

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter regarding the proposed Skagit instream flow rule

Comment: Ecology's proposed amended rule fails to provide water to accommodate the County's long term-population growth8. The Water Resources Act allows Ecology to "reserve and set aside public water for utilization for specific purposes in the future."9 The agency's regulations for establishing a water reservation require proponents to base their proposals on 50-year population and related water demand projections.10 Under the proposed amended rule, however, reservation quantities are based on current zoning. We also are concerned the proposed water reservation is inadequate even to meet the water needs for those who will depend on it if the amended rule is adopted. Ecology is assuming that rural water users will withdraw approximately 350 gallons per day. According to the Washington Department of Health, however, they will need much more. As the Health Department explains, "[U]tility records throughout the state indicate a significant increase in maximum day demands for lot sizes in excess of one acre. It would be appropriate, unless evidence is presented which indicates a better design premise, to use a maximum day demand (MDD) of 800 gpd/ERU for residential lots in excess of one acre. . . ."11

8 See Chapter 173-590 WAC.

9 RCW 90.54.050.

10 WAC 173-590-070.

11 Wash. State Dept. of Health, Wafer Sysfem Design Manual, DOH Pub. #331-123 5-4 (August 2001)(emphasis in original). Ecology's proposed rule amendment also is inconsistent with the Ecology/ Washington Department of Health Water Availability Guidance Document. Under the water availability guidance document, an individual water supply may be considered adequate for purposes of RCW 19.27.097 only if the water source is capable of providing water to a residential dwelling in the amount of 400 gallons per day. Wash. State Depts. Of Health & Ecology, Guidelines for Determining Water Availability for New Buildings, Ecology Pub. No. 93-27 (1993). Furthermore, Ecology's proposed rule amendment is inconsistent with Ecology's Irrigation Efficiency Guidance Document. Ecology's proposed rule amendment includes a proposal that credits water withdrawals for return flows. The proposed amended rule assumes no return flows where a home is connected to public sewer system, even though the rule amendment allows for irrigation of 1/12 of an acre for each residence, and 50 percent return flow where no public sewer service is provided. Available studies indicate that only ten to 15 percent of all water used indoors for domestic supply purposes actually is consumed. Therefore, return flows should be estimated at a much higher level than Ecology suggests for indoor domestic supply purposes where no public sewer service is available. Furthermore, Ecology recently published a guidance document explaining its policy for determining irrigation efficiency and consumptive use. The irrigation efficiency guidance document explains how consumptive uses are calculated for irrigation purposes. This document should be used by Ecology to estimate return

flows under the Skagit instream flow rule amendment. Ecology should use its irrigation efficiency and consumptive use guidance document when determining return flows for outdoor use.

Response: Thank you for your comment. See response to comment number 230. In addition, Ecology respectfully disagrees the proposed rule fails to provide water to accommodate the County's long term-population growth for the next twenty years. The agency's regulations for establishing a water reservation do not require proponents to base their proposals on 50-year population and related water demand projections. Chapter 173-590-070(4) provides a petition for a reservation shall include the present and projected population in 10, 25, and 50 year increments. The rule does not say a reservation must meet 50 years of projected growth; rather the information is part of the contents of a petition. Ecology also disagrees the proposed rule amendment is inconsistent with the Ecology/ Washington Department of Health Water Availability Guidance Document. Under the water availability guidance document, an individual water supply may be considered adequate for purposes of RCW 19.27.097 only if the water source is capable of providing water to a residential dwelling in the amount of 400 gallons per day. The operative word in the guidelines referenced is “may.” The County is in the position of determining what an adequate source and quantity of water is for the purposes of issuing a building permit. Department of Health has approved many public water systems for new connections that do not provide 400 gallons per day per connection. See chapter 246-290 WAC.

Comment 232

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter regarding the proposed Skagit instream flow rule

Comment: Ecology's proposed reservation is insufficient to protect the viability of agriculture. The background document acknowledges the importance of agriculture, but the rule amendment itself frustrates this possibility. The document suggests agricultural water needs will be addressed at a later time. The reservation does not include water for agricultural needs. In fact, the proposed rule amendment states the reservation is "a one-time, finite resource," thereby suggesting no additional water supplies will be made available for agriculture. Ecology improperly limited the scope of the rulemaking by excluding water for future agricultural needs. Ecology has a responsibility under RCW 90.54.010 to balance the needs for fish, residential, commercial and industrial needs, and for productive agriculture. The rule should reserve water under RCW 90.54.050(1) to accommodate increasing needs for irrigated agriculture.

Agriculture is the leading industry in Skagit County. In 1997 there were 714 farms in Skagit County, farming an average of 131 acres each.12 This reflects a total of 93,534 farmed acres. The 2002 Census of Agriculture reported 62,074 acres of harvested cropland in 2002. Of this, approximately 14,732 acres are irrigated within the Skagit River watershed (excluding the Samish River basin). The vast majority of irrigated agriculture, roughly 78 percent, occurs below the Skagit PUD pipeline near Sedro Woolley. A significant increase in irrigated agriculture has occurred since 1959, and this increase has accelerated since 1987. Currently, irrigation demand peaks in July of each year, at approximately 88 cfs, falling to approximately 28 cfs in the low flow month of September. If growth continues at historic rates, between 25,000 and 52,000 acres will be irrigated by 2050.

For the projected future demand, the crop irrigation requirements range from 149 cfs to 310 cfs in July and 47 to 97 cfs in September. This translates to additional water required above the current level ranging from 61 cfs to 222 cfs in July and 19 cfs to 70 cfs in September. Based on projected demand, by 2050 water rights will need to be developed to irrigate up to 23,000 acres of agricultural land. Ecology's proposed amended rule does not account for projected agricultural needs. This oversight is extremely disconcerting to Skagit County because agriculture is the lifeblood of the County. As the American Farmland Trust recently reported, "[f]or every $1 collected in taxes on agricultural lands in Skagit County, only 51 cents in community services is provided by governments, thus producing a 49 cent surplus in revenue to support government services provided to other local taxpayers. By comparison, for every $1 collected in taxes on residential lands in Skagit County, governments must provide $1.25 in community

services. Skagit County farmers thus provide a significant tax benefit for other local taxpayers."

Response: Thank you for your comment. Your comment is correct in that Ecology's proposed rule has no agriculture reservation. Agricultural water needs can be met by use of existing rights, reallocation of those rights, or development of new water rights. Agricultural water use in Skagit County's portion of the Stillaguamish basin is very limited. The numbers provided in the comment pertain to the Skagit basin, not the Stillaguamish basin

Comment 233

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter regarding the proposed Skagit instream flow rule

Comment: Ecology's proposed water reservation is illusory. The proposed reservation of authority by Ecology under WAC 173-503-073(5), coupled with the failure to withdraw and reissue an instream flow simultaneously with the reservations, renders the reservations illusory. Under WAC 173-503-073(5), the Department retains the unilateral authority to "limit or restrict the further use" of a reservation. As discussed above, the County cannot rely on the reservation for planning and permitting and no property owner can be assured that their water supply source will be available in the future. Moreover, Ecology does not have the statutory authority to regulate exempt wells as revocable and interruptible water rights. The statutory scheme created by this section additionally fails to satisfy the fundamental purpose of the rule amendment to preserve and protect an adequate supply of potable water for domestic use under RCW 90.54.020(5). A reservation, to satisfy this obligation in setting instream flows, must be permanent and of equal priority to the instream flow.

Response: Thank you for your comment. Ecology respectfully disagrees the proposed reservations of water are an illusion. The volumes of water proposed in the reservation are real. The comment's points about the failure to withdraw and reissue an instream flow simultaneously with the reservations, renders the reservations illusory makes no sense for the Stillaguamish rule, an new rule making in a basin with an existing rule. The comment may make sense in the context of the Skagit basin and an existing rule. Proposed rule language at 173-505-090(6) potential changes in local land use changing or further uses from the reservation will be deleted from the final rule. Any future changes to the proposed reservation volumes or uses will be done through separate a rule making action.

Comment 250

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter regarding the proposed Skagit instream flow rule

Comment: There is an insufficient basis for using 2 percent of low flows to set acceptable reservations for domestic water supply. Ecology has arbitrarily assumed that 2 percent reduction in flow is a both a surrogate for an equivalent level of habitat loss and an acceptable loss of habitat to develop a reservation for domestic water supply. Given the diversity of stream channels morphology in various tributary basins, this is an oversimplification. There is also no basis provided for using 7Q10 flow in the calculation of water available for the domestic reservation. The method is very approximate and not suitable for allocating water. These concerns are set forth in the technical reports of Geomatrix and Hardin Davis, Inc.

Response: Thank you for your comment. Your comment is not applicable to the Stillaguamish rule making. Ecology did not use two percent of low flows (7Q10) to set acceptable reservations for domestic water supply. Ecology did use a percent of acceptable habitat loss for the main stem Stillaguamish River at Silvana to size the reservation and then allocated or prorate that volume of water to the sub basins. This may well be a simplified way of allocating the water, but a reasonable way. Ecology did not use 7Q10 flow in the calculation of water

Comment 251

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter regarding the proposed Skagit instream flow rule

Comment: A 2 percent reduction in habitat on the Skagit River would yield substantially more water for a domestic and agricultural use reservation. Ecology has arbitrarily failed to state what would constitute either 2% of the 7Q10 flow or 2% of the habitat determined in the IFIM study for the proposed rule amendment. Using the weighted usual area (WUA) analysis in the Duke Engineering Report, a 2% loss of habitat in the Skagit River would amount to between 90 cfs (for rearing) and 138 cfs (for spawning).55

55 Hardin-Davis, Inc Reports, Attachments G, I, J and K.

Response: Thank you for your comment. Your comment is not applicable to the Stillaguamish rule making. Please see the response to comment number 250.

Comment 252

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter regarding the proposed Skagit instream flow rule

Comment: The Ecosystem Diagnosis and Treatment Model indicates that the Skagit River and Nookachamps Creek can support substantially higher reservations. Mobrand-Jones & Stokes conducted a Ecosystem Diagnosis and Treatment (EDT) model analysis for the Skagit River and Nookachamps Creek.56 The EDT method is widely used by state and local agencies in salmon recovery planning and measuring the impacts to habitat from a various criteria including low flows. The Mobrand study, prepared for Chinook only, indicates that that there would be no loss in life history diversity, productivity and abundance at an 8% reduction in flow. The results were similar in the Nookachamps at flows between 4% and 8%. These results suggest that it is highly arbitrary for the Department to rely on limited data and over simplifications to regulate streamflows in a system as complex as the Skagit River Basin. The EDT report establishes that the 1999 IFIM study is out-of-date and needs to be revised. Ecology has not, for example addressed the increased flow that results from the Baker Dam Licensing settlement. This flow, an additional 1100 cfs in the river, is exactly the source contemplated for "filing the hole in the river" created by the 2001 rule.57

56 Mobrand Biometrics Inc. Report, Attachment 0.
57 AR 02071

Response: Thank you for your comment. Your comment about Skagit basin EDT modeling for the Skagit River and Nookachamps Creek is not applicable to the Stillaguamish rule making. In addition, EDT is a model that does not determine hydraulic information or detailed hydraulic numbers based on measurements. It is merely a listing of assumptions about how many fish could be produced assuming all of your assumptions are correct. The EDT model was designed for two purposes: 1) to spatially and temporally identify limiting habitat factors and 2) to evaluate the relative impact of multiple recovery and protection actions on salmon populations. A characterization of both current and historic river conditions is assembled for a given watershed/basin by rating each of 46 habitat attributes for every reach in the river. With a small number of exceptions (i.e., attributes that capture channel width, reach length, gradient, and channel unit composition), most EDT attributes are assigned an index rating based on a scale of 1 to 4 (See http://www.mobrand.com/MBI/pdfs/AttributeRatings-July2005-7_13_05.pdf for details).

Ratings are assigned using the best available information and metadata called “level of proof” are stored in the model to document the quality of information used to assign each rating. Quality of information ranges from empirical data (e.g., scour chain study, USGS gauge, habitat survey) to expert opinion. The relative amount of each information type used to rate EDT attributes varies among reaches and watersheds. Proposed habitat management actions have

been modeled in many Puget Sound watersheds using EDT to estimate the relative effect of one action versus another action on salmon population performance. The strength of this approach is to compare the relative impact of each of a suite of potential actions against one another in an attempt to determine how to "get the biggest bang for your buck." Less attention should be paid to the absolute predicted impact of any single action. EDT is not the proper tool for estimating the absolute impact of a single action on salmon population performance for the following reasons. First, EDT was not designed to answer such a question. Rather, EDT is as a scientific model structured as multiple hypotheses describing the relationship between salmon survival and habitat; not an empirical/statistical model necessary for forecasting future salmon population abundance. As such, it is intended and proper uses are stated above.

The second reason is related to the process for how actions are actually modeled in EDT. Modeling of actions in EDT is based entirely on expert opinion surrounding how habitat attribute ratings will change spatially and temporally due to implementation of the proposed action. As such, the modeler needs to assess to what extent the rating for each of the 46 attributes in each reach will change due to the proposed action. If the modeler's assumptions prove to be wrong in any way, so too will the EDT model output be incorrect (i.e., EDT's estimate of future salmon productivity, abundance, capacity, and life history diversity). Potential assumption errors are numerous due to the infancy of research on monitoring habitat action effectiveness. Two common assumption error types are omission of modeling a rating change in a given attribute and inaccurately assigning the magnitude of a rating change for attributes hypothesized to change due to the proposed management action. For these reasons, reliance on EDT derived estimates to evaluate the absolute impact of a single habitat management action, including a water withdrawal, on salmon populations is not scientifically defensible.

In very limited applications of EDT in the Stillaguamish basin, the overall fish population change predictions within EDT were not very sensitive to changes to the model attribute "changes in inter-annual variability of flows." Given the model is not sensitive to changes of flow attributes, it is axiomatic that fish population numbers generated by the model would not change much based on relatively larger, say five to ten percent, changes in flow.

Comment 267

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter regarding the proposed Skagit instream flow rule

Comment: The SBEIS for the proposed amendment rule ignores the fact that the quantity of water reserved in many sub-basins is inadequate to meet expected needs. Since exempt wells are the only available source of water for many rural businesses, small rural businesses bear a disproportionate impact. While some of the latent demand may be addressed by extension of municipal services into rural and suburban sub-basins, there is no discussion of where extensions are planned, when such service will be made available, or how costly such services may be. In the absence of such information, it is impossible to conclude that no disproportionate impact will befall small businesses.

Response: Thank you for your comment; however Ecology respectfully disagrees the quantity of water reserved in many sub-basins is inadequate to meet expected needs. Ecology's analysis shows the reserved quantites of water will meet expected needs for over twenty years.

Comment 270

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter regarding the proposed Skagit instream flow rule

Comment: As an initial matter, the primary statement in the analysis regarding Nookachamps Creek is contrary to representations of Ecology staff at public meetings. The analysis states that the Department considered closing the Nookachamps basin, but determined that it would allow additional withdrawals. On March 8, 2005, Dan Swenson stated at the public

hearing in Darrington, Washington that the reservation for the Nookachamps was already committed to development in the basin since April 2001 and would not be available to any future development. Ecology needs to be clear in the Nookachamps and in any other basin where its staff, who presumably will be determining the extent of available reservations in the basins, believe that the proposed reservations are not in fact available for future use.

Response: Thank you for your comment. Nookachamps Creek is not in the Stillaguamish basin and any comments related thereto are not applicable to the Stillaguamish basin. Ecology agrees with your comment that Ecology needs to be clear in any basin as to the extent of available reservations in the basin or if information indicates, a reservations is not in fact available for future use. Ecology knows of no basins or sub basins in the Stillaguamish basin where the reservation is not available.

Comment 276

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter regarding the proposed Skagit instream flow rule

Comment: Requiring expansion of public water systems to rural areas "may [also] require revisions to local comprehensive land use plans and/or update of the water system plan of the participating public water system."87 Ecology recognizes similar dangers associated with establishing instream flows. "Establishing instream flows may limit the potential for obtaining new water rights from an affected water body. In such cases, the lack of available water may limit or alter the nature of new development. Where water supplies cannot be obtained from another source or 'created' through water use efficiency measures, comprehensive land use plans may need to be amended. . . . Local governments may need to modify their comprehensive land use plans if establishment of an instream flow adversely impacts the projections water resource availability upon which such plans are predicated."88

87 Id. at 6-68

88 Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6-123-6-124.

Response: Thank you for your comment. Ecology respectfully disagrees the proposed rule requires expansion of public water systems to rural areas. The proposed rule simply does not do that. The rule does implement the Municipal Water Law of 2003. Connection to a municipal water supplier is governed by RCW 43.20.260.

Comment 278

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter regarding the proposed Skagit instream flow rule

Comment: Housing needs cannot be met absent guarantees of adequate potable water supplies. Skagit County believes that limiting water availability in many rural sub-basins will drastically alter development patterns and may necessitate systematic re-zoning. Changing the assumptions upon which Skagit County and major water purveyors planned will similarly significantly impact planning efforts and necessitate wide ranging amendments to water system planning. The Skagit County Comprehensive Plan utilizes low land-use densities to prevent urban development outside of the Urban Growth Area.91 Requiring development of public water systems and limiting rural development could encourages unplanned growth in urban areas and urban sprawl into areas outside the UGA. Of particular concern is how the amended rule, by not addressing agricultural water use, will promote the conversion of agricultural lands. None of these issues are adequately discussed or considered in the current rule-making. The Comprehensive Plan recognizes that numerous considerations, including potential conflicts between groundwater development and instream resources, may necessitate development of public water systems in rural areas.92 Accordingly, the Plan sets up a process for resolving such conflicts, calling for a coordinated approach to water system development. This coordinated approach is reflected in the

Coordinated Water System Plan and the Comprehensive Plan (CWSP) and ensures that as water system planning continues, governments consider the potential impact service extensions will have on development patterns.93 The proposed rule amendment is counter to this coordinated approach and effectively demands revision to the County's CWSP.

91 Skagit County Comprehensive Plan, 4-8 (2003).
92 Skagit County Comprehensive Plan, 10-13 (2003).
93 Economic and Engineering Services, Inc., Skagit County Coordinated Water System Plan Regional Supplement, 1-2 (1999

Response: Thank you for your comment. Ecology respectfully disagrees the proposed rule requires development of municipal water suppliers and or limits rural development that could encourages unplanned growth in urban areas and urban sprawl into areas outside the UGA. As to the particular concern that the absence of an agricultural reserve in the proposed rule will promote the conversion of agricultural lands, Ecology has found no evidence that water has limited agriculture production or was a principal factor in the conversion of agriculture land to other uses in the basin. Based on the crops produced in the Stillaguamish basin, there appears to be ample water under existing rights and claims to meet irrigation demands.

Comment 279

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter regarding the proposed Skagit instream flow rule

Comment: Conflicts with Skagit County Critical Areas Ordinance. Skagit County's Critical Areas Ordinance (CAO) regulates impacts to critical areas including wetlands and wetland buffers, fisheries habitat and geologic hazards. The amended rule fails to recognize potential conflicts which may arise where public water service extension under the amended rule will result in disturbance to critical areas which could be avoided by well development.

Response: Thank you for your comment. Ecology respectfully disagrees with the County's assertion that the rule somehow requires extension of public water systems. They rule simply does not require expansion of water systems. The rule states that use of the reservation water is not available, if public water is available. The County along with municipal water suppliers, not Ecology, determines where those supply lines and other infrastructure will be located.

Comment 280

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter regarding the proposed Skagit instream flow rule

Comment: Ecology's failure to consult with Skagit County on its Skagit instream flow rule and proposed rule amendment violate the State Building Code. As reflected in the background document, Ecology is directing Skagit County to assume additional responsibilities under RCW 19.27.097. The statute allows Ecology to adopt such regulations, but only after consulting with affected local governments.94 Ecology never consulted with the County to determine how the proposed amended rule would impact county planning or the provision of services in rural areas.

94 RCW 19.27.097(3).

Response: Thank you for your comment. Ecology respectfully disagrees that Ecology failed to consult with Skagit County on the proposed instream flow rule. Several meetings were held with County staff prior to issuing a draft of the proposed rule in December of 2004. Additionally, Ecology is not directing Skagit County to assume additional responsibilities under RCW 19.27.097 or Chapter 58.17 RCW. The County is obligated under those statutes to make certain findings regarding potable water for buildings requiring potable water and or subdivision of land. The proposed rule creates new water rights (reservations and instream flows) that should now be considered in the deliberations of the County. The decisions the County has to make after the rule are the same as before the rule.

Comment 287

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Subsection 020 concludes that the proposed reservation is "adequate." This is not true given that the water contained in the proposed reservation is insufficient to supply existing developable parcels. Furthermore, the making of legislative findings are beyond Ecology's delegated authority.

Response: Thank you for your comment. Water volumes contained in the proposed reservations is sufficient for the projected twenty year growth. The parcel analysis done for this rule making indicates over 9000 parcels could be served by the reservation using the 350 gpd figure. If all of the parcels are on septic system, the reservation can serve over 18,000 parcels.

Comment 293

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: The County and public water purveyors planned for expansion of water systems into rural areas.7 These plans focused on in-fill and provision of services in Urban growth Areas, cautioning that "[as the land use and WSPs for the rural area are further developed, the routing of water system distribution and transmission lines through previously unsewered areas should consider their potential impact on development patterns."8 Ecology ignores this caution, necessitating provision of service to high demand areas rather than comprehensive growth planning.

7 See Economic and Engineering Services, Inc., Skagit County Coordinated Water System Plan Regional Supplement, 8-1 - 8-14 (1999).
8 Economic and Engineering Services, Inc., Skagit County Coordinated Water System Plan Regional Supplement, 1-2 (1999).

Response: Thank you for your comment. Please see response to comment 222. The language cited regarding consideration of the impacts if a water system is in a rural area is for the local government to consider within the watershed planning process. The local governments opted not to participate in the watershed planning process for the Stillaguamish basin. The language is focused at a planning level review. Ecology would consider any new application for public water in a rural area in light of local government plans, as part of the public interest test. The rule does not necessitate provision of service to high demand areas rather Ecology looks to the local government under its comprehensive planning to make such decisions. The State looks to Skagit County to plan under the GMA. The use of public water systems in either an urban or rural area to meet water needs is a local decision, guided in part by the Coordinated Water System Plan, local ordinances, and State law.

Comment 303

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: The 1.657 cfs contained in the proposed domestic reservation represents a small fraction of recognized needs and the amount of water which can be withdrawn without harming instream flow resources. In light of these findings and the fact that the quantity of water reserved in the proposed reservation is insufficient to meet anticipated demands, Ecology should increase the amount of water contained in the proposed domestic reservations.

Response: Thank you for your comment. The proposed reservation of water is five cubic feet per second as measured at the Stillaguamish River at Silvana. The reservation volume of water was determined based on a volume of water that could be withdrawn, the associated loss of habitat, and the long-term significance of that lost habitat on fish. Ecology does not believe it can increase the amount of the reserves without a corresponding long-term impact to fish and other instream flow values.

Comment 309

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Domestic Ground Water Reservation: Subsection 073(1) describes the proposed reservation as "adequate." However, the proposed reservation is inadequately sized to meet either existing or anticipated demand. Many of the subbasins lack sufficient supply to serve all available lots and the reservation proposed in the Fisher Creek subbasin is insufficient to accommodate exempt well development which has occurred since April 15, 2001, the effective date of the existing instream flow rule. The primary purpose for amending the rule is to respond to statutory obligations to ensure adequate water is available for out-of-stream uses. By failing to adequately address existing needs the proposed reservation fails to meet its essential purpose. Projections indicate that approximately 100 cfs of uninterruptible flows are needed to accommodate County-wide demand over the next 50 years. This is within range of variability for existing stream measuring devices and half the water which was previously determined to be available for appropriation in the Skagit River Basin.

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish instream flow rule making. The adequacy of reserved water to meet future needs is addressed in comment response 210.

Comment 310

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Subsection 073(2)(d)(i) dictates that the reservation is available only in areas where local governments enact requirements identical to those contained in the proposed amended rule. Ecology lacks authority to demand that municipalities enact ordinances or other regulations; any action exceeding Ecology's delegated authority is invalid.

Response: Thank you for your comment. The proposed Stillaguamish rule has no Subsection 073(2)(d)(i). However, a similar idea was proposed in section 173-505-090(2)(d)(i) that conditions on a building permit or subdivision would contain the reservation restrictions. That language has been deleted, however local recognition of the reservation and consideration of the reservation in local decision making is still an issue. Please see response to comment 240.

Comment 317

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Ecology's proposed rule amendment is inconsistent with Ecology's proposed Samish and Stillaguamish instream flow rules. The proposed Samish and Stillaguamish instream flow rules follow the guidance document by proposing a reservation for future out-of-stream water

uses totally about two percent of total low flow. The Skagit rule amendment only provides this amount where Ecology estimates lower growth levels. Using a habitat-based flow level in one basin and not in another invites confusion and a number of unintended consequences. There are a several other inconsistencies between the three proposals, which are highlighted in a side-by-side comparison attached to this letter and incorporated by reference.14

14 Ecology has explained inconsistencies between the Skagit rule amendment and other proposals based on the fact that the Watershed Planning Act provides Ecology to fashion rules that are tailored to specific recommendations of watershed planning groups. Watershed planning was not successfully completed in the Samish watershed, and Ecology and stakeholders agreed not: to undertake watershed planning in the Skagit River Basin because implementation of the 1996 MOA already was underway by the time the Watershed Planning Act passed the following year. It is disingenuous for Ecology now to adopt a rule that "punishes" Skagit County for the conscious decision of all parties to focus watershed planning activities on the Samish Basin instead.

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish instream flow rule making. The adequacy of reserved water to meet future needs is addressed in comment response 210. Ecology recognizes that watershed planning pursuant to chapter 990.82 RCW was Watershed planning was not successfully completed in the Samish watershed, and did not occur in the Skagit or Stillaguamish basins.

Comment 323

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: . . .Ecology's proposed amended rule is inconsistent with the agency's regulations for establishing a water reservation.l6 The Water Resources Act allows Ecology to "reserve and set aside public water for utilization for specific purposes in the future."l7 Ecology's regulations set forth the procedures to be followed and the requirements for petitioning for a reservation of water. Ecology regulations require that petitions for reservation of water must be based on 50-year population and related water demand projections. Ecology failed to consider long-range population projections when determining the amount of water to be reserved under the proposed reservation.
16 See Chapter 173-590 WAC.
17 .

Response: Thank you for your comment. Chapter 173-590-070(4) provides a petition for a reservation shall include the present and projected population in 10, 25, and 50 year increments. The rule does not say a reservation must meet fifty years of projected growth; rather the information is part of the contents of a petition. A reservation, as a water right, must be for a reasonable projected beneficial use. Planning horizons commonly used are six and twenty years. Ecology considered long time frames for projected demand, and those beyond twenty years are simply too speculative.

Comment 324

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Establishment of Subbasin Management Units and Reservation Quantities by Subbasin Management Unit. Some proposed reservations contain insufficient water to meet the needs of wells developed after April 15,2000, the effective date of the Skagit instream flow rule. Where "reserved" water will be used to accommodate existing residences, it is inappropriate to characterize these subbasins as open.

Response: Thank you for your comment. Ecology respectfully disagrees that reserved water will be used to accommodate existing residences. The reservations proposed in the rule are for

new uses of water, not existing uses of water nor does the Skagit instream flow rule have any bearing on residents in the Stillaguamish basin.

Comment 325

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: The amount of water contained in the proposed reservations is generally insufficient to accommodate existing lots or recognized demand for additional housing units. In undersizing the proposed reservations, Ecology ignores its obligations to provide safe and adequate water supplies.

Response: Thank you for your comment. The amount of water contained in the proposed reservations is generally sufficient to accommodate projected demand for the next twenty years. In creating he proposed reservations, Ecology satisfies its obligations to provide adequate and safe supplies of water to satisfy human

Comment 326

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: In its instream flow guidance document Ecology advocates a flow-based approach to sizing groundwater reservations. However, in sizing the proposed reservation for the Lower, Middle and Upper Skagit sub basins, Ecology arbitrarily departed from this approach by focusing on the number of buildable lots. By undersizing the proposed reservations in these sub basins, Ecology severely restricts Skagit County's ability to accommodate increased growth in areas where

Response: Thank you for your comment. The comment is not applicable to the proposed rule. Generally, Ecology used a percent of habitat loss converted to a water flow or volume to size the groundwater reservations.

Comment 328

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: The approach to reservation sizing advocated by Ecology in the Guidance document is to limit reservations to an amount which will result in no more than a one to two percent loss in habitat during low-flow periods. The one to two percent figure represents an amount that biologists concluded would not significantly impact the long-term sustainability of fish populations. There is no hard science supporting the one to two percent assumption, nor is there any science supporting a choice of where, within that range, Ecology chooses to set the reservation - both are the exclusive province of "best professional judgment."

Response: Thank you for your comment, please see the response for comment 306. Science was used in determining the percent fish habitat loss for each increment of stream flow lost. The decision on what percent habitat loss to allow was done by Ecology management, a policy choice informed by science, but science. Ecology has the authority and discretion in allocating water to make these water management decisions. The 1 - 2% number was chosen by management as a conservative number balancing because it was a small number. Ecology management was required to balance between protecting and preserving fish as required in the Water Resources

Act of 1971 (Ecology has no option but to stop any further degradation of fish and fish habitat when giving out new water rights) and providing trying to also provide for a drinking water supply for rural domestic households. These two objectives from the Legislature require balancing the allocation of remaining water. directly conflict with each other but Ecology was mandated by the Legislature to determine the balance.

Comment 337

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: . . . [T]he domestic reservation proposed for some subbasins are inadequate in size to guarantee an uninterrupted supply of water to all existing residents. The proposed amended rule, by failing to ensure an adequate, uninterruptible supply of water to all existing residents fails of its essential purpose. The domestic reservations proposed for several other subbasins are insufficient to satisfy planned and projected growth. Ecology's proposed rule creates a conflict with existing growth management plans and requirements without offering any solutions or even adequately disclosing the magnitude of the likely shortfall.

Response: Thank you for your comment. Ecology recognizes that the reservations of water are finite and that they will be fully used someday - assuming growth beyond the current twenty year population projection occurs. Given a long enough time-period, it is reasonable to say the reservations will be used. The Legislature recognized the finite and variable supply of water by adopting the Prior Appropriation doctrine into law many years ago. It is axiomatic that at some point in time, available supplies will be allocated. At that point in time, new or additional water uses will have to be met from reallocation of existing supplies or new supplies developed in areas where instream flow and existing rights are not impaired. The proposed rule provides for both.

Comment 445

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: . . .[T]he number of parcels that will be counted against the reservation has not been adequately disclosed. The rule would require existing water right holders to use water from the reservation to maintain an uninterruptible supply. This is a Hobson's Choice for many of the County's current rural residents that in fact is no choice at all. Skagit County's preliminary data suggests that in many subbasins this would result in immediate stream closures if new homes constructed since April 2001 are counted against the reservations.

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish basin since there is no effective rule. This is a new rule making and any existing water rights will be senior to rights created by this rule making. The rule would require existing water right holders to use water from the reservation to maintain an uninterruptible supply. However, future rural domestic users would have to use water from the reservation to maintain an uninterruptible supply

Comment 448

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Application of the reservation to a specific date is arbitrary and without a technical basis, because the stream flow and precipitation data used to calculate the reservation

quantities cover various time periods. Will withdrawals from exempt wells developed after April 14, 2001, the effective date of the existing Skagit instream flow rule, automatically be debited against proposed reservations? If so, how much of the water budgets established under the rule amendment already have been used by permit arid exempt withdrawals developed since April 14, 2001, the effective date of the existing Skagit instream flow rule?

Response: Thank you for your comment. Ecology respectfully disagrees application of the reservation to a specific date is arbitrary. The reason the priority date of the reservation is the date the rule is effective is because the statute says so. Please see RCW 90.03.345. There is no discretion on this point. Comments related to wells developed April 14, 2001, are not applicable to this rule making.

Comment 455

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: What is the justification for not using 2% of the 7Q10 of the Skagit River when setting an allocation for the mainstem? Ecology has stated that these amounts were not used because they are "too big." This is not a scientific basis or best professional judgment. The same criteria should be applied across the board unless you can prove scientifically that there is some reason not to.

Response: Thank you for your comment. The Stillaguamish basin reservation was not set using 2% of the 7Q10 of the Skagit River. For reservation information please see response to comments 215, 303, and 306.

Comment 456

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: How do you justify a proposed reservation of 1.65 cfs in the Skagit River Watershed where the average annual yield is 12 million acre feet per year? In the Samish River Basin, Ecology has recommended a reservation of 1.0 cfs while the Samish River yield is 177,300 acre feet/yr or 1.5% of the average annual Skagit River streamflow. In the Stillaguamish River Basin, Ecology has recommended a reservation of 2 cfs on the North Fork Stillaguamish River while the yield of that river is 1,370,000 acre feet/yr or 11.4% of the Skagit River. The same proportion used in the Stillaguamish applied to the Skagit River would be 18 cfs and the same proportion in the Samish applied to the Skagit River would lead to a reservation of 68 cfs. The Entiat River has a proposed rule with a reservation of 5 cfs. The yield at the point of measurement for the Entiat River is 367,300 acre feet/year or 3% of the Skagit River's annual yield. The same proportion of the reservation to the yield of the river applied to the Skagit River would result in a reservation of 163 cfs. What is the scientific justification for such a small reservation on the Skagit River?

Response: Thank you for your comment. The question as to what is the scientific justification for such a small reservation on the Skagit River is not applicable to the Stillaguamish rule making.

Comment 855

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program

Comment: Attachment 1 of the DNS shows the number of potentially developable parcels within each subbasin and the estimated number of parcels which could be developed under the rule. The DNS fails to provide any analysis of how the number of buildable lots was calculated. Ecology requested this information from Skagit County but did not frame the request in context of the proposed rule. It appears that the data is inaccurate in some of the calculations.

Response: Thank you for your comment. Within the Stillaguamish rule making, the number of potentially developable parcels within each sub basin and the estimated number of parcels which could be developed under the rule was not done. The reservation of water for rural domestic supply is not limited to sub basins, it is watershed wide. The number of potentially buildable lots was determined by parcel analysis at the watershed scale. All tax parcels with a building were subtracted from the overall number of parcels. A simplifying assumption used was that if a parcel did not have a building, it was a potential buildable lot. Ecology is unaware of inaccurate data regarding parcels in the Stillaguamish basin obtained from either Skagit or Snohomish Counties.

Comment 932

Commentor: Jodi Slavik, Building Industry Association of Washington

Type: Letter dated April 25, 2005

Comment: Not only does Ecology trump the statutory allowance of exempt wells by rule, but it also disallows any consideration of future water availability. Nowhere in the proposed instream flow rule does it provide for additional future water reservations or a process to consider such additional reservations. In fact, the rule specifically states that "The reservation is a one-time, limited exception to the instream flows and closures. Once the reservation is fully allocated, it is no longer available." WAC 173-505-090(6) In doing so, it creates an absolute limit on the number of wells, contrary to RCW 90.44.050, and it forces future ground water withdrawals for single or group domestic uses to apply for a permit.

Response: Thank you for your comment. Ecology respectfully disagrees that the rule disallows any consideration of future water availability. WAC 173-505-110, “Future permitting actions” is all about future water availability. You are correct, that the proposed instream flow rule does not provide for additional future water reservations or a process to consider such additional reservations. There is no need to. A rule making in the future can certainly draw upon the statutory foundation used for this rule and amend or revise the reservation. The rule specifically states that "Review of this chapter may be initiated by the department whenever significant new information is available, a significant change in conditions occurs, or statutory changes are enacted that are determined by the department to require review of the chapter”. Please see Section 170 of the rule. The rule does not create an absolute limit on the number of wells nor force future ground water withdrawals for single or group domestic uses to apply for a permit. In the Stillaguamish basin the projected population for the rural areas (where the reserved water will be used) over the next twenty years will not exhaust the reserved volumes.

Comment 933

Commentor: Jodi Slavik, Building Industry Association of Washington

Type: Letter dated April 25, 2005

Comment: The finite water reservation conflicts with RCW 90.54 and RCW 36.70A. The Water Resources Act of 1971 holds the following to be a fundamental guiding principal: "Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs." (RCW 90.54.020(5)) Moreover, domestic water use is regarded to be beneficial, and allocation is determined on a cost-benefit basis, including consideration of public benefit.

Response: Thank you for your comment. Ecology respectfully disagrees that a finite water

reservation conflicts with RCW 90.54 and RCW 36.70A. RCW 90.54.010 states in part, "…Although water is a renewable resource, its supply and availability are becoming increasingly limited, particularly during summer and fall months and dry years when demand is greatest. Growth and prosperity have significantly increased the competition for this limited resource. Adequate water supplies are essential to meet the needs of the state's growing population and economy. At the same time instream resources and values must be preserved and protected so that future generations can continue to enjoy them." The law itself recognizes the limited nature of water and competing demands. The entire idea of the Water Code and water right permitting is to allocate a scarce resource that has many people competing for it to use. Ecology agrees that domestic water use is regarded to be beneficial. However, its allocation is not determined on a cost-benefit basis, rather the allocation is determined by the assessment required by RCW 90.03.290. That consideration does including consideration of public benefit or public interest. Also please see responses to comment 210.

Comment 935

Commentor: Jodi Slavik, Building Industry Association of Washington

Type: Letter dated April 25, 2005

Comment: WAC 173-505-090(8) increases local liability, undermines growth management planning, encourages lawsuits, and further impairs water withdrawals. Ecology continues to exceed its authority in WAC 173-505-090(8). The provision states in part: "(5) If existing county and city land use decisions, including zoning changes and building permit and sub-division approvals, allow for increased densities that adversely affect small tributaries and other flow-sensitive areas, the department may limit or restrict the further use of the reservation." (emphasis added) This section contradicts RCW 90.44.050 because it blatantly prohibits exempt wells based on a subjective standard wielded by Ecology. Nor does this provision speak to future local government land use decisions; it applies to all existing plans and regulations that were painstakingly crafted, debated, and adopted based on the balancing required in the GMA. Through this provision Ecology could attempt to regulate land use, a role expressly reserved to local governments. Ecology is not granted review and approval authority of GMA comprehensive plans and their development regulations, and it should not attempt to do so through regulation.

Response: Thank you for your comment. Ecology notes that commentor reference to WAC 173-505-090(8) appears to be incorrect since the proposed rule does not contain that section. However, WAC 173-505-090(6) does have the rule language referenced. Proposed rule language at 173-505-090(6) related to potential changes in local land use changing or further uses from the reservation will be deleted from the final rule. Any future changes to the proposed reservation volumes or uses will be done in a new rule making action. Please see response to comment 233. The provision as originally proposed was to recognize that things change and assumptions on use of reserved water and or the impact of reserved water use may not go as planned. If things do not go as planned, a new rule making effort can be initiated. Ecology, through the proposed rule, never had nor has an interest in regulating land use, a role expressly reserved to local governments. Finally, Ecology is not looking for approval authority of GMA comprehensive plans and their development regulations through water resource rules and regulation. Rather, Ecology will inform local governments with respect to water as provided for by statute. For example, see chapter 90.54 RCW.

Comment 937

Commentor: Jodi Slavik, Building Industry Association of Washington

Type: Letter dated April 25, 2005

Comment: The 350 gpd generalized withdrawal amount is excessive and further limits exempt wells. WAC 173-503-090(5)(a) establishes a generalized withdrawal amount of 350 gpd

to determine reservation usage. However, this amount is double that of average household use. The Skagit Public Utility District, in neighboring WRIA 3 and 4, pinpoints average daily household use at 176 gallons. Given that Ecology's bloated withdrawal amount of 350 gpd will cut the number of exempt wells in half, the agency should be required to determine and use accurate withdrawal amounts. However, Ecology is not directed to find other information ("This amount will be reconsidered if and when sufficient information is collected and verified…")

Response: Thank you for your comment. Ecology respectfully disagrees the 350 gpd generalized withdrawal amount is excessive and further limits exempt wells. In fact, most of the future development that uses the reservation will be in areas not served by sewer and the generalized withdrawal amount will be 175 gpd. Thank you for the comment that "… Skagit Public Utility District, in neighboring WRIA 3 and 4, pinpoints average daily household use at 176 gallons." That further supports the 175 gpd figure. Also please see response to comments 314, 315, 320, 865, and 866.

Comment 947

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: In providing reserves for rural out-of-stream uses, and in closing the basin while excluding any provision for public supplies, this Rule is not consistent with direction given in recognized plans developed to meet growth management objectives. This Rule would provide a ground water reserve for future rural growth using permit-exempt wells, and a surface water reserve for stock watering, but it ignores the demands of population growth in cities and urban growth areas (UGAs). It appears to assume that existing public supplies are adequate to meet needs for growth, and even requires rural growth outside of UGAs to connect to public systems whenever possible. The 10-year GMA Comprehensive Plan update proposed by Snohomish County for approval in 2005 contains 3 alternatives, and all alternatives would allocate growth so that about 80% of the county population would be contained within cities and UGAs, and 20% would be distributed in rural areas. Consequently, this Rule would provide for out-of-stream uses in a fashion that is both inequitable to public purveyors, including Arlington, and inconsistent with direction given under GMA.

Response: Thank you for your comment. Ecology respectfully disagrees that in closing the basin the rule concurrently excludes any provision for public supplies. Rather the rule provides in section 110 a framework for future water right decisions. Your comment is correct, the rule provides a ground water reserve for future rural growth using permit-exempt wells, and a surface water reserve for stock watering. The rule does not ignore the demands of population growth in cities and urban growth areas, rather Ecology assumes, based on analysis of existing rights and current uses, those needs will be met by existing or new municipal water providers that use the normal water right permitting process. In fact, most of the projected demand, six and twenty year, for municipal water systems that are part of the North Snohomish Coordinated Water System Plan will be met from existing rights. Ecology does not see how the rule is inequitable to public purveyors, including Arlington. As to the proposed rule being inconsistent with direction given under GMA, please see response to comments 843 through 848.

Comment 950

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: A growth-related economic effect of this Rule is the incentive that a rural reserve would create to develop in rural rather than urban areas. Water from exempt wells for homes in rural areas would be quite inexpensive relative to the extremely high capital facility and service fees that would be required in urban areas because of the need to pass on water acquisition

costs to the customers. Therefore, the inability of urban areas to share in the reserve portion of this Rule could accelerate development of rural properties. More land is typically cleared per single house in rural areas than per single house in urban areas, thus also defeating one of the habitat preservation goals of the Rule.

Response: Thank you for your comment. Ecology respectfully disagrees that a growth-related economic effect of this proposed rule is an incentive that a rural reserve would create to develop in rural rather than urban areas. Ecology recognizes that water from permit exempt wells for homes in rural areas would be quite inexpensive relative to the potentially higher capital facility and service fees that would be required in urban areas. For Ecology's response to comments on the rule undermining or having an impact on land use, please see response to comments 843 through 848. Ecology generally agrees that more land is typically cleared per single house in rural areas than per single house in urban areas, however that fact, assuming it is true, does not defeat a habitat preservation or conservation goal of the rule. Rather the amount of land cleared for development, either rural or urban, is under the purview of the local land use authority and certainly beyond the scope of an instream flow rule.

Comment 951

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: We offer two alternative approaches to advance the resolution of these concerns and creation of an improved Rule. The first is to modify the domestic ground water reserve to provide for the needs of population growth served by municipal purveyors in the basin. A reasonable alternative would be to create a reserve that mirrors planned population growth--80% for cities and UGAs serviced by public purveyors, and 20% for rural landowners with permit-exempt wells.

Response: Thank you for your comment. Please see response to comment 1025 regarding the scope of this proposed rule. Secondly, the domestic reserve was sized based on impacts to fish habitat during low flow times and in light of RCW 90.54.020(5). That statutory directive is interpreted by Ecology to apply to domestic water needs that can not be satisfied some other way. Please see response to comment 950 and the focus of the reserve to rural areas. Ecology does not see a need to allow the municipal water suppliers access to a reservation of water. Please see response to comment 947 and 948.

Comment 952

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: The second approach would be to simply abandon reserves altogether, except for securing the instream flows necessary for salmonid recovery and fluvial functions. This latter approach would achieve the primary objective of instream flows, avoid the inequities of additional reservations, and allow another opportunity for watershed planning to balance water supplies and demands

Response: Thank you for your comment. Ecology believes it can not meet its statutory directives and simply abandon reserves altogether. While that idea would secure the instream flows necessary for salmonid recovery and fluvial functions, it would not satisfy RCW 90.22.040 and RCW 90.54.020(5). Ecology agrees with the City of Arlington that an opportunity exists for watershed planning under chapter 90.82 RCW to balance water supplies and demands within the basin.

Comment 981

Commentor: James Miller, City of Everett

Type: Letter dated May 18, 2005

Comment: We support the inclusion of a reservation for future withdrawals through exempt wells. In addition, we believe that the State should consider providing funding for "source exchange." This would provide financial assistance to local utilities that could get water from other sources than presently used in order to reduce their possible impact on streamflow.This should be part of a salmon recovery strategy. This would also provide for development of long-term solutions to future water supply needs in the basin in a manner compatible with salmon recovery plans.

Response: Thank you for your comment that City of Everett supports the inclusion of a reservation for future withdrawals through exempt wells. Your comment that City of Everett believes the State should provide funding for "source exchange" is noted; however that is beyond the scope of this rule making. Ecology does not doubt that this would provide financial assistance to local utilities that could get water from other sources than presently used in order to reduce their possible impact on stream flow and it could be part of a salmon recovery strategy.

Comment 1021

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: We are also concerned the proposed water reservation is premised on assumptions contrary to established Ecology and State Department of Health policies. Ecology is assuming that rural water users will withdraw approximately 350 gallons per day (gpd).23 Ecology is also proposing to limit surface water withdrawals in the Lake Cavanaugh area to 150 gpd.24 According to the Washington Department of Health, however, they will need much more. As the Health Department explains:[Ujtility records throughout the state indicate a significant increase in maximum day demands for lot sizes in excess of one acre. It would be appropriate, unless evidence is presented which indicates a better design premise, to use a maximum day demand (MDD) of 800 gpd/ERU for residential lots in excess of one acre.25

23 Proposed WAC 173-505-090(7)(a).

24 Proposed WAC 173-505-060.

25 Wash. State Dept of Health, Water System Design Manual, DOH Pub. #331-123 5-4 (August 2001) (emphasis in original). Ecology's proposed rule amendment also is inconsistent with the Ecology/ Washington Department of Health Water Availability Guidance Document. Under the water availability guidance document, an individual water supply may be considered adequate for purposes of RCW 19.27.097 only if the water source is capable of providing water to a residential dwelling in the amount of 400 gallons per day. Wash. State Depts. of Health & Ecology, Guidelines for Determining Water Availability for New Buildings, Ecology Pub. No. 93-27 (1993). Furthermore, Ecology's proposed rule amendment is inconsistent with Ecology's Irrigation Efficiency Guidance Document. Ecology's proposed rule amendment includes a proposal that credits water withdrawals for return flows. The proposed rule assumes no return flows where a home is connected to public sewer system, even though the rule allows for irrigation of 1/12 of an acre for each residence, and 50 percent return flow where no public sewer service is provided. Available studies indicate that only a small percent of all water used indoors for domestic supply purposes actually is consumed. Therefore, return flows should be estimated at a much higher level than Ecology suggests for indoor domestic supply purposes where no public sewer service is available. Furthermore, Ecology recently published a guidance document explaining its policy for determining irrigation efficiency and consumptive use. The irrigation efficiency guidance document explains how consumptive uses are calculated for irrigation purposes. This document should be used by Ecology to estimate return flows under the Skagit instream flow rule amendment. Ecology should use its irrigation efficiency and consumptive use

Response: Thank you for your comments. Please see response to comments 231, 316, 320 as they relate to the State Department of Health policies. Also please note that Department of Health rules and regulations do not apply to single family or residential domestic use. For example, single domestic uses of water from Lake Cavanaugh are not under the purview of Department of Health. Department of Health makes no pronouncements as to what an adequate water supply is for parties it does not regulate. However, and nor for this particular question, DOH did say on this issue for public water systems Chapter 5 of the WSDM provides guidance on

water demands (attached). Below is language that may help Ecology set the level of water needed for inside domestic use.

"When designing on the basis of an analogous system, a lower limit for the guidance document when determining return flows for outdoor use maximum day demand (MDD) value is established at 350 gallons/day/ERU (WAC 246-290-221). Even though this is somewhat less than what would be calculated using Equation 5-2 (a doubling of the average daily demand), it is consistent with the Department of Ecology's position regarding household water uses when water rights allocations are being decided for developments which restrict outside irrigation uses. Even with the 350-gpd/ERU threshold, the designer must still provide metered water use records from the analogous system that support the water demand design criteria used for the new system. There may be some projects for which sufficient information (meter records) has been collected and verified to support a maximum day demand of less than 350 gallons/day/ERU. That data may only be used in support of expansion for that specific water system [WAC 246-290-221(2)]."

Comment 1029

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Restrictions on exempt well development in these rules will discourage development throughout the region, shifting growth patterns towards urban centers served by municipal water purveyors or towards redevelopment of agricultural lands with existing, senior water rights. The synergistic effect of these three proposals will change the face of development in northwestern Washington, reducing growth throughout the 3,526 square miles of Whatcom, Skagit, and Snohomish counties covered by these rules. Ecology needs to address the significance of the urbanizing impacts its proposals will have on these Washington counties. Ecology recognizes that regional restrictions can have significant cumulative effects when it states: "Should established flows reduce the amount of water available for out-of-stream uses, [setting instream flows by administrative rules] in multiple watersheds could reduce development on a regional or statewide scale."41 Despite this recognition, Ecology glosses over clearly significant cumulative effects. In the face of such conflicts, Ecology should prepare a comprehensive EIS.

41 Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6-124

Response: Thank you for your comment. Please see response to comments 843 through 848, and 898. Ecology respectfully disagrees the proposed Stillaguamish rule will change the face of development in northwestern Washington, reducing growth throughout the 3,526 square miles of Whatcom, Skagit, and Snohomish

Comment 1037

Commentor: Becky Kelley and Ross Freeman, WEC and American Rivers

Type: Letter dated May 13, 2005

Comment: Concerns about aspects of the reserve for future uses: Ecology proposes a reserve of up to 5 cfs or 3.23 million gallons a day, designed to meet a variety of needs for at least two decades. Under the Water Resources Act, the case can be made that Ecology must try to secure water in "potable condition to satisfy human domestic needs" as part of a reserve. However, we are concerned that this reserve could lead to sprawling development by providing assurance of water supplies to rural developers. Ecology states that the "public interest is advanced by this limited reservation clearly overrides the small potential for negative impacts on instream resources."2 Where has this case been made? Have the public benefits for the reservation been weighed against the potential impacts to listed fish? Please explain.

2 WAC 173-505-090(1).

Response: Thank you for your comment related to growth and sprawling development. Ecology does not share your concern. The rule or reservations created do not limit or facilitate growth. Ecology believes the reservation is sufficient to meet the need of forecasted population growth for twenty years. The purpose of the reserve is to provide water for rural development approved by the counties consistent with the counties land use plans and zoning. The rule does not change the local jurisdictions obligation under the Growth Management Act. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth.The use of overriding considerations of the public interest was done to authorize the potential impact to instream flows from the use of reserved water. That use is also limited to efficient domestic needs. The public benefit is maintaining the overall integrity of the County and local government planning and development process, but incorporating the water use by the permit exempt well sector into water management. Please see response to comments 237, 312, and 457.

Comment 1038

Commentor: Becky Kelley and Ross Freeman, WEC and American Rivers

Type: Letter dated May 13, 2005

Comment: Concerns about aspects of the reserve for future uses: We firmly believe that the metering and reporting of all use from the reserve is an effective management tool for individual users and will inform the management of the Stillaguamish water budget. Any new rule should require metering, including for withdrawals otherwise exempted from permit. We support a requirement that local governments adopt an ordinance stating water use conditions on future building permits, including those exempt from permits under RCW 90.54.050. Such an ordinance is consistent with the education provisions of the compliance and enforcement section of the proposed rule.3 The approval of a building permit provides an efficient and effective means to provide education about water use.

3 WAC 173-505-150.

Response: Thank you for your comment on aspects of the reserve for future uses. Ecology respectfully disagrees with your comment regarding universal metering of uses from the reserve. Ecology agrees with the concept of accounting for water use. In general, metering is an effective way to account for water use. The rule exempts only single domestic users from the metering. Wells that will be used by two or more residences and new permitted uses must be metered. For the water used by a single connection metering is not the only way to account for water use. Based on well logs, normal well construction techniques, and pumps commonly used we can reasonably know the number, depth of withdrawal and instantaneous use of water. To account for use on an annual basis is the other main unknown. In this case we have empirical data from nearby Skagit County for domestic rural water use on an annual basis. Use of the reserve on an annual basis can be reasonably accounted for using the 350 or 175 gallons per day figure, which ever is appropriate, multiplied by the number of wells. That annual usage is then deducted from the remaining volume of water in the reserve. The rule language on accounting for use under the reserve was changed to include empirical data in the accounting if the project proponent chooses to do so. The level of data accuracy for use of water from the reserve is sufficient for this water management tool. Please also see response to comment 1038.

Ecology acknowledges that American Rivers/Washington Environmental Council support a requirement that local governments adopt an ordinance stating water use conditions on future building permits, including those exempt from permits under RCW 90.44.050. Ecology has changed that portion of the rule to be more general. The rule now states "…The reservation shall be applicable only when the appropriate city or county submit a written acknowledgement to the department that confirms that any legally required determinations of adequate potable water for building permits and subdivision approvals will be consistent with applicable provisions of this chapter. Once this chapter is adopted and written acknowledgement is received, the department will promptly notify those cities or counties, the Tribes, water well contractors and the public that

the reserve is in effect in those jurisdictions where acknowledgements exist." The original language of requiring building permits to contain the restrictions of the reserve lead to a concern on whom would enforce the reservation conditions, Ecology or local jurisdictions. Understandably, Ecology is responsible to enforce Ecology rules. To remove any ambiguity regarding enforcement, the language was changed. The policy originally proposed, local consideration of water resource management issues in their land use actions, is the same in both proposed versions of the rule.

Comment 1046

Commentor: Clair Olivers, Snohomish County Public Utility District #1

Type: Letter dated May 17, 2005

Comment: We support the inclusion of a reservation for future withdrawals through exempt wells. It might also be beneficial to the process, overall, to include a similar small reservation for future municipal groundwater withdrawals to allow time for development of long-term solutions to future water supply needs in the basin.

Response: Thank you for your comment that the District supports the inclusion of a reservation for future withdrawals through exempt wells. Ecology considered whether or not to include future municipal groundwater withdrawals from reserved water and rejected that option. Future municipal groundwater withdrawals can be obtained through the permitting program and would allow time for development of long-term solutions to future water supply needs in the basin. In addition, the exercise of inchoate rights will meet municipal supplier

Comment 1051

Commentor: Pam Bissonnette, King County Department of Natural Resources and Parks

Type: Letter dated May 13, 2005

Comment: King County supports the attempt to link consideration of future out-of-stream needs with instream needs, but has concerns about the reserve concept. King County commends Ecology for its effort through this proposed rule to link together both instream flow protection and provisions addressing future out of stream uses. The untested concept of reserves may prove to be an effective protective – but not restorative – element of the rule, but at this point it raises concern. It has been described as a way to cap diversions from exempt wells that today have no such constraint. It is not clear, however, how DOE can provide up-front assurances that the limit will work in application. In addition, King County strongly recommends that the reserve concept should only be applied where the provisions of the Municipal Water Law of 2003 – including flexibility in service areas/water rights, validation of inchoate water rights, new statutory duty to serve, consistency with local government comprehensive plans – can't assure water supply to meet growth needs, either permanent or temporary. Any application of the reserve concept, in the Stillaguamish watershed or elsewhere, should incorporate the means to assess accurately its effects and effectiveness in helping meet flow needs for fish and people.

Response: Thank you for your comment. The reserve policy is not a restorative element of the rule, it provides new water for new uses. The effects and effectiveness of the reserves in helping meet flow needs for fish and people is an issue Ecology will continue to explore. There is no way Ecology can provide up-front assurances that the reservation limits will work in applications other than to implement the rule. The use of the reserve for domestic supply is limited as King County strongly recommends. Ecology modified rule language to make a better connection to the Municipal Water Law of 2003 and RCW 43.20.260.

Comment 1058

Commentor: David Monthie, King County Department of Natural Resources and Parks

Type: Letter dated December 14, 2004

Comment: It is not clear whether or how Ecology would propose to allow an additional 1-2 percent of habitat loss through reservations of water that would be allowed irrespective of the established instream flows, or stream closures. The spatial impact of such habitat loss could be considerable, depending upon the characteristics of any particular area of the Stillaguamish system (or any other river system) where these additional withdrawals are allowed.

Response: Thank you for your comment. Your comment is correct that the spatial impact of such habitat loss could be considerable, depending upon the characteristics of any particular area of the Stillaguamish system (or any other river system) where these additional withdrawals are allowed. However, the use of the domestic reserve is in rural areas where the density of wells will preclude the any considerable impact by multiple wells. The location and depth of any well in the future also will bear on how much impact the individual well has. It is not possible to predict with any specificity for environmental analysis where any well will be drilled in the future, let alone speculating were up to 9,200 more wells will be drilled. It was that problem, in part, that lead to a habitat impact assessment as if the block of water came right out of surface water, all at one point. In addition, the 1 – 2 percent habitat loss will only occur in the low flow years, not every year.

Comment 1063

Commentor: David Monthie, King County Department of Natural Resources and Parks

Type: Letter dated December 14, 2004

Comment: Out of Stream Allocations: 2. Application of Overriding Consideration of Public Interest (OCPI) – The rule proposes to create two reservations not subject to the instream flow rule: an unspecified amount for stock water and 5 cfs of groundwater for future domestic use. Ecology justifies these reservations by declaring that the public interest is advanced. The Guidance Document appears to presume that in any basin, up to a certain amount of water may be consumptively used, irrespective of “minimum” flows established by rule, or stream closures, under the statutory authority to make this determination. While this may be true in area-specific situations, establishing this as a general agency approach would seem to trigger the need to develop rules of general applicability under the APA in order for Ecology to apply such a policy statewide. To the best of our knowledge, Ecology has in the past limited the application of this concept to area-specific determinations (e.g., the Lake Tapps water supply project) where it has identified the specific elements of the public interest that support such a determination.

Response: Thank you for your comment related to application of Overriding Consideration of Public Interest (OCPI). Your comment is correct that the rule proposes to create two reservations not subject to the instream flow rule. The stockwater reserves for surface and ground water are specified. One cubic foot per second for surface water and twenty acre-feet for ground water. Your comment is also correct, in part, that Ecology justifies these reservations by declaring that the public interest is advanced. The use of OCPI was done to authorize the potential impact to instream flows from the use of reserved water. That use is also limited to efficient domestic needs. The public benefit is maintaining the overall integrity of the County and local government planning and development process, but incorporating the water use by the permit exempt well sector into water management. Please see response to comments 237, 312, and 457. Finally, your comment is correct that past usage of OCPI has been limited to individual water right determinations. Using OCPI in a programmatic sense may be a first, but is authorized by the code because we are authorizing the apparent impairment of an instream flow right. Ecology is proposing the use of OCPI within the rule to provide full public participation.

Comment 1064

Commentor: David Monthie, King County Department of Natural Resources and Parks

Type: Letter dated December 14, 2004

Comment: Out of Stream Allocations: 3. Similarly, such a reservation of water for out of stream use would seem to be appropriate in areas where it is not likely to affect Streams, or where the health of the streams may be minimally affected. In other areas the effects may be more direct or more detrimental. Ecology should at a minimum evaluate assessments that have been done at the local level that address such issues, and make separate decisions with regard to each proposed rule, and the potentially affected streams in each watershed, as to the likely impacts such use will have.

Response: Thank you for your comment. In this case we believe the health of the streams to be minimally affected by the use of reserved water, provide all requirements of the reserve are adhered to. Ecology did look at watershed assessments and habitat surveys done in the Stillaguamish basin by Snohomish County. Those assessments did not address potential changes to habitat by changes to flow.

Comment 1065

Commentor: David Monthie, King County Department of Natural Resources and Parks

Type: Letter dated December 14, 2004

Comment: Out of Stream Allocations: 4. There is no indication as to whether Ecology has factored in the "duty to serve" provisions of the Municipal Water Law, or the availability of "inchoate" water rights, into its reservations of water for out of stream use in any given basin. It would appear that such issues are within the explicit or implicit direction to the Departments of Ecology and Health provided by the Legislature in that 2003 legislation.

Response: Thank you for your comment. The rule language in section 090 was changed to better link with the provisions of the Municipal Water Law, especially RCW 43.20.260 and duty to serve. The availability of inchoate water held by municipal water suppliers in the basin was one part of our evaluation and affirms that if development is within the service area of a municipal supplier, then that new development ought to hook-up to the municipal system.

Comment 1066

Commentor: David Monthie, King County Department of Natural Resources and Parks

Type: Letter dated December 14, 2004

Comment: Out of Stream Allocations: 5. Exempt wells – Ecology has the authority to control groundwater withdrawals that are exempt from permits and we support the rule encompassing this approach. We suggest that Ecology consider using its full authority–e.g., requiring metering on all withdrawals, even those made under exempt wells. This would seem to provide data that is currently missing statewide as to the extent of withdrawals from such use, and would allow monitoring, if necessary, of compliance with limitations on exempt well use.

Response: Thank you for your comment. Metering was consider for all withdrawals and deemed not necessary. Please see response to comment 1038.

Comment 1067

Commentor: David Monthie, King County Department of Natural Resources and Parks

Type: Letter dated December 14, 2004

Comment: Out of Stream Allocations: 6. As noted above, it is not clear how Ecology

developed the 350 gpd standard for each household. The Guidance document refers to USGS data for Washington. The State Department of Health would seem likely to have much more accurate data for Washington, and should be responsible for establishing standards for domestic water use. A related issue is the basis for Ecology's assumption that 50 percent of septic system discharge may be allocated to recharge of stream flows. We are not aware of the technical basis for being able to make that general statement, or for applying it as a general concept irrespective of hdyrogeological conditions at the well or stream.

Response: Thank you for your comment regarding the 350 gpd standard for each household. Please see response to comments 231, 316, 320, 1021, and 1022. The State Department of Health does not regulate single family or on farm residential water use. For the assumption that 50 percent withdrawn water is recharged to the basin when the residence is on a septic system, please see response to comments 314, 315, 320, 865, 866, and 937.

Comment 1075

Commentor: Jon Hasselman, National Wildlife Federation

Type: Letter dated May 12, 2005

Comment: . . .NWF is concerned about the reservations established for future residential uses and stockwatering. While Ecology portrays these uses as de minimis, it is not scientifically supported to permit additional withdrawals from a system that is already suffering from overappropriation and elevated temperatures.7

7 National Research Council of the National Academy of Sciences, Managing the Columbia River: Instream Flows, Water Withdrawals, and Salmon Survival (2004)

Response: Thank you for your comments and concerns about the reservations of water established for future residential uses and stockwatering. Ecology does believe, using habitat losses in the mainstem, that use of the reservation water will not significantly jeopardize the fisheries and or instream resources. The assessment of habitat impact is conservative in that the actual impact will not be at one point (it will be diffuse across the watershed) and not surface water. Use of the domestic reserve will be from ground water wells that should temper, but not eliminate the impact or effect on surface water flows.

Comment 1105

Commentor: Karen Allston, Center for Environmental Law and Policy

Type: Letter dated May 12, 2005

Comment: Generally, CELP does not believe that Ecology has met its burden of proving future growth overrides the potential for negative impacts to instream resources. Case law has established the "overriding considerations of the public interest" (OCPI) exception found in RCW 90.54.020 should be narrowly construed and applied only when the overriding public interest impinges on a public right. See, Postema v. PCHB, 142 Wn.2d 68, 83 (2000); and 23 Washington Practice section 8.91. Future growth is not an emergency situation that warrants application of this limited exception. Future growth should, rather, be addressed by progressive planning that takes into consideration the current status of instream resources in the Stillaguamish Basin.

Response: Thank you for your comment related to overriding considerations of the public interest and why Ecology is using that exception found in RCW 90.54.020. Please see response to comment 1063.

Comment 1106

Commentor: Karen Allston, Center for Environmental Law and Policy

Type: Letter dated May 12, 2005

Comment: The IFIM studies upon which the proposed reservation is based appear to have relied on historical hydrograph data that does not take into account future likely effects of climate change, nor the potential impacts likely from the use of inchoate water rights. In the face of such uncertainty, Ecology should have taken a more conservative approach to addressing future needs, such as requiring future use to be mitigated. Indeed, Ecology's Guidance on Setting Instream Flows and Allocating Water for Future Out-of-Stream Uses (September 2004) acknowledges the extreme nature of relying on OCPI to justify a reservation for future use by recommending avoiding, minimizing and mitigating the harm caused by such withdrawals.

Response: Thank you for your comments. Your comment is correct that hydrographs used to predict future stream flow exceedances relied upon historical stream flow data. Likely effects of global warming are not know with enough precession to be included in the analysis or rule language. Please see response to comments

Comment 1107

Commentor: Karen Allston, Center for Environmental Law and Policy

Type: Letter dated May 12, 2005

Comment: There are several recommendations in this Guidance for minimizing impacts that were not included in the proposed amendments to Ch. 173-503 WAC, but that should be added. The most critical among them is requiring (rather than reserving the right to require) metering of future withdrawals accessing the reservation. Under state law, new permitted water allocations must be metered. It is unreasonable and bad public policy not to require metering for new allocations, regardless of whether they are permitted or exempt from permit requirements. It is illogical and inappropriate not to treat the proposed future allocations consistently with statutory metering requirements. It is unjustifiable and indefensible to allow unmetered uses in light of the current status of fish habitat degradation, existing water quality violations, and presence of ESA-listed fish. If Ecology determines not to require metering as part of the proposed amendments, it should assume a higher use per day per household and deduct a greater amount from the reservation per withdrawal.

Response: Thank you for your comment on metering. Ecology respectfully disagrees with your comment regarding universal metering of uses from the reserve. First off, Ecology agrees with the concept of accounting for water use. In general, metering is an effective way to account for water use. The rule exempts only single domestic users from the metering. Wells that will be used by two or more residences and new permitted uses must be metered. For the water used by a single connection metering is not the only way to account for water use. Based on well logs, normal well construction techniques, and pumps commonly used we can reasonably know the number, depth of withdrawal and instantaneous use of water. To account for use on an annual basis is the other main unknown. In this case we have empirical data from nearby Skagit County for domestic rural water use on an annual basis. Use of the reserve on an annual basis can be reasonably accounted for using the 350 or 175 gallons per day figure, which ever is appropriate, multiplied by the number of wells. That annual usage is then deducted from the remaining volume of water in the reserve. The rule language on accounting for use under the reserve was changed to include empirical data in the accounting if the project proponent chooses to do so. The level of data accuracy for use of water from the reserve is sufficient for this water management tool. Please also see response to comment 1038.

Comment 1108

Commentor: Karen Allston, Center for Environmental Law and Policy

Type: Letter dated May 12, 2005

Comment: Other potential opportunities for minimizing impacts, as indicated in the Guidance, should be included in the proposed rule amendments. For example, requiring hook-

ups to public water supply if it becomes reasonable and timely in the future, and require decommissioning of wells; requiring deeper wells to be drilled when there is evidence using deeper aquifers would minimize impacts to hydraulically connected surface water; and acquiring and transfer water rights for instream purposes to offset effects of other uses.

Response: Thank you for your comment regarding other potential opportunities for minimizing impacts of future water use. Ecology agrees, and the rule reflects, that hook-up to municipal water suppliers for new connections in their service area is desirable. The rule does not explicitly require deeper wells to be drilled when there is evidence using deeper aquifers would minimize impacts to hydraulically connected surface water, however that may very well be a mitigation strategy. Finally, changes to water rights to meet new needs is encourage under the alternative water supply section, please see section 120 of the rule.

Comment 1109

Commentor: Karen Allston, Center for Environmental Law and Policy

Type: Letter dated May 12, 2005

Comment: CELP supports the requirement in (2)(f) requiring connection to a public water system when water becomes available. However, we recommend the rule require decommissioning of exempt wells upon connection to ensure compliance with this subsection.

Response: Thank you for CELP's support of the rules requirement to connect to a public water system when water becomes available. Ecology deleted from the proposed rule the idea that wells drilled in the service area of a municipal water supplier be decommissioned upon connection to the system. People commenting on the rule pointed out how problematic that section of the proposed rule was.

Comment 1110

Commentor: Karen Allston, Center for Environmental Law and Policy

Type: Letter dated May 12, 2005

Comment: The statement in (6) that Ecology "may limit or restrict the further use of the reservation" if county land use decisions are inconsistent with this chapter appears to conflict with the requirement in (2)(d)(i) that an ordinance or other action is established by a city or county that includes elements in subsection (2). Ecology "must" limit or restrict the reservation in the absence of county

Response: Thank you for your comment regarding the reservation and local actions taken in response to the reservation. The statement in (6) that Ecology "may limit or restrict the further use of the reservation" if county land use decisions are inconsistent with this chapter was deleted as being redundant to the regulation review section of the rule. Some people commenting on the rule though Ecology would change the terms of the reservation without going through rule making. That is not the case, any change to the reservation would be through rule making. The proposed rule language related to the reservation being effectuated or contingent upon a County or City adopting an ordinance related to the reservation was also changed. It was changed, in part because of Snohomish and Skagit County comments that there is no known legal requirement for the County to enact such legislation. However, Ecology firmly believes the Counties should consider the reservation and all water management with in its deliberative processes on land use and use of water in the basin. Please see RCW 90.54.090, where the law reads all agencies of state and local government, including counties and municipal and public corporations, shall, whenever possible, carry out powers vested in them in manners which are consistent with the provisions of this chapter. The rule language on adopting an ordinance related to the reservation was changed to be more general, but still address the idea the County will consider the reservation. The rule now reads, that the reservation shall be applicable only when the appropriate city(ies) or counties submit a written acknowledgment to the department that

confirms that any legally required determinations of adequate potable water for building permits and subdivision approvals will be consistent with applicable provisions of this chapter. Ecology believes this language is more consistent with existing law and our authority.

Comment 1119

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Mount Vernon hearing, March 24, 2005

Comment: The reservation and the idea behind it is appropriate. The State Water Resources Act requires the Department of Ecology to balance the needs for water, fish and agriculture – or I mean people, fish and agriculture. And I think it's a positive development that the department recognizes the need to provide some form of water reservation to provide for future domestic needs. However, a 20-year population forecast is woefully inadequate. Steve and I, we haven't quite known each other for 20 years, but 20 years goes by really fast, and we're going to be at the end of the 20 years before we even get started here.

Response: Thank you for your comment and recognition of the State Water Resources Act. Ecology respectfully disagrees that a 20-year population forecast is woefully inadequate. The 6 and 20 –year planning horizons comes from statute (RCW 43.62.035) and is used by many jurisdictions and water systems as a time period for projecting population and water needs.

Comment 1120

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Mount Vernon hearing, March 24, 2005

Comment: The critical water supply service areas and the water coordinated water system planning are all done with a 50-year population projection in mind, and in fact, the Department of Ecology's own regulations for petitions, governing petitions to establish a reservation require an applicant to submit a 50-year population projection. If it's impossible to find it, then it's inappropriate for Ecology to require it. And if Ecology is going to require it of an applicant, we think it's appropriate for Ecology to – to look at the same standard.

Response: Thank you for your comment. Please see response to comment 323.

Comment 1122

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, Mount Vernon hearing, March 24, 2005

Comment: In fact, if anything, this rule works at a cross purpose because what we're doing is that we're taking away the ability to use disbursed small withdrawals in favor of larger, more concentrated ones that, if anything, will have a greater potential for an impact on surface water than – than the smaller withdrawals.

Response: Thank you for your comment.

Comment 1141

Commentor: Hal Beecher, Washington Department of Fish and Wildlife

Type: Oral testimony, March 24, Mt Vernon and Arlington Hearings; letter dated March 24, 2005.

Comment: Mt. Vernon Hearing: The proposed rule includes a reserve for domestic use. The proposed reserve is intended for lands that do not have public water supplies available to them. It would not be subject to instream flows. The quantity of this reserve would equate to an additional

impact of one to two percent of drought habitat approximately – or, that is, the habitat at the . . . Tenth percentile flow level. Thus, in lower flow conditions, habitat would be reduced by up to one to two percent. This fixed flow reduction would equate to small proportional reductions in habitat at higher flows.

Arlington Hearing: The proposed rule includes a reserve for domestic use. The proposed reserve is intended for lands that do not have public water supplies available to them. It would not be subject to instream flows. The quantity of this reserve would equate to an additional impact of one to two percent of drought habitat approximately – or, that is, the habitat at the . . .tenth percentile flow level. Thus, in lower flow conditions, habitat would be reduced by up to one to two percent. This fixed flow reduction would equate to small proportional reductions in habitat at higher flows.

Letter, March 24, 2005: The proposed rule includes a reserve for domestic use. The proposed reserve is intended for lands that do not have public water supplies available to them. It would not be subject to instream flows. The quantity of this reserve would equate to an additional impact of 1-2% of "drought" habitat (i.e. habitat at the 10th percentile flow level); thus, in lower flow conditions, habitat would be reduced by up to 1-2%. This fixed flow reduction would equate to smaller proportional reductions in habitat at higher flows.

Response: Thank you for your comment and recognition of the impact of the withdrawal of the reserved water. Ecology agrees with your comment.

Comment 1142

Commentor: Hal Beecher, Washington Department of Fish and Wildlife

Type: Oral testimony, March 24, Mt Vernon and Arlington Hearings; letter dated March 24, 2005.

Comment: Mt. Vernon Hearing: Fish population recovery from drought-associated declines would be slowed and reduced slightly during non-drought years. However, in the interest in moving forward with the setting of instream flows, the Department of Fish and Wildlife supports this as an acceptable compromise, consistent, we believe, with meeting both the needs of people and salmonid recovery.

Arlington Hearing: Fish population recovery from drought-associated declines would be slowed and reduced slightly during non-drought years. However, in the interest of moving forward with the setting of instream flows, the Department of Fish and Wildlife supports this as an acceptable compromise consistent, we believe, with meeting both the needs of people and salmon recovery.

Letter, March 24, 2005: Fish population recovery from drought-associated declines would be slowed and reduced slightly during non-drought years. However, in the interest of moving forward with the setting of instream flows, WDFW supports this as an acceptable compromise consistent, we believe, with meeting both the needs of people and salmonid recovery.

Response: Thank you for your comment and recognition of the impact of the withdrawal of the reserved water. Ecology agrees with your comment.

Comment 1190

Commentor: John Postema

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: And, of course, as – as Steve mentioned, no new wells are allowed if public water is available. And if a public water system is constructed, new well uses will have to connect to the public system within 120 days. All users of new well water will have to install meters on their wells and they'll be required to report usage to DOE and are subject to curtailment – to curtailment if that's necessary.

Response: Thank you for your comment regarding no use of the domestic ground water reserve if the project is within the service area of a municipal supplier. On this point, the rule is merely reflecting statutory law. The rule does not create the requirement, rather the Municipal Water Law of 2003 did. Please see RCW 43.20.260. Any metering of water obtained from a municipal water supplier is a requirement of the water system, and not Ecology. Ecology does not require service meters for municipal water systems.

Comment 1192

Commentor: John Postema

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: And very important, I think that what we see here – and this was my question earlier – the Department of Ecology, basically, will tell the County what to do. And then when all of this will happen. And when this – what they call reservation water, when it's used up, there will be no more water period. Now, the – That is kind of what I – what I read and analyzed that out of the document.

Response: Thank you for your comment. Ecology respectfully disagrees that Ecology will tell the local jurisdictions what to do. Ecology has authority to recommend land use actions to the local jurisdictions and all agencies of state and local government, including counties and municipal and public corporations, shall, whenever possible, carry out powers vested in them in manners which are consistent with the provisions of chapter 90.54 RCW. That chapter of the statute is the authority, in part, for this rule making. Please see RCW 90.54.090. Your comment is correct that at some time in the future, the reservation water will be used up. Ecology disagrees there will be no more water period. There are other options for water than a domestic well using water from the reservation. Given the reservation of water is expected to last over twenty years, perhaps local comprehensive plans will be crafted to address the issue.

Comment 1199

Commentor: John Postema

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: I believe there is a problem. There is a siltation problem. There is a forest management problem. There is a lack of management problem. I think this could be somewhat more constructive. That the Department of Ecology should. . .go back and says, "Look. We can do it with storage. Maybe we should allow more lakes and ponds to be created. And maybe we can do..." Because the runoff is about 35, 40 percent. It just goes right in the river. You know, so if we were allowed to create more ponds, we would help a lot more. There's different ways. You can try through the evaporation. You can try all types of things which are much more effective than trying to hone it – to focus in on this one-and-a-half percent.

Response: Thank you for your comment that you believe there is a siltation problem and a forest management problem. Ecology concurs, as does the salmon recovery plan, that silt and sediment load are a problem for fish production. Those issues are beyond the scope of this rule making. Please see the salmon recovery plan for planned actions to address sediment and silt.

Comment 1204

Commentor: John Roney, Snohomish County

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: One of the things that we had talked about – Steve has met with us and several different groups at the County a couple times. We talked about extending water out into the rural communities. We think there's a real problem with communication at the State level between

agencies. We have CTED, which is a growth management agency, saying you can't extend water. And now we have a water rule that's coming forward and says, "Well, why don't you just extend water out there?" It's the same thing that happened with – that's happening with wetland mitigation banking that we got – we're trying to formulate a policy on. We've got different people at the State coming down and doing stuff to us rather than working with us. And so we – we want to be partners with them. We don't want to be just told how we do stuff.

Response: Thank you for your comment regarding extending water out into the rural communities. Ecology respectfully offers that Snohomish County is misreading the rule. Existing law, please see RCW 43.20.260, requires that new projects needed potable water built within the retail service area of a municipal water supplier seek water from that supplier. The proposed rule merely mimics that statutory directive. The is no prohibition under GMA in regards to public water systems in a rural area if the local government so chooses. Please see RCW 36.70A.030(16) for the definition of rural governmental services" or "rural services" that includes domestic water systems.

Comment 1205

Commentor: John Roney, Snohomish County

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: We don't have – We're afraid that we're going to be stuck with another unfunded mandate. That we're going to be the – the bad guys out here in the community trying to watch you. We don't have expertise in water rights. We're not hiring anybody with expertise in water rights. But we have – We don't have the resources. And if it's another one of these unfunded mandates, we're already overcooked on that up at the County right now. I can guarantee it. And just in conclusion at this time, I just want to go on record as the – the County Executive is in opposition to the imposition of this rule and we will be working with the council and with our departments to come up with a response. If citizens feel like they would like a meeting with the County Executive to voice their opinions before this comment is issued on behalf of the County, we'll be happy to sit down with you in a meeting. Thank you.

Response: Thank you for your comment.

Comment 1207

Commentor: Scott Fowler, Dahlman Pump & Well Drilling, Inc.

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: However, we have some serious issues on the amount of water that is available. The exempt well or a group of exempt wells no where in the State has proved to have a negative impact on instream flows. As a matter of fact, it can be argued that those exempt wells have a positive impact on instream flow since most of those wells are drilled into confined aquifers and the water recharges the septic

Response: Thank you for your comment. The ground water reserve will meet projected demand for over twenty years. Ecology respectfully disagrees that most domestic wells in the Stillaguamish basin are drilled into confined aquifers. In general, most of the wells are constructed in the surface, unconfined aquifer, in the Stillaguamish basin. Given the shallow depth and geology of the basin, many of these wells do intercept water that, but for the withdrawal, would augment stream flow. Ecology does agree that domestic on site waste treatment systems will

Comment 1208

Commentor: Scott Fowler, Dahlman Pump & Well Drilling, Inc.

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: We also do not believe there's enough water in this plan to take care of our future ag needs. As the economy changes and the crop changes, their water demand changes and that needs to be addressed. At this time we cannot support the rule as it is written. You'll receive further written comment from us.

Response: Thank you for your comment, please see response to comments 210, 215, 287, 323, 931, 1120, and 1207 for more on the reservation and meeting future water needs. As to meeting agriculture water needs please see response to comments 330 and 1027.

Comment 1224

Commentor: Steve Aslanian

Type: Oral testimony, Arlington hearing, March 24, 2005

Comment: I believe this plan must be more bold rather than assumptive or suggestive as in only encouraging property owners to keep cattle out of streams. It must further address – address future land uses. Regarding the 18,000 exempt wells, 18,000 being the arithmetic derivation of the 175 gallons per connections per day, I don't believe that 175 gallons per day is a realistic figure for a rural land use in the summertime. Just today a study was released that showed that lethal elevated stream temperatures are projected for cold-water fish. This is the time when people would be supposedly using 175 gallons per day. I believe that the portion of 175-505-090(6) states that Ecology may further limit reserved water in areas of increased densities that adversely affect small tributaries and other flow-sensitive areas. "May" is what I've underlined here. I believe that this statement only hints at the need for adaptive management, which. . .I believe should be the major focus of this legislation.

Response: Thank you for your comment that this plan must be more bold rather than assumptive or suggestive as in only encouraging property owners to keep cattle out of streams, it must further address future land uses, and that the 175 gallons per day is not a realistic figure for a rural land use in the summertime. The proposed rule does encourage property owners to keep cattle and livestock out of stream by recognizing a stock tank as a direct diversion. Under a water quality program, the State has funded fencing of riparian zones with willing land owners. Ecology agrees that 175 gallons per day is not a realistic daily water use figure. It is not intended to be a limit on daily use, but rather an average number to use to account for the use of domestic reserve water for homes on septic systems for a year time period. Ecology agrees that an adaptive management framework may be a better way to address issued in the basin, however that is beyond the scope of this rule.

Comment 1242

Commentor: Kimberly Ordon, Tulalip Tribe

Type: Letter dated May 13, 2005

Comment: Reservation of Water for Future Use & Climate Change Impacts: Tulalip has serious concerns over Ecology's proposal to include in an instream flow rule an out of stream reservation for future water use. Ecology has estimated by less than scientific means that the reservation would constitute a 1% - 2% habitat loss given certain variables. Aside from the obvious point that an instream flow rule is a mechanism by which instream flows are secured against out-of-stream uses, Ecology did not appear to take into consideration the fact of climate change. Tulalip has been funding ongoing research that shows significant changes over time from the impacts of climate change. All of this data points to current and future instream flow declines. Adopting an instream flow rule that builds in out-of-stream allocations in a climate of continued losses does not comport with the major efforts of resource management partners to develop salmon recovery plans. In order to justify such an approach, Ecology must link the rationale for this reservation to its obligations for salmon recovery.

Response: Thank you for the comment that Tulalip has serious concerns over Ecology's proposal to include in an instream flow rule, an out of stream reservation for future water use and that Ecology did not appear to take into consideration the fact of climate change. The inclusion of the reservations is in direct response to statutory directives. Please see RCW 90.54.020(5) and the rural domestic reserve is intended to address that. Please see RCW 90.22.040 and the stockwatering reserves are intended to fulfill that statutory directive. The proposed instream flows are in response to RCW 90.54.020(2). Ecology has estimated the reservation would constitute a 1 percent – 2 percent habitat loss given certain variables. The determinations on habitat loss come from Weighted Useable Area versus flow data developed for the project. Ecology believes we have a credible, scientific foundation for the determinations of impact created by use of water under the reservation. As to global warming, please see response to comments 1070 and 1071.

Comment 1243

Commentor: Kimberly Ordon, Tulalip Tribe

Type: Letter dated May 13, 2005

Comment: The reservation is intended to be spread throughout the basin. This approach will lead to land use sprawl. One of the points of the Growth Management Act is to restrict development and reduce sprawl. The Municipal Water Law of 2003 requires adoption of conservation measures prior to the use of inchoate and future new sources of supply. This is because of a recognition that water is a finite resource. Ecology's reservation offers new sources of supply with none of these restrictions in place. In order to protect and reduce impacts to sensitive areas and closed basins (i.e. Church Creek, Portage Creek) it is important to target growth to areas that can be served by existing water sources.

Response: Thank you for your comment. In general, Ecology does not view the rule or reservations created as limiting or facilitating growth. Land use and growth management is controlled by the local jurisdiction. The rule does not change that. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth. In regards to the Municipal Water Law of 2003, the rule language was revised to better fit with the law. For example, public water supply was changed to municipal water supplier. One feature of the rule is that use of the reserved water is not allowed if a project is developed in the retail service area of a municipal water supplier and service can be provide. Please see RCW 43.20.260. This is not new law created by the rule, but rather implementation of the Municipal Water Law of 2003. Ecology is also looking to the existing municipal water suppliers in the basin to comply with that part of the Municipal related to conservation and efficiency and use of inchoate water prior to new source development.

Comment 1247

Commentor: Kimberly Ordon, Tulalip Tribe

Type: Letter dated May 13, 2005

Comment: Require Metering and Reporting: Tulalip supports adopting measures requiring metering and reporting of water usage. The only way to insure with confidence that the Stillaguamish instream flow is protected is by instituting an accounting device that accurately reflects out-of-stream usage. Metering and reporting is the only way to accomplish that goal. Tulalip requests that all future groundwater rights, exempt wells and surface water rights be required to install and maintain measuring devices and report the data to the Department of Ecology.

Response: Thank you for your comment that Tulalip supports metering and reporting for all users. In general, Ecology agrees that one way to insure with confidence that out of stream use is accounted for is metering. However, that is not the only way. Please see response to comment 1038.

Comment 1261

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: In an attempt to comply with its statutory mandate, Ecology has proposed creating a "reservation" of water for these out of stream uses. The proposed reservation appears to meet human population projections currently being utilized by Snohomish County in its proposed update to its 20-year GMA Comprehensive Plan. That being said, it is important to recognize that the projections underlying the current proposed comprehensive plan are middle range estimates based upon the OFM population projection range for the County. The OFM range has a much higher potential for new residents. As such, there is the possibility the proposed rule may underestimate human need in the future.

Response: Thank you for your comment. Comment noted.

Comment 1262

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: The determination that the proposed reservation may be adequate for human need is, by necessity, contingent upon Snohomish County adopting an ordinance to undertake the legal responsibilities of the DOE in administering water rights related to exempt water withdrawals. There is no known legal requirement for the County to enact such legislation. Absent such action by the County, the rule prohibits access to the domestic water reservation. In that situation, the rule clearly fails to provide adequate water supply for human consumption and use in violation of RCW 90.54.005.

Response: Thank you for your comment. The proposed rule language related to the reservation being effectuated or contingent upon local government adopting an ordinance related to the reservation was changed. However, Ecology firmly believes the Counties and Cities should consider the reservation and all water management with in their deliberative processes on land use and use of water in the basin. Please see RCW 90.54.090, where the law reads all agencies of state and local government, including counties and municipal and public corporations, shall, whenever possible, carry out powers vested in them in manners which are consistent with the provisions of this chapter. The rule language on adopting an ordinance related to the reservation was changed to be more general, but still address the idea the Counties or Cities will consider the reservation. The rule now reads, the reservation shall be applicable only when the appropriate cities or counties submit a written acknowledgment to the department that confirms that any legally required determinations of adequate potable water for building permits and subdivision approvals will be consistent with applicable provisions of this chapter. Ecology believes this language is more consistent with existing law and our authority. For more on this feature of the rule related to local government see response to comments 240, 310, 332, 446, 447, and 1013.

Comment 1266

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: Proposed WAC 173-505-090 improperly delegates DOE's statutory responsibility to administer the water right management program. At Section 173-505-090, DOE reserves ground water for permit-exempt domestic water use contingent upon local governments undertaking DOE's statutory responsibility in administering the rule and the water right management program. DOE has no legal authority to delegate its responsibilities statutorily vested in it by the Legislature, and is not authorized in adopting rules under the APA to force local

governments to include conditions in permits that would implement the proposed

Response: Thank you for your comment; please see response to comment 1266.

Comment 1267

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: The current system of reviewing adequate water supply for domestic use is conducted by local health districts and not Snohomish County. The Snohomish County Health District (a separate legal entity) makes a determination of whether the septic tank and well are "adequate" within the meaning of the law. When the County receives the Health District's determination, it either issues or denies a permit accordingly. The County is not involved in determining if adequate water is available. To the extent that such a scheme does not constitute an unlawful delegation of DOE's regulatory responsibilities, the proposed rule likely constitutes an unfunded mandate on local government because it requires local governments to administer a new program related to water supply for which it currently lacks staff, administrative procedures and regulations, or inspection protocols. I understand from my discussions with you that Ecology may revise its approach in this regard from the proposed rule. After our meeting, you were going to confer with the Health District. The revised approach DOE appears to be contemplating seems to be a constructive way to resolve or mitigate the County's concerns expressed in this section.

Response: Thank you for your comment; please see response to comment 1266.

Comment 1268

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: The proposed rule's restriction of future permit-exempt groundwater withdrawals and requirement that such domestic users connect to a public water supply systems violates Ch. 36.70A RCW (the Growth Management Act).At proposed WAC 173-505-090(e) and (f), the rule disallows a new water withdrawal and requires domestic users to connect to public water supply systems. Such a system violates the Growth Management Act (GMA) which prohibits the connection of properties to public utilities outside of urban growth areas. See, RCW 36.70A.110. It appears that the bulk of the proposed rule would impact rural areas. Even if public water systems are in existence nearby, the courts and Growth Management Hearings Board have held that the extension of urban governmental services (such as sewers, or other utilities) into a rural area are prohibited absent a public health emergency. See, e.g., Thurston County v. The Cooper Point Assn. et al, 148 Wn.2d 1, 57 P.3rd 1156 (2002) It is unlikely that the Board or courts would consider the establishment of an instream flow "a public health" emergency. There is no such finding set forth in the proposed rule. Furthermore, to the extent that this part of the rule requires local governments to impose such a rule, the rule cannot require local government to take action in direct contravention of the law. We strongly urge that DOE consult with its colleagues in the State's Department of Community, Trade and Economic Development in order to resolve this issue.

Response: Thank you for your comment. In regards to this issue, please see response to comments 217, 222, 294, 316.

Comment 1283

Commentor: Shawn Yanity, Stillaguamish Tribe of Indians

Type: November 8, 2004

Comment: With regards to WAC 173-505-090 of the proposed instream flow rule, we would

like further clarification on the maximum future allocation language. As we understand it, according to the proposed instream flow rule, a total of 150 cfs could potentially be withdrawn from the North Fork Stillaguamish River at river mile 6.5 only if proposed instream flows are being met. This 150 cfs includes upstream control reaches and tributaries. Currently, according io Ecology's WRATS database, a total of 24.1 cfs ground and surface water is being withdrawn from upstream of N.F. Stillaguamish R.M. 6.5. If our understanding of this rule language is correct, then an additional 125.9 cfs could be withdrawn from the N.F. Stillaguamish above this location as long as the instream flow is being met. Does that mean a water right could be granted that would withdraw 125.9 cfs of water from the N.F. Stillaguamish River from October 16th–June 30th and store this water for use during the closure period of July 1st–October 15th?

Response: Thank you for your comment regarding WAC 173-505-090 and your request for further clarification on the maximum future allocation language. Your comment stated, as we understand it, according to the proposed instream flow rule, a total of 150 cfs could potentially be withdrawn from the North Fork Stillaguamish River at river mile 6.5 only if proposed instream flows are being met. This 150 cfs includes upstream control reaches and tributaries. Currently, according to Ecology's WRATS database, a total of 24.1 cfs ground and surface water is being withdrawn from upstream of N.F. Stillaguamish R.M. 6.5. If our understanding of this rule language is correct, then an additional 125.9 cfs could be withdrawn from the N.F. Stillaguamish above this location as long as the instream flow is being met. Does that mean a water right could be granted that would withdraw 125.9 cfs of water from the N.F. Stillaguamish River from October 16th–June 30th and store this water for use during the closure period of July 1st–October 15th? Yes, that is what the maximum allocation coupled with the open period of withdrawal on the N.F. Stillaguamish at RM 6.5 could lead to assuming the water right application passed all other statutory tests. Please see RCW 90.03.290.

Comment 1284

Commentor: Shawn Yanity, Stillaguamish Tribe of Indians

Type: November 8, 2004

Comment: The Tribe takes it role (sic) as natural resource co-manager seriously and we are disappointed that we were excluded from the determination of the "reservation" flows as outlined in WAC 173-505-110 of the proposed instream flow rule. Had the Tribe been aware of this proposal from the beginning there would have been discussion of its determination of reserved flows and its validity in Washington Water Code. Current Washington water law is based on priority date and therefore the "first in time, first in right" premise. By including reservation language in the instream flow rule, Ecology is essentially taking water from the instream flow rule, which should have a priorily date before any use of "reserved" water.

Response: Thank you for your comment and concern regarding the reservations of water. Ecology acknowledges the Tribe takes it role as natural resource co-manager seriously and that the Tribe is disappointed they we were excluded from the determination of the reservations. Your comment that Washington water law is based on priority date and therefore the "first in time, first in right" premise is correct. Your comment is also correct that by including a reservation of water in the rule that is not subject to instream flow limitations, it is essentially taking water from the instream flows. However, Ecology evaluated the potential loss of habitat created by use of the reserved water and found the impacts to fish habitat would not significantly harm the resources. Please see response to comments 1019 and 1020.

Comment 1285

Commentor: Shawn Yanity, Stillaguamish Tribe of Indians

Type: November 8, 2004

Comment: The Tribe believes that this reservation causes harm to treaty rights. In our view,

Ecology is attempting to appease development at the expense of fish. RCW 90.03.290(3) states that Ecology will reject applications, such as reservations, and refuse to issue a permit if it will impair existing rights, such as established instream flows. RCW 90.54.050(1) states that the department of Ecology may reserve water for beneficial utilization in the future, however, there is no exemption of reserved water from instream flow protection. Furthermore, the inclusion of a reservation in the proposed instream flow rule shows that Ecology is more interested in out of stream water use than protecting instream flow that may not even be met in a particular year. If for some reason despite the recommendation of the Tribes, Ecology keeps the reserved water language in the instream flow rule, the Tribe would like to see language stating that inchoate water rights are included in this reservation. Also, the Tribe would like to see language stating that the reserved water will be metered to ensure that reservation flows do not exceed the flows as listed in the proposed rule.

Response: Thank you for your comment and concerns regarding the reserves. Please see response to comment 1284. Ecology respectfully disagrees we are more interested in out of stream water use than protecting instream flow that may not even be met in a particular year. Rather we are attempting to fulfill several statutory obligations; while setting instream flows is a major purpose of the rule we have other statutory obligations to fulfill. One obligation is the need to ensure that adequate and reliable source of water is available for rural development where no alternatives exit. The reserved water language in the instream flow rule does this. Given the reservation is for rural domestic supply, there is no inchoate water to include in the accounting. Metering will not be required for single domestic users, but accounting for use of the reserve water will be done. We will use actual water use data or reasonable estimates. For more on metering see response to comment 1038.

Comment 1289

Commentor: Steve Anthes, Kettle Range Conservation Group

Type: E-mail dated March 23, 2005

Comment: Enforcing State laws to permit local governments to issue new building permits only when sufficient potable water is available is a sound approach. We believe the proposed in-stream flow rule strengthens this law by requiring local governments to inform future well owners of some limitations to protect the Stillaguamish and its streams. This makes good sense.

Response: Thank you for your comment. Ecology agrees with your comment. The proposed rule language related to the reservation being effectuated or contingent upon a County or City adopting an ordinance related to the reservation was changed. It was changed, in part because of County and City comments that there is no known legal requirement for the County or City to enact such legislation. However, Ecology firmly believes the County or City should consider the reservation and all water management with in its deliberative processes on land use and use of water in the basin. Please see RCW 90.54.090, where the law reads all agencies of state and local government, including counties and municipal and public corporations, shall, whenever possible, carry out powers vested in them in manners which are consistent with the provisions of this chapter. The rule language on adopting an ordinance related to the reservation was changed to be more general, but still address the idea the County will consider the reservation. The rule now reads that the reservation shall be applicable only when the appropriate city (ies) or counties submit a written acknowledgment to the department that confirms that any legally required determinations of adequate potable water for building permits and subdivision approvals will be consistent with applicable provisions of this chapter. Ecology believes this language is more consistent with existing law and our authority.

Comment 1291

Commentor: Steve Anthes, Kettle Range Conservation Group

Type: E-mail dated March 23, 2005

Comment: We also suggest that Ecology should require measuring of future water use. Obviously, we need to know how much water is being used to manage it more wisely.

Response: Thank you for your comment that Ecology should require measuring of future water use. The rule does provide that all future permitted water rights used to withdraw water be metered. Ecology is not requiring single domestic uses created under the ground water permit exemption to be metered at this time. In general, Ecology agrees that one way to insure with confidence that out of stream use is accounted for is metering. However, that is not the only way. Please see response to comment 1038.

Comment 1303

Commentor: Eldon Ball

Type: E-mail dated April 30, 2005

Comment: Measure future water use. We need to know how much water is being used in order to manage it more wisely.

Response: Thank you for your comment regarding metering of water use. Ecology agrees with the concept of accounting for water use. In general, metering is an effective way to account for water use. The rule exempts only single domestic users from the metering. Wells that will be used by two or more residences and new permitted uses must be metered. For the water used by a single connection metering is not the only way to account for water use. Based on well logs, normal well construction techniques, and pumps commonly used we can reasonably know the number, depth of withdrawal and instantaneous use of water. To account for use on an annual basis is the other main unknown. In this case we have empirical data from nearby Skagit County for domestic rural water use on an annual basis. Use of the reserve on an annual basis can be reasonably accounted for using the 350 or 175 gallons per day figure, which ever is appropriate, multiplied by the number of wells. That annual usage is then deducted from the remaining volume of water in the reserve. The rule language on accounting for use under the reserve was changed to include empirical data in the accounting if the project proponent chooses to do so. The level of data accuracy for use of water from the reserve is sufficient for this water management tool. Please also see response to comment 1038.

Comment 1315

Commentor: Harold Boswell

Type: E-mail dated April 26, 2005

Comment: Please consider the following in adopting protections for the river: Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.

Response: Thank you for your comment related to ensuring that the groundwater "reserve" does not lead to sprawling development, harming farms and fish. The rule or reservations created do not limit or facilitate growth. Ecology believes the reservation is sufficient to meet the need of forecasted population growth for twenty years. The purpose of the reserve is to provide water for rural development approved by the counties consistent with the counties land use plans and zoning. The rule does not change the local jurisdictions obligation under the Growth Management Act. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth.

Comment 1316

Commentor: Harold Boswell

Type: E-mail dated April 26, 2005

Comment: Please consider the following in adopting protections for the river: Measure future water use. We need to know how much water is being used in order to manage it more wisely.

Response: Thank you for your comment regarding metering of water use. Ecology agrees with the concept of accounting for water use. In general, metering is an effective way to account for water use. The rule exempts only single domestic users from the metering. Wells that will be used by two or more residences and new permitted uses must be metered. For the water used by a single connection metering is not the only way to account for water use. Based on well logs, normal well construction techniques, and pumps commonly used we can reasonably know the number, depth of withdrawal and instantaneous use of water. To account for use on an annual basis is the other main unknown. In this case we have empirical data from nearby Skagit County for domestic rural water use on an annual basis. Use of the reserve on an annual basis can be reasonably accounted for using the 350 or 175 gallons per day figure, which ever is appropriate, multiplied by the number of wells. That annual usage is then deducted from the remaining volume of water in the reserve. The rule language on accounting for use under the reserve was changed to include empirical data in the accounting if the project proponent chooses to do so. The level of data accuracy for use of water from the reserve is sufficient for this water management tool. Please also see response to comment 1038.

Comment 1319

Commentor: David Breed

Type: E-mail dated April 28, 2005

Comment: I support taking stronger measures to protect the Stillaguamish watershed, including the proposed limits on new wells.

Response: Thank you for your comment. Ecology views the proposed limits on new wells to be better incorporation of water withdrawn by the permit exempt well into the over all management framework. Any lawful water use under the ground water permit exemption creates a water right with both privileges and obligations. One of the obligations is curtailment of use if a senior right is not satisfied. Reconciling interruptible water rights and pubic water supply is the issues the reservation was designed to address. Incorporation of the reservation into local land use plans and resource management plans should lead to better overall water management. In addition the closures we are proposing give us a tools to deal with the permit-exempt wells and provide for orderly way to address future water needs in the basin while protecting instream flows.

Comment 1322

Commentor: Maria Butler

Type: E-mail dated April 11, 2005

Comment: The following are ways that Ecology's Stillaguamish proposal could be improved: Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.

Response: Thank you for your comment related to ensuring that the groundwater "reserve" does not lead to sprawling development, harming farms and fish. The rule or reservations created do not limit or facilitate growth. Ecology believes the reservation is sufficient to meet the need of forecasted population growth for twenty years. The purpose of the reserve is to provide water for rural development approved by the counties consistent with the counties land use plans and zoning. The rule does not change the local jurisdictions obligation under the Growth Management Act. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth.

Comment 1324

Commentor: Maria Butler

Type: E-mail dated April 11, 2005

Comment: Measure future water use. We need to know how much water is being used in order to manage it more wisely.

Response: Thank you for your comment regarding metering of water use. Ecology agrees with the concept of accounting for water use. In general, metering is an effective way to account for water use. The rule exempts only single domestic users from the metering. Wells that will be used by two or more residences and new permitted uses must be metered. For the water used by a single connection metering is not the only way to account for water use. Based on well logs, normal well construction techniques, and pumps commonly used we can reasonably know the number, depth of withdrawal and instantaneous use of water. To account for use on an annual basis is the other main unknown. In this case we have empirical data from nearby Skagit County for domestic rural water use on an annual basis. Use of the reserve on an annual basis can be reasonably accounted for using the 350 or 175 gallons per day figure, which ever is appropriate, multiplied by the number of wells. That annual usage is then deducted from the remaining volume of water in the reserve. The rule language on accounting for use under the reserve was changed to include empirical data in the accounting if the project proponent chooses to do so. The level of data accuracy for use of water from the reserve is sufficient for this water management tool. Please also see response to comment 1038.

Comment 1329

Commentor: James Chapman

Type: E-mail dated April 13, 2005

Comment: The proposal to limit groundwater use is needed because streams and groundwater are connected. Using too much groundwater robs our streams and rivers of water, especially in the summer.

Response: Thank you for your support of the proposal to limit groundwater development when appropriate. Ecology agrees that groundwater contributes to the base flow of rivers and streams in the watershed. Ecology views the limit you note to be better incorporation of water withdrawn by the permit exempt well into the over all management framework. Any lawful water use under the ground water permit exemption creates a water right with both privileges and obligations. One of the obligations is curtailment of use if a senior right is not satisfied. Reconciling interruptible water rights and pubic water supply is the issues the reservation was designed to address. Incorporation of the reservation into local land use plans and resource management plans should lead to better overall water management. In addition, the rule provides full or seasonal closures for many streams. Ground water associated with the stream is also closed, if the withdrawal of that ground water would effect the flow or level of the regulated stream. Please see section 070 of the rule.

Comment 1330

Commentor: James Chapman

Type: E-mail dated April 13, 2005

Comment: Another good feature is the accountability placed on local land use decisions. Local governments would need to adopt an ordinance stating that building permits may be limited in the future by the availability of water for wells. State law already requires a demonstration of adequate potable water before any new building permit is issued.

Response: Thank you for your comment. Your comment is correct that State law already

requires a demonstration of adequate potable water before any new building permit is issued. Ecology's rule is forging a stronger link between local government actions and State water resource management. The proposed rule language related to the reservation being activated or contingent upon local government adopting an ordinance related to the reservation was changed. However, Ecology firmly believes the Counties and Cities should consider the reservation and all water management with in their deliberative processes on land use and use of water in the basin. Please see RCW 90.54.090, where the law requires all agencies of state and local government, including counties and municipal and public corporations, shall, whenever possible, carry out powers vested in them in manners which are consistent with the provisions of this chapter. The rule language on adopting an ordinance related to the reservation was changed to be more general, but still address the idea the Counties or Cities will consider the reservation. As the rule now reads, the reservation shall be applicable only when the appropriate cities or counties submit a written acknowledgment to the department that confirms that any legally required determinations of adequate potable water for building permits and subdivision approvals will be consistent with applicable provisions of this chapter. Ecology believes this language is more consistent with existing law and our authority. For more on this feature of the rule related to local government see response to comments 240, 310, 332, 446, 447, and 1013.

Comment 1332

Commentor: James Chapman

Type: E-mail dated April 13, 2005

Comment: The rules should provide for regular measurement of future water use. We need to know how much water is being used in order to manage it more wisely.

Response: Thank you for your comment regarding metering of water use. Ecology agrees with the concept of accounting for water use. In general, metering is an effective way to account for water use. The rule exempts only single domestic users from the metering. Wells that will be used by two or more residences and new permitted uses must be metered. For the water used by a single connection metering is not the only way to account for water use. Based on well logs, normal well construction techniques, and pumps commonly used we can reasonably know the number, depth of withdrawal and instantaneous use of water. To account for use on an annual basis is the other main unknown. In this case we have empirical data from nearby Skagit County for domestic rural water use on an annual basis. Use of the reserve on an annual basis can be reasonably accounted for using the 350 or 175 gallons per day figure, which ever is appropriate, multiplied by the number of wells. That annual usage is then deducted from the remaining volume of water in the reserve. The rule language on accounting for use under the reserve was changed to include empirical data in the accounting if the project proponent chooses to do so. The level of data accuracy for use of water from the reserve is sufficient for this water management tool. Please also see response to comment 1038.

Comment 1342

Commentor: Eric Doyle

Type: E-mail dated April 14, 2005

Comment: I implore you to do everything within your authority to ensure that adequate instream flows for steelhead and other native fish are preserved in the Stillaguamish River, and the other great rivers of our state. With specific regard to the Stilly, the following are ways that Ecology's Stillaguamish proposal could be improved: Measure current and projected water use to better plan for ways to maintain instream flows.

Response: Thank you for your comment regarding metering of water use. Ecology agrees with the concept of accounting for water use. In general, metering is an effective way to account for water use. The rule exempts only single domestic users from the metering. Wells that will be

used by two or more residences and new permitted uses must be metered. For the water used by a single connection metering is not the only way to account for water use. Based on well logs, normal well construction techniques, and pumps commonly used we can reasonably know the number, depth of withdrawal and instantaneous use of water. To account for use on an annual basis is the other main unknown. In this case we have empirical data from nearby Skagit County for domestic rural water use on an annual basis. Use of the reserve on an annual basis can be reasonably accounted for using the 350 or 175 gallons per day figure, which ever is appropriate, multiplied by the number of wells. That annual usage is then deducted from the remaining volume of water in the reserve. The rule language on accounting for use under the reserve was changed to include empirical data in the accounting if the project proponent chooses to do so. The level of data accuracy for use of water from the reserve is sufficient for this water management tool. Please also see response to comment 1038.

Comment 1343

Commentor: Eric Doyle

Type: E-mail dated April 14, 2005

Comment: [E]nsure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish;

Response: Thank you for your comment. The rule or reservations created do not limit or facilitate growth. Ecology believes the reservation is sufficient to meet the need of forecasted population growth for twenty years. The purpose of the reserve is to provide water for rural development approved by the counties consistent with the counties land use plans and zoning. The rule does not change the local jurisdictions obligation under the Growth Management Act. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth.

Comment 1353

Commentor: Steve Lovelace

Type: E-mail dated April 26, 2005

Comment: The following are ways that Ecology's Stillaguamish proposal could be improved. Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.

Response: Thank you for your comment. The rule or reservations created do not limit or facilitate growth. Ecology believes the reservation is sufficient to meet the need of forecasted population growth for twenty years. The purpose of the reserve is to provide water for rural development approved by the counties consistent with the counties land use plans and zoning. The rule does not change the local jurisdictions obligation under the Growth Management Act. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth.

Comment 1357

Commentor: Mike MacDougall

Type: E-mail dated April 27, 2005

Comment: The following are ways that Ecology's Stillaguamish proposal could be improved: Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.

Response: Thank you for your comment. The rule or reservations created do not limit or

facilitate growth. Ecology believes the reservation is sufficient to meet the need of forecasted population growth for twenty years. The purpose of the reserve is to provide water for rural development approved by the counties consistent with the counties land use plans and zoning. The rule does not change the local jurisdictions obligation under the Growth Management Act. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth.

Comment 1360

Commentor: Robert Meyer

Type: E-mail dated April 26, 2005

Comment: Measure future water use. We need to know how much water is being used in order to manage it more wisely.

Response: Thank you for your comment regarding metering of water use. Ecology agrees with the concept of accounting for water use. In general, metering is an effective way to account for water use. The rule exempts only single domestic users from the metering. Wells that will be used by two or more residences and new permitted uses must be metered. For the water used by a single connection metering is not the only way to account for water use. Based on well logs, normal well construction techniques, and pumps commonly used we can reasonably know the number, depth of withdrawal and instantaneous use of water. To account for use on an annual basis is the other main unknown. In this case we have empirical data from nearby Skagit County for domestic rural water use on an annual basis. Use of the reserve on an annual basis can be reasonably accounted for using the 350 or 175 gallons per day figure, which ever is appropriate, multiplied by the number of wells. That annual usage is then deducted from the remaining volume of water in the reserve. The rule language on accounting for use under the reserve was changed to include empirical data in the accounting if the project proponent chooses to do so. The level of data accuracy for use of water from the reserve is sufficient for this water management tool. Please also see response to comment 1038.

Comment 1364

Commentor: Mike O'Shea

Type: E-mail dated May 1, 2005

Comment: The policy should include sufficient groundwater reserves that do not lead to sprawling development, harming farms and fish.

Response: Thank you for your comment. The rule or reservations created do not limit or facilitate growth. Ecology believes the reservation is sufficient to meet the need of forecasted population growth for twenty years. The purpose of the reserve is to provide water for rural development approved by the counties consistent with the counties land use plans and zoning. The rule does not change the local jurisdictions obligation under the Growth Management Act. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth.

Comment 1368

Commentor: Sherry Perkins

Type: E-mail dated April 27, 2005

Comment: Measure future water use. We need to know how much water is being used in order to manage it more wisely.

Response: Thank you for your comment regarding metering of water use. Ecology agrees with the concept of accounting for water use. In general, metering is an effective way to account

for water use. The rule exempts only single domestic users from the metering. Wells that will be used by two or more residences and new permitted uses must be metered. For the water used by a single connection metering is not the only way to account for water use. Based on well logs, normal well construction techniques, and pumps commonly used we can reasonably know the number, depth of withdrawal and instantaneous use of water. To account for use on an annual basis is the other main unknown. In this case we have empirical data from nearby Skagit County for domestic rural water use on an annual basis. Use of the reserve on an annual basis can be reasonably accounted for using the 350 or 175 gallons per day figure, which ever is appropriate, multiplied by the number of wells. That annual usage is then deducted from the remaining volume of water in the reserve. The rule language on accounting for use under the reserve was changed to include empirical data in the accounting if the project proponent chooses to do so. The level of data accuracy for use of water from the reserve is sufficient for this water management tool. Please also see response to comment 1038.

Comment 1369

Commentor: Sherry Perkins

Type: E-mail dated April 27, 2005

Comment: Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.

Response: Thank you for your comment related to ensuring that the groundwater "reserve" does not lead to sprawling development, harming farms and fish. The rule or reservations created do not limit or facilitate growth. Ecology believes the reservation is sufficient to meet the need of forecasted population growth for twenty years. The purpose of the reserve is to provide water for rural development approved by the counties consistent with the counties land use plans and zoning. The rule does not change the local jurisdictions obligation under the Growth Management Act. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth.

Comment 1372

Commentor: Kathryn Piland

Type: E-mail dated May 5, 2005

Comment: Measure future water use. We need to know how much water is being used in order to manage it more wisely.

Response: Thank you for your comment regarding metering of water use. Ecology agrees with the concept of accounting for water use. In general, metering is an effective way to account for water use. The rule exempts only single domestic users from the metering. Wells that will be used by two or more residences and new permitted uses must be metered. For the water used by a single connection metering is not the only way to account for water use. Based on well logs, normal well construction techniques, and pumps commonly used we can reasonably know the number, depth of withdrawal and instantaneous use of water. To account for use on an annual basis is the other main unknown. In this case we have empirical data from nearby Skagit County for domestic rural water use on an annual basis. Use of the reserve on an annual basis can be reasonably accounted for using the 350 or 175 gallons per day figure, which ever is appropriate, multiplied by the number of wells. That annual usage is then deducted from the remaining volume of water in the reserve. The rule language on accounting for use under the reserve was changed to include empirical data in the accounting if the project proponent chooses to do so. The level of data accuracy for use of water from the reserve is sufficient for this water management tool. Please also see response to comment 1038.

Comment 1378

Commentor: Bruce Reed

Type: E-mail dated March 26, 2005

Comment: State law allows local governments to issue new building permits only when sufficient potable water is available. The rule strengthens this law by requiring local governments to inform future well owners of some limitations to protect the Stilly and its streams.

Response: Thank you for your comment. Your comment is correct that State law already requires a demonstration of adequate potable water before any new building permit is issued. Ecology's rule is forging a stronger link between local government actions and State water resource management and we do look to local governments to inform future well owners of some limitations to protect the Stilly and its streams. The proposed rule language related to the reservation being effectuated or contingent upon local government adopting an ordinance related to the reservation was changed. However, Ecology firmly believes the Counties and Cities should consider the reservation and all water management with in their deliberative processes on land use and use of water in the basin. Please see RCW 90.54.090, where the law reads all agencies of state and local government, including counties and municipal and public corporations, shall, whenever possible, carry out powers vested in them in manners which are consistent with the provisions of this chapter. The rule language on adopting an ordinance related to the reservation was changed to be more general, but still address the idea the Counties or Cities will consider the reservation. The rule now reads, the reservation shall be applicable only when the appropriate cities or counties submit a written acknowledgment to the department that confirms that any legally required determinations of adequate potable water for building permits and subdivision approvals will be consistent with applicable provisions of this chapter. Ecology believes this language is more consistent with existing law and our authority. For more on this feature of the rule related to local government see response to comments 240, 310, 332, 446, 447, and 1013.

Comment 1380

Commentor: Bruce Reed

Type: E-mails dated March 26 and May 1, 2005

Comment: MARCH 26: Ecology should require measuring of future water use: water meters are a fact of life for most water users in Washington. We need to know how much water is being used so that we can manage it more wisely.

MAY 1: Measure future water use. We need to know how much water is being used in order to manage it more wisely.

Response: Thank you for your comments regarding metering of water use. Ecology agrees with the concept of accounting for water use. In general, metering is an effective way to account for water use. The rule exempts only single domestic users from the metering. Wells that will be used by two or more residences and new permitted uses must be metered. For the water used by a single connection metering is not the only way to account for water use. Based on well logs, normal well construction techniques, and pumps commonly used we can reasonably know the number, depth of withdrawal and instantaneous use of water. To account for use on an annual basis is the other main unknown. In this case we have empirical data from nearby Skagit County for domestic rural water use on an annual basis. Use of the reserve on an annual basis can be reasonably accounted for using the 350 or 175 gallons per day figure, which ever is appropriate, multiplied by the number of wells. That annual usage is then deducted from the remaining volume of water in the reserve. The rule language on accounting for use under the reserve was changed to include empirical data in the accounting if the project proponent chooses to do so. The level of data accuracy for use of water from the reserve is sufficient for this water management tool. Please also see response to comment 1038.

Comment 1383

Commentor: Bruce Reed

Type: E-mail dated May 1, 2005

Comment: The following are ways that Ecology's Stillaguamish proposal could be improved. Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.

Response: Thank you for your comment. The rule or reservations created do not limit or facilitate growth. Ecology believes the reservation is sufficient to meet the need of forecasted population growth for twenty years. The purpose of the reserve is to provide water for rural development approved by the counties consistent with the counties land use plans and zoning. The rule does not change the local jurisdictions obligation under the Growth Management Act. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth.

Comment 1388

Commentor: Donald Shank

Type: E-mail dated April 28, 2005

Comment: As someone who has hiked, camped, hunted and fished the Stilliguamish Basin for the last 50 years, who eats the produce of its farms, and who wants his grandson to be able to do the same, I ask you to: Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.

Response: Thank you for your comment related to ensuring that the groundwater "reserve" does not lead to sprawling development, harming farms and fish. The rule or reservations created do not limit or facilitate growth. Land use and growth management is controlled by the local jurisdiction. The rule does not change that. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth.

Comment 1390

Commentor: Donald Shank

Type: E-mail dated April 28, 2005

Comment: Measure future water use. We need to know how much water is being used in order to manage it more wisely.

Response: Thank you for your comment regarding metering of water use. Ecology agrees with the concept of accounting for water use. In general, metering is an effective way to account for water use. The rule exempts only single domestic users from the metering. Wells that will be used by two or more residences and new permitted uses must be metered. For the water used by a single connection metering is not the only way to account for water use. Based on well logs, normal well construction techniques, and pumps commonly used we can reasonably know the number, depth of withdrawal and instantaneous use of water. To account for use on an annual basis is the other main unknown. In this case we have empirical data from nearby Skagit County for domestic rural water use on an annual basis. Use of the reserve on an annual basis can be reasonably accounted for using the 350 or 175 gallons per day figure, which ever is appropriate, multiplied by the number of wells. That annual usage is then deducted from the remaining volume of water in the reserve. The rule language on accounting for use under the reserve was changed to include empirical data in the accounting if the project proponent chooses to do so. The level of data accuracy for use of water from the reserve is sufficient for this water management tool. Please also see response to comment 1038.

Comment 1397

Commentor: Val Schroeder

Type: E-mail dated April 26, 2005

Comment: Limit future groundwater use. Streams and groundwater are connected: limits are prudent because using too much groundwater robs our streams and rivers of water, especially in the summer.

Response: Thank you for your support of the proposal to limit groundwater when that ground water contributes to streams and that using too much groundwater robs our streams and rivers of water, especially in the summer. Ecology agrees that groundwater contributes to the base flow of rivers and streams in the watershed. Ecology views the limit you note to be better incorporation of water withdrawn by the permit exempt well into the over all management framework. Any lawful water use under the ground water permit exemption creates a water right with both privileges and obligations. One of the obligations is curtailment of use if a senior right is not satisfied. Reconciling interruptible water rights and pubic water supply is the issues the reservation was designed to address. Incorporation of the reservation into local land use plans and resource management plans should lead to better overall water management. In addition, the rule provides a closure or seasonal closure to many streams and the ground water, that if withdrawn would effect the flow or level of the regulated stream. Please see section 070 of the rule.

Comment 1398

Commentor: Val Schroeder

Type: E-mail dated April 26, 2005

Comment: Require accountability for local land use decisions. The proposal requires local governments to adopt an ordinance stating that building permits may be limited in the future by the availability of water for wells. State law already requires a demonstration of adequate potable water before any new building permit is issued. The new rule would strengthen this responsibility.

Response: Thank you for your comment to require accountability for local land use decisions, that building permits may be limited in the future by the availability of water for wells, and that State law already requires a demonstration of adequate potable water before any new building permit is issued. Your comment is correct that State law already requires a demonstration of adequate potable water before any new building permit is issued. Ecology's rule is forging a stronger link between local government actions and State water resource management and we do look to local governments to inform future well owners of some limitations to protect the Stilly and its streams. The proposed rule language related to the reservation being effectuated or contingent upon local government adopting an ordinance related to the reservation was changed. However, Ecology firmly believes the Counties and Cities should consider the reservation and all water management with in their deliberative processes on land use and use of water in the basin. Please see RCW 90.54.090, where the law reads all agencies of state and local government, including counties and municipal and public corporations, shall, whenever possible, carry out powers vested in them in manners which are consistent with the provisions of this chapter. The rule language on adopting an ordinance related to the reservation was changed to be more general, but still address the idea the Counties or Cities will consider the reservation. As the rule now reads, the reservation shall be applicable only when the appropriate cities or counties submit a written acknowledgment to the department that confirms that any legally required determinations of adequate potable water for building permits and subdivision approvals will be consistent with applicable provisions of this chapter. Ecology believes this language is more consistent with existing law and our authority. For more on this feature of the rule related to local government see response to comments 240, 310, 332, 446, 447, and 1013.

Comment 1402

Commentor: Ricky Taylor

Type: E-mail dated April 12, 2005

Comment: The following are ways that the Department of Ecology's Stillaguamish proposal could be improved: Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.

Response: Thank you for your comment related to ensuring that the groundwater "reserve" does not lead to sprawling development, harming farms and fish. The rule or reservations created do not limit or facilitate growth. Ecology believes the reservation is sufficient to meet the need of forecasted population growth for twenty years. The purpose of the reserve is to provide water for rural development approved by the counties consistent with the counties land use plans and zoning. The rule does not change the local jurisdictions obligation under the Growth Management Act. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth.

Comment 1404

Commentor: Ricky Taylor

Type: E-mail dated April 12, 2005

Comment: Measure future water use. We need to know how much water is being used in order to manage it more wisely.

Response: Thank you for your comment regarding metering of water use. Ecology agrees with the concept of accounting for water use. In general, metering is an effective way to account for water use. The rule exempts only single domestic users from the metering. Wells that will be used by two or more residences and new permitted uses must be metered. For the water used by a single connection metering is not the only way to account for water use. Based on well logs, normal well construction techniques, and pumps commonly used we can reasonably know the number, depth of withdrawal and instantaneous use of water. To account for use on an annual basis is the other main unknown. In this case we have empirical data from nearby Skagit County for domestic rural water use on an annual basis. Use of the reserve on an annual basis can be reasonably accounted for using the 350 or 175 gallons per day figure, which ever is appropriate, multiplied by the number of wells. That annual usage is then deducted from the remaining volume of water in the reserve. The rule language on accounting for use under the reserve was changed to include empirical data in the accounting if the project proponent chooses to do so. The level of data accuracy for use of water from the reserve is sufficient for this water management tool. Please also see response to comment 1038.

Comment 1407

Commentor: TerryAnn Towers

Type: E-mail dated April 13, 2005

Comment: The following are ways that Ecology's Stillaguamish proposal could be improved. Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.

Response: Thank you for your comment related to ensuring that the groundwater "reserve" does not lead to sprawling development, harming farms and fish. The rule or reservations created do not limit or facilitate growth. Ecology believes the reservation is sufficient to meet the need of forecasted population growth for twenty years. The purpose of the reserve is to provide water for rural development approved by the counties consistent with the counties land use plans and zoning. The rule does not change the local jurisdictions obligation under the Growth

Management Act. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth.

Comment 1413

Commentor: Jeffrey Weist

Type: E-mail dated April 11, 2005

Comment: The following are ways that Ecology's Stillaguamish proposal could be improved. Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.

Response: Thank you for your comment related to ensuring that the groundwater "reserve" does not lead to sprawling development, harming farms and fish. The rule or reservations created do not limit or facilitate growth. Ecology believes the reservation is sufficient to meet the need of forecasted population growth for twenty years. The purpose of the reserve is to provide water for rural development approved by the counties consistent with the counties land use plans and zoning. The rule does not change the local jurisdictions obligation under the Growth Management Act. Please see comments 843 through 848, 856, 1251, and 1284 for more on the relationship of the rule to growth.

Comment 1415

Commentor: Jeffrey Weist

Type: E-mail dated April 11, 2005

Comment: Measure future water use. We need to know how much water is being used in order to manage it more wisely.

Response: Thank you for your comment regarding metering of water use. Ecology agrees with the concept of accounting for water use. In general, metering is an effective way to account for water use. The rule exempts only single domestic users from the metering. Wells that will be used by two or more residences and new permitted uses must be metered. For the water used by a single connection metering is not the only way to account for water use. Based on well logs, normal well construction techniques, and pumps commonly used we can reasonably know the number, depth of withdrawal and instantaneous use of water. To account for use on an annual basis is the other main unknown. In this case we have empirical data from nearby Skagit County for domestic rural water use on an annual basis. Use of the reserve on an annual basis can be reasonably accounted for using the 350 or 175 gallons per day figure, which ever is appropriate, multiplied by the number of wells. That annual usage is then deducted from the remaining volume of water in the reserve. The rule language on accounting for use under the reserve was changed to include empirical data in the accounting if the project proponent chooses to do so. The level of data accuracy for use of water from the reserve is sufficient for this water management tool. Please also see response to comment 1038.

090 (2) Reservation Conditons

Comment 217

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, March 9, 2005, Mt. Vernon hearing on proposed Skagit instream flow rule.

Comment: Public water service is not available everywhere. In fact it's only available in a few of the subbasins that you have restricted, and is certainly not available in the Upper Basin and in most of the Middle Basin, middle main stem area. The requirement for a connection for

those within 500 feet of existing PUD waters lines is unfeasible, and in fact, the rule, would preclude the county from allowing storage to meet the needs for interruptible water rights. In other words, interruptible, the rule as it's currently written, would require the county to acknowledge that an interruptible water supply is not a proper basis for issuing a building permit even if storage is available.

Response: Thank you for your comment. References to upper and middle basin are not applicable to the Stillaguamish system or rule (rather they refer to the Skagit River. Ecology recognizes that public water is not available in all locations of the Stillaguamish basin and has modified the proposed rule language to reflect the idea that hook-up to a municipal water system is desirable if the proposed development is in the service area of a municipal water system and the service can be provided. Please see RCW 43.20.260.

Comment 222

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, March 9, 2005, Mt. Vernon hearing on proposed Skagit instream flow rule.

Comment: [T]he rule does not address the impacts of the mandatory PUD extension, or the proposed water extensions to 500 feet. We believe that this requirement will cause rural sprawl throughout many areas of the county where the otherwise gradual incremental growth is adequately and appropriately served by smaller water withdrawals.

Response: Thank you for your comment. The proposed rule does not require mandatory extension of a municipal water supplier or public water system. Rather, the rule provides that use of the reserved water is not allowed if water service can be provided from a municipal water supplier in a timely and reasonable manner. The final rule language will not have a definition of timely and reasonable. Any determination of timely and reasonable service will be done by the local utilities in keeping with existing law and changes to statute created by the Municipal Water Law bill of 2003.

Comment 240

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated March 18, 2005, regarding proposed Skagit instream flow rule amendments.

Comment: Ecology cannot overcome limitations on its statutory authority by enlisting the County to enforce regulations against exempt well use. The background document states that the County has a "role and responsibility in ensuring that new development has an adequate quantity of potable water."34 This statement implies that the County has some affirmative obligation under RCW 19.27.097 to determine the "legal" adequacy of water supply for building permits. This specific issue has been litigated against Skagit County in Snohomish County Superior Court. In a lawsuit brought by the Swinomish Indian Tribal Community, the court dismissed a claim that the County was violating RCW 19.27.097 by issuing building permits that rely on exempt wells after the adoption of the Skagit River Instream Flow rule. In so ruling, the court concluded that RCW 19.27.097 "imposes no affirmative obligations on the County."35 Ecology can not bootstrap onto the County's legal authority, where the Department lacks authority under state law to limit exempt well use.

34 Skagit River Amendment Background on the Reservation, Closures, and Hydraulic Continuity, at 13.
35 Swinomish Indian Tribal Community v. Skagit County, Snohomish County Case No. 04-2-05842-1 Memorandum Opinion, at 7 (December 22, 2004).

Response: Thank you for your comment. Ecology is not, and did not intent to, overcome limitations on its statutory authority by enlisting the County to enforce regulations against permit exempt well use. Rather Ecology was and is seeking to have the County recognize water rights

and limitations to legal availability recognized within its actions. The proposed language at WAC 173-505-090(2)(d)(i) that related to reservation conditions also being conditions within a building permit or subdivision approval was deleted. That language was changed to be more general and not action specific. The rule now provides (see new section 090(2)(d)) the reservation shall be applicable only when the appropriate city or county submit a written acknowledgement to the department that confirms that any legally required determinations of adequate potable water for building permits and subdivision approvals will be consistent with applicable provisions of the rule. Again the idea is for local governments to consider water in their land use decisions (see RCW 90.54.130) and for them to take action consistent with the Water Code (see RCW 90.54.090).

Comment 256

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated March 18, 2005, regarding proposed Skagit instream flow rule amendments

Comment: Ecology's proposed amended rule preempts Skagit County's land use regulatory authority. The proposed rule amendment grants Ecology authority to limit or restrict further use of the domestic supply reservation established under the rule "if existing County and city land-use decisions, including zoning changes in building permit and subdivision approvals, allow for uses inconsistent with [the Skagit instream flow rule] or for increased densities that adversely affect small tributaries and other flow sensitive areas."60 This provision allows Ecology to preempt local land-use decisions that are reserved exclusively to the Skagit County Board of Commissioners under the Growth Management Act.61

60 Proposed instream flow rule, at WAC 173-503-073(5).
61 RCW 36.70A.070; Snohomish County v. Anderson, 123 Wn.2d 151,868 P.2d 116 (1994); Whatcom County v. Brisbane, 125 Wn.2d 345,884 P.2d 1326 (1994).

Response: Thank you for your comment. The proposed rule language at WAC 173-505-090(6) related to changes to the reservation if existing County and city land-use decisions, including zoning changes in building permit and subdivision approvals change will be deleted from the final rule. Any changes to the rule will be done by rule-making.

Comment 257

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated March 18, 2005, regarding proposed Skagit instream flow rule amendments

Comment: Skagit County is concerned that there is no assurance that it can rely on the reservation for future planning and permitting. The rule amendment is silent as to how the Department will account for water use and the extent of the available reservation. We understand that Ecology staff has already concluded that none of the reservation for the Nookachamps Creek basin is available for future development. Ecology has not indicated how this determination was made or how similar determinations will be made in the future. The terms of WAC 173-503-073 would grant complete discretion to Ecology to modify or eliminate a reservation by its unilateral determination that land use decisions or building permit decisions by the County are inconsistent with the rule.

Response: Thank you for your comment. Ecology respectfully disagrees the proposed rule is silent on how Ecology will account for water use under the reservation. Please see propose WAC 173-505-090(7)

Comment 312

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Subsection 073(2)(f) limits outdoor water use to 1/12th of an acre. This conflicts with statutorily provided rights contained in RCW 90.44.050. Agency rules that interfere with legislatively-provided rights are invalid.

Response: Thank you for your comment. Ecology respectfully disagrees. Please see response to comment 237.

Comment 313

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: In subsection 073(5), Ecology claims broad authority to further limit or restrict access to the reservation if counties increase densities, approve building permits or enact zoning changes which conflict with the purpose of this chapter. Because the proposed domestic reservations are insufficient to meet existing and anticipated demand, counties must revise their land use plans to allow the transfer of density into areas where more water is available. Ecology is in effect requiring wholesale zoning revisions while reserving absolute veto authority over the decisions it mandates, This exceeds Ecology's delegated authority.

Response: Thank you for your comment. That section of the proposed rule related to Ecology further limiting or restricting access to the reservation if counties increase densities, approve building permits or enact zoning changes which conflict with the purpose of this chapter will be deleted in the final proposal. Any changes in the future that limiting or restricting access to the reservation will be done by a new rule making to revise the existing rule.

Comment 314

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: In subsection 073(6)(b), Ecology claims discretion to assume domestic use of 350 gpd per residence or business. Ecology also claims discretion to adjust water use down to 175 gpd if the residence or business is served by on-site septic service. First, the implicit assumption that use of on-site septic and drainfield systems are 50 percent consumptive is contrary to existing literature which places the level or return flows much higher.

Response: Thank you for your comment. The accounting for water use under the reservation proposed using average numbers 350 gpd per residence or business or 175 gpd if the residence or business is served by on-site septic service. Ecology agrees the 50 percent recharge from a septic system is conservative. Ecology believes it is prudent to be conservative in this matter. The value is supported by studies. The 350 gallons per day assumption is an estimate of annual average use by an average household, including a small amount of outdoor irrigation. The U.S. Geological Survey in its year 2000 water use report for Washington state reports that estimated domestic water use (including outdoor use) for Skagit County is 124 gallons per person per day (USGS 2004). The 2000 Census estimates the average number of people per household in Skagit County as 2.6 (US Census 2000). The 124 gallons per day multiplied by 2.6 persons per house yields 322.4 gallons per day, close to the standard Ecology is using.

Ecology may also reduce the estimated water consumed from the reservation by 50% per household to account for septic return flow. In areas not served by sewer, a portion of the water used by a home infiltrates to the ground via the septic system. The amount returned

depends on site specific factors such as household water usage patterns, soil types, vegetation, and septic design. Ecology is using the 50% return flow estimate as a conservative assumption based on an analysis prepared by the consulting firm Economic and Engineering Services (EES 2002). The analysis used hydrologic principles and basic water use assumptions to look at four different water use scenarios –low water use; medium water use; high water use and maximum water use. The medium water use scenario analyzed return flow to the aquifer from water-use inside the household based on three people per household using 70 gallons per person per day for inside use and irrigation of 50' x 50' or 2500 square feet of lawn and garden. The return flow from this scenario is estimated to range from 51% to 72%.

Comment 315

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: [T]here is no guarantee that Ecology will apply either assumption, leaving landowners and Skagit County with the possibility that the rules of the game may change at any time.

Response: Thank you for your comment. Ecology believes accounting for use under the reservation will be straightforward. A home or business is either on a septic system or not. If the home is on septic the volume debited from the reservation will be 175 gpd; if not, 350 gpd. Ecology's accounting for water use under the reservation will be available to the County should they chose to inspect or verify the accounting.

Comment 316

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: In section 073(2)(e), Ecology states that the reservation in unavailable in areas served by public water systems. "Public water system" under the proposed amended rule includes group-domestic systems. Ecology should clarify whether they intend for new development to tie into existing group-domestic systems served by exempt wells. This assumption is inconsistent with Ecology's Instream Flow Guidance Document. First, Ecology's proposed rule amendment is inconsistent with the Instream Flow Guidance Document. The guidance document recognizes the need to provide water for future out-of-stream needs. The guidance document indicates that water reservations will be limited to that amount of water that can be withdrawn while causing less than one to two percent fish habitat loss during a one in ten-year low flow condition (i.e., measured at a ninety percent exceedence level).13 By contrast, the Skagit rule uses the lesser of two percent or the amount of water needed for future growth, depending on ecology's analysis of population growth.

13 Guidance Document, at pp. 16-17.

Response: Thank you for your comment. The proposed rule language has been changed. The phrase "public water system has been changed to " municipal water supplier" to better reflect original intent and the Municipal Water Law of 2003. The intent is that new demand be met from a municipal water supplier when service can be provided in a timely and reasonable manner. The intent is not for new development to tie into existing group-domestic systems served by exempt wells if those systems are not municipal water suppliers, an expanding system, and approved by DOH for the expansion.

Comment 318

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Ecology's proposed rule amendment is inconsistent with the Ecology/State Health Department Water Availability Guidance Document. Under the guidelines document, and (sic) individual water supply may be considered adequate for purposes of RCW 1927.097 only if the water source is capable of providing water to a residential dwelling in the amount of 400 gallons per day. Ecology's proposed amended instream flow rule ignores the water availability guidance

Response: Thank you for your comment. Please see response to comment 231.

Comment 319

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Ecology's proposed rule amendment is inconsistent with the State Health Department Water System Design Manual. Skagit County believes the State Health Department's Water System Design Manual accurately reflects the amount of water needed for rural residential purposes. According to the Design Manual, "[Utility records throughout the state indicate a significant increase in maximum day demands for lot sizes in excess of one acre. It would be appropriate, unless evidence is presented which indicates a better design premise, to use a maximum day demand (MDD) of 800 gpd/ERU for residential lots in excess of one acre . . ."15

15 Wash. State Dept. of Health, Water System Design Manual, DOH Pub #331-

Response: Thank you for your comment. Please see response to comment 231.

Comment 320

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Ecology's proposed rule amendment is inconsistent with Ecology's Irrigation Efficiency Guidance Document. Ecology's proposed rule amendment includes a proposal that credits water withdrawals for return flows. The document assumes no return flows where a home is connected to public sewer system, even though the rule amendment allows for irrigation of l/12 of an acre for each residence, and 50 percent return flow where no public sewer service is provided. Available studies indicate that only ten to 15 percent of all water used indoors for domestic supply purposes actually is consumed. Therefore, for indoor domestic supply purposes where no public sewer service is available, return flows should be estimated at a much higher level than Ecology proposes.

Response: Ecology agrees the proposed rule and the 50 percent recharge rate is inconsistent with the Irrigation Efficiency Guidance Document. The Irrigation Efficiency Guidance Document was created to guide evaluations of consumptive use for the purpose of adding new uses to excising agriculture water rights. Generally, those investigations, within the context of an application review are very detailed. Here, in a broad, general, accounting for domestic water use under the reservation there is no need to be so precise. Detailed investigations of the consumptive or nonconsumptive nature of each use of water under the reservation are not planned. A conservative, general, assumption is made. On average, about 250 ground water

permit exempt wells are drilled in the basin. It is not a prudent use of resources to create a program to do a detailed assessment of each well's use and the consumptive or nonconsumptive nature of that use. Domestic outdoor water use is more variable over the years than are agricultural uses and as such would cause future challenges to change the accounting for each well, each year. A workload that is not reasonable to address on a case by case basis. Finally, please see response to comment 240.

Comment 321

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: . . .Ecology recently published a guidance document explaining its policy for determining irrigation efficiency and consumptive use. The irrigation efficiency guidance document explains how consumptive uses are calculated for irrigation purposes. This document should be used by Ecology to estimate return flows under the Skagit instream flow rule amendment. Ecology should use its irrigation efficiency and consumptive use guidance document when determining return flows for outdoor use.

Response: Thank you for your comment. Ecology disagrees the irrigation efficiency guidance document should be applied on a case by case basis to the domestic wells using water under the reservation. Please see the response to comment 320.

Comment 322

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: The amended rule proposal provides up to 50 percent "credit" for return flows were (sic) on-site septic systems are used. We agree return flow credit is inappropriate where wastewater treatment systems "export" water out of eight subbasin (sic). Otherwise, we fail to see a relevant distinction based on whether wastewater is treated on site or otherwise.

Response: Thank you for your comment. Please see the response to comment 320. Ecology agrees with you that return flow credit is inappropriate where wastewater treatment systems "export" water out of the basin of origin. If wastewater is not treated in a sewer system, the usual method of treatment is an on site septic

Comment 446

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: WAC 173-503-020 is amended under Ecology's proposal to subject local government decision making to RCW 90.54.090. This is a new provision in the regulation, and there are no comparable provisions under the proposed Samish or Stillaguamish instream flow rules. Does this proposal impose new responsibilities on local governments, and if so what are they?

Response: Thank you for your comment. The proposed rule does not subject local government decision making to RCW 90.54.090. The statue at RCW 90.54.090 states " All agencies of state and local government, including counties and municipal and public corporations, shall, whenever possible, carry out powers vested in them in manners which are

consistent with the provisions of this chapter." This is existing law and has been for some time. Local decision making is already subject to this idea of local government exercising its powers consistently with water rules created pursuant to chapter 90.54 RCW.

Comment 451

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Does WAC 173-503-073(2)I mean Ecology intends to review group water system approvals?

Response: Thank you for your comment. The proposed Stillaguamish has the requirement in section 090 that "Domestic water use shall meet the water use efficiency standards of the uniform plumbing code as well as any applicable local or state requirements for conservation standards". For small group domestic uses there is generally no water system plan. In some cases the small systems have an abbreviated planning requirement. Department of Health is the primary state agency that reviews water system plans. Ecology does review a subset of the water system plans DOH approves each year. In general, there is no expectation that Ecology would be reviewing all water systems in the basin with regards to conservation and efficiency.

Comment 452

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: WAC 173-503-073(6)(b) states that Ecology may – but is not required – to provide 50 percent credit for return flows where individual homes are served by on-site septic system. How will this be decided? What is the basis for assuming 50 percent return flows?

Response: Thank you for your comment. Please see response to comments 314, 315, and 320.

Comment 457

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: The proposed rule on the Entiat River allows for irrigation of up to 0.5 acre of lawn and garden, which is consistent with state law allowing for use of exempt groundwater withdrawals. How do you justify 1/12th of an acre for irrigation? What is the scientific or legal basis for this limit?

Response: Thank you for your comment. Please see the response to comment 237. The 1/12th of an acre for irrigation limitation comes from the idea the reservation is an adequate and safe supplies of water preserved and protected in potable condition to satisfy human domestic needs. (See RCW 90.54.020(5)). The intent is to focus, but allow some, additional outdoor water use, but not a large quantity of outdoor use. The ground water is to be preserved for domestic needs. The limitation to 1/12 acre is though to do this. The 1/12 acres relates to the fact that up to six homes may be served on a permit exempt well. Six multiplied by 1/12 acre would equal one-half acre of outdoor irrigation, the amount allowed under RCW 90.44.050 for these types of de minimus uses.

Comment 857

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Applying Ecology's assumed water use of 350 gallons per day (gpd) for each residence,22 one in four parcels would be without water. Under Ecology's proposal, 1,024 parcels would be unbuildable.

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish rule making. Please see response to comments 843 through 856.

Comment 865

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program

Comment: . . .[T]he best-case scenario for rural residents is that Ecology may reduce the assumed level of consumption for residences utilizing on-site wastewater treatment by 50 percent.

Response: Thank you for your comment. Any development using water from the domestic reserve and treating sewage by on-site systems will be debited 175 gallons per day from the water reserved.

Comment 866

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter to Ecology regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program

Comment: This scenario is uncertain because such a reduction is within Ecology's discretion.25

25 "[The department may account for water use at a rate of 350 gallons per day (gpd) per residence or business. This figure may be adjusted down to 175 gpd if the residence or business is served by an on-site septic system." Proposed WAC 173-503-073(6)(b)

Response: Thank you for your comment. Any development using water from the domestic reserve and treating sewage by on-site systems will be debited 175 gallons per day from the water reserved. As a part of the rule (see section 090(6)), any changes to that figure will need to be made through the rulemaking process, not simply at Ecology's whim.

Comment 892

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter to Ecology regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program

Comment: This is especially true where, as here, the proposed rule requires connection to public water systems which could cost as much as three times that of an exempt well.40

40 Proposed WAC 173-503-025.

Response: Thank you for your comment. The rule provides that development in the service area of a municipal provider seek water from the municipal water supplier. Access is allowed to the reservation for such persons if service from a municipal supplier is denied. The proposed rule definition of timely and reasonable has been deleted from the final proposal. Any decision on duty to serve and timely and reasonable will be made by the local jurisdictions as provided for in the coordinated water system plan. Please see RCW 43.20.260 and response to comment 882.

Comment 893

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter to Ecology regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program

Comment: The burden of such connections cannot be overstated because, as Ecology recognizes, "[extending public water supplies into areas served by exempt wells may result in increased costs to existing exempt well owners who, if they choose to connect to the public system, may be required to pay part or all of the costs of extensions and/or connections."41

41 Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6-67.

Response: Thank you for your comment. Please see response to comments 892 and 882. The extension of public water infrastructure and paying for it is the purview of the local jurisdictions. Individuals must also pay for the cost of installing wells and septic systems or of acquiring existing rights if they wish to use those sources; Ecology is unaware of any free source of water.

Comment 895

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter to Ecology regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program

Comment: Public water supply – Ecology recognizes that requirements to connect to public water supplies "may increase demands on public water systems, but only to the extent that water systems have planned for, and are capable of, providing the water."43 Ecology's conclusions are highly suspect given the deficit in water supply and uncertainty regarding which parcels will choose to develop exempt wells utilizing the reservation.

43 Determination of Nonsignificance, 18.

Response: Thank you for your comment. Ecology respectfully disagrees that it is speculative to say the requirement to connect to public water supplies "may increase demands on public water systems, but only to the extent that water systems have planned for, and are capable of, providing the water." Please see the Municipal Water Law of 2003, codified in part, in chapter 90.03 RCW and RCW 43.20.260.

Comment 936

Commentor: Jodi Slavik, Building Industry Association of Washington

Type: Letter dated April 25, 2005

Comment: It is. . .frankly offensive that Ecology is granting itself authority to punish a local government and its taxpayers if it deems that area to have planned densities that "adversely affect small tributaries and other flow-sensitive areas." To what level is "adverse"? What is the range of "small tributaries"? What are the "flow-sensitive areas"? What is the process to make these determinations? Such vague definitions and a lack of process will encourage lawsuits from environmental and citizens groups looking to stop growth and responding lawsuits from property

owners who have been denied economic use of their property.

Response: Thank you for your comment. Please see response to comment 935. The issues you raise are precisely why any changes to the proposed rule will be done by a future rule making. It was not Ecology's intent to imply a change to the rule can be done other than through rule making.

Comment 971

Commentor: Rich Hoey, Department of Health

Type: Letter dated March 18, 2005

Comment: WAC 173-505-090(2)(e): Concerns with this verbiage: This verbiage does not align itself with the stated goal (i.e., to require the applicant to request service of the purveyor). Suggested change to this verbiage: All landowners proposing a new industrial, commercial, or residential use of water within a municipal water supplier's retail service area pursuant to RCW 43.20.260 must provide documentation (prior to the issuance of a building permit or subdivision approval) that they have requested water service from the appropriate municipal water supplier (MWS) and that the MWS determined that service could not be provided in a timely and reasonable way. NOTE: We recommend that disputes over the definition of timely and reasonable be resolved at the local level through a set formal process or through the court system.

Response: Thank you for your comment. The language of proposed WAC 173-505-090(2)(e) was changed in response to your comments.The policy of the original language is the same, if a development is within the service area of provider, then they should get water from that provider. The language now has a better link to municipal water suppliers and their duty to serve as provided for under RCW 43.20.260. Implicit is that disputes over the definition of duty to serve and or timely and reasonable be resolved at the local level through a set formal process

Comment 972

Commentor: Rich Hoey, Department of Health

Type: Letter dated March 18, 2005

Comment: WAC 173-505-090(2)(f): Concerns with this verbiage: Health believes that this section of the rule will be very difficult to implement and enforce. This verbiage does not align itself with the stated goal (i.e., to require the applicant to request service of the purveyor). Suggested change to this verbiage: Deletion of this subsection. NOTE: Local governments may choose to take this type of action as a means to stretch the limited supply of reserve water. We believe this is a decision best made at the local level where ultimate implementation would occur.

Response: Thank you for your comment. The policy expressed in proposed WAC 173-505-090(2)(f) was that when a new development/residence is created within the service area of a purveyor, and the purveyor can not serve the development now, use of the reservation is OK. However, when the municipal water system is expanded into the area, then the development must hook up to the municipal water system. In response to your comment, the language was deleted.

Comment 975

Commentor: Rich Hoey, Department of Health

Type: Letter dated March 18, 2005

Comment: The following is provided in the event that Ecology wishes feedback that would promote a stronger "duty to serve" expectation than the current stated goal (i.e., stronger than to

require the applicant to request service of the purveyor). WAC 173-505-090(2)(e): Suggested change to this verbiage: All landowners proposing a new industrial, commercial, or residential use of water within a municipal water supplier's retail service area pursuant to RCW 43.20.260 must obtain water service from the appropriate municipal water supplier unless the criteria specified in RCW 43.20.260 cannot be met.

Response: Thank you for your comment. The proposed rule language for the applicable section in the new rule is 090(2)(f) and the rule language is similar and with the same effect as what you proposed.

Comment 976

Commentor: Rich Hoey, Department of Health

Type: Letter dated March 18, 2005

Comment: The following is provided in the event that Ecology wishes feedback that would promote a stronger "duty to serve" expectation than the current stated goal (i.e., stronger than to require the applicant to request service of the purveyor). WAC 173-505-090(2)(f): Suggested change to this verbiage: Deletion of this subsection.

Response: Thank you for your comment. Please see response to comment 972.

Comment 1013

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Ecology's requirement that Counties adopt ordinances consistent with its rule exceeds the department's authority and creates an unfunded mandate: Proposed WAC 173-505-090(2)(d)(i) makes availability of the domestic reservation contingent upon Skagit County's adoption of an ordinance consistent with Ecology's proposed rule. Ecology bears the responsibility for implementing water resources and cannot, absent legislative authorization, delegate management to counties. This provision not only exceeds Ecology's authority, but creates an unfunded mandate in the process.

Response: Thank you for your comment. In response to your comment Ecology changed the rule language. The proposed rule now has a section that says the reservation is effective upon the County recognizing that the rule is in place and considering the rule in its actions (when applicable).

Comment 1410

Commentor: TerryAnn Towers

Type: E-mail dated April 13, 2005

Comment: Measure future water use. We need to know how much water is being used in order to manage it more wisely.

Response: Thank you for your comment regarding metering of water use. Ecology agrees with the concept of accounting for water use. In general, metering is an effective way to account for water use. The rule exempts only single domestic users from the metering. Wells that will be used by two or more residences and new permitted uses must be metered. For the water used by a single connection metering is not the only way to account for water use. Based on well logs, normal well construction techniques, and pumps commonly used we can reasonably know the number, depth of withdrawal and instantaneous use of water. To account for use on an annual basis is the other main unknown. In this case we have empirical data from nearby Skagit County

for domestic rural water use on an annual basis. Use of the reserve on an annual basis can be reasonably accounted for using the 350 or 175 gallons per day figure, which ever is appropriate, multiplied by the number of wells. That annual usage is then deducted from the remaining volume of water in the reserve. The rule language on accounting for use under the reserve was changed to include empirical data in the accounting if the project proponent chooses to do so. The level of data accuracy for use of water from the reserve is sufficient for this water management tool. Please also see response to comment 1038.

100 – Maximum Allocation

Comment 1039

Commentor: Becky Kelley and Ross Freeman, WEC and American Rivers

Type: Letter dated May 13, 2005

Comment: Support for maximum future allocation: WEC and American Rivers support the policy of a maximum future allocation as a means to protect high flows.4 We understand that this provision is an attempt to recognize and preserve some semblance of a natural flow regime. As acknowledged in the rule, protecting "high flows" is important to maintain ecological functions, such as channel maintenance and fish migration. Incorporating this concept into instream flow rules shows an evolution in instream flow management commensurate with our evolving understanding of the science. While we cannot speak to adequacy of the maximum flow numbers specifically, we support this general approach.
4 WAC 173-505-100.

Response: Thank you for WEC and American Rivers' comment and support for maximum future allocation. Comment noted.

Comment 1062

Commentor: David Monthie, King County Department of Natural Resources and Parks

Type: Letter dated December 14, 2004

Comment: Out of Stream Allocations: 1. In general, there should be some deference to, and acknowledgment of, requirements and policies adopted by local governments in attempting to address issues of water supply. These may exist in comprehensive plans (and implementing ordinances, policies, or rules), or watershed plans developed under RCW 90.82 or 90.54, or other water-related planning efforts (e.g., groundwater management plans; coordinated water supply plans). The development of these rules should reflect Ecology's effort to implement as well the specific provisions of the 2003 Municipal Water Law that attempt to link water supply planning and delivery to those other planning

Response: Thank you for your comment. Ecology recognizes the planning framework the local jurisdictions use related to land use and used the local jurisdictions population forecasts and or parcel data for our work. Ecology also worked with Snohomish County, for example, exploring ways to support their work related to critical area ordinances (critical aquifer recharge areas in particular) and was not able to see how the rule can support their work. However, Ecology does not defer to these local plans for protection of instream flows or the establishment of an instream flow right. Local authority does not extend to these issues. The rule language in section 090 was changed to better reflect Ecology's effort to implement specific provisions of the 2003 Municipal Water Law that link land development and use of municipal water supplies.

110 – Future Permitting Actions

Comment 331

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Future Changes and Transfers: Under section 081, change applications will only be approved if they are consistent with this chapter. This provision should be revised to indicate that continuity with ch.173-503 WAC applies in addition to the requirements for change listed at RCW 90.03.250 - .340 and do not replace those requirements.

Response: Thank you for your comment. In response to your comment rule language has been changed to avoid confusion that the rule replaces statutory requirements. For any water right decision, compliance with the statute and any watershed specific rules is required. Please see the change to rule language in the purpose section of the rule.

Comment 458

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Since this draft rule does not address commercial or industrial uses, what if a resource based industry or support resource industry wants to locate in the rural areas – most likely outside of a water purveyor's service area, what are the chances and the timeframe for obtaining a water right? If the tributary basin is closed, what are the chances and timeframe for obtaining a water right?

Response: Thank you for your comment. If a resource based industry or support resource industry wants to locate in the rural areas, Ecology is unable to predict its chances and timeframe for obtaining a water right. In large part, the ability to obtain a water right and the time period to do so depends on what the business wants to do. For example, the business could use the cost-recovery program and obtain a decision in not less than 3 months, but probably within six – eight months. If the business elected to not pursue cost-recovery, then its choice to pursue a new water right as compared to a change to an existing right would have a major bearing. Because of recent legislation, change decisions are being rendered in a timely manner. The same is not true for new decisions. If a tributary basin is closed, then the affirmative water right or change to water right decision may hinge on what mitigation, if any, is proposed by the business. There are simply too many variables for Ecology to predict timelines and decision outcomes without more information.

Comment 463

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Will we be able to create more Group B water systems (WAC 246-291) in the Skagit Basin following the Skagit Coordinated Water System Plan (Chapter 246- 293 WAC)? Will they have the same requirements? For these systems, following the State Law, they must design for 800 gallons for each connection. How will this work? What about "timely and reasonable?" What about the newly enacted "municipal water rights bill" (2E2HB 1338, 2003 Legis. Sess.) and the duty to serve requirement? If there is an approved Group B, can it grow into a Group A water system?

Response: Thank you for your comment. Whether or not more Group B water systems (WAC 246-291) in the Skagit Basin following the Skagit Coordinated Water System Plan can be created is up to the Department of Health and compliance with existing law. The rule does not preclude the establishment of a new Group B system in the basin if service can not be provided by a municipal water supplier. Please see response to comment 316. As to the idea of 800 gallons per day, Department of Health has approved many public water systems for new connections that do not provide 800 gallons per day per connection. See Chapter 246-290 WAC.

Comment 958

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: . . . [W]e can appreciate the difficulty in making decisions with limited data. We understand that, under this Rule, any future water supplies we might develop near Arlington would be subject to discharges in the mainstem Stillaguamish River at Silvana, and that those flows are set using the best professional judgment that combines one year of 30-year old actual measurements and 51 years of combined and transposed data obtained from as far as 35 miles up river. We recognize this is a common procedure and are not questioning the suitability of this approach. We simply hope the same latitude for professional judgment would be applied to the City of Arlington should we be required to demonstrate the effects of the development or expansion of our future water supplies.

Response: Thank you for your comment and appreciation of the potential difficulty in making decisions with limited data. The instream flows established for the Stillaguamish River at Silvana were determined from fish habitat needs in conjunction with the exceedance hydrographs. Ecology does not see that assessment as data limited. An acceptable method based, in part, on professional judgment was used for the exceedance hydrograph development for that site. As is the case most of the time data and professional judgment go hand-in-hand when making decisions. Should the City of Arlington be required to demonstrate the effects of the new water development or expansion of existing water supplies for future use, Ecology assumes empirical data and best professional judgment will be part of the process.

Comment 966

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: Water rights administrative procedures. The effect of this Rule on pending water rights remains unclear, but appears to affect a potential senior water right before it is appropriated. Ecology advertises '"2 lines" for water rights processing, but this Rule appears to create a third line. Ecology has been promoting "2 lines"–one for the slower processing of new water rights applications, and another for more expeditious water right changes and transfers. If the consideration of instream flows as a "water right for the river" is correct, then it appears that the rule will actually take a third route and circumvent the pending applications. The practical effect of this Rule on our pending water right application and on any future transfers of senior water rights remains unclear to us, but it appears to affect a potential senior water right before it is appropriated, and other senior rights that may be transferred or consolidated.

Response: Thank you for your comment. The effect of this rule on pending water right applications is that any approved water right permit will be conditioned as provided for in the rule. That requirement is found in chapter 90.03 RCW. The proposed rule, in keeping with the statute does not circumvent the pending applications, rather they are explicitly addressed, please see section 110(2). The practical effect of this rule on our pending water right application and on any future transfers of water rights is that they are subject to the rule and/or are evaluated in light of the rule.

Comment 1022

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Skagit County is concerned that establishing multiple, conflicting standards will cause confusion and may invite challenges to building permits premised on reservations withdrawals. These conflicts, and the risk of litigation, should be resolved before Ecology proceeds with rulemaking. Under any definition, 150 gpd is insufficient to meet domestic needs and more withdrawals should be allowed. Furthermore, WAC 173-505-110 lists five situations under which withdrawals are exempt from closures. Surface water withdrawals from Lake Cavanaugh for domestic supply purposes do not meet any of these exceptions; therefore, future withdrawals from the lake would be prohibited. Because of the geological conditions in the Lake Cavanaugh area (i.e., near-surface bedrock with low porosity), surface water is in many cases the only source of water available. The language in sections 060 and 110 leaves this area without a source of domestic water for the future and is therefore, unacceptable. Subsequently, Skagit County requests that this section be modified to allow future domestic surface water withdrawals from Lake Cavanaugh.

Response: Thank you for your comment. Ecology is not aware of any multiple, conflicting standards that will cause confusion and may invite challenges to building permits. Building permits, there issuance, and decisions made in the process are entirely under the control of the County. Ecology strongly encourages the County to consider water rights, and limitations on water within there deliberative processes. The 150 gpd is sufficient to meet domestic needs. Ecology believes the 150 gpd is easily achieved with reasonable efficiency of use and little to no out-door use. Should a project proponent desire more water to use, the permitting process is available. For example, storage of water during the winter, when water is available, may be an option. The number of withdrawals from lakes and ponds to met domestic needs is not limited by the rule making. Ecology recognizes that in certain areas, for example the Lake Cavanaugh area, ground water is limited not an option because of the geology of the region. The rule language for closures was changed to list lakes and ponds as exempt from the closure.

Comment 1111

Commentor: Karen Allston, Center for Environmental Law and Policy

Type: Letter dated May 12, 2005

Comment: (1)(b) allows for an undefined mitigation plan. Ecology should instead require mitigation or withdrawals that result in no net loss to the water source. CELP disagrees with the adaptive management approach (if monitoring shows the plan to be ineffective, use is subject to instream flows) to water use. It is unreasonable, bad public policy, and contrary to protecting public health to assume water right holders for domestic supply will interrupt or curtail use after they have become reliant on it.

Response: Thank you for your comment regarding mitigation. Please see response to comment 1080. The definition of mitigation in section 173-505-030(7) clear states that a mitigation plan must show that the withdrawal with mitigation in place will not impair instream flow rights. In most case this will require water for water and will result in no net loss to the stream. Ecology recognizes that CELP disagrees with the adaptive management approach (if monitoring shows the plan to be ineffective, use is subject to instream flows) to water use. Ecology believes it prudent to clearly warn parties proposing mitigation what the consequences of mitigation failing are. Ecology agrees it could become an enforcement issue. However, the law allows for mitigation and the rule provides some guidance on that point.

Comment 1292

Commentor: Steve Anthes, Kettle Range Conservation Group

Type: E-mail dated March 23, 2005

Comment: . . .[W]e know that Ecology proposes risky mitigation strategies to allow additional water use. But we feel that mitigation should be proven before any new water use is allowed.

Response: Thank you for your comment regarding mitigation and that you feel Ecology proposes risky mitigation strategies to allow additional water use. Please see response to comments 1080, and 1111 for more on mitigation and the rule.

Comment 1381

Commentor: Bruce Reed

Type: E-mail dated March 26, 2005

Comment: Ecology proposes risky mitigation strategies to allow additional water use: mitigation should be proven before any new water use is allowed.

Response: Thank you for your comment on mitigation strategies. Please see response to comments 1080, and 1111 for more on mitigation and the rule.

120 – Alternative Sources of Water

Comment 333

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then- proposed Skagit Instream Flow Rule amendments

Comment: Alternative Sources of Water: Subsection 100 conflicts with subsection 030's finding that 200 cfs is available for future use.

Response: Thank you for your comment. The comment about 200 cfs being available for future use does not apply to the Stillaguamish rule making. Ecology does not see a conflict between the section of the rule on alternative sources, (intended to present alternatives to new source development) and the section on future permitting.

Comment 450

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then- proposed Skagit Instream Flow Rule amendments

Comment: Has Ecology examined the capabilities of public water systems to accommodate future connections? If so, when do water purveyors anticipate service will be provided and what areas will not receive service?

Response: Thank you for your comment. Ecology as, in a limited manner, examined the capabilities of public water systems to accommodate future connections. In general the municipal water systems in the basin have water to meet the twenty year projected demand. An exception is the City of Arlington, whose future demand is currently be reevaluated. Ecology is working with the City to meet their needs. The service areas for the public water systems are described in the North Snohomish Coordinated Water System Plan (CWSP). Ecology and the Department of Health (the agency with primary jurisdiction here) expect expansion of municipal system to be in keeping with the CWSP.

Comment 961

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: . . .[A]n improved Rule could also evaluate the instream effects of various water supply scenarios, including, for example, the consideration of: rural vs. urban reserves; inter-basin vs. intra-basin sources; alternative well usage patterns; alternative pump rates; and the re-use or artificial recharge and recovery of our treated wastewater.

Response: Thank you for your comment. Ecology agrees that water management in the basin may be improved if there was an evaluation of the instream effects of various water supply scenarios, including, for example, the consideration of: rural vs. urban reserves; inter-basin vs. intra-basin sources; alternative well usage patterns; alternative pump rates; and the re-use or artificial recharge and recovery of our treated wastewater. However, all such assessments are beyond the scope of this rule making. Please see response to comments 469 and 1025.

Comment 964

Commentor: Karen Latimer and Paul Richart, City of Arlington, Utilities Division

Type: Letter dated May 13, 2005

Comment: We'll certainly need to buy more water from PUD to meet our projected demand, but we are also obligated by regional plans to investigate additional sources within the Stillaguamish basin. Our preliminary calculations further suggest that this is also a more ecologically sustainable approach. Using USGS discharge data for the NF Stillaguamish and Upper SF Sultan Rivers, the Stillaguamish produces more water per unit area than does the basin that recharges Spada Reservoir at low (90th percentile), moderate (50th percentile), and high (10th percentile) flows.

Response: Thank you for your comment; comment noted. It seems reasonable and prudent for the City to investigate any and all reasonable water sources.

Comment 1112

Commentor: Karen Allston, Center for Environmental Law and Policy

Type: Letter dated May 12, 2005

Comment: WAC 173-505-120, and -130–CELP strongly supports these proposed amendments. However, unfortunately, these are hollow policy statements in the face of Ecology's limited budget resources to support an effective compliance program and the recommended alternatives to mitigate future withdrawals. Ecology should support proposals to decrease reliance on General Funds for its Water Resources Program, and seek a system that makes the Water Resources Program self-financing and provides financial resources necessary to fund effective enforcement and effective mitigation. See CELP's new report, Water Is Worth It: Making the case for a water management fee, which proposes such a system. www.celp.org/waterisworthit.html.

Response: Thank you for your comments and support on proposed WAC 173-505-120, and 130 and that these may be hollow policy statements in the face of Ecology's limited budget resources to support an effective compliance program and the recommended alternatives to mitigate future withdrawals. Ecology agrees that resources to implement the rule will be competing with all the other work done by staff in the Program. It is beyond the scope of this rule for Ecology to support proposals to decrease reliance on General Funds for its Water Resources Program and seek a system that makes the Water Resources Program self-financing.

130 – Trust Water Rights

Comment 334

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then- proposed Skagit Instream Flow Rule amendments

Comment: Establishment of Trust Water Rights Program: Ecology is authorized under 90.42 RCW to manage the state trust water program. It is not clear whether or how the proposed trust water rights program for the Skagit River basin would differ form the Trust Water Program already authorized under Ch. 90.42. RCW. Under subsection 110(2), Ecology reserves the power to determine how water will be allocated between future instream and out-of-stream uses without providing any discussion of how this determination will be made. This leaves Skagit County and its residents in the unenviable position of having to guess how this program may affect their planning and growth management decisions.

Response: This comment asks about a trust water program for the Skagit basin whereas the proposed rule applies only to the Stillaguamish basin. However, the proposed rule has a similar idea regarding trust water rights. Chapter 90.42 RCW will guide future trust water right decisions.

Comment 1036

Commentor: Becky Kelley and Ross Freeman, WEC and American Rivers

Type: Letter dated May 13, 2005

Comment: General support for the establishment of instream flows: We support inclusion of a trust water program in rule, however, there is no program articulated to make the program a reality. Has Ecology determined if existing water rights can be placed in the trust to be written into the rule (e.g., rights held by state agencies or willing donors)?

Response: Thank you for your comment. Section 130 of the proposed rule is entitled Establishment of trust water rights program. Your comment is correct that no program is articulated. Ecology is intending to create the program in the future and the rule langue is advising the public so. There has been no evaluation of existing water rights potentially eligible for transfer to the trust program in the Stillaguamish basin. Any water rights transferred to the trust program will be done in keeping with chapter 90.42 RCW which provides very specific guidance.

Comment 1331

Commentor: James Chapman

Type: E-mail dated April 13, 2005

Comment: The trust water program to allow the purchase or donation of water rights for the benefit of fish, wildlife and the environment is a great feature. I own a farm in northeast Oregon and our ditch company plans to accept an offer to buy our late summer water rights along the Lostine River.

Response: Thank you for your comment and support of the trust water rights program.

Comment 1399

Commentor: Val Schroeder

Type: E-mail dated April 26, 2005

Comment: Establish a trust water program. This allows water-rights to be purchased or

donated so that water can remain instream for the benefit of fish, wildlife, and the environment.

Response: Thank you for your comment. The proposed rule does establish a trust water right program as your comment calls for.

150 – Compliance and Enforcement

Comment 219

Commentor: Joe Mentor, Jr., Skagit County

Type: Oral testimony, March 9, 2005, Mt. Vernon hearing on proposed Skagit instream flow rule.

Comment: We have said all along throughout the negotiations lawn water restrictions are impractical and unfair in rural areas. We continue to believe that and we will submit a much thorough explanation of why that we think that is in our written comments.

Response: Thank you for your comment. Ecology respectfully disagrees that lawn watering restrictions are unfair. Under Prior Appropriation, the junior right must curtail use if that use is impairing a senior right. Assuming that ground water wells in the basin capture water, that but for the capture, would flow to regulated surface water sources with established rights it is reasonable for the user to restrict use to avoid impairing senior water rights. The di minimus law watering is considered part of human needs called for in RCW 90.54.020(5).

Comment 255

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated March 18, 2005, regarding proposed Skagit instream flow rule amendments

Comment: Ecology's Skagit instream flow rule and proposed rule amendment are unenforceable. As explained above, neither Ecology nor the County can restrict the exemption from state permitting created under RCW 90.44.050. Only the Legislature can do that. Furthermore, outdoor water use restrictions are unenforceable as a practical matter in rural areas. The customers of a public water system all share the same priority date, which is the priority date of their water utility. By contrast, each rural resident with a private well has his or her own priority date. These vary on an individual basis, depending on the date each landowner establishes a water right priority date for an exempt groundwater withdrawal. This letter explains elsewhere why we do not agree with Ecology's characterization of how a priority date is established for an exempt well. It is impractical to monitor water use in the field on an individual basis, and to compare field conditions against building permit records to determine when each homeowner established a water right priority date.

Response: Thank you for your comment. As to any rule or this proposed rule being unenforceable, Ecology respectfully disagrees. Generally, in our society we rely upon voluntary compliance with the law. However the Water Code and the proposed rule do provide for compliance or enforcement. Granted it may be a resource intensive effort. As to the limitations on exempt wells, administrative rules may not contradict legislative enactments. However, Ecology believes limitations on the use of reservation water are permissible. Please see response to comment 237.

Comment 332

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the

then-proposed Skagit Instream Flow Rule amendments

Comment: The proposed amended rule is not enforceable. Neither Ecology nor Skagit County can restrict actions which the Legislature has statutorily exempted from regulations. The rule would require Skagit County to impose building permit conditions, but is unclear who will enforce those conditions.

Response: Thank you for your comment. As to any rule or this proposed rule being unenforceable, Ecology respectfully disagrees. Generally, in our society we rely upon voluntary compliance with the law. However the Water Code and the proposed rule do provide for compliance or enforcement. Granted it may be a resource intensive effort depending on the level of effort. The proposed rule language on Section 090(2)(d)(i) has been deleted. The rule will not require that the terms and conditions of the reservation be a condition on the building permit. That language has been changed, in part, based on confusion as to who would enforce the rule. Ecology wants to be very clear that Ecology enforces the Water Code and it was not our intent that local jurisdictions do so. However, Ecology does believe local jurisdictions do have a role in water management, especially in making findings regarding potable water and or water availability for subdivisions.

Comment 447

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: Ecology's proposal requires Skagit County to impose building permit conditions, including limitations on outdoor water use. Who is Ecology expecting to enforce these permit conditions and how will they be enforced?

Response: Thank you for your comment. Ecology wants to be very clear that the department enforces the Water Code and it was not our intent that local jurisdictions do so. However, Ecology does believe local jurisdictions do have a role in water management, especially in making findings regarding potable water and or water availability for subdivisions. How the rule will be enforces is laid out in proposed WAC 173-505-150 Compliance and enforcement.

Comment 1041

Commentor: Becky Kelley and Ross Freeman, WEC and American Rivers

Type: Letter dated May 13, 2005

Comment: Ensure Stream Flow protection compliance: An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule. Articulating this program in rule provides greater assurances that it will be implemented.

Response: Thank you for your comment. Ecology will work to implement an effective instream flow monitoring and compliance program as part of the rule's implementation. As you noted, articulating this program in rule provides greater assurances that it will be implemented. The current gauging program in the basin is expected to be maintained indefinitely.

Comment 1223

Commentor: Steve Aslanian

Type: Oral testimony, Arlington Hearing, March 24, 2005

Comment: I'm a citizen. And my words are those of a manager of a public water system and a conservationist. My thoughts are that this plan is a start. It identifies problems. Unfortunately, if

we all look in the mirror, I don't believe that it will provide a complete framework for a credible. . . solution. I believe it must be acknowledged that monitoring and enforcement will not be feasible except in the most egregious violations. If I'm going to withhold my water use, I expect my neighbor to. If we don't all work together on this project, we're going to get really angry at each other, I believe.

Response: Thank you for your comment that it must be acknowledged that monitoring and enforcement will not be feasible except in the most egregious violations, and your concern that if we don't all work together on this project, it will result in neighbors being angry at one other. Ecology acknowledges that resources to enforce the water code are minimal and could be more. However, the rule provides for compliance and Ecology expects to enforce the rule to the extent resources allow.

Comment 1248

Commentor: Kimberly Ordon, Tulalip Tribe

Type: Letter dated May 13, 2005

Comment: Enforcement: Tulalip recognizes that there is a fiscal burder for enhancing Ecology's enforcement program; however, it is an important element to insuring the security of the Stillaguamish instream flow. Enforcement against illegal water uses or exceeding water right allocations is imperative.

Response: Thank you for your comment that Tulalip recognizes that there is a fiscal burden for enhancing Ecology's enforcement program and it is an important element to insuring the security of the Stillaguamish instream flow. Ecology agrees with your comment. Please see response to comments 255, 332, and 1024 for more on enforcement.

Comment 1275

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: Ecology should seek to identify and eliminate illegal water withdrawals prior to establishing the Instream Flow Rule. Ecology needs to enforce existing water rights law. Ecology staff have acknowledged that there may be widespread illegal withdrawals of surface water and groundwater in the Stillaguamish Basin (as distinguished from unperfected water rights). Ecology staff have also stated that they do not know the true magnitude of these illegal withdrawals, that they have no plans to determine the magnitude of illegal withdrawals, and that they have no plans to take strong action to eliminate them.

Response: Thank you for your comment; comment noted.

Comment 1276

Commentor: Thomas Fitzpatrick, Snohomish County

Type: Letter dated May 12, 2005

Comment: At the same time, the proposed rule caps future additional water use in the basin, and Ecology staff have stated that future water-dependent uses must obtain their water through transfers or purchases of existing water rights. Such a proposal is unfair. First, it acknowledges potential infringement upon existing water rights without an aggressive plan to determine actual infringements and stop them. Second, it allows those who are currently illegally taking water from the public domain to prevent those who would legally obtain new water rights to do so in the future. Snohomish County is obliged to enforce the laws under its jurisdiction, and Ecology is similarly obliged to enforce water rights law, and such enforcement is critical to water management in the Stillaguamish Basin. Only after a proper identification and aggressive enforcement process can an instream flow rule accurately determine the amount of water that

can be legally withdrawn in the future without causing impairments to existing water rights and the environment.

Response: Thank you for your comment; comment noted.

Comment 1304

Commentor: Eldon Ball

Type: E-mail dated April 30, 2005

Comment: Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

Response: Thank you for your comment related to enforcement of the water law as one aspect of water management. Ecology agrees with your comment. Ecology's enforcement program is an important element to insuring the protection of the Stillaguamish instream flow. Please see response to comments 255, 332, and 1024 for more on enforcement.

Comment 1312

Commentor: Patricia Bolton

Type: E-mail dated April 14, 2005

Comment: In addition, the rules are only worth the paper they are written on if there is not an enforcement plan, a commitment to measuring the flows (outflow) over time and discipline.

Response: Thank you for your comment. Ecology agrees with your comment. Ecology's enforcement program is an important element to insuring the protection of the Stillaguamish instream flow. Please see response to comments 255, 332, and 1024 for more on enforcement.

Comment 1318

Commentor: Harold Boswell

Type: E-mail dated April 26, 2005

Comment: Please consider the following in adopting protections for the river: Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

Response: Thank you for your comment. Ecology agrees with your comment. Ecology's enforcement program is an important element to insuring the protection of the Stillaguamish instream flow. Please see response to comments 255, 332, and 1024 for more on enforcement.

Comment 1326

Commentor: Maria Butler

Type: E-mail dated April 11, 2005

Comment: Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

Response: Thank you for your comment. Ecology agrees with your comment. Ecology's enforcement program is an important element to insuring the security of the Stillaguamish instream flow. Please see response to comments 255, 332, and 1024 for more on enforcement.

Comment 1334

Commentor: James Chapman

Type: E-mail dated April 13, 2005

Comment: [Ecology]. . . should establish an effective instream flow monitoring and compliance program should to enforce the instream flow rule.

Response: Thank you for your comment related to enforcement of the water law as one aspect of water management. Ecology agrees with your comment. Ecology's enforcement program is an important element to insuring the security of the Stillaguamish instream flow. Please see response to comments 255, 332, and 1024 for more on enforcement.

Comment 1344

Commentor: Eric Doyle

Type: E-mail dated April 14, 2005

Comment: [E]stablish an effective monitoring and enforcement program to ensure adequate compliance with instream flow rules.

Response: Thank you for your comment related to enforcement of the water law as one aspect of water management. Ecology agrees with your comment. Ecology's enforcement program is an important element to insuring the security of the Stillaguamish instream flow. Please see response to comments 255, 332, and 1024 for more on enforcement.

Comment 1348

Commentor: Lawrence Doyle, Greywolf Fly Fishing Club

Type: E-mail dated April 12, 2005

Comment: Of course, an effective instream flow monitoring and compliance program is required to enforce the instream flow and groundwater design. Usages and drawdowns must be controlled by law and violations be punished by stiff penalties.

Response: Thank you for your comment related to enforcement. Ecology agrees with your comment. Ecology's enforcement program is an important element to insuring the protection of the Stillaguamish instream flow. Please see response to comments 255, 332, and 1024 for more on enforcement.

Comment 1355

Commentor: Steve Lovelace

Type: E-mail dated April 26, 2005

Comment: Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow

Response: Thank you for your comment. Ecology's enforcement program is an important element to insuring the protectin of the Stillaguamish instream flow. Please see response to comments 255, 332, and 1024 for more on enforcement.

Comment 1362

Commentor: Robert Meyer

Type: E-mail dated April 26, 2005

Comment: Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow

Response: Thank you for your comment related to enforcement of the water law as one aspect of water management. Ecology agrees with your comment. Ecology's enforcement program is an important element to insuring the security of the Stillaguamish instream flow. Please see response to comments 255, 332, and 1024 for more on enforcement.

Comment 1365

Commentor: Mike O'Shea

Type: E-mail dated May 1, 2005

Comment: Water usage must be measured and enforced to ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

Response: Thank you for your comment regarding enforcement of the rule and metering of water use. Ecology agrees with the concept of accounting for water use. In general, metering is an effective way to account for water use. The rule exempts only single domestic users from the metering. Wells that will be used by two or more residences and new permitted uses must be metered. For the water used by a single connection metering is not the only way to account for water use. Based on well logs, normal well construction techniques, and pumps commonly used we can reasonably know the number, depth of withdrawal and instantaneous use of water. To account for use on an annual basis is the other main unknown. In this case we have empirical data from nearby Skagit County for domestic rural water use on an annual basis. Use of the reserve on an annual basis can be reasonably accounted for using the 350 or 175 gallons per day figure, which ever is appropriate, multiplied by the number of wells. That annual usage is then deducted from the remaining volume of water in the reserve. The rule language on accounting for use under the reserve was changed to include empirical data in the accounting if the project proponent chooses to do so. The level of data accuracy for use of water from the reserve is sufficient for this water management tool. Please also see response to comment 1038. As to enforcement, Ecology agrees with your comment. Ecology's enforcement program is an important element to insuring the protection of the Stillaguamish instream flow. Please see response to comments 255, 332, and 1024 for more on enforcement.

Comment 1370

Commentor: Sherry Perkins

Type: E-mail dated April 27, 2005

Comment: Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

Response: Thank you for your comment related to enforcement. Ecology agrees with your comment. Ecology's enforcement program is an important element to insuring the protection of the Stillaguamish instream flows. Please see response to comments 255, 332, and 1024 for more on enforcement.

Comment 1374

Commentor: Kathryn Piland

Type: E-mail dated May 5, 2005

Comment: Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

Response: Thank you for your comment related to enforcement of the water law as one

aspect of water management. Ecology agrees with your comment. Ecology's enforcement program is an important element to insuring the security of the Stillaguamish instream flow. Please see response to comments 255, 332, and 1024 for more on enforcement.

Comment 1385

Commentor: Bruce Reed

Type: E-mail dated May 1, 2005

Comment: Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

Response: Thank you for your comment related to monitoring, compliance, and enforcement of the water law as necessary aspects of water management. Ecology agrees with your comment. Ecology's enforcement program is an important element to insuring the security of the Stillaguamish instream flow. Please see response to comments 255, 332, and 1024 for more on enforcement. As to monitoring, Ecology and basin partners have established a stream gauging program in the basin. Please see the following web site for more information, http://www.ecy.wa.gov/programs/eap/flow/shu_main.html.

Comment 1392

Commentor: Donald Shank

Type: E-mail dated April 28, 2005

Comment: Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

Response: Thank you for your comment related to enforcement of the water law as one aspect of water management. Ecology agrees with your comment. Ecology's enforcement program is an important element to insuring the security of the Stillaguamish instream flow. Please see response to comments 255, 332, and 1024 for more on enforcement.

Comment 1406

Commentor: Ricky Taylor

Type: E-mail dated April 12, 2005

Comment: Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

Response: Thank you for your comment related to enforcement of the water law as one aspect of water management. Ecology agrees with your comment. Ecology's enforcement program is an important element to insuring the security of the Stillaguamish instream flow. Please see response to comments 255, 332, and 1024 for more on enforcement.

Comment 1411

Commentor: TerryAnn Towers

Type: E-mail dated April 13, 2005

Comment: Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

Response: Thank you for your comment related to enforcement of the water law as one aspect of water management. Ecology agrees with your comment. Ecology's enforcement

program is an important element to insuring the security of the Stillaguamish instream flow. Please see response to comments 255, 332, and 1024 for more on enforcement.

Comment 1417

Commentor: Jeffrey Weist

Type: E-mail dated April 11, 2005

Comment: Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

Response: Thank you for your comment related to enforcement of the water law as one aspect of water management. Ecology agrees with your comment. Ecology's enforcement program is an important element to insuring the security of the Stillaguamish instream flow. Please see response to comments 255, 332, and 1024 for more on enforcement.

170 – Regulation review

Comment 335

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment A to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: WAC 173-503-140- Regulation Review: The proposed Samish River and Stillaguamish River rules allows Ecology to initiate a review of the rule if significant new information becomes available or if a significant change in conditions occurs. The proposed amended Skagit River rule allows Ecology to review the rule any time conditions change, regardless of whether the change is significant in nature. The test for rule modification should apply consistently

Response: Thank you for your comment. The rule provides for review as you recommend (when new information becomes available or if a significant change in conditions occurs).

Benefit-Cost Analysis (BCA)/Small Business Economic Impact Statement (SBEIS)

Comment 260

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated March 18, 2005, regarding proposed Skagit instream flow rule amendments

Comment: The benefit-cost analysis. The rule-making record must contain sufficient evidence that the benefit-cost analysis justifies the determinations made.65 Ecology failed to complete an adequate benefit-cost analysis for its 2001 rule, a fact that is recognized in the Preliminary Benefit-Cost Analysis for the proposed rule amendment. This error cannot be corrected by a new analysis without simultaneously withdrawing and reissuing the instream flow rule. The analysis for the rule amendment is also missing any consideration of the rule on public and private entities. Finally, the analysis fails to consider the need for complex regulatory oversight in portions of the basin where there is no perceived threat to instream flows from additional domestic and irrigation uses.
65 RCW 34.05.328(2).

Response: Thank you for your comment. We agree that the rule-making record must contain sufficient evidence that the benefit-cost analysis justifies the determinations made.

Ecology also believes the cost benefit analysis for the Stillaguamish rule does so. The portion of the comment referencing Comments related to the Skagit rule making in 2001 and the current amendment are not applicable to the Stillaguamish rule making.

Comment 262

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated March 18, 2005, regarding proposed Skagit instream flow rule amendments

Comment: The new benefit-cost analysis does not overcome the failure to disclose the impact of the rule on exempt well use in the prior rule-making. This omission can only be rectified to be consistent with the APA rule-making procedures by withdrawing and reissuing the original rule.

Response: Thank you for your comment, however the comment is not applicable to the Stillaguamish rule making. There is no prior rule making and there is no omission of a cost benefit analysis. Please see Ecology's web page at http://www.ecy.wa.gov/laws-rules/activity/wac173505.html.

Comment 263

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated March 18, 2005, regarding proposed Skagit instream flow rule amendments

Comment: The benefit-cost analysis for the proposed amended rule is flawed because it is premised on the assumption that Skagit County PUD can and will extend service into areas with inadequate groundwater reservations. The analysis fails to discuss the cost of such extensions, when such extensions may occur, or whether extensions will provide service to all those in need. Absent an understanding of actual water availability there can be no meaningful balancing of the costs and benefits of its regulation.

Response: Thank you for your comment; however the comment is not applicable to the Stillaguamish rule making. In the Stillaguamish basin there is no expectation that Skagit County PUD will serve or provide public water. It is anticipated that public water systems in the Stillaguamish basin will provide water service in their claimed service areas consistent with existing laws and regulations.

Comment 264

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated March 18, 2005, regarding proposed Skagit instream flow rule amendments

Comment: [The cost benefit]. . .analysis is flawed because it lacks any assessment of the benefits derived from the rule in terms of fishery resources and recreation that would still be present without the rule amendment. The potential impacts of exempt well use and the reservations are so small in relation to stream flow, particularly on the main stem of the river, that it is not possible to assume that the rule amendment will have any impact one way or another on the stated benefits.

Response: Thank you for your comment; however Ecology respectfully disagrees the cost benefit anaylsis did not assess the benefits derived from the rule in terms of fishery resources and recreation. Please see the cost benefit analysis on Ecology's web page at http://www.ecy.wa.gov/laws-rules/activity/wac173505.html.

Comment 265

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated March 18, 2005, regarding proposed Skagit instream flow rule amendments

Comment: Significant impacts from the 2001 rule and proposed rule amendment are not adequately disclosed in the Small Business Economic Impact Statement (SBEIS). In 2001, Ecology concluded that Chapter 173-503 WAC did not result in a disproportionate impact on small businesses.74 This conclusion conflicts with Ecology's Rule Development Plan Guidelines which recognized "[small businesses, land development and agricultural activities with pending water applications or requiring new water rights would be affected by the rule."75 At this time, Ecology further recognized that since the rule was not drafted pursuant to the 2514 process, "a small business analysis is needed."76 Internal Ecology e-mails explain this discrepancy and demonstrate that the requisite data was never provided to Ecology economists. Ecology therefore chose to forego the analysis in order to maintain their desired timeline in 2001.77

74 CR 102, AR 00046-7.
75 AR 00032
76 AR 10738
77 See e.g., AR 11483-485.

Response: Thank you for your comment; however the comment is not applicable to the Stillaguamish rule making. This is new rule making and there is no 2001 rule or proposed amendment of a rule that pertains to the Stillaguamish basin. A Small Business Economic Impact Statement (SBEIS) was done. Please see the SBEIS on Ecology's web page at http://www.ecy.wa.gov/laws-rules/activity/wac173505.html.

Comment 266

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated March 18, 2005, regarding proposed Skagit instream flow rule amendments

Comment: Setting of instream flows has a significant disproportionate impact on small businesses. Ecology's instream flows are set at a level which is rarely reached. Because minimum flows are unattainable, rural small businesses which do not have access to municipal services cannot obtain an uninterruptible water supply. Rural businesses are typically smaller than their urban counterparts and much more likely to suffer than their larger urban counterparts who have access to municipal supplies. Furthermore, inadequate sizing of the proposed reservation ensures that not all rural businesses will have access to uninterruptible sources of water. The proposed rule amendment SBEIS fails to adequately discuss these impacts and the direct impacts on industry and professions such as well drillers.

Response: Thank you for your comment; however Ecology respectfully disagrees the Small Business Economic Impact Statement (SBEIS) is deficient. The SBEIS does address rural business.

Comment 268

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated March 18, 2005, regarding proposed Skagit instream flow rule amendments

Comment: Ecology's least burdensome alternative analysis is less than a page in length. The analysis is limited to creation of the proposed reservation, ignoring the impact of establishing minimum flows and closures. As noted above, this is inappropriate because the proposed amendments are in part responsive to inadequate analysis for the initial rule. To proceed using

the initial rule as a baseline guarantees that neither the initial rule nor the entire rule package will ever undergo a complete analysis.

Response: Thank you for your comment; however Ecology respectfully disagrees the least burdensome alternative analysis is deficient. Pursuant to RCW 34.05.328 Ecology determined the rule is needed to achieve the general goals and specific objectives of chapters 90.22 and 90.54 RCW. Alternatives for protecting instream flows are limited; the only mechanism available to set an instream flow is rulemaking. A rule is the only way to make an instream flow water right. Ecology believes the least burdensome analysis is sufficient and satisfies Chapter 34.05 RCW.

Comment 269

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated March 18, 2005, regarding proposed Skagit instream flow rule amendments

Comment: An adequate least burdensome alternative analysis must consider the goals of the regulatory program – to provide water for instream and out-of-stream uses – to evaluate whether the instream flows, closures, and proposed reservation are the most efficient means of reaching those ends. In doing so, an adequate analysis must consider a reasonable range of alternatives to reaching that end. It is impossible to evaluate what may constitute an appropriate range of alternatives when plans for municipal water service are unknown or undisclosed.

Response: Thank you for your comment and Ecology agrees with your comment. Ecology also believes the least burdensome alternative analysis did what you suggest. How instream flows are protected does not hinge upon where municipal water is provided in the Stillaguamish basin. The establishment of an instream flow water right does not guarantee water will be available to satisfy the right. No water right comes with a guarantee water is available to satisfy the right. Junior water rights, such as the proposed instream flow, are satisfied if nature provides the water and senior rights are satisfied. As to public or municipal water supplies in the Stillaguamish basin, the North Snohomish County Coordinated Water System plan does provide a framework and indication of where municipal supplies will be served in the near term. However the purveying of public water is a dynamic process.

Comment 271

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated March 18, 2005, regarding proposed Skagit instream flow rule amendments

Comment: The least burdensome analysis that accompanies the proposed rule amendment fails to assess the basic need for the rule in portions of the basin where there is more than enough water available. In the mainstem of the river, for example, the Department has relied on very incomplete data to derive the number of buildable lots and afforded each lot an allocation under the reservation. The Department has not, however, calculated the critical flow or acceptable loss of habitat as it has done in the tributary basins. Had Ecology done so, it would be clear that the amount of water available for out of stream uses far exceeds potential demand. If this is true, then there is no need for a reservation or closure of the mainstem basin to exempt well or additional irrigation use.

Response: Thank you for your comment. Ecology respectfully disagrees that the least burdensome analysis that accompanies the proposed rule fails to assess the basic need for the rule in portions of the basin where there is more than enough water available. Water availability does not play a role in establishing an instream flow rule. See response to comment 269 regarding the exercise of an instream flow right. As to the establishment of the reservation, the main stem Stillaguamish was used to determine the size of the reservation based on an acceptable loss of habitat.

Comment 272

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated March 18, 2005, regarding proposed Skagit instream flow rule amendments

Comment: The least burdensome analysis should consider the exception for exempt wells contained in the June 1, 1999, draft of the 2001 rule79 or the Final Draft Rule-Preferred Alternative, dated February 17, 2000.80 Both versions of the rule allowed an exception for exempt wells as long as the wells would not adversely impact stream flows and there is no access to public water supply. The benefit-cost analysis should explain why this alternative does not work for the Skagit River Basin.

79 AR 04207-04212

Response: Thank you for your comment; however Ecology respectfully disagrees the least burdensome analysis for the Stillaguamish rule should consider reservations proposed in a Skagit basin proposal and or why lower reservations amounts were proposed in a draft of a Skagit proposal. The Skagit basin proposals have no bearing on the Stillaguamish proposals, as they are different rule making activities. To the extent any basin rule meets the statutory criteria of protecting stream flow, it may be a valid alternative concept to consider or analyze.

Comment 273

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated March 18, 2005, regarding proposed Skagit instream flow rule amendments

Comment: The least burdensome analysis should consider the reservations proposed in the November 20, 2004, draft of the proposed rule amendment and why lower reservations amounts were proposed in the draft rule amendment published for public comment.81 The Department has not consulted with Skagit County as required under RCW 19.27.097 to justify a conclusion, as represented in the analysis, that water budgets and mitigation programs are unduly expensive and administratively complex. This statement is at complete odds with new provisions in the rule supporting alternative sources of water and establishing a trust water rights program for the Skagit River.82 The burden of administrating this program should be weighed against the burden of the rule on the people of Skagit County.

81 November 20, 2004, Draft Amendment to Chapter 173-503.
82 Proposed WAC 173-503-100 and 110.

Response: Thank you for your comment. Please see the response to comment 272 that provides a response to this comment.

Comment 274

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated March 18, 2005, regarding proposed Skagit instream flow rule amendments

Comment: . . .[T]he least burdensome analysis should consider the March 2004 Skagit Basin Water Supply Memorandum of Agreement signed by Skagit County and the Upper Skagit Indian Tribe.83 Ecology needs to consider the approach to water supply budgeting in tributary basins in this agreement because the buildable lot assumptions used in the amendment are arbitrary and capricious.

83 Skagit Basin Water Supply Memorandum of Agreement

Response: Thank you for your comment. Please see the response to comment 272 that provides a response to this comment.

Comment 459

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: The SBEIS simply says there will be an impact, but that they can't really assess to what degree it may be. If the resources (agriculture, timber, mining, and recreation) cannot have supporting industries or commercial development then are we are at risk of losing the economic benefits and lifestyle from having them? The natural resources are what make up this county and region.

Response: Thank you for your comment. The SBEIS used reasonable assumptions and analyzed the likely impacts of the rule when information was available.

Comment 461

Commentor: Joe Mentor, Jr., Skagit County

Type: Attachment B to Skagit County's March 18, 2005 letter to Ecology regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: If the reservations are used up, which may happen very quickly as people fear that their development will be curtailed, what will this do to the cost and value of the land? Will inflated land value drive natural resource industries out? This was not addressed in the SBEIS.

Response: Thank you for your comment. The SBEIS did analyze the potential change to the cost and value of land owned by small business in the basin as compared to land owned by large business. In general, a limitation on water will increase the value of land with water or correspondingly reduce the value of land if water can not be obtained for development.

Response: Thank you for your comment. Ecology agrees with your comment.

Comment 938

Commentor: Jodi Slavik, Building Industry Association of Washington

Type: Letter dated April 25, 2005

Comment: The Cost-Benefit Analysis and Small Business Economic Impact Statement fail to address impacts on housing. The Preliminary Benefit-Cost & Least Burdensome Analysis (Cost-Benefit Analysis) and Small Business Economic Impact Statement (SBEIS) are woefully inadequate in their analysis of economic impacts and are an affront to economic recovery efforts in Washington. Neither specifically address the economic impact of a finite reservation for ground water withdrawals, including the limitation of new home development, reduced home values, decreased property tax valuation, and potential takings litigation. In fact, both documents seem to regard the reservation as a full-fledged allowance of wells, with no end in sight. The Cost-Benefit Analysis states, "The reservation will allow households and businesses to access water the entire year." There is no mention of the economic impact on local governments, businesses, or taxpayers when the reservation is fully used or when Ecology wields its prohibition hammer under WAC 173-505-090(8).

Response: Thank you for your comment. Ecology respectfully disagrees the Cost-Benefit Analysis and Small Business Economic Impact Statement fail to address impacts on housing and or the Preliminary Benefit-Cost & Least Burdensome Analysis (Cost-Benefit Analysis) and Small Business Economic Impact Statement (SBEIS) are woefully inadequate in their analysis of economic impacts and are an affront to economic recovery efforts in Washington. The projected increase in number of households over the next 20-year period in the Stillaguamish Basin is estimated to be between 5,500 and 6,000 households on permit exempt wells. There is in

aggregate enough water in the reservation to satisfy human domestic needs from these anticipated permit exempt wells. In fact, the reservation is divided into three different locations; the north fork, the south fork and main stem. The most restrictive location is the north fork which will be limited to 1.5 cfs. However, using Ecology's accounting number of 175 GPD/well, 5,541 wells could be installed. Thus even if all the development occurred in one area of the basin, there would likely be enough to serve forecasted development. As such, Ecology does not believe there will be any limitations on new home development for the foreseeable future as a result of the rule, nor any reduced home values, decreased property tax valuations or takings litigation.

Comment 939

Commentor: Jodi Slavik, Building Industry Association of Washington

Type: Letter dated April 25, 2005

Comment: In the Least Burdensome section of the Cost-Benefit Analysis, Ecology notes: "Conclusion: Requirements for connections and restrictions on use are likely to have an economic impact. The requirement that local governments adopt an ordinance prior to the reservation being established may delay or pre-empt reservation establishment. See "Rule Impacts to Waster Right Administration." Presumably, the section entitled "Rule Impacts to Water Right Administration" addresses the economic impact recognized by Ecology. It doesn't. It simply reiterates the process of getting a permit and using the reservation granted by Ecology. The closest this section comes to discussing economic impacts is the statement, "Businesses that elect to install permit exempt wells for their own moderate needs or to develop saleable land will face more choices as to their best option."

Response: Thank you for your comment. Proposed WAC 173-505-090(2)(d)(i) has been changed to read, "The reservation shall be applicable only when the appropriate city(ies) or counties submit a written acknowledgement to the department that confirms that any legally required determinations of adequate potable water for building permits and subdivision approvals will be consistent with applicable provisions of this chapter. Once this chapter is adopted and written acknowledgement is received, the department will promptly notify those city(ies) or counties, the Tribes, water well contractors and the public that the reserve is in effect in those jurisdictions where acknowledgements exist." The State's interest is that water rights and the State's water management program are considered within the local government's decision-making process pursuant to chapter 19.85 and or 58.17 RCW. Ecology does not find the quote you cite above in the Least Burdensome Analysis. However, that quote was located in Appendix A. The section by section analysis in Appendix A is a breakdown of the potential impacts of the rule. The section "Rule Impacts to Water Right Administration" provides greater detail of what the actual impact may be. Requirements for connection and restrictions on use are discussed on pages 9-25 of the analysis.

Comment 940

Commentor: Jodi Slavik, Building Industry Association of Washington

Type: Letter dated April 25, 2005

Comment: Similarly, the SBEIS does not provide a detailed economic analysis of the impact of a finite reservation, nor does it address the impacts to the hundreds of small builder companies in WRIA 5. The SBEIS assumes that the finite reservation will be sufficient to meet development needs in perpetuity ("For businesses developing land for residential construction, or requiring domestic water only, the reservation should meet that need. . ."). However, once the reservation is used, there will be significant impacts to residential builders in the form of water rights permitting costs, engineering fees, and devalued or unusable land. Even Appendix C, which purportedly details the impact to businesses if a reservation is not provided, fails to discuss actual costs or economic impacts of a residential development prohibition. This Appendix goes so far as to state "The magnitude of the impact will be determined by the proposed location and use of

future water permit holders." Isn't this the job of the Ecology in crafting the SBEIS? The SBEIS should include OFM population projections for WrlA 5, as well as current population figures, residential building trends, and projected development in local comprehensive plans. Ultimately, the Cost-Benefit Analysis fails RCW 34.05.328(d) by not providing "qualitative and quantitative. . .costs."

Response: Thank you for your comment. Ecology acknowledges that as long as population growth and development continue to occur, that a finite reservation will eventually run out. In fact, the Water Code is premised, in part, on the fact that water is a limited resource. The prior appropriation doctrine and its implementation by a permitting program were created because water is limited resource. The legislature has long acknowledged that water supply and availability around the state are becoming increasingly limited, particularly during summer and fall months and dry years when demand is greatest. Growth and prosperity have significantly increased the competition for this limited resource. We also know that the limitations or how much water falls as rain or snow is variable as between seasons and over time. Meeting future needs may require development of alternative water supplies as proposed in WAC 173-505-120. However, as mentioned previously, the reservation appears to be adequate to meet the rural residential needs of the WRIA for the next 20 years which is the time frame for the analyses. As such, we do not anticipate significant impacts to small builder companies in WRIA 5 related to residential construction unless they use an exempt well and must restrict some outdoor uses. That analysis is provided on pages 8-9 of the Cost Benefit Analysis.

Comment 942

Commentor: Jodi Slavik, Building Industry Association of Washington

Type: Letter dated April 25, 2005

Comment: A more flagrant failing of Ecology's statutory rulemaking requirements is comparing the SBEIS to RCW 19.85.040, which requires Ecology to "analyze the costs of compliance for businesses. . . including costs of equipment, supplies, labor, and increased administrative costs. . .[as well as] whether compliance with the rule will cause businesses to lose sales or revenue." This statute not only requires Ecology to describe how it "will involve small businesses in the development of the rule," but also "survey a representative sample of affected businesses or trade associations." RCW 19.85.040(2)(b) (3). . . Ecology has not demonstrated how it specifically included businesses in the rule development process, surveyed businesses, or appointed a cost-assessment committee as suggested by 19.85.040(3).

Response: Thank you for your comment. In part, RCW 19.85.040 (2)(b) & (3) say: (2) (b) A description of how the agency will involve small businesses in the development of the rule; and(3) To obtain information for purposes of this section, an agency may survey a representative sample of affected businesses or trade associations and should, whenever possible, appoint a committee under RCW 34.05.310(2) to assist in the accurate assessment of the costs of a proposed rule, and the means to reduce the costs imposed on small business.

In part, RCW 34.05.310(2) says: (2) Agencies are encouraged to develop and use new procedures for reaching agreement among interested parties before publication of notice and the adoption hearing on a proposed rule. Examples of new procedures include, but are not limited to☹a) Negotiated rule making by which representatives of an agency and of the interests that are affected by a subject of rule making, including, where appropriate, county and city representatives, seek to reach consensus on the terms of the proposed rule and on the process by which it is negotiated; and (b) Pilot rule making which includes testing the feasibility of complying with or administering draft new rules or draft amendments to existing rules through the use of volunteer pilot groups in various areas and circumstances, as provided in RCW 34.05.313 or as otherwise provided by the agency. Ecology believes that it is very important to obtain stakeholder input as part of the economic analyses and when the agency is developing and using

new procedures for reaching agreement among interested parties. In situations where this procedure is not considered beneficial, then Ecology can survey selected businesses.

As can be noted above, there is no language in RCW 19.85.040 that requires Ecology to survey businesses. It is permissive but not prescriptive. RCW 19.85.040 does indicate an agency "should" set up a committee to evaluate costs under RCW 34.05.310(2). However, RCW 34.05.310(2) is silent on how the committee should be set, who should be included and how it should conduct business. Ecology's interpretation is that these procedures are to be used in the alternative rulemaking proceedings noted above (i.e. pilot rulemakings and negotiated rulemakings.) As identified in the preproposal statement of inquiry (CR-101), Ecology elected to use "other" and not use either of these procedures when developing the rule and complying with Administrative Procedures Act.

Comment 1024

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: The benefit-cost analysis: The rule-making record must contain sufficient evidence that the benefit-cost analysis justifies the determinations made.29 The analysis lacks adequate consideration of effects on public and private entities. The analysis also fails to consider the need for complex regulatory oversight in portions of the basin where there is no perceived threat to instream flows from additional domestic and irrigation uses.

29 RCW 34.05.328(2).

Response: Thank you for your comment. RCW 34.05.328 requires Ecology to complete a benefit-cost analysis to determine that the probable benefits of the rule are greater than the probably costs. Ecology believes that the final document meets this requirement. The analysis does consider the impact of the rule on private and public entities. For example, the analysis forecasts and evaluates impacts on future exempt wells that might be constructed by either private or public entities, considers impacts on private agricultural interests, and also considers the impact on households and businesses required to connect to public water systems. Impacts to public water purveyors are anticipated to be small due to adequate water under existing rights or the ability to obtain new water in the basin. The City of Arlington is an exception and Ecology is working directly with the City. Ecology does not believe that the regulatory oversight will be unduly burdensome in any areas of the basin. In general, the State relies upon voluntary compliance from our citizens for the Water Code as well as many environmental laws and regulations. The State recognizes the stewardship ethic of the citizens in the basin. However, the rule does provide in detail a framework for compliance efforts to implement the rule and Water Code. See section 150 of the rule.

Comment 1025

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Least burdensome alternative analysis: Ecology's least burdensome alternative analysis is less than a page in length.30 An adequate least burdensome alternative analysis must consider the goals of the regulatory program – to provide an adequate supply of water for instream and out-of-stream uses – to evaluate whether the instream flows, closures, and proposed reservation are the most efficient means of achieving those ends. The least burdensome alternative does not meet this basic need. The least burdensome analysis should consider the exception for exempt wells contained in other instream flow rules.

30 Wash. Dept. of Ecology, Preliminary Benefit-Cost Analysis & Least Burdensome Analysis for Amendment to Chapter 173-505 WAC Instream Resources Protection Program- Stillaguamish River Basin Water Resource Inventory Area (WRIA 5) 27 (2005).

Response: Thank you for your comment. Ecology performed a least burdensome analysis to consider that "the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives." Ecology does believe the rule is the least burdensome rule that could be promulgated to achieve the general goals and specific objections of the instream flow program. The Water Code directs that instream flows be established, that a water right is created, and is part of the prior appropriation doctrine. Given the limits imposed by statute, there is no option to develop an instream flow right outside or parallel to the Water Code.

The commentor's reference to "exception for exempt wells contained in other instream flow rules" is assumed to refer to instream flow rules that have considered an exception for exempt wells as long as the wells would not adversely impact stream flows and there is no access to public water supply (See AR 04207-04212 & AR 04264-04269). Ecology has added that to the Least Burdensome Analysis. However, Ecology does not believe that achieves the general goals and specific objectives of the statute because of the lack of protection for instream flow. To ignore impacts to stream flow by ground water development is not reasonable. All wells are believed to impact ground water resources and to some extent, and depending on location and geology, may impact the flow or level of a stream adversely.

Applicants for water rights can address hydraulic continuity and potential impairment of an instream flow right by demonstrating that there is no impairment of instream flows. Alternatively, project proponents within the water right application process have other opportunities to meet their needs. The ground water reservation recognizes the need for rural, domestic, needs. Given the finite nature of the reservation, as all water is limited, future efforts on water management and linkage to land use planning and development will be strengthened. Ecology also proposed and is promulgating a rule with a narrow scope, as compared to a watershed plan developed pursuant to chapter 90.82 RCW. In the Stillaguamish Basin, the local citizens chose to not pursue such planning. The budget proviso for the money used for this work specified: "$600,000 of the water quality account–state appropriation is provided solely for setting instream flows in six basins not currently planning under the watershed planning act." The narrow scope reflects the direction to establish instream flows.

Comment 1143

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: Below and included in the attached document are my comments on the proposed Stillaguamish In Stream Flow Rule. Specifically, my comments related to the Small Business Economic Impact Study (SBEIS) that was prepared for the proposed rule. I am a practicing natural resource economist with a private consulting business located in Stanwood, WA. I am also adjunct research faculty in WSU's Department of Natural Resource Sciences.

Response: Thank you for taking the time to comment on the rule. Your comment is noted.

Comment 1144

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: I live in the Stillaguamish Watershed and am a voting member of the Stillaguamish Implementation Review Committee (SIRC). As an economist I have grave concerns about the quality of the SBEIS that was prepared for the proposed rule, and it is my professional opinion that this document does not meet the requirements detailed in RCW 19.85.

Response: Thank you for your comment. Ecology respectfully disagrees with your comment. Ecology believes the document does quantify to the extent possible the potential economic impact of this rule and meets the requirements of chapter 19.85 RCW. Ecology also believes that

major impacts have been covered and conclusions are supported. Ecology has added language to the final SBEIS where it believes clarification, based on your comments, would be useful. The responses to the specific comments are provided below based on those listed in the document.

Comment 1145

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: On the surface this document appears to be a template study that could be written about any watershed. There are no specific references to locations or businesses that operate in the Stillaguamish watershed. Furthermore, this document is a discussion, not a quantitative assessment. One finishes this document with no better knowledge of the scale or specific types of economic impacts that will affect current and future business development in the Stillaguamish Basin.

Response: Thank you for your comment. Specific comments on the substance of the SBEIS are addressed in the response to comments 1146 to 1184. Impressions of the document can not be addressed.

Comment 1146

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: Under RCW 19.85, the code that requires agencies to prepare an SBEIS, if the rule causes a disproportionate impact on small businesses, it is required to show how it will reduce the costs to these businesses. Even though the report concludes that "significant economic impacts" may arise from the proposed rule, only one short paragraph in the report is dedicated to how these impacts will be mitigated. Department of Ecology has NOT demonstrated in this report any effort or plan to mitigate the stated impacts.

Response: Thank you for your comment that chapter 19.85 RCW requires agencies to show how it will reduce the costs to small businesses, if the rule causes a disproportionate impact on small businesses. RCW 19.85.030(2) says, based upon the extent of disproportionate impact on small business identified in the statement prepared under RCW 19.85.040, the agency shall, where legal and feasible in meeting the stated objectives of the statutes upon which the rule is based, reduce the costs imposed by the rule on small businesses. Methods to reduce the costs on small businesses may include:

(a) Reducing, modifying, or eliminating substantive regulatory requirements;
(b) Simplifying, reducing, or eliminating recordkeeping and reporting requirements;
(c) Reducing the frequency of inspections;
(d) Delaying compliance timetables;
(e) Reducing or modifying fine schedules for noncompliance; or
(f) Any other mitigation techniques.

Ecology believes mitigating of cost is required when legal and feasible in meeting the objectives of the statutes. Ecology lacks discretionary authority to reduce, modify, or eliminate the substantive regulatory requirement for a water right. There is no basis upon which to say small business do not need a water right. Under the proposed rule, there is minimal record keeping (if any) and no reporting requirements. It simply is not possible to reduce record keeping or reporting to a lesser level. Even if it were, Ecology has no authority to single out a class of water users. There are no inspections. Delaying compliance timetables makes no sense if the only time to comply with the rules related to use of reservation water is at the time of well construction and development. Finally compliance actions are prescribed by the rule and statute and (again) Ecology lacks authority to treat one class of users differently than another. There are simply no mitigation techniques we could implement.

Comment 1147

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: My specific comments are included as notes in the PDF file of the report attached to this e-mail. Click twice on the notes to open them. The notes are placed after the section they refer to. These comments will also be sent to my state and local elected representatives. If the quality of this SBEIS is any measure, then RCW 19.85 must be changed. The economic impacts on small businesses of this rule are not adequately presented in the SBEIS. If we are to adopt such rules it should be with eyes wide open to the economic consequences, which is the intent of RCW 19.85. These consequences for small businesses in the Stillaguamish Watershed remain unknown.

Response: Thank you for your comment. Please see response to comment 1144.

Comment 1148

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: This SBEIS is woefully deficient and does not meet the requirements of RCW 19.85. It is unspecific and does not quantify or attempt to quantify the potential economic impact of this rule. Nor does it describe how these impacts will be effectively mitigated. Major economic impacts are omitted, and conclusions about economic impacts are not supported or explained. (Specific comments are placed at the END of the sentence or paragraph that they refer to.)

Response: Thank you for your comment. Ecology respectfully disagrees with your comment. Ecology believes the document does quantify the potential economic impact of this rule and meets the requirements of chapter 19.85 RCW. The impacts have been quantified to the extent possible. Ecology also believes that major impacts have been covered and conclusions are supported. Ecology has added language where it believes clarification, based on your comments, would be useful. The responses to the specific comments are provided below based on the notes you attached to the SBEIS document.

Comment 1149

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 7: 3. "Creation of the reservations: Currently, groundwater withdrawals via exempt wells in the Stillaguamish River or its tributaries are subject to the requirements in RCW 90.44.050. Under the proposed rule, water from permit-exempt wells for domestic, small businesses and stockwatering will still be available via the reservations, but comes with some restrictions. Under the reservation, only domestic uses will be allowed year around. For businesses that would typically use a relatively small amount of process water (up to 5,000 GPD), domestic needs of the business could be met from the reservation and if the business is located in areas with partial closures an interruptible right would still be available during open periods. For businesses developing land for residential construction or requiring domestic water only, the reservation should meet that need although outdoor use will be restricted to irrigation of 1/12th of an acre per residence."

Comment: That water limitation could severely limit the sale price of the property. A property value (appraisal) approach should be taken to look at how land values would be affected.

Response: Thank you for your comment. Ecology agrees that there could be an impact on the sales price of property and this analysis was performed for the SBEIS and is listed on pages 10 and 11. A detailed description was provided in the Appendix of the Benefit-Cost analysis and this has since been incorporated as a new appendix for the SBEIS. Please see Appendix D of the SBEIS.

Comment 1150

Commentor: Carolyn Henri,

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 7: "The creation of the stockwatering reservation will likely provide year-around access to groundwater for new stockwatering uses."

Comment: How has this conclusion been determined? Using what inventory of stock and watering needs? How much water per head? Have the numbers used been verified with actual livestock owners or actual data? Has there been any allowance for growth in this reservation as the human population of the watershed grows and livestock numbers increase?

Response: Thank you for your comments related to the stockwater reserve. The stockwater reserve is create to meet the needs of stock owners for continuous and reliable source of water supply. There is no restriction on the use created by the rule. At some point in time, the stockwater reserve may be used up, at which time stock owners would need to go through the permitting program to obtain stock water. The inventory of stock used by Ecology is data collected by the Snohomish Conservation District (SCD). The data was collected by the Conservation District within the Clean Water District Boundary's and is a count of commercial and noncommercial beef cattle, dairy cattle, goats, horses, llama, pigs, sheep, and other animals. The data is used to gauge the relative number of stock in the basin. The data is known to be incomplete and estimated to be one-half the stock in the clean water district. As far as Ecology knows, the survey done by SCD is the only one done in the basin. For the rule, it is assumed that existing stock in the basin are watered from existing water rights.

For future stockwater use, Ecology made no attempt to calculate water duties for specific animals. Rather a duty for a horse, 12 gallons per day, was used as a proxy to provide a relative gauge. A horse has a high water duty as compared to all but milking dairy cows and horse farms seem to be the most common rural land conversion. The 12 gallons per day for a horse was not verified by talking with actual livestock owners or actual data from the Stillaguamish basin. No such compiled data is known to exist. The figure however comes from an Environmental Protection Agency manual that is based on empirical data from across the county. Finally, there is no allowance for growth in this reservation as the human population of the watershed grows and livestock numbers increase in the rule other than an amended rule process in the future if necessary. The 20 acre-feet of stock water is enough water for about 1450 – 1500 animal units, about a 30 percent increase in basin stock assuming all stock used ground water. The number of animal units that can be served by the reservation would go up; if not all stock are horses.

The surface water, stockwater reservation created as prescribed by RCW 90.22.040 is an instantaneous reservation, with no annual quantity of water. It would be meaningless to talk about daily or annual quantities of water. It is an instream stockwater right. The ground water reservation of water, twenty acre-feet, is proposed for the future stockwater needs not satisfied by the use of surface water. Of course the reservation is not sized nor intended to meet all stockwater needs, numerous water rights and claims to water rights for stockwatering exist in the basin. Numerous existing wells drilled under the permit exemption are used for stockwatering.

Comment 1151

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 8: 5. "Transfers: Water right transfers that would have occurred before the rule even though they may have impaired instream flows will no longer be allowed. This may be a cost for those that would have transferred water. However, only two transfers of any kind for small quantities have been recorded previously. Therefore, it seems reasonable to conclude that this impact will be small. Transfers of water rights may become part of mitigation strategies used by businesses to offset the impacts of their new water needs."

Comment: Lack of historic transfers in this watershed is most likely because transfers were not necessary to meet water needs. That necessity will likely change with new restrictions in place. Therefore, it is NOT "reasonable to conclude that this impact will be small."

Response: Thank you for your comment. Ecology believes there will be enough water for domestic uses related to business activity. Businesses needing large quantities of water for production that involves consumptive use may propose transfers to mitigate their impact. This option has always been available to them.

Comment 1152

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 8: 6. "Impacts to businesses depending on instream flows: Creation of the reservation, stream closures, and restrictions on withdrawals from lakes and ponds should all serve to reduce the amount of water that would have been withdrawn without the rule. This could potentially be a beneficial impact to ecosystem services and recreation, and could impact property values. For businesses that provide guide services such as rafting, fishing and bird watching…"

Comment: How? Where? Be specific.

Response: Thank you for your comment that is related to business that provide guide services such as rafting, fishing and bird watching. Ecology estimated the amount of increased water as being "small" based on the small amount of water likely to remain in the river relative to the case today. An instream flow water right does not guarantee water will be available to satisfy the right. The USFS indicated that few rafting companies were present on the river. Fishing and bird watching are not identified as significant industries on the river. The change in waste assimilation capacity is expected to be insignificant for the river. As such, no further information was provided in this part of the analysis.

Comment 1153

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 8: "For those dependent on dilution for waste removal, there could be a very minor beneficial impact. However, it is anticipated that the business benefits of a reduced depletion in flows will be very small due to the small quantities of water involved."

Comment: Were these small gains in water quantity measured? Were impacts discussed with relevant industries?

Response: Thank you for your comment, this comment comes in response to the sentence, "However, it is anticipated that the business benefits of a reduced depletion in flows will be very small due to the small quantities of water involved." These small quantities haven't been measured since they haven't occurred yet. However, there was an attempt at quantification that can be found in the Benefit Cost Assessment (page 15). The impacts were not discussed with the relevant industries. However, please note that there is no significant commercial rafting industry on the Stillaguamish to our knowledge. The same is apparently true of bird watching and

commercial fishing.

Comment 1154

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 8: "Reporting and Recordkeeping: No additional reporting or recordkeeping is likely to be required."

Comment: Increased metering requirements referred to on page 11, para 3 should be listed here as a cost.

Response: Thank you for your comment that increased metering requirements referred to on page 11, paragraph 3, of the SBEIS should be listed here as a cost. Ecology does not believe there is any change in metering requirements associated with this rulemaking. The rule creates no metering obligations that do not exist in law today (See RCW 90.03.360 or Department of Health rules). As such, no additional costs were included.

Comment 1155

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 8: "Additional Professional Services: Additional professional services including hydrogeological expertise and engineering design and surveying may be required if technical services are required to provide technical documentation of a water transfer or a water line extension must be designed. Closures in basins may lead some to transfer water rights or lease from others. This will likely require increased use of professionals including hydrogeologists, biologists, engineers, and attorneys. The exact requirements would depend on the river or stream, proposed change, etc. Mitigation options might involve construction of storage tanks and associated piping requiring engineering design services. Anyone required to connect to a public water system would likely require additional engineering design and surveying.

Comment 1 regarding the above: These costs could run in the tens to hundreds of thousands of dollars for a business enterprise. No attempt has been made to quantify a range cost.

Response: Thank you for your comment that costs for professional services could run in the tens to hundreds of thousands of dollars for a business enterprise. No attempt has been made to quantify a range cost. Ecology agrees that the costs for mitigation could be significant. Chapter 19.85 RCW requires us to list the additional professional services required and this is what is listed here. The actual costs are provided at the end under "compliance costs." Estimates of professional service costs and transfer costs have been provided and are listed there. Connection costs were provided in this section previously.

Comment 1156

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 8: "Additional Professional Services: Additional professional services including hydrogeological expertise and engineering design and surveying may be required if technical services are required to provide technical documentation of a water transfer or a water line extension must be designed. Closures in basins may lead some to transfer water rights or lease from others. This will likely require increased use of professionals including hydrogeologists, biologists, engineers, and attorneys. The exact requirements would depend on the river or stream, proposed change, etc. Mitigation options might involve construction of storage

tanks and associated piping requiring engineering design services. Anyone required to connect to a public water system would likely require additional engineering design and surveying."

Comment 2 regarding the above: Costs of actual historic transfers in other parts of the state where they are more common could be a starting basis for transfer

Response: Thank you for your comment regarding costs of actual historic transfers. Specificity for cost analysis is difficult, since any fact pattern of a transfer of a water right or investigation of potential impairment of a surface water body is not known.

Comment 1157

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 8: "Additional Professional Services: Additional professional services including hydrogeological expertise and engineering design and surveying may be required if technical services are required to provide technical documentation of a water transfer or a water line extension must be designed. Closures in basins may lead some to transfer water rights or lease from others. This will likely require increased use of professionals including hydrogeologists, biologists, engineers, and attorneys. The exact requirements would depend on the river or stream, proposed change, etc. Mitigation options might involve construction of storage tanks and associated piping requiring engineering design services. Anyone required to connect to a public water system would likely require additional engineering design and surveying."

Comment 3 regarding the above: Data on costs of hooking up to a public system can be obtained from firms who perform this service, or the County Public Works office.

Response: Thank you for your comment that data on costs of hooking up to a public system can be obtained from firms who perform this service, or the County Public Works office. Connection costs were provided in this section previously, please see page 9 of the SBEIS.

Comment 1158

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 9: "Costs of Equipment, Supplies, Labor, and Increased Administrative Costs: Increased equipment associated with pipeline and tank construction may be required for mitigation options but is included in the descriptions below."

Comment: It does not seem to be included below. Please reference exactly where this is discussed.

Response: Thank you for your comment. The reference costs are in paragraph 4 on page nine which considers the cost of the connection. Transfer and storage cost estimates have been added in this same section or are noted in the Appendix of the SBEIS.

Comment 1159

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 9: "Future irrigation uses would likely not be impacted too much under the proposed rule since permits would already likely be interruptible."

Comment: This last statement is unclear. Would future irrigation be affected or not? If so how? Dow has this been documented and verified? The term "not be impacted too much" is professionally unacceptable in a document of this type and subject matter. No attempt has been made to quantify this impact.

Response: Thank you for your comment related to whether or no future irrigation would be affected or not and if so how. The sentence you reference is as follows: "Future irrigation uses would likely not be impacted too much under the proposed rule since permits would already likely be interruptible." Ecology believes that any new water right issued for these purposes absent the proposed rule would likely be conditioned on instream flows pursuant to RCW 77.55.050. With the rule, water could only be obtained for specified sources during open periods. The relevant change is from an interruptible agricultural/ commercial permit, to a case where water could only be obtained during open periods and used or stored. With the interruptible water right, water could likely be stored, so this was perhaps slightly more desirable, but the cost of storage of approximately 3 months of water (without the rule) is unlikely to be cost-effective. Analysis of storage cost has been added to Appendix D. A more likely alternative would be the transfer of existing water which has a range for agricultural uses of between $40 and $120/ acre-ft. The impact would include having to buy more water. An analysis can be found in Appendix D.

Comment 1160

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 9: "The cost associated with reducing any transfers will be the difference in value the proposed user and seller placed on the water."

Comment: What does the term "reducing any transfers" mean? This is jargon and should be avoided. If terms like this are used, a glossary should be included.

Response: Thank you for your comment regarding the phrase "reducing any transfers" and what it means. The sentence you refer to is "The cost associated with reducing any transfers will be the difference in value the proposed user and seller placed on the water." This was intended to note that any transfers that may be restricted due to biological criteria would be impacted based on the relative difference in value between the two users. This has been re-worded and is noted in the same section.

Comment 1161

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 10: "The estimated cost of outdoor use restrictions to users of permit exempt wells is likely to be between $3 and $35 per year per well."

Comment: How is this number derived?! Describe in detail how this is calculated. Are these real or NOMINAL values? The footnote refers the reader to an analysis that is not included in the document.

Response: Thank you for your comment regarding the estimated cost of outdoor use restrictions to users of permit exempt wells is likely to be between $3 and $35 per year per well and a question as to how is this number derived. This was derived using a valuation methodology. A discussion of this technique is included in Appendix D.

Comment 1162

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 10: "This is the lost revenue that would be experienced by any firm that owns developable property likely to be served by an exempt well."

Comment: This very likely grossly underestimates the economic impact. The real cost to the business owner will be the reduced SALE PRICE of the land, due to the inability to develop water rights. Many commercial properties will be unsaleable without sufficient access to water. This can be verified with commercial land appraisers and real estate firms. Undeveloped commercial farmland, for example, has little or no value without sufficient access to water.

Response: Thank you for your comment that lost revenue that would be experienced by any firm that owns developable property likely to be served by an exempt well is very likely grossly underestimated. The reservation is believed to be adequate for a 20-year period which is the period of analysis. As such, there does not appear to be a reduction in the ability to develop land for residential users. The main impact will be for restrictions on water use and that is the analysis presented and listed in Appendix D. As mentioned previously, the impact to farmers will be the change from having an interruptible water right for periods of low flows to only being able to have a water right during the open periods of the year. This cost will likely be reduced by purchasing or transferring water rights.

Comment 1163

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 10: "For those business using conditioned water right permits, the restrictions on use during low flows will impose a cost varying with the volume and use forgone."
Comment: Some commercial examples would be useful here.

Response: Thank you for your comment that some commercial examples would be useful here. The sentence this applies to states: "Other impacts (e.g. connection requirements, restrictions on transfers, etc.) will also tend to raise costs." This could apply to any business-developed parcel that would be required to connect to a municipal water supplier. This could raise costs depending on the connection requirements. Restrictions on transfers might require more expensive connections in another fashion. This could be an additional expense for an expanding business. Connection costs and transfers are discussed in the document.

Comment 1164

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 10: "Other impacts (e.g. connection requirements, restriction on transfers, etc.) will also tend to raise costs. To the extent that increased costs yield increased prices, gross revenues will likely be reduced."
Comment:This is a discussion that needs to be quantified.

Response: Thank you for your comment suggesting that this discussion needs to be quantified. Chapter 19.85 RCW states the following; "whether compliance with the rule will cause businesses to lose sales or revenues." Ecology has interpreted this to mean that revenues are to be described as increasing or decreasing. We have typically provided a number if it is reasonably available (as listed on page 10 for businesses developing land), but believe the law does not require a strict numeric response.

Comment 1165

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 10: "The impacts of the proposed rule related to the reservation and closures will likely be experienced by existing property owners without existing water rights."

Comment: No. It also affects all CURRENT businesses that may have future expansion plans.

Response: Thank you for your comment. Ecology agrees that a business that may have expansion plans may be impacted by the rule. However, this would likely be those that are impacted by the difference between receiving an interruptible right and those that will now be able to acquire water during open periods. Again, the utility of an interruptible water right to any commercial or agricultural endeavor is difficult to determine. Storage is an expensive option, and it is unlikely to be practical in many cases. Moreover, it is more likely that transferring water rights will be more economical. However, any existing expanding agricultural sectors have not transferred water rights, at least not as reflected in Ecology records, implying that many of existing water rights are being put to use in newly expanding crop areas. As such, the rule may not impact these users at all.

Comment 1166

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 10: "The number of business-owned developable properties was determined, and this was evaluated to determine those likely to be served by exempt wells in the future. The result was a record of existing business owners, parcel size and current land use and zoning that allowed for projection of the number of wells that could be developed."

Comment: How many acres were affected?

Response: Thank you for your comment regarding how many acres were affected. An exact number was not determined and will depend on which parcels develop in the future. As mentioned in footnote 8, business-owned developable parcels are roughly 22% in Skagit County and 21% in Snohomish County of the total area of the watersheds.

Comment 1167

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 10 (footnote): Calculation assumes a 2.7% real discount rate. Discussion of this calculation can be found in the benefit-cost analysis.

Comment: The referenced discussion does not seem to exist anywhere in the document. The interest rate used for discounting is exceptionally small and not standard usage for government agencies. No justification of this is given.

Response: Thank you for your comment related to the footnote on page 10 of the SBEIS. This footnote states: "Calculation assumes a 2.7 percent real discount rate." The rate used is based on a risk-free discount rate determined by the prevailing rate on I-bonds. The rate is based on an average of the fixed rates for these inflation adjusted bonds and has been calculated to be approximately 2.7 percent. A discussion is provided in Appendix D.

Comment 1168

Commentor: Carolyn Henri,

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 11: Table 2.1. Compliance Costs for Business-Owned Exempt Well Development

Comment: Although the economic impact metric "median cost per employee" is allowed under RCW 19.85.040, its use in this context is inappropriate and irrelevant. It also grossly understates the economic impact. When discussing undeveloped land parcels, the correct metric should be "cost per 100 dollars of sales". The real cost to the landowner will be the reduced SALE PRICE of the land, due to the inability to develop water rights. The current table UNDERESTIMATES this cost. Some commercial properties may not saleable at all without water rights. Reduced property values will also have an economic impacts (sic) on Snohomish County and other local jurisdictions. Information should be obtained from commercial real-estate firms with knowledge of these kinds of sales. The Direct and Indirect effects of reduced property values in North Snohomish County are not discussed.

Response: Thank you for your comment noting that although the economic impact metric "median cost per employee" is allowed under RCW 19.85.040, you believe its use in this context is inappropriate, irrelevant; and grossly understates the economic impact reduced property values will have on Snohomish County and other local jurisdictions. However, RCW 19.85 allows the use of three alternative measures of cost impacts as a way to measure disproportionality. Ecology chose to use the cost per employee measure and believes it is an adequate representation of the proportionality of costs.

Comment 1169

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 11: CONCLUSIONS: As described above, there will likely be an impact to some businesses in the watershed from the proposed rule. It is likely that some firms will experience increased compliance costs associated with restrictions on water use, increased metering requirements, and water line extension costs. In general, the impacts are likely to be disproportionately borne by smaller firms as measured on a cost per employee basis.

Comment: Mention this on page 8, under Cost Analysis, Reporting and Recordkeeping.

Response: Thank you for your comment that Ecology should mention this on page 8, under Cost Analysis, Reporting and Recordkeeping. The relevant sentence discussed is "It is likely that some firms will experience compliance costs associated with restrictions on water use, increased metering requirements and water line extension costs." This statement is in error. Ecology does not believe there will be an increase in requirements associated with metering. This part of the sentence has been deleted. Please see the SBEIS.

Comment 1170

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 11: 3. ACTIONS TAKEN TO REDUCE THE IMPACT ON SMALL BUSINESS

Comment: DOE has NOT shown that it has reduced the costs on small businesses affected by the rule. A statement that it has and one marginally relevant example are not sufficient evidence that DOE has made any effort whatsoever to reduce economic impacts. For this reason DOE is NOT in compliance with RCW 19.85. The real impacts, including reductions in property values of small business owners, associated decline in the tax base and the economic effects of decreased land development by small businesses in the watershed – among other impacts- are not even discussed, much less proposals for the mitigation of these effects put forth.

Response: Thank you for your comment. Ecology is required to mitigate impacts if they are disproportionate and "if legal and feasible." In the case of water right impacts, Ecology does not believe that it could mitigate impacts to small businesses in any manner that would not be illegal or infeasible. For example, Ecology believes that to allow more water use or exemptions for small businesses to the closure restrictions as a way of mitigating impacts would likely exceed its statutory authority under current water management laws.

Comment 1171

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 11: In crafting the proposed instream flow rule, Ecology has actively attempted to reduce, modify or eliminate substantive regulatory requirements to all entities in the watershed. For example in a previous draft of the rule, Ecology considered prohibiting all outdoor uses of water during low flow periods. The proposed rule allows some outdoor watering which will reduce the impacts to small businesses proportionately more than large businesses.

Comment: This statement is not supported. DOE has NOT shown that it has reduced the costs on small businesses affected by the rule. The SBEIS should address each area of the rule for which there is an impact and describe and quantify the change in economic impacts due to reductions in regulatory requirements. This has NOT been done.

Response: Thank you for your comment that the statement, "In crafting the proposed instream flow rule, Ecology has actively attempted to reduce, modify or eliminate substantive regulatory requirements to all entities in the watershed" is not supported. Ecology worked to minimize the impacts to all water users by limiting requirements on all businesses. However, the specific impacts to businesses in the watershed have been discussed in the body of the document. Ecology is required to mitigate impacts if they are disproportionate and "if legal and feasible." In the case of water right impacts, Ecology does not believe that it could mitigate impacts to small businesses in any manner that would not be illegal or infeasible. For example, Ecology believes that to allow more water use or exemptions for small businesses to the closure restrictions as a way of mitigating impacts would likely exceed its statutory authority under current water management laws.

Comment 1172

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 11: There are no recordkeeping or reporting requirements or inspections and compliance timetables and fine schedules were not altered.

Comment: Why are these listed here if there is no impact to mitigate?

Response: Thank you for your comment and question as to why are these listed here if there is no impact to mitigate. The sentence referred to is: "There are no recordkeeping or reporting requirements or inspections and compliance timetables and fine schedules were not altered." This sentence was put in the document since the items listed are supposed to be considered pursuant to chapter 19.85 RCW. It was added to clarify that these were not considered further.

Comment 1173

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 12: HOW WAS SMALL BUSINESS INVOLVED IN THE

DEVELOPMENT OF THIS RULE? This rule has been developed over a long period with substantial public involvement. Several public meetings were held to discuss the language and the proposed rule was posted on Ecology's website. The filing of the CR-102 will provide for official public hearings to consider the rule and an opportunity for the business community to provide input.

Comment: The intent of RCW 19.85.040 (2)(b) is to engage small businesses beyond the standard public comment process. There is no evidence that DOE has reached out directly to small business organizations or groups, pursuant to RCW 19.85.070.

Response: Thank you for your comment. Ecology did not elect to do a negotiated rulemaking or pilot rulemaking process as part of this process. As such, Ecology elected to do a standard rulemaking process as per chapter 34.05 RCW. Ecology believes that input from stakeholders is important; Ecology believes this was accomplished via two public hearings, the availability of draft rule language on the website, public outreach, and the opportunity to comment such as this. Ecology has reviewed all comments made and has incorporated those that are relevant. As such, Ecology believes that relevant stakeholders were engaged as required by statute.

Comment 1174

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 12: [E]xisting business owners of undeveloped property are likely to be the industries that will be required to "comply" either directly in terms of attempting to acquire water or indirectly in terms of changes in asset values. Therefore, the following list is provided indicating Standard Industrial Codes (SIC) codes for existing developable properties in the Stillaguamish watershed12 and based on previous water right permit data. [Page 12: Table 5.1. Industries Likely Required to Comply with the Rule]

Comment: This list includes only businesses who own "undeveloped property". However, it is true that existing businesses with developed land and water rights would be affected by this rule if they should change their business and/or expand their business. There are many other businesses that will be affected by this rule, and as such should all be included in the list. Examples of industries not included are Dairies (SIC 0241), Dairy products (5143) and packaged frozen food ((5142). It is not clear that DOE verified existing businesses in the watershed or their current and future water needs.

Response: Thank you for your comment that the list in table 5.1 of the SBEIS includes only businesses who own "undeveloped property" and if it is true that existing businesses with developed land and water rights would be affected by this rule if they should change their business and/or expand their business they should be on the list. Ecology acknowledges that some industries that are operating in the area may want to expand and that they might be affected by the rule. However, as mentioned in the text, no industries are required to comply with the rule. It is only those that choose to get water in the future that must comply. As such, Ecology used existing raw land owners and the SIC codes of previous water right permit applicants to generate the list. However, Ecology has added the suggested codes, plus several other industries listed in the agricultural census and not previously indicated..

Comment 1175

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 19: For individuals and business entities, there are several alternatives. Applicants may choose as a first order of business to solicit a hydrogeologist to certify that a well would not cause an impairment of a water right in those areas where hydraulic continuity is unlikely. This would allow an applicant to develop a well without the limitations

imposed by the existing rule's instream flows and without the limitations imposed by the proposed amendment. However, the applicant would bear the additional cost of the analysis.

Comment: A range of estimated cost for this type of analysis should be included.

Response: Thank you for your comment that a range of estimated cost for this type of analysis should be included. The range of costs for an assessment of this type ranges from several hundred to several thousands of dollars depending on the extent of the analysis.

Comment 1176

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 19: For some wells in basins that drain groundwater to saltwater bodies, the cost for hydrogeologic consultation would likely be very small.

Comment: This is probably not the majority of affected parties. For them the costs would be infinitely higher, and would be an effective barrier to obtaining water.

Response: Thank you for your comment that the majority of affected parties are not in basins that drain groundwater to saltwater bodies, the cost for hydrogeologic consultation would likely be an effective barrier to obtaining water. Ecology respectfully disagrees the cost for obtaining water will be an effective barrier to obtaining water. However, this section is limited to a discussion of those that would elect to use permit-exempt wells to access water.

Comment 1177

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 20: If the proposed rule amendment goes into effect, then use of the permit-exempt well water will now be obtained from a reservation if year-around use is desired. Businesses that elect to install permit exempt wells for their own moderate needs or to develop saleable land will face more choices as to their best option. Under the proposed rule, the project proponent may choose other methods of water well development (for example drilling to deep aquifers) to meet their needs and avoid limitations imposed by the rule.

Comment: What would be the practicality and associated cost differential of this suggested alternative? If the average well drilling costs can be estimated at $7,000, then this additional cost to drill to deeper aquifers should also be estimated. Snohomish County hydrogeologists are a source of information on this issue and should be consulted.

Response: Thank you for your comment and question as to the practicality and associated cost differential of drilling a deeper well when the average well drilling costs can be estimated at $7,000, then this additional cost to drill to deeper aquifers should also be estimated. The cost for drilling is based on cost per foot so a deeper well will cost more. The practicality of this alternative would depend on the location of the parcel, stratigraphy, distance to a river or stream, and depth of the well. All specific project information is not obtainable.

Comment 1178

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 21: PROPOSED RULE (CHAPTER 173-505 WAC) The complete rule language for "Instream Resources Protection and Water Resources Program-Stillaguamish River Basin Water Resources Inventory (WRIA) 5" can be found in proposed Chapter 173-505 WAC. The following provides a brief description of the proposed rule and a further discussion of those specific rule provisions that may impact instream flows and/or out-of-stream uses of water.

Comment: The text in this section should be in the MAIN body of the SBEIS.

Response: Thank you for your comment that the text of the rule should be in the main body of the SBEIS. This section is intended to provide information for the rule broken down to item by item and indicate where there may be changes from the existing baseline. It is included as an Appendix as it is supporting information for the main body of the document.

Comment 1179

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: Page 22: Conclusion: Setting minimum instream flows might reduce the availability of water for future appropriations. This may have significant economic effects – See "Rule Impacts to Water Right Administration."

Comment: How is "significant" defined? State in terms of number of businesses affected, decline in associated net revenues. This loss must be quantitatively estimated.

Response: Thank you for your comment related to the word "significant", how it is defined, and that it should be stated in terms of number of businesses affected, and or decline in associated net revenues. Ecology understands that "significant" is not defined in the document, but it is intended in this context to indicate places where the rule may represent a substantive change from the existing baseline. Reference is then made to the section titled "Rule Impacts to Water Rights" in order to discuss the impact of this rule provision in the context of water rights and water use.

Comment 1180

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 23: Conclusion: This is unlikely to be a limit on future development in the basin. No significant economic impact is anticipated.

Comment: What reasoning and methodology were used to arrive at this conclusion? How was this conclusion determined?

Response: Thank you for your comment asking for the reasoning and methodology that were used to arrive at the conclusion on page 23 that this is unlikely to be a limit on future development in the basin. No significant economic impact is anticipated. Approximately 90.47 cubic feet per second (cfs) of consumptive surface and groundwater withdrawals are permitted in the basin. An additional five cfs is allocated to domestic uses and municipal providers (except City of Arlington) apparently have enough water to provide service for the next 20 years. This would leave only agricultural and commercial/ industrial development. As has been noted, only two agricultural water rights have been issued in the last 20 years. The total amount of water requested in new applications extending back to 1990 is 30 CFS. Even if all these accepted interruptible rights, it would only be limited in two stream reaches (i.e. Squire Creek and Jim Creek).

Comment 1181

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 23: Conclusion: Some potential impacts to future water right applicants. Metering requirements are not a change from current requirements. See "Rule Impacts to Water Right Administration."

Comment: Terms such as "some" and "significant" impacts are non-specific,

relative, and give no sense of the actual economic impact. More specific impacts should be estimated.

Response: Thank you for your comment that terms such as "some" and "significant" impacts are non-specific, relative, and give no sense of the actual economic impact and that more specific impacts should be estimated. Ecology understands that "significant" is not defined in the document, but it is intended in this context to indicate places where the rule may represent a change from the existing baseline. Reference is then made to the section titled "Rule Impacts to Water Rights" in order to discuss the economic impact of this rule provision in the context of water use.

Comment 1182

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Pages 23-24: 173-505-120 Alternative Sources of Water. The department encourages the use of alternative sources of water. These may be important as potential mitigating projects when a water use is proposed. Conclusion: No significant economic impact.

Comment: How can the report conclude that no significant economic impact will be incurred by accessing alternative sources of water? How could this NOT have an additional economic cost? What is specifically included here? And how is this conclusion developed?

Response: Thank you for your comment that evaluation of alternative sources will have an additional economic cost. Section 173-505-120 indicates that there is a "need" for alternative sources of supply and that they can be used to offset impacts of withdrawals. This is the case under the baseline, and so no impact from this rule section is anticipated.

Comment 1183

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: Page 24: 173-505-140 Future Changes and Transfers. Transfers will only be allowed if they don't conflict with this chapter. Conclusion: This may restrict transfers that would have occurred absent the rule. This may have a potentially significant economic impact. See "Rule Impacts to Water Right Administration."

Comment: What specifically does "potentially significant economic impact" mean? How is this quantified? What are the cost elements that have been considered to draw this conclusion?

Response: Thank you for your comment on what specifically does "potentially significant economic impact" mean, how it is quantified, and what are the cost elements that have been considered to draw this conclusion. Ecology understands that "potentially significant economic impact" is not defined in the document, but it is intended in this context to indicate where the rule may represent a substantive change from the existing baseline. Reference is then made to the section titled "Rule Impacts to Water Rights" in order to discuss the impact of this rule provision in the context of water use.

Comment 1184

Commentor: Carolyn Henri

Type: E-mail dated May 13, 2005, with attachment (notes on the SBEIS)

Comment: SBEIS, Page 24: 173-505-160 Appeals. All decisions can be appealed to the pollution control hearings board. Conclusion: No significant impact.

Comment: This is NOT correct. There are very real costs associated with the landowner's time to prepare and file the appeal, and most likely hire legal council for this purpose. This cost can and is frequently quantified and should be quantified here.

Response: Thank you for your comment that there are very real costs associated with the landowner's time to prepare and file the appeal, and most likely hire legal council for this purpose and that this cost can and is frequently quantified and should be quantified here. Section 173-505-160 simply indicates that all final written decisions by Ecology can be appealed to the Pollution Control Hearing Board. This is the current situation and therefore is not a change caused by this rule-making.

Comment 1200

Commentor: John Postema

Type: Oral testimony, Arlington Hearing, March 24, 2005

Comment: So there is a benefit-and-cost analysis done. Instead of – Studies they've done. There's been a small business impact study has been done. And reading those, if I look at the cost of doing it, it . . . outweighs the benefit greatly. But the. . .law says. . .the Department of Ecology does not have to weigh it. They just have to do it. Anyway, it's a documentation which you can find on the Internet.

Response: Thank you for your comment regarding additional studies. Ecology concurs the studies are on the internet. Please see http://www.ecy.wa.gov/programs/wr/instream-flows/isfhm.html and then look for the Stillaguamish basin for more information.

State Environmental Policy Act (SEPA)

Comment 281

Commentor: Joe Mentor, Jr., Skagit County

Type: March 18, 2005 letter regarding the then-proposed Skagit Instream Flow Rule amendments

Comment: The Skagit instream flow rule and proposed rule amendment violate the State Environmental Policy Act. Skagit County's comments on Ecology's SEPA review of the proposed amended rule are provided in a separate letter, a copy of which is attached hereto as Attachment C and hereby incorporated by reference. In summary, Ecology failed to undertake the requisite hard look at the localized, regional, or cumulative effects. Because of significant effects, Ecology must prepare an Environmental Impact Statement for the proposed amended rule in order to comply with SEPA.

Response: Thank you for your comment. Ecology disagrees the proposed Stillaguamish violates the State Environmental Policy Act (SEPA). Ecology disagrees with your contention that Ecology failed to undertake the requisite hard look at the localized, regional, or cumulative effects of the Stillaguamish proposed instream flow rule. The SEPA checklist analyzed or discussed the localized, as in within the basin, effects of the proposed rule. As to regional impacts, Ecology is unsure what you mean. An instream flow rule for the Stillaguamish basin is applicable only in the Stillaguamish basin. The rule is not applicable beyond the basin boundary. Current and projected water withdrawals (pending applications) are for the development and use of water in the basin. There is no known project proposal or regional purveyor that contemplate exporting Stillaguamish basin water outside the basin. The proposed instream flow rule neither encourages nor discourages water development for regional needs assuming there were a regional purveyor and/or the desire to create such an entity. As to cumulative effects, Ecology is unsure what your point or question is. The instream flow program will primarily be implemented through water right administration. Any water right issued, in theory, would have an effect on future development of

rights from that water source. The creation of the instream flow right will have no greater cumulative effect than would issuing any other water right.

Comment 473

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology wrongly concluded that the impacts of the proposed amended rule are insignificant.

Response: Thank you for your comment. Ecology respectfully disagrees that Ecology wrongly concluded the impacts of the proposed rule are insignificant. Ecology believes the checklist and determination of no significance based on that information is a reasonable conclusion.

Comment 474

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology's conclusion is in error because Ecology failed to take the requisite hard look at potential effects of the proposed amended rule.

Response: Thank you for your comment. Ecology respectfully disagrees that Ecology wrongly concluded the impacts of the proposed amended rule are insignificant. Ecology believes the checklist and determination of no significance based on that information is a reasonable conclusion. Ecology believes the potential effects of the proposed rule were adequately evaluated.

Comment 475

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: In determining whether impacts are significant, Ecology must consider among other things: conflicts between the proposal and existing laws and requirements protecting the environment. . .

Response: Thank you for your comment. Ecology agrees with your comment.

Comment 476

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: [Ecology must consider among other things]. . . The precedent the proposal establishes for significant future environmental effects. . .

Response: Thank you for your comment. Ecology agrees with your comment.

Comment 821

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: [Ecology must consider among other things]. . .impacts to prime farmlands.1

1 WAC 197-11-330(3).

Response: Thank you for your comment. The GMA requires local jurisdictions to adopt plans, zoning, and ordinances that protect prime farmland from conversion or redevelopment. (RCW 36.70A.060 and 36.70A.177) If measures in place are insufficient to prevent redevelopment of prime farmland, or if Skagit County chooses to remove protection of farmland, then redevelopment of farmland in these subbasins is likely. It would also require separate environmental review. The magnitude of this potential impact is reliant on the level of protection prime farmlands are provided under Skagit County ordinance, the demand for rural housing, and the availability of rural housing with adequate water supplies within the area.

Comment 822

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: In evaluating potential adverse impacts, Ecology must consider elements of the built environment including but not limited to, the proposal's relationship to existing land use planning and populations.

Response: Thank you for your comment. Ecology agrees with your comment.

Comment 823

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: In evaluating potential adverse impacts, Ecology must consider elements of the built environment including but not limited to, the proposal's relationship to. . .impacts on housing. . .

Response: Thank you for your comment. Ecology agrees with your comment.

Comment 824

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: In evaluating potential adverse impacts, Ecology must consider elements of the built environment including but not limited to, the proposal's relationship to. . .impacts on the provision of public services including public water supplies.2

2 WAC 197-11-444.

Response: Thank you for your comment; Ecology agrees with your comment.

Comment 825

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Sufficient consideration of potential environmental effects is a prerequisite to DNS issuance.

Response: Thank you for your comment; Ecology agrees with your comment.

Comment 826

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology's conclusion that an Environmental Impact Statement (EIS) is unnecessary ignores significant effects, leaving the proposed rule vulnerable to legal challenge and further delaying achievement of our common goals.

Response: Thank you for your comment. Ecology respectfully disagrees with the suggestion that an environmental impact statement is necessary.

Comment 827

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Under the State Environmental Policy Act (SEPA)3, environmental quality reflects the condition of both natural and built components of the environment.4 Significant impacts under SEPA are impacts which have a reasonable likelihood of more than a moderate adverse impact on environmental quality.5

3 Chapter 43.21C RCW.
4 WAC 197-11-444.
5 WAC 197-11-794(1).

Response: Thank you for your comment. Ecology agrees with your assessment of the requirements of chapter 43.21C RCW. WAC 197-11-444 and 5 WAC 197-11-794(1). Ecology also believes the checklist and information presented complies with applicable law.

Comment 828

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Significant impacts on environmental quality necessitate preparation of an EIS.

Response: Thank you for your comment. Ecology agrees that your comment accurately reflects the law but does not believe that significant impacts result from this proposed rule, as documented in Ecology's determination for State Environmental Policy Act compliance.

Comment 829

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: In determining whether effects are potentially significant, " [the lead agency shall make its threshold determination based upon information reasonably sufficient to evaluate the environmental impact of a proposal."7

7 WAC 197-11-335.

Response: Thank you for your comment. Ecology agrees that your comment accurately reflects the law.

Comment 830

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: . . .SEPA's full disclosure requirements "should be invoked whenever more than a moderate effect on the quality of the environment is a reasonable probability." 8

8 Norzuay Hill Preservation and Protection Ass'n v. King County Council, 87 Wn.2d 267,552 P.2d 674,680 (1976).

Response: Thank you for your comment. Material disclosure is required under SEPA no matter what the threshold determination, as evidenced in WAC 197-11-340(3)(iii) and 600(3)(b)(ii). It was not Ecology's intention, nor did it do so, by issuing a DNS for this proposal to withhold relevant information. Ecology believes relevant information was disclosed and analyzed in the checklist.

Comment 831

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Here, the information considered was not reasonably sufficient to conclude that a more than moderate effect on the quality of the environment will not occur. In fact, available information supports the opposite conclusion.

Response: Thank you for your comment. Ecology respectfully disagrees with Skagit County's contention that an environmental impact statement is necessary; available information, as documented in the checklist, supports the opposite conclusion.

Comment 832

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology failed to adequately consider localized effects. . .when determining the requisite level of analysis.9

9 WAC 197-11-330(3).

Response: Thank you for your comment. Ecology respectfully disagrees that Ecology failed to consider localized effects. WAC 197-11-330(3) discusses, when making a threshold determination, the need for considering that "(a) The same proposal may have a significant adverse impact in one location but not in another location." In other words, the lead agency should consider any special conditions existing in the specific location that will be effected by the proposal.

Ecology has recognized that each water management program and, more

importantly, each watershed has unique qualities, which is why one "comprehensive" EIS for the adoption of instream flow rules statewide is inappropriate and inadequate except as a preliminary step in staged environmental review. Ecology believes the commentor has misinterpreted this portion of the SEPA rules, but has correctly identified the impacts of the rule as "localized." ["Localize" is defined by Webster's as "1. To make local; 2. To restrict or confine to a specific locality; 3. To attribute to a specific locality.—vi. To become local, especially to become fixed in one part or area] The rule provides water for domestic uses. Ecology recognizes that in localized areas the reservation may not be enough to meet projected demand beyond the twenty year time period. Because 1) these areas are localized; 2) the areas are, and not prevalent, 3) and there exists other potential water management options to meet these needs exist and 4) or alternatively other areas within the watershed can to accommodate growth, and these localized effects were determined to not be significant. This is particularly true considering that under existing law, absent any rule, water uses have the potential to be subject to cut-off if their water use impairs another senior right.

Comment 833

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology failed to adequately consider. . .absolute quantitative effects. . .when determining the requisite level of analysis.9

9 WAC 197-11-330(3).

Response: Thank you for your comment. Ecology respectfully disagrees with that Ecology failed to adequately consider absolute quantitative effects when determining the requisite level of analysis. WAC 197-11-330(3) discusses, when making a threshold determination, the need for considering that… "(b) The absolute quantitative effects of a proposal… may result in a significant adverse impact regardless of the nature of the existing environment." Ecology did quantify the number of parcels that could be served under the reservation and how many buildable lots would be potentially not served. Ecology also did the analysis from a projected population perspective and this satisfies the needed quantitative analysis at least with respect to building houses, and meeting a future, twenty year, projected need.

Comment 834

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology failed to adequately consider . . .cumulative effects of the amended rule when determining the requisite level of analysis.9

9 WAC 197-11-330(3).

Response: Thank you for your comment. Ecology respectfully disagrees that Ecology failed to adequately consider cumulative effects of the proposed rule (there is no amended rule) when determining the requisite level of analysis. Please see the checklist and determination for this rule making at: http://www.ecy.wa.gov/programs/wr/instream-flows/Images/pdfs/stilli/stillichklst21105.pdf.

Comment 835

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology failed to adequately consider conflicts with laws and requirements for

environmental protection. . .10
10 WAC 197-11-330(3)(e).

Response: Thank you for your comment. Ecology respectfully disagrees that Ecology failed to adequately consider conflicts with laws and requirements for environmental protection in our decision making. Please see the checklist and determination for this rule making at: http://www.ecy.wa.gov/programs/wr/instream-flows/Images/pdfs/stilli/stillichklst21105.pdf.

Comment 836

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology failed to adequately consider . . . The precedent for actions with significant environmental effects created by the proposal. . .10

10 WAC 197-11-330(3)(e).

Response: Thank you for your comment. Ecology respectfully disagrees that Ecology failed to adequately consider the precedent for actions with significant environmental effects created by the proposal. Please see the checklist and determination for this rule making at http://www.ecy.wa.gov/programs/wr/instream-flows/Images/pdfs/stilli/stillichklst21105.pdf.

Comment 837

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology failed to adequately consider . . . Environmentally special areas including farmlands. . .10
10 WAC 197-11-330(3)(e).

Response: Thank you for your comment. Ecology respectfully disagrees that Ecology failed to adequately consider environmentally special areas including farm lands in developing the proposed rule. Please see the checklist and determination for this rule making at: http://www.ecy.wa.gov/programs/wr/instream-flows/Images/pdfs/stilli/stillichklst21105.pdf.

Comment 838

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology appears to have concluded that the goal of instream resource protection outweighs all other considerations, thereby negating the Department's obligation to conduct a meaningful analysis.

Response: Thank you for your comment. Ecology respectfully disagrees that Ecology concluded that the goal of instream resource protection outweighs all other considerations, thereby negating the Department's obligation to conduct a meaningful analysis. A meaningful analysis was done to comply with SEPA. Please see the checklist and determination for this rule making at http://www.ecy.wa.gov/programs/wr/instream-flows/Images/pdfs/stilli/stillichklst21105.pdf.

Comment 839

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: [The]. . . conclusion [suggested in comment 838] is incorrect because the lead agency may not balance a proposal's favorable social, economic and environmental effects against independently significant adverse environmental impacts to avoid a determination of significance.11 Such a balancing, while appropriate in making the final decision between alternative means of achieving the purpose and need, is not appropriate in the initial determination of significance.12

11 WAC 197-11-330(5), 197-11-315(5) and 330(5).
12 WAC 197-11-330(5), 197-11-315(5) and 330(5).

Response: Thank you for your comment. Ecology respectfully disagrees that the determination of no significant impacts is not supported by the checklist. Ecology also rejects the idea the agency balanced the proposal's favorable social, economic and environmental effects against independently significant adverse environmental impacts to avoid a determination of significance. Please see the checklist and determination for this rule making at: http://www.ecy.wa.gov/programs/wr/instream-flows/Images/pdfs/stilli/stillichklst21105.pdf

Comment 840

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Skagit County believes that the direct impacts resulting from the proposed rule are significant [and] that the "marginal impacts when considered together may result in a [cumulatively] significant impact"13. . .

13 WAC 197-11-330(5), 197-11-315(5) and 330(5).

Response: Thank you for your comment. The comment is noted that Skagit County believes that the direct impacts resulting from the proposed rule are significant [and] that the "marginal impacts when considered together may result in a [cumulatively] significant impact" Ecology respectfully disagrees with the County's assessment. Please see the checklist and determination for this rule making at http://www.ecy.wa.gov/programs/wr/instream-flows/Images/pdfs/stilli/stillichklst21105.pdf.

Comment 841

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Skagit County believes that . . .the proposed rule is in potential conflict with requirements for environmental protection including, but not limited to the state's Growth Management Act and the locally adopted Skagit County Countywide Planning Policies, Skagit County's Comprehensive Plan, the Skagit County Coordinated Water System Plan Regional Supplement, and Skagit County's Critical Areas Ordinance. These considerations dictate completion of an EIS prior to adopting the proposed amended rule.

Response: Thank you for your comment. Ecology respectfully disagrees with the County's assessment. For example, Ecology is unaware of any "requirements for environmental protection" contained in the Skagit County Coordinated Water System Plan Regional Supplement that the rule amendment may be in conflict with. Ecology acknowledges that revisions of the plan may be necessary if water is to be supplied to a sub basin with in the future if there is an unmet needs. However, for the 20 year period considered in this rulemaking, there is no conflict identified. The extension of a public water system is a local decision made by parties to the CWSP and Department of Health.

Comment 842

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Impacts to Land and Shoreline Use: The proposed rule amendment will limit the total availability of water in rural areas of the county. . .

Response: Thank you for your comment. Ecology does not agree that the proposed rule will limit the total availability of water in rural areas of the county. Please see response to comment 843 and 844.

Comment 843

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Impacts to Land and Shoreline Use: The proposed rule amendment will. . .foreclose all future groundwater use in some tributary basins.

Response: Thank you for your comment. Ecology respectfully disagrees the proposed rule will foreclose all future groundwater use in some tributary basins. Ecology believes that future water needs in any basin can be meet by either new water rights (perhaps developed with appropriate mitigation), transfer of existing rights, use of the reserved water or alternative water sources.

Comment 844

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The DNS fails to disclose or discuss the potential effects the rule amendment will have on growth in rural and urban areas.

Response: Thank you for your comment. For rural areas, the checklist stated "The rule provides for a reservation of ground water to be withdrawn by permit-exempt ground water wells in areas not served by a public water system. Historic records (well log data) indicate that about 246 wells per year have been installed from 1986 to 2003. Using Puget Sound Regional Council and Office of Financial Management population estimates for the watershed area outside of the urban growth areas, we estimate there will be 5,692 new wells installed through 2025. This amounts to 271 wells per year. Data for the service areas of public water supply systems were not available for spatial analysis and the combined service areas comprise a larger area than that described by the urban growth areas. The potential of 5,692 wells is almost certainly greater than will actually be drilled, given we know that more of the basin will be served by a public water supply than is accounted for in our spatial assessment. The ground water reserve of 3.23 million gallons per day could be spread across up to 9,000 new permit exempt wells. It appears the reserved ground water supply is adequate to meet the projected demand through 2025."

Ecology believes the above adequately evaluates the impact of the rule on rural growth. For public water systems the only known system that may have a supply shortfall in the near term (2011) is City of Arlington. Ecology is working with Arlington to meet their needs. It is not anticipated the proposed rule will direct growth one way or the other, if water is not a factor limiting growth now or for the foreseeable future (twenty years).

Comment 845

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The Office of Financial Management has prepared twenty-year population forecasts by which Skagit County is to adopt comprehensive plans and development regulations to assure that sufficient capacity of land is suitable for development within its jurisdiction to accommodate its allocated housing and employment growth, as adopted by countywide planning policies.14 Skagit County and its municipalities have adopted population and employment forecasting and allocations through 2025.15 Skagit County assumes that it will experience growth regardless of the rule amendment and must plan for it pursuant to the Growth Management Act.16

14 RCW 36.70A.115
15 Population and Employment Forecasting and Allocation 2005, Berryman and Henigar, Inc. in association with Michael J. McCormick, December, 2003
16 RCW 36.70A.040

Response: Thank you for your comment. Ecology agrees with your statement.

Comment 850

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The increased density could also result in other environmental impacts such as loss of open space . . .

Response: Thank you for your comment. GMA requires local jurisdictions to designate open space corridors. (RCW 36.70A.160) The rule amendment will not alter these designations, will not increase overall growth, nor can it be expected to significantly alter the availability of open space within the watershed.

Comment 851

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The increased density could also result in other environmental impacts such as. . .increased urban runoff. . .

Response: Thank you for your comment. Ecology respectfully disagrees that the rule will shift growth from that planned for by the Cities and Counties to increased density that could also result in other environmental impacts such as increased urban runoff. See responses to comments 843 through 847.

Comment 852

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The increased density could also result in other environmental impacts such as. . .other development pressures on critical areas.

Response: Thank you for your comment. Ecology respectfully disagrees that the rule will shift growth from that planned for by the Cities and Counties to increased density that could also

result in other environmental impacts such as other development pressures on critical areas. The development of critical areas is governed by County ordinance. See responses to comments 843 through 847 and 851.

Comment 853

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The DNS does not discuss how the proposed amendment will affect planned growth throughout the county or in the nine of twenty-six subbasins which lack sufficient water. As discussed in more detail below, this is but one of several conflicts with environmental protections impermissibly ignored by Ecology.

Response: Thank you for your comment. In the Stillaguamish basin, the reservation of water is available across the basin. Ecology knows of no subbasins that lack sufficient water.

Comment 862

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The DNS. . .lacks any discussion of how this impact will affect growth demand in other areas of the county.

Response: Thank you for your comment. The comment that the DNS lacks any discussion of how growth impacts in Nookachamps will impact or affect growth demand in other areas of Skagit County is accurate. Given that Nookachamps Creek is not in the Stillaguamish basin, it is not necessary to evaluate or analyze that issue in the evaluations done for the Stillaguamish basin. The analysis done for State Environmental Policy Act compliance is focused on the geographic area impacted by the proposed action. Not all of Skagit County or Snohomish County is impacted by the Stillaguamish rule. Only the land base within the basin is impacted by the proposal. Please see response to comment 853.

Comment 863

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: There is no analysis, for example, for the DNS representation that "[over time, Skagit PUD should be able to provide service to most areas of the Nookachamps, Fisher, and Carpenter subbasins."23

23 Determination of Nonsignificance, 11.

Response: Thank you for your comment. Your comment is correct, in the Stillaguamish basin DNS, there is no analysis of the ability of Skagit PUD to provide service in the Nookachamps, Fisher, and Carpenter subbasins. Those sub basins are not part of the Stillaguamish basin and therefore not governed by this rule making.

Comment 870

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: In determining the significance of a proposal's impacts, the SEPA responsible official must consider conflicts with federal and local laws, or requirements protecting the environment.26
26 WAC 197-11-330(3)(e)(iii).

Response: Thank you for your comment. Ecology agrees with your comment.

Comment 871

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The proposed rule is in conflict with prior agency determinations and multiple laws and requirements, all of which were ignored in issuing the DNS.

Response: Thank you for your comment. Ecology does not agree with your comment.

Comment 873

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: As the DNS notes, "rural areas are . . . Generally dependant on individual wells and septic tanks."28 The proposed amended rule prefers connection to public water systems over reliance on individual wells in part because there is insufficient water in the proposed reservation to satisfy the needs of current residents or anticipated demand within many of the subbasins. The effect of the proposed amended rule's emphasis on connecting to public water systems is to increase public water system expansion into rural areas.
28 Determination of Nonsignificance, 15.

Response: Thank you for your comment. Ecology disagrees that "The proposed amended rule prefers connection to public water systems over reliance on individual wells in part because there is insufficient water in the proposed reservation to satisfy the needs of current residents or anticipated demand within many of the sub basins." Rather the preference for connection to existing public water systems when the connection can be made in a timely and reasonable manner comes from several statutes. Ecology is implementing statutory directives such as RCW 90.54.020(8) and provisions of the Municipal Water Law from 2003. Please see RCW 43.20.260.

Comment 881

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology should assess the environmental impact of increased public water system expansion vs. increased exempt well withdrawals. This analysis would have two components: diversion impacts and infrastructure impacts. The diversion assessment should look at the impacts to instream resources of increased public water system surface water diversions that will be required to serve all these new connections (the local water purveyors do not manufacture water; they get it from the same aquatic resource that the rule is supposedly trying to protect) versus the effects of increasing the number of dispersed, relatively small groundwater withdrawals that would occur without the rule.

Response: Thank you for your comment. If the public water systems require additional

water rights to extend water service to areas with a recognized shortfall, they would develop a source of supply analysis and pursue a water right. It has already been determined within the DNS and supporting documentation that additional withdrawals or transfers of water right in these areas are possible.

Comment 883

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Housing is a component of the built environment34 and, as such, impacts upon housing must be considered in making a SEPA threshold determination.
34 WAC 197-11-444(2)(b)(ii).

Response: Thank you for your comment. Ecology agrees that housing is a component of the built environment and, as such, impacts upon housing are considered in making a SEPA threshold determination. Ecology did consider housing in the assessment.

Comment 888

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: The DNS also fails to disclose that certain proposed reservations may be fully allocated. Dan Swenson stated at the March 8, 2005, public meeting in Darrington that the proposed reservation for the Nookachamps was already committed to residences constructed since April 15, 2001.

Response: Thank you for your comment. The comment is not applicable to the Stillaguamish rule making. No part of the proposed reservations is or may be fully allocated at this time.

Comment 891

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology's Final Environmental Impact Statement for Watershed Planning admits that restrictions on exempt well use "may limit the availability of affordable housing by increasing the cost of water for placement of water lines and distribution systems."39
39 Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6-64.

Response: Thank you for your comment. Ecology agrees that the Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 has that language.

Comment 904

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Insufficient Analysis of Connected Actions: Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. . . . Proposals or parts of proposals are closely

related, and they shall be discussed in the same environmental document, if they: Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.

Response: Thank you for your comment. WAC 197-11-060(3)(b) in full states: Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. (Phased review is allowed under subsection (5)). Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they:

(i) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or

(ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.

In the case of the rule making for instream flows in the Samish, Skagit, and Stillaguamish basins, the proposals are separate, distinct and do not depend upon each other for implementation. The proposed rules also do not depend on a larger proposal as their justification or for their implementation. The actions are independent of each other. Independent environmental review is appropriate.

Comment 912

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology's conclusion that the proposed Skagit and Stillaguamish instream rules pose no significant effect directly conflicts with Ecology's own statements. In the face of such conflicts, Ecology should retract its determination of nonsignificance and prepare a comprehensive EIS.

Response: Thank you for your comment. Ecology respectfully disagrees.

Comment 913

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: SEPA's full disclosure requirements "should be invoked whenever more than a moderate effect on the quality of the environment is a reasonable probability."55

55 Norway Hill Preservation and Protection Ass'n v. King County Council, 87

Response: Thank you for your comment. Material disclosure is required under SEPA no matter what the threshold determination, as evidenced in WAC 197-11-340(3)(iii) and 600(3)(b)(ii). It was not Ecology's intention by issuing a DNS for this proposal to fail to "disclose" relevant information. Ecology believes all issues have been disclosed; please see SEPA documentation on Ecology's web page.

Comment 914

Commentor: Joe Mentor, Jr., Skagit County

Type: March 16, 2005 letter regarding Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Comment: Ecology's proposed amended rule poses far more than a reasonable probability of a moderate effect on the quality of the built environment therefore, Ecology should take

advantage of this opportunity to revisit its DNS, revoke that decision, and begin preparing the required EIS.

Response: Thank you for your comment. Ecology respectfully disagrees.

Comment 1026

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Ecology's proposed rule results in significant unintended impacts, the effects of which have not been adequately analyzed or disclosed: Ecology failed to take the requisite hard look at potential effects of the proposed rule. Ecology must consider conflicts between the proposal and existing laws and requirements protecting the environment, the precedent the proposal establishes for significant future environmental effects, and impacts to prime farmlands.31 Ecology failed to adequately consider cumulative effects of regional instream flow setting proposals when determining the requisite level of analysis.32 Skagit County believes the "marginal impacts when considered together may result in a [cumulatively] significant impact."33

31 WAC 197-11-330(3).
32 WAC 197-11-330(3).
33 WAC 197-11-330(5),197-11-315(5) and 330(5).

Response: Thank you for your comment. Ecology respectfully disagrees that the department failed to assess potential conflicts between the proposal and existing laws and requirements protecting the environment. Water rights are specific to the use of water. An instream flow right is to protect instream values. The establishment of any water right does not guarantee the water will be available to satisfy the right nor does it impact senior rights. Existing laws and regulations protecting the environment are not in conflict with water rights. Ecology respectfully disagrees the proposed rule results in significant unintended impacts, the effects of which have not been adequately analyzed or disclosed for farmland. Agricultural production, based on the latest figures available includes: Over 2,500 acres of mixed grasses; 1,700 acres of field corn; about 1,100 acres of green peas; approximately 600 acres of Irish potatoes; about 510 acres of winter wheat; 240 acres of field spinach; 160 acres of corn (type not specified); 135 acres of alfalfa (for hay); 110 acres of perennial ryegrass; 75 acres of ornamentals for nurseries; approximately 60 acres of hybrid poplar; 55 acres of cucumbers; 25 acres of seed beets; 20 acres of sweet corn; 20 acres of seed cabbage; 10 acres of spring oats; 10 acres of red fescue; 7 acres of pumpkins; 4 acres of Christmas trees; and 1 acre of apples.

Adding all uses is 7,342 acres of production. Most of that production is not irrigated. Ecology added up the number of irrigated acres for water right permits, certificates, and claims, the number of irrigated acres on paper is 48,164 acres. Ecology knows that not all claims for water rights (see chapter 90.14 RCW) represent vested water rights, but surely some part does. We also know that wet water use is less than total paper water rights – but only adjudication can tell for sure. Ecology's contention is there are enough existing agriculture water rights to cover existing and future agriculture water use.

Ecology recognizes the interests of Skagit and Snohomish Counties and the State in having viable, productive agriculture in the region. Water is simply not a limiting factor for viable, productive agriculture in the Stillaguamish basin. For example, Snohomish County recently published the Snohomish County Agriculture Action Plan, a plan to preserve and protect the agriculture economy in Snohomish County, March 2005. Nowhere in that document are water rights or the need for irrigation water mentioned, let alone defined as an issue to address. As to adequately considering the cumulative effects of regional instream flow setting proposals when determining the requisite level of analysis please see response to comments 904, and 1018.

Comment 1027

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Ecology ignored impacts to agricultural lands: Agriculture is a leading industry in Skagit County, and agricultural water supply needs are growing. Nevertheless, Ecology's proposed rule does not include a reservation of water for agricultural needs. There are over 7,300 acres – roughly 11 ½ square-miles – within the Stillaguamish River basin which are currently in agricultural production.34 This omission inflicts a disproportionate negative effect on agriculture. Any action that significantly and disproportionately impacts such a significant portion of the basin, the people employed in this industry, and all those who depend on government services substantially underwritten by agricultural production deserves commensurate attention. Skagit County urges Ecology to revise the proposed rule to address the needs of agricultural water users.

34 Determination of Nonsignificance, 19.

Response: Thank you for your comment. Ecology respectfully disagrees that potential impacts to agriculture lands. Please see response to comment 1026. The needs for agriculture water use in that portion of Skagit County overlaid by the Stillaguamish basin as well as in the rest of the basin are declining as compared to growing. Agriculture has been declining in the Stillaguamish basin for a number of years due to many factors, but not due to water use or water rights. Ecology recognizes that some 7,342 acres of production exist in the basin. Implied in your comment to create an agriculture reservation is that all existing agriculture water use is not authorized by a water right. That is simply not the case. No reservation of water for agriculture was created because of the narrow rule scope. In addition, there is no demonstrated need. Any water right reservation created must be assessed in light of RCW 90.03.290 water right tests. Those tests are water availability, beneficial use, impairment of existing rights, and public interest. There is simply no documented, demonstrable future beneficial use for any agriculture reservation of water.

Comment 1028

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Ecology ignored significant impacts to land use: Ecology fails to disclose or discuss the potential effects the rule amendment will have on growth in rural and urban areas. Skagit County will experience growth regardless of the rule amendment. The rule, however, will have a profound effect on how and where that growth will take place. Ecology recognizes "[w]ater availability is one major determinant of land use."35 Ecology also recognizes statewide implementation of restrictions on exempt well use "could result in cumulative and significant unavoidable impacts to homeowners and municipalities in the state."36 Failure to discuss land use impacts is troubling in light of restrictions on water use in neighboring basins. Limiting water availability in northwestern Washington will affect residential and commercial development patterns throughout the region but no explanation of the effects of these changes has been provided.

Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. . . . Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they: Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.37 Ecology is undertaking a comprehensive program to regulate instream flows throughout the state and has previously treated individual planning effort as part of an integrated whole.38 As of July 2003, watershed planning efforts were underway in forty-two of the state's sixty-three Water Resource Inventory Areas (WRIAs).39 Ecology's rulemaking schedule anticipates adoption of ten instream flow rules governing eleven WRIAs during 2005.40 Ecology is following a similar process for the neighboring Samish and Skagit river basins. Rule adoption in all three of these basins is anticipated within the next six months. The three proposed rules are thus interdependent parts of a larger course of action and the interactions between the three rules need to be considered

together.

35 Wash. Dept. of Ecology, Instream Resources and Water Allocation Program Review Draft Environmental Impact Statement 3-11 (1987).
36 Wash. Dept. of Ecology, Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6-65 (2003).
37 WAC 197-11-060(3)(b).
38 See e.g. FEIS for Watershed Planning; FEIS for Western Washington instream Resource Protection Program; DEIS for Instream Resources and Water Allocation Program Review; Guidance, Setting Instream Flows and Allocating Water for Future Out-Of-Stream Uses.
39 Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 1.
40 Wash. State Dept. of Ecology, Instream Flow Rule-Making Schedule, January 2005-September 2006 (Feb. 28, 2005).

Response: Thank you for your comment. Please see response to comments 843 through 848, and 898.

Comment 1030

Commentor: Joe Mentor, Jr., Skagit County

Type: Letter dated May 13, 2005

Comment: Ecology ignored significant impacts on housing resources: Housing is a component of the built environment,42 and a fundamental component of the GMA.43 Counties that plan under GMA must "encourage the availability of affordable housing to all economic segments of the population, promote a variety of residential densities and housing types, and encourage preservation of existing housing stocks."44 Ecology's Final Environmental Impact Statement for Watershed Planning admits that restrictions on exempt well use "may limit the availability of affordable housing by increasing the cost of water for placement of water lines and distribution systems."45

This is especially true where, as here, the proposed rule requires connection to public water systems which cost as much as twice that of an exempt well.46 The burden of such connections cannot be overstated because, as Ecology recognizes, "[e]xtending public water supplies into areas served by exempt wells may result in increased costs to existing exempt well owners who, if they choose to connect to the public system, may be required to pay part or all of the costs of extensions and/or connections."47

Skagit County is especially concerned that Ecology's proposed Stillaguamish rule is the only pending instream flow rule in the region that requires landowners withdrawing water from the reservation to abandon their wells and connect to municipal water.48 The cost of developing a well, only to then cap it and connect to municipal water is anything but reasonable. Compounding these costs is the prospect of having to incur these costs on a mere 120 days notice 49 Skagit County is particularly concerned about the disproportionate effect this could have on lower income families.

42 WAC 197-11-444(2)(b)(ii).
43 Chapter 36.70A RCW.
44 RCW 36.70A.020(4).
45 Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6 64
46 Proposed WAC 173-505-030(13).
47 Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6 67
48 Proposed WAC 173-505-090(2)(f).
49 Id.

Response: Thank you for your comment. Ecology respectfully disagrees that Ecology ignored significant impacts on housing resources. We agree with you that housing is a component of the built environment. Housing was assessed in the SEPA checklist. Skagit County's concern that Ecology's proposed Stillaguamish rule is the only pending instream flow rule in the region that requires landowners withdrawing water from the reservation to abandon their wells and connect to municipal water is noted. Ecology has deleted that portion of the rule. (Note: The proposed requirement was only for wells constructed within the service area of a municipal provider.)

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COPIES OF ALL WRITTEN COMMENTS
REGARDING
PROPOSED CHAPTER 173-505 WAC
WATER RESOURCES MANAGEMENT AND INSTREAM FLOW PROGRAM
STILLAGUAMISH RIVER BASIN WATER RESOURCE INVENTORY AREA
(WRIA 5)

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CLEAN, FLOWING WATERS FOR WASHINGTON

The Center for
Environmental Law & Policy

Center for Environmental Law & Policy
May 12, 2005

Allston, Karen – Center for Environmental Law and Policy

Department of Ecology
3190 160th Ave S.E.
Bellevue, WA 98008

BY EMAIL AND U.S. MAIL

RE: CELP comments to draft new rule, Ch. 173-505 WAC, Stillaguamish River Basin, Water Resources Inventory Area (WRIA 5)

Dear Steve:

The Center for Environmental Law and Policy (CELP) provides the following comments to the proposed draft rule, Ch. 173-505 WAC for WRIA 5.

WAC 173-505-030 Definitions.

1101-"Permit-exempt withdrawals" or **"permit exemption":** should include language that acknowledges these withdrawals are subject to all applicable law, not just the ground water code. **"Public water system"** is defined at RCW 70.119.020(8) and 90.03.015, not RCW 43.20.260.

1102-"Timely and reasonable manner": We question whether Ecology has authority to define timely and reasonable. In any event, we believe the State Department of Health and/or local jurisdictions are better positioned to define timely and reasonable.

The Legislature has made clear that public water supply is the preferred option for water supply. With the passage of HB 1338, public water suppliers now have a "duty to serve" residential users. Reliance on exempt wells for domestic water supply should be the last option utilized. If Ecology retains this definition, the definition should embody this preference. It should also include encourage satellite management of smaller water supply systems as a preferred alternative to exempt wells, consistent with stated policies and requirements in Ch. 70.119A RCW.

The 120-day and 500-foot definitions appear to be arbitrary and not entirely consistent with other state law (see, e.g., Ch. 70.116 RCW and Ch. 70.119A RCW).

1103-Additionally, the term "purveyor" is undefined and should be replaced with "public water system" as defined in RCW 90.03.015.

2400 North 45th Street, Suite 101 1 Seattle WA 98103 ~ 206.223.8454 ~ fax 206.223.8464 1 www.celp.org

BOARD OF DIRECTORS: Melissa S. Arias, Dianne D'Alessandro, Barbara Floyd, Joan Foley, Craighton Goeppele, Barry Goldstein, Kyle Kovalik, Nancy Rust, Roger van Gelder, Sims Weymuller, Francis Wood

WAC 173-505-080 Future stock watering.

1104-Because it is unclear which specific surface waters are reserved, and in light of the fact that certain surface waters are "closed" to further appropriations under WAC 173-505-070, this proposed reservation is not legally justifiable. Ecology provides no rationale or justification for allowing this reservation for all surface waters in the Stillaguamish Basin.

It is unclear whether the two acre-foot per year reservation is additive, i.e., whether every year an additional two acre-feet per year is reserved, so that in 10 years, a total of 20 acre-feet is determined to be available for use under this reservation.

In the absence of a requirement that users of this reservation meter and report their water use, there is no reasonable means by which Ecology can track this proposed water use and ensure the proposed reservations are not exceeded. Nor will Ecology be able to ensure compliance with this section absent requiring metering and reporting of water use under this reservation. CELP recommends this entire section be stricken and that stock water uses go through the permit system and receive water if Ecology determines it is available pursuant to applicable law.

WAC 173-505-090 Reservation of permit-exempt ground water for future domestic uses.

1105-Generally, CELP does not believe that Ecology has met its burden of proving future growth overrides the potential for negative impacts to instream resources. Case law has established the "overriding considerations of the public interest" (OCPI) exception found in RCW 90.54.020 should be narrowly construed and applied only when the overriding public interest impinges on a public right. See, Postema v. PCHB, 142 Wn.2d 68, 83 (2000); and 23 Washington Practice section 8.91. Future growth is not an emergency situation that warrants application of this limited exception. Future growth should, rather, be addressed by progressive planning that takes into consideration the current status of instream resources in the Stillaguamish Basin.

1106-The IFIM studies upon which the proposed reservation is based appear to have relied on historical hydrograph data that does not take into account future likely effects of climate change, nor the potential impacts likely from the use of inchoate water rights. In the face of such uncertainty, Ecology should have taken a more conservative approach to addressing future needs, such as requiring future use to be mitigated. Indeed, Ecology's Guidance on Setting Instream Flows and Allocating Water for Future Out-of-Stream Uses (September 2004) acknowledges the extreme nature of relying on OCPI to justify a reservation for future use by recommending avoiding, minimizing and mitigating the harm caused by such withdrawals.

1107-There are several recommendations in this Guidance for minimizing impacts that were not included in the proposed amendments to Ch. 173-503 WAC, but that should be added. The most critical among them is requiring (rather than reserving the right to require) metering of future withdrawals accessing the reservation. Under state law, new permitted water allocations must be metered. It is unreasonable and bad public policy not to require metering for new allocations, regardless of whether they are permitted or exempt from permit requirements. It is illogical and inappropriate not to treat the proposed future allocations consistently with statutory metering requirements. It is unjustifiable and indefensible to allow unmetered uses in light of the current status of fish habitat degradation, existing water quality violations, and presence of ESA-listed fish. If Ecology determines not to require metering as part of the proposed amendments, it should assume a higher use per day per household and deduct a greater amount from the reservation per withdrawal.

1108-Other potential opportunities for minimizing impacts, as indicated in the Guidance, should be included in the proposed rule amendments. For example, requiring hook-ups to public water supply if it becomes reasonable and timely in the future, and require decommissioning of wells; requiring deeper wells to be drilled when there is evidence using deeper aquifers would minimize impacts to hydraulically connected surface water; and acquiring and transfer water rights for instream purposes to offset effects of other uses.

1109-CELP supports the requirement in (2)(f) requiring connection to a public water system when water becomes available. However, we recommend the rule require decommissioning of exempt wells upon connection to ensure compliance with this subsection.

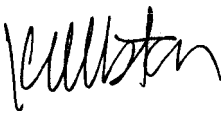
1110-The statement in (6) that Ecology "may limit or restrict the further use of the reservation" if county land use decisions are inconsistent with this chapter appears to conflict with the requirement in (2)(d)(i) that an ordinance or other action is established by a city or county that includes elements in subsection (2). Ecology "must" limit or restrict the reservation in the absence of county compliance. WAC 173-505-110 Future Permitting Actions.

1111-(1)(b) allows for an undefined mitigation plan. Ecology should instead require mitigation or withdrawals that result in no net loss to the water source. CELP disagrees with the adaptive management approach (if monitoring shows the plan to be ineffective, use is subject to instream flows) to water use. It is unreasonable, bad public policy, and contrary to protecting public health to assume water right holders for domestic supply will interrupt or curtail use after they have become reliant on it.

1112-WAC 173-505-120, and -130

CELP strongly supports these proposed amendments. However, unfortunately, these are hollow policy statements in the face of Ecology's limited budget resources to support an effective compliance program and the recommended alternatives to mitigate future withdrawals. Ecology should support proposals to decrease reliance on General Funds for its Water Resources Program, and seek a system that makes the Water Resources Program self-financing and provides financial resources necessary to fund effective enforcement and effective mitigation. See CELP's new report, Water Is Worth It: Making the case for a water management fee, which proposes such a system. www.celp.org/waterisworthit.html

Thank you for your consideration of these comments. Sincerely,



Karen Allston Executive Director

Anthes, Steve [santhes@kettlerange.org] Sent: Wednesday, March 23, 2005 4:24 PM
Steve Hirschey
Department of Ecology
3190 160th Ave. S.E.
Bellevue, Washington 98008

Dear Mr. Hirschey, On behalf of the Kettle Range Conservation Group, we strongly support the adoption of an Instream Flow Rule to protect the fisheries, wildlife, and ecology in the Stillaguamish River.

- **1288-**Many of our members, supporters, and staff enjoy world-class Steelhead fishing, recreation along the river, and river sports such as rafting and kayaking.
  We enthusiastically support a limit on future groundwater use that robs our streams and river of water, especially in the predicted continuation of hot and dry springs and summers.
- **1289-**Enforcing State laws to permit local governments to issue new building permits only when sufficient potable water is available is a sound approach. We believe the proposed in-stream flow rule strengthens this law by requiring local governments to inform future well owners of some limitations to protect the Stillaguamish and its streams. This makes good sense.
- **1290-**However, we understand that Ecology has not stated how the proposal will help meet Puget Sound Chinook salmon recovery goals. We think any stream flow protection policy should result in better protection of fish and streams.
- **1291**-We also suggest that Ecology should require measuring of future water use. Obviously, we need to know how much water is being used to manage it more wisely.
- **1292**-In addition, we know that Ecology proposes risky mitigation strategies to allow additional water use. But we feel that mitigation should be proven before any new water use is allowed.
- **1293**-Finally, we are very concerned that Ecology acknowledges the impacts on stream flows associated with logging, but makes no attempt to incorporate any safeguards. This approach is unacceptable to us.
- **1294**-Thank you for you kind consideration in this important matter. Regards, Steve Anthes, Vice President, Board of Directors, Kettle Range Conservation Group, www.kettlerange.org

---

Bailey, J Chalice [chaliceb@gmail.com] Sent: Tuesday, April 26, 2005 6:12 PM
J Chalice Bailey, 2538 1/2 56th Ave SW, Seattle, WA 98116

Dear Steve Hirschey:

- **1295-**My love for the rivers and oceans prompts me to send this request. Our
  waters are precious, life-giving resources, not only for people, but for the wild animals, the fish, etc. Please protect the quality of our rivers and the continuation of a viable aquifer by considering the following: Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.
- **1296**-Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.
- **1297-**Measure future water use. We need to know how much water is being used in order to manage it more wisely.
- **1298**-Include recommendations to reduce the impacts of logging.
- **1299**-Thank you for your good work. Thank you for your consideration.

Sincerely,
J Chalice Bailey

Ball, Eldon [eldonball@juno.com] Sent: Saturday, April 30, 2005 8:21 PM
Eldon Ball, 3022 NE 140th St., #121, Seattle, WA 98125
Dear Steve Hirschey:

- **1300**-Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.
- **1301**-Include recommendations to reduce the impacts of logging.

- **1302**-Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.
- **1303**-Measure future water use. We need to know how much water is being used in order to manage it more wisely.
- **1304-**Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

Thank you for your consideration.
Sincerely,
Eldon Ball

Barmettler, Bill and Patti [bpbar@juno.com] Sent: Wednesday, March 23, 2005

Good morning, Mr. Hirschey –

- **1305-**I don't know all the details about the proposed rules for the Stillaguamish, but I'd like to commend Ecology for trying to get out ahead of the problem.
- **1306-**I've been involved (as a concerned citizen, not a professional) with water quality and quantity problems on the Chehalis River, which I believe is over-allocated about 400% by Ecology's estimates.
- **1307-**When the Chehalis is below the minimum instream flow (the instream flow number is almost surely too lax) most of summer it's a little late to be trying to deal with the problem. **1308-**And exempt wells continue to proliferate. By capping the number and size of wells that will be permitted, Ecology can draw a line in the sand now. You'll catch heat from both sides of course but I think the basic idea is excellent.

Bill & Patti Barmettler,
POB 1462 Chehalis WA 98532,
1-360-748-8265, bpbar@juno.com

Beecher, Hal, Washington Department of Fish and Wildlife, – March 24, 2005 – Letter

Dear Mr. Hirschey:

1226-The Washington Department of Fish and Wildlife (WDFW) supports adoption of the proposed Stillaguamish instream flows and associated rules as WAC 173-505. The proposed rules include compromises consistent, we believe, with meeting the concurrent needs of both people and fish.

1227-The instream flows proposed for adoption are based on detailed instream flow studies at a number of locations throughout the Stillaguamish River basin, as well as supplementary analyses of instream flow needs for fish in other parts of the watershed. These studies are the result of collaboration among co-managers of the fish resources (WDFW, Stillaguamish Tribe, and Tulalip Tribes), federal agencies, and the Department of Ecology. They resulted in recommendations for instream flows that will support good fish habitat in the Stillaguamish River basin.

1228-We recognize that the rules proposed are intended to provide for but limit additional out-of-stream water use and diversion. We recognize that the instream flows we have recommended will not always be met in the river. Our studies indicate that when flows are below those recommended, fish production is reduced. Lowering instream flows below those proposed would result in more frequent and greater reduction of fish production and higher risks for salmonid recovery.

1229-The instream flows recommended will support conditions necessary for fish production to sustain harvest and to allow stock recovery. Instream flows will not independently ensure recovery or harvestable production. Adequate flows, combined with other appropriate management of habitat and harvest, addressing other limiting factors, as well as providing historic and normative hydrology, are also necessary. Fish inhabiting the Stillaguamish River basin include Chinook salmon, listed as Threatened under the federal Endangered Species Act, as well as coho, chum, and pink salmon, bull trout, steelhead, and cutthroat trout.

1230-The proposed rule includes a reserve for domestic use. The proposed reserve is intended for lands that do not have public water supplies available to them. It would not be subject to instream flows. The quantity of this reserve would equate to an additional impact of 1-2% of “drought” habitat (i.e. habitat at the 10th percentile flow level); thus, in lower flow conditions, habitat would be reduced by up to 1-2%. This fixed flow reduction would equate to smaller proportional reductions in habitat at higher flows. Fish population recovery from drought-associated declines would be slowed and reduced slightly during non-drought years. However, in the interest of moving forward with the setting of instream flows, WDFW supports this as an acceptable compromise consistent, we believe, with meeting both the needs of people and salmonid recovery.

Sincerely,

Hal A. Beecher,
Instream Flow Biologist

King County
Department of
Natural Resources and Parks Director's Office
King Street Center
201 South Jackson Street, Suite 700 Seattle, WA 98104-3855

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2005

May 13, 2005

Bissonnette, Pam -- King County Department of Natural Resources and Parks

Steve Hirschey
Department of Ecology
3190 - 160th Ave. SE
Bellevue, Washington 98008

Dear Mr. Hirschey:

1048-This letter is in response to the request from the Department of Ecology for comments on the proposed Water Management Rule for the Stillaguamish watershed. Thank you for the opportunity to provide comments on this proposed rule. Although the Stillaguamish watershed does not cross King County boundaries, it is joined to King County watersheds through regional efforts to recover Endangered Species Act-listed populations of chinook salmon and bull trout, and by regional interests in maintaining the quality of life cherished by local communities.

1049-Technical and policy work over the past five years through the Shared Strategy and watershed planning processes such as that in the Stillaguamish watershed, has made it clear that instream flow issues are fundamental to meeting the ecological, cultural and economic needs of the region. On top of the dire condition of salmon stocks, all the Puget Sound watersheds face significant challenges from population growth and climate change. All these issues cross jurisdictional boundaries and call for proactive and immediate action related to instream flow management. The Stillaguamish rule-making process is an opportunity to act to ensure the flow needs of people and fish are met as these challenges become more tan[9]ible.

In this context, I am pleased to offer the following comments to augment comments King County offered in December 2004 on the concept outline for the Stillaguamish rule. I have enclosed a copy of these earlier comments for your review. I ask that you incorporate the December 2004 comments to the extent they are not addressed by the current proposed rule, by reference into the comment record for the rule.

1050-King County supports establishing a water right for instream needs in the Stillaguamish watershed on the current schedule. King County fully supports the objectives of Ecology in developing this rule for the Stillaguamish River in order to protect the important functions this river system performs for fish and their habitat needs, as well as providing some direction and boundaries for other future uses of the water in the system. As one of the first rules to be proposed by Ecology under the new flow rule guidance document, the proposed rule is likely to provide a template for future statewide or watershed rulemaking by Ecology. King County is hopeful that the final rule sets a strong precedent for new rules that support the achievement of flows meeting the needs of people and fish.

1051-King County supports the attempt to link consideration of future out-of-stream needs with instream needs, but has concerns about the reserve concept. King County commends Ecology for its effort through this proposed rule to link together both instream flow protection and provisions addressing future out of stream uses. The untested concept of reserves may prove to be an effective protective – but not restorative – element of the rule, but at this point it raises concern. It has been described as a way to cap diversions from exempt wells that today have no such constraint. It is not clear, however, how DOE can provide up-front assurances that the limit will work in application. In addition, King County strongly recommends that the reserve concept should only be applied where the provisions of the Municipal Water Law of 2003—including flexibility in service areas/water rights, validation of inchoate water rights, new statutory duty to serve, consistency with local government comprehensive plans—can't assure water supply to meet growth needs, either permanent or temporary. Any application of the reserve concept, in the Stillaguamish watershed or elsewhere, should incorporate the means to assess accurately its effects and effectiveness in helping meet flow needs for fish and people.

1052-King County supports further work by DOE to clarify the relationship of this rule, and other new and existing rules, to flows needed for salmon recovery. We should not underestimate the contribution of an updated instream flow rule to flow regimes supporting sustainable and harvestable salmon populations, especially in watersheds without rules – and therefore no water right for instream uses. Staff from DOE and Washington Department of Fish Wildlife have made it clear, however, that having an instream flow rule will not in itself ensure a flow regime sufficient for salmon recovery. As a first principle, DOE should craft the rule to ensure that it does not impede or undermine achieving the recovery goals and objectives in the anticipated watershed plans and regional Recovery Plan.

1053-In addition, this rule-making process, given its similar timing to that of the anticipated June 2005 Recovery Plan for chinook, is an opportunity for DOE to convey to the region its perspective on how instream flow rules can and should be related to the establishment of instream flow conditions that significantly improve the potential for the recovery of local salmon populations. DOE should take advantage of this opportunity through language in the rule itself, background information released with the final rule, or other means.

1054-King County supports immediate action by DOE, working with other state agencies, tribes and local governments, to identify and implement actions that improve instream flows. Beyond helping the region understand the relationship of instream flow rules to salmon recovery needs, DOE can help watersheds move beyond the narrow administrative constraints of instream rules to actions that restore flow regimes. King County applauds the efforts DOE has made to broaden its technical and policy perspective on the features of flow regimes that need protection and restoration — moving beyond a minimum flow focus to include other factors such as peaks, timing, seasonality, frequency and rate of change. King County is hopeful that the agency carries its broadening perspective forward into the identification and implementation — by DOE and others — of actions putting the region on the path to flow regimes that meet the needs of people and recovered salmon populations. DOE should ensure that it carry any momentum from the completion of the new flow rule into efforts to improve flows.

1055-On a broader note, King County welcomes the arrival of the Gregoire administration and its choice of Jay Manning as the new head of DOE. We look forward to having many opportunities to make progress on shared natural resource management objectives. It is our assumption that the state's salmon recovery strategy "Extinction is Not an Option", retain its validity under the new administration and that DOE will pursue the objectives and actions identified in that strategy. One such action guided by that strategy is adoption of the final Stillaguamish rule and other new rules.

I look forward to further opportunities to work with DOE to identify and implement actions that will ensure instream flow conditions that support a range of ecological, cultural and economic needs of the region, including recovery of local salmon populations. If you would like to discuss any of these topics in more detail or if you have any questions, please contact David St. John, Special Projects Manager in the Water Policy Unit, in the Director's Office of the Department of Natural Resources and Parks, at 206-296-8003.

Thank you again for the opportunity to provide comments on the proposed rule. Please do not hesitate to contact me if you have additional questions.

Sincerely,

Pam Bissonette
Director

Enclosure

Bolton, Patricia [pbolton@us.ibm.com] Sent: Thursday, April 14, 2005 2:26 PM
Patricia Bolton, 5309 232nd Ave SE, Issaquah, WA 98029

Dear Steve Hirschey:

- **1309-** I have enjoyed fishing and visiting the Stilly for many years and want to see it protected.
- **1310-**Instream flow rules set by State Ecology are a good idea but I'm very concerned that it could backfire. We need to make sure the levels and reserves don't encourage over-development of the watershed and impacting the long term viability of flows.
- **1311**-ALL policies and rules should result in sustainable flows to protect the migration and spawning of salmon, steelhead and sea-run cutthroat trout in the Stilly and tributaries.
- **1312-**In addition, the rules are only worth the paper they are written on if there is not an enforcement plan, a commitment to measuring the flows (outflow) over time and discipline.
- **1313-**Thank you for your consideration. Thanks for considering this citizen's views!

Pat Bolton

Boswell, Harold [hboswell@comcast.net] Sent: Tuesday, April 26, 2005 4:14 PM
Harold Boswell, 4614 Third Avenue NW, Seattle, WA 98107

Dear Steve Hirschey:

- **1314-**Please consider the following in adopting protections for the river:
  - ***** Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.
- **1315**-Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.
- **1316**-Measure future water use. We need to know how much water is being used in order to manage it more wisely.
- **1317**-Include recommendations to reduce the impacts of logging.

- **1318-**Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

Thank you for your consideration.
Sincerely,
Harold Boswell,
206-783-9165

Breed, David [cedartrees@yahoo.com] Sent: Thursday, April 28, 2005 5:07 PM
David Breed, 7510 Happy Hollow Road, Stanwood, WA 98292

Dear Steve Hirschey:

- **1319**-I support taking stronger measures to protect the Stillaguamish watershed, including the proposed limits on new wells.
- **1320-**It is important to note that I am a property owner in the Stilly watershed, a patron of local organic farmers, and a volunteer "Salmon Watcher" for Snohomish County. So I understand that such actions will have a direct impact on me and the fish I love.
- **1321-**Please do not be deceived by the undoubtedly loud voices you will hear from property owners, farmers, and developers who would like to turn the Stilly into just another overused and overdeveloped river. Some of us value it and the wildlife it supports more than we value the dollar value of property or resources it produces.

Thank you for your consideration.
Sincerely,
David W. Breed Jr.,
360-652-6069

Butler, Maria [mlbul44@earthlink.net] Sent: Monday, April 11, 2005 7:03 PM
Maria Butler, 1419 North View Rd, Oak Harbor, WA 98277
Dear Steve Hirschey:

- **1322**-The following are ways that Ecology's Stillaguamish proposal could be improved.
    - Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.
- **1323**-Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.
- **1324**-Measure future water use. We need to know how much water is being used in order to manage it more wisely.
- **1325**-Include recommendations to reduce the impacts of logging.
- **1326-**Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

Thank you for your consideration. Sincerely, Maria Butler

Chapman, James [jlchap@gte.net] Sent: Wednesday, April 13, 2005 8:55 AM
James Chapman, 23321 75th Ave. W., Edmonds, WA , WA 98026-8519
Dear Steve Hirschey:

- **1327-**I support the Department of Ecology's plan to establish instream flow rules for the Stillaguamish River. It is an action that is long overdue. The "Stilly" supports steelhead, five species of salmon, exceptional recreation opportunities and working farms. I have personally spent the last several years helping build the Lime Kiln Trail along it south banks upstream from Granite Falls. However, water pollution and unplanned development threaten what is special about the Stillaguamish watershed.
- **1328-**If Ecology adopts a strong "instream flow rule" the Stilly can continue providing for fish, wildlife, water quality, and recreation. On the other hand, too much additional new water use could encourage more "sprawl" development, which would harm fisheries, farming and the quality of life in the watershed.

- **1329-**The proposal to limit groundwater use is needed because streams and groundwater are connected. Using too much groundwater robs our streams and rivers of water, especially in the summer.
- **1330-**Another good feature is the accountability placed on local land use decisions. Local governments would need to adopt an ordinance stating that building permits may be limited in the future by the availability of water for wells. State law already requires a demonstration of adequate potable water before any new building permit is issued.
- **1331-**The trust water program to allow the purchase or donation of water rights for the benefit of fish, wildlife and the environment is a great feature. I own a farm in northeast Oregon and our ditch company plans to accept an offer to buy our late summer water rights along the Lostine River.
- **1332-**The rules should provide for regular measurement of future water use. We need to know how much water is being used in order to manage it more wisely.
- **1333-**They should also include recommendations to reduce the impacts of logging. Logging can have a tremendous impact on water quality and quantity.
- **1334-**Finally, they should establish an effective instream flow monitoring and compliance program should to enforce the instream flow rule.
- **1335-**Thank you for the opportunity to comment. Thank you for your consideration.

Sincerely,
James Chapman,
425-774-5047

Cone, Nelson [sharnel@olypen.com] Sent: Thursday, April 28, 2005 9:58 PM
To: Hirschey, Steve
Subject:

- **1336-Save the Stilly**

Nelson Cone, PO Box #64, Sequim, WA 98382
April 29, 2005
Dear Steve Hirschey:

- **1337-**Thank you for your consideration.

Sincerely, Nelson Cone

Doyle, Eric [coho7575@netscape.net] Sent: Thursday, April 14, 2005 3:16 PM
Eric Doyle, 18200 11th Ave NE, Shoreline, WA 98155
Dear Steve Hirschey:

- **1338**-I am a professional fisheries biologist active in salmon and steelhead conservation efforts in Washington State. I am also an avid fly-fisherman and a member of the Wild Steelhead Coalition. I am deeply concerned about the impacts that water resources development will have on our beloved Stillaguamish River.
- **1339-**As you may know, the Stilly is legendary in fly-fishing lore as one of the great rivers on which the pursuit of steelhead with the fly was born. Unfortunately, like so many of our rivers, today's steelhead runs are a mere fraction of those historically pursued by the pioneers of this great sport. I spend thousands of dollars a year in Washington state pursuing this hobby, as do many of my friends and colleagues. We are a powerful economic force. As a group, we are deeply concerned about the recent declining trends in regional steelhead populations.
- **1340-**We are not alone in our concerns. As I'm sure you are now aware, NOAA Fisheries has indicated that they will initiate a status review of Puget Sound steelhead to determine their eligibility for listing under the ESA. The petition for listing was submitted by a retired lifelong WDFW employee who, like myself, is deeply concerned about the future of this wonderful game fish. Given my knowledge of the current status and trends of our steelhead, I view the likelihood of listing to be as high as 60 to 70%.
- **1341-**While you may or may not view this as a moral imperative as I do, it is certainly a prudent course of action for your agency. If PS steelhead are listed under the ESA, their life history requirements will compel a hard look at instream flows in all regional rivers. Why not take steps now to be better prepared to meet the demands of ESA compliance?

- **1342**-I implore you to do everything within your authority to ensure that adequate instream flows for steelhead and other native fish are preserved in the Stillaguamish River, and the other great rivers of our state. With specific regard to the Stilly, the following are ways that Ecology's Stillaguamish proposal could be improved:
  1) Measure current and projected water use to better plan for ways to maintain instream flows;
- **1343-**2) ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish;
- **1344-** 3) establish an effective monitoring and enforcement program to ensure adequate compliance with instream flow rules.
- **1345-**Thank you for your consideration on this critically important issue.

Best regards,
Eric Doyle

Doyle, Lawrence [ldoyle@cablespeed.com] Sent: Tuesday, April 12, 2005 5:31 PM
Lawrence Doyle, 4601 Lopez Ave, Port Townsend, WA 98368
Steve,

- **1346**-As the Greywolf Fly Fishing Club (Gardner Washington) representative to the Washington Steelhead Summit, I have closely studied and strongly support the American Rivers' instream flow and groundwater policies. The structure of these policies of course are the proper ones to emulate for our Beautiful Stillaguamish and protection of the wild fish.
- **1347-**The actual flows, storage, and architecture of the river system of course are scenario dependent and most familiar to you and DNS. With care and attention, knowledge and backbone, the usual development pressures, both physical and political can be channeled to control the instream flow profiles and groundwater usages which historically have been compromised on most rivers.
- **1348-**Of course, an effective instream flow monitoring and compliance program is required to enforce the instream flow and groundwater design. Usages and drawdowns must be controlled by law and violations be punished by stiff penalties.
- **1349-**Believe me, developers and land owners will be constantly attempting to usurp and overturn the protection policies. You have my support and voice. Thank you for your consideration.

Fowler, Scott – Letter dated May 10 2005:
Dear Mr. Lufkin:

- **1250-**Thank you for taking time to address my concerns regarding the instream flow rule on the Stillaguamish basin and other basins in the state. This instream flow rule basically sets up the future expanse of public water. It does nothing to protect instream flow and probably will hurt instream flows in the future.
- **1251-**The vision of the Department of Ecology and the Department of Health is to have everyone on public water. Public water does have some benefits (higher density of people per square acre) but has some negative side effects like redistributing water from one basin to another, thus transporting water out of basins through sewer systems and high uses of water through lawn irrigation. All of these have a high negative impact on instream flow.
- **1252-**On the reverse side in rural Washington residential wells and small Class B well systems keep the most of that said water in the basin. Nowhere in Washington State has the Department of Ecology (DOE) been able to prove that legal exempt well or group of these wells has had a negative impact on instream flow. One can as easily argue that a residential well with septic system actually improves instream flow.
- **1253-**Your plan also has a very limited supply of water set aside for agriculture. If the ag community cannot use their property to earn a living, it will be sold and made into hard surface. Most ag property is located in excellent recharge areas.
- **1254-**It seems to me that Ecology has its heart in the right place but is creating a mountain of legal and property rights legislation out of a molehill.

Hasselman, Jon – National Wildlife Federation

National Wildlife Federation
People & Nature: *Our Future* is in the Balance

Western Natural Resource Center
6 Nickerson Street, Suite **200 • Seattle, Washington, 98109** www.nwf.« T:
(206) 285-8707 • Fax: (206) 285-8698 • www.nwf.org

May 12, 2005

Dept. of Ecology
Attn: Steven Hirschey 3190 160th Ave S.E. Bellevue, WA 98008 stillaguamish@ecy.wa.gov
VIA EMAIL and U.S. MAIL

Re: Comments on Proposed Instream Flow Rules for Stillaguamish Basin

Dear Mr. Hirschey:

1069-Please find enclosed the comments of the National Wildlife Federation ("NWF") on the proposal to amend W.A.C. 173-505 for the Stillaguamish River Basin. With over one million members nationwide, and approximately 25,000 members within the state of Washington, NWF is the nation's largest conservation advocacy and education organization. The mission of NWF is to inspire Americans to protect wildlife for our children's future.

1070-NWF has a keen interest in the Department of Ecology's efforts to protect and restore instream flows throughout the state. Species protected under the federal Endangered Species Act ("ESA") as well as other aquatic species at risk—including the listed Puget Sound chinook salmon—rely on adequate flows of high quality water in the Stillaguamish River. As a general matter, NWF applauds Ecology for resuming the development of new instream flow rules for the Stillaguamish River and elsewhere in the state. New rules have not been adopted in decades, and most basins have become overappropriated. Accordingly, at a minimum it is critical to set instream flow rules so communities can begin addressing the difficult questions of allocation of limited resources and restoration of degraded streams.

NWF submits these comments to highlight one critical issue that is not unique to the Stillaguamish, but as important here as anywhere else: the failure to consider the high likelihood of future changes to the river's timing, quality and quantity of flows associated with global climate change. While Washington state has been a leader in efforts to reduce and mitigate the effects of climate change, the reality is that climate change is here, and we must plan to address its consequences. Regrettably, the proposed rule provides for an increase in consumptive uses even though the science strongly indicates that instream flows will be dramatically affected over the coming decades due to climate change. We urge Ecology to revisit this proposal, taking into account this science.

- **1071-**CLIMATE CHANGE AND NORTHWEST RIVERS

NWF recently released a comprehensive summary of the state of knowledge regarding likely climate change impacts to Pacific Northwest Rivers, a copy of which is attached.' The report highlights the likely flow and water quality impacts of predicted climate change on several of the

region's rivers, including three that flow into Puget Sound.

Washington state is already beginning to feel the effects of climate change: regional temperatures have increased by an average of 1.5 degrees during the 20th century.[2] Snowpack has decreased 11 % since the mid-1900s, and the dates of peak snow accumulation and snowmelt-derived streamflow has shifted by up to a month earlier during the same period.[3] Analysis of Cascade glaciers reveal substantial decreases over the past few decades. For example, the glaciers that feed the Skagit River basin have lost 44% of their mass over the past 150 years, and that pace is increasing.[4]

According to the University of Washington's Climate Impacts Group ("CIG"), average annual temperatures could rise by as much as 4.7 degrees F by the 2020s, and up to 5.8 degrees F by the 2040s. While precipitation is likely to increase, it is more likely to fall as rain rather than as snow. Indeed, the region could see an additional 50 percent decline in the next 45 to 75 years in average snowpack, significantly reducing the source of summer flows for Puget Sound and Columbia basin rivers.

1072-These changes could dramatically affect water resource management in the Stillaguamish River and elsewhere. Research demonstrates that the reduced snowpack will contribute to potentially significant shifts in volumes and timing of streams flows in snowmelt-fed rivers. Summer (July –September) flows are expected to decrease, and the peak spring runoff will shift earlier in the year.[5] These rapid changes could have dramatic effects on aquatic species—particularly salmonids—already stressed by habitat degradation, hydrosystem operations and other human factors. Salmonids are highly adapted to local conditions, and not well suited to rapid changes in conditions as are predicted in these models. Changes in flow during the winter—chiefly more intense and/or sustained high flow events—also presents risks to salmonids. Excessive flows can mobilize sediments that clog salmon redds and scour out needed gravel.

1073-Moreover, the climate change models suggest dramatic impacts to water quality, particularly temperatures. Salmonids are highly sensitive to temperatures, and there is evidence that most Western Washington rivers and streams are already near or above critical temperature thresholds. Climate change models suggest that summer temperatures will be pushed further in coming years, presenting yet more threats to aquatic species and salmonids. Other extensive research nationwide on cold water fish bears this out.[6]

' National Wildlife Federation, Fish out of Water: A Guide to Global Warming and Pacific Northwest Rivers (March 2005). We incorporate the report, and the studies discussed therein, by reference into these comments.

[2] Id. at 10.

[3] Id.

[4] Id. at 25.

[5] Id.at19.

[6] Id.at15.

1074-THE STILLAGUAMISH INSTREAM FLOW RULE

As noted above, NWF applauds Ecology's intention to develop scientifically credible flow levels in the Stillaguamish basin, and to appropriate all remaining unappropriated water in the basin for fish, wildlife and other instream values.

1075-However, NWF is concerned about the reservations established for future residential uses and stockwatering. While Ecology portrays these uses as *de minimis*, it is not scientifically supported to permit additional withdrawals from a system that is already suffering from overappropriation and elevated temperatures.

1076-Perhaps more importantly, the rule and accompanying modeling do not account for the likely impacts to the Stillaguamish River from climate change, as discussed above. NWF contacted Ecology's consultants who performed the underlying hydrologic modeling, and confirmed that climate change was not considered in their flow modeling. NWF further confirmed that building the predicted hydrological impacts of climate change into the flow model would be technically feasible. NWF urges Ecology to redo the hydrologic analysis in a way that incorporates anticipated impacts of climate change. Since the proposed instream flows are typically not satisfied today, it appears highly likely that flows will fall short by an even larger margin in the future. In this light, Ecology's proposal to authorize future withdrawals from an already degraded baseline merits reconsideration.[7]

1077-NWF is not unaware of anticipated growth, and accompanying water needs, in the Stillaguamish basin. Providing water for new growth, while mitigating its impacts and preserving wildlife and instream values, will require an aggressive yet thoughtful comprehensive approach to watershed and streamflow planning. NWF makes the following recommendations:

a. We cannot control climate change (at least in the short to medium term) or ocean conditions. We can, however, better regulate land uses in salmon habitat, harvest, hatchery operations, and other stressors to salmon so that they are better equipped to survive and adapt to changing conditions. Washington's continued support of habitat restoration actions and strong implementation of the Growth Management Act and Shorelines Management Act, among other laws, will help. In particular, encouraging local communities to adopt Low Impact Development standards will go a long way towards allowing basins like the Stillaguamish to accommodate new growth without further degrading the existing resource.

b. **1078-**Ecology should work with the Department of Fish and Wildlife and the Tribes to identify the subbasins within the Stillaguamish watershed that are most important for fish and wildlife. Ecology should not permit any additional unmitigated withdrawals from these basins, and should focus its efforts there on restoration.

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[7] National Research Council of the National Academy of Sciences, Managing the Columbia River: Instream Flows, Water Withdrawals, and Salmon Survival (2004).

c. **1079-**Given that streamflows are already inadequate, Ecology should seek to develop and implement measures that provide additional instream flows before authorizing any new uses. For example, efforts to encourage conservation and efficiency in domestic and agricultural uses could provide a buffer to accommodate new growth.

d.. **1080-**We urge Ecology to provide greater detail and structure on the range of permissible mitigation plans in the draft rule. Absent specific scientific evidence to the contrary, NWF does not believe as a general matter that anything other than bucket-for-bucket, in-place and in-time replacement of a withdrawal is suitable mitigation for new water withdrawals. As noted above, Ecology should consider developing mitigation scenarios that improve streamflows—as recently proposed for the Columbia River—rather than simply struggle to maintain an inadequate baseline.

e. **1081-**Ecology should require monitoring and metering. It is difficult to imagine how water management can be effectively carried out without effective metering of withdrawals and oversight over flows.

Thank you for considering these comments. If you have any questions, you can contact me at (206) 285-8707 ext 105.

Sincerely,

Jan Hasselman
Counsel

c.c.
Elliot Marks, Governor's Executive Policy Office

Enclosures

Henri, Carolyn

Mr. Lufkin,

1143-Below and included in the attached document are my comments on the proposed Stillaguamish In Stream Flow Rule. Specifically, my comments related to the Small Business Economic Impact Study (SBEIS) that was prepared for the proposed rule. I am a practicing natural resource economist with a private consulting business located in Stanwood, WA. I am also adjunct research faculty in WSU's Department of Natural Resource Sciences.

1144-I live in the Stillaguamish Watershed and am a voting member of the Stillaguamish Implementation Review Committee (SIRC). As an economist I have grave concerns about the quality of

the SBEIS that was prepared for the proposed rule, and it is my professional opinion that this document does not meet the requirements detailed in RCW 19.85.

1145-On the surface this document appears to be a template study that could be written about any watershed. There are no specific references to locations or businesses that operate in the Stillaguamish watershed. Furthermore, this document is a *discussion*, not a quantitative assessment. One finishes this document with no better knowledge of the scale or specific types of economic impacts that will affect current and future business development in the Stillaguamish Basin.

1146-Under RCW 19.85, the code that requires agencies to prepare an SBEIS, if the rule causes a disproportionate impact on small businesses, it is required to show how it will reduce the costs to these businesses. Even though the report concludes that "significant economic impacts" may arise from the proposed rule, only one short paragraph in the report is dedicated to how these impacts will be mitigated. Department of Ecology has NOT demonstrated in this report any effort or plan to mitigate the stated impacts.

1147-My specific comments are included as notes in the PDF file of the report attached to this e-mail. Click twice on the notes to open them. The notes are placed after the section they refer to. These comments will also be sent to my state and local elected representatives. If the quality of this SBEIS is any measure, then RCW 19.85 must be changed. The economic impacts on small businesses of this rule are not adequately presented in the SBEIS. If we are to adopt such rules it should be with eyes wide open to the economic consequences, which is the intent of RCW 19.85. These consequences for small businesses in the Stillaguamish Watershed remain unknown.

Sincerely,
Carolyn J. Henri

Carolyn J. Henri, Ph.D.
Resource Consulting
7925 300th St. NW
Stanwood, WA 98292
Phone: (360) 629-6587
Fax: (360) 629-7002
Cell: (425) 308-1634
E-Mail: Carolyn@ResourceConsulting.us
Website: www.ResourceConsulting.us

Carolyn Henri Comments on SBEIS

1148-1-This SBEIS is woefully deficient and does not meet the requirements of RCW 19.85. It is unspecific and does not quantify or attempt to quantify the potential economic impact of this rule. Nor does it describe how these impacts will be effectively mitigated. Major economic impacts are omitted, and conclusions about economic impacts are not supported or explained. Specific comments are placed at the END of the sentence or paragraph that they refer to.

Page 7: 3. Creation of the reservations: Currently, groundwater withdrawals via exempt wells in the Stillaguamish River or its tributaries are subject to the requirements in RCW 90.44.050. Under the proposed rule, water from permit-exempt wells for domestic, small businesses and stockwatering will still be available via the reservations, but comes with some restrictions. Under the reservation, only domestic uses will be allowed year around. For businesses that would typically use a relatively small amount of process water (up to 5,000 GPD), domestic needs of the business could be met from the reservation and if the business is located in areas with partial closures an interruptible right would still be available during open periods. For businesses developing land for residential construction or requiring domestic water only, the reservation should meet that need although outdoor use will be restricted to irrigation of 1/12th of an acre per residence.

1149-2-That water limitation could severely limit the sale price of the property. A property value (appraisal) approach should be taken to look at how land values would be affected.

Page 7: The creation of the stockwatering reservation will likely provide year-around access to groundwater for new stockwatering uses.

1150-3-How has this conclusion been determined? Using what inventory of stock and watering needs? How much water per head? Have the numbers used been verified with actual livestock owners or actual data? Has there been any allowance for growth in this reservation as the human population of the watershed grows and livestock numbers increase?

Page 8: 5. Transfers: Water right transfers that would have occurred before the rule even though they may have impaired instream flows will no longer be allowed. This may be a cost for those that would have transferred water. However, only two transfers of any kind for small quantities have been recorded previously. Therefore, it seems reasonable to conclude that this impact will be small. Transfers of water rights may become part of mitigation strategies used by businesses to offset the impacts of their new water needs.

1151-4-Lack of historic transfers in this watershed is most likely because transfers were not necessary to meet water needs. That necessity will likely change with new restrictions in place. Therefore, it is NOT "reasonable to conclude that this impact will be small."

Page 8: 6. Impacts to businesses depending on instream flows: Creation of the reservation, stream closures, and restrictions on withdrawals from lakes and ponds should all serve to reduce the amount of water that would have been withdrawn without the rule. This could potentially be a beneficial impact to ecosystem services and recreation, and could impact property values. For businesses that provide guide services such as rafting, fishing and bird watching,

1152-5-How? Where? Be specific.

Page 8: For those dependent on dilution for waste removal, there could be a very minor beneficial impact. However, it is anticipated that the business benefits of a reduced depletion in flows will be very small due to the small quantities of water involved.

1153-6-Were these small gains in water quantity measured? Were impacts discussed with relevant industries?

Page 8: *Reporting and Recordkeeping:* No additional reporting or recordkeeping is likely to be required.

1154-7-Increased metering requirements referred to on page 11, para 3 should be listed here as a cost.

Page 8: *Additional Professional Services:* Additional professional services including hydrogeological expertise and engineering design and surveying may be required if technical services are required to provide technical documentation of a water transfer or a water line extension must be designed. Closures in basins may lead some to transfer water rights or lease from others. This will likely require increased use of professionals including hydrogeologists, biologists, engineers, and attorneys. The exact requirements would depend on the river or stream, proposed change, etc. Mitigation options might involve construction of storage tanks and associated piping requiring engineering design services. Anyone required to connect to a public water system would likely require additional engineering design and surveying.

1155-8-These costs could run in the tens to hundreds of thousands of dollars for a business enterprise. No attempt has been made to quantify a range cost.

1156-9-Costs of actual historic transfers in other parts of the state where they are more common could be a starting basis for transfer costs.

1157-10-Data on costs of hooking up to a public system can be obtained from firms who perform this service, or the County Public Works office.

Page 9: *Costs of Equipment, Supplies, Labor, and Increased Administrative Costs:* Increased equipment associated with pipeline and tank construction may be required for mitigation options but is included in the descriptions below.

1158-11- It does not seem to be included below. Please reference exactly where this is discussed.

Page 9: Future irrigation uses would likely not be impacted too much under the proposed rule since permits would already likely be interruptible.

1159-12-This last statement is unclear. Would future irrigation be affected or not? If so how? Dow has this been documented and verified? The term "not be impacted too much" is professionally unacceptable in a document of this type and subject matter. No attempt has been made to quantify this impact.

Page 9: The cost associated with reducing any transfers will be the difference in value the proposed user and seller placed on the water.

1160-13-What does the term "reducing any transfers" mean? This is jargon and should be avoided. If terms like this are used, a glossary should be included.

Page 10: The estimated cost of outdoor use restrictions to users of permit exempt wells is likely to be between $3 and $35 per year per well.

1161-14-How is this number derived?! Describe in detail how this is calculated. Are these real or NOMINAL values? The footnote refers the reader to an analysis that is not included in the document.

Page 10: This is the lost revenue that would be experienced by any firm that owns developable property likely to be served by an exempt well.

1162-15-This very likely grossly underestimates the economic impact. The real cost to the business owner will be the reduced SALE PRICE of the land, due to the inability to develop water rights. Many commercial properties will be unsaleable without sufficient access to water. This can be verified with commercial land appraisers and real estate firms. Undeveloped commercial farmland, for example, has little or no value without sufficient access to water. See note on Table 2.1.

Page 10: For those business using conditioned water right permits, the restrictions on use during low flows will impose a cost varying with the volume and use forgone.

1163-16-Some commercial examples would be useful here.

Page 10: Other impacts (e.g. connection requirements, restriction on transfers, etc.) will also tend to raise costs. To the extent that increased costs yield increased prices, gross revenues will likely be reduced.

1164-17-This is a discussion that needs to be quantified.

Page 10: The impacts of the proposed rule related to the reservation and closures will likely be experienced by existing property owners without existing water rights.

1165-18-No. It also affects all CURRENT businesses that may have future expansion plans.

Page 10: The number of business-owned developable properties was determined, and this was evaluated to determine those likely to be served by exempt wells in the future. The result was a record of existing business owners, parcel size and current land use and zoning that allowed for projection of the number of wells that could be developed.

1166-19-How many acres were affected?

Page 10 (footnote): Calculation assumes a 2.7% real discount rate. Discussion of this calculation can be found in the benefit-cost analysis.

1167-20-The referenced discussion does not seem to exist anywhere in the document. The interest rate used for discounting is exceptionally small and not standard usage for government agencies. No justification of this is given.

Page 11:

Table 2.1. Compliance Costs for Business-Owned Exempt Well Development

Number of Firms[9]	Average Employment (No. of Employees)	Average Cost per Employee[10] ($)	Median Cost Per Employee ($)
Small Firms-55	6-15	$580-$7,183	$70-$863
Large Firms-17	475-795	$2-$19	$2-$19

1168-21-Although the economic impact metric "median cost per employee" is allowed under RCW 19.85.040, its use in this context is inappropriate and irrelevant It also grossly understates the economic impact. When discussing undeveloped land parcels, the correct metric should be "cost per 100 dollars of sales". The real cost to the landowner will be the reduced SALE PRICE of the land, due to the inability to develop water rights. The current table UNDERESTIMATES this cost. Some commercial properties may not saleable at all without water rights. Reduced property values will also have an economic impacts (sic) on Snohomish County and other local jurisdictions. Information should be obtained from commercial real-estate firms with knowledge of these kinds of sales. The Direct and Indirect effects of reduced property values in North Snohomish County are not discussed.

Page 11: CONCLUSIONS: As described above, there will likely be an impact to some businesses in the watershed from the proposed rule. It is likely that some firms will experience increased compliance costs associated with restrictions on water use, increased metering requirements, and water line extension costs. In general, the impacts are likely to be disproportionately borne by smaller firms as measured on a cost per employee basis.

1169-22-Mention this on page 8, under Cost Analysis, Reporting and Recordkeeping.

Page 11: 3. ACTIONS TAKEN TO REDUCE THE IMPACT ON SMALL BUSINESS

1170-23-DOE has NOT shown that it has reduced the costs on small businesses affected by the rule. A statement that it has and one marginally relevant example are not sufficient evidence that DOE has made any effort whatsoever to reduce economic impacts. For this reason DOE is NOT in compliance with RCW 19.85. The real impacts, including reductions in property values of small business owners, associated decline in the tax base and the economic effects of decreased land development by small businesses in the watershed - among other impacts- are not even discussed, much less proposals for the mitigation of these effects put forth.

Page 11: In crafting the proposed instream flow rule, Ecology has actively attempted to reduce, modify or eliminate substantive regulatory requirements to all entities in the watershed. For example in a previous draft of the rule, Ecology considered prohibiting all outdoor uses of water during low flow periods. The proposed rule allows some outdoor watering which will reduce the impacts to small businesses proportionately more than large businesses.

1171-24-This statement is not supported. DOE has NOT shown that it has reduced the costs on small businesses affected by the rule. The SBEIS should address each area of the rule for which there is an impact and describe and quantify the change in economic impacts due to reductions in regulatory requirements. This has NOT been done.

Page 11: There are no recordkeeping or reporting requirements or inspections and compliance timetables and fine schedules were not altered.

1172-25-Why are these listed here if there is no impact to mitigate?

Page 12: HOW WAS SMALL BUSINESS INVOLVED IN THE DEVELOPMENT OF THIS RULE?
This rule has been developed over a long period with substantial public involvement. Several public meetings were held to discuss the language and the proposed rule was posted on Ecology's website. The filing of the CR-102 will provide for official public hearings to consider the rule and an opportunity for the business community to provide input.

1173-26-The intent of RCW 19.85.040 (2)(b) is to engage small businesses beyond the standard public comment process. There is no evidence that DOE has reached out directly to small business organizations or groups, pursuant to RCW 19.85.070.

Page 12: [E]xisting business owners of undeveloped property are likely to be the industries that will be required to "comply" either directly in terms of attempting to acquire water or indirectly in terms of changes in asset values. Therefore, the following list is provided indicating Standard Industrial Codes (SIC) codes for existing developable properties in the Stillaguamish watershed[12] and based on previous water right permit data.

Page 12:

Table 5.1. Industries Likely Required to Comply with the Rule

SIC Code	Description	SIC Code	Description
1442	Construction sand & gravel	5154	Livestock
1521	Single-family housing construction	5193	Flowers & florists' supplies
1794	Excavation work	5261	Retail nurseries and garden stores
2011	Meat packing plants	5261	Retail nurseries and garden stores
2038	Frozen specialties, nec	6021	National commercial banks
2411	Logging	6211	Security brokers and dealers
2421	Sawmills and planing mills, general	6531	Real estate agents and managers
2621	Paper mills	6552	Subdividers and developers, nec
2653	Corrugated and solid fiber boxes	7032	Sporting and recreational camps
2676	Sanitary paper products	7999	Amusement and recreation, nec
4011	Railroads, line-haul operating	8051	Skilled nursing care facilities
4612	Crude petroleum pipelines	8121	Unassigned
4911	Electric services	8322	Individual and family services
4941	Water supply	8399	Social services, nec
4952	Sewerage systems	8611	Business associations
5031	Lumber, plywood, and millwork	8641	Civic and social organizations
5032	Brick, stone and related materials	8661	Religious organizations
5099	Durable goods, nec	8731	Commercial physical research
5114	Unassigned	8733	Noncommercial research organizations

1174-27-This list includes only businesses who own "undeveloped property". However, it is true that existing businesses with developed land and water rights would be affected by this rule if they should change their business and/or expand their business. There are many other businesses that will be affected by this rule, and as such should all be included in the list. Examples of industries not included are Dairies (SIC 0241), Dairy products (5143) and packaged frozen food ((5142). It is not clear that DOE verified existing businesses in the watershed or their current and future water needs.

Page 19: For individuals and business entities, there are several alternatives. Applicants may choose as a first order of business to solicit a hydrogeologist to certify that a well would not cause an impairment of a water right in those areas where hydraulic continuity is unlikely. This would allow an applicant to develop a well without the limitations imposed by the existing rule's instream flows and without the limitations imposed by the proposed amendment. However, the applicant would bear the additional cost of the analysis.

1175-28-A range of estimated cost for this type of analysis should be included.

Page 19: For some wells in basins that drain groundwater to saltwater bodies, the cost for hydrogeologic consultation would likely be very small.

1176-29-This is probably not the majority of affected parties. For them the costs would be infinitely higher, and would be an effective barrier to obtaining water.

Page 20: If the proposed rule amendment goes into effect, then use of the permit-exempt well water will now be obtained from a reservation if year-around use is desired. Businesses that elect to install permit exempt wells for their own moderate needs or to develop saleable land will face more choices as to their best option. Under the proposed rule, the project proponent may choose other methods of water well development (for example drilling to deep aquifers) to meet their needs and avoid limitations imposed by the rule.

1177-30-What would be the practicality and associated cost differential of this suggested alternative? If the average well drilling costs can be estimated at $7,000, then this additional cost to drill to deeper aquifers should also be estimated. Snohomish County hydrogeologists are a source of information on this issue and should be consulted.

Page 21: PROPOSED RULE (CHAPTER 173-505 WAC) The complete rule language for "Instream Resources Protection and Water Resources Program-Stillaguamish River Basin Water Resources Inventory (WRIA) 5" can be found in proposed Chapter 173-505 WAC. The following provides a brief description of the proposed rule and a further discussion of those specific rule provisions that may impact instream flows and/or out-of-stream uses of water.

1178-31-The text in this section should be in the MAIN body of the SBEIS.

Page 22: *Conclusion: Setting minimum instream flows might reduce the availability of water for future appropriations. This may have significant economic effects--See "Rule Impacts to Water Right Administration."*

1179-32-How is "significant" defined? State in terms of number of businesses affected, decline in associated net revenues. This loss must be quantitatively estimated.

Page 23: *Conclusion: This is unlikely to be a limit on future development in the basin. No significant economic impact is anticipated.*

1180-33-What reasoning and methodology were used to arrive at this conclusion? How was this conclusion determined?

Page 23: *Conclusion: Some potential impacts to future water right applicants. Metering requirements are not a change from current requirements. See "Rule Impacts to Water Right Administration."*

1181-34-Terms such as "some" and "significant" impacts are non-specific, relative, and give no sense of the actual economic impact. More specific impacts should be estimated.

Pages 23-24: 173-505-120 Alternative Sources of Water. The department encourages the use of alternative sources of water. These may be important as potential mitigating projects when a water use is proposed. *Conclusion: No significant economic impact.*

1182-35-How can the report conclude that no significant economic impact will be incurred by accessing alternative sources of water? How could this NOT have an additional economic cost? What is specifically included here? And how is this conclusion developed?

Page 24: 173-505-140 Future Changes and Transfers. Transfers will only be allowed if they don't conflict with this chapter. *Conclusion: This may restrict transfers that would have occurred absent the rule. This may have a potentially significant economic impact. See "Rule Impacts to Water Right Administration."*

1183-36-What specifically does "potentially significant economic impact" mean? How is this quantified? What are the cost elements that have been considered to draw this conclusion?
Page 24: 173-505-160 Appeals. All decisions can be appealed to the pollution control hearings board. *Conclusion: No significant impact.*

1184-37-This is NOT correct. There are very real costs associated with the landowner's time to prepare and file the appeal, and most likely hire legal council for this purpose. This cost can and is frequently quantified and should be quantified here.

Hoey, Rich – Washington Department of Health

March 18, 2005

Hedia Adelsman
Department of Ecology
300 Desmond Drive
Lacey, Washington 98504-7600

Dear Ms. Adelsman:

Subject: Comments of Instream Flow Rules

This memo is in follow-up to our meeting held on March 4, 2005. As requested, the following are the Department of Health (Health), Office of Drinking Water's comments on the Stillaguamish River Basin's Instream Flow Rule. Please apply these thoughts to other in-stream flow rules as they are developed. We understand, pursuant to recent discussions with you, that the identified goal relating to timely and reasonable water service provisions in the rule is to <u>require the applicant to request service of the purveyor</u>. With this expressed goal in mind and our mutual desire to prevent the continued proliferation of exempt wells, please consider our suggested changes below. Included in this document (page 2) are comments that would reflect a modified approach to the stated goal: placing a stronger emphasis on the "duty to serve" expectation.

Our comments are as follows:

<u>WAC 173-505-030 (10)</u>: Current verbiage: "Public water system" means any system established under RCW 43.20.260 which provides water for human consumption through pipes or other constructed conveyances, excluding a system serving only one single-family residence and a system with four or fewer connections all of which serve residences on the same farm. This term includes group domestic systems.

969-Concerns with this verbiage: Public water systems are not established under RCW 43.20.260. RCW 43.20.260 refers to a municipal water supplier's duty to provide service under certain conditions.

The verbiage as written implies that Ecology expects all systems (with the exception of a single family residence and a system or a family farm) to have a “duty to serve” expectation. RCW 43.20.260 does not imply that all public water systems fall into this expectation.

Suggested change to this verbiage: Deletion of this definition.

WAC 173-505-030 (13): Current verbiage: "Timely and reasonable manner" means potable water service can be provided by a purveyor within one hundred twenty days of a purveyor's written approval of the request for service, to a property located within the public water system and within five hundred feet of the purveyor's water pipe line. The department may determine that water service is unreasonable if the applicant for service provides sufficient information to show that the capital cost of connection would be more than twice the cost of an individual alternative source.

970-Concerns with this verbiage: This verbiage does not align itself with the stated goal (i.e., to require the applicant to request service of the purveyor). Instead, this verbiage reflects cut and dry timely and reasonable criteria in all duty to serve situations. We believe that a cut and dry perspective may have the unintended consequence of allowing greater development of exempt wells. In our experience, situations vary greatly and water utilities and local government need flexibility to provide service in a manner that will minimize the proliferation of new wells.

Suggested change to this verbiage: Deletion of this definition. Provide direction in WAC 173-505-090 (2)(e).

WAC 173-505-090 (2) (e): Current verbiage: “A new water withdrawal under this reservation is not allowed in those areas where a public water system has been established, and where the connection can be provided in a timely and reasonable manner.”

971-Concerns with this verbiage: This verbiage does not align itself with the stated goal (i.e., to require the applicant to request service of the purveyor).

Suggested change to this verbiage: All landowners proposing a new industrial, commercial, or residential use of water within a municipal water supplier’s retail service area pursuant to RCW 43.20.260 must provide documentation (prior to the issuance of a building permit or subdivision approval) that they have requested water service from the appropriate municipal water supplier (MWS) and that the MWS determined that service could not be provided in a timely and reasonable way.

NOTE: We recommend that disputes over the definition of timely and reasonable be resolved at the local level through a set formal process or through the court system.

WAC 173-505-090 (2)(f): Current verbiage: “If a public water system becomes available after the effective date of this chapter to persons using water under the reservation, and the connection can be provided in a timely and reasonable manner, those persons must connect to the public water system. Any such persons must take affirmative action to connect to the public water system no later than one hundred twenty days after receiving the department's written order to cease and desist use of the well.

972-Concerns with this verbiage: Health believes that this section of the rule will be very difficult to implement and enforce. This verbiage does not align itself with the stated goal (i.e., to require the applicant to request service of the purveyor).

Suggested change to this verbiage: Deletion of this subsection.

NOTE: Local governments may choose to take this type of action as a means to stretch the limited supply of reserve water. We believe this is a decision best made at the local level where ultimate implementation would occur.

The following is provided in the event that Ecology wishes feedback that would promote a stronger "duty to serve" expectation than the current stated goal (i.e., stronger than to require the applicant to request service of the purveyor).

WAC 173-505-030 (10): 973-Suggested change to this verbiage: Deletion of this definition.

WAC 173-505-030 (13): 974-Suggested change to this verbiage: Suggest deletion of this definition. Suggest adding the following verbiage to WAC 173-505-090 (2)(d): An ordinance or other administrative action is established by the appropriate city or county that provides definition and procedural direction relating to the provision of water service in a "timely and reasonable" manner.

WAC 173-505-090 (2)(e): 975-Suggested change to this verbiage: All landowners proposing a new industrial, commercial, or residential use of water within a municipal water supplier's retail service area pursuant to RCW 43.20.260 must obtain water service from the appropriate municipal water supplier unless the criteria specified in RCW 43.20.260 cannot be met.

WAC 173-505-090 (2)(f): 976-Suggested change to this verbiage: Deletion of this subsection.

Thank you for the opportunity to comment. Please contact me at (360) 236-3160, or Michele Vazquez at (509) 456-2774, if you need additional clarification on these comments.

Sincerely,

Richard T. Hoey, P.E.
Deputy Director - Field Operations

City of Seattle
Gregory J. Nickels, Mayor

Hoffman, Ray – Seattle Public Utilities

Seattle Public Utilities

Chuck Clarke, Director

May 13, 2005

Steve Hirschey
Washington State Department of Ecology
3190 - 160th Ave, SE
Bellevue, WA 98008-5452

Dear Mr. Hirschey:

990-Please accept this letter as an indication of our support for the Department of Ecology's instream flow rule-setting process, in general, and for its proposed Stillaguamish Basin Rule (WAC 173-505), in particular. We believe that this statutory authority to establish instream flow rules should remain with Ecology as the manager of the waters of the State.

991-As you are aware, the City of Seattle has extensive experience in water resource management, through both our water supply and hydroelectric *projects* on several rivers in the State. For decades, we have worked to understand the rivers where we have operations and to involve stakeholders in meaningful, cooperative decision making about the management of these river systems. This work has resulted in FERC license agreements and an HCP that guarantee biologically and hydrologically-based instream flows that are actively managed by the City with participation of other governments and which are supported and informed by ongoing research and adaptive management. We believe these approaches can serve as a model for other basins because they have demonstrated that sound science, active management and good communication can indeed produce better outcomes with respect to water resource management and to the protection of ecological functions in these watersheds.

992-We believe that instream flow rules provide an important foundation for water resource management and believe that they should be established in each watershed- Especially for systems that do not have formal water management planning processes, rule-setting provides for an initial analysis of basin hydrology in comparison to aquatic habitat. The process of assembling this information and sharing it with basin stakeholders can foster important dialogue about the balance of instream and out-of-stream uses and values. The resulting rule often provides a baseline of protection and essential information for public and private entities planning for their future.

993-We also believe that establishing instream flow rules provides an opportunity to complement rule-making with additional water resource management tools, such as reservations for rural residents and stock watering, trust water acquisition and requirements for using municipal water supply where it is reasonably available. While the rules themselves don't guarantee the implementation of these tools, they do serve as useful steps towards more comprehensive water resource management.

994-We would caution, however, that each watershed is unique in its mix of natural features, human uses of the resource, and institutional capacity for water resource management. Ecology's

program for developing and refining instream flow rules and for promoting comprehensive water resource management must be respectful of these unique features in each watershed Ecology considers.

With respect to the Stillaguamish Rule, we have not undertaken a thorough technical review. Nonetheless, we have learned about the technical and policy process that Ecology has undertaken and have the following general comments:

The technical analysis was built on the legacy of prior studies and appears to have used qualified personnel and proven methods.

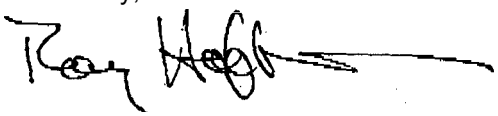
995-The Rule appears to fulfill your mandate to consider both multiple instream and outof-stream needs.

996-The process for rule development appears to have been respectful of local interests and to have engaged local stakeholders.

997-The acceptability of the rule would b e n e f i t from Ecology clearly communicating the scientific rationale for the Stillaguamish Rule- It is our understanding that during most of the years, portions of the Rule will not be met because the Rule has been set at a level to protect base flows that may occur naturally on only an occasional basis. As a result, it could appear that the Rule has been established in a manner such that it cannot be met, which without adequate explanation, could undermine the credibility of the Rule.

998-In summary, we feel that Ecology's effort to generate new instream flow rules is an important benefit to the water resources and aquatic ecosystems of the State. We encourage your continued cooperation and communication with the local and regional public and wish you the best of luck in completing the rulemaking process and implementing these rules. Thank you for the opportunity to comment.

Sincerely,



Ray Hoffman

Director, Corporate Policy & Performance Seattle
Public Utilities

cc: Jay Manning, Department of Ecology
Josh Baldi, Washington Environmental Council

Seattle Municipal Tower, 700 5th Avenue, Suite 4900, PO Box 34018, Seattle, WA 98124-4018
Tel: (206) 684-5851, TTY/rDD: (206) 233-7241, Fax: (206) 684-4631, Internet Address: httpllwww.beattle.gov/.util/
M equal employment opportunity, affirmative action employer. Accommodations for people with disabilities provided upon request.

File Code: 2540
Date: May 12, 2005

Joyner, Calvin – US Forest Service, USDA

Steve Hirschey
The Department of Ecology
3190 160th Ave. S.E.
Bellevue, WA 98008

Dear Mr. Hirschey:

1231-The US Department of Agriculture Forest Service is very interested in the process of protecting water resources in the State of Washington. The Forest Service fully supports the designation of instream flows necessary for the protection and restoration of wildlife, fish, water quality, scenic, and aesthetic values. The Forest Service direction for managing instream flows on National Forest Systems Lands (NFS) (i.e., public lands managed by the Forest Service) is similar to Washington State's Instream Flow Protection and Water Resources Program in many respects. **1232-**We consider it important to develop instream flows that are associated with the natural hydrograph, as much as possible, and include provisions for variable flows. High flows are critical to maintaining the morphology and habitat characteristics of streams and to species using those habitats. We support the Department of Ecology in this effort to protect the resources by creating both a low flow component and a maximum component of the instream flow allocation (New sections ((Washington Administrative Code)) WAC 173-505-050 and 173-505-100).

1233-New section WAC 173-505-010 (3) and (4) states that existing water rights, including federal Indian and non-Indian reserved rights, will not be affected by the proposed rule. The Forest Service agrees with this statement, as we have federally reserved rights based on several authorities including our enabling legislation, the 1897 Organic Administration Act. We recognize that the extent of federal reserved rights would be determined through an adjudication process. While we concur overall with the instream flows quantified for the Stillaguamish River Basin, we retain the right to claim additional instream flows for streams on NFS (National Forest Systems) lands if necessary to meet conditions of our reservation authorities. We expect that these needs will be commensurate with the flow needs of the state.

1234-The success of the instream flow rule in meeting the needs of the wildlife, fish, water quality, scenic and aesthetic values of the Stillaguamish River relies heavily on the data and methods used to determine the desired flows. We hope that Ecology errs somewhat on the side of the resources to provide a margin of safety. We understand the relationship of water to the economic viability of an area, and that too restrictive, or unnecessarily large water reservations for instream flows, may unduly restrict development in the counties. However, once a water permit or right is given, it is extremely difficult, if not impossible to take back water for the common good.

1235-We appreciate the opportunity to comment on the proposed rule. It is our objective to manage water resources on NFS lands in cooperation with States, other Federal agencies, Tribal governments, stakeholders, and holders of valid water rights to provide mutually beneficial programs for protecting, restoring, maintaining, and utilizing water resources. To accomplish this objective, we would like to participate in watershed planning group efforts (or to work directly with Ecology if there is no watershed planning group effort), to quantify instream flows on NFS lands in the upcoming basins across Washington. The Forest Service would also like to work with Ecology toward joint ownership of instream flow water rights on NFS lands in the future, where feasible.

1236-We commend the Department of Ecology and the Washington State legislature for recognizing the importance of instream flows and look forward to working with you on water resource management. Please feel free to contact Trish Carroll at 503-808-2905 (tcarroll@fs.fed.us) or Gary Ketcheson at 425-744-3429 extension 3421 (gketcheson@fs.fed.us) for any information you may need.

Sincerely,
/s/ Calvin N. Joyner
CALVIN N. JOYNER
Director, Natural Resources

WASHINGTON ENVIRONMENTAL COUNCIL

PROTECTING OUR LAND, AIR AND WATER

BRINGING RIVERS TO LIFE

American Rivers

FOUNDED 1973

May 13, 2005

Kelley, Becky – Washington Environmental Council,

Freeman, Ross – American Rivers

Department of Ecology
Attn: Steve Hirschey
3190 160th Ave SE
Bellevue, WA 98008

Re: Comments on proposed WAC 173-505, Instream Flow Rule for the Stillaguamish River Basin WRIA 5

Dear Mr. Hirschey:

Washington Environmental Council (WEC) and American Rivers thank you for the opportunity to provide comment on *173-505 Instream Resources Protection Program Stillaguamish River Basin -WRIA5*. Our organizations appreciate Ecology's efforts to move forward with this long-delayed rule.

Of the primary features of the proposed rule, WEC and American Rivers comments are as follows:

General support for the establishment of instream flows;

Concerns about aspects of the reserve for future uses;

Support for maximum allocation limits;

Other specific recommendations.

Following are details regarding our observations.

I. General support for the establishment of instream flows.

a) **1032**-As noted in our prior informal comments (Dec 10, 2004), WEC and American Rivers are generally very supportive of the state establishing instream flows. One third of the Washington's watersheds have some form of instream flow protection, put in place over a ten-year period from the mid 70s to mid 80s. The fact that only one instream flow has been established in Washington State in the subsequent two decades starkly illustrates the important work that needs to be done. Consequently, we hope that Ecology will not countenance any delay tactics from entities less supportive of the proposed Stillaguamish flow rule.

b) **1033**-According to Ecology's website, the Stillaguamish watershed is home to numerous salmonid species such as Coho (a depressed population), Pink, Chum, and Sockeye salmon, and Steelhead and Cutthroat trout. Two species, Chinook salmon and Bull trout, are listed as threatened under the Endangered Species Act. Clearly, adequate instream flow is an important building block for recovery

of these species. While the proposed rule states as its purpose the retention of "perennial rivers, streams, and lakes in the Stillaguamish River basin…" to "protect and preserve" fish and other environmental values…"[5], the rule provides for up to 2% loss of habitat of these species. Given the goal of the State's Salmon Recovery Strategy to "Retain or provide adequate amounts of water in streams to protect and restore fish habitat required by wild salmonids," we recommend that the rule more clearly specify how the rule supports fish recovery. For example, the supplemental SEPA documentation states that reserves for future uses will support human domestic needs and stockwatering, but how will these reserves help salmon? Has the 2% impact been accounted for in the tributaries or just the main stem? If the impact is on the tributaries, it clearly would be much greater than 2%. Has Ecology conducted this analysis? Please explain.

c) ***1034****-There are many uncertainties over the planning horizon that can further reduce the amount of water in the system, including climate change and modeling inaccuracies. It is likely that climatic changes in particular will affect the water availability assumptions over the course of the proposed 20-year planning horizon (which is based on human population projections). As currently configured, fisheries and instream flows appear to assume the risk associated with these uncertainties. Accordingly, is there an adaptive management strategy and/or planned actions to address these potential flow impacts?*

d) **1035-**We support the policy to close streams that may be impaired further by additional surface or groundwater withdrawals. Although we are aware of the sensitivity of several of the streams proposed for closure, and we believe it is appropriate to take such action, WEC and AR cannot speak to whether the proposed rule adequately addresses sensitive tributaries.

e) **1036-**We support inclusion of a trust water program in rule, however, there is no program articulated to make the program a reality. Has Ecology determined if existing water rights can be placed in the trust to be written into the rule (e.g., rights held by state agencies or willing donors)?

II. Concerns about aspects of the reserve for future uses.

a) **1037-**Ecology proposes a reserve of up to 5 cfs or 3.23 million gallons a day, designed to meet a variety of needs for at least two decades. Under the Water Resources Act, the case can be made that Ecology must try to secure water in "potable condition to satisfy human domestic needs" as part of a reserve. However, we are concerned that this reserve could lead to sprawling development by providing assurance of water supplies to rural developers. Ecology states that the "public interest is advanced by this limited reservation clearly overrides the small potential for negative impacts on instream resources."[6] Where has this case been made? Have the public benefits for the reservation been weighed against the potential impacts to listed fish? Please explain.

b) **1038-**We firmly believe that the metering and reporting of all use from the reserve is an effective management tool for individual users and will inform the management of the Stillaguamish water budget. Any new rule should require metering, including for withdrawals otherwise exempted from permit. We support a requirement that local governments adopt an ordinance stating water use conditions on future building permits, including those exempt from permits under RCW 90.54.050. Such an ordinance is consistent with the education provisions of the compliance and enforcement section of the proposed rule.[7] The approval of a building permit provides an efficient and effective means to provide education about water use.

III. Support for maximum future allocation.

a) **1039-**WEC and American Rivers support the policy of a maximum future allocation as a means to protect high flows.[8] We understand that this provision is an attempt to recognize and preserve some

[5] WAC 173-505-020.

[6] WAC 173-505-090 (1).

[7] WAC 173-505-150.

[8] WAC 173-505-100.

semblance of a natural flow regime. As acknowledged in the rule, protecting "high flows" is important to maintain ecological functions, such as channel maintenance and fish migration. Incorporating this concept into instream flow rules shows an evolution in instream flow management commensurate with our evolving understanding of the science. While we cannot speak to adequacy of the maximum flow numbers specifically, we support this general approach.

IV. Other specific recommendations.

a) **1040-Inadequate Recognition of Impacts Related to Forestry.** Over 76% of the Stilly watershed is comprised of forestry, and according to Ecology documentation, "There are many habitat limiting factors (e.g., temperature, sediment, altered stream flows, loss of estuarine habitat) negatively affecting the salmon population and their ecosystem. Most factors are result of upland forestry activities."[9] Given the acknowledged impact of forestry on the Stilly, why is there no direction on this limiting factor within the rule? Although we understand there are legal limitations, surely Ecology and WDFW could coordinate with the Department of Natural Resources to ensure that their forest practices in the area conform to the state's obligation to protect and enhance stream flow.

b) **1041-Ensure Stream Flow protection compliance.** An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule. Articulating this program in rule provides greater assurances that it will be implemented.

WEC and American Rivers appreciate the efforts that have resulted in the proposed rule. While aspects of the proposal raise significant concerns, we again want to emphasize our general support for instream flow rulemaking. Thank you for your consideration.

Sincerely,

Becky Kelley
Campaign Director
Washington Environmental Council

Ross Freeman
Conservation Policy Advocate
American Rivers

[9] *Action Plan for Setting Achieving and Protecting Stream Flows,* Washington Department of Ecology and Washington Department of Fish and Wildlife, P.25 (January 23, 2004).

Kroehler, Corbett [activism@planet-save.com] Sent: Wednesday, April 27, 2005 1:33 AM
Corbett Kroehler, 5104 Stratemeyer Drive, Orlando, FL 32839
Dear Steve Hirschey:

- **1350-**The Stillaguamish River ("Stilly") is home to a world class Steelhead fishery, five species of salmon, exceptional recreation opportunities, working farms, and people. Unfortunately, water pollution and unplanned development threaten to harm what is special about the Stillaguamish watershed.
- **1351-**Washington state has become the de facto vanguard with respect to various types of environmental protection and, even though I live on the opposite side of the country, I often look to Washington for examples of responsible management of taxpayer resources. With regard to the Stillaguamish, if a strong "instream flow rule" is adopted, you can protect remaining stream flows for fish, wildlife, water quality, and recreation. However, allowing too much additional new water use could encourage more "sprawl" development, which would harm fisheries, farming and the quality of life in the watershed.
- **1352-**Only one rule has been adopted in the past two decades. It's time for your state to act to protect our fisheries, streams and quality of life. While setting a new instream flow does not automatically increase the amount of water available to support fish, it will help protect existing flows and define fish flow needs.

Thank you for your consideration.
Yours truly,
Corbett Kroehler,
407-855-8874

Latimer, Karen & Richart, Paul -- City of Arlington Utilities Division

RE: City of Arlington Review Comments on Proposed Stillagaumish Water Management Rule

Dear Steve:

944-The City of Arlington is pleased to submit our comments on the draft of the Stillaguamish River Basin-Instream Resource Protection & Water Resource Program, Chapter 173-505 WAC ("'Rule"). This letter conveys our interest in a Rule that would significantly affect how we do business as a purveyor of water in our regionally recognized service area.

945-The city is currently preparing our approach to meeting the aggressive goals set for us under the Growth Management Act--perhaps more than doubling our population in the next 20 years. We have capacity to supply instantaneous demand for only a few more years, and will need to increase that supply by about 80% by 2023. One estimate of annual demand indicates we will exhaust our capacity by 2019, and may need an additional 3,100 acre-feet by 2050.

946-We understand and agree with the need for instream flow protection. Indeed, the City of Arlington's proactive approach with other environmental efforts, including TMDLs headed by Ecology staff, speaks to our genuine concern and intent to embrace sustainable development concepts. However, this Rule, as drafted, would significantly and unacceptably limit our opportunities for meeting our water supply obligations. Our foremost comments on the rule are summarized in four bullets below. We then elaborate on each of these areas, and suggest one or more alternatives for resolution of our concerns.

947-Growth. In providing reserves for rural out-of-stream uses, and in closing the basin while excluding any provision for public supplies, this Rule is not consistent with direction given in recognized plans developed to meet growth management objectives.

Hydrologic analyses. This Rule contains assumptions that weaken Ecology's hydrologic analyses, resulting in an undue burden on the City.

Ecological assumptions. This Rule contains some language and assumptions that could result in reduced benefits to salmon recovery in the Stillaguamish basin, and perhaps incomplete or ineffective protection for salmonid populations on a regional scale.

Water rights administrative procedures. The effect of this Rule on pending water rights remains unclear, but appears to affect a potential senior water right before it is appropriated. Ecology advertises '"2 lines" for water rights processing, but this Rule appears to create a third line.

Growth: This Rule would provide a ground water reserve for future rural growth using permit-exempt wells, and a surface water reserve for stock watering, but it ignores the demands of population growth in cities and urban growth areas (UGAs). It appears to assume that existing public supplies are adequate to meet needs for growth, and even requires rural growth outside of UGAs to connect to public systems whenever possible. The 10-year GMA Comprehensive Plan update proposed by Snohomish County for approval in 2005 contains 3 alternatives, and all alternatives would allocate growth so that about 80% of the county population would be contained within cities and UGAs, and 20% would be distributed in rural areas. Consequently, this Rule would provide for out-of-stream uses in a fashion that is both inequitable to public purveyors, including Arlington, and inconsistent with direction given under GMA.

948-Spada Reservoir is the water source for most of southwestern Snohomish County, as well as about one-fifth of Arlington's annual consumption and it is likely the authors assumed this source would supply continued growth within the Stillaguamish basin. The Snohomish County Council, authorized by the Public Water System Coordination Act of 1977, recognized Arlington and other northern Snohomish County localities in 1988 as a Critical Water Supply Service Area. Our participation with other communities in a long range capacity and distribution planning exercise resulted in the Northern Snohomish County Coordinated Water System Plan (CWSP). Although the CWSP identified Spada Reservoir as one source available to the city, it requires us to look first at potential supplies located within or much closer to the Stillaguamish basin. As a result, this Rule would appear to constrain and be contrary to the direction of the CWSP.

949-In addition, there are practical difficulties created by the assumption of a regional supply that are not easily addressed. The City of Everett and Snohomish County PUD have priority contractual commitments with other customers. Existing infrastructure limitations would also require expensive capital improvements that are not within the near-term means of the PUD, the wholesaler that delivers water from Spada Reservoir to Arlington.

950-A growth-related economic effect of this Rule is the incentive that a rural reserve would create to develop in rural rather than urban areas. Water from exempt wells for homes in rural areas would be quite inexpensive relative to the extremely high capital facility and service fees that would be required in urban areas because of the need to pass on water acquisition costs to the customers. Therefore, the inability of urban areas to share in the reserve portion of this Rule could accelerate development of rural properties. More land is typically cleared per single house in rural areas than per single house in urban areas, thus also defeating one of the habitat preservation goals of the Rule.

951-We offer two alternative approaches to advance the resolution of these concerns and creation of an improved Rule. The first is to modify the domestic ground water reserve to provide for the needs of population growth served by municipal purveyors in the basin. A reasonable alternative would be to create a reserve that mirrors planned population growth--80% for cities and UGAs serviced by public purveyors, and 20% for rural landowners with permit-exempt wells. **952-**The second approach would be to simply abandon reserves altogether, except for securing the instream flows necessary for salmonid recovery and fluvial functions. This latter approach would achieve the primary objective of instream flows, avoid the inequities of additional reservations, and allow another opportunity for watershed planning to balance water supplies and demands within the basin.

953-Hydrologic Analyses: Ecology makes a broad and unsupported assumption that all groundwater in the basin is in direct hydraulic continuity with the rive; However, the 1996 USGS report on ground water in Snohomish County (WRIR 96-4312) identifies several geohydrologic units in the Stillaguamish basin with horizontal hydraulic conductivities that may range from thousandths of a foot to thousands of feet per day. We believe this heterogeneous geologic character likely provides two or more aquifers that are practically and distinctly separate from the river. For example, our wellhead protection plan, reviewed by both the Departments of Ecology and Health in 2004, identifies that the 10-year time of travel of ground water around our airport well, situated 2 to 3 miles from the Stillaguamish River, does not intersect the river. The Haller Park well field, however, draws water from the river on a daily basis. These highly variable time scales demonstrate distinctly different opportunities for managing water usage in the basin during critical periods that range from days to months.

954-Consequently, the rate at which individual aquifers provide base flow support during low flow times has not yet been shown sufficiently to justify closing of the entire basin, especially appropriations of

ground water. The closure of the basin is our most serious concern with the Rule, because it would limit new sources within our service area, create an additional burden in the evaluation in the impairment of senior and junior water rights, and require potentially very costly analyses to demonstrate a lack of detrimental instream impacts.

955-The closure also does not appear to be supported by a water balance. Ecology uses exceedence hydrographs to evaluate and define instream flow reservations throughout the basin, but we have not found a water balance that documents over-appropriation or helps to identify alternative water sources. Our understanding from Ecology presentations and meetings is that the Stillaguamish basin is not fully appropriated or over-appropriated. Given the constraints that a basin closure would place on us as low-impact water users (see below), basin closure would yield too few benefits at too high a cost.

956-Ecology apparently did not consider the range of effects of public water supplies on river discharges. For example, there is no consideration that although our well withdrawals are considered a consumptive use, that we actually augment river discharge on an annual basis through the return of our treated wastewater to the river in volumes greater than it is withdrawn. Using 2004 data, withdrawals from our riverside Haller Park well field exceeded wastewater return flows on 66 days, most between June 15th and August 22nd. Even if all groundwater withdrawn by the City directly and immediately affected river flows, including the airport well, the net effect to the river on a peak demand day was a reduction of about 2 cfs, or about one-tenth of one percent of the instream flow proposed for the lower Stillaguamish River each August. For 300 days during the year, we actually increased the discharge of the river between 0.5 and 2 cfs, with an annual net discharge of more than 66 acre-feet more than we withdrew. The additional volume is the water we purchased from Snohomish County PUD (whose source is Spada Reservoir on the Sultan River) and from the City of Marysville (with some sources in the Snohomish basin).

957-Few uses of water are either 100% consumptive or 100% nonconsumptive. All uses can be classified as very consumptive or very nonconsumptive or somewhere in-between. These data demonstrate that although we hold one of the larger consumptive water rights in the basin, we are much closer to beneficial or zero impacts than we are to severe-detrimental impacts.

958-Finally, we can appreciate the difficulty in making decisions with limited data. We understand that, under this Rule, any future water supplies we might develop near Arlington would be subject to discharges in the mainstem Stillaguamish River at Silvana, and that those flows are set using the best professional judgment that combines one year of 30-year old actual measurements and 51 years of combined and transposed data obtained from as far as 35 miles up river. We recognize this is a common procedure and are not questioning the suitability of this approach. We simply hope the same latitude for professional judgment would be applied to the City of Arlington should we be required to demonstrate the effects of the development or expansion of our future water supplies.

959-We have several suggestions for creation of an improved Rule. First, basin closure should be dropped from the Rule; its need should be determined within the watershed planning process after full consideration of the basin water balance.

960-Second, we believe the rule needs to identify those aquifers that truly provide the base flow needed to provide sufficient flows for sustainable and productive fisheries support. A robust and defensible approach might be to model base flow contribution areas using aquifer characteristics and well draw-down tests throughout the basin to define a continuity gradient from full to partial to none around mainstem channels and tributaries.

961-Third, an improved Rule could also evaluate the instream effects of various water supply scenarios, including, for example, the consideration of: rural vs. urban reserves; inter-basin vs. intra-basin sources; alternative well usage patterns; alternative pump rates; and the re-use or artificial recharge and recovery of our treated wastewater.

962-Ecological Assumptions: We are concerned that the well-intentioned use of the Rule as one tool for helping to meet salmonid recovery goals in Puget Sound may not be completely thought through, yielding unsatisfactory results both for the fish and our customers. Several of our comments made earlier in this letter also have implications that make us question the benefits to fish. This rule recommends water reclamation, reuse, and artificial recharge and recovery as alternatives to establishing new water sources. These measures are common recommendations and increasingly used in practice, but they also result in greater losses and therefore greater consumption, gallon (used) for gallon (withdrawn). In our case, we may need to reuse or recharge in the future in order to stretch our supplies. If our wastewater return flows were fully diverted from the river during a peak day demand for potable water, discharge in the mainstem Stillaguamish River would be reduced by approximately 6 cfs, or 4 cfs more than under typical operations

in 2004. If other water users made similar efforts to reclaim and reuse water in the name of conservation (that is, more fully consume the water they use), the cumulative effect on instream flows from senior water users could result in declining discharge. This is an instance where a well-intentioned requirement would have a negative impact on fish in the Stillaguamish basin.

963-Although Spada Reservoir has perhaps a luxurious capacity to supply future growth in Snohomish County, we are concerned about the effects on fish at basin and regional scales. We have demonstrated that our wholesale water purchases amount to interbasin transfers of water resulting in augmentation of Stillaguamish basin flows in about 10 months each year. The literature is full of examples where interbasin transfers of water to satisfy the demands for water in one basin, already depleted by population growth, have resulted in depleted supplies in both basins. We therefore suggest that reliance on the Spada Reservoir as the lone source for our supplies is inappropriate and ecologically incompatible with the needs of the Sultan-Skykomish-Snohomish River system. The complex result, in simple terms, is more of a temporary shift in blame than a long-term solution.

964-We'll certainly need to buy more water from PUD to meet our projected demand, but we are also obligated by regional plans to investigate additional sources within the Stillaguamish basin. Our preliminary calculations further suggest that this is also a more ecologically sustainable approach. Using USGS discharge data for the NF Stillaguamish and Upper SF Sultan Rivers, the Stillaguamish produces more water per unit area than does the basin that recharges Spada Reservoir at low (90th percentile), moderate (50th percentile), and high (10th percentile) flows.

965-We propose that an improved Rule would encourage public suppliers--at least the larger Suppliers--to look first in "their own, wetter backyard" before considering interbasin water transfers. Planners and growth managers would need to validate that a basin contains adequate water supplies prior to allocating growth to cities, UGAs, and rural areas within that basin. It may be too late to implement this approach in the southwestern county, but it is both timely and critical for the Stillaguamish basin, with its smaller communities that are beginning to experience rapid growth.

966-Water Rights Administrative Procedures. Ecology has been promoting "2 lines"--one for the slower processing of new water rights applications, and another for more expeditious water right changes and transfers. If the consideration of instream flows as a "water right for the river" is correct, then it appears that the rule will actually take a third route and circumvent the pending applications. The practical effect of this Rule on our pending water right application and on any future transfers of senior water rights remains unclear to us, but it appears to affect a potential senior water right before it is appropriated, and other senior rights that may be transferred or consolidated.

967-In Closing: The City recognizes the Stillaguamish River is at the heart of life as we know it, and we are earnest in our effort to be good stewards of it. We recognize the need to assure an adequate level of instream flow for the River, and appreciate the tremendous effort Ecology has made in tackling these complex issues. (Thanks in particular, Steve, for taking the time to meet with our staff to discuss the Rule.) However, the current version of this Rule is simply too restrictive for us to meet the needs of our citizens and our environment, and address our obligations under the Growth Management Act. We look forward to working with Ecology and others to manage the basin for the wise use of its water supplies.

Karen Latimer and Paul Richart
Interim Public Works Director / Utilities Manager

Lovelace, Steve [dotandsteve@msn.com] Sent: Tuesday, April 26, 2005 7:16 PM
Steve Lovelace, PO Box 245, Wilkeson, WA 98396
Dear Steve Hirschey:
The following are ways that Ecology's Stillaguamish proposal could be improved.

- **1353**-Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.
- **1354**-Include recommendations to reduce the impacts of logging.
- **1355**-Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.
- **1356**-Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.

Thank you for your consideration.

Sincerely,
Steve Lovelace

MacDougall, Mike [mmacdougall@watrust.com] Sent: Wednesday, April 27, 2005 7:22 AM
Mike MacDougall, 10105 N Parkside Dr. Nine Mile Falls, WA 99026
Dear Steve Hirschey:

- **1357**-The following are ways that Ecology's Stillaguamish proposal could be Improved: Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish. Thank you for your consideration.

Sincerely,
Mike MacDougall

Joe Mentor, Jr., March 18, 2005, Letter to Geoff Tallent regarding Skagit Instream Flow Rule Amendments (footnotes removed).

- **224-**Summary of Comments
  Skagit County is strongly opposed to adoption of Ecology's proposed amended Skagit Instream Flow Rule. As discussed in more detail below, this proposal is not supported by Ecology's rulemaking record and is contrary to the law in several key respects:
  I. Ecology's Skagit Instream Flow Rule and its Proposed Rule Amendment Exceed Ecology's Statutory Authority.
- **225-**A. Ecology's Skagit instream flow rule and proposed rule amendment fail to balance the needs of water for people, fish and agriculture, as otherwise required by state law. The Department of Ecology exceeds its statutory authority by adopting an instream flow rule that fails to balance competing resource needs, including domestic water supplies. The Water Resources Act declares three "water resources objectives" for allocating the state's water resources. These objectives are to provide sufficient water for: 1) residential, commercial, and industrial needs; 2) fish populations; and 3) productive agriculture.1 The legislative history of this provision indicates a strong policy directive to balance the needs of water for people, fish and agriculture. The proposed rule amendment largely ignores this statutory mandate by establishing instream flow regulations without adequately addressing out-of-stream water needs. Ecology cannot ignore its obligation to preserve and protect an adequate supply of potable water for human domestic use.2
- **226-**Ecology acknowledges that the proposed amended rule is necessary because the 2001 rule does not adequately meet the agency's mandate to provide water for human needs.3 In response to this admitted problem, Ecology proposed creating of a domestic reservation which "will provide for an uninterruptible water supply for many . . . parcels" throughout the county.4
- **227-**With respect to exempt wells established after the effective date of the 2001 rule, such water users may apply to participate in the proposed reservation.5 Ecology personnel have publicly stated that they intend to treat all post-2001/pre-amendment exempt wells as part of the reservation.
- **228-**Ecology recognized flaws in the existing rule, and committed to fix them. Nevertheless, Ecology limited the scope of the current rulemaking, effectively excluding consideration of needed changes. For example, RCW 90.03.345 indicates that a reservation of water for beneficial uses under RCW 90.54.050(1) establishes a priority date as of the effective date of the reservation. To preserve and protect an adequate and safe supply of domestic water, however, Ecology must include within the scope of its current rulemaking a revision of the existing
  rule's effective date to correct the disparity between the priority dates for the instream flow rule and the reservations**.**
- **229-**Skagit County is concerned that the amount of water to be made available for out-of-stream uses under the proposed rule amendment is insufficient to meet anticipated needs. The County particularly objects to Ecology's failure to address water needs referenced in the County's Comprehensive Plan. This omission demonstrates the lack of balance in Ecology's current instream flow initiative. Ecology's proposed reservation is insufficient to meet long-term water needs to accommodate Skagit County's projected population growth.

- **230-**As required under the Growth Management Act (GMA) each decade the Office of Fiscal Management provides Skagit County with long-term population projections. In its GMA planning the County is required to adopted OFM's high, medium, or low growth forecasts. In water resources planning, Skagit County applies the high growth projection and a 50 year planning horizon to guarantee adequate water supplies are available to meet demand. Projected over the next 50 years, anticipated growth equates to a need to supply water to an additional 220,000 people, or 84,615 new households.6 Assuming growth is consistent with County planning (80 percent urban, 20 percent rural), 44,000 new rural residents will need 16,923 new dwellings. By contrast, the proposed groundwater reservation in Ecology's proposed rule amendment would accommodate only 6,100 new households, assuming water use is limited to 175 gpd. If 350 gpd of consumption is assumed,7 only 3,046 residences will have water. This result leaves Skagit County unable to accommodate projected population growth in the County. Ecology's proposed rule amendment leaves literally thousands of rural residents without potable water and Skagit County without the ability to accommodate the population growth another state agency directs it to provide for.
- **231-**Ecology's proposed amended rule fails to provide water to accommodate the County's long term-population growth8. The Water Resources Act allows Ecology to "reserve and set aside public water for utilization for specific purposes in the future."9 The agency's regulations for establishing a water reservation require proponents to base their proposals on 50-year population and related water demand projections.10 Under the proposed amended rule, however, reservation quantities are based on current zoning. We also are concerned the proposed water reservation is inadequate even to meet the water needs for those who will depend on it if the amended rule is adopted. Ecology is assuming that rural water users will withdraw approximately 350 gallons per day. According to the Washington Department of Health, however, they will need much more. As the Health Department explains, “utility records throughout the state indicate a significant increase in maximum day demands for lot sizes in excess of one acre. It would be appropriate, unless evidence is presented which indicates a better design premise, to use a maximum day demand (MDD) of 800 gpd/ERU for residential lots in excess of one acre. . . .”11
- **232-**Ecology's proposed reservation is insufficient to protect the viability of agriculture. The background document acknowledges the importance of agriculture, but the rule amendment itself frustrates this possibility. The document suggests agricultural water needs will be addressed at a later time. The reservation does not include water for agricultural needs. In fact, the proposed rule amendment states the reservation is "a one-time, finite resource," thereby suggesting no additional water supplies will be made available for agriculture. Ecology improperly limited the scope of the rulemaking by excluding water for future agricultural needs. Ecology has a responsibility under RCW 90.54.010 to balance the needs for fish, residential, commercial and industrial needs, and for productive agriculture. The rule should reserve water under RCW 90.54.050(1) to accommodate increasing needs for irrigated agriculture.
  Agriculture is the leading industry in Skagit County. In 1997 there were 714 farms in Skagit County, farming an average of 131 acres each.12 This reflects a total of 93,534 farmed acres.13 The 2002 Census of Agriculture reported 62,074 acres of harvested cropland in 2002.14 Of this, approximately 14,732 acres are irrigated within the Skagit River watershed (excluding the Samish River basin).l5 The vast majority of irrigated agriculture, roughly 78 percent, occurs below the Skagit PUD pipeline near Sedro Woolley.16 A significant increase in irrigated agriculture has occurred since 1959, and this increase has accelerated since 1987.17 Currently, irrigation demand peaks in July of each year, at approximately 88 cfs, falling to approximately 28 cfs in the low flow month of September.18 If growth continues at historic rates, between 25,000 and 52,000 acres will be irrigated by 2050.19 For the projected future demand, the crop irrigation requirements range from 149 cfs to 310 cfs in July and 47 to 97 cfs in September. This translates to additional water required above the current level ranging from 61 cfs to 222 cfs in July and 19 cfs to 70 cfs in September.20 Based on projected demand, by 2050 water rights will need to be developed to irrigate up to 23,000 acres of agricultural land.21
- **233-**Ecology's proposed amended rule does not account for projected agricultural needs. This oversight is extremely disconcerting to Skagit County because agriculture is the lifeblood of the County. As the American Farmland Trust recently reported, "[f]or every $1 collected in taxes on agricultural lands in Skagit County, only 51 cents in community services is provided by governments, thus producing a 49 cent surplus in revenue to support government services provided to other local taxpayers. By comparison, for every $1 collected in taxes on residential lands in Skagit County,

governments must provide $1.25 in community services. Skagit County farmers thus provide a significant tax benefit for other local taxpayers."22 Accordingly, any action that impacts agriculture impacts not only the 3,300 plus people employed in agriculture,23 but all those who depend on government services substantially underwritten by agricultural production.
Ecology's proposed water reservation is illusory. The proposed reservation of authority by Ecology under WAC 173-503-073(5), coupled with the failure to withdraw and reissue an instream flow simultaneously with the reservations, renders the reservations illusory. Under
WAC 173-503-073(5), the Department retains the unilateral authority to "limit or restrict the further use" of a reservation. As discussed above, the County cannot rely on the reservation for planning and permitting and no property owner can be assured that their water supply source will be available in the future. Moreover, Ecology does not have the statutory authority to regulate exempt wells as revocable and interruptible water rights. The statutory scheme created by this section additionally fails to satisfy the fundamental purpose of the rule amendment to preserve and protect an adequate supply of potable water for domestic use under RCW 90.54.020(5). A reservation, to satisfy this obligation in setting instream flows, must be permanent and of equal priority to the instream flow.

- **234-**B. Ecology unlawfully seeks to restrict lawful water use. 1. Ecology's proposed amended Skagit River instream flow rule improperly characterizes priority dates of lawful water rights recognized under RCW 90.44050. The proposed amended rule declares that "withdrawal of ground water in hydraulic continuity with surface waters in the Skagit River and perennial tributaries shall be expressly subject to instream flows."24 The proposed amended rule further notes that: "All water rights commenced prior to this amendment but subsequent to the original establishment of instream flows . . .shall be subject to the provisions of this chapter as they existed prior to this amendment."25 The 2004 guidance on setting instream flows issued by Ecology provides an explanation of how Ecology intends to implement this provision by stating: “The priority date associated with a permit-exempt groundwater right is the date of first beneficial use, which in the case of domestic use for new residents would typically be the date of occupancy of the residence.26 As explained below, we believe this statement of the law is incorrect.
- **235-**a. The priority date for exempt wells is the date upon which the appropriator first initiated efforts to apply water to a beneficial use. Under settled law, the priority date of a water right relates back to the date the first step was taken to perfect the water right.27 Washington courts have stated that under state water law, a water right priority date relates back to the time the application is filed.28 RCW 90.03.247 provides Ecology with explicit authority to impose conditions on permitted water rights to protect instream flows. Otherwise, a water right priority date is the application date for a new water right, not the date upon which the right is first applied to beneficial use.
- **236-**There is a different rule under Washington law for groundwater withdrawals that are exempt under the requirements of RCW 90.44.050. The priority date of an exempt groundwater withdrawal must be considered in light of pre-code water law. A leading treatise discusses this issue directly: “Historically, before the permit process came into existence, and presumably for those uses today that are exempt from the permit process, the priority date depended on when the "first step" to appropriate water was taken; for if the succeeding steps were completed with "due diligence," the priority date related back to the date of the first step. The courts required a combination of (1) an intent to appropriate and (2) an overt act to constitute the first step, followed by the (3) diligent pursuit. In general, the first step had to occur on the ground to give evidence of the bona fide intent to appropriate. Because this first step required some initial investment of time and money by the claimant, it was seen as giving evidence of the bona fide intent and therefore was justification for giving the claim to the claimant. When the first step was followed by due diligence resulting in consummation of the water use, the priority date related back to when the first step was taken.29 The priority date of a water right relates back to the first steps taken under the law to establish a water right, regardless of whether the right arises under a permit or is recognized under RCW 90.44.050. It is incorrect to say that the priority date for exempt wells coincides with the first instance of beneficial use. Instead, the first steps taken to establish the right is submitting a well log to Ecology, or a development application to the County that indicates the applicant's intent to rely on an exempt well.30
- **237-**2. Ecology improperly seeks to regulate lawful activities otherwise are exempt from state regulation. Ecology can condition a pending permit to require compliance with an instream flow adopted after a water right priority date was established.31 This authority is recognized, however,

only where the agency already has granted a water right permit and where the statute provides explicit authority to condition water right applications and permits. No such authority exists with respect to exempt wells. RCW 90.03.247 -- the only provision of law providing Ecology with conditioning authority -- applies only to permitted water rights. There is no comparable regulation of exempt groundwater rights. Consequently, authority to condition a water right permit does not extend to requiring subordination of an exempt groundwater right to a later-adopted instream flow rule.

- **238-**Ecology is a state agency created by statute. The agency only has the authority granted to it by the state legislature. In Ecology v. Rettkowski, the Supreme Court held that Ecology lacks implied powers. Recently, in Biggers v. Bainbridge Island, the Washington Court of Appeals applied the same standard to a local government. The Biggers court invalidated the City of Bainbridge Island's moratorium on shoreline development activities exempt from permitting requirements under the Shoreline Management Act. The court noted that the City: "Exists and derives its authority in power from the State Constitution and the Legislature. 'It has neither existence nor power apart from its creator, the Legislature, except such rights as may be granted to municipal corporations by the State Constitution."32 In a similar case, the State Supreme Court recently invalidated a resolution passed by the Tacoma-Pierce County Board of Health banning smoking in all public establishments throughout Pierce County. The Supreme Court held that a health board's regulatory authority comes solely from statutory delegation. The Court ruled that a local regulation is invalid if the regulation "conflicts with a statute that "permits what is forbidden by state law or prohibits what state law permits."33
- **239-**Here, in enacting the exempt well provision, the Legislature provided an exemption from state regulation. Ecology has no authority to restrict activities which the Legislature expressly exempted from its regulatory purview and any regulation which does so is invalid. Like the City of Bainbridge Island and the Pierce County Health Board, Ecology has no authority beyond that provided by the Legislature. Here, the Legislature has provided an exemption from state regulation for small groundwater withdrawals and Ecology may not restrict activities that are otherwise are exempt from its regulatory purview.
- **240-**Ecology cannot overcome limitations on its statutory authority by enlisting the County to enforce regulations against exempt well use. The background document states that the County has a "role and responsibility in ensuring that new development has an adequate quantity of potable water."34 This statement implies that the County has some affirmative obligation under RCW 19.27.097 to determine the "legal" adequacy of water supply for building permits. This specific issue has been litigated against Skagit County in Snohomish County Superior Court. In a lawsuit brought by the Swinomish Indian Tribal Community, the court dismissed a claim that the County was violating RCW 19.27.097 by issuing building permits that rely on exempt wells after the adoption of the Skagit River Instream Flow rule. In so ruling, the court concluded that RCW 19.27.097 "imposes no affirmative obligations on the County."35 Ecology can not bootstrap onto the County's legal authority, where the Department lacks authority under state law to limit exempt well use.
- **241-**3. Ecology has no authority to regulate as between otherwise lawful water uses and water users. Ecology's Skagit instream flow rule and its proposed rule amendment are inconsistent with the Supreme Court's decision in Ecology v. Rettkowski. In that case, the Washington Supreme Court ruled that the statutory adjudication process is the sole means of determining the existence, amount and priorities of existing water rights.36 Consequently, the Court ruled that Ecology does not have independent authority to make these determinations for purposes of regulating between un-adjudicated existing rights. Determinations as to the extent, validity and priority "implicate important property rights."37 The Court reasoned that, because of the complicated nature of such inquiries and the profound effect of the determinations, the Legislature entrusted the superior courts with responsibility to determine the validity between existing water rights.38 Contrary to this limitation on Ecology's statutory authority, the proposed amendment, as described in the Preliminary Benefit-Cost Analysis, assumes that any exempt well put into use after April 2001 is "legally required to curtail use during low flows."39 This is precisely the kind of determination under the Water Code that is reserved for adjudication in superior court. Ecology cannot, by rule or otherwise, determine the priority between existing exempt wells and the instream flow rule.
- **242-**C. Ecology's authority to set instream flows does not include the authority to protect "maximum" flows for spawning and rearing habitat. Ecology's instream flow guidance document describes how Ecology will determine instream flow levels. The document describes steps Ecology and the

Washngton Department of Fish and Wildlife (WDFW) will take to determine instream flow levels. The guidance document directs agency fish scientists to estimate flows that "provide maximum spawning and rearing habitat."40 Ecology is using the methodology contained in the guidance document to establish instream flow levels for the Skagit River. As the guidance document points out, Ecology's flow setting authority arises from several sources. There is no legal authority, however, for Ecology to establish stream flows based on flow estimates that provide "maximum" spawning and rearing habitat.41 In fact, both statutes and case law suggest a narrower view. The Minimum Water Flows and Levels Act authorizes Ecology only to establish "minimum water flows" to protect fish and wildlife resources and aesthetic or recreational values.42 Similarly, the Water Resources Act authorizes Ecology to set "base flows" necessary "to provide for protection of wildlife, fish, aesthetic and other environmental values, and navigation."43 Further, in the Yakima River adjudication, the Court has described "minimum"
stream flows as the "minimum instream flow which is necessary to maintain anadromous fish life in the river."44

- **243-**Under the terms of the 1996 Memorandum of Agreement Regarding Utilization of Skagit River Basin Water Resources for Instream and Out of Stream Purposes (1996 MOA), Public Utility No. 1 of Skagit County (Skagit PUD), and the City of Anacortes funded a study by Duke Engineering and Services, Inc. to support Ecology's instream flow rulemaking. The Duke Engineering report presented a range of flow options. Ecology chose the highest flow - the flow intended to provide the maximum spawning and rearing habitat. This approach exceeds Ecology's statutory mandate and ignores Ecology's obligation to provide "sufficient water for residential, commercial and industrial need . . . [and] providing sufficient water for productive agriculture."45 We do not agree Ecology's authority to set instream flows allows the agency to establish regulatory minimum flows levels that effectively preclude the use of water for future out-of-stream uses.
- **244-**Instream flow levels should be both hydrologically achievable and scientifically defensible. In the Skagit River Basin, the only scientific report prepared to support the Skagit River instream flow rule specifically found that 830 cfs could be withdrawn from the Skagit River significantly alternating the hydrologic regime,46 without causing harm to aquatic resources. Nevertheless, the rule establishes a far lower allowable withdrawal and associates flow that,
continuously and on a year-round basis, has never been met.47
- **245-**Ecology improperly limited the scope of the amended rule by failing to include reconsideration of instream flow levels within the proposed rule amendment. There is abundant evidence to suggest that the instream flow levels were not properly set. Mean monthly flows do not meet the instream flow requirement about 20 percent of the time. In addition, mean daily flows have not continuously satisfied the instream flow requirement for twelve consecutive calendar months at any time during the period of record (63 years) at USGS Gage #13-200500, for the Skagit River near Mt. Vernon. It is arbitrary and capricious to establish minimum flows at a level which rarely occurs. The resulting flows, while desirable in terms of habitat, are not minimum flows but appear to be some sort of target or optimal flow.
- **246-**Instream flows are based on Duke Engineering and Services, Inc.'s 1999 Final Technical Report, Lower Skagit River Instream Flow Studies.48 A review of the report found that in conducting the rearing analysis, "erroneous hydrologic data were inextricably entered into at least 7 of the 10 transects."49 These erroneous entries caused: “major errors in the predicted water surface elevations at seven of the ten transects. Even in a large river like the Skagit, errors of 1.0 ft or more are unacceptable; in the DEAS rearing file, seven of the transects had errors larger than this, and three transects had errors larger than 5.0 ft. . . . As a result of these errors, the WUA rearing results reported in DEAS 1999 are incorrect. The amount of error is great enough that no conclusions on the flow habitat relationship can be drawn from the DEAS analysis.50 Errors in determining optimal rearing flows are of grave concern because rearing flows for chinook salmon and steelhead trout were used to set minimum flows for more than half the year, including all of the lowest flow periods.51

II. Ecology's Proposed Amended Skagit Instream Flow Rule is Arbitrary and Capricious.

- **247-**A. Ecology's proposed rule amendment is not supported by sound science or other substantial evidence. 1. The buildable lot assumptions in the rule are flawed. The number of estimated additional parcels at build-out used to set reservation quantities in the proposed rule amendment is inaccurate. Although these data originated from Skagit County, they were derived from criteria established during the early phases of the settlement negotiations.52 The criteria used at that time excluded many

parcels that are affected by the current rule amendment. Among the exclusions at the time the data were generated are: parcels located within 200 feet of an existing PUD transmission line parcels located outside of the Skagit River basin buildable parcels located in counties other than Skagit (i.e., Snohomish and Whatcom counties) At no time did the Department of Ecology request parcel data that would be relevant to the current proposed rule language even though the Department modified the rule criteria in a manner that would result in the inclusion of additional affected parcels. The parcel enumerating criteria that changed since the settlement negotiations include:

- expanding the boundaries of the Skagit River basin to include areas within separate saltwater drainages
- changing the mandatory hookup requirement to include all parcels located within 500 feet of any public water system pipeline
- applying reservations to basins that include land in other counties
- creating reservations for main stem segments of the Skagit River that include previously un-quantified tributaries

These changes have resulted in an overall increase in the number of potentially buildable parcels that are not accounted for in the reservation budget. In addition to these changes in criteria, it should be pointed out that the number of potentially buildable parcels is constantly changing due to the creation of new parcels during land divisions. These newly created parcels would also be excluded from Ecology's parcel count, and therefore would also be excluded
from the reservations. It is arbitrary and capricious for Ecology to impose a regulation of such profound impact without conduction (sic) a preliminary assessment of the affected parcels done for a completely different purpose.

- **248**-More troubling, the Department has not focused on the more important issue of how the rule amendment will affect future growth demand. This cannot be addressed by a one-time email exchange or telephone conversation with Skagit County staff as to the number of buildable lots in each basin. The buildable lot information was developed for settlement discussions to provide an order of magnitude for water budgets under discussions in those negotiations. These numbers cannot be legitimately taken to be the limit on future development and densities within the basins. 52 Skagit County, Map of Affected Parcels June 2004. This map does not include attached parcels in the saltwater drainages that are subject to the proposed rule amendment.
- **249**-Skagit County GIS has prepared a preliminary assessment of affected lots that far exceeds the values used in the proposed rule amendment.53 This analysis also illustrates the fundamental flaw in the assumptions used by the Department in developing the reservations. Unless Ecology is prepared to conduct a thorough review of affected parcels and development potential for those parcels, the buildable lot assumptions are not appropriate for establishing reservations for future water use.
- **250-**2. There is an insufficient basis for using 2 percent of low flows to set acceptable reservations for domestic water supply. Ecology has arbitrarily assumed that 2 percent reduction in flow is a both a surrogate for an equivalent level of habitat loss and an acceptable loss of habitat to develop a reservation for domestic water supply. Given the diversity of stream channels morphology in various tributary basins, this is an oversimplification. There is also no basis provided for using 7Q10 flow in the calculation of water available for the domestic reservation. The method is very approximate and not suitable for allocating water. These concerns are set forth in the technical reports of Geomatrix and Hardin Davis, Inc.54
- **251-**3. A 2 percent reduction in habitat on the Skagit River would yield substantially more water for a domestic and agricultural use reservation. Ecology has arbitrarily failed to state what would constitute either 2% of the 7Q10 flow or 2% of the habitat determined in the IFIM study for the proposed rule amendment. Using the weighted usual area (WUA) analysis in the Duke Engineering Report, a 2% loss of habitat in the Skagit River would amount to between 90 cfs (for rearing) and 138 cfs (for spawning).55
- **252-**4. The Ecosystem Diagnosis and Treatment Model indicates that the Skagit River and Nookachamps Creek can support substantially higher reservations. Mobrand-Jones & Stokes conducted a Ecosytem Diagnosis and Treatment (EDT) model analysis for the Skagit River and Nookachamps Creek.56 The EDT method is widely used by state and local agencies in salmon recovery planning and measuring the impacts to habitat from a various criteria including low flows. The Modrand study, prepared for Chinook only, indicates that that there would be no loss in life

history diversity, productivity and abundance at an 8% reduction in flow. The results were similar in the Nookachamps at flows between 4% and 8%. These results suggest that it is highly arbitrary for the Department to rely on limited data and over simplifications to regulate stream flows in a system as complex as the Skagit River Basin. The EDT report establishes that the 1999 IFIM study is out-of-date and needs to be revised. Ecology has not, for example addressed the increased flow that results from the Baker Dam Licensing settlement. This flow, an additional 1100 cfs in the river, is exactly the source contemplated for "filing the hole in the river" created by the 2001 rule.57

- **253**-Ecology's proposed amended Skagit instream flow rule is inconsistent with other existing and proposed agency rules, and the instream flow guidance document. Ecology's proposed rule amendment is inconsistent with the Instream Flow Guidance Document. The guidance document recognizes the need to provide water for future out-of-stream needs. The guidance document indicates that water reservations will be limited to that amount of water that can be withdrawn while causing less than one to two percent fish habitat loss during a one in ten-year low flow condition (i.e., measured at a ninety percent exceedance level).58 By contrast, the rule amendment uses the lesser of two percent or the amount of water needed for buildable lots, depending on Ecology's analysis of population growth.
- **254-**The proposed rule amendment for the Skagit River is inconsistent with Ecology's proposed Samish and Stillaguamish instream flow rules. The proposed Samish and Stillaguamish instream flow rules follow the guidance document by proposing a reservation for future out-of-stream water uses totalling (sic) about two percent of total low flow. The Skagit rule amendment only provides this amount where Ecology estimates lower growth levels. Using a habitat-based flow level in one basin and not in another invites confusion and a number of unintended consequences. There are a several other inconsistencies between the three proposals, which are highlighted in a side-by-side comparison attached to this letter and incorporated by reference.59
- **255-**C. Ecology's Skagit instream flow rule and proposed rule amendment are unenforceable. As explained above, neither Ecology nor the County can restrict the exemption from state permitting created under RCW 90.44.050. Only the Legislature can do that. Furthermore, outdoor water use restrictions are unenforceable as a practical matter in rural areas. The customers of a public water system all share the same priority date, which is the priority date of their water utility. By contrast, each rural resident with a private well has his or her own priority date. These vary on an individual basis, depending on the date each landowner establishes a water right priority date for an exempt groundwater withdrawal. This letter explains elsewhere why we do not agree with Ecology's characterization of how a priority date is established for an exempt well. It is impractical to monitor water use in the field on an individual basis, and to compare field conditions against building permit records to determine when each homeowner established a water right priority date.
- **256-**D. Ecology's proposed amended rule preempts Skagit County's land use regulatory authority. The proposed rule amendment grants Ecology authority to limit or restrict further use of the domestic supply reservation established under the rule "if existing County and city land-use decisions, including zoning changes in building permit and subdivision approvals, allow for uses inconsistent with [the Skagit instream flow rule] or for increased densities that adversely affect small tributaries and other flow sensitive areas."60 This provision allows Ecology to preempt local land-use decisions that are reserved exclusively to the Skagit County Board of Commissioners under the Growth Management Act.61
- **257-**Skagit County is concerned that there is no assurance that it can rely on the reservation for future planning and permitting. The rule amendment is silent as to how the Department will account for water use and the extent of the available reservation. We understand that Ecology staff has already concluded that none of the reservation for the Nookachamps Creek basin is available for future development. Ecology has not indicated how this determination was made or how similar determinations will be made in the future. The terms of WAC 173-503-073 would grant complete discretion to Ecology to modify or eliminate a reservation by its unilateral determination that land use decisions or building permit decisions by the County are inconsistent with the rule.
- **258-**Ecology is improperly creating a new regulatory regime where all land use and building permit decisions are subject to ultimate veto by the Department including the potential after-the-fact revocation of a reservation. The rule amendment does not provide any standard or other guidance on how Ecology proposes to evaluate whether a local decision is "consistent" with the rule. Coupled with

improper reservation by the Department of the right to modify a reservation, and thereby amend the rule without following rule making procedures, there will be no finality to land use decisions by the County. At any time, as with the rule amendment itself, the Department can declare existing water use to be unlawful. This is precisely how Ecology proposes to treat exempt wells placed in use after April 2001 and prior to adoption of the rule amendment.

- **259-**III. Ecology's Skagit Instream Flow Rule and its Proposed Rule Amendment Violate Rulemaking Procedural Requirements. Before adopting a significant legislative rule, an agency must show that the rule is, among other things: 1) supported by a cost/benefit analysis; 2) the least burdensome alternative; and 3) consistent and coordinated with other federal, state and local laws.62 A significant legislative rule is one which adopts substantive provisions of law pursuant to delegated legislative authority, or adopts or significantly amends a new regulatory program.63 A rule adopted without compliance with these procedural requirements is subject to invalidation under the Administrative Procedure Act (APA).64
- **260-**A. The benefit-cost analysis. The rule-making record must contain sufficient evidence that the benefit-cost analysis justifies the determinations made.65 Ecology failed to complete an adequate benefit-cost analysis for its 2001 rule, a fact that is recognized in the Preliminary Benefit-Cost Analysis for the proposed rule amendment. This error cannot be corrected by a new analysis without simultaneously withdrawing and reissuing the instream flow rule. The analysis for the rule amendment is also missing any consideration of the rule on public and private entities. Finally, the analysis fails to consider the need for complex regulatory oversight in portions of the basin where there is no perceived threat to instream flows from additional domestic and irrigation uses.
- **261-**Bill Bafus prepared an evaluation of probable benefits and costs for the current rule on or about February 28, 2001.66 The analysis failed to disclose that exempt wells will be interruptible under the rule. Instead, the analysis states, "water supplies for single dwellings or smaller developments may also utilize these and/or groundwater wells exempt from water right requirements under RCW 90.44.050 - again subject to section 060 of the proposed rule."67 This oblique statement was consistent with Ecology's failure to ever advise the County or public that the 2001 rule would result in an interpretation that exempt wells are interruptible or that the use of exempt wells at any time of the year would be considered unlawful by the Department. Representatives of the Ecology were asked this very question by Skagit County Commissioners as early as February 8, 2000. Ecology staff was specifically asked whether the rule would prohibit drilling wells in rural areas of the county.68 Ecology responded that this was an "unsettled area of the law."69 The Department never disclosed otherwise in its public presentations about the rule in 2000 and 2001. In a list of anticipated questions and responses for public hearings, the Department states: “The presently proposed rule does not address exempted wells...Exempted wells that are drilled after the effective date of the rule would be junior in priority to the instream flows. Ecology will continue to develop data regarding exempt wells and hydraulic continuity with the waters to be protected in the proposed instream flow regulation ... These issues will be fully addressed in the ESHB 2514 watershed planning and formal recommendations arrived through the watershed planning process.70 On October 12, 2000, Ecology presented the rule at a public meeting and represented that the groundwater exemption was not affected by the rule.71 In contrast to these public statements, Ecology was internally of the belief that the rule would cause exempt wells to be interruptible. This was discussed between staff and legal counsel on October 12, 2000.72 It was apparently the view of the Department, as reflected in an email to County staff on June 19, 2001, wherein Rod Sakrison for the first time publicly stated that exempt wells would have to cease pumping in June of each year.73
- **262-**The new benefit-cost analysis does not overcome the failure to disclose the impact of the rule on exempt well use in the prior rule-making. This omission can only be rectified to be consistent with the APA rule-making procedures by withdrawing and reissuing the original rule.
- **263-**The benefit-cost analysis for the proposed amended rule is flawed because it is premised on the assumption that Skagit County PUD can and will extend service into areas with inadequate groundwater reservations. The analysis fails to discuss the cost of such extensions, when such extensions may occur, or whether extensions will provide service to all those in need. Absent an understanding of actual water availability there can be no meaningful balancing of the costs and benefits of its regulation.
- **264-**Additionally, analysis is flawed because it lacks any assessment of the benefits derived from the rule in terms of fishery resources and recreation that would still be present without the rule

amendment. The potential impacts of exempt well use and the reservations are so small in relation to stream flow, particularly on the main stem of the river, that it is not possible to assume that the rule amendment will have any impact one way or another on the stated benefits.

B, Small business economic impact statement.

- **265**-Significant impacts from the 2001 rule and proposed rule amendment are not adequately disclosed in the Small Business Economic Impact Statement (SBEIS). In 2001, Ecology concluded that Chapter 173-503 WAC did not result in a disproportionate impact on small businesses.74 This conclusion conflicts with Ecology's Rule Development Plan Guidelines which recognized "[slmall businesses, land development and agricultural activities with pending water applications or requiring new water rights would be affected by the rule."75 At this time, Ecology further recognized that since the rule was not drafted pursuant to the 2514 process, "a small business analysis is needed."76 Internal Ecology e-mails explain this discrepancy and demonstrate that the requisite data was never provided to Ecology economists. Ecology therefore chose to forego the analysis in order to maintain their desired timeline in 2001.77
- **266-**Setting of instream flows has a significant disproportionate impact on small businesses. Ecology's instream flows are set at a level which is rarely reached. Because minimum flows are unattainable, rural small businesses which do not have access to municipal services cannot obtain an uninterruptible water supply. Rural businesses are typically smaller than their urban counterparts and much more likely to suffer than their larger urban counterparts who have access to municipal supplies. Furthermore, inadequate sizing of the proposed reservation ensures that not all rural businesses will have access to uninterruptible sources of water. The proposed rule amendment SBEIS fails to adequately discuss these impacts and the direct impacts on industry and professions such as well drillers.
- **267-**The SBEIS for the proposed amendment rule ignores the fact that the quantity of water reserved in many sub-basins is inadequate to meet expected needs. Since exempt wells are the only available source of water for many rural businesses, small rural businesses bear a disproportionate impact. While some of the latent demand may be addressed by extension of municipal services into rural and suburban sub-basins, there is no discussion of where extensions are planned, when such service will be made available, or how costly such services may be. In the absence of such information, it is impossible to conclude that no disproportionate impact will befall small businesses.

C. Least burdensome alternative analysis.

- **268-**Ecology's least burdensome alternative analysis is less than a page in length.78 The analysis is limited to creation of the proposed reservation, ignoring the impact of establishing minimum flows and closures. As noted above, this is inappropriate because the proposed amendments are in part responsive to inadequate analysis for the initial rule. To proceed using the initial rule as a baseline guarantees that neither the initial rule nor the entire rule package will ever undergo a complete analysis.
- **269-**An adequate least burdensome alternative analysis must consider the goals of the regulatory program - to provide water for instream and out-of-stream uses - to evaluate whether the instream flows, closures, and proposed reservation are the most efficient means of reaching those ends. In doing so, an adequate analysis must consider a reasonable range of alternatives to reaching that end. It is impossible to evaluate what may constitute an appropriate range of alternatives when plans for municipal water service are unknown or undisclosed.
- **270**-As an initial matter, the primary statement in the analysis regarding Nookachamps Creek is contrary to representations of Ecology staff at public meetings. The analysis states that the Department considered closing the Nookachamps basin, but determined that it would allow additional withdrawals. On March 8, 2005, Dan Swenson stated at the public hearing in Darrington, Washington that the reservation for the Nookachamps was already committed to development in the basin since April 2001 and would not be available to any future development. Ecology needs to be clear in the Nookachamps and in any other basin where its staff, who presumably will be determining the extent of available reservations in the basins, believe that the proposed reservations are not in fact available for future use.
- **271-**The least burdensome analysis that accompanies the proposed rule amendment fails to assess the basic need for the rule in portions of the basin where there is more than enough water available. In the mainstem of the river, for example, the Department has relied on very incomplete data to derive

the number of buildable lots and afforded each lot an allocation under the reservation. The Department has not, however, calculated the critical flow or acceptable loss of habitat as it has done in the tributary basins. Had Ecology done so, it would be clear that the amount of water available for out of stream uses far exceeds potential demand. If this is true, then there is no need for a reservation or closure of the mainstem basin to exempt well or additional irrigation use.

- **272-**The least burdensome analysis should consider the exception for exempt wells contained in the June 1, 1999, draft of the 2001 rule79 or the Final Draft Rule-Preferred Alternative, dated February 17, 2000.80 Both versions of the rule allowed an exception for exempt wells as long as the wells would not adversely impact stream flows and there is no access to public water supply. The benefit-cost analysis should explain why this alternative does not work for the Skagit River Basin.
- **273-**The least burdensome analysis should consider the reservations proposed in the November 20, 2004, draft of the proposed rule amendment and why lower reservations amounts were proposed in the draft rule amendment published for public comment.81 The Department has not consulted with Skagit County as required under RCW 19.27.097 to justify a conclusion, as represented in the analysis, that water budgets and mitigation programs are unduly expensive and administratively complex. This statement is at complete odds with new provisions in the rule supporting alternative sources of water and establishing a trust water rights program for the Skagit River.82 The burden of administrating this program should be weighed against the burden of the rule on the people of Skagit County.
- **274-**Finally, the least burdensome analysis should consider the March 2004 Skagit Basin Water Supply Memorandum of Agreement signed by Skagit County and the Upper Skagit Indian Tribe.83 Ecology needs to consider the approach to water supply budgeting in tributary basins in this agreement because the buildable lot assumptions used in the amendment are arbitrary and capricious.
- **275-**D. Coordination with federal, state and local laws. 1. Growth Management Act and Comprehensive Plan. Ecology concluded without analysis that the proposal "does not conflict with any local, state, or federal laws or requirements for the protection of the environment."84 However, as the DNS notes, "rural areas are . . . otherwise generally dependant on individual wells and septic tanks."85 There is insufficient water in the proposed reservation to satisfy the needs of all currently available parcels within Skagit County. The effect of the proposed rule is to encourage public water system expansion into rural areas. Ecology, however, admits that expansion of public water systems to rural areas "may create conflicts with the Growth Management Act if the areas proposed for water supply extension are not within an urban growth area. The extended availability of public water supplies may create pressures to develop or redevelop affected areas at higher density."86 Few, if any, of the areas most affected by inadequate reservations are within the urban growth area.
- **276-**Requiring expansion of public water systems to rural areas "may [also] require revisions to local comprehensive land use plans and/or update of the water system plan of the participating public water system."87 Ecology recognizes similar dangers associated with establishing instream flows. “Establishing instream flows may limit the potential for obtaining new water rights from an affected water body. In such cases, the lack of available water may limit or alter the nature of new development. Where water supplies cannot be obtained from another source or 'created' through water use efficiency measures, comprehensive land use plans may need to be amended. . . . Local governments may need to modify their comprehensive land use plans if establishment of an instream flow adversely impacts the projections water resource availability upon which such plans are predicated.”88
- **277-**Ecology also previously acknowledged that "[I]f water supply becomes limited, people may make different decisions on where to work, live, and farm than they would make where the water supply is not limited."89 Ecology has not considered how instream flows, closures, or the small proposed groundwater reservation may impact development throughout the Skagit River Basin, or whether changes in growth patterns will comport with Growth Management Act planning or requirements. The importance of such considerations is apparent in light of projections that Skagit County's population may more than triple between 2000 and 2050.90
- **278-**Housing needs cannot be met absent guarantees of adequate potable water supplies. Skagit County believes that limiting water availability in many rural sub-basins will drastically alter development patterns and may necessitate systematic re-zoning. Changing the assumptions upon

which Skagit County and major water purveyors planned will similarly significantly impact planning efforts and necessitate wide ranging amendments to water system planning.

The Skagit County Comprehensive Plan utilizes low land-use densities to prevent urban development outside of the Urban Growth Area.91 Requiring development of public water systems and limiting rural development could encourages unplanned growth in urban areas and urban sprawl into areas outside the UGA. Of particular concern is how the amended rule, by not addressing agricultural water use, will promote the conversion of agricultural lands. None of these issues are adequately discussed or considered in the current rule-making.

The Comprehensive Plan recognizes that numerous considerations, including potential conflicts between groundwater development and instream resources, may necessitate development of public water systems in rural areas.92 Accordingly, the Plan sets up a process for resolving such conflicts, calling for a coordinated approach to water system development. This coordinated approach is reflected in the Coordinated Water System Plan and the Comprehensive Plan (CWSP) and ensures that as water system planning continues, governments consider the potential impact service extensions will have on development patterns.93 The proposed rule amendment is counter to this coordinated approach and effectively demands revision to the County's CWSP.

- **279-**3. Conflicts with Skagit County Critical Areas Ordinance. Skagit County's Critical Areas Ordinance (CAO) regulates impacts to critical areas including wetlands and wetland buffers, fisheries habitat and geologic hazards. The amended rule fails to recognize potential conflicts which may arise where public water service extension under the amended rule will result in disturbance to critical areas which could be avoided by well development.
- **280-**4. Ecology's failure to consult with Skagit County on its Skagit instream flow rule and proposed rule amendment violate the State Building Code. As reflected in the background document, Ecology is directing Skagit County to assume additional responsibilities under RCW 19.27.097. The statute allows Ecology to adopt such regulations, but only after consulting with affected local governments.94 Ecology never consulted with the County to determine how the proposed amended rule would impact county planning or the provision of services in rural areas.
- **281-**E. The Skagit instream flow rule and proposed rule amendment violate the State Environmental Policy Act. Skagit County's comments on Ecology's SEPA review of the proposed amended rule are provided in a separate letter, a copy of which is attached hereto as Attachment C and hereby incorporated by reference. In summary, Ecology failed to undertake the requisite hard look at the localized, regional, or cumulative effects. Because of significant effects, Ecology must prepare an Environmental Impact Statement for the proposed amended rule in order to comply with SEPA.
- **282-**Conclusion: Ecology's proposed Skagit Instream Flow Rule amendment - and the existing rule -- ignores the agency's broader legislative mandate to balance instream and out-of-stream needs. The proposed rule falls short of this objective. Instead, the agency is short-changing rural residents by ignoring their current and future needs for water. Ecology's Skagit Instream Flow Rule imposes an institutional aridity on rural Skagit County and unnecessarily restricts the amount of water available.95 This direction is not supported by the law, nor is it responsible public policy.
- **283-**Ecology's current strategy to adopt instream flow rules will undermine Skagit County's efforts to comply with the Growth Management Act and other provisions of law relating to water availability. The County also is concerned about the fairness and enforceability of the proposed rule. Skagit County will shoulder much of the burden for enforcement of the rule, without having had an opportunity to consult with Ecology on how the rules will be implemented. Skagit County would like to see the rule amendment substantially revised. We hope you will take these comments in mind and follow our recommendations. We look forward to working with you and other state agencies and interested parties to develop effective, responsible regulations to protect Skagit County's aquatic resources.

Attachment A -- Section by Section Comments -- Skagit County submits for the record the following section-by-section comments on the proposed Skagit Instream Flow Rule Amendment:

WAC 173-503-010 - General Provision:

- **284-**Nothing in Ecology's record shows that flows in saltwater drainages between the Samish River and Skagit River basins affect flows in the Skagit River. Nevertheless, Ecology's existing instream flow rule applies to these areas. Inexplicably, the proposed rule amendment leaves this provision

unchanged.' Furthermore, the current rule language only excludes some saltwater islands in WRIA 3 from the rule. A strict reading of this section would make withdrawals from some saltwater islands (e,g., Sinclair Island) commencing after the effective date of the rule subject to interruption unless the project proponent funds a study to show that these withdrawals are *not* in continuity with the Skagit River. Restricting the rule applicability to the Skagit River basin would remove this unnecessary requirement.

- **285-**On August 13, 2004, the Governor's Water Policy Advisor Committee circulated a "strawman" proposal for the parties to consider. The strawman proposal proposed to define the Skagit Basin (and the proposed rule coverage) as "the area drained by the Skagit River and its tributaries." Nevertheless, in its proposed amended rule the department neglected to apply this definition.

WAC 173-503-020 – Purpose:

- **286-**Ecology's approach of including language from other sections of the RCW in the purpose section is uniquely applied to the proposed amended Skagit River rule. Reiterating existing statutory obligations adds nothing to the rule, potentially confusing and complicating implementation. The rule could be simplified, without adverse effect to the goals of implementing a fair and effective program to protect instream and out-of-stream resources by adopting the more succinct approach similar to the approach contained in the proposed Samish and Stillaguamish rules.[1] [1]Ecology staff argues that these areas are included under the proposed rule amendment not because of their hydraulic continuity with the Skagit River but because they were included in the original rule and the Agency decided not to include an amendment to this section within the rule amendment. This rationale exalts form over substance and shouldn't be the basis for compounding an earlier error.
- **287**-Subsection 020 concludes that the proposed reservation is "adequate." This is not true given that the water contained in the proposed reservation is insufficient to supply existing developable parcels. Furthermore, the making of legislative findings are beyond Ecology's delegated authority.

WAC 173-503425 – Definitions:

- **288-**The definition of "appropriation" provides the basis for Ecology to subject *exempt* groundwater withdrawals to stream closures under WAC 173-503-051. Whether stream closures are applicable to exempt groundwater withdrawals is an unsettled question of law.
- **289-**The definition of "domestic water use" states that "outdoor watering shall be limited to an area not to exceed a total of 1/12 of an acre, or 13,6303 square feet, for all outdoor uses for each individual domestic water use." Water for up to one-half acre of noncommercial lawn or garden, and commercial and industrial uses, are exempt by the provisions of RCW 90.44.050.2 The proposed definition excludes all use of water for commercial or industrial purposes except for human consumption thus restricting uses expressly exempted from state regulation. Ecology lacks the authority to restrict ground water withdrawals that otherwise qualify for exemption from state regulation under RCW 90.44.050.3 Moreover, prohibiting all commercial and industria1 uses in rural parts of Skagit County where alternative sources of supply are unavailable not only conflicts with existing planning efforts, but interferes with the provision of basic services in rural areas.
- **290-**The proposed definition for the term "Instream flow" attempts to consolidate a number of statutory definitions using the phrase "base flow" or "minimum flow." The Washington Supreme Court repeatedly has interpreted the water code such that the court interprets different words to have different meanings..' The various *statutory* terms included within this definition may have different meanings, and it is wrong for Ecology to assume they do not. The definition of "'mitigation plan" in the proposed Skagit and Stillaguamish rules contains a qualitative component that is absent from the Samish River rule. Expanding this definition reflects a change in Ecology policy and may also create a conflict with hydropower licensing and operation.

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2 Kim 115 WE. App. 157,61 P.3d 1211 (2003).

3 *5,* Entertainment Industrv Coalition v. Tacoma-Pierce Counhr Health Dept., - Wn.2d. 105 P.3d *985,938* (2005) *ciling* Parkland Lipht & Water *Co.* v. Tacoma-Pierce *Counh, 151* WnWn. 2d 428,433,90 Wn. 2d 37 (2004); Rettkowski v. Ecoloa, 122 Wn. 2d 219, 226, 858 P. 2d 232 (1993); Bip;gers - v. gainbridge Island, - Wn. Apy. -103 P. 2d 244,247 (2004).

4 See e-g., Pend Oreille Pub. Utilitv Dist. v. Eco1oe;v , 146 Wn. 2d 778, 797, 51 P.3d 744 (2002).

- **1419**-"Nonconsumptive use" includes reference to water quality. This is a new and unique approach to defining nonconsumptive uses. Ecology is inconsistent in its application of this approach k a u s e water quality is not a component of the definition contained in the proposed Samish River rule. Ecology should assume, absent information to the contrary, that exempt wells are in compliance with all applicable health department requirements. Under the proposed definition, few if any water uses would be nonconsumptive. Specifically the definition excludes hydropower, which traditionally is treated as nonconsumptive.
- **1420**-The definition of "Permit exempt" well is misleading. Several sections of the groundwater code in addition to an exemption from permitting requirements are inapplicable to exempt wells. RCW 90.44.070 requires Ecology to deny any permit application where the withdrawal would *exceed* the capacity of the aquifer to reasonably yield water, or where the withdrawal would unreasonably interfere with artesian we11 pressure. Since no permit is required for wells exempted under RCW 90.44.050, Ecology cannot re1 *y* on RCW 90.44.070 to limit exempt wells development where ground water mining is occurring.
- **1421**-RCW 90.44.100(1) allows water users to apply for a change in their permitted or certificated point of withdrawal or use without loosing their priority date. Change applications are not available for exempt wells because exempt wells are appurtenant to the land; if an exempt well water right was moved to a new location, the owner of the transferring parcel would retain the legal *right* to drill another exempt well. The result would be creation of a new water right rather than the transfer of an existing right.5 Since an exempt well user is unlikely to obtain a permitted or certificated right, they are likely unable to benefit from such a change.
- **1422**-RCW 90.44.110 contains a prohibition against waste. The final paragraph authorizes Ecology to, "in the issuance of an original permit, or an amendment to an original permit or certificate of vested rights to . . . specify for the proposed well or wells or other works a manner of construction adequate to accomplish the provisions of this section." RCW 90.44.1 *10's* authority to specify the manner of construction dues not extend to exempt wells.
- **1423**-Paragraph four of RCW 90.44.130 designates the priority date for permitted or certificated withdrawals. It does not address the priority date for exempt wells.
- **1424**-Under RCW 90.44.445, only certificated water right holders may participate in acreage expansion programs.
- **1425**-RCW 90.44.450 allows the Department to require metering of withdrawals as a condition of a new permit. This section does not authorize Ecology to require metering of withdrawals from exempt wells. Additionally, the Legislature specifically exempted certain small wells from portions of the groundwater code; Ecology lacks authority to restrict the commensurate legislatively-created rights.
- **291-**"Timely and reasonable" under the proposed amended rule means the ability to provide service within 120 days and which requires a line extension of no more than 500 feet. The definition grants Ecology the discretion to declare connection unreasonable if connection cannot be provided for less than twice the cost of an individual alternative source. First, there is no requirement that Ecology will exercise this discretion.
- **292-**Second, the 120-day period does not begin to run until the purveyor's written approval of a request for service; this leaves an applicant at the purveyor’s mercy. The definition should include a provision allowing exempt well development to proceed where the purveyor fails to make service available in a timely and reasonable manner.
  The Coordinated Water System Plan (CWSP) contains detailed utility service review procedures, including procedures applicable when a utility is unwilling to provide sewice.6 No such provision is contained in the amended rule. Ecology failed to recognize conflicts between the definition of "timely and reasonable" contained in the proposed amended rule and the CWSP.
- **293-**The County and public water purveyors planned for expansion of water systems into rural areas.7 These plans focused on in-fill and provision of services in Urban Growth Areas, cautioning that "[a]s the land use and WSPs for the rural area are further developed, the routing of water system distribution and transmission lines through previously unsewered areas should consider their potential impact on development patterns."8 Ecology ignores this caution, necessitating provision of service to high demand areas rather than comprehensive growth planning.

- **294-**The amended rule creates a conflict with the CAO which could be avoided if the amended rule allowed well development in areas where public water service is available when well development reflects the least damaging practicable alternative. Third, the CAO protects fish and wildlife habitat conservation areas, together with a 200 foot buffer around such areas.9 The amended rule fails to recognize conflicts which may arise where "timely and reasonable" service extension under the amended rule will result in disturbance to habitat conservation areas that otherwise could be avoided by limited exempt well development. The CAO also protects against injury from development within 200 feet of geologic hasards.10 The amended rule would effectively require an applicant to connect to an existing public water supply even if doing so would require potentially destabilizing construction or excavation in these critical and sensitive areas.
- **295-**Next, in the definition of "timely and reasonable manner", Ecology bases its mandatory hookup requirement on the distance of a project from the location of "the purveyor's water pipeline", but later states that the Ecology may determine that cost of connection is unreasonable based on the cost to connect to "an appropriate public water system." The terms "purveyor" and "appropriate public water system" are not adequately defined, such that it is impossible to assess when a connection would be timely and reasonable. Ecology should provide clear definitions of these terms.
- **296-**Finally, the proposed definition of "withdrawal" differs sharply from the definitions contained in the proposed Samish and Stillaguamish rules. If, under the proposed definition, "physical movement" refers to the water's natural motion rather than a physical action inducing that movement, a universe of heretofore unimagined natural processes fall within the scope of "withdrawal." There is no reason to depart from a well-recognized definition and create ambiguity by adopting the proposed change.

297-WAC 173-503-040 - Establishment of Instream Flows:

- The proposed amended Skagit River rule is unique among Ecology's recently proposed instream flow rules to expressly address treatment of pending applications. The proposed amended rule incorrectly states that the priority date for exempt wells coincides with the date upon which a well is first put to beneficial use. This ignores that under the relation back doctrine, the priority date obtained by a water user who diligently develops a water right relates back to the date upon which the user first took steps to develop the right.11
- **298-**Mean monthly flows do not meet the instream flow requirement about 20 percent of the time. In addition, mean daily flows have not continuously satisfied the instream flow requirement for twelve consecutive calendar months at any time during the period of record (63 years) at USGS Gage #I 2-200500, for the Skagit River near Mt. Vernon. It is arbitrary and capricious to establish minimum flows at a level which rarely occurs. The resulting flows, while desirable in terms of habitat, are not minimum flows but appear to be some sort of target or optimal flow.
- **299-**Instream flows are based on an IFIM study prepared by Duke Engineering and Services, which has since been found to contain major errors undermining the rearing habitat analysis upon which instream flows are set.
- **300**-In addition, the flows used at the Skagit River gage (instream flow control point) are regulated flows based on releases from upstream reservoirs. The analysis did not consider the entire watershed but assumed the flows at the control point were natural flows. In light of these errors, Ecology would be remiss if it maintains the existing rule without reevaluating the flawed science upon which it is based.
- **301**-In addition, the Duke report also states, "*nearly all of the spawning in the lower mainstem of the Skagit River takes place just below the Highway 9 bridge . . .* " yet the current rule language conditions withdrawals throughout the Skagit basin, including those from areas located downstream of these spawning areas, on flow levels that are intended to protect spawning. These flow restrictions do not appear to be warranted. Subsequently, flow restrictions for the protection of spawning habitat *(i.e.,* those set for the months of April, May, June, October, and November, and for December 2-15) should not apply to withdrawals occurring downstream o€ the spawning areas identified in the Duke report.

WAC 173-503-050 - Water Availability Determination

- **302**-Subsection 050(2) recognizes that "two hundred cubic feet per second is available to be appropriated through ground water withdrawal or surface water diversion." The Duke Engineering Report concluded that total withdrawals of up to ten percent of the 50 percent exceedance flow would not significantly alter the historic hydrologic regime. Ten percent of the 50 percent exceedance flow in

September, the month with the lowest historic flows, is 830 cfs. This implies that additional allocations of less than 830 cfs would be protective of instream resources during a low flow period. When all existing rights and claims have been considered, 253 cfs remains available for appropriation.12 To ignore this analysis and without justification declare that only 200 cfs is available for appropriation, and then to allocate less than one percent of the available flows to uninterruptible domestic supplies is arbitrary and capricious.

- **303**-The 1.657 cfs contained in the proposed domestic reservation represents a small fraction of recognized needs and the amount of water which can be withdrawn without harming instream flow resources. In light of these findings and the fact that the quantity of water reserved in the proposed reservation is insufficient to meet anticipated demands, Ecology should increase the amount of water contained in the proposed domestic reservations.
- **304**-Moreover, Ecology's position contradicts its decision to make additional allocations subject to the IFIM instream flow levels. If additional withdrawals must be curtailed when flows drop below 10,000 cfs, why limit additional withdrawals to 830 cfs, since that number is meant to be protective of a flow rate of 8,300 cfs. Using the instream flow committee's ten percent criterion, the maximum interruptible allocation should be 1,000 cfs for September, since that would be ten percent of the 10,000 cfs flow, which is the minimum flow for September when use of these allocations would be allowed.
- **305**-Furthermore, why are additional withdrawals not available for up to ten percent of each month's 50 percent exceedance flow, since that would provide the same level of protection for each month? On page 18 of Ecology's Supplemental Environmental Analysis (SEA), Ecology states, "to retain instream 90% of the mean monthly flow and limit allowable withdrawal rights to the 10% biologically acceptable withdrawal quantity.. ." when discussing the instream flow committee's total allowable withdrawal limit. Later in the same section of the SEA, Ecology inexplicably sets maximum withdrawals during all months where the estuary limits are not in effect to the limit for the low-flow month of September (830 cfs), rather than using the instream flow committee's recommended out-of-stream allocation of 10% of mean monthly flow for each month (which range from 830 cfs to 1,610 cfs).
- **306**-The proposed amended rule is arbitrary and capricious because Ecology ignored the policies contained in its Instream Flow Guidance Document. The guidance document reflects a policy of setting reservation levels to an amount which will result in a one to two percent reduction in available habitat during low flow periods because Ecology and WDFW determined that such reductions will not adversely effect fish populations. This policy is set forth in Appendix A of the guidance document. The reservation for the lower, middle, and upper Skagit River subbasins are not based on these biological considerations, but are instead based on Ecology's misrepresentation of data showing the number of currently zoned building lots within the sub-basin. The proposed amended rule is therefore in conflict with Ecology's recently issued policy statements.

WAC 173-503-051 - Stream Closures

- **307**-The December 20, 2004 iteration of the proposed amended rule closed the Big Lake, Lake McMurray, Carpenter Creek, Fisher Creek, and Upper and Lower Nookachamps basins. The latest version closes many more tributary basins. Ecology should explain what information it relied on in making its December 20, 2004 determination and what changed to necessitate such a dramatic increase in closures.
- **308**-**WAC 173-503-060 - Future Permitting Actions:** The effects of this section depend heavily on the definition of "timely and reasonable." The problems with this definition explained above severely compromise this section.
- **309**-**WAC 173-503-073 - Domestic Ground Water Reservation:** Subsection 073(1) describes the proposed reservation as "adequate." However, the proposed reservation is inadequately sized to meet either existing or anticipated demand. Many of the subbasins lack sufficient supply to serve all available lots and the reservation proposed in the Fisher' Creek subbasin is insufficient to accommodate exempt well development which has occurred since April 15, 2001, the effective date of the existing instream flow rule. The primary purpose for amending the rule is to respond to statutory obligations to ensure adequate water is available for out-of-stream uses. By failing to adequately address existing needs the proposed reservation fails to meet its essential purpose.
  Projections indicate that approximately 100 cfs of uninterruptible flows are needed to accommodate County-wide demand over the next 50 years. This is within range of variability for existing stream

measuring devices and half the water which was previously determined to be available for appropriation in the Skagit River Basin.

- **310**-Subsection 073(2)(d)(i) dictates that the reservation is available only in areas where local governments enact requirements identical to those contained in the proposed amended rule. Ecology lacks authority to demand that municipalities enact ordinances or other regulations; any action exceeding Ecology's delegated authority is invalid.
- **311**-Subsection 073(2)(d)(iii) prohibits the use of interruptible withdrawals for domestic supply purposes in subbasins that are not closed. It is possible to construct a domestic water system that could make use of interruptible rights, and could rely on storage during low flow periods. This approach is currently being pursued by the Skagit PUD and could also be used for smaller systems. Ecology certainly acknowledges this possibility in both the Small Business Economic Impact Statement and the ' Preliminary Benefit-Cost & Least Burdensome Analysis where, in fact, the Department makes the case that the avoidance of the costs of these systems is the primary economic benefit of their rule amendment proposal. Since Ecology has concluded that use of interruptible withdrawals in mainstem areas would not harm aquatic resources, there does not appear to be a basis to prohibit their use. Subsequently, the restrictions on the use of interruptible withdrawals for domestic supply purposes in subbasins that have not been closed should be removed from the rule.
- **312**-Subsection 073(2)(f) limits outdoor water use to 1/12th of an acre. This conflicts with statutorily provided rights contained in RCW 90.44.050. Agency rules that interfere with legislatively-provided rights are invalid.
- **313**-In subsection 073(5), Ecology claims broad authority to further limit or restrict access to the reservation if counties increase densities, approve building permits or enact zoning changes which conflict with the purpose of this chapter. Because the proposed domestic reservations are insufficient to meet existing and anticipated demand, counties must revise their land use plans to allow the transfer of density into areas where more water is available. Ecology is in effect requiring wholesale zoning revisions while reserving absolute veto authority over the decisions it mandates. This exceeds Ecology's delegated authority.
- **314**-In subsection 073(6)(b), Ecology claims discretion to assume domestic use of 350 gpd per residence or business. Ecology also claims discretion to adjust water use down to 175 gpd if the residence or business is served by on-site septic service. First, the implicit assumption that use of on-site septic and drainfield systems are 50 percent consumptive is contrary to existing literature which places the level of return flows much higher.
- **315**-Second, there is no guarantee that Ecology will apply either assumption, leaving landowners and Skagit County with the possibility that the rules of the game may change at any time.
- **316**-In section 073(2)(e), Ecology states that the reservation in unavailable in areas served by public water systems. "Public water system" under the proposed amended rule includes group-domestic systems. Ecology should clarify whether they intend for new development to tie into existing group-domestic systems served by exempt wells. This assumption is inconsistent with Ecology's Instream Flow Guidance Document. First, Ecology's proposed rule amendment is inconsistent with the Instream Flow Guidance Document. The guidance document recognizes the need to provide water for future out-of-stream needs. The guidance document indicates that water reservations will be limited *to* that amount of water that can be withdrawn while causing less than one to two percent fish habitat loss during a one in ten-year low flow condition (i.e., measured at a ninety percent exceedence level).13 By contrast, the Skagit rule uses the lesser of two percent or the amount of water needed for future growth, depending on ecology's analysis of population growth.
- **317**-Ecology's proposed rule amendment is inconsistent with Ecology's proposed Samish and Stillaguamish instream flow rules. The proposed Samish and Stillaguamish instream flow rules follow the guidance document by proposing a reservation for future out-of-stream water uses totally about two percent of total low flow. The Skagit rule amendment only provides this amount where Ecology estimates lower growth levels. Using a habitat-based flow level in one basin and not in another invites confusion and a number of unintended consequences. There are a several other inconsistencies between the three proposals, which are highlighted in a side-by-side comparison attached to this letter and incorporated by reference.
- **318**-Ecology's proposed rule amendment is inconsistent with the Ecology/State Health Department Water Availability Guidance Document. Under the guidelines document, and individual water supply

may be considered adequate for purposes of RCW 19.27.097 only if the water source is capable of providing water to a residential dwelling in the amount of 400 gallons per day. Ecology's proposed amended instream flow rule ignores the water availability guidance document.

- **319**-Ecology's proposed rule amendment is inconsistent with the State Health Department Water System Design Manual. Skagit County believes the State Health Department's Water System Design Manual accurately reflects the amount of water needed for rural residential purposes. According to the Design Manual, "…utility records throughout the state indicate a significant increase in maximum day demands for lot sizes in excess of one acre. It would be appropriate, unless evidence is presented which indicates a better design premise, to use **a maximum day demand (MDD) of 800 gpd/ERU for residential lots in excess of one acre . ."**15
- **320**-Ecology's proposed rule amendment is inconsistent with Ecology's Irrigation Efficiency Guidance Document. Ecology's proposed rule amendment includes a proposal that credits water withdrawals for return flows. The document assumes no return flows where a home is connected to public sewer system, even though the rule amendment allows for irrigation of 1/12 of an acre for each residence, and 50 percent return flow where no public sewer service is provided. Available studies indicate that only ten to 15 percent of all water used indoors for domestic supply purposes actually is consumed. Therefore, for indoor domestic supply purposes where no public sewer service is available, return flows should be estimated at a much higher level than Ecology proposes.
- **321**-Furthermore, Ecology recently published a guidance document explaining its policy for determining irrigation efficiency and consumptive use. The irrigation efficiency guidance document explains how consumptive uses are calculated for irrigation purposes. This document should be used by Ecology to estimate return flows under the Skagit instream flow rule amendment. Ecology should use its irrigation efficiency and consumptive use guidance document when determining return flows for outdoor use.
- **322**-The amended rule proposal provides up to 50 percent "credit" for return flows were on-site septic systems are used. We agree return flow credit is inappropriate where wastewater treatment systems "export" water out of eight subbasin. Otherwise, we fail to see a relevant distinction based on whether wastewater is treated on site or otherwise.
- **323**-Finally, Eco1ogy's proposed amended rule is inconsistent with the agency's regulations fur establishing a water reservation.l6 The Water Resources Act allows Ecology to "reserve and set aside public water for utilization for specific purposes in the future."17 Eco1ogy"s regulations set forth the procedures to be followed and the requirements for petitioning for a reservation of water. Ecology regulations require that petitions for reservation of water must be based on 50-year population and related water demand projections. Ecology failed to consider long-range population projections when determining the amount of water to be reserved under the proposed reservation.

WAC 173-503-074 - Establishment of Subbasin Management Units and Reservation Quantities by Subbasin Management Unit:

- **324**-Some proposed reservations contain insufficient water to meet the needs of wells developed after April 15, 2001, the effective date of the Skagit instream flow rule. Where "reserved" water wil1 be used to accommodate existing residences, it is inappropriate to characterize these subbasins as open.
- **325**-The amount of water contained in the proposed reservations is generally insufficient to accommodate existing lots or recognized demand for additional housing units. In undersizing the proposed reservations, Ecology ignores its obligations to provide safe and adequate water supplies.
- **326**-In its instream flow guidance document Ecology advocates a flow-based approach to sizing groundwater reservations. However, in sizing the proposed reservation for the Lower, Middle and Upper Skagit sub basins, Ecology arbitrarily departed from this approach by focusing on the number of buildable lots. By undersizing the proposed reservations in these sub basins, Ecology severely restricts Skagit County's ability to accommodate increased growth in areas where water is available.
- **327**-Furthermore, on August 13, 2004, the Governor's Water Policy Advisor circulated a "strawman" proposal for the parties to consider. In the strawman proposal, limits on domestic withdrawals were only established for major tributary basins. Withdrawals from areas not in "capped" tributaries - specifically, withdrawals from wells located near the mainstem Skagit and Sauk rivers - were not limited, on the basis that these large rivers are not sensitive to the domestic withdrawal quantities that

are likely to occur in these areas. Nevertheless, in its rule amendment proposal, the department sets limits on withdrawals from these mainstem basin areas.

- **328**-The approach to reservation sizing advocated by Ecology in the Guidance document is to limit reservations to an amount which will result in no more than a one to two percent loss in habitat during low-flow periods. The one to two percent figure represents an amount that biologists concluded would not significantly impact the long-term sustainability of fish populations. There is no hard science supporting the one to two percent assumption, nor is there any science supporting a choice of where, within that range, Ecology chooses to set the reservation - both are the exclusive province of "best professional judgment."

WAC 173-503-075 - Stock Watering Reservation

- **329**-Under section 075, Ecology purports to exempt changes in the place of use from the normal change application requirements. There is no statutory basis for such authority and to create a category of changes which are exempted from review could result in injury to other water users. The stock watering reservation contained in the proposed amended rule allows for withdrawal of up to 130,000 gpd from surface or groundwater. Unlike the domestic reservation, the stock watering reservation does not distribute withdrawals to avoid potentially significant localized impacts. If withdrawals from the stockwatering reservation are confined to a small area, they could result in a potentially significant impact to localized resources.
- **330**-Agriculture is tremendously important to Skagit County - both economically and culturally. Agriculture is anticipated to expand over the planning horizon and uninterruptible supplies should be preserved to protect the communities which depend upon agriculture for their livelihood and lifestyle. It is insufficient, as the background document promises, to leave agricultural issues to a later date. Moreover, it is unclear why the proposed stockwatering reservation for the Skagit River is significantly smaller, as a percentage of available flows, than the reservations proposed for either the Samish or Stillaguamish rivers.

WAC 173-503-081 -Future Changes and Transfers

- **331**-Under section 081, change applications will only be approved if they are consistent with this chapter. This provision should be revised to indicate that continuity with ch, 173-503 WAC applies in addition to the requirements for change listed at RCW 90.03.250 - 340 and do not replace those requirements.

WAC 173-503-090 – Compliance and Enforcement

- **332**-The proposed amended rule is not enforceable. Neither Ecology nor Skagit County can restrict actions which the Legislature has statutorily exempted from regulations. The rule would require Skagit County to impose building permit conditions, but is unclear who will enforce those conditions.

WAC 173-503-100 – Alternative Sources of Water

- **333-**Subsection 100 conflicts with subsection 030's finding that 200 cfs is available for future use.

WAC 173-503-110 – Establishment of Trust Water Rights Program

- **334**-Ecology is authorized under 90.42 RCW to manage the state trust water program. It is not clear whether or how the proposed trust water rights program for the Skagit River basin would differ form the Trust Water Program already authorized under Ch. 90,42. RCW. Under subsection 110(2), Ecology reserves the power to determine how water will be allocated between future instream and out-of-stream uses without providing any discussion of how this determination will be made. This leaves Skagit County and its residents in the unenviable position of having to guess how this program may affect their planning and growth management decisions.

WAC 173-503-140- Regulation Review

- **335**-The proposed Samish River and Stillaguamish River rules allows Ecology to initiate a review of the rule if significant new information becomes available or if a significant change in conditions occurs. The proposed amended Skagit River rule allows Ecology to review the rule any time conditions change, regardless of whether the change is significant in nature. The test for rule modification should apply consistently across all WRIAs.

WAC 173-503-150- Water Rights Subject to Instream Flows Predating the Reservation.

- **336**-Subsection 150 states that parties who have "commenced" water rights subsequent to the effective date of the existing instream flow rule but prior to creation of the domestic reservation may apply to participate in the reservation, thereby exempting them from interruption. The meaning of "commenced" is ambiguous, but Ecology's instream flow guidance document indicates that the

department considers the "priority date associated with a permit-exempt ground water right is the date of first beneficial water use, which in the case of domestic use for new residence would typically be the date of occupancy of the residence." This is incorrect because the priority date relates back to the date the first step was taken to perfect the water right. Dan Swenson stated at the March 8, 2005 public meeting in Darrington that Ecology intends to treat all exempt well withdrawals initiated subsequent to the effective date of the existing instream flow rule but prior to creation of the domestic reservation as withdrawals from the reservation. Discrepancies between Ecology's representations and the plain language must be resolved.

- **337**-Second, the domestic reservation proposed for some subbasins are inadequate in size to guarantee an uninterrupted supply of water to all existing residents. The proposed amended rule, by failing to ensure an adequate, uninterruptible supply of water to all existing residents fails of its essential purpose. The domestic reservations proposed for several other subbasins are insufficient to satisfy planned and projected growth. Ecology's proposed rule creates a conflict with existing growth management plans and requirements without offering any solutions or even adequately disclosing the magnitude of the likely shortfal1.
- **445-**Finally, the number of parcels that will be counted against the reservation has not been adequately disclosed. The rule would require existing water right holders to use water from the reservation to maintain an uninterruptible supply. This is a Hobson's Choice for many of the County's current rural residents that in fact is no choice at all. Skagit County's preliminary data suggests that in many subbasins this would result in immediate stream closures if new homes constructed since April 2001 are counted against the reservations.

Attachment B: Questions for the Record

Skagit County hereby submits the following questions for the Record for the proposed Skagit Instream Flow Rule Amendment:

- **446**-1) WAC 173-503-020 is amended under Ecology's proposa1 to subject local government decision making to RCW 90.54.090. This is a new provision in the regulation, and there are no comparable provisions under the proposed Samish or Stillaguamish instream flow rules. Does this proposal impose new responsibilities on local governments, and if so what are they 7
- **447**-2) Ecology's proposal requires Skagit County to impose building permit conditions, including limitations on outdoor water use. Who is Ecology expecting to enforce these permit conditions and how will they be enforced?
- **448**-3) Application of the reservation to a specific date is arbitrary and without a technica1 basis, because the streamflow and precipitation data used to calculate the reservation quantities cover various time periods. Will withdrawals from exempt wells developed after April 14, 2001, the effective date of the existing Skagit instream flow rule, automatically be debited against proposed reservations? If so, how much of the water budgets established under the rule amendment already have been used by permit and exempt withdrawals developed since April 14, 2001, the effective date of the existing Skagit instream flow rule?
- **449**-4) Under WAC 173-503-073, a local government must acknowledge that interruptible water supplies cannot be used for year-round domestic supply. Does this provision preclude use of on-site storage for supply to augment interruptible supplies during low flow periods?
- **450**-5) Has Ecology examined the capabilities of public water systems to accommodate future connections? If so, when do water purveyors anticipate service will be provided and what areas will not receive service?
- **451**-6) Does WAC 173-503-073(2)(c) mean Ecology intends to review group The water system approvals?
- **452**-7) WAC 173-503-073(6)(b) states that Ecology may - but is not required – to provide 50 percent credit for return flows where individual homes are served by on-site septic system. How will this be decided? What is the basis for assuming 50 percent return flows?
- **453**-8) In a draft version of the rule dated November 20, 2004, Ecology proposed water reservations ranging from over 3,000 gallons per day (Stevens Creek) to over 133,000 gallons per day (Grandy Creek). The final draft rule amendment included substantially smaller water budgets. How did Ecology

initially determine the size of the proposed reservations and what criteria did it apply in deciding to reduce the size of the water budgets?

- **454**-9) The instream flows were set relative to the Skagit River gaged flows near Mount Vernon for the period of record (USGS Gage #12-200500). The flows at this point are entirely regulated. How do you justify using a regulated record as a basis for setting instream flows?
- **455**-10) What is the justification for not using 2% of the 7Q10 of the Skagit River when setting an allocation for the mainstem? Ecology has stated that these amounts were not used because they are "too big." This is not a scientific basis or best professional judgment. The same criteria should be applied across the board unless you can prove scientifically that there is some reason not to.
- **456**-11) How do you justify a proposed reservation of 1.65 cfs in the Skagit River Watershed where the average annual yield is 12 million acre feet per year? In the Samish River Basin, Ecology has recommended a reservation of 1.0 cfs while the Samish River yield is 177,300 acre feet/yr or 1.5% of the average annual Skagit River streamflow. In the Stillaguamish River Basin, Ecology has recommended a reservation of 2 cfs on the North Fork Stillaguamish River while the yield of that river is 1,370,000 acre feet/yr or 11.4% of the Skagit River. The same proportion used in the Stillaguamish applied to the Skagit River would be 18 cfs and the same proportion in the Samish applied to the Skagit River would lead to a reservation of 68 cfs. The Entiat River has a proposed rule with a reservation of 5 cfs. The yield at the point of measurement for the Entiat River is 367,300 acre feet/year or 3% of the Skagit River's annual yield. The same proportion of the reservation to the yield of the river applied to the Skagit River would result in a reservation of 163 cfs. What is the scientific justification for such a small reservation on the Skagit River?
- **457**-12) The proposed rule on the Entiat River allows for irrigation of up to 0.5 acre of lawn and garden, which is consistent with state law allowing for use of exempt groundwater withdrawals. How do you justify 1/12th of an acre for irrigation? What is the scientific or legal basis for this limit?
- **458**-13) Since this draft rule does not address commercial or industrial uses, what if a resource based industry or support resource industry wants to locate in the rural areas - most likely outside of a water purveyor's service area, what are the chances and the timeframe for obtaining a water right? If the tributary basin is closed, what are the chances and timeframe for obtaining a water right?
- **459**-14) The SBEIS simply says there will be an impact, but that they can't really assess to what degree it may be. If the resources (agriculture, timber, mining, and recreation) cannot have supporting industries or commercial development then are we are at risk of losing the economic benefits and lifestyle from having them? The natural resources are what make up this county and region.
- **460**-15) What effect will the rule amendment have on the relocation of the Town of Hamilton, the proposed mining, and the reclamation work to establish the Town's new site?
- **461**-16) If the reservations are used up, which may happen very quickly as people fear that their development will be curtailed, what will this do to the cost and value of the land? Will inflated land value drive natural resource industries out? This was not addressed in the SBEIS.
- **462**-17) How many unadjudicated water rights claims exist in the Skagit River Basin?
- **463**-18) Will we be able to create more Group B water systems (WAC 246-291) in the Skagit Basin following the Skagit Coordinated Water System Plan (Chapter 246-293 WAC)? Will they have the same requirements? For these systems, following the State Law, they must design for 800 gallons for each connection. How will this work? What about "timely and reasonable?" What about the the newly enacted "municipal water rights bill" (2E2HB 1338, 2003 Legis. Sess.) and the duty to serve requirement? If there is an approved Group B, can it grow into a Group A water system?
- **464**-19) Ecology cites the USGS report 'Numerical Model Analysis Of The Effects Of Ground-Water Withdrawals On Discharge To Streams And Springs In Small Basins Typical Of The Puget Sound Lowland, Washington (USGS 1999) and other reports to support its interpretation of hydraulic continuity in the basin. What are the other reports Ecology is referring to?
- **465**-20) What is the source of precipitation data used to calculate 7Q10 flows for the ungauged subbasins. What part of each sub-basin do these data represent? Were these data integrated across each sub-basin, or do they only represent a single point?
- **466**-21) What are the periods of record for precipitation data used to calcu1ate the 7Q10 CSM/ inch (cfs/mi2/in) numbers for the gauged sub-basins? Are they the same as the streamflow periods of record used to calculate the 7Q10 values? Were 7Q10 records evaluated to determine if they cover a

period of particularly wet or dry years? This is especially important for subbasins with short records (e.g., East Fork Nookachamps and Wiseman Creek, each with 8 years of data).

- **467**-22) It appears that in most cases estimated runoff (in inches based on streamflows) was used to estimate 7Q10 CSM/inch numbers while for Alder Creek precipitation was used. In all instances, the higher of the precipitation or runoff numbers were used, which in turn results in lower estimated 7Q10 flow for the ungauged basins when actual precipitation data are used. Can you explain the reasoning for the different approaches at different sub-basins?
- **468**-23) What is the basis for the assumption that a 1-2% loss in habitat corresponds with a 1-2% loss in stream flow during low-flow conditions? This is a critical assumption because it leads to the determination of the reservation quantities.
- **469**-24) During rulemaking, why didn't the Department of Ecology use groundwater modeling software, such as MODFLOW, to determine the potential effects anticipated domestic withdrawals from certain aquifers and/or areas would have on instream flows? Wouldn't the use of groundwater modeling software results in conjunction with the IFIM/ RHABSIM results lead to the promulgation of a more realistic and more defensible rule?
- **470**-25) Does the Department of Ecology believe that all surface water diversions and groundwater withdrawals in the Skagit Basin have the same effect on stream flows?
- **471**-26) The Skagit River Instream Flow Committee recommended that out of stream withdrawals in months not subject to estuary protection limits should be limited to 10% of the 50% exceedance curve for that month, which Ecology refers to as a "biologically acceptable withdrawal quantity" (page 18, Supplemental Environmental Assessment, October 30, 2000). Under this recommendation, the total withdrawals allowable would range from 830 cfs in September to 1,610 cfs in December. Why did the Department of Ecology ignore this recommendation from the instream flow committee and set the total allowable withdrawal limit at 830 cfs for all applicable months (September through January)? Hydrologic impact limits such as these are usually implemented to protect ecologically-useful high flows. What was Ecology's logic in setting a high-flow protection criterion equal to a low-flow month? Didn't the Department contradict the purpose of this protective limit by making additional withdrawals subject to interruption?
- **472**-27) Since the entire basis for the selected minimum stream flows is the protection of habitat in the Lower Skagit River mainstem, why doesn’t the Department of Ecology allow return flow credit for domestic users that are connected to a sewer system when these systems return used water to the mainstem via treatment plant outfalls?

Mentor, Joe, Jr., Skagit County ,

March 16, 2005

VIA E-MAIL AND FIRST CLASS MAIL
Mr. Geoff Tallent
Washington State Department of Ecology
3190 - 160th Ave. SE
Bellevue, Washington 98008

RE: Skagit County's Comments on Ecology's Determination of Nonsignificance for the amended Skagit River Instream Resources Protection Program.

Dear Geoff:

Skagit County appreciates the opportunity to comment on the Department of Ecology's January 24, 2005, Determination of Nonsignificance (DNS) for the proposed amended Skagit River Instream Flow Rule, Ch. 173-503 WAC. We trust that our comments will assist Ecology in accomplishing the mutual goals of the department and Skagit County to preserve and protecting adequate flows for instream and out-of-stream uses in the Skagit River Basin.

INTRODUCTION

473-Ecology wrongly concluded that the impacts of the proposed amended rule are insignificant.

474-Ecology's conclusion is in error because Ecology failed to take the requisite hard look at potential effects of the proposed amended rule.

475-In determining whether impacts are significant, Ecology must consider among other things: conflicts between the proposal and existing laws and requirements protecting the environment, **476-**the precedent the proposal establishes for significant future environmental effects, **821-**and impacts to prime farmlands.1

822-In evaluating potential adverse impacts, Ecology must consider elements of the built environment including but not limited to, the proposal's relationship to existing land use planning and populations, **823-**impacts on housing, **824-**and impacts on the provision of public services including public water supplies.2

825-Sufficient consideration of potential environmental effects is a prerequisite to DNS issuance.

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1 WAC 197-11-330(3).
2 WAC 197-11-444.

826-Ecology's conclusion that an Environmental Impact Statement (EIS) is unnecessary ignores significant effects, leaving the proposed rule vulnerable to legal challenge and further delaying achievement of our common goals.

INSUFFICIENT ANALYSIS OF POTENTIAL SIGNIFICANCE

827-Under the State Environmental Policy Act (SEPA)3, environmental quality reflects the condition of both natural and built components of the environment.4 Significant impacts under SEPA are impacts which have a reasonable likelihood of more than a moderate adverse impact on environmental quality.5

828-Significant impacts on environmental quality necessitate preparation of an EIS.6

829-In determining whether effects are potentially significant, " [t]he lead agency shall make its threshold determination based upon information reasonably sufficient to evaluate the environmental impact of a proposal."7

Accordingly, **830**-SEPA's full disclosure requirements "should be invoked whenever more than a moderate effect on the quality of the environment is a reasonable probability."8

831-Here, the information considered was not reasonably sufficient to conclude that a more than moderate effect on the quality of the environment will not occur. In fact, available information supports the opposite conclusion.

832-Ecology failed to adequately consider localized effects, **833**-absolute quantitative effects, **834**-and cumulative effects of the amended rule when determining the requisite level of analysis.9

835-Ecology failed to adequately consider conflicts with laws and requirements for environmental protection, **836**-the precedent for actions with significant environmental effects created by the proposal, **837**-or environmentally special areas including farmlands, all of which are considerations specifically addressed in the regulations for making threshold determinations.10

838-Ecology appears to have concluded that the goal of instream resource protection outweighs all other considerations, thereby negating the Department's obligation to conduct a meaningful analysis.

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3 Chapter 43.21C RCW.
4 WAC 197-11-444.
5 WAC 197-11-794(1).
6 RCW 43.21C.031(1).
7 WAC 197-11-335.
8 Norway Hill Preservation and Protection Ass'n v. King County Council, 87 Wn.2d 267,552 P.2d 674,680 (1976).
9 WAC 197-11-330(3).
10 WAC 197-11-330(3)(e).

839-Such a conclusion is incorrect because the lead agency may not balance a proposal's favorable social, economic and environmental effects against independently significant adverse environmental impacts to avoid a determination of significance.11 Such a balancing, while appropriate in making the final decision between alternative means of achieving the purpose and need, is not appropriate in the initial determination of significance.12

840-Skagit County believes that the direct impacts resulting from the proposed rule are significant, that the "marginal impacts when considered together may result in a [cumulatively] significant impactsl3 **841-**and that the proposed rule is in potential conflict with requirements for environmental protection including, but not limited to the state's Growth Management Act and the locally adopted Skagit County Countywide Planning Policies, Skagit County's Comprehensive Plan, the Skagit County Coordinated Water System Plan Regional Supplement, and Skagit County's Critical Areas Ordinance. These considerations dictate completion of an EIS prior to adopting the proposed amended rule.

POTENTIAL SIGNIFICANT IMPACTS WHICH WERE IGNORED

842-Impacts to Land and Shoreline Use

The proposed rule amendment will limit the total availability of water in rural areas of the county and **843-**foreclose all future groundwater use in some tributary basins. **844-**The DNS fails to disclose or discuss the potential effects the rule amendment will have on growth in rural and urban areas.

845-The Office of Financial Management has prepared twenty-year population forecasts by which Skagit County is to adopt comprehensive plans and development regulations to assure that sufficient capacity of land is suitable for development within its jurisdiction to accommodate its allocated housing and employment growth, as adopted by countywide planning policies.14 Skagit County and its municipalities have adopted population and employment forecasting and allocations through 2025.15 Skagit County assumes that it will experience growth regardless of the rule amendment and must plan for it pursuant to the Growth Management Act.16

846-The rule will have a profound effect on how and where that growth will take place. Limiting water supplies may create an incentive for landowners to accelerate development. A "first in, first served" or "use it or loose it" mentality will prevail and this could occur in rural areas as owners scramble to build before the reservation evaporates.

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11 WAC 197-11-330(5), 197-11-315(5) and 330(5).
12 WAC 197-11-330(5), 197-11-315(5) and 330(5);
13 WAC 197-11-330(5), 197-11-315(5) and 330(5).
l4 RCW 36.70A.115
15 Population and Employment Forecasting and Allocation 2005, Berryman and Henigar, Inc. in association with Michael J. McCormick, December, 2003
16 RCW 36.70A.040

847-The rural growth inducing effect of the proposed amended rule is in direct conflict with the Skagit County Comprehensive Plan and the goal of directing growth towards urban areas where services can be provided.17

848-The rule could also induce higher growth within urban areas as well as other non-urban (rural) areas outside of the Skagit River Basin. This will result in increased density and demand for services that are not contemplated under current planning.

849-Areas outside of the Skagit River Basin offer their own land carrying capacity constraints.

850-The increased density could also result in other environmental impacts such as loss of open space, 851-increased urban runoff and **852**-other development pressures on critical areas.

853-The DNS does not discuss how the proposed amendment will affect planned growth throughout the county or in the nine of twenty-six subbasins which lack sufficient water. As discussed in more detail below, this is but one of several conflicts with environmental protections impermissibly ignored by Ecology.

854-Ecology recognizes "[w]ater availability is one major determinant of land use."l8 Ecology also recognizes statewide implementation of restrictions on exempt well use "could result in cumulative and significant unavoidable impacts to homeowners and municipalities in the state."l9 It is troubling that despite this recognition, the DNS contains only cursory discussion of the amended rule's effect on land use. The DNS states:

> In urban areas and other areas served by public water, the proposal requires the existing public utility supply water for any new development. For areas not presently served by public water systems, the proposed rule provides water to satisfy most projected domestic needs. Attachment 1 shows by subbasin the potential number of residences served by the reservation and estimates of future demand at build-out. In most cases the future demand is satisfied. In other areas, such as the Nookachamps, Fisher, and Carpenter Creek, public water supplies will likely be required to meet maximum anticipated demand. Over time, Skagit PUD should be able to provide service to most areas of the Nookachamps, Fisher, and Carpenter subbasins.20

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17 Skagit County Comprehensive Plan, 4-1 (2003).
18 Wash. Dept. of Ecology, *Instream Resources and Water Allocation Program Review Draft Environmental Impact Statement* 3-11 (1987).
19 Wash. Dept. of Ecology, *Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW* 6-65 (2003).
20 Determination of Nonsignificance, 11.

855-Attachment 1 of the DNS shows the number of potentially developable parcels within each subbasin and the estimated number of parcels which could be developed under the rule. The DNS fails to provide any analysis of how the number of buildable lots was calculated. Ecology requested this information from Skagit County but did not frame the request in context of the proposed rule. It appears that the data is inaccurate in some of the calculations.

856-Ecology's conclusion, based on this information, is that "in most cases, the future demand is satisfied."21 This conclusion ignores significant adverse effects to areas with insufficient water as well as the cumulative significant adverse effect of the shortfall.

857-Applying Ecology's assumed water use of 350 gallons per day (gpd) for each residence,22 one in four parcels would be without water. Under Ecology's proposal, 1,024 parcels would be unbuildable. Table 1 demonstrates the magnitude of the shortfall.

21 Determination of Nonsignificance, 11.
22 Proposed WAC 173-503-073(6)(b).

Table 1
Water Availability Deficit for Buildable Parcels in Skagit River Subbasins Assuming 350 gpd Consumption

UNIT	PARCELS SERVED BY RESERVATION	BUILDABLE PARCELS IN SUBBASIN	UNBUILDABLE PARCELS
Alder Creek*	28	28	
Anderson / Parker / Sorenson Creeks*	40	39	
Careys Creek*	12	12	
Carpenter Creek*	**17**	**64**	**-47 (73%)**
Childs/ Tank Creeks*	**51**	**55**	**-4 (7%)**
Coal Creek*	**52**	**79**	**-27 (34%)**
Cumberland Creek*	2	2	
Day Creek*	67	66	
Fisher Creek*	**7**	**136**	**-129 (95%)**
Gilligan Creek	28	28	
Grandy Creek*	85	85	
Hansen Creek*	**108**	**174**	**-66 (38%)**
Jones Creek*	40	40	
Loretta Creek*	4	4	
Mannser Creek*	30	29	
Morgan Creek*	**28**	**46**	**-18 (39%)**
Muddy Creek*	20	20	
Nookachamps Creek-East Fork	**34**	**217**	**-183 (84%)**
Nookachamps Creek-Upper	**24**	**551**	**-527 (96%)**
O'Toole Creek*	4	4	
Red Cabin Creek*	14	14	
Salmon / Stevens Creeks	**10**	**33**	**-23 (70%)**
Skagit - Lower	880	880	

Skagit - Middle	251	251	
Skagit - Upper	1190	1189	
Wiseman Creek*	20	20	
TOTAL	**3,046**	**4,066**	**-1,024 (25%)**

858-The significant localized effect in subbasins like the Upper Nookachamps is striking. In the Nookachamps the rule amendment will deny water to 527 of 551 lots - ninety-six percent of the parcels in the subbasin.

859-In Fisher Creek, there will be a ninety-five percent reduction. Several other subbasins suffer similar significant localized impacts.

860-Fisher and Nookachamps Creeks will effectively be closed to future development absent public water supplies.

861-In Fisher Creek, the reservation is only large enough to support seven residences. This is unlikely to be enough water to serve existing residences constructed since April 2001. Ecology staff has also represented at a public meeting that the reservation for Nookachamps Creek is not available for additional development. The DNS fails to disclose that the rule amendment will operate as a building moratorium in these basins until public water is available, assuming that it is financially supportable at rural densities, **862-**and lacks any discussion of how this impact will affect growth demand in other areas of the county.

863-There is no analysis, for example, for the DNS representation that "[o]ver time, Skagit PUD should be able to provide service to most areas of the Nookachamps, Fisher, and Carpenter subbasins."23

864-Ecology previously noted that encouraging public water systems to extend service into rural areas as an alternative to exempt well development "could result in increased development of current rural areas. Increased suburbia and its more intensive land uses will result in adverse impacts on water quality, habitat, earth, and other environmental media. Therefore, [requesting public water systems to extend service into rural areas] may result in significant cumulative and unavoidable adverse impacts."24 Ecology failed to resolve the conflict between these statements.

865-Finally, the best-case scenario for rural residents is that Ecology may reduce the assumed level of consumption for residences utilizing on-site wastewater treatment by 50 percent. **866-**This scenario is uncertain because such a reduction is within Ecology's discretion.

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23 Determination of Nonsignificance, 11.
24 *Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW* 6-70.

867-Even under this best-case scenario, hundreds of parcels will be left without water. Table 2 shows the shortfall in water by subbasins if Ecology were to apply a 50 percent reduction to all exempt wells with drawing from the reservation. Under this best-case scenario, one in five parcels will have no water supply and cannot be developed.

868-The localized effects are most significant in the Fisher and Nookachamps subbasins where over 90 percent of the otherwise buildable lots are left without access to potable water.

869-The cumulative effects of this reduction are equally significant, impacting 817 parcels throughout the county.

Table 2.
Water Availability Deficit for Buildable Parcels in Skagit River Subbasins
Assuming 175 gpd Consumption

[TABLE OMITTED]

The Relationship to Existing Land Use Plans and Populations

870-In determining the significance of a proposal's impacts, the SEPA responsible official must consider conflicts with federal and local laws, or requirements protecting the environment.26

871-The proposed rule is in conflict with prior agency determinations and multiple laws and requirements, all of which were ignored in issuing the DNS.

872-*Conflicts with the Growth Management Act* -- Ecology concluded without analysis that the proposal "does not conflict with any local, state, or federal laws or requirements for the protection of the environment."27

873-As the DNS notes, "rural areas are . . . generally dependant on individual wells and septic tanks."28 The proposed amended rule prefers connection to public water systems over reliance on individual wells in part because there is insufficient water in the proposed reservation to satisfy the needs of current residents or anticipated demand within many of the subbasins. The effect of the proposed amended rule's emphasis on connecting to public water systems is to increase public water system expansion into rural areas.

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25 "[The department may account for water use at a rate of 350 gallons per day (gpd) per residence or business. This figure **may** be adjusted down to 175 gpd if the residence or business is served by an on-site septic system." Proposed WAC 173-503-073(6)(b) (emphasis added)
26 WAC 197-11-330(3)(e)(iii).
27 Determination of Nonsignificance, 18.
28 Determination of Nonsignificance, 15.

874-Ecology previously recognized this risk, noting that requiring expansion of public water systems to rural areas "may create conflicts with the Growth Management Act (GMA) if the areas proposed for water supply extension are not within an urban growth area. The extended availability of public water supplies may create pressures to develop or redevelop affected areas at higher density."29

875-Requiring expansion of public water systems to rural areas "may require revisions to local comprehensive land use plans and/or update of the water system plan of the participating public water system. Funding would need to be identified to finance major water line extensions."30 Furthermore:

876-Establishing instream flows may limit the potential for obtaining new water rights from an affected water body. In such cases, the lack of available water may limit or alter the nature of new development. Where water supplies cannot be obtained from another source or 'created' through water use efficiency measures, comprehensive land use plans may need to be amended. . . . Local governments may need to modify their comprehensive land use plans if establishment of an instream flow adversely impacts the projections water resource availability upon which such plans are predicated.31

877-Ecology also previously acknowledged that "[ilf water supply becomes limited, people may make different decisions on where to work, live, and farm than they would make where the water supply is not limited."32

878-Ecology has not considered how the proposed rule will impact development throughout the Skagit River Basin or whether changes in growth patterns will be consistent with GMA planning. The importance of such considerations is apparent in light of projections that Skagit County's population may more than triple between 2000 and 2050.33

879-Changing the assumptions upon which Skagit County and major water purveyors planned will significantly impact planning efforts and necessitate wide ranging amendments to planning efforts.

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29 *Final Environmental Impact Statement for Watershed Planning Under Chapter* 90.82 *RCW* 6-68.
30 *Final Environmental Impact Statement for Watershed Planning Under Chapter* 90.82 *RCW* 6-68.
31 *Final Environmental lrnpact Statement for Watershed Planning Under Chapter* 90.82 *RCW* 6-123 - 6-124.
32 Wash. Dept. of Ecology, *Final Environmental Impact Statement (Including Program Overview) Western Washington lnstream Resources Protection Program* 5 (1979).
33 *See* Economic and Engineering Services, Inc., *Skagit County Coordinated Water System Plan Regional Supplement* Table 7-3 (June 1999) (population projections provided by the Washington State Office of Financial Management).

880-*Conflicts with the Skagit County Critical Areas Ordinance* – Skagit County's Critical Areas Ordinance (CAO) regulates impacts to wetlands, wetland buffers, geologic hazard areas, and protects fish and wildlife habitat conservation areas. The DNS fails to disclose conflicts which may arise where service extensions which are "timely and reasonable" under the amended rule will result in disturbance to critical areas which could be avoided by well development.

881-Ecology should assess the environmental impact of increased public water system expansion vs. increased exempt well withdrawals. This analysis would have two components: diversion impacts and infrastructure impacts. The diversion assessment should look at the impacts to instream resources of increased public water system surface water diversions that will be required to serve all these new connections (the local water purveyors do not manufacture water; they get it from the same aquatic resource that the rule is supposedly trying to protect) versus the effects of increasing the number of dispersed, relatively small groundwater withdrawals that would occur without the rule.

882-The infrastructure assessment should evaluate the environmental impacts of actually constructing all of these new pipelines through farmland, forest and creeks versus the relatively minimal impacts required to install a single or small group domestic well system.

Impacts on Housing

883-Housing is a component of the built environment34 and, as such, impacts upon housing must be considered in making a SEPA threshold determination.

884-The provision of housing is also a fundamental component of the GMA,35 necessitating that Ecology consider impacts on housing.

885-*Impacts on housing supply* -- The DNS incorrectly concludes that no housing units would be eliminated by the proposed rule.36 This conclusion is directly contradicted by Ecology's own admission that not all buildable parcels will have access to potable water.37

887-As Tables 1 and 2 demonstrate, 817 to 1,024 parcels become unbuildable under the amended rule. Prohibiting development of as many as one-fourth of all rural buildable parcels has a significant direct impact on the Skagit County housing supply. The DNS also fails to disclose that certain proposed reservations may be fully allocated. Dan Swenson stated at the March 8, 2005, public meeting in Darrington that the proposed reservation for the Nookachamps was already committed to residences constructed since April 15, 2001.

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34 WAC 197-11-444(2)(b)(ii).
35 Chapter 36.70A RCW.
36 Determination of Nonsignificance, 12.
37 Determination of Nonsignificance, 11-12.

889-The cumulative effect of reducing rural developable lots by 20 to 25 percent is significant. The localized effect of denying additional development in the Nookachamps and Fisher Creek subbasins imposes a significant localized effect on the provision of housing and affordable housing in these subbasins.

890-*Impacts on affordable housing* -- Counties that plan under GMA must "encourage the availability of affordable housing to all economic segments of the population, promote a variety of residential densities and housing types, and encourage preservation of existing housing stocks."38

891-Ecology's *Final Environmental Impact Statement for Watershed Planning* admits that restrictions on exempt well use "may limit the availability of affordable housing by increasing the cost of water for placement of water lines and distribution systems."39

892-This is especially true where, as here, the proposed rule requires connection to public water systems which could cost as much as three times that of an exempt well.40

893-The burden of such connections cannot be overstated because, as Ecology recognizes, "[e]xtending public water supplies into areas served by exempt wells may result in increased costs to existing exempt well owners who, if they choose to connect to the public system, may be required to pay part or all of the costs of extensions and/or connections."41

894-Impacts to affordable housing are deeply disturbing because almost 6,000 Skagit County households have a demonstrated need for affordable housing.42

Impacts on the Provision of Public Services

895-*Public water supply* -- Ecology recognizes that requirements to connect to public water supplies "may increase demands on public water systems, but only to the extent that water systems have planned for, and are capable of, providing the water."43 Ecology's conclusions are highly suspect given the deficit in water supply and uncertainty regarding which parcels will choose to develop exempt wells utilizing the reservation.

896-The fundamental uncertainty in Ecology's conclusions is evident in the statement that "[o]ver time, Skagit PUD should be able to provide service to most areas of the Nookachamps, Fisher, and Carpenter subbasins."44 Multiple qualifiers make this conclusory statement meaningless.

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38 RCW 36.70A.020(4).
39 *Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW* 6-64.
40 Proposed WAC 173-503-025.
41 *Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW* 6-67.
42 Skagit County Co~nprehensive Plan, 3-11 (2003).
43 Determination of Nonsignificance, 18.
44 Determination of Nonsignificance, 11 (emphasis added).

897-Uncertainty over which areas will receive service, when that service will be made available, and the cost of providing such services make it impossible to determine the significance of requiring connections.

898-Impacts on Sensitive Agricultural Lands

The closure of basins to further development creates a potential demand for farmland redevelopment. Redevelopment and the loss of prime farmlands will adversely affect historic and cultural resources central to Skagit County's agricultural heritage and identity. Adverse effects to prime farmlands, historic, and cultural resources are all factors the lead agency considers in evaluating the significance of a proposal's impacts.45 Impacts to these factors were overlooked in preparation of the DNS.

899-Skagit County contains some of the most productive farmland in western Washington. The DNS recognizes that "Skagit County (which contains nearly all of the agricultural areas in the Skagit basin) agricultural products had a $217,384,000 market value."46

900-The *Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW* similarly recognizes that agriculture represents 25 percent of total land use in Skagit County.47

901-As the American Farmland Trust recently reported, "[f]or every $1 collected in taxes on agricultural lands in Skagit County, only 51 cents in community services is provided by governments, thus producing a 49 cent surplus in revenue to support government services provided to other local taxpayers. By comparison, for every $1 collected in taxes on residential lands in Skagit County, governments must provide $1.25 in community services. Skagit County farmers thus provide a significant tax benefit for other local taxpayers."48

902-Accordingly, any action which impacts agriculture, impacts not only the 3,300 plus people employed in agriculture,49 but all those who depend on government services substantially underwritten by agricultural production.

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45 WAC 197-11-330(3)(e)(i).

46 Determination of Nonsignificance, 9. The American Farmland Trust, in association with Washington State University, conclude the "[tlotal known economic impacts of Skagit County agriculture . . . totals approximately $600 million annually. There are at least 3,300 people engaged in full-time equivalent employment tied directly to agricultural activities, and at least 5,650 people total engaged in employment generated overall by the local agriculture industry." American Farmland Trust, *Economic Impacts of Agriculture in Skagit County, WA 3* (2003).

47 *Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW* 4-21.

48 American Farmland Trust, *Economic Impacts of Agriculture in Skagit County, WA*3 (2003).

49 American Farmland Trust, *Economic Impacts of Agriculture in Skagit Counfy, WA* 16 (2003).

903-Lastly, under the proposed amended rule, the stockwatering reservation applies throughout Water Resource Inventory Areas (WRIAs) three and four. This is in stark contrast to the domestic reservation's subbasin allocation. The amended rule fails to recognize the possibility that uneven development of stockwatering wells throughout the planning area could result in locally significant impacts. The impact of clustered well development may have significant impacts which have been ignored by the DNS.

904-Insufficient Analysis of Connected Actions

Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. . . Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they: Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.50

905-Ecology is undertaking a comprehensive program to regulate instream flows throughout the state and has previously treated individual planning efforts as part of an integrated whole.51

906-As of July 2003, watershed planning efforts were underway in 42 of the state's 63 WRIAS.52 Ecology's rulemaking schedule anticipates adoption of ten instream flow rules governing eleven WRIAs during 2005.53

907-Ecology is following a similar process for the Samish River Basin immediately to the north of and tributary to the Skagit River Basin, and in the Stillaguamish River Basin immediately to the south of the Skagit River. Anticipated rule adoption in all three of these basins is anticipated within the next six months.

908-The three proposed rules are thus interdependent parts of a larger course of action and the interactions between the three rules need to be considered together.

909-Restrictions on exempt well development in the Skagit River Basin will discourage development in rural parts of the county, shifting growth patterns towards urban centers served by municipal water purveyors or towards redevelopment of agricultural lands with existing, senior water rights. Similar restrictions in the Samish and Stillaguamish basins will have a comparable effect. The synergistic effect of these three proposals will change the face of development in north-western Washington, reducing growth throughout the 3,526 square miles of Whatcom, Skagit, and Snohomish counties covered by these rules.

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50 WAC 197-11-060(3) (b).

51 *See e.g. FEIS for Watershed Planning; FEIS for Western Washington instream Resource Protection Program; DEIS for Instream Resources and Water Allocation Program Review; Guidance, Setting Instream Flows and Allocating Water for Future Out-OfStream Uses.*

52 *Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW* 1.

53 Wash. State Dept. of Ecology, *Instream Flozu Rule-Making Schedule,* January 2005-September 2006 (Feb. 28, 2005).

910-Ecology needs to address the significance of the urbanizing impacts its proposal will have on these Washington counties.

911-Ecology recognizes that regional restrictions can have significant cumulative effects when it states: "Should established flows reduce the amount of water available for out-of-stream uses, [setting instream flows by administrative rules] in multiple watersheds could reduce development on a regional or statewide scale."54 Despite this recognition, the DNS glosses over clearly significant cumulative effects.

912-Ecology's conclusion that the proposed Skagit and Stillaguamish instream rules pose no significant effect directly conflicts with Ecology's own statements. In the face of such conflicts, Ecology should retract its determination of nonsignificance and prepare a comprehensive EIS.

CONCLUSION

913-SEPA's full disclosure requirements "should be invoked whenever more than a moderate effect on the quality of the environment is a reasonable probability."55 **914**-Ecology's proposed amended rule poses far more than a reasonable probability of a moderate effect on the quality of the built environment therefore, Ecology should take advantage of this opportunity to revisit its DNS, revoke that decision, and begin preparing the required EIS.

Sincerely,
MENTOR LAW GROUP, PLLC

JOE MENTOR, JR.

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54 *Final Environmental Impact Statement for Watershed Planning Under Clzapter 90.82 RCW* 6-124.
55 Norway Hill Preservation and Protection Ass'n v. King County Council, 87 Wn.2d *267,* 552 P.2d 674,680 (1976).

Mentor Law Group
PLLC
1 100 Market Place Tower • 2025 First Avenue • Seattle, Washington 98121 TEL 206.493.2300 • FAX 206.493.2310

Mentor, Joe Jr. – Skagit County

Joe Mentor, Jr.
mentor@mentorlaw.corn

May 13, 2005

Via facsimile and first-class mail

Mr. Steve Hirschey
Washington State Department of Ecology
3190 - 160th Ave. SE
Bellevue, Washington 98008

RE: Proposed Stillaguamish Instream Flow Rule

Dear Mr. Hirschey:

1003-These comments are submitted on behalf of Skagit County on the Department of Ecology's proposed Stillaguamish Instream Flow Rule. Skagit County's comment letter on Ecology's proposed Skagit River amended instream flow rule and the documents attached thereto are incorporated by reference into the County's comment letter on the proposed Stillaguamish rule. The documents referenced herein are likewise incorporated by reference.

1004-Skagit County is concerned with any actions in the Stillaguamish River basin because a significant portion of the basin in within Skagit County. As the fifth largest tributary to Puget Sound,[1] the Stillaguamish River is an important resource which needs to be addressed as part of a comprehensive regional program. Skagit County believes it is critical that the adjacent Samish, Skagit, and Stillaguamish River basins be treated as part of the regional community which they represent and that Ecology proceed with an integrated approach to addressing what are fundamentally regional issues.

Summary of comments: Skagit County has the following concerns about the proposed rule:

- The proposed rule exceeds the scope of Ecology's authority to set instream flows.
- The proposed rule fails to balance the needs of water for people, fish and agriculture as required by state law.

[1] Ecology, Proposed Stillaguamish Water Management Rule, http:/ /www.ecy.wa.gov/programs/wr/instream-flows/Stillaguamishbasin.html

- The proposed rule would restrict lawful water use.
- The proposed rule is not consistent with APA procedural requirements.
- The proposed rule is not supported by sound science or other substantial evidence.
- The proposed rule is not enforceable.
- The proposed rule is inconsistent with other laws, regulations and policies, including previous guidance issued by Ecology and the Washington Department of Health regarding instream flow setting and determinations of water availability.
- The proposed rule preempts Skagit County's land use authority and frustrates efforts to comply with the Growth Management Act.
- Adoption of the proposed rule requires preparation of an environmental impact statement.

II. 1005-Ecology's Stillaguamish Instream Flow Rule exceeds Ecology's statutory authority

Ecology only has that authority granted to it by the state legislature. In Ecology v. Rettkowski, the Supreme Court held that Ecology lacks implied powers. Recently, in Biggers v. Bainbridge Island, the Washington Court of Appeals applied the same standard to a local government. The Biggers court invalidated the City of Bainbridge Island's moratorium on shoreline development activities exempt from permitting requirements under the Shoreline Management Act. The court noted that the City:

> [E]xists and derives its authority in power from the State Constitution and the Legislature. It has neither existence nor power apart from its creator, the Legislature, except such rights as may be granted to municipal corporations by the State Constitution.[2]

In a similar case, the State Supreme Court recently invalidated a resolution passed by the Tacoma-Pierce County Board of Health banning smoking in all public establishments throughout Pierce County. The Supreme Court ruled that a local regulation is invalid if it "prohibits what is permitted by state law."[3] As explained below, Ecology's proposed rule is clearly inconsistent with this line of cases.

A. 1006-Ecology improperly seeks to regulate lawful activities which are exempt from agency regulation

State law expressly exempts certain groundwater wells from permit requirements. Ecology has no authority to restrict activities which the Legislature expressly exempted from its regulatory purview and any regulation which does so is invalid. Where the Legislature has provided an exemption from state regulation for small groundwater withdrawals and Ecology may not restrict activities that are exempt from its regulatory purview.

1007-Ecology cannot overcome limitations on its statutory authority by enlisting counties to enforce regulations against exempt well use, nor can Ecology condition rights on a county's promulgation of local ordinances. Such actions are the province of the Legislature, not an executive department agency.

1008-Ecology can condition a pending permit to require compliance with an instream flow adopted after a water right priority date was established.[4] This authority is recognized, however, only where the agency already has granted a water right permit and where the statute provides explicit authority to condition water right applications and permits. No such authority exists with respect to exempt wells. RCW 90.03.247 -- the only provision of law providing Ecology with conditioning authority -- applies only to permitted water rights.

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[2] Biggers v. Bainbridge Island, 124 Wn. App. 858, ,103 P. 3d 244, 247 (2004)
[3] Entertainment Industry Coalition v. Tacoma-Pierce County Health Dept., 153 Wn.2d 657, 664, 105 P.3d 985, 988 (2005) *citing* Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health, 151 Wn. 2d 428, 433, 90 Wn. 2d 37 (2004).
[4] RCW 90.03.247.

There is no comparable regulation of exempt groundwater rights. Consequently, authority to condition a water right permit does not extend to requiring subordination of an exempt groundwater right to a later-adopted instream flow rule.

B. 1009-Ecology's authority to set instream flows does not include the authority to protect "maximum" flows for spawning and rearing habitat

Ecology's instream flow guidance document describes how Ecology will determine instream flow levels. The document describes steps Ecology and the Washington Department of Fish and Wildlife (WDFW) will take to determine instream flow levels. The guidance document directs agency fish scientists to estimate flows that "provide **maximum** spawning and rearing habitat."[5]

As the guidance document points out, Ecology's flow setting authority arises from several sources. There is no legal authority, however, for Ecology to establish stream flows based on flow estimates that provide "maximum" spawning and rearing habitat. The Minimum Water Flows and Levels Act authorizes Ecology only to establish **"minimum** water flows" to protect fish and wildlife resources and aesthetic or recreational values.[6] Similarly, the Water Resources Act authorizes Ecology to set "base flows" necessary "to provide for protection of wildlife, fish, aesthetic and other environmental values, and navigation."[7] Further, in the Yakima River adjudication, the Court has described "minimum" stream flows as the "minimum instream flow which is necessary to maintain anadromous fish life in the river."[8]

1010-Ecology developed an IFIM model of the Stillaguamish River to support its proposed instream flow rule. The IFIM model presented a range of flow options. Ecology chose the highest flow - the flow intended to provide the maximum spawning and rearing habitat. From December through April, the proposed minimum flows are higher than the flows of 100% weighted usable areas (WUA). This approach exceeds Ecology's statutory mandate and ignores Ecology's obligation to provide "sufficient water for residential, commercial and industrial need . . . [and p]roviding sufficient water for productive agriculture."[9] Ecology's authority to set instream flows does not allow the agency to establish regulatory flow levels that effectively preclude the use of water for future out-ofstream uses.

1011-Even more fundamentally, Skagit County supports the goals of salmon protection and restoration, however, the County is concerned that Ecology's proposed rule is not justified by these goals. Analysis of 75-years of flow data at the Anacortes gage indicates no clear reduction in mean monthly flows during the month of August and Ecology acknowledges that most habitat limiting factors "are [the] result of upland forestry activities." Efforts to establish minimum flows when instream flows do not represent a limiting factor does little to address the cause of decline and creates a distraction from more pressing concerns. Ecology's efforts would be better placed in areas substantially related to the cause of decline.

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[5] Guidance Document, at p. 2. (emphasis added). The document indicates that flow data might lead to a different, "more realistic" estimate of the "biological flows" needed by various fish populations. Unfortunately, the document does not explain how or why this will occur.

[6] RCW 90.22.010 (emphasis added).

7 RCW 90.54.020(3)(a).

8 In re. Rights to the Use of the surface Waters of the Yakima River Drainage Basin, 121 Wn. 2d 257, 279-80, 850 P.2d 1306 (1993).

[9] RCW 90.54.005.

C. 1012-Ecology's proposed rule preempts county land use regulatory

The proposed rule grants Ecology authority to limit or restrict further use of the domestic supply reservation established under the rule "if existing County and city land-use decisions, including zoning changes in building permit and subdivision approvals, allow for uses inconsistent with [the Stillaguamish instream flow rule] or for increased densities that adversely affect small tributaries and other flow sensitive areas."[10] This provision allows Ecology to preempt local land-use decisions that are reserved exclusively to the County Board of Commissioners under the Growth Management Act.[11]

D. 1013-Ecology's requirement that Counties adopt ordinances consistent with its rule exceeds the department's authority and creates an unfunded mandate

Proposed WAC 173-505-090(2)(d)(i) makes availability of the domestic reservation ontingent upon Skagit County's adoption of an ordinance consistent with Ecology's proposed rule. Ecology bears the responsibility for implementing water resources and cannot, absent legislative authorization, delegate management to counties. This provision not only exceeds Ecology's authority, but creates an unfunded mandate in the process.

E. 1014-Ecology's proposed definition of consumptive use conflicts with established regulatory direction

Ecology's attempt to define consumptive use to include qualitative changes is unprecedented and inconsistent with regulatory direction. In Ecology's regulations implementing the water resources management program established pursuant to the Water Resources Act of 1971 Ecology states that "[f]or purposes of this chapter ***and subsequent regulations formulated for planning and management within individual water resource inventory areas,*** the following definitions shall be used: . . . 'Consumptive use' means use of water whereby there is a diminishment of the water source."[12] Ecology claims Water Resources Act of 1971 as authority for its Stillaguamish instream flow rule,[13] and therefore must comply with WAC 173-500-050.

The definition contained quoted above is the same definition contained in Ecology's Conservancy Board regulations,[14] and instream flow rule for the Walla Walla River Basin.[15] The definition quoted above is substantively the same as the definition contained in Ecology's instream flow rule for the Colville River Basin.[16] Ecology should not inexplicably depart from this established policy. Ecology's approach in the Stillaguamish River Basin is also inconsistent with the approach adopted for the neighboring Samish and Skagit river basins, both of which define consumptive use in accordance WAC 173-500-050. Ecology's departure from regulatory direction and established practice should be reversed.

F. 1015-Ecology's proposed rule conflicts with other governmental efforts

Ecology must consider conflicts with federal and local laws or requirements protecting the environment.[17] The proposed rule is in conflict with prior agency determinations and multiple laws and requirements. Ecology concluded without analysis that the proposal "does not conflict with any local, state, or federal laws or requirements for the protection of the environment."[18]

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10 Proposed instream flow rule, at WAC 173-505-090(6).
11 RCW 36.70A.070; Snohomish County v. Anderson, 123 Wn.2d 151, 868 P.2d 116 (1994); Whatcom County v. Brisbane, 125 Wn.2d 345, 884 P.2d 1326 (1994).
12 WAC 173-500-050.
13 WAC 173-505-010(1). 14 WAC 173-153-030.
15 WAC 173-532-020(3).
16 WAC 173-559-020(3).
17 WAC 197-11-330(3)(e)(iii).
18 Determination of Nonsignificance, 29.

The effect of the proposed amended rule's emphasis on connecting to public water systems is to increase public water system expansion into rural areas. Ecology previously recognized this risk, noting that requiring expansion of public water systems to rural areas "may create conflicts with the Growth Management Act (GMA) if the areas proposed for water supply extension are not within an urban growth area. The extended availability of public water supplies may create pressures to develop or redevelop affected areas at higher density."[19]

Requiring expansion of public water systems to rural areas "may require revisions to local comprehensive land use plans and/or update of the water system plan of the participating public water system. Funding would need to be identified to finance major water line extensions."[20] Furthermore: Establishing instream flows may limit the potential for obtaining new water rights from an affected water body. In such cases, the lack of available water may limit or alter the nature of new development. Where water supplies cannot be obtained from another source or 'created' through water use efficiency measures, comprehensive land use plans may need to be amended.... Local governments may need to modify their comprehensive land use plans if establishment of an instream flow adversely impacts the projections water resource availability upon which such plans are predicated.[21]

Ecology also previously acknowledged that "[i]f water supply becomes limited, people may make different decisions on where to work, live, and farm than they would make where the water supply is not limited."[22] Ecology's proposed rule proceeds in spite of clear inconsistencies with these prior statements.

1016-Ecology also failed to coordinate with County planning efforts. Skagit County is concerned that Ecology's 20-year planning horizon is unreasonably short. Given the importance of water supply planning, Skagit County strongly believes the proposed reservation should reflect the 50-year timeline utilized by the County.

1017-Ecology further failed to coordinate with salmon recovery efforts with the basin. Shared Strategy for Puget Sound is currently performing a low-flow study in the Stillaguamish River basin, the results of which are anticipated this summer. Ecology should defer action on its proposed rule until this study becomes available and until consistency between salmon recovery efforts within the basin can be harmonized. Our common goals cannot be met by disconnected and potentially conflicting actions.

1018-Moreover, it is inappropriate to proceed with development of the Stillaguamish River rule until the Skagit River basin rule is finalized. The Skagit River is the main water supply source within the region. Ecology cannot determine whether limited water availability will shift development into the Stillaguamish River basin until the amount of available water in the Skagit River basin is determined. Absent an understanding of development pressures, Ecology cannot determine the adequacy of available water under the proposed Stillaguamish rule.

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19 Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6-

[20] *Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW* 6-

21 *Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6-123* - 6-124.

22 Wash. Dept. of Ecology, *Final Environmental Impact Statement (Including Program Overview) Western Washington Instream Resources Protection Program 5 (1979).*

III. 1019-The methodology applied in developing the Stillaguamish instream flow rule is inconsistent with existing and proposed agency rules, and the instream flow guidance document

Ecology's proposed rule is inconsistent with the instream flow guidance document. Ecology bases the flow reservation on habitat reductions that could occur during a very dry condition. Ecology's baseline varies between the "90% exceedance flow in the driest month" and the "7-day, 10-year low flow (7Q10)." In this case, Ecology interpreted the 1-in-10 year low flow condition as the 90% exceedance flow for the driest month. Brad Caldwell approximated the 90% exceedance flow for September at 431 cfs. Using the juvenile steelhead WUA supplied by Steward and Associates, and a habitat-loss threshold of 1% (not 2%), he arrived at a reservation of 5 cfs. In other words, a 5 cfs withdrawal from an existing flow of 431 cfs reduced juvenile steelhead WUA by 1%. E

Ecology's approach is extremely conservative and lacks justification for application of 1% rather than 2% threshold assumptions. Within the limits of precision of the PHABSIM models, a 1% WUA loss is not significant. Also, mathematically, the frequency of this WUA loss is rare. The 1-in-10-year low flow in the driest month occurs about 1/120[,h] of the time on an annual basis. A WUA reduction of 1% that happens less than 1% of the time is below the threshold of detection. The flow reduction needed to cause even a 1% WUA loss during commonly-occurring flows is much more

than 5 cfs. If Ecology had chosen the 2%-loss guideline here, their reservation would have been about 10 cfs instead of 5 cfs.

- **1020**-Using monthly exceedance flow statistics for the mainstem, and the same juvenile steelhead WUA data used by Ecology, Hardin-Davis, Inc. calculated the overall September WUA values (habitat exceedance analysis) with several potential flow reservations. Setting existing conditions as 100% WUA, the values for 5, 10, and 25 cfs withdrawals were 99.7, 98.4, and 97.9%. In other words, a constant 25 cfs withdrawal in September yielded a 2.1% reduction in WUA. Had Ecology applied the methodology it advocates in the guidance document, the reservation contained in the proposed Stillaguamish rule would be significantly larger.
- **1021**-We are also concerned the proposed water reservation is premised on assumptions contrary to established Ecology and State Department of Health policies. Ecology is assuming that rural water users will withdraw approximately 350 gallons per day (gpd).[23] Ecology is also proposing to limit surface water withdrawals in the Lake Cavanaugh area to 150 gpd.[24] According to the Washington Department of Health, however, they will need much more. As the Health Department explains:

  [Ujtility records throughout the state indicate a significant increase in maximum day demands for lot sizes in excess of one acre. It would be appropriate, unless evidence is presented which indicates a better design premise, to use **a maximum day demand (MDD) of 800 gpd/ERU for residential lots in excess of one acre...** [25]

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23 Proposed WAC 173-505-090(7)(a).

24 Proposed WAC 173-505-060.

25 Wash. State Dept of Health, *Water System Design Manual,* DOH Pub. #331-123 5-4 (August 2001)(emphasis in original). Ecology's proposed rule amendment also is inconsistent with the Ecology/Washington Department of Health Water Availability Guidance Document. Under the water availability guidance document, an individual water supply may be considered adequate for purposes of RCW 19.27.097 only if the water source is capable of providing water to a residential dwelling in the amount of 400 gallons per day. Wash. State Depts. of Health & Ecology, *Guidelines for Determining Water Availability for New Buildings,* Ecology Pub. No. 93-27 (1993). Furthermore, Ecology's proposed rule amendment is inconsistent with Ecology's Irrigation Efficiency Guidance Document. Ecology's proposed rule amendment includes a proposal that credits water withdrawals for return flows. The proposed rule assumes no return *flows* where a home is connected to public sewer system, even though the rule allows for irrigation of 1/12 of an acre for each residence, and 50 percent return *flow* where no public sewer service is provided. Available studies indicate that only a small percent of all water used indoors for domestic supply purposes actually is consumed. Therefore, return flows should be estimated at a much higher level than Ecology suggests for indoor domestic supply purposes where no public sewer service is available. Furthermore, Ecology recently published a guidance document explaining its policy for determining irrigation efficiency and consumptive use. The irrigation efficiency guidance document explains how consumptive uses are calculated for irrigation purposes. This document should be used by Ecology to estimate return flows under the Skagit instream flow rule amendment. Ecology should use its irrigation efficiency and consumptive use guidance document when determining return *flows* for outdoor use.

1022-Skagit County is concerned that establishing multiple, conflicting standards will cause confusion and may invite challenges to building permits premised on reservations withdrawals. These conflicts, and the risk of litigation, should be resolved before Ecology proceeds with rulemaking. Under any definition, 150 gpd is insufficient to meet domestic needs and more withdrawals should be allowed.

Furthermore, WAC 173-505-110 lists five situations under which withdrawals are exempt from closures. Surface water withdrawals from Lake Cavanaugh for domestic supply purposes do not meet any of these exceptions; therefore, future withdrawals from the lake would be prohibited. Because of the geological conditions in the Lake Cavanaugh area (i.e., near-surface bedrock with low porosity), surface water is in many cases the only source of water available. the language in sections 060 and 110 leaves this area without a source of domestic water for the future and is therefore, unacceptable. Subsequently, Skagit County requests that this section be modified to allow future domestic surface water withdrawals from Lake Cavanaugh.

IV. Ecology's proposed Stillaguamish rule violates procedural rulemaking requirements

1023-Before adopting a significant legislative rule, an agency must show that the rule is, among other things: 1) supported by a cost/benefit analysis; 2) the least burdensome alternative; and 3) consistent and coordinated with other federal, state and local laws.[26] A significant legislative rule is one which adopts substantive provisions of law pursuant to delegated legislative authority, or adopts or significantly amends a new regulatory program.[27] A rule adopted without compliance with these procedural requirements is subject to invalidation under the Administrative Procedure Act (APA).[28]

1024-The benefit-cost analysis

The rule-making record must contain sufficient evidence that the benefit-cost analysis justifies the determinations made.[29] The analysis lacks adequate consideration of effects on public and private entities. The analysis also fails to consider the need for complex regulatory oversight in portions of the basin where there is no perceived threat to instream flows from additional domestic and irrigation uses.

- **1025-Least burdensome alternative analysis**

Ecology's least burdensome alternative analysis is less than a page in length.[30] An adequate least burdensome alternative analysis must consider the goals of the regulatory program - to provide an adequate supply of water for instream and out-of-stream uses - to evaluate whether the instream flows, closures, and proposed reservation are the most efficient means of achieving those ends. The least burdensome alternative does not meet this basic need. The least burdensome analysis should consider the exception for exempt wells contained in other instream flow rules.

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26 RCW 34.05.328(1).

[27] RCW 34.05.328(5)(c)(iii).

28 RCW 34.05.570(2)(c).

[29] RCW 34.05.328(2).

30 *Wash.* Dept. *of* Ecology, *Preliminary Benefit-Cost Analysis & Least Burdensome Analysis for Amendment to Chapter 173-505 WAC Instream Resources Protection Program- Stillaguamish River Basin Water Resource Inventory Area (WRIA 5)* 27 (2005).

V. 1026-Ecology's proposed rule results in significance unintended impacts, the effects of which have not been adequately analyzed or disclosed

Ecology failed to take the requisite hard look at potential effects of the proposed rule. Ecology must consider conflicts between the proposal and existing laws and requirements protecting the environment, the precedent the proposal establishes for significant future environmental effects, and impacts to prime farmlands.[31] Ecology failed to adequately consider cumulative effects of regional instream flow setting proposals when determining the requisite level of analysis.[32] Skagit County believes the "marginal impacts when considered together may result in a [cumulatively] significant impact."[33]

A. 1027-Ecology ignored impacts to agricultural lands

Agriculture is a leading industry in Skagit County, and agricultural water supply needs are growing. Nevertheless, Ecology's proposed rule does not include a reservation of water for agricultural needs. There are over 7,300 acres - roughly $11^{1}/^{2}$ square-miles - within the Stillaguamish River basin which are currently in agricultural production.[34] This omission inflicts a disproportionate negative effect on agriculture. Any action that significantly and disproportionately impacts such a significant portion of the basin, the people employed in this industry, and all those who depend on government services substantially underwritten by agricultural production deserves commensurate attention. Skagit County urges Ecology to revise the proposed rule to address the needs of agricultural water users.

B. 1028-Ecology ignored significant impacts to land use

Ecology fails to disclose or discuss the potential effects the rule amendment will have on growth in rural and urban areas. Skagit County will experience growth regardless of the rule amendment. The rule, however, will have a profound effect on how and where that growth will take place.

Ecology recognizes "[w]ater availability is one major determinant of land use."[35] Ecology also recognizes statewide implementation of restrictions on exempt well use "could result in cumulative and significant unavoidable impacts to homeowners and municipalities in the state."[36] Failure to discuss land use impacts is troubling in light of restrictions on water use in neighboring basins. Limiting water availability in northwestern Washington will affect residential and commercial development patterns throughout the region but no explanation of the effects of these changes has been provided.

> Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. . . . Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they: Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.[37]

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31 WAC 197-11-330(3).
32 WAC 197-11-330(3).
33 WAC 197-11-330(5),197-11-315(5) and 330(5).
34 Determination of Nonsignificance, 19.
35 Wash. Dept. of Ecology, Instream Resources and Water Allocation Program Review Draft Environmental Impact Statement 3-11 (1987).
36 Wash. Dept. of Ecology, Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6-65 (2003).
37 WAC 197-11-060(3)(b).Ecology is undertaking a comprehensive program to regulate instream flows throughout the state and has previously treated individual planning effort as part of an integrated whole.

1029-Restrictions on exempt well development in these rules will discourage development throughout the region, shifting growth patterns towards urban centers served by municipal water purveyors or towards redevelopment of agricultural lands with existing, senior water rights. The synergistic effect of these three proposals will change the face of development in northwestern Washington, reducing growth throughout the 3,526 square miles of Whatcom, Skagit, and Snohomish counties covered by these rules. Ecology needs to address the significance of the urbanizing impacts its proposals will have on these Washington counties. Ecology recognizes that regional restrictions can have significant cumulative effects when it states: "Should established flows reduce the amount of water available for out-of-stream uses, [setting instream flows by administrative rules] in multiple watersheds could reduce development on a regional or statewide scale."[41] Despite this recognition, Ecology glosses over clearly significant cumulative effects. In the face of such conflicts, Ecology should prepare a comprehensive EIS.

C. 1030-Ecology ignored significant impacts on housing resources

Housing is a component of the built environment,[42] and a fundamental component of the GMA.[43] Counties that plan under GMA must "encourage the availability of affordable housing to all economic segments of the population, promote a variety of residential densities and housing types, and encourage preservation of existing housing stocks."[44]

Ecology's *Final Environmental Impact Statement for Watershed Planning* admits that restrictions on exempt well use "may limit the availability of affordable housing by increasing the cost of water for placement of water lines and distribution systems."[45] This is especially true where, as here, the proposed rule requires connection to public water systems which cost as much as twice that of an exempt well.[46] The burden of such connections cannot be overstated because, as Ecology recognizes, "[e]xtending public water supplies into areas served by exempt wells may result in increased costs to existing exempt well owners who, if they choose to connect to the public system, may be required to pay part or all of the costs of extensions and/or connections."[47] Skagit County is especially concerned that Ecology's proposed Stillaguamish rule is the only pending instream flow rule in the region that requires landowners withdrawing water from the reservation to abandon their wells and connect to municipal water.[48] The cost of developing a well, only to then cap it and connect to municipal water is anything but reasonable. Compounding these costs is the prospect of having to incur these costs on a mere 120 days notice [49] Skagit County is particularly concerned about the disproportionate effect this could have on lower income families.

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[38] *See e.g. FEIS for Watershed Planning; FEIS for Western Washington instream Resource Protection Program; DEIS for Instream Resources and Water Allocation Program Review; Guidance, Setting Instream Flows and Allocating Water for Future Out-Of-Stream Uses.*

39 *Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW* 1.

40 Wash. State Dept. of *Ecology, Instream Flow Rule-Making Schedule,* January 2005-September 2006 (Feb. 28, 2005).

41 Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6-124.

42 WAC 197-11-444(2)(b)(ii).

43 Chapter *36.70A* RCW

44 RCW 36.70A.020(4).

45 Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6-64

46 Proposed WAC 173-505-030(13).

[47] Final Environmental Impact Statement for Watershed Planning Under Chapter 90.82 RCW 6-67 /

48 Proposed WAC 173-505-090(2)(f).

49 1d.

VI. 1031-Conclusion

Ecology's current strategy to adopt instream flow rules will undermine the County's efforts to comply with the Growth Management Act and other provisions of law relating to water availability. Skagit County is also concerned about the fairness and enforceability of the proposed rule. Skagit County will shoulder much of the burden for enforcement of the rule, without having had an opportunity to consult with Ecology on how the rules will be implemented.

Skagit County appreciates the opportunity to present these comments and looks forward to working with you and other state agencies and interested parties to develop effective, responsible regulations to protect aquatic resources within the Stillaguamish basin.

Sincerely,

MENTOR LAW GROUP, PLLC
Joe Mentor, Jr.

Meyer, Robert [meyer@ewingandclark.com] Sent: Tuesday, April 26, 2005 6:45 PM
Subject: Please Protect and Preserve our Salmon
Robert Meyer, 2110 Western Ave, Seattle, WA 98121
Dear Steve Hirschey:

The following are ways that Ecology's Stillaguamish proposal could be improved:

- **1358**-Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.
- **1359**-Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.
- **1360**-Measure future water use. We need to know how much water is being used in order to manage it more wisely.
- **1361**-Include recommendations to reduce the impacts of logging.
- **1362**-Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

Thank you for your consideration.
Sincerely,
Robert J. Meyer

Miller, James – City of Everett

May 18, 2005

Steve Hirschey
Washington State Department of Ecology
3190 160th Ave. SE
Bellevue, WA 98008

Re: Stillaguamish River Instream Flow Rule

Dear Steve:

977-The purpose of this letter is to support the need for the proposed Instream Flow Rule for the Stillaguamish River. We believe that instream flows must be set in order to protect fish habitat as a key element of any salmon recovery plan for Puget Sound.

978-Everett provides water to over 75% of Snohomish County. Our wholesale and retail planning service area includes the western half of Snohomish County from the King County boundary to Skagit County. As such, this includes the lower Stillaguamish River basin which was one of the areas addressed in our 2000 Water Plan for the possible future provision of water. At this time, only Arlington obtains about 20% of their water from our water supply. The rest is outside of our existing water usage area.

979-We support the setting of appropriate instream flows by rule as an essential part of the State's water resources management responsibilities. We believe that establishing instream flows at levels needed to protect fish runs is necessary to create certainty for all water users and uses in a basin. We have found that the instream flows set for the Sultan River can result in benefits to both people (hydropower, water supply, and flood control) and fish. However, unlike the Stillaguamish, in the Sultan Basin we have the advantage of a large storage project and the ability to manage flows to ameliorate the effects of natural extremes.

980-Our main concern is that the Proposed Rule sets an instream flow for the North Fork during August at 800 cfs. We do not believe that this meets one of your key criteria of "hydrologically achievable". This is over double the average monthly flow or 50% exceedence level. Instead it is at the 10% exceedence level meaning it could only be met in the natural flow condition one out of ten years. This would not meet any reasonable standard of achievability. In an unregulated river, like the Stillaguamish, nature does not always provide flows that are optimal to support desired fish populations. The proposed instream flows for the summer months are all higher than the average flows for these months. This creates a double whammy for water suppliers because this is the time of highest municipal water usage.

981-We support the inclusion of a reservation for future withdrawals through exempt wells. In addition, we believe that the State should consider providing funding for "source exchange." This would provide financial

assistance to local utilities that could get water from other sources than presently used in order to reduce their possible impact on streamflow. This should be part of a salmon recovery strategy. This would also provide for development of long-term solutions to future water supply needs in the basin in a manner compatible with salmon recovery plans.

982-We support the need for an instream flow rule for the Stillaguamish River and Ecology's efforts so far in developing the Proposed Rule. We suggest that some policy refinements suggested above would help to make the Rule more acceptable to basin stakeholders.

Sincerely,
James W. Miller, P.E.
Engineering Superintendent

Monthie, Dave, King County Dept. of Natural Resources and Parks

King County
Department of
Natural Resources and Parks Director's Office
King Street Center
201 South Jackson Street, Suite 700 Seattle, WA 98104-3855

December 14, 2004
Steve Hirschey
Washington State Department of Ecology
3190 - 160th Ave SE
Bellevue, WA 98008

Re: Comments on the Department of Ecology's November 1 Concept Outline for Stillaguamish Instream Flow Rule

Dear Mr. Hirschey:

This is to provide you with a set of informal comments from the King County Department of Natural Resources and Parks on the November 1, 2004 "concept outline" for the proposed Instream Resources Protection and Water Resources Program – Stillaguamish River Basin. Our comments reflect the provisions in the concept outline, as well as other supporting material—e.g., the Department of Ecology's (Ecology) September 2004 "Setting Instream Flows and Allocating Water for Future Out-of-Stream Uses" guidance document (Guidance Document), and other material provided by Ecology explaining particular provisions of this Guidance Document.

King County fully supports the objectives of Ecology in developing this rule for the Stillaguamish River in order to protect the important functions that this river system performs for fish and their habitat needs, as well as providing some direction and boundaries for other future uses of the water in the system. The Stillaguamish River is not in King County. However, King County has worked with the tribes, other local governments, and other partners in developing a regional salmon recovery plan for the entire Puget Sound ESU, for which the Stillaguamish will likely play a significant role. In addition, since the proposed rule for the Stillaguamish is one of the first two to be proposed by Ecology under the foregoing guidance document, and is therefore likely to provide a template for future statewide or watershed rulemaking by Ecology, we would like to offer a few comments that we would have made on the Guidance Document itself. We will divide them up into instream flow and out of stream use comments.

We want to say at the outset that we commend Ecology for its effort to link together both instream flow protection and provisions addressing future out of stream uses. In particular, the Guidance Document represents a commendable effort to link together and, sort, in a sensible way, a number of disparate pieces of work related to water resource management. We believe that the process to outline such linkages, and develop appropriate pathways toward better water resource management at the state and local levels, should continue.

1056 1. The proposed flow regime is evidently based on an IFIM evaluation that was done quite some time ago. The characteristics of the river system may have been altered considerably since then because of several large floods, one major landslide, and siltation due to heavy logging and associated practices. While we can understand that a complete redoing of the IFIM work would take considerable time, and carry a significant cost, we would suggest that some form of verification of the original transects be undertaken. This could be an evaluation through aerial photos, or field inspections of a certain percentage of the cross sections. This work would provide a higher level of comfort with the assumptions underlying the IFIM calculations.

1057 2. It is not clear whether the proposed approach addresses fully the needs of bull trout, an Endangered Species Act (ESA) listed species that is present and spawns in the Stillaguamish system. There is also a pending petition to list steelhead under the ESA, and the rule should factor that possibility into its flow proposals.

1058 3. It is not clear whether or how Ecology would propose to allow an additional 1-2 percent of habitat loss through reservations of water that would be allowed irrespective of the established instream flows, or stream closures. The spatial impact of such habitat loss could be considerable, depending upon the characteristics of any particular area of the Stillaguamish system (or any other river system) where these additional withdrawals are allowed.

1059 4. It is not clear whether Ecology has used the Viable Salmonid Population (VSP) framework that is guiding development of the regional salmon recovery plan that is expected to be completed by 2006, as well as the supporting tools (e.g., habitat models). If not, the proposed flow regime to be adopted by the state could conflict with the regional recovery plan developed under the ESA. It would be important to ensure that the federal services comment on this possibility.

1060 5. We would support the objective of capping withdrawals so that total flows in the system allow for maintenance of a "normative" flow regime in terms of hydrologic characteristics. We appreciate that the Guidance Document points out the value of developing ecological flows that protect ecological functions that are important to preserving and protecting fish and wildlife populations. This is consistent with the views of the State's Independent Science Panel with regard to flow and ecosystem conditions necessary to achieve recovery. We disagree with the inference in the Guidance Document that, in streams with a lack of historic flow data or with a highly altered hydrologic regime, the use of IFIM, PHABSIM or toe-width approaches is sufficient to establish an appropriate flow standard. Without some historic hydrologic context (useful in both cases), departures in flow conditions cannot be appropriately represented in such models. Even in data-poor or highly altered watersheds, the use of hydrologic models such as HSPF or DHSVM can provide a reasonable synthetic record that can be used as a precursor to more specific habitat-based models such as IFIM, thus increasing confidence in the predictions of flow-habitat responses.

1061 6. There is no explicit mention of other activities that are state-regulated, or over which the state has control, that may have significant impacts on stream conditions. For example, ensuring proper forest practices is of particular importance in maintaining or improving the environmental integrity of this basin. Inasmuch as the scope of this rule (and other rules) as outlined in the Guidance Document goes beyond the direct authority of Ecology (e.g., in establishing quantified standards for domestic water use, which would otherwise appear to be the purview of the Department of Health or local boards of health), it would appear that Ecology's rules should consider (or explicitly reference) other activities and standards that clearly have or would affect achieving the goals of this rule and other rules with regard to protecting flows. Ecology could also consider referencing, and requiring consistency with, programs and plans developed for the protection of fish under explicit state authorities (e.g., Salmon Recovery Act) or federal ones (e.g., the ESA).

Out of Stream Allocations

1062 1. In general, there should be some deference to, and acknowledgment of, requirements and policies adopted by local governments in attempting to address issues of water supply. These may exist in comprehensive plans (and implementing ordinances, policies, or rules), or watershed plans developed under RCW 90.82 or 90.54, or other water-related planning efforts (e.g., groundwater management plans; coordinated water supply plans). The development of these rules should reflect Ecology's effort to implement as well the specific provisions of the 2003 Municipal Water Law that attempt to link water supply planning and delivery to those other planning processes.

1063 2. Application of Overriding Consideration of Public Interest (OCPI)

The rule proposes to create two reservations not subject to the instream flow rule: an unspecified amount for stock water and 5 cfs of groundwater for future domestic use. Ecology justifies these reservations by declaring that the public interest is advanced. The Guidance Document appears to presume that in any basin, up to a certain amount of water may be consumptively used, irrespective of "minimum" flows established by rule, or stream closures, under the statutory authority to make this determination. While this may be true in area-specific situations, establishing this as a general agency approach would seem to trigger the need to develop rules of general applicability under the APA in order for Ecology to apply such a policy statewide. To the best of our knowledge, Ecology has in the past limited the application of this concept to area-specific determinations (e.g., the Lake Tapps water supply project) where it has identified the specific elements of the public interest that support such a determination.

1064 3. Similarly, such a reservation of water for out of stream use would seem to be appropriate in areas where it is not likely to affect streams, or where the health of the streams may be minimally affected. In other areas the effects may be more direct or more detrimental. Ecology should at a minimum evaluate assessments that have been done at the local level that address such issues, and make separate decisions with regard to each proposed rule, and the potentially affected streams in each watershed, as to the likely impacts such use will have.

1065-4. There is no indication as to whether Ecology has factored in the "duty to serve" provisions of the Municipal Water Law, or the availability of "inchoate" water rights, into its reservations of water for out of stream use in any given basin. It would appear that such issues are within the explicit or implicit direction to the Departments of Ecology and Health provided by the Legislature in that 2003 legislation.

1066-5. Exempt wells
Ecology has the authority to control groundwater withdrawals that are exempt from permits and we support the rule encompassing this approach. We suggest that Ecology consider using its full authority—e.g., requiring metering on all withdrawals, even those made under exempt wells. This would seem to provide data that is currently missing statewide as to the extent of withdrawals from such use, and would allow monitoring, if necessary, of compliance with limitations on exempt well use.

1067-6. As noted above, it is not clear how Ecology developed the 350 gpd standard for each household. The Guidance document refers to USGS data for Washington. The State Department of Health would seem likely to have much more accurate data for Washington, and should be responsible for establishing standards for domestic water use. A related issue is the basis for Ecology's assumption that 50 percent of septic system discharge may be allocated to recharge of stream flows. We are not aware of the technical basis for being able to make. that general statement, or for applying it as a general concept irrespective of hdyrogeological conditions at the well or stream.

1068-We want to note that the Stillaguamish basin will be the subject of a pilot project funded through the Shared Strategy process to evaluate instream flows and their relationship to the watershed recovery plans being developed for the Puget Sound ESU. We suggest that Ecology attempt to incorporate the results of that project into its evaluation of the best flow regime to support the recovery objectives.

Feel free to contact me if you want to discuss these comments further. Sincerely,

David Monthie
Regional Water Policy Analyst

Oien, Ted and Jean

Camano Vu Dairy
April 18, 2005

Dear Mr. Hirschey:

983-Part of the reason no watershed planning group was formed on the Stillaguamish River basin is due to the many groups that we already have formed and attend. There is only so much time that active farmers can devote to all these various projects. It seems like a lot of them could be combined and the spring and summer are the busiest time of year for our area farmers. We are trying to make a living in this wonderful valley.

984-During the summer we do not water our lawns. We do not add pesticides to it. We grow dandelions instead.

985-We don't need any more rules and we are already overregulated which has forced more and more dairy farms and their families out of business. If buraqcracies (sic) continue to do this and we will be importing our foods from other countries which have no regulations and no safety standards of chemicals.

986-Maybe if we had less construction and building in the area, there would be less need for more water.

987-Let the Tribes take less fish and maybe the populations of fish would come back more readily.

988-Why put trees along sloughs that are shrinking.

989-Why are fish more important than people?

Sincerely,
Ted and Jean Oien
Camano Vu Dairy
7221 Norman Road
Stanwood, WA 98292
360-939-0510

Olivers, Clair – Snohomish County Public Utility District #1

May 17, 2005

Re: Stillaguamish River Instream Flow Rule

Dear Steve:

1042-The purpose of this letter is to support the need for and offer comments on the proposed Instream Flow Rule for the Stillaguamish River. As you know, the Snohomish County Public Utility District #1 (District) provides electric and water service throughout Snohomish County. Specifically, we are the provider of retail electric service in the Snohomish County portion of the Stillaguamish River basin; and, we operate three water systems within the basin and provide a supplemental wholesale supply of water to the City of Arlington.

1043-We feel that the setting of instream flows by rule is an essential part of the State's water resources management responsibilities, whether in response to flows agreed upon in locally-developed basin plans or by Ecology action in the absence of such plans, as in the case of the Stilly. We believe that establishing instream flows at levels needed to protect fish runs and other significant instream values is necessary to creating certainty for all water users and uses in a stream basin. Our experience in the Sultan River leads us to conclude that active management using sound science and an adaptive approach can result in benefits to both people (hydropower, water supply, and flood control) and fish. However, in the Sultan we have the advantage of a large storage project and the ability to manage flows to limit some natural extremes.

1044-In an unregulated stream, like the Stilly, nature does not always provide flows that are optimal or even sufficient to support desired fish populations. This fact presents a significant challenge to the effort to draft a rule that is protective of a specified level of fish habitat.

1045-We have not conducted a thorough technical review of the Stillaguamish Rule; however, we have attended several presentations on it and participated in discussions on the work behind the Rule. The approach used to establish the relationship between flow and fish habitat seems to be based on generally-accepted principles and methods. There is, however, no linkage to fishery management in the instream flow-setting process; so, there is no way to determine if the habitat quantities to be protected and fish escapement numbers are correlated. This leaves open the question of whether lower flows at some times and locations would be sufficient to support the fish management program for the basin. A case in point is the data for the flow point on the North Fork of the Stilly above Arlington, which is a stream where there has been only minimal modification of the natural environment, but where flows would not meet the Rule requirement in late Summer in the vast majority of years. This result would be difficult to explain and, we believe, unnecessarily creates confusion and doubt about the basis and validity of the Rule. This is a weakness of the instream flow-setting process that needs some further evaluation to insure wider support of these rules, in addition to the necessity for stronger ties between habitat management and fishery management.

1046-We support the inclusion of a reservation for future withdrawals through exempt wells. It might also be beneficial to the process, overall, to include a similar small reservation for future municipal groundwater withdrawals to allow time for development of long-term solutions to future water supply needs in the basin.

1047-We support the need for the instream flow Rule for the Stillaguamish River and applaud Ecology's efforts so far in developing the Proposed Rule. We feel that the technical work is supportable and suggest that some policy refinements would help to make the Rule more acceptable to a wide array of basin stakeholders. We look forward to working with Ecology as the Rule is developed and implemented. Thank you for the opportunity to comment.

Sincerely,
Clair Olivers
Assistant General Manager, Water Resources
Snohomish County Public Utility District #1

Kimberly Ordon, The Tulalip Tribes

May 13, 2005

Mr. Jay Manning, Director
Department of Ecology
P.O. Box 47600
Olympia, WA 98504

Mr. Steve Hirschey
Department of Ecology
3190 160th Ave. SE
Bellevue, WA 98008

RE: Proposed Rulemaking on Stillaguamish River Instream Resources Protection Program at WAC 173-505.

Dear Mr. Manning and Mr. Hirschey;

1237-The Tulalip Tribes would like to offer comments on the above-referenced rulemaking for the Stillaguamish River basin. The present-day tribal entity known as The Tulalip Tribes of Washington is the political successor in interest to certain tribes, bands, and groups of Indians who were parties to the Treaty of Point Elliott of January 22, 1855 (12 Stat. 927). *United States v. Washington*, 459 F. Supp. 1020, 1039 (W.D.Wash. 1978). The Tulalip Tribes are a federally recognized Indian tribe and reside on the Tulalip Indian Reservation established pursuant to the Treaty of Point Elliot of January 22, 1855 (12 Stat. 927) and by The Executive Order of December 23, 1873. The Tulalip Tribes reserved the right to take fish in their usual and accustomed fishing places pursuant to the Treaty. These usual and accustomed treaty fishing areas include the freshwater areas of the Snohomish and Stillaguamish river basins and certain marine waters of the Puget Sound through which fish propagated in such basins pass. *U.S. v. Washington,* 459 F. Supp. 1020, 1038 (W.D. Wash. 1978); *U.S. v. Washington,* 626 F. Supp.

1405, 1527 (W.D. Wash. 1985), *Aff'd*, 841 F.2d 317 (9th Cir. 1988). The right to take fish includes the right to habitat protection including a reserved water right of appropriate quality and quantity to support continuation and enhancement of fish runs. In the Stillaguamish River basin, the Tulalip Tribes and the Stillaguamish Tribes work jointly to protect treaty resources.

1238-Tulalip lauds the Department of Ecology's effort to set instream flows as an important step in the statewide effort to restore fish and fish habitat. Because Tulalip depends on salmon for its economic livelihood and its cultural survival the Tribes supports this effort.

1239-Tulalip currently participates in a number of forum with the purpose of developing salmon recovery plans to respond to Endangered Species Act listings of chinook stocks by the National Marine Fisheries Service (NMFS). Tulalip currently serves as Vice Chair of the Snohomish River Basin Recovery Forum which has just completed its comprehensive Salmon Recovery Plan for the Snohomish Basin. Tulalip serves on the Development Committee of Shared Strategies. Tulalip scientists are members of the Technical Recovery Team (TRT) appointed by NMFS to assist in developing recovery plans. Tulalip scientists also serve on the Snohomish Technical Team and the Stillaguamish Technical Advisory Group (STAG) both of which are charged with developing the technical foundation for salmon recovery plans. Tulalip also participates on the Stillaguamish Implementation Review Committee (SIRC) which is responsible for developing and implementing a salmon recovery plan in the Stillaguamish basin. Last, Tulalip is a leader in Puget Sound hatchery reform of hatchery practices to fit with salmon recovery planning in both the Stillaguamish & Snohomish basins.

1240-Clearly, Tulalip takes its resource management obligations seriously in order to manage fishery resources and improve habitat in the Tribes' U&A places. Tulalip has a keen interest in protecting and restoring the salmon resources of its U&A places. The Tulalip fishing fleet has severely curtailed harvest in order to return more fish to spawning grounds. However, it is apparent that this is not enough to restore a once robust and thriving fishery. Habitat improvements must be made to capitalize on escapement goals set by fisheries managers. We have legal, policy, & cultural obligations as managers of this resource to insure that actions are taken to improve habitat in such a way as to bring about recovery of tribal resources. Tulalip scientists in cooperation with others have identified instream flows as limiting factors for salmon recovery. Therefore, Tulalip views Ecology's efforts to adopt instream flows as a key component to respond to the State's salmon recovery obligations.

1241-Toward that end, Tulalip expects that Ecology's instream flow program ensure salmon recovery by either meeting or exceeding other efforts that are currently underway in the Tribes' U&A that are aimed at salmon recovery planning. Tulalip is concerned that there are some aspects of the Stillaguamish rule that do not meet these expectations. While the Tribes supports most components of the proposed rule, there are some elements that are problematic.

1242- Reservation of Water for Future Use & Climate Change Impacts

Tulalip has serious concerns over Ecology's proposal to include in an *instream flow* rule an *out of stream* reservation for future water use. Ecology has estimated by less than scientific means that the reservation would constitute a 1% - 2% habitat loss given certain variables. Aside from the obvious point that an instream flow rule is a mechanism by which instream flows are secured against out-of-stream uses, Ecology did not appear to take into consideration the fact of climate change. Tulalip has been funding ongoing research that shows significant changes over time from the impacts of climate change. All of this data points to current and future instream flow declines. Adopting an instream flow rule that builds in out-of-stream allocations in a climate of continued losses does not comport with the major efforts of resource management partners to develop salmon recovery plans. In order to justify such an approach, Ecology must link the rationale for this reservation to its obligations for salmon recovery.

1243-The reservation is intended to be spread throughout the basin. This approach will lead to land use sprawl. One of the points of the Growth Management Act is to restrict development and reduce sprawl. The Municipal Water Law of 2003 requires adoption of conservation measures prior to the use of inchoate and future new sources of supply. This is because of a recognition that water is a finite resource. Ecology's reservation offers new sources of supply with none of these restrictions in place. In order to protect and reduce impacts to sensitive areas and closed basins (i.e. Church Creek, Portage Creek) it is important to target growth to areas that can be served by existing water sources.

1244-Forest Practices

Another variable that Ecology did not take into consideration when developing its rule is the impact from forest practices in the Stillaguamish basin. Over 75% of the basin was identified by Ecology as being in some way affected by forest practices either by loss of habitat, increased sediment loading instream, temperature increases and more. Despite recognition of these negative impacts, the rule does not take any measures to respond to these affects. Failure to address forest practices impacts will make the instream flow rule less effective in protecting fish and fish habitat.

1245-Recharge from Septic Tanks ,WAC 173-505-07

Tulalip does not agree that recharge from septic tanks should be considered by Ecology when issuing water rights. It is the Tribes' opinion that water is being returned to a different aquifer system than that from which it was withdrawn. Currently, Ecology lacks the ability to account for water it has already allocated through its permit system. Tulalip has little confidence that Ecology can add the burden of tracking, in any meaningful way, recharge from this source. The bank account will never be reconciled.

1246-Mitigation Plans, WAC 173-505-100

Tulalip strongly disagrees with allowing exemption from instream flow requirements by surface and ground water permits subject to an approved mitigation plan. Unless a mitigation plan can show measureable and continued benefit to instream flows, no exemption should be allowed.

1247-Require Metering and Reporting

Tulalip supports adopting measures requiring metering and reporting of water usage. The only way to insure with confidence that the Stillaguamish instream flow is protected is by instituting an accounting device that accurately reflects out-of-stream usage. Metering and reporting is the only way to accomplish that goal. Tulalip requests that all future groundwater rights, exempt wells and surface water rights be required to install and maintain measuring devices and report the data to the Department of Ecology.

1248-Enforcement

Tulalip recognizes that there is a fiscal burder for enhancing Ecology's enforcement program however, it is an important element to insuring the security of the Stillaguamish instream flow. Enforcement against illegal water uses or exceeding water right allocations is imperative.

1249-Summary

The Tulalip Tribes support adoption of an Instream Flow rule for the Stillaguamish River basin taking into consideration the necessary amendments or additions listed here. Tulalip is particularly concerned with the reservation of water for future allocations particularly in light of future climate impacts. Tulalip supports a rule that meets obligations to accomplish salmon recovery.

Sincerely
LAW OFFICE OF KIMBERLY ORDON
Kimberly Ordon

O'Shea, Mike [o_sheamike@hotmail.com] Sent: Sunday, May 01, 2005 11:17 AM
Mike O'Shea, 6620 151st Ave. N.E., Redmond, WA 98052

Dear Department of Ecology,

1363-I sincerely request that a healthy instream flow for the Stilliguamish be established. This must be a healthy flow to enable the preservation and recovery of salmon and steelhead.

1364-The policy should include sufficient groundwater reserves that do not lead to sprawling development, harming farms and fish.

1365-Water usage must be measured and enforced to ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

Thank you for your consideration.
Sincerely,
Mike C. O'Shea,
425-885-5372

Perkins, Sherry [sherperk@aol.com] Sent: Wednesday, April 27, 2005 11:53 AM
Sherry Perkins, 16015 SE 7th St, Bellevue, WA 98008
Dear Steve Hirschey:
The following are ways that Ecology's Stillaguamish proposal could be improved.

1366-Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.

1367-Include recommendations to reduce the impacts of logging.

1368-Measure future water use. We need to know how much water is being used in order to manage it more wisely.

1369-Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.

1370-Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

Thank you for your consideration.

Sincerely,

Sherry Perkins

Piland, Kathryn [piland4@earthlink.net] Sent: Thursday, May 05, 2005 9:56 AM

Kathryn Piland, 21431 62nd St NE, Granite Falls, WA 98252

Dear Steve Hirschey:

1371-I am concerned about the current and possible future condition of the Stillaguamish River. Please adopt a strong "instream flow rule" to enhance salmon recovery efforts while also continuing to provide people adequate supplies of this most precious of natural resources-clean water.

1372-Measure future water use. We need to know how much water is being used in order to manage it more wisely.

1373-Develop partnerships with other governmental agencies and community groups to encourage wise water use by everyone.

1374-Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

1375-Include recommendations to reduce the impacts of logging. I am not against the logging industry--we all use products made from trees. There is a way to do it sustainably and I would gladly support those companies who do so.

Thank you for your consideration.

Sincerely,

Kathryn Piland

Raisler, Richard, March 23, 2005 -- Letter

Department of Ecology

Attn: Steve Hirschey

Steve Hirschey,

999-I am a Skagit Valley citizen, retired businessperson and volunteer interested in protecting and preserving water quality of Washington lakes, streams and rivers. It is critical that you adopt instream flows to protect fisheries, wildlife, and ecology. Limiting future groundwater use is prudent and necessary for future generation's quality of life.

1000-Your decision to adopt instream flows for the Stillaguamish River is a critical component towards this effort. Thank you for this bold and necessary step. This decision comes after many years of not using your authority granted by the State in 1971. Please use your authority prudently and where ever necessary to protect Puget Sound Chinook salmon, steelhead, sea run cutthroat, and all species of salmon.

1001-This will require having a mitigation strategy that is proven to prevent abuse of the law.

1002-Many citizens, tribes, and organizations are contributing to the protection, restoration, and enhancement of the Stillaguamish Watershed. Thank you for joining in the process.

Respectfully,

Richard Raisler

14954 Channel Lane

LaConner, WA 98257

Reed, Bruce [brucer@cablespeed.com] Sent: Saturday, March 26, 2005 7:51 AM

Steve Hirschey,

1376-The watershed of the Stillaguamish River ("Stilly") is home to a world class Steelhead fishery, five species of salmon, exceptional recreation opportunities, and a number of people. Unfortunately, pollution and sprawl threaten to harm what is special about the Stilly.

1377-I support adoption of an instream flow generally as critical to protect the Stilly's fisheries, wildlife, and ecology before they are gone forever. A limit on future groundwater use is prudent: if we use too much groundwater, we rob our streams and river of water, especially in hot, dry summers.

1378-State law allows local governments to issue new building permits only when sufficient potable water is available. The rule strengthens this law by requiring local governments to inform future well owners of some limitations to protect the Stilly and its streams.

1379-The problems I have with the proposal include:

Ecology has not stated how the proposal will help meet Puget Sound Chinook salmon recovery goals - any stream flow protection policy should result in better protection of fish and streams.

1380-Ecology should require measuring of future water use: water meters are a fact of life for most water users in Washington. We need to know how much water is being used so that we can manage it more wisely.

1381-Ecology proposes risky mitigation strategies to allow additional water use: mitigation should be proven before any new water use is allowed.

1382-Ecology acknowledges the impacts on stream flows associated with logging, but makes no attempt to incorporate any safeguards.

Sincerely,
Bruce Reed,
1616B 20th Ave, Seattle, WA 98122

Reed, Bruce [brucer@cablespeed.com]
Sent: Sunday, May 01, 2005 3:04 PM

Dear Steve Hirschey:

The following are ways that Ecology's Stillaguamish proposal could be improved.

1383-Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.

1384-Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.

1380-Measure future water use. We need to know how much water is being used in order to manage it more wisely.

1382-Include recommendations to reduce the impacts of logging.

1385-Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

Thank you for your consideration.
Sincerely,
Bruce Reed

Schroeder, Val [hightide@wavecable.com] Sent: Tuesday, April 26, 2005 8:16 PM
Val Schroeder, 1369 Arrowhead Road, Camano Island, WA 98282
Dear Steve Hirschey:

1394-The Stillaguamish River ("Stilly") is home to a world class Steelhead fishery, five species of salmon, exceptional recreation opportunities, working farms, and people.

1395-Unfortunately, water pollution and unplanned development threaten to harm what is special about the Stillaguamish watershed. If a strong "instream flow rule" is adopted, we can protect remaining stream flows for fish, wildlife, water quality, and recreation. However, allowing too much additional new water use could encourage more "sprawl" development, which would harm fisheries, farming, and the quality of life in the watershed.

1396-Please adopt a rule that stops unplanned sprawl development and protects fish, water quality and the rural lifestyle of the Stillaguamish watershed. The Stillly proposal would:

1) Adopt an instream flow. An instream flow is long overdue and critical to protect the Stilly's fisheries and other instream resources before they are gone forever.

1397-2) Limit future groundwater use. Streams and groundwater are connected: limits are prudent because using too much groundwater robs our streams and rivers of water, especially in the summer.

1398-3) Require accountability for local land use decisions. The proposal requires local governments to adopt an ordinance stating that building permits may be limited in the future by the availability of water for

wells. State law already requires a demonstration of adequate potable water before any new building permit is issued. The new rule would strengthen this responsibility.

1399-4) Establish a trust water program. This allows water-rights to be purchased or donated so that water can remain instream for the benefit of fish, wildlife, and the environment.

1400-The State was granted authority in 1971 to adopt rules to protect lakes and streams from future water withdrawals. So far, Washington's Dept of Ecology has adopted instream flow rules for one-third of Washington's 62 watersheds. Only one rule has been adopted in the past two decades. It's time for the state to act to protect our fisheries, streams and quality of life. While setting a new instream flow does not automatically increase the amount of water available to support fish, it will help protect existing flows and define fish flow needs.

Thank you for your consideration.
Sincerely,
Val Schroeder

Shank, Donald [dhal9000@aol.com] Sent: Thursday, April 28, 2005 11:00 AM
Donald Shank, 3339 Northwest Avenue Apt 1, Bellingham, WA 98225
Dear Steve Hirschey:

1386-I am writing to urge you to adopt an instream flow protection policy for the Stilliguamish River. The Stilliguamish isn't just some ditch full of water. It is a complex series of processes and associations, and instream flow is a vital factor in the makeup of this river. When activities like logging and development take place at levels that alter the surface and subsurface hydrology of this basin, the Stilly is altered as well, sometimes with unforseen and unintended consequences.

1387-We must act to ensure that ample instream flows exist to protect the fish, wildlife and family owned farms of the Stilliguamish Valley. To set aside merely "adequate" flows is to invite disaster if initial calculations of what is adequate are incorrect. Better to err on the side of caution, and nature, rather than pressing the "edge of the envelope" trying to satisfy a demand for perpetual growth, a demand which by definition can never be sated in a finite system. If in the future it turns out we were wrong, far too cautious, we can always change it. If we allow expansion of development and intensive logging and we are wrong, it's too late to go back and change it, once the salmon runs have been destroyed and farms paved over.

1388-As someone who has hiked, camped, hunted and fished the Stilliguamish Basin for the last 50 years, who eats the produce of its farms, and who wants his grandson to be able to do the same, I ask you to:

Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.

1389-Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.

1390-Measure future water use. We need to know how much water is being used in order to manage it more wisely.

1391-Include recommendations to reduce the impacts of logging.

1392-Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

1393-These protections should have been granted decades ago, and they certainly should not be delayed any longer. We have plenty of examples of what happens when we fail to protect instream flows, so let us not allow this vital and valued resource to remain at risk any longer. Take the day and drive north, go up to Barlow Pass and follow the Stiiliguamish River through the South Fork Valley, down to the mainstem near Arlington, through Silvana and on to the Sound. Better yet, get out and take some hikes, and when you get past Granite Falls get in a canoe and float the western half. See and feel this treasure for yourself, understand both intellectually and viscerally why these protections are so important, then take action to preserve the Stilliguamish River for the generations who will follow us.

Thank you for your consideration.
Sincerely,
Donald Shank,
360-671-1061

Slavik, Jody, Building Industry Association of Washington -- Letter

Post Office Box 1909 Olympia, WA 98507 1-800-228-4229 FAX (360) 352-7801 www.biaw.com

April 25,2005

Department of Ecology
Attn: Steve Hirschey
3190 160th Ave. S.E.
Bellevue, Washington 98008

Dear Mr. Hirschey:

930-The Building Industry Association of Washington (BIAW) appreciates this opportunity to comment on the proposed Stillaguamish Water Management Rule, establishing instream flows for the Stillaguamish River in WRIA 5. BTAW represents over 11,200 member companies in the land development and building trades, many of which build in WRIA 5. These members rely on thoughtful, long-term planning that is predictable, stable, and allows for needed economic growth. Unfortunately, the proposed instream flow rule undermines certainty, usurps local planning, and stymies economic growth. For these reasons, BTAW is adamantly opposed to the proposed rule language. Our opposition is detailed below.

931-Ecology lacks authority to impose a reservation that restricts exempt wells. RCW 90.44.050 expressly exempts the withdrawal of ground water "for single or group domestic uses in an amount not exceeding five thousand gallons a day" from state permitting, and it further grants these wells "a right equal to that established by a permit issued under the provisions of this chapter." Ecology cannot, by rule, change the express exemption of RCW 90.44.050 such that only a finite amount of wells will be allowed in WRIA 5.

932-Not only does Ecology trump the statutory allowance of exempt wells by rule, but it also disallows any consideration of future water availability. Nowhere in the proposed instream flow rule does it provide for additional future water reservations or a process to consider such additional reservations. In fact, the rule specifically states that "The reservation is a one-time, limited exception to the instream flows and closures. Once the reservation is fully allocated, it is no longer available." WAC 173-505-090(6) In doing so, it creates an absolute limit on the number of wells, contrary to RCW 90.44.050, and it forces future ground water withdrawals for single or group domestic uses to apply for a permit.

933-The finite water reservation conflicts with RCW 90.54 and RCW 36.70A. The Water Resources Act of 1971 holds the following to be a fundamental guiding principal: "Adequate and safe supplies of water shall be preserved and protected in potable condition to satisfy human domestic needs." (RCW 90.54.020(5)) Moreover, domestic water use is regarded to be beneficial, and allocation is determined on a cost-benefit basis, including consideration of public benefit.

934-The statute most reflective of the balancing of natural resource protection and economic growth is the Growth Management Act, RCW 36.70A. In this chapter, the goals of housing, economic development, and property rights are paired with the environment, open space, and limitation of sprawl. Under RCW 36.70A, local governments are vested with the authority to create comprehensive plans that provide ample housing and job opportunities while protecting local resources. This is a careful balancing act; local governments thoroughly weigh public benefit and cost before producing growth plans and development regulations. However, these thoughtful, long-term plans are usurped when the Ecology creates a

finite limitation of water for exempt wells in rapidly growing areas. Similarly, Ecology is abrogating its duty to preserve and protect sufficient water for domestic needs when it creates arbitrary limits on ground water withdrawals.

935-WAC 173-505-090(8) increases local liability, undermines growth management planning, encourages lawsuits, and further impairs water withdrawals. Ecology continues to exceed its authority in WAC 173-505-090(8). The provision states in part:

If existing county and city land use decisions, including zoning changes and building permit and sub-division approvals, allow for increased densities that adversely affect small tributaries and other flow-sensitive areas, the department may limit or restrict the further use of the reservation. (emphasis added) This section contradicts RCW 90.44.050 because it blatantly prohibits exempt wells based on a subjective standard wielded by Ecology. Nor does this provision speak to future local government land use decisions; it applies to all existing plans and regulations that were painstakingly crafted, debated, and adopted based on the balancing required in the GMA. Through this provision Ecology could attempt to regulate land use, a role expressly reserved to local governments. Ecology is not granted review and approval authority of GMA comprehensive plans and their development regulations, and it should not attempt to do so through regulation.

936-It is also frankly offensive that Ecology is granting itself authority to punish a local government and its taxpayers if it deems that area to have planned densities that "adversely affect small tributaries and other flow-sensitive areas." To what level is "adverse"? What is the range of "small tributaries"? What are the "flow-sensitive areas"? What is the process to make these determinations? Such vague definitions and a lack of process will encourage lawsuits from environmental and citizens groups looking to stop growth and responding lawsuits from property owners who have been denied economic use of their property.

937-The 350 gpd generalized withdrawal amount is excessive and further limits exempt wells. WAC 173-503-090(5)(a) establishes a generalized withdrawal amount of 350 gpd to determine reservation usage. However, this amount is double that of average household use. The Skagit Public Utility District, in neighboring WRIA 3 and 4, pinpoints average daily household use at 176 gallons. Given that Ecology's bloated withdrawal amount of 350 gpd will cut the number of exempt wells in half, the agency should be required to determine and use accurate withdrawal amounts. However, Ecology is not directed to find other information ("This amount will be reconsidered if and when sufficient information is collected and verified.").

938-The Cost-Benefit Analysis and Small Business Economic Impact Statement fail to address impacts on housing. The Preliminary Benefit-Cost & Least Burdensome Analysis (Cost-Benefit Analysis) and Small Business Economic Impact Statement (SBEIS) are woefully inadequate in their analysis of economic impacts and are an affront to economic recovery efforts in Washington. Neither specifically address the economic impact of a finite reservation for ground water withdrawals, including the limitation of new home development, reduced home values, decreased property tax valuation, and potential takings litigation.

In fact, both documents seem to regard the reservation as a full-fledged allowance of wells, with no end in sight. The Cost-Benefit Analysis states, "The reservation will allow households and businesses to access water the entire year." There is no mention of the economic impact on local governments, businesses, or taxpayers when the reservation is fully used or when Ecology wields its prohibition hammer under WAC 173-505-090(8).

939-In the Least Burdensome section of the Cost-Benefit Analysis, Ecology notes: "Conclusion: Requirements for connections and restrictions on use are likely to have an economic impact. The requirement that local governments adopt an ordinance prior to the reservation being established may delay or pre-empt reservation establishment. See "Rule Impacts to Waster Right Administration."

Presumably, the section entitled "Rule Impacts to Water Right Administration" addresses the economic impact recognized by Ecology. It doesn't. It simply reiterates the process of getting a permit and using the reservation granted by Ecology. The closest this section comes to discussing economic impacts is the statement, "Businesses that elect to install permit exempt wells for their own moderate needs or to develop saleable land will face more choices as to their best option."

940-Similarly, the SBEIS does not provide a detailed economic analysis of the impact of a finite reservation, nor does it address the impacts to the hundreds of small builder companies in WRIA 5. The SBEIS assumes that the finite reservation will be sufficient to meet development needs in perpetuity ("For businesses developing land for residential construction, or requiring domestic water only, the reservation should meet that need..."). However, once the reservation is used, there will be significant impacts to residential builders in the form of water rights permitting costs, engineering fees, and devalued or unusable land.

Even Appendix C, which purportedly details the impact to businesses if a reservation is not provided, fails to discuss actual costs or economic impacts of a residential development prohibition. This Appendix goes so far as to state "The magnitude of the impact will be determined by the proposed location and use of future water permit holders." Isn't this the job of the Ecology in crafting the SBEIS? The SBEIS should include OFM population projections for WRIA 5, as well as current population figures, residential building trends, and projected development in local comprehensive plans. Ultimately, the Cost-Benefit Analysis fails RCW 34.05.328(d) by not providing "qualitative and quantitative. . .costs."

941-Ecology further asserts "This rule has been developed over a long period with substantial public involvement. Several public meetings were held to discuss the language and the proposed rule was posted on Ecology's website." Supposedly this statement is made to comply with RCW 90.54.010, which provides in part:

"(b) Through a comprehensive planning process that includes the state, Indian tribes, local governments, and interested parties, it is possible to make better use of available water supplies and achieve better management of water resources. . . .

(d) Comprehensive water resource planning must provide interested parties adequate opportunity to participate. Water resource issues are best addressed through cooperation and coordination among the state, Indian tribes, local governments, and interested parties."

However, two public informational meetings and posting the rule on the website does not rise to the level of "substantial public involvement." In addition, "[t]he Stillaguamish River is not a WRIA where watershed planning is being conducted." (Ecology Focus sheet, August 2004) Without a watershed planning group, how has Ecology gathered the requisite information to make an informed analysis of economic impacts on small business?

942-A more flagrant failing of Ecology's statutory rulemaking requirements is comparing the SBEIS to RCW 19.85.040, which requires Ecology to "analyze the costs of compliance for businesses. . . including costs of equipment, supplies, labor, and increased administrative costs. . .[as well as] whether compliance with the rule will cause businesses to lose sales or revenue." This statute not only requires Ecology to describe how it "will involve small businesses in the development of the rule," but also "survey a representative sample of affected businesses or trade associations." RCW 19.85.040(2)(b), (3) (emphasis added). Ecology has not demonstrated how it specifically included businesses in the rule development process, surveyed businesses, or appointed a cost-assessment committee as suggested by 19.85.040(3).

943-BIAW opposes the rule amendments to Chapter 173-505 WAC. The proposed rule surpasses Ecology's authority and has dramatic impacts on the regional housing industry, as well as the Snohomish and Skagit County economies. In a final blow to local homebuilders and taxpayers, Ecology fails to address or otherwise mitigate these impacts in the rule or in the supporting Cost-Benefit Analysis and SBEIS.

Sincerely,
Jodi C. Slavik, Of Counsel

Taylor, Ricky [taylorrl@mindspring.com] Sent: Tuesday, April 12, 2005 9:35 PM
Ricky Taylor, 4221 114th ST SE, Everett, WA 98208

Dear Steve Hirschey:

1401-The Stillaguamish River is home to a world class Steelhead fishery, five species of salmon, exceptional recreation opportunities, working farms, and people. Unfortunately, water pollution and unplanned development threaten to harm what is special about the Stillaguamish watershed.

1402-The following are ways that the Department of Ecology's Stillaguamish proposal could be improved:

Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.

1403-Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.

1404-Measure future water use. We need to know how much water is being used in order to manage it more wisely.

1405-Include recommendations to reduce the impacts of logging.

1406-Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.

Thank you for your consideration.
Sincerely,
Ricky Taylor

Towers, TerryAnn [ttowers@artlover.com] Sent: Wednesday, April 13, 2005 9:57 PM
TerryAnn Towers, 19524 Knoll Dr., Arlington, Washington 98223
Dear Steve Hirschey:

1407-The following are ways that Ecology's Stillaguamish proposal could be improved.

Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.

1408-Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.

1409-Include recommendations to reduce the impacts of logging.

1410-Measure future water use. We need to know how much water is being used in order to manage it more wisely.
1411-Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.
Thank you for your consideration.
Sincerely,
Terry Towers

Van Natter, Bill [slowsnap@att.net] Box 1153, Bothell, WA 98041 Sent: April 14, 2005

Dear Steve Hirschey:

1412-It was gratifying to learn that the Department of Ecology is proceeding with stream flow rules for the Stilly. This river is a jewel and is an ideal setting for the implementation of fair and enforceable water stream flow rules. Please do not be deterred or bullied by demands for the further degradation of this very significant quality of life resource. Thank you for your consideration.
Sincerely,
Bill Van Natter,
425 486 5011

Weist, Jeffrey [onariver1@yahoo.com] Sent: Monday, April 11, 2005 11:57 PM
Jeffrey Weist, 2595 SE Brookside Ct, Port Orchard, WA 98367

Dear Steve Hirschey:

1413-The following are ways that Ecology's Stillaguamish proposal could be improved.
Ensure that the groundwater "reserve" does not lead to sprawling development, harming farms and fish.
1414-Ensure policy supports salmon recovery. An instream flow protection policy should result in better protection of fish and streams.
1415-Measure future water use. We need to know how much water is being used in order to manage it more wisely.
1416-Include recommendations to reduce the impacts of logging.
1417-Ensure stream flow protection compliance. An effective instream flow monitoring and compliance program should be established to enforce the instream flow rule.
Thank you for your consideration.
Sincerely,
Jeffrey Weist

Yanity, Shawn, Stillaguamish Tribe – Letter

November 8, 2004

Ms. Linda Hoffman
Director
Washington Department of Ecology
PO Rox 47600
Olympia. WA 98504-7600

RE: WRIA 05 Proposed Instream Flow Rule

Dear Ms. Hoffman,

1279-The Stillaguamish Tribe is supportive of setting instream flows in the Stillaguamish Watershed. The Tribe appreciates the spirit of natural resource co-management that has occurred between Washington

Department of Ecology, Washington Department of Fish and Wildlife, TulaIip Tribes and itself in determining what flows are necessary for fish. As you are aware, the Tribe has a vested interest in the protection of water resources for fish. Salmon are integral to the cultural, spiritual, and economic well being of the Stillaguamish Tribe. This letter shall serve as formal comments from the Stillaguamish Tribe regarding the proposed instream flow rule for WRIA 05.

1280-The Stillaguamish Tribe, a federally recognized tribe since 1978 and Point Elliot Treaty Tribe, has inhabited the lands of the Stillaguamish Watershed since time immemorial. Therefore, we feel it necessary to include language in the instream flow rule acknowledging that the Tribe has a treaty reserved senior water right in the watershed. Actual quantification of the water right may be uncertain at this time, but our treaty reserved water right has a priority date that is time immemorial and requires proper recognition in the instream flow rule language.

1281-The Stillaguamish Tribe views the language in WAC 173-505-060 to be un-protective of instream flows. According to Ecology's WRATS database, Lake Cavanaugh, a largely summer vacation home community, and its distributary Lake Creek currently hake 48 permitted and certificated water rights from their surface waters totaling 0.75 cfs. In addition, there are currently 24 water right applications pending totaling 1.43 cfs in the WRATS system with priority dates senior to the proposed instream flow rule. Assuming approval of these water right applications, a total of 2.18 cfs could potentially be withdrawn from these systems, thus reducing flows to Pilchuck Creek, which already suffers from excessively low summer flows. If permitted and certificated water are counted alone, aside from exempt wells, this 2.18 cfs loss could create a 26% reduction of flow during a 90% exceedence flow event on Pilchuck Creek during Chinook spawning.

1282-If Ecology continues to allow exempt wells in this area, even when limiting to in-house use when Pilchuck Creek flows fall below the proposed instream flow, then this will further exacerbate the summer low flow problem in PiIchuck Creek and instream resources could he severely harmed. The Tribe supports stronger language in the proposed instream flow rule that limits the number of exempt wells that could go in this area. We also support language stating that when senior instream flow water rights on Pilchuck Creek are below the proposed flows, all junior water rights and/or exempt wells must be shut off.

1283-With regards lo WAC 173-505-090 of the proposed instream flow rule, we would like further clarification on the maximum future allocation language. As we understand it, according to the proposed instream flow rule, a total of 150 cfs could potentially be withdrawn from the North Fork Stillaguamish River at river mile 6.5 **only** if proposed instream flows are being met. This 150 cfs includes upstream control reaches and tributaries. Currently, according to Ecology's WRATS database, a total of 24.1 cfs ground and surface water is being withdrawn from upstream of N.F. Stillaguamish R.M. 6.5. If our understanding of this rule language is correct, then an additional 125.9 cfs could be withdrawn from the N.F. Stillaguamish above this location as long as the instream flow is being met. Does that mean a water right could be granted that would withdraw 125.9 cfs of water from the N.F. Stillaguamish River from October 16th - June 30th and store this water for use during the closure period of July 1st '-October 15th?

1284-The Tribe takes it role as natural resource co-manager seriously and we are disappointed that we were excluded from the determination of the "reservation" flows as outlined in WAC 173-505-110 of the proposed instream flow rule. Had the Tribe been aware of this proposal from the beginning there would have been discussion of its determination of reserved flows and its validity in Washington Water Code. Current Washington water law is based on priority date and therefore the "first in time, first in right" premise. By including reservation language in the instream flow rule, Ecology is essentially taking water from the instream flow rule, which should have a priority date before any use of "reserved" water.

1285-The Tribe believes that this reservation causes harm to treaty rights. In our view, Ecology is attempting to appease development at the expense of fish. RCW 90.03.290(3) states that Ecology will reject applications, such as reservations, and refuse to issue a permit if it will impair existing rights, such as established instream flows. RCW 90.54.050(1) states that the department of Ecology may reserve water for beneficial utilization in the future, however, there is no exemption of reserved water from instream flow protection. Furthermore, the inclusion of a reservation in the proposed instream flow rule shows that Ecology is more interested in out of stream water use than protecting instream flow that may not even be met in a particular year. If for some reason despite the recommendation of the Tribes, Ecology keeps the reserved water language in the instream flow rule, the Tribe would like to see language stating that inchoate water rights are included in this reservation. Also, the Tribe would like to see language stating that the reserved water will be metered to ensure that reservation flows do not exceed the flows as listed in the proposed rule.

1286-To reiterate, the Stillaguamish Tribe is supportive of establishing minimum instream flow rules and would like to continue to work cooperatively with Ecology. We have some serious concerns as to

whether the proposed rules adequately protect fish. We have an equal if not greater concern that the Department of Ecology is not properly recognizing the co-management role of the tribe as well as rights reserved by treaty. If you have any questions please feel free to contact Jody Brown or Pat Stevenson at (360)-435-2755 ext. 30 or ext. 28 respectively.

Sincerely,
Shawn Yanity
Chairman
Stillaguamish Tribe

APPENDIX C

ALL ORAL TESTIMONY
REGARDING
PROPOSED CHAPTER 173-505 WAC
WATER RESOURCES MANAGEMENT AND INSTREAM FLOW PROGRAM
STILLAGUAMISH RIVER BASIN WATER RESOURCE INVENTORY AREA
(WRIA 5)

Oral Comments from Hearings on the Stillaguamish rule proposal
In the order of the Speaker at each Hearing
With Comment Numbers Indicated

Mount Vernon, Police and Court Campus Multi-purpose Room, 1805 Continental Place
March 24, 2005, 2:15 p.m.

Mr. Tom Fitzpatrick, Executive Director of Snohomish County (representing Snohomish County Executive Aaron Reardon…….....C-5

Hal Beecher, Fisheries Biologist, Washington Department of Fish and Wildlife……..C-3

Joe Mentor, Jr., Attorney, representing Skagit County……....C-10

Arlington, Pioneer Hall, 20722 67th Avenue NE
March 24, 2005, 7:00 p.m.

Hal Beecher, Fisheries Biologist, Washington Department of Fish and Wildlife……..…C-4

John Postema……..……..…..…C-12

John Roney, Agriculture Coordinator, Snohomish County (representing County Executive, Aaron Reardon)……C-13

Scott Fowler, Dahlman Pump & Well Drilling, Inc……..…C-7

Ty Costa…….…..C-5

Jody Brown, Biologist, Stillaguamish Tribe of Indians …….…...C-4

Beverly Hatfield……..…C-7

Marlene Ross……...C-14

Steve Aslanian……..…..…C-3

In addition, testimony made by Joe Mentor in Darlington on March 8 and Mount Vernon on March 9, 2005 regarding the revision to Chapter 173-503 WAC are included on page 8.

Aslanian, Steve – Arlington Hearing

STEVE ASLANIAN: The name is Steve Aslanian.

1223-I'm a citizen. And my words are those of a manager of a public water system and a conservationist. My thoughts are that this plan is a start. It identifies problems.

Unfortunately, if we all look in the mirror, I don't believe that it will provide a complete framework for a credible -- credible -- solution. I believe it must be acknowledged that monitoring and enforcement will not be feasible except in the most egregious violations. If I'm going to withhold my water use, I expect my neighbor to. If we don't all work together on this project, we're going to get really angry at each other, I believe.

1224-I believe this plan must be more bold rather than assumptive or suggestive as in only encouraging property owners to keep cattle out of streams. It must further address -- address future land uses. Regarding the 18,000 exempt wells, 18,000 being the arithmetic derivation of the 175 gallons per connections per day, I don't believe that 175 gallons per day is a realistic figure for a rural land use in the summertime. Just today a study was released that showed that lethal elevated stream temperatures are projected for cold-water fish. This is the time when people would be supposedly using 175 gallons per day. I believe that the portion of 175-505-090(6) states that Ecology may further limit reserved water in areas of increased densities that adversely affect small tributaries and other flow-sensitive areas. "May" is what I've underlined here. I believe that this statement only hints at the need for adaptive management, which -- which I believe should be the major focus of this legislation.

1225-And, lastly, I think that we all should realize, when we look at our grandkids, that any plan that allows the build-out of one-half the existing lots in this basin and also does not address subdivisions will remain part of a problem.

Beecher, Hal – Washington Department of Fish and Wildlife, Mount Vernon Hearing

MR. HAL BEECHER: Hi. I'm Hal Beecher from the Department of Fish and Wildlife.

1137-The Washington Department of Fish and Wildlife supports adoption of the proposed instream flows for the Stillaguamish basin and the associated rules as WAC 173-505. The propo -- the proposed rules include compromises consistent, we believe, with meeting concurrent demands and needs of both people and fish.

1138-The instream flows proposed for adoption are based on detailed instream flow studies at a number of locations throughout the Stillaguamish basin as well as sup -- supplementary analyses of instream flows needed for fish in other parts of the watershed. These studies are the result of collaboration among co-managers of the fish resources, the Department of Fish and Wildlife, Stillaguamish Tribe and Tulalip Tribes, federal agencies and the Department of Ecology. They resulted in recommendations for instream flows that will support good fish habitat in the Stillaguamish River basin.

1139-We recognize that the rules proposed are intended to provide for but limit additional out-of-stream water use and diversion. We recognize that the instream flows we have recommended will not always be met in the river. Our studies indicate that when flows are below those recommended, fish production is reduced. Lowering instream flows below those proposed would result in more frequent and greater reduction of fish production and higher risks for salmonid recovery. The instream flows recommended will support conditions necessary for fish production to sustain harvest and to allow stock recovery.

1140-Instream flows will not independently ensure recovery of harvestable production. Ade -- adequate flows, combined with other appropriate management of habitat and harvest, addressing other limiting factors, as well as providing historic and normative hydrology, are also necessary. Fish inhabiting the Stillaguamish River basin include Chinook salmon, listed as Threatened under the federal Endangered Species Act, as well as coho, chum and pink salmon, bull trout, steelhead and cutthroat trout.

1141-The proposed rule includes a reserve for domestic use. The proposed reserve is intended for lands that do not have public water supplies available to them. It would not be subject to

instream flows. The quantity of this reserve would equate to an additional impact of one to two percent of so-called drought habitat, i.e., the habitat at the ten percent -- tenth percentile flow level. Thus, in lower flow conditions habitat would be reduced by up to one to two percent. This fixed flow reduction would equate to smaller proportional reductions in habitat at higher flows.

1142-Fish population recovery from drought-associated declines would be slowed and reduced slightly during non-drought years. However, in the interest in moving forward with the setting of instream flows, the Department of Fish and Wildlife supports this as an acceptable compromise, consistent, we believe, with meeting both the needs of people and salmonid recovery. Thank you.

Beecher, Hal – Washington Department of Fish and Wildlife, Arlington Hearing

HAL BEECHER: I'm Hal Beecher from the Washington Department of Fish and Wildlife.

1137-The Department of Fish and Wildlife supports adoption of the Proposed Stillaguamish Instream Flows and associated rules. The proposed rules include compromises consistent, we believe, with meeting the concurrent needs of both people and fish.

1138-The instream flows proposed for adoption are based on detailed instream flow studies at a number of locations throughout the Stillaguamish Basin as well as supplementary analyses of instream flow needs for fish in other parts of the watershed. These studies are the results of collaboration among co-managers of the fish resources, the Department of Fish and Wildlife, Stillaguamish Tribe, and Tulalip Tribes, as well as Federal agencies and the Department of Fish – the Department of Ecology. They resulted in recommendations for instream flows that will support good fish habitat in the Stillaguamish River Basin.

1139-We recognize that the rules proposed are intended to provide for but limited - limit additional out-of-stream water use and diversion. We recognize that the instream flows we have recommended will not always be met in the river. Our studies indicate that when flows are below those recommended, fish production is reduced. Lowering instream flows below those proposed would result in more frequent and greater reduction of fish production and higher risks to salmonid recovery. The instream flows recommended will support conditions necessary for fish production to sustain harvest and to allow stock recovery.

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1141-The proposed rule includes a reserve for domestic use. The proposed reserve is intended for lands that do not have public water supplies available to them. It would not be subject to instream flows. The quantity of this reserve would equate to an additional impact of one to two percent of drought habitat approximately -- or, that is, the habitat at the tenth percentile flow level. Thus, in lower flow conditions, habitat would be reduced by up to one to two percent. This fixed flow reduction would equate to small proportional reductions in habitat at higher flows.

1142-Fish population recovery from drought-associated declines would be slowed and reduced slightly during non-drought years. However, in the interest of moving forward with the setting of instream flows, the Department of Fish and Wildlife supports this as an acceptable compromise consistent, we believe, with meeting both the needs of people and salmon recovery. Thank you.

Brown, Jody – Stillaguamish Tribe of Indians, Arlington Hearing

JODY BROWN: I'm Jody Brown. I'm a biologist with the Stillaguamish Tribe.

1211-First, I'd just like to say that the Stillaguamish Tribe was a part of the instream flow setting process from the beginning. And we appreciate that. And we take our role as co-managers in the -- in the Stillaguamish watershed serious. We support the proposed instream flow rule. There are a few situations -- a few parts of the rule that the Tribe has commented on already and may not necessarily be in favor of. However, overall, the Tribe is in favor of the rule.

1212-The Tribe believes that water is a limited resource. We all depend on it. Farmers do. Homeowners. Businesses. And the Tribes themselves. Mostly, the fish depend on water. It's not

rocket science to believe that fish need water. And the Tribe would -- believes that ensuring there is enough water for fish is just a part of salmon recovery. Salmon are at the heart of the Tribe's lifestyle. And many of you may or may not be aware, but the Stillaguamish Tribe has not really had a fishery for salmon for quite sometime. Especially Chinook Salmon, which are the most important for the Tribe.

1213-This being - this instream flow is only being a part of salmon recovery would help in the recovery of the Chinook Salmon. But there are many other aspects of habitat, such as sedimentation – which I've heard several people talk about -- and the temperatures and other water quality situations that are important for salmon for the recovery.

1214-I guess overall we would just like to state that the Tribe is -- is in favor of the instream flow rule. And I guess if you have any comments that you would like to address to the Tribe or if you have any questions, you can contact me or someone at the Tribe. And I'll be here after the meeting if you have any questions, as well. Thank you.

Costa, Ty – Arlington Hearing

TY COSTA: Ty Costa. 6325 181st Avenue, Southeast, Snohomish.

1209-I started out by talking about the State water right laws and have made that comment. The other bill of rights I want to just mention here is Amendment VI. It says, "Not to be deprived of life, liberty or property without due process of law." We have a very short time to on this to make our comments while they've had several years to put this all in order for them. So I - I want to make that point. Because when a young man goes into service, he takes an oath. He takes an oath of allegiance to protect the Constitution of the United States against foreign and domestic. And I don't think the Department of Ecology is following up behind that.

1210-The other issue is agriculture. The price of crude oil. We are getting into this position of bringing in food. When that food that comes in, the tomatoes from Argentina and so on, come in by ship. When that barrel price hits a $100 a barrel, guess what you're going to be buying tomatoes for, if you can find it? And I just use tomatoes as a product. But we need to protect our food sources. Water is the number one thing that's going to keep us fed. Thank you.

Fitzpatrick, Tom – Snohomish County, Mount Vernon Hearing

MR. TOM FITZPATRICK: Thank you very much. Are you getting that for recording? My name is Tom Fitzpatrick and I am here representing the Snohomish County Executive Aaron Reardon. I am the Executive Director of Snohomish County and serve on Mr. Reardon's staff, and he asked me to come today to provide feedback from the perspective of the Snohomish County Executive. Also here today is Marcia Isenberg, who is the Legislative Analyst for the Public Works Committee of the Snohomish County Council.

1126-And I think you know this, but Snohomish County is a charter county. We do not have county -- a county commissioner system of government, but rather under our charter a -- the -- an independent elected County Executive and a legislative branch composed of the County Council. And although there has not been formal governmental action by Snohomish County in regard to the proposed rule, I do wish to indicate to you that there has been a great deal of dialogue between the legislative and the executive branches of government. There appears to be a unanimity of view between the executive and the legislative branches of government. And in addition to Ms. Isenberg's presence today, I anticipate that another County Council representative, Mr. Moats, who staffs as the Legislative Analyst for the Planning and Development Committee of the County Council, is planning to be with you this evening for your meeting in Arlington.

1127-County Executive Reardon has placed as one of his priorities as he began his term in Snohomish County the preservation and the enhancement of agriculture in Snohomish County. And it's rather fortuitous that you have the meeting on the 24th because it was last week that Executive Reardon finished the first phase of his implementation to basically improve agricultural viability in Snohomish County by issuing Executive Order 05-43 which is to establish a policy for preserving and

enhancing the agricultural economy. And this couples with a Snohomish County Agricultural Action Plan which has been finalized and has been issued. In developing the action plan the executive branch worked in conjunction with the legislative branch. Councilmember Koster from the First District, which includes the Stillaguamish basin, co-chaired an agricultural summit with Executive Reardon from which the action plan flowed. And I previously indicated to Steve before the meeting that I will leave copies of both the executive order and the action plan for the record for the Department of Ecology so that you can see.

1128-There is a great deal of concern on behalf of County Executive Reardon that the proposed rule by the Department of Ecology will severely impact the agricultural community in Snohomish County which -- which we are protected -- which we are committed to protecting. And we also feel that the proposed rule will perhaps burden the agricultural community more than other uses that are contemplated.

1129-And although I'm here today to, in a sense, express our concern in Snohomish County and opposition to the rule as presently drafted, I do want to include in my comments an invitation to the Department of Ecology to work with Snohomish County through this process. Not only in just receiving, in a sense, the formal comments that you'll be receiving in this process, but to make available to you some of the resources and the experience that the Snohomish County government has in regard to these matters, particularly in regard to management of water resources.

1130-In regard to the rule -- and we appreciate the comments that were given by staff earlier in the session that, in fact, Ecology had considered historical stream flows in fashioning the rule, which they did apparently in conjunction with a biological assessment that relates to fish populations. Although those are reassuring comments, I have to tell you that in looking at the rule we in Snohomish County have to believe, particularly in regard to the Stillaguamish River, that either very little weight was given to the historical flow record in the Stillaguamish River, or in fact, it had been ignored.

1131-Our reference to the data, to the stream flow gage at Arlington which was referenced in the staff presentation, indicates that over the 70-year historical flow rate, that at that gage in Arlington the river has met the proposed August flow rate standard by the pol – by Ecology only six times in the last 75 years. And our analysis from Surface Water Management is that the river never met those standards at any time in August from 1923 to 1949, and it's never been met since 1976, and we have been unable to detect any clear historical reduction in flow which seems to account for this disparity. And so we would urge Ecology not to go forward with the rule at this point until there is really a -- another examination of the historical flow rates, which the -- which Snohomish County would be happy to assist and dialogue with Ecology in that regard, so that we can determine that, in fact, the true flow levels in the Stillaguamish are being recognized, and that we could therefore look for appropriate solutions.

1132-The other thing that we want to point out, and I think you're all aware of the shared strategy initiative, which is to try to bring to resolution, particularly in the whole Puget Sound basin, an approach to water issues, including levels and stream flows, but also water quality and a variety of other land-use-related things, in order to protect and enhance our aquatic life. But while you're in the process of developing and potentially issuing this rule, shared strategies is performing a low-flow study analysis in the Stillaguamish River. And Snohomish County, our Surface Water Management Division of Public Works which reports to the executive branch, is involved in performing some of that work on behalf of the shared strategy analysis.

And so we would urge upon Ecology at this point to -- to simply not rush forward with this rule until the information that is going to be developed out of the shared strategy approach is available for Ecology's consideration. And Bill Leif from Surface Water Management -- and I think,
Steve, you know Bill -- he will have the time lines available at least when that is going to be -- at least we anticipate what would be available to provide that information to the Department of Ecology.

1133-Finally, some miscellaneous comments about what we, from a County perspective, are concerned about. Not only in the sense of the proposed substance of the rule, but, I mean, you know, clearly you have to recognize that -- that under the Growth Management Act the ability of anyone to hook up to a public water system is precluded if you are outside of an urban growth area. So clearly the agricultural basin, the Stillaguamish valley, is outside almost all the UGA areas. Any hookup to any public water system, if it wasn't cost prohibitive, is simply not allowed under the -- under the GMA regulations that we have, and also the cost would perhaps be totally impermissible.

And as for, in a sense, a human development under the various codes that are applicable in Snohomish County, accessibility to a public water system is simply not an option unless you've been

already included in an urban growth area. And currently the County is involved in its update to the ten-year Comprehensive Plan as required under GMA. The recommendation has not come from the Department of Planning and Development Services, and I do know there is going to be an emphasis on -- on trying to preserve agricultural uses and space in the Stillaguamish region. But I have to say that if Ecology is anticipating that there is going to be any major shift in urban growth boundaries, I think that is certainly not foreseeable from what the executive branch sees at this particular point.

1134-Finally, we will note, and I won't detail it out because I know it's well known to Ecology, but these proposed regulations coming from the Department of Ecology seem to envision a lot of additional responsibilities to be placed upon County government. In part, in administering these programs, reviewing the availability of water, making determinations as to whether building permits will be allowed, and other various sorts of responsibilities which the rule contemplates will be taken on by your subdivision, the Counties. We don't see any analysis of what this is going to mean to the Counties. We haven't seen any basis to determine that the proposed rule -- that Ecology has the right to shift these responsibilities to County government, or that, in fact, this would not be simply another unfunded mandate from the State for local government to absorb.

1135-Now, although I practiced law for 30 years, I'm not here in a capacity as a lawyer, having transferred to the executive's office. And so by no means do I wish to engage in -- in laying out various legal theories. I do wish to express, because I have consulted with them, the willingness of the prosecuting attorney's office to discuss those issues with Ecology, but I would merely make the point that if you are anticipating that County government will be your partner in implementing what you come up with, then the time is here for you to treat your potential partner as a partner and to get our feedback and take into consideration some of the costs and the burden, from an administrative standpoint, that you expect local government to absorb.

1136-Finally, I would like to conclude again on the basis that we are deeply concerned about what is being proposed. We don't like what is being proposed. You can anticipate that Snohomish County will be submitting extensive written comments before the end of the period. But in saying that, I want to underscore for the Department of Ecology a genuine willingness to work with you to try to find some viable solutions here. We, of course, are concerned about our agricultural community, but we are also concerned about the quality of life in Snohomish County and in areas that -- along the Stillaguamish. And we want to provide our expertise and background to you, and we hope we will be working constructively with you in the future. On behalf of Executive Reardon, thank you very much.

Fowler, Scott -- Dahlman Pump and Well Drilling, Inc., Arlington Hearing

SCOTT FOWLER**: 1206-**I'm Scott Fowler. I'm with Dahlman Pump & Well Drilling, Burlington, Washington. P.O. Box 422. I'm here representing the Washington State Drilling & Ground Water Association and their future clients. We agree with Ecology that watersheds should be managed at the basin level. So we applaud you for that attempt.

1207-However, we have some serious issues on the amount of water that is available. The exempt well or a group of exempt wells no where in the State has proved to have a negative impact on instream flows. As a matter of fact, it can be argued that those exempt wells have a positive impact on instream flow since most of those wells are drilled into confined aquifers and the water recharges the septic systems.

1208-We also do not believe there's enough water in this plan to take care of our future ag needs. As the economy changes and the crop changes, their water demand changes and that needs to be addressed.

At this time we cannot support the rule as it is written. You'll receive further written comment from us. Thank you.

Hatfield, Beverly – Arlington Hearing

BEVERLY HATFIELD: I'm Beverly. **1215-**At the risk of being the ridiculous here, I am a private homeowner in the area. Came here more for interest. First of all, I would like to applaud the farmers. Marlene especially. As I've watched the news, especially with the concern about the drought, I, as a

private citizen, have made the choice. I live on a little less than a quarter of an acre. I would call myself a hobby gardener. I'm not planting -- I'm not planting a garden this year because I know it will take water. I am on city water. So this doesn't affect me at all.

1216-But what I'm here for now, because I chose to be here this evening, is I'm alarmed by the ridiculousness of certain things. I wrote in my notes here "fish." Always fish. That's alarming to me. We're a roomful of people here; not a roomful of fish. It was alarming to me the way that the concerns were categorized on his slide show: Fish, wildlife, recreation, navigation, esthetics, water quality, livestock need, potable needs. Potable needs is what we drink. That's the last thing on the list. That alarms me. I'm appalled by it, quite honestly. I'm not afraid to sit up here and say I'm a conservative. And I'm not in agreement with the way that our Legislature is leading this State; that goes from water on up.

1217-And knowing very little about it -- I did receive this member alert. The last thing I would like to say is that at the very bottom -- And I guess it was John who -- who put this together -- says, "Note: Any water withdrawals by Indian tribes will not be affected." I'd like to know the answer to that. That's all. Thank you.

Joe Mentor Jr., March 8, Darrington Hearing on the proposed Skagit Basin rule.

For the record I am an attorney and I represent Skagit County as a Special Deputy Prosecuting Attorney, and I'm going to briefly summarize the county's comments on this draft rule.
208- I, too, would like to thank Ecology for all of its work, and I have spent the better part of 2 years working with Dan and Geoff and others trying to find a solution to the problem of reconciling the needs for water for aquatic resources and for the county's population. Unfortunately, I think we are still a long ways away from finding that solution.

209-Skagit County's interests are in developing and implementing a fair and effective program to protect and restore aquatic resources, but at the same time to ensure an adequate reliable water supply for its citizens. Specifically, the county's interested in ensuring that there is a supply to accommodate the future needs of the county's growing population for domestic supply protecting the county's agricultural base, and providing water for other future economic needs and protecting the property rights of its citizens. The proposed, the rule as it is currently proposed, the rule amendment I should say, fails to address the county's concerns, and we would like for it to be substantially revised.

210-Based on the frequency of flows as was shown in the presentation tonight, we do not believe that building permits can be issued in large areas of the county. The county's water supplies under the reservations that are described in the rule will be exhausted within a matter of 15 to 20 years. With all due respect to the Department of Ecology, the amount of water in the reservation is a pittance compared to the amount of water that is available in this basin.

211-The rule is not enforceable as it is currently drafted, and we believe it preempts the county's land use regulatory authority.

212-The restrictions of the rule are arbitrary. There is no science at all supporting them.

213-We do not agree that senior water rights are protected. In fact, we believe that many of those smaller water users are, in fact, impaired by the -- by the draft rule.

The county will explain its position in more detail at the hearing in Mt. Vernon tomorrow night and in written comments that will be submitted as part of the record. The county also is hosting a public workshop on March 15th in which we will hope to hear more from the county citizens about their concerns about this rule.

214-We are hopeful that our concerns will be addressed through this rule making, but we are not optimistic. Skagit County has appealed the existing rule and we will be joining this amendment to our appeal if it is not substantially changed. And that's all I have to say.

Joe Mentor Jr., March 9, Mt. Vernon Hearing on the proposed Skagit Basin rule.

For the record my name is Joe Mentor, Jr. I am an attorney with the Mentor Law Group and I am here representing Skagit County as a commissioned Special Deputy Prosecuting Attorney. Our firm has represented Skagit County in negotiations to try to address the amendment to the instream rule. We represented the county in its appeal of the current instream flow rule and we were

defending the county against a lawsuit by the Swinomish Tribe seeking to stop the county from issuing any new building permits to the Skagit Basin. Skagit County will be providing written comments.

209-For the record I would like to summarize briefly the county's concerns. First, the county is interested in developing and implementing a fair and effective program to protect and restore aquatic resources. For that reason the county has adopted a stringent critical areas ordinance in an agreement in 2004 in agreement with the upper Skagit Tribe to impose significant restrictions on development in the Upper Skagit Basin. The county also is interested in ensuring an adequate reliable water supply for its citizens. That means accommodating future needs for domestic supply and taking into account the county's comp plan and utility plans, protecting the county's agricultural base, taking into account changing conditions and increasing needs for water for agriculture and also for your other future economic needs and finally protecting the property rights of Skagit County citizens. Unfortunately, the rule does none of these things, and for that reason we believe that it should be substantially revised before it becomes final.

210-Based on the frequency of flows under the rule, building permits cannot be issued by the county except for use by those where for the reservation is available. Yet we believe that reservation is illusory, is far inadequate to meet the needs that the county has identified. The flows in the river are -- are low, they are below the -- they are rarely met and for that reason we believe they are too high. In fact, the flows this year have fallen below the amount set in the instream flow rule since about the middle of February, and so as of mid-February we would be under significant water restrictions in this county.

215-The water budgets are focused on use for existing parcels. I think it's truly unfortunate that Ecology requested the building parcel data that it did without explanation as to why the data was being requested. It is taken out of context, and is not -- is highly misleading as an indication of future population projections. We also believe it's unfortunate that the Department has ignored the county's comp plan and the population projections, which we believe are a much more reliable indication of what the future needs will be.

216-You have indicated that there are shortfalls in water supplies in a number of subbasins in the Skagit Basin, but you have not made up for those anywhere. The reservations, which is a question I would have asked had the question and answer session continued, was how much of the water budgets already have been used. That is not clear to us. However, the rule attempts to count water use that already has been occurring since 2001 against the water budgets, and we would like to know how much you think that really means there is available.

217-Public water service is not available everywhere. In fact it's only available in a few of the subbasins that you have restricted, and is certainly not available in the Upper Basin and in most of the Middle Basin, middle main stem area. The requirement for a connection for those within 500 feet of existing PUD waters lines is unfeasible, and in fact, the rule, would preclude the county from allowing storage to meet the needs for interruptible water rights. In other words, interruptible, the rule as it's currently written, would require the county to acknowledge that an interruptible water supply is not a proper basis for issuing a building permit even if storage is available.

218-The rule fails to address regional needs. At the same time you are moving forward with this proposed rule you are moving forward with proposed rules in the Samish and in the Stillaguamish Basins. There has been no effort at all to reconcile the regional need for water and to reconcile the limitations imposed on other water supplies. Our belief is that the county's water supplies will be exhausted within 15 to 20 years if this rule is put into effect.

211-The restrictions of the rule are not enforceable. Neither Ecology nor Skagit County can restrict statutory exemptions from state regulations, and I'm referring specifically to the exempt well statute. The proposal would impose building permit conditions. It's unclear who would enforce those permit conditions. It's not clear whether there are new responsibilities imposed on local governments, and if there are, who will pay for those additional responsibilities.

219-We have said all along throughout the negotiations long water restrictions are impractical and unfair in rural areas. We continue to believe that and we will submit a much thorough explanation of why that we think that is in our written comments.

213-Finally we think the amendment, finally on this issue we believe the amendment unlawfully restricts senior exempt well water rights. We absolutely disagree with your notion that an exempt well must have been put to beneficial use in order to arise. The only authority you have to impose restrictions on water rights with a prior, an earlier priority date is where a permit or an

application has been filed. There is specific statutory authority to impose conditions on those water rights but not on exempt wells.

220-We believe this rule would preempt county land use authority. It fails to allow for commercial and industrial use in the Upper Basin, and there is no provision for agricultural water use. Background documents as agricultural needs will be addressed later. We do not believe this is realistic and is unduly burdensome on the county and its residents. We believe that the agricultural water needs should be addressed now. There is no reservation made in this rule for agricultural water use, and, in fact, the rule implies that the reservation is a finite one-time resource, and that there would be no water available in the Skagit Basin for future agricultural needs or increases in agricultural needs.

221-There are a number of impacts of this rule that are not -- that are not addressed and that we believe should be before final rule is adopted. First and foremost, the rule ignores the impacts of -- of releases from the hydro dams in the headwaters of the Skagit.

222-Secondly, the rule does not address the impacts of the mandatory PUD extension, or the proposed water extensions to 500 feet. We believe that this requirement will cause rural sprawl throughout many areas of the county where the otherwise gradual incremental growth is adequately and appropriately served by smaller water withdrawals.

223-Finally, I think we need to really step back from some of the preconceived notions about exempt well water use, and also, about water as a limiting factor in the Skagit Basin.

214-We have been hopeful that our concerns would be addressed through this rule-making process. You described how Ecology decided to amend the existing rule. The amendment to the existing rule is also a requirement of a court order that applies to this process. We have been hoping that this rule-making process would resolve that appeal and would avoid the need for future appeals but we are not optimistic based on what you have proposed. Skagit County has appealed the existing rule. We will be joining the amendment to this -- proposed amendment to our appeal if it is not substantially changed. Thank you.

Mentor, Joe Jr., Skagit County – Stillaguamish Rule's Mount Vernon Hearing, March 24

MR. JOE MENTOR: Thank you. **1114**-For the record, my name is Joe Mentor, Jr., and I'm an attorney and I represent Skagit County. We'd like to thank all of you for coming up here to Mount Vernon to talk to us about this proposed instream flow rule and to hear what we have to say. We'd also like to thank Mr. Fitzpatrick for coming up here from Snohomish County, and much of what I have to say will echo his remarks as well.

1115-First of all, Skagit County recognizes the importance of the Stillaguamish River basin as a producer of salmon and the importance of habitat in the Skagit -- in the Stillaguamish basin as it relates to the entire Puget Sound region. Having said that, we are opposed to adoption of this rule, not so much for this rule in itself, but because of the unresolved questions around the proposed instream flow rule for the Skagit River.

1116-If Mr. Fitzpatrick does not like the Stillaguamish rule, I would count him lucky because of the inconsistencies internally and -- and with other laws of -- of this rule pale in comparison to those of the Skagit. Skagit County, too, would like to work with the Department of Ecology to fashion a responsible enforceable instream flow program for the Stillaguamish River, but we don't like to be dictated to, and we feel very much that the department has done precisely that with regard to the three instream flow rules that are currently being proposed that cover the entire -- entirety of Skagit County.

1117-Ecology recognizes that there are significant limitations on the authority of the department to impose the kinds of restrictions that are called for in this instream flow rule. They -- however, the department refuses to recognize or to acknowledge the restrictions on local governments that also exist.

1118-As I read the law, the Department of Ecology can impose metering requirements on any ground water withdrawals, including those that are exempt under the ground water code, and Counties can, under -- under the Growth Management Act, protect aquifer recharge areas, the Counties can regulate subdivisions, and the Counties can require connection to public water service if it is timely and reasonably available. In our part of the Stillaguamish basin, the Lake Cavanaugh area, there are no plans to provide public water service now or in the future, yet that simple fact is ignored in this regulation. We are limited in -- under the State constitution and under the laws of Washington as to what we can and cannot regulate, and where we have not been granted explicit authority we do

not have it. Neither does the Department of Ecology. And we do not believe it's appropriate for the department to adopt a rule that requires the Counties to enforce it where the Counties have -- do not have the authority to do so.

1119-The reservation and the idea behind it is appropriate. The State Water Resources Act requires the Department of Ecology to balance the needs for water, fish and agricul -- or I mean people, fish and agriculture. And I -- I -- I think it's a -- it's a positive development that the department recognizes the need to provide some form of water reservation to provide for future domestic needs. However, a 20-year population forecast is woefully inadequate. Steve and I, we haven't quite known each other for 20 years, but 20 years goes by really fast, and we're going to be at the end of the 20 years before we even get started here.

1120-The critical water supply service areas and the water -- coordinated water system planning are all done with a 50-year population projection in mind, and in fact, the Department of Ecology's own regulations for petitions, governing petitions to establish a reservation require an applicant to submit a 50-year population projection. If it's impossible to find it, then it's inappropriate for Ecology to require it. And if Ecology is going to require it of an applicant, we think it's appropriate for Ecology to -- to look at the same standard.

1121-We question the science behind this rule. There is no direct correlation between flow and -- and habitat loss, and there isn't necessarily a direct correlation between habitat loss and salmon productivity. The -- the -- we question whether using a weighted usable area standard to -- to equate to that is -- is appropriate, especially since the weighted usable area that we're referring to is habitat that is not available under natural flow conditions. We question the -- the direct one-for-one connect -- connection between surface water and ground water. I've been -- been taught that -- and I believe this -- that water almost always comes from someplace and it goes someplace else, but that doesn't mean that in every circumstance in every part of this basin a -- a ground water well will have a direct and immediate and one-for-one connection to -- to a surface water body.

1122-In fact, if anything, this rule works at a cross purpose because what we're doing is that we're taking away the ability to use disbursed small withdrawals in favor of larger, more concentrated ones that, if anything, will have a greater potential for an impact on surface water than -- than the smaller withdrawals.

1123-Another concern we have, which we share with Snohomish County, is -- is in protecting the viability of agriculture as the -- as the center piece of our -- of our local economy. Skagit County studies show -- and we've submitted these studies for the record in the Skagit rule -- and while I'm at that point I suppose I should say that we would like to incorporate by reference all of the materials that we submitted for the Skagit rule making as part of the Stillaguamish rule making record. But our studies show that the agricul – that agricultural irrigation needs in this area are, in fact, increasing, and they will continue to do so. There are two reasons for that. One is that the climate is warming. I don't think there's any question about that. And that causes an increase in the evapotranspiration of water for agriculture. Second is that there is a trend towards the production of higher value crops. And when you look at the materials that we submitted for the Skagit rule making you'll see those trends, in fact, are proven pretty much across the board. **1124**-There is no review of -- and has been no review of regional water needs. And that is another major concern of ours. We have participated over the last six weeks or so, maybe even two months, in -- in workshops and public hearings and in discussions with the department over the proposed rules for the Samish, the Stillaguamish and the Skagit. And in every case we've asked the question whether the department has examined regional water needs, and the answer always is no. And we look at the needs for water in the Stillaguamish basin, but we do it without regard to what the needs are for water in the Skagit, and the same with the Samish. And the result of that is that we foreclose opportunities to use the most plentiful resources, which in our case is the Skagit, in favor of requiring basins to produce their own water to use there, regardless of whether it's appropriate and whether -- and whether the amount of water that's available from that basin is adequate to meet the population needs and agricultural needs in that area.

1125-We -- we have a concern in particular with the Lake Cavanaugh area. As I mentioned before, there is no public water available in that area, now or in the future. The rule seems internally inconsistent as well in saying that water is available through permitting, but, in fact, the Pilchuck basin is closed during the many months from May 31st, I believe, under the rule, until October 16th. That leaves us without a supply of water in that basin, and there's no provision made to -- to accommodate that. I will conclude my remarks there. We also, as will Snohomish County, be submitting written comments, and we look forward to working with the department to try to reconcile our concerns here with the goals of protecting the salmon productivity in this area. Thank you.

Postema, John – Arlington Hearing

JOHN POSTEMA: **1186-**My name is John Postema. 19127 99th Avenue Southeast, Snohomish. I wrote for the Farm Bureau a Member Alert. And for those who are - have not received it, there's copies right there by the door. The importance to farmers are such that we feel that all of us should know very well what's going to happen.

1187-I spent four years on the Snohomish County Ground Water Advisory Committee. And we -- There's a big -- That was funded by the -- about half-million dollars by the DOE. And we found a lot of different things. That in this particular basin, according to the studies done by Gold & Associates, there was only – the annual relationship between consumptive use and the ground water recharge was 1.56, -- .6. So less than 2 percent. And I want you to keep it in mind because that is an important issue. Because if we're going to take the water away from farmers and property owners, that's important.

1188-But there's other things. We analyzed what this 24-page document actually could do and there's a couple things that Steve did not mention. One of them is that outdoor watering will be limited to 3,630 square feet. Now, if you build a house at 3500, you'll be about 130 square feet less for whatever use, maybe lawn, maybe gardening. Since I'm in the nursery business, I don't particularly like that aspect of it. But -- So 1/12th of an acre for any outdoor water use. And I'm not sure how that goes to farmers when it goes bare -- bare parcels. So if you have a ten-acre parcel and you want to have some new water use, the way I read this document.

1189-As far as the livestock watering, you will be required, if you want new water usage, to take your livestock away from the streams and rivers. And, by the way, there's about 90 of those creeks and rivers. So it's not only the Stilly; it's also what feeds into it, plus about 70 lakes and ponds. And you only will be able to use it for drinking water. This is what -- what the -- what the rule will say. Not for washing it or whatever. For drinking water. And, also, you will only be allotted so much – so much -- so many cows or cattle as the land can – can support. Now, that's a -- that's a very far-reaching thing. I think that's, you know, that's why feed lots are not -- not included. Water usage will be metered and the amount of livestock shall be limited to the carrying capacity of the grazing lands.

1190-And, of course, as -- as Steve mentioned, no new wells are allowed if public water is available. And if a public water system is constructed, new well uses will have to connect to the public system within 120 days. All users of new well water will have to install meters on their wells and they'll be required to report usage to DOE and are subject to curtailment -- to curtailment if that's necessary.

1191-All new building permits will be issued unless the applicant complies with those conditions and other conservation requirements. Another very important thing, I think, is all future water usage will become subject to the use-it-or-lose-it rule. I don't know how it applies. So if you don't use it for the first couple years, you might just lose it. I assume that it's just only for the new water. I hope.

1192-And very important, I think that what we see here -- and this was my question earlier -- the Department of Ecology, basically, will tell the County what to do. And then when all of this will happen. And when this – what they call reservation water, when it's used up, there will be no more water period. Now, the -- That is kind of what I -- what I read and analyzed that out of the document.

1193-Farm Bureau is concerned about fish just like all of us. And the problem with this proposal is it doesn't address the issue. I mean, it doesn't do anything about sedimentation. It doesn't do anything about siltation. And it takes -- It could take away.

1194-And now I have to go back to what the Gold & Associates study found is that in all Snohomish County the -- the -- the consumptive use in relation to the annual ground water charge is less than 2 percent. And that applies here, too. So what can we fix? And this is -- By the way, this was a projection. I think it was 12-years-and-a-half. It was done in 1994. And so what will it do? It -- it – it -- And I had a discussion with -- with Dan a little earlier about if -- if a doctor says you are suffering and you have one-percent chance if you do this, or you change your lifestyle, what will you pick? Will you pick the one percent to survive? You won't. And the problem with this whole proposal is it's so irrational.

1195-I -- I believe -- And I told -- told Steve that -- that this is close to fraud to the people because the farmers will not be able to survive. It doesn't matter what they agree that it says; it doesn't matter what anybody says. But if you don't have water, you can't do anything.

1196-I also believe there are some technical problems with this. The RCW, as Steve said, the State Code requires the Department of Ecology to do certain things. And it – it also requires them to -- to evaluate all the water components, what goes into it. It's supposed to do this. And this is RCW 90.82.070. And it says: The assessments, which shall be included, are an estimate of the surface and ground water present in the management areas. Now, whatever I've heard tonight, that's not -- Nobody knows. And estimate of the surface and ground water available in the management area, talk -- taking into account seasonal and other variations and estimate to the water in management area represented by claims in the water rights, claims registry, water use permits, certified rights, existing main stream flow rules, et cetera. And an estimate of the surface and ground water actually being used in the management areas. Those are requirements. And I don't think that this proposal rules takes it into account.

1197-The -- the other one -- And I think you already found out that instream flow is based -- When - when we were on the Ground Water Committee, this was about the Snohomish River system, and we talked about instream flow and assessment, we wanted to address the wells. And I thought we would take about 25 to 30 percent of wells. That was probably what I thought it was. Well, it turned out to be less than 2 percent. And so then we said, "You know what? Let's take all this water we're using, like the PUD and the Everett and the City of Seattle," let's put it back in the system and find out what it shows. And you know what? We still were 28 percent short. Close to 30 percent. We said, "How is that possible?" Well, I didn't know that the stream flow is based not on historical data. It is based on habitat, you know. And that's how - how the law apparently reads. But it means that we cannot meet any of those base flows. And I was just told that in some of the areas, in fact, the County will have those comments I'm quite sure, that we haven't met any of those base flows in the last 30 years.

1198-So you're already -- have a big problem. Because it's artificial set way too high. You will not historically, but based on whatever we think that the fish will like to have at a particular time in August. So, you know, fish can't wait apparently. I've seen them wait and they wait until September when the first rains come in. But that apparently doesn't come into the picture. The bottom line is this: What good will it do to take of that 1.56 percent what we're using of water of the annual ground water recharge, what good will it do to fix this problem?

1199-I believe there is a problem. There is a siltation problem. There is a forest management problem. There is a lack of management problem. I think this could be somewhat more constructive. That the Department of Ecology should -- should go back and says, "Look. We can do it with storage. Maybe we should allow more lakes and ponds to be created. And maybe we can do..." Because the runoff is about 35, 40 percent. It just goes right in the river. You know, so if we were allowed to create more ponds, we would help a lot more. There's different ways. You can try through the evaporation. You can try all types of things which are much more effective than trying to hone it -- to focus in on this one-and-a-half percent.

1200-So there is a benefit-and-cost analysis done. Instead of -- Studies they've done. There's been a small business impact study has been done. And reading those, if I look at the cost of doing it, it out -- outweighs the benefit greatly. But the -- the law says you don't -- You know, the Department of Ecology does not have to weigh it. They just have to do it. Anyway, it's a documentation which you can find on the Internet.

1201-So to wrap it up. This whole project, I think the Department of Ecology is barking up the wrong tree. And if they would be able to -- to make this go, then there won't be any more agriculture in this part of the County.

Roney, John – Arlington Hearing

JOHN RONEY: Hi. **1202**-I'm John Roney. I'm the Agriculture Coordinator at Snohomish County. And I'm representing County Executive, Aaron Reardon, who is out of the area right now. Mr. Reardon's administration, which is a little over a year now, one of the priorities has been try to reestablish communication with the ag community and to find opportunities to stabilize ag where -- where there is need and to grow ag as we can have available lands and the ingenuity of our farmers and markets to provide our products.

1203-We're in opposition to the imposition of this rule because we think it will be too limiting on the growth that can occur for our farmers. We intend -- Mr. Reardon intends to work with the County Council and file written notice with the State. I think we have until the 23rd or something of April. <Steve Hirschey: "25th of April.">

JOHN RONEY: 25th of April. We've been working with our Surface Water Management Department in our Prosecuting Attorney's Office to try and understand what this rule really means in terms of impact. I don't think we know that yet. We're not comfortable with the methodologies and the basis for the stream flows. We think there's probably some flaw -- It's flawed. And what we would prefer to do at Snohomish County would be to work in partnership with DOE and our farm and rural community to find options and methods to reach a goal. We've been participating in the shared strategies movement an -- an organization that has been trying to find win-wins situations for fish and for agriculture. And we're very concerned, like John Postama just mentioned, that imposition of this rule could mean another death threat to the ag community and we're not going to allow -- sit back and allow that to happen.

1204-One of the things that we had talked about -- Steve has met with us and several different groups at the County a couple times. We talked about extending water out into the rural communities. We think there's a real problem with communication at the State level between agencies. We have CTED, which is a growth management agency, saying you can't extend water. And now we have a water rule that's coming forward and says, "Well, why don't you just extend water out there?" It's the same thing that happened with -- that's happening with wetland mitigation banking that we got -- we're trying to formulate a policy on. We've got different people at the State coming down and doing stuff to us rather than working with us. And so we - we want to be partners with them. We don't want to be just told how we do stuff.

1205-We don't have -- We're afraid that we're going to be stuck with another unfunded mandate. That we're going to be the -- the bad guys out here in the community trying to watch you. We don't have expertise in water rights. We're not hiring anybody with expertise in water rights. But we have -- We don't have the resources. And if it's another one of these unfunded mandates, we're already overcooked on that up at the County right now. I can guarantee it. And just in conclusion at this time, I just want to go on record as the -- the County Executive is in opposition to the imposition of this rule and we will be working with the council and with our departments to come up with a response.

If citizens feel like they would like a meeting with the County Executive to voice their opinions before this comment is issued on behalf of the County, we'll be happy to sit down with you in a meeting. Thank you.

Ross, Marlene – Arlington Hearing

MARLENE ROSS: **1218-**Well, I want to thank all of you people, hard-working people, for being here, too. I certainly agree with her, too. We all love fish. We all love wildlife. We love everything on our land and around it. But we should maybe -- The -- the people just come to us citizens and real quickly say that, "Oh, if we don't do this and don't do that, we're going to lose our water rights." Like the gentleman said, he's -- They've had a long time to work on it. We don't. We don't have time.

1219-So if -- if things are so serious and so bad, they need to put a gate on the entrance to Washington State. And every person that decides to move to Washington State shall be fined. And the citizens that are born and raised here and made the land what it is today, they should be given priority to preserve the State of Washington and take care of it. Turn it into a beautiful, pristine tourist attraction to enjoy the beautiful water and the mountains and the grass. Because when you drive up the road, the thing that's pretty are the pastures and the dairy farms and the gardens. Not the condominiums and cities.

1220-So if the people want to move into the State of Washington, let them pay for it. Don't take and -- and cause us landowners that have been here all of our lives one expensive thing after the other until we can't afford to live here. Then what will we have? Just row after row of condominiums?

1221-Those are the ones -- I -- I go down the road. I've been here all my life. And -- and somebody was going to build something. And they bulldozed it all away. And there's a building there. And guess what happened? It's vacant. There's only so much money in people's pockets.

1222-And after all the trees are gone and all the streams are gone, it isn't the landowner

that's ruining the land, it's development. So if you're going to make it hard for us farmers and property owners, make it hard for the developers and everything else. I don't want a new city down the road. I want the wilderness. We're taking care of the land. If it wasn't for us, there wouldn't be any left. Anyway, something has got to be done to where the property owner has more rights and to take care of their land at their own expense, because we always have and we always will. That's what kills the fish and everything else, are the newcomers that come in and don't care. They just want to get a job. Send the factory jobs to Moses Lake. Anyway, thank you very much.

APPENDIX D

DOCUMENTATION OF PUBLIC INVOLVEMENT EFFORTS REGARDING PROPOSED CHAPTER 173-505 WAC WATER RESOURCES MANAGEMENT AND INSTREAM FLOW PROGRAM STILLAGUAMISH RIVER BASIN WATER RESOURCE INVENTORY AREA (WRIA 5)

Focus on **Setting Stream Flows for the Stillaguamish River**

from Ecology's Water Resources Program

The Department of Ecology (Ecology) is proposing to establish instream flows for the Stillaguamish River in Water Resources Inventory Area (WRIA) 5, Chapter 175-505 WAC. The Water Resources Act of 1971, Chapter 90.54 RCW provides that the quality of the natural environment shall be protected and, where possible, enhanced. In addition, perennial rivers and streams of the state shall be retained with base flows necessary to provide for the preservation of wildlife, fish, scenic, aesthetic and other environmental and navigational values.

Background

The Stillaguamish River is not a WRIA where watershed planning is being conducted under chapter 90.82 RCW, but a great deal of work is being done related to salmon recovery under chapter 77.85 RCW. The instream flow work is being conducted by Ecology in cooperation with the Department of Fish and Wildlife, the Tribes, and local government. Under the Governor's Salmon Recovery Plan, WRIA 5 is not listed as one of the 16 most salmon critical basins in Washington.

The Stillaguamish Implementation Review Committee, a salmon recovery group, is being advised to ensure that work on the proposed rule incorporates the instream flow analysis and recommendations into its salmon recovery strategy.

Overview of the basin

The Stillaguamish River is the fifth largest tributary in the Puget Sound. The watershed is divided into three large sub-basins--the North Fork, the South Fork, and the lower mainstem. The three largest tributaries include:

- Pilchuck Creek
- Deer Creek
- Canyon Creek

The river supports five species of salmon including chinook (listed as threatened under ESA), coho (depressed population), pink, chum, and sockeye. Two species of anadromous trout, bull and cutthroat, are also supported by the watershed.

Habitat limiting factors play an important role in the flow conditions in the Stillaguamish. Temperatures, sediment and altered stream flows negatively affect the salmon populations and their ecosystems. In the past, severe low flows have resulted in the reduction of the coho smolt population. Areas of the basin that experience low flows during the summer months include:

- North Fork

- Pilchuck Creek
- Lower mainstem

The instream flow rule

Instream flow rules will define the flows in the basin that need to be protected from future diversions or withdrawals. Instream flows are set to ensure adequate water remains in the river system to protect fish and other uses in a stream.

Setting stream flows by state rule does not guarantee that a certain amount of water will always be in a specific stream or river at a particular time. Rather, no water rights would be issued that would cause the rivers to go below a certain amount, at a specific place, for a specific time. What stream flow rules actually do is give communities, farmers, ranchers and other water users more predictability about future water allocation.

The instream flow rule, if adopted, will be a condition to all pending and subsequent water right applications. Anyone getting a water right after a stream flow rule is adopted will know their water supply is subject to a specific amount of water flowing in their source. If a stream flow drops below levels set in rule, then these "junior" water-right holders will have to decrease or even stop taking water out of the basin.

Ecology is looking at many factors that affect stream flows, including instream needs for fish habitat, ground water development, the status of existing water rights, tribal interests, how surface and ground waters connect, and a myriad of other factors.

Rule making is a public process. As a rule is developed there will be opportunities – both informal open houses and formal public hearings – for people to express their views on the proposal. You may view the Web site listed at the end if this document for additional information.

For more information

Water management is a shared responsibility. Local governments, watershed planning groups and the state all have roles to ensure there is enough water to sustain future growth, agriculture, healthy fish populations and recreation needs.

For more information on the Stillaguamish River instream flow rule, please call Stephen Hirschey in Ecology's Northwest Regional Office at (425) 649-7066 or email: shir461@ecy.wa.gov. You may also visit the Web site at: http://www.ecy.wa.gov/laws-rules/activity/wac173505.html.

PUBLIC MEETING AND OPEN HOUSE

Water Resources Stillaguamish Stream-Flow Rule

--and--

Water Quality Cleanup Plan for Stillaguamish Watershed and Port Susan

Tuesday, November 9, 2004
Stillaguamish Valley Pioneer Museum
20722 67th Ave. N.E. Arlington, Washington

Meetings at: 3:00 pm to 5:00 pm *--and--* 7:00 pm to 9:00 pm

Open House: 5:00 to 7 pm

COMMENT PERIOD: Open Until December 10th

The Department of Ecology will be hosting an open house on two topics:

1. **The Stillaguamish Stream-Flow Rule. The rule will define the flows in the basin that need to be protected from future diversions or withdrawals. Stream flows are set to ensure adequate water remains in the river system to protect fish and other uses in a stream.**
2. **The public meeting and open house will also provide information on Water Quality Cleanup Plan for Fecal Coliform Bacteria, Dissolved Oxygen, and Temperature.**

For more information on the Stillaguamish Stream-Flow Rule contact Steve Hirschey at (425) 649-7066, email [shir461@ecy.wa.gov]

For more information on the WQ activities, please contact Sally Lawrence at (425) 649-7036, email [slaw461@ecy.wa.gov]

Ecology's web site: http://www.ecy.wa.gov

For more information on the Public Meeting and Open House, please contact DouGlas Palenshus at (425) 649-7041, email [dpal461@ecy.wa.gov]

For special accommodation needs or language translation call TTY (for the speech or hearing impaired) at 800-833-6388.

News Release

WASHINGTON STATE DEPARTMENT OF ECOLOGY

FOR IMMEDIATE RELEASE – Oct. 22, 2004

04-194

Ecology department to hold sessions on proposed Stillaguamish cleanup plan and stream-flow rule

BELLEVUE – The Washington Department of Ecology (Ecology) is sponsoring an open house and two public meetings on Tues, Nov. 9 in Arlington so people can learn about the department's efforts to improve water quality and allocate future water supplies in the Stillaguamish watershed.

Two separate presentation and discussion sessions, each covering both topics, will be offered at Arlington's Stillaguamish Valley Pioneer Museum, 20722 67th Ave. N.E. In an effort to provide greater opportunities for attendance, the first public meeting will be held from 3 to 5 p.m., followed by an open house from 5 to 7 p.m., with the second meeting running from 7 to 9 p.m.

Ecology, in conjunction with local organizations, has been identifying pollutants and developing a water cleanup plan for the Stillaguamish watershed. The river basin is failing to meet state water-quality standards due to:

- **Elevated concentrations of fecal coliform pollution** from farms, domestic and wild animals, failing septic systems, urban storm water runoff and leaking sewer systems.
- **Decreased levels of dissolved oxygen.** Fecal coliform and other nutrients such as fertilizers enter the watershed and feed algae blooms that use up available oxygen. Low dissolved oxygen levels threaten salmon and other aquatic life.
- **High summer water temperatures**. A lack of sufficient streamside shading, upstream landslides, bank erosion and low stream flows all contribute to warm water problems which harm fish and other wildlife.

A proposed water cleanup plan for the Stillaguamish will be available after Nov. 1 for public review and will be presented at the Nov. 9 events. The proposal

will be placed on the Internet at
http://www.ecy.wa.gov/programs/wq/tmdl/watershed/tmdl_info-nwro.html and at the Arlington, Everett and Stanwood public libraries.

Ecology also will present features of a new draft rule the department is considering to help determine how water in the Stillaguamish basin ought to be allocated for future uses. When formally adopted the rule is intended to:

- Protect fish, wildlife, water quality, recreation and aesthetics in the watershed while also providing water for future domestic uses.
- Set minimum stream flows for the rivers and creeks in the Stillaguamish watershed.
- Protect water levels for lakes and ponds in the watershed.
- Reserve a certain amount of ground water for future domestic use that won't need a new water right.
- Set aside sufficient water for grazing livestock without needing a new water right.

The public is invited to ask questions and provide comments about the concepts and issues that Ecology is seeking to address through the stream-flow rule. Ecology will present a formal proposed stream-flow rule for the Stillaguamish watershed later in the winter, and will conduct public hearings next year before a rule is adopted.

Comments about the Stillaguamish water cleanup plan should be addressed by Friday, Dec. 10, to Sally Lawrence, Department of Ecology, 3190 160th Ave. S.E., Bellevue, Wash., 98008; e-mail: slaw461@ecy.wa.gov and phone: 425-649-7036.

Comments regarding the features and issues for consideration in the draft Stillaguamish stream-flow rule should be sent by Friday, Dec. 10, to Steve Hirschey, Department of Ecology, 3190 160th Ave. S.E., Bellevue, Wash., 98008; e-mail: shir461@ecy.wa.gov and phone: 425-649-7066.

# # #

Contact: Larry Altose**, Public information officer, 425-649-7009, or pager 206-663-1785**

Stillaguamish River water quality technical reports available at:
http://www.ecy.wa.gov/biblio/0403017.html
http://www.ecy.wa.gov/biblio/0403010.html

For more information about setting stream flows in Washington:
http://www.ecy.wa.gov/programs/wr/instream-flows/isfhm.html

Ecology's Web site: http://www.ecy.wa.gov

Broadcast version

An open house will be held Tuesday, November 9, in Arlington to allow the public to hear about and weigh in on an Ecology Department plan to clean up water pollution in the Stillaguamish River watershed.

The department also will present the main features of a draft rule it is considering to set stream flows in the Stillaguamish and allocate water for future uses. Ecology is seeking public comments about the issues and features of the draft rule.

There will be two sessions, each covering both of these topics, on November 9 at the Stillaguamish Valley Pioneer Museum. The first public meeting will take place from three to five p.m., followed by an open house. The second session will occur from seven to nine p.m.

Open House

Stillaguamish Stream-Flow Rule (WRIA 5) Chapter 173-505 WAC

from Ecology's Water Resources Program

Stillaguamish Stream-Flow Rule

Tuesday, November 9, 2004

Arlington's Stillaguamish Valley Pioneer Museum, 20722 67th Ave. N.E.

Two Sessions
Session One: 3-5 pm
Open House: 5-7 pm
Session Two: 7-9 pm

Send comments by December 10, 2004 to:
Steve Hirschey
Department of Ecology
3190 160th Ave. S.E., Bellevue, Washington 98008

e-mail:
shir461@ecy.wa.gov

phone: 425-649-7066

The Department of Ecology (Ecology) is proposing to establish stream flows for the Stillaguamish River in Water Resources Inventory Area (WRIA) 5, Chapter 175-505 WAC. The purpose of a stream flow is to protect and, where possible, enhance the quality of the natural environment. In addition, perennial rivers and streams of the state must be retained with base flows necessary to provide for the preservation of wildlife, fish, scenic, aesthetic and other environmental values.

Comments on the features and issues of the draft stream-flow rule may be sent to Ecology by December 10, 2004.

Background

The Stillaguamish River is not a WRIA where watershed planning is being conducted under chapter 90.82 RCW, but a great deal of work is being done related to salmon recovery under chapter 77.85 RCW. The stream flow work is being conducted by Ecology in cooperation with the Department of Fish and Wildlife, the Tribes, and local government. The Stillaguamish Implementation Review Committee, a salmon recovery group, is being advised to ensure that work on the proposed rule incorporates the instream flow analysis and recommendations into its salmon recovery strategy.

Stream-Flow Rule

The stream-flow rules will define the flows in the basin that need to be protected from future diversions or withdrawals. Stream flows are set to ensure adequate water remains in the river system to protect fish and other uses in a stream.

Ecology is looking at many factors that affect stream-flows. The new draft rule will help determine how water in the Stillaguamish basin ought to be allocated for future uses. The draft rule is intended to:

- Protect fish, wildlife, water quality, recreation and aesthetics in the watershed while also providing water for future human uses.
- Set minimum stream flows for the rivers and creeks in the Stillaguamish watershed.
- Protect water levels for lakes and ponds in the watershed.
- Reserve a certain amount of ground water for future home and small business use that won't need a new water right permit.
- Set aside sufficient water for grazing livestock that in some cases will not need a water right permit.
- Create stricter standards for issuing new water rights in the basin.

(continued on back)

Open house information

The public is invited to ask questions and provide comments about the concepts and issues the draft stream-flow rule is seeking to address.

There will be two informal sessions conducted on Tuesday, Nov. 9 at Arlington's Stillaguamish Valley Pioneer Museum, 20722 67th Ave. N.E. The first public meeting will be held from 3 to 5 p.m. and the other from 7 to 9 p.m., with an open house from 5 to 7 p.m.

Comments regarding the features and issues for consideration in the draft Stillaguamish stream-flow rule should be sent by Friday, Dec. 10, to Steve Hirschey, Department of Ecology, 3190 160th Ave. S.E., Bellevue, Wash., 98008; e-mail: shir461@ecy.wa.gov and phone: 425-649-7066.

If you would like additional information on the open house, please call Judy Beitel at (360) 407-6878 or e-mail: jbei461@ecy.wa.gov.

APPENDIX E

COPIES OF THE FINAL TEXT OF THE ADOPTED RULE WITH CHANGES TO THE PROPOSAL INDICATED CHAPTER 173-505 WAC WATER RESOURCE MANAGEMENT AND INSTREAM FLOW PROGRAM STILLAGUAMISH RIVER BASIN WATER RESOURCE INVENTORY AREA WRIA 5

Chapter 173-505 WAC

INSTREAM RESOURCES PROTECTION AND WATER RESOURCES PROGRAM
Stillaguamish River Basin
Water Resources Inventory Area (WRIA) 5

FINAL ADOPTED VERSION

NEW SECTION

WAC 173-505-010 General provisions--Authority and applicability. (1) This chapter is adopted under the authority of the Water Resources Act of 1971 (chapter 90.54 RCW), Minimum Water Flows and Levels Act (chapter 90.22 RCW), Water Well Construction Act (chapter 18.104 RCW), Water resource management (chapter 90.42 RCW), Regulation of public ground waters (chapter 90.44 RCW), and Water resources management program (chapter 173-500 WAC).

(2) This chapter applies to the use and appropriation of:

(a) All surface waters that drain within the Stillaguamish River basin, also known as water resources inventory area (WRIA) 5, including its tributaries and areas adjacent to the mouth of the Stillaguamish River that drain to salt water; and

(b) All ground water hydraulically connected with surface waters of the Stillaguamish River basin. Existing studies indicate a substantial likelihood that all waters within WRIA 5 are in hydraulic continuity with the surface waters covered herein.

(3) This chapter shall not affect existing water rights, including perfected riparian rights or other appropriative rights existing on the effective date of this chapter, unless otherwise provided for in the conditions of the water right in question.

(4) This chapter shall also not affect federal Indian and non-Indian reserved rights. The Stillaguamish Tribe of Indians and the Tulalip Tribes reserve the right to a claim for a treaty-derived off-reservation instream flow right with senior priority. The extent of such rights can only be adjudicated in federal or state court.

(5) This chapter does not limit the department's authority to establish instream flow requirements or conditions under other laws, including hydropower licensing under RCW 90.48.260.

(6) In accordance with RCW 90.54.090, all agencies of state and local government, including counties and municipal and public corporations, shall, whenever possible, carry out powers vested in them in manners which are consistent with this chapter.

(7) In administering and enforcing this chapter, the department's actions shall be consistent with the provisions of chapter 90.54 RCW.

NEW SECTION

WAC 173-505-020 Purpose. (1) The purpose of this chapter is to retain perennial rivers, streams, and lakes in the Stillaguamish River basin with instream flows and levels necessary to protect and preserve wildlife, fish, scenic, aesthetic, recreation, water quality and other environmental values, navigational values, and stock water requirements.

(2) The chapter creates a reservation of adequate and safe supplies of potable water to satisfy human domestic needs, and reservations for stock watering.

(3) This chapter sets forth the department's policies to guide the protection, utilization and management of Stillaguamish River basin surface water and interrelated ground water resources. It establishes instream flows and closures, and sets forth a program for administration of future water allocation and use. This chapter does not relieve anyone from compliance with relevant statutory requirements.

NEW SECTION

WAC 173-505-030 Definitions. For the purposes of this chapter, the following definitions shall be used. In the event that these definitions differ from those contained in related rules, the definitions presented here will supersede any others for this chapter:

(1) **"Allocation"** means the designating of specific amounts of water for specific beneficial uses.

(2) **"Appropriation"** means the process of legally acquiring the right to specific amounts of water for beneficial uses, as consistent with the requirements of the ground and surface water codes and other applicable water resource statutes. This term refers to both surface and ground water right permits and to ground water withdrawals otherwise exempted from permit requirements under RCW 90.44.050.

(3) **"Consumptive use"** means a use of water that diminishes the amount or quality of water in the water source.

(4) **"Department"** means the Washington state department of ecology.

(5) **"Domestic water use"** means, for the purposes of administering WAC 173-505-090, potable water to satisfy the human domestic needs of a household or business, including water used for drinking, bathing, sanitary purposes, cooking, laundering, and other incidental uses. Outdoor watering shall be limited to an area not to exceed a total of 1/12th of an acre, or three thousand six hundred thirty square feet, for all outdoor uses for each individual domestic water use. Under all circumstances, total outdoor watering for multiple residences under the permit exemption (RCW 90.44.050) shall not exceed one-half acre.

(6) **"Instream flow"** means a stream flow level set in rule that is required to protect and preserve fish, wildlife, scenic, aesthetic and other environmental values, and navigational values. The term "instream flow" means a base flow under chapter 90.54 RCW, a minimum flow under chapter 90.03 or 90.22 RCW, or a minimum instream flow under chapter 90.82 RCW.

(7) **"Mitigation plan"** means a scientifically sound plan voluntarily submitted by a project proponent to offset the impacts of a proposed water use and approved by the department. A mitigation plan can be submitted to the department for a stream, basin, reach, or other area. A mitigation plan must show that the withdrawal with mitigation in place will not impair existing water rights, including instream flow rights, or diminish water quality. The plan must provide mitigation for the duration of the water use.

(8) **"Municipal water supplier"** means an entity that supplies water for municipal water supply purposes. (RCW 90.03.015.)

(9) **"Municipal water supply purposes"** means a beneficial use of water: (a) For residential purposes through fifteen or more residential service connections or for providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year; (b) for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district; or (c) indirectly for the purposes in (a) or (b) of this subsection through the delivery of treated or raw water to a public water system for such use. (Partial definition; for the complete text of this definition refer to RCW 90.03.015.)

(10) **"Nonconsumptive use"** means a use of water that does not diminish the amount or quality of water in the water source.

(11) "**Permit-exempt withdrawals"** or **"permit exemption"** means a ground water withdrawal exempted from permit requirements under RCW 90.44.050, but which is otherwise subject to the ground water code.

(12) **"Reservation"** means an allocation of water for future beneficial uses. The effective date of a reservation, as well as the priority date of a given appropriation from a reservation, is the same as the effective date of this chapter.

(13) **"Stream management unit"** means a stream segment, reach, or tributary used to describe the part of the relevant stream to which a particular instream flow level applies.

(14) **"Withdrawal"** means the appropriation or use of ground water, or the diversion or use of surface water.

NEW SECTION

WAC 173-505-040 Establishment of stream management units. The department hereby establishes the following stream management units.

Table 1
Stream Management Unit Information
(N.F. is North Fork; S.F. is South Fork)

Stream Management Unit Name	Control Point by River Mile (RM) or Latitude North (Lat.) and Longitude West (Long.)	Stream Management Reach
Stillaguamish Mainstem	Stillaguamish River nr Silvana Ecology Station #05A070 RM 11.2 Lat. 48 11 49.5, Long. 122 12 32	From the mouth at Port Susan to the confluence of the N.F. of the Stillaguamish River and the S.F. of the Stillaguamish River.
North Fork (N.F.) Stillaguamish River:		
N.F. Stillaguamish River at Arlington, WA	USGS Station #12167000 RM 6.5 Lat. 48 15 42, Long. 122 02 47	From confluence with the S.F. Stillaguamish to river mile 17.6.
N.F. Stillaguamish River at Oso	Ecology Station #05B090 RM 17.6 Lat. 48 16 21, Long. 122 53 17	From river mile 17.6 to headwaters.

South Fork (S. F.) Stillaguamish River:		
S.F. Stillaguamish River	RM 24.4	From confluence with the N.F. Stillaguamish River to RM 34.9.
S.F. Stillaguamish River at Granite Falls, WA	USGS Station #12161000 RM 34.9 Lat. 48 06 12, Long. 121 57 07	From S.F. Stillaguamish River at RM 34.9 to headwaters.
Stillaguamish River Tributaries:		
Church Creek nr Stanwood	Ecology Station #05L070 RM 3 Lat. 48 14 54, Long. 122 18 48	From mouth to headwaters, including tributaries.
Glade Bekken Creek - stream 0030	At the Sylvania Terrace Rd. crossing RM 0.5	From mouth to headwaters, including tributaries.
Portage Creek	At 208th St. NE & 66th Ave. crossing RM 7.0	From mouth to headwaters, including tributaries.
Fish Creek	At Sill Rd. crossing RM 2.0	From mouth to headwaters, including tributaries.
Pilchuck at Bridge 626	Ecology Station #05D070 RM 0.5 Lat. 48 12 49, Long. 122 13 03	From mouth to the Campground Bridge, including tributaries.

Pilchuck Creek above Lake Creek	Ecology Station #05D150 RM 17 Lat. 48 20 35, Long. 122 03 23	From Campground Bridge to headwaters, except Lake Cavanaugh.
Pilchuck Creek Tributaries:		
Lake Creek nr mouth	Ecology Station #05K060 RM 0.2 Lat. 48 20 29, Long. 122 03 18	From mouth to headwaters, including tributaries, except Lake Cavanaugh.
North Fork (N. F.) Stillaguamish River Tributaries:		
Squire Creek at Squire Creek Park	Ecology Station #05H070 RM 1.2 Lat. 48 16 13, Long. 121 40 17	From mouth to headwaters, including tributaries.
Deer Creek nr Oso	Ecology Station #05C090 RM 1.3 Lat. 48 17 03, Long. 121 55 35	From mouth to headwaters, including tributaries.
Brooks Creek	At Brooks Creek Rd. Bridge RM 0.3	From mouth to headwaters, including tributaries.
Montague Creek	At Hwy 530 bridge RM 0.3	From mouth to headwaters, including tributaries.
Rollins Creek	Off C Post off Hwy 530 about RM 1.0	From mouth to headwaters, including tributaries.

Boulder River nr mouth	Ecology Station #05J060 RM 0.5 Lat. 48 16 40, Long. 121 46 52	From mouth to headwaters, including tributaries.
French Creek	At Hwy 530 bridge RM 0.4	From mouth to headwaters, including tributaries.
Segelson Creek	At Swede Haven Rd. bridge off Hwy 530 RM 0.3	From mouth to headwaters, including tributaries.
Furland Creek	At Hwy 530 bridge RM 0.2	From mouth to headwaters, including tributaries.
Ashton Creek	At Hwy 530 bridge RM 0.2	From mouth to headwaters, including tributaries.
Grant Creek	At Hillis Rd. bridge off Hwy 530 RM 0.1	From mouth to headwaters, including tributaries.
Rock Creek	At RM 1.1	From mouth to headwaters, including tributaries.
Koonz Creek - Stream 0138	At WDFW bridge RM 1.5	From mouth to headwaters, including tributaries.
Harvey Creek	At side road crossing of Grandview Rd. RM 1.5	From mouth to headwaters, including tributaries.

South Fork (S. F.) Stillaguamish River Tributaries:		
Jim Creek at Whites Road	Ecology Station #05G070 RM 3.3 Lat. 48 10 41, Long. 122 03 06	From mouth to headwaters, including tributaries.
Siberia Creek, tributary to Jim Creek	At mouth near 131st Ave. NE, RM 0.0	From mouth to headwaters, including tributaries.
Canyon Creek nr Masonic Park	Ecology Station #05F080 RM 5.0 Lat. 48 07 17, Long. 121 54 17	From mouth to headwaters, including tributaries.
Armstrong Creek	At Harvey Creek Rd. crossing RM 1.0	From mouth to headwaters, including tributaries.
Jordan Creek	At Jordan Rd. crossing RM 0.1	From mouth to headwaters, including tributaries.
Tiger Creek - stream 0363	Near Masonic Park, RM 1.6	From mouth to headwaters, including tributaries.

NEW SECTION

WAC 173-505-050 Establishment of instream flows. (1) Instream flows established in this section protect stream flows from future withdrawals, and preserve flow levels that are necessary to protect wildlife, fish, water quality, scenic, aesthetic and other environmental values, navigational values, and stock watering requirements.

(2) Instream flows established in this section are water rights with a priority date the same as the effective date of this chapter.

(3) Instream flows are expressed in cubic feet per second (cfs). These flows are measured at the control points identified in WAC 173-505-040 and apply to the stream management reach. The instream flow provisions for any water right located in a stream

management unit shall specifically describe the instream flow levels for the control station in that unit and shall refer generally to other downstream instream flow requirements that may also become controlling and critical to the use of water under such right.

(4) Instream flows are to be protected from impairment by junior water rights. Except as provided in WAC 173-505-080, 173-505-090, and 173-505-110, junior water rights shall be exercised only when flow conditions provide enough water to satisfy senior rights, including the instream flows set in this chapter. Withdrawals of water that would conflict with the established instream flows shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

(5) Stream flow requirements on existing water rights are not modified by this chapter. Existing water rights that include a provision that water use will be subject to future instream flows are now subject to the instream flows established in WAC 173-505-050.

(6) Instream flows are established for the stream management units in WAC 173-505-040, as follows:

Table 2
Instream Flows for the Mainstem and North and South Forks, Stillaguamish River
(in cubic feet per second) (RM.=River Mile)

Month	Day	Ecology Station #05A070 Stillaguamish RM 11.2	USGS Station #12167000 North Fork Stillaguamish RM 6.5	Ecology Station #05B090 North Fork Stillaguamish RM 17.6	South Fork Stillaguamish RM 24.4	USGS Station #12161000 South Fork Stillaguamish RM 34.9
Jan.	1-31	2200	1200	915	1800	1200
Feb.	1-29	2000	1200	850	1600	1200
Mar.	1-15	2000	1300	850	2250	1600
	16-31	2000	1300	915	2250	1600
Apr.	1-30	2000	1300	915	2000	1600
May	1-31	2000	1300	915	2000	1600
Jun.	1-15	2000	1300	915	1200	1060
	16-30	2000	1400	650	1200	1060
Jul.	1-15	2000	1100	600	1150	1060
	16-31	2000	800	500	750	700
Aug.	1-15	1700	800	425	750	700
	16-31	1700	800	500	750	700
Sep.	1-15	1700	800	700	775	700
	16-30	1700	800	850	775	700
Oct.	1-15	1700	800	870	1250	1200
	16-31	1700	800	870	1900	1700
Nov.	1-15	2200	950	915	2300	1800
	16-30	2200	950	915	2300	1800
Dec.	1-31	2200	1300	915	2500	1800

Table 3
Instream Flows for Tributaries of
the Mainstem and North and South Forks Stillaguamish River Basin
(in cubic feet per second) (RM.=River Mile)

Month	Day	RM 0.5 Pilchuck Creek	RM 17 Pilchuck Creek	RM 1.2 Squire Creek	RM 3.3 Jim Creek	RM 5.0 Canyon Creek	RM 0.3 Lake Creek	RM 1.3 Deer Creek	RM 0.3 Brooks Creek
Jan.	1-31	170	98	200	250	525	21	411	39
Feb.	1-29	170	98	200	250	450	21	411	39
Mar.	1-15	170	98	280	250	450	21	474	68
Mar.	16-31	170	98	280	250	450	21	474	68
Apr.	1-30	170	98	280	250	450	21	474	68
May	1-31	170	98	280	250	450	21	474	68
Jun.	1-15	170	98	280	250	450	21	313	45
Jun.	16-30	170	98	280	250	350	21	313	45
Jul.	1-31	170	98	200	250	350	21	195	45
Aug.	1-31	140	98	200	250	350	21	88	17
Sep.	1-30	170	98	200	250	400	21	353	17
Oct.	1-31	170	98	200	250	525	21	617	39
Nov.	1-15	170	98	160	250	525	21	411	39
Nov.	16-30	170	98	160	250	525	21	411	39
Dec.	1-31	170	98	160	250	525	21	411	39

Table 4
Instream Flows for Tributaries of
the Mainstem and North and South Forks Stillaguamish River Basin
(in cubic feet per second) (RM.=River Mile)

Month	Day	RM 0.3 Montague Creek	RM 1.0 Rollins Creek	RM 0.5 Boulder Creek	RM 0.4 French Creek	RM 0.3 Segelson Creek	RM 0.2 Furland Creek	RM 0.2 Ashton Creek	RM 0.1 Grant Creek
Jan.	1-31	29	47	167	56	47	33	34	67
Feb.	1-29	29	47	167	56	47	33	34	67
Mar.	1-15	53	80	203	73	79	44	46	87
Mar.	16-31	53	80	203	73	79	44	46	87
Apr.	1-30	53	80	203	73	79	44	46	87
May	1-31	53	80	203	73	79	44	46	87
Jun.	1-15	35	53	134	48	52	29	30	57
Jun.	16-30	35	53	134	48	52	29	30	57
Jul.	1-31	35	53	134	48	52	29	30	57
Aug.	1-31	12	20	154	18	20	10	10	23
Sep.	1-30	12	47	250	84	47	49	51	101
Oct.	1-31	29	47	167	84	47	49	51	101
Nov.	1-15	29	47	167	56	47	33	34	67
Nov.	16-30	29	47	167	56	47	33	34	67
Dec.	1-31	29	47	167	56	47	33	34	67

Table 5
Instream
Flows for Tributaries of
the Mainstem and North and South Forks Stillaguamish River Basin
(in cubic feet per second) (RM.=River Mile)

Month	Day	RM 3.0 Church Creek	RM 0.5 Glade Bekken Creek	RM 7.0 Portage Creek	RM 2.0 Fish Creek	RM 1.1 Rock Creek	RM 1.5 Koonz Creek
Jan.	1-31	24	10	11	16	29	19
Feb.	1-29	24	10	11	16	29	19
Mar.	1-15	43	21	22	30	53	36
Mar.	16-31	43	21	22	30	53	36
Apr.	1-30	43	21	22	30	53	36
May	1-31	43	21	22	30	53	36
Jun.	1-15	28	14	14	20	35	24
Jun.	16-30	28	14	14	20	35	24
Jul.	1-31	28	14	14	20	35	24
Aug.	1-31	10	4	4	6	12	8
Sep.	1-30	10	4	4	6	29	19
Oct.	1-31	24	10	11	16	29	19
Nov.	1-15	24	10	11	16	29	19
Nov.	16-30	24	10	11	16	29	19
Dec.	1-31	24	10	11	16	29	19

Table 6
Instream Flows for Tributaries of
the Mainstem and North and South Forks Stillaguamish River Basin
(in cubic feet per second) (RM.=River Mile)

Month	Day	RM 1.5 Harvey Creek	RM 1.0 Armstrong Creek	RM 0.1 Jordan Creek	RM 1.6 Tiger Creek	RM 0.0 Siberia Creek
Jan.	1-31	9	34	18	27	37
Feb.	1-29	9	34	18	27	37
Mar.	1-15	6	46	34	48	49
Mar.	16-31	6	46	34	48	49
Apr.	1-30	6	46	34	48	49
May	1-31	4	46	34	48	49
Jun.	1-15	4	30	22	32	32
Jun.	16-30	4	30	22	32	32
Jul.	1-31	4	30	22	32	32
Aug.	1-31	4	10	7	11	11
Sep.	1-30	4	51	18	11	27
Oct.	1-31	4	51	18	11	55
Nov.	1-15	9	34	18	27	37
Nov.	16-30	9	34	18	27	37
Dec.	1-31	9	34	18	27	37

NEW SECTION

WAC 173-505-060 Lakes and ponds. RCW 90.54.020(3) provides, in part, that the quality of the natural environment shall be protected, and where possible, enhanced, and lakes and ponds shall be retained substantially in their natural condition. The department has determined that further consumptive withdrawals would impact the lakes and ponds of the Stillaguamish River basin. Therefore, surface withdrawals from all lakes and ponds shall be limited to single in-house domestic uses not to exceed one hundred fifty gallons per day per residence.

NEW SECTION

WAC 173-505-070 Stream closures. (1) The department determines that, based on historical and current low flows and uses, no water is available for additional year-round appropriation from the streams and tributaries in the Stillaguamish River basin. All unappropriated water from the streams and rivers is hereby appropriated for purposes of protecting and preserving fish and wildlife and other instream values, as of the date of this chapter. Therefore, the department closes all the rivers and streams in the Stillaguamish River basin to any further appropriations. This includes all ground water hydraulically connected to those surface waters, the withdrawal of which will have an effect on the flow or level of the rivers and streams.

(2) Exceptions to the closures and instream flow requirements are provided in WAC 173-505-060, 173-505-070(3), 173-505-080, 173-505-090 and 173-505-110.

(3) The department finds that there is some water above the instream flows at specific locations and times of year that could be captured for storage or other projects that do not require year-round, uninterruptible water supplies. Therefore, the water sources described in the table below have water available for the time periods specified. These withdrawals are subject to the instream flows established in WAC 173-505-050 and the maximum allocations defined in WAC 173-505-100(2).

Table 7
Water Source and Open Periods.*

Water Source	Open Period
Stillaguamish River from its multiple mouths at Port Susan to the confluence of N.F. Stillaguamish River and S.F. Stillaguamish River (RM 0 to 17.8).	October 16-June 30
N.F. Stillaguamish, from RM 0 (its confluence with the S.F. Stillaguamish) to river mile 17.6.	October 16-June 30
N.F. Stillaguamish River, from RM 17.6 to its headwaters.	November 1-June 30

S.F. Stillaguamish River from its confluence with the N.F. Stillaguamish River (RM 17.8) to RM 34.9.	November 1-June 15
Pilchuck Creek from mouth to RM 16.4 (confluence of Bear Creek).	October 16-May 31
Squire Creek from mouth to its headwaters.	November 1-February 15, and May 1-June 30
Canyon Creek from mouth to RM 11.8 (confluence of N.F. Canyon Creek and S.F. Canyon Creek).	December 1-May 31
N.F. is North Fork **S.F.** is South Fork **RM** is river mile .*Tributaries to the water sources are excluded from the open period unless specifically listed.	

NEW SECTION

WAC 173-505-080 Future stock watering. (1) Consistent with RCW 90.22.040, the department retains one cubic foot per second of surface water for future stock watering pursuant to the following requirements:

(a) This surface water flow is available to satisfy stock watering requirements for stock on riparian grazing lands which drink directly from streams, lakes or other public waters. Appropriation or use of water from the reservation for stock watering shall be limited to the land base and carrying capacity of the grazing lands next to the stream or water course. The reservation shall not be available for feedlots and other activities which are not related to normal grazing land uses.

(b) The department encourages existing riparian stock water right holders to remove livestock from streams for the purpose of protecting water quality and stream habitat. Uses that meet the following conditions shall be considered to qualify as direct stock watering from a stream:

(i) Small amounts of water are diverted (screened and piped) to nearby stock water tanks for consumption by livestock;

(ii) Stock water tanks shall be located close to the surface water source, and have as short a bypass reach as possible, while providing protection to the water body, stream bank and associated vegetative zone;

(iii) If a float or demand type valve is not used, the tank overflow must return to the same source, at or near the point of diversion;

(iv) The stock tank must serve stock, which normally range that parcel of property; and

(v) The quantity of water consumed from the stock tank should not exceed the quantity consumed if the stock drank directly from the stream.

(c) The decision by a person to divert stock water from the stream and into a tank does not constitute an adjudication of any claim to the right to the use of the water, as between the claimant and the state, or as between one or more water use claimants and another or others.

(2) The department reserves twenty acre-feet per year of ground water for future stock watering.

(3) The department will maintain an estimate of the amount of water used from the reservation, and reserves the right to require metering and reporting of water use to ensure compliance with the conditions of use for stock watering under this section.

NEW SECTION

WAC 173-505-090 Reservation of permit-exempt ground water for future domestic uses. (1) The department has weighed the public interest supported by providing a limited amount of water for domestic uses with the potential for negative impact to instream flow resources. The department finds that the public interest advanced by this limited reservation clearly overrides the small potential for negative impacts on instream resources (RCW 90.54.020 (3)(a)).

Based on this finding, the department hereby allocates a total amount of water not to exceed five cubic feet per second (5 cfs) to provide adequate and safe supplies of water for year-round future domestic uses. Of that 5 cfs, the reservation is further defined by limits on the amount of reserved water that can be withdrawn from the North and South Forks of the Stillaguamish River, as identified in the following table.

This reservation of ground water is not subject to the instream flows established in WAC 173-505-050 or the stream closures established in WAC 173-505-070.

Table 8
Allocation of Reservation as Measured at Specified River Miles

Water Source (RM - River Mile)	Amount of Water Available, Measured in Cubic Feet per Second (cfs) and Gallons per Day (gpd)
Stillaguamish River at RM 11.2	5 cfs or 3.23 million gpd
Of that 5 cfs, the following maximums may be taken from the specified locations:	
North Fork Stillaguamish River at RM 6.5	2 cfs or 1,292,544 gpd
South Fork Stillaguamish River at RM 24.4	1.5 cfs or 969,408 gpd

(2) Use of water under the reservation is available only if all the conditions set forth in this section are fully complied with. Conditions for use of the reservation water are:

(a) The reserved water shall be for ground water uses exempt from a water right permit application. This reservation is for either single or small group domestic uses, as defined in WAC 173-505-030(5).

(b) This reservation of ground water shall not exceed 3.23 million gallons of water per day (5 cfs).

(c) Domestic water use shall meet the water use efficiency standards of the uniform plumbing code as well as any applicable local or state requirements for conservation standards.

(d) This reservation shall be applicable only when the appropriate city(ies) or counties submit a written acknowledgment to the department that confirms that any legally required determinations of adequate potable water for building permits and subdivision approvals will be consistent with applicable provisions of this chapter.

Once this chapter is adopted and written acknowledgment is received, the department will promptly notify those city(ies) or counties, the tribes, water well contractors and the public that the reserve is in effect in those jurisdictions where acknowledgments exist.

(e) It shall be the responsibility of an applicant for a building permit or subdivision approval proposing a water use under the reservation to comply with the conditions in (a), (c), (e), (f), (g) and (h) of this subsection and all other conditions of this chapter.

(f) A new ground water withdrawal under this reservation is not allowed in areas where a municipal water supply has been established and a connection can be provided by the municipal supplier. If an applicant for a building permit or subdivision approval cannot obtain water through a municipal supplier, the applicant must obtain a letter from a municipal supplier prior to drilling a well which states that service was denied. Such a denial shall be consistent with the criteria listed in RCW 43.20.260.

(g) Outdoor water use is limited to the watering of an outdoor area not to exceed a total of 1/12th of an acre for all outdoor uses under each individual domestic water use. Under all circumstances, total outdoor watering for multiple residences under the permit exemption (RCW 90.44.050) shall not exceed one-half acre.

(h) The department reserves the right to require metering and reporting of water use for single domestic users, if more accurate water use data is needed for management of the reservation and water resources in the area of the reservation. All other ground water users under the permit-exemption shall be required to install and maintain measuring devices, in accordance with specifications provided by the department, and report the data to the department.

(3) The reservation is a one-time, finite amount of water. Once the reservation is fully allocated, it is no longer available. Other water sources may be available under the provisions in WAC 173-505-110, 173-505-120, 173-505-130 and 173-505-140.

(4) The department shall notify the appropriate county, in writing, when it determines that fifty percent, seventy-five percent, and one hundred percent of the reservation has been allocated. The department shall also issue a public notice annually in a newspaper of general circulation for the region that shows the amounts of reserved water that have been allocated and what remains unallocated, as well as identifying any water source that has been fully allocated and from which water is no longer available under this reservation.

(5) If a water use is not in compliance with any condition of this reservation, the department may take action consistent with WAC 173-505-150.

(6)(a) A record of all ground water withdrawals from the reservation shall be maintained by the department. The department will account for water use under the reservation based on the best available information reflecting actual water uses contained in well logs, water availability certificates issued by the counties, water rights issued by the department, public water system approvals or other documents. When other sources of information are not readily available, the department may account for water use at a rate of three hundred fifty gallons per day (gpd) per residence or business. This figure may be adjusted down to one hundred seventy-five gpd if the residence or business is served by an on-site septic system.

(b) If an entity using water under this reservation subsequently abandons the withdrawal and notifies the department, the water use may be credited back to the reservation.

NEW SECTION

WAC 173-505-100 Maximum allocations. (1) High flows provide critical ecological functions such as channel and riparian zone maintenance, flushing of sediments, and in and out migration of fish. The protection of the frequency and duration of higher ecological flows can be accomplished by establishing a maximum amount of water/flow that can be withdrawn from the stream above the instream flow levels.

(2) Therefore, the department determines that the total consumptive withdrawals from existing and future water rights in the Stillaguamish River basin during open periods shall not exceed a total of 300 cubic feet per second (cfs) as measured at ecology station #05A070, river mile 11.2. Of that 300 cfs, the maximum allocation is further defined by limits on the amount of water that can be withdrawn from specified stream reaches, at specific times. Refer to the table and map, below.

Table 9
Maximum Allocation

Water Source.*	**Open Period**
Stillaguamish River from its multiple mouths at Port Susan to the confluence of N.F. Stillaguamish River and S.F. Stillaguamish River (RM 0 to 17.8).	October 16-June 30
	Maximum Allocation 300 cfs
Of that 300 cfs, the following maximums may be taken from the specified stream reaches at the specified times:	
N.F. Stillaguamish, from RM 0 (its confluence with the S.F. Stillaguamish) to river mile 17.6.	October 16-June 30
	Maximum Allocation 150 cfs
N.F. Stillaguamish River, from RM 17.6 to its headwaters.	November 1-June 30
	Maximum Allocation 120 cfs
S.F. Stillaguamish River from its confluence with the N.F. Stillaguamish River (RM 17.9) to RM 34.9.	November 1-June 15
	Maximum Allocation 150 cfs

Pilchuck Creek from mouth to RM 16.4 (confluence of Bear Creek).	October 16-May 31	
	Maximum Allocation 50 cfs	
Squire Creek from mouth to its headwaters.	November 1-February 15, and May 1-June 30	
	Maximum Allocation 20 cfs	
Canyon Creek from mouth to RM 11.8 (confluence of N.F. Canyon Creek and S.F. Canyon Creek).	December 1-May 31	
	Maximum Allocation 40 cfs	
N.F. is North Fork	**S.F.** is South Fork	**RM** is river mile

.* Tributaries to the water sources are excluded from the open period unless specifically listed.

N.F. is North Fork; **S.F.** is South Fork; **cfs** is cubic feet per second; **confluence** .= the juncture of two or more flowing streams

Figure 1
Maximum allocations for specific stream reaches (listed above) in the Stillaguamish River basin, measured at designated control points

(3) All water rights issued after the effective date of this chapter are subject to the maximum allocation limits, the instream flows established in WAC 173-505-050 and other applicable provisions in this chapter. Use of the water must be consistent with the requirements of the surface water code (chapter 90.03 RCW) and other applicable statutory, administrative and case laws.

(4) The department will maintain a record of the amount of water allocated from all water rights in the Stillaguamish River basin, including those existing prior to the effective date of this chapter. When the maximum allocation is fully appropriated for any river, river reach, or stream, the department shall notify the appropriate county, in writing. The department shall also issue a public notice in a newspaper of general circulation for the region stating the maximum allocation is fully allocated.

NEW SECTION

WAC 173-505-110 Future permitting actions. (1) Surface and ground water permits not subject to the instream flows and closures established in WAC 173-505-050 and 173-505-070 may be issued if any of the following situations apply:

(a) The proposed use is nonconsumptive, and compatible with the intent of this chapter.

(b) The applicant elects to submit a scientifically sound mitigation plan, as defined in WAC 173-505-030(7), and it is approved by the department. If monitoring of a mitigation plan shows the mitigation is not effective, use of water under the permit shall then be subject to the instream flows. In the case of a closed stream, the use shall cease until a more effective mitigation plan is put in place.

(c) The proposed ground water use will not impair senior water rights. Based on the hydrogeology of the basin, and the location and depth where ground water withdrawals generally occur, future ground water withdrawals have a high likelihood of capturing water that would result in impacts to surface water flows and levels in the Stillaguamish River basin. Therefore, a ground water permit that is not subject to the instream flows or closures may be approved only if an applicant can demonstrate, through studies and technical analysis, and to the satisfaction of the department, that the proposed use will not cause impairment to existing water rights, including the instream flows set in this chapter.

(d) Before the department can approve a water right application for a new public water supply under (b) or (c) of this subsection, the applicant must also demonstrate that there are no other municipal water suppliers in the same proposed retail service area that can provide water. If domestic potable water can be provided by another municipal supplier, the department shall reject the water right application.

(e) The proposed use is for a salmon recovery project recommended for approval by the department of fish and wildlife.

(2) All water right permits approved by the department for a consumptive use from a water source with instream flows established by this chapter and during open periods are subject to those instream flows, as established in WAC 173-505-050. In addition, the total appropriation cannot exceed the maximum allocation limits described in WAC 173-505-100.

(3) No right to withdraw, divert or store the public surface or ground waters of the Stillaguamish River basin that conflicts with the provisions of this chapter will hereafter be granted, except in cases where such rights will clearly serve overriding considerations of the public interest, as stated in RCW 90.54.020 (3)(a).

(4) All future surface and ground water permit holders shall be required to install and maintain measuring devices, in accordance with specifications provided by the department, and report the data to the department in accordance with the permit requirements. In addition, the department may require the permit holder to monitor stream flows and ground water levels.

NEW SECTION

WAC 173-505-120 Alternative sources of water. (1) The legislature has long acknowledged that water supply and availability around the state are becoming increasingly limited, particularly during summer and fall months and dry years when demand is greatest. Growth and prosperity have significantly increased the competition for this limited resource (RCW 90.54.090 (1)(a)). This chapter provides limited exceptions for new uses in the Stillaguamish River basin. However, there is a continuing need for ongoing and reliable sources for new water uses. This need dictates the continued development and use of alternative sources of water, such as:

- Reuse of reclaimed water;
- Artificial recharge and recovery;
- Multipurpose water storage facilities;
- Conservation and efficiency measures applied to existing uses and the transfer of saved water;
- Acquisition of existing water rights; and
- Establishment of a trust water rights program.

(2) Alternative sources of water of equal or better quality than a new source can be used to improve stream flows for fish, offset impacts of withdrawals on stream flows and provide sources of water for future out-of-stream uses.

NEW SECTION

WAC 173-505-130 Establishment of trust water rights program. (1) The department will establish a trust water right program to facilitate the acquisition of existing water rights through purchases, long-term leases, donations and conserved water saved through state and federally funded conservation projects.

(2) The determination of how much water should be allocated between future out-of-stream uses and the restoration and enhancement of instream flows will be made at the time the water is acquired and deposited into the trust water rights program.

NEW SECTION

WAC 173-505-140 Future changes and transfers. No changes or transfers to existing surface or ground water rights in the Stillaguamish River basin shall hereafter be granted that conflict with the purposes or provisions of this chapter. Any change or transfer proposals can be approved only if there is a finding that existing rights, including instream flows hereby established, will not be impaired.

NEW SECTION

WAC 173-505-150 Compliance and enforcement. (1) In accordance with RCW 90.03.605, in order to obtain compliance with this chapter, the department shall prepare and distribute technical and educational information regarding the scope and requirements of this chapter to the public. This is intended to assist the public in complying with the requirements of their water rights and applicable water laws.

(2) When the department determines that a violation has occurred, it shall:

(a) First attempt to achieve voluntary compliance. An approach to achieving this is to offer information and technical assistance to the person, in writing, identifying one or more means to accomplish the person's purposes within the framework of the law.

(b) If education and technical assistance do not achieve compliance, the department shall issue a notice of violation, a formal administrative order under RCW 43.27A.190, or assess penalties under RCW 43.83B.336, 90.03.400, 90.03.410, 90.03.600, 90.44.120 and 90.44.130.

NEW SECTION

WAC 173-505-160 Appeals. All final written decisions of the department of ecology pertaining to water right applications, permits, certificates, regulatory orders and related decisions made pursuant to this chapter can be appealed to the pollution control hearings board in accordance with chapter 43.21B RCW.

NEW SECTION

WAC 173-505-170 Regulation review. Review of this chapter may be initiated by the department whenever significant new information is available, a significant change in conditions occurs, or statutory changes are enacted that are determined by the department to require review of the chapter.

NEW SECTION

WAC 173-505-180 Map. For the purposes of administering this chapter, the boundaries of the Stillaguamish River basin contained in the figure below are presumed to accurately reflect the basin hydrology unless demonstrated otherwise.

Figure 2

Chapter 173-505 WAC

INSTREAM RESOURCES PROTECTION AND WATER RESOURCES PROGRAM
Stillaguamish River Basin
Water Resources Inventory Area (WRIA) 5

Copies of the Final Text of the Adopted Rule
with Changes to the Proposal Indicated

Chapter 173-505 WAC

INSTREAM RESOURCES PROTECTION AND WATER RESOURCES PROGRAM

Stillaguamish River Basin
Water Resources Inventory Area (WRIA) 5

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NEW SECTION

WAC 173-505-010 General provisions--Authority and applicability. (1) This chapter is adopted under the authority of the Water Resources Act of 1971 (chapter 90.54 RCW), Minimum Water Flows and Levels Act (chapter 90.22 RCW), Water Well Construction Act (chapter 18.104 RCW), Water resource management (chapter 90.42 RCW), Regulation of public ground waters (chapter 90.44 RCW), and Water resources management program (chapter 173-500 WAC).

(2) This chapter applies to the use and appropriation of:

(a) All surface waters that drain within the Stillaguamish River basin, also known as water resources inventory area (WRIA) 5, including its tributaries and areas adjacent to the mouth of the Stillaguamish River that drain to salt water; and

(b) All ground water hydraulically connected with surface waters of the Stillaguamish River basin. Existing studies indicate a substantial likelihood that all waters within WRIA 5 are in hydraulic continuity with the surface waters covered herein.

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(3) This chapter shall not affect existing water rights, including perfected riparian rights or other appropriative rights existing on the effective date of this chapter, unless otherwise provided for in the conditions of the water right in question.

(4) This chapter shall also not affect federal Indian and non-Indian reserved rights. The Stillaguamish Tribe of Indians and the Tulalip Tribes reserve the right to a claim for a treaty-derived off-reservation instream flow right with senior priority. The extent of such rights can only be adjudicated in federal or state court.

(5) This chapter does not limit the department's authority to establish instream flow requirements or conditions under other laws, including hydropower licensing under RCW 90.48.260.

(6) In accordance with RCW 90.54.090, all agencies of state and local government, including counties and municipal and public corporations, shall, whenever possible, carry out powers vested in them in manners which are consistent with this chapter.

(7) In administering and enforcing this chapter, the department's actions shall be consistent with the provisions of chapter 90.54 RCW.

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NEW SECTION

WAC 173-505-020 Purpose. (1) The purpose of this chapter is to retain perennial rivers, streams, and lakes in the Stillaguamish River basin with instream flows and levels necessary to protect and preserve wildlife, fish, scenic, aesthetic, recreation, water quality and other environmental values, navigational values, and stock water requirements.

(2) The chapter creates a reservation of adequate and safe supplies of potable water to satisfy human domestic needs, and *reservations* for stock watering.

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(3) This chapter sets forth the department's policies to guide the protection, utilization and management of Stillaguamish River basin surface water and interrelated ground water resources. It establishes instream flows and closures, and sets forth a program for administration of future water allocation and use. *This chapter does not relieve anyone from compliance with relevant statutory requirements.*

NEW SECTION

WAC 173-505-030 Definitions. For the purposes of this chapter, the following definitions shall be used*. In the event that these definitions differ from those contained in related rules, the definitions presented here will supersede any others for this chapter*:

(1) **"Allocation"** means the designating of specific amounts of water for specific beneficial uses.

(2) **"Appropriation"** means the process of legally acquiring the right to specific amounts of water for beneficial uses, as consistent with the requirements of the ground and surface water codes and other applicable water resource statutes. This term refers to both surface and ground water right permits and to ground water withdrawals otherwise exempted from permit requirements under RCW 90.44.050.

(3) **"Consumptive use"** means a use of water that diminishes the amount or quality of water in the water source.

(4) **"Department"** means the Washington state department of ecology.

(5) **"Domestic water use"** means, for the purposes of administering WAC 173-505-090, potable water to satisfy the

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human domestic needs of a household or business, including water used for drinking, bathing, sanitary purposes, cooking, laundering, and other incidental uses. Outdoor watering shall be limited to an area not to exceed a total of 1/12th of an acre, or three thousand six hundred thirty square feet, for all outdoor uses for each individual domestic water use. Under all circumstances, total outdoor watering for multiple residences under the permit exemption (RCW 90.44.050) shall not exceed one-half acre.

(6) **"Instream flow"** means a stream flow level set in rule that is required to protect and preserve fish, wildlife, scenic, aesthetic and other environmental values, and navigational values. The term "instream flow" means a base flow under chapter 90.54 RCW, a minimum flow under chapter 90.03 or 90.22 RCW, or a minimum instream flow under chapter 90.82 RCW.

(7) **"Mitigation plan"** means a scientifically sound plan voluntarily submitted by a project proponent to offset the impacts of a proposed water use and approved by the department. A mitigation plan can be submitted to the department for a stream, basin, reach, or other area. A mitigation plan must show that the withdrawal with mitigation in place will not impair existing water rights, including instream flow rights, or diminish water quality. The plan must provide mitigation for the duration of the water use.

*(8) **"Municipal water supplier"** means an entity that supplies water for municipal water supply purposes. (RCW 90.03.015.)*

*(9) **"Municipal water supply purposes"** means a beneficial use of water: (a) For residential purposes through fifteen or more residential service connections or for providing residential use of water for a nonresidential population that is, on average, at least twenty-five people for at least sixty days a year; (b) for governmental or governmental proprietary purposes by a city, town, public utility district, county, sewer district, or water district; or (c) indirectly for the purposes in (a) or (b) of this subsection through the delivery of treated or raw water to a public water system for such use. (Partial definition; for the complete text of this definition refer to RCW 90.03.015.)*

*(10) **"Nonconsumptive use"** means a use of water that does not diminish the amount or quality of water in the water source.*

*(11) **"Permit-exempt withdrawals"** or **"permit exemption"** means a ground water withdrawal exempted from permit requirements under RCW 90.44.050, but which is otherwise subject to the ground water code.*

*(12) **"Reservation"** means an allocation of water for future beneficial uses. The effective date of a reservation, as well as the priority date of a given appropriation from a reservation, is the same as the effective date of this chapter.*

Deleted: (8) **"Nonconsumptive use"** means a use of water that does not diminish the amount or quality of water in the water source.¶
(9) **Permit-exempt withdrawals"** or **"permit exemption"** means a ground water withdrawal exempted from permit requirements under RCW 90.44.050, but which is otherwise subject to the ground water code.¶
(10) **"Public water system"** means any system established under RCW 43.20.260 which provides water for human consumption through pipes or other constructed conveyances, excluding a system serving only one single-family residence and a system with four or fewer connections all of which serve residences on the same farm. This term includes group domestic systems.¶
(11) **"Reservation"** means an allocation of water for future beneficial uses. The priority date of a given allocation is the same as the effective date of the reservation.¶
(12) **"Stream management unit"** means a stream segment, reach, or tributary used to describe the part of the relevant stream to which a particular instream flow level applies.¶
(13) **"Timely and reasonable manner"** means potable water service can be provided by a purveyor within one hundred twenty days of a purveyor's written approval of the request for service, to a property located within the public water system and within five hundred feet of the purveyor's water pipe line. The department may determine that water service is unreasonable if the applicant for service provides sufficient information to show that the capital cost of connection would be more than twice the cost of an individual alternative source.¶

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*(13) **"Stream management unit"** means a stream segment, reach, or tributary used to describe the part of the relevant stream to which a particular instream flow level applies.*

(14) **"Withdrawal"** means the appropriation or use of ground water, or the diversion or use of surface water.

NEW SECTION

WAC 173-505-040 Establishment of stream management units. The department hereby establishes the following stream management units.

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Table 1
Stream Management Unit Information
(N.F. is North Fork; S.F. is South Fork)

Stream Management Unit Name	Control Point by River Mile (RM) or Latitude North (Lat.) and Longitude West (Long.)	Stream Management Reach
Stillaguamish Mainstem	Stillaguamish River nr Silvana Ecology Station #05A070 RM 11.2 Lat. 48 11 49.5 Long. 122 12 32	From the mouth at Port Susan to the confluence of the N.F. of the Stillaguamish River and the S.F. of the Stillaguamish River.
North Fork (N.F.) Stillaguamish River:		
N.F. Stillaguamish River at Arlington, WA	USGS Station #12167000 RM 6.5 Lat. 48 15 42 Long. 122 02 47	From confluence with the S.F. Stillaguamish to river mile 17.6.
N.F. Stillaguamish River at Oso	Ecology Station #05B090 RM 17.6 Lat. 48 16 21 Long. 122 53 17	From river mile 17.6 to headwaters.
South Fork (S. F.) Stillaguamish River:		
S.F. Stillaguamish River	RM 24.4	From confluence with the N.F. Stillaguamish River to RM 34.9.
S.F. Stillaguamish River at Granite Falls, WA	USGS Station #12161000 RM 34.9 Lat. 48 06 12 Long. 121 57 07	From S.F. Stillaguamish River at RM 34.9 to headwaters.
Stillaguamish River Tributaries:		

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Church Creek nr Stanwood	Ecology Station #05L070 RM 3 Lat. 48 14 54 Long. 122 18 48	From mouth to headwaters, including tributaries.
Glade Bekken Creek - stream 0030	At the Sylvania Terrace Rd. crossing RM 0.5	From mouth to headwaters, including tributaries.
Portage Creek	At 208th St. NE & 66th Ave. crossing RM 7.0	From mouth to headwaters, including tributaries.
Fish Creek	At Sill Rd. crossing RM 2.0	From mouth to headwaters, including tributaries.
Pilchuck at Bridge 626	Ecology Station #05D070 RM 0.5 Lat. 48 12 49 Long. 122 13 03	From mouth to the Campground Bridge, including tributaries.
Pilchuck Creek above Lake Creek	Ecology Station #05D150 RM 17 Lat. 48 20 35 Long. 122 03 23	From Campground Bridge to headwaters, except Lake Cavanaugh.
Pilchuck Creek Tributaries:		
Lake Creek nr mouth	Ecology Station #05K060 RM 0.2 Lat. 48 20 29 Long. 122 03 18	From mouth to headwaters, including tributaries, except Lake Cavanaugh.
North Fork (N. F.) Stillaguamish River Tributaries:		
Squire Creek at Squire Creek Park	Ecology Station #05H070 RM 1.2 Lat. 48 16 13 Long. 121 40 17	From mouth to headwaters, including tributaries.

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Deer Creek nr Oso	Ecology Station #05C090 RM 1.3 Lat. 48 17 03 Long. 121 55 35	From mouth to headwaters, including tributaries.
Brooks Creek	At Brooks Creek Rd. Bridge RM 0.3	From mouth to headwaters, including tributaries.
Montague Creek	At Hwy 530 bridge RM 0.3	From mouth to headwaters, including tributaries.
Rollins Creek	Off C Post off Hwy 530 about RM 1.0	From mouth to headwaters, including tributaries.
Boulder River nr mouth	Ecology Station #05J060 RM 0.5 Lat. 48 16 40 Long. 121 46 52	From mouth to headwaters, including tributaries.
French Creek	At Hwy 530 bridge RM 0.4	From mouth to headwaters, including tributaries.
Segelson Creek	At Swede Haven Rd. bridge off Hwy 530 RM 0.3	From mouth to headwaters, including tributaries.
Furland Creek	At Hwy 530 bridge RM 0.2	From mouth to headwaters, including tributaries.
Ashton Creek	At Hwy 530 bridge RM 0.2	From mouth to headwaters, including tributaries.
Grant Creek	At Hillis Rd. bridge off Hwy 530 RM 0.1	From mouth to headwaters, including tributaries.
Rock Creek	At RM 1.1	From mouth to headwaters, including tributaries.
Koonz Creek - Stream 0138	At WDFW bridge RM 1.5	From mouth to headwaters, including tributaries.

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Harvey Creek	At side road crossing of Grandview Rd. RM 1.5	From mouth to headwaters, including tributaries.
South Fork (S. F.) Stillaguamish River Tributaries:		
Jim Creek at Whites Road	Ecology Station #05G070 RM 3.3 Lat. 48 10 41 Long. 122 03 06	From mouth to headwaters, including tributaries.
Siberia Creek, tributary to Jim Creek	At mouth near 131st Ave. NE, RM 0.0	From mouth to headwaters, including tributaries.
Canyon Creek nr Masonic Park	Ecology Station #05F080 RM 5.0 Lat. 48 07 17 Long. 121 54 17	From mouth to headwaters, including tributaries.
Armstrong Creek	At Harvey Creek Rd. crossing RM 1.0	From mouth to headwaters, including tributaries.
Jordan Creek	At Jordan Rd. crossing RM 0.1	From mouth to headwaters, including tributaries.
Tiger Creek - stream 0363	Near Masonic Park, RM 1.6	From mouth to headwaters, including tributaries.

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NEW SECTION

WAC 173-505-050 Establishment of instream flows. (1) Instream flows established in this section protect stream flows from future withdrawals, and preserve flow levels that are necessary to protect wildlife, fish, water quality, scenic, aesthetic and other environmental values, navigational values, and stock watering requirements.

(2) Instream flows established in this section are water rights with a priority date the same as the effective date of this chapter.

(3) Instream flows are expressed in cubic feet per second (cfs). These flows are measured at the control points identified in WAC 173-505-040 and apply to the stream management reach. The instream flow provisions for any water right located in a stream management unit shall specifically describe the instream flow levels for the control station in that unit and shall refer generally to other downstream instream flow requirements that may also become controlling and critical to the use of water under such right.

(4) Instream flows are to be protected from impairment by junior water rights. Except as provided in WAC 173-505-080, 173-505-090, and 173-505-110, junior water rights shall be exercised only when flow conditions provide enough water to satisfy senior rights, including the instream flows set in this chapter. Withdrawals of water that would conflict with the established instream flows shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.

(5) Stream flow requirements on existing water rights are not modified by this chapter. Existing water rights that include a provision that water use will be subject to future instream flows are now subject to the instream flows established in WAC 173-505-050.

(6) Instream flows are established for the stream management units in WAC 173-505-040, as follows:

Table 2
Instream Flows for the Mainstem and North and South Forks, Stillaguamish River
(in cubic feet per second) (RM=River Mile)

	Ecology Station #05A070	USGS Station #12167000	Ecology Station #05B090	USGS Station #12161000

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Month	Day	Stillaguamish RM 11.2	North Fork Stillaguamish RM 6.5	North Fork Stillaguamish RM 17.6	South Fork Stillaguamish RM 24.4	South Fork Stillaguamish RM 34.9
Jan.	1-31	2200	1200	915	1800	1200
Feb.	1-29	2000	1200	850	1600	1200
Mar.	1-15	2000	1300	850	2250	1600
	16-31	2000	1300	915	2250	1600
Apr.	1-30	2000	1300	915	2000	1600
May	1-31	2000	1300	915	2000	1600
Jun.	1-15	2000	1300	915	1200	1060
	16-30	2000	1400	650	1200	1060
Jul.	1-15	2000	1100	600	1150	1060
	16-31	2000	800	500	750	700
Aug.	1-15	1700	800	425	750	700
	16-31	1700	800	500	750	700
Sep.	1-15	1700	800	700	775	700
	16-30	1700	800	850	775	700
Oct.	1-15	1700	800	870	1250	1200
	16-31	1700	800	870	1900	1700
Nov.	1-15	2200	950	915	2300	1800
	16-30	2200	950	915	2300	1800
Dec.	1-31	2200	1300	915	2500	1800

Table 3
Instream Flows for Tributaries of
the Mainstem and North and South Forks Stillaguamish River Basin
(in cubic feet per second) (RM=River Mile)

Month	Day	RM 0.5 Pilchuck Creek	RM 17 Pilchuck Creek	RM 1.2 Squire Creek	RM 3.3 Jim Creek	RM 5.0 Canyon Creek	RM 0.3 Lake Creek	RM 1.3 Deer Creek	RM 0.3 Brooks Creek
Jan.	1-31	170	98	200	250	525	21	411	39
Feb.	1-29	170	98	200	250	450	21	411	39
Mar.	1-15	170	98	280	250	450	21	474	68
Mar.	16-31	170	98	280	250	450	21	474	68
Apr.	1-30	170	98	280	250	450	21	474	68
May	1-31	170	98	280	250	450	21	474	68

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Jun.	1-15	170	98	280	250	450	21	313	45
Jun.	16-30	170	98	280	250	350	21	313	45
Jul.	1-31	170	98	200	250	350	21	195	45
Aug.	1-31	140	98	200	250	350	21	88	17
Sep.	1-30	170	98	200	250	400	21	353	17
Oct.	1-31	170	98	200	250	525	21	617	39
Nov.	1-15	170	98	160	250	525	21	411	39
Nov.	16-30	170	98	160	250	525	21	411	39
Dec.	1-31	170	98	160	250	525	21	411	39

Table 4
Instream Flows for Tributaries of
the Mainstem and North and South Forks Stillaguamish River Basin
(in cubic feet per second) (RM=River Mile)

Month	Day	RM 0.3 Montague Creek	RM 1.0 Rollins Creek	RM 0.5 Boulder Creek	RM 0.4 French Creek	RM 0.3 Segelson Creek	RM 0.2 Furland Creek	RM 0.2 Ashton Creek	RM 0.1 Grant Creek
Jan.	1-31	29	47	167	56	47	33	34	67
Feb.	1-29	29	47	167	56	47	33	34	67
Mar.	1-15	53	80	203	73	79	44	46	87
Mar.	16-31	53	80	203	73	79	44	46	87
Apr.	1-30	53	80	203	73	79	44	46	87
May	1-31	53	80	203	73	79	44	46	87
Jun.	1-15	35	53	134	48	52	29	30	57
Jun.	16-30	35	53	134	48	52	29	30	57
Jul.	1-31	35	53	134	48	52	29	30	57
Aug.	1-31	12	20	154	18	20	10	10	23
Sep.	1-30	12	47	250	84	47	49	51	101
Oct.	1-31	29	47	167	84	47	49	51	101
Nov.	1-15	29	47	167	56	47	33	34	67
Nov.	16-30	29	47	167	56	47	33	34	67
Dec.	1-31	29	47	167	56	47	33	34	67

Table 5
Instream
Flows for Tributaries of

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the Mainstem and North and South Forks Stillaguamish River Basin
(in cubic feet per second) (RM=River Mile)

Month	Day	RM 3.0 Church Creek	RM 0.5 Glade Bekken Creek	RM 7.0 Portage Creek	RM 2.0 Fish Creek	RM 1.1 Rock Creek	RM 1.5 Koonz Creek
Jan.	1-31	24	10	11	16	29	19
Feb.	1-29	24	10	11	16	29	19
Mar.	1-15	43	21	22	30	53	36
Mar.	16-31	43	21	22	30	53	36
Apr.	1-30	43	21	22	30	53	36
May	1-31	43	21	22	30	53	36
Jun.	1-15	28	14	14	20	35	24
Jun.	16-30	28	14	14	20	35	24
Jul.	1-31	28	14	14	20	35	24
Aug.	1-31	10	4	4	6	12	8
Sep.	1-30	10	4	4	6	29	19
Oct.	1-31	24	10	11	16	29	19
Nov.	1-15	24	10	11	16	29	19
Nov.	16-30	24	10	11	16	29	19
Dec.	1-31	24	10	11	16	29	19

Table 6
Instream Flows for Tributaries of
the Mainstem and North and South Forks Stillaguamish River Basin
(in cubic feet per second) (RM=River Mile)

Month	Day	RM 1.5 Harvey Creek	RM 1.0 Armstrong Creek	RM 0.1 Jordan Creek	RM 1.6 Tiger Creek	RM 0.0 Siberia Creek
Jan.	1-31	9	34	18	27	37
Feb.	1-29	9	34	18	27	37
Mar.	1-15	6	46	34	48	49
Mar.	16-31	6	46	34	48	49
Apr.	1-30	6	46	34	48	49
May	1-31	4	46	34	48	49
Jun.	1-15	4	30	22	32	32
Jun.	16-30	4	30	22	32	32
Jul.	1-31	4	30	22	32	32

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Aug.	1-31	4	10	7	11	11
Sep.	1-30	4	51	18	11	27
Oct.	1-31	4	51	18	11	55
Nov.	1-15	9	34	18	27	37
Nov.	16-30	9	34	18	27	37
Dec.	1-31	9	34	18	27	37

NEW SECTION

WAC 173-505-060 Lakes and ponds. RCW 90.54.020(3) provides, in part, that the quality of the natural environment shall be protected, and where possible, enhanced, and lakes and ponds shall be retained substantially in their natural condition. The department has determined that further consumptive withdrawals would impact the lakes and ponds of the Stillaguamish River basin. Therefore, surface withdrawals from all lakes and ponds shall be limited to single in-house domestic uses not to exceed one hundred fifty gallons per day per residence.

NEW SECTION

WAC 173-505-070 Stream closures. (1) The department determines that, based on historical and current low flows and uses, no water is available for additional year-round appropriation from the streams and tributaries in the Stillaguamish River basin. All unappropriated water from the streams and rivers is hereby appropriated for purposes of protecting and preserving fish and wildlife and other instream values, as of the date of this chapter. Therefore, the department closes all the rivers and streams in the Stillaguamish River basin *to any further appropriations. This includes all* ground water hydraulically connected to those surface waters, *the withdrawal of which will have an effect on the flow or level of the rivers and streams.*

(2) Exceptions to the closures and instream flow requirements are provided in WAC 173-505-*060, 173-505-*070(3), 173-505-080, 173-505-090 and 173-505-110.

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(3) The department finds that there is some water above the instream flows at specific locations and times of year that could be captured for storage or other projects that do not require year-round, *uninterruptible* water supplies. Therefore, the water sources described in the table below have water available for the time periods specified. These withdrawals are subject to the instream flows established in WAC 173-505-050 and the maximum allocations defined in WAC 173-505-100(2).

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Table 7
Water Source and Open Periods*

Water Source	Open Period
Stillaguamish River from its multiple mouths at Port Susan to the confluence of N.F. Stillaguamish River and S.F. Stillaguamish River (RM 0 to 17.8).	October 16-June 30
N.F. Stillaguamish, from RM 0 (its confluence with the S.F. Stillaguamish) to river mile 17.6.	October 16-June 30
N.F. Stillaguamish River, from RM 17.6 to its headwaters.	November 1-June 30
S.F. Stillaguamish River from its confluence with the N.F. Stillaguamish River (RM 17.8) to RM 34.9.	November 1-June 15
Pilchuck Creek from mouth to RM 16.4 (confluence of Bear Creek).	October 16-May 31
Squire Creek from mouth to its headwaters.	November 1-February 15, and May 1-June 30
Canyon Creek from mouth to RM 11.8 (confluence of N.F. Canyon Creek and S.F. Canyon Creek).	December 1-May 31
N.F. is North Fork	**S.F.** is South Fork **RM** is river mile
*Tributaries to the water sources are excluded from the open period unless specifically listed.	

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NEW SECTION

WAC 173-505-080 Future stock watering. (1) Consistent with RCW 90.22.040, the department retains one cubic foot per second of surface water for future stock watering pursuant to the following requirements:

(a) This surface water flow is available to satisfy stock watering requirements for stock on riparian grazing lands which drink directly from streams, lakes or other public waters. Appropriation or use of water from the reservation for stock watering shall be limited to the land base and carrying capacity of the grazing lands next to the stream or water course. The reservation shall not be available for feedlots and other activities which are not related to normal grazing land uses.

(b) The department encourages existing riparian stock water right holders to remove livestock from streams for the purpose of protecting water quality and stream habitat. *Uses that meet the following conditions shall be considered to qualify as direct stock watering from a stream:*

Deleted: Under these circumstances, no water right change application is required, as long as all of the following conditions are met:

(i) Small amounts of water are diverted (screened and piped) to nearby stock water tanks for consumption by livestock;

(ii) Stock water tanks shall be located close to the surface water source, and have as short a bypass reach as possible, while providing protection to the water body, stream bank and associated vegetative zone;

(iii) If a float or demand type valve is not used, the tank overflow must return to the same source, at or near the point of diversion;

(iv) The stock tank must serve stock, which normally range that parcel of property; and

(v) The quantity of water consumed from the stock tank should not exceed the quantity consumed if the stock drank directly from the stream.

(c) The decision by a person to divert stock water from the stream and into a tank does not constitute an adjudication of any claim to the right to the use of the water, as between the claimant and the state, or as between one or more water use claimants and another or others.

(2) The department reserves *twenty* acre-feet per year of ground water for future stock watering.

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(3) The department will maintain an estimate of the amount of water used from the reservation, and reserves the right to require metering and reporting of water use to ensure compliance

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with the conditions of use for stock watering under this section.

NEW SECTION

WAC 173-505-090 Reservation of permit-exempt ground water for future domestic uses. (1) The department has weighed the public interest supported by providing a limited amount of water for domestic uses with the potential for negative impact to instream flow resources. The department finds that the public interest advanced by this limited reservation clearly overrides the small potential for negative impacts on instream resources (RCW 90.54.020 (3)(a)).

Based on this finding, the department hereby allocates a total amount of water not to exceed five cubic feet per second (5 cfs) to provide adequate and safe supplies of water for year-round future domestic uses. Of that 5 cfs, the reservation is further defined by limits on the amount of reserved water that can be withdrawn from the North and South Forks of the Stillaguamish River, as identified in the following table.

This reservation of ground water is not subject to the instream flows established in WAC 173-505-050 or the stream closures established in WAC 173-505-070.

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Table 8
Allocation of Reservation as Measured at Specified River Miles

Water Source (RM - River Mile)	**Amount of Water Available, Measured in Cubic Feet per Second (cfs) and Gallons per Day (gpd)**
Stillaguamish River at RM 11.2	5 cfs or 3.23 million gpd
Of that 5 cfs, the following maximums may be taken from the specified locations:	
North Fork Stillaguamish River at RM 6.5	2 cfs or 1,292,544 gpd
South Fork Stillaguamish River at RM 24.4	1.5 cfs or 969,408 gpd

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(2) Use of water under the reservation is available only if all the conditions set forth in this section are fully complied with. Conditions for use of the reservation water are:

(a) The reserved *water* shall be for ground water uses exempt from a water right permit application. This reservation *is* for either single or small group domestic uses, as defined in WAC 173-505-030(5).

(b) This reservation of ground water shall not exceed 3.23 million gallons of water per day (5 cfs).

(c) Domestic water use shall meet the water use efficiency standards of the uniform plumbing code as well as any applicable local or state requirements for conservation standards.

(d) This reservation shall be applicable *only when the appropriate city(ies)* or *counties submit a written acknowledgment to the department* that *confirms* that *any legally required determinations of adequate potable water for building permits* and *subdivision approvals will* be *consistent with applicable provisions of this chapter.*

Once this chapter is adopted and written acknowledgment is received, the department will promptly notify those city(ies) or counties, the tribes, water well contractors and the public that the reserve is in effect in those jurisdictions where acknowledgments exist.

(e) It shall be the responsibility of an applicant for a building permit or subdivision approval *proposing a* water *use* under the reservation to comply with the conditions in (a), (c), (e), (f), (g) and (h) of this subsection and all other conditions of this chapter.

(*f*) A new *ground* water withdrawal under this reservation is not allowed in areas where a *municipal* water *supply* has been established and *a* connection can be provided *by the municipal supplier. If an applicant for a building permit or subdivision approval cannot obtain water through a municipal supplier, the applicant must obtain a letter from a municipal supplier prior to drilling a well which states that service was denied. Such a denial shall be consistent with the criteria listed in RCW 43.20.260.*

(g) Outdoor water use is limited to the watering of an outdoor area not to exceed a total of 1/12th of an acre for all outdoor uses under each individual domestic water use. Under all circumstances, total outdoor watering for multiple residences under the permit exemption (RCW 90.44.050) shall not exceed one-half acre.

(h) The department reserves the right to require metering and reporting of water use for single domestic users, if more accurate water use data is needed for management of the reservation and water resources in the area of the reservation. All other ground water users under the permit-exemption shall be

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Deleted: (f) If a public water system becomes available after the effective date of this chapter to persons using water under the reservation, and the connection can be provided in a timely and reasonable manner, those persons must connect to the public water system. Any such persons must take affirmative action to connect to the public water system no later than one hundred twenty days after receiving the department's written order to cease and desist use of the well.¶

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required to install and maintain measuring devices, in accordance with specifications provided by the department, and report the data to the department.

(3) The reservation is a one-time, finite amount of water. Once the reservation is fully allocated, it is no longer available. Other water sources may be available under the provisions in WAC 173-505-110, 173-505-120, 173-505-130 and 173-505-140.

(*4*) The department shall notify the appropriate county, in writing, when it determines that fifty percent, seventy-five percent, and one hundred percent of the reservation has been allocated. The department shall also issue a public notice annually in a newspaper of general circulation for the region that shows the amounts of reserved water that have been allocated and what remains unallocated, as well as identifying any water source that has been fully allocated and from which water is no longer available under this reservation.

(5) If a water use is not in compliance with any condition of this reservation, the department may take action consistent with WAC 173-505-150.

(6)(a) A record of all ground water withdrawals from the reservation shall be maintained by the department. The department will account for water use under the reservation based on the best available information reflecting actual water uses contained in well logs, water availability certificates issued by the counties, water rights issued by the department, public water system approvals or other documents. When other sources of information are not readily available, the department may *account for water* use *at a rate* of three hundred fifty gallons per day (gpd) per residence or business. This figure may be adjusted down to one hundred seventy-five gpd if the residence or business is served by an on-site septic system.

(b) If an entity using water under this reservation subsequently abandons the withdrawal and notifies the department, the water use may be credited back to the reservation.

Deleted: Once this chapter is adopted, the department will promptly notify the appropriate county or counties, water well contractors and the public of the restrictions on future permitted and permit-exempt water withdrawals, availability of water from the reservation and the specific requirements that an applicant obtaining a building permit or subdivision approval must comply with.¶ (4)

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Deleted: (b) The county or city shall provide ecology with an annual report on the number of building permits and subdivision approvals that will use water from the reservation. This report must also identify the type of use associated with each approval.¶

Deleted: (6) If existing county and city land use decisions, including zoning changes and building permit and subdivision approvals, allow for uses inconsistent with this chapter or for increased densities that adversely affect small tributaries and other flow-sensitive areas

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NEW SECTION

WAC 173-505-100 Maximum allocations. (1) High flows provide critical ecological functions such as channel and riparian zone maintenance, flushing of sediments, and in and out migration of fish. The protection of the frequency and duration of higher ecological flows can be accomplished by establishing a maximum amount of water/flow that can be withdrawn from the stream above the instream flow levels.

(2) Therefore, the department determines that the total consumptive withdrawals from existing and future water rights in the Stillaguamish River basin during open periods shall not exceed a total of 300 cubic feet per second (cfs) as measured at *ecology station #05A070*, river mile 11.2. Of that 300 cfs, the maximum allocation is further defined by limits on the amount of water that can be withdrawn from specified stream reaches, at specific times. Refer to the table and map, below.

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Table 9
Maximum Allocation

Water Source*	Open Period
Stillaguamish River from its multiple mouths at Port Susan to the confluence of N.F. Stillaguamish River and S.F. Stillaguamish River (RM 0 to 17.8).	October 16-June 30
	Maximum Allocation 300 cfs
Of that 300 cfs, the following maximums may be taken from the specified stream reaches at the specified times:	
N.F. Stillaguamish, from RM 0 (its confluence with the S.F. Stillaguamish) to river mile 17.6.	October 16-June 30
	Maximum Allocation 150 cfs
N.F. Stillaguamish River, from RM 17.6 to its headwaters.	November 1-June 30
	Maximum Allocation 120 cfs
S.F. Stillaguamish River from its confluence with the N.F. Stillaguamish River (RM 17.9) to RM 34.9.	November 1-June 15
	Maximum Allocation 150 cfs
Pilchuck Creek from mouth to RM 16.4 (confluence of Bear Creek).	October 16-May 31
	Maximum Allocation 50 cfs
Squire Creek from mouth to its headwaters.	November 1-February 15, and May 1-June 30
	Maximum Allocation 20 cfs

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Canyon Creek from mouth to RM 11.8 (confluence of N.F. Canyon Creek and S.F. Canyon Creek).	December 1-May 31	
	Maximum Allocation 40 cfs	
N.F. is North Fork	**S.F.** is South Fork	**RM** is river mile

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* Tributaries to the water sources are excluded from the open period unless specifically listed.

N.F. is North Fork; **S.F.** is South Fork; **cfs** is cubic feet per second; **confluence** = the juncture of two or more flowing streams

Figure 1
Maximum allocations for specific stream reaches (listed above) in the Stillaguamish River basin, measured at designated control points

(3) All water rights *issued after* the *effective date of this chapter are subject to the* maximum allocation *limits,* the instream flows established in WAC 173-505-050 and other applicable provisions in this chapter. Use of the water must be consistent with the requirements of the surface water code (chapter 90.03 RCW) and other applicable statutory, administrative and case laws.

(4) The department will maintain a record of the amount of water allocated from all water rights in the Stillaguamish River basin, including those existing prior to the effective date of this chapter. When the maximum allocation is fully appropriated

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for any river, river reach, or stream, the department shall notify the appropriate county, in writing. The department shall also issue a public notice in a newspaper of general circulation for the region stating the maximum allocation is fully allocated.

NEW SECTION

WAC 173-505-110 Future permitting actions. (1) Surface and ground water permits not subject to the instream flows and closures established in WAC 173-505-050 and 173-505-070 may be issued if any of the following situations apply:

(a) The proposed use is nonconsumptive, and compatible with the intent of this chapter.

(b) The applicant elects to submit a scientifically sound mitigation plan, as defined in WAC 173-505-030(7), and it is approved by the department. If monitoring of a mitigation plan shows the mitigation is not effective, use of water under the permit shall then be subject to the instream flows. In the case of a closed stream, the use shall cease until a more effective mitigation plan is put in place.

(c) The proposed ground water use will not impair senior water rights. Based on the hydrogeology of the basin, and the location and depth where ground water withdrawals generally occur, future ground water withdrawals have a high likelihood of capturing water that would result in impacts to surface water flows and levels in the Stillaguamish River basin. Therefore, a ground water permit that is not subject to the instream flows or closures may be approved *only* if an applicant can demonstrate, through studies and technical analysis, and to the satisfaction of the department, that the proposed use will not cause impairment to existing water rights, including the instream flows set in this chapter.

(d) Before the department can approve a water right application for a new public water *supply* under (b) *or* (c) of this subsection, the applicant must also demonstrate that there are no other *municipal* water *suppliers* in the same proposed retail service area that can provide water. If domestic potable water can be provided by another *municipal supplier*, the department shall reject the water right application.

(e) The proposed use is for a salmon recovery project recommended for approval by the department of fish and wildlife.

(2) All water right permits approved by the department for a consumptive use from a water source with instream flows established by this chapter and during open periods are subject

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to those instream flows, as established in WAC 173-505-050. In addition, the total appropriation cannot exceed the maximum allocation limits described in WAC 173-505-100.

(3) No right to withdraw, divert or store the public surface or ground waters of the Stillaguamish River basin that conflicts with the provisions of this chapter will hereafter be granted, except in cases where such rights will clearly serve overriding considerations of the public interest, as stated in RCW 90.54.020 (3)(a).

(4) All future surface and ground water permit holders shall be required to install and maintain measuring devices, in accordance with specifications provided by the department, and report the data to the department in accordance with the permit requirements. In addition, the department may require the permit holder to monitor stream flows and ground water levels.

NEW SECTION

WAC 173-505-120 Alternative sources of water. (1) The legislature has long acknowledged that water supply and availability around the state are becoming increasingly limited, particularly during summer and fall months and dry years when demand is greatest. Growth and prosperity have significantly increased the competition for this limited resource (RCW 90.54.090 (1)(a)). This chapter provides limited exceptions for new uses in the Stillaguamish River basin. However, there is a continuing need for ongoing and reliable sources for new water uses. This need dictates the continued development and use of alternative sources of water, such as:

- Reuse of reclaimed water;
- Artificial recharge and recovery;
- Multipurpose water storage facilities;
- Conservation and efficiency measures applied to existing uses and the transfer of saved water;
- Acquisition of existing water rights; and
- Establishment of a trust water rights program.

(2) Alternative sources of water of equal or better quality than *a new* source can be used to improve stream flows for fish, offset impacts of withdrawals on stream flows and provide sources of water for future out-of-stream uses.

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NEW SECTION

WAC 173-505-130 Establishment of trust water rights program. (1) The department will establish a trust water right program to facilitate the acquisition of existing water rights through purchases, long-term leases, donations and conserved water saved through state and federally funded conservation projects.

(2) The determination of how much water should be allocated between future out-of-stream uses and the restoration and enhancement of instream flows will be made at the time the water is acquired and deposited into the trust water rights program.

NEW SECTION

WAC 173-505-140 Future changes and transfers. No changes or transfers to existing surface or ground water rights in the Stillaguamish River basin shall hereafter be granted that conflict with the purposes or provisions of this chapter. Any change or transfer proposals can be approved only if there is a finding that existing rights, including instream flows hereby established, will not be impaired.

NEW SECTION

WAC 173-505-150 Compliance and enforcement. (1) In accordance with RCW 90.03.605, in order to obtain compliance with this chapter, the department shall prepare and distribute technical and educational information regarding the scope and requirements of this chapter to the public. This is intended to assist the public in complying with the requirements of their water rights and applicable water laws.

(2) When the department determines that a violation has occurred, it shall:

(a) First attempt to achieve voluntary compliance. An approach to achieving this is to offer information and technical assistance to the person, in writing, identifying one or more means to accomplish the person's purposes within the framework

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of the law.

(b) If education and technical assistance do not achieve compliance, the department shall issue a notice of violation, a formal administrative order under RCW 43.27A.190, or assess penalties under RCW 43.83B.336, 90.03.400, 90.03.410, 90.03.600, 90.44.120 and 90.44.130.

NEW SECTION

WAC 173-505-160 Appeals. All final written decisions of the department of ecology pertaining to water right applications, permits, certificates, regulatory orders and related decisions made pursuant to this chapter can be appealed to the pollution control hearings board in accordance with chapter 43.21B RCW.

NEW SECTION

WAC 173-505-170 Regulation review. Review of this chapter may be initiated by the department whenever significant new information is available, a significant change in conditions occurs, or statutory changes are enacted that are determined by the department to require review of the chapter.

NEW SECTION

WAC 173-505-180 Map. For the purposes of administering this chapter, the boundaries of the Stillaguamish River basin contained in the figure below are presumed to accurately reflect the basin hydrology unless demonstrated otherwise.

Figure 2

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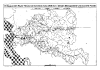

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